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CAC Advisor

Missouri and Illinois Updates

Dog Bites – Missouri Eliminates "One Free Bite Rule"


David T. Ahlheim

Given the recent decision by a Maryland Court of Appeals, *Tracey v. Solesky,* deeming pit bulls – as a breed – to be inherently dangerous and akin to harboring a wild animal, it may be time to review what the recent developments with animal liability in Missouri and Illinois.

Traditionally, under Missouri and common law, homeowners and pet owners were liable for the actions of their pets (and in particular dogs) if the animal showed vicious propensities and the owner knew or should have known it. *Bussell v. Tri-County Humane Society*, 50 S.W.3d 303 (Mo. App. E.D. 2001). A case could not proceed without both of those elements.

The most common way that an animal owner would know about the "vicious propensities" of the animal was if the animal had previously bitten or attacked someone. Lawyers have traditionally joked that a dog gets "one free bite" and the owner has to pay for the rest.

In 2010, the Missouri legislature passed a sweeping change in dog bite legislation that makes dog owners strictly liable for their animal regardless of prior vicious propensity. This means for all practical purposes that a homeowner is liable for any action of its dog regardless if it has bitten anyone before and whether the owner knew or should have known of a danger.

Missouri statute 273.036 provides that:

> *The owner or possessor of any dog that bites, without provocation, any such person while such person is on public property, or lawfully on private property, including the property of the owner or possessor of the dog, is strictly liable for damages suffered . . .*

Curiously though, the new statute only specifically applies to dogs – not cats or other traditional domesticated pets. While incidents with those animals are certainly less common, it is likely the old rules still apply to those animals. *(continued on page 3)*

Giving a Deposition: Why do I Have to Testify?


James W. Childress

If you work in the insurance industry, sooner or later you will be asked to give deposition testimony on behalf of the company. This news is normally greeted with great apprehension. Giving deposition testimony does not have to be as stressful as you may have thought. Our firm has represented many insurance carriers in situations of this type. We have made a few observations which may be helpful when it is your turn for deposition testimony.

The very fact that a person has requested your deposition usually means that something is already amiss. Typically, it involves a bad faith claim, vexatious refusal to pay claim, failure to defend, or garnishment action. The claim process has usually been played out, and now there is some insurance issue which was spawned by the claim process.

Testifying Individually vs. as Corporate Representative

A claims handler can be deposed one of two ways: (1) individually; or (2) as a corporate representative for the carrier. There are tricks to each.

First, a plaintiff can ask for particular people in the insurance company who they deem important to the issue. This often happens when you were the claims handler on the file at some point. For example, if you signed the denial of coverage letter, you will likely be deposed individually. You may be asked about actions you took and the reasons behind them. You can only properly be asked about things you did or know. *(continued on page 2)*

Giving a Deposition

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Second, a plaintiff can call upon the insurance carrier to designate the person the carrier wishes to produce for the deposition. The requesting party need only ". . . describe with reasonable particularity the matters on which examination is requested." Mo. Rule 57.03(b)(4). It is a very effective tool for the opposition since they can simply designate the areas of inquiry, but it also allows us to designate the person best suited to give his testimony. Often, it can be more than one person. The Federal Court system has similar rules (see Fed.R.Civ.P. 30). This person is testifying on behalf of the company and may reach beyond an individual's knowledge and what the carrier knew or did. Therefore, great consideration should be given to who should be produced to appropriately respond.

Documents at Deposition

A plaintiff also has the right to subpoena or request documents that can be discussed during a deposition. Mo. Rule 57.03(b)(3); Fed.R.Civ.P 30(f)(2) In the case of insurers, most often the entire claim file is requested. The carrier should have already carefully preserved any and all documentation regarding the file. Please note the claim file is more than just notes on the computer. It typically includes all emails, physical documents, electronic records, letters, and investigation reports that are used as part of a claim handling process.

In direct actions, an insured is entitled to the contents of the carrier's claim file and it becomes part of discovery. *Grewell v. State Farm Mutual Ins. Co.,* 192 S.W.3d 33 (Mo. 2003). It does not mean that all claim file information should be or will be disclosed. The content of a claim file is properly discoverable only up to a point where the relationship changes and becomes adversarial in nature. *Scottrade, Inc. v. St. Paul Mercury Ins.*, 2011 U.S. Dist. LEXIS 14833 (E.D. Mo. 2011). Other privileges may exist too. It should be reviewed carefully with the claims representative, and counsel should decide which documents are deemed "privileged" and which ones should be produced for opposing counsel.

Preparing for the Deposition

The next step in the process is to become completely prepared. All documents produced for inspection by the opposition should be carefully reviewed with the witness prior to the deposition testimony. The company witness should be totally comfortable with all the documents and familiar with their content.

If the preparation is complete and thorough, the deposition becomes much easier. We recommend "batting practice" with the witness prior to the deposition. We ask our witness to treat us like opposing counsel. Then we question them vigorously as if it were a real deposition setting. This gives the witness some preview as to what to expect and more confidence in responding to the deposition questions.

So don't be alarmed if you are asked to give deposition testimony on behalf of your company. Involve counsel early, and discuss it thoroughly. It is equally important to carefully preserve the entire file. Before giving a deposition, extensive preparation is essential. Remember that you do have rights as a witness, and they should be invoked if need be. With these things in mind, your experience to give a deposition testimony on behalf of your company should be a good one.

Courts' Conflicting Rulings Allow Plaintiffs to Stretch Bounds of Reason Regarding Policy "Ambiguity"

Justin C. Wilson

Over several years leading up to 2009, Missouri Courts trended to find ambiguities in auto policies with respect to "anti-stacking" provisions in underinsured motorist (UIM) endorsements. This came to a head in November 2009 when Missouri's Supreme Court handed down its decision in *Richie v. Allied Property & Casualty Ins. Co.,* 307 S.W.3d 132. There, the Court found the insured's policy ambiguous with respect to UIM coverage where the insured was injured while occupying a non-owned vehicle. The Court permitted him to stack his UIM policies from multiple vehicles. Because the language of the policy had "ambiguity," the Court voided anti-stacking language so as to provide the most coverage for the insured.

After *Richie*, Missouri opinions on UIM stacking have been mixed, ironically leading to our own uncertainty with respect to whether courts will find ambiguity within a given policy's language. Plaintiffs' attorneys now reach beyond common sense to try to find ambiguity in insurance policies to expand limits.

Stacking is a relatively recent phenomenon in insurance, only commonly coming into use within the past few decades. Plaintiffs' attorneys seeking to make the most of their clients' cases argued that an insured with multiple vehicles with UIM coverage on a policy was paying premiums for multiple layers of UIM coverage. Therefore, if injured in a covered accident, the insured should be entitled to "stack" the coverage amounts.

As Missouri courts find ambiguity in a given policy's language with respect to UIM coverage, insurers are forced to tweak the language of their policies in hopes of limiting to the coverage for which they are actually contracting. But the cycle does not appear to be ending. Instead of clarity, insurers are given mixed signals. (continued on page 4)

"Put a Lien on It" Chiropractor Liens are Now Enforceable


James F. Maher

With the recent rise in collection efforts by Medicare, Medicaid and other medical providers, there is an increased attempt to place liens or assert subrogation rights on personal injury settlements and judgments. If a lien is properly asserted by a hospital or medical provider, the defendant or insurance carrier must protect the lien or face additional penalties.

In Missouri, the right for a medical provider to assert a lien was first formally recognized in 1941 and has been modified since. Statutes provide the right to assert a lien to a "public hospital" or "private hospital partially supported by charity." RSMo. §430.230. The lien is to be limited to *personal injury claims* arising in tort or negligence. Hospital liens are not typically allowed in wrongful death cases since it is not a "personal injury claim." *Bamberger v. Freeman,* 299 S.W.3d 684 (Mo. Ct. App. 2009). The amount that can be recovered by way of a medical lien will be limited to the cost of the treatment or the service provided.

Chiropractors, physician offices and physical therapy offices have often tried to assert a right under the "hospital lien" statute. The language of the statute was partially modified in 1999 and 2003 to include other medical providers in RSMo. § 430.225. However, the legislature did not modify the charity requirement in RSMo. §430.230. Therefore, since most physician offices and chiropractors are not supported by charity, their liens were usually ineffective. Attorneys and insurers were free to ignore such liens because chiropractors' liens were nothing more than a piece of paper.

This all changed on November 1, 2011. The Missouri Court of Appeals recently chose to ignore the requirement that RSMo. §430.230 required a private health care provider be partially supported by charity to assert a lien. In the case of *Kelly v. Marvin's Midtown Chiropractic,* 351 S.W.3d 833(Mo. Ct. App. 2011), the court held chiropractors are health care providers as defined under RSMo. § 430.225 and therefore entitled to assert liens. The Court reasoned that few, if any, medical providers are charitable organizations. "Requiring such health care providers to be supported by charity would preclude most, if not all, of them from asserting a statutory lien" and thus defeating the point of the RSMo. §§ 430.225 and 430.230.

While this is a new development in Missouri, chiropractors' liens have been valid in the state of Illinois since 1996. Illinois has treated chiropractors' liens as valid and enforceable under the Physicians Lien Act, 770 Ill. Comp. Stat. 80/0.01 et seq (1996).

Given this, all chiropractors' liens in both Missouri and Illinois must be treated with the full reverence of a traditional hospital lien. Therefore, please re-review all files with liens by a physician or chiropractor. Failure to honor a lien can cause a defendant to have additional liability including double payment, attorneys fees and other costs.

Dog Bites *(continued from page 1)*

While most of the old defenses are eliminated, a couple defenses are possible based upon the statute. First, the obvious carve out is "without provocation." However, the term is not defined and there are no reported cases. It is unclear from the statute if this is a complete affirmative defense or merely a fact issue for a jury to assess comparative fault. Section 273.036 does provide for an assessment comparative fault of the "damaged party."

The next obvious affirmative defense is based upon trespass. Section 273.036 provides that a person must be on public property or "lawfully on private property." As such, if a trespasser comes onto your insured's property, the homeowner would likely not be strictly liable.

These defenses become tested based upon a fact scenario on which I was recently asked to comment. A person reaches over the fence to pet his neighbors' Golden Retriever who was wagging his tail. In this exchange, the dog allegedly bites his hand. Plaintiff says the owner is strictly liable. However, the defense can argue that reaching to pet the dog was "a provocation" and a "trespass" by reaching over the fence.

Illinois has a substantially similar statute, 510 ILCS 5/2.16, governing dog bites but does specifically include all other animals:

> *If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby.*

Illinois' statute allows for the same or similar defenses to Missouri's statute are present in Illinois also.

At this point, you should be aware of the shift in Missouri law which is moving in conformity to the national trend. There are defenses still available but they are shrinking.

Policy "Ambiguity"

(*continued from page 2*)

This issue is highlighted by the Western District's July 26, 2011 rulings in two similar cases, with two differing outcomes. That day, the Court decided ***Stewart v. Liberty Mutual Fire Ins. Co.,*** 349 S.W.3d 381 and ***Long v. Shelter Ins. Cos.,*** 351 S.W.3d 692. These cases dealt with similar facts and similar UIM and excess policy language. Yet, two divisions of the Western District Court of Appeals read the policies differently, allowing ***Long*** to stack the policies, and not permitting stacking by ***Stewart***.

These conflicting decisions allow plaintiffs to stretch common sense when searching for ambiguities in policies. On December 27, 2011, the Eastern District Court of Appeals decided *Manner v. American Family Mutual Ins. Co., et al.,* ED96143. There, Plaintiff sought to stack the UIM benefits of four policies of insurance when he was injured while driving his Yamaha motorcycle.

Plaintiff argued the "owned-vehicle" exclusion within the four policies, which would preclude stacking, did not apply because the terms "person" and "owned" were ambiguous, as used within the policies. Plaintiff argued that "person" was ambiguous because the word was not defined. The Court spent nearly four pages of its opinion explaining why the plaintiff's argument was meritless, and that "person" was not ambiguous. In an even longer analysis, the court found that the term "owned" was not ambiguous. Therefore, the Court precluded stacking of two of the policies. Another issue was raised regarding the third policy. The question was whether plaintiff was a "resident" of his father's home and led the court to remand for further determination with respect to stacking the final two policies.

Clearly difficulties remain with respect to drafting policies that reflect the true intent of the parties, rather than the post hoc inventions of plaintiffs' attorneys. But as Missouri courts continue to issue conflicting rulings with respect to stacking, we can provide little definitive guidance on how to avoid unwanted results.

Firm Updates

The Eighth Circuit Court of Appeals affirmed *David Ahlheim* and *Craig Klotz's* clients' Motion for Summary Judgment that the insurance carrier did not owe over $1 million in attorneys fees relating to its denial of a duty to defend.

David Ahlheim received summary judgment in St. Charles County for on a premises matter. Plaintiffs were severely injured when they drove their delivery van into a drainage culvert that bisected a levee road on private property. The court found the landowner ceded control to the independent contractor.

Rebecca Cary won a defense verdict for a local school district in St. Louis County. Plaintiff slipped and fell injuring his knee during gym class. He claimed the asphalt playground was a dangerous condition. Rebecca successfully argued there was no defective condition in the asphalt that caused the injury.

CAC raised over $1,400 for Big Brothers Big Sisters and participated in the Big Brothers Big Sisters "Bowl for Kids Sake" on March 23, 2012.

CAC was a hole sponsor and *Jim Childress* and *Rebecca Cary* participated in the MoASBO-MUSIC Golf Tournament at the Lodge of the Four Seasons in late April 2012.

Jim Childress and *David Ahlheim* were featured speakers at "Mini-Law School for the Public" on the topic of Torts and Civil Litigation. The event was co-sponsored by The Missouri Bar and St. Louis University School of Law.

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Missouri's Dram Shop Statute: Has the Bar Been Lowered?

Joseph V. Lesinski

Missouri's Dram Shop Statute provides the exclusive remedy for individuals injured as a result of the sale of liquor to an intoxicated driver. The current Dram Shop Statute has three elements. The claim must be brought (1) "by or on behalf of any person who has suffered personal injury or death . . ." against a (2) "person licensed to sell intoxicating liquor by the drink for consumption on the premises . . ." and demonstrated by clear and convincing evidence that the person (3) "*knowingly served intoxicating liquor to a visibly intoxicated person . . .*" Mo. Rev. Stat. § 537.053(2) (2011) (emphasis added). Visibly intoxicated is expressly defined as "inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction." Mo. Rev. Stat. § 537.053(3) (2011).

Defendants have historically defended dram shop cases on a lack of specific "clear and convincing evidence" of *knowingly* serving alcohol to a *visibly intoxicated person*. However, the Missouri Court of Appeals recently determined that circumstantial evidence is sufficient to create a genuine issue of material fact on this significant requirement. *Nokes, et al. v. HMS Host USA, LLC,* 353 S.W.3d 6 (Mo. Ct. App. 2011).

In *Nokes,* the family of an automobile accident victim alleged dram shop liability against the owners of a restaurant in the Kansas City International Airport. The alleged drunk driver boarded a plane from Kansas City to Dallas. Driving home in Dallas, the drunk driver was in an accident. Plaintiff alleged that, prior to the collision, the airport restaurant served intoxicating liquor to the drunk driver and sought liability under the Dram Shop Statute. Based on sales receipts, the driver allegedly consumed four 3.5 ounce whiskey drinks within a two hour period. Based on this consumption rate, plaintiff's toxicology expert opined that the driver must have demonstrated obvious signs of intoxication, clear to anyone paying attention.

However, the record was devoid of direct evidence concerning the driver's visible

condition at the restaurant. No one at the restaurant even recalled seeing the driver. Accordingly, the trial court granted defendant summary judgment, finding as a matter of law that plaintiff was unable to demonstrate the driver was knowingly served intoxicating liquor while visibly intoxicated.

The *Nokes* court reversed, determining that direct evidence of the driver's visible intoxication is not required to defeat summary judgment. Rather, the court specified that circumstantial evidence, including the toxicologist's testimony regarding the driver's likely outward manifestations of intoxication, is sufficient to defeat a summary judgment. The Court found the existence of a genuine issue of material fact as to whether liquor was knowingly served to a visibly intoxicated person. The *Nokes* court reasoned that the current Dram Shop Statute does not set forth the type of evidence necessary to prove the elements of the cause of action and therefore, only requires that the impairment be "shown", and not that someone must observe a visibly intoxicated person. *Nokes*, 353 S.W.3d at 12.

The *Nokes* decision has lowered the bar for defeating summary judgment in dram shop cases, arguably enabling reliance solely on circumstantial evidence to create a genuine issue of material fact concerning the element of knowingly serving alcohol to a visible intoxicated individual. We expect plaintiffs to rely on *Nokes* in arguing the sufficiency of similar circumstantial evidence in future dram shop cases. Ultimately, regardless of type of evidence necessary to prove the elements, plaintiffs must still establish by clear and convincing evidence that defendant knowingly served intoxicating liquor to a visibly intoxicated person.

Inside This Issue

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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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