

ARIZONA SUPREME COURT

ROBERTO TORRES, et al) **Arizona Supreme Court**
) **No. CV-22-0142-PR**
 Plaintiffs/Appellees,)
 v.)
) Court of Appeals
 JAI DINING SERVICES (PHOENIX) INC.,) Division One
) No. 1 CA-CV 19-0544
 Defendant/Appellant.)
) Maricopa County
) Superior Court
) No. CV2016-016688

**AMICUS BRIEF OF
THE ARIZONA LICENSED BEVERAGE ASSOCIATION**
(Submitted with the written consent of the parties)

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	3
INTRODUCTION.....	5
THE ARIZONA LICENSED BEVERAGE ASSOCIATION (ALBA) AND ITS INTERESTS IN THIS CASE AND ITS INVOLVEMENT WITH THE PASSAGE OF ARS § 4-311 AND ARS § 4-312.....	6
ARGUMENT.....	8
I. ORIGIN AND SCOPE OF ARIZONA’S CONTROL OF ALCOHOL.....	8
A. History and Source of Arizona Controlling Liquor	8
B. Arizona’s Liquor Industry and Impact on Our State	9
C. Exhaustive Regulations for Everything Liquor Related.....	10
D. Local Governing Authority Input on Liquor Sales	11
II. THE “OBVIOUSLY INTOXICATED” DEFINITION PROVIDES A CLEAR AND CERTAIN WORKABLE COMPLIANCE STANDARD.....	11
A. Observation of Consumption of Alcohol Toxicity as a Standard.....	11
B. Balancing the Cultural Norms While Protecting the Public, Health, Safety, and Welfare.....	12
C. Why Establishing a Clear Standard is Important.....	13
D. Arizona Laws Designed to Try to Prevent Over-Intoxication.....	15
E. Regulation and Enforcement Against Egregious Licensee Behavior.....	15
F. The Obviously Intoxicated Standard Can Be Articulated and Described for Educational and Training Purposes.....	16
III. DRAM SHOP JUDGMENTS ARE ONLY WORTH WHAT CAN BE COLLECTED.....	18
IV. THE LEGISLATURE’S HOLISTIC APPROACH IS REQUIRED.....	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Keckonen v. Robles</i> , 146 Ariz. 268 (Ct. App. 1985).....	19
<i>Ontiveros v. Borak</i> , 136 Ariz. 500 (1983).....	6
Constitutional Provisions	
18 th Amendment to the US Constitution	10
21st Amendment to the U.S. Constitution.....	8, 12
Statutes, Acts & Rules	
Volstead Act of 1919.....	8
A.R.S. § 4-101 et seq.	10
A.R.S. § 4-112(G)(2)	16
A.R.S. § 4-201(G).....	11
A.R.S. § 4-202(D)	16
A.R.S. § 4-203(F)	11, 16
A.R.S. § 4-210	16
A.R.S. § 4-210(A)(2)	16
A.R.S. § 4-210.01(A)	16
A.R.S. § 4-210.01(C)	16
ARS § 4-244(14).....	13, 14

ARS § 4-244(23).....	15, 16
ARS § 4-244(33).....	13
ARS § 4-246.....	14
ARS § 4-301.....	19
ARS § 4-311.....	5, 6, 13, 20
ARS § 4-311(D)	17
ARS § 4-312.....	6, 20
ARS § 4-312(B).....	5
ARS §28-1381(A) (1).....	5, 10
A.A.C. R19-1-101 et seq.	10
A.A.C. R19-1-103.....	17
Other Authorities	
Raymond Fosdick and Albert Scott, <i>Toward Liquor Control</i> (1933).....	8
Az. Dept. Liq. Lic. Contrl., <i>Fiscal Year Annual Report</i> , (2022).....	9

INTRODUCTION

The regulation of alcohol, whether through each person's own decision to consume or not, through government-enacted laws, education, or through the allocation of liability for the damages it can cause, has long been a continuing issue. The full gambit of phrases to describe alcohol run from "it's the spirit of the devil in a bottle" to "beer is how we know God loves us and wants us to be happy". Certainly, our country didn't pass Prohibition because the consumption of alcohol was always good for us or for society, but Prohibition proved to be a colossal failure because it ignored the cultural significance that alcohol played in our society. Today, we continue to face the challenge of balancing the legal use of alcohol against the costs and risks that Arizona's government faces in the legalization and regulation of its use.

The Arizona Licensed Beverage Association ("ALBA") urges the Court to uphold the constitutionality of ARS §4-312(B); it will preempt the nebulous, amorphous common law civil claim and, instead, provides a clear and express private right of action in ARS §4-311. In upholding the Constitutionality of this statute, the Arizona liquor industry will operate in an environment where 1) individual patrons can be criminally liable for any harm they cause, and for driving while "impaired to the slightest degree" pursuant to ARS §28-1381(A) (1) (as in this case where the driver is serving a 14-year sentence), 2) individual patrons can be civilly liable to victims for any harm they cause (as in this case which imposed a 1.2 million dollar judgment against the driver), 3) licensees can be civilly liable to victims under ARS

§4-311 for serving an underage person or serving someone who is “obviously intoxicated” (as in this case where the plaintiffs sued the bar under a private right of action, but the jury found that the bar did not violate any of its statutory responsibilities) and 4) licensees can still face administrative punishments which include, fines, suspensions and revocations of liquor licenses for violating Arizona’s all-encompassing liquor law regulatory scheme found in Title IV Statutes and its Administrative Code (“Arizona Liquor Laws”) as well as criminal punishments to individuals for violating Arizona Liquor Laws.

THE ARIZONA LICENSED BEVERAGE ASSOCIATION (ALBA) INTERESTS IN THIS CASE AND ITS INVOLVEMENT WITH THE PASSAGE OF ARS § 4-311 AND ARS § 4-312

ALBA is a non-profit organization established in 1936 to promote the responsible sale of alcoholic beverages, to establish and maintain effective communication with the Arizona Department of Liquor Licenses and Control (“DLLC”), to initiate, lobby for, and support laws that preserve the right of all Arizona retail liquor licensees to operate legitimate and lawful businesses.

In 1986 ALBA’s counsel, Don Isaacson, carefully crafted and proposed the language of ARS §4-311 and ARS §4-312 in direct response to the Ontiveros Court’s invitation. *Ontiveros v. Borak* , 136 Ariz. 500, 513; 667 P.2d 200, 213 (1983). The enactment was a significant item of legislation passed in the 1986 session. It affected every retail licensee in the state, numbering in the thousands, by setting firm and objective standards that every licensee, grocery clerk, waiter, waitress, and bartender

could follow in providing a safe environment for themselves, their patrons, and the public.

The definition of “obviously intoxicated” was specifically used to provide an objective standard of determining when service is permissible, and when it is not. Specific duties of responsibility were delineated; for example, a drinking consumer was not relieved of any responsibility; whether he or she demonstrated intoxication or not, it did not relieve any liability of the drinker to an injured person. Also, the law precluded the drinker from asserting a claim against the licensee for over-service so that the drinker could not shift responsibility to the licensee for serving him to a state of intoxication. The intent of the Legislature was to impose the maximum incentive on the drinker to know their own limit of consumption and through apportionment of liability to act responsibly, even if they were over-served.

However, there was no decrease in responsibility for a licensee or their servers, for serving someone after that person exhibited obviously intoxicated behavior. The Legislature also expected that with an objective standard of liability/intoxication, liability insurance would become more affordable and available, thereby protecting persons who are injured by the negligent acts of restaurants, bars, and other liquor retailers. A successful plaintiff who is unable to collect the awarded damages, in whole or in part, is in itself a limitation on damages.

Because this case will significantly impact its members and their employees, ALBA respectfully offers this Court its perspective and understanding of the Arizona

regulatory history, framework, basic operations, impact, and scope of this case on our liquor industry. None of the parties to this case paid in whole or in part for the preparation of this brief.

ARGUMENT

I. ORIGIN AND SCOPE OF ARIZONA'S CONTROL OF ALCOHOL.

A. History and Source of Arizona Controlling Liquor.

Shortly after Arizona became a state in 1912, the Volstead Act of 1919 was enacted, and a national prohibition of alcohol sales essentially eliminated the need for liquor regulation. On September 5, 1933 Arizona voted to ratify the 21st Amendment to the U.S. Constitution which gave Arizona the right to legalize alcohol and choose its own system of regulation. In 1933 Arizona organized the Temperance Enforcement Division to the State Tax Commission. Ultimately, in 1939 the responsibility for liquor enforcement, and its control through a liquor licensing scheme, was given to the DLLC.

In restarting alcohol sales, Arizona devised its alcohol regulations to protect the public, health, safety, and welfare with substantial guidance. In 1933 John D. Rockefeller, Jr., a self-described teetotaler, commissioned Raymond Fosdick and Albert Scott to study American past alcohol regulation as well as the regulatory schemes in other countries (Canada, England, Holland, Norway, Finland, Russia) and directed them to draft guidance for the return of legal alcohol and its regulation. They

produced a book entitled *Toward Liquor Control*, which provided national guidance to policymakers as they established regulatory systems for alcohol. Raymond Fosdick and Albert Scott, *Toward Liquor Control* (1933). The book suggests two main approaches to regulating alcohol, “control system” (the book’s preferred system because it takes the profit motive out of the sale of alcohol using the state for operating the business of alcohol for off-premises store sales which 18 states adopted) or a “licensing system” (which Arizona adopted and is based on England’s former licensing system of allowing private sector entities to conduct alcohol sales which most of the other states adopted). Much of the book’s suggested framework for regulation still exists in Arizona’s liquor laws today.

B. Arizona’s Liquor Industry and Impact on Our State.

The scope of the State’s liquor regulations impacts thousands of Arizona liquor licensees. As of the fiscal year ending 2022, there were 14,644 licenses issued. Az. Dept. Liq. Lic. Control, *Fiscal Year Annual Rpt.*, p. 5, (2022). The most common liquor industry businesses recognized by the public are restaurants, bars, and liquor stores (most owned by small business owners), hotels, major sports stadiums, theaters and entertainment venues, golf courses, city entertainment districts, ski resorts, large charity special events such as car shows, national sporting contests and conventions. These business operations play a significant role in determining the character of our State and make our State a desirable location for both visitors and residents. Collectively, these businesses significantly impact the economic health of Arizona.

C. Exhaustive Regulations for Everything Liquor Related.

Not only was liquor the only commodity with two U.S. Constitutional Amendments, 18th and 21st, given Arizona's scheme of regulation, it is one of the most regulated commodities in our state. Federal, state, county, and city law enforcement agencies each play a significant role in enforcement of the regulatory structure. Every aspect of alcohol is regulated; who, what, how much and where it can be manufactured, who and how old you can be to handle it, how old you must be to buy it and consume it, what time of the day it can be bought and sold, how long you can remain in a licensed location after consuming too much of it, where it can be bought, where, when and how it can be consumed, where it can be stored, how it can be delivered or sold to retailers, how much of it can be delivered or sold, who can sell it, and in what neighborhood it can be sold, and in what condition the product is in and in what condition the purchaser is in, the content of the product and labeling of the product, every aspect of its marketing and promotion, how it can be paid for, what types of alcohol can be sold and at how many locations in the State, how to return it and how to dispose of it, and who pays how much in taxes on its sale at both the wholesale and retail levels, posted warnings for drinking when pregnant, and how much of it can be in your blood to be able to legally drive. A.R.S. § 4-101 et seq., A. C. R19-1-101 et seq. and ARS §28-1381.

D. Local Governing Authority Input on Liquor Sales.

Further, without getting into too much detail, each local governing authority, (cities, towns or county if the proposed location is an unincorporated area) as well as any person residing within one-mile radius of the proposed location can protest the issuance of any retail liquor license to the local governing authority and if the local governing authority recommends to the DLLC that a license not issue, or a local resident protests or the DLLC protests at the state level, then the matter is heard by the Arizona State Liquor Board with the burden on the liquor license applicant showing that he or she is “capable, qualified and reliable” to hold the license. A.R.S. § 4-203(F). Those who own 10% or more of a liquor-licensed business are vetted by the DLLC through an application process that includes a national background check using a fingerprint card and a detailed questionnaire. And that for each proposed licensed retail location “the applicant bears the burden of showing that the public convenience requires and that the best interest of the community will be substantially served by the issuance of a license.” A.R.S. § 4-201(G).

II. THE “OBVIOUSLY INTOXICATED” DEFINITION PROVIDES A CLEAR AND CERTAIN WORKABLE COMPLIANCE STANDARD.

A. Observation of Consumption of Alcohol Toxicity as a Standard.

Other than the person consuming alcohol, who really knows what any person’s reaction to alcohol will be, for some people just one drink is way too many, for some “experienced” drinkers they could consume what would render most of us

unconscious. Consumption of some alcohol can be good for you, too much can make you sick, too much can injure you or someone else, and too much too often could destroy lives and even result in death. But as a society, we all know this, these are the inherent risks assumed by our society and State in enacting the 21st Amendment and our State's Legislature accepting the responsibility of regulating alcohol. Given that the toxic effect of alcohol varies greatly for each individual, it makes sense that a standard be based on the observation of alcohol's effect on the consumer.

B. Balancing the Cultural Norms While Protecting the Public, Health, Safety, and Welfare.

The Arizona Legislature could have made the consumption of alcohol legal in Arizona only in a laboratory with toxicologists and medical personnel to observe the toxicity of alcohol on each individual but instead recognized how our culture prefers to consume alcohol. Accordingly, the Arizona Legislature set a reasonable standard of when the duty should be imposed to stop its service in the various settings it is commonly consumed. The Legislature, in establishing rules for public, health and safety, can continue to modulate this risk by adjusting this standard as necessary to best balance our cultural norms with our risk tolerance.

The Legislature and the DLLC are best situated to impose comprehensive regulation on this issue, by contrast, the courts are not well situated to develop universal standards for the sale and consumption of alcohol. Courts must take each case as it comes, and as the old adage goes, hard facts make bad law, meaning that an extreme case is a poor basis for a general law that would cover a wider range of less

extreme cases. In other words, a general law is better drafted for the average circumstance as this will be more common. Setting these standards is, therefore, best done by our Legislature which can be responsive to society's norms, technological advances, and wishes, and which can adopt a comprehensive regulatory scheme with civil, administrative, and criminal penalties and private rights of action. The executive branch through the DLLC and other state and local law enforcement agencies can determine the aggressiveness, resources applied and focus of the enforcement of these laws.

C. Why Establishing a Clear Standard is Important.

For example, imposing civil liability based solely on alcohol's known inherent risk of toxicity making the licensee liable merely for serving alcohol or making the licensee responsible for this toxicity until it eventually dissipates from one's system is grossly unfair and eliminates any standard for when a licensee should cease service to a consumer.

Practically speaking, before giving someone a drink, you can't always know whether that drink should be the person's last. Instead, the Legislature deemed it sensible to impose a standard based on observable signs that a consumer is "obviously" intoxicated. It did so in ARS § 4-244(14), by making it illegal to sell alcohol to someone who is obviously intoxicated. Further, in ARS § 4-311, the Legislature created private civil liability for harm caused by selling to an obviously intoxicated person. And finally in ARS § 4-244(33), the Legislature made it illegal

for an obviously intoxicated person to consume on the licensed premises, or to buy or attempt to buy alcohol from the licensee or an employee of the licensee. In all cases, the focus is on the standard of “obvious” intoxication.

Given the Arizona standard for not driving if impaired to the slightest degree, if one is going to drink, it is the consumer’s responsibility to make sure they have a designated driver or make arrangements for alternative transportation. This is where the Legislature placed the responsibility for the decision on the consumer initially or if they continue to consume until the burden is shifted on the server to make a determination when the patron displays behavior of “obvious” intoxication, which is the point where a patron may not make the right decisions in choosing whether to operate an automobile, and therefore, in society’s interest, a server must then make the determination to terminate service. Obvious intoxication is the logical point where the server is alerted when service must cease.

And to avoid public drunkenness and the risks of an obviously intoxicated person seeking more alcohol from another server, and the unpredictable behavior of someone who may become violent or cause someone else to become violent, the licensee is given thirty minutes to cause the obviously intoxicated person to leave the licensed premises. ARS § 4-244(14). That’s the standard the Legislature decided was best to impose on the liquor industry. While this standard can be challenging to implement, at least it is one that can be articulated in training and in educating the liquor industry.

D. Arizona Laws Designed to Try to Prevent Over-Intoxication.

Additionally, even before obvious intoxication occurs and because the Legislature wants the rate of consumption regulated it passed ARS § 4-244(23) which forbids; drinking contests, unlimited drinks during a set period of time at a fixed price, delivery of more than fifty ounces of beer, one liter of wine or four ounces of distilled spirits to any one person at one time for that person's consumption.

ARS § 4-244(23) prohibits a licensee from selling too much too soon so the licensee or its employees can monitor the condition of the customer before continuing to serve that customer. Why a limit of 4 ounces of distilled spirits? Because some cocktails' recipes call for 4 ounces. Why 50 ounces of beer? Because patrons don't want to miss the sporting event waiting in line to buy more beer. Why one liter of wine? Because people like to order a whole bottle of wine with their dinner. The Legislature weighs the cultural demands of society (a hard lesson learned from Prohibition) and by setting guidelines regulates the risks to society and to the licensee through strict liability and aggressive regulatory enforcement. These statutes show precisely why our Legislature should have the freedom to legislate in this area. The judiciary cannot realistically dictate by ounce how much alcohol a bar can serve. But our Legislature can, and it did—as part of a comprehensive regulatory scheme.

E. Regulation and Enforcement Against Egregious Licensee Behavior.

The Legislature set out these detailed standards, but then limited enforcement to administrative penalties and criminal law pursuant to A.R.S. § 4-246, as the

Legislature explicitly chose not to create a private right of action for these violations. So if a licensee or employee gives someone 8 shots of tequila, violating ARS § 4-244(23), the liquor licensee can be fined up to three-thousand dollars per violation pursuant to ARS § 4-210.01(A), and/or attend a DLLC approved training program pursuant to ARS § 4-210.01(C) and/or the liquor license can be suspended or revoked pursuant to ARS § 4-210 with the licensee statutorily barred from applying for another license for one year pursuant to A.R.S. § 4-202(D) and required then to requalify proving they are capable, qualified and reliable, pursuant to A.R.S. § 4-203(F) which depending on their licensing history may not be possible, and persons can be criminally charged but there's no private right of action.

Further, when actions by licensees amount to a lack of exercising common sense, especially in egregious circumstances, it raises the issue of whether the licensee has failed to satisfactorily maintain their “capability, qualifications and reliability requirements” to continue to hold a liquor license in the first place and is grounds for the DLLC to revoke, suspend or refuse to renew their liquor license. A.R.S. § 4-210(A)(2).

F. The Obviously Intoxicated Standard Can Be Articulated and Described for Educational and Training Purposes.

One of the main means of regulating alcohol sales is through the education and training of the people engaged in Arizona’s liquor industry. The DLLC is statutorily empowered to offer extensive and topic-specific guidance and coordination of training in Arizona Liquor Laws for our industry. A.R.S. § 4-112(G)(2). First, all

trainers' programs are vetted by the DLLC as every instructor must receive DLLC approval and requires every instructor to cover in detail, as regards to dealing with obviously intoxicated individuals, the class includes; the effects of spirituous liquor and recognizing signs of obvious intoxication, responsibility for the safety of customers, service limitations of spirituous liquor at a licensed premises, special event, or sampling event, monitoring customer consumption and intervention techniques using skill assessment, refusing spirituous liquor service or sale to an intoxicated individual using policy, procedure, and skill assessment, disorderly conduct and acts of violence, defining disorderly conduct and acts of violence, maintaining order on the licensed premises using policy, procedures, and skill assessment, real life examples of kinds of problem situations that may arise, recognizing a problem situation, and employee responsibilities in a problem situation, grounds for suspension or revocation of the liquor license, administrative liability, criminal liability, and civil liability, all of which is followed by an objective examination. A.A.C. R19-1-103.

As the above indicates, extensive education and training on the service of alcohol to obviously intoxicated persons are exhaustively provided, but just as important to that topic being covered, is the necessity of an articulable standard to use for proper and adequate training as provided in ARS § 4-311(D):

“D. For the purposes of this section, “obviously intoxicated” means inebriated to such an 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.”

Whereas common law liability is impossible to use for training given its indeterminable and nebulous nature. Licensees don't know when they'll be held responsible or for what. How can a licensee's employee know what to do under an amorphous common law rule? This conundrum poses a massive problem for Arizona's liquor industry.

III. DRAM SHOP JUDGMENTS ARE ONLY WORTH WHAT CAN BE COLLECTED.

The legislature is best for allocating the liquor industry risks and determining how much of risk liability should be born and by whom when considering the burdens on the industry in toto. A dram shop plaintiff cannot collect his or her damages if a substantial number of licensees can't get or afford insurance and the value of their business is insufficient to pay those damages. Currently, Arizona licensees are having difficulty finding carriers to provide insurance. Many carriers leave Arizona because of the astronomical costs just to defend dram shop cases (such as Badger Mutual, Burlington, CAN, First Specialty, Founders, Houston Specialty, Liberty Surplus, Sompo/Endurance, Starstone, Topa, United Fire, Western World, WH Greene/IICNA). While new carriers come into Arizona as well, many of them leave soon thereafter. Many licensees can't afford the premiums and are subjected to the constant stress of losing their businesses if they are sued and many cannot afford the defense of these lawsuits. Having an articulable standard creates a firmer ground for

insurance carriers in Arizona and provides substantial guidance to carriers trying to assess and charge for risks that should lower premiums.

IV. THE LEGISLATURE’S HOLISTIC APPROACH IS REQUIRED.

The Legislature determines when to discipline licensees administratively or criminally, and when to impose civil liability. These legislative choices require a careful balancing of competing objectives. Some regulations such as what time of day the public can purchase alcohol are regulatory enforcement only, with no civil liability. And no civil liability for social hosts because “virtually every aspect of the manufacture, sale and distribution of alcoholic beverages has been regulated by the Legislature and any policy modifications which are designed to encompass the potential liability of social providers of intoxicating beverages should be left to the sound discretion of the legislature.” *Keckonen v. Robles* , 146 Ariz. 268, 270; 705 P.2d 945, 947 (Ct. App. 1985) as the Legislature did in ARS § 4-301.

The Arizona Legislature imposed civil liability on licensees for serving minors or someone who is obviously intoxicated. Interfering with the Legislature’s balancing of cultural norms with regulating the inherent risks of the consumption of alcohol combined with law enforcement’s modulation of the aggressiveness of punishment hinders the Legislative’s and law enforcement’s more timely, responsive control of alcohol.

CONCLUSION

When common law is inconsistent with statutory law, too complex or nebulous, this can lead to uncertainty and confusion for businesses and individuals who are in good faith trying to comply with the law. Common law can be too slow to adapt to changes in our society and culture, this is especially true for the regulation of the sale of alcohol. ALBA therefore respectfully requests this Court uphold the constitutionality of ARS § 4-312 and supports the provisions in ARS § 4-311 providing for liability when serving someone who is “obviously intoxicated” or underage which provides our industry with a much more workable standard.

RESPECTFULLY SUBMITTED this 16th day of May 2023.

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