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MODL Quarterly Report

Missouri Organization of Defense Lawyers

In this issue ...

The MODL Quarterly Report

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President's Message

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We have officially entered my favorite time of year. I get to hear from my kids about long division, vocabulary words, and history lessons learned in school at the end of each day. Youth soccer season is well under way, and basketball is right around the corner. Football is in full swing — Go Chiefs! Go Mizzou! Not much beats playoff baseball, even with a disappointing early exit by the Cardinals, but Albert's quest for 700 was a blast. And, the cooler weather and changing leaves make spending time outdoors a joy, maybe with a fire burning in the pit.

As we get into the holiday season, I hope you all will be giving with your time and resources. With the help of Rebecca Nickelson, MODL recently encouraged its members to participate in DRI's "International Day of Service" through a food drive to benefit food banks in Missouri. That particular effort is coming to a close around the time you are receiving this newsletter. I know we have several firm members who participated, and I hope we were able to make a difference for organizations collecting for Missouri citizens in need. While this food drive is concluding, there is no reason that our efforts to help have to reach an end. Please remember as we enter this season of giving that, for many, it is also a season of need. If you are able, look for ways you can help your community.

On an entirely different note, MODL recently hosted a Judicial Reception in conjunction with the Missouri Bar Annual Meeting and Judicial Conference. I would like to extend my thanks to all of Missouri's honorable judges who attended, as well as the members of our organization who participated. It was a real pleasure catching up with judges in whose courts I have not had an opportunity to appear in some time, to meet those in jurisdictions where I do not typically practice, and to spend time with colleagues.

Whatever holidays or gatherings you may be enjoying this time of year, I wish you all safe and joyful celebrations with family and friends.

MODL Members Come Together

At the ...

MODL Judicial Reception during the 2022 Annual Missouri Bar/Missouri Judicial Conference

September 14, 2022 ♦ University Plaza Hotel ♦ Springfield, MO

At the ...

MODL Views from the Bench Judicial Luncheon

November 4, 2022 ♦ Bartolino's ♦ St. Louis, MO

↑ *The Judicial Panel (from left): Judge Madeline Orling Connolly, Judge Thomas Albus, Judge Mary Elizabeth Ott, and Judge John Bodenhausen*

At the ...

MODL/IDC Joint Defense Law Seminar

August 12, 2022 ♦ Busch Stadium ♦ St. Louis, MO

Judge John R. Lasater

Associate Circuit Judge, Missouri's 21st Judicial District

by Tommy S. Powell
Brinker & Doyen, L.L.P. ♦ St. Louis, MO

In 2017, the Honorable John R. Lasater was appointed to the 21st Judicial Circuit as an Associate Circuit Judge. Born and raised in St. Louis, Judge Lasater attended John Burroughs High School before attending the University of Wisconsin where he received a degree in economics. Judge Lasater then obtained his law degree from Washington University in St. Louis in 1991. Before graduation, Judge Lasater thought he would enter civil practice. Instead, he obtained a clerkship at the Missouri Court of Appeals. Working there, he gained great experience that would serve him well as a litigator. Following his clerkship, Judge Lasater began his 23-year career at the St. Louis County Prosecutor's office.

Now serving as a judge in the 21st Judicial Circuit, Judge Lasater has thoroughly enjoyed his time on the bench. He and his wife, the Honorable Judge Julia Pusateri Lasater, have noted the respect from attorneys practicing and also the congeniality of fellow judges on the bench.

Judge Lasater acknowledged several individuals who have made a direct impact on his legal career. First being his wife Julie, who has shared a similar career path when she was an assistant prosecuting attorney in St. Louis County. They enjoy catching up at the courthouse café during the week for lunch and also spending time with their two sons on the weekends. Next, the Honorable Dean Waldemer has had a significant influence on Judge Lasater's practice. While both at the St. Louis County Prosecutor's office, Judge Lasater recalls second chairing numerous murder trials with Judge Waldemer, who helped boost his confidence in his litigating skills. He finally noted the impact his father Donald Lasater, a trial attorney and prosecutor in the St. Louis area, had on his legal career and encouraging him to pursue a law degree while in college. Also, Judge Lasater's brother was a St. Louis County police officer for 43 years before retiring. It was this combination of law and order growing up that sparked his interest in pursuing a law degree.

Judge Lasater's judicial assignments include civil and family court matters. While on the family court docket, Judge Lasater has adapted to the substantive law as well as the practical aspects of issues involving division of marital property and child custody. He has recognized the difficulty in adjudicating cases involving child custody. It is a different form of raw emotion that Judge Lasater handles, but one that he takes pride in dealing with. Child custody goes beyond the four walls of the courtroom and requires a more practical breakdown of the issues presented. Being new to the family court docket, Judge Lasater has been very grateful to the other judges in the 21st Circuit. They were and are a tremendous resource for him when dealing with unfamiliar issues.

After practicing as an assistant prosecuting attorney, Judge Lasater has enjoyed being on the other side of the bench. He noted how our profession is adversarial by nature, but still demands respect towards the court as well as the opposing party. Being an experienced litigator himself, he understands the passion and long hours trial attorneys work in presenting their case.

As one of those zealous advocates in the past, Judge Lasater had a great respect for the judges he practiced before, and now experiences that same respect towards him and the court in the 21st Circuit. Judge Lasater understands the deliberate thoughtfulness judges take when deciding cases. Additionally, when the courts re-opened after the pandemic, Judge Lasater was excited to see familiar faces as well as new ones in his courtroom and chambers. Having the ability to interact with the parties face to face has helped him break down the problems of a case and assist the parties towards a resolution.

Outside of the courtroom, Judge Lasater and his wife are Boy Scout Adult leaders and Troop committee members. He also does his best to make an annual fishing trip up to northern Wisconsin.

SAVE THE DATE

2023 "John L. Oliver, Jr." Trial Academy

March 29-31, 2023
MU School of Law
Columbia, MO

What attendees have said ...

"Was a great experience! Thoroughly enjoyed and learned a lot."

"This was an incredible training. Scary at times and, with work, it was hard to prepare as I would have liked. But I think it is equally important to learn those skills. So thank you all for taking time away from your job to put this on and invest in teaching new lawyers."

"Wow – Thank you so much! I learned so much and felt so lucky that I could get such great feedback from so many excellent attorneys."

"A wonderful helpful conference – thank you! I will recommend that others from my firm attend in the future."

So mark your calendar and make plans to give your attorneys the same great experience!

Board Member Spotlight

Lauren H. Navarro

I am a Senior Associate in the Kansas City office of Armstrong Teasdale, LLP. Our office in Kansas City has around 30 attorneys, with the majority of them being litigators. Armstrong Teasdale is based in St. Louis, Missouri, but has been growing a lot in recent years with new offices in Boston, Miami, London, and Dublin.

My practice primarily involves the representation of insurance companies in high-stakes coverage disputes. A lot of this work is "behind the scenes" rather than in active litigation, and involves preparing coverage opinions and counseling insurers on risk management. I also defend insurance companies that have been sued for breach of contract or bad faith, primarily under Missouri, Kansas and Illinois law. Outside of my insurance work, I defend companies against complex commercial claims, including class actions and multi-party contract disputes.

I lived all over the Midwest as a child – in six states by age 14, but spent most of my formative years in St. Joseph, Missouri. I have lived in Kansas City since attending UMKC's six-year law program, where I met my husband, Bryce. We now have two young children, Brooks and Claire, who are two years and eight months old. We also have our first "baby," Jasper, who is a very spoiled eight-year-old Miniature Schnauzer. Life as lawyers with little kids is busy, but we love (almost) every minute of it. We enjoy getting to spend time with our family and friends when we can, and are looking forward to soon taking our first vacation as a family of four!

Recent Case Updates

by Agota Peterfy

Brown & James, P.C. ♦ St. Louis, MO

Public Road Defined for Purposes of Uninsured Motorist Coverage

In *M.P. v. Trexis One Ins. Corp*, the Missouri Court of Appeals for the Southern District of Missouri recently upheld a judgment from the Circuit Court of Greene County, finding that no coverage existed under the uninsured motorist provision of appellant's automobile insurance policy. 2022 WL 3009590 (Mo. App. July 29, 2022). In the underlying case, appellant was riding a bicycle in the parking lot of a privately owned RV park, was struck by a golf cart and was injured. *Id*. Appellant filed a claim under the uninsured motorist ("UM") provision of their insurance policy, issued by respondent ("Trexis"). *Id*. at *2. Appellant's policy contained an exclusion for UM coverage for "any vehicle or equipment designed mainly for use off public roads while not on public roads". *Id*. Trexis denied the claim, because the golf cart was designed mainly for use off public roads, and because the accident did not occur on a public road. *Id*. Appellant filed suit. After a bench trial, the Honorable Jason R. Brown of Greene County ruled in favor of Trexis, holding that the accident did not occur on a public road, and as such was excluded from the UM coverage of appellant's insurance policy.

The Court of Appeals upheld the trial court's ruling. The Court noted that the burden of proving coverage is on the insured in cases where the existence of coverage is at issue under the policy definitions. *Id*. at *4. The parties agreed that the golf cart is a motor vehicle designed mainly for use off public roads. *Id.* at *5. Therefore, coverage is excluded under appellant's policy unless the accident occurred on a public road. The parties also agreed that appellant's policy did not contain a definition of "public road." *Id*. In the instant appeal, the parties offered competing definitions of "public road." Trexis suggested that "public road" should be interpreted using its "plain ordinary meaning," while appellant suggested several judicial definitions by Missouri courts in prior cases. *Id*. The Appellate Court distinguished appellant's cases and noted that each definition proffered by appellant arose from very different and very specific contexts, such as a criminal case,[1] a license revocation case,[2] or a case for the declaration of abandonment of a public road,[3] and as such, appellant's argument for their application was unpersuasive. *Id* at *6. Instead, the Court relied on the well-established Missouri Supreme Court standard that when interpreting an undefined term in an insurance policy, the "plain and ordinary meaning" of the term in question should apply, as it would be understood by an ordinary person purchasing insurance.[4]

Applying the above standard, the Court defined "public road" as one owned or maintained by a state or political subdivision, or one to which the general public has access and uses freely and commonly. *Id.* at *6. In the instant case, it was undisputed that the road and the adjacent parking lot at issue were not owned or maintained by a state or political subdivision and the trial court found that based on the evidence, while the road and parking lot were "accessible for restricted use by the public but [] not used by the public freely and commonly". *Id.* at *8. As such, appellant failed to

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1 *State v. Gittmeier,* 400 S.W.3d 838 (Mo. App. 2013).

2 *Covert v. Fisher*, 151 S.W.3d 70 (Mo. App. 2004).

3 *Faustlin v. Mathis*, 99 S.W.3d546 (Mo. App. 2003).

4 *Doe Run Res. Corp. v. Am.Guarantee & Liab. Ins.*, 531 S.W.3d 508 (Mo. banc 2017).
Burns v. Smith, 303 S.W.3d 505 (Mo. banc 2010).
Ritchie v. Allied Prop. & Cas. Ins. Co., 307 S.W.3d 132 (Mo. banc 2009).
McCormack Baron Mgmt. Servs., Inc. v. Am. Guarantee & Liab. Ins. Co., 989 S.W.2d 168 (Mo. banc 1999).
Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. banc 1997).
Greer v. Zurich Ins. Co., 441 S.W.2d 14 (Mo. 1969).
Faries v. United Servs. Auto. Ass'n, 628 S.W.3d 257 (Mo.App. 2021).
Copling v. Am. Fam. Mut. Ins. Co., S.I., 612 S.W.3d 226 (Mo.App. 2020).
Brown v. Am. Fam. Mut. Ins. Co., 572 S.W.3d 154 (Mo.App. 2019).
Progressive Max Ins. Co. v. Hopkins, 531 S.W.3d 649 (Mo.App. 2017).

show that the exclusion in the UM provision of Trexis' policy didn't apply and that they would be entitled to coverage. *Id.* at *9.

Compliance with Missouri Supreme Court Rule 84.04 is Mandatory

Over the last few months, both the Eastern and the Western District Court of Appeals issued several opinions stressing the importance of compliance with the requirements of Rule 84.04. Attorneys specializing in appellate practice are no doubt familiar with Missouri Supreme Court Rule 84.04, governing the content of appellate briefs. The recent Court of Appeals decisions discussed below offer a warning to attorneys and pro se litigants who may consider the requirements of Rule 84.04 hyper-technical and question the importance of observing them.

In *TG v. DWH*, the Missouri Court of Appeals for the Eastern District dismissed appellant's appeal for multiple violations of Missouri Supreme Court Rule 84.04. 648 S.W.3d 42 (Mo. App. 2022). In his statement of facts, appellant misrepresented the facts in the record, referenced matters outside of the record on appeal, and excluded relevant facts. *Id*. at 47. Furthermore, appellant failed to support each of his factual statements with citations to the record on appeal, in violation of Rule 84.04(c). The Points Relied On section of appellant's brief was also defective, in that it failed to allege a ground upon which relief could be granted, was impermissibly multifarious, and did not include a list of authorities supporting his Points Relied On. *Id*. at 49. In fact, the Court noted that appellant's Points Relied On was simply an abstract statement of law. *Id.* at 48. Finally, in the argument section of his brief, appellant again failed to support his factual assertions by specific citations to the record on appeal. *Id*. at 50.

In its opinion dismissing the appeal, the Court noted that Missouri Supreme Court Rule 84.04 exists to ensure that the Court of Appeals can conduct a meaningful and neutral review of the issues. *Id.* at 46. To review appellant's appeal and determine which parts of the record on appeal supported appellant's various statements of fact would not only cause undue burden for the Court, but would force the Court to become appellant's advocate, in contravention of its role as a neutral arbiter. *Id*. at 50. Therefore, although the Court noted its preference to dispose of cases on the merits, appellant's appeal was dismissed for its multiple violations of Rule 84.04.

The Western District reached identical results in three recent cases involving pro se litigants.[5] In each of the cases, the respective appellants violated the requirements of Rule 84.04 in drafting the Statement of Facts, Points Relied On, and Argument sections of their brief. The Court noted that it is within its discretion to overlook technical briefing deficiencies when it does not impede a review on the merits. *Murphy, 2022 WL 4349621 at* *4; *Gan, 640 S.W.3d* at 457. In fact, in one of the cases, the Court struck appellant's original brief for noncompliance with briefing rules, specified the violations, and afforded appellant an opportunity to amend and refile his brief. Ultimately though, in each of the cases the Court determined that the Rule 84.04 violations were so substantial and material as to impede disposition of the case on its merits and each appeal was dismissed.

Even the Missouri Supreme Court weighed in on the issue in *State v. Minor*, 648 S.W.3d 721 (Mo. Banc 2022). Although the Court ultimately exercised its discretion to address the merits of appellant's point on appeal, the Court noted that "continued reiteration of the importance of the briefing rules without enforcing any consequence implicitly condones continued violations and undermines the mandatory nature of the rules." *Id*. at 728-729, citing *Alpert v. State*, 5473 S.W.3d 589, 601 (Mo. banc 2018).

No Special Relationship Existed Between Owner of Concert Venue and Attendee

In *MB v. Live Nation Worldwide*, the Missouri Court of Appeals, Eastern District, was asked to review the trial court's order granting summary judgment to respondent. 2022 WL 3204716 (Mo. App. Aug. 9, 2022). The underlying lawsuit was brought for negligence for failing to protect appellant from the criminal act of a third person. *Id*. at *1. Appellant was attending a concert at a concert venue owned and operated by respondent with a friend. *Id*. Appellant was consuming alcoholic drinks at the concert and felt sick and intoxicated. *Id*. She sought medical attention at the medical tent at the concert, where she was treated for being overheated and overconsuming alcohol. *Id*. A member of the security team spoke with appellant and confirmed that she drove to the concert with a friend. *Id*. at *2. Subsequently,

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[5] *Kouadio-Tobey v. Division of Employment Security*, 651 S.W.3d 839 (Mo. App. 2022).
Gan v. Schrocik, 640 S.W.3d 451 (Mo. App. 2022).
Murphy v. Steiner, 2022 WL 4349621 (Mo. App. Sept. 20, 2022).

appellant voluntarily got in her friend's truck and left the concert. *Id*. Appellant alleged that her friend later sexually assaulted her at his apartment. *Id*.

In her suit, appellant alleged that respondents were liable for the damages she suffered resulting from the alleged sexual assault, because they assumed a duty for her safety, and should not have permitted her to leave the concert with her would be assailant. *Id*. Respondents moved for summary judgment contending that they didn't owe appellant a duty of care to protect her from the criminal acts of a third party. *Id*. St. Louis County Circuit Court Judge Albus agreed and granted respondent's motion.

In her appeal, appellant argued that the trial court erred in finding that respondent owed her no legal duty. *Id*. The Court noted it is well established law in Missouri that a business has no duty to protect an invitee from the criminal acts of a third person because such acts are not foreseeable. *Id*. at *4. The Supreme Court of Missouri recognized two exceptions to the "no duty" rule: one involving a special relationship between the parties, where one party is entrusted with the protection of another and relies on that party for safety; and one involving special circumstances, where a defendant has notice of prior similar crimes. *Id.* at *5, citing *Elkins v. Acad. I., LP*, 633 S.W.3d 529, 537 (Mo. App. S.D. 2021), and *Stafford v. Drury Inns, Inc.*,165 S.W.3d 494, 496 (Mo. App. E.D. 2005). In the instant case, appellant argued that the fact that respondents cared for her in the medical tent at the concert created the special relationship, and respondent thus had a duty to protect her from sexual assault by a third party. *Id*. at *6. Relying on the Missouri Supreme Court's decision in *Wieland v. Owner -Operator Serv., Inc.*, 540 S.W.3d 845 (Mo. banc 2018), the Appellate Court rejected appellant's reasoning. *Id*. at *6. In *Wieland*, the Supreme Court held that no duty arises under the special-relationship exception unless "a business knows or has reason to know a specific third person is both (1) on its premises and (2) dangerous." *Wieland,* 540 S.W.3d. at 849. There was no evidence in the record in the instant case that either appellant or any other person reported any misconduct by her assailant to respondent and appellant voluntarily left the concert with him. *MB, 2022 WL 3204716 at *6*. In order to create a duty of care on the part of a business owner to protect an individual from the criminal acts of a third party, the criminal "conduct and resulting injuries" must be foreseeable. *Id*. The Court held that under the facts in this case, it was not foreseeable that appellant might be harmed by the person she came to the concert with and with whom she left voluntarily, such that it would have created a duty to protect appellant.[6] *Id*.

A little more than two years after the incident at issue in this case took place, Governor Parson signed into law The Business Premises Safety Act, which went into effect on August 28, 2018. Mo. Sect. 537.787. The law codifies Missouri's general "no duty" rule on the part of business owners, and outlines specific affirmative defenses business owners can raise even if a duty is found to exist, such as that the business had implemented "reasonable security measures," that the business was closed to the public when the incident occurred, and the injured individual was a trespasser on the premises or was attempting to or engaged in committing a felony.

[6] Although appellant raised other points on appeal, the Court held that its finding of "no duty" to appellant was dispositive of the appeal. *Id.* at *7.

Thank You!

Thank you to the following MODL firms for supporting their communities through the October DRI Food Drive

Baker Sterchi Cowden & Rice, L.L.C.

Baty Otto Coronado Scheer PC

Brown & Ruprecht

Foland, Wickens, Roper, Hofer & Crawford, P.C.

Kutak Rock LLP

Sinars Slowikowski Tomaska

A Look at Missouri's Expert Witness Statute Five Years After Adopting FRE 702

by Ben Harner and Paul Hess[1]
Thompson Coburn LLP ♦ St. Louis, MO

Introduction

In August 2017, the Missouri legislature amended § 490.065, RSMo.,[2] the statute governing the admissibility of expert witnesses, to match the Federal Rules of Evidence ("FRE"). At the time, proponents of the law believed this would provide a more stringent standard regarding the admissibility of expert opinions in Missouri.[3] However, even with the new statute adopting the same language as FRE 702, and with Missouri courts looking to *Daubert* and its progeny for guidance, it is still relatively rare for expert opinions to be excluded in Missouri state court. This article provides an overview of how Missouri case law has developed in the five years since the statute took effect on August 28, 2017.

Missouri's expert admissibility statute provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case.[4]

This language mirrors FRE 702, which governs expert admissibility in federal cases.[5] Since enactment of the amended statute, Missouri courts have focused on the three-part test often used by federal courts applying FRE 702: (1) whether the expert is qualified; (2) whether the testimony is relevant; and (3) whether the testimony is reliable.[6]

The primary difference between the amended Missouri statute and its prior version relates to assessing reliability. Under the prior version of the statute, "[t]he facts or data in a particular case upon which an expert bases an opinion or inference…must be of a type *reasonably relied upon by experts in the field* in forming opinions or inferences upon the subject and must be *otherwise reasonably reliable*."[7] With this language, Missouri courts applied the *Frye* standard — which required only that an expert's methods be *generally accepted* in that field of expertise.[8] But, just as

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1 Ben Harner is a partner at Thompson Coburn LLP, and focuses primarily on complex product liability and tort matters. Paul Hess is an associate at Thompson Coburn LLP, practicing tort and business litigation.

2 All references to § 490.065 are to 2017 unless otherwise noted.

3 For example, upon signing the new standard into law, then-Gov. Eric Greitens stated that adopting the federal standard would keep "junk science" out of Missouri courts and make Missouri more desirable for business. Marshall Griffin, *With Gov. Greitens' Signature, Missouri Set to Tighten Expert-Witness Rules*, St. Louis Public Radio (Mar. 28, 2017), http://news.stlpublicradio.org/post/gov-greitens-signature-missouri-set-tighten-expert-witness-rules#stream/0. MODL also endorsed the amendment. *Missouri Adopts Daubert Standard Governing Admissibility of Expert Opinion Evidence*, National Law Review (Mar. 29, 2017), https://www.natlawreview.com/article/missouri-adopts-daubert-standard-governing-admissibility-expert-opinion-evidence.

4 § 490.065.2(1), RSMo.

5 Fed. R. Evid. 702; *see State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317 (Mo. App. E.D. 2018). It should be noted that proposed revisions may alter FRE 702. *See* Proposed Amendments to Rule 702 – Testimony by Expert Witnesses, MODL Quarterly Report (Winter, 2022). Time will tell if the Missouri legislature will follow suit if those changes occur to FRE 702.

6 *See, e.g., Gardner,* 562 S.W.3d at 319; *Jones v. City of Kansas City*, 569 S.W.3d 42, 54 (Mo. App. 2019), *overruled on other grounds by Wilson v. City of Kansas City*, 598 S.W.3d 888 (Mo. banc 2020); *Gebhardt v. Amer. Honda Motor Co., Inc.*, 627 S.W.3d 37, 44 (Mo. App. W.D. 2021).

7 § 490.065.3, RSMo. (1989) (emphasis added).

8 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* standard was still used by Missouri courts post-*Daubert*, until § 490.095 was amended. *See Gardner*, 562 S.W.3d at 316.

FRE 702 signaled the end of *Frye* in federal courts, the amendment of § 490.065 has eliminated *Frye* in Missouri courts.[9] Now, rather than merely showing "general acceptance" or "reasonable reliability," expert evidence must meet three prerequisites for reliability: (1) *sufficient* facts or data; (2) *reliable* principles and methods; and (3) that the methods have been *reliably applied* to the facts.[10] Importantly, with this change, Missouri courts have confirmed that the *Daubert* factors will often play a role in assessing reliability.[11] These stricter reliability requirements have provided, and should continue to provide, more opportunities to *successfully* challenge expert evidence in Missouri state courts.

Takeaways from Missouri Case Applying Amended Statute

1. **The Change in the Reliability Standard Creates More Opportunities for Exclusion.**

   Since August of 2017, the Missouri Court of Appeals has addressed § 490.065 in 20 *civil* cases. Excluding an expert remains an uphill battle, occurring in only three of those cases.[12] Of course, part of the challenge is that appellate courts review a trial court's exclusion or admission of expert testimony for abuse of discretion — a deferential standard that only results in overturning a trial court if the decision is arbitrary and clearly illogical.[13] Further, with limited Missouri precedent, trial court judges are seemingly reluctant to exclude an expert and appeals judges are unlikely to find an abuse of discretion.

   The cases do, however, suggest the amended reliability standard has increased scrutiny of expert methodology and created more opportunities for exclusion of expert evidence and establishing helpful precedent. Of the cases examined for this article, 12 analyzed the reliability of expert testimony — six cases applied the new standard and six applied the old "reasonably reliable" standard.[14] *None* of the cases applying the old standard resulted in exclusion of expert testimony; but, *two* cases applying the new standard excluded some or all of the expert's testimony based on reliability principles. Defense attorneys should keep these cases in mind when pointing out deficiencies in expert reliability.

   Gebhardt v. American Honda Motor Co., Inc.:

   Gebhardt is the best example of a successful challenge to the reliability of an expert's methodology under amended § 490.065.2. It should be especially useful to defendants going forward — particularly in product liability cases where an expert fails to perform adequate testing or otherwise use a reliable methodology. In *Gebhardt*, the plaintiff alleged a defect caused his ATV to suddenly accelerate and flip as he went up an embankment in a creek bed. The plaintiff's mechanical engineering expert testified that the accident was likely caused by water getting into the ATV's throttle position sensor and engine, producing a short circuit that caused the sudden acceleration. The appellate court affirmed the exclusion of the plaintiff's expert's testimony as unreliable for several reasons. First, the court recognized the distinction between qualifications and reliability[15] (issues often blurred in analyzing the admissibility of expert testimony). The court also rejected the expert's attempt to rely on a recall involving a different scenario than alleged as the expert performed no testing to support his theory that the recall condition existed in the subject ATV.[16]

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[9] *Gardner*, 562 S.W.3d at 319 ("The adoption of the federal rules in Section 490.065.2 makes clear that *Frye*—superseded by those very same rules and no longer followed in federal courts—should no longer be followed in Missouri either.").

[10] § 490.065.2(1)(b)-(d), RSMo.

[11] *See Gebhardt*, 627 S.W.3d at 44 (citing cases).

[12] The three cases excluding expert testimony are: *Gebhardt*, 627 S.W.3d 37 (excluding expert based on reliability); *Campbell v. Union Pac. R.R. Co.*, 616 S.W.3d 451 (Mo. App. W.D. 2020) (excluding expert based on lack of reliability and relevance); and *A.J.C. ex rel. J.D.C. v. K.R.H.*, 602 S.W.3d 857 (Mo. App. W.D. 2020) (excluding expert based on lack of qualifications). A number of cases have deemed challenged expert testimony admissible. *See, e.g., Linton ex rel. Linton v. Carter*, 634 S.W.3d 623 (Mo. 2021); *Otwell v. Treasurer*, 634 S.W.3d 850 (Mo. App. E.D. 2021); *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. App. E.D. 2020); *Revis v. Bassman*, 604 S.W.3d 644 (Mo. App. E.D. 2020); *Hogenmiller v. Miss. Lime Co.*, 574 S.W.3d 333 (Mo. App. E.D. 2019); *Jones*, 569 S.W.3d 42.

[13] *Ingham*, 608 S.W.3d at 681.

[14] Either because the case was argued before the new statute was effective, or the case was of a type within § 490.065.1, which applies the previous standard to select cases.

[15] *Gebhardt*, 627 S.W.3d at 44-45 (the expert's "mechanical engineering experience alone is not sufficient to establish that the trial court abused its discretion in finding that his opinions were not sufficiently reliable to be admissible in this case").

[16] *Id*. at 45.

Finally, the court found that the expert's opinions were the result of assumptions and conjecture — "[e]ven if such a theory was plausible, its speculative foundation and lack of confirmatory testing, third-party validation or other facts and data buttressing the reliability of the methods applied or conclusions produced provided the trial court a sufficient basis to exclude [the expert's] testimony."[17]

Campbell v. Union Pacific Railroad Company:

Campbell is another case that confirms an expert's opinions require a reliable basis. There, the plaintiff brought a claim on behalf of her daughter against a railroad company and its employees for negligence after a train collided with her daughter's car. Without much discussion of the new reliability standard under § 490.065, the appellate court affirmed the trial court's exclusion of expert testimony which had been based on an excluded accident simulation video. The plaintiff offering the expert had failed to properly challenge the exclusion, and the appeals court cited the defense's challenges to the video — that it lacked factual foundation, misrepresented facts, and was purely speculative — in affirming exclusion of expert testimony based on such evidence as unreliable.[18]

2. Federal Cases, including *Daubert*, Are Strongly Persuasive:

Since the 2017 amendment, Missouri appellate courts have also consistently stated that federal cases addressing FRE 702 are persuasive (albeit, not controlling). Notably, the first cases that interpreted the amended §490.065 considered *Daubert* and subsequent cases to be "strong persuasive authority" in applying the Missouri statute.[19] More recently, in *Gebhardt*, the court agreed, noting that "[w]here Missouri law adopts language from the Federal Rules of Evidence, federal cases applying those rules are persuasive — though not binding — authority."[20] And, another court, specifically discussing how to interpret § 490.065, stated that cases interpreting FRE 702 and 703 are "relevant and useful."[21] With this in mind, defense attorneys should continue to cite federal cases, from Missouri and beyond, which provide a much more established body of law regarding expert admissibility.

A recent and helpful federal court opinion is *Miravalle v. One World Technologies*.[22] In that case, the plaintiff, who had cut himself with a table saw, hired a mechanical engineer to support his design defect and inadequate warning theories against the saw's manufacturer. The defendant challenged to the expert's testimony that the saw lacked proper warnings and instructions, and that it failed to include flesh-sensing technology. The district court excluded the expert testimony because the expert "failed to do any work to determine with any degree of scientific methodology to support his opinions, and consequently, the Court cannot evaluate the reliability of his opinions."[23] This case notes a variety of ways a court can find an expert's testimony to be unreliable, addressing numerous factors discussed by *Daubert*, including no evidence of testing, general acceptance, peer-reviewable tests, or error rate calculations. Likewise, the expert did not know what modifications or additional parts were needed to employ a proposed alternative design, and otherwise did not confirm hypothetical design changes would be economically feasible.

Conclusion

Exclusion of expert witnesses continues to be fairly rare in Missouri, even after the adoption of the federal reliability standard. Defense attorneys should nevertheless be encouraged by the recent cases (even if the sample size is small) suggesting the amended Missouri statute has teeth. With time and advocacy, Missouri will be able to develop stronger precedent for excluding expert witnesses.

17 *Id*. at 45-46.

18 *Campbell*, 616 S.W.3d at 476.

19 *See Gardner*, 562 S.W.3d at 317; *Jones*, 569 S.W.3d at 53 (emphasis added).

20 *Gebhardt*, 627 S.W.3d at 44.

21 *Ingham*, at 700.

22 *Miravalle v. One World Technologies, Inc.*, 2021 WL 5801860 (E.D. Mo. Dec. 7, 2021).

23 *Id*. at *7.

Pretender to the Throne: The Stacy Test and the Future of Hybrid Sovereign Immunity

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Introduction

Sovereign immunity has been well-documented throughout history. It began with the notion that the king can do no wrong and has become the proposition that the government cannot be sued without its consent. While the core concept of sovereign immunity in Missouri[2] has remained consistent since the passing of § 537.600[3] in 1978, the doctrine's outer contours have fluctuated over the decades.

For instance, the sovereign immunity statute introduces, but does not define, the phrase "public entity."[4] In fact, the entire chapter features only a single definition of "public entity" that was (and still remains) extremely limited, including only "any city, county, township, village, town, municipal corporation, school district, special purpose or taxing district, or any other local public body created by the general assembly."[5] This has left certain entities vulnerable to suit, even where they bear such a connection to government that any distinction is arguably in name only. Although these entities do not fall within the restrictive definition above, some of them have been deemed "hybrid" entities entitled to sovereign immunity. This article focuses on those "hybrid" entities that claim the crown of sovereign immunity.

The History of Hybrid Sovereign Immunity

Shortly after chapter 537 defined "public entity," the Missouri Supreme Court began addressing the possibility of "hybrid" entities. Within two years, the Court addressed whether Bi-State Development Agency ("Bi-State"), Cass Medical Center, and the Regional Justice Information Service Commission ("REJIS") were sufficiently similar to public entities to be entitled to sovereign immunity under § 537.600.

Bi-State was statutorily created as a result of a compact between Missouri and Illinois, had "substantial governmental authority and power" regarding a variety of public works, featured only Missouri commissioners selected by the governor with the advice and consent of the senate, and reported to the governor.[6] Cass Medical Center, as a county hospital, was also organized pursuant to statute, and it was operated by a county commission to whom the elected trustees reported.[7] REJIS, as a database coordinated and administered by a joint commission authorized by statute, was held to be "cloaked with sovereign immunity."[8]

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2 For a thorough summary of the doctrine of sovereign immunity, see "Immunity from Suit: What Does It Mean?" by Steven F. Coronado and Lauren L. Nichols in the *Winter 2020 MODL Quarterly Report*.

3 All statutory references are to the Revised Statutes of Missouri.

4 The current instantiation of § 537.600 clarifies the term "public entity" "shall include any multistate compact agency created by a compact formed between this state and any other state which has been approved by the Congress of the United States." This revision was enacted on the heels of *State ex rel. Trimble v. Ryan*, 745 S.W.2d 672 (Mo. banc 1988), addressed herein.

5 *See* § 537.700.2(3).

6 *State ex rel. Trimble v. Ryan*, 745 S.W.2d 672, 674-75 (Mo. banc 1988). Notwithstanding the holding that Bi-State was a sufficiently "hybrid" public entity, the Court ultimately held that Bi-State still remained "amenable to suit under the statutory waiver of immunity contained in sec. 537.600.1(2), pertaining to injuries '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.'" *Id*. at 675.

7 *State ex rel. Cass Medical Center v. Mason*, 796 S.W.2d 621, 622 (Mo. banc 1990). Relatedly, the Missouri Supreme Court has also determined that a board of trustees that operated a city hospital is entitled to sovereign immunity. *State ex rel. Bd. of Trustees of City of N. Kansas City Mem'l Hosp. v. Russell*, 843 S.W.2d 353 (Mo. banc 1992).

8 *State ex rel. Regional Justice Information Service Commission v. Saitz*, 798 S.W.2d 705, 706 (Mo. banc 1990).

The *Stacy* Case: A Test Is Formed

This history culminated in the Missouri Supreme Court in *Stacy v. Truman Medical Center*, 836 S.W.2d 911 (Mo. banc 1992).[9] In *Stacy*, the Court considered whether Truman Medical Center was a "public entity" and therefore immune from suit under § 537.600.

As assessed in *Stacy*, the relevant case law began with *Truman Medical Center, Inc. v. National Labor Relations Board* ("NLRB"), 641 F.2d 570 (8th Cir. 1981), although the issue was somewhat different. There, the Eighth Circuit considered whether the hospital was a "political subdivision" of the state, for purposes of determining whether the NLRB had jurisdiction over it.[10] The court noted that the NLRB considered entities to be political subdivisions where they were created directly by the state or administered by individuals answerable to public officials or the general public.[11] Using these two alternatives, the court held that as a private non-profit corporation administered by an independent self-perpetuating board of directors, Truman Medical Center clearly did not meet the definition of a political subdivision.[12]

After examining the Bi-State, Cass Medical Center, and REJIS opinions as well, the *Stacy* Court distilled a tripartite test for determining whether an entity is such a "hybrid" and therefore entitled to the protections of sovereign immunity:

> First, each entity must perform a service traditionally performed by the government . . .
>
> The second, and probably the most critical, requirement of entities entitled to sovereign immunity is that they are controlled by and directly answerable to one or more public officials, public entities, or the public itself . . .
>
> The third requirement concerns what limitations, if any, apply to the creation of a public entity that will have the benefits of sovereign immunity. Put another way, the basic issue involves how and by whom is government or a public entity formed? New governmental entities or political subdivisions of existing governmental entities are formed by government itself or by the voters acting as a group. We would not expect a group of individuals to be able to form their own governmental body.[13]

Applying these elements to Truman Medical Center, the *Stacy* Court determined that although the hospital did perform a traditional governmental activity in providing medical care, it was not controlled by a municipality or political subdivision, but rather by a private board of directors, the majority of whom were not appointed or subject to removal by the public or any public officials.[14] Finding the lack of public control conclusive, the Court held that Truman Medical Center was not entitled to sovereign immunity.[15]

Hybrid Sovereign Immunity in the Post-*Stacy* Era

The Casualty Reciprocal Exchange Case

The Missouri Supreme Court subsequently looked at *Stacy* to determine whether a corporation was a "public corporation" and therefore not violative of the Missouri Constitution.[16] The corporation considered was the Missouri Employers Mutual Insurance Company ("MEM"), a statutorily created entity that insures Missouri employers against liability for workers' compensation. Although the Court did not strictly adhere to the *Stacy* analysis, it addressed in detail the second element, namely, whether MEM was "created and controlled for a public purpose."[17] It considered that MEM, whose operation and existence was controlled by statute, was required to report to the governor and general assembly, but it also noted that the company's policyholders had the ability to elect successor members of the board of directors.[18] As such, the Court found that MEM "satisfied the public control element . . . in substantial part."[19] As for the third *Stacy* element, MEM "was created by the legislature for a specific public

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[9] *Stacy* was abrogated on other grounds by S*outhers v. City of Farmington*, 263 S.W.3d 603 (Mo. banc 2008). Because this subsequent history is not relevant to the discussion here, it is not included in the main text of this article.

[10] *Truman*, 641 F.2d at 574.

[11] *Id*. at 572.

[12] *Id*. at 572-73.

[13] *Stacy*, 836 S.W.2d at 919.

[14] *Id*.

[15] *Id*. at 919-21.

[16] *Cas. Reciprocal Exch. v. Mo. Employers Mutual Ins. Co.*, 956 S.W.2d 249 (Mo. banc 1997).

[17] *Id*. at 254.

[18] *Id*. at 254-55.

[19] *Id*.

purpose," improving workers' compensation and developing related policies.[20] In concluding that MEM was a constitutional public corporation, the Court noted that the first *Stacy* requirement regarding traditional government roles was less applicable "in modern times because of the 'broad range of activities in which the government is involved.'"[21]

The Appellate Court's Restrictive Analysis in Estes

More recently, in *Estes v. Bd. of Trs. of Mo. Pub. Entity Risk Mgmt. Fund*, the Missouri Court of Appeals of the Western District applied the *Stacy* test to the Missouri Public Entity Risk Management Fund ("MOPERM"), a legal service similar to MEM that is authorized to provide optional liability coverage to governmental entities, including officers and employees, that pay to participate.[22] There, the parties did not dispute that MOPERM, an entity created by the general assembly, was formed by the government and therefore met the third *Stacy* element.[23]

The *Estes* court then turned to the other elements. Regarding the first element, it noted that "the Court in *Casualty Reciprocal Exchange* could not readily conclude that MEM was performing a traditional governmental service."[24] To distinguish the end result in that case, the appellate court also observed that in *Casualty Reciprocal Exchange*, the Court had considered a slightly different question—a "public corporation" under the Missouri Constitution, versus a "public entity" for purposes of sovereign immunity—which permitted the Court to discount this *Stacy* element.[25]

Regarding the final element, the *Estes* court emphasized that a "hybrid" entity must be both "controlled by ***and*** directly answerable to one or more public officials, public entities, or the public itself."[26] Although it found that MOPERM was controlled by public officials or public entities, it held that MOPERM was not directly answerable to public officials, public entities, or the public, as it was not subject to the same "reporting obligations and accountability measures imposed on MEM."[27] Citing to cases involving legislatively created statewide funds like the Petroleum Storage Tank Insurance Fund ("PSTIF"), the court noted that such entities are not protected by sovereign immunity where, like MOPERM, "the entity's enabling legislation unequivocally declares that moneys held by the entity are not state funds, or that the entity's actions cannot be relied upon to hold the state liable."[28] Without both the "control" and "directly answerable" aspects of this element, the *Estes* court concluded that this element could not be met.[29] Because MOPERM did not meet the first or second *Stacy* requirements, the Court concluded that MOPERM was not enough like a public entity to be entitled to sovereign immunity.[30]

A Word from the Federal Courts

Shortly after transfer was denied for the *Estes* case, one of our coordinate federal courts weighed in on this issue. In *Dykes v. Missouri Higher Education Loan Authority* ("MOHELA"), Judge Sippel held that the loan servicer was entitled to sovereign immunity.[31] MOHELA was statutorily created and therefore easily met the third *Stacy* element.[32] In finding that MOHELA also met the second element, the Court noted that the governor appointed five of seven members of the board of directors, and the Missouri Department of Higher Education retained authority to review MOHELA's financial records.[33] Lastly, the Court considered whether MOHELA performed a function that government had typically performed in the past. Noting first that the creating statute deems MOHELA's duties an "essential public function," the Court also acknowledged that "the state has historically taken an active role in encouraging students to attend university by establishing and overseeing public institutions, funding scholarships, and managing the Missouri Financial Assistance Program," thus concluding that MOHELA was a "hybrid" public entity entitled to sovereign immunity.[34]

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20 *Id*. at 255.

21 *Id*. at 254 (quoting *Stacy*, 836 S.W.2d at 919).

22 *Estes v. Bd. of Trs. of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d 678 (Mo. App. W.D. 2021).

23 *Id*. at 691-92.

24 *Id*. at 696.

25 *Id*.

26 *Id*. (emphasis in original).

27 *Id*. at 700-01.

28 *Id*. at 702-03.

29 *Id*. at 703.

30 *Id*.

31 *Dykes v. Missouri Higher Education Loan Authority*, 4:21-CV-00083-RWS, 2021 WL 3206691 (E.D. Mo. July 29, 2021).

32 *Id*. at *5.

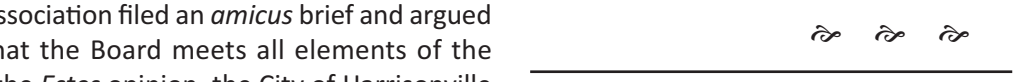
33 *Id*.

34 *Id*. at *6.

What Does the Future Hold for Hybrid Sovereign Immunity?

In late 2021, the Missouri Supreme Court accepted appeal directly from the circuit court of *City of Harrisonville v. Board of Trustees of PSTIF*, No. SC99273. One of the issues briefed is whether the Board of Trustees is protected by sovereign immunity. The Board argues in its brief that it is a state agency and therefore a public entity under § 537.600, or in the alternative, that it is a hybrid entity.[35] The Missouri Petroleum and Convenience Association filed an *amicus* brief and argued in greater detail that the Board meets all elements of the *Stacy* test.[36] Citing the *Estes* opinion, the City of Harrisonville argued that the Board was not susceptible to *Stacy*'s hybrid analysis because "it is a special fund, not a state fund."[37] It noted that PSTIF was specifically mentioned in *Estes* as one of the legislatively created statewide funds not protected by sovereign immunity.[38] In response, the Board reiterated that, distinct from the fund, itself, the Board is a state agency.[39]

Much like the very existence of the sovereign immunity doctrine in Missouri, the *Stacy* test has experienced some turbulence since it was formed. After the *Estes* opinion, the *Stacy* test could be considered to have four elements instead of just three. Despite the analysis of hybrid sovereign immunity in the *City of Harrisonville* appeal, the Missouri Supreme Court could of course decide the case on one of the myriad other points on appeal. At the time of publication of this article, no opinion has been issued. For now, practitioners should remain cognizant of the *Stacy* elements and the post-*Estes* need to establish that an arguably hybrid entity is both "controlled by ***and*** directly answerable to one or more public officials, public entities, or the public itself."[40]



[35] Respondent/Cross-Appellant's Brief, *City of Harrisonville v. Bd. of Trustees of PSTIF*, No. SC99273, 25-29 (Mo. banc Mar. 21, 2022).

[36] Brief of Amicus, *City of Harrisonville v. Bd. of Trustees of PSTIF*, No. SC99273, 12-16 (Mo. banc Mar. 21, 2022).

[37] Appellant's Response/Reply Brief, *City of Harrisonville v. Bd. of Trustees of PSTIF*, No. SC99273 18-20 (Mo. banc April 27, 2022).

[38] *Id*.

[39] Respondent/Cross-Appellant's Reply Brief, *City of Harrisonville v. Bd. of Trustees of PSTIF*, No. SC99273, 7-10 (Mo. banc May 12, 2022).

[40] *Estes*, 623 S.W.3d at 696.

Considerations in Claims and Cases Involving Missouri Tort Victims' Compensation Fund

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In 1987, Missouri legislatively established the Missouri Tort Victims' Compensation Fund, RSMo. §§ 537.675 through 537.693. According to the Missouri Department of Labor & Industrial Relations, which statutorily manages many of the funds received by the Tort Victims' Compensation Fund ("Fund"), the primary purpose of the Fund is to "help compensate those who have been injured due to the negligence or recklessness of another (such as in a motor vehicle collision or a hunting accident), and who have been unable to obtain full compensation because the party at fault (the tortfeasor) had no insurance, or inadequate insurance, or has filed for bankruptcy, or for other reasons specified by the law."

The Fund is financed through a statutory lien on most final punitive damage judgments. Section 537.675 grants the State of Missouri a lien, for monies to be deposited into the Fund on 50 percent of most punitive damage final judgments after deduction of attorney's fees and expenses.

Historically, the Fund has had extended periods of insufficient funds to compensate or satisfy claims. However, last year, the U.S. Supreme Court rejected Johnson & Johnsons' appeal seeking to overturn a more than $2 billion award which included an award of punitive damages, which was a reduced amount of the more than $4 billion verdict. The Supreme

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Court's rejection of this appeal rendered the judgment final. Following conclusion of the Johnson & Johnson appeals, the Fund received more than $480 million from the punitive award.

According to the State Treasurer's Office, in July of 2020, the Fund had a balance of just over $9.5 million. During the 2020 to 2021 fiscal year, the Fund received just under $485 million.[1] The most recent report from the Office of Missouri State Treasurer, shows receipts of $500,000 from July 2021 to June 2022, transfers out of the Fund of more than $125 million, and a June 2022 balance of more than $359 million.[2] In addition to providing a source of payment to uncompensated tort victims, 26 percent of all monies received by the Fund are transferred to Missouri's four Legal Services agencies[3]; the largest transfer of money out of the Fund in fiscal year 2021 to 2022 appears, primarily, related to the transfer of funds to these agencies.

Because of the limited Fund resources before the payment from the Johnson & Johnson award, attorney involvement in claims involving, or potentially involving the Fund, is believed to have been relatively limited. While the Department of Labor's website states "[a]t this time, there are no funds to pay claims filed after January 1, 2011," tort victims, and their attorneys, have taken notice of the recent influx of available resources in the Fund. Anecdotally, claims and cases where the Fund is an additional target for payment have risen. Additionally, cursory review of Missouri legal websites demonstrates numerous publications pertaining to the potential ability to obtain additional financial recovery from the Fund. With the apparent availability of Fund resources and the growing awareness of the potential for additional recovery from the Fund, what defense-oriented considerations should be given to a claim with potential Fund involvement?

Preliminarily, any award to the tort victim through the Fund is capped at $300,000. A judgment against the tortfeasor is not necessary for a tort victim to make a claim against that Fund. An "uncompensated tort victim" includes a "tort victim whose claim against the tort-feasor has been settled for the policy limits of insurance covering the liability of such tort-feasor and such policy limits are inadequate in light of the nature and extent of damages due to the personal injury or wrongful death." RSMo. § 537.675.1(5)(a).

While likely obvious, the primary consideration is recognizing when the tort victim may be seeking potential recovery beyond the tortfeasor from the Fund, i.e. cases or claims involving clearly insufficient insurance limits to compensate the injured party's damages.

In a situation where a tortfeasor's insurance limits are insufficient to compensate the injured party for his or her injuries, an excess judgment, especially one exceeding the insurance limits plus $300,000, could likely never be satisfied. Without the real potential to satisfy the judgment, the tortfeasor/plaintiff may never be willing to file a Satisfaction. While not being able to completely control the tortfeasor's motivations in this regard, cooperation with the tortfeasor or his or her attorney, especially with assisting the tortfeasor to obtain necessary documentation (primarily a certified copy of the tortfeasor's declaration page and insurance policy), to make a claim against the Fund can assist in avoiding the tortfeasor's desire to obtain a judgment.

If unable to avoid an excess judgment, defense counsel should consider the possibility of utilizing a settlement agreement to protect the tortfeasor, and possibly his or her insurer, from any recovery efforts beyond the payment of the applicable insurance limits. This agreement can further identify the manner in which plaintiff will and can seek a judgment, include protectionary language for the tortfeasor against any potential future subrogation claim by the Fund, and require, at a minimum, that the tortfeasor/plaintiff file a partial Satisfaction, confirming that the claim against the tortfeasor has been satisfied.

Section 537.693 grants to the State of Missouri a subrogation right relative to any payments made from the Fund "to any right of action of the claimant to recover payments with respect to which the compensation has been paid and to enforce the underlying judgment against the tort-feasor." While no reported cases have been found discussing this section, it appears most likely to apply in the event the tort victim obtains a judgment against a tortfeasor and after recovery from the Fund seeks to enforce the underlying judgment. While, practically speaking, this situation may be one that is considered very infrequently, the existence of this subrogation right to Missouri reinforces the need to try and obtain a settlement agreement from the tort victim and, at a minimum, a partial satisfaction. If a settlement agreement

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[1] https://treasurer.mo.gov/bank/FundReport/2021/2021%20-%20FiscalYearEndFunds.pdf.

[2] https://treasurer.mo.gov/bank/FundReport/2022/2022%20-%20FiscalYearEndFunds.pdf.

[3] Legal Services of Southern Missouri, Mid-Missouri Legal Services, Legal Services of Eastern Missouri, and Legal Aid of Western Missouri.

extinguishes any claim the tort victim has against the tortfeasor directly, or if a partial satisfaction is filed as to the tortfeasor, all rights of the tort victim against the tortfeasor have been resolved and the State of Missouri should have no ability to be subrogated, directly or indirectly, against the tortfeasor.

With the recent influx of funds into the Missouri Tort Victim's Compensation Fund, plaintiffs/claimants seem more likely than ever to look to the Fund for potential additional recovery against tortfeasors who are either uninsured or underinsured. While awards from the Fund appear to happen relatively quickly, this author understands that tort victims are still waiting at least a year before they can expect to receive any compensation. Because of the apparent backlog of claims against the Fund, the direct impact of the recently received funds may not yet be known.

M.O. v. Geico General Insurance Company, et al.

Misreported by the national media but does it have any real effect on the Missouri legal community?

by Evan Schodowski and Jacob Bielenberg
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The Missouri Court of Appeals recently reached an opinion in *M.O. v. Geico General Insurance Company, et al.*, matter (Opinion No.: WD84722) that set the world of legal news ablaze.

Despite the real-world implications of the opinion, the media are misreporting the effect of the *Geico* opinion. The story was originally reported by a local newspaper, The Kansas City Star.[1] The Kansas City Star article is misleadingly titled "Missouri woman says she caught STD in car. Auto insurance to pay out $5.2 million." Furthermore, the Kansas City Star article incorrectly states that "[t]he man was found liable for not disclosing his infection status and the woman was awarded $5.2 million for damages and injuries to be paid by GEICO." Yahoo News and MSN republished the Kansas City Star article on their respective websites.[2,3] These articles appear to be verbatim re-posts of the Kansas City Star article and not the product of independent reporting; yet they contributed to the national interest in the matter. Given the sensationalized reporting, it is no surprise Defense Counsel started receiving calls from insurers inquiring about the implications of the *Geico* opinion.

In truth, however, Geico has not been ordered to pay $5,200,000 in damages and is actively litigating a declaratory judgment action in the United States District Court for the Western District of Missouri, in an attempt to foreclose any potential coverage obligations which could arise out of the underlying judgement.[4] Moreover, the Missouri Court of Appeals Opinion clearly states that the applicable policy limits for the policy at issue are $1,000,000. Therefore, it is unclear why the media believes that Geico is currently obligated to pay the $5,200,000 judgment rendered against its insured.

While dramatized, the opinion is still important when placed in the broader context of the relationship between insurers and insured because *Geico* lays the framework for insureds and claimants who cooperate with each other to greatly limit an insurer's ability to contest the merits of a claimant's factual allegations and is therefore relevant to both Insurers and

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1 https://www.kansascity.com/news/article262267902.html

2 https://www.yahoo.com/news/jackson-county-woman-says-she-222907031.html

3 https://www.msn.com/en-us/news/crime/missouri-woman-says-she-caught-std-in-car-auto-insurance-to-pay-out-2452-million/ar-AAYcmV3

4 *See Geico General Insurance Company, et al. v. Martin Brauner,* Case No.: 4:22-cv-00082-CV-W-FJG.

Insurance Defense Counsel. More specifically, the opinion is the product of a perfect storm which required: (1) cooperation of the insured and claimant; (2) an extremely narrow interpretation of R.S.Mo. § 537.065; and (3) unfortunate procedural timing for Geico.

To fully realize the basis of the Opinion at issue and to avoid similar situations in the context of future claims handling procedures, understanding of the facts and the known procedural history is important.

Factual/Procedural Summary

This matter arose out of a romantic relationship between M.O. ("claimant") and M.B ("insured"). Geico issued the auto policy which provided coverage for the insured's vehicle with an applicable policy limit of $1,000,000. The insured was diagnosed with a throat tumor that was caused by the human papillomavirus ("HPV").[5] The insured and claimant developed a romantic relationship and engaged in unprotected intercourse within the insured's vehicle. As a result, the claimant contracted HPV from the insured.

The cornerstone of claimant's legal theory was the insured was liable under a negligence theory because the insured had a duty to disclose his infectious condition or to take measures for the purpose of preventing the transmission of the disease. The insured admitted that he had pre-existing knowledge of his diagnosis but denied having knowledge that HPV could be sexually transmitted.

Regarding the pertinent procedural history, the following events are relevant:

- February 25, 2021 – the claimant demands pre-suit settlement for the $1,000,000 policy limits and provides Geico with a copy of the petition that she intends to file against the insured.
- March 11, 2021 – pursuant to R.S.Mo. § 537.065, the claimant and insured enter into a contract to arbitrate the claimant's allegations and to limit recovery of any judgment to funds collectible under the insured's Geico policy.
- April 7, 2021 – Geico denies coverage and rejects claimant's settlement demand.
- April 7, 2021 – Geico files a declaratory judgment action in federal court against its insured seeking a judicial determination that it has no obligation to provide coverage for the claimant's injuries.
- May 17, 2021 – the claimant and insured participate in arbitration, the arbitrator issues an award in favor of the claimant in the amount of $5,200,000.
- May 24, 2021 – claimant provides Geico notice that she has entered into an agreement under R.S.Mo. § 537.065 with the insured.
- May 25, 2021 – claimant files her petition against the insured with the trial.
- June 18, 2021 – Geico files a Motion to Intervene with the trial court.
- June 22, 2021 – claimant files her Motion to Confirm the Arbitration Award.
- July 2, 2021 – the trial court grants claimant's Motion to Confirm the Arbitration Award.
- July 2, 2021 – after granting claimant's Motion to Confirm, the trial court then grants Geico's Motion to Intervene.
- July 30, 2021 – Geico files motions to vacate, to conduct discovery, and for a new trial.
- September 8, 2021 – the trial court summarily denies each of Geico's motions.
- June 8, 2022 – Geico continues litigating its declaratory judgment action against its insured.

How the Court of Appeals Approached the Issue

The issue on appeal was whether the trial court erred by denying Geico's motions seeking a new trial, discovery, and to vacate the mediation award.[6] Geico argued that it was deprived a meaningful opportunity to participate in the underlying proceedings and that it's due process rights were violated.

The central statute at issue was R.S.Mo. § 537.065[7], which allows litigants to enter into agreements by which any

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[5] The human papillomavirus ("HPV") is the most common sexually transmitted infection (STI) and it affects as many as 43 million Americans. *See* https://www.cdc.gov./std/hpv/stdfact-hpv.htm.

[6] No independent judgment was rendered against Geico in the underlying proceedings before the trial court.

[7] R.S.MO 537.065 provides in relevant part: "537.065. Claimant and tort-feasor may contract to limit recovery to specified assets or insurance contract…. 1.Any person having an unliquidated claim for damages against a tort-feasor, on account of personal injuries, bodily injuries, or death may enter into a contract with such tort-feasor or any insurer on his or her behalf or both if the insurer has refused to withdraw a reservation of rights or declined coverage for such unliquidated claim…"

recovered damages are limited to insurance proceeds. However, R.S.Mo. § 537.065 also confers upon insurers a right to intervene in the subject litigation.[8] Despite the language of the statute, the Missouri Court of Appeals interpreted R.S.Mo. § 537.065 narrowly and determined the right of intervention was "limited." The Missouri Court of Appeals ultimately held that R.S.Mo. § 537.065 "does not provide for the unconditional right to litigate the injured party's claims on the merits but merely requires that insurers be provided with notice of an agreement under § 537.065 before a judgement may be entered and that insurers have the opportunity to intervene in any pending lawsuit for thirty days thereafter." (Internal quotation marks omitted.)

The Court of Appeals reasoned that because Geico was provided notice of the agreement before the trial court confirmed the arbitration award and was allowed to intervene – albeit after the trial court confirmed the arbitration award – Geico was ultimately afforded its statutory rights pursuant to R.S.Mo. § 537.065. Concerning Geico's argument that its due process rights had been violated, the Missouri Court of Appeals held that Geico was not deprived of an opportunity to participate in litigation because it was free to litigate its coverage obligations in the pending declaratory judgment action; and that it could have chosen to provide a defense to its insured, thereby participating in litigation, but chose to disclaim coverage instead. In other words, Geico was afforded the rights proscribed to it under the law, but it failed to properly ensure its interests were safe-guarded.

How Does M.O. v. Geico General Insurance Company, et al., Impact Future Claims Handling in Missouri?

As indicated previously, Geico finds itself in a predicament that is the product of: (1) cooperation between the insured and claimant; (2) an extremely narrow interpretation of R.S.Mo. § 537.065; and (3) unfortunate procedural timing.

Until the Missouri Supreme Court reviews the Court of Appeals' opinion, the only factor that can be readily addressed by insurers is the first factor – cooperation between the insured and claimant.[9] Here, the claimant and the insured only had an opportunity to cooperate by entering into their arbitration and § 537.065 agreements because Geico disclaimed coverage.

At a minimum, in matters where there is even a low probability that coverage may exist, regardless as to how unusual the underlying facts may be, insurers should provide a defense subject to a reservation of rights. This should occur before and until coverage counsel can fully evaluate the matter and provide guidance on disclaiming coverage. Had Geico provided its insured with a defense subject to a reservation of rights, the claimant and insured would not have had an opportunity to enter into the arbitration agreement, without Geico's knowledge and input, which resulted in an expedited arbitration award.

In matters where the potential exposure is substantial, insurers should provide a defense subject to a reservation of rights until a declaratory judgment action is resolved. Insurers should promptly engage coverage counsel to file a declaratory judgment action seeking a judicial determination of its coverage obligations. The alternative is to attempt to litigate a declaratory judgment action in which cooperating litigants craft the version of facts which may be designed to maximize the insurer's exposure. Furthermore, providing a defense while pursuing declaratory judgment will make it much more difficult for the litigants to cooperate with each other.

Though more costly, providing a defense subject to a reservation of rights while simultaneously seeking declaratory judgment will allow the insurer to indirectly participate in the underlying litigation and influence the specific findings of fact and conclusions of law which may impact the declaratory judgment action. Ultimately, insurers must choose to safeguard their rights at the expense of up-front defense expenses or else face a scenario where they are exposed to unlimited awards defined by parties opposed to their interests. If they neglect to safeguard their interests, they will be left to narrow readings of the law as they attempt to back down awards far in excess of the expenses they would have ever incurred in defense of the matter.

Conclusion

Despite the sensationalism surrounding the case, the tragic thing for the defense bar is that the entire matter could have potentially been avoided. This matter could have been handled like any routine coverage issue and escaped the gaze of the media. Instead, the legal community is left wondering what happened and what could have been.

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[8] "Any insurer or insurers who receive notice pursuant to this section shall have the unconditional right to intervene in any pending civil action involving the claim for damages within thirty days after receipt of such notice…" R.S.Mo 537.065(4).

[9] The third factor arguably would not have been at issue if Geico granted coverage under a reservation of rights, because it would have been involved in the litigation and could have had an opportunity to impact the overall procedural timing of the underlying litigation.