

ARIZONA'S DRAM SHOP STATUTE PREEMPTS COMMON LAW NEGLIGENCE CLAIM AGAINST LIQUOR LICENSEE

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Torres v. JAI Dining
Arizona Court of Appeals
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The Arizona Court of Appeals held that Arizona's statutory framework for determining dram shop liability preempts plaintiffs' common law claims against a liquor licensee and that the dram shop statute is constitutional.

Cesar Aguilera Villanueva engaged in a night of drinking, went home to sleep, and then got up – still drunk – to drive his friend home. On the way back home, Villanueva crashed his truck into a car stopped at a red light, killing the car's occupants. The decedents' relatives sued Villanueva and JAI, the owner of the club where Villanueva had been drinking. JAI argued that Villanueva's stop at home was a superseding, intervening cause that broke the chain of causation. The trial court disagreed and denied JAI's motion. The jury found against Villanueva and JAI, awarding plaintiffs \$2 million, finding JAI 40% at fault. JAI appealed, and the court of appeals reversed. In a decision filed in September 2020, the court held that Villanueva's having reached home safely, and then having made an independent decision to leave again and drive, was an intervening superseding cause that broke the chain of proximate causation.

The Arizona Supreme Court granted review and vacated the court of appeals' decision. It held that the trial court properly refused to grant JAI judgment as a matter of law on intervening, superseding cause because a reasonable person in JAI's position could have foreseen that Villanueva would drive while intoxicated, cause an accident, and injure someone as long as he remained intoxicated. As such, the jury needed to decide whether Villanueva's decision to resume driving was an intervening superseding cause. The court declined to address whether the dram shop statutes preempt common law dram shop claims, remanding that issue to the court of appeals.

The court of appeals held today that the dram shop statute "expressly preempts" common law negligence claims. The court addressed the issue even though JAI had not raised it in the trial court because the parties had had the opportunity to brief the issue, and because of the unique verdict: the jury had found JAI violated a common law obligation but not a statutory obligation imposed on liquor licensees.

On the preemption issue, the court went through the history of dram shop liability in Arizona, noting that at common law, a tavern owner was not liable for injuries sustained off premises by the act of an intoxicated person. It was only in 1983 when the Supreme Court decided *Ontiveros v. Borak* and a companion case that the court abolished the common law doctrine of tavern owner non-liability and first recognized a common law cause of action for dram shop liability. Three years later, the legislature enacted A.R.S. § 4-311(A), providing that a licensee could be liable for selling alcohol to an "obviously intoxicated" person or a minor who proximately causes property damage, injury or death. A.R.S. § 4-312(B) states that a licensee is not liable except as provided in § 4-311. This language, said the court, preempts the common law liability created in *Ontiveros* and replaced it with the defined statutory scheme based on "objective, observable and workable standards." Thus, the common law claims against JAI were preempted.

The court also held that the statute does not unconstitutionally abrogate a common law cause of action. A 1995 case called *Young v. DFW* had held the statute unconstitutional as abrogating a common law action for those who could not establish the purchaser was obviously intoxicated, but could establish that the licensee knew or should have known the purchaser was intoxicated. But, *Young* had not examined whether the right to recover against dram shops existed at common law. The court simply assumed the constitution's anti-abrogation clause applied.

The fact that the common law recognized general negligence actions does not bring dram shop liability claims within the anti-abrogation clause's scope, said the court. Even though "negligence suits certainly have their basis in common law," that does not protect rights of recovery unavailable at common law. The context out of which the claim arises must be examined to determine whether it is a right of action recognized by the common law." If, for a particular kind of wrong and against a particular type of defendant, "negligence could not have been maintained at the time the anti-abrogation provision was instituted, it is not protected by that provision." And, Arizona courts had uniformly rejected lawsuits for dram shop liability by the time our constitution was adopted. Thus, dram shop claims are not protected by the constitutional anti-abrogation clause. The legislature "retains the constitutional power to recraft the parameters or scope of a court-pronounced common law cause of action."

The court concluded that A.R.S. § 4-312(B) "remains good law." It therefore reversed the judgment against JAI and remanded for entry of judgment in its favor. The plaintiff will certainly seek Supreme Court review of this decision, which we will watch for and report on as the case progresses.

Note that in *Schwab v. Matley* the Supreme Court previously held unconstitutional another section of the dram shop statute, A.R.S. § 4-312(A). That section held that a licensee cannot be liable to a customer who was served or to any person present when the customer was served who knew of the customer's impaired condition. That section was unconstitutional because article 18, section 5 of the constitution requires that the jury must always decide the defense of contributory negligence or assumption of the risk. The statute ran afoul of this section because it took away from the jury the decision of the customer's or person present's negligence. Today's decision does not affect *Schwab*, as *Schwab* was decided under a different constitutional provision. *Schwab* therefore remains good law after today.

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