STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

ALEXANDRIA DOERING; JASON DOERING; TROY DOERING; JOHN H. PRIEBE, Guardian ad Litem for minor plaintiffs, Jason Doering and Troy Doering; and KERSTEN A. SCHMELZER, a person under a disability, by her general guardian, Attorney Curtis M. Kirkhuff,

Plaintiffs-Respondents

Appeal No. 93-3386

vs.

Oneida Co. #93-CV-230

WEA INSURANCE GROUP, and WISCONSIN PHYSICIANS SERVICE HEALTH INSURANCE,

Nominal Plaintiffs,

v.

THOMAS J. STAMPER, LINDA J. STAMPER, ALIAS INSURANCE COMPANY NO. 1 AND ALIAS INSURANCE COMPANY NO. 2,

Defendants

DEANNE J. VON ARX, d/b/a ALPINE BAR & RESORT and SCOTT A. MELAND,

Defendants-Appellants

BRIEF AND APPENDIX OF PLAINTIFFS-RESPONDENTS

APPEAL FROM THE CIRCUIT COURT FOR ONEIDA COUNTY
HONORABLE MARK A. MANGERSON PRESIDING

Respectfully submitted:

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STATEMENT OF ISSUES

1. Does §125.035, Wis. Stats. deny to those victims injured by an adult drunk driver who was unlawfully sold alcoholic beverages the fundamental right to an adequate remedy in the laws for their injuries, contrary to Wis. Const. art. 1, sec. 9 and art. 1, sec. 1?

   The Trial Court Answer: Yes.

2. Does §125.035 Wis. Stats. which grants immunity from civil liability to those providing liquor to intoxicated adults who subsequently cause injury to third persons violate Wis. Const. art. 1, sec. 1 because it, without a rational basis, creates a class of tort victims who are denied adequate remedy and access to the courts of Wisconsin?

   The Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The respondents believe that the Court's decision should be published. This case presents issues which have not been addressed by the appellate courts of Wisconsin.

The respondents believe that oral argument will aid the Court in understanding the issues presented in this case.

STATEMENT OF FACTS

This lawsuit arises out of an automobile accident that occurred on September 1, 1992. During the evening hours of September 1, 1992, Thomas J. Stamper was served alcoholic beverages at the Alpine Bar & Resort. The defendant, Deanne J. Van Arx, is the owner of the Alpine Bar & Resort. The defendant, Scott A. Meland, was the bartender serving alcoholic beverages to Thomas J. Stamper at the Alpine Bar & Resort on September 1, 1992. (R. 21, pp. 5, 6)

Scott A. Meland served alcoholic beverages to Thomas J. Stamper in the full knowledge that Thomas J. Stamper was intoxicated. In doing so, Scott A. Meland violated §125.07(2), Wis. Stats., which prohibits the sale of alcoholic beverages to a person who is intoxicated. (R. 21, p. 6)

Deanne J. Van Arx was present at the Alpine Bar & Resort at the time the alcoholic beverages were served to Thomas J. Stamper. In full knowledge that Thomas J. Stamper was intoxicated, she witnessed and approved the sale of alcoholic beverages to Thomas J. Stamper. In doing so, Deanne J. Van Arx also violated §125.07(2), Wis. Stats. (R. 21, p. 6)

In addition to serving Thomas J. Stamper alcoholic beverages when they knew he was intoxicated, Scott A. Meland and Deanne J. Van Arx also knew that Thomas J. Stamper was under the influence of marijuana while at the Alpine Bar & Resort. Despite knowing that Thomas J. Stamper returned to

the bar with the odor of marijuana on his person, Scott A. Meland and Deanne J. Van Arx continued to sell alcohol to Thomas J. Stamper. In addition, Scott A. Meland and Deanne J. Van Arx knew that Thomas J. Stamper drove to the Alpine Bar & Resort, and fully intended to drive away from the Alpine Bar & Resort while intoxicated. Scott A. Meland and Deanne J. Van Arx also knew that Thomas J. Stamper's driving privileges had been previously revoked. (R. 21, p. 6)

Thomas J. Stamper, intoxicated and under the influence of marijuana, drove away from the Alpine Bar & Resort on September 1, 1992. During that drive, while speeding, he ran a stop sign on Old County K, in Oneida County, Wisconsin, and collided with a vehicle driven by Alexandria Doering, in which Kersten A. Schmelzer was a passenger. Both women were returning home after working late in order to finish preparing their classrooms for the first day of school (the next day). (R. 21, pp. 6, 7)

Alexandria Doering and Kersten A. Schmelzer both suffered devastating injuries as a result of this collision, although Thomas J. Stamper was relatively unhurt. Both Alexandria Doering and Kersten A. Schmelzer suffer from permanent brain damage as a result of this accident, as well as from numerous other permanent physical injuries. (R. 21, p. 7)

The respondents brought an action, claiming that Deanne J. Van Arx and Scott A. Meland were both negligent in serving

alcoholic beverages to Thomas J. Stamper while he was intoxicated, in violation of §125.07(2), Wis. Stats., and that their negligence was a substantial factor in causing the accident and injuries suffered by the respondents. (R. 21, pp. 1-13)

Subsequently, the appellants moved to dismiss the complaint on the grounds that §125.025(2), Wis. Stats., made them immune from civil liability. (R. 36, 37, 38, 41).

The trial court denied the defendants' motion to dismiss and found:

> (1) §125.035, Wis. Stats., creates two classifications of victims of intoxicated drivers;
>
> (2) that to pass constitutional scrutiny there needs to be a compelling state interest in the classifications established in §125.035(2), Wis. Stats.;
>
> (3) that Wis. Const. art. 1, sec. 9, specifically provides that there be an adequate remedy for every wrong;
>
> (4) that legislative elimination of the right to assert a claim against a possible joint tortfeasor is a substantial abridgment of that fundamental right;
>
> (5) that §125.035, Wis. Stats., is unconstitutional because it does not satisfy the rational basis test set forth in Omernik v. State, 64 Wis. 2d 6, 218 N.W.2d 734 (1974);
>
> (6) that §125.035(4)(b), Wis. Stats., also violates the plaintiffs' constitutional rights under Wis. Const., art. 1, sec. 9. (R. 43, pp. 1-7).

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT §125.035, WIS. STATS., UNCONSTITUTIONALLY VIOLATED RESPONDENTS' FUNDAMENTAL RIGHTS GUARANTEED BY WIS. CONST., ART. 1, SEC. 9.

The trial court explicitly held that:

> "[T]here needs to be a compelling state interest in the classifications made by §125.035(2), Stats., since Wis. Const. art. 1, sec. 9, specifically provides that there be an adequate remedy for every wrong and elimination of recovery against a possible joint tort-feasor, considering the State of Wisconsin law . . . is a substantial abridgement of that fundamental right".

The trial court correctly concluded that the basis for the claim being asserted by respondents was that the licensed vendor of alcohol sold intoxicants to someone they knew was drunk and would subsequently be operating a motor vehicle. Respondents' common law right to bring a claim arises from the violation of §125.07(2), Wis. Stats., since a duty exists in the law, violation of that duty gives rise to the common law right to bring a claim against the alcohol vendor. This right to a certain remedy for injuries and wrongs is fundamental.

The appellant incorrectly asserts the trial court erred in holding such right to be fundamental on the grounds that Wis. Const. art. 1, sec. 9 refers only to those remedies available at common law when the state constitution was adopted in 1848. In effect, the appellants' argue that "fundamental rights", within the meaning of Wis. Const. art. 1, sec. 9, remain static and do not evolve as society evolves.

The respondents respectfully disagree.

Wis. Const., art. 1, sec. 9, provides:

> "Every person is entitled to a certain remedy in the laws for all injuries and wrongs which he may receive in his person ..."

The overwhelming precedent set forth by the Supreme Court of Wisconsin holds that the common law changes as society has changed from the time our constitution was adopted. The courts are empowered to expand the common law to conform with modern societal needs. Sorensen v. Jarvis, 119 Wis. 2d 627, 633, 350 N.W.2d 108 (1984).

The Sorensen court correctly stated that:

> "... on the basis of past cases decided by this court, this court is free to determine whether, as a matter of policy, we should recognize a common law cause of action by an injured third person against a vendor of liquor." Sorensen, 119 Wis. 2d at 632.

The Court further stated:

> "Thus, as a part of our common law heritage, this court is free to amend the common law." Sorensen, 119 Wis. 2d at 633.

The trial court implicitly found that in enacting §125.07, Wis. Stats., the legislature recognized the danger inherent in selling alcohol to intoxicated persons. The danger to society is not lessened because the vendor served an intoxicated adult as opposed to an intoxicated minor. The costs of driving while intoxicated already are too great. Ten years ago the estimated cost to society of drinking and driving amounted to between $21 and $24 billion each year. U.S

Presidential Commission on Drunk Driving, Final Report 1 (1983). To reduce costs of this magnitude requires a serious review of existing policies, and a focus on policies which reduce these costs. Bureau of Justice Statistics, Special Report on Drunk Driving, p. 3 (NCJ 134728, Sept. 1992).

A. FUNDAMENTAL RIGHTS HAVE EVOLVED

Historically, under Wisconsin common law, a liquor vendor was not liable to a third party for injury or damage caused by a patron's intoxication. Demge v. Feierstein, 222 Wis. 199, 203, 268 N.W. 210 (1936). The (now rejected) rationale used by the courts in denying such liability was that the act of selling or furnishing alcoholic beverages was considered too remote to be a proximate cause of the injury to a third party. Seibel v. Leach, 233 Wis. 66, 68, 288 N.W. 774 (1939). The old concept that the responsibility for injuries must only be born by the drinker and not the seller has been rejected.

The meaning of proximate cause has changed. The old decisions were based on the reasoning that proximate cause meant "immediate cause". Today causation is established when the plaintiff proves that the tortious act was a substantial factor in causing the harm. Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 236-238, 55 N.W.2d (1952); Estate of Campbell v. Chaney, 169 Wis. 2d 399, 410, 485 N.W.2d 421 (1992). As the legislative notes concerning §125.035, Wis. Stats. reflect, there could be no legislative finding made as

part of this law that "consumption rather than the furnishing of alcohol beverages is the proximate cause of injuries to 3rd persons. . . . " (R. 40, Exhibit B, R. Tradewell memo, Drafter's Note from the Legislative Reference Bureau). (emphasis added)

In Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970), the Wisconsin Supreme Court abandoned the proximate cause rule of nonliability. However, the Court held that a tavern owner was not liable for injuries to a third party caused by an intoxicated patron, **on public policy grounds**.

Chief Justice Hallows dissented in Garcia, and strongly argued that a liquor vendor who sells alcohol to another should be held accountable provided that the liquor vendor's negligence was a substantial factor in causing the third person's injuries. Garcia, 46 Wis. 2d at 737.

Fourteen years later, in Sorensen v. Jarvis, supra, the Wisconsin Supreme Court adopted Chief Justice Hallows' reasoning, and allowed a third party to bring an action against a tavern owner for injuries to a third party caused by a minor patron's intoxication.

The question in Sorensen was:

> "whether a third party injured by an intoxicated minor has a common law negligence action against a retail seller for the negligent sale of an intoxicated beverage to a person the seller knew or should have known was a minor and whose consumption of the alcohol was a cause of the accident." Id. 119 Wis. 2d at 629.

The Sorensen court applied basic common law negligence principles and adopted the reasoning of Chief Justice Hallows' dissent in Garcia when it held:

> (1) That recognizing the liability of a supplier of liquor is not the singling out of a particular business for special sanctions, but rather that the majority opinion immunizes a single segment of society--the liquor industry--from liability for negligence to which persons in general are subject; (2) that the chain of causation between the furnishing of the liquor, driving a vehicle while intoxicated, and the injuries presents not a hard case but a routine cause question; (3) that the necessity of drawing a line between a commercial vendor and a social host is a "strawman" argument, because "social justice" and "common sense" required that a social host not give an intoxicated guest more liquor; and (4) that a drunk driver will not be relieved of his responsibility--he will remain liable- but that responsibility will be shared with at least one additional culpable party, the negligent tortfeasor who supplied the liquor, when the negligence of each is a substantial factor in causing the plaintiff's injuries. The dissent also points out that the acceptance of the majority's argument that imposition of liability on a vendor would create an onerous burden on the courts, if carried to its logical conclusion, would bring to a standstill the important and necessary work of the court in keeping the common law modern and vital.

Sorensen, 119 Wis. 2d at 642-643.

The Sorensen court also recognized that the sale of alcohol to a minor was prohibited by law, and that therefore the act of the vendor in selling the alcohol constituted negligence per se. Sorensen, 119 Wis. 2d at 636. Similarly, selling alcohol to an intoxicated adult (which occurred in this case) is prohibited by §125.07(2), Wis. Stats.

In Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857

(1985), the Wisconsin Supreme Court expanded this common law duty to social hosts. Koback also involved the furnishing of alcohol to a minor. As in Sorensen, the court concluded that such furnishing of alcohol to a minor, violated the law, and constituted negligence per se. Koback, 123 Wis. 2d at 269. The holdings of Sorensen and Koback were based in part upon the premise that selling or furnishing intoxicants to a minor is illegal.

Clearly, as societal needs have evolved, Wisconsin courts have recognized the need and expanded the common law. Today's public policy dictates recognition of the common law right to sue a bartender or tavern owner when they sell alcohol to an intoxicated patron who in turn injures a third party.

Other states also recognize the need to adapt the common law to changing societal values and needs. While Wis. Const. art. 1, sec. 9, does not have a counterpart in the United States Constitution, Fla. Const. art 1, sec. 21, supplies a parallel to Wisconsin's art. 1, sec. 9. It requires the courts of Florida "shall be open to every person for redress of any injury ..." Kluger v. White, 281 So. 2d 1,3 (Fla. 1973). Florida had passed a law which abolished the right of a person who had his property damaged by another to recover from that tortfeasor. The Kluger court held that this statute violated Fla. Const. art. 1, sec. 21. The Kluger court stated in pertinent part:

> It is essential, therefore, that this Court consider whether or not the Legislature is, in fact, empowered to abolish a common law and statutory right of action without providing an adequate alternative.
>
> Nor can we... adopt a view which would allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim ...
>
> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided ... or where such right has become part of the common law of the State ... the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. Id. at 4.

The Kluger decision clearly recognized that reviewing courts will not rubber stamp legislative enactments which deny a citizen access to the courts in order to seek redress for injuries.

In Kallas Millwork Corp. v. Square D. Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975) §893.155, Wis. Stats. was found unconstitutional:

> "because it grants immunities to the class of defendants protected therein on a classification basis that is unreasonable and denies other possible defendants equal protection of the laws ... In addition, the statute deprives a plaintiff of a remedy for a wrong that is recognized by the laws of the state. The

> statute is therefore also unconstitutional under Wis. Const., art. 1, sec. 9".

The Kallas court held that a statute which established a 6 year statute of limitations for some groups of persons engaged in the construction business (not all persons engaged in the construction business) violated Wis. Const. art. 1, sec. 9. Similarly, §125.035, Wis. Stats. grants civil immunity to sellers of alcohol if the drunk driver is an adult. In light of Kallas, the trial court correctly found this grant of immunity to be a substantial abridgment of [a] fundamental right". (R.43, p. 3)

Courts have found fundamental rights implicit in the Constitution even though not specifically enumerated therein. The U.S. Supreme Court has recognized fundamental rights which are not expressly stated in the U.S. Constitution. See Griswold v. Connecticut 381 U.S. 479 (1965) (marital zone of privacy); Carey v. Population Services International, 431 U.S. 78 (1987) (right to contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion); Stanley v. Georgia, 394 U.S. 557 (1969); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (right of family members to live together).

The respondents respectfully submit that certain fundamental rights are implicit in the Wisconsin Constitution. This is true when the Constitution is interpreted in light of current societal needs and values. The framers of the

Wisconsin Constitution specifically enumerated the fundamental right to equal and adequate redress for "all injuries and wrongs received". That is, the law has long recognized that similarly situated victims of tortious conduct have the right to assert common law claims against tortfeasors liable for the injuries they cause.

Unless the rights to adequate redress and access to the courts are carefully protected as fundamental, Wis. Const. art. 1, sec. 9, is meaningless and mere surplusage. Wis. Const., art. 1, sec. 9 is violated when a statute denies a remedy for common law rights which the legislative enactment itself recognized. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Rosenthal v. Kurtz 62 Wis. 2d 1, 213 N.W.2d 741 (1973).

The appellants argue that respondents have no cause of action that can be asserted against them because they have civil immunity. They further argue that respondents have no claim against them which has been recognized as part of the common law. Garcia, Sorensen and Koback, however, give recognition to a victim's right to sue a negligent alcohol vendor at common law under certain circumstances.

The legislature, codified the Sorensen and Koback decisions when it adopted §125.035, Wis. Stats. By doing so, the legislature recognized that the acts of a liquor vendor can be a substantial factor in causing injuries sustained by

a victim of a drunk driver who was served alcohol by a vendor.

Clearly, by enacting §125.035(4), Wis. Stats., the legislature adopted the fundamental common law rights recognized in Sorensen and Koback. A legislative enactment which on one hand gives victims of minor drunk drivers the right to sue vendors who sell alcohol to these minors, cannot deny the same right to those injured by intoxicated adults without subjecting the statute strict scrutiny. It is fundamental that every person must have a certain remedy for all injuries and wrongs.

B. §125.035, WIS. STATS. IS UNCONSTITUTIONAL BECAUSE IT FAILS TO SATISFY THE STRICT SCRUTINY TEST.

The constitutional guarantees of Wis. Const. art. 1, sec 9, are fundamental and §125.035, Wis. Stats. violates Wis. Const. art. 1, sec. 9, because it fails to satisfy the strict scrutiny test.

If a classification intentionally impinges upon fundamental rights or constitutes a suspect classification, it is subjected to strict scrutiny and can be upheld only if it is necessary to promote compelling governmental interests. In Matter of Estate of Eisenberg, 90 Wis. 2d 620, 628, 280 N.W.2d 359, appeal dismissed 100 S.Ct. 476, 444 U.S. 976, 62 L.Ed 403 (Ct. App. 1979); See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17, rehearing denied 411 U.S. 959 (1972).

Wis. Const. art 1, sec. 1, guarantees equal protection. It states:

> "**Equality; inherent rights.** SECTION 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The Equal Protection clause of the Wisconsin Constitution is substantively the same as the due process and Equal Protection clauses of the 14th Amendment of the U.S. Constitution. State ex rel. Cresci v. Schmidt, 62 Wis. 2d 400, 414, 215 N.W.2d 361 (1974); Yotvat v. Roth, 95 Wis. 2d 357, 363 n.1, 290 N.W.2d 524 (Ct. App. 1980). The Equal Protection clause of the 14th Amendment is designed to assure that those who are similarly situated will be treated the same under the law. Treiber v. Knoll, 135 Wis. 2d 58, 68-69, 398 N.W.2d 756 (1987).

Since the equal right to adequate remedy in the laws is a fundamental right, and §125.035, Wis. Stats., does not provide an equal right to adequate remedy, it is necessary to apply the strict scrutiny test stated above.

1. The legislative purpose for enacting Ch. 125, Wis. Stats. was to protect the public from injury caused by intoxicated persons.

In applying the strict scrutiny test, it is necessary to first determine the state's purpose for enacting Ch. 125, Wis. Stats. Second, it must be determined whether or not the

legislature's purpose satisfies a compelling state interest.

The trial court found Ch. 125, Wis. Stats., "is an exercise of the state's police power in regulating the sale and use of intoxicating beverages, recognized to be potentially dangerous." (R.43 p3.). In essence, the statute is a legislative enactment designed to prevent intoxicated persons from injuring themselves and others.

Under the broad sweep of the 21st Amendment to the United States Constitution, states are granted police power in regulation of the sale of liquor in the interests of the public health, safety, morals and general welfare. State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee, 105 Wis. 2d at 217, citing California v. LaRue, 409 U.S. 109, 114, rehearing denied 410 U.S. 948 (1972). The power of the state over the liquor industry is almost plenary. Wisconsin Wine & Spirit Institute v. Michael Ley and Wisconsin Department of Revenue, 141 Wis. 2d at 970, citing Moedern v. McGinnis, 70 Wis. 2d 1056, 1068-69, 236 N.W.2d 240, 246 (1975).

Legislative intent can be determined by reading the statute in context with the other laws enacted as part of that chapter of laws. This is particularly true where there is no direct expression of legislative intent. Walker v. Bignell, 100 Wis. 2d 256, 271 301 N.W.2d 447 (1981).

The legislature expressly stated its legislative intent concerning Ch. 125, Wis. Stats. when it stated:

125.01. Legislative intent

> This chapter shall be construed as an enactment of statewide concern for the purpose of providing a uniform regulation of the sale of alcohol beverages.

Section 125.035 (2) & (3), Wis. Stats, read together, holds liquor vendors civilly liable if they force a consumer or trick a consumer into drinking alcohol. Section 125.035 (4), Wis. Stats., makes a liquor vendor civilly liable for furnishing alcohol to a minor.

Section 125.07(2)(a)1, Wis. Stats., imposes a criminal penalty upon anyone who disperses alcohol to "a person who is intoxicated"; §125.07(1), Wis. Stats., provides for a forfeiture for furnishing alcohol to a person who is underage.

The Wisconsin legislature recognized that both consumption and furnishing alcohol beverages can cause injuries. The legislative history of §125.035 reveals that the legislature could not make a legislative finding that consumption rather than selling alcohol beverages is the proximate cause of injuries in such circumstances because of the modern concept of proximate cause adopts the "substantial factor" analysis. (R. 40, Exhibit B, R. Tradewell memo, Drafter's Note from the Legislative Reference Bureau.)

The respondents submit the legislative purpose of Ch. 125, Wis. Stats., becomes even more clear when considering the statistical impact intoxicated drivers have on society.

2. Intoxicated drivers inflict great harms on society.

The respondents respectfully request this Court to take judicial notice, pursuant §902.01, Wis. Stats., of the tremendous harm caused when intoxicated persons drive the highways.

Of the recorded 168,995 traffic fatalities involving alcohol in the United States in 1990, ninety-one (91) percent of those fatalities involved drunk drivers 21 years of age or older. Statistical Abstract of the United States, 113th Edition, p. 624 (1993). (R-Ap. 101)

An alcohol-related motor vehicle fatality occurs every 30 minutes, according to the U.S. Department of Transportation estimates. Gastel, Drunk Driving & Liquor Liability, Insurance Information Institute Reports (October 1993) (R. 40, Exhibit A, p. 2). Two out of every five Americans will be involved in an alcohol-related crash during their lifetimes. Id. In 1989 more than 90% of those arrested for driving while intoxicated were more than 24 years old. Statistical Abstract of the United States, 113th Edition, p. 624 (1993).

[1] (R-Ap. 101). Indeed statistics reveal a decline in the number of high school seniors who drink, suggesting that the problem of adults driving while drinking may be more severe than previously realized. Bureau of Justice Statistics, Special Report on Drunk Driving, p. 3 (NCJ 134728, Sept. 1992).

It is not rational, therefore, to impose criminal and civil liability on vendors selling to minors, and only criminal liability on vendors selling to adults. The costs of driving while intoxicated already are too large. Ten years ago the estimated cost to society of drinking and driving amounted to between $21 and $24 billion each year, U.S. Presidential Commission on Drunk Driving, Final Report 1 (1983). (R. 40, Exhibit B). To reduce costs of this magnitude

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[1]Estimated arrests for driving under the influence, by age for 1989

Age	Arrests	Arrests per 100,000 drivers
Total	1,735,000	1,048
Percent distribution	100.0	(X)
16 to 17 years old	1.1	503
18 to 24 years old	8.3	1,607
25 to 29 years old	22.2	1,869
30 to 34 years old	17.6	1,486
35 to 39 years old	12.0	1,123
40 to 44 years old	8.1	872
45 to 49 years old	5.3	725
50 to 54 years old	3.3	558
55 to 59 years old	2.2	400
60 to 64 years old	1.4	262
65 years old and over	1.2	100

requires a serious review of existing policies, and a focus on policies which reduce those costs and deter sale of alcohol to intoxicated adults.

By making sellers and others who supply alcohol more careful about how they serve drinks, liquor liability laws help to reduce the number of drunk drivers.

Forty-one [41] states and the District of Columbia have some form of law holding sellers or servers of liquor liable for the foreseeable damage a drunk person causes while under the influence of alcohol." Gastel, Drunk Driving & Liquor Liability, Insurance Information Institute Reports (October 1993) (R. 40, Exhibit A, p. 2). (Bureau of the Census, Statistical Abstract of the United States 1993, p. 624).

Laws which hold servers of liquor responsible protect human life. "In 1992 the number of people who died in an alcohol-related crash fell almost 11 percent ... from 19,887 in 1991 to 17,699" in 1992. Id.

The respondents submit that the legislative intent in enacting Ch. 125, Wis. Stats. was to protect the public from intoxicated drivers. Inserting within Ch. 125, Wis. Stats. a provision granting civil immunity to people who serve intoxicated adults directly contradicts the fundamental goal of Ch. 125, Wis. Stats.

3. The state has no compelling interest in barring one class of tort victims from equal access to the courts and adequate remedy against responsible liquor vendors who sell alcohol to

intoxicated adults.

Clearly, the legislative purpose for enacting Ch. 125, Wis. Stats., was to protect the public from harms associated with drunk driving. Additionally, the express language of §125.035, Wis. Stats., establishes no doubt that the legislature granted civil immunity to those who furnish alcohol to adults.

No compelling state interest can be established for such a grant of civil immunity. This is particularly true when considered in light of the State's interest in protecting the public from the great harm caused by the act of furnishing alcohol to intoxicated persons. The legislature implicitly acknowledged the interest in protecting liquor vendors from liability is not compelling because they did not grant immunity in all cases. Instead of overruling Sorensen and Koback, §125.035(4) codified those decisions. No compelling state interest can be shown with respect to §125.035(2), Wis. Stats.

4. The legislature created two classifications of tort victims in §125.035, Wis. Stats.

The appellants incorrectly assert that nothing in the legislative history demonstrates that the legislature intended to create different classes of victims by enacting §125.035, Wis. Stats. However, the intent to create different classes of victims is clearly found in the statute itself.

That is, by granting furnishers of alcohol civil immunity

when adults are served and not granting civil immunity when minors are served. Section 125.035(2) and (4), Wis. Stats., expressly create two classes of tort victims, i.e., those injured by drunk adults and those injured by drunk minors. Victims of minors who are served alcohol have a right and remedy for their injuries and damages against the alcohol server, while victims of intoxicated adults do not.

The equal right to adequate remedy in the laws for injuries is a fundamental right of victims of drunk drivers. Section 125.035, Wis Stats. cannot survive strict scrutiny. Clearly, on its face it deprives a class of Wisconsin citizens of their constitutionally protected right to a remedy for all injuries and wrongs. No compelling state interest exists to justify this deprivation of a fundamental right. Therefore, §125.035(2) violates Wis. Const., art.1, sec. 9.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT §125.035, WIS. STATS. IS UNCONSTITUTIONAL BECAUSE IT FAILS TO SATISFY THE RATIONAL BASIS TEST SET FORTH IN OMERNIK

Alternatively, should this court conclude that no fundamental right has been unconstitutionally deprived, respondents contend that §125.035, Wis. Stats., is unconstitutional because no rational basis exists to support the desperate treatment victims injured by negligently served drunk drivers receive under the statute.

A law will be declared unconstitutional if the challenging party establishes that the statute possesses no

rational basis in light of the overall legislative objective. Vance v. Bradley, 440 U.S. 93, 97 (1979); Clark Oil & Refining Corp. v. Tomah, 30 Wis. 2d 547, 553, 141 N.W.2d 299 (1966).

This standard of review forbids a court from substituting its own notions of good public policy for those adopted by the legislature. This does not mean, however, that a rational basis analysis is limited to form and not substance. As the United States Supreme Court has stated, the rational basis standard of review is "not a toothless one." Schweiker v. Wilson, 450 U.S. 221, 234 (1981); State ex rel. Grand Bazaar v. Milwaukee, 105 Wis. 2d 203, 209, 313 N.W.2d 805 (1982).

Equal Protection does not require that all persons be dealt with identically under the law. It does, however, require that once legislative classifications are made, they must relate to the purpose for which the classification is made, in a rational and fair way. Watts, 122 Wis. 2d at 79, citing Baxstrom v. Herold, 383 U.S. 107, 111 (1966) and Walters v. City of St. Louis, 347 U.S. 231, 237 (1954).

The Wisconsin Supreme Court has set forth a five-fold test for reviewing Equal Protection challenges to statutory classificatory schemes in Omernik v. State, 64 Wis. 2d 6, 19, 218 N.W.2d 734 (1974). Under this test:

> "(1) All classification must be based upon substantial distinctions;
>
> (2) the classification must be germane to the purpose of the law;

(3) the classification must not be based on existing circumstances only;

(4) the law must apply equally to each member of the class; and

(5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation."

It is clear from the decisions of Wisconsin appellate courts that legislation need not fail all five parts of the test to be declared unconstitutional. In Grand Bazaar, a challenged ordinance failed parts (1), (2), (3), and (5) of the Omernik test, and was declared unconstitutional. Grand Bazaar, 105 Wis. 2d at 215-217. In Wisconsin Wine and Spirit Institute v. Ley, 141 Wis. 2d 958, 967-968, 416 N.W.2d 914 (Ct. App. 1987), a challenged statute failed parts (3) and (5) of the test, and was declared unconstitutional. Both Grand Bazaar and Wisconsin Wine, like this case, deal with ordinances and statutes governing the sale of liquor.

As stated above, the power of the state over the liquor industry is almost plenary. Wisconsin Wine, 141 Wis. 2d at 970.

Nevertheless, despite this broad power, and despite the difficult burden of the rational basis test, both statutes and ordinances regulating the sale of liquor have been found to be unconstitutional. See Grand Bazaar, 105 Wis. 2d at 215-217; Wisconsin Wine, 141 Wis. 2d at 967-968.

Like the ordinance in Grand Bazaar, and like the statute

in Wisconsin Wine, the statute in this case is unconstitutional because it fails the five-fold test set forth in Omernik. Most significantly, § 125.035, Wis. Stats., fails part (5) of the Omernik test, because the characteristics of each class created by §125.035, Wis. Stats. are not so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation.

In failing part (5) of the Omernik test, §125.035, Wis. Stats. also fails part (1) of the test, because the classifications created by §125.035, Wis. Stats., are not based on substantial distinctions.

The trial court held in this case that §125.035, Wis. Stats. failed parts (1), (2) and (5) of the Omernik test.

It is important to note that, while the trial court held that §125.035, Wis. Stats., was subject to the strict scrutiny test because a fundamental right was involved, the court also held that the statute failed to satisfy the constitutional criteria set forth in Omernik. The trial court stated in pertinent part:

> "The entirety of Ch. 125, Stats., is an exercise of the state's police power in regulating the sale and use of intoxicating beverages, recognized to be potentially dangerous. §125.07(2)(1)(1), Stats., imposes a criminal penalty upon the person who disperses alcohol to "a person who is intoxicated"; §125.07 (1), Stats., provides only a forfeiture for the distribution of alcohol to a person who is under age. The rational basis for granting immunity only to those who serve intoxicated adults cannot be an intent to deter serving intoxicated minors by civil liability, since that belies the statutory

> scheme. Had the legislature intended to be more concerned with serving intoxicated minors than intoxicated adults, such intent should be reflected in the corresponding penalty sections just cited.'
>
> "Furthermore, the graveman of the claim at bar is that the licensee served intoxicating beverages to an intoxicated person whom the licensee allegedly knew would be subsequently operating a motor vehicle; the consumer then was involved in the accident which injured the plaintiffs. The real proximate cause of the injuries (in the classic sense) is the intoxication and coexistent negligence; age of the driver really has no bearing on the claim. When the criminal statute against serving alcoholic beverages to intoxicated persons has already been allegedly violated, it is inconceivable that additional civil liability, were the consumer a minor, would have deterred the defendant in his or her actions whatsoever. The end result becomes arbitrary; a person injured by an intoxicated driver who is 21 years of age who has been served to excess by a bar owner has no recovery against that bar owner, but if the driver is one day younger, the recovery potential exists. The victims' right to recover is not determined by application of the law to the bartender or the victim, but rather to the fortuitous factor of age of the consumer."

(R.43, pp. 3-4)

It is clear §125.035, Wis. Stats., creates two different classes of victims injured by drunk drivers. The operative factor in determining into which class an injured victim is placed is the age of the drunk driver. Injured victims are treated differently under the statute. Victims of adult drunk drivers cannot sue the person who negligently sold alcohol to the intoxicated adult. The statistics cited in this brief clearly show the largest class of drunk driving victims are those injured by drunks 21 years of age or older. On the

other hand, those persons injured by underage drunk drivers have civil recourse against the bartender who served the already intoxicated driver the liquor.

Part (1) and part (5) of the Omernik test require that these two statutorily created classes have some "substantial" difference and distinction between them in order for §125.035, Wis. Stats. to be valid. However, there simply is no rationale distinction between the members of each class created by § 125.035, Wis. Stats. Both classes contain members of the general public. Both classes contain injured persons. Both classifications contain persons injured by drunk drivers. Both classes contain persons injured by drunk drivers who were served by bartenders who were breaking the law. However, one class is permitted to sue that vendor, and the other is not. Therefore, §125.035(2) violates parts (1) and (5) of Omernik.

Part (2) of the Omernik test requires that the classification be germane to the purpose of the law. Equal Protection requires that a distinction may have some relevance to the purpose for which the classification is made. Watts, 122 Wis. 2d at 79. The distinctions made by §125.035, Wis. Stats., fail this test.

The respondents recognize the legislature's power and duty to regulate the sale of alcohol in Wisconsin. The respondents also recognize the legislature's power and duty to try to curtail irresponsible drinking, and especially drunk

driving, in Wisconsin. The respondents know, firsthand, the real human suffering and tragedy that can be caused by drunk drivers.

However, in regulating the sale of alcohol in Wisconsin, the legislature cannot deny Equal Protection under the laws unless there is a valid reason for doing so. The difference in the treatment of the classes, created by § 125.035, Wis. Stats., has no relevance to the purpose for which those classifications were made. Therefore, part (2) of the test set forth in Omernik cannot be satisfied. This case is not about the legitimacy of regulating the sale of alcohol to minors. This case concerns whether a victim of a negligently served drunk driver should be treated differently just because of the drunk's age.

III. PUBLIC POLICY FACTORS SUPPORT DECLARING §125.035, WIS. STATS. UNCONSTITUTIONAL.

Our courts from their earliest examination of legislative socioeconomic regulation have held that Equal Protection demands reasonableness in legislative classifications. Equal Protection came to be seen as requiring some rationality in the nature of the class singled out with the rationality of a particular statute tested by the classifications's ability to serve the purposes intended by the statute. Courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of the statute's purpose.

This rational basis test assumes that all legislation has

a legitimate purpose based on somebody's conception of the general public good. What we are really talking about is the means and ends of each law. If the means chosen burdens one group and benefits another, the statute must be scrutinized. Clearly, the means (i.e., §125.035, Wis. Stats.) burdens one group and benefits another.

When §125.035, Wis. Stats., is scrutinized under these circumstances, no rational purpose can be found. The costs to society are the same regardless of which class the injured victim is in. There is no difference in the horrendous pain and suffering each victim of drunk drivers must endure. In this case, two young teachers have been seriously and permanently disabled. They have had their lives torn away from them. Their hopes and dreams have been horrendously and needlessly destroyed.

If Thomas Stamper had been 20 years old, Alexandria Doering and Kersten Schmelzer would have been treated much differently. That is, they would have had an opportunity to seek adequate redress for their injuries against the negligent alcohol vendor.

Simple and fundamental common law negligence principles apply here. Should the bartender and bar owner have known that Thomas Stamper was intoxicated after drinking in the bar, leaving for a short time to smoke marijuana in his truck, and then returning to the bar asking for more alcohol? Was the

bartender's conduct in serving Thomas Stamper alcohol under such circumstances a substantial factor in causing the injuries and damages in this case?

The "ends" of §125.035, Wis. Stats., granted civil immunity to vendors and furnishers of alcohol to intoxicated adults. The means to that "end" was to divide the class of victims of all drunk drivers into two classes of victims and treat them differently for no valid purpose.

The appellants argue that public policy grounds support the legislative enactment of §125.035, Wis. Stats., drawing support from rationale set forth in Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979).

Appellants argue that the legislative grant of immunity will prevent potential unlimited liability for tavern keepers, social hosts, hotel keepers, and the sponsors of public and private events. Id., 90 Wis. 2d at 492. Remember, adult drunk drivers cause more injuries and cost society far more money than do the minors. It is clear that the statutory and criminal penalties imposed on bartenders and tavern owners serving either intoxicated adults or minors DO NOT DETER THIS CONDUCT FROM OCCURRING. Furthermore, the trial court found that "[t]he rational basis for granting immunity only to those who serve intoxicated adults cannot be an intent to deter serving intoxicated minors by civil liability, since that belies the statutory scheme." (R.43 p.3) This is not an

adequate remedy.

In effect §125.035, Wis. Stats., gives immunity to hard core offenders and encourages sellers to serve drunk adults. One cannot ignore the economic realities of profits and increased sales when a tavern owner knows they cannot be sued for continuing to serve an adult who is drunk. Appellants argue that this statutory immunity must be preserved or there will be the potential for "unlimited liability", more litigation and increased insurance premiums for tavern owners. Appellants ignore the fact that traditional common law negligence rules of duty, breach, causation and damages must be proved.

Appellants ignore the fact that common law principles of joint and several liability in addition to comparative negligence would be applied to each case as well. Who should pay for the costs of the care of Alexandria Doering and Kersten Schmelzer? Should it be the taxpayers of Wisconsin, or one who by virtue of their tortious conduct was a substantial factor in causing the harm?

The appellants offer the rationale that abrogation of immunity would result in run-away litigation. Appellants admit by making this argument that a problem exists. Vendors have been selling and continue to sell alcohol to intoxicated adults. Justice Hallows' dissent in Garcia constitutes a fitting response to this contention. Justice Hallows wrote:

> The argument that extending liability will increase litigation is the standard object made every time such a question is considered. This scare argument of unfounded claims, increased burden on the courts, and the unjustness of putting a person to a defense of a lawsuit has been considered and rejected many times. If accepted, it would bring to a standstill the important and vital work of the court in respect to keeping the common law modern and viable. These same dire results, predicted when this court abolished governmental, parental, hospital, and religious immunities, **have not come to pass**. Logically this ground caves in of its own weight because extended logically no recovery should be allowed in any area because someone may bring a false claim.

Garcia, 46 Wis. 2d at 740-741. (emphasis added)

The appellants offer rationale in support of immunity on the grounds that a liquor vendor might be held negligent per se for serving a person with a blood alcohol level of .1% or higher even though such person revealed no outward signs of intoxication. Again, appellants ignore the reality of common law negligence concepts applied every day by Wisconsin trial courts. A claimant in those circumstances must prove by a preponderance of the credible evidence that the vendor knew or should have known the imbiber was intoxicated and despite this actual or constructive knowledge, continued to sell alcohol to the intoxicated drinker Additionally, the claimant must prove that this conduct was a substantial factor in causing the harm. Those principles should apply in this instance. If applied properly, all issues will be fairly adjudicated in each case.

Section 125.035, Wis. Stats., stands alone in allowing

sweeping civil immunity without adequate alternative forms of redress. It extends such immunity at the extreme cost of leaving a great number of innocent victims without opportunity of adequate remedy through access to the courts without a rational basis for doing so.

When a court recognizes a cause of action in the common law as it did in Sorensen, supra, the rationale underlying Wis. Const. art. 1, sec. 1, is also applicable, especially when dealing with a major social issue of our time.

The fundamental flaw of §125.035, Wis. Stats., is that serving intoxicated adults constitutes a more serious social fault than serving minors because we have more drinking adults than minors in our population. The statute is irrational on those grounds. It provides an avenue of adequate redress for injuries caused by intoxicated minors but not for injuries caused by intoxicated adults. Statistically the number of intoxicated adults served by bar owners and bartenders is much greater than for minors. The potential adverse social consequences are much greater for persons injured by drunk drivers over the age of 21 because there are many more of them. The Wisconsin Constitution requires a remedy for all injuries. This statute unconstitutionally takes that remedy away.

In Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), the court recognized the importance of balancing opposing

public policy views as part of a constitutional analysis:

> We are fully mindful that policy considerations and the balancing of the conflicting interests are the truly vital factors in the molding and application of the common law principles of negligence and proximate causation. But we are convinced that recognition of the plaintiff's claim will afford a fairer measure of justice to innocent third parties whose injuries are brought about by unlawful and negligent sale of alcoholic beverages to minors and intoxicated persons, will strengthen and give greater force to the enlightened statutory and regulatory precautions against such sales and their frightening consequences, and will not place any unjustifiable burdens upon defendants **who can always discharge their civil responsibilities by the exercise of due care**...Liquor licensees, who operate their businesses by way of privilege rather than as of right, have long been under strict obligation not to serve minors and intoxicated persons and if, as is likely, the result we have reached in the conscientious exercise of our traditional judicial function substantially increases their diligence in honoring that obligation then the public interest will indeed be very well served.

Id., 31 N.J. 205-206. (emphasis added)

When the public policy factors are fairly considered and balanced, they support finding §125.035, Wis. Stats., unconstitutional.

IV. CASES FROM OTHER JURISDICTIONS SUPPORT DECLARING §125.035, WIS. STATS. UNCONSTITUTIONAL.

State court decisions from other states reveal close judicial scrutiny of statutes which create different classes of alcohol vendors. Two Minnesota Supreme Court decisions support a willingness to examine legislative classifications that limit the ability of injured parties to present their claims.

A Minnesota law differentiating between sellers of 3.2 beer and other alcoholic beverages was struck down as violative of both the United States and Minnesota Constitutions in Wegan v. Billage of Lexington, 309 N.W. 2d 273, 280 (Minn. 1981). The Wegan court stated in pertinent part:

> "[T]here is no rational basis for distinguishing between persons injured by those intoxicated from drinking 3.2 beer and those intoxicated as a result of consuming stronger liquor. An injured person cares little whether the driver who causes his injuries becomes intoxicated as a result of consuming 3.2 beer or stronger liquor." Id. at 280.

The Wegan court also stated:

> "Indeed a lay person unable to obtain just compensation because of the peculiarities of Minnesota's Dram Shop Law could justifiably conclude that he was the victim of artificial legal word games." Id. at 280.

Three Justices who concurred in Wegan expressed the view that the entire statute lacked validity because there was no rational basis for the legislature to refuse to impose liability upon 3.2 beer vendors. Id. at 281. Clearly, this legislatively created disparity between the liability of the two types of vendors has no rational basis. The same reasoning applies to this case.

Also, in Kossak v. Stalling, 277 N.W.2d 30 (Minn. 1979), the court held that subjecting private tortfeasors to the general six year statute of limitations, but subjecting municipal tortfeasors to a one year statute of limitations

violated Equal Protection. The Kossak court applied the rational basis test in finding a constitutional violation that did not justify the short statute of limitations.

Similarly, Wisconsin's differentiation between vendors to adults and vendors to minors lacks rationality as did Minnesota's distinction between vendors of 3.2 beer and other vendors or treating victims of private tortfeasors differently from victims of government tortfeasors.

V. LEGISLATION IN OTHER JURISDICTIONS SUPPORT DECLARING §125.035, WIS. STATS. UNCONSTITUTIONAL.

Many states have enacted "dram shop acts" explicitly imposing liability on vendors who knowingly serve alcohol to an intoxicated person who injures another. Ala. Code §6-5-71 (1975); Liquor Control Act, Ill. Rev. Stat. ch. 43, §135 (1975); Me. Rev. Stat. Ann. tit. 17, §2002 (1964); Mich. Comp. Laws Ann. §436.22 (Supp. 1985); N.Y. Gen. Oblig. Law §11-101 (McKinney 1978 & Supp. 1984-85); N.D. Cent. Code §5-01-06 (Supp. 1983); Ohio Rev. Code Ann. §4399.01 (Page 1982); Utah Code Ann. §32-11-1 (Supp. 1983); Vt. Stat. Ann. tit. 7, §501 (1972). Minn. Stat. Ann. §340.95 (West Supp. 1984); R.I. Gen. Laws §3-11-1 (1976); Conn. Gen Stat. §30-102 (1985); Wyo. Stat. §12-5-502 (1984); Colo. Rev. Stat. §13-21-103 (1973); Ga. Code Ann. §51-1-18 (1982).

States who have not passed dram shop laws may impose civil liability because criminal statutes similar to § 125.07(2)(a), Wis. Stats. impose duties on vendors of alcohol.

Thus Wisconsin has a firm public policy against serving intoxicants to an already intoxicated person:

> "no person may procure for, sell, dispense or give away alcohol beverages to a person who is intoxicated".

A penalty of imprisonment for up to 60 days and between a $100.00 and $500.00 fine is imposed on violators. This public policy was reinforced by the decision in Sorensen. This public policy remains viable because nothing in the legislative history of §125.035(2), Wis. Stats., suggests that the legislature wanted vendors to serve drinks to intoxicated purchasers.

This statute creates incentives for keeping drunk drivers off the road by penalizing those who contribute to the intoxication. Hence, the trial court judge correctly pointed out that courts should provide the remedy to the tortiously injured victim as Wis. Const. art. 1, sec. 9 guarantees. The principle that remedies should be supplied to the victims despite some legislatively imposed hurdles enjoys solid support. See Kallas Millwork Corp. v. Square D Co., supra.

Wisconsin's policy against selling alcohol to intoxicated persons has support in other jurisdictions. There is ample authority which supports the conclusion that violating a criminal statute by serving intoxicants to an already intoxicated person leads to the civil liability of the seller to those injured by the intoxicated imbiber. In Waynick v.

Chicago's Las Department Store, 269 F.2d 322 (7th Cir. 1959), the court imposed civil liability on an Illinois seller of intoxicants to an Illinois driver who injured a Michigan resident. The Waynick court found that the sale violated Illinois criminal code prohibiting sales of alcohol to an intoxicated person. This statute, the court stated, created a duty to protect members of the public, and the breach of that duty created liability to persons injured by the intoxicated purchaser.

Finally, several jurisdictions confirmed civil liability of vendors to intoxicated persons even where the legislature repealed a statute explicitly providing for civil liability. See Elder v. Fisher, 217 N.E. 2d 847 (Ind. 1966); and Ramsey v. Anctil, 211 A.2d 900 (N.H. 1965) which held:

> "The repeal of the civil damage statute did not abrogate the common law principles of negligence." Id. at 901.

In Rappaport, supra, the court held that even though New Jersey had repealed its dram shop law, a common law negligence action against the tavern which served an intoxicated minor could still be maintained by the estate of the person killed by the drunk driver. The court found that criminal statutes which the defendant had violated gave rise to a duty and the breach of that duty was evidence of negligence.

Similarly, in Jardine v. Upper Darby Lodge, 198 A.2d 550 (Penn. 1964), the court held that repeal of the state dram

shop act in 1951 did not abrogate civil liability of vendors at common law.

Wisconsin has evinced a strong policy stand against serving alcohol to intoxicated consumers. By doing so, Wisconsin has recognized the duty that vendors of alcohol not serve intoxicated patrons. A breach of that duty gives rise to a common law negligence claim on behalf of one injured by the intoxicated drinker. This concept recognizes and supports the greater governmental and societal interest to stop vendors from serving those persons who are drunk.

CONCLUSION

The trial court correctly declared §125.035, Wis. Stats. unconstitutional. The respondents respectfully request that the trial court's judgment be affirmed.

Dated this 19th day of April, 1994.

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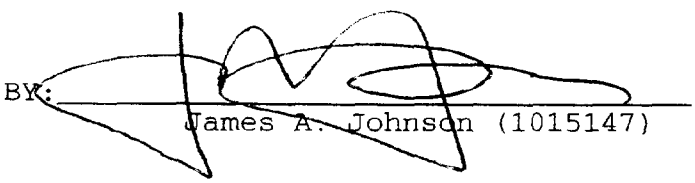

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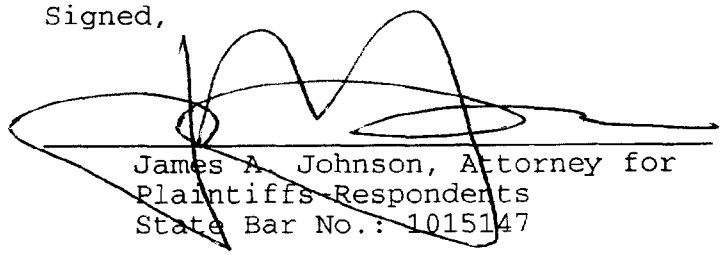
CERTIFICATION

I certify that this brief conforms with the requirements of Rule 809.19(8)(b) and c as to form and length, as follows:

The text of this brief is typed in 12 point Courier and the total length of the brief is 40 pages.

Dated this 19th day of April, 1994.

Signed,



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