Fall, 2020

MODL Quarterly Report

Missouri Organization of Defense Lawyers

President's Message

Debbie S. Champion
MODL 2020-21 President
Rynearson, Suess, Schnurbusch & Champion, LLC
St. Louis, MO

I am thrilled to report to you for the first time since I became the President of the Missouri Organization of Defense Lawyers. I knew I could never fill the shoes of Mimi Doherty, and those of the long line of great leaders this organization has had, and I have shown that well in the first few months. I do have a great excuse: it's 2020! Normally there would have been some fanfare — some planning for some fun "get-togethers" and networking events. In the past, we have hosted several judicial luncheons where the judges educate and entertain us. This year….. Silence.

In the last 2-3 months I have heard from people who are tired of staying home. I hear people complain about not being able to get together, about having trouble being away from friends, and about how much their lives have changed. We all feel as if we are "on hold." I have voiced that complaint myself, probably more frequently and more loudly than most. I identified closely with the post on Facebook which said "Introverts …. Check on your extrovert friends. They are not okay."

Just yesterday I had a conversation with a friend who lives in a large urban area, and I complained about the virus and how much the year 2020 stinks. I told her I was having some trouble keeping upbeat.

She woke me up.

She said, "HELLO! This is a PANDEMIC. This is not just flu season; it is not just a broken bone that has laid you up for a while. It is a PANDEMIC. All our lives have been impacted in many ways and some of those impacts include the death of loved ones. We are overwhelmed with the fear that our children or our spouse might suffer long term deficits from this illness. We have not been able to attend normal medical or dental visits. There are people who have not been able to see their elderly parents for half of a year or more and you are wondering why you don't feel good about our world right now?"

We went on to discuss the importance of taking control of your life during a pandemic and we have outlined some common practical solutions for you in this newsletter which I think will help.

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In this issue ...

The MODL *Quarterly Report*

Editor Chris Brackman
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President's Message *(from page 1)*

Mostly, you should be good to yourself. We will get through this, but we will never again suffer from the delusion that our plans are more important than the Grand Plan, whatever that might be.

Yet we move forward. We have some good things happening in MODL. We have new members on our Board who bring us new enthusiasm and depth of experience. We welcome the following new Board members for this year:

Kerensa Cassis, *Shook, Hardy & Bacon, L.L.C.*

Mark Dunn, *Osburn, Hine, & Yates, L.L.C.*

Glen Ehrhardt, *Rogers, Ehrhardt, Weber & Howard, LLC*

Diane Lewis, *Brown & Ruprecht*

Kaci Peterson, *Schreimann, Rackers, Francka & Blunt, L.L.C.*

Alexandra Haar, *HeplerBroom, LLC,* filling our Junior Board position

My 2020 Board is wonderful, and we are working to provide you with career development and personal development messages until we culminate the year at our 36th Annual Meeting at the Hilton on Branson Landing, set for June 3-5, 2021. I fully expect to have it in person at that time! I want to see you there. Please help me make it a big turnout (assuming we are not violating any laws by that time). Bring your family and enjoy all the wonderful speakers and fun events we have planned. Please put it on your calendar today.

We have some virtual presentations coming up -- fascinating CLE opportunities for you to learn practical practice strategies for complicated cases. I expect that you will see an invitation shortly to sit in on a discussion with some experienced defense attorneys and Dr. Valentina Ngai, a biomechanical engineering expert. The discussion will provide you with trial tips and expert tips shared between the lawyers and Dr. Ngai. They will discuss investigation, discovery, depositions, and litigation/trial strategy. I promise you will walk away with good new ideas that will improve your practice.

Finally I want to confide something to you. I need YOU this year. I need to know what MODL can do for you and I need to know what you can do for MODL. Any ideas? Suggestions? PLEASE send them on to me. I want you to have more value than ever for your membership. I want you to realize that value and help grow our membership in your firm and others.

Are you willing to serve on a committee? Are you willing to help with a presentation for a CLE program? Are you willing to set up or plan a wellness or a diversity or an ethics CLE?

Are you willing to help with an amicus brief? We would love the help. PLEASE contact me or any Board member and pass on your interest and I promise we will not take up too much of your time!

In the meantime, be safe, be careful, and be kind to yourself and others.

Earnestly,

Debbie S. Champion
dchampion@rssclaw.com

MODL Amicus Committee Update

by Rachel A. Riso
MODL Amicus Committee Chair
Baird Lightner Millsap, PC
Springfield, MO

MODL is currently looking for a volunteer to draft an amicus brief in a case pending before the Supreme Court. If your firm is interested in providing amicus assistance in this pending case, please contact Rachel Riso, rriso@blmlawyers.com, for details.

If your firm would like to request MODL amicus assistance for an appeal or writ, please go to www.modllaw.com, click on "Amicus Briefs," and complete the Amicus Committee Request form. Please contact the Chair of the Amicus Committee, Rachel Riso, rriso@blmlawyers.com, with any questions. Missouri Rule 84.05(f) governs the submission of Amicus Curiae briefs.

Tips for Dealing with Stress During Covid-19

The Corona virus has impacted all of us in many ways: physically, emotionally, financially, socially. The days blend together, the workdays are longer, and with fewer breaks. Often the weekends and weekdays just seem the same.

Over 45% of Americans feel that the pandemic has negatively affected them and their emotional well-being. ("Stress in America 2020, a National Mental Health Crisis," American Psychological Association). We have lost the separation between work-time and home-time, and the separation of family-time from client-time. These losses are unhealthy, and they are detrimental to wellness and mental stability and satisfaction.

The following steps are commonly suggested to restore a distinction between the "schedule" of your day, and will help you regain energy and reestablish some control over your day.

1. **PUT YOUR WORK AWAY** when the workday is over. Physically distancing work from your evening events can take the place of that mental wind down you have as you leave the office and head toward home. Having those work materials separate from your living room where you have time with your family will help you mentally separate from work.

2. **MOVE.** It is important for your wellbeing to move. You may be someone who works out every day even during the period when your gym was closed. You are likely sitting for longer periods of time, allowing your focus to diminish by failing to take a physical break from work. Whether you want to walk around the neighborhood, run a half marathon, or walk to your kitchen for a drink of water, it is important to move your body. You need to physically separate yourself from your computer at least once an hour and to take at least 250 steps.

3. **CHANGE YOUR UNIFORM.** You might work in your pajamas. You might work in a suit. When you end your workday, change your clothes. You might put on a new set of PJs or you might change from one pair of sweats to another. Make that change so your amygdala and the rest of your brain know that you are off work for the day. It is a powerful change and remember it worked for Mr. Rogers.

4. **GET OUT.** Maybe that means get out of the house, maybe that means get out of your office. When you are at work for long periods of time, you will lose focus if you do not take a break. Go for a drive. Drive or walk through a park. Walk around the block and BREATHE. You may find that meditation or breathing helps you relax, but even if you do not try such exercises — just force yourself to get away from work during the day before you "stop working." You will see a big increase in energy and focus.

5. **DO SOMETHING FOR SOMEONE ELSE.** You might decide to contact Debbie and offer to do something for MODL or consider there are thousands of people who live in your extended neighborhood who need help. People at risk who cannot really cook, who might love an ice cream treat, who are at such high risk they cannot safely leave their homes. Check on the people who are at home and stuck there, have a chat, send a card. Reach out in some way. When you reach out with a helping hand for someone else, you know you will feel better and more in control.

There are numerous books and articles about how to manage your physical or emotional health during the pandemic. If you need help, reach out for help, and then pass the information on to the person next to you — they are struggling too.

Board Member Spotlight

Alexandra Haar

Hello MODL!

I'm Alexandra Haar, a partner at HeplerBroom's downtown St. Louis office and a new MODL Board member. I have a hand in a variety of defense areas, including personal injury, pharmaceutical product liability, school and religious institution defense, and recently, defense of § 1983 claims.

Conversationally, I prefer to go by "Alex," although you'll never hear my parents (one of whom is the inimitable Bob Haar) call me anything other than my full name. I grew up in St. Louis City, and I now live around the corner from Jerry Noce (I still maintain that we didn't know this when we started looking at houses in the neighborhood!) with my sixteen-year-old son Dylan and significant other Andrew.

Our dog was just as shocked as I was when we added two cats to the family last year, but fortunately, all of us have managed fairly well during the pandemic.

Speaking of which, one lesson I've learned during the pandemic is to prioritize family and self-care. With the lines between work and home life blurred by technology, I was, like the rest of the world, forced to pivot sharply into the unknown earlier this year.

With the new availability of time formerly used for commuting, extracurriculars, and in-person events, I began a more consistent workout schedule and spent more time talking with Dylan. As things reach for normalcy, I am motivated to keep these new uses of time for both my own and my family's benefit.

Brian Waller

After three years in private practice, I started managing litigation in-house for Shelter Insurance in Columbia, Missouri, and have been there ever since. In my current role as Vice President of Government Relations, I develop and implement positions and strategies regarding political, legislative, regulatory and industry matters that affect Shelter on local, state, national and international levels. I really enjoy the relationships I've developed in this job and the positive impacts we've been lucky enough to create for our policy holders.

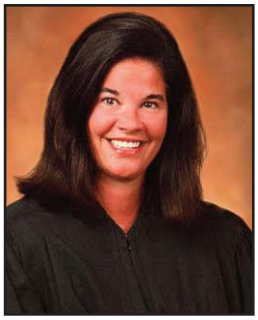
My wife Erika Waller has a Ph.D. from Mizzou where she works as a Licensed Psychologist and Associate Clinical Professor. We have two kids, twelve-year-old Joe and fifteen-year-old Kate. One of my favorite things about my work at Shelter has been taking my family with me on some of my work travels. When they were really little, the kids would occasionally run my PowerPoint presentations to branch offices, they've attended a mediation, a bill signing with the Governor of Arkansas, and meetings with the Missouri Congressional Delegation on Capitol Hill where Kate asked the members to consider extending the National Flood Insurance Program that was about to expire! And this brings me to my favorite thing about MODL – the family centric Annual Meetings. Erika, Joe and Kate have attended every Annual Meeting with me since before I joined the Board. They always have a blast and have made their own friends at these meetings that they look forward to seeing each year.

What is your TV guilty pleasure? I think I'll always remember looking forward to binging countless TV series with my family most every night during the pandemic.

An Introduction to the Missouri Judiciary

Judge Elizabeth (Beth) Hogan

by Rebecca Nickelson
Sinars Slowikowski Tomaska ♦ St. Louis, MO



The pandemic has changed all our lives and Judge Beth Hogan is no exception. She is a trial judge in the City of St. Louis. She hopes everyone will keep being patient and think of others instead of just ourselves.

As a judge, she misses day-to-day interaction with people at the courthouse. Being a judge means being around people and being ready for whoever walks in that day and there is not a lot of down time.

Personally, she misses human interaction. She does not like that everyone is afraid of each other now. Her family walks a large dog in Forest Park every single morning and she can see the change in people being afraid just walking around.

She knows people usually make fun of her for being a homebody, but even for someone like her, missing interaction with others during the pandemic has been strange.

Last year, she was criminal presiding judge in Division 16. This year, the City of St. Louis divided its criminal cases into individual dockets. The trial judges are now assigned 100-160 criminal cases each. So, even during the pandemic, she has presided over video hearings, with some on the record. She has not had any hearings where a witness provided testimony. Because criminal cases are on individual dockets, she is keeping up with her cases without trials. All of her civil cases were sent back to the presiding judge in Division 1, and no new civil cases have been assigned to her.

She cannot imagine what would have happened if all criminal cases had been docketed in Division 16 during the pandemic. Having to contact every single prosecutor and defense attorney from Division 16 would not have worked. She has modified how she handles cases during the pandemic – using two computers – one with case information and the other for email to contact attorneys on the case. She then tells the presiding judge in Division 1 which cases need to be prioritized for jury trial.

The Court will be trying to narrow down which cases really need a speedy trial because the defendant is confined, or if attorneys and witnesses are ready. Judges can request shields for courtrooms for clerks, sheriffs and witnesses. The Court is working on making arrangements for voir dire with social distancing.

Jurors will be able to request excuses from jury duty if they or their family members are immune compromised or if they are afraid to be around others. Once the Court gets back to routinely bringing in jurors, she expects potential jurors for longer trials to have more financial hardships because people have been laid off and might be just starting back to work and cannot leave for a couple-week trial.

All civil cases are on hold when it comes to trials. She hopes everyone knows the Court is willing to work with the parties on moving civil cases along. The Court does not want to hold up settlement approval or be in the way in terms of finalizing a case just because of the pandemic, so parties should request virtual hearings.

Judge Hogan serves on the Civic Education Supreme Court Committee. This group develops programs for schools, rotary groups and other community groups. Although this has diminished during the pandemic, they are working to set up virtual programs. She is coordinator for the St. Louis area, so she works with St. Louis City and County judges to give presentations.

She is also a member of the Supreme Court Municipal Committee, which is a very active committee. They have continued to have virtual meetings thoughout the pandemic. She expects this committee to continue to address how to keep the courts going and how to deal with warrants during quarantine.

Changes to Missouri's Punitive Damages and Consumer Protection Laws Provide Greater Certainty for Litigants

by Kerensa Cassis
Shook, Hardy & Bacon L.L.P. ♦ Kansas City, MO

Missouri's punitive damages and consumer protection laws recently underwent comprehensive changes in an effort by the Legislature to improve the legal climate in Missouri. Missouri courts are consistently positioned near the bottom of businesses' rankings of state legal systems.[1] The American Tort Reform Foundation has ranked Missouri on its "Judicial Hellhole" list for years, and estimates that excessive tort litigation in Missouri results in a loss of $2 billion in personal income annually and a loss of 32,205 jobs, resulting in a "tort tax" of $505.21 per person.[2] Trial lawyers routinely take advantage of the broad and ambiguous nature of the Missouri Merchandising Practices Act (MMPA), which allows for attorney's fees and punitive damages. The need to reform Missouri's punitive damages scheme is evidenced in recent multi-billion dollar awards coming out of St. Louis courts. Senate Bill 591, signed into law on July 1, 2020, applies to causes of action filed after August 28, 2020.

Punitive Damages

Over the last few decades, court rulings in Missouri have made punitive damages standards increasingly diluted and ambiguous, allowing seemingly negligent conduct to qualify for punitive damages. Senate Bill 591 returns Missouri's punitive damages law to its intentional tort roots. It makes several important changes to Missouri's punitive damages law:

- Solidifies the standard for punitive damages. Formerly, several formulations were used to determine the type of conduct required to award punitive damages, including outrageous conduct. Now, punitive damages are only for egregious cases where the "defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others."
- Codifies the "clear and convincing evidence" standard for punitive damages adopted in *Rodriguez v. Suzuki Motor Corp*., 936 S.W.2d 104 (Mo. banc 1996).
- Requires leave of court and supporting evidence before plaintiffs can allege punitive damages. Although Courts have always been gatekeepers, SB 591 allows trial courts to weed out meritless claims by conducting meaningful review of the evidence to determine whether the jury could "reasonably conclude, based on clear and convincing evidence, that the standard for a punitive damages award" has been met.
- Protects employers from vicarious liability for punitive damages when employers did not share the state of mind necessary for punitive damages.

According to attorney Jennifer Artman, a partner in Shook Hardy & Bacon LLP's Kansas City office, who has studied the effect of SB 591 on Missouri's existing punitive damage law, "The jury will still decide whether the standard for punitive damages has been met and set the amount of any award. The bill simply makes sure that the standards are clear and the process is fair."

MMPA

The MMPA (Mo. Rev. Stat. § 407.025, et seq.) was intended to provide relief for consumers harmed by unlawful business practices, but its broad language has allowed abuse.

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[1] "Missouri Raises Bar for Punitive Damages and Consumer Protection Law Claims," Washington Legal Foundation, https://www.wlf.org/2020/05/14/publishing/missouri-raises-bar-for-punitive-damages-and-consumer-protection-law-claims/, May 14, 2020.

[2] "Consumer Protection Reform Bill Passed by Missouri Legislature," American Tort Reform Association, http://www.atra.org/2020/05/13/consumer-protection-reform-bill-passed-by-missouri-legislature/, May 13, 2020.

Between 2000 and 2009, reported MMPA decisions increased by 678%.[3] The changes in SB 591 bring Missouri's consumer protection laws in line with other states. The changes focus on allowing consumers harmed by unfair business practices to recover under the MMPA, while keeping litigants who were never misled (or never even purchased the product) from utilizing the legal system to their advantage.

Important reforms to the MMPA include:

- Claimant must show he/she acted as a "reasonable consumer … in light of all circumstances" and the allegedly unlawful act "would cause a reasonable person to enter into the transaction." 407.025(2)(a)-(b). Formerly, MMPA plaintiffs did not have to show they were even influenced by (much less relied upon) an alleged representation, allowing individuals who purchased a product to obtain compensation despite being completely unaware of the purported statement.
- Claimants will be required to prove damages with "sufficiently definitive objective evidence to allow the loss to be calculated with a reasonable degree of certainty." 407.025(2)(c).
- Class members must show the conduct at issue caused their damages.
- Attorney's fees awarded in MMPA class actions must bear a "reasonable relationship" to the amount of the judgment (or for equitable relief, be based on the time expended).

"Some lawyers have exploited the MMPA's vagueness, turning it into a vehicle for lawsuit abuse and tarnishing the reputation of Missouri's civil justice system," explains Artman, who testified at legislative proceedings on behalf of the American Tort Reform Association (ATRA). "The new law does not affect the right of an individual to be fully compensated for any injuries actually sustained. It does, however, require claimants to meet a reasonable person and reasonable reliance standard while reducing the ability of creative lawyers to recover where the consumer has not experienced an actual loss."

Issues for Defense Lawyers

Open to challenge is a determination of whether the changes in SB 591 should apply prospectively or retrospectively. Despite SB 591's language that it applies only to cases filed after its effect, defense counsel may argue portions of the changes to these laws are merely procedural (rather than substantive) and therefore should be applied retroactively. *See, e.g., Wilkes v. Mo. Hwy. & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988). Although a trial court could fairly reject this notion, Missouri appellate courts may be interested in addressing the issue.

In addition, defense lawyers could challenge SB 591's applicability to pending cases based on the language of Section 8 to Section 510.261, which states: "Except to the extent that they are expressly inconsistent with this section, all common law limitations on punitive damages and all limitations on the recovery of punitive damages contained in other sections of the laws of this state remain in full force and effect." Read literally, this section would effectively mean that the prior pleading guidelines, which allow plaintiffs to plead punitive damages in their initial complaint, is directly contrary to the new requirements of this section. Such a reading would require a court to strike the allegations of punitive damages in an initial complaint.

Conclusion

The changes to punitive damages codified by SB 591 provide parties with constitutionally required fair notice of the types of conduct that may result in punishment and curbs excessive awards that may slow economic growth and employment in Missouri. Likewise, the changes to the MMPA lessens negative impacts in nearly every industry, most notably the food and beverage industry. The changes provide fairness for all parties while still ensuring adequate compensation for injured parties.

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[3] *See Joanna Shepherd, The Expanding Missouri Merchandizing Practices Act 13* (Am. Tort Reform Found. 2014).

Correction

In the last issue of the MODL Quarterly Report*, the author of the feature on Judge Kerr was listed incorrectly. The author was Stephen Barber of Rynearson, Suess, Schnurbusch & Champion, LLC; St. Louis, MO. We apologize for the oversight and thank Mr. Barber for his contribution.*

Understanding Missouri's Dram Shop Law: How it Started and What it Means Today

by Katie St. John and Seth Gausnell
Gausnell, O'Keefe & Thomas, LLC ♦ St. Louis, MO

What is the Missouri Dram Shop Law?

Missouri Statute 537.053 defines the requirements for dram shop liability. Although furnishing alcoholic beverages alone cannot be the proximate cause of injuries inflicted by intoxicated persons, an action may be brought by, or on behalf of, a person who suffered personal injury or death against any person licensed to sell intoxicating liquor for consumption on the premises when: (1) it is proven by clear and convincing evidence (2) that the seller knew or should have known (3) that intoxicating liquor was served to a person under the age of twenty-one years or knowingly served intoxicating liquor to a visibly intoxicated person. Voluntary intoxication is not permitted as a cause of action under Missouri Dram Shop laws, with one exception. If an individual is under the age of twenty-one and voluntarily intoxicated, an establishment owner may face liability depending on other facts and circumstances

The Statute goes on to define "visibly intoxicated" as a person who is inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction. Furthermore, a person's blood alcohol content (BAC) does not constitute prima facie evidence to establish that a person is visibly intoxicated, but nevertheless can be admissible evidence of the person's intoxication. Additionally, an action alleging consumption on the premises to a person under the age of twenty-one allows the seller or seller's agent or employee to offer proof that the seller or the seller's agent or employee required and was shown a driver's license or a state or federal-issued personal identification card that appeared to be genuine and showing that the individual was at least twenty-one years of age. This offer of proof is relevant in determining the relative fault of the seller or the seller's agent or employee in the cause of action.

History of the Missouri Dram Shop Law

In 1929, the Missouri Legislature enacted the Missouri Dram Shop Act. The Act allowed for recovery by an injured person against an individual furnishing alcoholic beverages. Furnishing the beverage alone was considered the proximate cause of the injury rather than the consumption. Prior to 1929, Missouri followed common law principles – consumption was considered the proximate cause rather than the furnishing of alcoholic beverages. This means that in 1929, when the Dram Shop Act was enacted, it was a deviation from the common law. The purpose for this deviation makes more sense when one considers the other historical factors at play, namely the prohibition of alcohol.

In 1934, the Dram Shop Act was repealed, and common law principles were restored. This period of time allowed for Missouri courts to construe and shape the contours of common law principles regarding liability for individuals engaged in the sale of intoxicating liquors to be consumed on their premises. In 1983, the Missouri Court of Appeals Eastern District found, for the first time, a duty existed on tavern owners to refrain from serving intoxicated persons or face liability for their actions. *Carver v. Shafer*, 647 S.W.2d 570 (Mo. App. ED 1983). Other cases followed suit and in 1985 the Missouri legislature responded to the public policy as announced by the courts by passing Missouri Statute 537.053. The statute since then has undergone changes, but the basic principle remains the same – furnishing intoxicating beverages alone is not enough for a cause of action against a seller or seller's agent, unless the individual is under the age of twenty-one or the individual is visibly intoxicated.

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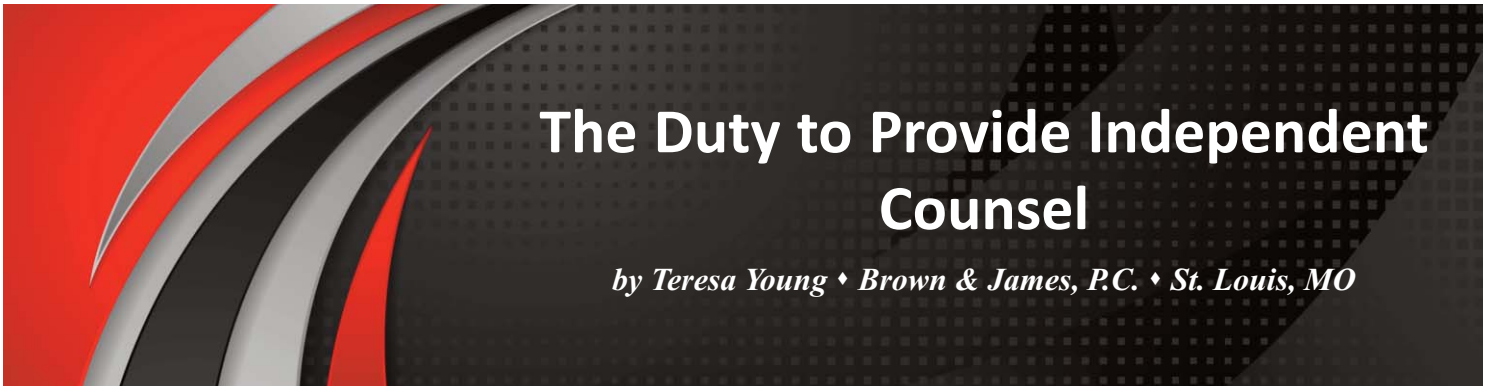
What does this mean for Missouri establishments serving alcohol on their premises?

Under the current Missouri statute, an owner of an establishment may be liable when a patron of their establishment injures another individual, is under the age of twenty-one, and does so while under the influence. With the development of technology and use of fake IDs, verifying the true age of an individual has its challenges. In a case where the individual was served by the establishment and under the age of twenty-one and fake identification was given, the outcome varies on a case by case basis. These cases take into consideration the identification card itself and how realistic it looks.

Additionally, Missouri establishment owners and their employees may face liability when an individual is overserved. Again, this has its challenges as an individual's behavior may vary when consuming alcoholic beverages. The statute offers some guidance here. First, the person injured by the establishment patron must produce clear and convincing evidence that the establishment knew or should have known that the patron was already visibly intoxicated. Visible intoxication is further defined as impairment shown by significant uncoordinated physical action or significant physical dysfunction.

Age identification and avoiding overserving are only two of several broad areas for an establishment to address to protect itself from dram shop liability. This is not a complete survey of the law surrounding dram shop liability in Missouri and certainly does not discuss all the nuisances present. Missouri establishments should become well versed in their options in terms of ensuring all individuals that are furnished an alcoholic beverage from their establishment are at least twenty-one years of age. This may mean taking additional steps to detect fake identification cards. Additionally, establishment owners and their employees should undertake training to identify behaviors present in individuals showing signs of visible intoxication to avoid overserving.



The Duty to Provide Independent Counsel

by Teresa Young ♦ Brown & James, P.C. ♦ St. Louis, MO

It is well-known that an insurance company has the right to defend an insured under a reservation of rights. However, insurers should approach a reservation of rights with an understanding of all the possible ramifications of this decision. One possible result is that the insured will demand that the insurer provide independent counsel at its own cost. But does an insured have the right to independent counsel following a reservation of rights? The analysis of an insured's right to retain counsel revolves around the question of whether the issuance of a reservation of rights letter creates a conflict such that the insurer may no longer control the defense of the claim, including choice of counsel.

Under the tripartite relationship, defense counsel is retained by an insurer to represent its insured's interests in responding to a claim or lawsuit. In every jurisdiction, the insured is considered the client of the insurance defense counsel. As such, counsel's primary duty of loyalty is always to the insured. However, whether counsel also owes a duty of loyalty to the insurer varies from state to state.

In Missouri, counsel represents both the insurer and the insured and, therefore, owes a duty of loyalty to both. This dual representation is permissible because the insurer and the insured have a "community of interest," namely, to

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prevail in the claim or lawsuit brought against the insured. The defense counsel thus represents the interests of both the insured and the insurer in defending the insured. The insurance contract between the insurer and the insured shapes the rights and obligations of the parties to the tripartite relationship. The insurer typically maintains the right to direct the litigation, evaluate claims and settlement, make economic decisions without the assent of the insured, and to select counsel to represent the interests of the insured.

However, the right to control the defense has its limits. Selection of defense counsel is generally afforded to the insurer under the language of the insurance policy. Still, an insurer's right to control the defense may be circumscribed where there is a conflict of interest between the insurer and its insured.

Courts regularly hold that the insured is entitled to separate representation if there is a demonstrable conflict of interest between the insurer and insured such that the community of interest has been eroded. Examples of possible conflicts of interest under the tripartite relationship include lawsuits in which an insurer receives late notice of a claim, the claimed damages substantially exceed the insured's policy limits, or punitive damages are alleged but not covered by the policy. In these same situations, it is common for an insurer to notify its insured that it is providing a defense to the claim or lawsuit under a reservation of rights.

Whether the issuance of a reservation of rights letter demonstrates a conflict of interest that bars the tripartite relationship varies from state to state, although nearly every jurisdiction recognizes that the reservation creates a potential conflict of interest.

While no jurisdiction holds that a conflict of interest arises in every instance a reservation of rights letter is issued, some jurisdictions, such as California, view the issuance of a reservation of rights letter as strong evidence of a conflict. In those jurisdictions, the insurance company is generally not permitted to direct or regulate the representation of the policyholder following the issuance of the reservation of rights. These jurisdictions believe that the reservation of rights so jeopardizes the commonality of interest that the conflict can only be remedied by hiring independent counsel at the insured's choosing. Other jurisdictions hold that an enhanced obligation of good faith is imposed on the insurer when a reservation of rights letter has been issued, but does not automatically raise a conflict of interest such that the insured is entitled to engage defense counsel of its choice at the insurer's expense at the outset.

Under Missouri law, the issuance of a reservation of rights is not viewed as a *per se* conflict of interest that deprives the insurer of the right to control the defense and to engage counsel. However, at least one federal court, *Howard v. Russell Stover Candies, Inc*., 649 F.2d 620 (8th Cir.1981), has determined that a conflict could exist such that the insurer could not be allowed to continue directing the defense.

Ultimately, if a fully-notified insured accepts the insurer's defense under a reservation of rights, the reservation will not be deemed a denial of coverage and the insurer will maintain all contractual rights furnished under the policy. These rights include any right to control the defense of the case and to retain counsel.

However, an insurer cannot force its insured to accept a reservation of rights defense under Missouri law. The insured has the right to reject the insurer's offer to defend under a reservation of rights. In that circumstance, the insurer may respond in one of three ways: it may withdraw the reservation of rights and provide a complete defense of the claim; it may stand on the reservation of rights; or it may file a declaratory judgment action to determine the scope of the policy's coverage.

Where an insurer refuses to withdraw a reservation of rights, Missouri courts will treat this as a declination of coverage. The insured is then free to hire independent counsel to defend the underlying suit as with any other declination. If the damages are later held to be covered under the policy, the insured can then seek reimbursement of defense costs along with any other damages they suffer as result of the improper declination of coverage.

Wishing all of you and your families the very best new year!

Green v. Fotoohighiam

by Kevin D. Brooks
Foland, Wickens, Roper, Hofer & Crawford, P.C.
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Summary judgment is a valuable tool for civil defense practitioners. In *Green v. Fotoohighiam*, 606 S.W.3d 113, 114 (Mo. banc 2020), reh'g denied (Sept. 29, 2020), the Supreme Court of Missouri recently revisited one of its most-cited opinions regarding summary judgment, *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371 (Mo. 1993). In doing so, the Court made clear that the summary judgment record begins and ends with the numbered paragraphs in the statement of facts. It also closed an escape hatch exploited by parties to allow consideration of materials outside the numbered paragraphs in the statement of facts filed in opposition to the summary judgment motion.

In *Green*, the plaintiff sued the defendants, alleging that they conspired to set her mobile home on fire. The plaintiff moved for partial summary judgment on the issue of liability. *Green* at 115. The plaintiff set forth a statement of uncontroverted material facts and supported each numbered paragraph with deposition testimony or affidavit. *Id*. at 115-116. The supporting materials contained portions of Defendant Mehrdad Fotoohighiam's ("Mehrdad") deposition testimony that were not cited or referenced by the plaintiff. *Id*. at 115. Mehrdad failed to respond to the motion for partial summary judgment, which was granted by the trial court. *Id*. After a damages trial, the jury returned a verdict against Mehrdad. *Id*.

On appeal, the Supreme Court of Missouri reviewed summary judgment practice, noting it was governed by *ITT* and Rule 74.04. *Id*. at 116. In order to meet its burden, the movant must attach to the motion a statement of uncontroverted material facts in separately numbered paragraphs referencing pleadings, discovery, exhibits or affidavits. *Id*. at 117. Because Mehrdad failed to timely respond to the plaintiff's motion, all of plaintiff's material facts were deemed admitted. *Id*. On appeal, Mehrdad argued that portions of the deposition testimony attached to plaintiff's motion demonstrated that plaintiff was not entitled to judgment as a matter of law. *Id*. Mehrdad cited *Street v. Harris*, 505 S.W.3d 414 (Mo. App. E.D. 2016) to support his argument. In *Street*, the Missouri Court of Appeals reversed the lower court and held that a movant did not meet the required prima facie showing of entitlement to summary judgment necessary to make the non-movant respond even though the failure to respond is deemed an admission of the movant's facts. *Id*. at 417.

Green recognized that other opinions of the Court of Appeals had reached the contrary result and noted that *Street* overlooked the revisions to Rule 74.04. For instance, in *Fidelity Real Estate Co. v. Norman*, 586 S.W.3d 873 (Mo. Ct. App. 2019), the Court of Appeals recognized that the current version of Rule 74.04 restricted a trial court's review from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to only "the motion, the response, the reply and the sur-reply." *Id*. at 883. Notably, the *Fidelity Real Estate* court recognized that *Street's* interpretation that allowed consideration of the entire record potentially turned the court into an advocate. "[R]equiring either the trial or reviewing court to examine the entire record, rather than just those facts identified in the motion and response, could easily place the court in the position of an advocate insofar as the court would have to identify not only the material facts but also those that are subject to genuine dispute." *Id*. at 883, n. 15.

Green also cited *Great S. Bank v. Blue Chalk Constr., LLC*, 497 S.W.3d 825 (Mo. Ct. App. 2016), noting that the summary judgment phase "is made through Rule 74.04(c) paragraphs and responses." *Green,* 606 S.W.3d at 120. *Blue Chalk* described any reference outside the Rule 74.04(c) paragraphs as "analytically useless" given that it would require the court to exceed *de novo* review. *Id*. *Green* further noted that, despite *Street*, the Eastern District of the Court of Appeals had correctly applied Rule 74.04 in *Peck v. All. Gen. Ins. Co*., 998 S.W.2d 71 (Mo. Ct. App. 1999). *Peck* did not allow a party to rely on uncited portions of depositions or uncited portions of a petition when the non-movant made unexplained denials to the movant's numbered paragraphs. *Green* quoted *Peck* that "references to the record must appear in the

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response. The incorporation by reference to a memorandum of law does not satisfy the requirement of a properly drafted response to the motion for summary judgment. A court may properly refuse to consider documents filed in opposition to a motion for summary judgment which have not been identified in a response which complies with Rule 74.04(c)(2), but are described only in a memorandum filed in opposition to the motion." *Green, 606 S.W.3d* at 121.

Concluding, *Green* overruled *Street*. It also noted that "any court — whether it be the circuit court addressing summary judgment in the first instance or an appellate court reviewing an entry of summary judgment — need only consult what was properly put before it by way of Rule 74.04(c) paragraphs and responses." *Id*.

Green offers practitioners a good reminder to tighten up summary judgment drafting. It may be a good time to update the years-old "Summary Judgment Standard" boilerplate language that cited *ITT*. It also reminds us that any factual reference in a motion for summary judgment must be contained in the numbered paragraphs (or corresponding response). In this regard, it may be wise to key citations in the accompanying legal memorandum to the numbered paragraphs – as opposed to the depositions or other materials.

Furthermore, will *Green* lead to even more expansive statements of facts? Missouri appellate courts have bemoaned excessive statements of fact in the past. For instance, in *Columbia Mut. Ins. Co. v. Heriford*, 518 S.W.3d 234 (Mo. Ct. App. 2017), the majority stated "very few claims or defenses have more than five or six material facts." *Id*. at 240, n.6. In dissent, Judge Scott noted he was "skeptical" of such a limited number. *Id*. at 244. However, he noted that "bloated" statements of fact create unnecessary difficulties for parties and courts. *Id*. This trend does not appear to be dissipating. The author recently responded to a statement of facts in a relatively uncomplicated matter that included 288 separate numbered paragraphs. Despite this type of abuse, in light of *Green*, parties will likely continue to be over inclusive as opposed to under inclusive. Or as Mark Twain wrote, "I didn't have time to write a short letter, so I wrote a long one instead."

Evidence of Corporation's Prior Conviction(s) May Not Be Used for Impeachment Purposes or to Rebut Good Character Evidence

by Mark Dunn and Paul Ozbun
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The Missouri Supreme Court recently handed down a decision limiting the ability of a party to introduce evidence of prior corporate convictions for impeachment purposes and providing guidance on the use of such convictions to rebut alleged "good-character evidence" introduced by a defendant. In *Sherrer v. Bos. Sci. Corp*., No. SC 97465, 2020 WL 6041581, (Mo. Oct. 13, 2020) the Supreme Court addressed, for the first time, whether section 491.050, RSMo. permits impeachment of a corporation. The Court concluded that it does not. The Court further held that, under the facts of the case, the prior convictions at issue could not be used to contradict factual assertions, or to rebut good-character evidence, allegedly introduced by defendant's witnesses and its counsel.

Background

Eve Sherrer ("Plaintiff") had surgery in October of 2010, for stress urinary incontinence. *Sherrer*, 2020 WL 6041581, at *1. The surgeons implanted a Solyx polypropylene mesh sling, which was manufactured and designed by Boston Scientific Corporation ("BSC"). *Id*. Plaintiff complained that

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her condition worsened, and she had a second surgery in January of 2011 to remove portions of the Solyx sling and implant an Align polypropylene mesh sling, which was manufactured and designed by C.R. Bard ("Bard"). *Id*. In April 2014, Plaintiff underwent a third surgery to remove Solyx and Align slings. *Id*. Nevertheless, Plaintiff allegedly did not improve and suffered painful complications.

Plaintiff filed suit in October of 2012 and, in an amended petition, alleged claims against BSC and Bard for negligence, product defect, and failure to warn.[1] Plaintiff's claims against BSC and Bard, ultimately were tried to a jury from November of 2015 through February of 2016. *Id*.

Defendant Bard had previously been convicted of 391 counts of "conspiracy, mail fraud, false statement, and adulterated product/failure to file medical device reports" *Id*. at *3. At trial, Plaintiff's counsel attempted to introduce evidence of these convictions as impeachment. The trial court sustained Bard's objections and the evidence was excluded.

The jury returned verdicts in favor of Defendants BSC and Bard. *Id*. at *2. Plaintiff appealed and claimed that the trial court erred in sustaining objections to the admission of Bard's criminal convictions for impeachment under section 491.050, and further argued that the trial court erred in failing to allow evidence of the convictions for use in contradicting and rebutting evidence of good-character allegedly introduced by Bard's witnesses and counsel.[2] *Id*.

Prior Convictions Not Admissible

Plaintiff asserted that the Circuit Court erred in excluding evidence of Bard's prior criminal convictions because (1) the evidence was admissible as a matter of right to impeach Bard's credibility pursuant to section 491.050, RSMo; and (2) the evidence became admissible during the course of trial as negative character evidence to rebut evidence of Bard's good corporate character. *Id*. at *3.

The Court noted that, generally, "a circuit court has discretion to control the bounds of cross-examination, but its control is limited by section 491.050, which gives an absolute right to show a prior conviction of a witness." *Id*. (*citing Fisher v. Gunn*, 270 S.W.2d 869, 876 (Mo. 1954)). Section 491.050, RSMo, in relevant part, reads "Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case .... Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer."

Plaintiff argued that the term "person" includes a corporation because section 1.020(12), RSMO Supp. 2013, defines "person" to include corporations, and thus section 491.050 is applicable to Bard. *Id*. The Court disagreed and noted that Section 1.020(12) provides that the term "person" ***may*** include corporations, "but not if the inclusion of 'corporation' is 'plainly repugnant to the intent of the legislature or the context thereof[.]'" *Id*. (*citing* section 1.020, RSMo Supp. 2013).

The Court noted that section 491.050 was initially enacted in 1895 in order to remove the common law consequence that all witnesses convicted of infamous crimes were incompetent. *Id*. The statute allowed a convicted individual to be deemed competent to testify, but permitted the admission of evidence of the prior conviction to impeach credibility. *Id*. The Court pointed out that the statute as enacted in 1895 is nearly identical to the present-day statute, and that nothing in the statute's history indicates that the legislature intended the statute to affect a corporation and noted that no case law exists applying the statute to a corporation. *Id*. at *4

Since section 491.050 relates to whether a person is competent to be a witness, the Court next addressed what a "witness" is. *Id*. "A witness is one who testifies under oath or affirmation in person, by deposition, or by affidavit. *Id*. (citation omitted). A witness must have (1) present understanding, or ability to understand, the obligation to speak truth; (2) capacity to observe the occurrence; (3) capacity to remember the occurrence; and (4) capacity to translate the occurrence into words. *Id*. (*citing State v. Robinson*, 835 S.W.2d 303, 307 (Mo. banc 1992)). And, generally, a witness "may only testify to those matters of which the witness has personal first-hand knowledge." *Id*.

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[1] Plaintiff also sued Truman Medical Center-Lakewood ("TMC"), the place where her surgeries took place, and University Physician Associates ("UPA"), the employer of the surgeons who conducted her first surgery, for various negligence claims. *Id*. at *1-2. Plaintiff ultimately settled with TMC and UPA and proceeded against BSC and Bard only.

[2] Plaintiff raised several other claims of error on appeal, which were not related to evidence of prior convictions and are, therefore, not addressed in this summary.

(citation omitted). The Court reasoned that a corporation meets none of the above criteria, because, "being an artificial person created by operation of law, [a corporation] can act only though its officers, directors and agents." *Id*. (*quoting Schneider v. Schneider*, 146 S.W.2d 584, 589 (Mo. 1940)).

The Court concluded that, although a party could impeach a corporate representative's credibility by evidence of the representative's own prior convictions, this is not applicable to a corporation. *Id*. "Because section 491.050 renders any convicted 'person' a competent 'witness' and corporations cannot be witnesses, interpreting 'person' to include corporations would be plainly repugnant to the legislature's intent and the context of section 491.050." *Id*.

Alternatively, Plaintiff argued that "evidence of Bard's criminal convictions was admissible to contradict or rebut Bard's evidence of good corporate character or became admissible, under the curative admissibility doctrine, to rebut inadmissible evidence of Bard's good corporate character." *Id*. Plaintiff pointed to specific statements made by Bard's counsel which she believed permitted her to introduce prior convictions of Bard. Specifically, Bard's counsel made the following assertions, among others, during opening statement:

- Bard fully complied with the FDA regulations and safety standards in bringing the Align to market;
- Bard makes devices that are life improving, life enhancing, lifesaving in different types;
- They make surgical products we're talking about, like the Align that help enhance the quality of life;
- Bard extensively tested the Align for safety;
- The FDA set the guidelines and the rules and Bard fully complied;
- Bard complied with all the FDA regulations and standards; and
- [T]o be able to stand here as a woman and defend this product and defend this company and to know that these are helping millions of women is really rewarding.

Id. at *5.

The Court rejected Plaintiff's argument that she could present Bard's prior convictions to contradict these assertions because "evidence of Bard's prior convictions does not contradict any of the assertions stated in Bard's opening statement." *Id*. The convictions for conspiracy, mail fraud, false statements, and adulterated reports simply did not factually contradict any of the assertions made during opening statement. "The convictions are evidence of Bard's misconduct in the 1980s related to heart catheter devices manufactured by a division that Bard sold years before the Align was brought to market. Sherrer was not entitled to contradict the statements of Bard's attorney with evidence of Bard's prior convictions for unrelated conduct that was not otherwise pertinent to the issues being tried." *Id*. at *5. The court also noted earlier in the opinion that contradiction evidence is not admissible if it relates to only a collateral matter. *Id*. at *4.

The Court also rejected Plaintiff's alternative argument that Bard's assertions during opening statement opened the door to evidence rebutting Bard's good corporate character. *Id*. at *5. The Court recognized that, while not evidence, an opening statement can open the door to the admission of evidence relating to a theory presented in an opening statement. *Id*. (citations and quotations omitted). However, the Court reasoned that trial courts have much discretion in such matters, and "little unfair prejudice could have resulted from these fleeting statements in the context of a five-week trial." *Id*.

Plaintiff also argued that the testimony of several of Bard's witnesses opened the door to evidence rebutting the inference of Bard's good corporate character. For example, Bard's chief operating officer testified that "acting responsibly and with the safety of patients in mind, [Bard] would always do [its] own independent testing." *Id*. at *5. The Court noted that the "curative admissibility doctrine applies when one party introduces inadmissible evidence and allows the opposing party to introduce otherwise inadmissible evidence to rebut or explain inferences raised by the first party's evidence." *Id*. at *4 (*quoting State v. Taylor*, 298 S.W.3d 482, 493 (Mo. banc 2009)). "The curative evidence, however, must be confined to the evidentiary point to which the inadmissible evidence was directed, and a circuit court has discretion as to whether any curative evidence will be allowed." *Id*. (citations omitted). In this specific instance, Bard's convictions from the 1980's relating to heart catheters did not meet the evidentiary point of Weiland's testimony. Moreover, the Court noted that the testimony complained of was elicited by Plaintiff's counsel. "A party 'cannot take advantage of the doctrine of curative admissibility to counter testimony [it] adduced.'" *Id*. at *6 (*quoting Straughan v. Murphy*, 484 S.W.2d 465, 469 (Mo. 1972)).

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Therefore, under the circumstances, the Court concluded that evidence of Bard's past convictions was not admissible to contradict or rebut Bard's evidence of good corporate character, nor did such evidence become admissible under the curative admissibility doctrine.

Concluding Comments

Defendants often face the challenge of excluding evidence of alleged prior bad acts in a variety of contexts. The *Sherrer* case will, at least, assist defense counsel in excluding evidence of prior convictions of the corporate defendant when offered for impeachment. Moreover, the Court in *Sherrer* confirmed existing law that limits the use of prior convictions for purposes of contradiction or rebutting "good-character" evidence. If plaintiff's proposed use of a prior conviction does not directly contradict the defendant's evidence, it should be excluded. Interestingly, the Court did not address whether any of the statements made by Bard's counsel or witnesses did, in fact, constitute "good-character" evidence. That, apparently, must wait for another day.

Immunity from Suit: What Does it Mean?

by Steve Coronado
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Missouri Courts consistently hold sovereign and official immunity are immunities from suit. The Missouri Supreme Court previously reinforced this principal of law as to sovereign immunity in the case of *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008). The Missouri Supreme Court has now reinforced the same principal of law as it pertains to official immunity in its recent decision in *State ex rel. Alsup v. Kanatzar*, SC 97427, 2019 WL 6710274 (Mo. banc Dec. 10, 2019).

To better understand these immunity defenses, it is important to understand some basic concepts. Sovereign immunity and official immunity apply only to governmental entities and the employees of governmental entities. Sovereign immunity is generally a tort protection for government entities, and not their employees, who are covered by two different government immunity doctrines: the official immunity and public duty doctrines. *Southers*, 263 S.W.3d at 609. However, if employees of a governmental entity are sued in their official capacity, it is the same as suing the entity itself and thus, sovereign immunity applies to the individual employees.

Official immunity belongs only to an employee of a governmental entity. Because of sovereign and official immunity, as well as the public duty doctrine, suing a governmental entity or an employee of a governmental entity creates protections not otherwise available to other entities and individuals sued in tort.

By invoking sovereign immunity, governmental entities are protected from suit. However, there are some narrow exceptions to sovereign immunity. *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. banc 2016) (stating statutory provisions that waive sovereign immunity must be strictly construed). Under Missouri Revised Statute § 537.600, Missouri public entities do not receive sovereign immunity for injuries (1) directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment and (2) resulting from the dangerous condition of public property. Full common law sovereign immunity belongs only to state entities. *Southers*, 263 S.W.3d at 609 (quoting *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996)). Missouri municipalities are not provided immunity for proprietary functions performed for the benefit or profit of the municipality as a corporate entity, but are rather

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immune only for those governmental functions performed for the common good. *Id*. Additionally, municipalities and other public entities can waive sovereign immunity for governmental functions to the extent that they are covered by liability insurance. *Id*.; and RSMo § 537.610.1. If, however, an insurance policy expressly disclaims any waiver of sovereign immunity or intent to provide insurance coverage for any claim that would be barred by sovereign immunity, sovereign immunity is not waived. *State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368, 372 (Mo. banc 2016).

Immunity from suit means exactly what it says, an exemption from being sued or remaining in a suit when named as a defendant. In *Southers*, the Court stated that sovereign immunity typically provides protection for government entities, whereas public employees are typically covered by official immunity and the public duty doctrine. *Southers*, 263 S.W.3d at 609.

Official immunity protects public employees from liability for negligence committed during the course of their official duties while performing discretionary acts, which are acts requiring judgment in determining how or whether an act should be done. *Id*. Official immunity does not provide immunity for torts committed in the performance of ministerial acts, which are acts of a clerical nature in which a public officer is required to act upon in a prescribed manner without regard to his own judgment. *Id*. at 610. The goal of official immunity is to allow public officials to make judgments affecting public safety and welfare without fear of personal liability.

The public duty doctrine provides that a public employee is not civilly liable for the breach of a duty owed to the general public, rather than a particular individual. *Id*. The public duty doctrine does not insulate public employees from all liability, as they could still be found liable for breach of ministerial duties in which an injured party had a special, direct, and distinctive interest; this exception exists when injury to a particular, identifiable individual is reasonably foreseeable as a result of a public employee's breach of duty. *Id*. at 612. The public duty doctrine is not an affirmative defense, but rather it is plaintiff's burden to prove that the public duty doctrine does not apply as part of proving the duty element of plaintiff's cause of action. *Id*.

Application of the public duty doctrine leaves the plaintiff unable to prove all elements of his claim for negligence, whereas application of the doctrine of official immunity merely impacts liability but does not destroy the underlying tort. *Id*. Arguably, where there is no underlying tort, there can be no respondeat superior liability. Thus, the public duty doctrine shields employees and the governmental bodies that employ them from liability. *Id*. However, where the legislature has expressly abolished such immunity, the public duty doctrine shall not be expanded to apply sovereign immunity beyond that intended by statute or contrary to the legislature's intent. *Id*.

In the *Southers* case, plaintiffs brought suit against the city and three officers for the deaths of two motorists in a traffic collision with a speeding police vehicle. The speeding police vehicle was in pursuit of a suspect to a robbery when it hit the plaintiff's vehicle. The Supreme Court of Missouri assessed the defendants' immunity claims, as discussed below.

The *Southers* Court found that official immunity applied to the driver of the speeding police vehicle, as the officer was responding to an emergency and was involved in making discretionary decisions. *Id*. at 618. Additionally, the Court found that the officer's pursuit of the vehicle arose from duties owed to the public, making the officer eligible for the protections of the public duty doctrine. These immunity protections were found to be personal to the officer and could not be extended to the city. Because the officer's underlying conduct was the negligent operation of a vehicle, the city waived sovereign immunity under RSMo § 537.600. Thus, despite the fact that the officer was immune, the Court held the city was not immune from claims of respondeat superior liability and could not claim residual protections under the public duty doctrine. *Id*. at 620.

The plaintiffs in *Southers* also brought suit against two officers for negligent supervision claims, alleging the negligent supervision of officers resulted in the injuries to the decedents. Again, the court found official immunity applied to the officers because the conduct of these officers was highly discretionary, supervisory, and mostly involved policy decisions in which the doctrine of official immunity was intended to shield. *Id*. at 620. Official immunity did not extend to the city, as the protections of official immunity are personal to the officers. Regarding the public duty doctrine, the officers received protection under this doctrine because the Court found an officer's duty to supervise other officers in his command is a duty owed to the general public. *Id.* Additionally, the Court found absent a waiver of sovereign immunity, the public duty doctrine could be extended to provide the city protection from liability through respondeat superior. *Id*. While the city could receive protection under the

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public duty doctrine, it is unnecessary because, absent any waivers, the city would be entitled to sovereign immunity.

In *Alsup*, the Missouri Supreme Court found that official immunity, just like sovereign immunity, is an immunity against suit. Specifically, the *Alsup* Court found official immunity protects public officials sued in their individual capacities from liability for negligence committed during the course of their official duties while performing discretionary acts, rather than ministerial acts. *State ex rel. Alsup v. Kanatzar*, SC 97427, 2019 WL 6710274, at *2 (Mo. banc Dec. 10, 2019). Thus, when an official asserts an affirmative defense of official immunity, the official should be afforded such immunity so long as they were performing a discretionary act, were acting within the scope of their authority, and were acting without malice.

The central issue in determining whether official immunity extends to an action is to determine whether the action itself is ministerial or clerical. *Id*. at *4. The test for whether a task is "ministerial" in determining whether official immunity will apply is the same test for whether a task is "ministerial" for purposes of a writ of mandamus. Even when a clerical or ministerial act appears to be authorized or required by statute, official immunity will still apply if the official retains authority to decide when and how that act is to be done. *Id*. As a result, even though a statute might require a public official to act "fairly," "competently," "safely," or "reasonably" in a given situation, the performance of that action will fall within official immunity because what constitutes fair, competent, safe, or reasonable may differ from time to time, place to place, and official to official. *Id*.

In *Alsup*, an in-school suspension teacher, Carlos Alsup ("Alsup"), physically restrained a student, which resulted in personal injuries to the student. The Court found that while Alsup had the authority and, perhaps, the duty to act, Alsup had to determine how to restrain the student, whether a physical restraint was necessary, and the degree of force to use. Because how Alsup was to act was open to him, he was protected by official immunity. *Id*.

The public duty doctrine, like official immunity, applies only to employees of a governmental entity and should operate as an immunity against suit when the actions of the government employee implicate a duty owed to the public as opposed to a single individual. The essential principles of the public duty doctrine were described in *Briscoe v. Walsh*, 445 S.W.3d 660 (Mo.App. E.D. 2014).

> The public duty doctrine protects a public officer from civil liability for his or her negligence. The public duty doctrine recognizes that a public officer owes a duty to the public and not to a particular individual. The public duty doctrine states that a public employee is not civilly liable for the breach of a duty owed to the general public, rather than a particular individual. In other words, the doctrine negates the duty element of negligence, so that an individual plaintiff cannot succeed in establishing a cause of action for negligence against a public officer. The public duty doctrine applies to both ministerial and discretionary functions.
>
> The public duty doctrine does not insulate a public employee from all liability, as he could still be found liable for breach of ministerial duties in which an injured party had a special, direct, and distinctive interest. This exception exists when injury to a particular, identifiable individual is reasonably foreseeable as a result of a public employee's breach of duty.

Id. at 666. Policies, while they may be evidence of negligence and create ministerial duties, are not by themselves sufficient to impair the effect of the public duty doctrine. Conduct that violates applicable policies do not remove the public employee's negligence from the protection of the public duty doctrine "where the provisions at issue indicate no intent to modify or supersede these common law immunity protections." *Rhea v. Sapp*, 463 S.W.3d 370, 379 (Mo.App. W.D. 2015) (*quoting Southers v. City of Farmington*, 263 S.W.3d 603, 617 (Mo. banc 2008)).

Thus, to meet the burden to plead the existence of a duty based on negligence, plaintiff must plead facts to show (1) the existence of a ministerial duty, (2) in which the injured party had a special, direct, and distinctive interest (different from the public at-large), and (3) intent established by the statute or policy to supersede the public duty doctrine. An allegation that the official or governmental agency acted with malice, or in the alternative, acted willfully, wantonly, and with a conscious disregard for a person's rights takes the claim outside of the protections of the public duty doctrine. See *Southers*, 263 S.W.3d at 611-12 (Mo. banc 2008); *McCormack v. Douglas*, 328 S.W.3d 446, 450 (Mo.App. S.D. 2010).

Missouri law holds sovereign immunity and, by implication, official immunity as the rule rather than the exception. Factual circumstance should be liberally construed in favor of the application of immunity. Where it is shown that a defendant is immune from suit as a matter of law, and the Court fails to recognize a public entity's or its employee's right

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to be exempt from suit, a writ is appropriate. Either a writ of mandamus or a writ of prohibition may be appropriate when immunity is denied.

A writ of mandamus is used to require a court to perform a mandatory ministerial act, or a duty already defined by law. *See* S*tate ex rel. Young v. Wood*, 254 S.W.3d 871, 872 (Mo. banc 2008); *Williams v. Gammon*, 912 S.W.2d 80, 83 (Mo.App.1995). Litigants seeking mandamus must allege and prove that they have a clear, unequivocal, specific right to a thing claimed. *Id*. Petitions for writs of mandamus are typically brought to assess whether a court abused its discretion; whereas a petition for writ of prohibition challenges a court's jurisdiction or authority to act. Writs of prohibition prevent a court for wrongfully assuming jurisdiction of a party. *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168, 171 (Mo. banc 2019). A writ of prohibition is not a substitute for a direct appeal, and a court will issue a writ of prohibition only where there is lack of jurisdiction and lack of an adequate remedy by appeal. *State ex rel. Riederer v. Mason*, 810 S.W.2d 541, 543 (Mo.App.1991).

Nonetheless, "where unnecessary, inconvenient, and expensive litigation can be avoided, prohibition is the appropriate remedy." *State ex rel. Anheuser–Busch, Inc. v. Mummert*, 887 S.W.2d 736, 737 (Mo.App.1994). If it is believed a defendant has immunity from suit, a petition for writ of prohibition may be brought showing that, as the defendant is immune from suit, the trial court does not have jurisdiction in the case. While it is unusual to issue a writ directing a court to grant summary judgment, such a writ is appropriate where the motion should have been granted because the other party has no cause of action as a matter of law. *State ex rel. Police Retirement Sys. v. Mummert*, 875 S.W.2d 553 (Mo. banc 1994). Where a defendant is clearly entitled to immunity, it is not necessary to wait through a trial and appeal to enforce that protection. *State ex rel. Bd. of Trustees of City of N. Kansas City Mem'l Hosp. v. Russell*, 843 S.W.2d 353, 355 (Mo. banc 1992).

Conclusion

Sovereign immunity, official immunity, and the public duty doctrine protect governmental entities and their employees from liability. Sovereign immunity provides a broad protection for governmental entities and those employees of a governmental entity sued in their official capacity. Sovereign immunity may be waived by the narrow circumstances under Missouri Revised Statute § 537.600.

Official immunity is personal to an employee of a governmental entity. A public official may invoke the protections of official immunity while performing a discretionary act during the course of their official duties. Officials do not receive immunity for ministerial acts. The difference between a discretionary and ministerial act is key in determining whether there is immunity. If an official retains the authority to decide when and how an act is to be done, they will fall within the protections of official immunity. If an official performs an act of a clerical nature in which they are required to act in a prescribed manner without regard to his own judgment, official immunity will not apply.

The public duty doctrine provides that a public employee is not civilly liable for the breach of a duty owed to the general public. The public duty doctrine negates the duty element of negligence, so that an individual plaintiff cannot succeed in establishing a cause of action for negligence against a public officer. Because the public duty doctrine erases the underlying tort, there can arguably be no respondeat superior liability; shielding both the official and the governmental agency from liability except in those cases where immunity is waived by statute.

Immunity from suit, including the protections of sovereign immunity, official immunity, and the public duty doctrine, means the right to be exempt from the requirement of participating in litigation. This exemption should be honored at the earliest possible opportunity.

About the Author

Steven Coronado, the author of this article, is with the law firm of Baty Otto Coronado PC with offices in Kansas City, St. Louis and Springfield, Missouri. Steve has been defending government entities and specifically MOPERM members for over 25 years. He is a member of the Governmental Liability Committee of the Defense Research Institute (DRI) and a former member of the organization's Board of Directors. He is also a former Director and President of the Missouri Organization of Defense Lawyers (MODL). Steve enjoys the challenges presented by cases involving public entities and their employees. He is grateful to be of service to those who have chosen to serve the public.

The article was prepared with the assistance of Lauren Nichols, an associate with the Baty Otto Coronado firm. Lauren is a member of the KCMBA and is a recent graduate of the University of Nebraska College of Law. Lauren is excited to begin her legal career and looks forward to working with public entities and their employees in the future.