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CAC Advisor

Missouri and Illinois Updates

Legislative and Judicial Efforts to Normalize "Co-Employee" liability

David T. Ahlheim

Since August 2010, the explosion of "co-worker" liability cases has been palpable. In many serious workplace injuries, civil lawsuits have targeted the company's president, safety managers, foreman and other "officers or directors." Plaintiff and defense lawyers have been struggling to keep up with the consequences.

The primary reason was the Western District Court of Appeals decision in Robinson v. Hooker, 323 S.W.3d 418 (2010). That decision took a narrow or "strict" reading of the traditional "exclusive remedy" provision as read through the prism of the 2005 Missouri workers compensation tort reform. Robinson essentially eliminated the statutory protection from civil lawsuits from the employer's "exclusive remedy" statute.

Recent statutory modification and a recent decision by the same Western District Court of Appeals in Hansen v. Ritter, 375 S.W.3d 201 (2012) have attempted to bring clarity and restore order to the confusion.

Historical Analysis

When states started implementation of a workers compensation system in the 1920s, it was designed to protect and give certainty to employees and employers. Workers would receive guaranteed medical payments and compensation for workplace accidents. Employers would gain cost certainty by elimination of jury trials. Part of the trade-off for a no-fault workers compensation system was that it would be the exclusive remedy for work place accidents. By statute, no civil suits were permitted against an employer and employees.

In the early 1980s, the Court of Appeals slightly modified this to allow civil lawsuits against co-employees in egregious cases. State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo. App. E.D. 1982). Suits were permitted when a co-employee knowingly or recklessly exposes a fellow co-employee to a danger beyond that normally faced in the workplace – "Something More" *(continued on page 3)*

Evidence of Drug Use for Comparative Fault & Impeachment in a Civil Trial
Secrist v. Treadstone, LLC and Johntz

Craig Klotz

In Secrist v. Treadstone, LLC, Plaintiff Danny Secrist, a construction worker, filed suit against Treadstone, LLC, the owner of the property he was rehabbing, after he suffered severe injuries as the result of a fall down an elevator shaft. A jury found Treadstone was twenty percent (20%) at fault and Secrist was eighty percent (80%) at fault based on admission of evidence reflecting the presence of marijuana in Secrist's system. On appeal, the Missouri Court of Appeals for the Western District overturned and ordered a new trial.

In the underlying trial, the court allowed the admission of evidence reflecting Secrist's positive drug test results for marijuana, which showed Secrist had a THC level of 50 mg/ml, for the purpose of comparative fault and impeachment. However, Secrist appealed on the basis that Treadstone failed to lay the foundation required by law for the admission of marijuana consumption and impairment evidence by failing to introduce evidence from which the jury could reasonably infer that Secrist had a sufficient level of marijuana in his system to be impaired at the time of the accident.

Comparative Fault

The Court of Appeals found that allowing evidence regarding Secrist's THC level, standing alone, was not logically relevant in that without *(continued on page 2)*

Voluntary Dismissal: What Exactly Does it Mean or Do?


David T. Ahlheim

Most times when a case gets dismissed, it is a time for celebration. However, often times that does not mean that the case is really completed and leads to many more questions. A couple cases recently push the limits on what it means when a case gets dismissed and what can be expected.

In brief, a plaintiff may dismiss its case once without prejudice to re-filing and without consent of court at any time prior to voir dire of a jury. Missouri Rule of Civil Procedure 67.02. At any point in time prior to a jury being selected, a plaintiff can dismiss his or her case. The Judge has no discretion and defendant has no ability to object.

It is especially frustrating in cases where the Plaintiff has not endorsed experts, followed a Case Management Order or refuses to work up the case. A defendant who does not have this luxury has to prepare for a trial and appear on Monday of trial to find the Plaintiff has dismissed the case.

Upon filing a voluntary dismissal, the court immediately loses jurisdiction to hear any motions or any substantive issues. The case is "as if [it] had never been filed." Oney v. Pattison, 747 S.W.2d 137, 139 (Mo. banc 1988).

In a recent case, Hart v. Impey, the Court entered summary judgment. But before entering a subsequent order awarding attorney's fees, Plaintiff filed a voluntary dismissal. The Court of Appeals ruled that the attorney's fees order was invalid because the Court lost jurisdiction over the case.

This is reminiscent of two cases recently handled where a plaintiff has dismissed a case after receiving an adverse ruling on dispositive motions but before the order becomes final. Plaintiff voluntarily dismissed after the Court granted favorable ruling on choice of law and/or summary judgment. In one case, Plaintiff dismissed and re-filed within hours of the Judge's ruling. It is unclear if these cases, along with the Hart case, become an unfortunate trend. Regardless, we believe a new judge will be heavily persuaded by prior reasoned rulings.

As indicated, because the dismissal is "without prejudice," the exact same matter can be re-filed the same day or at anytime through the original statute of limitations. This is most often in negligence cases five (5) years from date of loss or within one year from the date of the dismissal. RSMo. §§516.120 and 516.230.

One of the few benefits provided to a defendant is that the plaintiff is to bear taxable court costs. RSMo. § 514.170. Rule 67.02 provides that any new cause of action may be stayed until a plaintiff has paid unpaid costs from the first action. In practice, we file Motions to Tax Costs upon a voluntarily dismissal and, if not paid, Motions to Stay in the new action. Often the costs are nominal; however, we take solace where we can.

Evidence of Drug Use for Comparative Fault & Impeachment in a Civil Trial
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more information it lends itself to "rank speculation." Specifically, the Court ruled that evidence of THC in the system, without any evidence that the level was sufficient to impair, was improper. The Court of Appeals stated that there must be evidence beyond the "mere fact that a drug was present in someone's system in a particular quantity before a reasonable inference can be made that the person was impaired therefrom." Furthermore, "evidence of the level of drugs in persons system is meaningless to the lay person until there is some evidence as to what affect those levels of the drug in a person's system will be expected to have on the individual in question." Unlike with alcohol, where there is a statutory threshold that results in a presumption of impairment, no such standards currently exist with other drugs, legal or illegal. There is no rule that any level of any drug in the person's system results in "automatic permissible inference of impairment." As such, the Court of Appeals ruled that there was no evidence that the level of THC in Secrist's system would result in a certain type or degree of impairment or that his behavior the day of the incident was consistent with impairment by marijuana ingestion.

Impeachment

In Missouri, courts have generally ruled that any possible impairment of a witness's ability to recall is relevant to his credibility. However, in this matter the Court ruled that evidence regarding Secrist's THC levels for purpose of impeachment was improper because THC levels in the bloodstream are not alone an indication of impairment. As a result, the Court found that it is mere speculation to conclude that THC levels in the bloodstream was anything more than THC being present in the blood. The Court based this conclusion on the fact that the presence of THC in the blood does not establish when the person is exposed to or when the person ingested the marijuana or whether the person was impaired as a result of THC ingestion.

Therefore, a positive drug test alone will not likely get before a jury either directly or indirectly. We are now recommending using toxicology experts to present evidence to show impairment in light of this decision.

Legislative and Judicial Efforts to Normalize "Co-Employee" Liability

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than a simple failure to maintain a safe workplace. Most of the successful cases are shocking examples of work place activity (i.e. ordering an employee to run a faulty pressure tank to "run it until it blows.")

Post Robinson

We have defended "Something More" cases including: Did a foreman direct an employee to work on live power lines without safety equipment? Did a president instruct an untrained employee to put his hand into an unguarded and malfunctioning punch press? These cases always involved the fundamental question: Did the co-employee affirmatively create a risk beyond that faced in the normal work environment?

With Robinson eliminating co-employee protections, we are now defending several cases where a co-employee "failed to maintain a safe work environment." The lawsuits allege civil liability for co-employees from foreman to presidents of companies for run of the mill accidents. Largely because of Robinson, these allegations survived Motions to Dismiss.

Hansen v. Ritter and Legislative Changes

In summer 2012, the Western District Court of Appeals issued Hansen v. Ritter. While specifically upholding Robinson, the Court practically overruled it. The Hansen Court ruled that a co-employee does not owe a common law duty to another co-employee to maintain a safe workplace. That duty is the non-delegable duty of the employer. As such, any lawsuit claiming the co-employee failed to maintain a safe workplace is properly dismissed. However, the Court essentially reiterated that the "Something More" analysis is still good law.

Also, the Missouri Legislature enacted a statutory "fix" to the workers compensation exclusivity provision. For accidents after August 28, 2012, co-employees are protected except for any "affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." RSMo. § 287.120. No court has interpreted this new provision. It is clearly a legislative attempt to create a "Something More" standard. However, it is broad and open to substantial interpretation.

Where are we?

Both Hansen and the statutory change are generally positive for defendants and insurers. As time moves forward, it appears that Robinson was largely an aberration. With these two changes, the state of the law is generally similar to pre-Robinson. "Something More" cases are likely the only viable co-employee cases.

In practice, we are aware of a couple Circuit Courts having dismissed Robinson "failure to maintain a safe workplace" cases. Many Plaintiffs' lawyers are, by amendment, turning these into "Something More" cases to get around Hansen. This essentially means that a case will survive a Motion to Dismiss but will face serious challenges on a Motion for Summary Judgment. Even if a case survives a summary judgment, Plaintiffs will have an extraordinarily hard time making a submissible case at trial because of the high burden of proof.

We believe we are seeing a stabilization of this area of the law and return to traditional principles of co-employee liability. Because of the attention to this area brought by Robinson, we still expect to see more co-employee cases in the future. Yet, we expect these to have limited exposure except in truly outrageous circumstances.

Sports, Athletics and Defending the Event Organizer


David T. Ahlheim

Running in a 5K race for a local charity or participating in an endurance/obstacle race is increasing in popularity. For almost all events, participants often get asked sign waivers or releases. This includes allowing children to participate in school physical education and to play sports.

However, if you get injured in a sporting event that you voluntarily participated in, what defenses are available to the sponsor? Besides traditional comparative fault, this article discusses the two most common absolute defenses.

Releases and Waivers

We have addressed that releases or waivers of future injuries are enforceable under Missouri law but the release must be conspicuous and specific.

However, it was recently addressed again in Holmes v. Multimedia KSDK, Inc. (Mo. App. E.D. No. ED98466, January 15, 2013). In this matter, Plaintiff Holmes signed up for the Susan G. Komen Race for the Cure. Plaintiff fell on the television reporter's equipment that was left in the open. As part of the entry form, there was a "race waiver and release," this included a release for Komen and all event sponsors or affiliates. The release was "for any injury or damages." The release was signed before KSDK was affiliated with the event.

The Court of Appeals in Holmes held that "public policy disfavors but does not prohibit releases of future negligence." Slip Op. at 5. The release will be considered valid if it contains "the words 'negligence' or 'fault' or their equivalents" are used conspicuously so that a reasonable person knows what he or she is signing. Slip Op 6.

Also, the Court was not concerned that KSDK was not specifically identified in the release. It felt that a class of individual "event sponsors" was sufficient definition of a class of people and upheld the release.

In Illinois, exculpatory agreements are similarly not favored by the law and are strictly construed against the party they benefit. However, they are enforced. But, it is often a fact specific analysis as how conspicuous and specific language of the agreement. The agreement protecting one from the consequences of his own "negligence" must be expressed in clear, explicit, and unequivocal language showing that such was the intent of the parties. Calarco v. YMCA, 149 Ill. App. 3d 1037, 1042 (Ill. App. Ct. 2d Dist. 1986).

Assumption of Risk

By knowingly and voluntarily participating in an event or sport, the participant often assumes the risks involved. This would absolve the event sponsor of related liabilities.

Besides the obvious expressed assumption of risk discussed earlier, Missouri recognizes an "implied

assumption of risk" doctrine that protects event sponsors, including schools, CYC or other sponsors. The participant is deemed to have assumed the risks inherent in the sport or activity, and thus the defendant owes no duty to protect the plaintiff from such risks.

Sheppard ex rel. Wilson v. Midway R-1 Sch. Dist., 904 S.W.2d 257, 261 (Mo. App. W.D. 1995).

In a recent case of some curiosity, the Kansas City Royals mascot "Sluggerrr," was sued for throwing a hot dog during

What Effect Does Internet Registration Have on a Waiver?

With so many events moving to internet registration, often when signing up on-line, there is a box that must be clicked indicating that you have "read" the agreement.

There are two main types of internet based agreements: "click wrap" and a looser "browse wrap" agreements. Most "click wrap" agreements require the user to clicking an "OK" or "I Agree" button on the webpage or pop-up window. A user rejects it by clicking "Cancel" or closing the window. A "browse wrap" agreement suggests that a user agrees to terms and conditions without specifically clicking or "agreeing" but otherwise completes the transaction.

However, Missouri and Illinois Courts have found generally that "click wrap" or even, in some circumstances, "browse wrap" sales agreements are enforceable. While no case discusses applicability of exculpatory clauses, other similar provisions, including arbitration clauses, have been upheld.

Major v. McCallister, 302 S.W.3d 227 (Mo. Ct. App. 2009), Hubbert v. Dell Corp., 359 Ill. App.3d (Ill. Ct. App. 2005)

the "Hot Dog Launch" that hit the eye of Plaintiff Coomer. The case turned on the affirmative defense of "assumption of the risk." Voluntary participation in the activity serves as consent to the known, inherent, risks of the activity and relieves the defendant of the duty to protect the plaintiff from those harms. A person has no duty to protect against those inherent risks resulting from the nature of the activity itself. Ivey v. Nicholson-McBride, 336 S.W.3d 155, 157 (Mo. App. W.D. 2011).

The Court of Appeals determined that objects leaving the field (i.e. balls, bats, etc.) were known risks. In those instances, a person "assumes risks" involved with the event. However, the Court ruled that secondary risks from promotions (or hot dogs thrown by mascots) are not "necessarily inherent to the game." Coomer v. Kan. City Royals Baseball Corp., 2013 Mo. App. LEXIS 46 at 6 (Mo. Ct. App. Jan. 15, 2013).

When these issues are presented in a case, look at the language of the release. It must be conspicuous and include key words or equivalents of "negligence" or "fault" and have a specific class of people to be released. Lastly, see if a plaintiff assumed the risk of the event and whether the risk is "inherent to the game."

Firm Updates

David Ahlheim received a directed verdict on behalf of a condominium developer after seven days of trial in St. Louis County. Plaintiffs claimed a water leak was covered under express and implied warranties and/or res ipsa loquitur doctrine.

David Ahlheim and *Craig Klotz* won a trial in St. Louis County after Plaintiff claimed injuries from a slip and fall at a condominium. Plaintiff claimed water was on the lobby floor from improper snow and ice removal and resulted in a fractured wrist.

Rebecca Cary and *David Ahlheim* were featured speakers at seminars sponsored by National Business Institute on "Personal Injury 101" and "Damages in Personal Injury."

Jim Childress and *Rebecca Cary* were featured speakers on school liability claims at Missouri United School Insurance Counsel's annual meeting in January 2013.

Childress Ahlheim Cary participated again in the Bar Association of Metropolitan St. Louis' Motion for Kids program by buying Christmas presents for area foster children.

Childress Ahlheim Cary welcomes *Scott Kehlenbrink* and *Claire Kaltenbach* to the firm as Associates.

The information provided is for general information and discussion only. It should not be construed as complete legal analysis for the matters presented and is not considered legal advice. This material is considered advertising material and has not been approved by the Missouri Bar Association or the Supreme Court of Missouri.

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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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