

**BEFORE THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

Number 87304

**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,**

Defendant/Respondent.

**APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
Cause Number 052-1007
Honorable Steven R. Ohmer, Division 2**

**BRIEF OF DEFENDANT/RESPONDENT
MARTIN & BAYLEY, INC. d/b/a
HUCK'S CONVENIENCE FOOD STORE**

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TABLE OF CONTENTS

Table of Authorities	4
Jurisdictional Statement	6
Statement of Facts	7
Points Relied On	14
Argument	16

A. The trial court did not err in dismissing Plaintiff’s petition and holding that Plaintiff did not have a cause of action against Defendant because subsection 2 of Missouri’s Dram Shop Act does not violate the Open Courts provision of the Missouri Constitution; as there is no recognized cause of action under Missouri common law for dram shop liability claims, and such cause of action is purely a creature of statute, the Act’s limitation of the class of persons against whom such an action may be maintained constitutes a substantive limitation in the statute giving rise to the cause of action, and not a procedural bar preventing Plaintiff from accessing the courts; as such, this limitation does not violate the Open Courts provision.

16

B. The trial court did not err in dismissing Plaintiff’s petition, and correctly held that subsection 2 of Missouri’s Dram Shop Act does not violate the Equal Protection Clause of the Missouri Constitution; the statute’s limitation of dram shop claims to claims against sellers of alcohol by the drink for consumption on the premises did not operate to the disadvantage of a suspect class or impinge upon a fundamental right explicitly or implicitly protected by the Constitution, and was rationally related to a legitimate state interest.

31

C. The trial court did not err in dismissing Plaintiff’s petition, and this Court should deny Plaintiff’s request that the Court rewrite the terms of the Dram Shop Act to allow Plaintiff to pursue a liability claim against

Defendant, because Plaintiff did not raise this constitutional question at the earliest possible opportunity or at any time when the case was before the trial court, and therefore the issue is not preserved for appeal; alternatively, the Dram Shop Act, as written, is unambiguous, gives effect to the intent of the legislature, does not lead to absurd or illogical results that would defeat the purpose of the legislature, and as such does not need to be rewritten.

34

Conclusion

37

Certificate of Service

38

Certificate of Compliance

39

TABLE OF AUTHORITIES

<u>Authority</u>	<u>Pages</u>
<i>Bosch v. St. Louis Healthcare Network</i> , 41 S.W.3d 462 (Mo.banc 2001)	16
<i>Care and Treatment of Schottel v. State</i> , 159 S.W.3d 836 (Mo.banc 2005) . .	15, 35
<i>Carver v. Schafer</i> , 647 S.W.2d 570 (Mo.App.E.D. 1983)21, 22, 24, 28
<i>Ernst v. Dowdy</i> , 739 S.W.2d 571 (Mo.App.E.D. 1987)	29, 20
<i>Etling v. Westport Heating & Cooling Services, Inc.</i> , 92 S.W.3d 771 (Mo.banc 2003)	14, 25, 26, 32
<i>Hoskins v. Business Men’s Assur.</i> , 79 S.W.3d 901 (Mo.banc 2002)17
<i>In re Estate of Saling</i> , 924 S.W.2d 312 (Mo.App.S.D. 1996)16
<i>Kansas City v. Webb</i> , 484 S.W.2d 817 (Mo.banc 1972)	15, 34
<i>Kelly v. Sinclair Oil Corp.</i> , 476 N.W.2d 341 (Iowa 1991)	15, 33
<i>Kilmer v. Mun</i> , 17 S.W.3d 545 (Mo.banc 2000)9, 10, 11, 14, 18, 19, 20, 22, 26, 28, 34
<i>Lambing v. Southland Corp.</i> , 739 S.W.2d 717 (Mo.banc 1987)	14, 29
<i>Leiser v. City of Wildwood</i> , 59 S.W.3d 597 (Mo.App.E.D. 2001)16, 36
<i>Leimkuehler v. Myers</i> , 780 S.W.2d 653 (Mo.App.W.D. 1989)12, 14, 23, 24

Ming v. General Motors Corp., 130 S.W.3d 665 (Mo.App.E.D. 2004) 15, 36

Nesbitt v. Westport Square, Ltd., 624 S.W.2d 519 (Mo.App.W.D. 1981)
.21, 22, 24, 28

Sampson v. W.F. Enterprises, Inc., 611 S.W.2d 333 (Mo.App.W.D. 1980)
.21, 22, 24, 28

Simpson v. Kilcher, 749 S.W.2d 386 (Mo.banc 1988)20,
21

Skinner v. Hughes, 13 Mo. 440 (Mo. 1850)
.21

Spears v. Capital Region Med. Center, 86 S.W.3d 63 (Mo.App.W.D. 2002) .19,
35

United C.O.D. v. State, 150 S.W.3d 311 (Mo.banc 2004)15, 17, 31,
32

Mo. Const., Article I, § 2 15,
31

Mo. Const., Article I, § 14 14,
18

RSMo § 1.14010, 20

RSMo § 287.240(1) 25,
26

RSMo § 302.505 11

RSMo § 311.310 8, 10, 11, 19, 22, 28, 29, 34

RSMo § 537.053 [1985]19, 20, 21, 22, 23, 28,

34

RSMo § 537.053 [2002]7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 22, 23, 30, 35,

36

JURISDICTIONAL STATEMENT

Defendant/Respondent adopts the Jurisdictional Statement set forth in the brief filed by Plaintiff/Appellant.

STATEMENT OF FACTS

Defendant/Respondent Martin & Bayley, Inc. d/b/a Huck's Convenience Store ("Defendant") does not adopt the Statement of Facts submitted by Plaintiff/Appellant Eloise Snodgras ("Plaintiff"), as it does not contain all of the facts pertinent to the issues on appeal. Pursuant to Rule 84.04(f) of the Missouri Rules of Civil Procedure, Defendant submits the following Statement of Facts.

In her Petition filed in the City of St. Louis Circuit Court, Plaintiff, the natural mother of minor decedent Terry Keown, asserted against Defendant, a corporation operating under the fictitious name of "Huck's Convenience Food Store," claims of negligent sale of alcohol to a minor (Count I) and negligent retention of an incompetent employee (Count II). (LF 3-4)¹ Plaintiff also asserted, as Count III, an alternative claim for declaratory relief "in the event that the court finds Plaintiff has no claim for wrongful death and damages against Defendant under the terms of R.S.Mo. § 537.053 or otherwise under Missouri law." (LF 5) Plaintiff alleged in Count III that, to the extent RSMo § 537.053, Missouri's Dram Shop Act, "does not allow a claim for dram shop injury and death against a seller of packaged liquor to a minor for consumption of liquor by the purchasing minor off the premises of the packaged liquor seller, said statute is

¹ All references to the Legal File shall be designated "LF." All references to Defendant's Supplemental Legal File, filed contemporaneously herein, shall be designated "SLF."

unconstitutional and violates” the Open Courts and Equal Protection clauses of the Missouri Constitution. (LF 5-6)

Plaintiff’s Petition made the following specific factual allegations: At all relevant times, Defendant employed individuals, including Beau Taylor, to sell items to the public, including but not limited to beer and other alcoholic beverages, and such individuals thereby acted in the course and scope of their employment, thereby making Defendant responsible for their actions under the doctrine of respondeat superior. (LF 4) At or about 7:00 p.m. on October 1, 2004, Turner or another employee or agent of Defendant sold a twelve-pack of beer to Plaintiff’s decedent, Terry Keown, who was then less than 21 years old, without checking Keown’s identification. (LF 4) Defendant thereby violated RSMo § 311.303. (LF 4) Early the following morning, Keown drank all or substantially all of the beer sold to him, and became intoxicated thereby. (LF 4-5) Keown thereafter drove his vehicle while intoxicated by the beer illegally sold to him by Defendant, and died in a one-car crash after losing control of his vehicle. (LF 5) Defendant, by and through its agents, negligently sold beer to Terry Keown, and such illegal sale was the proximate cause of Keown’s death, thereby rendering Defendant liable under Missouri law, including, but not limited to, RSMo § 537.053. (LF 5) Further, upon information and belief, prior to October 1, 2004, employees of Defendant, including but not limited to Beau Turner, regularly made illegal sales of liquor to minors at Defendant’s store located at 150 Salt Lick Road,

St. Peters, Missouri. (LF 6) Defendant's management knew or in the exercise of ordinary care should have known that Turner and other employees of Defendant regularly sold liquor to minors. (LF 6) Also, Defendant had no established business practice to determine whether employees were illegally selling liquor to minors. (LF 6)

Defendant moved to dismiss Plaintiff's Petition pursuant to Rule 55.27(a)(6) for failure to state a claim for which relief could be granted. (LF 12) In its motion, Defendant stated that Plaintiff's claims were barred by RSMo § 537.053, Missouri's Dram Shop Act. (LF 13) As noted by Defendant, the Dram Shop Act prohibited dram shop liability by declaring that furnishing alcoholic beverages was not the proximate cause of injuries inflicted by intoxicated persons; however, subsection 2 of the Act provided an exception, allowing for liability against persons licensed to sell liquor by the drink for consumption on the premises, when it was 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 21 or to a visibly intoxicated person. (LF 13) According to Defendant, the sale of liquor alleged in Plaintiff's Petition was of packaged liquor, not liquor by the drink for consumption on the premises; therefore, the exception set forth in subsection 2 did not apply to the immediate case. (LF 13)

In its motion to dismiss, Defendant noted that the Missouri Supreme Court, in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo.banc 2000), held that the portion of the

Dram Shop Act authorizing a dram shop claim only when a liquor licensee had been convicted of violating RSMo § 311.310 violated both the Open Courts provision of the Missouri Constitution and the principle of separation of powers, since the determination of whether civil relief existed was within the province of either the legislature or, in the absence of legislation, the courts as a matter of common law. (LF 13) Defendant further noted that the Court also held in *Kilmer* that the above procedural prerequisite of a criminal prosecution and conviction was the only unconstitutional provision of the Dram Shop Act, and that the remainder of the Act remained valid under RSMo § 1.140, which allowed severance of unconstitutional provisions from the remaining provisions of a statute. (LF 14) Accordingly, the exception to the Dram Shop Act's declaration of non-liability, set forth in subsection 2 and applicable to persons licensed to sell liquor by the drink for consumption on the premises, remained in effect, thereby barring Plaintiff's claim of negligent sale of liquor to a minor. (LF 15)

Defendant additionally argued in its motion that, since Plaintiff could not state a claim under the Dram Shop Act for the negligence of its employee in selling liquor to a minor, the court could not find Defendant liable for negligent hiring and/or retention, and therefore Count II had to be dismissed as well. (LF 15-16) Finally, Defendant contended that, in light of the Missouri Supreme Court's statement in *Kilmer* that it was up to the legislature to decide whether the Dram Shop Act, as it remained, should be retained, repealed or modified in some

constitutionally appropriate manner, there was no basis for Plaintiff's alternative claim for declaratory relief and Count III also had to be dismissed. (LF 16)

Plaintiff responded to Defendant's motion to dismiss by means of a memorandum in opposition, in which she argued that, under RSMo § 311.310, it was a crime for any establishment to sell liquor to a minor, whether or not the liquor was for consumption on the premises; the Dram Shop Act permitted a suit against a seller of liquor to a minor for consumption on the premises, but not against a seller of packaged liquor to a minor, even though the latter act was a crime; Plaintiff sought a declaration that this distinction between sellers of liquor for consumption on the premises and sellers of packaged liquor violated the Open Courts and Equal Protection clauses of the Missouri Constitution; no Missouri court had ever ruled on this precise issue, including the Missouri Supreme Court in *Kilmer v. Mun*; and, "[t]here is no valid reason to immunize from civil liability commercial sellers of packaged liquor to minors when Missouri law criminalizes such conduct, § 311.310, and the purpose of Missouri law is to prohibit all sales of liquor to minors so as to prevent underage drinking. See RSMo § 302.505 (the 'zero tolerance law')." (SLF 1-3)

Plaintiff also alleged in her memorandum that the employee of Defendant who allegedly sold beer to Terry Keown also pled guilty to the criminal charge of selling liquor to another minor. (SLF 3) However, the records of this criminal case, including the charge, guilty plea, judgment and sentence, were never

presented to the trial court, and the trial court made no reference to this criminal matter in its order and judgment. (See LF 19-23)

On July 18, 2005, the trial court heard arguments on Defendant's motion to dismiss and took the matter under submission. (LF 18) On October 18, 2005, the trial court entered an Order and Judgment granting Defendant's motion and dismissing Plaintiff's Petition. (LF 19-23) Citing *Leimkuehler v. Myers*, 780 S.W.2d 653 (Mo.App.W.D. 1989), the court held that a seller of packaged liquor, such as Defendant, was not liable for damages under the Dram Shop Act, which required that the liquor be sold for consumption on the premises. (LF 19) The trial court noted the observation in *Leimkuehler's* concurrence that the distinction between a bar and a liquor store under the Dram Shop Act seemed to insulate a package store employee from liability for selling intoxicating beverages directly to someone whom the employee knew to be a minor, knew to be intoxicated, and knew to be driving. (LF 20-21) The trial court stated, "This may seem to be an absurd result, but it is the Court's job to determine legislative intent from what the legislature actually said, not what the Court thinks it should have said." (LF 21) The trial court then went on to reject Plaintiff's constitutional challenges to the Dram Shop Act's limitation of civil liability to sellers of liquor by the drink for consumption on the premises:

The flaw in Plaintiff's argument is that it attacks the substance of the very statute that gives rise to the remedy against a dram shop rather than alleging a viable procedural hurdle. Missouri does not recognize dram shop liability at common law. § 537.053.1. Therefore, recovery for

damages against a dram shop is available solely by way of § 537.053[.2]. In short, except as provided by statute, there is no right to recover against dram shops furnishing alcoholic beverages for injuries inflicted by intoxicated persons. Because there is no “recognized cause of action” at common law against a dram shop, limiting the class of persons against whom such a civil action may be maintained does not violate the open-courts clause.

(LF 23)

Plaintiff thereafter appealed the trial court’s judgment to this Court. (LF

24)

POINTS RELIED ON

A. The trial court did not err in dismissing Plaintiff’s petition and holding that Plaintiff did not have a cause of action against Defendant because subsection 2 of Missouri’s Dram Shop Act does not violate the Open Courts provision of the Missouri Constitution; as there is no recognized cause of action under Missouri common law for dram shop liability claims, and such cause of action is purely a creature of statute, the Act’s limitation of the class of persons against whom such an action may be maintained constitutes a substantive limitation in the statute giving rise to the cause of action, and not a procedural barrier that arbitrarily and unreasonably prevented Plaintiff from accessing the courts.

Kilmer v. Mun, 17 S.W.3d 545 (Mo.banc 2000)

Liemkuehler v. Myers, 780 S.W.2d 653 (Mo.App.W.D. 1989)

Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771 (Mo.banc 2003)

Lambing v. Southland Corp., 739 S.W.2d 717 (Mo.banc 1987)

Mo. Const., Article I, § 14

RSMo § 537.053

B. The trial court did not err in dismissing Plaintiff’s petition, and correctly held that subsection 2 of Missouri’s Dram Shop Act does not violate the Equal Protection Clause of the Missouri Constitution; the statute’s limitation of dram shop claims to claims against sellers of alcohol by the

drink for consumption on the premises did not operate to the disadvantage of a suspect class or impinge upon a fundamental right explicitly or implicitly protected by the Constitution, and was rationally related to a legitimate state interest.

United C.O.D. v. State, 150 S.W.3d 311, 313 (Mo.banc 2004)

Kansas City v. Webb, 484 S.W.2d 817 (Mo.banc 1972)

Kelly v. Sinclair Oil Corp., 476 N.W.2d 341 (Iowa 1991)

Kilmer v. Mun, 17 S.W.3d 545 (Mo.banc 2000)

Mo. Const., Article I, § 2

RSMo § 537.053

C. This Court should deny Plaintiff's request that the Court rewrite the terms of the Dram Shop Act to allow Plaintiff to pursue a liability claim against Defendant, because Plaintiff did not raise this constitutional question at the earliest possible opportunity or at any time when the case was before the trial court, and therefore the issue is not preserved for appeal; alternatively, the Dram Shop Act, as written, is unambiguous, gives effect to the intent of the legislature, does not lead to absurd or illogical results that would defeat the purpose of the legislature, and as such does not need to be rewritten.

Spears v. Capital Region Med. Center, 86 S.W.3d 63 (Mo.App.W.D. 2002)

Care and Treatment of Schottel v. State, 159 S.W.3d 836 (Mo.banc 2005)

Ming v. General Motors Corp., 130 S.W.3d 665 (Mo.App.E.D. 2004)

Leiser v. City of Wildwood, 59 S.W.3d 597 (Mo.App.E.D. 2001)

RSMo § 537.053

ARGUMENT

A motion to dismiss for failure to state a claim upon which relief can be granted attacks the plaintiff's pleadings, and is solely a test of the adequacy of the plaintiff's petition. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-4 (Mo.banc 2001). In reviewing a motion to dismiss, the court must assume that all of the plaintiff's averments are true, and liberally grant to plaintiff all reasonable inferences therefrom. *Id.* at 464. No attempt is made to weigh the facts alleged as to whether they are credible or persuasive; instead, the petition is reviewed in an "almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Id.*

Unlike a motion for summary judgment, a court may not consider facts outside the face of the petition in ruling on a motion to dismiss filed pursuant to Rule 55.27(a). *See In re Estate of Saling*, 924 S.W.2d 312, 313 (Mo.App.S.D. 1996). In the appendix to her brief, Plaintiff has attached a copy of court documents concerning *State v. Turner*, Case Number 0511-CR118, St. Charles County Circuit Court, which purportedly relate to another instance of Beau Turner supplying liquor to a minor, subsequent to the incident involving Terry Keown. *See* Appendix to Plaintiff's Brief, pages 6-12; see also SLF 3. However, this

criminal proceeding was never referenced in either Plaintiff's Petition or the trial court's Order and Judgment. (LF 3-9, 19-23) Defendant submits that this Court should likewise not consider *State v. Turner* in ruling on the present appeal.

Count III of Plaintiff's Petition, and the points relied on in Plaintiff's brief, challenge the constitutionality of Missouri's Dram Shop Act, RSMo § 537.053. Under Missouri law, a state statute will be presumed to be constitutional, and will not be held unconstitutional unless it clearly and undoubtedly contravenes the Constitution. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo.banc 2004). Courts will enforce a statute unless it "plainly and palpably affronts fundamental law embodied in the constitution." *Id.* The burden of proof is on the party claiming that the statute is unconstitutional, and the court will resolve all doubts in favor of the procedural and substantive validity of an act of the legislature. *Id.* As an act of the legislature approved by the governor carries with it a strong presumption of constitutionality, the reviewing court will resolve doubts in favor of the procedural and substantive validity of the legislative act. *Hoskins v. Business Men's Assur.*, 79 S.W.3d 901, 904 (Mo.banc 2002).

A. The trial court did not err in dismissing Plaintiff's petition and holding that Plaintiff did not have a cause of action against Defendant because subsection 2 of Missouri's Dram Shop Act does not violate the Open Courts provision of the Missouri Constitution; as there is no recognized cause of action under Missouri common law for dram shop liability claims, and such

cause of action is purely a creature of statute, the Act's limitation of the class of persons against whom such an action may be maintained constitutes a substantive limitation in the statute giving rise to the cause of action, and not a procedural barrier that arbitrarily and unreasonably prevents Plaintiff from accessing the courts.

The Open Courts provision of the Missouri Constitution, Article I, § 14, provides:

That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

In *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo.banc 2000), the Missouri Supreme Court fashioned a new analytical approach to the Open Courts provision, finding that “there is a coherent line of reasoning that can be distilled from various opinions over the years that, if followed in this and subsequent cases, will ensure that article I, section 14 retains its vitality while permitting proper deference to legislative enactments.”

The Court summarized this approach as follows: the Open Courts provision prohibits laws that *arbitrarily and unreasonably* bar individuals or classes of individuals from accessing Missouri's courts to enforce *recognized* causes of action for personal injury. *Id.* Under this analysis, a statute may modify or abolish a cause of action that had been recognized at common law or by statute, but when a barrier is erected in seeking a remedy for a recognized injury, the

question is whether it is unreasonable or arbitrary. *Id.* at 550. Under *Kilmer*, a statute violates the Open Courts provision of the Missouri Constitution if (1) access to court for a recognized injury is (2) subject to an unreasonable or arbitrary barrier. *Id.* at 553.

In *Kilmer*, the Court confronted a requirement that is no longer set forth in the current version of the Dram Shop Act. Subsection 3 of the Dram Shop Act then in effect, RSMo § 537.053 (1985)², stated that, to assert a cause of action for personal injury or death against a person licensed to sell intoxicating liquor by the drink for consumption on the premises, based on that person’s sale of liquor to an obviously intoxicated person, the person licensed to sell liquor had to have been convicted or received a suspended imposition of sentence under RSMo § 311.310. *Id.* § 311.310 made it a criminal misdemeanor for a licensee to provide liquor to persons under the age of 21 or to any intoxicated person.

The Court held in *Kilmer* that the barrier imposed by RSMo § 537.053.3 – the requirement of a conviction under § 311.310 – was invalid. There was no “certain remedy” as guaranteed under the Open Courts provision if the cause of action was “entirely dependent on whether or not the county prosecutor has prosecuted and obtained a conviction of their alleged wrongdoer for violating Section 311.310 by selling intoxicating liquor to an obviously intoxicated person.” 17 S.W.3d at 553. Further, the statutory provision enabled the prosecuting

² The Dram Shop Act was subsequently amended in 2002 by H.B. No. 1532.

attorney, and not the legislative branch, to determine whether there was a cause of action under § 537.053.3, thereby violating the separation of powers: “the determination of whether a civil claim for relief exists is within the province of the legislature, or in the absence of legislative enactment, with the court as a matter of common law.” *Id.* at 552.

Accordingly, the Court held, “The prerequisite of a criminal conviction, in order for a plaintiff to proceed with a civil action, is . . . both arbitrary and unreasonable.” *Id.* at 553. However, this unconstitutional provision was subject to the statutory presumption of severability set forth under RSMo § 1.140 and could be excised from the statute, thereby allowing preservation of the non-offending portions of the statute. *Id.* “Therefore, consistent with section 1.140, we leave it to the legislature to decide whether the statute, as it remains, should be retained, repealed or modified in some constitutionally appropriate manner.” *Id.* at 554.

The Court also held in *Kilmer* that the dram shop claim at issue – a claim against a restaurant who had served beer to a driver who subsequently caused a fatal accident – was a “recognized cause of action.” *Id.* at 551. In so holding, the Court overruled its earlier decision in *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo.banc 1988), which had held that a similar dram shop claim was specifically prohibited by the Dram Shop Act in effect at that time.

The previous version of the Dram Shop Act at issue in both *Simpson* and *Kilmer* contained subsection 1, which declared it to be the policy of the state to prohibit dram shop liability and follow the common law rule that furnishing alcoholic beverages was not the proximate cause of injuries inflicted by intoxicated persons; and subsection 2, which declared that the holdings in *Carver v. Schafer*, 647 S.W.2d 570 (Mo.App. 1983), *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo.App. 1981) and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo.App. 1981), were abrogated “in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.” See §§ 537.053.1, .2 (1985). The *Kilmer* court noted that, with respect to subsection 2’s declaration that the listed judicial holdings were to be abrogated in favor of “*prior* judicial interpretation,” there were in fact Missouri decisions pre-dating *Carver*, *Sampson* and *Nesbitt* – starting with the 1850 decision of *Skinner v. Hughes*, 13 Mo. 440 (Mo. 1850) -- which appeared to allow dram shop claims. *Kilmer*, 17 S.W.3d at 551. The Court then stated, “Historical references aside, if subsections 1 and 2 of section 537.053 were the whole statute, we would accept the obvious proposition that the legislature had indeed abolished dram shop liability.” *Id.* However, the enactment of subsection 3 of the predecessor Dram Shop Act, allowing for dram shop liability if the seller

was convicted under § 311.310, made it clear that the legislature did *not* abolish dram shop liability. *Id.*

Subsequent to the Court’s decision in *Kilmer*, the Missouri legislature amended the Dram Shop Act to the version in effect on October 2, 2004, the date of the accident allegedly causing the death of Plaintiff’s minor son. The legislature retained subsection 1 in its entirety, which stated that was the “policy of this state” 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.” § 537.053.1 (2002). However, the legislature eliminated all of subsection 2 of the preceding version of the Act, which had declared that the holdings in *Carver*, *Sampson* and *Nesbitt* “be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.” § 537.053.2 (1985). Subsection 3 of the preceding version of the Act was renumbered as subsection 2, the requirement of a conviction under § 311.310 (found unconstitutional in *Kilmer*) was deleted, and additional burden-of-proof language was added, so that subsection 2 of the current version of the Act reads as follows:

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.

§ 537.053.2 (2002). The legislature also added a new subsection 3, defining “visibly intoxicated,” and a new subsection 4, disallowing a right of recovery to a person suffering injury or death proximately caused by that person’s voluntary intoxication, unless that person is under the age of 21. §§ 537.053.3, .4 (2002).

The legislature also added subsection 5, which stated:

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 of 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 degree of fault of the seller or seller’s agent or employee in the action.

§ 537.053.5 (2002). Finally, the legislature added subsection 6, prohibiting an employer from discharging an employee for refusing to serve a visibly intoxicated person. § 537.053.6 (2002).

Thus, under the current version of the Dram Shop Act, there is no dram shop liability except in actions against persons licensed to sell liquor by the drink on the premises, who knowingly serve minors or visibly intoxicated persons. *See* § 537.053.2 (2002). In point of fact, this is consistent with the Act’s predecessor. *See* § 537.053.3 (1985); *see also* *Leimkuehler v. Myers*, 780 S.W.2d 653, 655 n.1 (Mo.App.W.D. 1989), holding that the Act provided limited liability only against

businesses licensed to sell intoxicating liquor by the drink for consumption on the premises, and had no applicability to an action against a package liquor store.

Unlike its predecessor, however, the current version of the Dram Shop Act no longer contains the paragraph stating that the holdings in *Carver*, *Sampson* and *Nesbitt* were abrogated in favor of prior judicial interpretation. Rather, the statute simply states that it remains the policy to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons, but notwithstanding this common law rule, a dram shop claim may be brought against any person licensed to sell liquor by the drink for consumption on the premise, if there is clear and convincing evidence that the seller knew or should have known that liquor was served to a minor or knowingly served liquor to a visibly intoxicated person.

The trial court in the immediate case noted the Dram Shop Act's distinction between claims against sellers of liquor by the drink for consumption on the premises (which were allowed under the statute) and claims against sellers of package liquor (not provided for under the statute). The trial court further noted that, as referenced in the concurrence to *Leimkuehler*, the Act's distinction between bars and liquor stores appeared to insulate a package liquor store employee from liability even if that employee sold liquor to a person whom the employee knew was a minor, knew was intoxicated, and knew was driving a car with other occupants. (LF 20-21) The trial court agreed that this "may seem an

absurd result,” but went on to hold that it could only determine legislative intent from what the legislature actually said, not what the court thought it should have said. (LF 21)

The trial court then held that question of whether the Open Courts provision applied to invalidate the challenged statute often turned on whether the statute imposed a procedural bar to access to the courts, or substantively changed or limited the right to recovery. (LF 22-23). The trial court found that the statutory distinction challenged by Plaintiff – allowing claims against sellers of liquor by the drink for consumption on the premises (i.e., bars), but not against sellers of package liquor – was an attack on the substance of the very statute giving rise to the remedy against a dram shop, rather than a procedural hurdle, and as such did not violate the Open Courts provision. (LF 23)

The trial court was correct in so holding. *Etiling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771 (Mo.banc 2003), cited by the trial court, concerned a challenge to the constitutionality of RSMo § 287.140, the workers’ compensation statute limiting death benefits to “dependents” of the deceased employee, brought by non-dependent relatives of the decedent. The Missouri Supreme Court rejected the contention that the statute “arbitrarily and unreasonably barred a class of individuals” – the non-dependent relatives – from bringing a wrongful death action against the decedent’s employer. *Id.* at 773. The Court noted that Missouri did not recognize a common law cause of action for

wrongful death, and therefore recovery for wrongful death against an employer was available solely by statute (i.e., § 287.240(1)). *Id.* Except as provided by statute, there was no right to recover against employers for wrongful death. *Id.* “Because there is no right to recover, the fact that [the non-dependant relatives] were barred by statute from maintaining such action did not violate their right to be heard in court, and the restriction cannot be said to be arbitrary or unreasonable.” *Id.* The relatives had not alleged a true procedural hurdle preventing them from accessing the courts. *Id.* at 774. The wrongful death statute did not violate the Open Courts doctrine simply because the legislature desired to exclude a class from maintaining an action. *Id.*

As in *Etling* -- and unlike *Kilmer* -- Plaintiff does not allege that the Dram Shop Act imposes a procedural bar preventing her from accessing the courts; rather, her complaint concerns the exclusion of sellers of package liquor from the class of defendants who can be held liable in a civil dram shop action. As noted by the trial court, there is no common law cause of action for dram shop liability; Plaintiff’s recovery, if any, must come solely from the statute. The fact that Plaintiff cannot recover under the Dram Shop Act against Defendant, because the latter was not a seller of liquor by the drink for consumption on the premises, does not mean the Dram Shop Act violated the Open Courts provision. There was no procedural bar to Plaintiff’s cause of action, preventing Plaintiff from accessing

the courts; Plaintiff's claim failed because of the substance of the Dram Shop Act itself.

Accordingly, the trial court correctly dismissed Plaintiff's claim that the Dram Shop Act was unconstitutional under the Open Courts provision of the Missouri Constitution.

Plaintiff raises several additional arguments in favor of finding that she has a valid claim against Defendant, despite the Dram Shop Act's failure to include sellers of package liquor as persons against whom dram shop liability can be asserted. First, Plaintiff contends that she is without any remedy, even though her son suffered a recognizable dram shop injury, "simply because Huck's illegally sold him packaged liquor instead of alcohol by the drink. That distinction is arbitrary and unreasonable." Regardless of the merits of Plaintiff's statement – similar to, if more vehement, than the trial court's characterization of the distinction as "absurd" – it remains the case that this distinction is not a *procedural* barrier, preventing Plaintiff access to the courts, but a substantive limitation on the persons who can be held liable in a dram shop action. Plaintiff's complaint is with the substance of the very statute giving rise to the remedy against a dram shop. The legislature's decision to limit the class of defendants who can be held liable in a dram shop action by means of the Dram Shop Act, where the action is not recognized at common law, does not violate the Open Courts doctrine.

Plaintiff also contends that *Kilmer* held that subsection 1 of the Dram Shop Act (the same under both the 1985 and 2002 versions) did not eliminate or abolish dram shop liability. In fact, *Kilmer* did say just that: “Historical references aside, if subsections 1 and 2 of section 537.053 were the whole statute, we would accept the obvious proposition that the legislature had indeed abolished dram shop liability.” 17 S.W.3d at 551. It was the presence of subsection 3 in the 1985 version of the Dram Shop Act that precluded the Court from finding that § 537.053 abolished dram shop liability. *Id.*

Plaintiff also argues that Missouri recognizes negligence *per se* civil claims against sellers of liquor who violate RSMo § 311.310, which makes it a misdemeanor criminal offense to sell alcohol to minors. Plaintiff specifically cites *Sampson*, *Nesbitt*, and *Carver* in support of her contention that Missouri allows for negligence *per se* claims based on § 311.310. While Plaintiff acknowledges that these three decisions were expressly abrogated in subsection 2 of the 1985 version of the Dram Shop Act, she contends that the 2002 amendment of the Act, deleting former subsection 2 in its entirety, made these cases valid again.

Defendant disagrees. These three decisions remain abrogated under the current version of the Dram Shop Act, which states that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons, with the limited exception applicable to sellers of liquor by the drink for

consumption on the premises. In other words, common law claims for dram shop liability, including claims of negligence *per se*, remain abolished.

Further, the Missouri Supreme Court has emphatically rejected Plaintiff's argument that violation of RSMo § 311.310 may give rise to a civil cause of action, at least against sellers of package liquor such as Defendant. In *Lambing v. Southland Corp.*, 739 S.W.2d 717 (Mo.banc 1987), the Missouri Supreme Court held,

Even assuming that Section 311.310 gives rise to a civil cause of action, our courts to date have limited the applicability of that cause of action to suits against tavern owners, who dispense alcoholic beverages by the drink. The parties have not cited, nor do we find, any case in which the liability has been extended to package liquor store proprietors in Missouri, either under Section 311.310 or general common law principles. Section 537.053 expresses a legislative intent to shield purveyors of intoxicants from liability for the injuries caused by their drunken patrons. Section 311.310 can no longer be read to give rise to a cause of action except under the limited circumstances provided in Section 537.053. Even were we inclined to extend common law liability to package store proprietors who knowingly sell alcohol to intoxicated customers, the passage of, and policy expressed in, Section 537.053 counsels against such a holding. . . .

Id. at 719-720. Therefore, Plaintiff's argument that Missouri recognizes civil causes of action based on § 311.310 against package liquor vendors is without merit.

Plaintiff also cites this Court's decision in *Ernst v. Dowdy*, 739 S.W.2d 571 (Mo.App.E.D. 1987), decided at roughly the same time as *Lambing*. In *Ernst*, this Court held that vendors of liquor for consumption off the premises ("package sales") were "dram shops" and came within the ambit of the 1985 version of the

Dram Shop Act to the same extent as vendors of liquor for sale by the drink on the premises, and as such, were likewise statutorily immune from dram shop liability. *Id.* at 573. The Court characterized the distinction between vendors of liquor for consumption *on* the premises and vendors of liquor for consumption *off* the premises as “highly artificial” with respect to the Act’s grant of immunity from dram shop liability. According to Plaintiff, the distinction was just as “highly artificial” when applied to the Dram Shop Act’s provision of liability for sales to minors.

We disagree. The legislature crafted the present Dram Shop Act to be as broad as possible regarding immunity from dram shop liability, but to be very limited with respect to the persons against whom, and the circumstances under which, dram shop liability can be imposed. See §§ 537.053.1, .2 (2002). In other words, the Dram Shop Act is drafted so as to provide general immunity from dram shop liability, with narrow, detailed exceptions. The distinction between sellers of liquor for consumption on the premises and sellers of liquor for consumption off the premises is therefore very pertinent to the Dram Shop Act as currently drafted.

In sum, there is no “recognized cause of action” against sellers of package liquor under the present Dram Shop Act, and the Act’s provisions do not place procedural barriers that arbitrarily and unreasonably prevent access to the courts. The Dram Shop Act does not contravene the Open Courts provision of the Missouri Constitution.

B. The trial court did not err in dismissing Plaintiff's petition, and correctly held that subsection 2 of Missouri's Dram Shop Act does not violate the Equal Protection clause of the Missouri Constitution; the statute's limitation of dram shop liability to claims against sellers of alcohol by the drink for consumption on the premises did not operate to the disadvantage of a suspect class or impinge upon a fundamental right explicitly or implicitly protected by the Constitution, and was rationally related to a legitimate state interest.

The Equal Protection provision of the Missouri Constitution, Article I, § 2, provides:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

In equal protection challenges, the court's first step is to determine whether the challenged statutory classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo.banc 2004). If it does so operate, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest. *Id.*

Otherwise, review is limited to a determination of whether the classification is rationally related to a legitimate state interest. *Id.*

A class receiving heightened scrutiny in equal protection analysis includes race, alienage, national origin, gender, and illegitimacy. *Id.* As for fundamental rights, those requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the Constitution. *Id.* Regarding the rational basis for statutes challenged under the Equal Protection provision, there need only be a “conceivably rational basis to uphold the regulatory scheme.” *Id.* A legislative choice is not subject to courtroom fact-finding, and may be based on rational speculation unsupported by evidence or empirical data. *Id.*

In the immediate case, Plaintiff does not contend that she or her son belong to a suspect class, nor does she argue that the Dram Shop Act impinges upon her or her son’s fundamental, constitutionally-protected rights. *See Eiting*, 92 S.W.3d at 774-5. Plaintiff’s challenge to the Dram Shop Act is that there is no rational basis for the Act to grant immunity to sellers of package liquor who illegally sell liquor to minors, but allow such claims against sellers of liquor by the drink for consumption on the premises. Plaintiff contends that this is an arbitrary classification that is irrelevant to the achievement of the Act’s purpose.

Defendant disagrees. First, Defendant notes that Plaintiff, herself, acknowledges that the legislative history of the Dram Shop Act shows that a stated

purpose for limiting civil liability to sellers of liquor by the drink for consumption on the premises is because the premises owner or employees can observe the drinker and determine if he or she is “visibly intoxicated” before serving more alcohol. We submit that this reason, alone, provides enough of a rational basis for distinguishing between sellers of liquor for consumption on the premises and sellers of liquor for consumption off the premises.

Moreover, sellers of package liquor have no control over their patrons once the patrons make their purchase and leave the sellers’ premises. This, of course, contrasts with bars, taverns, and other sellers of liquor for consumption on the premises. The legislature could therefore have rationally concluded that the purposes of the Dram Shop Act would not be furthered by imposing upon sellers of package liquor a standard of care equivalent to that imposed on sellers of liquor by the drink for consumption on the premises. *See Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341, 347-349 (Iowa 1991) (Iowa dram shop statute, precluding liability against licensees who did not sell *and* serve alcoholic beverages for on-premises consumption, did not violate equal protection).

Plaintiff bears the burden of proving that the Dram Shop Act violates the Equal Protection clause; that is, she must prove that the statute’s allowance of civil liability against sellers of liquor for consumption on the premises, but not against sellers of liquor for consumption off the premises, rests upon a ground wholly irrelevant to the achievement of the statute’s objective. *See Kansas City v. Webb*,

484 S.W.2d 817, 824 (Mo.banc 1972). An example of a classification that would violate the Equal Protection clause was noted in dictum set forth in *Kilmer*: requiring that the dram shop be prosecuted and convicted under RSMo § 311.310 before allowing a dram shop claim to proceed, as the prior version of the Dram Shop Act did, would lead to a class of plaintiffs who may have suffered recognizable injury caused by out-of-state dram shops, but who have no remedy because the Act only applies to Missouri licensees. *See* 17 S.W.3d at 552, n. 21.

Defendant does not believe that Plaintiff has met that burden in this case. There was a rational basis for differentiating between sellers of liquor by the drink for consumption on the premises and sellers of liquor for consumption off the premises. The Dram Shop Act does not violate the Equal Protection clause and Plaintiff's Point B must be denied.

C. This Court should deny Plaintiff's request that the Court rewrite the terms of the Dram Shop Act to allow Plaintiff to pursue a liability claim against Defendant, because Plaintiff did not raise this constitutional question at the earliest possible opportunity or at any time when the case was before the trial court, and therefore the issue is not preserved for appeal; alternatively, the Dram Shop Act, as written, is unambiguous, gives effect to the intent of the legislature, does not lead to absurd or illogical results that would defeat the purpose of the legislature, and as such does not need to be rewritten.

In Point C of her brief, Plaintiff seeks to invoke rules of statutory construction to have this Court rewrite RSMo § 537.053 so as to allow Plaintiff to assert a dram shop claim against a seller of package liquor. The Court should deny Plaintiff's request for the following reasons.

First, Plaintiff failed to ask for this remedy at the trial level, either in her Petition or her memorandum in opposition to Defendant's motion to dismiss. In the context of constitutional issues, the appellant must raise the issue at the earliest available opportunity in order to preserve appellate review. *Spears v. Capital Region Med. Center*, 86 S.W.3d 58, 63 (Mo.App.W.D. 2002). Accordingly, Defendant submits that this point was not preserved for appeal, and as such should be summarily denied.

Alternatively, Defendant submits that the Dram Shop Act, as written, is unambiguous, gives effect to the intent of the legislature, and does not lead to absurd or illogical results such as would defeat the legislature's purpose in drafting the Act.

The general rule of statutory construction requires courts to determine the intent of the legislature based on the plain language used and the problem sought to be remedied by the statute's enactment. *Care and Treatment of Schottel v. State*, 159 S.W.3d 836, 841 (Mo.banc 2005). Statutes should not be interpreted in a way that produces unreasonable, oppressive or absurd results. *Ming v. General Motors Corp.*, 130 S.W.3d 665, 668-9 (Mo.App.E.D. 2004). A statute must be

construed in its entirety and, if reasonably possible, all provisions must be harmonized. *Id.* at 669. “While we avoid imparting words into a statute that are not plainly written or necessarily implied, we may supply missing words when, as written, the statute leads to absurd results.” *Id.* Likewise, in order to interpret a statute so as to reach an absurd result contrary to its clear purpose, courts will ignore or excise language which had clearly been inadvertently included in legislation contrary to its clear purpose. *Leiser v. City of Wildwood*, 59 S.W.3d 597, 604 (Mo.App.E.D. 2001).

In this case, the purpose of RSMo § 537.053 could not be less ambiguous. The legislature clearly wanted to abolish dram shop liability generally, but allow a limited cause of action under certain circumstances, and applicable only against bars, taverns and other sellers of liquor by the drink for consumption on the premises. Even the trial court, in decrying the “absurd” result of insulating from dram shop liability sellers of package liquor who knowingly sell to minors, held that the result was consistent with the legislature’s intent. Moreover, the Act’s distinction between sellers of package liquor and sellers of liquor for consumption on the premises is not unconstitutional, as demonstrated above.

Plaintiff’s proposed solution is to completely rewrite the Dram Shop Act, in a manner inconsistent with the legislature’s clear intent. Defendant submits that the changes sought by Plaintiff must come from the legislature, not this Court. Point III should be denied.

CONCLUSION

Based on the foregoing, Defendant prays this Court to affirm the trial court's judgment dismissing Plaintiff's cause of action against Defendant for failure to state a claim.

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing brief and one disk were served by United States mail this 7th day of April, 2006 on James E. Parrot, Attorney for Plaintiff/Appellant, 1221 Locust Street, Suite 1000, St. Louis, Missouri 63101.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), the undersigned certifies that:

1. To the best of the undersigned's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the claim, defense, request, demand, objection, contention or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; the claims, defenses, and other legal contentions herein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or establishment of new law; the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery; and the denials of factual contention are warranted by the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

2. The respondent's brief complies with the limitation contained in Rule 84.06(b).

3. The respondent's brief contains 9,229 words.

4. The disk filed with the respondent's brief is a double-sided, high-density, IBM-PC compatible 1.44 MB, 3.5-inch disk, and has been scanned for viruses and is virus-free. The brief was prepared by using Microsoft Word 2002.
