**IN THE MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

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| LESTER NOKES, et al., | ) | |
| | ) | |
| Appellants, | ) | |
| | ) | Appeal No.: WD 73055 |
| vs. | ) | |
| | ) | |
| HMSHOST USA, LLC, et al., | ) | |
| | ) | |
| Respondents. | ) | |

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Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Joel F. May
Jackson County Cause No. 0916-CV01105

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# *AMICUS CURIAE* BRIEF OF THE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF APPELLANTS

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# I. TABLE OF AUTHORITIES

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## II. INTERESTS OF AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a professional organization of approximately 1,400 trial lawyers in Missouri, most of whom are engaged in personal injury litigation involving Missouri citizens.

The interpretation of the Missouri Dram Shop statute found at RSMo § 537.053 is an issue of importance with far reaching consequences for Missouri citizens. Appellants' presentation of evidence supporting the claim of "visible intoxication" should be sufficient to submit the question of respondents' liability for determination by a jury.

As discussed herein, MATA supports appellants' position that the trial court erred in ruling that appellants could not, as a matter of law, maintain their claims against respondents simply because they did not provide eye witness testimony concerning an individual's physical condition at the time he was served alcohol by respondents' agents.

*Amicus Curiae* believe that the trial court's ruling incorrectly interprets the requirements of RSMo § 537.053 to necessarily include eye witness testimony of an intoxicated person's physical condition at the time of service of alcohol. Public policy calls for those who have been injured by the improper service of alcohol to visibly intoxicated persons to have the ability to prove the elements of their claim by indirect and circumstantial evidence in order to be made whole in court.

On behalf of the citizens of the State of Missouri, MATA urges this court to find that the trial court abused its discretion in finding that appellants did not, as a matter of law, provide evidence sufficient to defeat respondents' Motion for Summary Judgment,

and present the claim to a jury for determination.

## III. CONSENT OF THE PARTIES

MATA has received written consent from all parties to file this brief via letters faxed to *Amicus* counsel by attorneys for the parties on November 29 and 30, 2010.

## IV. JURISDICTIONAL STATEMENT

MATA adopts and incorporates appellant's Jurisdictional Statement.

## V. STATEMENT OF FACTS

MATA adopts and incorporates appellant's Statement of Facts.

## VI. POINT RELIED ON

**THE TRIAL COURT ERRED IN HOLDING THAT EYE WITNESS TESTIMONY OF VISIBLE INTOXICATION IS REQUIRED IN A DRAM SHOP CLAIM BECAUSE THE PLAIN LANGUAGE OF §537.053 DOES NOT COMPEL SUCH EVIDENCE; AND IS CONTRARY TO THE PUBLIC POLICY OF THIS STATE WHICH IS TO PREVENT THE SERVICE OF INTOXICATING LIQUOR BY THE DRINK TO VISIBLY INTOXICATED PERSONS.**

*State ex rel. Unnerstall v. Berkemeyeker* 298 S.W. 3d 513 (Mo. banc 2009)

*Daniels v. Senior Care, Inc.* 21 S.W. 3d 133 (Mo. App. S.D 2000)

*Northside Equities, Inc. v. Hulsey* 567 S.E. 2d 4 (Ga. 2002)

*Rodriguez v. Suzuki Motor Corp.* 936 S.W.2d 104 (Mo. banc 1996)

## VII. ARGUMENT

**THE TRIAL COURT ERRED IN HOLDING THAT EYE WITNESS TESTIMONY OF VISIBLE INTOXICATION IS REQUIRED IN A DRAM SHOP CLAIM BECAUSE THE PLAIN LANGUAGE OF §537.053 DOES NOT COMPEL SUCH EVIDENCE; AND IS CONTRARY TO BY THE PUBLIC POLICY OF THIS STATE WHICH IS TO PREVENT THE SERVICE OF INTOXICATING LIQUOR BY THE DRINK TO VISIBLY INTOXICATED PERSONS.**

Summary judgment is "an extreme and drastic remedy and great care should be exercised in utilizing the procedure." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. banc 1993). Granting summary judgment borders on the denial of due process. *Lawrey v. Reliance Insurance Company,* 26 S.W.3d 857, 863 (Mo. Ap. W.D. 2000). For this reason, if there is any dispute as to any material fact, summary judgment should be denied.

Dram shop claims are inherently difficult because, in most cases, the only eye witnesses to the wrongful service of alcohol are either the drunk himself (who is usually a defendant in both civil and criminal contexts) or employees of the defendant dram shop, with their obvious bias, all of whom universally proclaim that "we do not serve alcohol to visibly intoxicated persons." It is difficult, if not impossible, to discover the identity of other witnesses to the service of alcohol who are long gone by the time of the injury inflicted by the drunk, which usually occurs some place other than the establishment

whose wrongful service of alcohol contributed to cause the injury. All too often, the effects of these actions undertaken by the joint tort feasors (drunk driver and dram shop which served him) are devastating, and yet the injured plaintiff (or his survivors) have no way of obtaining compelling direct evidence, by way of eye witness testimony, of the serving of intoxicating liquor to a visibly intoxicated person. Add to these inherent difficulties the increased burden of having to prove the elements of the claim by clear and convincing evidence, and one sees how the deck is stacked. Nevertheless, the legislature has declared the public policy of this state to be that victims of the improper service of alcohol be allowed to recover subject to the requirements set forth in RSMo § 537.053.

In restricting this cause of action to persons licensed to sell intoxicating liquor by the drink for consumption on the premises, the legislature implicitly acknowledged that such licensees have voluntarily undertaken a duty to serve alcohol responsibly. In exchange for undertaking this duty, such licensees are granted special rights to make their profits by the sale of intoxicating liquor for consumption on premises, to the exclusion of all non-licensees. Generally speaking, the vast majority of licensees provide proper training to their employees and responsible service of alcohol to the public. However, for those few who don't, an overly constrictive interpretation of an already limited cause of action defeats the true public policy of prohibiting improper service of alcohol to visibly intoxicated persons; and wrongfully prohibits deserving claimants from a reasonable opportunity to gain redress for their damages resulting from the wrongful actions of others.

The trial court's Judgment requiring direct eye witness testimony concerning an intoxicated patron's visible signs of intoxication adds an element to the cause of action which is not found within the language of RSMo §537.053. In so doing, the trial court based its holding upon language contained in §537.053.3 providing "[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." *Id.* However, the trial court's discussion of that portion of the statute is misguided, because it only tells half the story of what is the actual evidence in the record concerning the intoxicated person's visible intoxication. It isn't the blood alcohol content (hereinafter BAC) alone which plaintiffs submit in support of prima facie evidence of visible intoxication, but rather BAC evidence ***plus expert witness testimony concerning the medical scientific facts regarding the effects of the alcohol on said intoxicated person, and how those effects would be demonstrated through physical dysfunction and uncoordinated physical actions.***

The Missouri Supreme Court has set forth a few oft-stated principals for assistance in statutory construction: "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning."... "To discern legislative intent, 'The Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem that the statute was enacted to remedy.' "... "It is presumed that the legislature intended that every word,

clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert verbiage or superfluous language in a statute." *State ex rel. Unnerstall v. Berkemeyeker* 298 S.W. 3d 513, 519 (Mo. banc 2009). [internal citations omitted]

Clearly, the evident purpose of §537.053 is to provide a right of recovery to victims of the improper service of alcohol to visibly intoxicated persons being served alcohol for immediate consumption. It would thwart that purpose to require that all elements of the claim be proven by direct eye witness testimony, particularly since "[c]ircumstantial evidence is viewed no differently from direct evidence when determining whether there was genuine issue as to any material facts so as to preclude summary judgment." *Daniels v. Senior Care, Inc.* 21 S.W. 3d 133,139 (Mo. App. S.D 2000).

The logical interpretation of the language in §537.053.3 quoted above is that the legislature wanted to distinguish a dram shop civil action from a more stringent situation involving the criminal charge of driving while intoxicated. In comparing these two situations, we look to the DWI statutes, specifically RSMo §577.037.1 which states "[I]f there was eight-hundredths of one percent or more by weight of alcohol in the person's blood, *this shall be prima facie evidence that the person was intoxicated* at the time the specimen was taken." [emphasis added] *Id.* The legislature's intent to distinguish the presumption given in a criminal DWI case from a civil dram shop action is evidenced by additional language found in § 537.053 at issue: "...but may be admissible as relevant

evidence of the person's intoxication." BAC levels, standing alone without expert interpretation, in the absence of any legal presumptions, would mean nothing to a trier of fact. By specifically inserting this language concerning the admissibility of BAC as relevant evidence of the person's [visible][1] intoxication, the legislature must have intended that evidence of BAC be interpreted by expert witness testimony, which is exactly what plaintiff submitted in this case.

This is the same analysis that was applied by the Supreme Court of Georgia in *Northside Equities, Inc. v. Hulsey* 567 S.E. 2d 4 (Ga. 2002). In that case, the Georgia Supreme Court was confronted with a situation very similar to the instant case in deciding whether a plaintiff produced sufficient evidence of a person's "noticeable intoxication" under the Georgia Dram Shop Act [2] in order to avoid the entry of summary judgment in favor of the dram shop defendant. In *Hulsey* the Georgia Supreme Court noted that there was BAC evidence combined with expert testimony that the drinker would have exhibited manifestations of intoxication, yet the only eye witness testimony was from several employees of the defendant dram shop averring that the drinker was not "noticeably intoxicated." The Court then found that since the direct eye witness evidence was not uncontradicted due to the BAC evidence (as interpreted by expert testimony), the

[1] Although the word "visible" is not specifically used, "visible intoxication" is the only type of intoxication contemplated by the statute. To add this language discussing any other type of intoxication in this statute would indeed be superfluous.

[2] O.C.G.A. § 51-1-40(b)

circumstantial evidence coupled with the conclusive presumption in the Georgia DWI statute[3] (that a person with a BAC significantly less than the drinker in that case is presumed to be intoxicated) was sufficient to create a question of fact as to whether said drinker was "noticeably intoxicated" when she was served alcohol at work, thus preventing summary judgment. *Northside Equities Inc. v. Hulsey, supra, at 7.*

Furthermore RSMo § 537.053 does not create a requirement that the only way to prove visible intoxication would be through eye witness testimony. To have added that requirement, subsection three of the statute, in pertinent part, would have to read something such as: "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 only when submitted in conjunction with eye witness testimony of the visible intoxication."

Respondents, in their memoranda in support of their motion for summary judgment, also urge a strained interpretation of the statute under which the "knowingly" component modifies not only the service of the intoxicating liquor, but also the additional visible intoxication of the patron. The absurd result of this interpretation eviscerates the cause of action by forcing the jury to read the mind of an alcohol seller absent such seller's mea culpa regarding his knowledge of that patron's visible intoxication.

This is easily demonstrated by a fact scenario in which there is abundant evidence of a patron's significant physical uncoordination and significant physical dysfunction

[3] O.C.G.A § 40-6-391(a)(5)

while continually being served intoxicating liquor, as testified to by independent witness Honest Abe himself, yet there is no evidence that the server knowingly served the person whom he observed to be visibly intoxicated. Under defendant's interpretation, such a case would not be submissible. This result would clearly frustrate the evident purpose of the Dram Shop act.

Most often, the licensee allowed to sell intoxicating liquor by the drink for consumption on the premises, (the only possible defendant under RSMo § 537.053), is a corporation or other business entity and not any particular individual bartender or server. Therefore, "knowledge" of the service of intoxicating liquor attributable to the licensee is derived from the facts and circumstances of the event in question, and not the personal observations or mental state of any particular bartender or server. For instance when a patron is provided with a "round" of shots at bar side to be taken back by him to his table to be consumed by other members of his party, it would be foolish to contend that the licensee didn't "know" of the service of intoxicating liquor to the members of that party, even though the server did not have specific knowledge of each member. Similarly, the question of "visible intoxication" should also be determined from the facts and circumstances of the event in question, rather than the specific observations of any particular bartender or server, or any other eye witness for that matter.

The following example serves to illustrate this point. Lets say that the alleged intoxicated person (similar to the one involved in this case) consumes fourteen to seventeen standard alcoholic drinks over a two hour time period at a local bar. During

that time frame, the patron stumbles to the bathroom, vomits, falls in coming back to his bar stool, and the bartender notices that he has wet his pants, thus exhibiting both types of "visible intoxication" as defined in the statute. As a result, the bartender decides to cut him off. But, ten minutes later, the bartender's shift ends and a new bartender starts but does not see the alleged intoxicated patron exhibit any particular sign of visible intoxication and serves him more intoxicating liquor. In that case, the second bartender did not "knowingly serve intoxicating liquor to a visibly intoxicated person" as the statute is interpreted by defendant, but most certainly did "knowingly serve intoxicating liquor" to a visibly intoxicated person.

In the vast majority of dram shop cases, the alleged intoxicated person's testimony about his appearance and demeanor (proclaimed to be devoid of any visible signs of intoxication) while being served alcohol, an example of which was relied upon by the trial court in this case, is highly suspect for more than one reason. First, is the obvious bias and propensity for selfish denial that he would be so irresponsible as to drink too much. Second, there is the effect of the alcohol on his ability to "...see, hear, perceive and observe..." as pointed out in *Rodriguez v. Suzuki Motor Corp.* 936 S.W.2d 104, 106 (Mo. banc 1996), not to mention accurately recall the particulars of his appearance and demeanor. Yet in many instances, the drunk's testimony may be the only direct eye witness testimony as to his physical condition. To dismiss the case in such instances, in the face of compelling circumstantial evidence to the contrary, would negate the true purpose of the Dram Shop act. Once again, however, even if such intoxicated patron

vividly described his own significant physical uncoordination and significant physical dysfunction, it would still not suffice in proving that the server knew he was visibly intoxicated under the analysis discussed herein above.

Finally, the decision by the trial court in this case contradicts her reasoning distinguishing the instant case from decisions from other jurisdictions. The court explained that those other situations contained evidence exhibiting some sort of physical impairment close to the time of service, in addition to expert testimony, yet acknowledged that much of that evidence of physical impairment was after the actual service of alcohol. In analyzing the decisions from other jurisdictions in this manner, the trial court was actually acknowledging just how powerful circumstantial evidence can be in supporting a dram shop claim.

Consider the situation in which an investigating police officer performing a field sobriety test at the scene of a fatal collision documents abundant findings of "significant physical uncoordination and significant physical dysfunction" exhibited by the drunk driver. It turns out that these findings were obtained only fifteen minutes after service of the "last call, one for the road" drink consumed by the drunk before leaving an establishment. BAC results obtained thirty minutes after the field sobriety test exhibit a .27 BAC, which a forensic toxicologist states would have amounted to a .24 BAC at the time of the service of the last drink. That is three times the legal limit yet, because of the exponential effects of increasing alcohol intoxication, that person is actually nine times as drunk as someone at the legal limit. The forensic toxicologist also states that said person

would have exhibited the same physical uncoordination and physical dysfunction at the time of service of the last drink as was observed by the investigating police officer in the field, because the relative BAC of that person was the same at those two points in time. However once again, under the trial court analysis in this case, the decedant's survivors in our hypothetical wouldn't be allowed their day in court against the dram shop absent direct eye witness testimony as to the patron's visible intoxication at the time of service of the last drink. This clearly contravenes the evident purpose of the Dram Shop Act, and violates the public policy of this state, which is to prevent the service of intoxicating liquor to visibly intoxicated persons.

## VIII. CONCLUSION

*Amicus Curiae* requests this Court to reverse the trial court's entry of summary judgment, and to remand the case to allow plaintiffs to proceed to trial on their dram shop cause of action.

Respectfully,

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## IX. CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer disk containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys in support of appellants is attached to Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06 (c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06 (b); and (3) this Brief contains 3,112 words as calculated by the Microsoft Word software used to prepare this Brief.

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## X. CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and forgoing was mailed this ___ day of February, 2011 to:

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