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 REPLY BRIEF

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

A. The plaintiffs' arguments about the sufficiency of the evidence are irrelevant.

1. Whether the evidence (also) supports a finding contrary to the verdict misses the point.

As explained in the opening brief (at 13, 21-22) and more fully below (§ I.B, below), the jury found that JAI did not violate a statute and that Cesar was not "obviously intoxicated." The plaintiffs' argument section in the answering brief (at 27-30) leads by contending that the evidence was sufficient to infer that Cesar was obviously intoxicated.

This argument is irrelevant because the jury in fact found in JAI's favor on count 2. Tellingly, the plaintiffs do not argue that there was *insufficient* evidence to support that verdict, or that a reasonable jury would have been required to find against JAI on count 2. And because the plaintiffs filed no cross-appeal, they cannot attack that aspect of the verdict. For this appeal, then, the actual verdict is all that matters. The Court should therefore disregard the argument in pages 27-30 of the answering brief.

2. Even if the plaintiffs had properly challenged the jury's finding that Cesar was not obviously intoxicated, there is adequate evidence to support that finding.

Notably, though, the jury had ample bases for its finding that Cesar was not "obviously intoxicated" when JAI served him. Leticia Morales testified that when she observed Cesar at Jaguar's, he was not intoxicated. [IR-201 at 177:15-22 (APP151) (Q: "[W]hen you observed Cesar at Jaguar's that night, he was not intoxicated? [A:] Correct.").] Similarly, JAI's expert witness answered "No" when asked if he had "seen any evidence in this case that Cesar Aguilera showed any signs of impairment, other—obvious or otherwise, at any particular point in time." [IR-203 at 218:8-11.] The jury was free to credit this testimony and conclude, as they did, that Cesar was not obviously intoxicated.

B. The jury necessarily found that JAI did not violate any statute and that Cesar was not "obviously intoxicated."

1. The Court must harmonize the verdicts.

The plaintiffs dispute (at 23-27) the significance of the jury verdicts. "It is fundamental that every attempt must be made to harmonize a jury's verdict." 75B Am. Jur. 2d *Trial* § 1509. "A reviewing court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and it must exhaust this effort before it disregards the jury's verdicts."

United Dairymen of Ariz. v. Schugg, 212 Ariz. 133, 138, ¶ 19 (App. 2006). Where, as here, the jury found for different parties and different claims, a reviewing court may analyze the claims, jury instructions, and verdicts to determine the jury's underlying rationale. For example, in *Golonka v. Gen. Motors Corp.*, 204 Ariz. 575, 580-84, ¶¶ 11-27 (App. 2003), this Court found that the jury necessarily relied on only one of two possible legal theories because that was the only coherent way to harmonize the verdicts. *See id.* at 582, ¶ 18 ("[W]e now decide whether the jury's rejection of Plaintiffs' strict liability design claim necessarily reflected a rejection of the negligent design claim. We start by examining the trial court's instructions to the jury on each claim.").

Here, the jury evaluated three claims against JAI: two common-law claims and one statutory claim. The jury found for the plaintiffs on the common-law claims, and for JAI on the statutory claim. [IR-148 to IR-150 (APP090-94) (verdicts).] Comparing the elements of the claims confirms that the jury necessarily found that JAI did not violate any statute.

Specifically, the jury instructions for the *statutory claim*, claim 2, stated that "Plaintiffs must prove": that (1) JAI "violated Arizona [statutory] law" when it sold liquor to Cesar, (2) Cesar consumed the liquor, (3) Cesar's

consumption of the liquor was a proximate cause of the deaths of the decedents, and (4) Plaintiffs suffered damage. [IR-146 at 7 (APP084).] To prove causation and succeed on their *common-law claims*, the plaintiffs had to prove that Cesar consumed the liquor (element 2) and that his consumption proximately caused the decedents' deaths (element 3). And of course, they had to prove damages (element 4). As shown in the table below, by finding for the plaintiffs on the common law claims, the jury found that plaintiffs had satisfied the elements of causation and damages (elements 2 through 4):

Elements of claim 2 [IR-146 at 7 (APP084)]	**Required for common-law claims?**	**Required for statutory claim?**
1. JAI "violated Arizona law"	✗	✓
2. Cesar consumed the liquor	✓	✓
3. Consumption was the proximate cause	✓	✓
4. Damages	✓	✓

Thus, the verdict for JAI on the statutory claim can only be explained by the fact that the jury concluded that JAI had not violated any statute (element 1).

As for the violation of Arizona law (element 1 of the statutory claim), the instructions told the jury about the following statutory provisions:

- The prohibition on serving a "disorderly or obviously intoxicated person" (which refers to A.R.S. § 4-244(14)).
- The prohibition on selling more than a certain amount of alcohol "to one person at one time for that person's consumption" (which refers to A.R.S. § 4-244(23)).
- That a licensee is liable if it sold alcohol to a purchaser who is "obviously intoxicated," the purchaser consumed the alcohol, and the consumption of the alcohol proximately caused an injury (which refers to A.R.S. § 4-311(A)). The instruction also provided the statutory definition of "obviously intoxicated" from A.R.S. § 4-311(D).

[IR-146 at 7-8 (APP084-085).]

If the jury found that JAI had violated *any* of those statutory provisions, then it would have been required to find element 1 satisfied. Consequently, because element 1 is the only element missing from the common-law claims, the jury's verdict on claim 2 necessarily means that the jury found that JAI did not violate any of these statutes—including the prohibitions on serving a person who is obviously intoxicated, A.R.S. §§ 4-244(14) and -4-311(A). That is the only coherent way to interpret the verdicts.

2. The plaintiffs offer no other way to harmonize the verdicts.

Although "a reviewing court must search for a reasonable way to read the verdicts as expressing a coherent view of the case," *United Dairymen*, 212 Ariz. at 138, ¶ 19, the plaintiffs offer no other way to harmonize the verdicts. Instead, they attempt to poke holes in JAI's explanation. Their efforts do not succeed.

The plaintiffs note (at 25) that no written questions or special interrogatories were submitted to the jury. But written questions or special interrogatories were not necessary. This Court may rely on the verdicts themselves and the necessary implications from the verdicts. The plaintiffs also argue (at 25) that because JAI's motion for judgment as a matter of law did not address the jury verdicts, JAI waived its ability to do so on appeal. But JAI has already acknowledged (at 22) that statutory preemption is a new issue on appeal (and it is one the Court may address).

The plaintiffs further suggest (at 26) that the jury might have found for JAI on the statutory claim not for a legally valid reason, but because it had "done enough" by finding for the plaintiffs on the common-law claims. In other words, the plaintiffs invite the Court to conclude that the jury ignored

the jury instructions and rendered a verdict contrary to the jury's actual findings. But this Court "assume[s] the jury followed its instruction," *Golonka*, 204 Ariz. at 583, ¶ 21, and the plaintiffs offer no evidence to rebut that important presumption.

The plaintiffs finally suggest (at 26) that perhaps the jury thought that the phrase "you may consider the following statutory provisions" meant that they could choose to ignore some of those provisions. That argument misconstrues the instruction. The jury instruction stated, in mandatory terms, that "Plaintiffs *must* prove" that JAI "violated Arizona law." [IR-146 at 7 (APP084) (emphasis added).] By finding for JAI, the jury therefore found that JAI had *not* violated Arizona law. The phrase "you may consider" before the list of "statutory provisions" simply told the jury about the relevant statutes to consider. Contrary to the plaintiffs' suggestion, the instruction did not make the statutory violation optional.

At bottom, the Court must construe the verdicts in a way that harmonizes them. The only way to harmonize them is to conclude that the jury necessarily found that JAI did not violate A.R.S. § 4-311(A) by serving alcohol to an "obviously intoxicated" patron. The plaintiffs offer no other

way to harmonize the verdicts or any legitimate reason to disregard the verdicts.

C. The Court may reach the preemption issue, and the irrelevant doctrine of fundamental error does not require otherwise.

The opening brief (at 22-27) explained why this Court should consider the preemption issue even though it is a new issue on appeal. Instead of addressing those arguments head on, the plaintiffs insist that the court cannot consider the preemption issue because JAI has not shown fundamental error. But fundamental error—a doctrine primarily used in criminal cases and for trial-type error—is merely one of many doctrines that allow courts to address issues raised for the first time on appeal. Courts often consider new issues on appeal in civil cases without discussing fundamental error. *See, e.g.*, *Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, 578 n.14 (App. 2015) (considering issue on which defendant did not move for judgment as a matter of law without discussing fundamental error); *Standard Chartered P.L.C. v. Price Waterhouse*, 190 Ariz. 6, 39 (App. 1996) (same).

JAI has not invoked the doctrine of fundamental error, so the plaintiffs' discussion of it is irrelevant. Contrary to the plaintiffs' implicit suggestion

(by focusing solely on that doctrine), JAI does not need to satisfy the fundamental-error requirements. Instead, several other well-settled doctrines allow the Court to reach the issue.

As JAI explained in its opening brief (at 22-27), the Court should consider the preemption argument because it presents a pure "issue of law" on a "constitutional issue" of "statewide importance." *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 231 Ariz. 236, 238, ¶ 8 (App. 2012) (discussing exceptions to the general rule against raising new issues on appeal). Considering the issue would give the Court a valuable opportunity to "correctly explain the law," *Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, 143, ¶ 11 (App. 2002), on a factual record that cleanly presents the issue. Indeed, this Court has stated that when, as here, "we are considering the interpretation and application of statutes, we do not believe we can be limited to the arguments made by the parties if that would cause us to reach an incorrect result." *Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993).

The plaintiffs dispute none of this. They do not contest that the preemption argument presents a pure issue of law on a constitutional issue of statewide importance, and that this case presents a particularly good vehicle for addressing the issue because of the unique verdicts.

The plaintiffs observe (at 31) that appellate courts generally will not consider new issues raised on appeal "[b]ecause a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects" beforehand. (Quoting *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994)). But that point confirms why the Court *should* address the issue in this case. Even if JAI had raised this issue below, the superior court had to follow *Young Through Young v. DFW Corp.*, 184 Ariz. 187 (App. 1995), which held § 4-312(B) unconstitutional for violating the anti-abrogation clause, even if the trial judge thought that *Young* was no longer good law. The Court would have been completely powerless to reach any other result, as the opening brief explained (at 25-26). *See Sell v. Gama*, 231 Ariz. 323, 330, ¶ 31 (2013) (Trial court cannot "depart from binding precedent" even if it "anticipat[es] that [the appellate court] will overrule existing case law."). Thus, the main reason not to consider new issues on appeal simply does not apply to this case.

D. Contrary to the plaintiffs' argument, the Legislature preempted the common-law dram shop claims.

The opening brief (at 18-19) explained the history of dram shop liability and the legislative preemption. The plaintiffs do not dispute most

of this history, starting from the premise that at common law, "a tavern owner [was] not liable for injuries sustained off-premises by third persons as the result of the acts of an intoxicated patron." *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983). The plaintiffs likewise do not dispute that in response to *Ontiveros*, the Legislature decided to specify in statute when a tavern owner would be liable for the torts of its patrons. It enacted A.R.S. § 4-311(A), which makes a liquor licensee "liable for property damage and personal injuries . . . or . . . wrongful death . . . if a court or jury finds" certain factors, including that the licensee sold alcohol to a patron who was either underage or "obviously intoxicated."

The Legislature also enacted A.R.S. § 4-312(B). The plaintiffs largely ignore § 4-312(B) as it applies to liquor licensees (such as JAI). But § 4-312(B) is dispositive because it makes § 4-311(A) the exclusive means to hold liquor licensees liable for the torts of their patrons:

> [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). Thus, the only way to hold a defendant such as JAI "liable in damages" for harms allegedly caused by the "serving of spirituous liquor" is "as provided in § 4-311."

The plaintiffs do not directly challenge this straightforward reading of § 4-312(B). Instead, they cite a pair of irrelevant cases regarding the scope of § 4-312(B). The first case, *Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 249-53 (1994), addressed whether § 4-312(B)'s immunity extends to social hosts (i.e., non-licensees) who provide alcohol to underage people. The second case, *Petolicchio v. Santa Cruz Cty. Fair & Rodeo Ass'n, Inc.*, 177 Ariz. 256, 260-61 (1994), addressed whether § 4-312(B)'s immunity extends to alcohol that was stolen (i.e., not sold) by an underage person. Neither case applies because (1) JAI is a licensee, not a social host; (2) Cesar did not steal his beers; and (3) Cesar was not underage. Those cases do not call into question § 4-312(B)'s application to this case.

The plaintiffs (at 39) summarize *Hernandez* and *Petolicchio* as showing that "there are still common-law dram-shop causes of action beyond the cause of action provided in A.R.S. § 4-311." That is true but irrelevant. For ordinary commercial sales of alcohol by licensees, A.R.S. §§ 4-311 and 4-312 define the scope of liability. If anything, the cases confirm JAI's undisputed

explanation of the legislative history of § 4-312(B), which was passed to limit liability because of "vendors' difficulties in obtaining affordable liquor liability insurance." *Hernandez*, 177 Ariz. at 251.

For these reasons, and contrary to the plaintiffs' arguments, § 4-312(B) squarely preempts common-law dram shop claims like the ones asserted in this case.

E. A.R.S. § 4-312(B) does not violate the anti-abrogation clause.

As explained in the opening brief (at 19-21), the anti-abrogation clause does not protect new rights of action. It "protects from legislative repeal or revocation those tort actions that 'either existed at common law or evolved from rights recognized at common law.'" *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 3, ¶ 9 (2003) (citation omitted). The plaintiffs do not dispute that dram shop liability did not exist at common law.

Instead, the plaintiffs argue (at 41-42) that dram shop liability "evolved" from common-law "principles of responsibility for affirmative acts and omissions that may endanger others, such as providing a dangerous instrumentality to a minor or to an adult incapable of operating that dangerous instrumentality safely." Invoking such broad, nebulous

concepts, however, does not trigger the modern construction of the anti-abrogation clause as set forth in *Dickey*.

Dickey teaches that claims such as this one—which were barred at common law—are not protected from legislative preclusion. In *Dickey*, a boy was injured while sledding in a municipal park in Flagstaff. 205 Ariz. at 2, ¶ 2. His parents sued the City. Flagstaff invoked the limitation on liability in A.R.S. § 33-1551. *Id.* at 2, ¶¶ 2, 6. The parents argued that this statute violated the anti-abrogation clause because it prevented them from bringing a simple negligence claim against the City. *Id.* at 3, ¶ 8. The Supreme Court held that the anti-abrogation clause did not apply because "municipalities were immune from civil suits for ordinary negligence at common law." *Id.* at 4, ¶ 12.

The Supreme Court looked to the specific type of claim and the specific type of defendant. In other words, a cause of action that was specifically barred at common law did not "evolve[] from rights recognized at common law" and is not protected by the anti-abrogation clause. *See id.* at 3, ¶ 9; *accord* *Smyser v. City of Peoria*, 215 Ariz. 428, 438, ¶ 30 (App. 2007) ("Similarly, because the City would have been totally immune from suit at common law for ordinary negligence while acting in a governmental capacity, and it was

acting in that capacity by providing emergency medical services, A.R.S. § 9–500.02(A) does not violate the anti-abrogation clause.").

Dickey's basic proposition decides this case. The common law specifically prohibited imposing liability on tavern owners for the torts of their patrons. *See Ontiveros*, 136 Ariz. at 504 ("[T]he rule of nonliability for tavern owners has been the common law in Arizona."). Thus, modern dram shop claims did not "evolve[] from rights recognized at common law." *Dickey*, 205 Ariz. at 3, ¶ 9. To the contrary, the modern dram shop claims are orthogonal to the common-law rule. The specific type of claims (liability for the consequences of furnishing alcohol) asserted against this specific type of defendant (a tavern) were not available at common law.

Dram shop liability did not "evolve[]" from common-law *rights* in any specific and relevant way. Evolution is a gradual process—"a process of continuous change"; "a process of gradual and relatively peaceful . . . advance." *Evolution*, The Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/evolution. By contrast, when *Ontiveros* announced the demise of the common law doctrine of tavern owner nonliability, it recognized its transformative holding. "[T]he common law doctrine of tavern owner nonliability is abolished in Arizona," 136 Ariz.

at 513, are words of revolution, not evolution. That phrase from *Ontiveros* compares almost perfectly to the similarly abrupt announcements of governmental nonimmunity in *Stone v. Ariz. Highway Comm'n*, 93 Ariz. 384, 392 (1963) (which *Dickey* relied on):

Abolishing dram shop immunity	**Abolishing governmental immunity**
"[T]he common law doctrine of tavern owner nonliability is abolished in Arizona." *Ontiveros*, 136 Ariz. at 513.	"The substantive defense of governmental immunity is now abolished. . . ." *Stone*, 93 Ariz. at 392.
"Therefore, [cases to the contrary] are overruled. . . ." *Ontiveros*, 136 Ariz. at 507.	"All previous decisions to the contrary are specifically overruled." *Stone*, 93 Ariz. at 392.

Thus, the anti-abrogation clause does not protect the rights of action and they remain susceptible to legislative policymaking. Indeed, when the Supreme Court established new liability for dram shops in *Ontiveros*, it expressly anticipated potential legislative correction: "If we are mistaken in this, it is possibly within the legislative power to confer upon the liquor industry some special benefit exempting it from liability." 136 Ariz. at 513.

Referring to the types of broad, nebulous concepts like those in the answering brief (at 42) will not suffice to invoke the anti-abrogation clause.

The clause protects causes of action that "evolved from *rights* recognized at common law," not *concepts*. *Cronin v. Sheldon*, 195 Ariz. 531, 539, ¶ 39 (1999) (emphasis added). Almost any conceivable tort law would share *some* principles with common-law torts. *Dickey* expressly acknowledged that "negligence suits certainly have their basis in common law," but held that such a basis did not trigger the anti-abrogation clause. 205 Ariz. at 3 n.3.

The plaintiffs make no effort to distinguish *Dickey*. Indeed, they do not even cite it. That silence is telling. The plaintiffs instead cite (at 43-44) *Schwab v. Matley*, 164 Ariz. 421 (1990). But *Schwab* did not discuss the anti-abrogation clause or § 4-312(B). Instead, *Schwab* addressed § 4-312(A), a contributory negligence provision about a bar's liability to the drinking patron himself or to people accompanying the drinking patron. Subsection (A) violated article 18, § 5 of the Arizona Constitution, which provides that "[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." The plaintiffs cite *Schwab* for the dicta that the legislature cannot "abolish the recognized common law duties of care," 164 Ariz. at 425, but § 4-312(B) does not "abolish" any "duties of care"—it simply

modifies the duty stated in *Ontiveros* by clarifying that a licensee's duty is not to serve an "obviously intoxicated" or underage person.

To top it off, the plaintiffs cite (at 42-43) several cases citing *Young*. But that merely confirms that the Court should put a stop to this invalid line of cases. The Legislature has spoken on this issue; it is time to respect the Legislature's role of setting policy and making law. *See* Ariz. Const. art. 4, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature. . . .").

In sum, § 4-312(B) prevents JAI from being held liable for the torts of its patrons "except as provided in § 4-311." And here, the jury found that JAI did not violate § 4-311 (or any other statute). Thus, the judgment must be reversed and vacated.

II. As a matter of law, JAI did not proximately cause the accident.

If the common-law negligence claims are not preempted under § 4-312(B), then those claims fail for an additional reason—JAI did not proximately cause Cesar's car accident because Cesar's decision to drive after reaching a place of repose was an intervening and superseding cause. The plaintiffs' primary response is that proximate cause is a question of fact. But that general principle does not prevent judicial resolution when, as in

Patterson and here, the fundamental facts are undisputed and the scope of liability is a policy question for the court.

A. When the facts are undisputed, the scope of proximate cause is often a question for the court.

The opening brief (at 28-29) explained that courts—not juries—determine the outer bounds of liability under proximate causation. The plaintiffs counter (at 46) that "proximate cause is a question of *fact* for the jury to decide."

Proximate cause is one of the more complicated areas in the law because it involves so many different concepts—questions of fact, questions of law, and questions of policy. JAI does not dispute that questions of proximate cause often properly go to the jury. In a case about a car accident, for example, the jury might fairly be asked to decide whether the defendant's excessive speed was a proximate cause of the plaintiff's injury.

But some disputes about proximate cause unquestionably remain with the courts. To borrow an example from Prosser & Keeton, suppose a defendant speeds from Phoenix to Flagstaff and lightning strikes the car upon arrival, injuring the plaintiff passenger. *Cf.* W. Page Keeton, et al., *Prosser & Keeton on Torts*, § 41 at 264 (5th ed. 1984) ("*Prosser & Keeton*"). If the

defendant had not sped, the car would have arrived 20 minutes later and would have avoided the lightning strike (i.e., speeding was a but-for cause). In that case, if the key facts are uncontested, what legitimate role would the jury have in determining the boundaries of proximate cause? None. Instead, the court should resolve that proximate cause issue as a matter of law and policy.

The proximate cause issue in this case does not turn on any disputed facts—on appeal, JAI does not dispute any of the relevant facts. Instead, this proximate cause issue involves delineating, as a policy matter, the outer boundary of a tavern's liability. For these types of questions, proximate cause "depend[s] essentially on whether the *policy of the law* will extend the responsibility for the conduct to the consequences which have in fact occurred." *Id.* § 42, at 273 (emphasis added). In this context, the doctrine of 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 (emphasis added).

Thus, the plaintiffs' suggestion that proximate cause is always a question of fact for the jury is simply wrong. The real question is whether the particular proximate-cause issue *in this case* is one of fact for the jury or

one of law and policy for the court. As cited in the opening brief (at 28), this Court resolved that question in *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 438, ¶ 14 (App. 2007). This Court decided the proximate-cause question *as a matter of law* in a case about this very issue (liability for a tavern when a patron drives after having already reached a place of repose). In connection with their argument that proximate cause is a question of fact for the jury, the plaintiffs do not acknowledge *Patterson* at all.

Instead, the plaintiffs cite (at 46) *Dupray v. JAI Dining Svcs. (Phoenix), Inc.*, 245 Ariz. 578 (App. 2018). In the opening brief, however, JAI already explained why the proximate cause question in *Dupray* had to be sent to the jury. The patron in *Dupray* lived out of his car, so the jury needed to resolve whether his girlfriend's house was a place of repose (like a hotel room, where he would be expected to stay put the rest of the night) or a transitory stop (like a gas station on the way home). *See 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.").

Thus in *Dupray*, the Court articulated which fact dispute remained for the jury to resolve. By contrast, the plaintiffs here have not identified what

fact question the jury needed to resolve, nor could they given that JAI is not disputing the key facts. Instead, the appeal on this issue turns on whether delineating the bounds of a bar's liability falls to the Court or the jury. As *Patterson* recognized, that issue comes down to considerations of "public policy," meaning the Court should rule as a matter of law. *Patterson*, 214 Ariz. at 440, ¶ 19 (affirming grant of summary judgment on proximate causation).

The plaintiffs also cite (at 47) *Gipson v. Kasey*, 214 Ariz. 141 (2007), for the proposition that proximate cause is a question of fact. But *Gipson* addressed duty, not proximate causation. In context, the Court was merely rejecting the notion that intervening/superseding cause could determine the scope of *duty*: "Whether the plaintiff's conduct constituted an intervening (or even a superseding) cause of the harm suffered is a question of fact *and does not determine whether a duty exists*." *Gipson*, 214 Ariz. at 147, ¶ 30. The plaintiffs omitted the italicized portion from their quotation (without indicating the omission). That dictum does not purport to overturn the longstanding role of judges in resolving some proximate cause questions as a matter of law and policy.

B. The intervening/superseding cause analysis focuses on the intervening event, not the outcome.

The opening brief explained (at 30-35) why a patron's decision to drive after arriving home is an intervening and superseding cause that terminates liability for the tavern, and (at 35-37) why that doctrine applies as a matter of law to the undisputed facts of this case.

The plaintiffs do not grapple with most of that discussion. Instead, they claim (at 47-48) that it's foreseeable "that an intoxicated patron would crash a motor vehicle into another motor vehicle," and that Cesar "could cause a collision while driving in a condition of intoxication, drunkenness, and impairment." These arguments focus on the wrong event. The intervening/superseding cause is Cesar's decision to drive *after he had made it home and was sleeping in in own bed*. [IR-199 at 85:14-16 (APP129); *id.* at 155:6-24 (APP135).] At that point, he posed no risk to the public; the risk emerged only after his girlfriend woke him up, after Cesar agreed to accompany Wendy home, after Wendy drove herself home, and after Cesar woke up again in the back seat and decided to drive himself home.

If the intervening and superseding cause doctrine focused on the foreseeability of an accident with an impaired person behind the wheel, then

the tavern's liability would never end. But "[s]ome boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy." *Prosser & Keeton* § 41 at 264. Indeed, *Patterson* recognized "that highly intoxicated people make poor decisions," and that "it is foreseeable to a tavern owner that patrons of the tavern may become involved in a motor vehicle accident," but rejected that as a basis for never-ending liability. 214 Ariz. at 440, ¶¶ 18-19 (citation omitted). "[T]hat statement does not end our analysis," the Court wrote. *Id.* at ¶ 19. If the analysis stopped there, as the plaintiffs suggest here, then that would "ultimately subject tavern owners to unlimited liability, a result that would no more serve public policy than finding nonliability in all circumstances." *Id.* *Patterson*, therefore, squarely rejected the analysis the plaintiffs offer (at 47-48).

Returning to the rationale for dram shop liability clarifies the central risk to be avoided: traffic accidents during the drive from the bar to a place of repose. *See Hebert v. Club 37 Bar*, 145 Ariz. 351, 353 (App. 1984) ("[I]t 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."). After the patron has reached a place of repose, he is expected to

stay put the rest of the night and sleep off any impairment, and the bar is powerless at that point to prevent any future harm. The decision to return to a vehicle and 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.[1]

The plaintiffs make no effort to distinguish *Patterson*. They suggest (at 48-49) that *Dupray* undermines *Patterson*, again relying on the fact dispute for the jury in *Dupray* about whether his girlfriend's house was in fact a place of repose. But the plaintiffs have identified no similar issue of fact that precludes entry of judgment as a matter of law in this case.

III. The plaintiffs do not meaningfully dispute that a bar's only relevant duty is not to serve a disorderly or obviously intoxicated person.

The opening brief (at 43-45) explained that the only relevant duty Arizona cases and statutes impose on a bar is the duty not to serve alcohol

[1] This Court also resolved this issue in an unpublished case, which shows why it should publish whatever decision it makes in this case. *See* Opening Br. at 31 n.2.

to a disorderly or obviously intoxicated patron, which is within the bar's control.[2]

The plaintiffs do not directly dispute this point. Their answering brief mentions the word "duty" only a few times—on pages 35, 40, 41, 47, 50, 53—and contains no sustained discussion of that concept. The plaintiffs thus do not appear to argue that a bar has a duty broader than "to refrain from serving alcoholic beverages to underage persons or those who are disorderly or obviously intoxicated." *Henning v. Montecini Hosp., Inc.*, 217 Ariz. 242, 244, ¶ 6 (App. 2007). Their answering brief even quotes that articulation of the duty (at 40). The plaintiffs also argue (at 50-52) that this is a question for expert testimony and the jury. But "[t]he first element [of negligence], whether a duty exists, is a matter of law for the court to decide." *Gipson*, 214 Ariz. at 143, ¶ 9.

The plaintiffs suggest (at 51) that JAI had a duty to prevent Cesar from leaving the bar "and to ensure his safe transportation home." But the

[2] This case does not implicate other duties imposed on a bar, such as a duty not to serve an underage patron or a duty not to serve a patron known to have violent tendencies. Tellingly, those other duties also focus on the only thing a bar can control—serving alcohol—not preventing future harm after someone has been lawfully served.

plaintiffs do not identify the source of that duty, as is their burden. *See Quiroz v. Alcoa, Inc.*, 243 Ariz. 560, 574, ¶ 63 (2018) ("[T]he plaintiff bears the burden of proving the existence of a duty."). And they do not dispute the extensive explanation in the opening brief (at 44-56) that such a duty does not exist in Arizona (or that if it does exist, it extends only to an obviously intoxicated patron). They simply have no response to the argument that the law does not (and should not) impose a duty to control a patron's subsequent conduct when the bar has no physical power, legal right, or practical ability to do so.

Even if a designated driver drove Cesar home that night, he still could have gotten behind the wheel after his girlfriend asked him to take Wendy home. The plaintiffs have not explained how JAI could have stopped that, other than by not serving Cesar in the first place. So the whole case circles back to the legal standard for serving alcohol. And again, under Arizona statutes and caselaw, a bar may lawfully serve alcohol to an adult patron who is not obviously intoxicated.

In discussing Cesar's level of intoxication, the plaintiffs conflate (at 47-54) being too impaired to drive with being "obviously intoxicated." The two are not the same. It becomes unlawful to drive a car long before it becomes

unlawful for a bar to serve alcohol, and for good reason. The opening brief (at 46-51) explained that at the legal limit for driving, even experts cannot pick out the impaired person from the sober person. Prohibiting a bar from serving a patron when experts can't detect impairment would make no sense and would impose an impossible duty. Thankfully, at that level, the patron still has the capacity to take personal responsibility and decide not to drive. By contrast, the duty not to serve an obviously intoxicated patron is a workable duty because it gives the bar something to look for. By definition, a bartender can observe obvious intoxication: "*significantly* uncoordinated physical action or *significant* physical dysfunction that would have been *obvious* to a reasonable person." A.R.S. § 4-244(14) (emphases added).

As explained above (§ I.B), the jury necessarily found that Cesar was not obviously intoxicated when JAI served him. Consequently, JAI did not owe any additional duty, and JAI is entitled to judgment as a matter of law.

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 10th day of February, 2020.

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