IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION I

Mark H. Dupray and Ashlee Dupray, husband and wife, Plaintiffs-Appellees, vs. JAI Dining Services (Phoenix), Inc., Appellant.	No. 1 CA-CV 17-0599 Maricopa County Superior Court No. CV2014-007697

OPENING BRIEF

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INTRODUCTION

Mark Dupray was the unfortunate victim of an intoxicated driver, Pedro Panameno, who collided with Mr. Dupray's scooter as Mr. Panameno drove away from his girlfriend's house in anger after an argument. Mr. Dupray sued not only Mr. Panameno but also JAI Dining Services (Phoenix) Inc. ("JAI") the owner of a gentleman's club at which Mr. Panameno claimed to have spent part of his evening before returning to his girlfriend's house.

The evidence at trial did not support a verdict of liability on the part of JAI. The only evidence that Mr. Panameno went to the JAI-owned club was the deposition testimony of Mr. Panameno, but both parties' toxicology experts agreed that Mr. Panameno's testimony regarding alcohol consumption at the club was scientifically impossible, given the results of a blood alcohol test administered to him after the accident. Mr. Panameno's disproven testimony could not support a verdict against JAI.

Moreover, even if Mr. Panameno's testimony were sufficient to support a verdict, his description of the day's events established that JAI neither breached its duties nor was the proximate cause of Mr. Dupray's injuries. Under this Court's decision in *Patterson v. Thunder Pass*, JAI's duty of care was satisfied when Mr. Panameno was safely transported from its premises by the driver who had brought him. Mr. Panameno's subsequent decisions to not only take over driving himself

after reaching a place of safety, and to leave again after fighting with his girlfriend and drive aggressively as a result of his anger, were unforeseeable and extraordinary actions that broke the chain of proximate causation. JAI was entitled to judgment as a matter of law or, at a minimum, sufficient jury instructions to permit the jury to assess this evidence under the correct legal standard.

Lastly, the Plaintiffs' failure to satisfy their burden of proving entitlement to punitive damages by clear and convincing evidence, or to introduce evidence permitting the jury to assess reasonable punitive damages, requires vacatur of the punitive damages award. If the punitive damages award is sustained, it should be reduced to a 1:1 ratio with compensatory damages, rather than remaining at the excessive 2.85:1 ratio awarded by the jury.

COMBINED STATEMENT OF FACTS AND OF THE CASE

I. Mr. Panameno struck and injured Mr. Dupray while intoxicated.

On the evening of August 5, 2013, Pedro Panameno was driving away from his girlfriend's house in Anthem, Arizona when he hit and seriously injured Mark Dupray, an area resident who was stopped at a traffic light on his scooter. (Feb. 2, 2017 Tr. at 173:14-19, 175:6-21, 199:3-200:24.[1]) Field sobriety, breath, and blood tests administered to Mr. Panameno at the hospital following the accident found

[1] "Tr." references are to the transcripts of the proceedings before the trial court on the specified day, while "IR" references are to the Electronic Index of Record.

that he was driving while intoxicated, with a breathalyzer result of .154 and a blood test result of .167. (Feb. 2, 2017 Tr. at 109:18-112:3, 113:21-120:7, 121:3-122:18.) Mr. Panameno was arrested while in the hospital and, after pleading guilty, was sentenced to three-and-a-half years in prison. (Feb. 2, 2017 Tr. at 180:3-22.)

II. Mr. Panameno provided various explanations of what, when, and where he drank.

Although it is uncontroverted that Mr. Panameno was intoxicated when he hit Mr. Dupray, Mr. Panameno provided multiple, inconsistent accounts of how, when, and where he became intoxicated. At the scene of the accident, Mr. Panameno told an investigating officer that he drank two beers at a house party nearby. (Feb. 2, 2017 Tr. at 85:20-86:9.) Later that night, at the hospital, he told a different officer that he had two Blue Moon beers at Jaguars, a gentlemen's club operated by defendant JAI Dining. (Feb. 2, 2017 Tr. at 93:8-21, 113:24-114:2; Feb. 6, 2017 Tr. at 26:19-27:13.) During an interview with a presentence screener in his criminal case, Mr. Panameno stated that he did not know how much he had to drink. (Ex. 33.)

Only after Mr. Panameno and JAI had been jointly named in this lawsuit did Mr. Panameno begin to claim that he consumed a significant amount of alcohol both before arriving at and while at Jaguars. Specifically, in a deposition that was later introduced at trial as a substitute for live testimony, Mr. Panameno gave a

new, expansive account of his alleged consumption of alcohol on the day of the accident. According to his deposition testimony, Mr. Panameno left his girlfriend Lydia's house in Anthem with his girlfriend's brother, David, around 2:30 pm. (Feb. 2, 2017 Tr. at 149:1-18.) They drove in Mr. Panameno's car for approximately 30 minutes to the home of another friend, Carlos, at 47th Avenue and Thomas. (*Id.* at 150:14-151:8.) Shortly before 4 pm, the three left in Carlos's car to go to a nearby mall. (*Id.* at 152:2-20.)

According to this version of Mr. Panameno's day, he had not consumed any alcohol before leaving Carlos's house to go to the mall. (*Id.*at 148:1-151:18.) But on the way to the mall, they went through a drive-thru liquor store where Mr. Panameno said he purchased a fifth of Crown Royal bourbon and two beers mixed with an energy drink. (*Id.* at 152:14-154:13.) Over the next hour and fifteen minutes, Mr. Panameno claimed to have consumed all of the beers and all but one swig of the bourbon. (*Id.* at 154:23-157:15.)

From the mall, Mr. Panameno and his friends went to Jaguars, still in Carlos' car, where they purchased and consumed Budweiser beers sold in multi-bottle "buckets." (*Id.* at 163:18-168:12.) Mr. Panameno believed there were eight

bottles in a bucket,[2] that a total of three or four buckets had been purchased, and that he had had as many as eleven or twelve beers in total. (*Id.*)

Mr. Panameno testified that he and his friends left Jaguars in Carlos's car, with Carlos driving, and returned to Carlos's home. (*Id.* at 170:17-21.) Only then did Mr. Panameno get behind the wheel, driving himself and David the twenty-five minutes or so back to David and Lydia's house in Anthem. (*Id.* at 172:11-22.)

Mr. Panameno intended to remain at his girlfriend Lydia's house, but stayed for only five minutes because they immediately got into an argument over him having brought David back so late. (*Id.* at 147:14-148:1, 173:17-174:16, 187:6-186:16.) During that argument, Lydia confronted Mr. Panameno about his alcohol use, told him that he was too drunk to drive, and tried to physically take his keys so that he would not drive. (*Id.* at 187:6-16.) Mr. Panameno "wanted to party more" and so he "got the hell out of there." (*Id.*at 187:6-7, 187:15-16.) He was angry when he left and was driving aggressively, swerving around slower drivers, when he collided with Mr. Dupray less than a mile from Lydia's house. (*Id.* at 175:6-21, 188:18-189:8.)

[2] Jaguars' manager testified that the club did not sell buckets with eight beers, and that the standard buckets available to small groups like Mr. Panameno's had only five beers. (Feb. 7, 2017 Tr. at 41:19-42:25.)

III. Both parties' toxicologists agreed that Mr. Panameno's trial account of what he drank could not be true, given the blood alcohol test results.

Plaintiffs did not call any other witnesses or introduce any documentary evidence corroborating Mr. Panameno's deposition testimony about the alcohol he consumed on the night of the accident, or when and where he consumed it. They did not call as witnesses either of the friends who were with him or anyone at Jaguars who served him on that night. They did call a toxicology witness to testify regarding Mr. Panameno's likely consumption, given the results of the breathalyzer and blood alcohol tests and his body composition and drinking habits. (Feb. 6, 2017 Tr. at 4-49.)

Plaintiffs' toxicologist opined that Mr. Panameno's account of what he drank, where, and when could not be reconciled with the toxicology evidence. (*Id.* at 29:15-30:6.) If Mr. Panameno drank everything he claimed, his blood alcohol concentration would have been significantly higher. (*Id.*) Because blood alcohol concentration alone does not tell what or where someone drank, the toxicologist testified that there were multiple alternative scenarios combining beers and hard liquor that could have resulted in Mr. Panameno's blood alcohol concentration being what it was at the time he was tested in the hospital, after the accident. (*Id.* at 30:7-35:10.)

Two of the toxicologist's scenarios involved Mr. Panameno drinking nothing at all at Jaguars, and reaching his level of blood alcohol by consuming the

entire fifth of bourbon or by drinking beers from the open cases that were found in his car at the scene of the accident. (*Id.*) Less than all of the empty containers in Mr. Panameno's car would alone have resulted in his tested blood alcohol level. (*Id.*).

JAI's toxicology expert agreed, testifying that the blood alcohol test results affirmatively disproved Mr. Panameno's testimony about what he drank. (*Id.* at 122:14-125:13.) Like Plaintiff's toxicologist, JAI's toxicologist testified that Mr. Panameno could have reached that level of blood alcohol simply by drinking the Crown Royal he claimed to have purchased at the drive-thru liquor store. (*Id.*)

IV. The trial court denied JAI's motions for judgment as a matter of law or new trial.

At the conclusion of Plaintiffs' case, JAI moved for judgment as a matter of law on two grounds. (Feb. 7, 2017 Tr. at 77-84.) First, JAI contended, Plaintiffs had not introduced sufficient evidence from which a jury could find them liable for the accident. Specifically, JAI noted that Plaintiffs' only evidence that Jaguars served Mr. Panameno alcohol, or served it to him when he was visibly intoxicated, was Mr. Panameno's own account of what he drank and where. Given that both toxicologists agreed that Mr. Panameno's account was demonstrably false because it was inconsistent with the blood alcohol test results and that no other evidence had been submitted on this point, the evidence could not sustain a jury verdict against JAI.

Second, JAI contended that Mr. Panameno's decision to get back in his own car after being transported safely to Carlos' house, and again after reaching Lydia's house and having her tell him not to drive, were intervening superseding causes destroying the chain of proximate causation. (*Id.*)

The trial court denied the Rule 50 motion. (*Id.* at 85.) It also refused to give JAI's requested instruction regarding the doctrine of intervening superseding cause, limiting JAI to making an argument about intervening cause in closing that Plaintiffs' counsel could and did contest. (*Id.* at 31, 97.) The jury found in favor of the Plaintiffs against both Mr. Panameno and JAI, awarding compensatory damages of $3,503,494.58 and allocating 60% of the fault to Mr. Panameno. (IR 76.) It also awarded punitive damages of $400,000 against Mr. Panameno and $4 million against JAI. (*Id.*) The jury's verdict was incorporated in a judgment entered April 20, 2017. (IR 84.)

JAI filed a timely post-judgment motion renewing its Rule 50 motion for judgment as a matter of law or, in the alternative, requesting a remittitur or new trial pursuant to Rule 59. (IR86 (motion filed May 4, 2017).) The trial court denied that motion in an unsigned minute entry on August 11, 2017, and entered a signed order incorporating that ruling on September 13, 2017. (IR 93, 97.) JAI filed a notice of appeal from the judgment and the unsigned minute entry denying the post-judgment motions on September 8, 2017, and an amended notice of appeal

incorporating the signed order on September 21, 2017. (IR 96, 99.) This Court has jurisdiction under A.R.S. § 12-2101(A)(1) and (2).

STATEMENT OF THE ISSUES

1. Whether the trial court erred in denying JAI's motion for judgment as a matter of law:

a. on the ground of sufficiency of the evidence, where both parties' experts agreed that Mr. Panameno's account of what he drank was untrue given the blood alcohol evidence, and/or

b. based on the duty of care, where it is undisputed that, if Mr. Panameno visited Jaguars, he was safely transported from Jaguars by the same driver who brought him there, and/or

c. based on the doctrine of intervening and superseding causation, where Mr. Panameno's own actions after being safely transported from Jaguars destroyed the chain of proximate causation.

2. Whether the trial court erred in refusing to instruct the jury on intervening and superseding cause or to otherwise explain the term "proximate causation," which was included, but not explained, in a non-standard jury instruction offered by Plaintiffs, and in denying JAI's motion for a new trial on the basis of this error.

3. Whether the trial court erred in its rulings on punitive damages, both

a. denying JAI's motion for judgment as a matter of law on the sufficiency of the evidence to support an award of punitive damages, where there was no evidence that JAI acted with an evil mind and no evidence regarding the appropriate amount of punitive damages, and/or

b. refusing to remit the excessive punitive damages award, which was 2.8 times the amount of the compensatory damages award against JAI.

ARGUMENT

I. Standard of Review

This Court reviews a trial court's decision on a motion for judgment as a matter of law *de novo*, considering the evidence in the light most favorable to the party opposing the motion. *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 498 ¶ 83, 200 P.3d 977, 995 (App. 2008); *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53 ¶ 13, 961 P.2d 449, 451 (1998). Judgment as a matter of law should be granted when the evidence is insufficient for a reasonable fact finder to reach a verdict in favor of the opposing party. *See, e.g.*, *Duncan v. St. Joseph's Hosp. & Med. Ctr.*, 183 Ariz. 359, 353, 903 P.2d 1107, 1111 (App. 1995). It is the Court's duty to set aside a verdict where there is no evidence in the record to support it. *See, e.g.*, *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996).

This Court also reviews jury instructions *de novo*, reviewing the instructions in their entirety to confirm that they correctly state the applicable law. *See A*

Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty., 222 Ariz. 515, 533 ¶ 50, 217 P.3d 1220, 1238 *App. 2009).

This Court reviews the trial court's denial of a motion for new trial or remittitur pursuant to Rule 59 for abuse of discretion. *Monaco v. HealthPartners of So. Ariz.*, 196 Ariz. 299, 304 ¶ 13, 995 P.2d 735, 740 (App. 1999). However, the trial court abuses its discretion if it makes a legal error in exercising its discretion, and this Court reviews *de novo* any questions of law raised by a motion for new trial. *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 355 ¶ 8, 322 P.3d 168, 172 (App. 2014).

II. The jury's verdict against JAI was not supported by sufficient evidence, and the trial court erred in denying JAI's motion for judgment as a matter of law.

There is no dispute that Mr. Panameno caused the accident in which Mr. Dupray was injured, that Mr. Panameno was intoxicated at the time of the accident, or that Mr. Dupray was seriously injured. But JAI cannot be held liable for those injuries unless Plaintiffs met their burden of demonstrating that JAI was negligent and its negligence proximately caused Mr. Dupray's injuries. *See, e.g., Acuna v. Kroack*, 212 Ariz. 104, 113, 128 P.3d 221, 230 (App. 2006); *Berne v. Greyhound Parks of Ariz., Inc.*, 104 Ariz. 38, 448 P.2d 388 (1968); *Payne v. M. Greenberg Const.*, 130 Ariz. 338, 347, 636 P.2d 116, 125 (App. 1981); *Seiler v. Whiting*, 52 Ariz. 542, 84 P.2d 452 (1938).

Plaintiffs' negligence case against JAI depends entirely on the deposition testimony of Mr. Panameno, the only statement in which he indicated that he either consumed more than two beers at Jaguars or had anything to drink prior to going to Jaguars. (*Compare* Feb. 2, 2017 Tr. at 85:20-86:9, 93:8-21, 113:24-114:2; Feb. 6, 2017 Tr. at 26:19-27:13; Ex. 33; *with* Feb. 2, 2017 Tr. at 152:14-154:13, 154:23-157:15, 163:18-168:12.) Mr. Panameno's inconsistency is troubling, especially because his account of having drunk heavily before and at Jaguars arose only after he and JAI had been named as co-defendants in this lawsuit, such that his nwq testimony would shifted financial accountability off of himself and onto JAI.

But what tips this case from an ordinary one involving witness credibility determinations to the unusual case where the evidence is insufficient to support the jury's verdict is the uncontroverted and unanimous testimony of the toxicologists. Both parties' toxicologists agreed that, given the results of the blood alcohol test performed after the accident, it was not possible for Mr. Panameno's testimony about what he drank at JAI's establishment to be true. (Feb. 6, 2017 Tr. at 29:15-35:10; 122:14-125:13.) Because only Mr. Panameno's incorrect testimony suggested that JAI could have acted negligently in serving Mr. Panameno,[3] and

[3] The only other evidence introduced suggested that JAI had met its standard of care and had not served Mr. Panameno while he was visibly intoxicated. Both the bartender and front door hostess on duty that day had been trained regarding the requirements of Arizona law (Exs. 48, 52; Feb. 7, 2017 Tr. at 33:11-25, 53:19-57:7.) Mr. Panameno testified that he did not behave in any way that attracted

Plaintiffs themselves demonstrated that testimony was unreliable, there was insufficient evidence to support the jury verdict. JAI was entitled to judgment as a matter of law.

III. The testimony on which Plaintiffs depended to establish JAI's liability demonstrated that JAI had satisfied its duty of care and that Panameno's own actions broke the chain of proximate causation.

Plaintiffs will likely respond to the sufficiency of evidence problem on appeal as they did before the trial court, relying heavily on Mr. Panameno's testimony and insisting that the questions of evidentiary sufficiency discussed above are merely credibility issues on which deference is owed to the jury. (IR 87 at 12-13.) But that approach poses even greater problems for the judgment in this case, because Mr. Panameno's testimony – if credited – clearly establishes the absence of either the breach or causation elements of Plaintiffs' tort claims. The trial court erred in refusing to grant JAI's motion for judgment as a matter of law for either of these reasons and in refusing to even instruct the jury on the doctrine of intervening, superseding causation.

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attention from club personnel while he was at Jaguars, and both toxicologists agreed that frequent drinkers like Mr. Panameno are able to mask the symptoms of impairment. (Feb. 2, 2017 Tr. at 144:13-146:9, 182:18-184:3; Feb. 6, 2017 Tr. at 38:6-39:19, 126:16-128:12.)

A. JAI was entitled to judgment as a matter of law on duty and causation under *Patterson*.

Central to all three errors is the trial court's failure to apply this Court's decision in *Patterson v. Thunder Pass, Inc.*, which directly addressed both the duty of care and proximate causation in the dram shop context. 214 Ariz. 435, 153 P.3d 1064 (App. 2007). In *Patterson*, a patron of the defendant tavern, Dawn Roque, consumed alcohol while she was obviously intoxicated. 214 Ariz. at 439, 153 P.3d 1068. When she tried to leave the tavern, its employees confiscated her car keys and a tavern employee eventually drove her home. 214 Ariz. at 436, 153 P.3d at 1065. Once there, the employee gave Ms. Roque her keys and left. *Id.* Within an hour, Ms. Roque returned to the tavern parking lot, retrieved her car, and got into an accident with Mr. Patterson, who sued the tavern alleging that it had been negligent in over-serving Ms. Roque. *Id.*

The *Patterson* Court made two key and independent holdings. First, it addressed the standard of care applicable to taverns that have served a person to the point of obvious intoxication. Drawing on the language of A.R.S. § 4-244(14), the Court held that a tavern satisfies its duty of care when it stops serving the intoxicated patron and arranges for them to be transported off the premises by someone who is not intoxicated. 214 Ariz. at 439, 153 P.3d at 1068. The Court therefore held that Thunder Pass could not be held liable on a negligence theory, even assuming it had served Ms. Roque while she was intoxicated, because it had

"fulfilled [its] legal duty of affirmative, reasonable care to Roque and the public by separating Roque from her vehicle and arranging for, as well as subsequently providing, the safe transportation of Roque to her residence." *Id.*

As to the breach element of a negligence claim, *Patterson* stands for the proposition that a tavern that over-serves a patron is not automatically liable, as it can still satisfy its duty of care if the patron is safely transported from the premises. This holding recognizes that the risk in serving an obviously intoxicated patron lies chiefly in the fact that the patron who becomes intoxicated at a tavern may be unable to return to his home or other place of repose safely. *See, e.g., Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983) (patron was headed home); *Brannigan v. Raybuck*, 136 Ariz. 513, 667 P.2d 213 (1983) (accident happened within minutes of leaving bar parking lot). Once the patron has been returned safely to their place of repose, the risk of the patron deciding to leave again is no different than if they had become intoxicated at home with alcohol purchased at a store, and the risk they cause by choosing to leave home while intoxicated cannot reasonably be said to fall on the tavern employee who served them.

Second, the *Patterson* Court addressed the element of causation, finding that Ms. Roque's unforeseeable actions in leaving her home to reclaim her car and drive while still intoxicated constituted a sufficient intervening, superseding cause to disrupt the chain of proximate causation and preclude any finding of liability on

the part of the tavern. 214 Ariz. at 438-39, 153 P.3d at 1067-68. While acknowledging Patterson's argument that intoxicated people make poor decisions, the Court declined to find proximate causation on such "attenuated" reasoning, expressing concern that doing so "might ultimately subject tavern owners to unlimited liability, a result that would no more serve public policy than finding nonliability in all circumstances." 214 Ariz. at 440, 153 P.3d at 1069. It was unforeseeable and extraordinary that Ms. Roque would return to the tavern to get her car after being brought safely to her home, and that intervening event "negated any negligence on the part of the tavern or its employees." *Id.*

Comparison of the facts of *Patterson* to those of the instant case reveals the trial court's error in denying the motion for judgment as a matter of law. It is undisputed that Mr. Panameno did not drive either to or from Jaguars, and that he was instead transported safely to and from the club by his friend Carlos.[4] (*Id.*at 148:1-151:18, 163:18-168:12, 170:17-21.) Under *Patterson*, once Mr. Panameno had been safely transported from the club, JAI's duties were satisfied, regardless of whether it had served him alcohol while he was visibly intoxicated. 214 Ariz. at 439, 153 P.3d at 1068; A.R.S. § 4-244(14). The "designated driver" concept

[4] Although Mr. Panameno testified that Carlos was also drinking that afternoon, he could specifically identify only three to four drinks Carlos consumed over multiple hours – a single swig of the bourbon Mr. Panameno purchased at the drive-thru and two or three of the beers purchased at Jaguars. (Feb. 2, 2017 Tr. at 155:21-156:4, 164:21-166:18, 167:17-168:4.)

incorporated in the statutory scheme is premised on the reliability of non-intoxicated drivers being responsible for transportation of intoxicated people. Because the uncontroverted evidence demonstrated that JAI had satisfied its duty, JAI was entitled to judgment as a matter of law.

B. Mr. Panameno's actions after leaving the tavern were intervening, superseding causes of Plaintiff's injury.

JAI was also entitled to judgment as a matter of law based on intervening, superseding cause. Mr. Panameno committed not one but two separate, unforeseeable and extraordinary actions that broke the chain of causation, as Ms. Roque did in the *Patterson* case when she went back to the tavern to get her car after being taken safely home.

First, Mr. Panameno left Carlos's home after being safely transported there. This action was unforeseeable for JAI, which could know only that Mr. Panameno had both arrived and left in the custody of another driver, who was presumably operating in the capacity of a designated driver, a widely used and promoted way of maintaining the safety of tavern patrons. No evidence was introduced that Jaguars had any way of knowing that after Mr. Panameno relied on someone else to transport him when he had been drinking, he would later choose to drive himself anyway.

Nor was there any evidence that Jaguars knew or should have known that Mr. Panameno even had access to a car, given that he was driven both to and from

the club by someone else. Just having a driver's license does not necessarily mean that an individual actually owns or has access to a car to drive, or that they would choose to do so after being driven to and from a club by someone else. Moreover, even knowing that an intoxicated patron has access to a car does not make the patron's decision to leave a safe location to drive that car foreseeable, as is demonstrated by the *Patterson* case, in which the tavern knew Ms. Roque had a car and even returned her keys to her, but was still found not liable because her action of seeking out and driving that car while still intoxicated was held to be unforeseeable and extraordinary.

Here, leaving Carlos's house to drive his own car was only the first of Mr. Panameno's unforeseeable and extraordinary actions. It was his second such action that actually led to the accident with Mr. Dupray, and that action is less foreseeable than Ms. Roque's decision to reclaim her car before she was sober enough to do so safely. After leaving Carlos's house, Mr. Panameno safely reached his girlfriend's house in Anthem, and he left there *only* because they had a fight about his late return. (Feb. 2, 2017 Tr. at 147:14-148:1, 173:17-174:16, 187:6-186:16.) Despite their argument, his girlfriend attempted to keep him from leaving, telling him he was too drunk to drive and trying to take his keys so that he would not do so. (*Id.* at 187:6-16.) He evaded her attempt to take his keys and left abruptly, taking out his outrage at her comments in aggressive driving that

resulted, almost immediately, in hitting Mr. Dupray's scooter. (*Id.* at 175:6-21, 187:6-7, 187:15-16, 188:18-189:8.)

JAI had no way to foresee that Mr. Panameno would choose to forego the safety of Lydia and David's home to leave in anger and express that anger through reckless driving that resulted in the injury to Mr. Dupray. The jury was authorized by the trial court and encouraged by Plaintiffs to hold JAI responsible to speculate that an intoxicated patron, transported by a designated driver to a point of safety, would not "sleep it off" but instead do precisely what his girlfriend told him should not be done. While a jury might recognize that intoxicated people can be belligerent and engage risky behavior, holding JAI responsible for this unforeseeable and lengthy chain of events eviscerates the legal principles of proximate causation and intervening and superseding causation. Under the rule of law recognized in *Patterson*, Mr. Panameno's actions destroyed the chain of proximate causation, an JAI cannot be held liable for the results of those actions.

C. The trial court's refusal to instruct the jury regarding intervening, superseding cause compounded its error in failing to acknowledge the relevance of *Patterson*.

If the defendant in *Patterson* was entitled to summary judgment on liability where it demonstrated that an intoxicated patron had returned to pick up her car after being transported safely home, then JAI was entitled to judgment as a matter of law where Mr. Panameno was safely transported by his designated driver and

chose to drive not once but twice, the last time due to a personal argument over which JAI had no influence, about which it had no information, and which included his girlfriend explicitly telling him he should not drive.

Even if for some reason the uncontroverted evidence of Mr. Panameno's actions after being transported safely from Jaguars was insufficient to entitle JAI to judgment as a matter of law, at a minimum it raised an issue for the jury regarding proximate causation. However, even after hearing argument on JAI's Rule 50(a) motion and being fully apprised of the proximate causation issue, the trial court refused to give such an instruction. (Feb. 7, 2017 Tr. at 87.)

Instead, the trial court relied on the standard RAJI instruction regarding causation, which acknowledges that it is possible that there is more than one cause of an event, but provides the jury with no guidance that sometimes one of these multiple causes can be unforeseeable and extraordinary such that the chain of proximate causation is broken and other causes become legally irrelevant. (Feb. 8, 2017 Tr. at 8:6-11.) Adding to the confusion, the court's instructions actually mentioned the concept of "proximate cause," adopting a jury instruction proffered by Plaintiffs that described the scope of taverns' statutory liability using that term, but provided the jury with no information regarding what proximate cause means or how to apply it in this context. (*Id.* at 12:1-10.)

Furthermore, Plaintiff's standard of care expert outright denied that the rule established by this Court in *Patterson* existed, further necessitating a correction in the form of a specific jury instruction. (Feb. 2, 2017 Tr. at 65:20-66:25.) The trial court refused to do so, which was reversible error in the context of the evidence and the jury instructions as a whole. The trial court must give requested instructions that are supported by the evidence, accurately state the law, and pertain to important issues not covered by other instructions. *State ex rel. Miller v. Wells Fargo Bank of Ariz.*, 194 Ariz. 126, 132 ¶ 39, 978 P.2d 103, 109 (App. 1998). Merely mentioning proximate causation, without any explanation of that complex legal principle, is not "covering" that issue as required by *Miller*, particularly in a case where proximate causation issues were raised by the facts. *See also Gehres v. City of Phoenix*, 156 Ariz. 484, 486, 753 P.2d 174, 176 (1987) (finding refusal to grant directed verdict appropriate where jury "was fully instructed on intervening and superseding cause" and evidence existed that could support finding proximate causation).

IV. The jury's award of punitive damages was unsupported by evidence and was excessive.

As set forth above, the finding of liability against JAI is unsupported by the evidence, contrary to law, and the result of instructional error, and the judgment thus should be vacated in its entirety. Furthermore, wholly apart from the legal errors in the finding of liability and the compensatory award, the portion of the

judgment assessing $4 million in punitive damages against JAI cannot be sustained for two additional reasons.

First, Plaintiffs failed to meet their burden of establishing, by clear and convincing evidence, that JAI acted with an evil mind. *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986); *Bradshaw v. State Farm Mut. Auto Inc.*, 157 Ariz. 411, 422-23, 758 P.2d 1313, 1323-24 (1988); *Gurule v. Ill. Mut. Life & Cas. Co.*, 152 Ariz. 600, 734 P.2d 85 (1987). The jury was specifically instructed that, to meet this burden, Plaintiffs needed to demonstrate that JAI either (1) "acted to serve its own interests, having reason to know and consciously disregarding a substantial risk that its conduct might significantly injure the rights of others; or (2) "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." (Feb. 8, 2017 Tr. at 14:10-17.)

Plaintiffs failed entirely to meet this burden. Not only was their evidence of what Mr. Panameno drank at Jaguars contradicted by the scientific evidence, as their own expert acknowledged, but they made no effort to demonstrate that Jaguars had consciously disregarded any risks. Instead, the uncontroverted evidence was that both the bartender and hostess who were on shift that day had been trained on the requirements of Arizona law, and the manager who supervised them testified to both his own correct understanding of Jaguars' legal obligations

and the formal and on-the-job training used to educate staff on those obligations. (Exs. 48, 52; Feb. 7, 2017 Tr. at 33:11-25, 53:19-57:7.)

Plaintiffs also made no effort to introduce evidence from which the jury could have calculated a punitive damages award that was reasonable under the circumstances. *Hawkins v. Allstate Insurance Co.*, 152 Ariz. 490, 497, 501, 733 P.2d 1073, 1080, 1981 (1987). An award of punitive damages, if supported by the evidence, should be sufficient to punish and deter others without financially ruining the defendant. *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 219, 693 P.2d 348, 362 (App. 1984); *Olson v. Walker*, 162 Ariz. 174, 781 P.2d 1015 (App. 1989); *Hawkins*, 152 Ariz. at 502, 733 P.2d at 1085.

Plaintiffs introduced no evidence about JAI's financial condition or the profitability of its conduct as would be required to make such a determination, leaving the jury only able to engage in the kind of speculation and conjecture that *Hawkins* held may not be the basis of a punitive award. This is evident in the disparity between how the jury, struggling with the lack of relevant evidence, assessed compensatory and punitive damages. The jury found JAI only 40% at fault, but then awarded ten times more in punitive damages against JAI than it had against Mr. Panameno, who it found 60% at fault. (IR 76.) Plaintiffs failure to meet their burden of establishing either that JAI acted with an evil mind or

introducing any evidence from which the jury could calculate a reasonable punitive award requires that the punitive award be vacated.

Second, the punitive damages award in this case was excessive and should, at a minimum, be remitted to a 1:1 ratio with the compensatory damages assessed against JAI. Arizona courts have followed the guidance of the Supreme Court of the United States in *State Farm Automobile Insurance Co. v. Campbell* that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. 408, 425 (2003); *see also Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 200 P.3d 977 (App. 2008) (given the substantial compensatory damages awarded, punitive damages award reduced to the amount of compensatory damages); *Nardelli v. Metro. Group Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 277 P.3d 789 (App. 2012) (record did not justify awarding punitive damages at a ratio above 1:1); *Hudgins v. Southwest Airlines Co.*, 221 Ariz. 472, 212 P.3d 810 (App. 2009).

In this case, the compensatory damages were substantial, with the jury awarding Plaintiffs over $3.5 million. (IR 76.) Applying the allocation of fault, JAI's portion of that compensatory award was only slightly over $1.4 million, still a substantial amount, but an amount far less than the punitive damages award of $4

million. This ratio, of 2.85 to 1, is far above the amount permitted by due process under the established caselaw, and a remittitur was required.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be vacated and the case remanded for entry of judgment in favor of JAI. In the alternative, the judgment should be vacated and the case remanded for a new trial at which the jury is properly instructed on the doctrine of intervening, superseding cause as explained in *Patterson*. Lastly, even if this Court affirms the judgment as to liability and compensatory damages, it should vacate the punitive award or, at a minimum, order that it be remitted to no more than a 1:1 ratio with the compensatory award.

DATED this 15th day of December, 2017.

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