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CAC Advisor

Missouri and Illinois Updates

Court of Appeals Eliminates Protection for Co-Employees in Civil Suits from Workplace Accidents


David T. Ahlheim

The Missouri Court of Appeals, Western District, has purportedly overruled 75 years of precedent and is now allowing civil causes of action against co-employees. *Robinson v. Hooker,* WD 71207, 2010 Mo. App Lexis 1006. This is a dramatic break from the long-standing precedent that co-employees are typically immune from civil actions except in unusual cases or when a co-employee does "something more" than failing to maintain a safe work environment.

As has been discussed in prior issues, the Missouri Legislature passed a comprehensive tort reform in 2005. The tort reform affected civil, medical malpractice and Workers' Compensation cases. The main goal was to limit liability for Defendants and employers. Of note in the *Robinson* case, the general scope of the Workers' Compensation law was changed from being liberally construed to favor Workers' Compensation statutes to requiring strict construction of Workers' Compensation statutes. R.S.Mo. § 287.800. The purpose was to make Workers' Compensation more difficult to obtain.

For over 75 years, employers have been immune from civil lawsuits because of the Workers' Compensation system. The purpose was, in exchange for making Workers' Compensation a no fault system, employers would be immune from civil lawsuits. However, § 287.120 specifically identifies that employers are immune – not co-employees. Over the years, co-employees have been

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Exculpatory Clauses: Am I Protected?


Thomas J. Lewis

Exculpatory clauses are often used in contractual agreements to limit the liability of a party offering a service to another. Exculpatory clauses in contracts releasing an individual from his or her own future liability are not prohibited as against public policy in Missouri. *Alack v. Vic Tanny International of Missouri,* 923 S.W.2d 330, 334 (Mo. banc 1996). While public policy disfavors them, it does not prohibit releases of future negligence.

The major issue with many of these clauses hinges on the "specificity" of the exculpatory language. A defendant is released from future liability, including its own future negligence when a plaintiff executes a contract in which the exculpatory language is clear, unambiguous, unmistakable, and conspicuous. *Milligan v. Chesterfield Village, LLC,* 232 S.W.3d 683 (Mo.App. S.D. 2007). The exculpatory language must effectively notify a party that he or she is releasing the other party from claims arising from the other party's own negligence. *Milligan*, 232 S.W.3d 683. Traditional notions of justice are so fault based that most people might not expect such a relationship to be altered, regardless of the length of an exculpatory clause, unless done so explicitly.

General language will not suffice. Any potential for ambiguity will be construed against the drafter. Whether or not the language is "ambiguous" is a determination for the Court. In Missouri, the language used must be specific to be enforced. This

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Co-Employees

(*continued from page 1*)

considered immune from civil liability except for when they violate their own personal duties by "something more" than ordinary negligence. State ex. rel. *Badami v. Gaertner,* 630 S.W.2d 175 (1982).

The *Robinson* court took a new look at this traditional analysis. The court ruled that tort reform requires a "strict construction" review of R.S.Mo. § 287.120. Since the plain language of § 287.120 does not specifically provide immunity to co-employees, the court interpreted that the State Legislature wanted to allow suits against co-employees.

*Generally, a co-employee would not follow within the statutory definition of an "employer" as a "person…using a service of another for pay" and "having five or more employees." Strict application of the definition requires us to further conclude that co-employees are not entitled to invoke the employer immunity under § 287.120. Even though the language of the exclusivity provision was not amended in 2005, the scope of the employer immunity was narrowed by the new lens of strict construction. Robinson at * 9.*

•What does this mean?

This is a dramatic opinion and is clearly going to be heard by the Supreme Court. Indeed, the Western District's opinion would contradict even the most recent Supreme Court decisions on the issue. As such, the applicability of the Court of Appeals' decision is unclear. The Supreme Court has previously addressed this issue and held "something more" to be the standard. This would directly conflict with the Supreme Court's ruling. In any event, this decision could eventually lead to all on-the-job claims – typically be covered by Workers' Compensation – being spun off into civil lawsuits against co-employees. Indeed, the potential flood of cases could reach

tidal wave proportion.

Even if the Supreme Court does not take up this issue, the State Legislature would likely act to fix the massive expansion of civil lawsuits and the complete undermining of Workers' Compensation law. Indeed, by allowing civil suits, co-employee suits would swallow the exclusivity bargain of the Workers' Compensation system.

•Retroactive?

Further, while of limited applicability, and if the decision holds, Defendants could strongly argue that the change in tort reform should only apply prospectively from August 28, 2005. This is the enactment date of the 2005 tort reform. Otherwise, this would lead to an ex-post facto law that changes the rights and obligations of the parties. This would be consistent with the recent decision by the Supreme Court in *Klotz v. St. Anthony's Medical Center,* 311 S.W.3d 752.

Again, this is a dramatic opinion and the analysis is developing. We will keep you posted on any and all developments.

Schmitz vs. Great American Assurance Company,

2010 Mo.App. LEXIS 739 (June 2010)

By David T. Ahlheim

A general liability carrier attempted to defend its insured under reservation of rights based upon an exclusion in the policy. The reservation of rights was rejected by the insured. The umbrella carrier also refused to defend as it was a follow form policy and there was no coverage under the underlying policy. After general liability carrier refused to waive it reservation, the insured entered into a Settlement Agreement pursuant to R.S.Mo. 537.065 and consent judgment.

In a subsequent equitable garnishment action, the court found the general liability carrier's exclusion to not apply and that indeed it did owe a duty to defend and indemnify. The general liability carrier settled with Plaintiff for $700,000.00 in cash if Plaintiffs would provide a receipt and satisfaction to the court for $1 million and thus triggering the umbrella coverage. In *Schmitz,* the court determined that the $700,000.00 settlement was not a proper exhaustion of the general liability insurance policy and thus did not trigger the umbrella coverage.

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Court Addresses Factors for what is "Ordinary Care" for Landowners

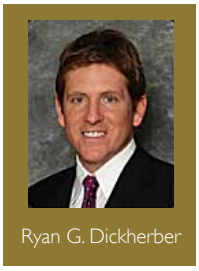
By David T. Ahlheim

The Eighth Circuit Court of Appeals recently addressed the issue of what is ordinary care on behalf of a landlord in premises liability suits. In ***Roberson v. AFC Enterprises,*** 602 F.3d 931, Plaintiff slipped and fell on wet oil in the Church's Fried Chicken Restaurant. Plaintiff testified she walked into the store and did not see the wet oil. On the way out, and approximately ten minutes later, she slipped and fell on wet oil. The Court reminded that Missouri law does not focus on the length of time a dangerous condition is present. Indeed, the Court noted that it is no longer "so important a factor." Instead, the more important factor was the "method of merchandising and nature of the article causing the injury." ***Roberson,*** 602 F.3d at 934. The Court ultimately ruled that the Plaintiff must show evidence of how the Defendant was monitoring their parking lot. However, the Court acknowledged that a store owner must have "some opportunity to observe the dangerous condition before the fall."

In the case at hand, because no evidence was presented as to the methods of merchandising and the nature of the article causing injury, a directed verdict was appropriate.

This is an interesting case as it affects most slip and fall matters in Missouri. Often, we focus upon how long the item was present before the incident took place. It is also important to investigate the type of business that the insured runs and steps to avoid accidents and spills. We recommend considering these types of analyses more so than the length of time the item existed prior to the slip and fall.

Can Plaintiff Bring Imputed Liability Claims Against an Employer if it has Admitted its Employee was Acting within Course and Scope of Employment?



Ryan G. Dickherber

We have seen over the past few years that a number of plaintiffs' attorneys in Missouri are bringing more than just a negligence claim when an employee causes a motor vehicle accident. Plaintiffs' attorneys have begun to look at the company itself to establish liability by making imputed liability claims (i.e. negligent entrustment, negligent hiring/retention, negligent supervision, negligent training) against them. In doing so, plaintiffs' attorneys attempt to discover inflammatory evidence to submit to the jury by delving into a company's policies and procedures regarding hiring, training, or operations. However, there is a great debate as to whether plaintiffs' attorneys can bring or conduct discovery on these imputed liability claims when a company admits that the employee was acting within the course and scope of his or her employment at the time of the motor vehicle accident.

Over fifteen years ago, the Supreme Court of Missouri in *McHaffie v. Bunch* issued a favorable opinion holding that once an employer admits that its employee was acting within the scope of his or her employment, a plaintiff cannot proceed on some other theory of imputed liability against the employer. 891 S.W.2d 822 (Mo. banc 1995). In *McHaffie*, plaintiff brought suit against a trucking company and its driver for injuries sustained in a collision. Plaintiff alleged that the trucking company was liable under theories of vicarious liability, negligent entrustment, and negligent hiring. The Supreme Court ruled that plaintiff was unable to bring the alternate theories of liability since agency had been admitted by the trucking company. In its reasoning, the Supreme Court noted that where imputation of negligence is admitted, the evidence submitted to establish the other theories serves no real purpose and potentially inflammatory evidence may come into the record which is irrelevant to any contested issue in the case.

Since *McHaffie*, companies have been successful in using this holding to prevent plaintiffs from proceeding on imputed liability claims. However, the logic of McHaffie has not been consistently followed over the years by the courts. Some courts have applied McHaffie by dismissing imputed liability claims of plaintiffs. *Hoch v. John Christener Trucking, Inc.,* 2005 WL 2656958 (2005). Other courts have not dismissed imputed liability claims, especially in cases where punitive damages are alleged against the company. *Miller v. Crete Carrier Corp.*, 2003 WL 25694930. Plaintiffs' attorneys attempt to distinguish *McHaffie* on this point in stating that these imputed liability claims can be pursued if punitive damages are alleged against the company. However, a federal court in Missouri has held the opposite of *Miller* by dismissing the imputed liability claims although punitive damages were alleged by plaintiff. *Connelly v. H.O. Wolding, Inc.*, 2007 WL 679885 (2007). The court emphasized that the language from *McHaffie* did not set out that one may assert additional theories of imputed liability when a plaintiff alleges punitive damages.

Although the courts do not apply *McHaffie* consistently, companies need to move to dismiss the imputed liability claims early to limit the scope of discovery – making the only issue one of negligence on behalf of the driver. By allowing plaintiffs' attorneys to look into a company's policies and procedures, it can lead to the discovery of inflammatory evidence that can drive up the settlement value or exposure of the company. However, even if claims are not dismissed early on, a company should raise the issue again prior to trial by requesting the court to force the plaintiff to make an election on which theory plaintiff will proceed with at trial.

The Spoliation Doctrine and Surveillance Video

The Missouri Approach


Joseph V. Lesinski

Security cameras are everywhere. However, finding and preserving video footage following an accident is often problematic in the real world. In cases involving a misplaced surveillance video (or other physical evidence), plaintiff's attorneys may seek to impose the evidentiary doctrine of "spoliation." However, simply neglecting to preserve the video, without more, is insufficient to impose the doctrine.

"Spoliation is the destruction or significant alteration of evidence." *Schneider v. Guilliams*, 976 S.W.2d 522, 527 (Mo.App. E.D. 1998). The doctrine does not look to whether the spoliator's opponent suffered prejudice as a result of the spoliation. *Id* at 526. Rather, the doctrine is designed to punish by imposing an adverse evidentiary inference. *DeGraffenreid v. R.L. Hannah Trucking Co.*, 80 S.W.3d 866, 873 (Mo. Ct. App. W.D. 2002) (holding that the wrongdoer must admit that the destroyed evidence would have been unfavorable to the spoliator's position). When spoliation is urged as a rule of evidence, the party seeking to benefit must show that intentional destruction occurred under circumstances which give rise to an inference of fraud and a desire to suppress the truth. *Morris v. J.C. Penney Life Ins. Co.,* 895 S.W.2d 73, 77 (Mo.App. W.D. 1995). Missouri does not recognize a separate cause of action for intentional or negligent destruction of evidence. *Baugher v. Gates Rubber Co.*, 863 S.W.2d 905 (1993).

The mere loss or failure to preserve surveillance video is insufficient to invoke the spoliation doctrine. *Baldridge v. Director of Revenue,* 82 S.W.3d 212, 223 (Mo. App. W.D. 2002). In *Baldridge,* the trial court set aside the revocation of a driver's license because the Director of Revenue failed to provide the driver with the surveillance video of his arrest. The Director urged that the video was partially recorded over by mistake. Ultimately, the *Baldridge* court found insufficient evidence of fraud, deceit, or bad faith to apply the spoliation doctrine.

In sum, to succeed on a spoliation theory, a plaintiff must establish that the possessor of the video recognized a duty to preserve it for use in the lawsuit. Simple negligence in failing to retain or preserve a videotape are likely insufficient to support the theory of spoliation.

The Illinois Approach


David T. Ahlheim

Under current Illinois law, the intentional or negligent failure of a party to an action to preserve evidence may give rise to sanctions. However, it is more common for a Plaintiff to bring a separate action for negligent spoliation of evidence. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188 (Ill. 1995)

To establish a case for negligent spoliation of evidence, a plaintiff must show that the defendant owed plaintiff a duty to preserve evidence, breached that duty, and because of that breach proximately caused plaintiff to be unable to prove the underlying cause of action. *Burlington Northern & Santa Fe Railway Co. v. ABC-NACO,* 2008 Ill. App. LEXIS 1219.

In *Boyd*, the Illinois Supreme Court stated that, while there is no common law duty to preserve evidence, such a duty may arise by agreement, contract, statute or special circumstance, or a defendant might voluntarily assume such a duty by affirmative conduct. There is a duty to preserve evidence if a reasonable person in the defendant's position would have foreseen that the evidence was material to the case. The plaintiff also must allege and the defendant's loss or destruction of the evidence caused the plaintiff to be unable to prove an otherwise valid underlying cause of action. 166 Ill. 2d 188

In *Dardeen v. Kuehling*, 213 Ill. 2d 329, 331 (Ill. 2004), the Illinois Supreme Court set forth a two-prong test for spoliation claims. Under the first prong, a spoliation plaintiff must demonstrate that at least one of the circumstances outlined in Boyd exists. Under the second prong, the plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have known the evidence would be material to potential civil litigation. If the spoliation plaintiff does not satisfy both prongs of the test, there is no duty to preserve the evidence at issue.

When new Illinois claims come in, it is essential be vigilant of and preserve evidence. This may mean having your insured keep or paying experts to store evidence. In situations where storage is not feasible, it is essential to document with photographs, detailed measurements, video and other similar methods. Failure to do so could expose your insureds to a separate cause of action for spoliation. Spoliation can also expose insurance carriers to extra-contractual damages and cause the carrier to be brought into a damage suit.

Exculpatory Clauses (*continued from page 1*)

specificity is determined by the use of the words "fault" or "negligence" or their equivalence in the clause or contract.

To help understand what is at issue, here are two representative cases – the first court refused to enforce the clause and the second did enforce it.

The seminal case is *Alack*. This case involved a health club member who suffered injuries while using health equipment. As part of his membership to the health club, the member signed a two page, 17 paragraph retail installment contract which contained a general exculpatory clause. The clause stated in relevant part:

By use of the facilities of Seller… Member expressly agrees that Seller shall not be liable for any damages arising from personal injuries sustained by the Member…on the premises… Member assumes full responsibility for any injuries, damages or losses which may occur to Member, on or about the premises and does hereby fully and forever release and discharge Seller and all associated gymnasiums, their owners, employees and agents from any and all claims, demands, damages, rights of action, or causes of action, present or future, whether the same be known or unknown, anticipated, or unanticipated, resulting from or arising out of the Member's use…

The *Alack* Court concluded that an exculpatory clause that purports to relieve a party from any and all claims is duplicitous, indistinct and uncertain. *Alack*, 923 S.W.2d at 337.

However, *Milligan* sets out an example of an enforceable exculpatory clause. In *Milligan*, the plaintiff executed a rental property agreement for an apartment. The agreement contained an exculpatory clause. Plaintiff was injured in a fire at the apartment complex and subsequently filed suit against the owner of the property. The defendants filed a motion for summary judgment based on the affirmative defense of release under the exculpatory clause. The clause stated in relevant part:

WAIVER OF LIABILITY: Lessee hereby agrees that Lessor shall not be liable to Lessees, his family, guests, invitees, servants, or others for injury to or death of any person, nor for loss or damage to property occurring in or about the Leased Premises from any cause whatsoever, even if the cause or damages or injuries are alleged to be the fault or caused by the negligence or carelessness of the Lessor.

The court held that the release was effective as to the owner because it clearly, unambiguously, unmistakably, and conspicuously applied even if the cause or damages or injuries were alleged to have been the fault or caused by the negligence or carelessness of the lessor applied even if the cause or damages or injuries were alleged to have been the fault or caused by the negligence or carelessness of the lessor. 232 S.W.3d at 691.

When looking at your claims to see if an exculpatory clause can be enforced, it is important to look at the specific language of the clause. It is essentially a bright-line rule that the words "fault" and "negligence" shall be used in an enforceable exculpatory clause. The more detailed and conspicuous the provision is, the more likely it is to be enforced.

Firm Updates

In June, ***Dave Ahlheim*** and ***Tom Lewis*** tried to verdict a pedestrian/vehicular accident in St. Louis County. The Plaintiff pedestrian crossed a 4 lane road outside of a crosswalk. Our driver was charged with failing to keep a careful lookout. The jury apportioned fault 55% to Plaintiff and 45% to the Defendants.

In July, ***Dave Ahlheim*** and ***Joe Lesinski*** obtained summary judgment in Cape Girardeau County on behalf of a foreman in a work place accident. Plaintiff sustained a double amputation of his right leg and left arm following coming into contact with a power line.

In May, ***Tom Lewis*** was elected to the Executive Committee of the Lawyers Association of St. Louis.

Jim Childress and ***Ryan Dickherber*** defeated challenges at the Court of Appeals and Missouri Supreme Court by a Third Party Defendant German ladder designer and manufacturer. The German company argued it was not subject to personal jurisdiction in Missouri.

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Inside This Issue

Childress Ahlheim Cary LLC

Attorneys at Law

At Childress Ahlheim Cary LLC we have not forgotten that the practice of law is a service profession. Our firm is committed to providing an unsurpassed level of representation and personal service to our clients. We believe maintaining close ties and providing open lines of communication with our clients ensure the quickest and most efficient handling of cases. Our lawyers provide thorough and prompt services in all aspects of our defense practice.

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