STATE OF WISCONSIN
C O U R T O F A P P E A L S
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
disability by her general guardian,
CURTIS M. KIRKHUFF,

CASE NO. 93-3386-LV

Plaintiffs-Respondents,

ONEIDA COUNTY
and CASE NO. 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,

and

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

Defendants-Appellants.

BRIEF OF PLAINTIFFS-RESPONDENTS

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

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STATEMENT OF THE CASE

The Statement of the Case and Statement of Facts submitted by the Appellants is accurate. One addition must, however, be made. Pursuant to §806.04(11), Stats., the Wisconsin Attorney General was served with the Summons and Complaint which, among other things, challenged the constitutionality of §125.035, Stats. (R1, 2, 6) The Attorney General declined to participate in this case.

The Attorney General was also notified of the pendency of the Petition for Leave to Appeal Non-Final Judgment or Order. (See, January 7, 1994, cover letter accompanying Respondents' response to petition.) The Attorney General's office has not appeared in this action.

STATEMENT ON ORAL ARGUMENT

Pursuant to sec. (Rule) 809.22, Stats., Respondent Kersten A. Schmelzer, through her general guardian, Curtis Kirkhuff, requests that this Court grant oral argument in this matter. This case raises the issue of the constitutionality of §125.035, Stats., which purports to grant civil immunity to providers of alcohol except under particular circumstances. The trial court concluded that §125.035 is unconstitutional, relying on the equal protection clauses of the state and federal constitutions. Implicit in the trial court's decision was the concern that the provision served no reasonable governmental purpose. This court may find that it needs to question counsel concerning the statewide implications of the provision. Oral argument will not unjustifiably increase the cost of litigation and is likely to be of more than marginal value.

STATEMENT ON PUBLICATION

Pursuant to sec. (Rule) 809.23, Stats., Respondent Kersten Schmelzer requests that this Court publish its opinion in this matter. This case presents an issue of substantial and continuing public interest. No published case has considered the constitutionality of §125.035, Stats.

ARGUMENT

I. THE TRIAL COURT'S DETERMINATION THAT §125.035, STATS., WAS UNCONSTITUTIONAL AS A DEPRIVATION OF THE EQUAL PROTECTION OF THE LAW IS A QUESTION OF LAW WHICH THIS COURT REVIEWS DE NOVO. IN MATTER OF ESTATE OF BARTHEL, 161 WIS. 2D 587, 592, 468 N.W.2D 689 (1991).

The trial court held that §125.035, Stats., deprives similarly situated persons of substantially equal treatment and, therefore, violates the equal protection clauses of the Wisconsin and United States Constitutions. (R46, R47) The trial court's holding required it to interpret the statutory provision. Questions of statutory interpretation are legal questions subject to de novo review by the Court of Appeals. Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d 768, 774-75, 461 N.W.2d 150 (Ct. App. 1990). Similarly, the constitutionality of a statutory provision presents a question of law subject to de novo review by this Court. In Matter of Estate of Barthel, 161 Wis. 2d 587, 592, 468 N.W.2d 689 (1991). Finally, Wisconsin courts analyze the equal protection clauses of the Wisconsin and United States Constitutions in identical fashion. Funk v. Wollin Silo & Equipment, Inc., 148 Wis. 2d 59, 61, n. 2, 435 N.W.2d 244 (1989).

The Equal Protection Clause of the 14th Amendment of the United States Constitution requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Article I, section 1 of the Wisconsin Constitution proclaims the equality and inherent rights of the people. These two constitutional provisions are substantially equivalent and seek a similar end. Funk, 148 Wis. 2d at 61, n. 2. Simply put, the guarantee of equal protection of the laws is a limit on state authority to devise classifications in law that treat similarly situated persons in a different manner. Stanley v. Illinois, 405 U.S. 645, 652 (1972). Statutory classifications of similarly situated persons must be narrowly drawn to meet only the legitimate goals of the particular statute. In Matter of Estate of Eisenberg, 90 Wis. 2d 620, 628, 280 N.W.2d 359 (Ct. App. 1979).

The evaluation of whether a particular statutory provision comports with equal protection is based upon the type of classification established and the classification's relationship to the provision's goal. This evaluation comprises the heart of this Appeal and will be discussed in detail.

II. SECTION 125.035, STATS., ESTABLISHES A CLASSIFICATION SYSTEM IN WHICH ONE GROUP OF VICTIMS OF INTOXICATED PERSONS AND ALCOHOL PROVIDERS MAY RECOVER DAMAGES FROM THE PROVIDER OF ALCOHOL. HOWEVER, A SIMILARLY SITUATED GROUP OF VICTIMS IS DEPRIVED OF THE OPPORTUNITY TO RECOVER DAMAGES FROM THE PROVIDER OF ALCOHOL.

This Court's starting point in analyzing the equal protection claim is a determination of the classification scheme which §125.035, Stats., establishes. The provision immunizes providers of alcohol beverages from damages sought by victims of intoxicated persons unless the intoxicated person instrumental in causing the damage was a minor at the time the provider served or sold alcohol to him or her. Thus, victims of adult intoxicated consumers are deprived of the opportunity to recover damages from a provider/tortfeasor under §125.035. In a case such as this one in which Kersten Schmelzer and Alexandria Doering were gravely injured by an adult intoxicated driver, Thomas Stamper, who had been served alcohol beverages by the defendant tavern owner and employee at a time at which they knew that Mr. Stamper was intoxicated and under the influence of marijuana, §125.035 operates to deprive the plaintiffs of recovery

from the provider/tortfeasor. Had Mr. Stamper been under the age of 21, however, Ms. Schmelzer and Ms. Doering would be entitled to recover damages from the provider.

III. THE TRIAL COURT WAS CORRECT IN CONCLUDING THAT THE STRICT SCRUTINY ANALYSIS IS APPLICABLE TO THE EQUAL PROTECTION CHALLENGE WHICH THIS CASE RAISES. ARTICLE I, SECTION 9, OF THE WISCONSIN CONSTITUTION GUARANTEES EACH CITIZEN A REMEDY FOR WRONGS. BECAUSE §125.035, STATS., PURPORTS TO DEPRIVE CITIZENS OF THE RIGHT OF ACTION AGAINST A TORTFEASOR, IT IMPLICATES THE CITIZEN'S ARTICLE I, SEC. 9, CONSTITUTIONAL RIGHT AND DEPRIVES THE CITIZEN OF A FUNDAMENTAL, CONSTITUTIONALLY PROTECTED RIGHT.

Article I, section 9, of the Wisconsin Constitution provides:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obligated to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

This provision has been interpreted to mean that every person is entitled to a day in court. Acharya v. AFSCME, Council 24, WSEU, 146 Wis. 2d 693, 700, 432 N.W.2d 140 (Ct. App. 1988). When an individual's potential claim is extinguished by law prior to the time the claim is actually in existence, the constitutional provision is likely offended. See, Kallas Millwork Corp., v. Square D Co., 66 Wis. 2d 382, 393, 225 N.W.2d

454 (1975); Rosenthal v. Kurtz, 62 Wis. 2d 1, 12-13, 231 N.W.2d 741 (1974). The purported immunity provision of §125.035, Stats., has the effect of extinguishing Kersten Schmelzer's claim and depriving her of her day in court. Thus, Article I, sec. 9, is implicated by the operation of §125.035.

The Appellants suggest that Article I, section 9, Wis. Cons., is not implicated in this matter because, at common law, an individual did not have a cause of action against a provider of alcohol for damages that individual sustained as a result of a third party's consumption of the provided alcohol. However, the Appellants interpretation over-simplifies the analysis and ignores critical legal precedent.

In Kwiatkowski v. Capitol Indemnity Corp., 157 Wis. 2d at 775-777, this Court recognized that the Supreme Court had changed the "common law rule of nonliability in third party actions," id. at 776, in Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984), and Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985). "This rule was premised upon the theory that the provider's act was not a proximate cause of the injury." Id. at 772. Thus, the change in the common law was the theory of proximate cause as it applied to third party

intoxication cases. The change in the common law was not one in which a new cause of action was created. The negligence cause of action was well established in the common law. The Appellants incorrectly assert that third party negligence actions as they concern alcohol providers are "new" causes of action not recognized by the common law. The only "new" component of the analysis is the court's recognition that providing alcohol may constitute a proximate cause of the injury, and therefore, negligence cannot be dismissed as a matter of law.

The cases which the Appellants cite in support of their argument that the Article I, section 9, Wis. Cons., provision is not implicated are not analogous to this case. In Vandervalden v. Victoria, 177 Wis. 2d 243, 252, 502 N.W.2d 276 (Ct. App. 1993), this Court declined to allow redress by a nonviable fetus. The basis for the court's determination that Article I, section 9, did not operate to allow redress was that a nonviable fetus is not a "person" and, therefore, is not entitled to legal protection. Article I, section 9, does not create new rights. To allow a non-person to pursue a remedy would, in fact, create a new right. Id. at 252. Kersten Schmelzer has an existing right to sue

in negligence which cannot be impeded under Article I, section 9.

The remaining cases which the Appellants cite are Kruschke v. City of New Richmond, 157 Wis. 2d 167, 174-75, 458 N.W.2d 832 (Ct. App. 1990), and Stanhope v. Brown County, 90 Wis. 2d 823, 845, 280 N.W.2d 711 (1979). Neither of these cases supports the Appellants' position, as each deals with concepts of sovereign and governmental immunity--immunity that was present at common law. Further, these immunity provisions apply to all potential victims, not simply selected victims.

The trial court was fully justified in concluding that a constitutional right is implicated in this matter. Thus, it properly concluded that the equal protection issue must be analyzed pursuant to the requisite "strict scrutiny" standard.

IV. SECTION 125.035, STATS., CANNOT WITHSTAND THE REQUISITE STRICT SCRUTINY ANALYSIS. IT DOES NOT PROMOTE A COMPELLING GOVERNMENTAL INTEREST. IN MATTER OF ESTATE OF EISENBERG, 90 WIS. 2D 620, 628, 280 N.W.2D 359 (1979). THE TRIAL COURT CORRECTLY FOUND §125.035 UNCONSTITUTIONAL.

In cases in which a constitutional right is implicated by a classification system, the "strict

scrutiny" equal protection analysis is applied.[1] See, In Matter of Estate of Eisenberg, 90 Wis. 2d at 628. This test requires that the classification be "'necessary to promote compelling governmental interests....'" Id. (Citation omitted.) The notion of a compelling governmental interest is couched in terms of a "pressing public necessity." Korematsu v. United States, 323 U.S. 215, 216 (1944).

Section 125.035, Stats., dismally fails the "compelling governmental interest" test. The effect of the statute is to deprive one class of Wisconsin citizens of the opportunity to obtain damages from a negligent tortfeasor. This effect is directly contrary to the interests of the state in insuring that injured persons are compensated by the individual or entity causing the damage. Quite simply, there is no state or governmental interest promoted by §125.035.; rather, there are merely some private interests, that of tavern owners and operators, that are protected at the expense

[1] Although the trial court concluded that a constitutional right was implicated and that strict scrutiny should apply, it actually examined the statute under the "rational basis" test and determined that the statute did not meet that lesser standard.

of the vast majority of Wisconsin citizens.[2] No rationale can be hypothesized to justify a conclusion that §125.035 promotes a compelling state interest. There is no "pressing public necessity" for the classification.

V. SHOULD THIS COURT DETERMINE THAT ARTICLE I, SECTION 9, WIS. CONS., DOES NOT SUPPORT THE CONCLUSION THAT §125.035, STATS., IMPLICATES A CONSTITUTIONAL RIGHT, APPLICATION OF THE RATIONAL BASIS EQUAL PROTECTION ANALYSIS RESULTS IN A SIMILAR CONCLUSION THAT §125.035 IS UNCONSTITUTIONAL. SECTION 125.035 IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.

In determining whether a statutory classification other than one that involves a suspect classification or fundamental right violates the equal protection of the laws, the

> general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). While equal protection review of a classification that is not suspect and does not

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[2] Analogizing this case to United States Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973), a legislative desire to protect a politically popular group "cannot constitute a legitimate [let alone a compelling] governmental interest." To withstand scrutiny, the provision must include independent "considerations in the public interest." Id. at 534-35.

implicate a fundamental right requires a lower standard of review than that of strict scrutiny, the rational basis review is, most assuredly, "'not a toothless one.'" Wisconsin Wine and Spirit Institute v. Ley, 141 Wis. 2d 958, 964, 416 N.W.2d 914 (Ct. App. 1987) (Citation omitted). A legitimate governmental interest connotes "[some independent] considerations in the public interest...." United States Department of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973) (bracketing in original).

The Wisconsin Court fashioned the "Omernik" test to use in reviewing challenges to classification schemes. It provides:

> (1) All classifications 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.

Omernick v. State, 64 Wis. 2d 6, 19, 218 N.W.2d 734 (1974). The section 125.035, Stats., classification scheme fails the first, second, and fifth elements of the Omernick test. Thus, the scheme does not comport with equal protection strictures.

There is no legitimate governmental interest in allowing some innocent victims of intoxicated consumers and alcohol providers to obtain redress while denying such opportunity to other victims. The Appellants have suggested that the scheme somehow protects minors. Nothing could be further from the truth. Providers of alcohol are the only protected persons and entities under §125.035, Stats. With the exception of bartenders who are under the management and control of an adult or minors illegally possessing and providing alcohol, the providers are adults. See, §§125.04(5)(a)4, 125.04(5)(c), 125.04(5)(d)2, 125.17, 125.32(2), 125.68, and 125.07(4), Stats. Minors do not receive any protection from §125.035 unless they are the victims of underage drinkers served by alcohol providers.[3]

There truly is no legitimate governmental interest in depriving victims of remuneration for their damages suffered at the hands of negligent tortfeasors. Further, there is no substantial difference between the class of victims injured at the hands of intoxicated minor tortfeasors and their alcohol providers and the

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[3] Kwiatkowski, supra, further illustrates that sec. 125.035, Stats., does not protect minors. There the Court concluded that minors who consume the alcohol cannot recover damages from the provider who served them.

class of victims injured at the hands of intoxicated adult tortfeasors and their alcohol providers. Section 125.035, Stats., allows an injured person's recovery to hinge on serendipity and chance, rather than on notions of duty, breach of duty, and proximate cause.

The purpose of the law is questionable at best. The only beneficent interpretation is that the legislature mistakenly perceived the provision as somehow protecting minors. A more cynical interpretation is that the special interests, flat out, won. As Moreno, supra at 534-35, explains, a "legitimate state interest" requires an element of positive public policy. Section 125.035, Stats., has none.

The fifth Omernick element is blatantly missing. "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." Omernick, 64 Wis. 2d at 19 (emphasis added). The characteristics of the respective classes do not differ at all. Rather, it is the characteristics of one of their tortfeasors that differ. Application of the Omernick test to the classification scheme can only

result in this Court's affirmation of the trial court's determination that §125.035, Stats., is unconstitutional.

The irrationality of §125.035, Stats., is, perhaps, best demonstrated by the facts of this case. Kersten Schmelzer and Alexandria Doering were critically injured by Thomas Stamper who had been provided alcohol at a time at which the provider knew that Stamper was intoxicated and under the influence of marijuana. Yet, §125.035, Stats., if constitutional, operates to deprive Schmelzer and Doering of recovery from the negligent provider. If Thomas Stamper had been under twenty-one years of age, Schmelzer and Doering could recover.

Section 125.07(1), Stats., prohibits the distribution of alcohol to underage persons. It sets up a series of penalties which are dependent upon the number of times a provider has been convicted of a violation. §125.07(1)(b). For a first offense, a convicted provider is subject to a forfeiture of not more than $500 if he or she has not had a violation within twelve months. §125.07(1)(b)2.a. Jail time is never authorized as a penalty for violating the underage provision. Further, §125.07(1)(b) does not include mandatory penalty provisions.

Section 125.07(2)(a)1, Wis. Stats., prohibits the distribution of alcohol to "a person who is intoxicated." Section 125.07(2)(b) provides:

> Any person who violates par. (a) shall be fined not less than $100 nor more than $500 or imprisoned for not more than 60 days or both.

(Emphasis added.) Regardless of whether a provider has had any violations in the past, that provider shall, not may, be fined at least $100 or imprisoned or both. Unlike underage violations, those violating this provision are subject to a term of imprisonment. Thus, it is obvious that the legislature has concluded that it is more egregious to provide alcohol to an intoxicated person than it is to provide alcohol to an underage person. This conclusion demonstrates that the legislature has a greater interest in prohibiting the distribution of alcohol to intoxicated persons than it does in prohibiting the distribution to underage persons. This, of course, is perfectly sound, as it is inherently dangerous to provide additional alcohol to an intoxicated person, while it is simply possibly dangerous to provide alcohol to an underage person. Once that underage person becomes intoxicated, the stiffer penalties of §125.07(2)(b) become effective.

In light of the legislature's conclusion that provision of alcohol to intoxicated persons is more offensive to the state interest than is provision to underage persons, the §125.035(4), Wis. Stats., exception to civil immunity granted only to the class of victims of underage drinkers bears no rational relationship to the legitimate governmental interest of discouraging violations of §125.07, Wis. Stats., and protecting the welfare of victims. The classification scheme is, thus, patently arbitrary, for the classification is not "'reasonable and practical in relation to the [legitimate] objective.'" State v. McManus, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989) (citation omitted). Victims injured by persons who were provided alcohol when they were already intoxicated are similarly situated to those who were victims of underage drinkers, yet the legislature has attempted to deny the first class a remedy for their injuries and wrongs. The classification scheme cannot withstand any level of equal protection analysis.

VI. THE ONLY POSSIBLE MEANS OF SAVING §125.035, STATS., IS TO EXTEND ITS EXCEPTION BENEFIT TO VICTIMS OF PROVIDERS WHO HAVE VIOLATED §125.07(2), STATS., BY PROVIDING ALCOHOL TO AN INDIVIDUAL WHO WAS ALREADY INTOXICATED AT THE TIME OF PROVISION.

Should this Court determine that the classification scheme is simply underinclusive, it may extend the benefits of the statutory provision to those erroneously excluded. Heckler v. Mathews, 465 U.S. 728, 738-39, (1984). Although Kersten Schmelzer asserts that §125.035, Stats., is unconstitutional on its face, she also requests that this Court, if it determines that the provision can be saved, extend the exception from immunity benefit to victims of providers who provided alcohol to persons whom the providers knew were intoxicated at the time the alcohol was provided. Expanding the exception at least allows victims of providers who have violated §125.07, Stats., to obtain redress.[4]

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[4] It is notable that those states cited in D. Nichols, Drinking/Driving Litigation (1994), §38.01, n. 11, which have enacted legislation limiting providers' liability, by and large, except victims of providers who have served underage or already intoxicated persons.

CONCLUSION

The trial court was correct in concluding that §125.035, Stats., violates equal protection and is unconstitutional. The classification system does not survive the strict scrutiny or the rational basis test. For this reason, Kersten Schmelzer respectfully requests that this Court affirm the trial court.

Respectfully submitted this 22nd day of April, 1994.

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CERTIFICATION

I hereby certify that this brief conforms to the form and length requirements of Rules (secs.) 809.19(8)(b) and (c), Stats., for a brief and appendix produced in typewritten form (10 spaces per inch, non-proportional font, double spaced, 1-1/2" margin on left and 1" margin on other three sides).

Dated at Madison, Wisconsin, this 22nd day of April, 1994.

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