

**IN THE
INDIANA SUPREME COURT**

Cause No. _____

TIERRA RAE PIERSON, *et al.*,

Respondents-Appellants
(Plaintiffs below),

v.

SERVICE AMERICA CORPORATION
d/b/a CENTERPLATE,

Petitioner-Appellee
(Defendant Below).

Court of Appeal Cause No.
49A02-1307-CT-561

Appeal from the Marion Superior Court
49D05-1012-CT-055716
49D07-1102-CT-006455

Hon. Robert R. Altice, Jr., Judge

***AMICI CURIAE* INDIANA TRIAL LAWYERS ASSOCIATION AND THE
NATIONAL CENTER FOR VICTIMS OF CRIME'S BRIEF IN OPPOSITION
TO CENTERPLATE'S PETITION TO TRANSFER**

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STATEMENT OF THE INTEREST OF THE *AMICI CURIAE*

The mission of the Indiana Trial Lawyers Association (“ITLA”) is to preserve the constitutional rights of open access to courts and equal protection under the law for all persons in Indiana. ITLA is an association of Indiana lawyers who regularly represent clients who have been injured as a result of others’ negligence. As such, ITLA’s members’ clients have and will rely on Indiana’s civil dram shop statute to pursue claims against those who furnish alcohol to visibly intoxicated persons when those persons cause harm, as here, to others.

The National Center for Victims of Crime (“National Center”), a nonprofit organization based in Washington, DC, is the nation’s leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this case because of its commitment to victims of drunk driving.

If the arguments presented by the Petitioner (“Centerplate”) and their aligned *amici curiae* (the “*Amici Large Venues*”) are adopted by this Court, injured parties will face the daunting task of having to identify each individual person who furnishes alcoholic beverages in order to establish actual knowledge of intoxication, and therefore liability, under Ind. Code § 7.1-5-10-15.5 (2013) (also referred to

herein as the “Dram Shop Act”). The effect, as recognized by the Court of Appeals in its opinion, would be that large venues that serve alcohol would simply be able to use their high number of servers or furnishers to create an exception to the actual knowledge requirement of the statute, all the while increasing the risk of drunk driving injuries created by the large volume of alcohol served. In other words, as the number of servers deployed increases, an injured plaintiff’s chances of personally identifying a server – with whom a plaintiff would have likely had no previous interaction – decreases, thereby eliminating that plaintiff’s ability to pursue his or her claim under the Dram Shop Act.

Not only is there no support for this position under the Act or applicable case law, it runs contrary to the established policy to hold providers liable for the foreseeable consequences of serving alcohol to visibly intoxicated patrons and protecting the health of the people of this state. As such, the position of Centerplate would, without any legal basis and contrary to the above policy, effectively eliminate liability for larger venues and even encourage them to over-serve patrons.

For these reasons and the reasons stated *infra*, Pierson *Amici* respectfully requests that this Court deny transfer and allow the Court of Appeals’ decision below to remain.

SUMMARY OF THE ARGUMENT

Neither the legislature, nor this Court, nor the Court of Appeals has ever endorsed a large venue exception to the Dram Shop Act or that a server of alcohol in violation of the Act must be personally identified. In fact, the Court of Appeals’

opinion rejecting this position relied upon well established policy behind the Dram Shop Act.

On appeal, Centerplate argued that “only a single inference arises, that is, no liability can ensue because no particular server to Gaff [the intoxicated driver] has been identified.” *Pierson ex rel. Pierson v. Serv. Am. Corp.*, 9 N.E.3d 712, 720 (Ind. Ct. App. 2014). The Court of Appeals recognized that Centerplate’s position would create an exception to the rule for larger venues that hired several servers.

Centerplate now frames its petition to transfer conversely: that it was the Court of Appeals who created the exception and Centerplate who argued the rule. This simply is not the case as the Dram Shop Act applies equally to all venues.

Furthermore, adopting Centerplate’s would have far-reaching adverse effects on the public policy reasons underlying the Dram Shop Act.

ARGUMENT

A. The Court of Appeals’ opinion reinforces that the Indiana Dram Shop Act must be uniformly applied regardless of venue.

1. *The Court of Appeals did not create an exception adverse to large venues in Dram Shop cases.*

Centerplate contends that the Court of Appeals “reached beyond the plain language of the statute to provide a new standard for persons furnishing alcohol at large venues because it did not believe the actual knowledge standard reflected sound public policy in this context.” (Brief of Centerplate in Support of Petition to Transfer, p. 8.)

In fact, the Court of Appeals cited the applicable policy behind the Dram Shop Act: “[t]he Dram Shop Act represents a legislative judgment and the declared public policy of this state that providers of alcoholic beverages should be liable for the reasonably foreseeable consequences of knowingly serving visibly intoxicated patrons.” *Pierson*, 9 N.E.3d at 716 (citing *Nat’l R.R. Passenger Corp. v. Everton by Everton*, 655 N.E.2d 360, 366 (Ind. Ct. App. 1995), *trans. denied*). Based on this established public policy, the Court rejected Centerplate’s argument that Plaintiffs were required to establish the identity the “person” who served Gaff where Centerplate was the sole provider of alcohol at the venue. To that end, the Court held:

In comparison to a neighborhood bar owner employing a few servers, a provider of alcoholic beverages using hundreds of volunteers to sell alcohol to thousands of patrons in a stadium may well seem ideally situated to lessen liability although the potential consequences are greatly increased. We do not believe this to be the intent of our Legislature.

Pierson, 9 N.E.3d at 720.¹

Nothing in this reasoning creates an exception for larger venues. Rather, the Court of Appeals’ holding reinforces that the Dram Shop Act applies to any person or entity that furnishes alcohol, be it through two servers or two hundred. One who furnishes alcohol in violation of the statute cannot then escape liability by playing a

¹ Indeed, even if policy reasons did not apply, the Court of Appeals was still correct to hold that a “person” under the Act encompassed Centerplate and all of its servers. *See* Ind. Code § 7.1-1-3-31 (2013) (“The term “person” includes:(1) a natural individual;(2) a firm;(3) **a corporation**;(4) a partnership;(5) a limited partnership;(6) a limited liability company;(7) an incorporated or unincorporated association; or (8) other legal entity; **whether acting by themselves or by a servant, an agent, or an employee**”) (emphases added).

proverbial shell game with its individual servers and the Dram Shop Act makes no such mandate.

2. *Centerplate and the Amici Large Venues are the ones attempting to rewrite the Dram Shop Act by creating large venue and identity exceptions.*

The fallacy in Petitioner's argument is that it proposes I.C. § 7.1-5-10-15.5 to require a plaintiff to identify the person serving alcohol in order to establish that a furnishing person or entity had actual knowledge of visible intoxication.

Centerplate argues that the failure of the Court of Appeals to apply such a standard here eliminates the actual knowledge requirement and transfers the burden of proof to the furnisher to identify the individual server. (*See* Centerplate Brief in Support of Transfer, p. 9.) The server could then ostensibly deny actual knowledge that the customer was visibly intoxicated at the point of sale. (*Id.*) Based on this misinterpretation of the statute and accompanying case law, Centerplate urges that the Court of Appeals' decision unfairly creates a public policy that singles out large venues and increases their liability. However, Centerplate has not cited any case law to support its position that a plaintiff is required to identify the specific person furnishing alcohol in order to establish liability or actual knowledge, thereby negating the foundation of its argument.

This is so because Indiana dram shop case law has long acknowledged the possibility that a server would not simply stand up and admit to serving a patron who was visibly intoxicated. *See Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968, 974 (Ind. 1999) ("Absent an admission that the person furnishing

alcohol had actual knowledge of the other's intoxication, the trier of fact must look to reasonable inferences based upon an examination of the surrounding circumstances") (citing *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1230 (Ind. 1988) and *Booker, Inc. v. Morrill*, 639 N.E.2d 358, 362 (Ind. Ct. App. 1994)). The effect of being able to use circumstantial evidence to establish a server's actual knowledge is that it renders the identity of the individual server immaterial to the inquiry. The focus is on the conduct of the intoxicated patron, not on the server's version of events, to wit:

Actual knowledge of intoxication can be inferred from indirect or circumstantial evidence such as what and how much the person was known to have consumed, the time involved, the person's behavior at the time, and the person's condition shortly after leaving.

Delta Tau Delta, 712 N.E.2d at 974 (citing *Booker*, 639 N.E.2d at 362). None of these factors focus on the server's observations or state of mind. Instead, they all relate to the actions and condition of the intoxicated patron, even when those actions occur outside the presence of the person furnishing alcohol.

Under Centerplate's approach, a plaintiff pursuing a dram shop case against a known provider of alcohol with multiple points of sale would have to identify servers who violated the statute even though this Court has repeatedly held that a plaintiff does not need to submit any evidence from a individual server in order to establish actual knowledge. In so arguing, Centerplate is literally proposing an extra and irrelevant burden on plaintiffs in cases against larger venues. I.C. § 7.1-5-10-15.5 makes no such requirement to establish liability and this Court need not

revisit firmly entrenched requirements of proof just because Centerplate is displeased with the decision of the Court of Appeals.

Granting Centerplate's petition to transfer would reject this Court's and the Court of Appeals' precedent permitting circumstantial evidence to establish dram shop liability, and therefore the petition should be denied.

B. Adopting Centerplate's modified burden to establish actual knowledge would modify the Dram Shop Act to contravene the public policy behind it.

As noted above, neither the Court of Appeals nor Plaintiffs appear to espouse a modified application of the Dram Shop Act.² Centerplate and the *Amici* Large Venues however are attempting to insert a separate requirement that would have this and future plaintiffs identify a server individually before they could proceed to offer circumstantial evidence. The effect of such a requirement would all but nullify the stated policies underlying the Act by conferring a *de facto* immunity to larger venues.

The issues presented by such Centerplate's proposed rewriting of the statute are substantial. The attention given to this case is justified. The death of a 12 year old girl on the cusp of being a teenager, and the serious injury of her young friend place this case in a national spotlight. Drunk driving has cost thousands of people their very lives. In 2010, 10,228 people were killed in alcohol impaired driving crashes, accounting for nearly one-third (31%) of all traffic-related deaths in the United States. Center for Disease Control and Prevention, *Injury Prevention &*

² Accordingly, the fear of the *Amici* Large Venues that their liability or insurance costs could increase has no basis in fact or law.

Control: Motor Vehicle Safety (http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html) (last accessed July 3, 2014). Serving alcohol to drunks (visibly intoxicated alcohol drinkers) is the antecedent act that directly leads to drunk driving.

Drinking alcohol and serving alcohol have long been regulated activities. The public interest in maintaining safe streets and sidewalks has long been recognized. The Indiana legislature has implemented several different statutes for the precise purpose of safeguarding Indiana citizens from drunk drivers. Those laws do not begin and end with the driver of the car. The policy behind those laws does not change just because one company stands to gain substantial monetary benefit from the sale of alcohol. The clear objective of the state legislature is to place responsibility with the server of alcohol as well. When a corporation serves alcohol, it must comply with the law. The alcohol provider and alcohol server are the last defense between the driver that exhibit signs of intoxication and the 12 year olds that live and play in Indiana communities.

It is understood by our General Assembly that drunken individuals can lose the ability to recognize the danger their drunkenness presents. Loss of judgment, loss of inhibitions, loss of common sense, loss of manual dexterity and loss of acute vision are all known effects of excessive alcohol use. A drunken individual is on occasion simply too impaired to recognize how much danger to others he or she is. The alcohol server and the provider of the alcohol must therefore step up and stop providing alcohol to drunks.

Centerplate and the *Amici* Large Venues are attempting to “carve out” a safe haven for the unfettered serving and drinking of alcohol. Harkening back to the recent “too big to fail” mentality that was used to justify the selective implementation of financial help offered to businesses, Centerplate is claiming that the volume of alcohol sales at a Colts football game are simply too large to regulate. This attitude turns a blind eye to the all too real consequences of fueling 67,000 football fans with virtually unregulated and free flowing beer. \$5.4 million in alcohol sales at a single event on any given Sunday during football season combines excessive alcohol consumption with a huge number of people in a relatively confined space.

The risks are obvious. Those risks spill out of the stadium and can make the streets dangerous. The risks have been identified with the death and injury of these children, but Centerplate has been aware of these risks from the day they determined that somehow the laws of the State of Indiana do not apply to its business or their “volunteer sales staff.”

Centerplate recruits on average 2,000 “volunteers” from various charitable organizations to push alcohol sales to the captive football fans at each sporting event. Centerplate maintains 600 separate distribution points that have the single common purpose of selling as much alcohol to as many captive fans as possible. All of this is done in the name of the charity. The charities are encouraged by Centerplate to engage in friendly, but misguided competition to see who can sell the most alcohol. The “volunteers” engage in earnest fund raising efforts recognizing the

“tremendous financial opportunity” to raise money for their charity at this major event. The “volunteers” have been given a monopoly to sell a highly desired product at a fixed price to a willing and captive customer with proven disposable income. The only limitation on the volunteers potential fundraising is how fast they can fill the cups and how quickly they can find the next buyer. And the process is repeated very, very quickly. Little or no thought is given to the consequences caused by these choices.

It is as if a false security pervades the stadium. It is as if nothing bad will happen in such a beautiful stadium where some of the best football in the NFL is played. Charitable organizations certainly must have a sort of ethereal immunity which will protect others from any wrongdoing on their part. This is a fantasy. The unfortunate reality is that if the law is not followed then serious injuries, even death will happen.

Each Sunday, Centerplate provides all the incendiary ingredients and then places those ingredients in the hands of virtually untrained and misguided volunteers that Centerplate knows are completely inexperienced in handling the alcohol infused event. Centerplate reaps huge financial rewards, yet attempts to minimize its direct responsibility in putting millions of dollars of alcohol into untrained hands with the express purpose of selling as much alcohol as is possible. The volunteers are incentivized to sell as much alcohol as possible because the amount Centerplate “donates” to their charity depends on the amount of alcohol the volunteers sell.

Centerplate is requesting the Indiana Supreme Court to create a judicial immunity for their business model. To carve out a previously unrecognized exception to the dram shop and serving laws that will immunize Centerplate from any liability for the over serving of alcohol. Centerplate argues that it has too large of a sales staff to train regarding alcohol service. Centerplate claims it has too many alcohol distribution points to effectively monitor sales to individual patrons. Centerplate simply makes too many individual sales in a very short period of time to effectively track those sales. Centerplate claims it is simply too large to be required to follow the law of this or any other state when it comes to the regulation of alcohol sales at major sporting events. Centerplate ignores the fact that regardless of its size, the number of its distributors or the number of its volunteers, the law in the state of Indiana is that each server must have training regarding the “state laws and rules regarding the sale and service of alcoholic beverages,” “the effects of alcohol,” “methods of: (i) identifying and refusing to serve or sell alcoholic beverages to an underage or intoxicated person.” Ind. Code § 7.1-3-1.5-6 (2013). These requirements are in place because the Indiana legislature recognizes the importance of not serving intoxicated individuals. The General Assembly has not created a *large venue exception*. A reversal of the Indiana Court of Appeal’s decision would be doing just that, creating a caveat for large venues when such a caveat does not and should not exist.³

³ Applying the Dram Shop Act with a caveat to larger venues would also violate the Equal Privileges and Immunities Clause of the Indiana Constitution. See *Paul Stielor Enterprises, Inc. v. City of Evansville*, 2 N.E.3d 1269 (Ind. 2014) (wherein smoking ban that applied to bars and restaurants but excepted riverboats was deemed unconstitutional in a 3-2 decision by this Court).

From a litigation standpoint, Centerplate and the *Amici* Large Venues would be placing a nearly impossible burden on plaintiffs to establish liability under the Dram Shop Act.

One must bear in mind that a dram shop action is somewhat unique in that a plaintiff, a victim of another's intoxication, has little to no opportunity to personally witness a third party furnishing alcohol to the person who subsequently perpetrates the harm. As a result, if required to identify the precise person who furnished alcohol to the intoxicated patron, a plaintiff's only and best source of such information would be the defendant, an intoxicated and adverse witness.

Based on this policy, whether there are several volunteers or two bartenders, one must ask: what financial incentive does a furnisher of alcohol have not to serve a visibly intoxicated patron? None whatsoever. A purveyor of drinks would have equal, if not more, incentive to obfuscate a patron's recall (and make additional money) rather than cutting off that same patron. In a setting such as a Colts game or any other large venue, the same approach would apply exponentially as would the number of intoxicated drivers on the road.

Ultimately, it is apparent why Centerplate would desire such a result. They could hire twice as many servers at a game without any limitation on serving patrons, even those visibly intoxicated, and thereby diminish their liability. If one such patron committed a wrong due to that intoxication, the odds that he could recall, much less fully identify, any individual who sold him a drink would be almost nil. Such a requirement to personally identify a server would therefore place

an insufferable burden on future plaintiffs and it would be an utter failure to “protect the . . . health . . . of the people of this state” since it would only promote an increase the number of intoxicated drivers on the road. Ind. Code § 7.1-1-1-1 (2013).

This Court should therefore deny Centerplate’s petition to transfer and uphold the proper application of the Dram Shop Act by the Court of Appeals.

CONCLUSION

Centerplate has not been singled out or victimized due to its status as a purveyor of spirits at a large venue. Rather, it and the *Amici* Large Venues are seeking immunity from the Dram Shop Act, without any basis at law, and contrary to standards of law developed through various decisions of this Court and the Court of Appeals.

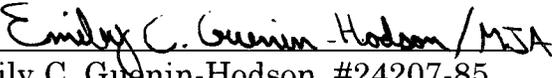
For these reasons, the Court should deny the petition to transfer.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Rule 44(E) of the Indiana Rules of Appellate Procedure, the undersigned counsel verifies that the foregoing *Amici Curiae* Brief (excluding cover page, table of contents, table of authorities, word count certificate, certificate of service, and signature block) contains less than 4,200 words.



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CERTIFICATE OF SERVICE

I hereby certify that on Monday, July 07, 2014, the foregoing was filed with the Clerk of the Indiana Supreme Court in accordance with Rule 23(A)(3). I also certify that on Monday, July 07, 2014, the foregoing was served personally upon the following in accordance with Rule 24(C)(2):

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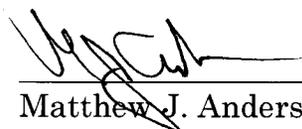
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