

THE ARIZONA LEGISLATURE'S ENACTMENT OF A.R.S. § 4-312(B) ABROGATED COMMON LAW DRAMSHOP CLAIMS

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Torres v. JAI Dining Servs. (Phx.) Inc.

Arizona Supreme Court

October 16th, 2023

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The Arizona Supreme Court held today in *Torres v. JAI Dining Servs. (Phx.) Inc.*, that the constitution does not protect common law dram shop actions, and thus, the legislature, by enacting a statutory dram shop claim, abrogated the then-existing common law dram shop cause of action. Abrogating the common law claim means that in order to sue a bar or other liquor licensee for injuries caused by a drunk driver, a claimant must meet the statutory standard—demonstrating that the drunk driver was served when he was “obviously intoxicated.”

Villanueva spent an evening drinking and socializing at Jaguars Club in Phoenix, and then drove away from the club while intoxicated. He eventually returned home and fell asleep for a short time before getting up to take a friend home. Tragically, Villanueva was still intoxicated and crashed into a car stopped at a red light, killing its occupants.

The victim’s two families sued Villanueva for negligence and sued JAI Dining Services (JAI), the owner of the Jaguars Club, under theories of statutory and common law dram-shop liability. After a trial, a jury found JAI liable under the common law dram-shop claim but found that JAI was not liable under the statutory dram-shop cause of action under A.R.S. § 4-311(A), which imposes liability on a liquor licensee that serves alcohol to a patron who is “obviously intoxicated.” The Jury then awarded Plaintiffs \$2 million in damages, apportioning 40% of the fault to JAI.

In a previous appeal, the Arizona Supreme Court rejected JAI’s argument that Villanueva’s decision to go home to bed before getting in the car again had broken the chain of proximate causation and relieved JAI from liability for Villanueva’s actions. The Supreme Court sent the case back to the Court of Appeals to consider whether JAI could argue that the statutory dram shop claim preempted the common law dram-shop action first recognized in *Ontiveros v. Borak*, 136 Ariz. 500 (1983). The Court of Appeals held that JAI could raise this argument, that the statute “expressly preempts” Plaintiff’s common law dram-shop claim, and that such preemption “does not run afoul” of the Arizona constitution’s anti-abrogation clause. That clause prohibits the legislature from enacting a statute that abrogates a common law cause of action recognized at the time the constitution was adopted. The Arizona Supreme Court agreed with the Court of Appeals determination, but on different reasoning.

The Supreme Court began its analysis by re-affirming the scope of Arizona’s anti-abrogation clause. It held that the anti-abrogation clause only prohibits the abrogation of claims that existed at common law in 1912 or that are based in rights of action existing at statehood. The Court then turned to whether the anti-abrogation clause insulated dram-shop actions from legislative control. In so doing, it noted that after *Ontiveros* recognized a common law dram shop action in 1983, the Arizona legislature responded by enacting A.R.S. §§ 4-311 and -312 in 1986. And A.R.S. § 4-312(B) limits liquor licensees’ tort liability to those dram-shop actions brought under § 4-311. The Supreme Court held that this legislative decision to limit dram-shop liability to those dram-shop actions brought under § 4-311 did not abrogate any common law right because there was no recognized common law claim for dram-shop liability until 1983. Accordingly, the Supreme Court held that common law dram-shop claims were not subject to Arizona’s anti-abrogation clause, agreeing with the Court of Appeals decision below.

In this case, because the jury found liability only on the common law dram-shop claim, which the legislature has abrogated, the Supreme Court remanded the case back to the trial court for entry of judgment in favor of JAI.

The Court's decision also contains a separate concurrence by Justice Bolick and a dissent by Justice Timmer.

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[Justin Ackerman](#) represents clients in federal and state appellate matters in cases involving excessive force, wrongful death, personal injury, bad faith, and premises liability. After graduating as the valedictorian of his class from Phoenix School of Law, Justin worked as a law clerk for the Hon. Michael J. Brown in Division One of the Arizona Court of Appeals. Following his clerkship, Justin has handled over 75 appeals, successfully arguing before the Arizona Court of Appeals, Arizona Supreme Court, and U.S. Court of Appeals for the Ninth Circuit. Justin has spoken at many seminars on appellate preservation topics and is recognized as a *Southwest Super Lawyers* Rising Star and Best Lawyers Ones to Watch in the area of Appellate Practice. He currently serves as the Chair of the Appellate Group at JSH.

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