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**SC 95067**

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**In the Missouri Supreme Court**

**Virginia Payne, Respondent**

**v.**

**Ashley Markeson, Appellant**

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

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**Appellant Ashley Markeson's Substitute Appellant's Brief**

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### Statement of the Issues

This is a second appeal between the parties. In the first appeal, the appellate court ruled the trial court was wrong in finding it had lost jurisdiction to rule on Ashley Markeson's Motion to Reduce the Jury's Verdict and the trial court "ought not have entered its Judgment for the full amount of the jury's verdict on July 9, 2012, without first ruling on Markeson's claims for the section 537.060 reduction." Payne v. Markeson, 414 S.W.3d 530, 543 (Mo.App. 2013). The appellate court ruled Markeson had timely and properly pleaded and proven entitlement to the reduction, but remanded for the trial court to consider Virginia Payne's legal arguments that there were statutory and public policy grounds sufficient to deny Markeson's entitlement to the reduction. Payne, 414 S.W.3d at 536-543.

Following the appellate court's remand, the trial court entered judgment against Markeson again denying her Motion to Reduce the Jury's Verdict, but this time for the following reasons: 1) co-defendant MM Investments Inc.'s liability was based on the dram-shop liability (a statutory claim) and is not a settlement with a person liable in tort; 2) Markeson, who was the intoxicated person, is not entitled to a reduction under §537.060 R.S.Mo.; and 3) allowing an intoxicated driver to reduce a verdict would be contrary to public policy as expressed in §537.053 R.S.Mo. The trial court also made a finding that in the event it would have granted a reduction of the actual damages award, Markeson would not be entitled to a reduction of the punitive damages award.

The trial court misapplied the law and the judgment should be reversed. There are no statutory or public policy grounds with respect to §537.053 R.S.Mo. (Missouri's dram shop statute) or §537.060 R.S.Mo. that would operate to deny Markeson's entitlement to have the jury's verdict of actual damages reduced by reason of the prior settlement Markeson reached with MM Investments, Inc., a joint tortfeasor. Payne's action against MM Investments, Inc. arises in tort and there is no public policy or limitation in the language in either statute prohibiting Markeson's entitlement to a reduction of the jury's verdict, even if the co-defendant was the dram shop that provided her alcohol and even if she was intoxicated at the time of the accident. This Court should reverse and remand with specific directions for the trial court to grant Markeson's motion and to reduce the jury's verdict of actual damages from \$350,000.00 to \$0.00.

The trial court's judgment contains an additional error. The trial court ruled that in the event it had reduced the verdict for actual damages, the jury's award of punitive damages would be unaffected. The trial court's ruling is premature and constitutes an improper advisory opinion. The trial court denied outright Markeson's request for a reduction of the jury's verdict. Judgment was entered against her for the full amount of the jury's verdict. The trial court's ruling as to what might happen with respect to the punitive damages award if the actual damages portion of the judgment was reduced constitutes an improper advisory opinion. The trial court has twice denied Markeson's request to reduce the jury's verdict of actual damages, and it has never entered judgment reducing the jury's verdict of actual damages from \$350,000 to \$0.00. This has never

occurred and the trial court's ruling as to a possible future ruling is improper. This Court should find the trial court's statement as to the punitive damages award is premature and remand with specific directions to reduce the jury's verdict of actual damages to zero.

### **Jurisdictional Statement**

This appeal is from the trial court's judgment entered on May 6, 2014 denying Markeson's Motion to Reduce the Jury's Verdict pursuant to §537.060 R.S.Mo. by reason of a prior settlement by Payne with co-defendant MM Investments, Inc. On May 16, 2014, Markeson appealed to the Missouri Court of Appeals for the Western District. On May 5, 2015, the appellate court reversed the trial court's judgment and remanded with directions for the jury's verdict to be reduced. On August 18, 2015, this Court accepted transfer after a timely request by Virginia Payne on June 16, 2015 and has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

### **Statement of Facts**

This is Markeson's second appeal on her request for a reduction of the jury's verdict by reason of a pretrial settlement made between Payne and co-defendant MM Investments, Inc. Previously, on September 10, 2013, the appellate court entered its opinion reversing the trial court's prior judgment and denial of Markeson's Motion to Reduce the Jury's Verdict. Payne v. Markeson, 414 S.W.3d 530 (Mo.App. 2013) (A-3-17.) The appellate court determined that the trial court retained jurisdiction over the case to rule on Markeson's Motion to Reduce the Verdict and the trial court "ought not have

entered its Judgment for the full amount of the jury's verdict on July 9, 2012, without first ruling on Markeson's claims for the section 537.060 reduction." Id., at 543.

Following the appellate court's remand, the parties filed supplemental suggestions in support of and in opposition to Markeson's motion. (L.F. 15-25.) The trial court again denied Markeson's Motion to Reduce the Jury's Verdict and entered judgment against Markeson for \$350,000.00 actual damages for three reasons: 1) MM Investments Inc.'s liability was based on the dram-shop liability (a statutory claim) and is not a settlement with a person liable in tort; 2) Markeson, who was the intoxicated person, is not entitled to a reduction under §537.060 R.S.Mo.; and 3) allowing an intoxicated driver to reduce a verdict would be contrary to public policy as expressed in §537.053 R.S.Mo. The trial court also made a finding that in the event it would have granted a reduction of the actual damages award Markeson would not have been entitled to a reduction of the punitive damages award. (L.F. 26, 27; A-1, 2.)

Markeson asserts in this appeal that the trial court misapplied the law in its determination and the following facts are relevant for the appellate court's de novo review.

Originally Virginia Payne brought an action against Ashley Markeson for injuries Payne sustained in an automobile accident caused by Markeson. (WD 75771 L.F. 1-4.) Payne filed a third amended petition adding MM Investments, Inc., d/b/a Doc Holliday's Bar & Grill alleging it was negligent in serving alcohol to Markeson, causing her to be intoxicated, and that the negligence and fault of MM Investments, Inc. directly and in

combination with Markeson's actions in driving while intoxicated, caused Markeson's injuries. (WD 75771 L.F. 27-34; A-17-24.) Both defendants pleaded a right to a reduction pursuant to §537.060 R.S.Mo. in the event Payne settled with the other co-defendant. (WD 75771 L.F. 36, 66, 205.)

Prior to trial, Payne settled with MM Investments, Inc. for \$475,000. Payne, 414 S.W.3d at 534. She went to trial against Markeson and the jury returned a verdict against Markeson for \$350,000 in actual damages and \$700,000 punitive damages. (WD 75771 L.F. 199, 200.) Prior to trial, Payne filed a Motion for Reduction or Set-Off pursuant to §537.060 R.S.Mo. (WD 75771 L.F. 158-160.) Following the jury's verdict, Markeson filed a Motion to Reduce the Jury's Verdict pursuant to §537.060. (WD 75771 L.F. 207-209; A-25-27.) The trial court ruled that it had lost jurisdiction to rule on Markeson's motion and entered judgment against Markeson for the full amount of the jury's verdict. (WD 75771 L.F. 219, 262-263.)

Upon appeal, the appellate court determined that the trial court erred in determining that it had lost jurisdiction to rule on Markeson's motion and that the trial court "ought not have entered its Judgment for the full amount of the jury's verdict on July 9, 2012, without first ruling on Markeson's claims for the section 537.060 reduction." Payne, 414 S.W.3d at 543. The appellate court ruled that Markeson had timely and properly pleaded and proven entitlement to the reduction, remanded for the trial court to consider Payne's legal arguments that Markeson was not entitled to a reduction by virtue of a settlement reached with co-defendant MM Investments, Inc.

because its liability arose from §537.053 (Missouri’s dram shop statute) and because Markeson was intoxicated at the time of the accident that injured Payne. Payne, 414 S.W.3d at 536-543.

Markeson asserted that there was no statutory or public policy ground in either §537.060 R.S.Mo. or §537.053 R.S.Mo. to prohibit her entitlement to a reduction of the jury’s verdict by reason of Markeson’s settlement with MM Investments, Inc. (L.F. 15-18.) Markeson asserted that liability under §537.053 R.S.Mo. is based in tort and there is nothing in either statute wherein the legislature has enacted provisions that would prohibit Markeson from obtaining a reduction of the jury’s verdict by reason of Payne’s settlement with a joint tortfeasor. (L.F. 15-18.)

Payne asserted that MM Investments was not “liable in tort,” citing cases from other jurisdictions that interpreted other states’ dram shop statutes and concluded that the statutes had no relation to common law liability or any theory in tort. (L.F. 19-25.) Payne also asserted that it would be against Missouri’s public policy to permit Markeson to obtain a reduction of the verdict, relying on §537.053.4 that states that no person over 21 “may assert a claim for damages for personal injury or death against the seller of intoxicating liquor by the drink for consumption on the premises arising out of the person’s voluntary intoxication.” (L.F. 21, 22.)

Markeson asserted that a claim for contribution was not a “claim for damages for personal injury or death” and therefore there was no prohibition in §537.053 that would

prevent Markeson from obtaining a reduction of the verdict, which is a satisfaction of an amount owed. (L.F. 16.)

On May 5, 2015, the appellate court reversed the trial court's judgment concluding there were no statutory or public policy grounds prohibiting application of §537.060 to reduce the compensatory damage award. (Op. 5-21.) The appellate court reversed with directions for the trial court to reduce the actual damages portion of the jury's verdict. (Op. at 21.)

On June 16, 2015, Payne moved for this Court to accept transfer, which was sustained on August 18, 2015.

## Points Relied On

### 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.**

Payne v. Markeson,

414 S.W.3d 530 (Mo.App. 2013).

Kilmer v. Mun,

17 S.W.3d 545 (Mo. banc 2000).

Dunaway by Dunaway v. Fellous,

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

Sanders v. Ahmed,

364 S.W.3d 195 (Mo. banc 2012).

§537.053 R.S.Mo.

§537.060 R.S.Mo.

## 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 and constituted an improper advisory opinion 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.

Robinson v. State Highway & Transp. Comm'n,

24 S.W.3d 67 (Mo.App. 2000).

Environmental Energy Partners, Inc. v. Siemens Bldg. Technologies,

178 S.W.3d 691 (Mo.App. 2005).

Forbes v. Forbes,

987 S.W.2d 468 (Mo.App. 1999).

Ball v. American Greetings Corp.,

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

## Argument

### 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.**

This is the second appeal between the parties. Previously, the appellate court reversed the trial court's judgment against Markeson ruling that the trial court erred as a matter of law in determining it had lost jurisdiction to rule on Markeson's Motion to Reduce the Jury's Verdict by reason of Payne's prior settlement with co-defendant MM Investments, Inc. Payne v. Markeson, 414 S.W.3d 530 (Mo.App. 2013). The appellate court ruled that Markeson had timely and properly pleaded and proven entitlement to the reduction, but remanded for the trial court to consider Virginia Payne's legal arguments that there were statutory and public policy grounds sufficient to deny Markeson's entitlement to the reduction. Payne, 414 S.W.3d at 536-543.

Following the appellate court's remand, the trial court entered judgment against Markeson again denying her Motion to Reduce the Jury's Verdict, but this time for the

following reasons: 1) co-defendant MM Investments Inc.'s liability was based on the dram-shop liability (a statutory claim) and is not a settlement with a person liable in tort; 2) Markeson, who was the intoxicated person, is not entitled to a reduction under §537.060 R.S.Mo.; and 3) allowing an intoxicated driver to reduce a verdict would be contrary to public policy as expressed in §537.053 R.S.Mo.

The trial court misapplied the law and the judgment should be reversed. There are no statutory or public policy grounds with respect to §537.053 R.S.Mo. (Missouri's dram shop statute) or §537.060 R.S.Mo. that would operate to deny Markeson's entitlement to have the jury's verdict of actual damages reduced by reason of the prior settlement Markeson reached with MM Investments, Inc., a joint tortfeasor. Payne's action against MM Investments, Inc. arises in tort and there is no public policy or limitation in the language in either statute prohibiting Markeson's entitlement to a reduction of the jury's verdict, even if she was intoxicated at the time of the accident. This Court should reverse and remand with specific directions for the trial court to grant Markeson's motion and to reduce the jury's verdict of actual damages from \$350,000.00 to \$0.00.

#### **A. Standard of review**

The interpretation of a statute is a question of law and appellate review is de novo. Wagner v. Bondex International, Inc., 368 S.W.3d 340, 357 (Mo.App. 2012); Heckadon v. CFS Enterprises, Inc., 400 S.W.3d 372, 377, 378 (Mo.App. 2013); see also Gibson v. City of St. Louis, 349 S.W.3d 460, 465 (Mo.App. 2011); Kivland v. Columbia Orthopaedic Group, LLP, 331 S.W.3d 299, 311 (Mo. banc 2011).

**B. Markeson is entitled to a reduction of the jury's verdict pursuant to §537.060 by the plain meaning of the statute.**

This court's primary rule of statutory interpretation is to give effect to legislative intent reflected in the plain language of the statute, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning. Wagner, 368 S.W.3d at 357; Nokes v. HMS Host USA, LLC, 353 S.W.3d 6, 10 (Mo. banc 2011); Parktown Imports, Inc. v. Audi of America, Inc., 278 S.W.3d 670, 672 (Mo. banc 2009). Section 537.060 provides in pertinent part:

When an agreement by release...is given in good faith to one or two or more persons liable in tort for the same injury or wrongful death,...such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. (A-30.)

A reduction under section 537.060 "is a satisfaction of an amount owed" and this statute implements the common law rule that a plaintiff is entitled to one satisfaction for a wrong. Norman v. Wright, 100 S.W.3d 783, 785 (Mo. banc 2003); Gibson, 349 S.W.3d at 465. Markeson is entitled to a reduction of the jury's verdict of actual damages from \$350,000 to \$0.00 by virtue of Payne's settlement MM Investments pursuant to §537.060 R.S.Mo. Brown v. Kneibert Clinic, 871 S.W.2d 3 (Mo.App. 1993); Clark v. Booth, 660 S.W.2d 316, 317 (Mo.App. 1983).

Section 537.060 R.S.Mo codifies a subset of the common law defense of satisfaction. Wagner, 368 S.W.3d at 358 Stevenson v. Aquilla Foreign Qualifications

Corp., 326 S.W.3d 920 (Mo.App. 2010). It provides a “mechanism for reducing an award of actual damages by amounts that were settled upon by other joint tortfeasors also responsible for damages and by the damaged party.” Wagner, 368 S.W.3d at 358, quoting Hogan v. Armstrong World Industries, Inc., 840 S.W.2d 230, 236 (Mo.App. 1992). The statutory directive contained in §537.060 R.S.Mo. is clear and Markeson is entitled to a reduction of the jury’s award of actual damages to be reduced from \$350,000 to \$0.00.

**C. Markeson is entitled to the reduction because liability under the Dram Shop Act is liability in tort.**

The trial court misapplied the law in ruling that Markeson was not entitled pursuant to §537.060 R.S.Mo. to a reduction of the jury’s verdict because Payne’s settlement with MM Investments, Inc. was based on the dram-shop law, which the trial court found was a “statutory claim” and not a settlement with a person “liable in tort.”<sup>1</sup>

**1. What is a tort?**

This Court has defined a tort to be “a civil or private wrong or injury.” Merrill v. City of St. Louis, 83 Mo. 244, 255 (Mo. banc 1884). It has been described as “a

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<sup>1</sup> Payne has never contested in either appeal application of §537.060 by reason of no “joint” liability between the co-defendants. Instead, her argument has always centered on whether liability against the dram shop co-defendant arises “in tort.” Cf. Stevenson, 326 S.W.3d at 928 (joint liability not proven when accidents were three years apart); Gibson, 349 S.W.3d at 467, 468 (joint liability not proven for separate occurrences producing separate injuries).

violation of a right in rem, a right which the plaintiff has as against all persons whom he comes into contact. A right which is 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; or, to be more nicely accurate, a tort is one’s disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract has established between the parties.” Dailey v. Vogl, 173 S.W. 707, 712 (Mo.App. 1915).

Torts are divided into two general classes: “personal torts” which involve injuries to the person (body, reputation or feelings) and “property torts” which involve injury or damage to property (whether realty or personalty). Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 422 (Mo.App. 1965). The appellate court correctly recognized in its opinion at \*6 that tort law focuses on the three basic elements of “duty, breach and damages.” L.A.C. ex rel. D.C. Ward Parkway Shopping Center Co., L.P., 75 S.W.3d 247, 257 (Mo. banc 2002).

**2. Duties forming the basis for a tort action may arise by common law or statute.**

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). A duty arising by statute does not indicate it action outside of the realm of tort law. As the appellate court noted, were it otherwise, there would be no such tort theory as negligence per se. (Op. at \*10 n.12 “[T]he violation of a

statute, which is shown to be the proximate cause of the injury, is negligence per se.” Dibrill v. Normandy Assocs., Inc., 383 S.W.3d 77, 84 (Mo.App. 2012), quoting Imperial Premium Fin., Inc v. Northland Ins. Co., 861 S.W.2d 596, 599 (Mo.App. 1993.)

The legislature has the constitutional power to create and abolish causes of action—including torts. Sanders v. Ahmed, 364 S.W.3d 195, 203, 204 (Mo. banc 2012) (wrongful death is a statutory cause of action independent of the predicate tort). Missouri recognizes torts that are created either by common law or by statute. Yellow Freight Systems, Inc. v. Mayor’s Comm. On Human Rights of the City of Springfield, 791 S.W.2d 382, 384 (Mo. banc 1990) (this Court recognizing when the violation of an ordinance may establish an element of tortious conduct in “common law or statutory tort action”); Jitterswing, Inc. v. Francorp, Inc., 311 S.W.3d 828, 831 (Mo.App. 2010) (court determining that that a forum selection clause did not apply to the statutory tort claim for the unauthorized practice of law); Thomas v. Siddiqui, 869 S.W.2d 740, 741 (Mo. banc 1994) (this Court determining it could abolish the common law tort of criminal conversation because it arose from common law and was not a statutory tort); Hope v. Nissan North America, Inc., 353 S.W.3d 68, 85 (Mo.App. 2011) (court noting that the claims for breach of warranty were contract claims and not statutory torts).

### **3. Dram shop liability is based in tort.**

Liability under §537.053 R.S.Mo is based in tort.<sup>2</sup> In Kilmer v. Mun, 17 S.W.3d 545, 550-553, fn 19 (Mo. banc 2000) this Court held: “In the context of dram shop liability, the death of plaintiffs’ decedent 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. See MAI 19.01, 33.03 and Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993).” See Simpson v. Kilcher, 749 S.W.2d 386, 394 (Mo. banc 1988) (referring to dram shop claim as a “rule of tort law”, overruled on other grounds by Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000); Elliot v. Kesler, 799 S.W.2d 97, 103, 104 (Mo.App. 1990) (punitive damages held to be applicable in a dram shop case).

Payne argued before the trial court that MM Investments, Inc. was not “liable in tort” relying on Hopkins v. Powers, 497 N.E.2d 757 (Ill. 1986) wherein the Illinois

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<sup>2</sup> Payne recognized the dram shop’s liability being based in tort. Originally Virginia Payne brought an action against Ashley Markeson for injuries Payne sustained in an automobile accident caused by Markeson. (WD 75771 L.F. 1-4.) Payne filed a third amended petition adding MM Investments, Inc., d/b/a Doc Holliday’s Bar & Grill alleging it was negligent in serving alcohol to Markeson, causing her to be intoxicated, and that the negligence and fault of MM Investments, Inc. directly and in combination with Markeson’s actions in driving while intoxicated, caused Markeson’s injuries. (WD 75771 L.F. 27-34; A-17-24.)

Supreme Court determined a dram shop was not “liable in tort.” However, 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. Dunaway, 842 S.W2d at 169. Also of note in Dunaway is appellate court’s use of the principal contacts rule of §145 of the Restatement (Second) on Conflicts of Law providing that “the rights and liabilities of parties with respect to an issue in tort” in a choice of law analysis on whether Missouri’s or Illinois’ dram shop law should apply with respect to plaintiff’s claim for personal injuries.

#### **4. Dram shop liability has a basis in common law.**

In addition, Missouri has never treated its dramshop statute as “exclusive sui generis non-tort liability” as Illinois has treated its very different dram shop statute. Payne’s reliance upon cases such as Hopkins and State v. Therrien, 830 A.2d 28, 36 (Vt. 2003) and Feuerhurm v. Ertelt, 286 N.W.2d 509, 511 (N.D. 1979) is not persuasive. Other courts may have found their particular state’s statutes “sui generis” without any relation to any common law liability or to any theory of tort. Missouri appellate courts have not agreed that this type of analysis applies to Missouri’s dram shop liability.

In Lambing v. Southland Corp., 739 S.W.2d 717, 718 (Mo. banc 1987), this Court determined that Missouri’s General Assembly’s repeal of its dram shop act in 1934 did

not alter the common law, instead, it restored questions of dram shop liability to the arena of the common law. This Court in Lambing recognized that in Carver v. Schafer, 647 S.W.2d 570 (Mo.App. 1983), the appellate court found a common law duty in tavern owners to refrain from serving intoxicated patrons and imposed liability for injuries resulting from a breach of that duty. Lambing, 739 S.W. at 719; Carver, 647 S.W.2d at 575. The court in Carver reasoned that the legislature's actions in enacting dram shop legislation were indicative of Missouri public policy expressed even more fundamentally "in the general law of torts." Id.

In Kilmer, the Court disagreed with the Legislature's description of the history of Missouri's common law with respect to dram shop liability. The legislature states in §537.053.1 that: "it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons." (A-28.) In Kilmer, this Court recognized that its holding in Skinner v. Hughes, 13 Mo. 440 (1850) that a dram shop owner who sold intoxicating liquors to a slave without permission from the slave's master was liable to the slave's owner for all damage occasioned by the consumption of the intoxicating liquors, has never been overruled. Kilmer, 17 S.W.3d at 551; See Moore v. Riley, 487 S.W.2d 555, 558 (Mo. 1972). In tracing the history of dram shop liability in Missouri, the appellate court concluded since the Dram Shop Act has common law origins, it is not a purely statutory cause of action and it is "ultimately irrelevant whether

such a distinction has any bearing on the question of whether dram shop liability sounds in tort.” (Op. at \*11-13.)

**5. Proximate cause is still a required element to find liability.**

Payne also argued before the trial court since the Dram Shop Act eliminates any requirement to prove proximate cause, the action is not a tort. Payne is incorrect. 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 shop. Although subsection 1 expressly identifies Missouri’s common law rule that “furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons,” the first phrase in subsection two—the subsection authorizing a cause of action expressly alters the common law rule by providing: “Notwithstanding 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...”

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 Act may eliminate common law liability, but it expressly creates liability (and by virtue of the creation it defines proximate cause) against dram shops. “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.” Auto Owners, 123 S.W.3d at 192 (emphasis added). The legislature has the power 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).

The appellate court recognized in its opinion at \*8: “Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with.” Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 862 (Mo. banc 1993). The appellate court noted 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.” (Op. at \*8, quoting, Kilmer, 17 S.W.3d at 551 n. 19.) The appellate court noted Payne’s interpretation (eliminating proximate cause) ignores the introductory language of subsection two and “is plainly an absurd result and one that ignores the introductory language of subsection 2.” (Op. at \*9.) The appellate court correctly recognized “We must presume that the legislature does not enact meaningless provisions or intend absurd results.” Star Dev. Corp. v. Urgent Care Assocs., Inc., 429 S.W.3d 487, 496 (Mo.App. 2014).

There is nothing in the language of either statute that prohibits Markeson from a reduction of the jury's verdict. The dram shop's liability arises from tort. Payne's settlement with co-defendant MM Investments, Inc. was a settlement with a joint tortfeasor entitling Markeson to the reduction. The trial court's judgment should be reversed.

**C. There is no limiting language or public policy expressed in §537.053 R.S.Mo prohibiting Markeson from a reduction of the jury's verdict.**

There is no limiting language or public policy expressed in §537.053 R.S.Mo. prohibiting Markeson from a §537.060 R.S.Mo. 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. The appellate court in its opinion at \*15 recognized: "Public policy may be understood as the working out of the values, norms and ideals of a society through the legal forms and the decision making process at all levels of government." Murphy v. Timber Trace Ass'n, 779 S.W.2d 603, 607 (Mo.App. 1989). Common law and legislation can both serve as sources of current public policy. Id. The appellate court noted in its opinion at \*15: "Whether [a] new [legislative] enactment represents an extension or departure from extant public policy may be determined by reference to prior and existent statutes." Id.

- 1. The public policies behind §537.060 are to encourage settlements and to implement the common law rule that a plaintiff is entitled to one satisfaction for a wrong.**

A reduction under §537.060 R.S.Mo. “is a satisfaction of an amount owed” and this statute implements the common law rule that a plaintiff is entitled to one satisfaction for a wrong. Norman v. Wright, 100 S.W.3d 783, 785 (Mo. banc 2003); Gibson v. City of St. Louis, 349 S.W.3d 460, 465 (Mo.App. 2011). The courts recognize that §537.060 R.S.Mo codifies a subset of the common law defense of satisfaction. Wagner v. Bondex International, Inc., 368 S.W.3d 340, 358 (Mo.App. 2012); Stevenson v. Aquilla Foreign Qualifications Corp., 326 S.W.3d 920, 925 (Mo.App. 2010). It provides a “mechanism for reducing an award of actual damages by amounts that were settled upon by other joint tortfeasors also responsible for damages and by the damaged party.” Wagner, 368 S.W.3d at 358, quoting Hogan v. Armstrong World Industries, Inc., 840 S.W.2d 230, 236 (Mo.App. 1992). The public policy under §537.060 R.S.Mo. is to encourage settlements. Lowe v. Norfolk and Western Railway Co., 753 S.W.2d 891, 895 (Mo. banc 1988); State ex rel. Curators of the University of Missouri v. Moorhouse, 181 S.W.3d 621, 624 (Mo.App. 2006).

- 2. The public policies behind §537.053 place responsibility solely on an intoxicated individual for his or her own injuries, but to recognize dram shop liability, in addition to intoxicated individuals, for injuries caused to unrelated third parties by intoxicated dram shop patrons and for injuries to dram shop patrons under the age of 21.**

The legislature is presumed to know the existing law when it enacts a statute. Scruggs v. Scruggs, 391 S.W.3d 383, 391 (Mo.App. 2005). When the legislature enacted

§537.053 R.S.Mo., it did not insert any language limiting or prohibiting a defendant who causes an accident while intoxicated from obtaining a §537.060 R.S.Mo. reduction by virtue of the plaintiff settling with a co-defendant, even if the co-defendant is the dram shop that served intoxicants to the defendant who caused the accident while driving intoxicated. (A-28.)

The legislature did enact section 4 that prohibits a person from “asserting a claim for damages for personal injury or death against the seller of intoxicating liquor by the drink for consumption on the premises arising out of the person’s voluntary intoxication,”(A-28) but this is irrelevant to Markeson’s request for a §537.060 reduction of the jury’s verdict. Markeson never made a claim for personal injuries against MM Investments. Her request to reduce the verdict is for an offset pursuant to §537.060 R.S.Mo., which “is a satisfaction of an amount owed.” Norman, 100 S.W.3d at 785; Gibson, 349 S.W.3d at 465.

In Hays v. Royer, 384 S.W.3d 330, 337 (Mo.App. 2012), the appellate court rejected an argument similar to the one advanced by Payne. The appellate court determined that, by rejecting a cause of action on behalf of the intoxicated individual, the Dram Shop Act was actually “carving out an exception to public policy,” which otherwise allows recovery for harm, rather than “creating a blanket public policy,” precluding all claims brought on behalf of an intoxicated individual. Id. In Hays, the appellate court refused to read into §537.053 a broad public policy preventing recovery by an intoxicated

driver so as to bar a negligent entrustment of a motor vehicle claim made by an intoxicated entrustee. Id.

The appellate court in its opinion at \*16 recognized in Simpson v. Kilcher, 749 S.W.2d 386, 392 (Mo. banc 1988), this Court determined the legislature did not abolish dram shop liability as to third parties under the circumstances set forth in 537.053.2. “Though the legislature has effectively precluded dram shop liability as to intoxicated individuals over the age of 21, it has reinforced the common law dram shop liability identified in Carver, but limited the circumstances under which it applies through the enactment of section 537.053.2.” (Op. at \*16.)

The appellate court correctly concluded the public policy behind the current Dram Shop Act is two-fold:

(1) to place responsibility solely on an intoxicated individual for his or her own injuries; but (2) to recognize that dram shops bear some responsibility, in addition to intoxicated individuals, for injuries caused to unrelated third parties by intoxicated dram shop patrons and for injuries to the dram shop patrons themselves if they are under the age of 21. (Op. at \*16.)

Payne relied upon out-of-state cases, such as Hopkins and Jodelis v. Harris, 517 N.E.2d 1055 (Ill. 1987), which are not persuasive. Missouri public policy protecting dram shop owners from liability is very different from the public policy of Illinois. Missouri courts have specifically rejected applying Illinois public policy over Missouri

public policy concerning dram shop liability when all things are equal in a choice of laws scenario.

In Dunaway by Dunaway v. Fellous, 842 S.W.2d 166, an Illinois plaintiff sued a Missouri tavern and the Missouri-domiciled owners of the tavern's premises for injuries sustained in an accident in Illinois involving the plaintiff and an intoxicated patron of the Missouri tavern. Id., at 167-689. The trial court applied Missouri law, which prevented the plaintiff from imposing liability on the tavern for the acts of intoxicated patrons reasoning: (1) Missouri's dram shop owners should be able to rely on the Missouri legislature's expressly-granted protection, and (2) application of Illinois' dram shop law would circumvent Missouri public policy. Id., at 169.

The trial court misapplied the law in finding that permitting Markeson a reduction of the jury's verdict was contrary to public policy as found in §537.053 R.S.Mo. The trial court's judgment should be reversed.

## 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 and constituted an improper advisory opinion 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.**

The trial court erred making a finding regarding the punitive damages award. The trial court's finding was premature and constitutes an improper advisory opinion. The trial court denied Markeson's Motion to Reduce the Jury's Verdict and entered judgment against her for actual damages in the amount of \$350,000.00. Had the trial court granted Markeson's motion and reduced the verdict to \$0.00, Markeson could have then filed a motion for judgment notwithstanding the verdict for reasons including, there can be no judgment for punitive damages in the absence of an award of actual damages. However, since the trial court never permitted the reduction, there was no judgment entered

reducing the award of punitive damages. The trial court's "ruling" on the punitive damages portion of the judgment was an improper advisory opinion.

### **Standard of Review**

This court affirms the trial court's judgment unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. Stevenson v. Aquilla Foreign Qualifications Corp., 326 S.W.3d 920, 925 (Mo.App. 2010), citing, Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). This Court defers to the trial court on factual issues and view the evidence and all reasonable inferences drawn there from in the light most favorable to the trial court's judgment, disregarding all contrary evidence. Stevenson, 326 S.W.3d at 925. However, this Court independently evaluates whether the trial court properly declared or applied the law. Id.

**The trial court's judgment containing a ruling regarding punitive damages was premature and an improper advisory opinion because the trial court never reduced the jury's award of actual damages and Markeson has not yet filed any post-judgment motion for judgment notwithstanding the verdict.**

The trial court erred in making a finding in its judgment denying Markeson's Motion to Reduce the Jury's Verdict that if the court were to allow a reduction of the actual damages "the punitive damage award would be unaffected." (L.F. 27.) The trial never reduced the verdict. Had the trial court reduced the verdict, Markeson would have been able to seek post-judgment relief, including the filing of a judgment notwithstanding

the verdict. Environmental Energy Partners, Inc. v. Siemens Bldg. Technologies, Inc., 178 S.W.3d 691, 713 (Mo.App. 2005) (appellate court ruling that granting a judgment notwithstanding the verdict is 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) (appellate court finding that the trial court correctly granted JNOV after jury assessed no actual damages); Ball v. American Greetings Corp., 752 S.W.2d 814, 820 (Mo.App. 1988) (this Court finding that correction of verdict and judgment for punitive damages not manifest to the trial court until after decision on post-trial motions).

Following this Court's reversal and remand for the trial court to consider Markeson's Motion to Reduce the Jury's Verdict, Markeson advised the trial court that in the event the trial court reduced the jury's verdict of actual damages from \$350,000.00 to \$0.00, that Payne would not be entitled to punitive damages without an award of actual damages, citing O-Brien v. Mobil Oil Corp., 749 S.W.2d 457, 458 (Mo.App. 1988); Environmental Energy, 178 S.W.3d at 713.

However, the trial court never reduced the jury's verdict. Instead, the trial court entered judgment against Markeson for actual damages of \$350,000.00. The trial court's ruling was improper advisory opinion. Robinson v. State Highway & Transp. Comm'n, 24 S.W.3d 67, 82 (Mo.App. 2000) (court's ruling on punitive damages was totally extraneous to its ruling on liability and constituted an improper advisory opinion). Markeson did not have a basis upon which to file a motion for judgment notwithstanding the verdict and the trial court's "finding" the punitive damage award is premature and

should be reversed along with the remainder of the judgment. This Court should reverse the trial court's ruling as to the punitive damages award as 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.

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**Appendix—electronically filed separately**

Judgment..... A-1

Payne v. Markeson, 414 S.W.3d 530 (Mo.App. 2013) ..... A-3

Third Amended Petition ..... A-17

Motion to Reduce the Verdict ..... A-25

Section 537.053 R.S.Mo..... A-28

Section 537.060 R.S.Mo..... A-30

## Certificate of Service and Compliance

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on September 23, 2015, a copy of Appellant's Substitute Brief and Appendix was served by electronic mail upon John Turner and Christopher Sweeny at [turner-sweeny@msn.com](mailto: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 7,516 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson  
SUSAN FORD ROBERTSON, Attorney