IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MELISSA A. RASMUSSEN,	)	
	)	
Respondent,	)	**WD83806**
v.	)	
	)	**OPINION FILED:**
	)	**June 15, 2021**
ILLINOIS CASUALTY COMPANY,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Clay County, Missouri
The Honorable Janet Sutton, Judge

Before Division Two: Mark D. Pfeiffer, Presiding Judge, and Alok Ahuja and Karen King Mitchell, Judges

Illinois Casualty Company ("ICC") appeals from the judgment of the Circuit Court of Clay County, Missouri ("trial court"), in favor of Melissa A. Rasmussen ("Rasmussen") in her claims against SRJS, Inc., d/b/a BoJo's Bar & Grill ("SRJS") and Tyler Rivera ("Rivera") (jointly, "Defendants") for violating Missouri's Dram Shop Act, § 537.053.[1] ICC, SRJS's liability insurer, intervened in the proceeding below pursuant to section 537.065.2. ICC raises two points on appeal, asserting that (1) the trial court erred in restricting ICC's discovery and (2) the trial court erred in awarding punitive damages. We affirm.

[1] All statutory references are to the REVISED STATUTES OF MISSOURI 2016, as supplemented.

Factual and Procedural Background[2]

On October 26, 2013, Ms. Rebecca S. Milner ("Milner") was a customer at SRJS, d/b/a BoJo's Bar & Grill. Between the hours of 6:00 p.m. and 11:50 p.m., Milner consumed large quantities of intoxicating liquors served by SRJS's employee, Rivera. When Milner left the bar, she drove westbound on Ne. 64th Street in her 2006 Honda Accord. At the same time, Rasmussen was driving a 2007 Chrysler PT Cruiser eastbound on Ne. 64th Street. Milner crossed the double centerline from the westbound lanes and entered Rasmussen's eastbound lane of travel going in the wrong direction. Milner's vehicle struck the front of Rasmussen's vehicle in a head-on collision. Rasmussen sustained severe, permanent, and progressive injuries which required past medical treatment in excess of $36,000 and will require extensive continuing medical treatment in the future up to and likely in excess of $900,000.

On February 29, 2016, Rasmussen filed an action against SRJS under the Missouri Dram Shop Act, § 537.053, for personal injuries, requesting compensatory and punitive damages. SRJS was insured under a commercial general liability insurance policy issued by ICC and sought coverage for Rasmussen's lawsuit. On August 25, 2017, ICC denied SRJS's request for coverage on the grounds that it was barred by the insurance policy's Liquor Liability Exclusion.

On January 22, 2018, Rasmussen filed a first amended petition, which added Rivera as a defendant. Count I alleged that SRJS failed to properly train, supervise, or monitor its employees to recognize intoxication, to cease the service of alcohol and/or follow other industry-standard protocol regarding the safety of bar and restaurant patrons. Count II alleged a negligence claim against Rivera for serving intoxicating liquors to a visibly intoxicated person. SRJS again requested coverage under the ICC policy for Rasmussen's first amended petition, which request

[2] In our review of a bench-tried case, we view the facts in the light most favorable to the judgment. *Sauvain v. Acceptance Indem. Ins. Co.*, 437 S.W.3d 296, 299 n.2 (Mo. App. W.D. 2014).

ICC denied on March 2, 2018, on the grounds that the allegations in the first amended petition fell outside the policy's coverage based on the application of the policy's Liquor Liability Exclusion.

Thereafter, Rasmussen and Defendants entered into a section 537.065 Settlement Agreement on June 5, 2018, in which the Defendants agreed that they would not contest liability and damages in the litigation and, in return, Rasmussen would only seek to collect the judgment from the ICC insurance policy insuring SRJS. On July 19, 2018, SRJS, by email from counsel, gave notice to ICC, as required by section 537.065.2, that the parties had entered into a Settlement Agreement pursuant to section 537.065.

On August 17, 2018, ICC filed a motion to intervene in the pending lawsuit, as a matter of right, pursuant to section 537.065.2. Contemporaneously, ICC filed a motion to dismiss Rasmussen's first amended petition on the grounds that general negligence claims may not be brought against the Defendants as a matter of law for dram-shop-related claims since the exclusive remedy under Missouri law for dram-shop-related claims is the limited cause of action authorized by section 537.053. In response, on September 10, 2018, Rasmussen filed a motion for leave to file a second amended petition, which specifically alleged a cause of action under section 537.053 against SRJS and Rivera and requested compensatory and punitive damages against each. On September 19, 2018, after a hearing, the trial court granted ICC's motion to intervene and Rasmussen's motion to file a second amended petition. Thereafter, ICC moved to dismiss Rasmussen's second amended petition. The trial court denied ICC's motion to dismiss as to Count I against SRJS and Count II against Rivera to the extent liability under the Dram Shop Act provisions were alleged and granted the motion as to Count III against both defendants as those allegations, which sounded in general negligence, were otherwise duplicative. ICC, as an intervenor, did not file any further responsive pleading to Rasmussen's second amended petition and did not otherwise seek to contest liability or the issue of causation for Rasmussen's damages

via responsive pleadings. Defendants filed their answer to Rasmussen's second amended petition on February 14, 2020, in which neither liability nor causation for Rasmussen's damages were contested.

On June 18, 2019, ICC filed a notice to take the deposition of Rasmussen. In response, Rasmussen filed a motion to quash ICC's deposition notice and to bar any additional discovery by ICC. Rasmussen alleged that section 537.065.2 did not permit ICC to control and manage the defense of its insured, SRJS; ICC was not an adverse party; and even if it was, its rights were restricted to its contractual obligations to defend SRJS, and it waived all of its rights by failing to adhere to their contract. ICC countered that, as a "party" to the lawsuit, it had the right under Rules 56.01(a) and 57.03(a) to conduct discovery to protect its interests, especially when its interest and that of its insured were not aligned. After a hearing held on August 22, 2019, the trial court granted Rasmussen's motion to quash.

While ICC was not permitted to take a discovery deposition of Rasmussen, Rasmussen did ***not*** object to ICC's written discovery to her. Hence, ICC submitted interrogatories and a request for production of documents to Rasmussen, which were answered without objection by Rasmussen. Additionally, Rasmussen did not object to ICC's counsel participating in the depositions of her life care plan and medical experts. ICC's counsel thus conducted lengthy cross-examinations of nurse life care planner Cori Ingram and neurologist Dr. Steven Arkin during their respective depositions.

A bench trial was held on February 19, 2020. Ms. Ingram's and Dr. Arkin's depositions were admitted into evidence. Rasmussen, her mother, and her son testified. Rasmussen offered evidence that she had incurred $36,320 in medical bills for treatment she received as a direct and proximate result of the injuries sustained in the October 23, 2016 motor vehicle collision and that she will need future medical care of at least in excess of $400,000 and likely in excess of $900,000.

ICC neither examined any of the witnesses nor offered any evidence. In closing, Rasmussen's counsel argued that liability was established via the answer filed by the Defendants and the evidence presented at trial. Counsel asked for damages in the total amount of $7 million: $5 million for actual, and $2 million for punitive. ICC's counsel objected to the trial court considering or awarding punitive and/or aggravating circumstances damages as such damages were not authorized by the Dram Shop Act. Rasmussen's counsel countered that because dram shop causes of action existed in the common law and were not expressly prohibited by Missouri's Dram Shop Act, punitive damages were available in the case.

On February 25, 2020, the trial court entered its judgment, awarding Rasmussen compensatory damages in the amount of $5 million against SRJS and $1 million against Rivera. The trial court also found that SRJS's actions "constituted a conscious disregard for the health, safety and welfare of Plaintiff Rasmussen and others" and awarded Rasmussen punitive damages in the amount of $2 million against SRJS to "punish . . . and deter it and other[s] from such conduct now and in the future."

ICC filed a motion to amend the judgment seeking to have the award of punitive and/or aggravating circumstances damages removed from the judgment and the trial court denied ICC's motion.

ICC timely appealed.

Point I

In ICC's first point on appeal, it asserts that the trial court abused its discretion when it granted Rasmussen's motion to quash its notice to take her deposition and bar any additional discovery. Though we conclude that ICC has a valid complaint that the trial court's discovery ruling was erroneous, ICC's point on appeal ignores the requirement to demonstrate that any such

error by the trial court prejudiced ICC by materially affecting the merits of the case. Accordingly, ICC's point on appeal must fail.

Standard of Review

"'Trial courts have broad discretion in administering rules of discovery, which this Court will not disturb absent an abuse of discretion.'" *Tate v. Dierks*, 608 S.W.3d 799, 803 (Mo. App. W.D. 2020) (quoting *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 610 (Mo. banc 2007)). "When reviewing the trial court's decision regarding issues arising from pre-trial discovery, of which appellate courts grant trial court decisions great deference, '[w]e look only for an abuse of this broad discretion which results in prejudice or unfair surprise.'" *Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 717 (Mo. App. E.D. 2014) (quoting *Day Advert. Inc. v. Devries & Assocs.*, 217 S.W.3d 362, 366 (Mo. App. W.D. 2007)).

"No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." Rule 84.13(b). "[A]ppellate review is for prejudice, not mere error." *Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d 225, 244 (Mo. App. S.D. 2019) (internal quotation marks omitted). "Prejudicial error is an error that materially affects the merits and outcome of the case." *Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs.*, 407 S.W.3d 621, 635 (Mo. App. E.D. 2013) (citing *D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co*., 316 S.W.3d 899, 904 (Mo. banc 2010)). "In order to demonstrate reversible error, . . . an appellant must demonstrate that the challenged trial court ruling or action was legally erroneous *and* that appellant was *actually* prejudiced as a result of that erroneous ruling or action." *Interest of J.G.H. v. Greene Cnty. Juv. Office*, 576 S.W.3d 257, 260 (Mo. App. S.D. 2019). "The burden is on the appellant to prove the trial court abused its discretion and prejudice resulted." *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 699 (Mo. App. E.D. 2020) (citing *In re Care & Treatment of Bradley v. State*, 554 S.W.3d 440, 452 (Mo. App. W.D.

2018)). This rule applies when addressing alleged trial court error in quashing a deposition. *See Bar Plan Mut. Ins. Co.*, 407 S.W.3d at 634-35 ("Assuming *arguendo* that the trial court did err and abuse its discretion in quashing the deposition and subpoena, this is not reversible error unless [appellant] was prejudiced thereby.").

Analysis

The General Assembly amended section 537.065 effective August 28, 2017.[3] The amended statute gives insurers "two specific, limited rights: (1) the right to decide whether to defend the insured in the underlying litigation, prior to the insured's entry into a § 537.065 agreement; and (2) the right to intervene in 'any pending lawsuit' within thirty days of receiving notice of a § 537.065 agreement." *Knight by & Through Knight v. Knight*, 609 S.W.3d 813, 822 (Mo. App. W.D. 2020). After being allowed to intervene, the insurer becomes "a 'party' to the

[3] Pertinent to this appeal, the amended statute provides:

> 1. Any person having an unliquidated claim for damages against a tort-feasor, on account of personal injuries, bodily injuries, or death, provided that, such tort-feasor's insurer or indemnitor has the opportunity to defend the tort-feasor without reservation but refuses to do so, may enter into a contract with such tort-feasor or any insurer on his or her behalf or both, whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither such person nor any other person, firm, or corporation claiming by or through him or her will levy execution, by garnishment or as otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage and which insurer is not excepted from execution, garnishment or other legal procedure by such contract. Execution or garnishment proceedings in aid thereof shall lie only as to assets of the tort-feasor specifically mentioned in the contract or the insurer or insurers not excluded in such contract. Such contract, when properly acknowledged by the parties thereto, may be recorded in the office of the recorder of deeds in any county where a judgment may be rendered, or in the county of the residence of the tort-feasor, or in both such counties, and if the same is so recorded then such tort-feasor's property, except as to the assets specifically listed in the contract, shall not be subject to any judgment lien as the result of any judgment rendered against the tort-feasor, arising out of the transaction for which the contract is entered into.
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> 2. Before a judgment may be entered against any tort-feasor after such tort-feasor has entered into a contract under this section, the insurer or insurers shall be provided with written notice of the execution of the contract and shall have thirty days after receipt of such notice to intervene as a matter of right in any pending lawsuit involving the claim for damages.

§ 537.065.1 & .2.

lawsuit with the same rights of any other party." *Id*. at 824 (citing *City of St. Joseph v. Hankinson*, 312 S.W.2d 4, 7 (Mo. 1958) ("Upon being permitted to intervene, [intervenor] became a defendant . . . entitled to raise any legitimate defenses which came within the general scope of the original suit, and which the original defendants might have raised."); *Martin v. Busch*, 360 S.W.3d 854, 858 (Mo. App. E.D. 2011) ("Upon intervention, the rights and responsibilities of [Intervenor] will be the same as any other party to the litigation.")).

ICC asserts that by seeking Rasmussen's deposition, it was simply seeking to conduct discovery concerning information relevant to the subject matter of the pending action as permitted by Rule 56.01(b)(1). "The legislature presumably recognized that, where some or all of an insured's personal assets are protected from execution by a § 537.065 agreement, the insured may have little incentive to assert a vigorous defense to an injured party's claims, and may even be contractually prohibited from mounting a defense." *Id*. at 820. "By enacting § 537.065.2, the legislature has declared that, where the insured has entered into an agreement limiting the assets against which a claimant may seek recovery, a liability insurance carrier has a sufficient interest in the determination of the insured's liability to support the insurer's intervention in the underlying litigation, as a matter of right." *Id*. After being allowed to intervene, ICC became a party to the lawsuit "with the same rights of any other party," *id.* at 824, including the right to conduct discovery, *see* Rule 56.01. "A trial court does not have discretion to deny discovery of matters that are relevant to a lawsuit and are reasonably calculated to lead to the discovery of admissible evidence, unless such matters are work product or privileged." *Bar Plan Mut. Ins. Co.*, 407 S.W.3d at 633-34.

We recognize that "it is well established that 'an intervenor must accept the action pending *as he finds it at the time of intervention.*'" *Knight*, 609 S.W.3d at 824 (quoting *Martin*, 360 S.W.3d at 858 n.5). However, even though the status of the pleadings was that liability and causation for

Rasmussen's damages were *not* contested by any party (including ICC), the *amount* of Rasmussen's damages was still an unresolved factual issue and ICC should not have been restricted by the trial court in conducting discovery on that issue.

Conversely, though the *trial court* erred in its discovery ruling, *Rasmussen* relented on enforcement of the trial court's ruling and did *not* object to interrogatories and requests for production of documents that were served upon Rasmussen by ICC and, instead, answered ICC's request for discovery. Likewise, Rasmussen's principal witnesses on monetary damages were a life care plan expert and a medical expert. In the depositions of these witnesses that were entered into evidence at trial, ICC's counsel was permitted without objection to extensively cross-examine these witnesses. And, at trial, ICC was permitted the opportunity to examine *any* of the witnesses called by Rasmussen but chose not to do so. Further, ICC was given the opportunity to present evidence of its own, but again, chose not to do so.

Not so coincidentally, then, ICC's point on appeal is devoid of any argument that the trial court's discovery ruling resulted in prejudice. Instead, only after Rasmussen pointed out the deficiency in ICC's point relied on in its Respondent's Brief did ICC argue for the first time in its Reply Brief that it was prejudiced by the trial court's discovery ruling. "[ICC's] argument is not preserved for our review, as it is not within the scope of any of their points on appeal, and was raised for the first time in Appellants' Reply Brief." *Med. Plaza One, LLC v. Davis*, 552 S.W.3d 143, 158 n.9 (Mo. App. W.D. 2018) (citations omitted). However, even assuming, *arguendo*, that the argument had been preserved, the record that we have itemized above does not suggest that the trial court's challenged discovery ruling materially affected the merits and outcome of the case.

Having not *argued* that it was prejudiced by the trial court's ruling, nor demonstrated in its point on appeal that it was prejudiced by the trial court's discovery ruling, ICC's point on appeal must fail.

Accordingly, Point I is denied.

Point II

In ICC's second point on appeal, it asserts that the trial court erred when it awarded Rasmussen punitive damages on her statutory dram shop liability claims. ICC argues that the Dram Shop Act does not permit the recovery of punitive damages. We disagree.

Standard of Review

"'Statutory interpretation is a question of law and is subject to *de novo* review.'" *Area 5 Pub. Def. Office v. Kellogg*, 610 S.W.3d 383, 387 (Mo. App. W.D. 2020) (quoting *Henry v. Piatchek*, 578 S.W.3d 374, 378 (Mo. banc 2019)). "'This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.'" *Id*. (quoting *Karney v. Dep't of Labor & Indus. Rels*., 599 S.W.3d 157, 162 (Mo. banc 2020)). Accordingly:

> We will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.
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> A statute is ambiguous when its plain language does not answer the current dispute as to its meaning. Ambiguities in statutes are resolved by determining the intent of the legislature and by giving effect to its intent if possible. When determining the legislative intent of a statute, no portion of the statute is read in isolation, but rather the portions are read in context to harmonize all of the statute's provisions. Rules of statutory construction are used to resolve any ambiguities if the legislative intent is undeterminable from the plain meaning of the statutory language.

Id. at 388 (quoting *Truman Med. Ctr., Inc. v. Progressive Cas. Ins. Co.*, 597 S.W.3d 362, 367 (Mo. App. W.D. 2020)). "It is presumed that every word, clause, sentence and provision of a statute have effect and that idle verbiage or superfluous language was not inserted into a statute." *State ex rel. Killingsworth v. George*, 168 S.W.3d 621, 625 (Mo. App. E.D. 2005). "'Because each word of a statute is presumed to have been included for a particular purpose, an interpretation rendering statutory language redundant or without meaning is disfavored.'" *Sun Aviation, Inc. v. L-3*

Commc'ns Avionics Sys., Inc., 533 S.W.3d 720, 726 (Mo. banc 2017) (quoting Matthew Davis, Note, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127, 1136 (2016)). "The legislature is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). "Courts never presume that our legislature acted uselessly and should not construe a statute to render any provision meaningless." *T.V.N. v. Mo. State Highway Patrol Crim. Just. Info. Servs.*, 592 S.W.3d 74, 81 (Mo. App. W.D. 2019) (internal quotation marks omitted).

Of significance to our ruling today, "[t]he legislature is presumed to have acted with a full awareness and ***complete knowledge of the present state of the law***, including judicial and legislative precedent." *Exec. Bd. of Mo. Baptist Convention v. Mo. Baptist Univ.*, 569 S.W.3d 1, 18 (Mo. App. W.D. 2019) (emphasis added). And, "[w]hen the legislature amends a statute, it is presumed that its intent was to bring about some change in the existing law." *Rinehart v. Laclede Gas Co.*, 607 S.W.3d 220, 227 (Mo. App. W.D. 2020). "This Court should never construe a statute in a manner that would moot the legislative changes, because the legislature is never presumed to have committed a useless act." *Id*.

Analysis

To address ICC's point, a brief history of the evolution of Missouri's dram shop law is necessary.[4] In 1919, the same year the Eighteenth Amendment to the United States Constitution[5] was ratified, Missouri passed the first Dram Shop Act, providing a statutory cause of action against a seller of liquor for injuries to person or property caused by an intoxicated person. 1919 Mo. Laws, *Intoxicating Liquors*, § 6 at 408, 411. Following the ratification of the Twenty-first

[4] A "dram shop" is described in section 537.053.2 as "any person licensed to sell intoxicating liquor by the drink for consumption on the premises."

[5] The Eighteenth Amendment prohibited the manufacture, sale, or transportation of intoxicating liquors.

Amendment repealing prohibition in 1933, the Missouri legislature repealed Missouri's Dram Shop Act in 1934. § 4487 RSMo 1929 (repealed 1933-34 Laws of Missouri, 77.) "The repeal of the dram shop act did not alter the common law; instead, the repeal of the dram shop act restored questions of dram shop liability to the arena of the common law and the transfiguring touch of the courts." *Lambing v. Southland Corp.*, 739 S.W.2d 717, 718 (Mo. banc 1987).

In 1983, in *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. E.D. 1983), a wrongful death action, the Eastern District of this Court extended liability under common law concepts to tavern owners who serve obviously intoxicated patrons, finding that tavern owners had a duty to refrain from serving obviously intoxicated patrons and imposing liability for injuries resulting from a breach of that duty. *Id.* Our Supreme Court has described Missouri's common law involving dram shop liability as follows:

> Until 1983, the common law in Missouri did not recognize a cause of action against a tavern owner by a person injured by an intoxicated tavern patron. In 1983, however, the Court of Appeals, Eastern District, 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. *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983). The court found that Section 311.310 is "indicative of Missouri public policy", a public policy which is expressed "even more fundamentally in the general law of torts." *Carver*, 647 S.W.2d at 575. The Court reasoned that under the general law of torts, "[e]very person is required to take ordinary care against injuries reasonably to be anticipated." *Id.* This standard of ordinary care "imposed a duty upon [the tavern owner] to avoid supplying [the tavern patron] with intoxicating liquor once it became apparent that [the tavern patron] was intoxicated." *Id.* The court determined that "the well-documented foreseeability of accidents caused by drunken drivers and the statutory policy expressed in sec. 311.310", *id.*, justify ***the extension of liability under common law concepts to tavern owners who serve intoxicated patrons***.

Lambing, 739 S.W.2d at 719 (emphasis added). In *Lambing*, our Supreme Court did not suggest that the Eastern District in *Carver* misstated the law; to the contrary, our Supreme Court recognized that, as of 1983, Missouri's common law "recognized a common law cause of action against a

tavern owner who served alcohol to an intoxicated patron who subsequently injured a third person." *Id.*[6]

In 1985, with "complete knowledge of the present state of the law," *Exec. Bd. of Mo. Baptist Convention*, 569 S.W.3d at 18, the Missouri legislature enacted section 537.053.[7] Section 1 of the law purportedly re-established the common law of England (that the consumption of alcohol and not the furnishing of alcohol was the proximate cause of injuries inflicted by intoxicated persons) regarding dram shop liability, and section 2 abrogated the *Carver*, 647 S.W.2d 570, *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. W.D. 1980), and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. App. W.D. 1981)[8] decisions that were contrary to

[6] Other cases pre-dating *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. E.D. 1983), based liability of tavern owners on the violation of a criminal statute. *See Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333, 337 (Mo. App. W.D. 1980) (A violation of section 311.310 "gives rise to a cause of action [against tavern owners] for civil damages."); *see also Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. App. W.D. 1981). However, "*Carver* is the first case extending liability [against tavern owners] on common law concepts." *Lambing v. Southland Corp.*, 739 S.W.2d 717, 719 n.1 (Mo. banc 1987).

[7] The 1985 law provided:

> 1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), 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, RSMo, 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.
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> 2. The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983); *Sampson v. W.F. Enterprises, Inc*., 611 S.W.2d 333 (Mo. App. 1980); and *Nesbitt v. Westport Square, Ltd*., 624 S.W.2d 519 (Mo. App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.
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> 3. Notwithstanding subsections 1 and 2 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 who, pursuant to section 311.310, RSMo, has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.

[8] *See supra* note 6.

that common law.[9] § 537.053.1 & .2 RSMo 1985. Section 3 provided a cause of action against a dram shop, but only if the dram shop was first criminally convicted of serving a minor or intoxicated person. § 537.053.3 RSMo 1985. The constitutionality of section 537.053 RSMo 1986 was upheld in *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988).[10]

But in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), the Missouri Supreme Court overruled *Simpson* and held that the 1985 statute, authorizing a dram shop cause of action only when the liquor licensee had been convicted for providing liquor to an intoxicated person, violated the open courts provision of the Missouri Constitution because it was an arbitrary and unreasonable procedural bar to "an injury that is legally recognized, as the dram shop injury is [so] recognized." *Id*. at 554. The *Kilmer* court also applied the fundamental rule of statutory construction that subsections of the statute must *not* be read in isolation, *see BASF Corp. v. Dir. of Revenue*, 392 S.W.3d 438, 444 (Mo. banc 2012) ("[N]o portion of the statute is read in isolation, but rather the portions are read in context to harmonize all of the statute's provisions."); *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) ("Our duty, after all, is 'to construe statutes, not isolated provisions.'") (internal citation omitted), in making its determination that section 537.053.1 RSMo 1986, which purported to eliminate dram shop liability, actually did not, stating as follows:

> [I]f subsections 1 and 2 of section 537.053 were the whole statute, we would accept the obvious proposition that the legislature had indeed abolished dram shop liability. But, ***the first two subsections cannot be read in isolation***. When we read the third subsection, which is section 537.053.3, as part of the whole statute, ***it is clear that the legislature did <u>not</u> abolish dram shop liability.***

[9] As we have stated previously, any suggestion that subsection 2 was "redundant" or "superfluous" ignores this Court's responsibility to presume just the opposite—that "each word of a statute is presumed to have been included for a particular purpose." *Sun Aviation, Inc. v. L-3 Commc'ns Avionics Sys., Inc.*, 533 S.W.3d 720, 726 (Mo. banc 2017).

[10] However, our Missouri Supreme Court specifically concluded that section 537.053 RSMo 1986 could *not* be given retrospective application to common law dram shop liability claims that arose before the statute's effective date. *Lambing*, 739 S.W.2d at 718. Hence, common law dram shop liability claims that arose after the decision in *Carver* but before the effective date of section 537.053 RSMo 1986 were allowed to proceed. *Id.* at 717 (allowing wrongful death dram shop liability claim against a tavern owner for the sale of alcohol to an obviously intoxicated patron to proceed when the accident occurred after the decision in *Carver* but before section 537.053 RSMo 1986 took effect); *Elliot v. Kesler*, 799 S.W.2d 97 (Mo. App. W.D. 1990) (same).

Kilmer, 17 S.W.3d at 551 (emphasis added).

The legislature responded to *Kilmer* and amended the Dram Shop Act in 2002.[11] And, "[w]hen the legislature amends a statute, it is presumed that its intent was to bring about some change in the existing law," and we should "never construe a statute in a manner that would moot the legislative changes, because the legislature is never presumed to have committed a useless act." *Rinehart*, 607 S.W.3d at 227. The 2002 amendment deleted section 537.053.2 RSMo 1985, which had purportedly abrogated the holdings in *Carver*, *Sampson*, and *Nesbitt*. Though fair debate can

[11] The 2002 amendment provided:

> 1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), 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.
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> 2. 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 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.
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> 3. For purposes of this section, a person is "visibly intoxicated" when inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction. A person's blood alcohol content does not constitute prima facie evidence to establish that a person is visibly intoxicated within the meaning of this section, but may be admissible as relevant evidence of the person's intoxication.
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> 4. Nothing in this section shall be interpreted to provide a right of recovery to a person who suffers injury or death proximately caused by the person's voluntary intoxication unless the person is under the age of twenty-one years. No person over the age of twenty-one years or their dependents, personal representative, and heirs may assert a claim for damages for personal injury or death against a seller of intoxicating liquor by the drink for consumption on the premises arising out of the person's voluntary intoxication.
>
> 5. In an action brought pursuant to subsection 2 of this section alleging the sale of intoxicating liquor by the drink for consumption on the premises to a person under the age of twenty-one years, proof that the seller or the seller's agent or employee demanded and was shown a driver's license or official state or federal personal identification card, appearing to be genuine and showing that the minor was at least twenty-one years of age, shall be relevant in determining the relative fault of the seller or seller's agent or employee in the action.
>
> 6. No employer may discharge his or her employee for refusing service to a visibly intoxicated person.

exist about interpreting the impact of the legislature's decision to delete section 537.053.2 RSMo 1985, *how* that deletion impacted the current state of the law is less important than recognizing *what* the legislature was doing in the 2002 amendment—that is, the legislature, in full recognition and knowledge of Missouri's history of common law on dram shop liability, was attempting to assert itself into the common law arena to *modify* the common law standards (*i.e.*, the 2002 amendment added a requirement that proof of the tavern owner's sale of alcohol to an obviously intoxicated patron must be proven by "clear and convincing evidence") for imposing dram shop liability as opposed to *abrogating* dram shop liability under the common law in its entirety and creating a *new* or *sui generis* statutory cause of action. And, though the legislature could have also changed or otherwise expressly limited the damages available for dram shop liability, it chose *not* to do so.[12] Our responsibility, of course, is to "enforce statutes as written, not as they might have been written." *City of Welliston v. SBC Commc'ns, Inc.*, 203 S.W.3d 189, 192 (Mo. banc 2006).

As stated previously, the first case in Missouri recognizing a common law cause of action relating to tavern owners serving obviously intoxicated persons who subsequently injure third persons was *Carver*. *Carver* was a wrongful death action, and the *Carver* court recognized that Missouri imposed no limitation on the amount of recovery (*i.e.*, punitive damages) in actions against dram shop owners and no limitation on recovery for wrongful death.[13] *Carver*, 647 S.W.2d at 576; *see also Elliot v. Kesler*, 799 S.W.2d 97, 102 (Mo. App. W.D. 1990) ("The holding of the court in *Carver v. Schafer* recognized a right to hold a tavern owner liable for serving liquor to an

[12] The 2002 amendment makes discrete changes to the cause of action recognized in *Carver*: heightening the burden of proof; defining "visible intoxication"; denying recovery in most instances to the intoxicated person themselves; and specifying the relevance of blood-alcohol testing and the intoxicated person's presentation of false identification. But despite these targeted modifications to the common law, the 2002 amendment does not comprehensively define a stand-alone statutory cause of action, and says nothing concerning the damages recoverable on a dram shop claim.

[13] "Under Missouri law, in wrongful death actions, damages for aggravating circumstances, which are the 'equivalent of punitive damages,' are recoverable." *Robinson v. Mo. State Highway & Transp. Comm'n*, 24 S.W.3d 67, 81 (Mo. App. W.D. 2000) (citing § 537.090; *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996)).

intoxicated person."). Likewise, the *Elliot* court found that the trial court properly submitted aggravating circumstances damages on plaintiffs' common law dram shop claim.[14] *Elliot*, 799 S.W.2d at 104.

Hence, the common law that existed prior to both the 1985 Missouri Dram Shop Act and the 2002 amendment to the Act recognized that punitive damages were a recoverable remedy on a dram shop liability claim. The 2002 amendment does not mention punitive damages, but is instead silent on the topic of punitive damages. The legislature's silence is not without meaning. As the Supreme Court has stated:

> This Court has consistently held that a statutory right of action *shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelops the remedies provided by common law. A statutory remedy does not 'comprehend and envelop' the common law if the common law remedies provide different remedies from the statutory scheme.* ***For example, if the common law remedy provides for punitive damages, but the statutory scheme does not, then the common law scheme is not preempted.***

Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 95-96 (Mo. banc 2010) (emphasis added).

"[N]o statute should be construed to alter the common law further than the words import." *Estate of Williams v. Williams*, 12 S.W.3d 302, 307 (Mo. banc 2000) (citing *Shaw v. Merchants Nat'l Bank*, 101 U.S. 557, 565, 25 L.Ed. 892 (1879)). "Where doubt exists about the meaning or intent of words in a statute, the words should be given the meaning which makes the least, rather than the most, change in the common law." *Id*. The Missouri Supreme Court has recognized that:

> When the legislature wishes to substitute a statutory limitation on punitive or penal damages for what would otherwise be a common law claim, it makes specific provision for such limitation. The general assembly by the words it uses is perfectly capable of preempting claims, limiting punitive damages or granting immunity. There is no need for courts to infer a limitation, preemption or immunity where the legislature did not say so. "To read words or concepts into our statutes that the

[14] "Aggravating circumstance damages are punitive in nature. It is their purpose to punish the defendant and deter future wrongdoing. They are in that respect akin to punitive damages." *Elliot*, 799 S.W.2d at 103 (citation omitted).

> general assembly did not write shows disrespect to both the general assembly and for the common law." *Overcast v. Billings Mut. Ins*., 11 S.W.3d 62, 69-70 (Mo. banc 2000).

Id. "The common law must apply to the [Dram Shop Act] unless a statute clearly abrogates the common law either expressly or by necessary implication." *Lindahl v. State*, 359 S.W.3d 489, 493 (Mo. App. W.D. 2011). Here, of course, our Missouri Supreme Court has clarified that Missouri's Dram Shop Act "did ***not*** abolish dram shop liability." *Kilmer*, 17 S.W.3d at 551 (emphasis added). Accordingly, because the legislature did not clarify a different interpretation on the allowance of punitive damages than established by common law in the dram shop liability context, punitive damages are recoverable in a statutory dram shop cause of action.

Point II is denied.

Conclusion

The trial court's judgment is affirmed.

/s/ *Mark D. Pfeiffer*
Mark D. Pfeiffer, Presiding Judge

Alok Ahuja and Karen King Mitchell, Judges, concur.