I. Jurisdictional Statement

This Court has appellate jurisdiction as the appeal was taken from a final judgment of the Circuit Court of St. Louis City disposing of all issues and parties, entered on October 18, 2005 (App. 1, L.F. 19). *See* RSMo. §512.020. Plaintiff-Appellant Elois Snodgras timely filed the notice of appeal on November 23, 2005 (L.F. 24). The Supreme Court also has jurisdiction as this appeal questions the constitutionality of a Missouri statute, RSMo. §537.053 (L.F. 7-8). *See* Mo. Const. Art. 5, §3.

II. Statement of Facts

Plaintiff is the mother of Terry Keown, a deceased minor. On October 2, 2004, Terry died in a single car crash a few hours after purchasing a 12 pack of beer from a Huck's convenience store owned and operated by Defendant (L.F. 4-5). Plaintiff alleges that Defendant's agent, one Beau Turner, did not check Terry's driver's license before illegally selling him the beer (L.F. 4). Plaintiff further alleges that Terry became intoxicated from drinking the beer illegally sold to him by Defendant, that he drove his car, lost control due to his intoxication, and crashed (L.F. 4-5). Plaintiff alleges that the medical examiner concluded that Terry died because of trauma to his head suffered in the crash and acute alcohol intoxication (L.F. 5).

Terry's mother filed a three count Petition in the Circuit Court for the City of St. Louis. In Count I she alleged that Huck's negligently sold her minor son a 12 pack of beer in violation of Missouri law, invoking RSMo. §311.310, which makes it a crime for a licensed retail establishment to sell alcohol to a minor, whether or not the alcohol was for drink on the premises (L.F. 4). Plaintiff further alleged that the alcohol from Huck's illegal sale proximately caused her minor son's intoxication and death in the single car crash (L.F. 4-5).

In Count II, Plaintiff alleged that Huck's negligently retained an incompetent employee who regularly sold beer to minors at its location in St. Peters, Missouri (L.F. 6). A sting operation of the subject Huck's Convenience Store by the St. Charles County Sheriff's Department after Terry's death caught Huck's again illegally selling alcohol to minors (App. 6-8).

In Count III, Plaintiff alleged that Missouri's Dram Shop Act, RSMo. §537.053.2, was unconstitutional to the extent it precluded her claim for the dram shop injury and wrongful death of her minor son which resulted from the illegal sale of packaged alcohol to him by Huck's.

The owner of Huck's, Respondent Martin & Bayley, Inc., moved to dismiss the Petition (L.F. 18). That motion was granted (App. 1). The trial court did agree, however, that it "may seem an absurd result" in light of Missouri law criminalizing

Huck's conduct (App. 3). Plaintiff timely appealed.

III. Points Relied Upon

A. The trial court erred in dismissing the Petition as its incorrectly found that Plaintiff did not have a cause of action against Defendant, a commercial seller of packaged alcohol to her minor son which lead to his death. Subsection 2 of the Dram Shop Act violates the Open Courts clause of the Missouri Constitution in that (1) it is arbitrary, unreasonable and irrational to disallow a wrongful death claim for a dram shop injury arising from the illegal sale of packaged alcohol to a minor when such a claim is allowed against an illegal seller to a minor of alcohol by the drink for consumption on the premises; (2) the illegal sale of alcohol by Defendant provided a basis for civil liability under the negligence per se doctrine for Plaintiff's dram shop injury and her son's death; (3) Missouri has recognized civil claims for dram shop injuries against illegal sellers of packaged alcohol, and (4) Missouri cases to the contrary are distinguishable.

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

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

Moore v. Riley, 487 S.W.2d 555 (Mo. 1972)

Shannon v. Wilson, 947 S.W.2d 349 (Ark. 1997)

Mo. Const. Art. 1, §14

RSMo. §537.053

RSMo. §311.310

B. The lower court incorrectly found that Plaintiff did not have a cause of action against Defendant, a commercial seller of packaged alcohol to her minor son which lead to his death, and erred in dismissing the Petition. Subsection 2 of the Dram Shop Act violates the Equal Protection clause of the Missouri Constitution in that it is arbitrary, unreasonable, without a rational basis, and impermissibly overbroad to immunize sellers of packaged alcohol from a wrongful death claim for a dram shop injury arising from an illegal sale to a minor when a cause of action is allowed against a seller of alcohol by the drink to a minor for consumption on the seller's premises.

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

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

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

McGuire v. C.L. Restaurant, Inc., 346 N.W.2d 605 (Minn. 1984)

Mo. Const. Art. 1, §2

RSMo. §537.053

RSMo. §311.310

C. The trial court erred in granting the motion to dismiss Counts I and II of the Petition because the lower court incorrectly found that Plaintiff did not have a wrongful death claim against Defendant for her minor son's dram shop injury, in that the Dram Shop statute can be construed to permit a civil claim against a commercial seller of packaged alcohol to a minor, in order to make the statute reasonable and non-arbitrary, and to fulfill the purposes of the alcohol control laws.

City of Joplin v. Joplin Water Works, 386 S.W.2d 369 (Mo. 1965)

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

Maryland Cas. Co. v. Gen. Elec. Co., 418 S.W.2d 115 (Mo. 1967)

Budding v. SSM Healthcare System, 19 S.W.3d 678 (Mo. 2000)

RSMo. §537.053

RSMo. §311.310

IV. Argument

The standard of review of an order and judgment granting a motion to dismiss is *de novo.* It is a question of law whether the Petition stated a claim upon which relief may be granted. On review, the Court accepts Plaintiff's allegations as true and gives the Petition its broadest intendment. *Bosch v. St. Louis Healthcare Network,* 41 S.W.3d 462, 464 (Mo. banc 2001).

"Statutes are presumed to be constitutional, and that party attacking the constitutionality of a statute 'bears an extremely heavy burden.' This Court will not invalidate a statute 'unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied' therein." *Etling v. Westport Heating & Cooling Serv.*, 92 S.W.3d 771, 773 (Mo. banc 2003) (citations omitted).

Missouri's 2002 Dram Shop Act, RSMo. §537.053, permits a civil suit against the seller to a minor of alcohol by the drink for consumption on the premises for a minor's dram shop injury or death. The trial court ruled that this statute does not allow a civil suit against a seller of packaged alcohol to a minor even though that act is also a crime. The trial court dismissed Counts I and II of the Petition (App. 4-5), although it found it an "absurd" result (App. 3).

Anticipating that possible decision, in Count III of the Petition Plaintiff

sought a declaration that the distinction in §537.053.2, between sellers of packaged alcohol and sellers for drink on the premises, as it applies to civil claims for sales to minors for dram shop injuries and death, violates two sections of the Missouri Constitution: Article I, §14 (the Open Courts Clause) and Article I, §2 (the Equal Protection Clause) (L.F. 7-8). Although no Missouri court has ever ruled on this issue, *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), guides us. Unfortunately, the trial court misread the import of this landmark decision.

A. The trial court erred in dismissing the Petition as its incorrectly found that Plaintiff did not have a cause of action against Defendant, a commercial seller of packaged alcohol to her minor son which lead to his death. Subsection 2 of the Dram Shop Act violates the Open Courts clause of the Missouri Constitution.

In *Kilmer* the Court found that subsection 3 of the 1985 Act, now subsection 2 after the 2002 amendment, was unconstitutional because it did not permit a civil suit without first a criminal prosecution of the restaurant that sold beer to an intoxicated adult who drove his vehicle and crashed into another car. *Id.* at 549-52. The Supreme Court held subsection 3 of the 1985 law to violate the Open Courts Clause (the legislature removed the criminal prosecution requirement in the 2002 repeal and rewording of §537.053). The Court also analyzed how then subsection 3 violated the Equal Protection Clause. *Id.* at 552 n.21; we discuss this point in Section IV. B. of this Brief.

Kilmer did not involve a minor drinker, *id*. at 545, and thus did not decide the issue herein: whether §537.053.2 is unconstitutional because it limits the remedy of minors suffering a dram shop injury to suits against only sellers of alcohol by the drink for consumption on the premises. No Missouri court has addressed this issue.

Kilmer articulated a new formulation for the Open Courts Clause. That section "prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." 17 S.W.3d at 549, *quoting Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. banc 1997) (Holstein, C.J., dissenting). Thus, "where a barrier is erected in seeking a remedy for a recognized injury, the question is whether it is arbitrary or unreasonable." *Id.* at 550. The court found that "[i]f the 'certain remedy' guaranteed in article I, section 14 'for every injury to person, property or character' has any meaning," the prior criminal prosecution requirement for a civil suit against a dram shop under subsection 3 of the 1985 Act was "invalid." *Id*.

This right to a remedy for every wrong runs through American jurisprudence as a brilliant, redeeming strand from the earliest days of the Republic, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60, 69 (1803), up to the present time,

as shown by *Kilmer*. In *Marbury*, Chief Justice Marshall wrote: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id*.

Kilmer reversed the Court's upholding of the same criminal prosecution requirement in the 1985 Dram Shop Act a few years earlier, *see Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988). *Kilmer*'s reversal was premised upon *Simpson*'s mistaken notion that plaintiff's claim was "not a legitimate one recognized by law ...". *Kilmer*,17 S.W.3d at 550-1. *Kilmer* stated that "a careful reading of the statute ... shows that this is not so. **There is a recognized cause of action.**" *Id*. at 551 (emphasis added).

For purposes of its Article I, §14 analysis, *Kilmer* found that a "recognized cause of action" equals a **"recognized injury."** The Court identified this as a "**dram shop injury**." *Id*. at 552 & nn. 20, 21 (emphasis added).

Kilmer found two sources for its conclusion that a dram shop injury equates to a recognized cause of action. One was the Dram Shop Act itself, particularly subsection 3 (subsection 2 of the current statute) when read in light of subsections 1 and 2 of the 1985 Act. The other source was Missouri common law, *citing Skinner v. Hughes*, 13 Mo. 440 (1850), of which the Court stated: "The dram shop liability portion of *Skinner* has apparently never been overruled." 17 S.W.3d at

551.

Kilmer held that the **"legislature purports to eliminate dram shop liability in section 537.053.1 and 537.053.2, but in actuality it does not."** *Id*. at 551 (emphasis added). Subsection 1 of the 1985 Act is the same as subsection 1 of the 2002 Act, it reads: "Since the repeal of the Missouri Dram Shop Act in 1934, it has been and continues to be the policy of this state to follow the common law of England, as described 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 case of injuries inflicted by intoxicated persons" (internal citation omitted). The Court found that was a misstatement of Missouri proximate causation law which permits the jury to find "more than one cause" for a defendant to be responsible for a plaintiff's injury. 17 S.W.3d at 551-2, n.19. Moreover, the Court found that Subsection 1 was a misstatement of Seventeenth Century English common law to which it refers, by specific citation to Section 1.010. *Id*. at 551. England did not recognize the concept of proximate cause until after the Seventeenth century. *Id*. The Court therefore gave subsection 1 no effect and held it was no bar to plaintiff's claim. *Id*.

Then the Court in *Kilmer* ruled that subsection 2 of the 1985 Act, which specifically abrogated three cases recognizing common law claims against dram

shops, also misstated Missouri law since it failed to abrogate *Skinner*. *Id*. After *Kilmer* was decided, the Legislature deleted former subsection 2.

What remained was subsection 3 of the 1985 Act (now subsection 2). Of this the Court stated: "When we read the third subsection, which is section 537.053.3, as part of the whole statute, **it is clear that the legislature did not abolish dram shop liability**." *Id.* (emphasis added). Indeed, **"section 537.053.3 recognizes the cause of action ..."**. *Id.* (emphasis added).

Under this analytical structure, the Court held the prior criminal conviction requirement violated the Open Courts provision because it made a civil remedy for a dram shop injury or death dependent upon the actions of a local prosecutor. *Id*. at 552.

As a further basis for finding part of subsection 3 of the 1985 Act to violate the constitution, dram shops across State lines would be completely immune from civil liability since they could not be prosecuted under Missouri law, §311.310. The Court in *Kilmer* stated that this would leave "**a class of plaintiffs who have suffered a recognized injury but have absolutely no remedy** against the wrongdoer because the statute only applies to Missouri licensees." *Id*. (emphasis added).

More recently, the Court heard an Open Courts Clause challenge to a

statute. In *Etling*, 92 S.W.3d at 773-4, the Court found that the Workers' Compensation Act's limit on payment of death benefits to those "dependent" upon the deceased worker did not violate Article I, §14 since it did not impose a procedural barrier to such a claim. The Court reasoned that the legislature can "exclude a class from maintaining an action" without violating the Open Courts Clause. *Id*. at 774.

Here, to the contrary, the Dram Shop Act does not exclude minors from suing for their dram shop injury. Indeed, subsection 4 of the 2002 Act specifically permits a lawsuit by a minor who is illegally sold alcohol and is injured. Rather, the Dram Shop Act arbitrarily limits the cause of action on the basis of which licensed seller illegally sold alcohol to a minor who later suffers a dram shop injury. Under the *Kilmer* analysis, as applied to packaged alcohol sellers to minors, Subsection 2 of the 2002 Dram Shop Act violated the Open Courts Clause.

1. It is arbitrary, unreasonable and irrational to disallow a wrongful death claim for a dram shop injury arising from the illegal sale of packaged alcohol to a minor when such a claim is allowed against an illegal seller to a minor of alcohol by the drink for consumption on the premises.

Applying these principles to this case, there can be no question but that the minor, Terry Keown, suffered a dram shop injury when Huck's sold him alcohol in violation of Missouri criminal law. In her wrongful death claim under §537.080,

Terry's mother alleges that the illegal sale led to his consumption of the alcohol, his intoxication while driving, the crash, and his death (L.F. 4-5). Under our caselaw, a packaged liquor seller, such Huck's, is a "dramshop." *Ernst v. Dowdy*, 739 S.W.2d 571, 573 (Mo. App. 1987) (discussed *infra* in Section IV. A. 3.).

The requirement that the dramshop sell to a minor alcohol by the drink before a civil action can be filed is an unconstitutional procedural barrier to this claim for Terry's death and his mother's dram shop injuries.

Under subsection 2 as it is written Terry's mother is left without any remedy, even though her son suffered a recognized dram shop injury, simply because Huck's illegally sold him packaged alcohol instead of alcohol by the drink. That distinction is arbitrary and unreasonable. The "dangers and horrible carnage that drunk drivers produce on American roadways ..." is not lessened if a minor is sold packaged alcohol as opposed to alcohol by the drink.[1]

It serves no purpose under the law to immunize packaged alcohol sellers from suit for their illegal sales that cause a minor's death or injury. This distinction gives packaged alcohol sellers a competitive advantage over sellers of alcohol by the drink. Nothing in the language of the statute nor in the legislative

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[1] *See* Note, *Reinventing the "Legislative Intent, or Rather the Legislative Mandate" On Dram Shop Liability In Missouri: A Look At Kilmer v. Mun*, 45 St. L.U. Law J. 625, 632 (2001) (hereinafter "Note").

history indicates an economic or social need for special protection and immunization from liability for packaged alcohol sellers over other sellers of alcohol. In a case striking damages caps applicable to all dram shops, the New Mexico Supreme Court stated: "We are distinctly unable to rationalize a legitimate or substantial reason for limiting the liability of a tavernkeeper who has a duty not to place drunks behind the wheel of a vehicle on the highway when, by contrast, a rancher or farmer is fully liable for negligently allowing his livestock to meander dumbly into the path of oncoming vehicles." *Richardson v. Carnegie Lib. Rest., Inc.*, 763 P.2d 1153, 1164 (N.M. 1988), *limited on other grounds*, 965 P.2d 305 (N.M. 1998).

Providing immunity to sellers of packaged liquor to minors undermines the comprehensive legislative scheme. Missouri law, §311.310, criminalized the conduct of Huck's. The criminal statue makes no distinction between sellers of packaged liquor to minors and sellers to minors of alcohol by the drink for consumption on the premises. Both are illegal. The criminal statute applies to "any licensee" selling alcohol to a minor.

The purpose of that law is to prohibit all sales of liquor to minors so as to prevent underage drinking and driving. *See* Section 302.505 (called the "zero tolerance law"). The Missouri Supreme Court has recognized that one of the

functions of liquor control law "is the protection of minors against exposure to the liquor traffic and the support of the public policy of excluding minors for their own benefit, from the use of intoxicating beverages." *Moore v. Riley*, 487 S.W.2d 555, 559 (Mo. 1972). To the same effect, in *May Dept. Stores v. Supervisor of Liquor Control*, 530 S.W.2d 460, 468 (Mo. App. 1975), Judge Simeone, writing for this Court, stated:

> Despite the changes in modern society and the prevalence of teenage drinking, our general assembly has throughout the years and again most recently **prohibited the sale of liquor to persons under the age of twenty-one**. Such restriction has its beneficial aspects. The **object and spirit of the statute is to protect** rather than punish. It protects the public, gives parents their natural right and protects **the minors** (emphasis added, footnote omitted).

The commentary to the Model Dram Shop Act notes that the statutes of every state criminalize the sales of alcohol to minors. This, the commentary found, is "indicative of the universal legislative recognition that minors are neither physically nor emotionally equipped to handle the consumption of alcoholic beverages, and that such consumption leads to tragic injuries and death." V. Colman, et al., *Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective*, 12 WESTERN STATE UNIV. L. REV. 417, 460 (1985) (Model Act reprinted at Appendix A to the article) (hereinafter "*Preventing Alcohol-Related Injuries*").

We posit that the artificial distinction in the 2002 Dram Shop Act between sellers of alcohol to minors actually defeats the purposes of the criminal laws. A minor purchasing packaged alcohol is likely to drive to the seller's business. That minor will consume the alcohol without observation by the seller, increasing the probability of drinking more. The minor purchaser from a packaged alcohol seller is therefore more likely to drive while intoxicated. On the other hand, a minor drinking in a bar or restaurant is probably less likely to overdrink since the minor is subject to observation. That minor also may spend more time in the restaurant after drinking, thereby lessening the effects of the alcohol before driving.

The deterrent effect of the criminal statute is limited. Here, *after* the illegal sale to Terry Keown and his death from the crash caused by his alcohol intoxication, the same Huck's employee was busted and plead guilty to selling liquor to another minor. *See State v. Turner*, No. 0511-CR00118 (11th Circuit., 02/16/05) (App. 6-12).[2] The Huck's employee, however, was put on probation and assessed only a $200.00 fine. *Id*. There is no record available at the St. Charles County Court or in Case.net showing that the Huck's employee was ever prosecuted for the illegal sale to Terry. In *May Dept. Stores*, the vendor's license

[2] The Court may take judicial notice of the proceedings of other courts when justice so requires. *Grassmuck v. Autorama Auto Equip. & Supply*, 659 S.W.2d 264, 266 (Mo. App. 1983).

to sell packaged liquor was suspended for only three days after it was convicted of selling to a minor. *Id*. at 462.

Minimal criminal penalties will not and have not prevented serial violators, such as Huck's, from selling packaged alcohol to minors. Without the civil cause of action a corporation has no financial incentive to prevent illegal sales by its employees. Providing an incentive for good corporate practices, including training and management of employees, was recognized in the Model Dram Shop Act as one of the main functions of allowing a civil claim against commercial sellers of alcohol to minors. *See Preventing Alcohol-Related Injuries*, *supra*, at 434-439. That finding was based upon extensive research of business practices in the retail alcohol industry. *Id*. at 444.

Not permitting a civil suit against a seller of packaged alcohol to a minor leads to an illogical result and defeats the purposes of the statutory scheme. The goals of the criminal statutes and the Dram Shop Act is zero tolerance for underage drinking and driving. One way to discourage underage drinking is to stop the sale of alcohol to minors. No doubt, sales may be limited by criminal prosecutions. But criminalizing the sale alone is imperfect, as is the case with Huck's. Providing for the award of civil damages against large corporations, such as Huck's, which profit from selling packaged liquor to minors creates a powerful economic incentive to

impose policies to stop such illegal sales. Dean Prosser succinctly states this beneficial function of the tort laws:

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

W. Prosser, LAW OF TORTS, at p.23 (4th Ed. 1971). As for of dram shop actions, the prophylactic effect has been specially recognized: "Anti-drinking and driving groups, such as Mothers Against Drunk Driving ('MADD'), saw this increased litigation as an effective means to curb drunk driving accidents." *See* Note, *supra* at 635-6. "MADD and SADD (Students Against Drunk Drivers) ... agree that dramshop liability is an effective measure in curbing drunken driving, but that the salutary impact of the dramshop act is diffused" by limits on the civil remedy. *Richardson*, 763 P.2d at 1156. In *McClellan v. Tottenhoff*, 666 P.2d 408, 415 (Wyo. 1983), the court observed that civil liability is an "effective deterrent to keep liquor vendors from selling liquor to minors ...".

Under these authorities, the Dram Shop Act's procedural immunity from civil suit for certain dram shops illegally selling alcohol to minors who suffer injury or death as a result violates the Open Court's Clause.

2. The illegal sale of alcohol by Defendant provided a basis for civil liability under the negligence per se doctrine for Plaintiff's dram shop injury and her son's death.

The Court in *Kilmer*, 17 S.W.3d at 551, found that subsection 1 of the 1985 Act, the same in the 2002 Act, did not eliminate or abolish dram shop liability. A dram shop claim thus exists under our well-recognized common law principles against Huck's for its illegal sale of packaged alcohol to the minor Terry Keown.

When a Missouri statute explicitly criminalizes conduct our courts recognize that the statute imposes a duty; the breach of this duty gives rise to a civil cause of action. *See, for example, Moore,* 487 S.W.2d at 556. There, a minor was permitted inside a bar in violation of City ordinances. The minor struck a patron with a glass. The Supreme Court first discussed cases from other jurisdictions which found sellers of alcohol to minors and intoxicated persons liable for torts resulting from such illegal sales. *Id*. at 557-8. The Supreme Court then held that "Missouri, of course, does recognize that a cause of action for civil damages may be based upon an act which is violative of a criminal statute or a penal municipal ordinance." *Id*. at 558.[3] This approach to civil liability is commonly known as the "negligence *per*

[3] The *Moore* Court found the bar not liable only because the purpose of the ordinances prohibiting minors from remaining in a bar was not to protect adult patrons but the minors themselves, and there was no evidence the minor drank alcohol at the bar. 487 S.W.2d at 559.

se" doctrine. *Steele v. Evenflo Co., Inc.*, 178 S.W.3d 715, 718 (Mo. App. 2005).

Section 311.310 criminalizes the sale of all intoxicating beverages to minors, making no distinction between sales of packaged alcohol or for consumption by the drink on the seller's premises. That statute reads in pertinent part:

> **Any licensee** under this chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty-one years ... shall be deemed guilty of a misdemeanor ... (emphasis added).

State v. Ohmes, 675 S.W.2d 681 (Mo. App. 1984), upheld the conviction of a liquor store clerk for selling a six pack of beer to a minor.

In *Samson v. W.F. Ent., Inc.*, 611 S.W.2d 333 (Mo. App. 1980) and *Nesbitt v. Westport Sq., Ltd.*, 624 S.W.2d 519 (Mo. App. 1981), our courts recognized civil actions against sellers of liquor to minors under the negligence *per se* doctrine. The appellate courts based their holdings on Section 311.310's criminalizing of alcohol sales to minors which created a statutory duty not to serve the minors. *See also Carver v. Schafer*, 647 S.W.2d 570, 575 (Mo. App. 1983) (finding common law claim only since the seller of liquor was in Illinois and not subject to prosecution under §311.310). Under subsection 2 of the 1985 Dram Shop Act *Samson*, *Nesbitt* and *Carver* were expressly abrogated. However, the 2002 repeal and reworking of the 1985 Dram Shop Act deleted former subsection 2. Those cases now appear to be valid. At the very least, the 2002 Dram Shop Act created

an ambiguity (we discuss this point in Section IV. C. of our Brief).

We are unaware of any other criminal conduct under Missouri law that does not give rise to a civil action. There certainly is no rational reason to immunize Huck's reprehensible conduct that creates a public menace.[4]

A more recent "duty" decision of this Court establishes that our laws do provide for a civil cause of action against the seller of packaged alcohol to minors:

> A duty to exercise care may be imposed by a controlling statute or ordinance ... or be imposed by common law under the circumstances of a given case. "The **judicial determination of the existence of duty rests on sound public policy**." Duty is simply an "expression of the sum total of those considerations of policy which lead the law to say that the **particular plaintiff is entitled to protection**." Any number of policy considerations may justify the imposition of duty in particular circumstances, including: the **social consensus** that the interest is worth protecting; the **foreseeability of the injury** and the degree of certainty that the plaintiff suffered injury; the **moral blame** society attaches to the defendant's conduct; the **prevention of future harm**; considerations of cost and the ability to spread the risk of loss and the economic burden on the actor and the community.

Boggs ex rel. Boggs v. Lay, 164 S.W.3d 4, 15-6 (Mo. App. 2005) (emphasis added, citations omitted).

That minors suffering injury or death from illegally sold alcohol are entitled

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[4] It was recently reported that in 2005, 16,694 people were killed by in alcohol related auto crashes, including a police officer who's mother attended a MADD event. *See* K. Bell, "Car Ribbons are Sober Reminder," ST. LOUIS POST-DISPATCH, Metro p.3, Jan. 1, 2006.

to protection is specifically recognized by our Legislature. Subsection 4 of the 2002 Dram Shop Act allows minors to sue for the own injuries and their parents to sue for their death resulting from the illegally sold alcohol.

The social consensus in Missouri that minors should not be sold alcohol by any seller, including packaged alcohol vendors, was expressed by our Legislature in Section 311.310. Huck's and other packaged liquor sellers have no immunity from this criminal sanction.

The forseeability of harm from selling packaged liquor to minors almost goes without saying. "[O]ne would have to be a hermit to be unaware of the carnage caused by drunken motorists. The problem was aptly described nearly twenty years ago: 'Our highway safety problems have greatly increased. Death and destruction stalk our roads. ...'." *Carver*, 647 S.W.2d at 573 (citation omitted). Moreover, "[b]y 1982, the Presidential Commission on Drunk Driving estimated that over fifty percent of highway fatalities resulted from motorists driving under the influence of alcohol, causing on average over 25,000 fatalities per year." *See* Note, *supra* at 632 n.42. *See also* Commentary to Model Dram Shop Act, *reprinted in, Preventing Alcohol-Related Injuries* at 460.

The moral blame society places upon sales of alcohol to minors by a packaged vendor is evidenced by Section 311.310 and the continued efforts of

socially conscious groups such as MADD and SADD.

These authorities recognize that civil suits function in part to prevent future harm by creating economic disincentives to morally reprehensible acts by an alcohol seller.

The cost to Huck's and other retail sellers of packaged alcohol to implement programs to avoid illegal sales to minors is, we submit, minimal. Especially when compared with the societal and personal costs of alcohol consumption by minors and drunk driving. Retail sellers of packaged alcohol can spread the risks and costs of liability by purchasing insurance, just as our laws compel retail sellers of alcohol by the drink for consumption on their premises.

In short, all the policy rationales support a cause of action for a minor's dram shop injury or death against an illegal packaged alcohol seller, such as Huck's.

The duty rule was favorably discussed by our High Court in *Moore*, 487 S.W.2d at 557, which relied upon a decision of the Indiana supreme court. *Elder v. Fisher*, 217 N.E.2d 847, 850 (Ind. 1966), held that the statute criminalizing all sales of alcohol to minors provided the basis for recognizing a cause of action against a drug store for selling packaged alcohol to a minor driver. The court found that the criminal statute imposed a duty on the druggist not to sell alcohol to

a minor: "It seems probable that the legislature intended to protect against the possible harm resulting from the use of intoxicating liquor by those to whom it was not to be sold." *Id*. at 851.

Indeed, most every other state addressing this issue has permitted a civil claim against sellers of packaged liquor to minors when either the minor is injured or the minor injures another, reasoning that such sales violate criminal laws.[5]

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[5] *See, for example, Anderson v. Moulder*, 394 S.E.2d 61, 67-8 (W.Va. 1990) (vendor sells keg to minors), *Blamey v. Brown,* 270 N.W.2d 884 (Minn.), *cert. den.*, 444 U.S. 1070 (1980), *abrogated on other grounds*, 337 N.W.2d 676 (Minn. 1983) (liquor store sells 12 pack of beer to minor who crashes car injuring his passenger), *Bradshaw v. Rawlings*, 612 F.2d 135, 143 (3rd Cir. 1979) (under Pennsylvania law, held a seller of barrels of beer to college sophomores for a party was liable for the death of a passenger in a car which crashed while driven by a minor who became drunk at the party), *Bregartner v. Southland Corp.*, 683 N.Y.S.2d 286, 288 (App. Div., 2nd Dept. 1999) (convenience store liable when selling alcohol directly to minor driver), *Chausse v. Southland Corp.*, 400 So.2d 1199 (La. App.), *writ. den.*, 404 So.2d 278 (La. 1981) (convenience store sells liquor to minor who drives and injures passenger), *Davis v. Shiappacossee,* 155 So.2d 365 (Fla. 1963) (liquor vendor sells case of beer and pint of whiskey to minor at a curbside location, minor gets drunk, crashes car and is killed), *Freeman v. Finney*, 309 S.E.2d 531 (N.C. App.), *rev. den.*, 315 S.E.2d 702 (N.C. 1984) (gas station sells six pack to minor who gives beer to another minor who drives while drunk and crashes into a third party), *Jamison v. The Pantry, Inc.*, 392 S.E.2d 474 (S.C. App. 1990) (convenience store sells case of beer to minor who crashes car injuring others), *Mackay v. 7-Eleven Sales Corp.*, 995 P.2d 1233, 1235 (Utah 2000) (convenience store liable for sale to minor), *Mansfield v. Circle K Corp.*, 877 P.2d 1130, 1136 (Okla. 1994) (commercial seller of alcohol for drink off-premises has statutory duty not to sell to minors and is thereby liable for injury or death, citing cases from other jurisdictions at 1133-4, n.9), *McClelland v. Tottenhoff*, 666 P.2d 408 (Wyo. 1983) (liquor store sells packaged alcohol to minor at drive-thru, minor gets intoxicated and crashes into third party), *Michnik-*

Many state statutes likewise do not limit the civil claim to sellers by the drink for consumption on the seller's premises, but apply liability to all commercial or licensed vendors.[6] We located only one other state which does not allow a suit against a seller of packaged alcohol. *See Kelly v. Sinclair Oil Corp.*, 476 N.W.2d 341 (Ia. 1991). That case, however, is distinguishable as there was no sale of packaged alcohol directly to a minor. The principal reason the Iowa court gave for denying the equal protection challenge to the law was that the packaged liquor seller did not have the opportunity to observe patrons. *Id*. at 343-4. Of course, that rationale does not apply to the sale to minors which is illegal, period. Liability can

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Zilberman v. Gordon Liquors, Inc., 453 N.E.2d 430 (Mass. 1983) (packaged liquor store sells beer to minor who crashes killing another), *Morris v. Farley Ent., Inc.*, 661 P.2d 167 (Alaska 1983) (liquor store sells fifth of tequila to minor who crashes car killing others), *Paskiet v. Quality State Oil Co.*, 476 N.W.2d 871 (Wis. 1991) (gas station sells case of beer to minor who gives beer to another minor who gets drunk and injures himself), *Pike v. George*, 434 S.W.2d 626 (Ky. App. 1968) (liquor store sells alcohol to minor who crashes car injuring his passenger), *Reyes v. Kuboyama*, 870 P.2d 1281, 1285-91 (Haw. 1994) (packaged liquor seller liable for sales to minors resulting in injury or death), *Rinks v. Bearss*, 921 P.2d 558 (Wash. App. 1996) (food store sells minor a case of beer, minor gives beer to another minor who drives and crashes into a third party), *Shannon v. Wilson*, 947 S.W.2d 349 (Ark. 1997) (liquor store liable for sales to minors, citing cases from other jurisdictions at 152-156), and *Thompson v. Victor's Liquor Store, Inc.*, 523 A.2d 264 (N.J. Super. Ct., A.D. 1987).

[6] *See, for example,* Mich. Stat. Ann. §§ 18.993 and 436.22, New Mex. Stat. Ann. §§41-11-1 and 60-7B-1, Fla. Stat. Ann. §768.125, and Tex. Alcoh. Bev. Code §106.14. *See also* Model Dram Shop Act §3, *reprinted at*, 12 WESTERN STATE UNIV. L. REV. 417, 449-51.

be avoided simply by carding the minor. We found no other state that adopted this decision.

The recognition by other states of the claim against licensed sellers of packaged alcohol to minors evidences the irrationality of the Missouri legislature purportedly granting immunity to these sellers in Subsection 2 of the Dram Shop Act vs. sellers of alcohol to minors by the drink for consumption on the seller's premises.

3. Missouri has recognized civil claims for dram shop injuries against illegal sellers of packaged alcohol.

Our laws have recognized an action against the seller of packaged liquor. In *Skinner v. Hughes*, 13 Mo. 440, 443 (1850), the Supreme Court held that a slave owner could recover for loss of property against a packaged liquor vendor for the death of his slave (one Willis). The opinion described the seller as a "store" which "sold intoxicating liquors not less than a quart." *Id*. at 441. The store sold a quart of whisky to Willis without permission of his owner. Willis "carried it to the mill and there drank it with the white hands about the mill, got drunk, started home ... and was found early the next morning lying on his face ... and frozen nearly to death." *Id*.

The Court in *Skinner* at 443, relied upon a South Carolina case, *Harrison v. Berkley*, 32 S.C. Law (1 Strobhart's) 223 (App. 1847). *Harrison* ruled that a

"shopkeeper" was liable to the slave master, under the ancient "trespass on the case" doctrine, for selling a "quart bottle of whiskey" to his slave who drank it away from the store and died of intoxication and exposure. The South Carolina court cited English authorities in support of its ruling. 32 S.C. Law at 224, 234.

The trespass to the case doctrine existed in English law well before 1607 and therefore is controlling in Missouri under RSMo. §1.010. *Kilmer*, 17 S.W.3d at 551 and §537.053.1.

The High Court in *Kilmer*, 17 S.W.3d at 551, found that *Skinner* has never been overruled. And, *Skinner* was not listed in subsection 2 of the 1985 Dram Shop Act as one of the cases "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 ...". Subsection 2 of the 1985 Act is not in the 2002 Act. Therefore, *Skinner* remains good law, despite observations in earlier cases.[7]

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[7] In *Lambing v. Southland Corp.*, 739 S.W.2d 717, 719 n.2 (Mo. banc 1987), decided before *Kilmer*, the Court "decline[d] to read *Skinner* as approving a cause of action against package liquor stores *generally*" (emphasis added). We submit that *Lambing* is no longer controlling precedent following *Kilmer*'s reaffirmation of *Skinner*. Moreover, *Lambing*'s use of the caveat "generally," without explaining what exceptions are thereby implied, raises the question whether the Court would have recognized a cause of action against a vendor of packaged liquors if the purchaser was a minor. In light of the 2002 Dram Shop Act's added protection of minors, *see* §537.053.4, which allows suit to be brought

As early as 1919, the General Assembly authorized a civil action for actual and punitive damages against "any person, firm or corporation who shall, by such illegal selling of such liquors ... have caused or contributed to any such injury ...". Mo. Rev. Stat. §6593 (1919). That statute was rescinded only as part of the repeal of the Prohibition amendment and laws.

More recently, this Court found that the phrase "dram shops" includes sellers of packaged alcohol, as well as sellers of alcohol for drink on the seller's premises. In *Ernst v. Dowdy*, 739 S.W.2d at 573, this Court rejected, "as highly artificial," any distinction between sellers of packaged liquor and sellers for drink on the premises. The packaged liquor store (the old 9-0-5) violated §311.310 by selling liquor to a minor who caused a car crash that injured the plaintiffs. *Id*. at 572. The Court did not allow the claim, which appears to have been under the common law negligence *per se* doctrine. The Court, however, did not consider the constitutional and statutory construction arguments presented herein.

With all due respect for the 1987 Court, one must ask: if the distinction between sellers of packaged liquor and sellers by drink for consumption on the premises is "highly artificial" for purposes of invoking the Dram Shop Act's

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by an injured minor or for a minor's death, even though the minor purchased and consumed the alcohol, we posit that the Court should find in favor of this claim.

immunity proviso in subsection 1, is not the distinction as "highly artificial" when applied to the Dram Shop Act's liability proviso now in subsection 2 of the Dram Shop Act? This is especially so in light of the mandate that statutes be liberally construed to do substantial justice. *See* RSMo. §1.010. Since a packaged alcohol seller is a dram shop, as recognized by *Ernst,* under the teachings of *Kilmer* it should be liable for dram shop injuries suffered by minor purchasers of the illegal alcohol.

4. Missouri cases to the contrary are distinguishable.

The Missouri cases holding that a seller of packaged liquor has no civil liability rest upon an unsound foundation and are distinguishable. In *Childress v. Sams*, 736 S.W.2d 48 (Mo. banc 1987), the commercial defendant sold a half barrel of beer for a party in 1983, before the Dram Shop statute took effect. There is no mention whether the purchaser was a minor or if the purchaser was intoxicated. Therefore, no basis existed for liability under the negligence *per se* doctrine since the liquor store did not violate §311.310. Instead the Court found support for its decision against the plaintiff by noting that neither *Sampson*, *Nesbitt*, nor *Carver* recognized a claim against a packaged liquor vendor. *Id*. at 50. What the Court did not say was that neither *Sampson*, *Nesbitt*, nor *Carver* involved the sale of packaged alcohol. As such, those cases could not have made an advisory opinion

on an issue not before them. *See Block v. Gallagher*, 71 S.W.3d 682, 685 (Mo. App. 2001). Hence, that *Samson*, *Nesbitt* and *Carver* did not rule on the liability of packaged liquor sellers should have had no legal bearing on the decision in *Childress*.

In *Lambing, supra*, 739 S.W.2d at 717, an intoxicated adult purchased packaged liquor from a 7-11 store and a few hours later crashed his car into the plaintiff. This case arose prior to passage of the 1985 Dram Shop Act. In affirming summary judgment for 7-11, the court again noted that *Samson*, *Nesbitt* and *Carver* did not involve the sale of packaged liquor. *Id*. at 719. The court also found that the passage of the 1985 Dram Shop Act counseled against extending liability to packaged liquor vendors. *Id*. Obviously, *Lambing* was decided prior to *Kilmer*'s constitutional expansion of the Dram Shop Act and the 2002 Act's specific protection of minors, in new subsection 4, who purchase illegal alcohol and suffer death or injury. *Lambing*'s reasoning on this issue is therefore no longer persuasive.

Like *Childress* and *Lambing*, the case of *Trammell v. Mathis*, 744 S.W.2d 474 (Mo. App. 1987), did not involve the purchase of packaged liquor by a minor and was decided before *Kilmer* and the 2002 re-working of the Dram Shop Act. There is no mention whether the adult was visibly intoxicated when the QuikTrip

sold him beer, so there appears to have been no basis for finding an illegal sale or no negligence *per se* liability. *Id*. at 475. *Leimkuehler v. Myers*, 780 S.W.2d 653 (Mo. App. 1989), is distinguishable on the same grounds as *Trammell*. The Court may also distinguish *Gabelsberger v. J.H.*, 133 S.W.3d 181, 185-6 (Mo. App. 2004), which held that an individual without a liquor license who purchased beer and then sold it to minors was not liable to the driver of another car crashed into by the intoxicated minors. The court found the non-commercial, non-licensed vendor akin to social hosts. They clearly have no liability under our caselaw and statutes. *Id*. at 185.

Here, to the contrary, Huck's is a licensed commercial vendor of packaged alcohol selling to a minor – a clear violator of the criminal law. Under these authorities, the trial court should have found that Section 537.053's apparently exclusion of Plaintiff's claim violated the Open Courts Clause.

B. The lower court incorrectly found that Plaintiff did not have a cause of action against Defendant, a commercial seller of packaged alcohol to her minor son which lead to his death, and erred in dismissing the Petition. Subsection 2 of the Dram Shop Act violates the Equal Protection clause of the Missouri Constitution in that it is arbitrary, unreasonable, without a rational basis, and impermissibly overbroad to immunize sellers of packaged alcohol from a wrongful death claim for a dram shop injury arising from an illegal sale to a minor when a cause of action is allowed against a seller of alcohol by the drink to a minor for consumption on the seller's premises.

In *Kilmer*, the Court found that the 1985 Dram Shop Act's requirement of a prior criminal conviction "could be described, as well, as a violation of the constitutional guarantee of equal protection of the laws," citing Article 1, §2 of the Missouri Constitution. 17 S.W.3d at 552 n.21. The Court held "[a] statute that creates **arbitrary classifications** that are **irrelevant to the achievement of the statute's purpose** may be struck down because the arbitrary classifications violate equal protection." *Id*. (emphasis added), *citing Kansas City v. Webb*, 484 S.W.2d 817 (Mo. banc 1972). In *Etling*, 92 S.W.3d at 775, the Court repeated this formulation and held that when no suspect classification (such as race or national origin) is present, courts must determine whether the class "distinction is rationally related to a legitimate state interest." *Id*. This so-called "'rational basis standard is not a toothless one.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J., concurring).

In *Webb*, the City subjected individual owners of property to eminent

domain proceedings. By local law, those individuals were not allowed to have a trial by a jury of twelve to determine the fair value of their property, even though corporations were allowed that right. The individuals were allowed only a jury of six freeholders chosen by the City. *See* 484 S.W.2d at 818.

The High Court quoted from earlier cases to explicate the meaning of this constitutional guarantee:

> Equal protection of the law means equal security or burden under the laws to everyone similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances. It is secured where a law operates on all alike, and does not subject the individual to an arbitrary exercise of the powers of government. This provision therefore prohibits discriminating and partial legislation, favoring particular persons or against particular persons of the same class.
> ...
>
> [A]ll persons ... should have like access to the courts of the country for the protection of their persons and property ...
>
> An act of the legislature which in terms gave to one individual certain rights, and denied to another similarly situated the same rights, might be challenged on the ground of unjust discrimination and a denial of equal protection of the laws.

Id. at 823 (citations omitted).

The Supreme Court in *Webb* held that an equal protection violation is made when the "classification rests upon a ground wholly irrelevant to the achievement of the state's objective, or which is not based upon differences reasonably related

to the purposes of the legislation." *Id*. at 824.

The Court in *Webb* then analyzed the constitutionality of the city ordinance by defining the class at-issue: those suffering condemnation of their property. *Id*. at 825. The Court found there was no difference between individuals and corporations in the class when measured against the objective of the law – to provide just compensation for property taken by the Government. *Id*.

Thus, the Court upheld the individual's equal protection challenge to the jury trial ordinance because it favored corporations over individuals having their property condemned without any valid reason for the difference. *Id*. In support of its decision, the Court cited *McClung v. Pulitzer Pub. Co.*, 214 S.W. 193, 195-200 (Mo. 1919), which held a venue law creating different rules for individuals and corporations sued for libel violated the equal protection clause.

Here, the relevant class is most accurately defined as minors suffering a dram shop injury or death as a result of the illegal sale of alcohol. Although this does not appear to be a suspect classification, *Etling*, 92 S.W.3d at 774-5, there is no rational basis for Subsections 2 and 4 of the 2002 Dram Shop Act to allow a civil remedy to certain minors for the criminal act of selling them alcohol but denies a remedy to other minors similarly situated who are harmed by the same criminal act. The immunization of this class of illegal sellers of alcohol to minors

impermissibly "draws an arbitrary line between otherwise identical claims," *Logan*, 455 U.S. at 442, held by minors suffering dram shop injuries or death.

Packaged alcohol sales to minors are just as illegal as sales to minor by the drink on the seller's premises. Neither sale depends upon observation of the minor for the illegality, as does the legality of a sale of alcohol to a "visibly" intoxicated adult. Both commercial vendors can avoid civil and criminal liability simply by carding the minor.

Likewise, there is no rational basis for immunizing from civil suit sellers of packaged liquor to minors while allowing suit against sellers of alcohol to minors by the drink on the seller's premises. "Courts do not favor special rules of tort nonliability because no group should be given special privileges to negligently injure others without bearing the consequences of that act." *Shannon*, 947 S.W.2d at 354, *citing Ontiveros v. Borak*, 667 P.2d 200, 212-3 (Ariz. 1983).

No valid or legitimate governmental interest is advanced by immunizing from civil liability some commercial sellers of alcohol to minors while allowing a claim against other sellers. This was recognized by dissent in *Simpson v. Kilcher*, that was followed in large part by the Court in *Kilmer*. After finding subsection 3 of the 1985 Dram Shop Act violated the equal protection clause, Chief Justice Billings wrote broadly about sellers of alcohol, without distinguishing between

packaged alcohol sellers and sellers by the drink for consumption on the seller's premises:

> While the legislature did intend to limit the liability of **sellers of liquor** by enacting §537.053, it **did not completely immunize them**. The obvious reason the legislature did not completely do away with liability for sellers of liquor is that it did not want them to have the opportunity to take advantage of immunity by **flagrantly and irresponsibly serving minors** and the obviously intoxicated.

Simpson, 749 S.W.2d at 397 (emphasis added). Unlike medical providers, for whom the courts have upheld a number of restrictions on civil lawsuits in order to promote the availability of healthcare, *see Batek v. Curators of Univ. Of Mo.*, 920 S.W.2d 895 (Mo. 1996), we can conceive of no rational reason to protect sellers of packaged liquor to minors for their illegal acts while allowing civil suits against other sellers of alcohol to minors. *Cf. Richardson*, 763 P.2d at 1164 (finding an equal protection violation, the court held it was "distinctly unable to rationalize a legitimate or substantial reason ..." behind damage caps in dram shop actions). We challenge Huck's to articulate one.

Indeed, immunizing packaged alcohol sellers actually undermines the legislative purposes behind the Dram Shop Act. One purpose obviously is to compensate the direct victims of illegal alcohol sales, including specifically the minor purchaser himself, *see* §537.053.4. The legislative purpose to compensate those directly harmed by a wrongful act has been recognized as legitimate by our

Supreme Court in an equal protection challenge to a compensation statute, *Etling*, 92 S.W.3d at 775 (employing that reason for upholding a classification that did not permit claimants who indirectly suffered damages to file a claim against an employer for wrongful death of an employee).

The only stated purpose of the Dram Shop Act's prerequisite to civil liability being a sale of alcohol by the drink for consumption on the seller's premises is so the bar or restaurant can observe the drinker to determine if the drinker is "visibly intoxicated" before serving alcohol to the drinker. *See* Legis. Summary H.B. & J. Res., 83rd Gen. Assembly, 1st Sess., p. 418-9 (1985). Interestingly, Subsection 2 of the 2002 Act itself does not make observation of a minor a prerequisite to civil liability. Rather, as to minors, Subsection 2 requires "evidence that the seller knew or should have known that intoxicating liquor was served to a person under the age of twenty-one years ...". The illegality of selling alcohol to minors is likewise not dependent upon the vendor observing the minor's behavior to determine whether the minor is intoxicated; the mere sale of alcohol to a minor is illegal. *See* §311.310. Therefore, the one articulated concern behind creating dram shop liability provides no rational basis for immunizing from civil liability packaged liquor sellers to minors.

The restriction on civil lawsuits by minors against packaged liquor sellers is

therefore impermissibly overbroad in achieving the stated purpose of the statute. *See McGuire v. C&L Rest., Inc.*, 346 N.W.2d 605, 612 (Minn. 1984) (holding that state's Dram Shop Act's cap on damages to violate the equal protection clause since it was unnecessarily overbroad to achieve the stated purposes thereof). *See also Lindsey v. Normet*, 405 U.S. 56 (1972), where the Court struck a law which required a double bond for tenants appealing an adverse forcible entry judgment because it violated the equal protection clause. The Court found the law was impermissibly overbroad in achieving its stated purpose of screening frivolous appeals since those tenants with money to post the double bond could appeal even if their claim of error was meritless, while tenants with a meritorious appeal but no money could not appeal. *Id*. at 78.

The Dram Shop Act's apparent immunity to packaged liquor sellers to minors also undermines the purposes of related statutes criminalizing the sale of alcohol to minors (§311.310) and drunk driving by minors (§302.505).

Every one of the reasons articulated in Section IV. A. 2. of this Brief for recognizing this cause of action against retail sellers of packaged alcohol to minors establishes that the continued immunity of these sellers, while permitting claims against other illegal sellers, is indefensible. By definition, an indefensible distinction has no rational basis and is arbitrary. Therefore, this immunity and

class based distinction between victims of the illegal sale of alcohol to minors violates the Equal Protection Clause.

C. The trial court erred in granting the motion to dismiss Counts I and II of the Petition because the lower court incorrectly found that Plaintiff did not have a wrongful death claim against Defendant for her minor son's dram shop injury, in that the Dram Shop statute can be construed to permit a civil claim against a commercial seller of packaged alcohol to a minor, in order to make the statute reasonable and non-arbitrary, and to fulfill the purposes of the alcohol control laws.

Should the Court decline to find a constitutional violation or that the common law claim exists, well-known rules of statutory construction permit the Court to conclude that Subsections 2 and 4 of the Dram Shop Act provide a remedy for the dram shop injuries suffered by Terry and his mother.

To determine the General Assembly's intent, courts examine the words, the context of the words, and the problem the legislature sought to remedy in the legislation in question. *See Care & Treatment of Schottel v. State*, 159 S.W.3d 836, 842-3 (Mo. banc 2005). In so doing, legislation must not be read in isolation but must be construed together, *Bachtel v. Miller Co. Nursing Home,* 100 S.W.3d 799, 801 (Mo. banc 2003), including reference to statutes addressing similar subjects but passed at a different time, *Lane v. Lensmeyer*, 158 S.W.2d 218, 226 (Mo. banc 2005). When interpreting a statute the Court must strive to implement legislative policy and harmonize all provisions. *Schottel* at 842. Courts look

elsewhere for interpretation of a statute when the statute as literally read "would lead to an illogical result defeating the purpose of the legislature." *State ex rel. Moore v. Brewster*, 116 S.W.3d 630, 638 (Mo. App. 2003). Here, the Court should examine the purposes behind Section 311.310's criminalizing of Huck's conduct as well as the language of the Dram Shop Act.

"Insight into the legislature's object can be gained by identifying the problems sought to be remedied ..." *Bachtel* at 801. In *Bachtel*, the Supreme Court held that the Missouri Nursing Home Act, which requires employees to report violations of the Act, "impliedly created" a cause of action for employees fired because they blew the whistle on their employer. *Id*. at 803. Our courts have recognized that Section 311.310 impliedly created a civil action against sellers of alcohol illegally to minors. *See Samson, Nesbitt* and *Carver.*

Courts assume the legislature did not intend an absurd law, *Schottel* at 842, nor an "absurd result," *Budding v. SSM Healthcare System*, 19 S.W.3d 678, 681 (Mo. banc 2000). "The law favors a construction of a statute which avoids unjust or unreasonable results." *Maryland Cas. Co. v. Gen. Elec. Co.*, 418 S.W.2d 115, 118 (Mo. banc 1967). Courts may depart from the plain language of a statute to avoid an "'absurd or glaringly unjust' result." *Inter-Modal Rail Employees Ass'n. v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 516 (1997).

As a remedy for an offending statute the court may modify or even strike out words "improvidently inserted." *City of Joplin v. Joplin Water Works*, 386 S.W.2d 369, 374 (Mo. 1965). More recently, this Court excised words from a Missouri statute as "improvidently included" since those words were "contrary to its clear purpose." *Leiser v. City of Wildwood*, 59 S.W.3d 597, 604 (Mo. App. 2001). Similarly, this Court has held that it "may supply missing words when, as written, the statute leads to an absurd result." *Ming v. Gen. Motors Corp.*, 130 S.W.3d 665, 669 (Mo. App. 2004).

When read together, three subsections of the 2002 Dram Shop Act, §537.053, create a serious legislative ambiguity.

Subsection 1 purports to eliminate the liability of alcohol sellers completely, however, the Supreme Court in *Kilmer*, 17 S.W.3d at 551, found that subsection to be an incorrect statement of Missouri law.

Subsection 2 begins "notwithstanding subsection 1," some dram shop injury claims are permitted, but apparently not those against sellers of packaged liquor.

Subsection 4 provides additional rights to an underage purchaser of intoxicating beverages by allowing the intoxicated minor to sue for his/her injuries and his/her parents to sue for the minor's death from the illegal sale of liquor by the drink. Interestingly, Subsection 4 does not limit a suit by or on behalf of

minors to those who drink on the seller's premises. It reads, in pertinent part: "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. ..." Our law directs that this ambiguity should be resolved in favor of a construction that effectuates the statutory purpose. *See* RSMo. §1.010, which provides, in pertinent part: "**all** acts of the general assembly, or **laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof**" (emphasis added).

In addition, the 2002 law's omission of subsection 2 of the 1985 law, which specified *Samson*, *Nesbitt* and *Carver* for abrogation, creates a further ambiguity. Those cases, two of which recognized common law dram shop actions for sales to minors, presumably are again effective, as discussed *supra* at Section IV. A. of this Brief.

We have already demonstrated how the distinction between packaged liquor sellers and other sellers of alcohol to minors is arbitrary, achieves no legitimate purpose, is contrary to criminal law, and violates the public policy behind the zero tolerance law.

Beyond this "absurd result," in the words of the trial court, there is evidence that the General Assembly apparently did not view the Dram Shop Act as narrowly

applying only to sellers of intoxicating drink for consumption on the premises. The Legislative Summary of the 1985 law repeatedly used the words "vendor" and "sales." *See* Legis. Summary H.B. & J. Res., 83rd Gen. Assembly, 1st Sess., p. 418-9 (1985). The Legislative Summary of the 2002 law used the phrase "persons licensed to sell intoxicating beverages." *See* Legis. Summary H.B. & J. Res., 91st Gen. Assembly, 2nd Sess., p. 223 (2002). Those broader words and phrases obviously can include sellers of packaged liquor. The Legislative Summaries did not restrict liability to sellers for consumption on the premises.

The only concern expressed in the Legislative Summary of the 1985 Dram Shop Act was whether it was reasonable to make dram shops liable for sales to "visibly intoxicated" adults, in the words of the statute. A dram shop requires the opportunity to observe an adult before it can reasonably recognize that the adult is "visibly intoxicated." For the most part, that can be done with an acceptable degree of certainty when the adult is served alcohol by the drink on the dram shop's premises. *See* Legis. Summary H.B. & J. Res., 83rd Gen. Assembly, 1st Sess., p. 418-9 (1985). There is no mention in the Legislative Summary of the need to observe minors before selling them alcohol.

It is perfectly reasonable to conclude that the General Assembly found it unnecessary for a dram shop to observe minors before selling minors alcohol. It is

illegal to sell minors alcohol, period. Indeed, the language of the Act implicitly recognizes this fact. Subsection 2, as it is currently written, permits suit against a seller of alcohol by the drink to a minor without need for proving that the seller knew or should have known the minor was visibly intoxicated.

Clearly, the ambiguities which undermine legislative policy must be remedied. The Court may rework Subsection 2 of the 2002 Act without disturbing the legislative intent to limit liability for sales to adults the seller can observe, while reinforcing the specific protections for minors.

First, take the phrase "person licensed to sell intoxicating liquor by drink for consumption on the premises" from its present location, replace it with the phrase "licensed alcohol seller," and insert the existing phrase just before the phrase "knowingly served intoxicating liquor to a visibly intoxicated person."

Then, add the phrase "licensed alcohol seller" before the phrase "seller knew or should have known that intoxicating liquor was served to a person under the age of twenty-one years ...". Lastly, change the word "served" in the latter phrase to "sold."

Subsection 2 of the Dram Shop Act would, therefore, read as follows:

> 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 [licensed alcohol] sell[er] when it is proven by clear and convincing evidence that the [licensed alcohol] seller

> knew or should have known that intoxicating liquor was [sold] to a person under the age of twenty-one years or [the person licensed to sell intoxicating liquor by the drink for consumption on the premises] knowingly served intoxicating liquor to a visibly intoxicated person.[8]

Our proposed rewording of the statute now reinforces the absolute prohibition against any sales of alcohol to minors, including sales to minors by packaged liquor vendors. It provides a financial incentive with teeth for licensed commercial sellers not to sell alcohol to minors. It reduces the opportunity for minors to obtain alcohol and drink and drive. It compensates minors injured or killer by illegally sold alcohol from any seller. And, it preserves the restrictions on claims arising from sales to adults. In sum, this rewording allows society to counter Huck's illegal conduct with every weapon in the law's arsenal.

V. Conclusion

WHEREFORE, Plaintiff prays that the Court reverse the Circuit Court's Judgment granting the Motion to Dismiss and remand this case to the Circuit Court for further proceedings.

Respectfully submitted,

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[8] Another possible re-wording of the Dram Shop Act may be found in Florida law, which permits a civil action against any "person" selling alcohol to a minor but restricts the defendants in claims involving adults to those who "serve" the intoxicated adult and can observe the customer's condition. *See Persen v. Southland Corp.*, 656 So.2d 453, 454-5 (Fla. 1995) (interpreting Fla. Stat. Ann. §768.125).

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1. This brief complies with the requirements of Mo. R. Ct. 55.03.

2. This brief complies with the type-volume limitation of Rule 84.06(b) because this brief contains 10,928 words, excluding the parts of the brief exempted by Rule 84.06(b).

3. The accompanying digital version of the Brief on diskette has been scanned for viruses and is virus free.

Dated: March 6, 2006

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James E. Parrot

Certificate of Service

I hereby certify that on the 6th day of March, 2006, I served via First Class U.S. Mail one paper copy and one digital copy on a diskette of the foregoing: Appellant's Brief, on counsel for Respondent:

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