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SC 95067

In the Missouri Supreme Court

Virginia Payne, Respondent

v.

Ashley Markeson, Appellant

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Jack R. Grate
Division 17

Appellant Ashley Markeson's Substitute Appellant's Reply Brief

Susan Ford Robertson #35932
J. Zachary Bickel #58731
The Robertson Law Group, LLC
1903 Wyandotte, Suite 200
Kansas City, MO 65108
816-221-7010 (phone)
816-221-7015 (fax)
zachb@therobertsonlawgroup.com
susanr@therobertsonlawgroup.com

Attorneys for Appellant Ashley Markeson

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

Table of Contents

Table of Cases and Authorities 3

Argument 6

Conclusion 15

Appendix 17

Certificate of Service and Compliance 18

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

Table of Cases and Authorities

Cases

Adams v. Children's Mercy Hospital,

832 S.W.2d 898 (Mo. banc 1992) 12

Auto Owners (Mut.) Ins. Co. v. Sugar Creek Memorial Post No. 3976,

123 S.W.3d 183 (Mo.App. 2003) 7, 11

Ball v. American Greetings Corp.,

752 S.W.2d 814 (Mo.App. 1988) 15

Brewster v. Gauss, 37 Mo. 528 (Mo. 1866) 11

Clark v. City of Humansville, 348 S.W.2d 369 (Mo.App. 1961)..... 8

Collins-Camden P'ship, L.P. v. County of Jefferson,

425 S.W.3d 210 (Mo.App. 2014) 9

Dailey v. Vogl, 173 S.W. 707 (Mo.App. 1915)..... 6

Dibrill v. Normandy Assocs., Inc.,

383 S.W.3d 77 (Mo.App. 2012) 7

Diehl v. O'Malley, 95 S.W.3d 82 (Mo. banc 2003) 7

Dunaway by Dunaway v. Fellous,

842 S.W.2d 166 (Mo.App. 1992) 9

Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo.App. 1988) 9

Elfrink v. Burlington Northern R. Co.,

845 S.W.2d 607 (Mo.App. 1992) 12

Environmental Energy Partners, Inc. v. Siemens Bldg. Technologies, Inc., 178 S.W.3d 691 (Mo.App. 2005) 15

Forbes v. Forbes, 987 S.W.2d 468 (Mo.App. 1999) 15

Hays v. Royer, 384 S.W.3d 330 (Mo.App. 2012) 10

Hopkins v. Powers, 497 N.E.2d 757 (Ill. 1986) 8, 9

In re Mills, 539 S.W.2d 447 (Mo. banc 1976)..... 8

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)..... 11

L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P., 75 S.W.3d 247 (Mo. banc 2002) 9

Lockwood v. Schreimann, 933 S.W.2d 856 (Mo.App. 1996)..... 12

Lowery v. Kansas City, 85 S.W.2d 104 (Mo. 1935) 7

Mitchell v. Health Culture Co., 162 S.W.2d 233 (Mo. 1942) 6

Nokes v. HMS Host USA, LLC, 353 S.W.3d 6 (Mo,App. 2011) 7

Norman v. Wright, 100 S.W.3d 783 (Mo. banc 2003) 11, 12

Osborne v. Purdome, 244 S.W.2d 1005 (Mo. banc 1952) 8

Rigby Corp. v. Boatmen's Bank and Trust Co., 713 S.W.2d 517 (Mo.App. 1986) 9

Sanders v. Ahmed, 364 S.W.3d 195 (Mo. banc 2012) 7, 10, 12

Spalding v. Citizens' Bank, 78 Mo.App. 374 (Mo.App. 1899)..... 11

State ex rel. Missouri Parks Ass'n v. Missouri Dept. of Nat. Resources, 316 S.W.3d 375 (Mo.App. 2010) 14

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

State ex rel. SLAH, L.L.C. v. City of Woodson Terrace,

378 S.W.3d 357 (Mo. banc 2012) 7, 8

Van Vacter v. Hierholzer, 865 S.W.2d 355 (Mo.App. 1993)..... 10

Missouri Statutes and Rules and Other Materials

§537.053 R.S.Mo.....6, 10-13

§537.060 R.S.Mo..... 6, 12, 14

§537.080 R.S.Mo..... 10

§538.230 R.S.Mo..... 12

§538.300 12

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

I.

The trial court erred in denying Markeson's motion to reduce the jury's verdict of $350,000.00 actual damages to $0.00 in accordance with §537.060 R.S.Mo because the court misapplied the law in that MM Investments was a joint tortfeasor and there is no public policy or limitation expressed in either §537.053 or §537.060 that prevents Markeson's entitlement to a reduction of the jury's verdict either because the co-defendant was the dram shop who provided her alcohol or because she was intoxicated at the time of the accident.

Ashley Markeson is entitled to a reduction of the jury's verdict from $350,000 to $0.00 in accordance with §537.060 because MM Investments was a joint tortfeasor. Nothing in Virginia Payne's brief supports the trial court's denial of the reduction.

Payne argues liability under the Act is "exclusive *sui generis* non-tort liability." (Respondent's Substitute Brief at 11, 12.) Payne's argument lacks support. First, the Dram Shop Act creates and permits a cause of action against a dram shop "by or on behalf of any person who has suffered personal injury or death." Section 537.053.2 R.S.Mo. (emphasis added). The action is a tort.[1]

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[1] A tort is defined as "a violation of a right in rem…created by law and not by an act of the parties." Mitchell v. Health Culture Co., 162 S.W.2d 233, 237 (Mo. 1942). "The very definition of tort…denotes an injury inflicted otherwise than by a mere breach of contract..." Dailey v. Vogl, 173 S.W. 707, 712 (Mo.App. 1915).

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

Second, even though the cause of action was created by statute, it is still a tort. Duties forming the basis for a tort action may be created by common law or by statute. Lowery v. Kansas City, 85 S.W.2d 104, 110 (Mo. 1935); Diehl v. O'Malley, 95 S.W.3d 82, 87 (Mo. banc 2003); Dibrill v. Normandy Assocs., Inc., 383 S.W.3d 77, 84 (Mo.App. 2012) (negligence per se); Sanders v. Ahmed, 364 S.W.3d 195, 203, 204 (Mo. banc 2012) (wrongful death).

Third, though the Act may have limitations on who can bring the claim, it is still a tort. This Court has recognized the power of the legislature to create and limit a cause of action, such as it did with the creation of the Dram Shop Act. Auto Owners (Mut.) Ins. Co. v. Sugar Creek Memorial Post No. 3976, 123 S.W.3d 183, 190, 191 (Mo.App. 2003) ("The Missouri Dram Shop Act is a legislative prohibition against dramshop liability coupled with the creation of a limited cause of action."); Nokes v. HMS Host USA, LLC, 353 S.W.3d 6, 10 (Mo,App. 2011) ("Missouri's dram shop statute, §537.053, provides the exclusive remedy for third persons injured as a result of the sale of liquor to an intoxicated driver.") (emphasis added).

Fourth, the Act is not "sui generis," as Court has defined the term to mean when an action's nature is "neither legal nor equitable." State ex rel. SLAH, L.L.C. v. City of Woodson Terrace, 378 S.W.3d 357, 361 (Mo. banc 2012). Examples of actions this Court has characterized as "sui generis" include:

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- Declaratory judgment actions: "designed to supply a deficiency in our remedial proceedings and are not intended to be a substitute for all existing remedies." Id.;
- Attorney disciplinary proceedings: "A disciplinary proceeding is not a 'criminal prosecution'; it is a proceeding 'sui generis,' in the nature of an inquiry by the court into the conduct of its officer for the protection of the public, the courts and the profession." In re Mills, 539 S.W.2d 447, 450 (Mo. banc 1976); and
- Contempt proceedings: "Contempt proceedings are *sui generis*, being neither civil actions nor prosecutions for offenses within the ordinary meaning of such terms" Osborne v. Purdome, 244 S.W.2d 1005, 1012 (Mo. banc 1952).

There is nothing in Missouri's jurisprudence that would first, characterize the Dram Shop Act as "sui generis," or second, even if the term was used, it would not necessarily mean an action brought under the Act for damages for injuries sustained was "non-tort." Clark v. City of Humansville, 348 S.W.2d 369, 372, 373 (Mo.App. 1961) (appellate court determining that action did not sound either in contract or fraud, but belonged to a class of actions "sui generis in nature and sounds in tort.")

Payne relies on Hopkins v. Powers, 497 N.E.2d 757 (Ill. 1986) for her argument that if liability arises exclusively from the dram shop act it is "sui generis non-tort liability." (Respondent's Substitute Brief at 11.) However, Illinois' treatment of its dram

shop act and its use of the term "sui generis" is not relevant or binding on this Court[2]. Missouri courts have never equated "sui generis" with "non-tort." The terms are not mutually exclusive and Payne's reliance upon Hopkins is not dispositive to this Court's interpretation of Missouri's dram shop and the offset statutes.

Payne's reliance upon cases discussing proximate cause as a necessary element of proof in tort cases is irrelevant to the issues on appeal. Rigby Corp. v. Boatmen's Bank and Trust Co., 713 S.W.2d 517 (Mo.App. 1986); L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P., 75 S.W.3d 247 (Mo. banc 2002); Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo.App. 1988) and Collins-Camden P'ship, L.P. v. County of Jefferson, 425 S.W.3d 210 (Mo.App. 2014) discuss what a plaintiff must prove to recover in tort—not whether the actions at issue were torts.

Payne also argues that since the Dram Shop Act "eliminates" any requirement to prove proximate cause, the action is not a tort. Payne's argument lacks merit. The Act does not eliminate proximate cause as to liability against the dram shop. To the contrary—it defines the proximate cause relevant to establishing liability against a dram

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[2] As noted in Dunaway by Dunaway v. Fellous, 842 S.W.2d 166, 168 (Mo.App. 1992), the Illinois Dram Shop Act is in direct conflict with Missouri's public policy in prohibiting dram shop liability, which is to make the consumption rather than the furnishing of alcoholic beverages the proximate cause of injuries inflicted by intoxicated persons. Illinois' public policy treats furnishing the alcohol as the proximate cause of the injuries and places the responsibility on tavern operators.

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

shop. The Act, entitled: "537.053. Sale of alcoholic beverage may be proximate cause of personal injuries or death--requirements--(dram shop law)" states:

> 2. Nothwithstanding subsection 1 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises when it is proven by clear and convincing evidence that the seller knew or should have known that intoxicating liquor was served to a person under the age of twenty-one years or knowingly served intoxicating liquor to a visibly intoxicated person."

Proximate cause is "merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct." Van Vacter v. Hierholzer, 865 S.W.2d 355, 358 (Mo.App. 1993). The General Assembly's removal of "if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person" does not mean the requirement to prove proximate cause has been eliminated, or that the action is now not a tort.

Section 537.080 (the statutory cause of action for wrongful death) contains no language within the statute requiring proximate cause, yet it is a necessary element in order to recover for the tort. (App. A-1); Sanders v. Ahmed, 364 S.W.3d 195, 208 (Mo. banc 2012) (to make a submissible case for wrongful death, a plaintiff must show "but-for" and "proximate" causation). Similarly, in construing the version of the dram shop act at issue in the instant appeal, the appellate court in Hays v. Royer, 384 S.W.3d 330,

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 30, 2015 - 09:04 PM

337 (Mo.App. 2012) held: "notwithstanding the proximate cause language in subsection 1, section 537.053 provides that a cause of action exists against any person licensed to sell intoxicating liquor by the drink, when liquor is sold…to someone who is visibly intoxicated and an injury or death results." This is consistent with this Court's interpretation of the prior version of the Act: "In the context of dram shop liability, the death…[or injury] may have been the direct result of the negligence of the intoxicated driver as well as the wrongdoing of the tavern operator in serving liquor to an obviously intoxicated person." Kilmer v. Mun, 17 S.W.3d 545, 551 n. 19 (Mo. banc 2000); Auto Owners (Mut.) Ins. Co. v. Sugar Creek Memorial Post No. 3976, 123 S.W.3d 183, 192 (Mo.App. 2003) ("The Dram Shop Act provides the exclusive, limited cause of action available to third parties whose injuries were proximately caused by a tavern's service of alcoholic beverages to an obviously intoxicated patron.") The court misapplied the law in finding Markeson was not entitled to a reduction of the verdict for the reason dram shop liability did not arise in tort.

In addition, Payne does not provide any relevant public policy argument to defeat Markeson's entitlement to the reduction of the verdict. There is no limiting language expressed in §537.053 R.S.Mo. prohibiting Markeson from a §537.060 reduction of the jury's verdict either because the co-defendant was the dram shop or because she was intoxicated at the time of the accident. This Court recognizes: "Section 537.060 applies to all tort actions." Norman v. Wright, 100 S.W.3d 783, 785 (Mo. banc 2003); see Brewster v. Gauss, 37 Mo. 528, 529 (Mo. 1866) (the statute is general in its nature and

applies to all judgments for private wrongs); Spalding v. Citizens' Bank, 78 Mo.App. 374, 383 (Mo.App. 1899) (same).

The General Assembly was clear in prohibiting the intoxicated driver from suing the dram shop for any injuries sustained by the intoxicated driver. §537.053.4. If the General Assembly had wanted to prohibit an intoxicated driver from obtaining a reduction under §537.060, it could have—but did not—so provide. "If the legislature has the constitutional power to create and abolish causes of action, the legislature also has the power to limit recovery in those causes of actions." Sanders, 364 S.W.3d at 203, quoting, Adams v. Children's Mercy Hospital, 832 S.W.2d 898, 907 (Mo. banc 1992). For example, in Norman, this Court found the General Assembly specifically listed in §538.300 (App. A-3) certain sections of chapter 537 that "do not apply" to improper-health-care torts and as §537.060 was not listed, if the parties agreed not to apportion fault under §538.230 (App. A-2), then §537.060 applies. Id., at 785. Similarly, as the General Assembly did not list §537.060 as prohibited by the use of an intoxicated individual, Markeson is entitled to its benefit.

None of the cases cited by Payne are relevant or persuasive. Cases addressing the public policy arguments regarding collateral sources have no relevance to the issue before this Court. See, e.g. Elfrink v. Burlington Northern R. Co., 845 S.W.2d 607, 615 (Mo.App. 1992) (declining to apply reduction for uninsured motorist benefits received); Lockwood v. Schreimann, 933 S.W.2d 856, 861 (Mo.App. 1996) (declining to permit a reduction for workers' compensation benefits received). There is no prohibition in either

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statute or any public policy prohibiting Markeson from obtaining a reduction. The trial court misapplied the law in denying Markeson a reduction of the jury's verdict.

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II.

The trial court erred in entering judgment finding that in the event the trial court reduced the jury's verdict of actual damages Markeson would not be entitled to a reduction of the punitive damages award because the finding was premature in that the trial court has never granted the reduction or entered judgment reducing the jury's verdict of actual damages. If the trial court reduced the jury's verdict for actual damages to zero, and entered judgment on the verdict, it would be ripe for Markeson to file a motion for judgment notwithstanding the verdict raising the issue of whether the punitive damages award should be set aside, but until the jury's verdict is actually reduced to zero, it is premature for the trial court to make its advisory statement.

Payne misses the point of Markeson's point on appeal. The trial court has never reduced the actual award in accordance with §537.060 and entered an amended judgment. Absent granting the reduction and entering an amended judgment, there has never yet been a basis for Markeson to file a post-judgment motion requesting review and relief on the punitive damages award <u>in light of</u> the reduction of the award of actual damages. The trial court did not make a "conditional" ruling with respect to the punitive damages award. It could not have done so because Markeson had never filed a post-judgment request seeking relief (because the court had never granted the reduction and entered an

amended judgment). See Environmental Energy Partners, Inc. v. Siemens Bldg. Technologies, Inc., 178 S.W.3d 691, 713 (Mo.App. 2005) (JNOV appropriate when a jury verdict awards punitive damages but no actual damages); Forbes v. Forbes, 987 S.W.2d 468, 469, 470 (Mo.App. 1999) (JNOV proper after jury assessed no actual damages); Ball v. American Greetings Corp., 752 S.W.2d 814, 820 (Mo.App. 1988) (correction of verdict and judgment for punitive damages not manifest to the trial court until after decision on post-trial motions).

Instead, the trial court's "ruling" on the punitive damages portion of the judgment was an improper advisory opinion. See State ex rel. Missouri Parks Ass'n v. Missouri Dept. of Nat. Resources, 316 S.W.3d 375, 386 (Mo.App. 2010) (trial court ruling addressing disputes not yet in existence constitutes an improper advisory opinion). This Court should reverse the trial court's ruling as to the punitive damages award as premature and constituted an improper advisory opinion.

Conclusion

Wherefore, for the above set forth reasons, Appellant Ashley Markeson moves that this Court reverse the trial court's finding as to the punitive damages award as an improper advisory opinion and to reverse and remand with specific directions to reduce the verdict from $350,000 to $0.00 and enter judgment thereon and for whatever further relief this court deems fair and just.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON #35932
The Robertson Law Group, LLC

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1903 Wyandotte, Suite 200
Kansas City, MO 64108
816-221-7010 (phone)
816-221-7015 (fax)
susanr@therobersonlawgroup.com
zachb@therobertsonlawgroup.com
Attorneys for Appellant Ashley Markeson

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Appendix—electronically filed separately

Section 537.080 R.S.Mo A-1

Section 538.230 R.S.Mo A-2

Section 538.300 R.S.Mo A-3

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Certificate of Service and Compliance

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on October 30, 2015, a copy of Appellant's Substitute Reply Brief and Appendix were served by electronic mail upon John Turner and Christopher Sweeny at turner-sweeny@msn.com at as Attorneys for Respondent Virginia Payne. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 2,780 words, excluding the cover, the certification and appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON, Attorney