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CAC Advisor

Missouri and Illinois Updates

Negligent Infliction of Emotional Distress: Bystander Plaintiffs in the "Zone-of-Danger"

Joseph V. Lesinski

For many years in Missouri, plaintiffs alleging negligent infliction of emotional distress were required to have also suffered a contemporaneous traumatic physical injury. *Pretsky v. Southwestern Bell Telephone Co.,* 396 S.W.2d 566, 568 (Mo. 1965). However, Missouri courts now acknowledge that bystanders to an injury-producing event can recover for negligent infliction of emotional distress if they were within the "zone-of-danger." *Asaro v. Cardinal Glennon Memorial Hosp.,* 799 S.W.2d 595, 599-600 (Mo. 1990).

In cases alleging emotional distress without contemporaneous physical trauma, a bystander plaintiff can recover upon a showing that 1) the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) plaintiff was present at the scene of an injury producing, sudden event, and (3) plaintiff was in the zone-of-danger, i.e., placed in reasonable fear or threatened with injury to her or his own person. *Asaro,* 799 S.W.2d at 599-600.

A claimant's physical presence at the injury-producing event is the most essential component to the zone-of-danger analysis. In *Asaro*, a mother claimed negligent infliction of emotional distress against a physician who incorrectly reported the status of her son's heart surgery. *Asaro,* 799 S.W.2d at 597. The *Asaro* court determined because the mother was not a patient and was in no personal *(continued on page 5)*

A Date to Remember? Key Dates for New Lawsuits in Missouri and Illinois

David T. Ahlheim

In a recent discussion with a new lawyer, I began explaining the various items or "internal checklist" that I go through when looking at a new Petition. It is an internal triage of key dates, items and other considerations that can have ramifications throughout a case. Some of these may seem basic. However, I have noticed some plaintiffs' lawyers are setting traps – intentionally or not.

• Service of Process

Service is achieved when a sheriff or process server formally serves a summons to a defendant personally, at his place of residence or through his registered agent. It does not matter that the defendant did not *personally* receive the summons but only if the item is left at a residence or business with a person who will reasonably give the summons to the defendant. In Missouri, a person over age fifteen (15) is able to accept service. Missouri Rule 54.13. In Illinois, a person only has to be thirteen (13). (735 ILCS 5/2-203(a))

Most often, fighting service is a losing proposition. It is costly and does not address the main issue of defending the suit. Many times, accepting service when the insured defendant knows about the suit is preferable.

• Venue

Missouri has significantly tightened the rules for acceptable venue in tort actions. Venue is only proper where the "injury first occurred." RSMo. § 508.010. Under Missouri Rule 51.045, a party must file a Motion to Transfer Venue within sixty (60) days of service or it is waived. A party may seek an extension within the sixty (60) days but otherwise it is waived.

In Illinois, venue is appropriate wherever any defendant resides or where the transaction at issue takes place. (735 ILCS 5/2-101) Venue is waived if not raised before filing a responsive pleading. (735 ILCS 5/2-104(b)). *(continued on page 2)*

A Date to Remember? (*continued from page 1*)

In Missouri, if you receive a case that is pending in the Circuit Courts of the City of St. Louis, Jackson County or Greene County, carefully look at whether venue is appropriate.

In Illinois, Madison and St. Clair Counties are notorious and change of venue is extraordinarily difficult to get – be it for cause or "forum non conveniens." It is more likely to look to removal, if possible.

• Removal

A matter that is filed in state court is eligible to be "removed" to federal court if there is complete diversity of citizenship between the plaintiff and defendant and the amount in controversy is over $75,000.00. 28 USC § 1332. However, a party may only remove the case within thirty (30) days of first notice of a suit. 28 USC §1441.

As a general rule, a defendant is better off in federal court – especially if you are in a liberal venue. If elements are met, removal cannot be contested by Plaintiff. However, please note the statute does not say "service." The statute specifically provides that clock starts running on "notice." ***This deadline cannot be extended by consent of parties or even by Court order.*** Tricky plaintiff lawyers will send a "courtesy copy" of the Petition to the insured and insurance carrier to start the thirty (30) day clock on removal. This is especially true if the venue is one of the ones mentioned above.

• Change of Judge

In Missouri, under most circumstances, a change of judge must be filed within sixty (60) days of service of process or it is waived. Missouri Rule 51.05. Again, if multiple extensions are given by a plaintiff's lawyer to file an answer, this option can be unknowingly waived.

In Illinois, the general rule is that an application for change of judge must be filed before the Court rules on any substantive issue or by consent of parties (735 ILCS 5/2-1001(a)(2)).

In my practice, change of judge should be used in limited cases. However, it is an important tool at your disposal. Since the judge's rulings will influence the entire case, it is important to consider. This is especially true on cases involving technical legal issues or potential Motions to Dismiss or Summary Judgments.

• Default Judgment

In the unfortunate situation where an insured gets a default taken against him, the defendant has ***one year*** from the entry of default judgment. Missouri Rule 74.05(d). The default judgment may only be set aside for "good cause." That means a "mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." Rule 74.05(d). After one year, the Court no longer has jurisdiction. It is entirely up to the Court's judgment as to what "good cause" means in practice.

Illinois has tighter rules on defaults. A default may only be set aside if a Motion to Set Aside has been filed within thirty (30) days of the entry of default.

I have seen a couple different times over the years where a plaintiff's lawyer engages in settlement negotiations and it stops because plaintiff's lawyer has taken a default judgment. In both cases, the plaintiff's lawyer never advised the insurance carrier that a default was imminent or even that suit was filed. Then, exactly one year and one day later, the lawyer sends a copy of the default judgment requesting payment. The matters become hotly contested equitable garnishment actions.

As this is written, I have had cases that hinged (good or bad) based on actions of a tricky plaintiff's lawyer, a well meaning personal counsel or absent-minded insured. Remembering the key dates above can help arm you with your own "internal checklist" for new matters in Missouri and Illinois.

Missouri Supreme Court Update: Case Notes

By David Ahlheim

The Missouri Supreme Court recently issued an en banc opinion addressing the appropriate venue to sue an insurance company in non-tort action. The issue has been in flux since the legislature created modified the venue statutes as part of the 2005 "Tort Reform" package.

In this case, Auto Owners Insurance Company pursued an equitable contribution and equitable contribution action against Columbia Mutual Insurance relating to an underlying matter. Suit was initially filed in Jackson County. The Circuit Court ordered it transferred to Boone County because Columbia Mutual's registered agent and office were located there.

The Supreme Court reversed and held that "in a non-tort action" an insurance corporation may be sued in any county where it has an agent or office for the transaction of its usual and customary business."

State ex rel. Auto Owners Ins. Co. v. Messina, 331 S.W.3d 662 (Mo. 2011)

Does a Certificate Holder become an Additional Insured under your Policy?

By David Ahlheim and Jim Maher

Let me ask you if you have run across this or similar situation in past:

After an accident, a party calls claiming that they are supposed to be an "additional insured" under your insured's insurance policy relating to work being performed. It may be a general contractor or a landowner claiming that they are an "additional insured" on a contractor's insurance policy. The party claims that there is no ***written*** contract. But he did have "some paperwork" with insurance information before the job started. A certificate of insurance is produced. It may even have some language typed in by a broker saying that the party may be an "additional insured." However, the broker never notified the insurance carrier.

We hear this or substantially similar stories at least several times per year. This exact scenario was presented to an Illinois Court of Appeals who was asked to examine what rights a certificate of insurance confers upon the holder. In short, the answer is none.

Factual Background

In *Westfield Insurance Company v. FCL Builders*, 2011 Ill. App. LEXIS 186, No. 1-10-0521 (Ill. App. 2011), FCL Builders was the general contractor. FCL subcontracted the steel fabrication and erection for the project to Suburban Ironworks, which in turn further subcontracted out the steel erection to JAK. JAK employed Plaintiff.

JAK only contracted with Suburban Ironworks and not FCL. JAK purchased a commercial general liability (CGL) policy from Westfield Insurance Company. The policy contained a standard endorsement that allowed all parties with whom the insured had written contracts to be considered "additional insured" under the policy.

About a month into the job, Plaintiff, a JAK employee, was severely injured when he fell off steel beam. Plaintiff filed a suit against FCL and Suburban, alleging the breach of various duties of care regarding job site safety.

Westfield Insurance filed a declaratory judgment action relating to its obligations to FCL.

Holding

Since no written contract between JAK and FCL existed, the sole issue before the Court was whether FCL qualifies as an additional insured under the insurance contract because of the certificate of insurance.

The Court stated the certificate did nothing to modify Westfield's obligations under the insurance contract. First, the certificate was not issued to FCL by Westfield, but instead by an independent insurance broker. Second and more importantly, the certificate contained a disclaimer that stated:

"This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below."

Based on this provision the Court held the certificate here expressly conferred no rights on the certificate holder, and expressly did not alter Westfield's liability on the policy in any way. Consequently, the Court held that the Certificate of Insurance alone did not confer any rights on FCL.

Upon closer look at the "key disclaimer," this is contained on almost every ACORD form. It is so standard that it is rather surprising that the Court has given such deference to it. Indeed, because of this stock language, the Court determined that the Certificate of Insurance form did not become part of the insurance policy and was merely informational. Therefore, keep this in mind when looking at any Certificate of Liability on this issue.

Missouri Approach

After an extensive search of cases in Missouri, there is no case that has addressed this exact issue. Most cases will focus on one of two things: (1) whether the agent has express authority to issue the certificate with additional insured language or (2) whether the certificate was incorporated into the insurance policy. For example, see *Bellamy v. Pacific Mutual Life Insurance,* 651 S.W. 2d 490 (1983) and *Crown Center Redevelopment Corp. v. Occidental Fire & Casualty Co.*, 716 S.W.2d 348 (1986).

However, at least a couple Missouri Courts have found disclaimers in a Certificate of Insurance to be valid. For example, in an "order of coverage" matter, an insured attempted to use a discrepancy between a Certificate of Insurance and the declarations page to create an ambiguity in an insurance policy. The Court found the Certificate of Insurance was not part of the insurance policy because of a similar styled disclaimer. *Empire Ins. Co. v. Farm Bureau Town & Country Ins. Co.*, 633 S.W.2d 215 (Mo. Ct. App. 1982)

By using the *Westfield Insurance* case as persuasive authority and in conjunction with existing Missouri law, an argument can be made that similar disclaimers, as found in most ACORD forms, would prevent a Certificate of Insurance from amending or altering policy of insurance. Therefore, the actions of a cavalier insurance broker may not necessarily be binding upon an insurance carrier.

Often though, the decision to consider whether a party is considered an additional insured (or not) under these circumstances can be difficult. Sometimes, decisions are made for business reasons as opposed to legal ones. However, cases like *Westfield Insurance v. FCL Builders* can strengthen the insurance carrier's hand during negotiations. But when doing so:

1. Determine whether a written contract exists;
2. Examine what level of authority the agent has to bind the carrier when issuing a Certificate of Insurance or whether it is for "informational purposes only;" and
3. Look closely for disclaimers on a Certificate of Insurance form as most ACORD forms have this somewhere on the form.

After the Judgment – How a Judgment Creditor Will Attempt to Collect from an Insurance Policy?

Craig R. Koltz

In Missouri, once a judgment creditor obtains a judgment against an insured, who was insured for the loss, she has two options to reach the proceeds from the insurance policy to satisfy the judgment. She may proceed with a traditional garnishment in accordance with Missouri Supreme Court Rule 90 and R.S.Mo *section* 525.050 or she may file a suit in equity directly against the insurance company holding the policy under R.S.Mo *section* 379.200.

The use of the traditional garnishment process to reach the proceeds of an insurance policy dates back to the late 1800's. However, the ability to reach the proceeds of an insurance policy through the traditional garnishment was significantly weakened when insurance companies began including "no action" clauses in their policies. These clauses provided that the insurance company was not liable under the policy until the insured actually paid the judgment. As such, the insurer avoided liability on the judgment and was not subject to garnishment unless the judgment debtor first paid the judgment.

In 1925, in response to the "no action" clauses, the Missouri Legislature passed what has become known as the "equitable garnishment" under R.S.Mo *section* 379.200. In fact, *section* 379.200 is not a garnishment at all, but is a suit in equity against an insurance company, which allows a judgment creditor to seek satisfaction of her judgment under an insurance policy. It was ratified to provide an equitable remedy for a judgment creditor where the insurer would otherwise be able to block the judgment creditor's available remedy with a policy which included a "no action" clause.

Initially, section 379.200 was seen as an additional tool for a judgment creditor in the process of satisfying a default judgment. However, over the years, many Missouri Courts came to view *section* 379.200 as the exclusive remedy for a judgment creditor to satisfy her judgment. In fact, several cases concluded that garnishment rules under Missouri Supreme Court Rule 90 and *section* 525.050 were inapplicable because insurance proceeds were not among those listed in Rule 90.01 as items subject to garnishment. Furthermore, some Missouri Courts ruled that when a judgment creditor attempted to garnish insurance proceeds under Rule 90 and *section* 379.200, it should be treated as an "equitable garnishment" under *section* 379.200.

Finally, after years of uncertainty, the Missouri Supreme Court provided some clarity in 2001. In *Johnston v. Sweany*, the Court stated unequivocally that "[t]here are two avenues for a judgment creditor to collect money from an insurance company: (1) a traditional garnishment under section 525.240 and Rule 90 or (2) a direct action against the insurer authorized by section 379.200. 68 S.W.3d 938 (Mo. 2002).

A traditional garnishment under Rule 90 and RSMo. *section* 525.050 is ancillary to the original proceeding. It is beneficial to the insurer because it allows for the garnishee to obtain all of its costs, including attorney's fees, in defense of the garnishment so long as a judgment is not obtained against it. It is styled with the same style as the original suit and the insurer is not indicated as a party, but is listed as a garnishee. The insurer is served with interrogatories to which it files its answers. Upon a motion with the Court, the judgment holder may then file exceptions to the interrogatory answers. It is from this posture that the matter moves forward to determine if coverage exists under the insurance policy.

The preferred method for judgment creditors is nearly always under *section* 525.050 because it does not contain any provisions for attorneys' fees or costs if the action to recover proceeds from the insurance policy *(continued on back cover)*

Firm Updates

Rebecca Cary led the efforts of Childress Ahlheim Cary's in the Big Brothers Big Sisters of Eastern Missouri – Bowling for Kids Sake 2011. We were able to raise almost $2,400.00. This is enough to sponsor two Little Brothers or Sisters for the calendar year. The event was a huge success – though perhaps not because of our bowling!

David Ahlheim and *Craig Klotz* obtained summary judgment in the U.S. District Court for Western Missouri. In this declaratory action, we sought to declare that our insurance carrier had no duty to defend the general contractor through our insured and subcontractor's commercial general liability policy. The general contractor had incurred a judgment against it for over $5,000,000 and $1,000,000 in attorneys fees. The matter is likely going to the 8th Circuit Court of Appeals.

Negligent Infliction of Distress (*continued from page 1*)

danger by the alleged negligence of the hospital, she was outside the required zone-of-danger. *Id.*

In a more recent case, the Missouri Supreme court refused to expand the zone-of-danger to include a husband at risk of being infected from his wife who had mistakenly been stuck by a needle causing her to contract Hepatitis C. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462 (Mo. banc 2001). The husband, who was not present when his wife was stuck, argued that the zone-of-danger should be extended to him because of the risk his wife might infect him. *Id* at 465. In rejecting this assertion, the Bosch court recognized that the pertinent injury-producing event was the moment his wife was actually pricked by the infected needle and not his subsequent risk of infection. *Id.*

Finally, the zone-of-danger rule is reserved only for true bystanders. *Jarrett v. Jones,* 258 S.W.3d 442 (Mo. 2008). In *Jarrett*, the driver of a vehicle was struck by defendant. *Id* at 447. Defendant's child was killed in the accident and the driver alleged that he suffered severe emotional trauma as a result of seeing defendant's deceased child. *Id.* The *Jarrett* court barred the driver from using the zone-of-danger analysis because he was directly involved in the accident and therefore, not merely a bystander. *Id* at 446.

In sum, the zone-of-danger test relies on the principle that a bystander plaintiff is more likely to truly suffer from emotional distress if he or she was within a zone in which they, like the direct victim, could have also been harmed rather than merely observing the accident from a safe distance. As a result, whether the bystander is within the zone-of-danger is a fact specific analysis determined by courts on case by case basis.

ISSUE UPDATE: Medical Bills: *Deck* Decision and Its Progeny

Thomas J. Lewis

In our previous ***CAC Advisor***, we discussed the court's current handling of the medical bills issue after Missouri Tort Reform in 2005. At the time of our last article, the Missouri Supreme Court had just handed down a decision in *Deck v. Teasley*, discussing this issue. Both the Plaintiff bar and Defense bar felt that the decision was favorable to each party's respective position.

Specifically, Plaintiff's felt that the decision allowed for the offering of evidence of medical charges after rebutting the presumption set forth under the statute. It was Plaintiff's position that the opinion should be interpreted that ***only*** Plaintiff could offer evidence of medical bills, specifically charges, under the statute. They argued that the statute, under a strict reading, did not allow for Defendants to offer any evidence of value. Defendant's disagreed with this argument and believed it allowed for both the charges (from the Plaintiff) and the amount paid and owed (from the Defendant) to be offered to the jury. However, the *Deck* decision was not so clear and certainly open to interpretation. Given how the tort reform statute has been read and interpreted by the trial court level in most venues, there was every reason to be skeptical of subsequent readings and interpretations.

In the early part of 2011, there has been one case, *Montgomery v. Wilson,* which has further clarified the reading of the *Deck* decision. Fortunately, this decision seems to let the jury hear the amount charged but then allows the defense to present the amount of the bills paid to a jury.

Consider *Montgomery v. Wilson*, decided on February 15, 2011, which interprets and confirms the *Deck* Court's findings on this issue. (2011 Mo.App. LEXIS 165). *Montgomery,* was a premise liability case. Plaintiffs presented billing custodian affidavits from his medical providers and expert testimony from medial doctors in an attempt to rebut the 490.715.5 presumption. *Id.* Plaintiff succeeded in rebutting the presumption. *Id.* The court held that "as *Deck* teaches us, once [Plaintiff] has presented substantial evidence to rebut the [Defendant's] argued "actual payment" presumed value for medical treatment [pursuant to section 490.715.5], it was the jury's role—not the trial judge's role—to ***weigh*** the conflicting evidence. *Id.* (emphasis included).

Based upon the *Montgomery* Court's holding, our previous analysis of how the Deck Court's interpretation of statute 490.715.5 seems to be correct. Again, I believe this is favorable interpretation of the statute as it allows the Defendant to present to the jury the ***amount of medical bills paid.*** Given the *Deck* Court opinion and its progeny, I do believe a Plaintiff may challenge the indirect collateral source issue that is present in allowing both amounts to be offered to the jury. However, for now, the state of the law on this subject is favorable!

Inside This Issue

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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.

After the Judgment *(continued from page 4)*

is unsuccessful. Furthermore, it is a direct action in equity against the insurer and follows traditional proceedings as it moves forward to determine if coverage exists under the insurance policy.

Lastly, the Federal Courts in Missouri have allowed for removal of both categories of garnishment actions, so long as they meet the requirements of diversity and the jurisdictional amount. This may be beneficial to insurers because most garnishment actions will be filed in the same venue where the original suit was filed and the default judgment was entered.

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