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

ANSWERING BRIEF

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INTRODUCTION

On a Monday evening in August 2013, a strip club, selling beers in bulk by the bucket, served a group of three men as many as 32 beers over the span of approximately three hours. At no point while selling these men these beer buckets, nor as they departed the club and got into their car, did the club make any meaningful effort to monitor their alcohol consumption or facilitate their safe transportation home by a sober driver. Rather, the strip club did absolutely nothing to prevent its overserved patrons from leaving unchecked in the same manner in which they arrived: by motor vehicle.

Approximately an hour later, before reaching his home and without having consumed additional alcohol, one of these men crashed his vehicle into Mark Dupray, who was lawfully stopped at a red light on a Vespa-esque motor scooter. Mark went out for a ride that night to buy root beer for his pregnant wife. Mark broke his neck and right humerus, was airlifted to the hospital, and underwent multiple surgeries.

When this strip club patron, Pedro Panameno ["Pedro"], crashed his car into Mark's scooter at about 45 miles per hour, his blood alcohol level ranged between 0.21 and 0.274 percent. Pedro had consumed between 16-26 drinks that day, 11-12 of which were beers that Jaguars served to him.

At trial, Plaintiffs conveyed a central theme of shared responsibility between state licensed purveyor of alcohol and overserved patron. After six days in court, the jury returned a Plaintiffs' verdict, allocating a 60% majority of fault to Pedro, with a 40% minority share to the strip club. In

addition to compensatory damages in excess of $3.5 million, the jury imposed punitive damages: $400,000.00 against Pedro, and $4,000,000.00 against the strip club.

JAI Dining Services (Phoenix) Inc. doing business as "Jaguars Phoenix" ["Jaguars"], now appeals. In doing so, Jaguars asks this Court to:

- Reassess the jury's findings concerning weight and credibility of witness testimony;
- Hold that, after Jaguars served his group of three men upwards of 32 beers, and was uninterested and uninvolved in their safe transportation home, Pedro's decision to drive was unforeseeable and extraordinary as a matter of law, or necessitated a jury instruction in this regard;
- Hold that no reasonable jury could conclude that a strip club, having profited from serving beer in bulk and doing nothing to mitigate the risk arising therefrom, consciously pursued a course of conduct knowing that doing so posed a danger to others;
- Hold, in a case involving substantial physical harm, an ongoing pattern of wrongful conduct, and a conscious disregard for public safety, that the jury's verdict imposing a punitive-to-compensatory damages ratio of 2.85:1.00 deprived Jaguars of due process.

The record adequately supports the jury's findings, both as to liability and punitive damages. The jury could have reasonably believed Pedro and Jaguars' General Manager's testimony concerning the mode and manner of Jaguars' alcohol service, cross-referencing one of the retrodated BAC models offered by Plaintiffs' toxicology expert. The jury could have then applied the standard of care set forth by Plaintiffs' expert, who identified at

least 10 different areas in which Jaguars was in breach. The totality of this evidence bears the reasonable conclusion that Jaguars was operating its business with a conscious disregard of risk, with one eye on profitable liquor sales and the other willfully blind, that warranted punitive damages.

Likewise, the trial judge correctly refrained from instructing the jury about a superseding intervening cause or deem it applicable as a matter of law. For this defense to possibly apply, Jaguars would have needed to present evidence that Pedro's decision to drive drunk was 1) independent in origin; 2) unforeseeable from its own subjective standpoint in real time, and 3) extraordinary in hindsight. Yet, the excess of alcohol Jaguars overserved Pedro's group, combined with its lack of proactive involvement concerning their subsequent safe transport, triggered the natural chain of tragic events that followed. Thus, Jaguars' claim on appeal collapses under scrutiny.

Finally, where multiple reprehensibility factors were supported by the evidence, the jury's chosen punitive-to-compensatory damage ratio was well within the norms established in applicable caselaw, and thereby does not violate Jaguars' due process rights.

COMBINED STATEMENT OF FACTS AND THE CASE

I. Jaguars. In August 2013, Jaguars was an adult entertainment club and bar in Phoenix, Arizona. During a typical summer Monday evening from 5:00 – 8:00 p.m., the club could expect to entertain as many as 30

customers. (Feb. 7, 2017 Tr.[1] at p.36:20, p.37:1). Jaguars had a golf cart to "patrol the outside parking lot," and cabs commonly positioned themselves out front. (Feb. 7, 2017 Tr. at p.39:5-6; p.68: 9-11). Jaguars had a camera surveillance system, depicting guests entering the club, ordering from the bar, and departing. (Feb. 7, 2017 Tr. at p.71:6-14). Inside the club, it was dark and the music was loud. (Feb. 7, 2017 Tr. at p.37:6-20). When guests arrived, Jaguars customarily pat them down and checked their IDs. (Feb. 7, 2017 Tr. at p.59:3-9). In August 2013, Jaguars did not log patrons that were, or became, intoxicated on its premises. (Feb. 7, 2017 Tr. at p.47:17-19).

Some Jaguars employees, including its General Manager Ricardo Salazar, underwent Arizona's perfunctory Title 4 training, merely comprising a three-hour class available online. (Feb. 7, 2017 Tr. at p.44:2-8). Jaguars also hired an outside company to occasionally train staff on alcohol service. (Feb. 7, 2017 Tr. at p.54:10-18). However, Jaguars did not generate, implement, or enforce any of its own written policies or procedures concerning either alcohol service or detecting patron intoxication. (Feb. 7, 2017 Tr. at p.29:4-23).

On Monday, August 5, 2013, at approximately 5:00 p.m., Jaguars had one doorman/"floor host" scheduled to work the door alongside one front door hostess. (Feb. 7, 2017 Tr. at p.33:16-25). Jaguars only had one bartender on duty, with no waitresses, cocktail servers, or other bartenders

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

assisting her in the service of alcohol – until the night shift began at 7:00 p.m. (Feb. 7, 2017 Tr. at p.35:13-16, p.60:21 – p. 61:5, p.64:21-23). General Manager Salazar was also working that evening. (Feb. 7, 2017 Tr. at p.32:6-7).

The "vast majority" of Jaguars' revenue arose from its liquor sales. (Feb. 7, 2017 Tr. at p.27:21-24). Jaguars sold bottled beer by the bucket. (Feb. 7, 2017 Tr. at p.40:16-18). Jaguars offered a monetary incentive to its customers to purchase beer in bulk, as the individual price of a beer was less this way. (Feb. 7, 2017 Tr. at Day 4, p.42:18-25). Jaguars offered a regular bucket containing eight bottled beers at 12 oz. apiece. (Feb. 2, 2017 Tr. at p.165:5-14). For larger groups, Jaguars also promoted a "Mega Bucket" consisting of 12 or 15 beers. (Feb. 7, 2017 Tr. at p.42:8-17).

As of at least December 30, 2016,[2] Jaguars was still selling beer by the bucket. (Feb. 7, 2017 Tr. at p.72:1-2).

II. Pedro Panameno. As of August 2013, Pedro was a 38-year-old man, weighing 245 pounds. (Feb. 2, 2017 Tr. at p.130:10-11; Feb. 6, 2017 Tr. at p.12:19-22). He was divorced, unemployed, and living with a friend, but did plan to get his own apartment. (Feb. 2, 2017 Tr. at p.141:19-22, p.147:2-20). Pedro was admittedly an alcoholic. (Feb. 2, 2017 Tr. at p. 146:7-9). He drank "a lot of beer" almost every day, beginning around noon or 1:00 p.m., and sometimes continuing through 3:00 or 4:00 a.m. the

[2] General Manager Salazar did not appear at trial; this date refers to the date of his videotaped deposition, portions of which were played for the jury.

following morning. (Feb. 2, 2017 Tr. at p.144:13-22). Pedro had a girlfriend, Lydia Larrigoitiy, who lived with her brother David Larrigoitiy, who was also Pedro's friend. (Feb. 2, 2017 Tr. at p.148:18-25).

III. Mark Dupray. Like Pedro, as of August 2013, Mark was a 38-year-old man. (Feb. 2, 2017 Tr. at p.20:21). But unlike Pedro, Mark was a husband and father, married to his wife of 11 years, already with one child together and another on the way. (Feb. 2, 2017 Tr. at p.191:11-13, p. 195:13-16). Mark's wife, Ashlee, was eight-months pregnant with his little girl. (Feb. 2, 2017 Tr. at p. 196:6-16). Mark worked in the insurance field, having been promoted the prior year to the manager of the Bristol West claims office. (Feb. 2, 2017 Tr. at p.195:17-24).

On the night of August 5, 2013, Mark went out for a ride on his Vespa-esque motor scooter to retrieve root beer for his pregnant wife. (Feb. 2, 2017 Tr. at p.196:22 – p.197:6. Mark chose his scooter over his car to feel the nighttime air. (Feb. 2, 2017 Tr. at p.198:18-24).

IV. Pedro Panameno – Pre-Jaguars. Pedro woke up and, around 7:45 a.m., ate two McGriddles from McDonalds with orange juice. (Feb. 2, 2017 Tr. at p.148: 2-17). Aside from half of a large bag of chips, which consumed later that afternoon, this was his only meal that day. (Feb. 2, 2017 Tr. at p.163:3-11). At about 10:30 a.m., Pedro drove his car to his girlfriend's house in Anthem, and visited with her brother, David. (Feb. 2, 2017 Tr. at p.148:18-23, p.149:9-16). At approximately 2:30 p.m., Pedro drove himself and David, in his own car, to the home of their mutual friend,

Carlos Enriquez. (Feb. 2, 2017 Tr. at p.150:21-23). After arriving, at around 4:00 p.m., Carlos drove the three of them to a liquor store, in Carlos' car. (Feb. 2, 2017 Tr. at p.152:14-20).

At the liquor store, Pedro purchased that large bag of chips, two Four Loko malt liquor energy drinks (16 oz. each) and a fifth of Crown Royal bourbon. (Feb. 2, 2017 Tr. at p.153:3-20, p.154:8-11). Their next stop was the Desert Sky mall. (Feb. 2, 2017 Tr. at p.152-4:18). Pedro testified that, before entering the mall, he consumed the two Four Lokos and about half the Crown Royal bottle. (Feb. 2, 2017 Tr. at p.155:9-11, p.156:11-13). Carlos, the driver thus far, also took an indeterminate "swig" of the Crown Royal. (Feb. 2, 2017 Tr. at p.156:1-4). After about an hour at the mall, on their way to Jaguars' strip club, Pedro drank the remainder of the Crown Royal. (Feb. 2, 2017 Tr. at p. 157:4-11). Pedro estimated their arrival at Jaguars to be about 5:00 p.m. (Feb. 2, 2017 Tr. at p. 157:23-25).

V. At Jaguars. Despite the amount of alcohol he had consumed, Jaguars permitted Pedro to enter its club, bypass the door's floor host and hostess, and sit at a table three rows from the stage. (Feb. 2, 2017 Tr. at p. 159:7-13, p. 160:19-23). Jaguars did not inquire or act upon any signs or symptoms of intoxication as to any member of Pedro's group, but instead served them beers by the bucket. (Feb. 2, 2017 Tr. at p. 163:18 – p. 164:17).

Over approximately the next three hours, Jaguars served Pedro and his friends three to four buckets of beer, each bucket containing eight Budweiser Platinum 12 oz. bottles. (Feb. 2, 2017 Tr. at p.164:1 – p.169:4). When they

ordered, only one man approached the bar, whereupon the bartender would exchange eight beers for cash, followed by the buyer returning to his table, bucket in hand. (Feb. 2, 2017 Tr. at p.163:18 – p.164:17). Pedro only went to the bar once to retrieve a bucket for his group. (Feb. 2, 2017 Tr. at p. 168:13-16). Every other time, it was Carlos, the group's driver, to whom Jaguars directly sold its beer buckets. (Feb. 2, 2017 Tr. at p. 168:17-24).

Across only three hours at Jaguars, Pedro consumed between 11-12 beers. (Feb. 2, 2017 Tr. at p.165:1 - p.166:14). During at least some portion of this time, Pedro, by his own recollection and admission, was intoxicated. (Feb. 2, 2017 Tr. at p.171:9-13). He was also likely exhibiting outward, visible manifestations of his intoxication. (Feb. 6, 2017 Tr. at p.19:1 – p.20:8, p.21:22 – p.22:10).

Pedro personally observed their driver, Carlos, drink two or three beers at Jaguars, but stated, "[a]fter that, I don't know because I was in my own little world." (Feb. 2, 2017 Tr. at p.167:17-24). Pedro added that Carlos "was probably drinking more," that "[e]verybody was probably pretty much toasted," and that "[e]verybody had more than their share, especially me." (Feb. 2, 2017 Tr. at p.184:16-22, p.186:2-7).

Despite serving these three men as many as 32 beers in all, there is no evidence in the record that Jaguars cut them off, kept track of who was drinking what, or monitored their alcohol intake in any meaningful way. The only Jaguars employee to testify, General Manager Salazar, who was working that evening, did not know who Pedro Panameno was, what time he

arrived, where he sat, or from where his group ordered drinks. (Feb. 7, 2017 Tr. at p.32:6-25).

While Jaguars' General Manager agreed that it was against their policy to sell an entire bucket of beer to just one person directly from the bar, he offered no testimony detailing Jaguars' alcohol service specifically to Pedro's group that evening. (Feb. 7, 2017 Tr. at p.45:18 – p.46:11).

In discovery, Plaintiffs requested production of Jaguars' video surveillance footage, as well as cash receipts concerning the Panameno group's orders; no such documentary evidence was ever produced or presented at trial. (Feb. 7, 2017 Tr. at p.48:12 – p.49:12).

VI. After Jaguars. There is no evidence in the record that Pedro, Carlos, or David encountered any resistance, concern, or assistance as to transportation that evening. The group departed Jaguars at approximately 8:00 p.m. the same way they came: in Carlos' vehicle with Carlos driving. (Feb. 2, 2017 Tr. at p.169:5-19). After leaving Jaguars, Pedro did not consume any additional alcohol. (Feb. 2, 2017 Tr. at p.176:7-9).

The group returned to Carlos' home, stayed for approximately 15-20 minutes, and then Pedro drove himself and David back to David's house in Anthem. (Feb. 2, 2017 Tr. at p. 172:1-21). They arrived after about a 25-minute drive, whereupon Pedro and his girlfriend, Lydia, had a verbal altercation. (Feb. 2, 2017 Tr. at p.173:12-19, p.174:13-15). Lydia identified numerous outward manifestations of Pedro's intoxication, noting that he smelled like alcohol and like a "homeless person." (Feb. 2, 2017 Tr. at

p.188:12-14). She further observed that his eyes were red, and that he "look[ed] really [messed] up." (Feb. 2, 2017 Tr. at p.187:6-17, p.188:3-7). Lydia told Pedro that he should not drive, and attempted to take away his keys, but was unsuccessful. (Feb. 2, 2017 Tr. at p.187:19-24). Pedro became "irate" and decided to "party more." (Feb. 2, 2017 Tr. at p.188:3-25). After approximately five minutes at Lydia and David's house, Pedro drove away in his car. (Feb. 2, 2017 Tr. at p.173:17-19, p.175:2-5.

VII. The Collision. Due to the "the alcohol in [him] already," and his "irate" mood, Pedro proceeded to drive "aggressively." (Feb. 2, 2017 Tr. at p.188:18-25). At approximately 8:39 p.m., Pedro, in his 2006 VW Jetta, rapidly approached Mark Dupray from behind. (Feb. 2, 2017 Tr. at p.77:23-25, p.79:3-7). Mark had lawfully and completely stopped at a red light. (Feb. 2, 2017 Tr. at p.79:3-7). Pedro estimated his speed at 45 miles per hour. (Feb. 2, 2017 Tr. at p.176:25 – p.177:2). Pedro violently struck the rear-end of Mark's vespa-type scooter, leaving no skid marks or other evidence of breaking. (Feb. 2, 2017 Tr. at p.80:11-16). The collision forces ejected Mark's scooter 225 feet from the impact zone. (Feb. 2, 2017 Tr. at p.79:19 – p.80:1).

Investigating officers found three 12-packs of Blue Moon 12 oz. bottles in Pedro's vehicle, with a few beers missing or broken. (Feb. 2, 2017 Tr. at p.81:14:20). Pedro testified that these beers had been in his car for a few days, and that the bottles shattered due to the impact. (Feb. 2, 2017 Tr. at p.176:10-24).

Police interviewed Pedro at the hospital around 10:15 p.m., which was about 1.5 hours post-collision. (Feb. 2, 2017 Tr. at p. 103:3-6). There, Pedro exhibited numerous signs of intoxication, including slurred speech, bloodshot and watery eyes, and a "strong odor of alcohol" on his breath. (Feb. 2, 2017 Tr. at p.94:4-8, p.95:7-12). Pedro had his blood drawn and tested for alcohol content at 12:14 a.m. and 1:24 a.m. (Feb. 2, 2017 Tr. at p.119:10-12, p.120: 6-8). A sample revealed a 0.167 percent BAC, which, even without retrodating to the moment of impact, exceeded the Arizona statute defining an extreme DUI. (Feb. 2, 2017 Tr. at p. 121:7-14, p.123:13-16); *see* A.R.S. § 28-1382(B).

Pedro admitted to police that he consumed alcohol that evening at Jaguars. (Feb. 2, 2017 Tr. at p. 93:14-21). However, he claimed that he only consumed two 20 oz. Blue Moon beers there. (Feb. 2, 2017 Tr. at p.93:14-21). Pedro later dismissed this latter remark, explaining that he was "probably out of it" at the time.

VIII. Blood Alcohol Retrodating. Applying retrodating, the testifying toxicologists each agreed that Pedro's BAC peaked at around the time of the collision. (Feb. 6, 2017 Tr. at p.18:1-10, p.131:16 – p.132:8). Taking into account his body weight and slightly varying elimination rates, this peak ranged between 0.21 and 0.274 percent. (Feb. 6, 2017 Tr. at p. 16:4:12, p.132:22 – p.133:6). Based on these factors and his testimony, the toxicologists opined that Pedro consumed somewhere between 16 – 26

drinks on August 5, 2013. (Feb. 6, 2017 Tr. at p.25:18 – p.26:12, p.130:16-23).

Although the toxicology experts could not specifically discern what Pedro drank and where, Plaintiffs' expert testifed to a reasonable degree of scientific certainty that Jaguars served him while he was exhibiting outward visible signs of intoxication. (Feb. 6, 2017 Tr. at p.47:16-25). Plaintiffs' expert emphasized the significance of a 0.10 percent BAC, opining that this is when someone like Pedro would have likely been visibly intoxicated. (Feb. 6, 2017 Tr. at p.19:1 – p.20:8, p.43:10 – p.44:15). Such observable indications include poor body gait, inability to stand properly, poor hand-eye coordination, and slurred speech. (Feb. 6, 2017 Tr. at p.18:10-19). Pedro reached this critical point of intoxication while on Jaguars' premises, sometime between 5:55 p.m. and 6:20 p.m., depending on his rate of elimination. (Feb. 6, 2017 Tr. at p.19:1 – p.20:8, p.21:22 – p.22:10).

Plaintiffs' toxiciologist offered a few plausible scenarios as to how Pedro, given the timeline in evidence, could have developed his BAC level when his blood was drawn; one such example involved Pedro consuming a fairly steady rate of the equivalent of eight shots of Crown Royal bourbon, and eight beers from approximately 4:00 p.m. onward. (Feb. 6, 2017 Tr. at p.25:18-26, p.12:32 – p.13:13).

IX. Standard of Care Testimony. Defendant did not retain a standard of care expert. Plaintiffs' expert delineated the following industry standards constituting reasonable alcohol service:

- Do not allow intoxicated persons into the bar in the first place; if this does occur, never serve them more alcohol. (Feb. 2, 2017 Tr. at p.34:13-24); *see also* A.R.S. §§ 4-244(14); 4-311(A).

- "You have to monitor the person," including actively counting the drinks they consume on the premises. (Feb. 2, 2017 Tr. at p.31:3-14, p.33:22-25).

- "[P]rovide your staff with an adequate training program that's going to help them [prevent and deter harm]." (Feb. 2, 2017 Tr. at p.29:3-10).

- Engage in conversation to evaluate the patron for signs of intoxication. (Feb. 2, 2017 Tr. at p.31:15-22).

- Serve one drink at a time, and never serve beer by the bucket; such service is "grossly irresponsible." (Feb. 2, 2017 Tr. at p.32:4:10, p.36:3-20); *see also* A.R.S. § 4-244(23) (it is a violation of law to serve "more than forty[3] ounces of beer… to one person at one time").

[3] This statute has since been amended, increasing the limit to "fifty" ounces of beer.

- With each distinct service of alcohol (one beer), make a real-time determination whether continued service is appropriate. (Feb. 2, 2017 Tr. at p.32:4-10, p.72:14-17).

- Make efforts to prevent customers from reaching the point of intoxication. (Feb. 2, 2017 Tr. at p.34:2-4).

- If a patron does become intoxicated, the bar must cut them off. (Feb. 2, 2017 Tr. at p.34:5-7); *see also* A.R.S. § 4-244(14).

- Once a patron becomes intoxicated, or is discovered to be intoxicated, that person must be removed from the premises within 30 minutes. (Feb. 2, 2017 Tr. at p.43:6-20); *see also* A.R.S. § 4-244(14).

- Efforts should be made to prevent such a person from driving, including inquiring as with whom they are accompanied, confirming a designated driver, arranging for a cab, and/or contacting someone else to pick them up – but no matter the manner, it is critical to ensure that they are transported from the premises safely and therefore not a risk to the public at large. (Feb. 2, 2017 Tr. at p.63:5-17); *see also* A.R.S. § 4-244(14).

- If such an intoxicated person insists on driving, the bar should obtain the patron's license plate number and report this information to the police. (Feb. 2, 2017 Tr. at p. 43:6-20).

X. Mark Dupray's Injuries and Surgeries. Mark was transported by helicopter to the hospital. (Feb. 6, 2017 Tr. at p.100:19-25). Mark suffered a cervical neck fracture at C2, with ligament tears spanning three vertebrae. (Feb. 6, 2017 Tr. at p.147:12 – p.148:10). Mark required a posterior fixation surgical repair. (Feb. 6, 2017 Tr. at p.148:20-25). This involved the implantation of six screws and two rods to support Mark's spine. (Feb. 6, 2017 Tr. at p.152:9-23). More likely than not, Mark will require at least one additional spine surgery, as his discs are now more susceptible to degenerative spine problems. (Feb. 6, 2017 Tr. at p.154:2-13, p.155:5-18).

Mark also sustained a comminuted displaced midshaft fracture to his right humerus, or upper arm area. (Feb. 2, 2017 Tr. at p.202:20-22, Feb. 7, 2017 Tr. at p.7:11-23). He underwent an internal fixation with a rod for that injury. (Feb. 7, 2017 Tr. at p. 8:1-5).

Unfortunately, this first humerus surgery was unsuccessful because Mark's bones did not union as intended. (Feb. 7, 2017 Tr. at p.12:15-23). Mark underwent a second surgery, approximately one year after the collision. (Feb. 7, 2017 Tr. at p.12:15 – p.13:5). In the interim, Mark required the use of a bone stimulator for about eight months, which was also

ineffective at curing this non-union. (Feb. 7, 2017 Tr. at p.15:25 - p.16:6, Feb 2, 2017 Tr. at p. 209:10-14).

Subsequently, after his second humerus surgery, Mark failed to develop adequate callus formation bridging his fractured bone. (Feb. 7, 2017 Tr. at p.15:16-24, p.16:17-22). Accordingly, Mark will require a future surgery – a different type of fixation – since he had already undergone two failed procedures involving the insertion of a rod. (Feb. 7, 2017 Tr. at p.17:13-25). This next surgery poses considerable risk because a major nerve crosses Mark's fracture site. (Feb. 7, 2017 Tr. at p.18:9-13). Concerned that he will lose all right arm function, Mark has not yet undergone this surgery. (Feb. 2, 2017 Tr. at p.213: 10-25).

Mark presented $392,015.08 in past medical bills at trial, and past lost wages of approximately $25,000.00. (Feb. 6, 2017 Tr. at p.63:19-21, p.64:18:23). Plaintiffs further presented diminished income capacity ranging from $122,000.00, if Mark were to retire at age 66, to $1.19 million upon an age-57 retirement. (Feb. 6, 2017 Tr. at p.80:2 – p.81:2).

XI. Denied - Jaguars' Motion for Summary Judgment. On June 25, 2015, Jaguars filed a Motion for Summary Judgment, arguing that they had met their standard of care as a matter of law, and that, in the alternative, Pedro's decision to drive was an intervening superseding cause that relieved the bar of all liability as a matter of law. (IR No. 30).

After hearing oral argument, in a Ruling dated September 21, 2015, Superior Court Judge Patricia Starr denied Jaguars' motion, specifically

observing that Jaguars "took no affirmative actions like those described" in the applicable case, *Patterson v. Thunder Pass, Inc*., 214 Ariz. 435, 153 P. 3 1064 (App. 2007). (IR No. 36 at pp.2-3).

XII. Denied – Jaguars' Rule 50 Motion for Directed Verdict. After the jury heard the evidence, Jaguars moved for directed verdict on the same issues it set forth in its Motion for Summary Judgment. Hon. Daniel Martin read his rationale on record:

- "[T]his is simply an issue for the jury to determine and it is causation. And then that is well within the province of the finder of fact. Not something to be taken away lightly by the Court." (Feb. 7, 2017 Tr. at p.85:6-9).

- "[T]he fact is that we have evidence that is at odds with other evidence. But that in and of itself does not mean that there is not sufficient evidence for the jury to make a determination as to, you know, where and in what quantity the alcohol was consumed. And that really is an issue of fact, and I would be reluctant to take that away [from the jury], and I am going to deny." (Feb. 7, 2017 Tr. at p.85:12-18).

XIII. Denied – Jaguars' Request to Remove Punitive Damages from Jury Consideration. Judge Martin, emphasizing "the testimony of particularly of [Plaintiffs' standard of care expert], the record is sufficient" for punitive damages. (Feb. 7, 2017 Tr. at p.95:21 – p. 96:3).

XIV. Denied – Jaguars' Request for a Non-Standard Instruction Concerning Satisfaction of Duty by Transport off Premises by a Non-Intoxicated Person. Observing that he was unable to find any evidence that "Carlos was not intoxicated at the time the three left Jaguars," and noting the only evidence on record pertaining to this issue was "Pedro's testimony by deposition as to Carlos drinking beer earlier on, and then stopping later on," Judge Martin denied Jaguars' request. (Feb. 7, 2017 Tr. at p.96:12 - p.97:8).

XV. Denied – Jaguars' Request for a Non-Standard Instruction on Intervening Superseding Cause. After weighing the issue, Judge Martin denied Jaguars' requested separate instruction, but allowed Jaguars to present the argument in closing, concerning the break in causation. (Feb. 7, 2017 Tr. at p.97:24 - p.98:3).

XVI. Pertinent Jury Instructions Issued. Judge Martin instructed the jury, in pertinent part, as follows:

- "You must decide what the facts are from the evidence presented here in court … You, and you alone, are the judges of the facts." (Feb. 8, 2017 Tr. at p.5:7-14); *see also* State Bar of Arizona, Revised Arizona Jury Instructions ["RAJI"] (5th Civil) Preliminary 1.

- "You will decide of the credibility and weight to be given to any evidence presented in the case." (Feb. 8, 2017 Tr. at p.5:21-23); *see* RAJI (5th Civil) Preliminary 3.

- "In deciding the facts of this case … you should consider what testimony to accept and what to reject. You may accept everything a witness says, or part of it, or none of it." (Feb. 8, 2017 Tr. at p.6:10-11); *see* RAJI (5th Civil) Preliminary 5.

- "Remember that expert opinion testimony should be judged as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case." (Feb. 8, 2017 Tr. at p.6:15-21); *see* RAJI (5th Civil) Preliminary 6.

- "Fault is negligence that was a cause of Plaintiff's injuries." (Feb. 8, 2017 Tr. at p.7:24-25); *see* RAJI (5th Civil) Fault 1.

- "Negligence may consist of action or inaction. Negligence is the failure to act as a reasonably careful person would act under the circumstances. Negligence causes an injury if it helps produce the injury and if the injury would not have happened without the negligence." (Feb. 8, 2017 Tr. at p.8:1-5); *see* RAJI (5th Civil) Fault 1.

- "There may be more than one cause of an injury." (Feb. 8, 2017 Tr. at p.8:6); *see* RAJI (5th Civil) Fault 6.

- "If you find more than one Defendant at fault for causing the Plaintiffs' injuries, you must then determine the relative degrees of fault of the Defendants… The fault of one person may be greater or lesser than that of another…" (Feb. 8, 2017 Tr. at p.9:9:15); *see* RAJI (5th Civil) Fault 8.

- Regarding A.R.S. § 4-244(14) and Negligence *Per Se*: "It is unlawful for a licensee or other person to serve, sell, or furnish spirituous liquor to a disorderly or obviously intoxicated person … or permit a disorderly or obviously intoxicated person to come into or remain on or about the premises, except … allow[ing] an obviously intoxicated person to remain on the premises for a period of time not to exceed 30 minutes after the state of obvious intoxication is known or should be known to the licensee and order that a non-intoxicated [person] may transport the obviously intoxicated person from the premises." (Feb. 8, 2017 Tr. at p.11:3-14). "[O]bviously intoxicated means inebriated to the extent that a person's physical faculties are substantially impaired and the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction that would have

been obvious to a reasonable person." (Feb. 8, 2017 Tr. at p.11:15: 20).

- Regarding A.R.S. § 4-244(23) and Negligence *Per Se*: "It is unlawful for an on sale retailer or an employee to deliver more than 40 ounces of beer … to one person at one time for that person's consumption." (Feb. 8, 2017 Tr. at p.11:21-25).

- Regarding A.R.S. § 4-311(A) and Negligence *Per Se*: "A liquor licensee is liable for personal injuries if a Court or jury finds all of the following: One, the licensee sold spirituous liquor either to a purchaser who was obviously intoxicated … Two, the purchaser consumed the spirituous liquors sold by the licensee. And three, the consumption of spirituous liquor was proximate cause of the injury, death, or property damage." (Feb. 8, 2017 Tr. at p.12:1-10).

- "[S]uch damages are called punitive or exemplary damages. To recover such damages, Plaintiffs have the burden of proving by clear and convincing evidence, either direct or circumstantial, that Defendant JAI Dining Services acted with an evil mind. This required state of mind may be shown by either of the following: one, Defendant JAI Dining Services 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 two, Defendant JAI Dining Services consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others. The law provides no fixed standard for the amount of punitive damages you may assess, if any, but leaves the amount to your discretion." (Feb. 8, 2017 Tr. at p.14:6-20); *see* RAJI (5th Civil) Fault Personal Injury Damages 4.

XVII. Jury Verdict. The jury awarded total compensatory damages of $3,503,494.58 with a majority of fault (60%) against Pedro, and a minority share of fault allocated to Jaguars (40%). (IR No. 85). The jury imposed $400,000.00 in punitive damages against Pedro, and $4 million in punitive damages against Jaguars. (IR No. 85).

XVIII. Denied – Jaguars' Motion for Judgment as a Matter of Law or, In the Alternative, Motion for New Trial. On May 4, 2017, Jaguars filed its post-judgment motion addressing the same issues it previously raised on summary judgment and directed verdict. (IR No. 86). Jaguars also argued that there was insufficient evidence for punitive damages, and that the punitive award was excessive, thereby contrary to due process. (IR No. 86). After hearing oral argument, on August 10, 2017, Judge Martin issued an Under Advisement Ruling denying Jaguars' motions. (IR No. 93).

STATEMENT OF THE ISSUES

1. Whether evidence that Jaguars served Pedro's group of three men as many as 32 bottled beers over three hours, of which Pedro personally drank 11 – 12, cross-referenced with expert toxicologist testimony and standard-of-care testimony, supports the jury's finding that Jaguars was negligent and its imposition of punitive damages;

2. Whether Jaguars satisfied its duty of care as a matter of law when Carlos, to whom it served alcohol, drove Pedro off its premises, taking into consideration how Jaguars had absolutely no involvement and took no action in relation to this transportation;

3. Whether the facts of this case warranted Jaguars' requested non-standard intervening superseding cause instruction or whether this doctrine applies as a matter of law, where Jaguars grossly overserved alcohol to a trio of men, and then neither took meaningful interest in their fate nor preventative measures to mitigate the public safety danger its overservice created;

4. Whether, in a matter involving reprehensible conduct, including repeated actions demonstrating reckless disregard for public safety and resulting physical harm, a punitive-to-compensatory damage ratio of 2.85:1.00 violates due process.

ARGUMENT

I. Standard of Review

Motion for Judgment as a Matter of Law. A trial court's denial of a motion for judgment as a matter of law is reviewed *de novo*. *See College Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 536, ¶ 9, 241 P.3d 897, 900 (App. 2010). The appellate court is to "view the evidence and reasonable inferences therefrom in the light most favorable to upholding the jury's verdict." *Acuna v. Kroack*, 212 Ariz. 104, 113, ¶3, 128 P.3d 221, 223 (App. 2006).

Motion for New Trial. To overturn a trial court's denial of a motion for a new trial, there must be a clear showing of an abuse of discretion. *Suciu v. AMFAC Distrib. Corp.,* 138 Ariz. 514, 520, 675 P.2d 1333, 1339 (App. 1983).

Refusal to Give Requested Jury Instruction. Appellate courts review a denial of a requested instruction for an abuse of discretion, further requiring resulting prejudice to the requesting party. *See Brethauer v. General Motors Corp.*, 221 Ariz. 192, 198, ¶ 24, 211 P.3d 1176, 1182 (App. 2009).

Imposition of Punitive Damages. A jury's imposition of punitive damages must be affirmed if any reasonable evidence exists to support it. *See Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 498, ¶ 82, 200 P.3d 977, 995 (App. 2008).

II. The Trial Court Properly Denied Jaguars' Motion for Judgment as a Matter of Law Because Substantial Evidence of Jaguars' Liability was Presented at Trial and the Weight and Credibility of Such Evidence is the Jury's Province.

Jaguars contends that the jury verdict in Plaintiffs' favor was not supported by the evidence. On appeal, "the evidence and reasonable inferences therefrom [must be viewed] in the light most favorable to upholding the jury's verdict." *Acuna*, 212 Ariz. at 104, ¶ 3, 128 P.3d at 223. If, upon review, there is "any substantial evidence exist[ing] permitting reasonable persons to reach such a result," then the jury verdict must be affirmed. *Id*. at 104, ¶ 24, 128 P.3d at 228.

"It is the jury's burden alone to weigh the credibility of witnesses and draw inferences from the evidence presented at trial." *Zuluaga by & through Zuluaga v. Bashas', Inc.*, 242 Ariz. 205, 212, ¶ 21, 394 P.3d 32, 39 (App. 2017). Moreover, it is the jury's role to reconcile conflicting evidence. *See State v. Linden*, 136 Ariz. 129, 134, 664 P.2d 673, 678 (1983) ("[T]he forum for resolving conflicts in the evidence is the trial court."). Therefore, an appeal does not present the parties an opportunity to "reweigh conflicting evidence or redetermine the preponderance of the evidence;" rather, the purpose of appeal is to "examine the record only to determine whether substantial evidence exists[.]" *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999).

Yet, Jaguars Opening Brief has selectively parsed the evidentiary record, arbitrarily declaring some of it to be true and other portions false,

and then advances self-serving inferences and conclusions. Jaguars, being the appealing party, has it backwards. At this procedural posture, we defer to the jury's verdict, and accept only the factual interpretations and inferences supporting it. Consequently, if there is any reasonable way to read, to weigh, or to reconcile the evidence to reach the jury's result, whether by accepting certain testimony, rejecting other testimony – in whole or in part – the jury's verdict must be affirmed.

In assembling its argument, Jaguars' brief at times reads more akin to a closing argument to a jury than that which forms a meritorious basis for appeal. For example, consider such statements as:

> "Pedro'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."

(Appellant's Opening Brief at p.12 [emphasis added]).

The jury could have reasonably accepted Pedro's explanation for telling the police soon after the collision that he only drank two 20 oz. beers at Jaguars because he was "out of it." (Feb. 2, 2017 Tr. at p.179:4-8) That said, attacks upon witness credibility have no place on appeal. The proper venue for such arguments was at trial, and defense counsel made those arguments at that time. Evidently, the jury chose to reject them.

Jaguars also highlights Pedro's testimony about his pre-Jaguars alcohol consumption (*e.g.*, two Four Lokos and sharing a bottle of Crown

Royal with Carlos), declares it inconsistent with the toxiciology experts' testimony, and concludes that Pedro's testimony is false as a matter of law. (Appellant's Opening Brief at p.12). This suggests that conflicting evidence somehow cancels itself out, as though factfinding is a zero sum game. Of course, not all evidence need be treated equal, and not all testimony need be believed.

It is true that both toxicologists agree, given Pedro's timeline, he could not have drank as much as he testified, cumulatively before and during his Jaguars patronage. (Feb. 6, 2017 Tr. at p. 29:15 – p.35:10, p.122:14 – p.25:13). Had he done so, his blood alcohol level would have been higher when tested post-collision.

Yet, there are many ways a jury could reasonably reconcile this evidence. Whereas Jaguars seemingly suggests that more weight be given to Pedro's pre-Jaguars testimony than his at-Jaguars testimony, a jury could have just as easily given more weight to Pedro's at-Jaguars than his pre-Jaguars testimony.

Alternatively, a jury could have reasonably believed Pedro's testimony regarding what he drank and where, but given less weight to his timeline.

Additionally, a jury could have reasonably accepted a scenario wherein Pedro consumed the equivalent of eight shots of Crown Royal and eight beers that evening, including beers that Jaguars served to him while he was visibly intoxicated. (Feb. 6, 2017 Tr. at p.25:18-26, p.12:32 – p.13:13).

Indeed, there are countless ways to mix and match the facts to support the jury's verdict. But we do not need to know precisely how the jury reached its findings – only that it was reasonably possible to do so.

Jaguars' argument also implicitly suggests a higher standard for dram shop negligence than what is applicable in Arizona. By reading Jaguars' brief in a vacuum, one might come away with the idea that, to be negligent, the jury would have had to find that Pedro consumed all – or a substantial majority of – his alcohol at Jaguars. That is not the law. Plaintiffs' standard of care expert attested to the industry standards for reasonable care in this case, including active monitoring of consumption, serving one drink at a time, assessing the intoxication of each individual upon each drink order, ceasing service to prevent intoxication, and, upon intoxication, taking affirmative measures to ensure safe transport from the premises. (Feb. 2, 2017 Tr. at p.29 - p.72); *see* A.R.S. §§ 4-244(14); 4-244(23); 4-311(A).

Thus, to support a finding of negligence on appeal, there need only be substantial evidence that Jaguars served a single beer to Pedro, which either rendered him visibly intoxicated, or served him one beer after he already was so, and then failed to affirmatively arrange his safe transportation home. Plaintiffs' expert toxicologist testified within a reasonable degree of scientific certainty that Jaguars served him while he was in such a visibly intoxicated state. (Feb. 6, 2017 Tr. at p.47:16-25). Meanwhile, Pedro testified as to the inordinate number of beers Jaguars served him, and his ensuing intoxication spurring his aggressive driving and resulting collision.

(Feb. 2, 2017 Tr. at p.165:1 - p.166:14, p.188:18-25). Finally, it is an undisputed fact that Jaguars did not affirmatively arrange for Pedro a safe ride home by a sober driver.

For these reasons, there is substantial evidence on record to support the jury's findings of fact that Jaguars was negligent and/or negligent *per se*.

III. Jaguars Breached its Duty of Care, and was Not Entitled to an Intervening Superseding Cause Instruction or Associated Ruling as a Matter of Law because it Overserved Alcohol to Pedro, and Subsequently Disinterested and Non-Involved in his Safe Transportation Home.

Jaguars' arguments regarding satisfaction of duty and intervening superseding cause are fundamentally based on a favorable comparison between itself and the defendant bar in *Patterson v. Thunder Pass, Inc*., 214 Ariz. 435, 153 P.3d 1064 (App. 2007). In presenting this comparison, Jaguars equates its utter non-involvement, inaction, and disinterest in the fate of its overserved patron, Pedro, to Thunder Pass, Inc.'s comprehensive and affirmative course of action that essentially reflects the Platonic Ideal of how a bar can and should mitigate risk after admitted alcohol overservice. Indeed, it is difficult to conceive of anything more that Thunder Pass, Inc. could have reasonably done within the law's limits to prevent its patron from driving. In contrast, Jaguars did absolutely nothing to prevent Pedro and his group from operating a vehicle after overserving them.

In *Patterson*, after overserving its patron, Thunder Pass, Inc. did the following:

1. **Observed** that its patron was intoxicated;
2. **Discerned** that its patron should not drive;
3. **Learned** that its patron arrived by motor vehicle;
4. **Noticed** that its patron was actively attempting to drive her vehicle in the parking lot;
5. **Physically confiscated** its patron's car keys;
6. **Arranged for a taxicab** to safely transport its patron home;
7. **Ensured** that its patron did not leave while waiting for her taxicab;
8. **Remained aware** of when the cab should have reasonably arrived;
9. **Noticed** that the taxicab did not, in fact, arrive within this time frame;
10. **Arranged** to have a sober employee drive its patron home in that employee's car, thereby distancing its overserved patron from her own car; and
11. **Watched** as its patron entered her home, only then returning her keys.

Id. at 436, ¶ 3, 153 P.3d at 1065.

Notably, each of these 11 points begins with a verb – an action word. In this way, Thunder Pass, Inc. remained consistently and actively involved in its intoxicated patron's fate after overserving her, including driving her home and away from her car. *Id*.

Unfortunately, the patron in *Patterson* was unforeseeably brazen, and extraordinarily determined to drive that night. *Id*. Remarkably, she managed to sneak back unnoticed to Thunder Pass Inc.'s parking lot within an hour of the bar transporting her home. *Id*. Then, this patron drove away while still

impaired, and caused a head-on collision. *Id*.

While acknowledging that Thunder Pass, Inc. wrongfully sold liquor to an obviously intoxicated purchaser in violation of A.R.S. § 4-311(A), this Court held that there were two different theories that relieved the bar of liability as a matter of law:

Satisfaction of duty of care. Referring to A.R.S. § 4-244(14) as a guiding template, this court opined that, upon overservice, a bar could relieve itself of liability if it: (1) ceased further service, sale, or furnishment of spirituous liquor to an intoxicated patron; (2) arranged for transportation of the intoxicated patron off the premises; (3) by a non-intoxicated person. *Id*. at 439, ¶ 16-17, 153 P.3d at 1068. Although a criminal statute, the Court suggested that the "ameliorative acts" described therein could relate to satisfaction of duty in a civil dram shop context. *Id*.

After Thunder Pass, Inc. overserved its patron, this Court observed that:

> "[T]he tavern's employees nonetheless fulfilled their legal duty of affirmative, reasonable care to [its patron] and the public by separating [her] from her vehicle and arranging for, as well as subsequently providing, the safe transportation of [its patron] to her residence."

Id. at 439, ¶ 16, 153 P.3d at 1068.

The Court added that there was no evidence of actual or constructive knowledge on the employees' part that the patron intended to return to their bar that evening to drive her car. *Id*.

Notably, a subsequent appellate opinion held that even strict

adherence to A.R.S. § 4-244(14) (*e.g.*, "transferring an intoxicated patron to another location") does not necessarily relieve a bar of liability as a matter of law. *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 257, ¶ 42, 293 P.3d 520, 533 (App. 2013). A less rigid analysis is called for, based on the specific facts, as to whether the bar exercised affirmative, reasonable care following its wrongful overservice. *Id*. This includes a consideration of what the bar subjectively knew about the patron's circumstances when they parted ways. *See id*.

Intervening superseding cause. The *Patterson* patron's venturing out from home and her astonishing return to Thunder Pass, Inc.'s parking lot was not reasonably foreseeable from the bar's perspective. *Patterson*, 214 Ariz. at 440, ¶ 19, 153 P.3d at 1069. This is due to the bar's actual knowledge that it had transported her home, while her car remained on-site. *See id.* at 436, ¶ 3, 153 P.3d at 1065.

This patron's effective undoing of the bar's extensive prophylactic efforts, which the bar conducted on her behalf and for her safety, went well beyond reasonable expectation. *Id.* at 440, ¶ 19, 153 P.3d at 1069. In that sense, taking an omniscient view of events, what she did is truly extraordinary. *Id*.

Thus, the *Patterson* patron's independent actions severed the chain of causation with respect to Thunder Pass, Inc. This reflects sensible public policy, as it incentivizes 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.

While this Court viewed duty and intervening superseding cause as two distinct paths to arrive at the same result, upon closer scrutiny, they are arguably interconnected. By adhering to the outline of duty contained in A.R.S. § 4-244(14), or engaging in functionally equivalent affirmative efforts to protect the public, it becomes less foreseeable that the overserved patron will cause harm. Consequently, any independent action of the patron, which causes a drunk-driving collision, is more likely to be extraordinary. This is because the patron had to actively overcome or disregard the protections the bar put in place in order to drive. Moreover, the patron must accomplish this after already being home – when getting home is generally understood as one of the most common reasons to drive while impaired.

Here, Jaguars neither satisfied its duty of care, as outlined in A.R.S. § 4-244(14) or by way of equivalent affirmative acts, nor did Pedro's actions constitute an intervening superseding cause.

A. Jaguars Failed to Satisfy its Duty of Care After Overserving Pedro When it Failed to Take Any Affirmative Efforts to Arrange for His Safe Transport Home.

There is good reason why Jaguars' Opening Brief consistently describes events in the passive voice when addressing satisfaction of duty. Consider the following examples, with emphasis added:

- "Pedro's decision to get back in his own car ***after being transported safely*** to Carlos' house…" (Opening Brief at p. 8).

- "Once the patron ***has been returned safely to their place of repose***…" (Opening Brief at p. 15).

- "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…" (Opening Brief at p. 19).

This abundant use of the passive voice should raise an important question: who is the actor doing the transporting? The "who" is highly significant to the legal analysis, as Thunder Pass, Inc.'s satisfaction of duty arose from its own active 1) arrangement for its patron's safe transport; 2) home; 3) by a non-intoxicated driver. *Id*. at 439, ¶ 16-17, 153 P.3d at 1068

Jaguars failed to satisfy any of these elements as to Pedro. It was Jaguars' other alcohol-consuming patron, Carlos**,** who transported Pedro to Carlos' home, without Jaguars having any input in this decision or how it was carried out. Pedro then drove David to David's home, but Pedro never reached his own home. (Feb. 2, 2017 Tr. at p. 147:2-20). Thus, a foreseeable incentive remained for Pedro to drive: to get home.

Finally, given the evidence actually on record, it is astonishing that Jaguars attempts to characterize Carlos as a "designated driver" in its Opening Brief:

> "Pedro 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."

(Opening Brief at p. 17) [Emphasis added].

We emphasize "presumably" in the above quote for two reasons: 1) on appeal, Jaguars does not get the benefit of factual presumptions in its favor; and 2) there is no factual basis supporting its presumption. Pedro personally observed Carlos drink multiple beers at Jaguars, stated that he "was probably drinking more" than that, and "[e]verybody was probably pretty much toasted," and "[e]verybody had more than their share." (Feb. 2, 2017 Tr. at p.184:16-22, p.186:2-7).

However, if Jaguars had affirmatively arranged for Pedro's transportation to Carlos' house, depending on the specific facts, that still might not have satisfied its duty as a matter of law. In *McMurtry*, the establishment's bar overserved one of its patrons, and then had an employee personally escort her back to her hotel room. 231 Ariz. 244, 247, ¶ 3, 293 P.3d at 523. Soon thereafter, while on her own, the patron attempted to walk out onto a balcony, directly from her room's window, to smoke a cigarette. *Id*. Unbeknownst to her, but known by the hotel, there was a sizeable gap between the balcony and the window; when she attempted to step out the window, she plunged multiple stories to her death. *Id*. at 247, ¶¶ 2-3, 293 P.3d at 523.

This Court acknowledged *Patterson* but disagreed with the hotel's reading of it that "the licensee is relieved of liability merely by transferring an intoxicated patron from the bar to another location." *Id*. at 257, ¶ 42, 293 P.3d at 533. Rather, the Court explained:

> "a licensee's liability turns on whether it has fulfilled its duty to exercise affirmative, reasonable care in serving intoxicants to patrons who might later injure themselves or an innocent third party, whether on or off the premises."

Id.

The hotel knew about "the hazard allegedly posed by the window/balcony configuration" in their patron's room. *Id*. Accordingly, this foreseeable danger constituted an issue of fact, preventing a ruling as a matter of law. *Id*. at 257, ¶ 42, n.10, 293 P.3d at 533.

Thus, if Jaguars had a sober employee personally drive Pedro to David and Lydia's home, a question of fact could nonetheless exist. For example, if there was evidence that Jaguar's employee knew or should have known that this was not Pedro's residence, that his car was parked there, or that he intended to drive from that location. While this certainly would have been a much better factual posture for Jaguars to find itself in with regard to comparative fault, per *McMurtry*, it would not offer Jaguars relief as a matter of law.

Jaguars failed to satisfy any of the three elements set forth in in *Patterson* to potentially satisfy a bar's duty to its overserved patron.

Moreover, merely acting on the *Patterson* elements would not have necessarily guaranteed relief from liability. In the present case, Jaguars did not satisfy its duty, and its appeal should be denied.

B. Jaguars is Not Relieved of Liability by Virtue of an Intervening Superseding Cause when Pedro's Actions were Inextricably Linked to Jaguars' Negligence, Foreseeable from Jaguars' Perspective, and were Ordinary in Hindsight.

In advancing its argument concerning intervening superseding cause, Jaguars omits any meaningful definition of an "intervening superseding cause," particularly in the dram shop context. Arizona courts have carefully defined these terms:

1. **Intervening:** An injury caused by an event of independent origin, for which the bar is not responsible.

Ontiveros v. Borak, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983).

2. **Superseding**: Two subparts parts:

   A) Unforeseeable by a reasonable person from the bar's perspective; and,

   B) When looking back after the event in hindsight, taking into account all facts whether known or not by the bar, the intervening event must appear extraordinary.

Id.

For this legal doctrine to apply, the event at issue must be both "intervening" and "superseding." *Id*. It is therefore possible than an act can be intervening, but not superseding. Specifically, if the original actor's negligence creates the risk of harm that causes the injury, an intervening force is not a superseding cause. *See State v. Slover*, 220 Ariz. 239, 244, 204 P.3d 1088, 1093. (App. 2009); *see also Petolicchio v. Santa Cruz Cty. Fair & Rodeo Ass'n, Inc.*, 177 Ariz. 256, 263, 866 P.2d 1342, 1349 (1994) (holding the following as an intervening cause, but not a superseding cause, because it was not subjectively unforeseeable as a matter of law: a minor's criminal act of stealing alcohol from a licensee employing his mother, and then distributing that alcohol to a friend, who caused a collision).

The Arizona Supreme Court has offered powerful language to counter claims that specifically unique facts of an otherwise conventional dram shop scenario warrant relief of liability per this narrow doctrine:

> "Common sense, common experience, and authority all combine to produce the irrefutable conclusion that furnishing alcohol, consumption of alcohol and subsequent driving of a vehicle which is then involved in an accident are all foreseeable, ordinary links in the chain of causation leading from the sale to the injury."

Ontiveros, 136 Ariz. at 507, 667 P.2d at 207.

Thus, absent extraordinary and unforeseeable circumstances, a patron's impaired driving of a motor vehicle, after a bar overserves that patron, is within the scope of the risk posed by the bar's overservice. *See id*.

Jaguars requests a ruling as a matter of law on this issue, but, in the alternative, alleges that Judge Martin abused his discretion not to instruct the jury about this abstract legal term of art, instead opting to permit defense counsel to make the argument in closing.

1. Jaguars is Not Entitled to a Ruling as a Matter of Law that Pedro's Decision to Drive Constituted an Intervening Superseding Cause.

When accepting as true only those facts supporting the jury verdict, and making favorable inferences therefrom, Pedro's decision to drive after Jaguars overserved him is neither intervening nor superseding as a matter of law.

Regarding "intervening," Pedro's decision and opportunity to drive is in no way of "independent origin" in relation to Jaguar's prior gross overservice of Pedro and subsequent failure to arrange for his safe ride home. *See id*. at 506, 667 P.2d at 206. Rather, Pedro's ending up at Carlos' house, where his car was parked and accessible, afforded him the opportunity to cause a drunk driving collision. Of course, Pedro only ended up there because, Carlos, to whom Jaguars also served alcohol, drove him. It was therefore Jaguars' negligence that set into motion this natural series of events. *See id*. at 507, 667 P.3d at 207.

Next, there is the foreseeability analysis, which takes the bar's subjective perspective, given what the bar knew in real time through its employees. Jaguars effectively took a path of willful ignorance. There is no

evidence suggesting that Jaguars' employees actively monitored Pedro's alcohol consumption, or took any interest in how these three men intended to get home. Rather, all Jaguars knew or had reason to know was the following:

- It served three or four buckets of beer to these men. Jaguars sold at least two of these beer buckets directly to Carlos, the individual who drove the group to the club in his car (Feb. 2, 2017 Tr. at p. 168:17-24); and

- After about three hours of drinking at its establishment, these men departed to their car and drove away, again with Carlos at the wheel.

This being the totality of information available to Jaguars when it allowed Pedro's group to leave via car, should Jaguars be surprised when one of these men causes a collision while driving drunk later that night?

Jaguars points to the highly-case-specific twists and turns that unfolded that night, and alleges that unforeseeability arises from these particularities. (Opening Brief at pp.17-19). Yet, such uniquely tailored – but generally mundane – starts and stops are simply not pertinent to this foreseeability analysis, which is narrowly confined to the bar's viewpoint in real time without the benefit of hindsight or omniscience. Jaguars' referenced specifics are nothing more than mere inconsequential happenstance, no more material to a foreseeability analysis than the precise

speed of the vehicles, the exact location of the collision, or the particular identity of the third-party victim.

Jaguars' argument thereby misses the forest for the trees, and meanders in the minutia. The fundamental point is that Jaguars failed to take any interest or ameliorative action with respect to its then-profitable, but careless, externalization of risk onto the public at large. Jaguars is in no way like Thunder Pass, Inc., which valiantly went above and beyond in an attempt to contain the potential danger it may have set loose. *See Patterson*, 214 Ariz. at 436, ¶ 3, 153 P.3d at 1065. So, when a drunk driving collision occurred in that case, despite the bar's efforts, it was truly surprising.

Additionally, Pedro is in no way like the extraordinarily relentless drunk driver in *Patterson*. *See id.* In *Patterson*, the bar transported its patron away from her car and to her home. *Id*. Here, another patron, to whom Jaguars also served alcohol, transported Pedro to his car and away from his home. *See id*.

There is also nothing remotely extraordinary about Pedro getting into a drunken verbal altercation with his girlfriend, or his insistence on driving despite her protests. Rather, this tale is but a cliché that one could expect broadcasted on network television any day of the week. Moreover, Lydia owed no separate legal duty to prevent Pedro from driving, upon which Jaguars could rely; it was neither her keys nor her car. Thus, Jaguars' ostensible surprise, when it comes to the perfectly ordinary sequence of events that unfolded, rings hollow.

For these reasons, this Court should deny Jaguars' appeal that Pedro's choice to drive was an intervening superseding cause as a matter of law.

2. Jaguars was Not Entitled to its Requested Non-Standard Jury Instruction as to Intervening Superseding Cause Because Pedro's Driving was a Foreseeable Event Within the Scope of Risk it Created and Because the Absence of this Instruction had No Prejudicial Result.

The appellate court reviews jury instructions as a whole to determine whether the jury has been given the proper rule of law to apply. *See Lifeflite Med. Air Transp. v. Native Am. Air Servs., Inc.*, 198 Ariz. 149, 151, ¶ 8, 7 P.3d 158, 160 (App. 2000). Trial courts are not expected to instruct the jury on every nuance of law proffered by counsel. *See Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 423, ¶ 12, 46 P.3d 431, 434 (App. 2002).

If a trial court refuses to give a requested instruction, the appellate review is one for an abuse of discretion, further necessitating a showing of resulting prejudice to the requesting party. *See Brethauer v. General Motors Corp.*, 221 Ariz. 192, ¶ 24, 211 P.3d 1176, 1182 (App. 2009). On the other hand, if a trial court instructs a jury on a theory not supported by the facts in evidence, an appellate court must reverse because the trial court has invited speculation. *See Higgins v. Assmann Elecs., Inc.*, 217 Ariz. 289, 294, ¶ 15, 173 P.3d 453, 458 (App. 2007).

/ / /

a. Pedro's Decision to Drive While Impaired was a Foreseeable Event Entirely Within the Scope of Risk Jaguars Created by Overserving him Alcohol and then Failing to Arrange for his Safe Transport Home.

In *State v. Vandever*, evidence that the victim of drunk driving was himself speeding did not warrant an intervening superseding instruction because the victim's negligent driving "was clearly a foreseeable event within the scope of the risk created." 211 Ariz. 206, 208, ¶¶ 6, 8, 119 P.3d 473, 475 (App. 2005); *see also Ritchie v. Krasner*, 221 Ariz. 288, 300, ¶ 32, 211 P.3d 1272, 1284 (App. 2000) (holding that the trial court did not abuse its discretion by refusing to instruct the jury on intervening superseding cause because standard causation instructions sufficed).

In this case, after weighing "the distinction between specifically instructing the jury on that legal standard [of intervening superseding cause], and allowing [defense counsel] to argue the break in causation in [his] closing," Judge Martin made the conscious decision to opt for the latter – to not instruct the jury, but to permit the argument. (Feb. 7, 2017 Tr. at p. 97: 24 – p. 98:3). This was not only correct, but it presented less risk; had Judge Martin issued the instruction, given that it was not supported by facts in evidence, it could have necessitated reversal on appeal per *Higgins*. 217 Ariz. at 294, ¶ 15, 173 P.3d at 458.

Due to Jaguars' egregious overservice of alcohol, and willful ignorance of its patrons' fate, the evidence does not support the notion that the ensuing collision was unforeseeable. Rather, Pedro's decision to drive

was a "foreseeable event within the scope of the risk created," as reasoned by the Court in *Vandever* to reject this very same non-standard instruction. 211 Ariz. at 208, ¶ 8, 119 P.3d 473, 475

Likewise, Pedro's utterly predictable behavior – *e.g.*, getting into a domestic verbal dispute with his girlfriend after showing up at her home after being at a strip club, where he drank 11-12 beers, and then irresponsibly deciding to drive – is neither independent from Jaguars' alcohol overservice nor extraordinary in hindsight. Pedro was a divorced, unemployed 38-year-old alcoholic who routinely "partied" into the early morning hours. (Feb. 2, 2017 Tr. at p.130:10-11; p.141:19-22, p.144:13-22, p.146:7-9). Stories akin to his, with disastrous consequences like that occurring here, are tragically commonplace.

b. Jaguars was Not Prejudiced by the Absence of a Legalistically Abstract Instruction, the Essence of Which was Already Incorporated into the Instructions Actually Given.

Assuming arguendo, if this Court were to find that this instruction should have been given, and that it was an abuse of discretion to withhold it, it raises the question whether it would have made any material difference in the jury's factual findings, so as to prejudice Jaguars.

The legal term of art itself – "intervening superseding cause" – could aptly be characterized as legalese, such to render it likely more confusing than helpful. To recite this abstract phrase to a jury without a broader

explanation could only be outdone, in terms of eliciting a sense of natural befuddlement, by providing the commentary necessary for it to arguably be comprehensible.

Nonetheless, Judge Martin did allow defense counsel to make, in essence, the underlying argument behind the legalese: that Pedro's acts were somehow so outlandish, so reckless, so unexpected, so as to render him completely at fault, and Jaguars free of fault. (Feb. 7, 2017 Tr. at p.97:24 - p.98:3). For example, defense counsel's very first two sentences directed toward the jury in closing were: "Pedro is one hundred percent at fault for the accident. He made the decision by Carlos' house to get behind the wheel." (Feb. 8, 2017 Tr. at p. 40:16-18). In this way, defense counsel enjoyed a full opportunity to flesh out his argument that Pedro's actions somehow eclipsed Jaguars' prior conduct.

To assist the jury in its deliberations, Judge Martin issued the standard instructions, including but not limited to causation, comparative fault, and negligence. (Feb. 8, 2017 Tr. at p.5:7 - p.14:20). Like in *Krasner*, these standard instructions adequately communicated to the jury the law necessary to reach its factual decision. *See* 221 Ariz. at 300, ¶ 32, 211 P.3d at 1284. And the jury did exactly that, rejecting defense counsel's argument to attribute all fault to Pedro. It found Jaguars 40% at fault, and imposed $4 million in punitive damages for, what it concluded, constituted a conscious disregard of the safety of others. (IR No. 85).

The numbers the jury selected for its verdict are important. Is it plausible that this same jury, that determined facts supporting a 40% fault allocation against Jaguars, would materially alter its assessment upon an instruction addressing a term of art as abstract as "intervening superseding cause?" That this same jury, which determined Jaguars' conduct to be so reprehensible that it imposed $4 million in punitive damages against it, would suddenly change its collective mind in Jaguars' favor just because it was instructed on phrases as nebulous as "unforeseeable from the bar's perspective" or "extraordinary in hindsight?" No; and moreover, these concepts, when boiled down to their fundamental essence, are already baked into the standard instructions concerning negligence and comparative fault.

Accordingly, if the jury found that Jaguars could not have reasonably foreseen this outcome – whether due to its own specific knowledge as to Pedro's group's intoxication or transportation, or its own actions to arrange such transportation – then the jury would have rationally allocated less fault to Jaguars. Likewise, if the jury determined that Pedro's decision to drive was extraordinary in hindsight, after Carlos directly transported him to his car or after he drunkenly argued with his girlfriend, then the jury would have reasonably allocated more fault to Pedro. The verdict being what it is, however, the jury apparently did not find these events to be unforeseeable or extraordinary in the least.

For these reasons, Jaguars' requested non-standard instruction would have been more confusing than helpful, and was superfluous, unwarranted,

and unnecessary. As such, Judge Martin's discretionary determination was not an abuse, and in no way prejudiced Jaguars.

IV. Clear and Convincing Evidence Exists to Warrant Punitive Damages when an Adult Entertainment Club Served Three Men As Many as 32 Beers in Three Hours, and then Failed to Take Ameliorative Efforts to Ensure their Safe Transport Home and Thereby Protect the Public from its Own Externalization of Risk.

For a case to reach a jury on punitive damages, the plaintiff must present clear and convincing evidence that the tortfeaser pursued a course of conduct "to serve its own interests despite knowledge that its acts were wrongful and in conscious disregard for the legal rights" of others. *Thompson v. Better-Bilt Aluminum Prod. Co*., 171 Ariz. 550, 559, 832 P.2d 203, 212 (1992); *see Gurule v. Illinois Mut. Life & Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987); *Rawlings v. Apodaca*, 151 Ariz. 149, 162-63, 726 P.2d 565, 578-79 (1986).

This does not necessarily require a showing of outrageousness, but merely that the tortfeasor persists, notwithstanding his actual or constructive knowledge of the highly probable harm that could ensue. *Gurule*, 152 Ariz. at 602, 734 P.2d at 87. Further, circumstantial evidence, and reasonable inferences drawn therefrom, adequately support punitive damages. *Quintero v. Rodgers,* 221 Ariz. 536, 541, ¶¶ 17–18, 212 P.3d 874, 879 (App. 2009).

It is the jury that "is in the best position to consider whether" a defendant's motive or conduct was such that it warrants punitive damages.

Rawlings, 151 Ariz. at 163, 726 P.2d at 579. Accordingly, on appeal, a jury's decision to award punitive damages should be affirmed if any reasonable evidence exists to support it. *See Sec. Title Agency, Inc.*, 219 Ariz. at 498, ¶ 83, 200 P.3d at 995.

Jaguars' General Manager conceded that the "vast majority" of its revenue is earned through liquor sales. (Feb. 2, 2017 Tr. at p.27:21-24). This may explain why, despite having undergone Title 4 training himself, Jaguars openly promoted and incentivized its patrons to purchase its beers by the bucket, selling them for a greater price overall, but for a lesser price per individual beer. (Feb. 2, 2017 Tr. at p. 42:8-25)

Then, after having deliberately charted this inherently risky business course, Jaguars failed to implement written policies or procedures concerning the identification of customer intoxication, or place reasonable limits on alcohol service. (Feb. 2, 2017 Tr. at p. 29:4-23). Such policies could have lessened the risk arising from its bulk-quantity pricing incentives, but would have also likely reduced sales.

Additionally, there is Pedro's testimony about how Jaguars actually served these beer buckets: to one person, directly from the bar, with no apparent follow-up or active monitoring as each beer was separately opened at the table. (Feb. 2, 2017 Tr. at p.163:18 – p.164:17). Jaguars permitted the men it overserved to leave with no apparent concern as to where they were going, how they were getting there, and who was driving. Finally, Jaguars

evidently kept no evidence of this overservice. (Feb. 7, 2017 Tr. at p.48:12 – p.49:12).

Because Jaguars' General Manager underwent the bare minimum Title 4 training required by law, Jaguars was on constructive notice that its method of alcohol service was unlawful. (Feb. 7, 2017 Tr. at p. 44:2-8); *see* A.R.S. §§ 4-244(14), 4-244(23). Thus, a jury could have reasonably found that its alcohol service to Pedro's group constituted a conscious disregard of the risks of harm likely to arise therefrom.

A jury could have also reasonably found that Jaguars' apparent lack of rule enforcement or meaningful oversight effectively incentivized waitstaff and bartenders to continue overserving customers, knowing that, the more they drank, the more they would continue to drink (and tip) – all while shielded by the umbrella of plausible deniability posed by their ignorance.

Through this profitable overservice, a jury could reasonably conclude that Jaguars "acted to serve its own interests," thereby consciously disregarding its risk and externalizing it onto the public roadways. *See Thompson*, 171 Ariz. at 559, 832 P.2d at 212.

The Arizona Supreme Court has quoted with approval a number of other courts that aptly compared the danger of overserving a prospective driver to other irresponsible purveyances of deadly means:

- Sale of firearms to minors or incompetents
- Sale of dangerous drugs to those known to be addicted

- Manufacture or release onto the market of dangerously defective commodities
- Lighting a fuse of a bomb.

Ontiveros, 136 Ariz. at 507, 509, 667 P.2d at 207, 209 (citing *Meade v. Freeman*, 93 Idaho 389, 462 P.2d 54 (1969), and *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 632, 198 A.2d 550 (1964)).

The first two examples are particularly appropriate as to Jaguars' protest that the jury did not award punitive damages proportionally with its fault allocation, awarding ten times more punitive damages against Jaguars than Pedro, but less overall fault. (Opening Brief at p.23). *Ontiveros*' cited examples acknowledge the significance of the power imbalance between a seller profiting from a potentially dangerous product, and a buyer suffering from compromised self-restraint. *Id*. In these transactions, especially when there is a state licensure on the seller's side, a jury could reasonably expect the seller to engage itself responsibly. It is therefore perfectly sensible that a jury, believing Pedro's driving to be the primary cause of the collision, could simultaneously find Jaguars, which actually profited off of Pedro's lack of will-power, to be more deserving of punishment.

Accordingly, punitive damages were adequately supported by the evidence on record in this matter.

V. The Jury's Chosen 2.83:1.00 Punitive to Compensatory Damage Ratio is Reasonable and Passes Constitutional Muster, in a Matter Involving Physical Harm, Reckless Disregard of Others' Safety, Repeated Actions, and Targeting Someone of Financial Vulnerability.

Determining whether a punitive award passes constitutional muster is a fact-intensive inquiry, in which the reprehensibility of the defendant's conduct is the most important consideration. *Sec. Title Agency, Inc.*, 219 Ariz. at 501, ¶ 95, 200 P.3d at 998 (citing *State Farm Mut. Auto. Ins. Co.,* 538 U.S. 408, 419, 123 S.Ct. 1513 (2003)). A "reprehensibility analysis" considers a number of factors, none of which are individually determinative. *Id*. These factors include:

1) The harm caused was physical as opposed to economic;
2) The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
3) The target of the conduct had financial vulnerability;
4) The conduct involved repeated actions or was an isolated incident;
5) The harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id.

These factors notwithstanding, the United States Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula" and has rejected "a categorical approach." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582, 116 S.Ct. 1589

(1996). Moreover, the Supreme Court has declined "to impose a bright-line ratio which a punitive damages award cannot exceed," holding that "there are no rigid benchmarks that a punitive damages award may not surpass." *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 (but observing that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety").

It should therefore not be at all surprising that the United States Supreme Court has upheld considerably greater punitive/compensatory damage ratios than 2.83:1.00, as in this case. For instance, in *Pacific Mut. Life Ins. Co. v Haslip*, the U.S. Supreme Court approved a 4:1 ratio of punitive damages to compensatory damages. 499 U.S. 1, 23-24, 113 L.Ed.2d 1 (1991).

Likewise, in *TXO Prod. Corp. v. Alliance Resources Corp.*, the Supreme Court upheld a punitive damages award ($10 million) that was 526 times greater than the compensatory damages award ($19,000). 509 U.S. 443, 465 113 S.Ct. 2711 (1993).

Arizona courts have closely followed the lead of the United States Supreme Court. Consequently, at times, this Court has reduced punitive awards. For instance, in 2014, the Arizona Court of Appeals reduced a 13:1 ratio to a 4:1 ratio. *Arellano v. Primerica Life Ins. Co.*, 235 Ariz. 371, 380, ¶ 45, 332 P.3d 597, 606 (App. 2014). Providing its reasoning, this Court observed that "single-digit multipliers are more likely to comport with due process, [and] a factor more than four comes close to the line of

constitutional impropriety." *Id.* at 379, ¶ 38, 332 P.3d at 605 (citing *Hudgins v. S.W. Airlines, Co.*, 221 Ariz. 472, 491, ¶ 57, 212 P.3d 810, 829 (App. 2009)).

In the published Arizona appellate opinions wherein punitive damages were reduced to a certain ratio, a recurring theme appears: the victim was not physically harmed:

- Where plaintiff "suffered economic harm rather than physical harm," damages were reduced to 1:1. *Sec. Title Agency, Inc.*, 219 Ariz. at 503-04, ¶¶ 106-108, 200 P.3d at 1000-01 (App. 2008)
- Where defendant's "misconduct did not cause Plaintiffs physical or economic injury," but only emotional distress, damages were reduced to 1:1. *Hudgins*, 221 Ariz. at 491, 212 P.3d at 829.
- Where damages were "largely economic," with an aggravation of "pre-existing mental health conditions," this Court reduced the damages ratio to 1:1. *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 230 Ariz. 592, 610-11, ¶¶ 86, 101, 277 P.3d 789, 807-08 (App. 2012)
- In a contractual insurance bad faith action, with only economic damages, this Court reduced the damages ratio to 4:1. *Arellano*, Ariz. at 380, ¶45, 332 P.3d at 606 (App. 2014)

In the present case, the jury awarded compensatory damages of

$3,503,494.58, allocating 40% of fault against Jaguars, rendering Jaguars' share of these damages to be $1,411,387.83. (IR No. 84). The jury also awarded $4 million in punitive damages directly against Jaguars. (IR No. 84). The jury's compensatory to punitive damage ratio was only 2.83:1.00.

Thus, the jury's chosen ratio is more equitable than that which this Court approved as recently as 2014 and, unlike the facts of *Arellano*, this is a case involving severe and permanent physical injury. Mark Dupray, with his wife eight months pregnant, sustained fractures to his neck and right humerus, for which he has thus far undergone three separate surgeries, with multiple surgeries reasonably expected to be necessary in the future. *See, e.g.,* (Feb. 6, 2017 Tr. at p.148:20-25, Feb. 7, 2017 Tr. at p. 8:1-5).

Of course, physical injury, as opposed to economic, is just one of the five enumerated reprehensibility factors. *See Sec. Title Agency, Inc.*, 219 Ariz. at 501, ¶ 95, 200 P.3d at 998. A jury could have reasonably also found that Jaguars' conduct was reprehensible in its "indifference to or a reckless disregard of the health or safety of others," targeting someone of "financial vulnerability," and its "repeated actions." Pedro, as an unemployed alcoholic, was particularly vulnerable to Jaguars' reckless promotion and sale of beer-by-the-bucket, which it continued to offer through at least December 2016. (Feb. 2, 2017 Tr. at p. 141:19-22, p.146: 7-9, Feb. 7, 2017 Tr. at p.72:1-2). Taken together, at least four distinct factors of reprehensibility are implicated by Jaguars' conduct.

Therefore, the jury's carefully selected punitive to compensatory

damage ratio of only 2:83:1.00 is reasonable, supported by the evidence, and constitutionally sound. As such, we respectfully request this Court to protect the jury's findings.

CONCLUSION

For the reasons set out above, Plaintiffs/Appellees respectfully move this Court to deny Jaguars' appeal in its entirety.

DATED this 24th day of January, 2018.

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