

## **I. Introduction**

Terry Keown, a minor, is dead as a result of a car crash after becoming intoxicated on beer illegally sold him by Defendant-Respondent at its St. Peters Huck's Convenience Food Store (L.F. 4-5). Terry's mother filed a wrongful death claim against the illegal seller. The trial court dismissed that lawsuit and held that the Dram Shop Act, RSMo. §537.053, limits civil remedies to minors who purchase alcohol for consumption on the seller's premises and immunizes from suit illegal sellers of packaged liquor to minors who are injured or killed.

Plaintiff-Appellant argued below that this construction of the Dram Shop Act violates the Open Courts and Equal Protection clauses of the Constitution, Art. 1, §§2 & 14, by allowing a civil claim to some minors injured or killed by illegal sales of alcohol without providing the claim to all such minors. Huck's offers no defense for this unprincipled and illogical distinction. Huck's argues only that the Legislature said what it said. Huck's cites to no legislative history which would even indicate that the General Assembly intended to immunize from civil suit illegal sellers of packaged alcohol to minors.

Huck's makes no applicable argument that this distinction follows any rational or legitimate public policy. Contrary to Huck's claim, there is no need for an alcohol seller to observe a minor before selling him/her alcohol (the rationale

for limiting a civil action to sellers by the drink for consumption on the seller's premises when the sale is to a "visibly intoxicated" adult). In the case of minors, the alcohol seller avoids breaking the law and civil liability by requesting that the minor display age-specific identification.

Huck's failed to address our arguments why this distinction between illegal sellers of alcohol to minors is unconstitutional. The lack of civil liability for illegal sellers of packaged alcohol undercuts the clear State policy against any sales of alcohol to minors to prevent underage drinking. It also creates a greater likelihood of minors drinking and driving – a well-known scourge. It fails to discourage illegal acts of commercial sellers of alcohol. It gives packaged alcohol sellers a competitive advantage over sellers by the drink for consumption on the seller's premises. It fails to compensate victims of illegal acts.

Shorn of legal technicalities, Huck's argument is that the Legislature "clearly intended" to allow sellers of packaged alcohol a free pass for illegal sales to minors. That is not the policy of the State of Missouri.

## **II. Argument**

### **A. Open Courts Clause**

In its argument on the Open Courts Clause Huck's fails to address the key issue articulated by the Court in *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc

2000): whether the Dram Shop Act “arbitrarily or unreasonably” bars minors injured or killed as a result of purchasing packaged alcohol from “seeking a remedy for a recognized injury” to “enforce a recognized cause of action” when the Act allows other minors to sue for injuries or death from illegal sales of alcohol by the drink. A statute that impairs remedies for a recognized injury and cause of action it is subject to review under the Open Courts Clause to determine whether the legislative act is arbitrary or unreasonable. *Id.* at 549-50.

Huck’s argues that the Dram Shop Act erects a substantive rather than a procedural barrier to a civil claim for minors purchasing from packaged alcohol sellers and therefore does not violate the Open Courts Clause (Brief at 25-7).

Huck’s argument mis-characterizes the issue by ignoring the holdings of *Kilmer*.

*Kilmer* held that injuries or death resulting from the illegal sale of alcohol are “recognized” by the Dram Shop Act as well as by the common law, and give rise to a “recognized cause of action.” *Id.* at 551-52 & nn. 20-21. In other words, a substantive right is violated when injury or death results from the illegal sale of alcohol. The Dram Shop Act specifically recognizes that a minor purchaser of illegally sold alcohol can sue for his own injuries, or his parents for his death. *See* RSMo. §537.053.4. But, the Dram Shop Act erects a *procedural* barrier to enforcement of this right by conditioning the availability of the claim to who sold

the illegal alcohol.

The substance vs. procedure debate is resolved by *Wilkes v. MHTC*, 762 S.W.2d 27 (Mo. banc 1988). There, the question was whether the statutory abrogation of sovereign immunity, in other words, who the injured party could sue, was a substantive or procedural act for purposes of deciding whether the statute would apply retroactively. The Court found that the abrogation of sovereign immunity did “not create a new cause of action but provides a remedy for a cause of action already existing for which redress could not be had because of the immunity.” *Id.* at 28. Thus, the statute was found to be procedural and was given retroactive application. *Id.*

Here, “dram shop injuries” lead to a “recognized cause of action,” in the words of *Kilmer*, 17 S.W.3d at 550-2 & nn. 20, 21. The injuries and cause of action, according to *Kilmer* at 551-2, were recognized by the common law before the Dram Shop Act and in the Act itself. Therefore, under the teachings of *Kilmer*, the Dram Shop Act’s limitation on which minors can sue certain sellers of alcohol is likewise a procedural act subject to Open Courts Clause scrutiny.

Huck’s offers no defense of the Act’s limitation on minors who can sue for illegal sales of alcohol. There is none. Rather, Huck’s only argues that the Act supposedly provides for “general immunity from dram shop liability, with narrow,

detailed exceptions” (Brief at 30). That is nothing more than *ipse dixit*. We know what the statute says, the question is whether it violates the Constitution. This arbitrary and unreasonable distinction violates the Open Courts Clause.

In our Opening Brief at 31 we distinguished the *Leimkuehler* case cited by Huck’s at page 23 of its Brief. We distinguished the *Etling* case cited by Huck’s at page 25 of its Brief in our Opening Brief at 12. And, in our Opening Brief at 30-31, we distinguished the *Lambing* case cited by Huck’s at page 28 of its Brief.

### **B. Equal Protection Clause.**

Huck’s does not dispute that the Dram Shop Act creates classifications of minors illegally sold alcohol who can and cannot file a civil action for their dram shop injury or death. Rather, Huck’s sole argument against the Equal Protection Clause claim is that this classification has a rational basis: so that the seller of alcohol can observe the drinker to determine if he/she is “visibly intoxicated,” in the words of the Act, Section 537.053.2, before selling the drinker more alcohol (Brief at 32). Huck’s disingenuously fails to state that this reason applies not to minors, but only to adults. An alcohol seller does not have to observe a minor or determine whether the minor is visibly intoxicated before selling to the minor; no sale to a minor is legal. *See* RSMo. §311.310.

Huck’s additional argument for no liability (Brief at pages 32-3), that

packaged alcohol sellers have no control over patrons after selling the alcohol, misses the point of the absolute prohibition of all sales of alcohol to minors. As applied to minors, there is no need to “control” them after a sale of alcohol. Alcohol simply cannot be sold to minors.

The objectives of the Dram Shop Act are clear: to create a disincentive for selling alcohol to visibly intoxicated adults and to any minor; compensating third parties injured or killed by the visibly intoxicated adult; and compensating either the injured minor illegally sold alcohol, the parents of the killed minor illegally sold alcohol, and third parties injured or killed by the minor illegally sold alcohol. Huck’s fails to show how immunizing packaged alcohol sellers to minors serves any of those purposes. It is not less illegal for Huck’s to sell alcohol to minors rather than a restaurant or bar. It is not less damaging for the minor illegally sold alcohol and who thereafter suffers injury or death if the illegal sale is by a packaged alcohol seller rather than a restaurant or bar. In short, there is not even a “rational speculation” on some proper basis for the classification between minors in the Dram Shop Act. *Cf. United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

At page 31 of its Brief Huck’s cites to *United C.O.D. v. State*, but the Court’s reasoning therein actually supports the arguments of Terry’s mother.

There, a group of taxicab drivers made an equal protection challenge to a statute which authorized local taxicab commissions. The local commission adopted a code regulating the dress of taxicab drivers. *Id.* at 312. The Court rejected that challenge because the statute and code were “conceivably rationally related to regulating part of the public transportation system and improving the quality of the system.” *Id.* at 313. Immunizing some sellers of alcohol to minors from their illegal acts cannot, by any stretch of imagination, improve the quality of the heavily regulated system for the sale of alcohol. And, it makes the transportation system more dangerous by putting minors on the road with alcohol. Clearly, the Dram Shop Act’s classification of minors able to sue illegal sellers of alcohol has no rational basis and thus violates the Equal Protection Clause.

### **C. Remedy For Constitutional Violations**

Huck’s argues that the Court should not consider the remedial points raised by Terry’s mother because she supposedly did not raise the constitutional question at the earliest opportunity (Brief at 34-5). Huck’s is incorrect. “To properly raise a constitutional question, one must: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by specific reference to the article or section or by quotation of the provision itself; (3) state the facts showing the violation; and

(4) preserve the constitutional question throughout for appellate review.” *United C.O.D.*, 150 S.W.3d at 313. Here, the Petition explicitly requested a declaration that the Dram Shop Act is unconstitutional in violation of the Open Courts and the Equal Protection Clauses, to the extent it withdrew a civil remedy for illegal sales of packaged alcohol to minors and sought “such further relief as is just” (L.F. 8). Terry’s mother preserved that argument in her opposition to the motion to dismiss (S.L.F. 2-4). The arguments Terry’s mother made at pages 39-45 of her Brief merely set forth, under the canons of statutory construction, the alternatives the Court may employ to remedy the offending statute, *see Kilmer*, 17 S.W.3d at 153, where the Court excised a portion of the 1985 version of the Dram Shop Act.

Huck’s argues at page 35 of its Brief that the Dram Shop Act as written does not lead to illogical results, is unambiguous, and gives effect to the legislature’s intent. Huck’s offers no support for this incredible claim. Indeed, the trial court found the distinction between illegal sellers of alcohol to minors to be “absurd” (L.F. 21). We cannot ascribe to the General Assembly any intent to immunize from civil liability lawbreakers who sell alcohol to minors.

### **III. Conclusion**

For each of the foregoing reasons, Plaintiff-Appellant prays that the Court reverse the trial court and remand this case for a trial on the merits.

Respectfully submitted,

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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 1,881 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: May \_\_\_\_, 2006

\_\_\_\_\_  
James E. Parrot

**Certificate of Service**

I hereby certify that on the \_\_\_\_\_ day of May, 2006, I served via First Class U.S. Mail one paper copy and one digital copy on a diskette of the foregoing: Appellant’s Reply Brief, on counsel for Respondent:

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