ARIZONA COURT OF APPEALS

DIVISION ONE

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

REPLY BRIEF

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INTRODUCTION

There is no dispute that Pedro Panameno was intoxicated when he hit Mr. Dupray's scooter or that Mr. Dupray suffered serious physical injuries in that accident. There is likewise no dispute that when an accident like this one occurs, Arizona law establishes potential liability for an establishment that served alcohol to the intoxicated driver.

But making the leap from potential liability to a properly supported jury award of compensatory and punitive damages requires more than merely establishing that the establishment served alcohol as a part of its business and that the intoxicated driver may have consumed alcohol there before the accident. Liability requires showing by a preponderance of the evidence, not mere speculation, that negligence by the establishment was a proximate cause of the accident in which the plaintiff was injured. Even when liability is established, an award of punitive damages requires showing by clear and convincing evidence that the establishment engaged in conduct above and beyond merely committing the tort for which compensatory damages were awarded.

In answering JAI's appeal from the jury's verdict, Plaintiffs ignore these requirements of Arizona law. As to liability, they take the position

that an establishment that serves alcohol can be held liable for an accident caused by a patron based solely on the speculation of an expert that contradicts the testimony of the only percipient witness. Although they grudgingly recognize that the requirement of proximate causation applies in dram shop act cases, they contend that it was permissible for the trial court to ignore evidence in the record from which the jury could have found an intervening, superseding cause destroying the chain of proximate causation and to refuse to give an instruction on that issue that correctly stated the applicable law. And they defend an award of punitive damages in an amount nearly three times the compensatory award through a partial recitation of evidence that, at most, would establish the elements of the tort rather than constituting the something more on which a punitive award must be based.

This Court should reject Plaintiffs' effort to establish strict liability and automatic punitive damages in dram shop act cases and should instead examine the issues raised by this appeal in light of existing Arizona law. Applying those established principles to the facts of this case requires vacating the existing judgment and either remanding for entry of judgment

in JAI's favor or, at a minimum, remanding for a new trial at which the jury is properly instructed.

ARGUMENT

I. The fact that Mr. Panameno was intoxicated when he hit Mr. Dupray's scooter does not alone establish liability on the part of JAI.

In their answering brief, Plaintiffs take the position that the only way an establishment that serves alcohol can avoid liability for actions taken by an overserved individual is to "affirmatively arrange" that individual's safe transportation home by a non-intoxicated individual. (Ans. Br. at 28.) Later in their brief, Plaintiffs go even further, contending that even "if Jaguars had affirmatively arranged for Pedro's transportation . . . that still might not have satisfied its duty as a matter of law." (*Id.* at 35.) In effect, Plaintiff's contend, once an establishment has served a patron "a single beer" that either "rendered him visibly intoxicated" or "after he already was so," then the establishment is the guarantor of any behavior that person may engage in until he is again sober. (*Id.* at 28.)

Plaintiffs' expansive view of dram shop act liability is not an accurate statement of Arizona law. A.R.S. § 4-244(14), on which they rely for the proposition that the establishment must affirmatively arrange for the safe

transport of the patron (rather than simply observing that the patron has left with the driver who brought them or arranged a ride), does not say that. The statute instead uses the passive voice of which Plaintiffs are generally so critical, providing that an establishment that overserves a patron may permit that patron to remain on its premises for a limited time "in order that a nonintoxicated person may transport the obviously intoxicated person from the premises." *Id.* For all that the facts of the *Thunder Pass* case happened to involve a tavern that took affirmative steps to drive a patron home, the Legislature did not impose such a burden and instead recognized that taverns may rely on others to safely transport patrons from their establishments. *Compare id. with Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 439, 153 P.3d 1064, 1068 (App. 2007) (drawing on the language of A.R.S. § 4-244(14) in articulating the standard of care).

Nor does Arizona recognize a rule that establishments that serve alcohol remain responsible for whatever an intoxicated person may do upon reaching home (or another place of repose) safely. The *McMurtry* case on which Plaintiffs rely does not stand for that proposition. It arose from unusual circumstances in which a hotel that overserved a patron in its bar could not rely on having returned her to her hotel room because that room

was inherently unsafe, containing a window that guests were encouraged to open in order to smoke and from which the patron fell to her death. *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 247-48 ¶¶ 2-3, 256-58 ¶¶ 38-39, 42-43, 293 P.3d 520, 523-24, 532-34 (App. 2013). Because the hotel knew of the specific safety issue and had invited it by encouraging guests to open their windows to smoke, this Court held that there was at least a material issue of fact regarding whether the intoxicated patron's fall from her window, after being returned there by the hotel, was extraordinary and unforeseeable. *Id.* at 258 ¶¶ 42-43, 293 P.3d at 534.

The *McMurtry* case did confirm the actual standard for dram shop act liability, which was originally articulated in the *Ontiveros* case and later codified in A.R.S. § 4-311: an establishment that is licensed to serve alcohol "is liable for injuries or death if the plaintiff establishes that (1) a licensee sold liquor to an 'obviously intoxicated' person; (2) the person consumed the liquor; and (3) the liquor consumption was a proximate cause of the injury or death." *Id.* at 257 ¶ 40, 293 P.3d at 533 (citing *Ontiveros v. Borak*, 136 Ariz. 500, 513, 667 P.2d 200, 213 (1983) and A.R.S. § 4-311). Applying that standard to the evidence in this case reveals two key problems, each of which requires reversal: (1) the jury could not conclude that JAI sold liquor

to Mr. Panameno while he was obviously intoxicated without engaging in impermissible speculation; and (2) the evidence at trial would support a factual finding that Mr. Panameno's actions broke the chain of proximate causation, but the trial court refused to recognize that or to instruct the jury adequately so that it could make that determination.

A. Plaintiffs could not meet their burden of proving that JAI overserved Mr. Panameno through speculation.

JAI cannot be held liable for Plaintiffs' injuries absent proof that it served alcohol to Mr. Panameno while Mr. Panameno was obviously intoxicated. *Id.* at 257 ¶ 40, 293 P.3d at 533. Although it is permissible for the jury to draw reasonable inferences from indirect evidence to reach this conclusion, if the "facts are of such a nature that an inference of due care is just as reasonable as one of negligence, the jury may not base a verdict on a guess or surmise that negligence existed." *Seiler v. Whiting*, 52 Ariz. 542, 548, 84 P.2d 452, 454 (1938).

Guessing at facts that would support a finding of liability by JAI is exactly what Plaintiffs have acknowledged that they asked the jury to do. The only evidence that Mr. Panameno even visited JAI's club, Jaguars, on the day of the accident, let alone drank anything there, let alone was served

while obviously intoxicated, is Mr. Panameno's own recitation from his deposition testimony. (Feb. 2, 2017 Tr. at 152:14-157:15, 163:18-168:12.[1]) Mr. Panameno never otherwise mentioned visiting Jaguars when giving different accounts of his drinking during the initial investigation of the accident or during his sentencing in the criminal case. (*Id.* at 85:20-86:9, 93:8-21, 113:24-114:2; Feb. 6, 2017 Tr. at 26:19-27:13; Ex. 33.) Nor were any other witnesses called to confirm that he was at Jaguars or what he drank there—not the friends who allegedly accompanied him, any of the people working at Jaguars that day, or any other patrons.

The problem that this poses for Plaintiffs' case is that they cannot rely on Mr. Panameno's testimony to establish that he was served while obviously intoxicated at Jaguars, because both of the parties' experts agree that Mr. Panameno could not actually have drank what he claimed to have drunk that day. (Feb. 6, 2017 Tr. at 29:15-30:6, 122:14-125:13.) Plaintiffs acknowledge this, stating "both toxicologists agree, given Pedro's timeline,

[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. "Ex." references are to exhibits introduced at trial.

he could not have drank as much as he testified, cumulatively before and during his Jaguars patronage." (Ans. Br. at 27.)

But Plaintiffs have no evidence to fill the gap created by Mr. Panameno's scientifically disproven testimony. Instead, they suggest that the jury could speculate that there might have been some combination of drinks before or at Jaguars, or some alternative timeline, that would have resulted in Mr. Panameno being visibly intoxicated while being served at Jaguars. In Plaintiffs' words, because "there are countless ways to mix and match the facts" to support a liability finding, "we do not need to know precisely how the jury reached its findings – only that it was reasonably possible to do so." (*Id.* at 28.) In support of this contention, they offer three possible options that, they claim, could have resulted in a properly supported jury verdict: (1) the jury "g[ave] more weight to Pedro's at-Jaguars than his pre-Jaguars testimony," meaning that he drank only beers at Jaguars and no Crown Royal beforehand; (2) the jury "g[ave] less weight to his timeline," assuming that he drank what he said but over a longer period; or (3) the jury "accepted a scenario wherein Pedro consumed the equivalent of eight shots of Crown Royal and eight beers that evening," (*Id.* at 27.)

The problem is, there is no evidence in the record that any of these proposed scenarios actually took place. At most, Plaintiffs' toxicologist said that someone could have reached the blood alcohol level Mr. Panameno displayed at the time of the accident by drinking eight beers and eight shots of 80-proof alcohol at a constant rate over a four-hour period ending at eight p.m. (Feb. 6, 2017 Tr. at 17:6-15, 26:10-12.) No one testified that Mr. Panameno had actually done so, and Mr. Panameno specifically testified contrary to the proposed scenario. The fact that Plaintiff can posit "countless ways to mix and match the facts" to speculate that Mr. Panameno may have been visibly intoxicated while at Jaguars is insufficient to support the jury's verdict of liability, and requires that the judgment be vacated in its entirety.

B. Even if Plaintiffs had established that JAI overserved Mr. Panameno, the facts raised issues of proximate causation that would relieve JAI from liability.

Plaintiffs' response to the issue of proximate causation is similarly problematic. Plaintiff takes the position that a proximate causation analysis is required only in the most extreme of circumstances, when a tavern has undertaken significant "affirmative efforts to protect the public" such that the overserved patron had to "actively overcome or disregard" in order to

cause a harm that could not be foreseen. (Ans. Br. at 32.) This standard, Plaintiffs suggest, serves public policy by "incentiviz[ing] bars to take similar efforts to mitigate their risk, knowing that, by doing so, they may eliminate their liability exposure as a matter of law." (*Id.* at 32-33.)

The Arizona legislature has made the relevant public policy determinations here, expressly stating that a liquor licensee is liable when its service of liquor "was a *proximate* cause of the injury or death." A.R.S. § 4-311 (emphasis added). The Legislature has not chosen to require that licensees affirmatively arrange for safe transport of overserved patrons, instead providing that an overserved patron may remain on the premises for up to thirty minutes "in order that a nonintoxicated person may transport the obviously intoxicated person from the premises." A.R.S. § 4-244(14). The requirement of proximate causation applies in every case, regardless of what steps the licensee did or did not take to transport the patron.

Plaintiffs' analysis of the *Thunder Pass* and *McMurtry* cases examining the application of proximate causation in the dram shop act context is similarly flawed. In examining *Thunder Pass*, Plaintiffs focus on the factual differences in how the intoxicated driver reached home safely: the driver in

Thunder Pass was transported by a tavern employee, while Mr. Panameno was transported by his friend Carlos and then drove himself back to his girlfriend's house, where he intended to stay the night.[2] *Thunder Pass*, 214 Ariz. at 436 ¶ 3, 153 P.3d at 1065; Feb. 2, 2017 Tr. at 170:17-19, 172:11-17.

Plaintiffs' analysis misses the point. Duty and causation are separate elements of an actionable tort, and proximate cause becomes relevant only when there is both breach of duty and causation in fact:

> If a tavern owner breaches [its] duty of reasonable care, the owner may be held liable for injuries or damages caused by his or her negligence. Thus, a plaintiff must still show causation, and actual causation, or "causation-in-fact" exists if a defendant's act contributed to the final result and if that result would not have occurred but for the defendant's conduct.
>
> Nevertheless, a tavern owner may be relieved of liability for an injury to which the owner has in fact made a substantial contribution if a plaintiff's injury occurs due to a later, intervening event of independent origin for which the owner is not

[2] At the time of the accident, Mr. Panameno did not have a home of his own – he was sleeping in his car or staying with friends. (Feb. 2, 2017 Tr. at 147:14-148:1.) He testified that he intended to remain at the home of his girlfriend Lydia and her brother David, and that he left after a few minutes only because he got into an argument with Lydia. (*Id.* at 172:18-21 (describing Lydia and David's house as "home"), 173:17-21 (testifying that he left after a few minutes because of the argument).)

> responsible. To constitute a cause relieving the tavern owner of liability, the intervening event must have also been superseding: that is, it must have been unforeseeable by a reasonable person in the position of the tavern owner and, when looking back after the event, the intervening event must appear extraordinary. Thus, if an injury is produced by an intervening and superseding cause, even though the original negligence may have been a substantial factor in bringing about the injury, the original actor is not legally responsible therefor because the necessary proximate causation is lacking.

Thunder Pass, 214 Ariz. at 438-39 ¶ 14, 153 P.3d at 1067-68 (internal citations and quotations omitted).

The relevant analysis thus focuses not on how the intoxicated persons got home safely, but on whether what they did after they got home safely was unforeseeable and extraordinary such that it broke the chain of proximate causation. Comparing Mr. Panameno's actions to those of the driver in *Thunder Pass* reveals that his actions were at least as foreseeable and ordinary as the actions that the *Thunder Pass* Court found to support entry of summary judgment in favor of the tavern on the grounds of lack of proximate causation. *Id.* at 440 ¶ 19, 153 P.3d at 1069.

Mr. Panameno testified that he was driven both to and from Jaguars by Carlos, in Carlos's car.[3] (Feb. 2, 2017 Tr. at 152:4-20, 170:17-21, 181:3-23, 184:7-13.) Jaguars had no basis to know whether Mr. Panameno had access to a car, nor did he show any indication of intending to drive after leaving their establishment. In contrast, Ms. Roque, the driver in *Thunder Pass*, not only had access to a car, but actually tried to drive away from the tavern, "back[ing] her vehicle into a parked Jeep and then dr[iving] forward over a parking block" before tavern employees confiscated her keys and arranged for her transport home. *Thunder Pass*, 214 Ariz. at 436 ¶ 3, 153 P.3d at 1065. The tavern in *Thunder Pass* thus knew that Ms. Roque had access to a car and affirmatively wanted to drive it, given that she had attempted to do so, but it nonetheless returned her car keys to her after transporting her home.

[3] The evidence regarding Carlos' intoxication is, at best, equivocal. When Mr. Panameno was asked to account for the specific amounts that he and his companions consumed from the liquor bought at the drive-through and at Jaguars, he specified that Carlos had drank only one shot of Crown Royal and one or two beers over the four-hour period. (Feb. 2, 2017 Tr. at 155:21-25, 164:21-23, 165:17-21, 166:9-18.) Later in the deposition, Mr. Panameno indicated that all three men were "pretty much toasted" and "had more than their share," but again indicated only that Carlos "was probably drinking more. I don't know. I can't tell you how much more he was drinking because I really – I didn't see what he was drinking." (*Id.* at 184:19-22, 186:4-7.)

Id. If Ms. Roque's decision to go back to the tavern to retrieve the car she had actively tried to drive away in was so unforeseeable and extraordinary that the tavern in *Thunder Pass* was entitled to summary judgment in its favor, how could Mr. Panameno's decision to leave home driving angrily after having an argument with his girlfriend not require judgment as a matter of law in JAI's favor, or at a minimum create a triable issue of fact regarding proximate causation?

A review of the *McMurtry* case similarly reveals the existence of at least a triable question regarding proximate causation. In that case, a hotel bar overserved a patron, then escorted her back to her hotel room on the third floor. *McMurtry*, 231 Ariz. at 247-48 ¶¶ 2-3, 293 P.3d at 523-24. She climbed or fell out of the room's window to her death. *Id.* This Court held that entry of summary judgment in favor of the hotel on a proximate causation theory was inappropriate given that there were material issues of fact about whether it was foreseeable that the intoxicated person would fall out of the window given its location and the regular use of window ledges for smoking. *Id.* at 256-57 ¶ 39, 293 P.3d at 532-33. The Court specifically referenced expert testimony that windows like the one in question are particularly dangerous when alcohol is served because "for the obvious

reason that intoxication affects guest inhibitions, judgment, reactions, and coordination" but still found that there was a triable issue of fact that the guest's fall from the window was not proximately caused by the service of alcohol. *Id.* If it could be unforeseeable and extraordinary that an intoxicated guest would climb out a window she had personally used earlier in that day to smoke, such that there was a triable issue of fact on proximate causation, then how could Mr. Panameno's decision to drive angrily away from home after having an argument not create similar issues?

C. The trial court's refusal to give an instruction adequate to describe proximate causation was erroneous and prejudicial.

The trial court denied judgment as a matter of law on the issue of proximate causation, holding that causation was an issue to be determined by the jury. (Feb. 7, 2017 Tr. at 85:6-11.) But the court then refused to specifically instruct the jury on the doctrine of proximate causation or the role of intervening, superseding cause, instead relying solely on the recommended jury instructions covering causation in fact, as follows:

> Negligence causes an injury if it helps produce the injury and if the injury would not have happened without the negligence.

> There may be more than one cause of an injury. . . . Before you can find Defendant JAI Dining Services at fault, you must find that Defendant JAI Dining Services' negligence was a cause of Plaintiff's injuries.

(Feb. 8, 2017 Tr. at 8:3-11; *see also* Feb. 7, 2017 Tr. at 97:24-98:24 (ruling on jury instructions).)

The basic causation instruction does nothing to help the jury understand that, under the doctrine of proximate causation, some of the multiple causes that "help[] produce an injury" still cannot form the basis of legal liability because something else happened later that was sufficiently unforeseeable and extraordinary that causation-in-fact alone no longer determines liability. *See Ontiveros*, 136 Ariz. at 506, 667 P.2d at 206 (differentiating between cause-in-fact and proximate causation); *Thunder Pass*, 214 Ariz. at 438-39 ¶¶ 13-14, 153 P.3d at 1067-68 (same). Nor is it likely that the jury could have just figured this out from defense counsel's argument, particularly after being instructed to apply the law exactly as instructed and that "the lawyer's questions and arguments are not evidence." (Feb. 8, 2017 Tr. at 5:4-6, 10-11.) In this case, the standard

instruction was not sufficient to adequately explain the distinction between causation-in-fact and proximate causation.[4]

JAI recognized the necessity of a specific instruction in this case and proposed one for that specific purpose. The proposed instruction did not simply use the words "intervening superseding cause," as Plaintiff's suggest.[5] (Ans. Br. at 44-45.) Instead, JAI's proposed instruction explained the effect of an intervening, superseding cause on liability, drawing directly on the language of *Thunder Pass*:

> Plaintiffs must show there was a natural and continuous sequence of events stemming from Defendant JAI Dining Services (Phoenix) Inc.'s alleged act or omission, unbroken by any

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[4] In *Ritchie v. Krasner*, a medical malpractice case, this Court held that the standard causation instructions were sufficient and that the trial court did not err in refusing additional instructions on intervening and superseding cause. 221 Ariz. 288, 300 ¶ 32, 211 P.3d 1272, 1284 (App. 2000). The opinion does not explain the basis on which the Court found the instruction to be adequate in that case, nor does it purport to hold that an instruction would never be appropriate or necessary. Moreover, like the Plaintiffs' answering brief in this case, the *Ritchie* first spends pages exploring the meaning of the proximate causation requirement and whether it could apply in the case, but then declaring that the jury did not require any explanation at all of a legal concept that took trained lawyers and judges pages of analysis to explain and apply.

[5] Plaintiffs actually proposed a jury instruction using the words "proximate cause" without explanation, and that instruction was given to the jury. (Feb. 8, 2017 Tr. at 12:1-10.)

> 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 in bringing about that harm.
>
> An intervening cause becomes a superseding cause, thereby relieving Defendant JAI Dining Services (Phoenix) Inc. of liability for any original negligent conduct, when the intervening force was unforeseeable and may be described, with the benefit of hindsight, as extraordinary.

(IR 52 at 23.) In light of the substantial evidence from which a properly instructed jury could have found an intervening, superseding cause destroying the chain of proximate causation, the refusal to give this instruction was plainly prejudicial. *See Anderson v. Nissei ASB Mach. Co.*, 197 Ariz. 168, 178 ¶ 39, 3 P.3d 1088, 1098 (App. 1999) (when considering whether trial court erred in refusing an instruction, appellate court must view the evidence in the light most favorable to the party who requested the instruction); *Cotterhill v. Bafile*, 177 Ariz. 76, 79, 865 P.2d 120, 123 (App. 1993) (same). Thus, at a minimum, the judgment should be vacated and the case remanded for a new trial before a properly instructed jury.

II. The award of punitive damages is unsupported by evidence and constitutionally excessive.

A. An award of punitive damages must be based on something more than liability for the underlying tort.

Plaintiffs concede that the imposition of punitive damages requires clear and convincing evidence that the defendant persists in pursuing a course of action knowing of the risks posed to others. (Ans. Br. at 47.) An award of punitive damages requires something more than "the mere commission of a tort" or even "gross negligence," but a systematic course of action taken in disregard of the rights of and risks posed to others. *See Rawlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 330-33, 723 P.2d 675, 679-82 (1986); *Volz v. Coleman Co.*, 155 Ariz. 567, 571, 748 P.2d 1191, 1195 (1987).

Plaintiffs introduced no such evidence, let alone clear and convincing evidence. All of the evidence introduced at trial related to a single visit Mr. Panameno claimed to have made to Jaguars, at the end of which the friend who drove him to the club also drove him away from the club. (Feb. 2, 2017 Tr. at 152:4-20, 170:17-21, 181:3-23, 184:7-13.) What exactly Mr. Panameno drank at or before reaching the club is unclear, but it certainly was not as much as he claimed, given the undisputed toxicological evidence and the

unanimous opinions of the experts.[6] (Feb. 6, 2017 Tr. at 29:15-30:6, 112:14-125:13.) At most, Plaintiffs could claim that JAI's employees should have noticed Mr. Panameno's intoxication and taken additional actions beyond letting him leave in a car driven by someone else to points unknown, where he may or may not have had access to a car or inclination to drive one.

Plaintiffs introduced no evidence that, if JAI's employees failed to detect and address Mr. Panameno's intoxication, this was a part of any pattern or practice of conduct. In this regard, Plaintiffs' answering brief presents a slanted and inaccurate description of the evidence at trial, despite acknowledging that they had a heightened burden to prove a course of wrongful conduct by clear and convincing evidence. (Ans. Br. at 47.) They state that Jaguars earns most of its revenue through the sale of liquor and encourages the purchase of multiple beers by selling them in discounted multi-bottle "buckets." (*Id.* at 48.) But they omit the evidence

[6] Having conceded that Mr. Panameno must have drank less that day in defending the liability finding and compensatory damages award (Ans. Br. at 27), Plaintiffs cannot simply ignore that concession and return to the disproven account of Mr. Panameno's drinking for the purposes of defending their punitive damages award.

that buckets are only sold to groups. (Feb. 7, 2017 Tr. at 62:20-63:22.) They assume that the buckets had eight beers each (Ans. Br. at 48), but fail to mention that Jaguars' manager testified that the club did not sell buckets of eight beers. (Feb. 7, 2017 Tr. at 41:19-42:25.) They also fail to mention that the "incentive" to purchase multiple beers amounted to a discount of 25 cents per bottle and represented a reduction in JAI's revenues. (Feb. 7, 2017 Tr. at 42:18-25; 62:3-16.)

They cite Jaguars' failure to "implement written policies or procedures" regarding alcohol service or identifying intoxicated customers. (Ans. Br. at 48.) But they fail to disclose that JAI relied on outside agencies to conduct the legally required training and additional formal training and introduced specific evidence that the particular employees working on the day of the accident had completed the required training. (Exs. 48, 52; Feb. 7, 2017 Tr. at 33:11-25, 53:19-57:7.) They also fail to mention the testimony of Jaguars' manager, on duty that day, in which he accurately described JAI's obligations regarding alcohol service, thereby demonstrating the adequacy of the training in informing employees. (*Id.)* Nor do they acknowledge that Mr. Panameno, the witness on which their entire case depends, himself testified that he and his friends were not acting in any way that would

draw attention to their behavior during their time at Jaguars. (Feb. 2, 2017 Tr. at 144:13-146:9, 182:18-184:3.) Lastly, they fail to mention that both toxicologists agreed that frequent drinkers like Mr. Panameno are able to mask the symptoms of impairment. (Feb. 6, 2017 Tr. at 38:6-39:19, 126:16-128:12.)

Plaintiffs simply introduced no evidence of "something more" that would support punitive damages liability – neither particular recklessness or indifference in interacting with Mr. Panameno on the day in question, nor a larger pattern of indifferent or reckless conduct. They failed to meet their burden of establishing entitlement to punitive damages by clear and convincing evidence, and the punitive damages award should be vacated for that reason as well.

B. Given the lack of evidence of any pattern of reckless or indifferent conduct, a punitive award of nearly three times the compensatory award is constitutionally excessive.

Plaintiffs' failure to introduce evidence of a pattern of reckless or indifferent conduct likewise establishes the constitutional infirmity of a punitive damages award that is 2.83 times the substantial compensatory award. Arizona courts have repeatedly recognized that in cases with substantial compensatory damages, a 1:1 ratio of compensatory to punitive

damages is likely the "outermost limit" of constitutional due process. *State Farm Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 277 P.3d 789 (App. 2012); *Hudgins v. Sw. Airlines Co.*, 221 Ariz. 472, 212 P.3d 810 (App. 2009); *Security Title Agency, Inc. v. Pope*, 219 Ariz. 480, 200 P.3d 977 (App. 2008). While the particular cases in which Arizona has examined this rule all happen to involve economic rather than physical injuries, the multi-factor test cited by those courts indicates that the physical or economic nature of the injury is only one of multiple factors that must be applied in determining whether an award is constitutionally excessive. *See Security Title*, 219 Ariz. at 501 ¶ 95, 200 P.3d at 998. There are four other reprehensibility factors, all of which weigh against a finding of reprehensibility in this case, where Plaintiffs introduced no evidence that any negligence in addressing Mr. Panameno's intoxication on this particular day was part of a pattern of repeated, intentional, reckless, or indifferent conduct or targeted vulnerable individuals.[7] *See id.* (listing reprehensibility factors). The

[7] Plaintiffs' suggest that the financial vulnerability factor applies because Jaguars discounted its drinks and Mr. Panameno was unemployed and had few financial resources. (Ans. Br. at 54.) However, the "target" of the conduct for purposes of punitive damages analysis is the person who

punitive damages award in this case was constitutionally excessive, and if this Court does not vacate it entirely (either as part of vacating the judgment of liability or for lack of clear and convincing evidence), it should reduce it to a 1:1 ratio with the compensatory damage award.

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 *Thunder Pass*. 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 an amount equal to the compensatory award.

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was injured (Mr. Dupray) not the person who did the injuring (Mr. Panameno).

RESPECTFULLY SUBMITTED this 27th day of February, 2018.

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