

**IN THE  
SUPREME COURT OF MISSOURI**

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**No. 87841**

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ELOIS SNODGRAS, for herself and  
on behalf of her deceased minor son TERRY KEOWN

Plaintiff-Appellant,

v.

MARTIN & BAYLEY, INC., d/b/a  
HUCK'S CONVENIENCE FOOD STORE,

Respondent.

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Appeal from the Circuit Court for the Twenty-Second Judicial Circuit  
Case No. 052-01007  
Honorable Stephen R. Ohmer

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**BRIEF OF *AMICUS* MISSOURI RESTAURANT ASSOCIATION IN SUPPORT  
OF MARTIN & BAYLEY, INC., d/b/a HUCK'S CONVENIENCE FOOD STORE**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Missouri Restaurant Association (“MRA”) appears in this case on its own behalf and on behalf of its members, and submits this brief in support of Respondent and the constitutionality of Missouri’s dram shop law, MO. REV. STAT. § 537.053 (2002) (the “Dram Shop Act”). The MRA is a state-wide, non-profit, trade organization which serves the needs and represents the interests of the foodservice and hospitality industry.

The MRA was intimately involved in the legislative effort to amend Missouri’s dram shop law that followed this Court’s decision in Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000). The MRA worked for several years in an effort with the Missouri Association of Trial Attorneys, the legislature, and other business and politically interested groups, to create a statute that satisfied constitutional requirements and clearly defined the liability that the legislature intended to carve out of the common law prohibition on dram shop liability. The MRA believes the Dram Shop Act withstands Appellant’s constitutional challenge. This Court’s ruling could have a significant impact on the Dram Shop Act, which, in turn, has a significant affect on MRA members, their liabilities and business operations.

The parties do not object to the MRA presenting its brief in this matter.

## **HISTORY OF MISSOURI’S DRAM SHOP ACT**

In 1919, Missouri passed the first dram shop law providing a statutory cause of action against a furnisher of liquor for injuries caused by an intoxicated person. 1919 Mo. Laws, Intoxicating Liquors, § 6 at 408, 411. This prohibition-era statute banned sale

and consumption of alcohol in Missouri, entirely. The law also created a new cause of action, permitting injured third parties, including an intoxicated person's family members, to bring a cause of action for damages against the party who illegally sold the alcohol. Id. In 1934, following the national passage of the 21st Amendment repealing prohibition, the Missouri legislature amended the dram shop statute, eliminating any statutory cause of action against a dram shop for injuries resulting from the actions of intoxicated customers.

Such remained the state of dram shop liability in Missouri until the early 1980s, when several Missouri Court of Appeal decisions permitted a cause of action against a dram shop for injuries caused by intoxicated persons. See Sampson v. W.F. Enterprises, Inc., 611 S.W.2d 333 (Mo. Ct. App. 1980), Nesbitt v. Westport Square, Ltd., 624 S.W.2d 519 (Mo. Ct. App. 1981), and Carver v. Schafer, 647 S.W.2d 570 (Mo. Ct. App. 1983). The Missouri legislature revisited its dram shop statute following these decisions. In 1985, a new law was passed, codified at MO. REV. STAT. § 537.053. The 1985 statute provided a cause of action against a dram shop, but only if the dram shop was first criminally convicted of serving a minor or intoxicated person. MO. REV. STAT. § 537.053.3 (1985).

In 2000, this Court considered the constitutionality of the 1985 dram shop law. In Kilmer, the Court determined that the criminal conviction element of the dram shop law violated the open courts provision of the Missouri Constitution because it was a procedural bar to plaintiff's recognized cause of action against a dram shop. Kilmer, 17

S.W.3d at 554. Kilmer declared a significant portion of the 1985 law unconstitutional and struck the offending language from the statute. Id. at 553-54. This Court “[left] it to the legislature to decide whether the statute, as it remain[ed], should be retained, repealed or modified in some constitutionally appropriate manner.” Id. at 554.

The legislature responded to Kilmer and amended the dram shop law in 2002. The amended law provides a limited cause of action against dram shops, entities described in the statute as “any person licensed to sell intoxicating liquor by the drink for consumption on the premises.” MO. REV. STAT. § 537.053.2 (2002). This statute, as amended in 2002, is the legislation challenged by Appellant, and is referred to herein as the Dram Shop Act.

### **ARGUMENT**

#### **I. THE DRAM SHOP ACT WITHSTANDS APPELLANT’S CONSTITUTIONAL CHALLENGE BECAUSE MISSOURI DOES NOT RECOGNIZE A DRAM SHOP CAUSE OF ACTION, BY STATUTE OR COMMON LAW, AGAINST A LICENSED SELLER OF PACKAGED LIQUOR.**

Appellant contends that the Dram Shop Act violates Article I, Section 14 (the “open courts” provision) of the Missouri Constitution. This Court has explained that “[a] statute [ ] may modify or abolish a cause of action that has been recognized by common law or by statute. But where a barrier is erected in seeking a remedy for a recognized injury, the question is whether it is arbitrary or unreasonable.” Kilmer, 17 S.W.3d at 550. The open courts provision of the Constitution “does not create rights, but is meant to

protect the enforcement of rights already acknowledged by law.” State ex rel. Tri-County Elec. Co-op. Ass'n v. Dial, 192 S.W.3d 708, 711 (Mo. banc 2006). This right of access to the courts “means simply the right to pursue in the courts the causes of action the substantive law recognizes.” Id. (citing Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 9 (Mo. banc 1992)).

When the 1985 dram shop act was challenged in Kilmer, the Court acknowledged that “for the purposes of our [open courts] analysis, it does not matter whether the recognized injury is a product of the longstanding common law or a recent statutory enactment.” Kilmer, 17 S.W.3d at 552 n.20. In the present case, Appellant argues that her recognized cause of action derives from both common law and statute. Respondent and the MPMCSA have refuted Appellant’s argument that she has a recognized cause of action under the Dram Shop Act in detail and the MRA adopts the arguments they presented. Additionally, as explained in detail below, any argument on the part of Appellant that she has a common law recognized dram shop cause of action against a package liquor provider is equally invalid.

By arguing that “dram shop” should be understood to include package liquor sellers, Appellant ignores the widely accepted meaning of the term. Merriam Webster’s New Collegiate Dictionary (1981) defines a “dramshop” simply as a “barroom.” Black’s Law Dictionary defines dram-shop as “a drinking establishment where liquors are sold to be drunk on the premises; a bar or saloon.” Black’s Law Dictionary 494 (6th ed. 1990).

A dram shop sells liquor for immediate consumption. A packaged liquor seller provides liquor in a sealed container to be consumed off premises.

Appellant nevertheless suggests that Missouri precedent supports considering package liquor providers “dram shops” for purposes of imposing civil liability. She reaches this conclusion by misapplying and stretching holdings from dram shop cases and ignoring clear precedent that specifically refutes this position.

The thrust of Appellant’s argument derives from Skinner v. Hughes, 13 Mo. 440, 443 (1850) lamentably, a property case in which the Court upheld an award of damages against a “store” for a slave owner’s property loss when his slave died from exposure to the cold after consuming liquor the store sold the slave. The Skinner opinion, apart from its racist and antiquated notions, is distinguishable from the present case for many reasons and entirely unpersuasive.

First, Skinner is not about package liquor liability. In Skinner, the “store” that sold the liquor to the plaintiff’s slave is not further described or defined. Id. We only know that the store sold “intoxicating liquor not less than a quart.” Id. Given that the slave took a bottle with him to the store to buy whiskey, it is safe to assume the store sold whiskey by the barrel. This Court recognized the significance of these facts in Lambing v. Southland Corp., 739 S.W.2d 717 (Mo. banc 1987), deciding it was “questionable” whether Skinner involved sale of package liquor since it was sold in an open container and available for immediate consumption.” Id. at 719. Accordingly, this Court wisely

declined to interpret Skinner as providing a common law dram shop cause of action against a package liquor store. Id.

Even in 1850 the legislature drew a distinction between a party that provided liquor by the drink and a party that provided liquor for consumption off site. In 1850, when Skinner was decided, no Missouri statute permitted a civil cause of action against a dram shop for injuries caused by intoxicated persons. This same distinction between a dram shop and sellers of liquor for off site consumption was drawn when criminal statutes of the era were interpreted. In State v. Slate, 24 Mo. 530 (1857), the distinction between a dram shop and grocer was discussed. The Court explained that criminal law considered “dram-shop keeper” to be a person “permitted by law, being licensed according to the provisions of the act, to sell intoxicating liquors in any quantity less than a quart” who was “allowed to suffer the liquor sold to be drunk at the place of sale.” Id. In contrast, a “grocer” was a person who “[could not] sell less than a quart” and who “[could not] permit the liquor sold to be drunk at the place of sale.” Id. The 1845 law’s distinction between a “dram-shop keeper” and a “grocer” focused on the amount of liquor sold and the ability of a purchaser to consume the liquor at the site of purchase. Id. This contrast is not unlike the modern day difference between a tavern and a packaged liquor provider and illuminates why Skinner cannot be considered a case about package liquor provider liability.

Additionally, Skinner is not a third-party injury case, as contemplated by law of the Twentieth and Twenty-First Centuries. Skinner is a property case involving

compensation for the loss of a slave. The “property loss” in Skinner bears no relation to any injury for which Appellant seeks to recover.

Unlike Skinner, cases properly understood to be dram shop cases involve injuries inflicted on third persons by furnishers of liquor by the drink to those who become voluntarily intoxicated. If Skinner has any present-day meaning, it is certainly not in the context of injuries caused by persons voluntarily intoxicated considering that the Skinner Court likened “selling liquor to a negro” to “placing noxious food within the reach of domesticated animals.” Skinner, 13 Mo. at 440. The 1850 Court did not consider Skinner’s slave to be a person even capable of voluntarily intoxication. Skinner is not influential, much less precedential, with respect to any dram shop decision handed down since the Emancipation Proclamation.

A fair review of the historical precedent set forth by legitimate dram shop cases reveals that a dram shop action against a packaged liquor provider is not, *and has never been*, a recognized common law action in Missouri. Other than Skinner, Appellant has not cited (and the MRA has not identified) a single case where common law liability was imposed on a package liquor provider for injuries suffered due to the acts of an intoxicated person since the 1934 repeal of the dram shop act.

Appellant acknowledges that the holding in Childress v. Sams, 736 S.W.2d 48 (Mo. banc 1987) is harmful to her argument and she tries to distinguish it from the present case. In Childress, the plaintiff sued the seller of packaged liquor for injuries sustained in a 1983 automobile accident based on the sale of liquor for consumption off

premises. Id. at 49-50. The Court discussed whether liability for the accident should be determined by common law standards or by standards imposed by the 1985 dram shop statute, applied retroactively. Id. at 50. The Court noted that between 1934 and 1986, there had been “no statutory liability imposed on the furnishers of intoxicating liquor” and that, “by case law, three Court of Appeals decisions have imposed liability in three different situations.” Id. (citing Sampson, 611 S.W.2d 333; (Mo. Ct. App. 1980); Nesbitt, 624 S.W.2d 519 (Mo. Ct. App. 1981), and Carver, 647 S.W.2d 570 (Mo. Ct. App. 1983)).

Appellant argues that, because the underlying facts in Childress, Sampson, Nesbitt, and Carver involved the sale of liquor by the drink on the part of tavern owners, Childress does not limit her cause of action against a package liquor provider. But Childress' holding is not limited to tavern owners. Rather, Childress explains who is immune from common law dram shop liability, and who is not. By ruling a furnisher of liquor who “did not sell liquor for consumption on the premises” could not be liable under common law for furnishing the liquor, Childress clarifies that package liquor is exempted from common law dram shop liability. Id. at 50.<sup>1</sup>

In the wake of the 1985 dram shop statute, 1987 was a busy year for dram shop appellate litigation. A few months after this Court handed down its decision in Childress,

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<sup>1</sup> Childress went on to explain that the plaintiff also had no cause of action against a seller of liquor under the 1985 Dram Shop Law where the seller did not sell intoxicating liquor by the drink. Childress, 736 S.W.2d at 50.

the Court of Appeals for the Eastern District found that a package liquor provider could be considered a “dram shop” and immune from liability under § 537.053.1. Ernst v. Dowdy, 739 S.W.2d 571, 573 (Mo. Ct. App. 1987). But two weeks later, this Court issued its ruling in Lambing, rejecting Ernst’s interpretation of “dram shop.” In Lambing, the Court expressly refused to extend dram shop liability to package liquor store proprietors. Lambing, 739 S.W.2d at 719 n.2. As explained above, Lambing found Skinner could not be read as approving a cause of action against a package liquor seller because it was questionable whether the store in Skinner was a dram shop since “the alcohol was sold in open containers and available for immediate consumption on the premises.” Id.

Two weeks after Lambing, the Court of Appeals for the Western District decided Trammel v. Mathis, 744 S.W.2d 474 (Mo. Ct. App. 1987), a case strikingly similar to the one at hand yet ignored by Appellant’s brief. The Trammel court dismissed a dram shop action against a QuikTrip convenience store that allegedly sold liquor to minors, ruling that “a commercial vendor selling liquor in original package for consumption off the premises is not liable, pursuant to statute *or common law*, for liabilities inflicted by intoxicated persons.” Id. at 475 (emphasis added). Trammel remains good law.

Kilmer, decided in 2000, is the next significant case involving a liquor provider’s liability for acts of intoxicated persons. Appellant argues that, per Kilmer, her claim is a recognized common law cause of action. To the extent Kilmer recognized a common law dram shop action, it is only as to sellers of intoxicating liquor by the drink. Kilmer, 17

S.W.3d at 551 (acknowledging a common law dram shop action under Moore v. Riley, 487 S.W.2d 555, 558 (Mo. 1972) (a suit against a tavern owner) and Lambing, 739 S.W.2d at n. 2 (permitting a dram shop action against a tavern owner, but denying it as to a packaged liquor provider)). Kilmer also discussed Skinner,<sup>2</sup> but considering that this Court did not even mention Childress, Ernst, or Trammel, cases that *expressly* denied liability on the part of package liquor providers, it cannot reasonably be assumed that the common law dram shop cause of action recognized in Kilmer extended to packaged liquor providers.

Kilmer set forth the parameters of dram shop law in Missouri until the Dram Shop Act was amended in 2002. Since the passage of the Dram Shop Act, Courts have been called upon, and consistently refuse, to extend liability under either common law or the Dram Shop Act beyond sellers of liquor by the drink.

For instance, in Gabelsberger v. J.H., et al., 133 S.W.3d 181 (Mo. Ct. App. 2004), the Missouri Court of Appeals for the Western District determined a cause of action against an individual who was paid to provide liquor to minors was barred “[u]nder the common law, [because] the consumption of alcohol by [the defendant] and his voluntary

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<sup>2</sup> Kilmer did not, as Appellant suggests, “affirm” Skinner. It only noted that the dram shop portion of Skinner had “apparently never been overruled.” Kilmer, 17 S.W.3d at 551. Kilmer noticeably does not dispute Lambing’s finding that Skinner should not be read as authorizing a cause of action against package liquor providers, generally.

intoxication was the proximate cause of [the third-party injury], not the furnishing of alcoholic beverages [to defendant].” Id. at 185. The Gabelsberger court also refused to extend liability to the individual seller of alcohol to a minor, finding that the Dram Shop Act “expresses a legislative intent to shield purveyors of intoxicants from liability for the injuries caused by their patrons with the exception of persons licensed to sell intoxicating liquor by the drink for consumption on the premises who sell to minors.” Id. at 186.

In Ritchie v. Goodman, 161 S.W.3d 851 (Mo. Ct. App. 2005), the Court of Appeals for the Southern District refused to extend common law or Dram Shop Act liability to social hosts who provided liquor to minors. Id. at 856-57. While the court “acknowledge[d] [its] power to modify the common law,” it would not “rule contrary to the evolving case law in the area.” Id. at 855 (citing Lambing, 739 S.W.2d at 718).

The only dram shop cause of action that arguably existed at common law prior to the passage of the Dram Shop Act was an action against a licensed seller of liquor by the drink. A packaged liquor seller of liquor for consumption off premises is, and has always been, immune from suit under common law for injuries inflicted by intoxicated persons. In any event, even if a dram shop common law action ever existed against a package liquor provider in Missouri, such cause of action has been abolished by the passage of the Dram Shop Act. See Adams v. Children’s Mercy Hosp., 832 S.W.2d 898, 905 (Mo. 1992) (holding that the open courts provision did not prevent statutes from changing common law by eliminating or limiting a common law cause of action.)

**II. IF THE PROVISIONS OF THE DRAM SHOP LAW APPELLANT CHALLENGES ARE UNCONSTITUTIONAL, THEY SHOULD BE SEVERED FROM THE STATUTE.**

Appellant suggests that, by limiting a cause of action to one against a licensed seller of liquor by the drink, the Dram Shop Act violates open courts and equal protection constitutional entitlements. She proposes that the Court remedy these violations by “rewording” the law. Appellant’s Brief at page 44. Appellant proposes that the Court may simply “remove” some phrases, “replace” them with others, “add” and/or “insert” terms and change other words. *Id.* at 44-45. If amended through the scheme Appellant proposes, the statute would then permit her to pursue a dram shop claim against a package liquor provider.

Appellant’s proposed rewording is constitutionally impermissible. “Courts cannot add words to a statute under the auspice of statutory construction.” Southwestern Bell Yellow Pages, Inc. v. Director Of Revenue, 94 S.W.3d 388, 390 (Mo. banc 2002) (citing Ryder Student Transp. Servs., Inc. v. Director of Revenue, 896 S.W.2d 633, 635 (Mo. banc 1995)). Respondent and the MPMCSA have explained the impropriety of Appellant’s suggestion that the Court may rewrite the statute. See Respondent’s Brief at 34-35 and MPMCSA Brief at page 9-11. The MRA agrees and adopts Respondent’s and the MPMCSA positions in this respect.

While the Court is forbidden from rewriting legislation, it is permitted to strike an offending portion of a statute, leaving the rest intact. In this case, if the Court determines

the Dram Shop Act presents an open courts or equal protection violation, severability is the appropriate remedy. Severability is governed by MO. REV. STAT. § 1.140 (2000), which provides:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

If constitutionally offensive language is stricken from the Dram Shop Act, the language that remains clearly reflects legislative intent, and “furnish[es] sufficient details of a working plan by which that intention can be made effectual.” Firearm’s Sec., Inc. v. Armory Facilities, Ltd., 760 S.W.2d 402, 405 (Mo. banc 1988) (citing State ex rel. Harvey v. Wright, 251 Mo. 325, 337 (Mo. banc 1913)). Although the MRA believes the Dram Shop Act is constitutional, if Appellant’s position is accepted, any constitutionally offensive language should be severed from the statute.

A. The Dram Shop Act is viable if its minor provisions are stricken.

Appellant, Respondent and other Amicus all recognize that the statute prohibits a finding of liability against a provider of alcoholic beverages for any injuries inflicted by intoxicated person unless the intoxicated person was (1) visibly intoxicated when served by a dram shop; or (2) a minor served by a dram shop. In fact, a clear purpose of the dram shop is to fully articulate these exceptions.

Appellant argues that the exception created for dram shop liability in the case of serving minors is unconstitutional. If the Court agrees, the exception for liability for service to minors should be severed from the remainder of the statute which sets forth the exception for dram shop liability in the case of service to visibly intoxicated persons. The language of the statute involving visibly intoxicated persons is not at issue in this case. The presumption that this provision of the statute is constitutional remains unchallenged.

The Dram Shop Act's visibly intoxicated provisions are not inseparably connected with, nor dependent upon, the provisions concerning minors. Rather, in several ways, the Dram Shop Act clearly considers the visibly intoxicated and minor exceptions to be distinct from one another. First, the Dram Shop Act provides different levels of culpability for licensed sellers depending upon whether improper service of liquor was to a minor or to a visibly intoxicated person. MO. REV. STAT. § 537.053.2 (2002). In the case of service to a minor, mere negligence is the standard. Id. But with respect to a

visibly intoxicated persons, a seller is only liable if it “*knowingly served* intoxicating liquor to a visibly intoxicated person.” Id.

Second, with respect to injuries caused by visibly intoxicated persons knowingly served liquor by dram shops, the Dram Shop Act limits recovery to “any person who has suffered personal injury or death.” Id. Only a third-party injured by the actions of the visibly intoxicated person has a right to recover against a dram shop. With respect to minors served intoxicating liquor, however, the Dram Shop Act creates a broader class of plaintiffs. MO. REV. STAT. § 537.053.4. In addition to a third-party injured by a minor negligently served liquor, the minor and his or her dependents, personal representative, or heirs may recover against a dram shop for damages arising out of personal injury or death. Id. The fact that the legislature set forth two separate standards of conduct for the Act’s minor and a visibly intoxicated exceptions, each with a different recovery, can only mean that it considered, and intended to treat, the exceptions as independent and unrelated to one another.

Accordingly, if the Court determines that the Dram Shop Act is unconstitutional with respect to the provisions concerning minors, the alleged unconstitutional language concerning minors can and should be severed from the remainder of the statute. If the language concerning minors is stricken, the Dram Shop Act reads:

537.053. Sale of alcoholic beverage not proximate cause of personal injuries or death--exceptions--requirements--(dram shop law)

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, RSMo, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. Notwithstanding subsection 1 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises when it is proven by clear and convincing evidence that the seller knew or should have known that intoxicating liquor was ~~served to a person under the age of twenty one years or~~ knowingly served intoxicating liquor to a visibly intoxicated person.

3. For purposes of this section, a person is "visibly intoxicated" when inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction. A person's blood alcohol content does not constitute prima facie evidence to establish that a person is visibly intoxicated within the meaning of this section, but may be admissible as relevant evidence of the person's intoxication.

4. Nothing in this section shall be interpreted to provide a right of recovery to a person who suffers injury or death proximately caused by the person's voluntary intoxication ~~unless the person is under the age of twenty one years~~. No person ~~over the age of twenty one years~~ or their dependents, personal representative, and heirs may assert a claim for damages for personal injury or death against a seller of intoxicating liquor by the drink for consumption on the premises arising out of the person's voluntary intoxication.

~~5. In an action brought pursuant to subsection 2 of this section alleging the sale of intoxicating liquor by the drink for consumption on the premises to a person under the age of twenty one years, proof that the seller or the seller's agent or employee demanded and was shown a driver's license or official state or federal personal identification card, appearing to be genuine and showing that the minor was at least twenty one years of age, shall be relevant in determining the relative fault of the seller or seller's agent or employee in the action.~~

6. No employer may discharge his or her employee for refusing service to a visibly intoxicated person.

Clearly, if the alleged offending language concerning liability for service to minors is stricken, the visibly intoxicated exception, standing alone, is complete and capable of being executed in accordance with legislative intent. Appellant acknowledges

that, in its Legislative Summary of the 1985 dram shop law, the legislature expressed its concern for making dram shops liable for sale of intoxicating liquor to “visibly intoxicated” persons. Appellant’s Brief at page 45. Appellant also recognizes that this Legislative Summary makes no mention of serving intoxicating liquors to minors. Id.

The legislature’s intent to create an exception from immunity for a dram shop that serves intoxicating liquor to a visibly intoxicated persons is apart from any intent to create an exception concerning service to minors. If the alleged unconstitutional language concerning minors is culled from the statute, the visibly intoxicated section is unaffected. Standing alone, it reflects the legislature’s intent, as well as the legislature’s efforts to satisfy the issues arising from this Court’s decision in Kilmer.

B. The Dram Shop Act is viable if language limiting a cause of action to providers of liquor by the drink is stricken.

As explained above, the MRA believes that the Dram Shop Act withstands an equal protection challenge (even though the exclusive liability under the statute is directed at MRA members.) If, however, the Court adopts Appellant’s contention that packaged liquor providers are “dram shops,” or that the distinction drawn between packaged liquor providers and liquor-by-the-drink providers is unconstitutional, Section 1.140 permits the Court to sever the language that gives rise to this distinction, leaving the remainder of the statute intact. If the Court determines that this distinction should be eliminated, language should be severed from the Dram Shop Act as follows:

537.053. Sale of alcoholic beverage not proximate cause of personal injuries or death--exceptions--requirements--(dram shop law)

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, RSMo, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. Notwithstanding subsection 1 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor ~~by the drink for consumption on the premises~~ when it is proven by clear and convincing evidence that the seller knew or should have known that intoxicating liquor was served to a person under the age of twenty-one years or knowingly served intoxicating liquor to a visibly intoxicated person.

3. For purposes of this section, a person is "visibly intoxicated" when inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction. A person's blood alcohol content does not constitute prima facie evidence to establish that a person is visibly intoxicated within the meaning of this

section, but may be admissible as relevant evidence of the person's intoxication.

4. Nothing in this section shall be interpreted to provide a right of recovery to a person who suffers injury or death proximately caused by the person's voluntary intoxication unless the person is under the age of twenty-one years. No person over the age of twenty-one years or their dependents, personal representative, and heirs may assert a claim for damages for personal injury or death against a seller of intoxicating liquor ~~by the drink for consumption on the premises~~ arising out of the person's voluntary intoxication.

5. In an action brought pursuant to subsection 2 of this section alleging the sale of intoxicating liquor by the drink for consumption on the premises to a person under the age of twenty-one years, proof that the seller or the seller's agent or employee demanded and was shown a driver's license or official state or federal personal identification card, appearing to be genuine and showing that the minor was at least twenty-one years of age, shall be relevant in determining the relative fault of the seller or seller's agent or employee in the action.

6. No employer may discharge his or her employee for refusing service to a visibly intoxicated person.

## **CONCLUSION**

Missouri's Dram Shop Act is constitutional and the judgment of the trial court should be affirmed. To the extent the Court finds the Dram Shop Act presents an open courts or equal protection violation of the Missouri Constitution, the offending language of the statute should be severed, leaving the remainder intact consistent with legislative intent.

Respectfully submitted,

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**RULE 84.06(c) CERTIFICATION**

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(c) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2003 and contains no more than **5,575** words, excluding those portions of the brief listed in Rule 84.06(c) of the Missouri Rules of Civil Procedure (less than the 27,900 limit in the Rule). The font is Times New Roman, proportional spacing, 13-point type. A 3½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Brief served by U.S. Mail, postage prepaid, to the following on this 5<sup>th</sup> day of September, 2006.

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