

ARIZONA COURT OF APPEALS

DIVISION ONE

ROBERTO TORRES, et al) **No. 1 CA-CV 19-0544**
)
Plaintiffs/Appellees/Cross-Appellants,) Maricopa Superior Court
v.) No. CV2016-016688
)
JAI DINING SERVICES (PHOENIX) INC.,)
)
Defendant/Appellant/Cross-Appellee)
)
)
)
)
)
)
)
)

**AMICUS BRIEF OF
THE ARIZONA LICENSED BEVERAGE ASSOCIATION**
Submitted with written permission of the parties

SCHELSTRAETE LAW OFFICES
Hayden Ferry Lakeside – Tempe
Town Lake
60 East Rio Salado Parkway, Suite
900
TEMPE, ARIZONA 85281
PHONE: (480) 272-7610
FAX: (866) 574-8846
EMAIL:Peter@Schelstraetelaw.com

Peter H. Schelstraete (013087)
Attorney for Amicus Curiae the
Arizona Licensed Beverage
Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES	3
INTRODUCTION.....	4
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.....	4
ARGUMENT.....	6
HISTORY - THE REGULATION OF ALCOHOL.....	6
OVERVIEW – ARIZONA CURRENT REGULATION OF ALCOHOL.....	8
SCOPE AND IMPACT OF THE LIQUOR INDUSTRY IN ARIZONA.....	9
THE INHERENT RISKS OF THE LEGALIZATION OF ALCOHOL.....	10
ALCOHOL EDUCATION AND TRAINING.....	12
DRAM SHOP JUDGMENTS ARE ONLY WORTH WHAT CAN BE COLLECTED.....	14
THE LEGISLATURE’S HOLISTIC APPROACH IS REQUIRED.....	15
CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Keckonen v. Robles</i> , 146 Ariz. 268 (Ct. App. 1985).....	15
<i>Ontiveros v. Borak</i> , 136 Ariz. 500 (1983).....	5
Constitutional Provisions	
21st Amendment to the U.S. Constitution.....	6
Statutes & Rules	
A.R.S. § 4-201(G).....	9
A.R.S. § 4-203(F)	9
ARS § 4-244(14).....	11
ARS § 4-244(23).....	11
ARS § 4-244(33).....	11, 12
ARS § 4-246.....	12
ARS § 4-301.....	15
ARS § 4-311.....	4, 11, 13, 16
ARS § 4-312.....	4, 15 16
A.A.C. R19-1-103.....	13
Other Authorities	
Raymond Fosdick and Albert Scott, <i>Toward Liquor Control</i> (1933).....	7

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, the federal government didn't pass Prohibition because the consumption of alcohol was always good for you, or for society, but Prohibition proved to be a colossal failure because it ignored the cultural significance that alcohol played in our society. So today we face the challenge on how best to regulate alcohol and allocate the costs of its inherent risks that Arizona chose to assume with its legalization. This case presents an extremely important issue of statewide impact on the regulation of alcohol in Arizona in determining first, who should decide its course and second, how we are going to get there.

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

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, 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 and wisely crafted 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, 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 the 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 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 of responsibility for a restaurant or bar, or their servers, for serving someone after that person had demonstrated that they were over intoxicated. The Legislature also expected that with an objective standard of liability/intoxication, liability insurance would become more affordable and available, and thereby protecting persons who are injured by the negligent acts of restaurants bars and other liquor retailers. Being awarded damages without the ability to collect, in whole or in part, is in itself a limitation on damages.

ALBA and its members have extremely important interests in ensuring reasonable and sensible regulation of licensees. None of the parties to this case paid in whole or in part for the preparation of this brief.

Because this case raises such important issues materially affecting so many in the Arizona Liquor Industry, ALBA believes it would be helpful to this Court to have a broader understanding of the Arizona regulatory history, framework, basic operations, impact, and scope of our liquor industry.

ARGUMENT

I. HISTORY - THE REGULATION OF ALCOHOL

Not too long 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. The 21st Amendment to the U.S. Constitution

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 Arizona Department of Liquor Licenses and Control (“Department”).

In restarting alcohol sales, Arizona did not devise its alcohol regulations without substantial assistance. 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 set up 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” (based on England’s former licensing system of allowing private sector entities for all alcohol sales which most states adopted, including Arizona). Much of the book’s suggested framework still exists in Arizona’s liquor laws today.

II. OVERVIEW – ARIZONA CURRENT REGULATION OF ALCOHOL

The liquor industry in Arizona is one of the most heavily regulated industries in the state, perhaps only second to banking. Every aspect of alcohol is regulated; who, what, how and where it can be manufactured, who can handle it, how old you must be to buy it and consume it, what time of the day it can be bought or sold, how long you can stick around after you've had 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, how much of it can be delivered, 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, 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.

Compliance with all these regulations is accomplished through education (voluntary compliance with knowledge of Arizona liquor laws), law enforcement both criminal, civil and a comprehensive administrative enforcement regimen including fines, suspensions and revocations of liquor licenses (local, county, state and federal), and licensing (those who own 10% or more of a liquor licensed business is vetted by the state through an application process which includes a national background check using a fingerprint card and detailed questionnaire).

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 license to the local governing authority and if the local governing authority recommends to the Department that a license not issue, or a local resident protests or the Department 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). And that for the proposed licensed 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).

III. SCOPE AND IMPACT OF THE LIQUOR INDUSTRY IN ARIZONA

This case affects thousands of Arizona liquor licenses, as of June 30th, 2021, there were 13,164 licenses issued. 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 and major golf tournaments and convention centers. These business endeavors play a significant role in making up the character of who we are as a State

and makes our State a desirable location for both visitors and residents. Collectively, these businesses significantly impact the economic health of Arizona, both directly and indirectly.

IV. THE INHERENT RISKS OF THE LEGALIZATION OF ALCOHOL

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 seasoned 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 your life as well as your friend's and family's and kill you in the end. These are the inherent risks assumed by our State in voting yes for the 21st Amendment and our legislature accepting the responsibility of regulating alcohol. There is no shortage of unreasonable ways the State could regulate alcohol, it could require licensure for each individual before they consume, it did not, or require all motor vehicles be equipped with an alcohol interlock device, it did not, or require sober-up holding cells at all on-sale licensed locations, it did not. Instead, the legislature set a reasonable standard of when to stop the service of alcohol.

Practically speaking, before giving someone a drink, you can't always know whether that drink should be the person's last. Instead, it's necessary to watch for physical, observable signs that someone is obviously intoxicated, and then cut them

off at that point. And of course, the legislature tells the liquor industry when that occurs, upon someone being “obviously intoxicated”. First, in ARS § 4-244(14), the legislature made it illegal to sell to an obviously intoxicated person. Second, 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, buy or attempt to buy alcohol from the licensee or an employee of the licensee. In all cases, the focus is on obvious intoxication.

And because society doesn’t want to witness the ugliness of public drunkenness nor risk the unpredictable behavior of someone who may become violent or cause someone else to become violent, the licensee is given thirty minutes to get the obviously intoxicated person on his or her way. 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.

Additionally, even before obvious intoxication occurs and because the legislature wants the rate of consumption to be monitored and 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, and 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.

The legislature set out these detailed standards, but then limited enforcement to administrative penalties and criminal law pursuant to A.R.S. § 4-246, 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, the liquor licensee can be fined, or the liquor license can be suspended or even revoked, and persons criminally charged but there's no private right of action.

V. ALCOHOL EDUCATION AND TRAINING

As stated above 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 Department provides extensive and topic specific guidance and coordination of training in Title 4 and its administrative code for the liquor industry. First, all trainers

are vetted by the Department as every instructor must receive Department 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. A.A.C R19-1-103.

As the above indicates, extensive education and training on the service of alcohol to obviously intoxicated persons is 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. People try to hold the licensee liable for how people get home but the licensee has thirty minutes to get them off the licensed premises, but can't lawfully take their keys away, can't force them to get a ride or get into a cab. This conundrum poses a massive problem for Arizona's liquor industry.

VI. 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, Somp/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. 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.

VII. THE LEGISLATURE'S HOLISTIC APPROACH IS REQUIRED

The Legislature determines when to administratively or criminally discipline licensees, 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 ARS § 4-301. The Arizona legislature chose to impose civil liability on licensees for serving minors or serving someone who is obviously intoxicated. The judiciary should respect these choices.

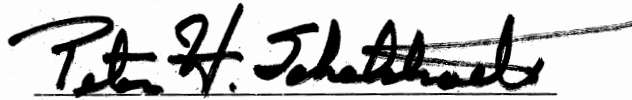
CONCLUSION

Given the importance and statewide impact on the liquor industry, ALBA respectfully requests that the Court address A.R.S. § 4-312(B) preemption of common-law dramshop liability, especially since this case offers a perfect vehicle for

doing so with its unique split-verdict determinative outcome. ALBA respectfully requests this Court find under ARS § 4-312(B), liquor licensees are not liable for property damage, personal injury, or death caused by selling, furnishing, or serving liquor to patrons, except as provided in ARS § 4-311.

DATED this 21st day of January 2022.

SHELSTRAETE LAW OFFICES



Peter H. Schelstraete
Attorney for ALBA