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IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION ONE

ROBERTO TORRES, et al., Plaintiffs/Appellees, v. JAI DINING SERVICES (PHOENIX) INC., Defendant/Appellant.	**Case No. 1 CA-CV 19-0544** Maricopa County Superior Court Case No. CV 2016-016688 Hon. Sherry K. Stephens

RESPONSE OF THE PLAINTIFFS/APPELLEES TO THE AMICUS CURIAE BRIEFS

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1. The standard of review.

Because, in Arizona, the right to bring a cause of action for damages is fundamental, any statute infringing on that right receives strict scrutiny. *AA Mechanical v. Superior Court*, 190 Ariz. 364, 365 (App. 1997). "The purpose of the anti-abrogation clause," after all, is "to curtail the legislature's power to limit the amount of recoverable tort damages and to ensure that tort claimants have open access to the courts." *Samaritan Health System v. Superior Court*, 194 Ariz. 284, 292-93 ¶ 37 (App. 1998).

2. Under Article 18, § 6, the common-law right to seek damages for personal injuries is embedded in the Constitution.

"The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." Article 18, § 6 of the Arizona Constitution.

The anti-abrogation provision is a "plain" and "simple" clause. *Inspiration Consolidated Copper Co. v. Mendez*, 19 Ariz. 151, 167 (1917). The clause "perpetuates the common-law action to recover damages for personal and other injuries inflicted negligently," that is, it safeguards an "action to recover damages for personal and other injuries inflicted negligently." *Behringer v. Inspiration Consolidated Copper Co.*, 17 Ariz. 232, 241 (1915). The clause thus prohibits the abrogation of "the common law action for personal injuries." *Merritt-Chapmen &*

Scott Corp. v. Frazier, 289 F.2d 849, 851 n. 2 (9th Cir. 1961).

Article 18, § 6 protects "the common-law action of negligence," and thus, by the prohibition against its abrogation, the common-law action was "taken from its status as one subject to the will of the Legislature and imbedded in the Constitution" *Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 443 (1926).

In Arizona, the cause of action for negligence needs no positive action by the Legislature to exist. *Id*. Although the action of negligence "was originally a common-law one, its status was," in the opinion of the Supreme Court, "changed when article 18, § 6 was adopted." *Id*. The Supreme Court held that Article 18, § 6 constitutionalized the common-law negligence action and thus placed its principal incidents "beyond legislative control." *Id*.

Thus, there is "no question" that Article 18, § 6 "makes the former common-law action for negligence a constitutional one," which "cannot be abrogated by the Legislature." *Moseley v. Lily Ice Cream Co.*, 38 Ariz. 417, 420 (1931). As the late, esteemed Judge John Malloy explained, "it is the law of this jurisdiction that art. 18, § 6 solidifies *in the Constitution* the right to bring a negligence action for personal injury." *Ream v. Wendt*, 2 Ariz. App. 497, 499 (1966) (emphasis added).

In 1970, the Arizona Supreme Court further explained that:

> There is no room for quibbling. The language of Section 6 is simple, explicit and all-inclusive. It cannot be misunderstood. Without limitation it confers the right to recover damages for injuries as existing under the common law. The rights so protected include not alone the right of action

> against an employer on his vicarious liability but a right against the actual wrongdoer, the person who committed the negligent act which caused the injury.

Kilpatrick v. Superior Court, 105 Ariz. 413, 422 (1970).

Article 18, § 6's "constitutional mandate" preserves "common law rights and correlative duties in tort" which, as a consequence, "can be altered only through clear and unambiguous expression in the Constitution and implementing legislative enactments." *Marquez v. Rapid Harvest Co.*, 1 Ariz. App. 562, 565 (1965). Article 18, § 6 gives "a right of action to recover damages for [a plaintiff's] personal injuries—a right which 'shall never be abrogated.'" *Morgan v. Hays*, 102 Ariz. 150, 158 (1967). The anti-abrogation clause "was enacted to elevate the common law action of negligence to constitutional stature to preserve the right inviolate." *Ruth v. Industrial Commission*, 107 Ariz. 572, 575 (1971).

3. Article 18, § 6 applies both to common-law causes of action that existed when Arizona became a state and to those the Arizona Supreme Court has recognized since then.

Since 1917, the Arizona Supreme Court has recognized that Article 18, § 6 applies to common-law causes of action, both to those that Arizona recognized when it became a State and those recognized after that. On that point, we start with the dissent published separately in *Inspiration Consolidated Copper Co. v. Mendez*, 19 Ariz. 169 (1917). In that dissent, Justice Henry D. Ross argued that it was "evident" that relevant constitutional provisions, including Art. 18, § 6 and

Art. 2, § 31, "do not apply to or affect the newly created rights of action for compensation against the employer." If they did, Justice Ross claimed the new Workmen's Compensation Act would violate the Arizona Constitution, because that Act did limit the amount of an injured worker's recovery. *Id*.

Justice Ross did not think that Art. 18, § 6 and Art. 2, § 31 of the Arizona Constitution applied since the new statutory scheme created a new liability, unknown to and in derogation of the common law. He concluded that "the power of the legislature to fix the measure of compensation in disregard of the common-law rule [was] as absolute as [it is] under the compensation act." *Id*. at 172.

In *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9 (1986), the Arizona Supreme Court explained that the majority opinion in *Inspiration Consolidated Copper Co. v. Mendez*, 19 Ariz. 151, 166-67 (1917), had rejected Judge Ross's position, and had held that Article 18, § 6 "protected common-law measures of recovery even in actions previously unknown to the common law." *Id*. at 14.

Boswell added that Article 18, § 6's "constitutional protection extends to wrongs recognized at common law" and "is not limited to those elements and concepts of particular actions which were defined in our pre-statehood case law." *Id*. at 17-18. After all, Arizona common law "is not frozen as of 1912" and, in fact, "must allow for evolution of common-law actions to reflect today's needs and knowledge." *Id*. at 17-18. "Any other rule would allow those 'long dead' to dictate

solutions to problems of which they could not have been aware." *Id*. at 18.

Unfortunately, in the *Harrington* case, the Court of Appeals overlooked both the dissenting and majority opinions in *Inspiration Consolidated Copper*, and concluded that only "such common law rights and remedies as existed at the time of the adoption of the Constitution are preserved" under Article 18, § 6. *Harrington v. Flanders*, 2 Ariz. App. 265, 266 (1965). *See also Rail N Ranch Corp. v. State*, 7 Ariz. App. 558, 560 (1968) (same).

Both *Harrington* and *Rail N Ranch* cited *Industrial Commission v. Frohmiller*, 60 Ariz. 464, 468-69 (1943) as support for that statement, although *Frohmiller* actually stated that if a cause of action merely had a common-law origin or common-law history, it would come within the scope of Article 18, § 6.

In 1980, the Court of Appeals stated that Article 18, § 6 "has not been applied to mandate creation of a new civil cause of action where none existed previously." *Lewis v. Swenson*, 126 Ariz. 561, 563 (App. 1980). That proposition is unremarkable, because nothing in the Arizona Constitution mandates creating any particular cause of action. It allows that creation—but does not mandate it.

Because the common law is a uniquely judicial creation—and because of the separation-of-powers doctrine—only Arizona courts can create new common-law causes of action. *See* Ariz. Const. art. 3 ("The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative,

the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."); *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 211 ¶ 37 (1999) ("The power to define existing law, including common law, and to apply it to facts rests *exclusively* within the judicial branch.") (emphasis added).

Indeed, by definition, the common law is law that courts alone create. *See Black's Law Dictionary* 345 (11th ed. 2019) (The "common law" is the "body of law derived from judicial decisions, rather than from statutes or constitutions."). Thus, Article 18, § 6 does not bar the Arizona Supreme Court "from declaring, clarifying, or modifying the common law." *Watts v. Medicis Pharmaceutical Corp.*, 239 Ariz. 19, 27 ¶ 26 (2016).

Still Arizona appellate courts have occasionally reiterated the unfounded proposition that Article 18, § 6 "applies only to rights recognized by the common law at the time the constitution was adopted." *Schoenrock v. Cigna Health Plan of Arizona, Inc.*, 148 Ariz. 548, 561 (App. 1985).

In 1987, the Court of Appeals took notice of the 1986 *Boswell* opinion, and stated that Article 18, § 6 actually "protects all common law principles and causes of action, not just those existing in 1912." *Humana Hospital Desert Valley v. Superior Court*, 154 Ariz. 396, 399 (App. 1987) (citing *Boswell*, 152 Ariz. at 17-

18). And so, the Court of Appeals held that the anti-abrogation clause would apply to a negligent-supervision cause of action, although the common law had not recognized that sort of action when Arizona became a State. *Id*.

In 1988, however, the Arizona Supreme Court did a stutter step on this issue when it held that a statute of repose did not operate to abrogate a strict products-liability tort because the tort of strict products liability did not exist when Article 18, § 6 was adopted. *Bryant v. Continental Conveyor & Equipment Co., Inc.*, 156 Ariz. 193, 195 (1988).

The stutter step in *Bryant* misled the United States District Court for the District of Arizona, which held in 1988 that a plaintiff had to prove that its present cause of action existed at the time that Article 18, § 6 was enacted for that clause to apply. *Miller v. United States*, 723 F.Supp. 1354, 1358 (D. Ariz. 1988) (citing *Bryant*, 156 Ariz. at 195), *rev'd*, 945 F.2d 1464 (9th Cir. 1991).

After *Bryant*, there was periodic uncertainty. For instance, in 1990, the Court of Appeals misconstrued *Boswell*, and stated Article 18, § 6 "only applies to rights recognized by common law at the time the Arizona Constitution was adopted." *Bruce v. Charles Roberts Air Conditioning*, 166 Ariz. 221, 225 (App. 1990). Also in 1990, the Court of Appeals held that a child had no right to bring a negligence claim against her parents because that right did not exist at the common law when Arizona adopted its constitution. *Sandbak by and through Tully v. Sandbak*, 166

Ariz. 21, 23 (App. 1990).

Fortunately, in 1993, the Arizona Supreme Court overruled *Bryant*, and recognized that the "right to recover for injuries caused by products was, of course, recognized at common law," and so, "the development of strict liability causes of action to vindicate that right" falls within the coverage of Article 18, § 6. *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993). Indeed, the Arizona Supreme Court emphasized that the "evolution of common law causes of action—whether in duty, standard of care, or damages—falls within" Article 18, § 6's "broad coverage." *Id*.

Those propositions, the Arizona Supreme Court explained, were in harmony with past cases applying Article 18, § 6 to post-statehood common-law causes of action for negligent supervision (first recognized in Arizona in 1972), *Humana Hospital Desert Valley v. Superior Court*, 154 Ariz. 396 (App. 1987) and for insurance bad faith (first recognized in Arizona in 1981), *Franks v. U.S. Fidelity & Guar. Co.*, 149 Ariz. 291, 299-300 (App. 1985). *Hazine*, 176 Ariz. at 344.

The Arizona Supreme Court rejected the possibility "that the legislature could constitutionally restrict personal injury claimants to pre-statehood theories of liability and pre-statehood measures of damages." *Id*. Indeed, given Article 18, § 6's history, the Arizona Supreme Court found it "inconceivable that the framers of the Arizona Constitution had any such intent," especially since the "'law must

allow for evolution of common-law actions to reflect today's needs and knowledge.'" *Id*. (quoting *Boswell*, 152 Ariz. at 18).

By 1999, the Court of Appeals fully applied *Hazine* when it stated that the "anti-abrogation clause operates to preclude the legislature from abolishing a common law right of action for money damages that either existed as of statehood or judicially evolved into existence thereafter." *Goodman v. Samaritan Health System*, 195 Ariz. 502, 506 ¶ 17 (App. 1999).

Later in 1999, the Arizona Supreme Court elaborated that the language of Article 18, § 6 had "to be construed broadly and unrestrictively" and "prevents abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort which trace origins to the common law." *Cronin v. Sheldon*, 195 Ariz. 531, 538 ¶ 35 (1999). *See Baker v. University Physicians Healthcare*, 231 Ariz. 379, 388 ¶ 34 (2013) (same); *Goldman v. Sahl*, 248 Ariz. 512, 523 ¶ 34 (App. 2020) (same).

A gloss appeared in 2003, when the Arizona Supreme Court suggested that to come with the scope of Article 18, § 6 a right of action "must have existed at common law or have found its basis in the common law at the time the constitution was adopted." *Dickey v. City of Flagstaff*, 205 Ariz. 1, 3 ¶ 9 (2003).

In 2010, the United States District Court for the District of Arizona added that, "to be protected by the abrogation clause, the cause of action must have either

been recognized at common law when the Arizona Constitution was established in 1912, or have evolved from common law antecedents." *Firetrace USA, LLC v. Jesclard*, 800 F.Supp.2d 1042, 1049 (D. Ariz. 2010).

4. In 1983, the Arizona Supreme Court first recognized a common-law dram-shop cause of action that had a common-law origin and history.

Under traditional common-law principles, it was not a tort "to either sell or give intoxicating liquor to 'a strong and able-bodied man,'" which prevented that conduct from constituting "culpable negligence that would impose legal liability for damages upon the vendor or donor of such liquor." *Cruse v. Aden*, 20 N.E. 73, 74 (Ill. 1889) (cited in *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983)).

But even under the original common-law approach, a patron impaired by alcohol, even if that impairment is not obvious, could not be regarded as a "strong and able-bodied" person. After all, "when a man is already totally drunk or through drink or disease has lost all power of choice or will, does not every person own him the duty not to intentionally or negligently harm him?" Bernard J. Moran, *Theories of Liability*, 1958 U. Ill. L.F. 191, 192 (1958). Courts have agreed that, even under the old common-law rule, "an intoxicated person was neither 'able bodied' nor 'ordinary.'" Wellborn Jack, Jr., *Torts—Liability of Tavern Keepers for Injurious Consequences of Illegal Sales of Intoxicating Liquors*, 22 La. L. Rev. 800, 803 (1960).

And so, well before Arizona became a state, a few American courts raised

the possibility that tavern owners could owe a duty to a drunkard to protect him from his own folly. The idea appeared in 1883, when the Texas Supreme Court let a widow recover against three sober patrons of a bar who had wagered with her alcoholic husband that he could not drink three pints of whiskey at a sitting. *McCue v. Klein*, 60 Tex. 168 (1883). Already extremely inebriated at the time, the man attempted the feat and died of acute alcohol intoxication. *Id*.

The concept of a duty owing to a person who was past the stage of helping himself found support elsewhere. The Iowa Supreme Court, for instance, expressed the opinion that an action might lie against an innkeeper if the person plied with liquor was so helpless with drink that he was incapable of consenting to the sale. *Bissell v. Starzinger*, 83 N.W 1065 (Iowa 1900). And the Oregon Supreme Court held that, independent of any statute, it was wrongful for any person repeatedly and continuously to ply another with liquor until intoxication was produced. *Ibach v. Jackson*, 35 P.2d 672 (Ore. 1934).

In 1940, although the Arizona Supreme Court had recognized that Arizona had no dram-shop statute, it held that there was a duty not to provide liquor to persons known to have subnormal ability to control their actions. *Pratt v. Daly*, 55 Ariz. 535, 546 (1940). The point is that, even under the old common-law analysis, a complaint alleging harm from offering liquor to a person who has lost the willpower "to resist the temptation when the liquor is offered to him" actually

"states a good cause of action under the common law." *Id*.

Thus, the Arizona Supreme Court's 1983 explicit abolition of traditional dram-shop immunity—which was a simultaneous recognition of a common-law cause of action for serving a patron to the point that the patron is impaired and a danger to others—had its origin in the common law itself.

Ontiveros also held that "the common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy. In reevaluating previous decisions in light of present facts and circumstances, we do not depart from the proper role of the judiciary." *Ontiveros*, 136 Ariz. at 504.

And so, because Arizona adopted the dram-shop cause of action in 1983 as part of the history and development of Arizona common law, any statute that would purport to eliminate the dram-shop common-law cause of action "except when a driver is obviously intoxicated" would violate the anti-abrogation clause and be unconstitutional. *Szeto v. Arizona Public Service Co.*, --- Ariz. ---, 2021 WL 5571488 at *4 ¶ 18 (App. Dec. 8, 2021) (citing *Young ex rel. Young v. DFW Corp.*, 184 Ariz. 187, 190 (App. 1995)).

And so, in the 2021 *Torres* opinion, when discussing common-law "dram shop claims," the Arizona Supreme Court acknowledged that the bar, as a liquor licensee, had a common-law duty to exercise due care in serving alcohol to the

patron "to protect members of the traveling public from being injured as a result of his intoxication." *Torres v. JAI Dining Services (Phoenix) Inc.*, 252 Ariz. 28, 30 ¶ 10 (2021). Indeed, in *Torres*, the Arizona Supreme Court repeatedly referred to the "common law" dram-shop claim. *Id*. at 30, 32, ¶¶ 6, 10, 19.

In Arizona, the Legislature cannot now abrogate the common-law dram-shop cause of action because, since 1983, it has become an integral part of Arizona common law. *See Dupray v. JAI Dining Services (Phoenix), Inc.*, 245 Ariz. 578, 582 ¶ 12 (App. 2018) ("A liquor licensee 'is under a duty, imposed both by common law principles and statute, to exercise affirmative, reasonable care in serving intoxicants to patrons who might later injure themselves or an innocent third party, whether on or off the premises.'") (quoting *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 438 ¶ 13 (App. 2007)).

DATED this 11th day of February, 2022.

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