

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 25, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1302

Cir. Ct. No. 2005CV545

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JACQUELYN L. TOMBERLIN,

PLAINTIFF-APPELLANT,

v.

ADOLPH COORS COMPANY, ADVANCED BRANDS & IMPORTING COMPANY, ANHEUSER-BUSCH, INC., ALLIED DOMEQ CANADA, LTD., ALLIED DOMEQ (HOLDINGS) PLC, ALLIED DOMEQ INTERNATIONAL HOLDINGS B.V., ALLIED DOMEQ OVERSEAS (EUROPE) LIMITED, ALLIED DOMEQ OVERSEAS HOLDINGS LIMITED, ALLIED DOMEQ OVERSEAS LIMITED, ALLIED DOMEQ SPIRITS & WINE AMERICAS, INC., ALLIED DOMEQ NORTH AMERICA CORP., ALLIED DOMEQ PLC, ALLIED DOMEQ SPIRITS & WINE USA, INC., BACARDI BOTTLING CORPORATION, BACARDI-MARTINI PRODUCT DEVELOPMENT, INC., BACARDI CARIBBEAN CORPORATION, BACARDI CORPORATION, BACARDI (DELAWARE) INVESTMENTS, INC., BACARDI GLOBAL BRANDS, INC., BACARDI BRANDS MANAGEMENT, INC., BACARDI GLOBAL BRANDS PROMOTIONS, INC., BACARDI INTERNATIONAL LIMITED, BACARDI GROUP, BACARDI-MARTINI B.V., BACARDI-MARTINI, INC., BACARDI-MARTINI & ROSSI HOLDINGS N.V., BACARDI NORTH AMERICA, INC., BACARDI LIMITED, BACARDI & COMPANY LIMITED, BACARDI USA, INC., BECK'S NORTH AMERICA, INC., BEER INSTITUTE, INC., BOSTON BEER COMPANY, BOURBON WAREHOUSE RECEIPTS, INC., BROWN-FORMAN CORPORATION, BROWN-FORMAN BEVERAGES WORLDWIDE, CASTELTON

HOLDINGS, INC., COORS BREWING COMPANY, DIAGEO-GUINNESS USA, INC., DIAGEO, INC., DIAGEO INVESTMENT CORPORATION, DIAGEO US LIMITED, DIAGEO HOLDINGS LIMITED, DIAGEO PLC, DIAGEO NORTH AMERICA, INC., FORTUNE BRANDS, INC., FOSTERS USA LLC, FRESNO BEST BRANDS, INC., FUTURE BRANDS LLC, GENERAL BEVERAGE (HOLDINGS) B.V., GENERAL BEVERAGE EUROPE B.V., GRAMAT HOLDINGS CORPORATION, GRAND METROPOLITAN PUBLIC LIMITED COMPANY, GRAND METROPOLITAN HOLDINGS LIMITED, GRAND METROPOLITAN INTERNATIONAL HOLDINGS LIMITED, GUINNESS AMERICA, INC., GUINNESS ENTERPRISES, INC., GUINNESS UDV FLORIDA, INC., HEINEKIN HOLDING NV, HEINEKIN INTERNATIONAL BV, HEINEKEN N.V., HEINEKEN USA, INC., HUEBLEIN HOLDINGS CORPORATION, HIRAM WALKER AV CORPORATION, HIRAM WALKER G&W, INC., HIRAM WALKER-GOODERHAM & WORTS LTD., INBEV USA LLC F/K/A LABATT USA LLC, JACOB LEINENKUGEL BREWING COMPANY, INC., JBB FUND F. COMPANY, INC., JBB SPIRITS (NEW YORK), INC., JIM BEAM BRANDS CANADA LP, JIM BEAM BRANDS EXPORT, INC., JIM BEAM BRANDS WORLDWIDE, INC., JIM BEAM BRANDS COMPANY, JOHN DE KUYPER & SON, INC., KHG, LLC, KOBRAND CORPORATION, LABATT BREWING COMPANY LTD., LATROBE BREWING COMPANY LLC, MAKER'S MARK DISTILLERY, INC., MARK ANTHONY BRANDS, INC., MARK ANTHONY BREWING, INC., MARK ANTHONY INTERNATIONAL, MARK ANTHONY BRANDS LTD., MARK ANTHONY GROUP, MARTINI & ROSSI CORPORATION, MARTLET IMPORTING COMPANY, INC., MAST-JAEGERMEISTER AG, MILLER BREWING COMPANY, MILLER PRODUCTS COMPANY, MBC ACQUISITION CORPORATION, MBC1, LLC, MBC2, LLC, MILLER BREWERIES EAST, INC., MILLER BREWERIES WEST LP, BLITZ-WEINHARD COMPANY LLC, MILLER BREWING INTERNATIONAL, INC., MILLER BREWING 1855, INC., SABMILLER HOLDINGS, INC., PEAK WINES INTERNATIONAL, INC., PILSNERS URQUELL USA, INC., REGAL CHINA CORPORATION, SAB MILLER PLC, SABMILLER HOLDINGS, LTD., SAMUEL ADAMS BREWERY COMPANY LTD D/B/A THE TWISTED TEA BREWING COMPANY, SANTA MARIA ADVERTISING CORPORATION, SCHENLEY INDUSTRIES, INC., SCHENLEY INTERNATIONAL COMPANY, INC., SIDNEY FRANK IMPORTING COMPANY, INC., SKYY SPIRITS LLC, SOMERSET GROUP, INC., SOMERSET PARTNER, INC., TENNESSEE DICKEL DISTILLING COMPANY, UDV (SJ) LIMITED, UNITED DISTILLERS MANUFACTURING, INC., UNITED DISTILLERS NORTH AMERICA,

**INC., UNITED DISTILLERS USA, INC., WOOD TERMINAL COMPANY
AND 65664 BC LTD.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Jacquelyn Tomberlin appeals from a judgment dismissing her class action complaint against numerous entities engaged in the manufacture and sale of alcohol. Her complaint sought damages and injunctive relief for what she describes as the “deliberate and reckless targeting of underage consumers in the design, advertising, and marketing of alcoholic beverages.” She alleged standing as a Wisconsin parent of a child subjected to the defendants’ marketing efforts, which have resulted in economic loss to her family. The trial court concluded that her complaint failed to allege any injury to a legally protected right, and dismissed her action for lack of standing to bring it. We affirm.

¶2 Tomberlin alleged that the defendants have, since at least 1982, deliberately designed and marketed alcoholic beverage products to appeal to minors. She alleged causes of action including deceptive trade practices, unjust enrichment, negligence, public nuisance and fraudulent concealment. She requested certification of a “guardian class,” consisting of Wisconsin parents or guardians “whose funds were used to purchase alcoholic beverages marketed by Defendants which were consumed without their prior knowledge by their children” since 1982, and an “injunctive class” consisting of “parents and

guardians of all children currently under the age of 21.” She demanded money damages and an injunction against the marketing practices alleged in the complaint. On the defendants’ motion to dismiss, the trial court concluded that Tomberlin had failed to allege an actionable injury independent of the injury to her child, and lacked standing in the absence of a protected legal interest. She challenges that ruling on appeal.

¶3 We employ a two-step standing analysis. *Norquist v. Zeuske*, 211 Wis. 2d 241, 247-48, 564 N.W.2d 748 (1997). We first determine whether the plaintiff has suffered a threatened or actual injury, and we then determine whether the interest asserted is recognized by law. *Id.* (citations omitted). We review the issue of a plaintiff’s standing de novo, as a question of law. *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶12, 275 Wis. 2d 533, 685 N.W.2d 573.

¶4 Tomberlin’s complaint failed to allege a compensable or actionable injury. Tomberlin expressly disavows any derivative claim based on damages her child may have suffered by spending money on or using alcohol, and in fact concedes that her child could not claim economic injury for spending money on alcohol. Instead, she asserts that she suffered a direct, compensable monetary loss when her child, without her knowledge or consent, illegally purchased alcoholic beverages with money the child received from her. However, Tomberlin cites no authority, and we are aware of none, for the proposition that a parent may recover damages from one who persuades a child to spend the child’s own money for a product or purpose the parent disfavors. She contends otherwise by asserting that the funds in her case are those she provided to her child for support and maintenance, “in satisfaction of a parent’s obligations under Wisconsin law.” Even if that were the case, it is not alleged in Tomberlin’s complaint nor inferable

from it, and we therefore do not treat it as a fact in evaluating her standing. *See John Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180 (although reviewing court “must accept the facts pleaded as true, it cannot add facts in the process of liberally construing the complaint”). And even if we did accept it as fact, Tomberlin fails to demonstrate that a parent who provides funds for support suffers a compensable injury if the child receiving them then spends them on something other than their intended purpose. We note Tomberlin’s argument here for standing does not depend on the alleged use of the provided funds to buy alcohol. Her contention that she is compensably injured if her child misspends money provided for support and maintenance is equally valid, or invalid, where the child is persuaded to spend the money on candy, video games or baseball cards, for example.

¶5 The second direct injury Tomberlin asserts is “the injury to Tomberlin’s interest as a parent in protecting her children against Defendants’ advertising and marketing targeted at her children.” As Tomberlin notes, “(a) parent’s interest in the parent-child relationship and in the care, custody, and management of his or her child is recognized as a fundamental liberty interest protected by the Fourteenth Amendment.” *See Steven V. v. Kelley H.*, 2004 WI 47, ¶22, 271 Wis. 2d 1, 678 N.W.2d 856. However, we agree with the trial court that marketing products to children, as alleged here, does not actionably interfere with the parent-child relationship. As the trial court noted,

there is no allegation that defendants have somehow prevented the plaintiff from monitoring what communications her minor child has been exposed to, from communicating with her minor child to counter the images and influences presented by mass advertising and marketing of defendants’ products, or from exercising control over her minor child’s finances to prevent the child from purchasing defendants’ products.

Consequently, Tomberlin did not assert an interest recognized and protected by law, and therefore does not have standing to maintain this action.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

