Volume I, Edition IV
December 2010

CAC Advisor

Missouri and Illinois Updates

Prepare to Succeed: A Few Words about Investigation

James W. Childress

The other day, a seasoned insurance client mentioned to me how technology has changed the claim landscape. Email, voicemail, wireless internet, texting, digital photography, video and Twitter have all added to the arsenal for both claimants and carriers. I agree that there are many more tools available for investigation. However, I have found and still find that there is no substitute or technology to displace prompt and thorough investigation.

Even though the newer technology can be dazzling, it still must be placed in the hands of competent people who are dedicated to properly investigating their case. I know that most of the carriers have a rigorous training program for claim investigation, and most are very successful. It never hurts to remind ourselves, however, that we must be constantly vigilant about early and solid investigation.

I have seen the importance of investigation many times throughout my career in defending cases. My first encounter was when we defended cases for a large, well known carrier. (I will not mention its name, but it was "like a good neighbor.") They specialized in the use of Polaroid photography. Many, many cases were won and lost on those photographs. I often wonder how many were marked as exhibits at trial. I do remember that they were almost fanatic about obtaining photographs immediately after an accident, and preserving the evidence.

There are many other examples. In a large truck accident case, the insured had the foresight to take photographs at the accident scene. *(Continued on page 2)*

CSST – When Lightning Strikes

David T. Ahlheim

In residential, commercial and even industrial application, a product called corrugated stainless steel tubing (CSST) has been used as a cost-effective alternative to standard threaded black iron piping for natural gas and propane. It is lightweight, flexible and requires fewer connections and fittings which make it easier to install than traditional black iron piping. Because of its flexibility, it is heavily used in retrofitting and renovations. CSST consists of a continuous, flexible, stainless steel pipe with an exterior PVC covering. It uses "home run" connections that run from the natural gas or propane source to each gas appliance. To date, over 150 million feet of corrugated stainless steel tubing has been installed in roughly 2 million homes.

There are at least four main manufacturers, Omegaflex, Titeflex, Ward Manufacturing and Parker Hannifan. Each has their own proprietary CSST and trade names that are not interchangeable. Each has their own exclusive distribution chain. Typically, each manufacturer – through its distributors – offers training and certification for installation of CSST to plumbers.

While this product has been revolutionary in the construction world, it has had one dramatic drawback that has mired it in lawsuits over the past ten years – lightning strikes. A direct lightning strike can carry over 100 million volts of electricity. While no construction methods can protect a building from a direct strike, CSST is vulnerable to *indirect strikes* that are a considerable distance away because of its ultra-thin walls.

When CSST fails in a lightning strike, a small pin head size hole melts the stainless steel. The CSST typically melts when the energy *(Continued on page 5)*

Prepare To Succeed

(*continued from page 1*)

Years later, these same photographs were used at trial to show a paint transfer which exonerated our insured. No one realized the significance of these photographs until much time had passed, and vehicles had been repaired or discarded. It reminds us that memories fade and stories change, but physical facts do not lie. Photographs of skid marks, vehicles or other property damage may tell the story.

Videography can be just as effective, such as video surveillance. This would be as effective as video surveillance. A word of caution: the Missouri Supreme Court Rules require that we produce video taken of the plaintiff. Surveillance can be an effective and devastating method of investigation, but videotaping the claimant should be used sparingly. Not too long ago, I encountered a situation where we had hours of videotape of the plaintiff. Most of it showed that he suffered an injury, and a limp. A very small portion (about 15 seconds) showed the plaintiff walking in a normal fashion. Our evidence actually supported the claim being made by plaintiff, and plaintiff's counsel used this aggressively at trial. On the issue of videotape surveillance, I would say use it if it supplies a homerun. Otherwise, use it sparingly.

This is not to say that investigation only involves still photography or videotape. In a more recent case involving a saw, the carrier was very prompt and active in its early investigation. It included obtaining the services of an expert witness, and retaining all the objects involved in the incident, including the wood being used at the time of the accident. When the plaintiff made a claim, he was immediately faced with a full and complete investigation that discouraged his lawyer. The case is languishing, and the claimant is on his second set of attorneys. In my view, the early and aggressive approach will go a long way in defeating that claim.

Finally, there is the issue of "preserving" the evidence. When given the opportunity and good early investigation is accomplished, we must be certain to hang onto it. I have encountered many, many cases where investigative material has been inadvertently destroyed or misplaced. Not only does it hurt the defense of the case, it can cause other more serious problems, such as the spoliation issue. Our firm previously wrote on that topic. It is very difficult to explain to a judge or jury that the exculpatory video evidence was inadvertently destroyed. Most people simply do not believe it.

So, when given an opportunity to investigate a case early, do so aggressively. It is equally important to hang onto the evidence once it is obtained. By doing so, it will help you achieve a successful result.

Illinois And Missouri Supreme Courts Update

By Joseph V. Lesinski

Preston v. American Family Mutual Insurance Company, 2010 Mo.App. LEXIS 1292 (September 2010)

Bicyclist struck after being waved on by motorist presented sufficient evidence to make an uninsured motorist claim

A bicyclist was waiting at an intersection when an unidentified driver stopped and waved him across the street. While crossing, the bicyclist was struck by a vehicle coming from the other direction and suffered significant injuries. The bicyclist brought an uninsured motorist claim against his insurer alleging that the unidentified driver was a negligent uninsured motorist and that he was injured as a direct and proximate result of her actions. (Pursuant to RSMo. §397.203(1), an unidentified motorist is deemed to be an uninsured motorist.)

The trial court granted the insurer's motion for summary judgment and the bicyclist subsequently appealed.

The Missouri Court of Appeals, Eastern District, reversed and remanded, holding that the bicyclist presented a genuine issue of material fact regarding causation. Specifically, the court held that the unidentified motorist could have been negligent in gesturing the bicyclist to cross a busy street with traffic approaching from the opposite direction and therefore, summary judgment was improper.

Hicks v. Korean Airlines Company, 2010 Ill.App. LEXIS 1029 (September 2010)

Illinois Dramshop Act is not sole remedy for alcohol related incidents

An employee of Korean Airlines was involved in a fatal car accident following a work function where she had been drinking. The estate of the deceased driver brought a personal injury lawsuit against Korean Airlines alleging it was liable both under the Dramshop Act and under the doctrine of respondeat superior. Specifically, plaintiff alleged Korean Airlines was liable for its employee's action in operating her motor vehicle while intoxicated since she was acting within the scope of her employment at the time of the accident.

(*continued on back cover page*)

Traveling for Business? Are You Still in the "Course and Scope" of Your Employment?


Thomas J. Lewis

We have recently been confronted with more and more cases involving insured employees involved in traffic accidents while traveling for business. In each of these instances, some portion of the employee's job included traveling away from the office and during that travel the employee engaged in some sort of drinking and entertainment activity. As a result, the injured party typically brings a lawsuit against the employer under the respondeat superior or agency theory. Under the doctrine of respondeat superior, an employer is held responsible for the misconduct of an employee where that employee is acting within the course and scope of his employment. *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. banc 1995). Many times, the issue becomes whether the employee was engaged in employment at the time of the incident.

Missouri long has held and followed the "going and coming rule" in determining whether an employee was acting within the course and scope of his employment. Getting to and from the place of work is ordinarily a personal problem of the employee unless there is some special benefit to the employer. *Sharp v. W. & W. Trucking Co.,* 421 S.W.2d 213 (Mo. banc 1967). The rule applies even when the employee uses an employer's motor vehicle. Id. The central premise is that a servant who is going to and from his place of work is "regarded as acting for his own purposes and not as engaged in work for his master." *Burks v. Leap,* 413 S.W.2d 258, 267 (Mo. 1967). Where an employee performs personal plans after work that do not benefit his employer, the employer is not liable for the employee's actions. *Massey v. Hamilton,* 583 S.W.2d 273, 275 (Mo.App. 1979).

In *Massey,* Darrell and Roger Hamilton were brothers who were in an accident when their truck collided with Joe Massey on their way home from work in Missouri to Kentucky. Their employer had paid their mileage to come to Missouri from Kentucky, and at the time of the accident they were on their way back to Kentucky for the weekend. The Court held that even though the employer initially paid for the Hamiltons' mileage to Missouri from Kentucky, the employer was not liable for the employees' actions. Their acts were personal in nature and not at the direction of their employer.

In order to skirt the going and coming rule, the injured party more often is pointing to exceptions including: the traveling employee exception, mutual benefit exception, special errand exception, and the dual purpose exception. The traveling employee exception arguably does not apply to lawsuits arising out of agency as it has its origins in the more liberally construed workers' compensation principles. *Custer v. Hartford Ins. Co.,* 174 S.W.3d 602, 610 (Mo.App. W.D. 2005). Even so, the courts have found that a traveling employee can be engaged in a deviation of employment when he/she is engaged in purely personal and social plans. *Smith v. Dist. II A & B, et. al.*, 59 S.W.3d 558, (Mo. App. W.D. 2001).

The other exceptions can prove a bit more problematic. Specifically, the special errand exception and dual purpose exception have been applied in lawsuits arising out of agency principles. However, the special errand exception is limited. If personal errands are performed with work related tasks and the work tasks create "special inconvenience, hazard or urgency in making the journey," an employer can be liable. *Tuttle v. Muenks, et. al,* 964 S.W.2d 514, (Mo.App. W.D. 1997). In *Tuttle*, the Court rejected the special errand exception because the employee was not "substantially inconvenienced" by traveling to the office to drop of work related material because also picking up his pay check. *Id.*

The dual purpose and mutual benefit exceptions are similar. The dual purpose doctrine provides "that if the employee's work requires travel, the employee (is) deemed to be in the course and scope of employment although he may be attending to a simultaneous personal purpose." *Id.* at 518. The travel must be necessary even where a personal purpose is lacking in order for the doctrine to apply. Id. Importantly, the dual purpose doctrine does not apply to a normal commute home or commute for a personal purpose, and instead, requires additional time or travel on behalf of the employer at the time of the accident, as well as evidence of both purposes in those cases. See *Gingell v. Walters Contracting Corp.*, 303 S.W.2d 683 (Mo.App. 1957).

The ultimate answer to whether an employee is within the course and scope of his employment requires a firm understanding of the "going and coming rule" and its potential exceptions and their application to the facts of an underlying claim. In the end, the injured party has to develop evidence that the employee was either working or engaged in one of the exceptions to the coming and going rule in order for the employer to have any liability. It is imperative in the initial claims and early litigation process that these facts are developed with an eye toward a motion for summary judgment.

Medical Bills: Amount Billed or Amount Paid? That is the question…


Rebecca A. Cary

This past year has given us a number of court decisions on the 2005 Tort Reform and the proper amount of medical bills that can be submitted to a jury. The Courts of Appeals have addressed the issue with differing results and formulas. We have addressed several of the cases in prior issues.

In October 2010, the Missouri Supreme Court attempted to put to rest the uncertainty with this issue. The question: whether a jury should hear evidence of the amount charged for medical treatment or the amount paid for the medical treatment in personal injury cases. In *Deck v. Teasley,* the Court decided Plaintiff Edith Deck was entitled to a new trial due to the trial court failing to allow her to present evidence of the full charges of her medical treatment to the jury. 322 S.W.3d 536 (Mo banc 2010).

The law in question is RSMo. § 490.715.5 that limits the evidence litigants can introduce regarding the value of medical treatment rendered to an injured party. It sets forth a rebuttable presumption that the dollar amount necessary to satisfy a plaintiff's financial obligation to his or her health care provider constitutes the value of the medical treatment rendered.

In her case, Plaintiff Deck filed a personal injury lawsuit arising out of a motor vehicle collision. Plaintiff offered testimony of three witnesses which set forth that the amount billed by the health care provider is a better indicator of the value of the medical treatment rendered than the amount reimbursed by Medicare. Despite this testimony, the trial court decided the presumption in § 490.715 was not rebutted and that the value of Plaintiff's medical treatment was the amount actually paid for her medical treatment, together with any amount she was still obligated to pay. The Missouri Supreme Court disagreed and found Plaintiff Deck properly rebutted the presumption by simply offering evidence that the value of her medical treatment was the amount billed.

Plaintiff lawyers feel the decision is favorable as they now have a blueprint to follow which will allow a jury to hear the amount charged for the medical bills. Essentially, the plaintiff needs to offer the medical bills, offer proof that the charges for the medical treatment equal the value of the medical treatment rendered and testimony to support these claims.

> The court seems to be in favor of giving all the information to a jury and letting them sort it out.

Defense lawyers are equally excited. The case seems to allow the defendant to offer the amount paid for the medical bills and any amount necessary to satisfy the financial obligation. Basically, if Plaintiff can introduce evidence of the amount billed for the medical treatment, then defendants can introduce evidence of the actual amount paid.

What does this mean? Plaintiffs are going to be able to present medical charges. Defendants are going to present the amount paid. The court seems to be in favor of giving all the information to a jury and letting them sort it out.

Firm Updates

CAC would like to introduce *Craig Klotz* to the firm. Craig is a 2006 graduate of University of Missouri-Kansas City law school and is licensed in Missouri and Illinois. He is part of our general litigation team.

CAC is continuing it is participation in The Motion for Kids Holiday Party. Motion for Kids serves St. Louis Area "Kids" in the foster care system and/or with a parent in the Missouri prison system. If you would like to participate next year, please contact Rebecca Cary or more information can be found at www.bamsl.org.

Tom Lewis participated, by singing and dancing with local lawyers and judges, in the Lawyers Association's 54th Annual Gridiron review in November.

CAC offers you our best wishes for the holidays and for health and happiness throughout the coming year.

CSST – When Lightning Strikes (*continued from page 1*)

from the lightning (trying to find the quickest way to the ground) arcs over to ductwork, structural metal beams, or copper tubing. Because of the high melting point of stainless steel, any hole is most likely from lightning. Due to the combustibility of gas, all three elements to start a fire are present: oxygen, a fuel source and the electric arc from the lightning. As a result, a mini-blow torch exists at the site of the failure. The losses are often catastrophic because of the blow torch effect rather than a slow smoldering fire that erupts.

CSST manufacturers typically claim that the resulting losses are not due to any defect in the product itself but are resulting from improper installation, bonding or grounding techniques and/or other installer error.

CSST Class Action

In 2004, a national class action was filed against the Omegaflex, Titeflex, Ward Manufacturing and Parker Hannifan in Clark County, Arkansas. The cause was settled and the settlement was approved on March 5, 2007. The settlement provided for a voucher of up to $2,000 to have your building bonded and grounded or a lightning protection system to be installed. More information can be found at www.csstsettlement.com

At this point, it is unclear what sort of protection the class action settlement will provide to the manufacturers. A recent jury verdict in Pennsylvania found Omegaflex strictly liable for damages resulting from an indirect strike.

Areas Of Interest Peculiar To CSST Fires

At or about the time of the class action settlement, the manufacturers began changing their installation instructions. In particular, the installation instructions began specifically providing that the CSST must be bonded and grounded using proprietary bonding clips. The manufacturers proffer that CSST is safe if properly bonded and grounded. However, prior to 2006, several manufacturers made no mention of bonding and grounding in installation and training.

Complicating matters more, the National Electric Code (NEC) and National Fire Protection Code (NFPA) and local building codes have not fully adapted to the introduction of CSST into the market place. However, building codes are intended to address life safety issues arising from stray electric current, as opposed to the dissipation of the energy created by an indirect lightning strike. As such, many experts across the country dispute whether bonding and grounding will have any effect in preventing a fire from a direct or indirect lightning strike. In other words, the bonding and grounding may merely be "window dressing" to make the customer feel safer but have no impact in preventing a fire.

Further, since the manufacturers now require bonding and grounding to a plumbing system, two different trades may be implicated – electricians and plumbers. Often, since two trades are involved, dividing responsibility between the two is muddled.

Claims And Lawsuits – What To Look For

As manufacturers may have protection from damage suits resulting from this class action settlement, Plaintiffs have sought to sue: (1) plumbers for improper installation, (2) electricians for failing to bond or ground the CSST, (3) general contractors, and (4) distributors on strict liability counts and improper training on how to install CSST.

The key facts that you should determine when you have one of these claims:

1. Identify the manufacturer of the CSST. Titeflex's CSST is stamped with the mark "GASTITE." Ward's CSST is stamped with the mark "WARDFLEX." OmegaFlex's CSST is stamped with the marks "TRACPIPE" or "COUNTERSTRIKE." Parker Hannifin's CSST is stamped with the mark "PARFLEX."

2. Was the CSST bonded or grounded?

3. Was the installation prior to 2006 when installation instructions were changed?

4. Was this a direct strike or indirect strike? This can be found by using a reporting service such as STRIKEfax or STRIKEnet. (http://thunderstorm.vaisala.com)

5. Retain a qualified Cause and Origin and Electrical Engineer and perform an inspection of the fire scene as soon as possible.

6. Put all potential parties on notice of a claim or bring them into the lawsuit as a third party as soon as practicable.

7. Preserve as much evidence as possible.

CSST cases are a combination of product liability cases, fire loss and construction cases. Knowing what to look for from the outset can make defending these claims more manageable

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.

Supreme Courts Update (*continued from page 2*)

Korean Airlines filed a motion for summary judgment asserting that it could not be liable either directly or vicariously because the Dramshop Act preempts all alcohol related liability. The trial court granted summary judgment in favor of Korean Air and plaintiff appealed.

The appellate court reversed the finding of summary judgment on the negligence count, finding the theory of respondeat superior liability against Korean Air was outside the scope of the Dramshop Act (which would otherwise control all claims related to the service of alcohol). The court concluded that although the Dramshop Act broadly preempts claims arising from a defendant's provision of alcohol, it does not prevent claims based on legal theories independent from serving alcoholic beverages. This ruling effectively ends the long-standing "exclusive remedy" of the Dramshop Act for alcohol-related negligence actions.

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