ARIZONA COURT OF APPEALS

DIVISION ONE

ROBERTO TORRES, et al., Plaintiffs/Appellees, v. JAI DINING SERVICES (PHOENIX) INC., Defendant/Appellant.	Court of Appeals Division One No. 1 CA-CV 19-0544 Maricopa County Superior Court No. CV2016-016688

DEFENDANT/APPELLANT JAI DINING SERVICES (PHOENIX) INC.'S OPENING BRIEF AND APPENDIX

Dominique Barrett (015856)
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
2390 E. Camelback Rd., Ste. 440
Phoenix, Arizona 85016
(602) 954-5605
dominique.barrett@qpwblaw.com

Eric M. Fraser (027241)
Joshua D. Bendor (031908)
OSBORN MALEDON, P.A.
2929 N. Central Ave., Ste. 2100
Phoenix, Arizona 85012
(602) 640-9000
efraser@omlaw.com
jbendor@omlaw.com

Attorneys for Defendant/Appellant JAI Dining Services (Phoenix) Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

This is a case about the scope of a bar's liability for the injuries its patron causes. Here, Cesar Villanueva was not obviously intoxicated when he was at Defendant/Appellant JAI Dining Services (Phoenix) Inc.'s club. After leaving the club, arriving home safely, and falling asleep in his own bed, Cesar decided to get behind the wheel. That fateful decision caused the deaths of two innocent people. Cesar has already been held responsible through both the criminal and civil justice systems. Although a jury necessarily found that Cesar was not obviously intoxicated, it nevertheless held JAI partially liable for the deaths that Cesar caused.

JAI should not be held liable for three independent reasons. First, the claims on which the jury found JAI liable have been preempted by statute. Second, Cesar's decision to drive after reaching a place of repose is an intervening/superseding cause that cuts off JAI's liability. Third, JAI did not breach any duty the law imposed on it, and there is nothing JAI could have done to prevent Cesar from leaving his house and getting behind the wheel several hours after he left the club. Thus, the trial court should have entered judgment in JAI's favor as a matter of law, and this Court should reverse.

STATEMENT OF FACTS AND CASE*

I. Background.

At 5:14 a.m. on November 8, 2015, Cesar Aguilera Villanueva crashed his pickup truck into a stopped car, killing both occupants. [IR-84 (Joint Pretrial Statement) at 1 (APP117).] Cesar was arrested at the scene. [IR-201 at 195:17-19 (APP152).] He was convicted of two counts of manslaughter and is currently serving a 14-year sentence. [IR-84 at 2 (APP118).]

The day before the accident, Cesar worked a 12-hour shift at his warehouse job. [IR-84 at 1 (APP117).] He went directly from work to a family wedding reception, and then to Jaguar's, a club owned by JAI Dining Services (Phoenix), Inc. [*Id.* at 1-2 (APP117-18).]

Cesar was not intoxicated when his group arrived at the club around 11:20 p.m. [IR-199 at 10:15-16 (APP126) (confirming that Cesar "reached the front door and paid his cover charge at 11:21"); *id.* at 67:8-12 (APP127) (same); Trial Exhibit 47 (same); IR-199 at 137:24-138:6 (APP131-32) (confirming with Cesar that he was "not intoxicated or showing signs of

---

* Selected record items cited are included in the Appendix attached to the end of this brief, cited by page numbers (e.g., APP092), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number.

intoxication at that time").] The group stayed for about three hours. [IR-199 at 67:8-12 (APP127) (11:21 p.m. arrival); *id.* at 159:2-6 (APP139) (2:20 a.m. departure).] Cesar drank six or seven beers at the club, but did not become obviously intoxicated. [IR-204 at 26:12-15 (APP183) (reflecting that Cesar drank 6-7 beers); IR-201 at 177:15-22 (APP151) (Q: "[W]hen you [Leticia Morales] observed Cesar at Jaguar's that night, he was not intoxicated? [A:] Correct")]; *see also* Argument § I.B, below (jury necessarily found that Cesar was not obviously intoxicated).

The group left the club around 2:20 a.m. [IR-199 at 159:2-6 (APP139).] Cesar drove his truck to his brother's house about fifteen minutes away. [*Id.* at 83:5-13 (APP128), 178:20-22 (APP140).] At his brother's house, Cesar drank an energy drink and hung out for a while to, in his words, "sober up." [*Id.* at 83:14-15 (APP128).] A friend drove Cesar home in his truck around 4:00 a.m. [*Id.* at 153:17-155:7 (APP133-35).] Cesar's girlfriend Leticia and friend Wendy came, too. [*Id.* at 154:22-155:1 (APP134-35).]

They arrived safely at Cesar's house, where Cesar crawled into his bed to sleep. [*Id.* at 85:14-16 (APP129); *id.* at 155:6-24 (APP135).] Sometime later, Leticia woke him to ask if he would drive their friend Wendy home. [*Id.* at

85:24-86:14 (APP129-30); *id.* at 155:14-17 (APP135).] Rather than stay in bed to sober up, Cesar reluctantly agreed. [*Id.* (APP135).]

Wendy drove Cesar's truck to her house (about 45 or 50 minutes away) while he slept in the back seat. [*Id.* at 155:14-24 (APP135), 180:17-181:3 (APP142-43).] On his way back home for the second time that morning, Cesar caused a fatal car wreck, killing Jesus O. Torres Guillen and Guadalupe Gastelum Suarez. [IR-84 at 2 (APP118).]

II. Trial court proceedings.

The crash victims' relatives (Plaintiffs/Appellees Roberto Torres, Orlenda Guillen, Hernan Gastelum Rosas, and Maria Suarez) sued Cesar and JAI. [IR-1.] Against Cesar, the plaintiffs asserted a negligence claim (count 1). [IR-7 at 5-7 (APP108-10).] Against JAI, the plaintiffs asserted common law negligence/dram shop liability (count 2) and statutory negligence per se (count 3). [IR-7 at 7-12 (APP110-15).] At the close of evidence, JAI moved for judgment as a matter of law under Rule 50(a) based on the proximate cause and duty elements of negligence; the court denied the motion. [IR-202 at 150:20-156:12 (APP162-68).]

The jury ultimately found in the plaintiffs' favor on negligence against Cesar and negligence/dram shop liability against JAI, but found in JAI's

favor on the negligence per se claim. [IR-148 to IR-150 (APP090-94).] The jury's finding in JAI's favor on negligence per se necessarily means that the jury found that Cesar was not disorderly or obviously intoxicated when JAI served him. [*Compare* IR-146 at 5-7 (APP082-84) (jury instruction on negligence) (no requirement of disorderliness or obvious intoxication), *with* IR-146 at 7-8 (APP084-85) (jury instruction on negligence per se) (requiring service of alcohol to a disorderly or obviously intoxicated person for liability)]; *see also* Argument § I.B, below.

The jury awarded the plaintiffs $2 million in compensatory damages, with fault apportioned 60% to Cesar and 40% to JAI. [IR-151 (APP096).] The jury rejected the plaintiffs' request for punitive damages. [IR-156 (APP098).]

After entry of judgment, JAI renewed its motion for judgment as a matter of law under Rule 50(b), again based on proximate cause and duty. [IR-177 (judgment); IR-178 (judgment); IR-180 (motion).] The superior court said this is "a very interesting issue," but denied the motion, explaining that "if the Court of Appeals wants to set public policy, that's their job, not mine." [IR-207 at 26:6-13 (APP200); *see* IR-188 (minute entry) (APP100); IR-190 (signed order) (APP102).] JAI timely appealed. [IR-192.] This Court has jurisdiction under A.R.S. § 12-2101(A)(1).

STATEMENT OF THE ISSUES

1. The Legislature expressly preempted all common law dram shop claims. This Court previously held the statutory preemption unconstitutional for violating the anti-abrogation clause of the Arizona Constitution, but the Supreme Court subsequently clarified that the anti-abrogation clause does not protect claims that arose after the Constitution was adopted. Here, dram shop claims arose after the Constitution was adopted. In light of these developments, did the Legislature properly preempt common law dram shop claims?

2. A bar patron's voluntary decision to drive after arriving to a place of repose is an intervening/superseding cause that terminates liability for the bar. After Cesar arrived home safely, he went to sleep, and then was awoken and reluctantly agreed to drive Wendy home. Does that intervening/superseding cause terminate JAI's liability?

3. Under Arizona law, a bar has a duty not to serve alcohol to a disorderly or obviously intoxicated individual. Here, the jury necessarily found that Cesar was not disorderly or obviously intoxicated. Did JAI breach any duty?

STANDARD OF REVIEW

Judgment as a matter of law. This Court reviews the denial of a motion for judgment as a matter of law de novo. *College Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 536, ¶ 9 (App. 2010). Judgment as a matter of law is appropriate where "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Ariz. R. Civ. P. 50(a).

Negligence. In negligence actions, the Court reviews de novo whether a legal obligation or duty to protect from injury or harm exists, while breach and causation ordinarily are questions of fact for the jury. *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007). "[I]n approaching the question of negligence or unreasonable risk," however, "the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable . . . ." *Grafitti-Valenzuela v. City of Phoenix*, 216 Ariz. 454, 458, ¶ 13 (App. 2007) (internal quotation marks and citations omitted); *see also Fedie v. Travelodge Int'l, Inc.*, 162 Ariz. 263, 266 (App. 1989) ("Although proximate cause is usually a question of fact for the jury, 'the determination of facts upon which there could be no reasonable difference of opinion is in the hands of the court.'") (quoting W. Page Keeton, et. al., *Prosser & Keeton*

on Torts, § 45 at 319-20 (5th ed. 1984) ("*Prosser & Keeton*")). Thus, a court may rule as a matter of law when "no reasonable juror could conclude that the standard of care was breached or that the damages were proximately caused by the defendant's conduct." *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 437-38, ¶ 10 (App. 2007) (quoting *Gipson*, 214 Ariz. at 143 n.1).

ARGUMENT SUMMARY

There are three independent bases for the Court to vacate the judgment.

The Arizona Legislature expressly preempted common law claims for dram shop liability. In *Young Through Young v. DFW Corp.*, 184 Ariz. 187 (App. 1995), this Court ruled the preemption statute unconstitutional for violating the anti-abrogation clause of the Arizona Constitution. *Young*, however, is not good law after *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1 (2003), which held that the anti-abrogation clause does not protect causes of action that arose after the Constitution was adopted. This Court should therefore overrule *Young*. (Argument § I.A.) Here, the judgment should be vacated because the jury found in favor of JAI on the statutory claim and found in favor of the plaintiffs only on the common law claims (which should have been preempted). (Argument § I.B.)

The Court should also vacate the judgment based on the intervening/superseding cause doctrine. As a matter of law, a patron's decision to drive after arriving safely at a place of repose is an intervening/superseding cause that negates the proximate cause element of a negligence claim. (Argument § II.B.) Here, JAI is not liable because Cesar made it home safely and fell asleep before being woken up and deciding to get behind the wheel. (Argument § II.C.)

The Court should also vacate because JAI did not breach any duty. A bar has a duty not to serve alcohol to a disorderly or obviously intoxicated individual. (Argument § III.A.1.) A bar does not have a duty not to serve a patron enough alcohol to cross the limit into unlawful driving because the Legislature has made a policy decision that the legal limit for driving is lower than the legal limit for requiring a bar to cut someone off. (Argument § III.A.2.) A bar likewise does not have a duty to prevent a patron from driving for the rest of the night because a bar has no legal right or practical ability to prevent a patron from driving. (Argument § III.A.3.) Here, JAI did not breach any duty it had under Arizona law because the jury necessarily found that Cesar was not disorderly or obviously intoxicated. (Argument § III.B.) The plaintiffs' arguments to the contrary would

essentially impose a strict liability regime on businesses that serve alcohol, which Arizona has never adopted. (Argument § III.C.)

Any of these issues provides a sufficient basis to reverse and vacate.

ARGUMENT

I. The claims on which the plaintiffs prevailed are preempted by statute.

A. The Legislature preempted the non-statutory claims.

Dram shop liability did not exist at common law. *See Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983) ("At common law, however, a tavern owner is not liable for injuries sustained off-premises by third persons as the result of the acts of an intoxicated patron, even though the tavern owner's negligence in serving that patron was a contributing cause of the accident."). In *Ontiveros*, the Supreme Court expressly abandoned that common-law rule and allowed dram shops to be sued in negligence. *See id.* at 513 ("We hold, therefore, that the common law doctrine of tavern owner nonliability is abolished in Arizona.").

In response to *Ontiveros,* the Legislature enacted A.R.S. §§ 4-311 and 4-312. *See* 1986 Ariz. Sess. Laws, ch. 329, § 1 (2d Reg. Sess.) (discussed in *Patterson*, 214 Ariz. at 439, ¶ 15 (App. 2007)). The first of the two statutes (A.R.S. § 4-311) sets forth statutory criteria for dram shop liability, including

that the drinker be "obviously intoxicated." The second statute (A.R.S. § 4-312(B)) states that there is no dram shop liability except under A.R.S. § 4-311, and therefore preempts common-law dram shop liability: "[E]xcept as provided in § 4-311, a person, firm, corporation or licensee *is not liable* in damages to any person who is injured, or to the survivors of any person killed, or for damage to property which is alleged to have been caused in whole or in part by reason of the sale, furnishing or serving of spirituous liquor." A.R.S. § 4-312(B) (emphasis added).

In 1995, Division Two of the Court of Appeals held that the preemption in A.R.S. § 4-312(B) violates the anti-abrogation clause of the Arizona Constitution. *Young Through Young v. DFW Corp.*, 184 Ariz. 187 (App. 1995). The anti-abrogation clause provides that "[t]he right of action to recover damages for injuries shall never be abrogated." Ariz. Const. art. 18, § 6. *Young* held "that section 4-312(B) unconstitutionally abrogates the general negligence cause of action recognized in *Ontiveros*." *Young*, 184 Ariz. at 190.

If *Young* were still good law, that would be the end of this argument. But the Arizona Supreme Court subsequently clarified that the anti-abrogation provision protects only those rights that existed at the time the Arizona Constitution was adopted. *Dickey ex rel. Dickey v. City of Flagstaff*,

205 Ariz. 1, 5, ¶ 18 ("Arizona's anti-abrogation provision was designed to protect rights of action in existence at the time it was adopted, but not necessarily those later created."). "Accordingly, [if] a suit . . . could not have been maintained at the time the anti-abrogation provision was instituted, it is not protected by that provision." *Id.*

Dickey held that claims against municipalities—which were not recognized at common law, then judicially recognized, and then legislatively restricted—are not protected by the anti-abrogation provision and may be restricted by legislation. *Id.* at 3-5. The same therefore goes for dram shop claims, which have followed the same historical pattern of non-recognition at common law followed by judicial recognition and then legislative restriction. *See, e.g.*, *Ontiveros*, 136 Ariz. at 513 (expressly acknowledging and rejecting the "common law doctrine of tavern owner nonliability").

Thus, A.R.S. § 4-312(B) is not prohibited by the anti-abrogation clause as the clause has been construed by the Supreme Court. This Court should give effect to the Legislature's valid decision to clearly delineate the contours of dram shop liability. The Court should revisit *Young*, and expressly overrule it or decline to follow it in Division One. *Cf. State v. Ott*, 167 Ariz. 420, 426 (App. 1990) ("When we are convinced that a decision of Division

Two relies upon clearly erroneous principles, the decision is not binding on this court.").

B. Because the plaintiffs prevailed only on preempted common-law claims, the judgment must be reversed and vacated.

Here, the jury evaluated three claims against JAI: two common-law claims and one statutory claim.[1]

Claim [IR-146]	**Jury verdict**	**Common law or statutory**
"Claim One – Negligence"	For the plaintiffs. [IR-148 (APP090).]	Common law
"Claim Two – Violation of Statute Negligence Per Se"	For JAI. [IR-149 (APP092).]	Statutory
"Claim Three – Dram Shop Liability Claim"	For the plaintiffs. [IR-150 (APP094).]	Common law

The statutory claim ("Claim Two") complied with A.R.S. § 4-311 because it required the plaintiffs to show that Cesar was "obviously

[1] Although the verdict forms [IR-148 to IR-150 (APP090-94)] identified three counts (negligence, negligence per se, and dram shop liability), the record shows that the third verdict form ("dram shop liability") was an additional instruction regarding JAI's liability for common law negligence under count 1 rather than a separate claim. [*See* IR-203 at 226:9-24 (APP175) (confirming that the two claims are negligence and negligence per se, and verdict form 3 merely states the common law negligence standard); IR-7 at 5-12 (APP108-15) (First Amended Complaint) (alleging two claims against JAI, and a separate negligence claim against Cesar).]

intoxicated" when JAI sold him alcohol. [IR-146 at 7 (APP084).] But because the plaintiffs did not meet their burden, the jury found for JAI on that claim. [IR-149 (APP092).]

By contrast, the remaining two claims ("Claim One" and "Claim Three") did not require the plaintiffs to prove any of the statutory criteria from A.R.S. § 4-311. [*See* IR-146 at 5-7 (Claim One) (APP082-84); *id.* at 9 (Claim Three) (APP086).] Consequently, A.R.S. § 4-312(B) preempts the claims and the judgment on those claims must be reversed and vacated.

C. This Court should consider the argument of whether *Young* remains good law in Arizona.

For several reasons, this Court should reach this issue even though JAI did not present the argument below. The Court unquestionably has discretion to consider this argument under the well-settled exceptions to the general rule concerning new arguments raised on appeal. The plaintiffs here were not prejudiced by JAI's failure to raise the issue because the superior court would have been compelled to follow *Young*. And this case presents an unusually good record on which to resolve this important question.

1. This Court has discretion to consider the issue because it presents a constitutional question, has statewide importance, and involves a purely legal question.

Appellate courts "do not ordinarily consider issues not raised in the trial court." *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406 n.9 (1995). "However, this rule is jurisprudential rather than substantive." *Id.* "When good reason exists, [appellate] court[s] may and will entertain such questions." *Id.* Courts are more likely to consider a new argument if it involves a "constitutional issue," *id.*; "a matter of statewide importance," *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 231 Ariz. 236, 238, ¶ 8 (App. 2012); or a pure "issue of law," *id.*

All of these "good reason[s]" apply with full force here. *Jimenez*, 183 Ariz. at 406 n.9. First, the continuing validity of *Young*, 184 Ariz. 187, presents a constitutional question because *Young* incorrectly interpreted article 18, § 6 of the Arizona Constitution in light of *Dickey*, 205 Ariz. 1.

Second, the continuing validity of common-law dram drop liability presents a matter of statewide importance because bars throughout the state are currently being held liable under amorphous common law theories when the Legislature plainly and expressly sought to limit dram shop liability to the clearly articulated circumstances described by A.R.S. § 4-311.

Third, the continuing validity of *Young* and common-law dram shop liability presents a pure issue of law. The only necessary facts are those apparent from the undisputed record: that the jury found for JAI on the statutory claim and found for the plaintiffs on the common-law claims. The only question is whether *Young* remains good law in light of *Dickey*, and that is a purely legal question.

Indeed, the Arizona Supreme Court has twice exercised its discretion and considered anti-abrogation arguments not raised below. *See Barrio v. San Manuel Div. Hosp. for Magma Copper Co.*, 143 Ariz. 101, 104 (1984) ("Nor is the issue one that turns upon disputed evidence. There is no necessity in this case for a trial judge to determine facts. We believe that the constitutional issue in the case at bench is sufficiently important that it should be considered even though not raised in the trial court."); *Ruth v. Indus. Comm'n*, 107 Ariz. 572, 574 (1971) (considering anti-abrogation issue not raised below because "[i]t has been repeatedly held by this Court that if the question is one of 'a general public nature, affecting the interests of the state at large' jurisdiction will be granted") (citation omitted).

2. The plaintiffs were not prejudiced because the superior court would have been powerless to do anything.

If JAI had raised the preemption argument below, it would not have made one bit of difference. "Trial courts are required to follow the decisions of a higher court." *Sell v. Gama*, 231 Ariz. 323, 330, ¶ 31 (2013). A trial court cannot "depart from binding precedent" even if it "anticipat[es] that [the appellate court] will overrule existing case law." *Id.* As the Arizona Supreme Court explained, "The lower courts are bound by our decisions, and this Court alone is responsible for modifying that precedent." *Id.*; *see also Francis v. Arizona Dept. of Transp.*, 192 Ariz. 269, 271, ¶ 11 (App. 1998) ("As to the trial court, [a Court of Appeals opinion] became binding precedent when it was published. It remains so until this court, in a published opinion, refuses to follow it or it is vacated by our supreme court. Whether [the opinion] is to be disaffirmed is not a question for the superior court. A lower court cannot refuse to follow the rulings of a higher court.").

Consequently, if JAI had raised the issue below, the superior court would have been *completely powerless* to do anything about it. It would have been bound to follow *Young* and could not have disregarded it, even if the superior court believed that this Court would overrule *Young* when

presented with the opportunity. This superior court in particular was keenly aware of the court's role in this case. [*Cf.* IR-207 at 26:2-13 (APP200) (explaining that "if the Court of Appeals wants to set public policy, that's their job, not mine").]

Thus, there would have been no practical difference if JAI had the preemption argument below, and the plaintiffs are not prejudiced by JAI's failure to engage in this act of futility.

3. This case presents an exceptionally good vehicle for addressing the continuing validity of *Young*.

This case has the perfect record for analyzing *Young*. The jury found for the plaintiffs on the common-law claims and for the defendant on the statutory claim. That means that the validity of *Young*, and the validity of A.R.S. § 4-312(B)'s preemption clause, made a material difference in this case.

By contrast, the records in other, future, cases might not cleanly present the issue. For example, if a future jury finds in favor of a bar on all claims, then the issue will never be presented to the appellate court. Conversely, if a future jury finds against a bar on all claims, then it might be difficult to determine whether the damages (i.e., the judgment) would have been any different if the common-law claims had been excluded from the

case. The issue gets presented best in a case like this one, where the statutory/common law distinction was outcome-determinative. This case therefore presents an exceptionally good vehicle for addressing the issue.

In the end, "the system is best served by considering and settling these questions" regarding the constitutionality of A.R.S. § 4-312(B). *Jimenez*, 183 Ariz. at 406 n.9. The Court should therefore reach those questions and declare that *Young* is no longer good law in light of *Dickey*.

II. As a matter of law, JAI's alleged negligence did not proximately cause the accident.

A. The scope of proximate cause, a required element of a negligence claim, is a policy question for the courts.

To succeed on their negligence claims, the plaintiffs must prove the existence of: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by defendant of that standard; (3) causation; and (4) damages. *Quiroz v. Alcoa, Inc.*, 243 Ariz. 560, 563-64, ¶ 7 (2018). The third element—causation—requires the plaintiffs to prove two separate types of causation: (1) but-for causation ("causation-in-fact" or "actual" causation), and (2) proximate causation ("legal" causation). See *Patterson*, 214 Ariz. at 438-39, ¶¶ 13-14 (distinguishing between "causation-in-fact" (¶ 13) and "proximate causation" (¶ 14)).

Proximate causation serves as a judicial limit on an actor's legal responsibility for otherwise negligent conduct. *See id.* at 439, ¶ 14. A proximate cause "is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 498 (App. 1980). In contrast to actual (but-for) causation, proximate causation "is a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all," but "rather one of the policy as to imposing legal responsibility." *Prosser & Keeton* § 44, at 301. In other words, proximate causation is "the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct." *Id.* § 41, at 264.

Importantly, the courts—not juries—determine the outer bounds of liability under proximate causation. A court properly rules in favor of a defendant as a matter of law when it finds that the negligent conduct at issue is not the proximate cause of the injury. *See, e.g.*, *Patterson*, 214 Ariz. at 439-40, ¶¶ 17-19 (concluding as a matter of law that bar's service of alcohol to drunk patron was not proximate cause of harm because patron's decision to return to car after getting home safely was "a superseding, intervening event

of independent origin that negated any negligence on the part of the tavern"); *Barrett v. Harris*, 207 Ariz. 374, 383, ¶ 31 (App. 2004) ("the trial court correctly ruled as a matter of law that the mere order to use blow-by oxygen was not a proximate cause of Emily's fatal injury").

Proving but-for causation cannot substitute for proving proximate causation. For example, a driver might see a dog-grooming shop, start to think about when to squeeze in a grooming appointment for Fido, and rear-end another car because of the mental distraction. The existence of the dog-grooming shop is a but-for cause of the accident because without the shop, the driver would not have been distracted. But without more, no one would say that the shopkeeper proximately caused the collision and can therefore face legal liability for the accident.

B. A patron's voluntary actions after arriving at a place of repose break the chain of legal causation for purposes of dram shop liability.

The doctrine of intervening/superseding causation is one aspect of proximate causation. If "an injury is produced by an intervening and superseding cause, . . . the necessary proximate causation is lacking." *Herzberg v. White*, 49 Ariz. 313, 321 (1937) (quoted by *Patterson*, 214 Ariz. at 439, ¶ 14). An intervening and superseding cause cuts off proximate

causation *even if* a defendant's actions were a but-for cause of the harm, and "*even though* the original negligence may have been a substantial factor in bringing about the injury." *Patterson*, 214 Ariz. at 439, ¶ 14 (emphasis added).

An intervening event is a subsequent event "of independent origin for which the owner is not responsible." *Id.* at 438-39, ¶ 14. Whether an intervening force is a superseding cause depends on "many considerations, one of the principal of which is whether the intervening cause is an extraordinary one, or one which might *normally be expected* by a reasonable person in view of the situation existing *at the time* of its intervention." *Herzberg*, 49 Ariz. at 321 (emphases added).

As applied to dram shop cases, a patron's decision to drive after arriving home is "unforeseeable and extraordinary and thus constitute[s] a superseding, intervening event of independent origin that negate[s] any negligence on the part of the tavern or its employees." *Patterson*, 214 Ariz. at 440, ¶ 19. *Patterson* recognized that once a patron has made it from the bar to a place of repose, the bar's legal responsibility generally ceases because the patron's conduct thereafter is an intervening, superseding event. The patron (Roque) was visibly intoxicated at the bar. The bar's employee eventually drove Roque home. *Id.* at 436, ¶ 3. Less than an hour later, Roque

returned to the bar, got back into her car, and then caused an accident. *Id.* The accident victim sued the bar, alleging he was injured as a result of the bar's negligent overservice of Roque. *Id.* ¶ 4. The trial court granted and the Court of Appeals upheld summary judgment in the bar's favor. *Id.* at 440, ¶ 20. Although the Court found that the bar had fulfilled its duty by driving Roque home, it also held that Roque's decision to leave home to retrieve her car while she was still drunk was a superseding, intervening event of independent origin that negated any negligence on the bar's part. *Id.* ¶¶ 17-19 ("[W]e hold that Roque's decision to return that night to retrieve her vehicle while she was still intoxicated was unforeseeable and extraordinary and thus constituted a superseding, intervening event of independent origin that negated any negligence on the part of the tavern or its employees.").[2]

Patterson reflects the primary purpose of dram shop liability. The Arizona Supreme Court first recognized a common law duty for dram shops

---

[2] This Court has decided another dram shop case that is directly on point (*Anderson v. Matador Mexican Food Rest., Inc.*, No. 1 CA-CV 09-0254, 2010 WL 3366656 (Ariz. App. Aug. 26, 2010)), but it is unpublished. Consequently, the Court should publish whatever decision it makes in this case. *See* Sup. Ct. R. 111(c)(1)(B). Pursuant to Rule 111(c)(3), a copy is attached at APP202.

in *Ontiveros*, 136 Ariz. 500. That case, "like its precursors from other jurisdictions, was premised on the observation that most people in modern society drive automobiles and that it is foreseeable to a tavern owner that his intoxicated patron will leave the bar, get into his automobile, and, as a result of his intoxication have a traffic accident." *Hebert v. Club 37 Bar*, 145 Ariz. 351, 353 (App. 1984). In other words, the central risk to be avoided is traffic accidents between the bar and a place of repose (e.g., the patron's home). Once a patron has reached a place of repose after consuming alcohol, however, the risk to the public contemplated by *Ontiveros* has effectively been prevented. *See Patterson*, 214 Ariz. at 440, ¶¶ 18-19; *cf. State ex rel. Dep't of Pub. Safety v. Kelley*, 172 P.3d 231, 236-37, ¶ 18 (Okla. App. 2007) (finding no probable cause to arrest defendant for being in actual physical control of a vehicle while intoxicated; defendant who was sleeping in backseat "was a passive occupant of his vehicle, using it as a place of repose and rest" and thus "posed no threat to the public at the time of his arrest").

In addition to *Patterson*, other dram shop cases confirm that a bar is not legally responsible for all bad decisions made by intoxicated patrons. For example, in *Hebert*, the bar served one of its patrons between 10-15 drinks in the morning, sold him a bottle of vodka "for the road," and then served him

more drinks when he returned that afternoon. 145 Ariz. at 352. He was cut off around 7 p.m. but allowed to stay (with a drink still in front of him) until 10:30, by which time he was blacked out and "exhibiting extreme signs of intoxication." *Id.* That night, he shot another customer in the bar parking lot. *Id.*

The victim's family sued the bar for negligence. *Id.* The evidence established that the bar had previously thrown the same patron out for being unruly, that the bar's employees knew the patron often suffered alcoholic blackouts, and that an employee knew he kept a gun in his car. *Id.* According to the testimony, the patron "probably would not have committed the crime had he been sober." *Id.*

But as a matter of law, the bar could not be held liable because of the lack of proximate causation: "Armed with the hindsight mentioned in *Ontiveros* and assuming for the purposes of this opinion that appellees were negligent, we believe, as did the trial court, that the murder here was both unforeseeable and extraordinary." *Id.* at 353; *see also Pierce v. Lopez*, 16 Ariz. App. 54, 59 (1971) (observing "that it is common knowledge that consumption of intoxicating liquors may excite emotions leading to violent disturbances the development of which a tavern keeper should be

reasonably alert to detect and suppress," but this does not "mean that a tavern keeper must possess extraordinary powers of foreseeability greater than those of a reasonable person in similar circumstances" (citations omitted)), *disapproved of on other grounds by Ontiveros*, 136 Ariz. 500.

The doctrine of intervening, superseding causation does not relieve a bar of all responsibility, however. A bar cannot ignore facts that would put a reasonable person on notice of a *particular risk* posed to or by an intoxicated patron. *See, e.g.*, *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 256, ¶ 39 (App. 2013) (finding hotel was aware of risk that intoxicated patron might step out on window ledge to smoke and thus rejecting that patron's actions were an intervening, superseding cause of his injury); *Carrillo v. El Mirage Roadhouse, Inc.*, 164 Ariz. 364, 369 (App. 1990) (reversing summary judgment where evidence showed the bar "was well aware" that an intoxicated patron's friends continued to pass him beers after he was cut off for being too drunk); *McFarlin v. Hall*, 127 Ariz. 220, 224-25 (1980) (finding bar liable where it had knowledge of intoxicated patron's violent temper but continued to serve him and he subsequently shot another patron in the parking lot).

In sum, under settled law, selling alcohol to a patron—even negligently—does not make a bar responsible for all of the patron's subsequent actions. Voluntary actions taken by a patron after arriving safely at a place of repose are not within the ordinary and foreseeable sequence of events from a bar's perspective, and thus they cut off proximate causation for purposes of dram shop liability.

C. Cesar's choice to drive after making it home safely was an intervening, superseding event that broke the chain of proximate causation.

Like in *Patterson*, Cesar's decision to get behind the wheel after he had already arrived home broke the chain of proximate causation.

At trial, the plaintiffs maintained that JAI served alcohol in a way that it knew or should have known created an unreasonable risk of harm because it did not adequately monitor or control its service. [IR-204 at 226:21-227:4 (APP189-90) ("When does the service of alcohol create an unreasonable risk of harm? When you don't monitor it. When you don't control it.").] Like in *Patterson*, however, Cesar's voluntary choice to drive *after* he had already made it home was not a foreseeable consequence of failing to adequately monitor the club's service of alcohol. *Ontiveros*, 136 Ariz. at 506 (assessing foreseeability from the bar's perspective). Moreover, Cesar's decision to

drive Wendy home was extraordinary "in view of the situation existing *at the time*" he made it. *Herzberg*, 49 Ariz. at 321 (emphasis added). By that time, Cesar was sleeping safely in his own bed at home and had been away from the club for hours. Like in *Patterson*, his choice to then get out of bed, get into a vehicle, and then drive is not the type of event "which might normally be expected by a reasonable person in view of the situation existing at the time." *Id.*

The superior court should have granted judgment as a matter of law for JAI on intervening, superseding cause because no evidence shows that JAI knew or should have known that Cesar would leave his house to drive Wendy home several hours after leaving the club. The situation might be different if, for example, Cesar told a bartender he had to be at work in three hours, thus indicating that he planned to get back in the car shortly after getting to a place of repose. Under those circumstances, the intervening cause may not qualify as a superseding one. *See McMurtry*, 231 Ariz. at 256-57, ¶ 39 (intoxicated patron's decision to step out on window ledge after being safely escorted to room was not an intervening, superseding cause of injury because the hotel knew "that many of its guests sat on its window ledges to smoke, that [the patron] had smoked earlier in the evening, and

that the Hotel provided signage instructing guests to step outside on the balcony to smoke"). But here, no evidence suggests that JAI had reason to know Cesar might leave his house long after leaving the club and going to bed to then get in the driver's seat. *See also Sucanick v. Clayton*, 152 Ariz. 158, 160 (App. 1986) (affirming summary judgment in favor of bar where "neither the tavern owner nor any of his employees had any notice either that Joe Poole posed a threat of physical harm to other patrons or that serious trouble would occur").

For these reasons, Cesar's decision to drive was an intervening, superseding cause that terminated the chain of proximate causation, and the superior court should have granted JAI's Rule 50(b) motion for judgment as a matter of law.

D. The plaintiffs' arguments to the contrary did not justify denying JAI's Rule 50(b) motion.

1. The plaintiffs focus on the wrong event.

Below, the plaintiffs criticized JAI for failing to ensure that Cesar got home safely. [*See, e.g.*, IR-183 at 4 ("regardless of how he got there"); IR-204 at 187:10-12 (APP188) ("The reality is, Jaguars did nothing to get Mr. Aguilera home safely. They let him go.").] But that criticism misses the point

because Cesar unquestionably *did* get home safely—the same result that would have occurred had JAI offered Cesar a taxi or had an employee drive him home. [*See* IR-204 at 166:3-7 (APP186) (arguing that JAI "failed to break the chain of liability" because "it failed to take any action to either determine Cesar was intoxicat[ed] or to prevent him from leaving Jaguars and become a danger to himself").]

Moreover, none of those things could have prevented Cesar from choosing to drive after going to sleep for the night. Consider two bars and two patrons. Bar A calls a taxi for Patron A, who makes it home safely. On the same night, Bar B does not call a taxi, but Patron B nevertheless makes it home safely. At that point, both Patron A and Patron B have made it home, to a place of repose. They are equally unlikely to decide to get behind the wheel instead of staying at home to sober up. The law should therefore treat the two bars the same for purposes of intervening/superseding cause. The fact that Bar B got lucky (whether because Patron B called himself a taxi, had a designated driver, drove home drunk without hitting anyone, or took public transportation) does not change the legal analysis on proximate causation.

As explained below (Argument § III.A.2), a patron has reached the point where he can no longer lawfully drive long before the law requires a bar to stop serving him alcohol. Moreover, Arizona's dram shop statute explicitly requires proof of causation to hold a bar responsible for injuries resulting from its service of overly-intoxicated patrons. A.R.S. § 4-311(A). It is not enough to show that a bar served someone enough alcohol that he could not lawfully drive. A plaintiff must *also* show that the event which did in fact occur was part of an unbroken and natural sequence of events flowing from the bar's alleged over-service.

Below, the plaintiffs also focused on *Dupray v. JAI Dining Services (Phoenix), Inc.*, 245 Ariz. 578 (App. 2018). [*See* IR-183 at 2-6.] But *Dupray* does not preclude judgment as a matter of law in this case. Indeed, *Dupray* acknowledged that there was "some force" to the argument that the patron's "decisions to drive once he was safely away from the club constituted intervening and superseding causes that broke the chain of causation." 245 Ariz. at 584, ¶ 21. But because the patron in *Dupray* lived out of his car, the question of whether he had in fact reached a place of repose presented a question of fact for the jury that precluded judgment as a matter of law. *Id.* at 584, ¶ 21 ("Whether the homes of his friend or his girlfriend were places

of repose, which might make unforeseeable his decision to leave them and continue driving, were factual questions for the jury, not the trial court, to determine."). Here, by contrast, Cesar unquestionably reached a place of repose—his own home—and no one contends otherwise.

In *Dupray*, the patron went from the bar to his friend's house, and then to his girlfriend's house. The collision occurred after the patron left his girlfriend's house. *Dupray* noted that bar personnel did not know how the patron had arrived or departed, or where he was going or staying, so "a jury could have reasonably concluded that [the] collision with Dupray was foreseeable from JAI's perspective." *Id.* at 585, ¶ 21. The plaintiffs relied on that point below. [*See* IR-183 at 2-6.] But again, this case is different because Cesar, unlike the patron in *Dupray*, unquestionably got to his own home—indeed, his own bed—before making the fateful decision to get up and drive. And as explained below (Argument § III.A.2), any duty a bar might have to arrange for transportation arises only after a patron is obviously intoxicated, which Cesar was not.

As the plaintiffs recognize, JAI's liability requires an unbroken chain of causation between JAI's negligent failure to adequately monitor its service of alcohol and Cesar's car wreck several hours later. [IR-204 at 173:2-3

(APP187) ("We must show you that those events were unbroken by any intervening and superseding cause.").] This unbroken chain is missing because Cesar voluntary chose to drive after he had already made it home safely, and that choice is an intervening, superseding event that interrupts the sequence of legal responsibility.

2. The plaintiffs' expansive view of a bar's legal responsibility would transform ordinary dram shop negligence into a form of strict liability.

Relying on the foreseeability of intoxicated patrons driving under the influence, the plaintiffs' theory at trial was that Cesar's choice to leave his home via automobile after arriving there safely cannot be an intervening, superseding cause. [*Id.* 236:18-22 (APP191) ("Superseding intervening cause, something extraordinary based on hindsight. Can you expect a professional who knows what the effects of alcohol to be to expect that people would make bad decisions until they sober up? Of course.").] The plaintiffs thus argue for a default rule that would make a bar responsible for all actions taken by a patron until the patron is sober, because people under the influence of alcohol "make bad decisions until they sober up." [*Id.* (APP191).]

But this concept of foreseeability is so broad that it swallows proximate cause whole. If any "bad decision" by someone under the influence is foreseeable, as the plaintiffs contend, then the mere fact that a bar served alcohol to a patron who then caused an injury would be sufficient for liability. Thus, in effect, bars would become strictly liable for all voluntary actions undertaken by a patron while under the influence of alcohol. [*See id.* at 187:10-13 (APP188) ("The reality is, Jaguars did nothing to get Mr. Aguilera home safely. They let him go. So they are responsible *until the effects of that alcohol wear off* . . . ."); IR-207 at 15:6-9 (APP196) ("The duty continues unless the tavern owner breaks the chain of liability or the drunk or the driver's conduct is no longer subject to the influence of the alcohol that was over served.").]

Arizona courts have never adopted such a strict liability doctrine. To the contrary, the Supreme Court has explicitly rejected the argument that dram shop liability is meant to "render tavern owners absolutely liable and remove from their patrons all civil responsibility for their own conduct." *Del E. Webb Corp. v. Super. Ct.*, 151 Ariz. 164, 168-69 (1986). This Court should not adopt a theory of proximate causation that would create a strict liability scheme for businesses that serve alcohol.

Because the plaintiffs' case necessarily rests on an untenable legal theory, the Court should reverse and remand for entry of judgment as a matter of law.

III. As a matter of law, the bar did not breach any duty.

In addition to statutory preemption and intervening/superseding cause, the "duty" element of negligence provides another way to think about this issue. Properly construed, a bar's duty is not to serve alcohol to a person who is disorderly or obviously intoxicated, and JAI did not breach that duty. By contrast, the plaintiffs' conception of a bar's duty goes far beyond what a bar has the legal right or practical ability to control, and therefore should be rejected.

Although this issue is closely related to the statutory preemption and proximate cause issues, it is an independent basis on which this Court may reverse. *Cf. Prosser & Keeton* § 42, at 274 ("It is quite possible to state every question which arises in connection with 'proximate cause' in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?").

A. A bar has a duty not to serve alcohol to a "disorderly or obviously intoxicated person."

1. *Ontiveros* and subsequent statutes limit a bar's duty to not serving a disorderly or obviously intoxicated person.

"Arizona does not presume duty; rather, in every negligence case, the plaintiff bears the burden of proving the existence of a duty." *Quiroz*, 243 Ariz. at 574, ¶ 63. Duty is based on either "special relationships" or "public policy." *Id.* at 565, ¶ 14. "[O]ur primary source for identifying a duty based on public policy is our state statutes." *Id.* at 566, ¶ 18.

Ontiveros held that bars have a duty "to exercise due care in ceasing to furnish intoxicants to customers in order to protect members of the public who might be injured as a result of the customer's increased intoxication." 136 Ariz. at 511. The court based this duty in part on A.R.S. § 4-244(14), which it summarized as making it "unlawful for a licensee to furnish alcohol to an intoxicated person." *See Ontiveros*, *id.* at 509.

"Three years after *Ontiveros* [and a companion case] were decided, our state legislature passed A.R.S. § 4-311, apparently in an effort to more specifically codify the law established by *Ontiveros* regarding licensee liability for serving intoxicated persons or minors." *Patterson*, 214 Ariz. at 439, ¶ 15. That statute clarified that bars are liable for injuries proximately

caused by serving patrons who are "obviously intoxicated" or "under the legal drinking age." A.R.S. § 4-311(A).

The Legislature later made analogous revisions to A.R.S. § 4-244(14), which *Ontiveros* had relied on for its finding of duty. *See* 1994 Ariz. Sess. Laws, ch. 373, § 8 (2d Reg. Sess.). That statute now prohibits the sale of alcohol to a "disorderly or *obviously* intoxicated person." A.R.S. § 4-244(14) (new word emphasized).

In sum, since *Ontiveros*, the Legislature has confirmed that the scope of a bar's duty is not to serve a "disorderly or obviously intoxicated person." *Id.*; *Henning v. Montecini Hosp., Inc.*, 217 Ariz. 242, 244, ¶ 6 (App. 2007) ("Arizona imposes a duty of care, both by statute and common law, on a 'supplier of liquor' to refrain from serving alcoholic beverages to underage persons or *those who are disorderly or obviously intoxicated*.") (emphasis added).

2. Even if a bar has a duty to arrange for transportation, that duty applies only to an obviously intoxicated patron.

Patterson also arguably references another potential duty: to provide an "obviously intoxicated" person with "safe transportation" from the premises. 214 Ariz. at 439, ¶ 16. In discussing this duty, *Patterson* relied on A.R.S. § 4-244(14), which prohibits a bar from allowing an "obviously

intoxicated person to come into or remain on or about the premises," except for the purpose of allowing "a nonintoxicated person to transport the obviously intoxicated person from the premises."

This Court should not recognize such a duty. First of all, as explained above (Argument § I.A), the Legislature chose not to create a private cause of action in A.R.S. § 4-311 for anything related to transporting a patron. And *Quiroz* teaches that the courts' "primary source for identifying a duty based on public policy is our state statutes." *Quiroz*, 243 Ariz. at 566, ¶ 18. Second, A.R.S. § 4-244(14) does not impose an *affirmative* duty to ensure or arrange for transportation. It merely allows the bar to let an obviously intoxicated patron remain on-premises for half an hour after the statute otherwise requires the bar to kick the patron out.

But even if this Court does recognize such a duty, the duty comes into play only if the bar has an "obviously intoxicated" patron under A.R.S. § 4-244(14). A bar has no duty to arrange for transportation for a patron who drinks too much to drive but is not obviously intoxicated such that the bar has to cut the patron off. The Arizona Legislature has decided, on public policy grounds, to set the legal limit for unlawful driving much lower than the legal limit for unlawfully serving.

In particular, the Legislature prohibits driving at "an alcohol concentration of 0.08 or more," or if the driver is "under the influence of intoxicating liquor . . . [and] impaired *to the slightest degree*." A.R.S. § 28-1381(A)(1)-(2) (emphasis added).

By contrast, the Legislature does not prohibit a bar from serving a patron until the patron is "*disorderly* or *obviously intoxicated*." A.R.S. § 4-244(14) (emphases added). "'[O]bviously intoxicated' means inebriated to the extent that a person's physical faculties are *substantially* impaired and the impairment is shown by *significantly* uncoordinated physical action or *significant* physical dysfunction that would have been *obvious* to a reasonable person." *Id.* (emphases added).

Putting these principles together, the table below shows that the ultimate standard for when a person may not lawfully drive is significantly lower than when a bar may not lawfully serve the person:

	Unlawful to drive	Unlawful to serve
Standard	Impaired to the slightest degree.	Inebriated to the extent that a person's physical faculties are *substantially* impaired and the impairment is shown by *significantly* uncoordinated physical action or *significant* physical dysfunction that would have been obvious to a reasonable person.
Physical effects required?	No	Yes
Degree of the effects	"slightest degree"	"substantially" or "significantly"
Obviousness required?	No	Yes

In particular, Arizona statutes make it unlawful to drive even if the effects of alcohol are "slight[]," regardless of whether the effects manifest themselves physically, and even if the effects are not obvious to a reasonable person. By contrast, the standard for unlawful service by a bar requires much more. It requires physical effects (i.e., mental effects are not enough), the effects must be "substantial[]" or "significant," and the effects must be *obvious* to a reasonable person.

In other words, there is a substantial range where a patron cannot get behind the wheel, but the bar may lawfully serve another drink. The Legislature's policy choice makes sense. When a person has had a couple of drinks, his faculties are clouded enough that he might not be able to react quickly enough to avoid a car accident. But he still has enough judgment to know that he should put the keys away and call an Uber. By contrast, someone who exhibits "significant physical dysfunction" and whose "physical faculties are substantially impaired," A.R.S. § 4-244(14), cannot be trusted to make that decision, so the bar must cut him off.

Even *Ontiveros* recognized this distinction. It extensively quoted from another opinion that described the continuum of effects from alcohol:

> [P]ersons who commence drinking intoxicants *pass through various stages* from complete sobriety to incapacitating intoxication and unconsciousness. . . . When the person has imbibed sufficient liquor that the effects thereof are becoming obvious to the ordinary person, the imbiber is *still able to control himself* and his actions sufficiently to avoid injury to others. If the imbiber continues to drink intoxicants, however, his condition will worsen until he reaches *the point that he can not control his thought or muscular processes*.

Ontiveros, 136 Ariz. at 507 (emphases added; citations omitted).

Presumably for this reason, *Ontiveros* repeatedly characterizes the bar's wrongful act as serving an "*already* intoxicated patron." *Id.* at 505

(emphasis added); *accord id.* at 506 ("served more alcohol while intoxicated"); *id.* at 510 ("sale of liquor to an *already* intoxicated person") (emphasis added). After all, the patron in *Ontiveros* "consumed approximately 30 beers" and had a blood-alcohol level of 0.33—more than *quadruple* today's 0.08 limit. *Id.* at 503.

Moreover, both sides' experts in this case agreed that the signs of intoxication will not be visible in most people at low blood-alcohol-concentration levels. The plaintiffs' own expert testified that even at 0.15% (i.e., almost double the 0.08% limit to drive), 42% of the population will not show signs of intoxication that are visible. [IR-202 at 31:18-21 (APP160) (plaintiffs' expert witness) ("So more than half, about 58 percent of the population, of social drinkers will show visible signs of intoxication at this .15 threshold, if you will."); *see also* IR-204 at 23:15-17 (APP182) (JAI's expert witness) ("the average person would not show [visible signs] until you get to above .15. An alcohol-tolerant person or a binge drinker would be even higher."); *id.* at 46:11-47:2 (APP184-85) ("[I]t's not until you get .2 where the overwhelming majority of all drinkers would be obviously intoxicated.").] Some people will show signs at 0.08, but some can "mask it." [IR-202 at 32:1-

15 (APP161) (plaintiffs' expert witness).] Even at 0.15%, therefore, detecting intoxication is not much better than a coin flip.

For these reasons, it makes sense that the law does not prohibit a bar from serving a patron at 0.08%. At that point, although the patron cannot legally drive, even "experts" and "trained professionals" cannot reliably "pick out the intoxicated person." [IR-204 at 46:11-47:2 (APP184-85)]; *see also State v. Martin*, 174 Ariz. 118, 121 (App. 1992) (noting that "it may be difficult for an individual driver to know when he has become 'impaired to the slightest degree' and should not drive").

At bottom, when a patron is drinking but does not yet show visible and obvious signs of intoxication, the patron must take personal responsibility for the decision to drive because he still has good enough judgment to make that decision. *See Martin*, 174 Ariz. at 121 ("Thus, we conclude that the stringency of the standard 'to the slightest degree' effectively puts the public on notice that one who drinks and drives does so at his peril."). Once the patron shows signs of obvious intoxication (i.e., significant or substantial physical impairment), then the bar has sufficient information to cut off service, and the patron may no longer be able to make

good decisions about driving. The law therefore imposes a duty on the bar at this point of obvious intoxication, but not before.

3. A bar does not have a duty to prevent a patron from driving for the rest of the night.

As a matter of law, a bar does not have a duty to prevent a patron from driving for the rest of the night. Although bars must comply with the duties the law imposes on them, they are not a source of insurance coverage for their patrons or the public. The courts must draw the line between liability and nonliability at some point. *See Berne v. Greyhound Parks of Ariz.*, 104 Ariz. 38, 41 (1968) ("Since people can and daily do sustain injuries from almost all conceivable conditions under a multitude of varying circumstances, and since the possessor of the premises is not an insurer of the safety of invitees, the line between liability and non-liability must be drawn at some point."). As the Supreme Court recently explained, "imposing a limitless tort duty on society may well deter negligent behavior, but it leaves little room for individual liberty and personal autonomy." *Quiroz*, 243 Ariz. at 578, ¶ 86.

At its core, tort liability is predicated on an actor's ability to avoid the harm. As explained by Justice Holmes:

> The requirement of an act is the requirement that the defendant should have made a choice. But the *only possible purpose* of

> introducing this moral element *is to make the power of avoiding the evil complained of a condition of liability*.

Oliver Wendell Holmes, *The Common Law* 95 (1881) (emphases added); *see also id.* ("All the cases concede that an injury arising from inevitable accident, *or, which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against . . . lays no foundation for legal responsibility*." (emphasis added; citation and internal quotation marks omitted)). This connection between liability and control recognizes that "the interests of the public are better served by the common law principles that make most persons responsible for their conduct." *Del E. Webb Corp.*, 151 Ariz. at 170.

When a bar cannot take any action that would avoid the evil complained of, there is no justification for imposing tort liability. *See also Cohen v. Maricopa Cty.*, 228 Ariz. 53, 57, ¶ 21 (App. 2011) (refusing to find County negligent for failing to monitor patient following discharge from custody because "when the patient is out of such controlled environment, even though allegedly in compliance with a court-approved outpatient treatment plan, the County has little practical control over that patient, the

patient's environment or the actions of others, and thus has little to no control over risk.").

Negligence cases across the factual spectrum recognize this fundamental link between duty and control. The cases below ruled as a matter of law that an actor's duty did not extend beyond where the actor could exercise control:

- The sponsor of a rodeo event did not owe a duty to a victim of assault by intoxicated patrons in the parking lot of participating restaurant because the sponsor "had no ownership or landlord control over the property, or any other relationship with [the restaurant] that would give it *authority and power to control* [the restaurant operator]." *Barkhurst v. Kingsmen of Route 66, Inc.*, 234 Ariz. 470, 474, ¶ 14 (App. 2014).
- A municipal airport did not owe a duty of care to a paraglider who collided mid-air with a hot air balloon. Although the accident occurred during a municipal-sponsored event, the airport had *no right to control* the airspace where the paraglider was injured. *Ritchie v. Costello*, 238 Ariz. 51, 54-55, ¶¶ 11-14 (App. 2015).
- A non-operating owner of a bar was entitled to summary judgment on dram shop and negligent training claims because, once a third party had taken over operations, the owner "no longer exercised *sufficient control* over the bar or its employees to owe any duty to" plaintiff. *Henning*, 217 Ariz. at 244, ¶ 2.
- An easement holder did not owe a duty to warn or protect an invitee from a cable fence that the easement holder had *no right to control*. *Clark v. New Magma Irrigation & Drainage Dist.*, 208 Ariz. 246, 251, ¶ 21 (App. 2004).

- When recognizing a new common law duty for dram shops, the Arizona Supreme Court emphasized that the duty between tavern owners and patrons is based on "the obligation of a licensee to *help control* the conduct of others who are patrons of his establishment." *Ontiveros*, 136 Ariz. at 511 n.4.

- A physician was entitled to summary judgment on negligence claims arising out of injury caused by the physician's former patient because "*any direct authority . . . to control Smith's behavior ended* . . . when Smith ceased to be his patient." *Davis v. Mangelsdorf*, 138 Ariz. 207, 209 (App. 1983).

- A retailer was entitled to summary judgment on negligence claims brought by a patron who tripped when crossing a landscaped area at the shopping center. The Court of Appeals expressly rejected that the retailer "had a duty to provide reasonably safe means of ingress and egress from its store regardless of whether the business exercised any control over the landscaped area" because "*nothing that [the retailer] could have done or not done* on its own premises would have had any effect on [the patron]'s use of the landscape area." *Yoder v. Tux-Xpress Inc.*, No. 1 CA-CV 16-0396, 2017 WL 1709509, at *2, ¶ 10 (Ariz. App. May 2, 2017) (copy at APP206).

(Emphases added).

Once a patron makes it home, then a bar has no physical power, legal right, or practical ability to control the patron's conduct. A bar has no power to take the patron's keys away from him in his own house, impound his vehicle, or physically prevent him from leaving his home. *See Patterson*, 214 Ariz. at 437, ¶ 5 (quoting the trial court's statement that the bar "had no

authority to either take [Roque's] keys or to impound her vehicle"). Being drunk at home is not a crime, after all.

For these reasons, the law does not and should not impose a duty to control its patrons' actions long after they have left the bar.

B. JAI did not breach any duty imposed by the law.

Here, JAI did not breach any duty the law imposed on it. The jury necessarily found that he was not disorderly or obviously intoxicated. (*See* Argument § I.B.) Thus, JAI did not breach its duty.

And even if the law also imposes an additional duty to transport an "obviously intoxicated" person from the premises, the bar did not breach that duty for the same reason (i.e., that the jury found Cesar not to be obviously intoxicated). On top of that, even if JAI had such a duty and breached it, then the breach of the duty was not the proximate cause the plaintiffs' injuries. Cesar did not hit the plaintiffs on his way home from the bar; he hit them only after making it home, falling asleep, and getting back behind the wheel. As *Patterson* demonstrates, even ensuring that a patron gets home safely does not, and cannot, ensure that the patron will not drive later in the night. Simply put, JAI had no legal right or practical ability to prevent Cesar from driving Wendy home later that night.

Unlike cases where a bar has knowledge of the patron's conduct and the ability to control it, JAI had no knowledge of or ability to control Cesar's decision to drive Wendy long after he left JAI's premises. *Cf.*, *e.g.*, *Carrillo*, 164 Ariz. at 370 ("Since the facts indicate that the *Roadhouse was aware Salvadore continued to drink* and that *it could have exercised control over that activity*, a jury could reasonably conclude that there is no excusable negligence . . . ." (emphasis added)).

For these reasons, the superior court should have entered judgment in JAI's favor as a matter of law based on the scope of JAI's duty.

C. The plaintiffs urge the court to ignore the scope-of-duty issues and adopt a form of strict liability for dram shops.

Below, the plaintiffs repeatedly suggested that a club's duty to a patron continues until the patron is sober. [*See* IR-207 at 15:6-9 (APP196) ("That duty continues unless the tavern owner breaks the chain of liability or the drunk or the driver's conduct is no longer subject to the influence of the alcohol that was over served."); IR-202 at 152:14-20 (APP164) (arguing that JAI remained legally responsible until Cesar's "decision-making, coordination, perception, reaction, all the things that Dr. McCabe talked about are no longer influenced by the alcohol that JAI Dining served. . . . It

ends when he is no longer subject to control of that alcohol.").] But bars have neither the legal right nor the practical ability to control their patrons until they are no longer under the influence.

Consider an example involving a physician's anesthetized patients. The physician should try to ensure that all of her patients have a ride home after surgery. If the physician let a groggy patient drive himself home, the physician would be partially legally responsible if the patient caused an accident on the way home because the physician breached her duty. By contrast, if the patient makes it home safely, then the physician cannot prevent her patient from getting behind the wheel. Consequently, the physician would have no duty once the patient made it home, and she would not be legally responsible if the patient drove after arriving home.

Below, the plaintiffs pointed out that JAI did not offer Cesar a cab or ensure that he had a sober driver to leave the bar. [*See* IR-207 at 17:25-18:4 (APP198-99).] But that criticism misses the point. In evaluating the scope of duty, the question is whether JAI had a duty to protect "against the event *which did in fact occur*." *Prosser & Keeton* § 42, at 274 (emphasis added). Even if JAI had a duty to protect the public from the risk that Cesar would hurt

someone while getting from the club to a place of repose, Cesar did *not* hurt anyone while getting home. He arrived home safely.

Once home, Cesar posed the same risk to the public as someone who purchases liquor, gets drunk at home, and then drives, and the same risk as someone who leaves a bar via Uber and then drives after arriving at home. In both instances, the business that provided the alcohol could not prevent the person from driving after arriving safely home, and thus they cannot be held liable for what might happen after that event. Here, JAI likewise had no legal right or practical ability to control Cesar's conduct after he arrived safely home. Thus, it cannot be held liable for what occurred after that event.

CONCLUSION

The Court should reverse the superior court's denial of JAI's Rule 50(b) motion for judgment as a matter of law, vacate the judgment, and remand with instructions to grant the motion and enter judgment in JAI's favor.

RESPECTFULLY SUBMITTED this 20th day of November, 2019.

OSBORN MALEDON, P.A.

By /s/ Eric M. Fraser
Eric M. Fraser
Joshua D. Bendor
2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
Dominique Barrett
2390 E. Camelback Rd., Ste. 440
Phoenix, Arizona 85016

Attorneys for Defendant/Appellant JAI Dining Services (Phoenix) Inc.

THIS PAGE INTENTIONALLY LEFT BLANK

THIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX
TABLE OF CONTENTS*

* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
1.	COMPLAINT AND JURY DEMAND	Nov. 2, 2016
2.	CERTIFICATE OF ARBITRATION	Nov. 2, 2016
3.	CIVIL COVERSHEET	Nov. 2, 2016
4.	PLAINTIFF'S A.R.S. 12-2602 CERTIFICATE REGARDING EXPERT TESTIMONY	Nov. 2, 2016
5.	DEMAND FOR JURY TRIAL	Nov. 2, 2016
6.	AFFIDAVIT OF SERVICE OF PROCESS	Jan. 19, 2017
7.	FIRST AMENDED COMPLAINT AND JURY DEMAND	Feb. 7, 2017
8.	DEFENDANT JAI DINING SERVICES (PHOENIX), INC.'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT	Feb. 22, 2017
9.	DEFENDANT JAI DINING SERVICES (PHOENIX), INC.'S CERTIFICATE OF COMPULSORY ARBITRATION	Feb. 22, 2017
10.	DEFENDANT JAI DINING SERVICES (PHOENIX), INC.'S DEMAND FOR JURY TRIAL	Feb. 22, 2017
11.	**ME: 150 DAY MINUTE ENTRY [04/01/2017]**	**Apr. 5, 2017**
12.	JOINT REPORT	May. 23, 2017
13.	SCHEDULING ORDER	Jun. 5, 2017
14.	AFFIDAVIT OF SERVICE OF PROCESS	Jul. 10, 2017
15.	NOTICE OF APPEARANCE	Jul. 12, 2017
16.	ANSWER	Sep. 19, 2017
17.	CERTIFICATE OF ARBITRATION	Sep. 19, 2017
18.	STIPULATION TO EXTEND DISCLOSURE AND DISCOVERY DEADLINES	Sep. 29, 2017
19.	AMENDED SCHEDULING ORDER	Oct. 4, 2017
20.	[PART 1 OF 3] DEFENDANT JAI DINING SERVICES (PHOENIX), INC.'S MOTION TO STRIKE DEFENDANT VILLANUEVA'S SWORN STATEMENT	Jan. 3, 2018

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
21.	[PART 2 OF 3] DEFENDANT JAI DINING SERVICES (PHOENIX), INC.'S MOTION TO STRIKE DEFENDANT VILLANUEVA'S SWORN STATEMENT	Jan. 3, 2018
22.	[PART 3 OF 3] DEFENDANT JAI DINING SERVICES (PHOENIX), INC.'S MOTION TO STRIKE DEFENDANT VILLANUEVA'S SWORN STATEMENT	Jan. 3, 2018
23.	PLAINTIFF'S RESPONSE IN OBJECTION TO DEFENDANT'S MOTION TO STRIKE DEFENDANT VILLANUEVA'S SWORN STATEMENT	Jan. 12, 2018
24.	DEFENDANT JAI DINING SERVICES (PHOENIX), INC.'S. REPLY IN SUPPORT OF MOTION TO STRIKE DEFENDANT VILLANUEVA'S SWORN STATEMENT	Jan. 31, 2018
25.	**ME: STATUS CONFERENCE SET [02/02/2018]**	**Feb. 7, 2018**
26.	MOTION TO CONTINUE TELEPHONIC STATUS CONFERENCE HEARING	Feb. 7, 2018
27.	AMENDED MOTION TO CONTINUE TELEPHONIC STATUS CONFERENCE HEARING	Feb. 7, 2018
28.	PROPOSED ORDER GRANTING PLAINTIFFS' TORRES MOTION TO CONTINUE TELEPHONIC STATUS CONFERENCE HEARING	Feb. 9, 2018
29.	**ME: STATUS CONFERENCE [02/27/2018]**	**Mar. 1, 2018**
30.	STIPULATION TO AMEND THE SCHEDULING ORDER	May. 7, 2018
31.	PROPOSED AMENDED SCHEDULING ORDER	May. 9, 2018
32.	**ME: TRIAL SETTING [06/06/2018]**	**Jun. 7, 2018**
33.	NOTICE OF DEPOSITION OF ALEJANDRO GARCIA	Jun. 13, 2018
34.	DEFENDANT JAI DINING SERVICES, INC'S MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Jul. 16, 2018
35.	DEFENDANT JAI DINING SERVICES, INC'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Jul. 16, 2018
36.	DEFENDANT JAI DINING SERVICES, INC'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PUNITIVE DAMAGES	Jul. 16, 2018

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
37.	DEFENDANT JAI DINING SERVICES, INC'S SEPARATE STATEMENT OF FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PUNITIVE DAMAGES	Jul. 16, 2018
38.	STIPULATION TO EXTEND PLAINTIFFS' TIME TO FILE RESPONSES TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT(SIC)	Aug. 22, 2018
39.	**ME: EXTENSION OF TIME/FILING GRANTED [08/29/2018]**	**Aug. 30, 2018**
40.	PROPOSED ORDER EXTENDING TIME FOR PLAINTIFFS' RESPONSES TO DEFENDANTS MOTIONS FOR SUMMARY JUDGMENT	Aug. 30, 2018
41.	[PART 1 OF 2] PLAINTIFF GASTELUM'S RESPONSE IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
42.	[PART 2 OF 2] PLAINTIFF GASTELUM'S RESPONSE IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
43.	[PART 1 OF 6] PLAINTIFF GASTELUMS'S SEPARATE STATEMENT OF FACTS IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
44.	[PART 2 OF 6] PLAINTIFF GASTELUMS'S SEPARATE STATEMENT OF FACTS IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
45.	[PART 3 OF 6] PLAINTIFF GASTELUMS'S SEPARATE STATEMENT OF FACTS IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
46.	[PART 4 OF 6] PLAINTIFF GASTELUMS'S SEPARATE STATEMENT OF FACTS IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
47.	[PART 5 OF 6] PLAINTIFF GASTELUMS'S SEPARATE STATEMENT OF FACTS IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
48.	[PART 6 OF 6] PLAINTIFF GASTELUMS'S SEPARATE STATEMENT OF FACTS IN OPPOSITION OF DEFENDANT JAI'S MOTION FOR SUMMARY JUDGMENT	Sep. 3, 2018
49.	PLAINTIFFS' JOINT RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Sep. 3, 2018

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
50.	[PART 1 OF 2] PLAINTIFFS' DISPUTES RE: DEFENDANT'S FACTS AND SEPARATE STATEMENT OF FACTS IN SUPPORT OF PLAINTIFFS' JOINT RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Sep. 3, 2018
51.	[PART 2 OF 2] PLAINTIFFS' DISPUTES RE: DEFENDANT'S FACTS AND SEPARATE STATEMENT OF FACTS IN SUPPORT OF PLAINTIFFS' JOINT RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Sep. 3, 2018
52.	STIPULATION TO EXTEND DEFENDANT'S TIME TO FILE REPLIES IN SUPPORT OF DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT	Sep. 19, 2018
53.	PROPOSED ORDER EXTENDING TIME FOR DEFENDANT'S REPLIES IN SUPPORT OF DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT	Sep. 24, 2018
54.	DEFENDANT JAI DINING SERVICES, INC'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Oct. 1, 2018
55.	DEFENDANT JAI DINING SERVICES, INC'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PUNITIVE DAMAGES	Oct. 1, 2018
56.	EFENDANT JAI DINING SERVICES, INC'S OBJECTIONS TO PLAINTIFFS' SEPARATE STATEMENT OF FACTS IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: CAUSATION	Oct. 1, 2018
57.	[PART 1 OF 2] DEFENDANT JAI DINING SERVICES, INC'S OBJECTIONS TO PLAINTIFFS' SEPARATE STATEMENT OF FACTS IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: CAUSATION	Oct. 1, 2018
58.	[PART 2 OF 2] DEFENDANT JAI DINING SERVICES, INC'S OBJECTIONS TO PLAINTIFFS' SEPARATE STATEMENT OF FACTS IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: CAUSATION	Oct. 1, 2018
59.	[PART 1 OF 2]PLAINTIFF'S ERRATA OF PLAINTIFF'S JOINT RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Oct. 2, 2018
60.	[PART 2 OF 2]PLAINTIFF'S ERRATA OF PLAINTIFF'S JOINT RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT RE: PROXIMATE CAUSATION	Oct. 2, 2018
61.	**ME: ORAL ARGUMENT SET [10/04/2018]**	**Oct. 5, 2018**

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
62.	STIPULATION TO CONTINUE ORAL ARGUMENT ON DEFENDANT JAGUAR'S MOTIONS FOR SUMMARY JUDGMENT	Oct. 12, 2018
63.	PROPOSED ORDER CONTINUING ORAL ARGUMENT ON DEFENDANT JAGUAR'S MOTIONS FOR SUMMARY JUDGMENT	Oct. 23, 2018
64.	**ME: HEARING [12/03/2018]**	**Dec. 4, 2018**
65.	DEFENDANT JAI DINING SERVICES, INC'S MOTION IN LIMINE NO. REGARDING LETICIA MORALES	Jan. 3, 2019
66.	DEFENDANT JAI DINING SERVICES, INC'S MOTION IN LIMINE NO. 7 RE FINANCIAL INFORMATION BEFORE PRIMA FACIE CASE	Jan. 3, 2019
67.	DEFENDANT JAI DINING SERVICES, INC'S MOTION IN LIMINE NO. 4 RE DANCER PAY STRUCTURE	Jan. 3, 2019
68.	DEFENDANT JAI DINING SERVICES, INC'S MOTION IN LIMINE NO. 5 RE OTHER POINTS OF SERVICE	Jan. 3, 2019
69.	DEFENDANT JAI DINING SERVICES, INC'S MOTION IN LIMINE NO. 2 RE OTHER INCIDENTS	Jan. 3, 2019
70.	DEFENDANT JAI DINING SERVICES, INC'S MOTION IN LIMINE NO. 3 RE OTHER POLICE REPORTS	Jan. 3, 2019
71.	DEFENDANT JAI DINING SERVICES, INC'S MOTION IN LIMINE NO. 6 RE FUTURE DANGER OR PUBLIC SERVICE	Jan. 3, 2019
72.	STIPULATION TO EXTEND TIME TO FILE COMPREHENSIVE JOINT PRETRIAL STATEMENT	Jan. 8, 2019
73.	PROPOSED ORDER EXTENDING TIME TO FILE COMPREHENSIVE JOINT PRETRIAL STATEMENT	Jan. 9, 2019
74.	**ME: EXTENSION OF TIME/FILING GRANTED [01/09/2019]**	**Jan. 10, 2019**
75.	PLAINTIFF GASTELUMS'S RESPONSE IN OPPOSITION OF DEFENDANT JAI'S MOTION IN LIMINE NO. 6 RE FUTURE DANGER OR PUBLIC SERVICE	Jan. 14, 2019
76.	PLAINTIFFS' JOINT RESPONSE TO DEFENDANT'S MOTION IN LIMINE 1 RE: LETICIA MORALES	Jan. 14, 2019
77.	PLAINTIFF GASTELUMS'S RESPONSE IN OPPOSITION OF DEFENDANT JAI'S MOTION IN LIMINE NO. 2 RE OTHER INCIDENTS	Jan. 14, 2019

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
78.	PLAINTIFFS' JOINT RESPONSE TO DEFENDANT'S MOTION IN LIMINE 5 RE: OTHER POINTS OF SERVICE	Jan. 14, 2019
79.	PLAINTIFF'S GASTELUMS'S RESPONSE IN OPPOSITION OF DEFENDANT JAI'S MOTION IN LIMINE NO. 7 RE FINANCIAL INFORMATION BEFORE PRIMA FACIE CASE	Jan. 14, 2019
80.	DEFENDANT JAI DINING SERVICES, INC'S REQUESTED JURY INSTRUCTIONS	Jan. 14, 2019
81.	DEFENDANT JAI DINING SERVICES, INC'S REQUESTED VOIR DIRE	Jan. 14, 2019
82.	PLAINTIFFS' JOINT RESPONSE TO DEFENDANT'S MOTION IN LIMINE 4 RE: DANCERS PAY STRUCTURE	Jan. 14, 2019
83.	PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO DEFENDANT JAI'S MOTION IN LIMINE NO. 3 RE OTHER POLICE REPORTS	Jan. 14, 2019
84.	JOINT PRE-TRIAL STATEMENT	Jan. 14, 2019
85.	PLAINTIFFS' JOINT PROPOSED VOIR DIRE	Jan. 16, 2019
86.	**ME: ORDER SECURING ATTENDANCE/PRISONER [01/16/2019]**	**Jan. 17, 2019**
87.	**ME: PRETRIAL CONFERENCE [01/16/2019]**	**Jan. 17, 2019**
88.	DEFENDANT JAI DINING SERVICES INC.'S MOTION TO SEVER PLAINTIFFS ROSAS AND SUAREZ' PUNITIVE DAMAGES CLAIM	Jan. 22, 2019
89.	JOINT STATEMENT OF DISCOVERY DISPUTE	Jan. 25, 2019
90.	[PART 1 OF 2] PLAINTIFFS TRIAL MEMORANDUM IN SUPPORT OF ADVERSE INFERENCE JURY INSTRUCTION	Jan. 28, 2019
91.	[PART 2 OF 2] PLAINTIFFS TRIAL MEMORANDUM IN SUPPORT OF ADVERSE INFERENCE JURY INSTRUCTION	Jan. 28, 2019
92.	DECLARATION OF SERVICE	Jan. 29, 2019
93.	SUBPOENA DUCES TECUM	Jan. 29, 2019
94.	**ME: STATUS CONFERENCE [01/29/2019]**	**Jan. 30, 2019**
95.	JOINT STATEMENT OF DISCLOSURE AND DISCOVERY DISPUTES	Feb. 4, 2019
96.	**ME: STATUS CONFERENCE SET [01/31/2019]**	**Feb. 5, 2019**

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
97.	DEFENDANT JAI DINING SERVICES, INC'S RESPONSE TO PLAINTIFFS' TRIAL MEMORANDUM IN SUPPORT OF ADVERSE INFERENCE JURY INSTRUCTION	Feb. 6, 2019
98.	**ME: PRETRIAL CONFERENCE [02/06/2019]**	**Feb. 7, 2019**
99.	PLAINTIFFS' RESPONSE IN OPPOSITION OF DEFENDANT JAI DINING SERVICES, INC.'S MOTION TO SEVER PLAINTIFFS ROSAS AND SUAREZ' PUNITIVE DAMAGES CLAIM	Feb. 7, 2019
100.	**ME: PRETRIAL CONFERENCE SET [02/07/2019]**	**Feb. 8, 2019**
101.	**ME: PRETRIAL CONFERENCE [02/08/2019]**	**Feb. 11, 2019**
102.	DEFENDANT JAI DINING SERVICES, INC.'S REPLY IN SUPPORT OF MOTION TO SERVER PLAINTIFFS ROSAS AND SUAREZ' PUNITIVE DAMAGES CLAIM	Feb. 11, 2019
103.	[PART 1 OF 7] PLAINTIFFS' JOINT REPLY IN SUPPORT OF THEIR REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION	Feb. 11, 2019
104.	[PART 2 OF 7] PLAINTIFFS' JOINT REPLY IN SUPPORT OF THEIR REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION	Feb. 11, 2019
105.	[PART 3 OF 7] PLAINTIFFS' JOINT REPLY IN SUPPORT OF THEIR REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION	Feb. 11, 2019
106.	[PART 4 OF 7] PLAINTIFFS' JOINT REPLY IN SUPPORT OF THEIR REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION	Feb. 11, 2019
107.	[PART 5 OF 7] PLAINTIFFS' JOINT REPLY IN SUPPORT OF THEIR REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION	Feb. 11, 2019
108.	[PART 6 OF 7] PLAINTIFFS' JOINT REPLY IN SUPPORT OF THEIR REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION	Feb. 11, 2019
109.	[PART 7 OF 7] PLAINTIFFS' JOINT REPLY IN SUPPORT OF THEIR REQUEST FOR AN ADVERSE INFERENCE JURY INSTRUCTION	Feb. 11, 2019
110.	**ME: HEARING SET [02/12/2019]**	**Feb. 14, 2019**
111.	EXPEDITED MOTION TO QUASH	Feb. 14, 2019
112.	NOTICE OF APPEARANCE FOR NON PARTY WITNESS VERONICA AGUILERA	Feb. 14, 2019
113.	NOTICE OF SUBSTITUTION OF COUNSEL FOR DEFENDANT CESAR AGUILERA VILLANUEVA	Feb. 15, 2019

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
114.	MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANT CESAR AGUILERA VILLANUEVA	Feb. 15, 2019
115.	PLAINTIFF'S JOINT RESPONSE IN OPPOSITION OF NON-PARTY VERONICA AGUILERA'S MOTION TO QUASH	Feb. 18, 2019
116.	PLAINTIFFS' JOINT REQUESTED JURY INSTRUCTIONS AND PLAINTIFFS' JOINT REQUESTED VERDICT FORMS	Feb. 20, 2019
117.	TRIAL/HEARING WORKSHEET	Feb. 20, 2019
118.	PROPOSED ORDER FOR MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANT CESAR AGUILERA VILLANUEVA	Feb. 21, 2019
119.	**ME: HEARING [02/20/2019]**	**Feb. 22, 2019**
120.	[PART 1 OF 2] DOMINIQUE BARRETT'S MOTION TO ASSOCIATE COUNSEL PRO HAC VICE	Feb. 22, 2019
121.	[PART 2 OF 2] DOMINIQUE BARRETT'S MOTION TO ASSOCIATE COUNSEL PRO HAC VICE	Feb. 22, 2019
122.	PLAINTIFFS' JOINT SUPPLEMENTAL REQUESTED JURY INSTRUCTION	Feb. 22, 2019
123.	PLAINTIFFS' JOINT RESPONSE IN OPPOSITION OF DOMINQUE BARRETT'S MOTION TO ASSOCIATE COUNSEL PRO HAC VICE	Feb. 24, 2019
124.	CERTIFICATE OF SERVICE BY CERTIFIED PROCESS SERVER	Feb. 24, 2019
125.	ORDER ON DOMINQUE BARRETT'S MOTION TO ASSOCIATE COUNSEL PRO HAC VICE	Feb. 25, 2019
126.	ORIGINAL DEPOSITION OF (ALEJANDRO GARCIA) TAKEN 06/15/2018	Feb. 25, 2019
127.	ORIGINAL DEPOSITION OF (RICARDO HERNANDEZ) TAKEN 05/23/2018	Feb. 25, 2019
128.	ORIGINAL DEPOSITION OF (CHERELLE RUBELL) TAKEN 05/25/2018	Feb. 25, 2019
129.	ORIGINAL DEPOSITION OF (JOHN ALLEN) TAKEN 05/09/2018	Feb. 25, 2019
130.	ORIGINAL DEPOSITION OF (JOHN ALLEN) TAKEN 05/08/2018	Feb. 25, 2019
131.	ORIGINAL DEPOSITION OF (ROBERT D CLEMENTS) TAKEN 07/13/2018	Feb. 25, 2019

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
132.	ORIGINAL DEPOSITION OF (DALLAS M. COWAN, PH.D., CIH, DABT) TAKEN 05/03/2018	Feb. 25, 2019
133.	PRELIMINARY JURY INSTRUCTIONS	Feb. 25, 2019
134.	JUROR QUESTION # 2	Feb. 27, 2019
135.	JUROR QUESTION # 1	Feb. 27, 2019
136.	**ME: TRIAL [02/25/2019]**	**Feb. 28, 2019**
137.	**ME: TRIAL [02/26/2019]**	**Feb. 28, 2019**
138.	JUROR QUESTION # 4	Feb. 28, 2019
139.	JUROR QUESTION # 3	Feb. 28, 2019
140.	**ME: TRIAL [02/27/2019]**	**Mar. 1, 2019**
141.	JUROR QUESTION # 5	Mar. 1, 2019
142.	**ME: TRIAL [02/28/2019]**	**Mar. 4, 2019**
143.	**ME: TRIAL [03/01/2019]**	**Mar. 4, 2019**
144.	JUROR QUESTION # 7	Mar. 4, 2019
145.	JUROR QUESTION # 6	Mar. 4, 2019
146.	FINAL JURY INSTRUCTIONS	Mar. 5, 2019
147.	**ME: TRIAL [03/04/2019]**	**Mar. 6, 2019**
148.	VERDICT FORM 1 NEGLIGENCE SIGNED	Mar. 6, 2019
149.	VERDICT FORM 2 NEGLIGENCE PER SE SIGNED	Mar. 6, 2019
150.	VERDICT FORM 3 DRAM SHOP LIABILITY SIGNED	Mar. 6, 2019
151.	VERDICT FORM 4 COMPENSATORY DAMAGES SIGNED	Mar. 6, 2019
152.	FINAL JURY INSTRUCTIONS PUNITIVE DAMAGES	Mar. 6, 2019
153.	**ME: TRIAL [03/05/2019]**	**Mar. 7, 2019**
154.	**RESTRICTED** JURY RANDOM LIST	Mar. 7, 2019

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
155.	TRIAL/HEARING WORKSHEET	Mar. 7, 2019
156.	VERDICT FORM 5 PUNITIVE DAMAGES SIGNED	Mar. 7, 2019
157.	JUDGMENT FOR JURY FEES	Mar. 7, 2019
158.	JUROR DELIBERATION QUESTION # 1	Mar. 7, 2019
159.	**ME: TRIAL [03/06/2019]**	**Mar. 8, 2019**
160.	**ME: TRIAL [03/07/2019]**	**Mar. 8, 2019**
161.	APPLICATION OF ATTORNEY'S FEES AND COSTS	Apr. 1, 2019
162.	AFFIDAVIT OF ATTORNEY'S FEES	Apr. 1, 2019
163.	PLAINTIFFS TORRES AND GULLEN STATEMENT OF COSTS	Apr. 1, 2019
164.	PLAINTIFFS TORRESS/GULLEN COUNSEL'S APPLICATION AND DECLARATION IN SUPPORT OF FEES	Apr. 1, 2019
165.	STATEMENT OF COSTS AND NOTICE OF TAXATION OF COSTS	Apr. 1, 2019
166.	EXHIBIT WORKSHEET H.D. 02/20/2019	Apr. 4, 2019
167.	EXHIBIT WORKSHEET H.D. 02/28/2019	Apr. 5, 2019
168.	DEFENDANT JAI DINING SERVICES, INC'S OBJECTIONS TO PLAINTIFFS' STATEMENT OF COSTS AND PROPOSED JUDGMENT (TRIALS 1 AND 2)	Apr. 10, 2019
169.	DEFENDANT JAI DINING SERVICES, INC'S RESPONSE TO PLAINTIFFS' APPLICATION OF ATTORNEY'S FEES AND COSTS	Apr. 10, 2019
170.	**ME: STATUS CONFERENCE SET [04/11/2019]**	**Apr. 12, 2019**
171.	DEFENDANT JAI DINING SERVICES, INC'S RESPONSE TO TORRES PLAINTIFFS' APPLICATION OF ATTORNEY'S FEES AND COSTS	Apr. 12, 2019
172.	NOTICE OF APPEARANCE	Apr. 15, 2019
173.	**ME: STATUS CONFERENCE [04/17/2019]**	**Apr. 18, 2019**
174.	[PART 1 OF 2] SUPPLEMENTAL STATEMENT OF COSTS AND NOTICE OF TAXATION OF COSTS	Apr. 22, 2019

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
175.	[PART 2 OF 2] SUPPLEMENTAL STATEMENT OF COSTS AND NOTICE OF TAXATION OF COSTS	Apr. 22, 2019
176.	**ME: ORDER ENTERED BY COURT [04/30/2019]**	**May. 1, 2019**
177.	JUDGMENT TRIAL 1-LIABILITY AND COMPENSATORY DAMAGES	May. 1, 2019
178.	JUDGMENT TRIAL 2-PUNITIVE DAMAGES	May. 1, 2019
179.	**ME: JUDGMENT SIGNED [05/01/2019]**	**May. 2, 2019**
180.	DEFENDANT JAI DINING SERVICES, INC'S RULE 50 (B) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW	May. 2, 2019
181.	MOTION TO SET SUPERSEDEAS BOND FOR JAI DINING SERVICES (PHOENIX), INC.	May. 15, 2019
182.	SATISFACTION OF JUDGMENT FOR JURY FEES	May. 16, 2019
183.	PLAINTIFFS' RESPONSE IN OPPOSITION OF DEFENDANT JAI DINING SERVICES, INC'S RULE 50(B) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW	May. 21, 2019
184.	DEFENDANT JAI DINING SERVICES, INC'S REPLY IN SUPPORT OF RULE 50(B) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW	Jun. 3, 2019
185.	**ME: ORAL ARGUMENT SET [06/05/2019]**	**Jun. 6, 2019**
186.	DEFENDANT JAI DINING SERVICES, INC'S EXPEDITED MOTION FOR A COURT REPORTER AT THE JUNE 18, 2019 ORAL ARGUMENT RE: RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW	Jun. 12, 2019
187.	ORDER GRANTING SUPERSEDEAS BOND	Jun. 18, 2019
188.	**ME: HEARING [06/18/2019]**	**Jun. 19, 2019**
189.	MOTION FOR SIGNED ORDER DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW	Jun. 20, 2019
190.	ORDER	Jun. 24, 2019
191.	**ME: ORDER SIGNED [06/24/2019]**	**Jun. 26, 2019**
192.	NOTICE OF APPEAL	Jul. 10, 2019
193.	SUPERSEDEAS/APPEAL BOND	Jul. 23, 2019

Electronic Index of Record
MAR Case # CV2016-016688

No.	Document Name	Filed Date
194.	NOTICE OF APPEARANCE	Jul. 23, 2019
195.	NOTICE OF POSTING SUPERSEDEAS BOND	Jul. 23, 2019
196.	NOTICE OF POSTING SUPERSEDEAS BOND	Jul. 23, 2019
197.	NOTICE OF TRANSCRIPT ORDER AND STATEMENT OF ISSUES ON APPEAL	Jul. 25, 2019
198.	[PART 1 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
199.	[PART 2 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
200.	[PART 3 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
201.	[PART 4 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
202.	[PART 5 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
203.	[PART 6 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
204.	[PART 7 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
205.	[PART 8 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
206.	[PART 9 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019
207.	[PART 10 OF 10] NOTICE OF FILING TRANSCRIPTS	Jul. 25, 2019

APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 08/08/2019

CAPTION: ROBERTO TORRESS ET AL VS. CESAR A VILLANUEVA ET AL

Electronic Index of Record
MAR Case # CV2016-016688

EXHIBIT(S): H.D. 02/20/2019 LIST: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 IN MANILA ENVELOPE

H.. 02/28/2019 LIST: 20 29 31 34 44 45 47 48 49 50 58 59 60 61 62 63 65 66 67 68 69 70 IN A BOX

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: GRETHE on July 31, 2019; [2.5-17026.63]
\\ntfsnas\C2C\C2C-1\CV2016-016688\Group_01

CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

FINAL JURY INSTRUCTIONS

CV 2016-016688

Roberto Torres and
Orlenda Guillen
and
Hernan Gastelum Rosas and
Maria Suarez

vs.

Cesar Aguilera Villanueva
and
JAI Dining Services (Phoenix) Inc. doing business as Jaguars

MARICOPA COUNTY SUPERIOR COURT

Judge Sherry K. Stephens

DUTY OF JURY

It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. You must follow these jury instructions. They are the rules you should use to decide this case.

It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in court. When I say "evidence", I mean the testimony of witnesses and the exhibits introduced in court. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion that you feel I have about the facts. You, as jurors, are the sole judges of what happened.

You must consider all these instructions. Do not pick out one instruction, or part of one, and ignore the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply, together with the facts as you have determined them.

LAWYERS' COMMENTS ARE NOT EVIDENCE

In their opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence.

EVIDENCE TO BE CONSIDERED

You are to determine what the facts in the case are from the evidence produced in court. If the court sustained an objection to a lawyer's question, you must disregard it and any answer given. Any testimony stricken from the court record must not be considered.

EXPERT WITNESS

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions. Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

CREDIBILITY [BELIEVABILITY] OF WITNESSES

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness had any motive, bias, or prejudice; whether the witness was contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.

Consider all of the evidence in the light of reason, common sense, and experience.

IMPEACHMENT WITH FELONY CONVICTION

Evidence that a witness has previously been convicted of a felony may be considered only as it may affect the credibility of that person as a witness. You may not consider that evidence for any other purpose. You must not consider that evidence as tending to prove or disprove any of the claims in

this case, or as evidence that the witness is a bad person or predisposed to commit crimes.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is the testimony of a witness who saw, heard, or otherwise sensed an event. Circumstantial evidence is the proof of a fact or facts from which you may find another fact. The law makes no distinction between direct and circumstantial evidence. It is for you to determine the importance to be given to the evidence, regardless of whether it is direct or circumstantial.

BURDEN OF PROOF
(More Probably True)

Burden of proof means burden of persuasion. On any claim, the party who has the burden of proof must persuade you, by the evidence, that the claim is more probably true than not true. This means that the evidence that favors that party outweighs the opposing evidence. In determining whether a party has met this burden, consider all the evidence that bears on that claim, regardless of which party produced it.

CORPORATE PARTY

A corporation is a party in this lawsuit. Corporations and individuals are entitled to the same fair and impartial consideration and to justice reached by the same legal standards. When I use the word "person" in these instructions, or when I use any personal pronoun referring to a party, those instructions also apply to JAI Dining Services (Phoenix) Inc. doing business as Jaguars.

RESPONDEAT SUPERIOR

Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars is responsible for the actions of its employee if the employee was acting within the scope of his/her employment.

INSURANCE

In reaching your verdict, you should not consider or discuss whether a party was or was not covered by insurance. Insurance or the lack of insurance has no bearing on whether or not a party breached a contract or a contractual covenant, or has suffered unjust enrichment, or has incurred damages, if any.

USE OF SPANISH DURING TRIAL

Spanish was used during this trial. The evidence you are to consider is only that provided through the official court interpreter. Although some of you may know Spanish, it is important that all jurors consider the same evidence. Therefore, you must consider only the English interpretation, disregarding what was heard in Spanish. You must disregard any different meaning. You may not consider what a fellow juror heard in Spanish.

CLAIMS AND ELEMENTS

I will now give you a statement of the claims in the case, and a statement of what has to be proved on each claim.

CLAIM ONE – NEGLIGENCE
VERDICT FORM ONE

Plaintiffs claim that Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars and Defendant Cesar Aguilera Villanueva are at fault for Plaintiffs' injuries sustained from the deaths of Jesus O. Torres Guillen and Guadalupe Gastelum Suarez.

Fault is negligence that was a cause of Plaintiffs' injuries.

Negligence is the failure to use reasonable care. Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances.

Before you can find any party at fault, you must find that party's negligence was a cause of Plaintiffs' injuries. Negligence causes an injury if it helps produce the injuries, and if the injuries would not have happened without the negligence. There may be more than one cause of an injury.

Defendant Cesar Aguilera Villanueva has admitted he was at fault/negligent. As to Defendant Cesar Aguilera Villanueva, Plaintiff must prove:

1. Plaintiffs were injured; and
2. Plaintiffs' damages.

As to Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars, Plaintiff must prove:

1. Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars was at fault.
2. Plaintiffs were injured; and
3. Plaintiffs' damages.

If you find Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars was not at fault, then your verdict must be for Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars.

If you find that Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars was at fault, then Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars is liable to Plaintiff and your

verdict must be for Plaintiffs. You should then determine the full amount of Plaintiffs' damages and enter that amount on the verdict form.

Defendant Cesar Aguilera Villanueva has admitted he is at fault and liable to Plaintiffs. You determine the full amount of Plaintiffs' damages and enter that amount on Verdict Form Four.

CLAIM TWO
VIOLATION OF STATUTE
NEGLIGENCE PER SE
VERDICT FORM TWO

On Plaintiffs' claim for dram shop liability as to Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars, Plaintiffs must prove:

1. Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars violated Arizona law when it sold spirituous liquor to Cesar Aguilera Villanueva; and
2. Cesar Aguilera Villanueva consumed the spirituous liquor sold by Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars; and
3. The consumption of spirituous liquor was a proximate cause of the deaths of Jesus O. Torres Guillen and Guadalupe Gastelum Suarez.
4. Plaintiffs' damages.

In deciding if Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars violated Arizona law, you may consider the following statutory provisions.

> It is unlawful for a licensee or other person to serve, sell or furnish spirituous liquor to a disorderly or obviously intoxicated person or for a licensee or employee of the licensee to allow or permit a disorderly or obviously intoxicated person to come into or remain on or about the premises.

It is unlawful for an on-sale retailer or employee to deliver more than 40 ounces of beer, one liter of wine or four ounces of distilled spirits I in any spirituous liquor drink to one person at one time for that person's consumption.

A liquor licensee is liable for personal injuries if a jury finds all of the following:

1. The licensee sold spirituous liquor to a purchase who was obviously intoxicated.
2. The purchaser consumed the spirituous liquor sold by the licensee.
3. The consumption of spirituous liquor was a proximate cause of the injury, death or property damage.

"Obviously intoxicated: means inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction that would have been obvious to a reasonable person.

PROXIMATE CAUSE

In order to find proximate cause, you must find that Plaintiffs' have proven by a preponderance of the evidence that Plaintiffs' injuries were probably and not merely possibly, caused by the alleged negligence of Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars.

INTERVENING/SUPERCEDING CAUSE

Plaintiffs must show there was a natural and continuous sequence of events stemming from Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars alleged act or omission, unbroken by any intervening and superseding cause that produced the injury, in whole or in part, and without which the injury would not have occurred.

An intervening cause is an independent cause that occurs between the original act or omission and the final harm and is necessary to bring about that harm. An intervening cause becomes a superseding cause, thereby relieving Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars of liability for any original negligent conduct, when the intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary.

CLAIM THREE
DRAM SHOP LIABILITY CLAIM
VERDICT FORM THREE

Tavern owners and other licensed sellers in Arizona owe a duty to exercise reasonable care when they sell liquor to a patron or customer under circumstances where the licensee or his employees know or should know that such conduct creates an unreasonable risk of harm to others who may be injured either on or off the premises.

If the duty of care is breached, the seller will be liable for the damage caused by such breach.

MEASURE OF DAMAGES
VERDICT FORM FOUR

If you find any Defendant liable to Plaintiffs, you must then decide the full amount of money that will reasonably and fairly compensate each Plaintiff for each of the following elements of damages proved by the evidence to have resulted from the deaths of Jesus Torres Guillen and Guadalupe Gastelum Suarez.

1. The loss of love, affection, companionship, care, protection, and guidance since the death and in the future.

2. The pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced, and reasonably probable to be experienced in the future.
3. The reasonable expenses of funeral and burial.

If you find more than one defendant at fault for Plaintiffs' injuries, you must then determine the relative degrees of fault of all those whom you find to have been at fault. The relative degrees of fault are to be entered on the verdict form as percentages of the total fault for Plaintiffs' injuries. The fault of one defendant may be greater or lesser than that of another, but the relative degrees of all fault must add up to 100%. This will be clear from the verdict form.

MORTALITY TABLES AND LIFE EXPECTANCY

Plaintiff Roberto Torres, the surviving father of Jesus O. Torres Guillen was born on June 7, 1964. He is now 54 years old. A person aged 54 years has a life expectancy of 32 more years. This is merely an estimate of the probable average remaining length of life of all male persons of Hispanic origin of this age.

Plaintiff Orlenda Guillen, the surviving mother of Jesus O. Torres Guillen was born on April 8, 1981. She is now 37 years old. A person aged 37 years has a life expectancy of 50.3 more years. This is merely an estimate of the probable average remaining length of life of all female persons of Hispanic origin of this age.

Plaintiff Hernan Gastelum Rosas, the surviving father and a legal guardian of Guadalupe Gastelum Suarez was born on April 27, 1968. He is now 50 years old. A person aged 50 years has a life expectancy of 32 more years. This is merely an estimate of the probable average remaining length of life of all male persons of Hispanic origin of this age.

Plaintiff Maria Suarez, the surviving mother and a legal guardian of Guadalupe Gastelum Suarez was born on April 15, 1979. She is now 39 years old. A person aged 39 years has a life expectancy of 50.3 more years. This is merely an

estimate of the probable average remaining length of life of all female persons of Hispanic origin of this age.

These estimates may be considered by you in determining the amount of damages for any wrongful death proved by the evidence to have resulted from the fault of any Defendant.

CLOSING INSTRUCTION

The case is now submitted to you for decision. When you go to the jury room you will choose a foreperson. He or she will preside over your deliberations.

I suggest that you discuss and then set your deliberation schedule. You are in charge of your schedule, and may set and vary it by agreement and with the approval of the Court. After you have decided on a schedule, please advise the bailiff.

You are to discuss the case and deliberate only when all jurors are together in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses. The admonition I have given you during the trial remains in effect when all of you are not in the jury room deliberating.

After setting your schedule, I suggest that you next review the written jury instructions and verdict forms. It may be helpful for you to discuss the instructions and verdict forms to make sure that you understand them. Again, during your deliberations you must follow the instructions and refer to them to answer any questions about applicable law, procedure and definitions.

Should any of you, or the jury as a whole, have a question for me during your deliberations or wish to communicate with me on any other matter, please utilize the jury question form that we will provide you. Your question

or message must be communicated to me in writing and must be signed by you or the Foreperson.

I will consider your question or note and consult with counsel before answering it in writing. I will answer it as quickly as possible.

Remember that you are not to tell anyone, including me, how you stand, numerically or otherwise, until after you have reached a verdict or have been discharged.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

At least six of you must agree on a verdict. If all eight agree on a verdict, only the foreperson need sign on the line marked "Foreperson." If six or sevn agree on a verdict, all those who agree, and only those who agree, must initial the verdict form on the numbered lines provided, leaving the line marked "Foreperson" blank. Please print your juror number where indicated on the verdict form.

Only the foreperson need sign the verdict form on the line marked "Foreperson."

You will be given four (4) forms of verdict. The verdict form read as follows:

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CV2016-016088

FILED
3/6/19 3:13p.m.
JEFF FINE, Clerk
By T. DeRaddo
T. DERADDO
Deputy

ROBERTO TORRES, ORLENDA GUILLEN, HERNAN GASTELUM ROSAS, AND GUADALUPE GASTELUM SUAREZ

VERDICT FORM 1
NEGLIGENCE

V

CESAR AGUILERA VILLANUEVA
JAI DINING SERVICES, INC.

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of:

_✓_ Plaintiffs Torres, Guillen, Gastellum and Suarez

____ Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars

*****

_✓_ Plaintiffs Torres, Guillen, Gastellum and Suarez

____ Defendant Cesar Aguilera Villanueva

If you find for Plaintiffs, complete Verdict Form Four.

Instructions:

At least six of you must agree on a verdict. If all eight jurors agree on a verdict, only the foreman need sign the form by placing his/her juror number and initials on the line marked "Foreperson." If six or more agree on a verdict, all those who agree, and only those who agree, must place your juror number and initials on the verdict form on the numbered lines provided, leaving the line marked "Foreperson" blank.

(1) _____ (Juror #) _____ (Initials)

(2) _____ (Juror #) _____ (Initials)

(3) _____ (Juror #) _____ (Initials)

(4) _____ (Juror #) _____ (Initials)

(5) _____ (Juror #) _____ (Initials)

(6) _____ (Juror #) _____ (Initials)

(7) _____ (Juror #) _____ (Initials)

5 (Juror #) JAE (Initials)
FOREPERSON

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CV 2016-016688

FILED
3/6/19 3:14 p.m.
JEFF FINE, Clerk
By T. DeRaddo
T. DERADDO
Deputy

ROBERTO TORRES, ORLENDA GUILLEN, HERNAN GASTELUM ROSAS, AND GUADALUPE GASTELUM SUAREZ

VERDICT FORM 2
NEGLIGENCE PER SE

V

CESAR AGUILERA VILLANUEVA
JAI DINING SERVICES, INC.

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of:

____Plaintiffs Torres, Guillen, Gastellum and Suarez

__✓__Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars

If you find for Plaintiffs, complete Verdict Form Four.

Instructions:

At least six of you must agree on a verdict. If all eight jurors agree on a verdict, only the foreman need sign the form by placing his/her juror number and initials on the line marked "Foreperson." If six or more agree on a verdict, all those who agree, and only those who agree, must place your juror number and initials on the verdict form on the numbered lines provided, leaving the line marked "Foreperson" blank.

(1) _____ (Juror #) _____ (Initials)

(2) _____ (Juror #) _____ (Initials)

(3) _____ (Juror #) _____ (Initials)

(4) _____ (Juror #) _____ (Initials)

(5) _____ (Juror #) _____ (Initials)

(6) _____ (Juror #) _____ (Initials)

(7) _____ (Juror #) _____ (Initials)

5 (Juror #) [signature] (Initials)
FOREPERSON

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CV2016-016688

FILED
3/6/19 3:14p.m.
JEFF FINE, Clerk
By T. DeRaddo
T. DERADDO
Deputy

ROBERTO TORRES, ORLENDA GUILLEN, HERNAN GASTELUM ROSAS, AND GUADALUPE GASTELUM SUAREZ

VERDICT FORM 3
DRAM SHOP LIABILITY

V

CESAR AGUILERA VILLANUEVA
JAI DINING SERVICES, INC.

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of:

✓ Plaintiffs Torres, Guillen, Gastellum and Suarez

____ Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars

If you find for Plaintiffs, complete Verdict Form Four.

Instructions:

At least six of you must agree on a verdict. If all eight jurors agree on a verdict, only the foreman need sign the form by placing his/her juror number and initials on the line marked "Foreperson." If six or more agree on a verdict, all those who agree, and only those who agree, must place your juror number and initials on the verdict form on the numbered lines provided, leaving the line marked "Foreperson" blank.

(1) _____ (Juror #) _____ (Initials)

(2) _____ (Juror #) _____ (Initials)

(3) _____ (Juror #) _____ (Initials)

(4) _____ (Juror #) _____ (Initials)

(5) _____ (Juror #) _____ (Initials)

(6) _____ (Juror #) _____ (Initials)

(7) _____ (Juror #) _____ (Initials)

5 (Juror #) (Initials)

FOREPERSON

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CV 2016-016688

FILED
3/6/19 3:14 p.m.
JEFF FINE, Clerk
By T. DeRaddo
T. DERADDO
Deputy

ROBERTO TORRES, ORLENDA GUILLEN, HERNAN GASTELUM ROSAS, AND GUADALUPE GASTELUM SUAREZ

VERDICT FORM 4
COMPENSATORY DAMAGES

V

CESAR AGUILERA VILLANUEVA
JAI DINING SERVICES, INC.

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of Plaintiffs and find the full damages for each Plaintiff to be:

Plaintiff Roberto Torres: $ 500,000.

Plaintiff Orlenda Guillen: $ 500,000.

Plaintiff Hernan Gastelum Rosas: $ 500,000.

Plaintiff Maria Suarez: $ 500,000.

If you found for Plaintiffs as to both Defendants, complete the following sentence.

We find the relative degrees of fault to be:

Defendant Cesar Aguilera Villanueva 60 %

Defendant JAI Dining Services (Phoenix) Inc. doing business as Jaguars 40 %

TOTAL: 100%

(Put a zero on the percentage line for a party that you find was not at fault. The total must equal 100%.)

Instructions:

At least six of you must agree on a verdict. If all eight jurors agree on a verdict, only the foreman need sign the form by placing his/her juror number and initials on the line marked "Foreperson." If six or more agree on a verdict, all those who agree, and only those who agree, must place your juror number and initials on the verdict form on the numbered lines provided, leaving the line marked "Foreperson" blank.

(1) _____ (Juror #) _____ (Initials)

(2) _____ (Juror #) _____ (Initials)

(3) _____ (Juror #) _____ (Initials)

(4) _____ (Juror #) _____ (Initials)

(5) _____ (Juror #) _____ (Initials)

(6) _____ (Juror #) _____ (Initials)

(7) _____ (Juror #) _____ (Initials)

5 (Juror #) JEE (Initials)
FOREPERSON

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CV 2016 - 016688

FILED
3/7/19 10:38
JEFF FINE, Clerk
By T. DeRaddo
T. DERADDO
Deputy

ROBERTO TORRES, ORLENDA GUILLEN, HERNAN GASTELUM ROSAS, AND GUADALUPE GASTELUM SUAREZ

VERDICT FORM 5
PUNITIVE DAMAGES

V

CESAR AGUILERA VILLANUEVA
JAI DINING SERVICES, INC.

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find in favor of:

_____ Plaintiffs Hernan Gastelum Rosas and Maria Suarez
__✓__ Defendant JAI Dining Services (Phoenix) Inc., doing business as Jaguars

If you find for Plaintiffs, complete the following sentence.

We the jury further award punitive damages for each Plaintiff in the following amounts:

Plaintiff Hernan Gastelum Rosas: $ _____.

Plaintiff Maria Suarez: $ _____.

Instructions:

At least six of you must agree on a verdict. If all eight jurors agree on a verdict, only the foreman need sign the form by placing his/her juror number and initials on the line marked "Foreperson." If six or more agree on a verdict, all those who agree, and only those who agree, must place your juror number and initials on the verdict form on the numbered lines provided, leaving the line marked "Foreperson" blank.

(1)	(Juror #)	#9 (Initials)
(2)	(Juror #)	#6 (Initials)
(3)	(Juror #)	#7 (Initials)
(4)	(Juror #)	#4 (Initials)
(5)	(Juror #)	#5 (Initials)
(6)	(Juror #)	#2 (Initials)
(7)	(Juror #)	#8 (Initials)

_____ _____

(Juror #) (Initials)

FOREPERSON

Clerk of the Superior Court
*** Electronically Filed ***
06/19/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-016688 06/18/2019

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
T. DeRaddo
Deputy

ROBERTO TORRES, et al. ROBERT F CLARKE

v.

CESAR AGUILERA VILLANUEVA, et al. JAY R GRAIF

DOMINIQUE K BARRETT
MATTHEW D KOGLMEIER
THEODORE M HOROWITZ
JUDGE STEPHENS

MINUTE ENTRY

East Court Building - Courtroom 712

2:30 p.m. This is the time set for Oral Argument on Defendant JAI Dining Services, Inc.'s Rule 50(b) Renewed Motion for Judgment as a Matter of Law, filed May 2, 2019. Appearing on behalf of Plaintiffs, Roberto Torres and Orlenda Guillen, is counsel, Robert F. Clarke. Appearing on behalf of Hernan Gastelum Rosas and Maria Suarez, is counsel, Theodore Horowitz. Appearing on behalf of Defendant, JAI Dining Services (Phoenix) Inc., are counsel, Dominique Barrett and Eric Fraser. Appearing telephonically on behalf of Defendant, Cesar Aguilera Villanueva is counsel, Megan Ritenour.

Court Reporter, Marylynne LeMoine is present. A record of the proceedings is also made digitally.

Discussion is held regarding Defendant JAI Dining Services (Phoenix), Inc.'s Motion to Set Supersedeas Bond, filed May 15, 2019.

There being no objections by Plaintiffs,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-016688 06/18/2019

IT IS ORDERED granting Defendant's Motion to Set Supersedeas Bond, all in accordance with the formal written *Order Granting Supersedeas Bond*, signed by the Court in open court on June 18, 2019 and filed (entered) by the Clerk on June 18, 2019.

The Court has read all briefing on Defendant JAI Dining Services, Inc.'s Rule 50(b) Renewed Motion for Judgment as a Matter of Law, filed May 2, 2019.

The parties present argument on Defendants' Motion.

For the reasons stated on the record,

IT IS ORDERED denying Defendants' Motion.

3:10 a.m. Matter concludes.

CLERK OF THE SUPERIOR COURT
FILED
6-24-19 11:13a.m.
T. DeRaddo, Deputy

Dominique Barrett, Esq. (Bar No.015856)
QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
2390 E. Camelback Road, Suite 440
Phoenix, Arizona 85016
Telephone: (602) 954-5605
Facsimile: (602) 954-5606
dominique.barrett@qpwblaw.com

Eric M. Fraser (Bar No. 027241)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
efraser@omlaw.com
Attorneys for Defendant JAI Dining Services (Phoenix), Inc.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, surviving father, on his own behalf and on behalf of ORLENDA GUILLEN, surviving mother of JESUS O. TORRES GUILLEN, Decedent,

HERNAN GASTELUM ROSAS and MARIA SUAREZ, husband and wife, surviving parents and legal guardians of GUADALUPE GASTELUM SUAREZ, Decedent.

Plaintiffs,

vs.

CESAR AGUILERA VILLANUEVA, a single man, JAI DINING SERVICES (PHOENIX) Inc.; a CORPORATION; d/b/a JAGUAR'S GOLD CLUB; DOE DEFENDANTS 1-100, BLACK CORPORATIONS 1-5 and WHITE COMPANIES 6-10.

Defendants.

CASE NO. CV2016-016688

ORDER

(Assigned to the Honorable Sherry K. Stephens)

Having considered JAI Dining Services (Phoenix), Inc.'s Rule 50(b) Renewed Motion for Judgment as a Matter of Law, and for the reasons stated on the record,

IT IS ORDERED denying JAI Dining Services (Phoenix), Inc.'s Rule 50(b) Renewed Motion for Judgment as a Matter of Law.

Dated this 24th day of June, 2019.

Honorable Sherry K. Stephens
Maricopa County Superior Court Judge

*** Electronically Filed ***
M. Cain, Deputy
2/7/2017 3:01:00 PM
Filing ID 8079762

Robert F. Clarke, Esq. SBN 5232
CLARKE LAW OFFICES
3001 East Camelback Road, Suite 145
Phoenix, Arizona 85016
(602) 952-3232
Attorney for Plaintiffs Torres

bob@clarkelaw-az.-com
minuteentries@clarkelawoffices.com

Matt Koglmeier, Esq, SBN
KOGLMEIER LAW GROUP, PLC
715 N. Gilbert Road, Suite 2
Mesa, Arizona 85203
Phone: (480) 962-5353
Fax: (480) 962-0010
Attorney for Plaintiffs Rosas and Suarez

IN THE SUPERIOR COURT IN THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, surviving father, on his own behalf and on behalf of ORLENDA GUILLEN, surviving mother of JESUS O. TORRES GUILLEN, Decedent,

HERNAN GASTELUM ROSAS and MARIA SUAREZ, husband and wife, surviving parents and legal guardians of GUADALUPE GASTELUM SUAREZ, Decedent.

Plaintiffs,

vs.

CESAR AGUILERA VILLANUEVA, a single man, JAI DINING SERVICES (PHOENIX) Inc.; a CORPORATION; d/b/a/ JAGUAR'S GOLD CLUB; DOE DEFENDANTS 1-100, BLACK CORPORATIONS 1-5 and WHITE COMPANIES 6-10.

Defendants.

Case No.: CV2016-016688

FIRST AMENDED COMPLAINT AND JURY DEMAND

(Wrongful death, Negligence, Dram Shop Liability)

Plaintiffs, for their causes of action against the Defendants, inclusive, state and allege as follows:

Identification of the parties

1. Plaintiff Roberto Torres is the husband of Orlenda Guillen, and they are the surviving parents of Jesus O. Torres Guillen, deceased. Plaintiff brings this action pursuant to A.R.S. §12-612 on his own behalf and on behalf of Orlenda Guillen.

2. Plaintiff Hernan Gastelum Rosas is the husband of Maria Suarez, and they are the surviving parents of Guadalupe Gastelum Suarez, deceased. Plaintiff brings this action pursuant to A.R.S. §12-612 on his own behalf and on behalf of Guadalupe Gastelum Suarez.

3. Unless otherwise specifically alleged, Roberto Torres and Orlenda Guillen, and Hernan Gastelum Rosas and Maria Suarez will be collectively referred to as Plaintiffs.

4. Plaintiffs are now and were at all relevant times residents of Maricopa County, Arizona.

5. On information and belief, Defendant Cesar Aguilera Villanueva (Villanueva), is now and was at all relevant times a single man and resident of Maricopa County, Arizona.

6. Defendant JAI Dining Services (Phoenix) Inc. is a Texas corporation, organized and existing pursuant to the laws of Texas and authorized to engage in the business of providing adult entertainment services throughout the United States, including the State of Arizona, including but not limited to its dba Jaguars Gold Club (Jaguars) located in Maricopa County, Arizona.

7. Doe Defendants 1-100 are sued fictitiously in that their correct names and legal identities are currently unknown to Plaintiffs. Said Doe Defendants participated with the named Defendants as agents, employees, servants, masters, principals, partners,

limited partners, subsidiary corporations, or other types of business or professional associations in providing adult entertainment services through defendant JGC's d.b.a Jaguars. When the true names and legal identities of these Doe Defendants become known, Plaintiffs will seek leave of Court to amend this Complaint to insert such true names and legal identities.

8. Defendants Black Corporations 1-5 and White Companies 6-10 are sued fictitiously in that their correct names and legal identities are currently unknown to plaintiff. Such fictitious corporations and companies are/were the professional corporations, partnerships, limited partnerships, affiliations, and/or associations of the named Defendants and/or participated with the named Defendants as agents, employees, servants, masters, principals, partners, limited partners, subsidiary corporations, or other type of business or professional associations. Further, when the true names and legal identities of these fictitious corporations and companies becomes known, Plaintiffs will seek leave of Court to amend this complaint to insert such true names and legal identities.

Jurisdiction and Venue

9. All acts, errors, and omissions of Defendants, inclusive complained of herein occurred in Maricopa County, Arizona.

10. The amount in controversy is in excess of the jurisdictional limits of this Court.

Common Allegations

11. During the late night hours of November 7, 2015 and into the early morning hours of November 8, 2015, Defendant Villanueva and six of his friends went to Defendant Jaguar's Gold Club.

12. Villanueva and his group stayed at Jaguars for approximately three hours drinking alcoholic beverages provided by their purchase of, *inter alia*, buckets of beer from Jaguars.

13. After drinking several alcoholic beverages served by Jaguars, Villanueva was obviously intoxicated.

14. Despite Villanueva's state of obvious intoxication, Jaguars failed to stop serving alcoholic beverages to Villanueva but, instead, continued to serve Villanueva and members of his group alcoholic beverages which were consumed on the premises.

15. After drinking several alcoholic beverages served by Defendants and while he was still at Jaguars, Villanueva exhibited numerous outward signs of intoxication from the alcohol Jaguars served.

16. Despite these obvious signs of intoxication, Jaguars continued to supply alcoholic beverages to Villanueva and the rest of the group, which were consumed on the premises.

17. One member of the Villanueva group was his girlfriend of seven years, Letiria Morales ("Morales").

18. Ms. Morales became extremely intoxicated while at Jaguars and left the club and spent the rest of the evening sitting in Villanueva's vehicle who remained inside Jaguars drinking alcoholic beverages.

19. Upon information and belief, Villanueva finished drinking alcoholic beverages served by and consumed at Jaguars.

20. Villanueva consumed no alcoholic beverages once he left Jaguar's.

21. Around 5:19 AM, Villanueva was driving home in a white Toyota Tundra eastbound on MC 85 in the median lane approaching Avondale Blvd. at 86 mph, 36 mph

above the posted 50 mph speed limit. Morales was the front seat passenger in Villanueva's vehicle.

22. Around 5:19 AM, Decedent Jesus Torres Guillen ("Jesus") was driving a 2005 Honda Civic. Decedent Guadalupe Gasteleum ("Guadalupe") was his passenger at the time. They were stopped in the eastbound median lane of MC 85 for a red traffic light at Avondale Blvd.

23. Jesus and Guadalupe were wearing their lap/shoulder safety restraints.

24. Villanueva's much larger Toyota Tundra crashed into Jesus' Honda Civic and continued up and over the Civic peeling off roof of the Civic and ejecting both Jesus and Guadalupe, even though they were wearing their seatbelts.

25. Plaintiff Guadalupe suffered a decapitation and severed spinal cord and was declared deceased at the scene.

26. Jesus was rushed to West Valley Hospital where he was declared deceased.

27. Villanueva was given a field sobriety test and failed.

28. The field sobriety test was performed approximately three hours after the Villanueva left Jaguars.

COUNT I–Negligence of Villanueva

29. Plaintiffs incorporate all previous allegations in this Complaint.

30. On November 7, 2015, Defendant Villanueva operated his vehicle in a negligent, careless and reckless manner in that, among other things, he drove severely intoxicated and failed to properly control his vehicle and the speed of his vehicle to avoid this crash.

31. At the above-mentioned time and place, Defendant Villanueva's driving was in violation of A.R.S. §§ 28-701(A) (reasonable and prudent speed), 28-693 (reckless driving), 28-695 (aggressive driving), 28-1381 (driving while under the influence of

alcohol), 28-1382 (driving while under the extreme influence of alcohol), 28-1383 (aggravated driving while under the influence of alcohol). These statutes and other traffic laws Mr. Villanueva violated are designated to protect the safety of motorists and passengers such as Jesus and Guadalupe.

32. Defendant Villanueva's violation of these statutes and other traffic laws constitutes negligence per se.

33. As a direct and proximate cause of the negligent, careless, and reckless driving of Villanueva, Jesus Torres Guillen died from the injuries inflicted by Villanueva.

34. As a further direct and proximate result of the negligent, careless, and reckless driving of Defendant Villanueva and as a direct and proximate result of Jesus's death, Plaintiffs Torres have been forever deprived of the love, care, attention, fellowship and companionship of their son Jesus.

35. As a further direct and proximate result of the negligent, careless, and reckless driving of Defendant Villanueva and as a direct and proximate result of their son Jesus's death, Plaintiffs Torres have been deprived of the economic contribution of Jesus.

36. As a further direct and proximate result of the negligent, of Defendant Villanueva and as a direct and proximate result of their son Jesus's death, Plaintiffs Torres have incurred expenses including but not limited to, nurses, physicians, hospitals, therapists, prescriptions, medications, funeral and burial expenses to be proven at the time of trial.

37. As a direct and proximate cause of the negligent, careless, and reckless driving of Villanueva, Guadalupe Gastelum Suarez died from the injuries inflicted by Villanueva.

38. As a further direct and proximate result of the negligent, careless, and reckless driving of Defendant Villanueva and as a direct and proximate result of

Guadalupe's death, Plaintiffs Rosas/Suarez have been forever deprived of the love, care, attention, fellowship and companionship of their daughter Guadalupe.

39. As a further direct and proximate result of the negligent, careless, and reckless driving of Defendant Villanueva and as a direct and proximate result of their daughter Guadalupe's death, Plaintiffs Rosas/Suarez have been deprived of the economic contribution of Guadalupe.

40. As a further direct and proximate result of the negligent, of Defendant Villanueva and as a direct and proximate result of their daughter Guadalupe's death, Plaintiffs Rosas/Suarez have incurred expenses including but not limited to, nurses, physicians, hospitals, therapists, prescriptions, medications, funeral and burial expenses to be proven at the time of trial.

41. Defendant Villanueva's conduct was reckless and wanton and in conscious disregard for the substantial threat of death to Decedents presented by driving drunk, evincing an evil hand guided by an evil mind and thereby compelling an award of punitive damages.

COUNT II–Negligence/Dram Shop Liability/Negligence *Per Se*–Jaguars

42. Plaintiffs incorporate all previous allegations in this Complaint.

43. Defendant Jaguars furnished and/or served multiple spirituous liquor beverages to Villanueva for his consumption.

44. During and after being served numerous alcoholic beverages at Jaguars, Defendant Villanueva demonstrated numerous outward signs of intoxication.

45. Despite demonstrating obvious signs of intoxication, Jaguars failed to stop serving Villanueva and/or remove him from its establishment, but instead continued over-serving him alcoholic beverages.

46. At no time did any of Jaguars personnel offer, or attempt to call, a taxicab for Villanueva.

47. Employees of Jaguars were aware and/or could presume that there was a risk that Villanueva was going to leave their establishment and drive his vehicle, despite the fact he had been consuming alcoholic beverages and showing signs of obvious intoxication.

48. Based on the conduct of Villanueva, Jaguars and its staff knew or should have known that Villanueva was obviously intoxicated and could not safely drive a motor vehicle.

49. Jaguars violated Arizona common law and statutory law including, but not limited to, A.R.S. §§ 4-244 and 4-311, and the regulations of the Arizona Department of Liquor Licenses and Control.

50. The above-mentioned statutes and regulations were enacted for the safety of the public and motorists and passengers like Plaintiff.

51. Jaguars' violation of the above-mentioned statutes and regulations constitutes negligence per se.

52. Jaguars owed a duty to other patrons, and the public, to exercise reasonable care and vigilance for their protection from foreseeable and unreasonable risks of injury and/or death including, but not limited to, the risks created by selling, dispensing, or otherwise furnishing spirituous liquor to and/or for the consumption of obvious intoxicated patrons.

53. Jaguars was negligent, careless, and reckless and breached these duties and, thereby, directly and proximately caused the deaths of Jesus and Guadalupe.

54. As a direct and proximate cause of the negligent, careless, reckless and breached duties of Defendant Jaguars, Jesus Torres Guillen died from the injuries inflicted by Villanueva.

55. As a further direct and proximate result of the negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of Jesus's death, Plaintiffs Torres have been forever deprived of the love, care, attention, fellowship and companionship of their son Jesus.

56. As a further direct and proximate result of the negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of their son Jesus's death, Plaintiffs Torres have been deprived of the economic contribution of Jesus.

57. As a further direct and proximate result of the negligent, of Defendant Jaguars and as a direct and proximate result of their son Jesus's death, Plaintiffs Torres have incurred expenses including but not limited to, nurses, physicians, hospitals, therapists, prescriptions, medications, funeral and burial expenses to be proven at the time of trial.

58. As a further direct and proximate result of the negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of Guadalupe's death, Plaintiffs Rosas/Suarez have been forever deprived of the love, care, attention, fellowship and companionship of their daughter Guadalupe.

59. As a further direct and proximate result of negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of their daughter Guadalupe's death, Plaintiffs Rosas/Suarez have been deprived of the economic contribution of Guadalupe.

60. As a further direct and proximate result of the negligent, of Defendant Jaguars and as a direct and proximate result of their daughter Guadalupe's death, Plaintiffs

Rosas/Suarez have incurred expenses including but not limited to, nurses, physicians, hospitals, therapists, prescriptions, medications, funeral and burial expenses to be proven at the time of trial.

61. Plaintiffs are informed and believe that Jaguars' actions and omissions are part of a plan, scheme, pattern and/or practice of: (a) negligently serving, selling, providing and/or furnishing spirituous liquor beverages to obviously intoxicated persons under circumstances where Jaguars knew or should have known created a foreseeable and unreasonable risk of severe harm and injury; (b) unlawfully serving, selling, providing and/or otherwise furnishing spirituous liquors to obviously intoxicated persons; (c) unlawfully allowing and permitting persons to remain on or about the premises after Jaguars knew or should have known that such persons were obviously intoxicated. Such actions and omissions events evil hands guided by evil minds thereby compelling an award of punitive damages.

COUNT III–Statutory Dram Shop–Jaguars

62. Plaintiffs incorporate the allegations contained in paragraphs as though fully set forth herein.

63. At all times pertinent hereto, Jaguars, holding Arizona Liquor License No. 06070572, sold spirituous liquor at its establishment.

64. Jaguars, therefore, was a "licensee" under A.R.S. §§ 4-101(19) and 4-311.

65. On April 1, 2011, in its capacity as a "licensee," Jaguars and its employees and/or agents furnished spirituous liquor to or for consumption by Villanueva, including times when he was obviously intoxicated.

66. Villanueva consumed the spirituous liquor inside the premises of Jaguars.

67. Jaguars' over service of Villanueva directly and proximately caused the deaths of Jesus and Guadalupe.

68. As a direct and proximate cause of the negligent, careless, reckless and breached duties of Defendant Jaguars, Jesus Torres Guillen died from the injuries inflicted by Villanueva.

69. As a further direct and proximate result of the negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of Jesus's death, Plaintiffs Torres have been forever deprived of the love, care, attention, fellowship and companionship of their son Jesus.

70. As a further direct and proximate result of the negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of their son Jesus's death, Plaintiffs Torres have been deprived of the economic contribution of Jesus.

71. As a further direct and proximate result of the negligent, of Defendant Jaguars and as a direct and proximate result of their son Jesus's death, Plaintiffs Torres have incurred expenses including but not limited to, nurses, physicians, hospitals, therapists, prescriptions, medications, funeral and burial expenses to be proven at the time of trial.

72. As a further direct and proximate result of the negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of Guadalupe's death, Plaintiffs Rosas/Suarez have been forever deprived of the love, care, attention, fellowship and companionship of their daughter Guadalupe.

73. As a further direct and proximate result of negligent, careless, reckless and breached duties of Defendant Jaguars and as a direct and proximate result of their daughter Guadalupe's death, Plaintiffs Rosas/Suarez have been deprived of the economic contribution of Guadalupe.

74. As a further direct and proximate result of the negligent, of Defendant Jaguars and as a direct and proximate result of their daughter Guadalupe's death, Plaintiffs

Rosas/Suarez have incurred expenses including but not limited to, nurses, physicians, hospitals, therapists, prescriptions, medications, funeral and burial expenses to be proven at the time of trial.

75. Plaintiff informed and believes that Defendant Jaguars knew or should have known that death and/or catastrophic injuries could occur due to its negligent, careless, and reckless conduct. Nonetheless, Defendant Jaguars disregarded these dangers and the risks they posed. Such acts and/or omissions constitute willful, wanton, reckless and malicious behavior and/or a conscious disregard of the substantial risk that such conduct might threaten the life, health and safety of Plaintiffs'' decedent. Such conduct by Defendant Jaguars evinced evil hands guided by evil minds thereby compelling an award of punitive damages

Demand for jury trial

76. Pursuant to Ariz. R. Civ. P. Rule 38(b) Plaintiffs demand a jury trial.

Prayer

WHEREFORE, Plaintiffs pray judgment against the Defendants, inclusive as follows:

1) For general damages to Plaintiffs Torres to compensate them for the loss of the love, care, attention, fellowship and companionship of their son Jesus with interest at the highest lawful rate from the date of judgment until paid in full.

2) For special damages in an amount to sufficient to compensate Plaintiffs Torres for all economic losses as alleged with interest at the highest lawful rate from the date said losses were incurred for the date of judgment, whichever is sooner, until paid in full.

3) For general damages to Plaintiffs Rosas/Suarez to compensate them for the loss of the love, care, attention, fellowship and companionship of their daughter

Guadalupe with interest at the highest lawful rate from the date of judgment until paid in full.

4) For special damages in an amount to sufficient to compensate Plaintiffs Rosas/Suarez for all economic losses as alleged with interest at the highest lawful rate from the date said losses were incurred for the date of judgment, whichever is sooner, until paid in full.

5) For Plaintiffs' costs incurred with interest at the highest lawful rate from the date of judgment until paid in full.

6) For such further relief as the court deems appropriate.

RESPECTFULLY Submitted this 7th day of February, 2017.

CLARKE LAW OFFICES

By _____

Robert F. Clarke
3001 East Camelback Road, Suite 145
Phoenix, Arizona 85016
(602) 952-3232

Clerk of the Superior Court
*** Electronically Filed ***
M. De La Cruz, Deputy
1/14/2019 4:35:00 PM
Filing ID 10060611

Matt Koglmeier, Esq. SBN 7200
KOGLMEIER LAW GROUP, PLC
715 N. Gilbert Road, Suite 2
Mesa, Arizona 85203
Phone: (480) 962-5353
Fax: (480) 962-0010
Attorney for Plaintiffs Rosas and Suarez

IN THE SUPERIOR COURT IN THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, surviving father, on his own behalf and on behalf of ORLENDA GUILLEN, surviving mother of JESUS O. TORRES GUILLEN, Decedent,

HERNAN GASTELUM ROSAS and MARIA SUAREZ, husband and wife, surviving parents and legal guardians of GUADALUPE GASTELUM SUAREZ, Decedent.

Plaintiffs,

vs.

CESAR AGUILERA VILLANUEVA, a single man, JAI DINING SERVICES (PHOENIX) Inc.; a CORPORATION; d/b/a/ JAGUAR'S GOLD CLUB, *et. al.*

Defendants

Case No.: CV2016-016688

JOINT PRE-TRIAL STATEMENT

(Assigned to the Honorable Sherry Stephens)

COMES NOW THE PARTIES, by and through undersigned counsel, pursuant to Rule 16(g), Ariz.R.Civ.P., and hereby submit this Joint Pretrial Statement:

I. UNCONTESTED FACTS DEEMED MATERIAL

On November 8, 2015 at 5:14 am, Defendant Villanueva was involved in a car crash that killed two people, Guadalupe Gastelum Suarez and Jesus O. Torres Guillen. Prior to the crash Defendant Villanueva had worked a twelve-hour shift at a warehouse. He then attended a family wedding reception, where he drank a beer and ate tacos. After the wedding, Villanueva

accompanied friends to Defendant Jaguars' establishment (a night club offering food, alcohol and topless dancing). On the way to Jaguars, Villanueva drank one beer. He bought and drank another beer after he paid his cover charge. Once inside the main club, over the course of the next two and half hours, Villanueva and the other two men in his group ordered two mega buckets of beer while the four women in the group ordered mixed drinks and beer.

Around 2:00 am, a woman in Defendant Villanueva's group had a confrontation with an employee of Defendant Jaguars when staff attempted to take her drink because it was after-hours

After leaving Jaguars, Defendant Villanueva went to his brother's house, arriving around 2:30 am. Next Defendant Villanueva and others in the group went to Villanueva's house arriving around 4:00 am. Once at home, Defendant Villanueva may have slept for a while. Sometime later, Villanueva's girlfriend, Leticia Morales asked him to take her friend, Wendy Marquez, home. The group departed in Defendant Villanueva's vehicle, but Villanueva was not driving. Defendant Villanueva slept in the back seat until the group arrived at their destination. Defendant Villanueva began driving his own vehicle. The accident occurred shortly thereafter.

At the time of the accident, Defendant Villanueva was driving at a high rate of speed (estimated to be 86 miles per hour) and struck the vehicle occupied by Jesus Torres and Guadalupe Gastelum Suarez. Defendant Villanueva's blood alcohol level two hours after the crash and five hours after leaving the club was .085. Experts engaged by the parties estimate, that Defendant Villanueva's blood alcohol content was between .128 and .166 at the time he left Defendant Jaguars' establishment. Defendant Villanueva was later convicted of two counts of manslaughter and sentenced to prison for fourteen years.

II. CONTESTED ISSUES OF FACT AND LAW THAT ALL COUNSEL DEEM MATERIAL OR APPLICABLE

1. Whether Defendant Villanueva exhibited obvious signs of intoxication when he was served alcohol while at Jaguars.
2. Whether Jaguars knew or should have known that Villanueva was obviously intoxicated when he was served at Jaguars.

XI. JURORS

The parties believe that an eight (8) 10 person jury would be appropriate in this matter. The parties believe that two alternate jurors should be selected and that the alternate jurors may not deliberate unless an agreement is reached regarding the ratio. The parties believe that six (6) jurors should be required to reach a verdict. In the event that a juror is excused for any reason during deliberation the parties believe that five (5) jurors should be required to reach a verdict. Defendants agree to all 10 deliberating with the following ratios being required for a verdict 6 of 8 or 7 of 9 or 8 of 10. The ratio thus will depend on how many jurors are still seated at the time of deliberations.

XII. ARIZONA RULE OF EVIDENCE 615

A. Plaintiffs: Yes

B. Defendant: Yes

XIII. BRIEF DESCRIPTION OF SETTLEMENT EFFORTS

The parties participated in a mediation on July 18, 2018 in front of Christopher Skelly. The parties were not able to reach a settlement. The parties have not since engaged in settlement conversations.

XIV. VERBATIM RECORD

The parties believe that the digital recording of the proceeding created by the court will be sufficient.

Defendants request a court reporter be present for all proceedings.

Dated this 14th day of January 2019.

KOGLMEIER LAW GROUP, PLC

By /s/ Robert F. Clarke (for)
Matt Koglmeier
Attorneys for Gastelum Rosas and Suarez

CLARKE LAW OFFICES

By /s/ Robert F. Clarke
Robert F. Clarke
Clarke Law Offices
3001 East Camelback Road, Suite 145
Phoenix, Arizona 85016
Attorney for Plaintiffs Torres

GUST ROSENFELD, PLC

By /s/ Robert F. Clarke (for)
Jay R. Graif
Gust Rosenfeld, PLC
One East Washington Street, Suite 1600
Phoenix, Arizona 85004-2553
Attorney for Defendant Cesar Aguilera Villanueva

QUINTAIROS, PRIETO, WOOD & BOYER PA

By /s/ Robert F. Clarke (for)
Dominique Barrett
Jenna C. Bailey
Quintairos, Prieto, Wood & Boyer, PA
2390 East Camelback Road, Suite 440
Phoenix, Arizona 85016
Attorneys for Defendant JAI Dining Service (Phoenix) Inc.

ORIGINAL e-filed this 14th day of January 2019 with:
The Clerk of The Court and electronic copies deliver to:

The Honorable Sherry K. Stephens
Maricopa County Superior Court

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, et al., Plaintiffs, v. CESAR AGUILERA VILLANUEVA, et al., Defendants.	No. CV 2016-016688

Phoenix, Arizona
February 26, 2019
9:38 a.m.

BEFORE THE HONORABLE SHERRY K. STEPHENS

TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 2

Proceedings recorded by electronic sound recording; transcript produced by U.C.C., LLC.

ERIN PERKINS
Transcriptionist
CET-601

I N D E X

February 26, 2019

Jury Trial - Day 2

M I S C E L L A N E O U S

E X H I B I T S

PLAINTIFFS' EXHIBITS

NO.	DESCRIPTION	ID	EVD
20	Photographs	106	106

DEFENDANTS' EXHIBITS

NO.	DESCRIPTION	ID	EVD
47	Photograph	110	110
48	Video	160	160

APPEARANCES

February 26, 2019

Judge: Sherry K. Stephens

For the Plaintiffs Torres:

Robert F. Clarke

Witnesses:

Cesar Aguilera Villanueva

Veronica Aguilera

For the Plaintiffs Rosas and Suarez:

Matthew D. Koglmeier

Theodore Horowitz

Witnesses:

Alejandro Garcia

For the Defendant Villanueva:

Jay R. Graif

Megan Ritenour

Witnesses:

None

For the Defendants JAI Dining Services, Inc.:

Dominique K. Barrett

Jenna C. Bailey

Darrell L. Barger

Witnesses:

None

APPEARANCES (Continued)

February 26, 2019

Also Appearing:

Roberto Torres, Plaintiff

Orlenda Guillen, Plaintiff

Hernan Gastelum Rosas, Plaintiff

Maria Suarez, Plaintiff

Cesar Aguilera Villanueva, Defendant

Sylvia Fisher, Interpreter

for his evening at Jaguars. Soon, the rest of the family arrived at the home and around 11 p.m. on November 7th, the Aguilera party of three men and four women left the house and headed for Jaguars. En route, Cesar stopped at QuikTrip. He bought a 24 ounce can of Budweiser and drank it as he drove to Jaguars.

By the time Mr. Aguilera got out of his car at Jaguars parking lot around 11:20, he had finished the 24 ounce Budweiser. Ordinarily, video cameras would record activity in the parking lot, including people walking from their cars towards the club and, similarly, walking from the club back towards their cars. You will not see any video recordings of Aguilera walking towards the club and you will not see any videos of Aguilera walking from the club.

We do know that Mr. Aguilera reached the front door and paid his cover charge at 11:21 because Jaguars takes a photograph and gathers identification information and stores that information for every customer that comes through the doors. Again, however, Jaguars has video cameras installed at that front door, covering that patio where the cover charges is paid -- paid. Again, you will not see any videos from that location.

Once through the front doors, Mr. Aguilera stepped onto a roughly 20-foot long walkway leading from the front doors into the main club. A large cooler with various brands

A In other terms. I wouldn't call it a buzz, just like pre-drinking.
Q Okay. All right. Help you relax a little bit?
A Yeah.
Q Ease you into the night? Does that sound about right?
A Yeah, that sounds about right.
Q Okay. Thank you. Now, according to Jaguars' records, when they took your picture is at that front entryway, that was about 11:21 p.m. Does that sound about right for your arrival time at Jaguars?
A Yeah.
Q Okay. And you remember them taking your picture?
A No.
Q Okay. All right. When you walk up to Jaguars, at some point before you enter the club you may a cover charge, correct?
A That is correct.
Q Okay. And do you pay that cover charge while you're still outside of the building or you go inside of the building to pay that cover page?
A Inside the building.
Q Inside the building? Okay. And of course, you don't remember your picture being taken?
A No.

who were already out in the truck, the rest of you, that is you, Joel, Veronica, Usef, and Tiara, all left at the same time? You were all basically pushed out at the same time?

A That is correct.

Q And then you went from there, from Jaguars, to your brother's house?

A Yep.

Q And your brother's house is over on -- in the area of 67th Avenue, south of Buckeye?

A That is correct.

Q You think it's about a 15-minute or so drive from Jaguars to your brother's house?

A I would say so.

Q Okay. Why did you go to your brother's house?

A Just to chill out for a little bit and sober up.

Q Okay. And chill out because of the anger?

A Yes.

Q Okay. Now, I think you told us in your deposition that you had a Red Bull at your brother's house?

A Correct.

Q And that's one of those energy drinks?

A That is correct.

Q Okay. Do you remember having anything else to drink other than that Red Bull?

A Not to my recollection.

Q Now, back then you were actually living in Veronica's home?
A That is correct.
Q With Veronica and your parents, correct?
A That is correct.
Q And so when you leave your brother's house, that's where you went, to Veronica's home?
A Yes.
Q And it was your home too?
A Correct.
Q Okay. And when you -- and that's not too far away from Joel's house, correct?
A Less than ten minutes.
Q Okay. I believe it's your memory that you got to your home and you fell asleep?
A Correct.
Q Your sister Veronica testified that you no sooner got home -- well, she did testify that you were sleeping in the car on the way from Joel's house to your house. But that you no sooner got home that Wendy and Leticia wanted to take Wendy home to Rainbow Valley. And that there was really no time to sleep. Does that --
A Excuse me.
Q -- sound right, or are you pretty convinced or you're pretty certain that you fell asleep for a bit?

A To my best recollection, I fell asleep.
Q Okay. But you were awoken by Leticia?
A Correct.
Q Telling you that Wendy wanted to go home?
A That's correct.
Q And you got up and decided that, okay, let's get her home?
A Correct.
Q You did put down a condition and that's that Wendy drive to Rainbow Valley?
A Correct.
Q You sort of hoped Leticia might drive back, but you knew it was likely you would have to drive back?
A Correct.
Q Okay. When you made that decision, you were still drunk?
A What do you mean by drunk there?
Q You were still impaired by alcohol?
A Yes.
Q So you take that 30 or 40-minute drive out to Rainbow Valley. Wendy gets dropped off. Do you talk at all to Wendy or with Wendy after you dropped her off?
A What do you mean?
Q Well, did you say, well how do I get out of here, for instance? Or did you just pass the time for a few minutes?

Q Now, but you told this jury this morning that when you ordered that -- when someone ordered the first mega bucket, you were not buzzed; you were fine. Do you agree with that --

A Correct.

Q -- now?

A Relaxed, buzzed, whatever you guys want to call it.

Q Well, that's not my question. You told this jury this morning that when that first bucket was ordered you were not buzzed, and you were fine. Do you remember that?

A No, I do not.

MR. CLARKE: Not only asked and answered, but that misstates his testimony. He did not testify he was fine.

THE COURT: All right. Sustained. Rephrase.

BY MR. BARGER:

Q Well, what did you tell the jury when the lawyer asked you the question to try to convince you that you were buzzed?

A I do not recall.

Q You don't recall? The fact is -- the jury has the job to recall. But the fact is you were not stumbling, you weren't slurring your words, you had just come in and sat down; isn't that fair?

A That is correct.

Q And you were not intoxicated or showing signs of intoxication at that time. You would agree with that? Forget

the words buzzed or pre-drinking.

A Correct.

Q Okay. You sat down like a normal person and you ordered -- or somebody in your group ordered a bucket, and that was fine?

A That is correct.

Q Okay. Now, at some point --

MR. BARGER: Your Honor, may I return to the podium for a moment?

THE COURT: You may.

BY MR. BARGER:

Q When the first mega bucket came, it was paid for with cash; is that your recollection?

A Correct.

Q All right. And kind of what happened is, I suspect, it's normally what happens when you have seven people and you have different couples, whatever was ordered, everybody chipped in cash. Is that what happened for that first round?

A Correct.

Q Okay. And maybe the -- the ladies paid for their own or -- and you guys bought your beer, or whatever happened, but everybody paid cash at one time, right?

A That is correct.

Q All right.

A We were all paying cash.

truck because you were tired?
A Correct.
Q Okay. You went to your brother's house, and you told the jury you didn't have anything else to drink after you left the club, right?
A Red Bull.
Q Well, I'm sorry, no alcohol after you left the club?
A That is correct.
Q You drank a Red Bull at your brother's house and then went to sleep in the back of your truck at 3 in the morning, right?
A I'm trying to recall if it was the back of the truck.
Q How about in the truck? You went --
A I believe so.
Q -- to sleep in the truck?
A I believe so.
Q Okay. And when you went there, at some point the group decided to go to -- back to your house, right?
A That is correct.
Q And who went back to your house? Did they wake you up, say we're going back to the house?
A I do not recall.
Q Okay. Who drove back to your house?
A I believe it was Usef.
Q Okay. Do you know where you were sitting? Were you

in the backseat, the front seat, or where?
A Do not recall.
Q But Usef drove, not you?
A Correct.
Q By then you had been up almost 24 hours without sleep, right?
A I don't recall the time at that time.
Q Well, I think you're going to tell us in a minute that you left your brother's house and you got home around 4:00. Does that sound correct to you?
A Around 4:00? Correct.
Q Okay. And you had arisen that morning at 5:00. So that's 23 hours you had gone without sleep, right?
A Prior to this happening?
Q Yes.
A Correct.
Q When -- when you got to your house, did your brother and his sister come, or was it just you and Wendy and Leticia?
A My brother stayed at his house.
Q He -- he didn't come to your house?
A Correct.
Q He stayed there. Did Veronica and Usef both come with you back to the house --
A Correct.
Q -- with Leticia and Wendy?

A That is correct.
Q Okay. And Usef drove. When you got home, what did you do? You got home around 4:00 at your house and you did what?
A I believe I laid down.
Q You went to sleep, didn't you?
A Correct.
Q Okay. And then how long were you asleep before someone came in and woke you up and said Wendy wants to come home?
A I couldn't tell you an exact timeframe.
Q You were asleep?
A Correct.
Q All right. And so at some point, Wendy wanted to go home. You and Leticia got in the truck and took -- and Wendy went home, correct?
A That is correct.
Q All right. And when you got home -- you got there, who drove the truck from your house to Wendy's house?
A Wendy.
Q And where were you?
A Backseat, I believe.
Q Were you asleep?
A Yeah.
Q And when you got there, did they wake you up?

A Yeah.
Q Did Wendy go in the house?
A I don't know.
Q Okay. Did Leticia -- was she in the truck?
A Yeah.
Q In the right, front seat?
A Yeah.
Q And then you drove back -- you headed back to your house from Wendy's house, after you had --
A That is correct.
Q -- after Wendy had been dropped off, right?
A That is correct.
Q Okay. And you drove?
A That is correct.
Q And when you -- it's not a place you'd been to before, and you said you got lost; is that what I understood?
A It's dirt roads over there, so you get lost --
Q Dirt roads?
A -- easily.
Q All right. So you got lost going back to your house, so you stopped and you phoned Wendy?
A Correct.
Q And you ask her what's the best way to get out of this neighborhood, right?
A Correct.

Q And she told you?
A She let me know the street I was on, kind of the catty corner, so I could punch it in the GPS. And then from there, I was able to find my way home.
Q And so what you did is, is you took that information, you were capable of putting it in your GPS, and you found the route and you started home?
A Correct.
Q Okay. Did you slur your words talking to Wendy?
A I do not recall.
Q Okay. Did you have any problem driving leaving -- leaving Wendy's house other than getting lost?
A No.
Q Okay. And when you drove, I assume, before the accident you must have come to intersections where you stopped at stop signs or stop lights, right?
A Correct.
Q Okay. You had no problem until the time of the accident itself --
A That is correct.
Q -- the event? You -- you drove for almost 30 minutes before the accident happened from Wendy's house without any problems, right, other than you got lost on the dirt road?
A Correct.
Q At some point, we know that at going 86 miles an hour

you ran into the back of a car, right?

A That is correct.

Q All right. And you said you didn't fall asleep. Well, how do you know you didn't fall asleep? Did you see the car? Did you --

A No, I did not.

Q Okay. So you could have fallen asleep, couldn't you?

A No.

Q That -- so you're absolutely wide-awake driving down the road with no problem for 30 minutes and you run into the back of a car at 86 miles an hour, and you absolutely can sit here and say it's not possible you fell asleep after not sleeping for 24 hours, right?

MR. GRAIF: Objection. Asked and answered.

THE COURT: Overruled. You may answer.

THE WITNESS: I was not asleep.

BY MR. BARGER:

Q Okay. So you were awake and you just didn't see a car --

A Correct.

Q -- stopped? So let me -- let me ask you a couple of questions. When you said you had nothing to drink after leaving the club that night, nothing alcohol wise --

A Correct.

Q -- and then you said you were pushed out of the club;

do you remember? And I'm not going to go through that again. But you're just as certain that you were pushed out of that club as you are that you had nothing to drink after you left Jaguars that night at 2:20; is that correct?

A I know for a fact I did not drink no alcohol after I left the club.

Q But you're just as certain about that as you are that you were being pushed out of the club?

MR. GRAIF: Objection, Your Honor. We've talked about the issue of being pushed and his words being --

THE COURT: Rephrase.

MR. GRAIF: -- applied pressure.

THE COURT: Rephrase.

BY MR. BARGER:

Q Okay. I want -- have you seen the video of that night when you left the club?

A No.

Q Okay. Would you like to see it?

A No.

Q Okay. Well, I'm going to show it with permission of the Court.

A Go ahead.

Q Okay.

MR. BARGER: Your Honor, it's -- it's marked as an exhibit. It's not been offered yet. I need to offer it.

you took Wendy and Leticia out to your truck at about 1:53 a.m., fair?

A I did not know the time.

Q I understand you didn't know the time, but if that is the correct time, as of 1:53 a.m. that second mega bucket was not on your table?

A Correct.

Q And the Jaguars' records also show that you came back into the club at 2:08 a.m. You don't have any quarrel with that, either?

A I cannot say I did or I didn't.

Q Okay. And your memory is that that second mega bucket had either just arrived or was on its way?

A Correct.

Q Okay. When you left Jaguars, did you say that you think Usef was the one to drive your truck?

A No.

Q Did you drive your truck?

A Correct.

Q Okay. You made the decision to drive your truck from Jaguars to your brother's?

A Correct.

Q You slept in the back of your truck for a little bit at your brother's?

A I don't recall where exactly in the truck, but --

Q Okay. And -- and you then made the decision to drive from your brother's to your home, and you arrived at your home something like 4 a.m.?

A That is correct.

Q Okay. And then you made that other decision to get Wendy out to her house, and then to drive back from Wendy's house?

A That is correct. I took responsibility for that.

Q And you were intoxicated every -- on each one of those decisions?

A To that point, I was still intoxicated.

Q One final thing. You were asked questions about going out drinking with your sister, Veronica. Was that a regular thing?

A What do you mean by regular?

Q Well, would you do it on every weekend? Would you do it once a month? Would you do it every six months?

A Rarely. Probably once -- once every six months.

Q Okay. And in Veronica did, indeed, I think, talk about you drinking a 40-ounce beer or a 48-ounce beer, even, I can't remember her exact testimony. You ever have a single -- single container of beer in a quantity of 40 ounces or 48 ounces?

A I wouldn't be able to recall that.

Q Okay. You never -- you don't remember that?

A No, I don't.
Q Mr. Villanueva, thank you very much.
MR. CLARKE: Those are all the questions I have.
THE COURT: Mr. Koglmeier, redirect.
MR. KOGLMEIER: Thank you, Your Honor.
BY MR. KOGLMEIER:
Q Mr. Aguilera, I just got just a couple quick questions. To get home -- you went from the club to Joel's house, correct?
A Correct.
Q You did that, as I remember you saying, to chill out and to sober up?
A Correct.
Q Okay. And then a short time later you go from Joel's house to your home, and you arrived about 4 a.m.?
A Correct.
Q Okay. Now, from home out to Rainbow Valley where Wendy lives, how far did you say -- how many minutes would that take to get there, do you know?
A I do not know.
Q That's out by Buckeye?
A Correct.
Q So it's quite a distance out there?
A Correct.
Q You say it's at least 30 minutes?

A More than that.
Q Okay. Is it 35 minutes?
A Forty-five, fifty.
Q Okay. Let's say it was -- let's say it was 40 minutes. So you would have gotten there, if you left at 4:00, at about 4:40, right?
A I don't recall the way she was driving, so I don't know if she got there fast of if she didn't.
Q Okay. So you don't know her speed. That's fair enough. But then you had to travel from Rainbow Valley to MC85, Buckeye, in Avondale where the crash took place, correct?
A Correct.
Q And how far away from your home is that intersection? How many minutes?
A Fifteen.
Q So would you agree with me that if you got home at 4 a.m. from Joel's house initially, that you couldn't have been there very long before you left to go to Rainbow Valley and then got all the way back to Avondale and MC85?
A That is correct.
Q In fact, probably home no more than 10 or 15 minutes; does that sound fair?
A Where?
Q You would have -- at 4 a.m., you only would have been home for, max, maybe 10 or 15 minutes?

THE COURT: Anything else?

MR. CLARKE: Nothing from Plaintiffs, Your Honor.

(Proceedings adjourned at 4:30 p.m.)

CERTIFICATE

I, Erin Perkins, CET-601, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): ERIN PERKINS, CET-601
TAMI S. MAYES, CET-546
MELISSA LOONEY, CET-607

/s/
ERIN PERKINS, CET-601 March 25, 2019
Proofreader

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, et al., Plaintiffs, v. CESAR AGUILERA VILLANUEVA, et al., Defendants.	No. CV 2016-016688

Phoenix, Arizona
February 28, 2019
9:30 a.m.

BEFORE THE HONORABLE SHERRY K. STEPHENS

TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 4

Proceedings recorded by electronic sound recording; transcript produced by U.C.C., LLC.

ERIN PERKINS
Transcriptionist
CET-601

I N D E X

February 28, 2019

Jury Trial - Day 4

M I S C E L L A N E O U S

E X H I B I T S

PLAINTIFFS' EXHIBITS

NO.	DESCRIPTION	ID	EVD
63	Morales Police Statement	116	117

DEFENDANTS' EXHIBITS

NO.	DESCRIPTION	ID	EVD
49	POS Report	51	52
50	POS Report	51	52

APPEARANCES

February 28, 2019

Judge: Sherry K. Stephens

For the Plaintiffs Torres and Guillen:

Robert F. Clarke

Witnesses:

Eric Langan

Paul White

For the Plaintiffs Gastelum Rosas and Suarez:

Matthew D. Koglmeier

Witnesses:

Leticia Morales

Cherelle Rubbell

For the Defendant Cesar Aguilera Villanueva:

Megan Ritenour

Witnesses:

None

For the Defendant JAI Dining Services, Inc.:

Dominique K. Barrett

Jenna C. Bailey

Darrell L. Barger

Witnesses:

None

APPEARANCES (Continued)

February 28, 2019

Also Appearing:

Roberto Torres, Plaintiff

Orlenda Guillen, Plaintiff

Hernan Gastelum Rosas, Plaintiff

Maria Suarez, Plaintiff

Cesar Aguilera Villanueva, Defendant

Sylvia Fisher, Interpreter

Tom Cromwell, Interpreter

Q Because are you aware that he had been up for over 24 hours?
A No.
Q Okay. And as far as you can say, you can't say he did or didn't fall asleep because you don't know; you were asleep, right?
A That's correct.
Q All right. You don't know whether he didn't make the turn because you were asleep?
A Correct.
Q Okay. Thank you. Is it my understanding, you don't remember when you arrived at Jaguars or when you left, that's what you testified to?
A That's correct.
Q Okay. Did you testify that, when you observed Cesar at Jaguars that night, that he was not intoxicated?
A Correct.
Q Okay. That's what you gave in your deposition testimony, that when you recall Cesar at Jaguars, when you saw him sit there, he was not intoxicated?
A Correct.
Q And that's a correct statement and accurate and true?
A That is correct.
Q Okay. And you had been his significant other for seven years, correct?

Q -- you then had him complete a Romberg modified?
A I did.
Q And what is that?
A On that test, I actually had him estimate 30 seconds.
Q Okay. Why do you do that?
A Because the introduction of certain chemicals can actually speed up your internal clock or slow down your internal clock. Everybody kind of has that sense of time. When you introduce substances to it, it can slow that down or speed that up.
Q Okay. And you noted that he had estimated 16 seconds -- what he felt was 30 seconds was actually 16 seconds?
A Correct.
Q Does that mean the clock is sped up or slowed down, or do you know?
A Don't know.
Q Okay. At that point, you made the decision to complete the arrest and take Mr. Aguilera in custody?
A Correct.
Q Okay. Officer, thank you very much. Those are all the questions.
A Thank you.
THE COURT: Mr. Koglmeier?
BY MR. KOGLMEIER:
Q Good afternoon, Officer White.

look at them. I will tell you what I'm doing in terms of the instructions. I'm more or less putting everything in there and then we'll talk about it. So when you read it, there will probably be more than you think should be there. I agree there's more than should be there, but we should talk about how we're going to present these issues to the jury. So you'll have a draft.

MR. KOGLMEIER: Thank you, Your Honor.

THE COURT: All right. Have a good evening.

(Proceedings adjourned at 3:21 p.m.)

CERTIFICATE

I, Erin Perkins, CET-601, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): ERIN PERKINS, CET-601

MELISSA LOONEY, CET-607

/s/
ERIN PERKINS, CET-601 March 25, 2019
Proofreader

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, et al., Plaintiffs, v. CESAR AGUILERA VILLANUEVA, et al., Defendants.	No. CV 2016-016688

Phoenix, Arizona
March 01, 2019
8:37 a.m.

BEFORE THE HONORABLE SHERRY K. STEPHENS

TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 5

Proceedings recorded by electronic sound recording; transcript produced by U.C.C., LLC.

ANTOINETTE M. FRANKS
Transcriptionist
CET-683

I N D E X

March 01, 2019

Jury Trial - Day 5

M I S C E L L A N E O U S

E X H I B I T S

PLAINTIFFS' EXHIBITS

NO.	DESCRIPTION	ID	EVD
65-69	Photographs	99	100
31	Document	119	119
58-62	Miscellaneous	119	119

DEFENDANTS' EXHIBITS

NO.	DESCRIPTION	ID	EVD
None			

APPEARANCES

March 01, 2019

Judge: Sherry K. Stephens

For the Plaintiffs Torres and Guillen:

Robert F. Clarke

Witnesses:

Roberto Torres

Orlenda Guillen

For the Plaintiffs Gastelum Rosas and Suarez:

Matthew D. Koglmeier

Witnesses:

Michael McCabe

Hernan Gastelum Rosas

Maria Suarez

For the Defendant Cesar Aguilera Villanueva:

Megan Ritenour

Jay R. Graif

Witnesses:

None

For the Defendant JAI Dining Services, Inc.:

Dominique K. Barrett

Jenna C. Bailey

Darrell L. Barger

Witnesses:

None

APPEARANCES (Continued)

March 01, 2019

Also Appearing:

Roberto Torres, Plaintiff

Orlenda Guillen, Plaintiff

Hernan Gastelum Rosas, Plaintiff

Maria Suarez, Plaintiff

Cesar Aguilera Villanueva, Defendant

Sylvia Fisher, Interpreter

Tom Cromwell, Interpreter

intoxication.

Q All right. At a .16, do you have an opinion as to whether Mr. Villanueva would have been showing signs of obvious intoxication?

A My opinion is that Mr. Villanueva, more likely than not, in all probability, was showing signs of intoxication. And I base that opinion on two general things, science and the evidence. Let's talk about science first.

Science tells us that if we look at the frequency -- I'm just going to abbreviate it freq, frequency. If we look at the frequency of people who show obvious signs of intoxication as a function of their blood alcohol concentration, for the most part, it's what the scientists call an L-shaped curve. So scientific studies show us that the majority of people will show visible signs of intoxication at a blood alcohol concentration at or about 150, at or about .15.

Q Is that the same to you as obvious intoxication?

A So obvious intoxication and visible intoxication, in this sense, equivalent terms. So more than half, about 58 percent of the population, of social drinkers will show visible signs of intoxication at this .15 threshold, if you will. What does that mean? That means there are people who, as I've already alluded to, are functionally tolerant. Right. And we know that. We know that there are people who can have really high blood alcohol concentration. They're not the majority of

people. These are special people, right, who can -- will not show visible or obvious signs of intoxication. They're able to mask it, based on their habits, based on their experience, at a higher level.

Q So more experienced drinkers can typically mask it over a .15?

A Correct.

Q Now can less experienced drinkers show obvious signs of intoxication at less than .15?

A Yes. All right. So it's not that -- it's not a hard threshold. All right. It's a threshold that we apply to -- scientific studies apply to the majority of people. But we know, based on scientific studies, that there are people who will show visible signs of intoxication below 8. And the evidence in this case --

Q I was going to ask you. What's the evidence in this case that applies to this principle?

A So the evidence in this case supports that when Aguilera is interfacing with the police at 5:45, 5:50 a.m. in the morning. Blood alcohol concentration then is actually less than .11, that he's got red, watery, bloodshot eyes. He's got thick speech, swaying, slurring speech. He's showing obvious signs of intoxication at that time, at a much lower than the .15 threshold would predict for the majority of people. He's not in the majority. He's less than the majority.

MR. CLARKE: Yeah.
THE COURT: All right. Please remember the admonition. Have a nice weekend.
UNIDENTIFIED SPEAKER: Will we be here next week?
THE COURT: Be right here, right here on Monday.
THE BAILIFF: All rise for the jury.
(Jury out at 2:29 p.m.)
THE COURT: The record will show the jury has left the courtroom.
I believe the judicial assistant brought copies of the verdict forms and two final jury instructions. Did everyone get them.
MS. BAILEY: Yes.
MR. CLARKE: Yes, we did.
MS. BARRETT: Before we do that, we've got some motions.
THE COURT: Okay. You may proceed.
MS. BARRETT: You want to hear that now?
THE COURT: Yes, I do.
MS. BARRETT: Defendant JAI Dining moves for a directed verdict in this matter on the negligence (indiscernible) claims. The Plaintiffs have the burden of proof in this case. And the burden of proof to prove that, at the time, that JAI Dining Services sold Spiritus liquor (phonetic) to Cesar Villanueva, Cesar Aguilera, at the time he

was obviously intoxicated. Obviously intoxicated means inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical actions or significant physical dysfunction that would have been obvious to a reasonable person.

Undisputed testimony of the witnesses in this case, Veronica Aguilera, Leticia Morales, even Cesar Aguilera himself has been that Mr. Aguilera, at the time that the first mega bucket was sold, that he was not intoxicated, did not appear obviously intoxicated whatsoever. The testimony is also that, at the time the second services of the mega bucket was done, Mr. Villanueva -- Aguilera -- I'm sorry -- testified that he was not even the one who ordered it.

And Veronica -- there was some dispute about who ordered it. Veronica testified that although she thought that he perhaps had ordered it, he, in fact, was not obviously intoxicated at the time second bucket was sold. So it's the Defendant's position that there is no testimony. Plaintiffs have not met their burden to prove that Mr. Aguilera was obviously intoxicated at the time of the service.

The second issue is with respect to the superseding intervening cause. Even if there is -- Plaintiffs meet their burden with respect to causation here, it is undisputed and there is undisputed testimony that Mr. Aguilera made it to a

place of repose, made it home, in his bed at home, and it was his decision then, once he made it home safe, to leave and get in the car. It is the Defendant's position that, at that point, once he made it home, JAI Dining's duty to Mr. Aguilera and to members of the public ended. Otherwise, Your Honor, the duty of JAI Dining would never end, frankly. There is no ending point if, in fact, the law was that JAI Dining or any other establishment would be responsible once somebody made it to a place of repose and safely at home.

The duty ended and, at that point, causation ended. And the Court should find that JAI Dining has met its -- or Plaintiffs have not met their burden of proof and find in favor of the Defendant.

MR. CLARKE: Thank you, Your Honor. The duty, of course, ends. It ends when Mr. Aguilera's decision-making, coordination, perception, reaction, all the things that Dr. McCabe talked about are no longer influenced by the alcohol that JAI Dining served. That's when it ends. It's not never ending. It ends when he is no longer subject to control of that alcohol.

For a -- an event to be intervening and superseding, the event must be independent. It must have been an event that occurs without any connection to the actions of the original (indiscernible), in this case, Jaguars. Every decision, every act, everything Mr. Aguilera did from the time he became

intoxicated while at JAI, she said it was as early as 1:53, was controlled by and influenced strongly by that alcohol. His decisions, whether he went to his brother's house and then to his house or, instead, went to Denny's for breakfast, or whatever he did, all of that was under the influence of alcohol. There's nothing independent about anything he did. If this thing happened Sunday afternoon when his blood alcohol -- when he no longer had alcohol in his system, different story, but it didn't. Everything, no independence, everything that he did was influenced by that alcohol.

Now going back to the obviously intoxicated standard, that's what happened in Young v. DFW. A -- I can't remember if it was a motion for summary judgment or a directed verdict. But basically, the court ruled against the Plaintiff in that case, saying you had not met that statutory burden of showing service was made at a time that the -- when the -- at a time when the person was known to the establishment to be obviously intoxicated. Young v. DFW went back to the (indiscernible) and said that you cannot take away that common law cause of action by statute. A statute that does that is unconstitutional.

In the Young case, the court said that the burden on the tavern owner is to know or -- but yeah, the burden on the tavern owner is to know what's going on with his patrons. You do that through monitoring, which isn't done here. You do it, in part, by not selling mass quantities of alcohol, because, at

some point, when somebody you're selling mass quantities of alcohol, you miss that point when that beer taken out of that bucket is the one that puts the customer over the edge, over to the point of obvious intoxication.

And so, the standard is that the tavern owner must know or the exercise -- exercise or reasonable diligence, should know that the person is intoxicated. When you're not paying attention, you can never know that. And that's what happened.

We have met our burden. We've established the breach of the common law standard of care. We've established the breach of the statutory through the testimony of Dr. McCabe, that Mr. Villanueva was obviously intoxicated. We have met our burden. And consequently, the Defendant's motion should be denied.

MR. KOGLMEIER: Thank you. Just briefly to add just a little bit, Your Honor. JAI, who served alcohol to Mr. Aguilera, and then the resulting bad decisions by Mr. Aguilera, as Dr. McCabe testified to, that's how the alcohol affects you. They are really in no position now to claim some type of superseding intervening cause. They created it. Now they're saying they have no responsibility for it. I agree with Mr. Clarke. That responsibility would end when he's no longer under the influence of the intoxicating liquor that they served.

We had certain -- plenty of evidence to show that he's obviously intoxicated based on the science that Dr. McCabe testified to today. We have more than sufficient evidence, based on the knew or should have known standard, the common law standard, that they overserved him. They served three people 60 ounces of beer each. And violation of statute right there. They didn't monitor. They didn't do anything to control the flow of alcohol, which they have a duty to do.

We would ask that the motion be denied.

THE COURT: Ms. Ritenour, did you want to be heard?

MS. RITENOUR: I do not, Your Honor. Thank you.

THE COURT: All right. Anything else?

MS. BARRETT: Yes, Your Honor.

THE COURT: Ms. Barrett.

MS. BARRETT: The operative time which one must look at whether someone must look at whether is obviously intoxicated is at the time of service. And in this particular case, it is undisputed, at the time of the service of the mega bucket, Mr. Aguilera was not intoxicated.

With respect to the intervening cause, intervening and superseding cause. It was not foreseeable that once Mr. Aguilera got home and got in bed, that he would leave that particular location. Otherwise, there would be no point in having somebody take a cab home. It would require the club to basically lock him in his house and somehow hold him hostage in

his own house until he sobers up. And that's not realistic. That's not what the law requires. And in this particular case it's not foreseeable that once he got home, that he was going to leave.

THE COURT: Okay. I those are factual questions for the jury. Under Rule 50, the standard is if a party has been fully heard on an issue during a jury trial, and the court finds that a reasonable jury would not have any (indiscernible) sufficient evidentiary basis to find that (indiscernible) in that issue. I find that there is sufficient evidence (indiscernible). So as to all (indiscernible). So the Rule 50 motion is denied.

All right. Is there anything else?

MR. CLARKE: Nothing from Plaintiffs, Your Honor.

MR. KOGLMEIER: (indiscernible).

THE COURT: So here's what I would like to do.

Do you have any witnesses?

UNIDENTIFIED SPEAKER: Three.

THE COURT: Three. And do you think you're going to be able to get them all in on Monday? We start at 9.

MS. BAILEY: I think we'd probably go into Tuesday.

MS. BARRETT: Tuesday morning, yeah.

THE COURT: Okay. So I'm happy to stay late to do jury instructions. We could do them during the noon hour. Probably at the end of the day would be better.

MR. KOGLMEIER: We do that Monday? I guess we're going to argue Tuesday.

THE COURT: If you're going to argue Tuesday, I'm sure that you would like to have the jury instructions, so that you can prepare your closing arguments.

MS. BARRETT: Yes.

MR. KOGLMEIER: Perfect.

THE COURT: So let's just -- we'll hopefully be able to adjourn by like 4:00 to do jury instructions. The way that I do them, just so that you're prepared, is I go page by page by page. And if you have objections, then you let me know page by page by page. And that goes as for the verdict forms as well. The verdict forms you received is just the basic language. The clerk will put it into the appropriate format with all of the lines for the jurors to sign. This is just the basic language.

So like I said, I'm not (indiscernible) to any of them. And if you want to change them, I'm open to doing that. It's just something to use as a starting point.

All right. Anything else for today?

MR. CLARKE: Nothing, Your Honor.

MR. KOGLMEIER: Nothing further.

THE COURT: All right. Have a nice weekend.

MS. BARRETT: Your Honor, thank you.

(Proceedings adjourned at 2:41 p.m.)

CERTIFICATE

I, Erin Perkins, CET-601, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): ANTOINETTE FRANKS, CET-683

/s/
ERIN PERKINS, CET-601 March 25, 2019
Proofreader

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, et al., Plaintiffs, v. CESAR AGUILERA VILLANUEVA, et al., Defendants.	No. CV 2016-016688

Phoenix, Arizona
March 04, 2019
9:15 a.m.

BEFORE THE HONORABLE SHERRY K. STEPHENS

TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 6

Proceedings recorded by electronic sound recording; transcript produced by U.C.C., LLC.

ANTOINETTE M. FRANKS
Transcriptionist
CET-683

I N D E X

March 04, 2019

Jury Trial - Day 6

M I S C E L L A N E O U S

APPEARANCES

March 04, 2019

Judge: Sherry K. Stephens

For the Plaintiffs Torres and Guillen:

Robert F. Clarke

Witnesses:

None

For the Plaintiffs Gastelum Rosas and Suarez:

Matthew D. Koglmeier

Witnesses:

None

For the Defendant Cesar Aguilera Villanueva:

Megan Ritenour

Witnesses:

None

For the Defendant JAI Dining Services, Inc.:

Dominique K. Barrett

Jenna C. Bailey

Witnesses:

John Allen

Robert Clements

APPEARANCES (Continued)

March 4, 2019

Also Appearing:

Roberto Torres, Plaintiff

Orlenda Guillen, Plaintiff

Hernan Gastelum Rosas, Plaintiff

Maria Suarez, Plaintiff

Cesar Aguilera Villanueva, Defendant

Sylvia Fisher, Interpreter

Tom Cromwell, Interpreter

THE COURT: -- intervening --
MS. BARRETT: -- cause.
THE COURT: -- cause. Okay.
MS. BARRETT: And I don't know if negligence needs to be capitalized in the proximate cause paragraph.
THE COURT: Let's see. Where is it? Yes.
MS. BARRETT: The third line.
THE COURT: I agree.
MS. BAILEY: And then at the bottom, to have a section about (indiscernible) shop liability. It seems like that's the general legal theory. But then, really, there's just negligence and there's negligence per se. So it seems confusing. That makes it seem like that's like a different claim, and really, it's just kind of the legal theory.
THE COURT: Well, that's how it was in the amended complaint.
So, Plaintiffs?
MR. KOGLMEIER: Your Honor, this is the known or should have known standard. And I think the jury is entitled to have it. And that's one of the standards at this point. On the basis that they can find Jaguars responsible.
THE COURT: So it's just that it's a slightly different theory?
MR. KOGLMEIER: Yes.
THE COURT: Okay. All right.

I shouldn't go over that.

THE COURT: Okay. So we'll let you complete your arguments after lunch. We'll take the afternoon break, and then we'll let you finish arguing.

MS. BARRETT: Thank you.

THE COURT: Okay. All right. Thank you. We'll see you tomorrow.

MR. CLARKE: Thank you, Your Honor.

(Proceedings adjourned at 3:49 p.m.)

CERTIFICATE

I, Erin Perkins, CET-601, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): ANTOINETTE FRANKS, CET-683

/s/
ERIN PERKINS, CET-601 March 25, 2019
Proofreader

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, et al., Plaintiffs, v. CESAR AGUILERA VILLANUEVA, et al., Defendants.	No. CV 2016-016688

Phoenix, Arizona
March 05, 2019
9:31 a.m.

BEFORE THE HONORABLE SHERRY K. STEPHENS

TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 7

Proceedings recorded by electronic sound recording; transcript produced by U.C.C., LLC.

ERIN PERKINS, CET-601
MELISSA LOONEY, CET-607
DIPTI PATEL, CET-997
Transcriptionist

I N D E X

March 05, 2019

Jury Trial - Day 7

PLAINTIFFS' WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	VD
None					

JAI DINING WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS	VD
Dallas Cowan	5	56	138		

M I S C E L L A N E O U S

APPEARANCES

March 05, 2019

Judge: Sherry K. Stephens

For the Plaintiffs Torres and Guillen:

Robert F. Clarke

Witnesses:

None

For the Plaintiffs Gastelum Rosas and Suarez:

Matthew Koglmeier

Witnesses:

None

For the Defendant Cesar Aguilera Villanueva:

Megan Ritenour

Witnesses:

None

For the Defendant JAI Dining Services, Inc.:

Dominique K. Barrett

Jenna C. Bailey

Darrell L. Barger

Witnesses:

Dr. Dallas Cowan

APPEARANCES (Continued)

March 05, 2019

Also Appearing:

Hernan Gastelum Rosas, Plaintiff

Maria Suarez, Plaintiff

Roberto Torres, Plaintiff

Orlenda Guillen, Plaintiff

Cesar Aguilera Villanueva, Defendant

Sylvia Fisher, Interpreter

Tom Cromwell, Interpreter

being obviously intoxicated beyond that. And that's been studied in the peer-reviewed literature in a variety of different studies settings where, again, you have those experts who are -- people have a known BAC, they -- and they can't really identify who's drunk and who's not until you get above this number.

Q So if the working definition that we have here in Arizona of obvious intoxication, essentially is inebriated to such an extent that any member of the public would think that it's obvious, you would put that in this bottom category?

A That's correct, beyond twice the legal limit, .16 to .2, much higher BACs than we're talking about in this case.

Q So the average person would not show signs of obvious intoxication until we're getting to this bottom level?

A Right, the average -- well, the average person would not show them until you get to above .15. An alcohol-tolerant person or a binge drinker would be even higher.

Q Okay. All right. Let's move into this case a little bit. Good job. Thank you. I assume in being a part of this case, you were -- reviewed a number of materials, like the police report, the depositions, things like that?

A Yes, I've reviewed a variety of materials over the last two years, including legal documents, deposition testimony, police reports, things of that nature.

Q And we're not going to list them all, but the

have been at, at the time he entered the bar. He testified that he had one drink from a tub and then they ordered a mega bucket, something similar. That's -- I've never seen one of them before, but 15 beers in a bucket that were split between a group of people. Even if you say the worst case scenario that's divided by three people, then you're talking about five beers; one when he came in, another five, and then we'll talk about the course of events later, but he even testified, in this case as well as told the police, it was between six and seven beers that he had consumed over the period of two and a half hours at Jaguars.

Q So you -- in the police report, you read that Mr. Aguilera told the cops, hey, I had six or seven beers at Jaguars?

A That's correct.

Q So even --

A Or he -- I think he said he had six to seven beers. So that could be --

Q That's true, okay.

A -- up until that point, it could include the first four, but he said six to seven beers. The conservative assumption is I put those at Jaguars, six to seven beers.

Q Okay. So let's --

A So --

Q -- let's put those all at Jaguars and let's -- let's

A I didn't write that opinion.
Q -- so maybe it appears in some legal document, that's not something you've ever held?
A No, ma'am.
Q And you told Plaintiffs' counsel that in your deposition too, you were confronted with that opinion and you said that's not my opinion; I don't know what that is?
A It was never my opinion.
Q Okay. Let's talk a little bit about obvious intoxication.
A Sure. I've been mentioning some peer-reviewed studies, or studies where we were -- they were interested in understanding how observations can affect whether you can tell whether someone is obviously intoxicated. So what they did was they took many different studies where they take emergency room doctors, who often see people come in drunk, alcohol counselors, and other experts and they have them at different blood alcohol concentrations. And they test whether somebody can pick out the person that's obviously intoxicated. And the very low alcohol concentrations at the .1 and even up to .15, they weren't able to pick -- they weren't able to pick out the intoxicated person or identify who was obviously and visibly intoxicated. It wasn't until you got to .15 or above .15 where trained professionals could even identify someone who is obviously intoxicated. And it's not until you get .2 where the

overwhelming majority of all drinkers would be obviously intoxicated.

So this is important because I think one of the standards here is, was Mr. Aguilera obviously intoxicated at either point of sale or when he left the bar and I think clearly, based on the methods of calculating his blood alcohol concentration, the peer-reviewed literature, and the Brick (phonetic) study was one that was offered by Dr. McCabe, even says that you can't do that, even the trained experts have a hard time doing it until they get to between .16 and .20, in that range.

Q All right. Talk to us a little bit more. At the beginning, we talked a lot about your training and experience. Talk to --

A Yeah.

Q -- us a little bit more about your background and your kind of ongoing keeping up with the literature and things like that, that allows you to talk to us about sleep deprivation and driving.

A Sure. So I offer opinions as in risk assessment. And risk assessment has maybe ten different components that includes industrial hygiene, toxicology, epidemiology, reviewing primary and peer-reviewed literature. And one of those areas is something like sleep deprivation. So as a risk assessor, you want to understand whether someone had been away

And let me discuss with you what we know about Cesar's state of intoxication. First of all, we don't know anything from Jaguars. It overserved, it failed to monitor, and it failed to take any action to either determine Cesar was intoxication or to prevent him from leaving Jaguars and become a danger to himself. Jaguars failed to break the chain of liability that attached to it.

Please don't be fooled by the relentless chant from Jaguars about its monitoring. Its general manager, Ricardo Hernandez testified last week, that the way Jaguars is set up, the dark room, the light shows, the disco balls, dancers everywhere, dancers drinking with customers, loud customers, loud music, he agrees that there is really no way to monitor what people drink.

He also stated that there are multiple servers and there was no way for those servers to communicate with each other. Mr. Garcia described for you, as I said earlier, a free for all, among the servers. Jaguars president, Eric Langan believes in the multiple server approach, because he doesn't want his customers having to wait.

John Allen testified yesterday that what Jaguars doesn't want its customers to wait for is more alcohol. We do know, however, that at 7:14 a.m. Sgt. White, who testified a few days ago, obtained blood samples from Mr. Aguilera. From those blood samples, we know, and it is uncontroverted that

Hernan and Maria experienced, the losses of their children.

We must show you that those events were unbroken by any intervening and superseding cause. Judge Stephens instructed you that an intervening clause must first be an independent cause. That is, it must be independent in origin from Jaguars' wrongful conduct. If there is an independent cause, you then move to the analysis of whether or not that cause supersedes liability.

If you decide it's not an independent cause, not independent origin, or if you find that it is not a cause of independent origin from which Jaguars' conduct is measured, then it cannot be an intervening cause. But if you believe that Mr. Aguilera's alcohol-impaired decision, alcohol-impaired judgment, alcohol-impaired physical functioning, alcohol-impaired perception, and alcohol-impaired reaction are somehow independent of Jaguars' actions in serving Mr. Aguilera all that alcohol to the point of intoxication, then and only then, can you determine whether or not Jaguars' actions -- I'm sorry, whether or not Aguilera's actions were unforeseeable by a reasonable person in Jaguars' position. Or in the exercise of hindsight, extraordinary.

Jaguars is charged as it is with malice that intoxication is foreseeable and further charged with the duty to exercise reasonable care to make sure its customers don't become intoxicated and don't become a danger to the public.

vehicle and drive another? How unforeseeable is that? How extraordinary is that? People who drink make bad decisions. They have a loss of critical judgment. That is one of the effects of alcohol and that's why it's necessary to be so careful when you sell alcohol. And that's why they have so many duties.

So Mr. Aguilera goes to Joel's house, goes -- what if he had gone to Denny's and stopped and got something to eat? And then he went over to some place, in a parking lot and fell asleep for 15 or 20 minutes and then continued driving? The reality is, Jaguars did nothing to get Mr. Aguilera home safely. They let him go. So they are responsible until the effects of that alcohol wear off to the point where he can get back to the position of making a good decision.

Years ago when I was taught to shoot out on the range, I was told that I was responsible -- when I pulled that trigger, I was responsible until that bullet stopped. I'm responsible for anything that happens between the time that bullet leaves the muzzle and when it finally stops. That's the same way in this case. Jaguars is responsible -- when they serve alcohol and they get somebody impaired, their responsible until that person is no longer impaired, is no longer a danger to others. He doesn't stop being a danger to people simply because he stops at a house and goes to sleep for a few minutes. It's very foreseeable that someone would get up and

Why is Jaguars in business in inviting people like Cesar? To sell alcohol. Sixty-five/thirty-five when the professional, the one in charge, the one who has a duty every bit as great as the drinker to serve responsibility -- to serve responsibly versus consumer responsibly. That professional is in the unique position of not only knowing but being required by law to know the effects of alcohol. Remember what Dr. Cowan showed us in some of his slides. It's poison. Sure, a beer or two probably isn't going to hurt you. You're going to enjoy it. You're going to relax. You're going to lose your inhibitions a little bit.

But too much of it is a poison, and for that very reason, the professional, the one in charge, the licensee, the guy who apparently has 17 of these licenses, if he doesn't know, nobody knows. And the law says you, Mr. Langan, have to know. When you run your clubs, you have to know.

I want to clear another issue up. Counsel suggested that dram shop liability is based on this violation of the statute. No, violation of statute liability is based on violation of the statute. The dram shop liability is quite simply imposes on tavern owners such as Jaguars the duty to exercise reasonable care when they sell liquor to a patron or customer under circumstances where the licensee or his employees know or should know that such conduct creates an unreasonable risk of harm to others who may be injured either

on or off the premises.

When does the service of alcohol create an unreasonable risk of harm? When you don't monitor it. When you don't control it. When you start the evening overserving with four mixed drinks, one of which is an AMF, (indiscernible) which is an AMF, five bottles of Corona, and a mega bucket of Budweiser. When you plop down that mega bucket knowing three men are the ones that ordered it and hope no one's going to drink 40 ounces of it because that's what the law requires.

You heard some more talk a few moments ago about receipts, about Exhibit No. 50. Exhibit 50 is all these heavily redacted receipts reflecting only cash sales that night. Where are the AMFs? If everyone's just tossing money on the table to buy these drinks, where are the AMFs? Where are the five bottle buckets of Coronas? Where are the other mixed drinks that the other women were drinking? You don't see them (indiscernible).

Where is the payment of the cover charge by Cesar and his family? Where is the purchase of initial beer? Now they said during cross-examination of somebody, I can't remember who, that, well, if you look, the receipts start at Page -- apparently Page 7. So where is Page 1 through 6? Maybe it's on there. Well, Page 7 starts with a Corona purchased at 11:21:04 p.m., just a couple of seconds after 11:21. In Exhibit 47 in by stipulation, this is Mr. Aguilera's screenshot

out about RCI Management Services 30 days before this trial and they're heavily involved. And they control all of that outside video. Whereas, ask yourself -- when you go back into the jury room, ask yourself why we don't have it. What would that have shown? They've got the patio area, they've got the parking lot. Let's see it. Why don't we have full records? Why don't we have seven people paying cover charges? Why don't we see these things.

You heard so much about monitoring. Just ask yourself is what they're doing reasonable. Is how they conduct their business reasonable? Is it negligent? Is it the Del Marva standard? To even suggest that he made this up for this case? The fact is he said you need to monitor and so did Mr. Clements. They just had it a little different way. How do you monitor how much, how fast, and what people are drinking if you're not watching what they're drinking? It's the same thing. Nothing but double talk.

Superseding intervening cause, something extraordinary based on hindsight. Can you expect a professional who knows what the effects of alcohol to be to expect that people would make bad decisions until they sober up? Of course. The fact that he may have gotten home at some point or to his brother's house which he said was to sober up. It was between Jaguars and his house. He stops to sober up, it's what he told the police. That's what he told us. He's

THE BAILIFF: All rise for the jury.

(Jury out at 4:54 p.m.)

THE COURT: All right. The record will show the jury's left the courtroom. All right. Please leave a cell o number where we can reach you. Please be no further away than 30 minutes from the courtroom in the event we have verdict.

With regard to the multi-part of the trial, we'll discuss that after the verdict comes in. All right. Is there anything else for today?

MR. CLARKE: Nothing from Plaintiffs, Your Honor.

THE COURT: All right. Thank you.

(Proceedings adjourned at 4:55 p.m.)

CERTIFICATE

I, Erin Perkins, CET-601, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): ERIN PERKINS, CET-601
MELISSA LOONEY, CET-607
DIPTI PATEL, CET-997

/s/
ERIN PERKINS, CET-601 March 25, 2019
Proofreader

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ROBERTO TORRES, et al.	)	
	)	
	)	
vs.	)	
	)	No. CV 2016-016688
	)	
CESAR AGUILERA VILLANUEVA, et al.	)	
	)	
	)	
	)	
	)	

Phoenix, Arizona
June 18, 2019

BEFORE: The Honorable Sherry K. Stephens
Judge of the Superior Court

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Oral Argument)

Marylynn LeMoine, RMR, CRI
Certified Reporter #50441

SUPERIOR COURT

A P P E A R A N C E S

On Behalf of the Plaintiffs Roberto Torres and Orlenda Guillen:

Robert F. Clarke, Esq.

On Behalf of the Plaintiffs Hernan Gastelum Rosas and Maria Suarez:

Theodore Horowitz, Esq.

On Behalf of the Defendant JAI Dining Services, Inc.:

Dominique Barrett, Esq.

Eric Fraser, Esq.

On Behalf of the Defendant Cesar Aguilera Villanueva:

Megan Ritenour, Esq. (Telephonic)

whether on or off the premises.

That duty doesn't end simply because somebody leaves. That duty doesn't end simply because someone stops at Place A and has breakfast, stops at Place B and gets gas, and then goes home for a few minutes. That duty continues unless the tavern owner breaks the chain of liability or the drunk or the driver's conduct is no longer subject to the influence of the alcohol that was over served.

Nothing here interfered with -- nothing here broke that duty. The only question that the jury had to answer in this case was whether or not the actions of Mr. Aguilera in getting home and then leaving again were intervening -- were -- constituted an intervening event superseding liability.

In other words, were his actions so independent in origin that they were clearly unforeseeable by the tavern owner or the exercise of reasonable hindsight so extraordinary as to relieve the tavern owner, JAI, from liability?

To suggest that *Patterson* versus *Thunder Pass* stands for the proposition that a drunk driver getting home and then leaving again constitutes an intervening event superseding liability as a matter of law is contrary to that holding.

Dupray made that absolutely clear. In the *Dupray* case, the Court said not that there is one fact question, but that there are several fact questions.

Whether the homes of his friend, Panameno, or his girlfriend were places of repose, which might make unforeseeable his decision to leave them and continue driving, were factual questions for the jury, not for the trial Court, to determine.

By the way, an undisputed fact in Panameno was -- or in *Dupray* was that Panameno -- Panameno considered his girlfriend's house his home, his place of repose. That was the uncontroverted evidence.

Nonetheless, JAI, the same defendant urged in the *Dupray* case that the Court should follow *Patterson*. First ignore all that business about getting the drunk driver home that occurred in *Patterson*, but the trial Court should ignore *Patterson* or should apply *Patterson* and simply say that since Panameno made it home and then left again, JAI is denied or his liability is relieved.

The *Dupray* Court found two distinctions between the facts in *Dupray* and the facts in *Patterson*.

First, of course, is the fact that in *Patterson*, once the bar breached its first duty by failing to monitor and control over service, the bar

then met its second duty by making sure that the drunk got home safely, taking her keys away from her, and it is against that conduct by the bar, broke the chain of liability.

The Court of appeals says it twice in the *Patterson* decision. *Thunder Pass'* actions in taking the car keys away and driving her home broke the chain of liability, and it was from that perspective of having done what is reasonable, what the law requires, is from that perspective that that drunk, Ms. Roque's subsequent actions in getting -- coming back in your car, causing a wreck, was unforeseeable, and superseded the liability and supported the grant of summary judgment.

The second reason the Court said is that the record contains no evidence, just as in this case, that JAI knew in *Dupray*, just as JAI didn't know in this case, how Panameno arrived or departed from the club, where he was heading after he left, or where he was staying.

Plus, a jury could have reasonably concluded that Panameno's collision with Dupray was foreseeable from JAI's perspective. It's measured from the perspective of the barkeeper and what the barkeeper did to, if anything, to address its ongoing duty.

The illustration that counsel used

regarding calling Uber, well, the evidence in *Dupray* was that Panameno was taken to and taken from Jaguar's by someone else, so there is evidence that there was a designated driver in that case.

Still, the Court of Appeals said it's still a fact question for the jury to decide.

The reason the Court doesn't get to sort of contort the definition or the reason the defendant doesn't get to contort the definition of duty to say that something happens magically to end the duty once certain conduct occurs is because those are questions of fact. Those are questions, whether they're undisputed or not. Those are questions that the jury gets to determine the legal significance.

The jury in our case was charged with -- and properly instructed by the Court -- to determine whether or not those undisputed facts of Mr. Aguilera getting home and leaving again, whether those were independent in a sufficient -- sufficiently independent to constitute an intervening event superseding liability, and the jury answered that question in favor of the plaintiffs.

There is nothing more for the Court to do. These issues have been decided, and in fact, JAI is precluded from litigating these issues all over again.

that they cannot control?

If there are any questions, I'd be happy to answer them.

THE COURT: No, I don't have any questions. Thank you.

It's a very interesting issue. I think there is law on both sides of this issue. I can certainly understand the position of both parties, but I am going to deny the motion for Rule 50(b) relief.

I believe that the matter was appropriately submitted to the jury. I believe that they made a decision, and if the Court of Appeals wants to set public policy, that's their job, not mine.

MR. FRASER: Thank you, Your Honor.

THE COURT: So that's my ruling.

Is there anything else for today?

MR. CLARKE: Nothing for Torres and Guillen plaintiffs, Your Honor.

MR. HOROWITZ: Nothing for Rosas and Suarez, Your Honor.

THE COURT: All right. Thank you.

We're adjourned.

(Whereupon, the proceedings were concluded for the day.)

C E R T I F I C A T E

I, MARYLYNN LEMOINE, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

DATED and signed this 12th day of July, 2019.

_____

Marylynn LeMoine, RMR, CRI
Certified Reporter #50441

2010 WL 3366656
Only the Westlaw citation is currently available.
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R.Crim. P. 31.24
Court of Appeals of Arizona,
Division 1, Department C.

Cymone J. ANDERSON; Gwendolyn Moore, individually and as a natural mother and next best friend of Cymone J. Anderson, an incapacitated adult; and Eric Anderson, Jr., Plaintiffs/Appellants,
v.
MATADOR MEXICAN FOOD RESTAURANT, INC.; Graham Brothers Entertainment of Tempe Limited Partnership, dba Graham Central Station, Defendants/Appellees.

No. 1 CA–CV 09–0254.
|
Aug. 26, 2010.

Appeal from the Superior Court in Maricopa County; Cause No. CV2006–017444, CV2007–011013, CV2008–013785 (Consolidated); The Honorable Edward O. Burke, Judge. AFFIRMED.

Attorneys and Law Firms

Gallagher & Kennedy PA By Mark S. O'Connor and Matthew MacLeod and Tidmore Law Offices LLP By Steve M. Tidmore and Ilya E. Lerma, Phoenix, Co–Counsel for Plaintiffs/Appellants.

Parrillo, Weiss & O'Halloran By Ronald E. Huser, Tempe, Attorneys for Defendant/Appellee Matador Mexican Food Restaurant, Inc.

Schneider & Onofry PC By Charles D. Onofry and Luane Rosen, Phoenix, Attorneys for Defendants/Appellees Graham Brothers Entertainment of Tempe and Graham Central Station.

MEMORANDUM DECISION

SWANN, Judge.

***1** {¶ 1} Gwendolyn Moore, Cymone Anderson, and Eric Anderson, Jr. (collectively, "plaintiffs") appeal from the superior court's grant of summary judgment for Matador Mexican Food Restaurant, Inc. ("Matador") and Graham Brothers Entertainment of Tempe Limited Partnership, ("Graham") d/b/a Graham Central Station. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

{¶ 2} Because we are reviewing a decision granting summary judgment in favor of Matador and Graham, we view the facts in the light most favorable to plaintiffs. *Andrews v. Blake,* 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003).

{¶ 3} Matador and Graham are liquor licensees that operate businesses in Phoenix and Tempe, respectively. On the evening of June 23, 2006, Deanna Devon Charles and her friend Victoria drove to Matador in Deanna's car. They began drinking at Matador at approximately 11:00 p.m. At approximately 12:30 a.m. on June 24, 2006, Deanna called her sister, Nicole, and asked to be picked up. Shortly thereafter, Nicole and her friend Loren met Deanna at her parked car. They observed that Deanna appeared to be intoxicated, and when Deanna asked them to transport her and Victoria to Graham Central Station, they agreed to do so. Matador did not confirm that Nicole and Loren would be providing Deanna's transportation.

{¶ 4} Loren drove Deanna and Victoria to Graham Central Station in Deanna's car, and Nicole followed in a separate vehicle. Loren dropped Deanna and Victoria at Graham Central Station at approximately 1:00 a.m., watched them enter, and then met Nicole at a nearby convenience store.

{¶ 5} According to a toxicology expert's calculation, Deanna consumed liquor at Graham Central Station. She left the establishment at closing time, 2:00 a.m. Loren, who was still driving Deanna's car, then picked up Deanna and Victoria in the parking lot. Loren did not see or speak to any Graham Central Station employees. He and Nicole observed that Deanna appeared to be even more intoxicated than before—she was staggering and leaning on Victoria.

{¶ 6} Loren drove Victoria to her residence and then drove Deanna to her apartment, where Nicole had already arrived in

her own vehicle. Stopping only once during the trip (to allow Deanna to urinate on the street), Loren arrived at Deanna's apartment at approximately 3:00 a.m. Deanna had difficulty getting out of the car, and had to be helped up the stairs to her apartment. Loren put Deanna in her bedroom and left her car keys on a table by the door. Loren and Nicole then left the apartment, leaving Deanna's car. There was no liquor in the apartment.

{¶ 7} Sometime between 3:00 a.m. and 3:45 a.m., Deanna left her apartment in her car. When she failed to stop at a red light, she caused a collision that seriously injured plaintiffs Cymone and Eric Anderson. At the time of the collision, Deanna's blood alcohol concentration was 0.19%.

***2** {¶ 8} Plaintiffs filed a complaint against Matador and Graham for negligence and negligence per se pursuant to A.R.S. §§ 4–244(14) and 4–311. Plaintiffs Cymone and Eric Anderson also filed separate negligence complaints against Deanna; those complaints were consolidated with the complaint against Matador and Graham. Graham moved for summary judgment, asserting, *inter alia,* that Deanna's decision to leave her apartment was an intervening and superseding cause of plaintiffs' injuries. The superior court agreed. The court entered judgment in favor of Graham and Matador,[1] and dismissed all claims against them.[2]

{¶ 9} Plaintiffs timely appeal. We have jurisdiction pursuant to A.R.S. § 12–2101(B) (2003).

STANDARD OF REVIEW

{¶ 10} We review the grant of summary judgment *de novo, Andrews,* 205 Ariz. at 240, ¶ 12, 69 P.3d at 11, and will affirm if the superior court's ruling is correct for any reason. *Glaze v. Marcus,* 151 Ariz. 538, 540, 729 P.2d 342, 344 (App.1986).

DISCUSSION

{¶ 11} To establish a negligence claim, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) the defendant's failure to conform to that standard; (3) a reasonably close causal connection between the defendant's conduct and the plaintiff's resulting injury; and (4) actual damages. *Ontiveros v. Borak,* 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983).

{¶ 12} In Arizona, a liquor licensee has a duty "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." *Patterson v. Thunder Pass, Inc.,* 214 Ariz. 435, 438, ¶ 13, 153 P.3d 1064, 1067 (App.2007) (citing *Ontiveros,* 136 Ariz. at 508–11, 667 P.2d at 208–11; *Brannigan v. Raybuck,* 136 Ariz. 513, 515–17, 667 P.2d 213, 215–17 (1983)). To recover for negligence, a plaintiff also must show that the liquor licensee's negligent conduct was the proximate cause of his injury. *Hebert v. Club 37 Bar,* 145 Ariz. 351, 353, 145 Ariz. 351, 701 P.2d 847, 849 (App.1984). Similarly, to recover under Arizona's "dramshop statute," A.R.S. § 4–311 (Supp.2009),[3] the plaintiff must show that a licensee sold liquor to an obviously intoxicated[4] person and that person's consumption of the liquor was a proximate cause of the plaintiff's injury.

{¶ 13} Whether proximate cause exists is usually a question for the jury; however, summary judgment is appropriate where reasonable people could not differ. *Robertson v. Sixpence Inns of Am., Inc.,* 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). "The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Id.* "An intervening cause is an independent cause that intervenes between defendant's original negligent act or omission and the final result and is necessary in bringing about that result." *Id.* An intervening cause becomes a superseding cause, and thereby relieves the defendant of liability, when the intervening cause was "unforeseeable by a reasonable person in the position of the original actor *and* when, looking backward, after the event, the intervening act appears extraordinary." *Ontiveros,* 136 Ariz. at 506, 667 P.2d at 206.

***3** {¶ 14} Here, the superior court found an intervening and superseding cause based on *Patterson.* In *Patterson,* a tavern employee confiscated an intoxicated patron's car keys, used a different vehicle to drive the patron to her residence, returned the patron's keys to her, and left. 214 Ariz. at 436, ¶ 3, 153 P.3d at 1065. Within an hour, the patron secretly returned to the tavern parking lot, retrieved her car, and caused a collision. *Id.* The injured plaintiff filed suit against the tavern. *Id.* at ¶ 4, 153 P.3d 1064. The superior court granted summary judgment in favor of the tavern. *Id.* at 436–37, ¶ 5, 153 P.3d at 1065–66. We affirmed on two grounds.

{¶ 15} First, we held that by separating the patron from her car and providing her safe transportation to her residence, the

tavern had fulfilled its legal duty of care to the patron and the public. *Id.* at 439, ¶ 16, 153 P.3d at 1068. Second, we held that even if the tavern had breached its duty, an intervening and superseding cause relieved it of liability. *Id.* at 439–40, ¶ ¶ 17–19, 153 P.3d 1064, 153 P.3d at 1068–69. We explained:

> Certainly, it is foreseeable to a tavern owner that patrons of the tavern may become involved in a motor vehicle accident after being served liquor past the point of intoxication.
>
> However, that statement does not end our analysis because the question remains whether the intervening acts of separating [the patron] from her vehicle and driving her home broke the chain of legal causation such as to relieve [the tavern] of liability in this case. We conclude that they did. Although, as [the plaintiff] correctly notes, "[i]t is well known that highly intoxicated people make poor decisions," finding proximate causation based on such reasoning is simply too attenuated and might ultimately subject tavern owners to unlimited liability, a result that would no more serve public policy than finding nonliability in all circumstances. Instead, we hold that *[the patron's] decision to return that night to retrieve her vehicle while she was still intoxicated was unforeseeable and extraordinary and thus constituted a superseding, intervening event of independent origin that negated any negligence on the part of the tavern or its employees.*

Id. at 440, ¶¶ 18–19, 153 P.3d at 1069 (emphasis added) (internal citation omitted).

{¶ 16} Matador and Graham contend that pursuant to *Patterson,* Deanna's decision to leave her apartment after having been transported there by Loren and Nicole was an intervening and superseding cause of plaintiffs' injuries. Plaintiffs contend that *Patterson* is distinguishable because unlike the tavern in *Patterson,* neither Matador nor Graham took any action to ensure that a sober driver would transport Deanna from their premises, place her in a safe location, and take reasonable steps to ensure that she would not have access to an automobile while she was still intoxicated.

{¶ 17} Plaintiffs' argument addresses breach of duty, rather than causation. To be sure, Matador and Graham may well have breached their duties, and for purposes of our decision we assume that they did. But causation requires a different inquiry. Had the accident occurred as Deanna was driving herself home from a bar, the result here would be different. But the chain of events established by the undisputed facts compels us to recognize that the risk caused by an intoxicated driver, who has safely reached her home and has no known compelling reason to leave, cannot reasonably be said to fall within the risk created by a licensee's act of serving a patron too much alcohol.[5] The latter risk lies chiefly in the fact that a person who becomes intoxicated at a commercial establishment may be unable to return to her home or other place of repose safely. But when the patron has safely been transported home, the risk of her deciding to leave home and take to the roads is no different than if she had become intoxicated at home with alcohol purchased at a store in package form.

***4** {¶ 18} As *Patterson* expressly acknowledged, where there is an intervening and superseding cause, a tavern cannot be held liable regardless of breach. We agree with Matador and Graham that as in *Patterson,* Deanna's independent decision to leave her apartment and drive was an intervening and superseding cause that broke the chain of proximate causation. Accordingly, summary judgment in favor of Matador and Graham was appropriate.[6]

{¶ 19} Pursuant to A.R.S. § 12–342 and ARCAP 21, Graham requests an award of costs on appeal. Matador expressly waives any right to recover costs. Because A.R.S. § 12–342 is mandatory, we award Graham its costs on appeal.

CONCLUSION

{¶ 20} For the reasons set forth above, we affirm the superior court's grant of summary judgment in favor of Matador and Graham.

CONCURRING: MARGARET H. DOWNIE, Presiding Judge and DONN KESSLER, Judge.

All Citations

Not Reported in P.3d, 2010 WL 3366656

Footnotes

1 The parties had stipulated that summary judgment would be entered in favor of Matador, which had not filed a motion for summary judgment, on the same ground as for Graham.

2 The court originally dismissed the "Complaint in its entirety," but the parties later stipulated to an amended *nunc pro tunc* judgment that contained Ariz. R. Civ. P. 54(b) language. The amended judgment acknowledged that plaintiffs' claims against Deanna remained.

3 We cite the current version of statutes when no revisions material to our decision have since occurred.

4 "Obviously intoxicated" means "inebriated to such an extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction that would have been obvious to a reasonable person." A.R.S. § 4–311(D) (Supp.2009) (previously § 4–311(C)).

5 At oral argument on appeal, plaintiffs' counsel contended that an intoxicated patron's negligent acts are always foreseeable, and a liquor licensee's liability is always a question of fact, until intoxication ends. We reject that theory, as it is inconsistent with *Patterson* and would impose essentially unlimited liability.

6 Because we conclude that summary judgment was appropriate on causation grounds, we need not address the issues raised in the parties' appellate briefs regarding duty and breach.

End of Document

2017 WL 1709509
Only the Westlaw citation is currently available.
NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona,
Division 1.

John W. YODER, Plaintiff/Appellant,
v.
TUX–XPRESS INC., Defendant/Appellee.

No. 1 CA–CV 16–0396
|
FILED 5/2/2017

Appeal from the Superior Court in Maricopa County, No. CV2014–013537, The Honorable Joshua D. Rogers, Judge.
AFFIRMED

Attorneys and Law Firms

Dillingham Law PLLC, Scottsdale, By John L. Dillingham, Counsel for Plaintiff/Appellant

Schneider & Onofry P.C., Phoenix, By Jon D. Schneider, Maria C. Lomeli, Counsel for Defendant/Appellee

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

MEMORANDUM DECISION

HOWE, Judge:

***1** ¶ 1 John W. Yoder appeals the trial court's granting summary judgment in favor of Tux–Xpress, Inc. Yoder argues that Tux–Xpress owed him a duty as a business invitee to provide reasonable means of ingress and egress from its store. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶ 2 One day in April 2013, Yoder went to Tux–Xpress to pick up a suit for his high school prom. When Yoder exited, he crossed through the landscape area in front of the store to get to the parking lot. The landscape area separated the sidewalk directly in front of Tux–Xpress and the parking lot. While crossing over the landscape area, Yoder stepped on a loose brick and fell face-first onto the parking lot curb. Yoder sued Tux–Xpress and the property owner, Ava Investments, LLC, alleging negligence in their failure to maintain the premises in a reasonably safe condition.

¶ 3 Tux–Xpress moved for summary judgment, arguing that Ava Investments owned and controlled the area where Yoder fell. Tux–Xpress submitted a statement of facts and the 1998 lease agreement with its motion for summary judgment. Although the lease was silent about who controlled the landscape area, the specific property leased to Tux–Xpress was Suite B. The lease required Tux–Xpress "to periodically sweep and clean the sidewalks and adjacent to the demised premises, as needed, and shall promptly remove all waste, trash, rubbish and papers accumulating on the premises." Additionally, the lease required Ava Investments to maintain in good repair the exterior walls, roof, and sidewalks.

¶ 4 To show that it never controlled or possessed the landscape area, Tux–Xpress alleged that it made no improvements or changes to the area before or after Yoder's fall. Before the bricks were installed, Tux–Xpress's owner informed Ava Investments of people walking their dogs through the landscape area and asked for something to be done. Ava Investments then hired a landscaper to "beautify" the area and install the bricks. Additionally, while other tenants put plants in the landscape area, Tux–Xpress never did so.

¶ 5 Yoder responded that control or possession of the landscape area was irrelevant to whether Tux–Xpress owed a duty to him as a business invitee. Although he argued that control was irrelevant, he disagreed that Tux–Xpress exercised no control or possession over the landscape area. Yoder alleged that Tux–Xpress had partial control over the landscape area because at one point in time it had to pay a portion of the area's water bill and that the other tenants installed plants in the landscape area.

¶ 6 After a hearing, the trial court granted Tux–Xpress summary judgment. The trial court noted that while "[i]t is true that the fact that an injury occurs off of a business' premises does not necessarily eliminate the business' duty ... [the duty] only extends to injuries occurring off its premises based upon the business' exercise of control over that which it has control,"—i.e., its own premises. The trial court

concluded that nothing in the lease transferred control of the landscape area to Tux–Xpress and that no evidence showed that Tux–Xpress controlled the landscape area. Yoder moved for reconsideration, which the trial court denied. After the trial court amended its judgment to add finality language pursuant to Arizona Rule of Civil Procedure 54(b), Yoder timely appealed.

DISCUSSION

***2** ¶ 7 Yoder argues that the trial court erroneously granted summary judgment because Tux–Xpress owed him a duty to maintain the landscape area outside its store. We review de novo the trial court's grant of summary judgment and view the facts in the light most favorable to the non-moving party. *Wickham v. Hopkins*, 226 Ariz. 468, 470 ¶ 7, 250 P.3d 245, 247 (App. 2011). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). Because Yoder did not present sufficient evidence to establish Tux–Xpress controlled or possessed the landscape area, the trial court did not err. [1]

¶ 8 To establish a claim for negligence, a plaintiff must prove four factors: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach of that standard of care; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages. *Gipson v. Kasey*, 214 Ariz. 141, 143 ¶ 9, 150 P.3d 228, 230 (2007). "Duty is defined as an obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Id.* at ¶ 10. Whether a duty exists is reviewed de novo and without such a finding, a negligence action cannot be maintained. *Wickham*, 226 Ariz. at 470–71 ¶ 8, 250 P.3d at 247–48.

¶ 9 Yoder argues that Tux–Xpress owed him a duty of care as a business invitee to keep the landscape area reasonably safe. A possessor of land has a duty to keep its premises reasonably safe for invitees. *Timmons v. Ross Dress for Less, Inc.*, 234 Ariz. 569, 570 ¶ 8, 324 P.3d 855, 856 (App. 2014). A possessor of land is defined as "a person who is in occupation of the land with intent to control it." *Id.* at 571 ¶ 8, 324 P.3d at 857. The lease between Tux–Xpress and Ava Investments states that the leased premises is Suite B. Further, the lease only required Tux–Xpress to periodically sweep the sidewalks and pick up trash. The lease did not require Tux–Xpress to do anything else regarding the area outside of Suite B. Instead, the lease required Ava Investments to maintain the exterior of the building and the sidewalks. Additionally, although other tenants took it upon themselves to plant flowers in the landscape area, Tux–Xpress never did so. On this record, we cannot say that Tux–Xpress either occupied the landscape area or intended to control it in any way. That Tux–Xpress did not change or alter the landscape area since it entered the lease with Ava Investments in 1998 supports this conclusion. Thus, Tux–Xpress did not have a duty to maintain the landscape area in which Yoder fell.

¶ 10 Yoder contends that as Tux–Xpress's business invitee, Tux–Xpress had a duty to provide reasonably safe means of ingress and egress from its store regardless whether Tux–Xpress exercised any control over the landscape area. Relying in part on *Stephens v. Bashas' Inc.*, 186 Ariz. 427, 924 P.2d 117 (App. 1996), Yoder argues that a business's duty extends beyond its own premises. But *Stephens* is distinguishable. In *Stephens*, a truck driver parked on a major street after a Bashas' employee told him that he could not park at Bashas' for lack of space. 186 Ariz. at 429, 924 P.2d at 119. A car hit Stephens as he walked to the back of his truck. *Id.* at 429, 924 P.2d at 119. Stephens sued Bashas' arguing that Bashas' had a duty to him as a business invitee. *Id.* at 429, 924 P.2d at 119. This Court found that "Bashas' had an affirmative duty to use reasonable care in conducting its business and maintaining its premises to avoid causing injury to Stephens," even though the injury occurred off Bashas' premises. *Id.* at 431, 924 P.2d at 121. Bashas's duty to Stephens as a business invitee arose from its failure to maintain its premises—the area it controlled—not the area where the accident occurred. Unlike *Stephens*, where Bashas' could have maintained its own lot so that Stephens would not have had to park on a major street, nothing that Tux–Xpress could have done or not done on its own premises would have had any effect on Yoder's use of the landscape area.

***3** ¶ 11 Yoder's reliance on *Timmons* is also misplaced. In *Timmons*, the plaintiff tripped outside of a Ross Dress for Less store and sued both Ross and the property owner for negligence. 234 Ariz. at 570 ¶ 2, 324 P.3d at 856. Ross argued that it had only a non-exclusive easement over the area where Timmons fell and therefore that it did not owe her a duty to keep the area safe. *Id.* at 571 ¶ 13, 324 P.3d at 857. This Court held that although Ross did not own the area where Timmons fell, the easement gave Ross sufficient control over the area to justify a duty to act reasonably in providing for the safety

of its invitees. *Id.* at 572 ¶ 16, 324 P.3d at 858. The Court's finding that Ross owed a duty to Timmons arose strictly from Ross's exercise of control over the area where Timmons tripped. Unlike the defendant in *Timmons*, Tux–Xpress's lease with its property owner contained no easement over the area where the accident occurred or any other language conferring control to Tux–Xpress and thus Tux–Xpress did not control or express an intent to control the area. [2]

¶ 12 Accordingly, a business owes a duty to its invitees when the business controls the area where an accident happens or when it fails to properly maintain its premises and that failure subsequently leads to an accident off its premises. Because Tux–Xpress did not control the landscape area, and Yoder did not show that Tux–Xpress failed to reasonably maintain Suite B, it did not owe a duty of care to Yoder.

CONCLUSION

¶ 13 For the foregoing reasons, we affirm.

All Citations

Not Reported in P.3d, 2017 WL 1709509

Footnotes

1 Because we hold that summary judgment was appropriate, we need not address Tux–Xpress's alternative argument that Yoder should be collaterally estopped from suing Tux–Xpress.

2 Yoder also relies on *Udy v. Calvary Corp.*, 162 Ariz. 7, 780 P.2d 1055 (1989). *Udy* is not useful here because it addressed a landlord's duty to a tenant and not a tenant's duty to a business invitee. We note, however, that the two concurring opinions considered the landlord's control over the premises in finding a duty existed. *See id.* at 16, 780 P.2d at 1064 (Jacobson, J., specially concurring) (finding a duty when the landlord controls the tenant's ability to protect himself from off-premises dangers); *id.* at 17, 780 P.2d at 1065 (Gerber, J., specially concurring) (finding the landlord's exclusive control over the premises a central fact in determining duty).

End of Document