



Missouri Organization of Defense Lawyers

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Spring 2005

President's Report

By Susan Ford Robertson, MODL President

Please make plans to attend MODL's 20th Annual Meeting "**Creating Great Defense Lawyers — Twenty Years of Experience.**" MODL plans to honor the 19 MODL Presidents in a special Presidents Reception during the Annual Meeting and many of the speakers during the CLE programs are former MODL Presidents. The meeting is June 9-11 at *Chateau on the Lake* in Branson, Missouri. I hope to see you there!

This year's legislative session addressed several issues of import and interest to all MODL members: Tort Reform, Retention of the Missouri Non-Partisan Court Plan and Judicial Funding.

Judicial Funding

This year the first request from the House of Representatives was for the judiciary's budget to be cut by \$17,000,000. The final approved budget left the judiciary's core budget largely intact with a budget cut in the amount of \$500,000. Several things contributed to bring about this result. MODL worked with the legislators to educate and convince them on the importance of retaining the judiciary's budget. Officers and general counsel from large businesses met personally with legislators to discuss the dangers of cutting judicial funding.

The 98-year-old Missouri Supreme Court Building had been scheduled to receive a long-needed renovation of the plumbing, heating and air conditioning systems with an estimated cost of \$4,500,000. Although these renovations are desperately needed, the Missouri Supreme Court agreed to defer these renovations in exchange for the legislature agreeing to leave the core judicial budget largely intact.

The renovations are vital; however, our highest state court conveyed to the House and Senate Judiciary Committees the greater need to protect the judiciary's core budget to ensure the continued functioning of the circuit and appellate courts. The judiciary's budget has been cut by millions of dollars over the last several years and these across-the-board cuts have affected court automation, judicial education and have resulted in court staff cuts. Reimbursement for senior judge compensation has been cut, as well as reimbursement for judges to attend the statutorily mandated judicial education.

Though the judiciary's budget was not cut as drastically as first feared it might be, the education process with the legislature and public must continue. Many thanks are owed to the MODL members and their clients and the lobbyists who spent many hours educating the legislature on the need for stable and secure judicial funding. MODL remains dedicated to

continue the education of the public, as well as the current and future legislators on the essential need to retain judicial funding necessary to provide continued efficient and expedient access to the courts for Missouri citizens.

Retention of the Missouri Non-Partisan Court Plan

Tied with MODL's commitment to retaining judicial funding is our commitment to the Missouri Non-Partisan Court Plan. Though bills were filed in the House of Representatives and in the Senate that would affect the Missouri Non-Partisan Court Plan, no substantive activity occurred on the bills this year. MODL, through its membership and lobbyist, worked hard to educate the legislators on the importance of the Missouri Non-Partisan Court Plan and why its continued strength and existence is vital to continue to ensure qualified jurists who can fairly and justly review and decide cases without fear of political pressures or resort to highly costly and divisive elections. The millions of dollars recently spent in Illinois and Texas on the appellate court judicial races with the blatant pandering and offensive television commercials demonstrate the effect of subjecting the highest level of judicial office to whoever can raise and spend the most money.

Diversity on the bench should remain an issue of high priority. We are now in a unique position of having the House of Representatives, the Senate and the Governor all from the Republican party but the Appellate Judicial Commission has a majority of members appointed by a Democratic governor. Two of the three laypeople on the Commission were appointed by Governor Holden in the month before he left office. The Missouri Non-Partisan Court Plan provides that for appointment to the appellate courts in Missouri the Governor must choose from a panel of three applicants provided by the Commission. Some people expressed concern about who the largely Democratic Commission would appoint to the first appellate court panel.

The Commission recently had the opportunity to present three applicants to the Governor for consideration to the current vacancy on the Missouri Court of Appeals for the Eastern District: the Honorable Kenneth Romines, Circuit Judge of St. Louis County, the Honorable Roy Richter, Associate Judge of Montgomery County, and Thomas Weaver, an experienced appellate attorney and MODL member from Armstrong Teasdale.

"President's Report" >p2

President's Report *(Continued from page 1)*

In the opinion of many, the Commission did an outstanding job in presenting the Governor with a qualified, diversified panel. The panel had a cross-section of political affiliation, geographical representation and legal experience. Though there are always other well-qualified applicants who do not make the panel, members of the Commission have a very difficult job and they should be commended on continuing to recognize the need to present qualified applicants for the Governor's consideration.

The Commission and the Governor will likely have several more opportunities to review applicants for appellate positions in the next few years. Diversity of race, gender and geographical representation should still remain a priority and MODL members are encouraged to continue to apply for judicial openings. While we enjoy a rich diversity in our membership, the appellate benches still have room for improvement.

MODL is also committed to presenting and supporting qualified individuals for the various judicial commissions when openings arise. MODL is supporting several individuals as they seek election to the Appellate Judicial Commission, as well as to several county judicial commissions this fall. We will be looking for your individual and firm support during the summer and fall on each of the various candidates seeking election to the various judicial commission spots.

Tort Reform

Governor Blunt has signed House Bill 393 and this law will affect cases filed after August 28, 2005 except for one provision pertaining to appellate bonds that will affect pending cases where judgments are entered as of August 28, 2005 or thereafter. Understanding what MODL is and the role MODL had with respect to this bill is important. MODL is a voluntary organization comprised of over 1,200 lawyers who devote over 50% of their practice to the defense of cases.

Over the past several years, MODL has been asked by the medical community to provide assistance in reviewing various legislative proposals addressing tort reform. MODL did not draft HB 393 and MODL did not draft its predecessor, HB 280 (the tort reform bill vetoed by Governor Holden). There are some provisions in HB 393 that MODL members wanted and other provisions we did not want to see included in the bill. Any perception that MODL wrote the bill or that MODL "got everything it wanted in the bill" is not only disconcerting, it is inaccurate. Unlike the medical malpractice tort reform statutes created by agreement in the 1980s and not challenged by virtue of a voluntary moratorium, this bill was written, negotiated and passed by the legislature. Like plaintiffs, defendants may seek judicial interpretation of certain provisions of this bill in the future and should be given a fair opportunity to do so.

MODL members and our lobbyist did work with various legislators, including the late Representative Richard Byrd who authored the tort reform bill, and many of the provisions the medical community sought to have addressed by legislation were achieved though we were not successful on all issues.

Important changes were made in statutes that pertain to all tort cases, including issues regarding venue, prejudgment interest, joint and several liability and evidence regarding proof of special damages (medical expenses). Changes pertaining to medical malpractice cases include the inadmissibility of evidence of a benevolent gesture made by a medical provider, modification of the affidavit statute to now require disclosure of the name and address of the affiant, and a tightening of who is qualified to sign the affidavit, as well as the long-needed modification that now defines how many caps apply in a particular case.

Condolences

We have suffered two recent tragic events — the death of John Oliver, Jr. and Representative Richard Byrd. John was a prominent and formidable fourth-generation attorney who provided a strength and presence to MODL since its inception. His stinging wit and wisdom are legendary to all who attended the annual MODL Trial Academy — whether as faculty or as a young lawyer. There is a proposal before the MODL Board to consider naming the MODL Trial Academy after John. Pages could be written about John but perhaps my father, Hamp Ford, put it best recently when he said, "I was with John in Cape Girardeau two weeks ago for an American College of Trial Lawyers' seminar. He appeared well and was his usual brilliant, caustic self. He remembered the name of every case he ever read and the holding of it. No better example of one dedicated to the service as a professional has ever practiced in our time in this state." We will miss John tremendously.

Another we will miss tremendously is Representative Richard Byrd who served as Chair of the Judiciary Committee and who was the tireless spokesperson for the medical community and other defendants whether they were corporate or individual. Many of us had the distinct privilege of working with him and watching his curious, quick and intelligent legal mind furiously at work while he worked to craft legislation necessary to help bring about needed changes for medical and general tort defendants. In many ways he was as stubborn as John, as both stood rock-solid on their principles. We will miss Richard and the void he leaves in the legislature will be hard to fill. Both men died far too early but both will be remembered with admiration and respect.

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The MODL Newsletter is a quarterly publication of the Missouri Organization of Defense Lawyers. If you have any comments or questions about the MODL Newsletter, please contact: Judy Curran; MODL Newsletter Chair; Missouri Highway and Transportation Commission; 600 N.E. Colbern Road; Lee's Summit, MO 64064; Phone: 816-622-6385; Fax: 816-622-0399; Email: judy.curran@modot.mo.gov



Recent Cases of Importance

By Lou Leonatti - Leonatti & Baker, P.C. - Mexico, MO

Congratulations to the young lawyers who recently participated in the MODL Trial Academy held at the University of Missouri-Columbia Law School. The faculty was impressed with the quality and ability of the young lawyers.

Several interesting decisions have come down from the Appellate Courts within the last several months. A couple of them are summarized for your review.

Maldonado v. Gateway Hotel Holdings, LLC, 154 S.W.3d 303 (Mo.App.ED 2003) is a case involving an action by a boxer who was injured in a boxing match at a hotel who sought compensation from the hotel for failure to provide medical monitoring and failure to have an ambulance at the sight of the boxing match. The Court of Appeals, in a 2 to 1 decision, upheld a \$13.7 million dollar verdict for the boxer. The match was held at the Regal Riverfront Hotel. Prior to the match the promoter entered into a contract with the Hotel that provided that the promoter would furnish a doctor at ringside for the match and an ambulance on standby at the Hotel the night of the event. When Maldonado was knocked out in the match, he was revived and then walked to his dressing room where he later lost consciousness. There was no ambulance at the site and Maldonado suffered severe brain damage. Plaintiffs submitted their case based on the "Inherently Dangerous Activity Doctrine" as set forth in MAI 16.08 alleging that adequate precautions had not been taken. When there is an inherently dangerous activity the landowner has a non-delegable duty to take special precautions to prevent injury from the activity. Citing *Hatch v. V.P. Fair Foundation, Inc.*, 990 S.W.2d 126.

The Defendants argument that the boxer assumed the risk for participating in the boxing match is not a defense to a danger created by the landowner's negligence. The Court of Appeals upheld the multi-million dollar verdict.

Rose v. Washington University, 154 S.W.3d 365 (Mo.App.ED 2004) is a medical negligence case for the failure to timely diagnose ovarian cancer. In June, 2000 the patient was evaluated for a rheumatological condition. A bone scan report recommended a bi-lateral renal ultrasound. The doctor who examined and treated the patient did not follow this recommendation and in February, 2001 the patient was diagnosed with ovarian cancer. Plaintiffs' expert testified that the ovarian tumor was present and diagnosable in June, 2000 and that the patient had a 60% chance of surviving 5 years if the tumor had been diagnosed in June of 2000.

The jury returned a verdict for the patient determining that she had lost a 57% chance of recovery and awarded \$2,000,000 for future non-economic damages, \$400,000 for future economic damages, \$430,000 in past non-economic damages and \$70,000 in past economic damages. The award for past economic damages exceeded the evidence and was reduced by the trial court. The Court of Appeals held that a submissible case was made.

The Court also permitted evidence about the patient's impairment of ability to perform household services that was properly classified as a future economic damage rather than a non-economic damage. The Court noted under the decision in *Collier v. Sims*, 366 S.W.2d 499, that physical impairment of a plaintiff's ability to perform household duties is a compensable claim and is equated with the loss of the ability of the plaintiff to work. This was supported by the testimony of an economist, Dr. Grossman, who opined that the loss of the patient's household services equaled \$10,000.

Another interesting medical negligence case is **McBride v. Farley**, 154 S.W.3d 404 (Mo.App.SD 2004). In this case, the jury returned a verdict in favor of the physician and physician's group. The plaintiff requested a new trial based on misconduct concerning the jury. Evidently the jury coordinator had been heard telling various jurors outside the courtroom that the case had previously been tried and resulted in a hung jury and that this was the second or third trial of the case. This violated the prohibition against receipt of extrinsic evidence by jurors during the trial or their deliberations. The grant of a new trial was upheld because the Court of Appeals concluded that the fact there had been an earlier trial resulting in a hung jury effectively communicated to the trial jury that the plaintiff had been unable to convince at least 9 former jurors that she could meet her burden of proof and was entitled to a verdict.

The case of **Sexton v. Jenkins Associates, Inc.**, 152 S.W.3d 270 (Mo. 2004) holds that the dismissal of a Petition without prejudice may still result in the application of the doctrine of "collateral estoppel" or "issue preclusion." In this case, Sexton's first lawsuit against a general contractor and three employees for his injuries resulting from the installation of a handrail around an open elevator was dismissed by the Circuit Court of Henry County without prejudice because the Court believed it lacked subject matter jurisdiction.

"Important Cases" >p4

Sexton then sued the same defendants in the Circuit Court of Jackson County with an Amended Petition. Defendants moved for Summary Judgment based on the trial court's opinion in Henry County which was affirmed by the Court of Appeals at 41 S.W.3d (1). The Supreme Court conceded that usually a dismissal without prejudice is not a final judgment on the merits of the claim and should not affect the plaintiff's right to re-file the action. The original decision (Sexton I) held that the Labor and Industrial Relations Commission had exclusive subject matter jurisdiction. Hence in the original proceeding in Henry County, the Order dismissing the matter for lack of subject matter jurisdiction, without prejudice, had been appealed. The issue of subject matter jurisdiction was fully litigated and issue preclusion prevented the second filing of the Petition in Jackson County.

The case of *Smith ex rel Stephan v. A F & L Insurance Company*, 147 S.W.3d 767 (Mo.App.ED 2004) concerns a vexatious refusal verdict against a long term health care insurer. Smith, when she was one month away from her 79th birthday, applied for a replacement long term care policy. Her husband of 53 years had died 5 years earlier and she had been suffering from Situational Depression. The agent went to her home and went over the application for long term care insurance with the insured and her daughter. Question #4 on the application asked for medical information within the past 5 years and in particular asked about whether she had received any treatment for Alzheimer's Disease, Dementia, Senility, forgetfulness or any other brain, mental or nervous disease or disorder. The answer was "no". The application did reflect that the insured was taking Paxil which is an antidepressant. Ms. Smith also provided her insurance agent with a medical authorization to obtain all of her medical records. Unfortunately the insurer did not review these records until after the insured had filed a claim. After the application was submitted an employee of the insurance company conducted an interview with Ms. Smith over the telephone. She asked if she had any trouble forgetting things or had trouble remembering things? Her answer was "No, except for minor forgetfulness." She was moved to the Westphalia Retirement Center due to mood dementia and osteoarthritis with forgetfulness. The daughter's claim with the insurer on her mother's behalf was rejected and the insurer declared it null and void claiming there was lack of full disclosure on the insurance application. The Court found that there was no material representation on the application for insurance and this finding was upheld by the Court of Appeals.

The Court held that the representations on the application were not false and that the insurer had failed to use due diligence in investigating the insured's medical history.

The trial court awarded the insured \$249,590 in accelerated damages based upon her life expectancy. The plaintiff was restored to her insurance policy benefits and the use of the life expectancy table was improper.

Steele v. Evenflo Co., Inc., 147 S.W.3d 781 (Mo.App.ED 2004) is a case involving confusion among the jurors as to whether punitive damages were submitted for their consideration. The case involved an Evenflo child booster seat which was alleged to have failed in an automobile accident paralyzing an infant from the chest down. Plaintiff pled punitive damages and submitted evidence concerning this issue. At the instruction conference, plaintiff withdrew his claim for punitive damages. Neither party requested a withdrawal or limiting instruction. The Court did not instruct on punitive damages.

The initial verdict of the jury was as follows: "\$8.5 million", "\$4.5 million in damages and \$4.0 million in punitives." The plaintiff urged the trial court to accept the entire verdict for \$8.5 million. Defendant urged the trial court to accept the verdict in the amount of \$4.5 million. The trial court refused to accept the verdict and read to the jury this additional instruction: "The Court advises that you are not to consider the issue of punitive damages with respect to either Defendant during your deliberations. In your verdict, you must award Plaintiff such sum as you believe will fairly and justly compensate D.J. Steele for any damages you believed he sustained and is reasonably certain to sustain in the future as a direct result of the occurrences mentioned in the evidence." Neither party objected to the wording of the instruction and argued that an additional instruction was unnecessary. The jury resumed their deliberations and returned a verdict for 8.5 million dollars.

Defendants filed a Motion for New Trial listing 39 separate points. The Court granted the Motion for New Trial because it was persuaded that it had erred in its handling of the jury's two verdicts. This ruling was entered more than 30 days after the entry of Judgment. Once 30 days has expired, the trial court is limited to granting the relief sought on grounds properly preserved and set forth in a Motion for New Trial. The Court of Appeals found that the reasons for granting the new trial set forth by the trial court were not contained in the Motion for New Trial.

The Appellate Court also held that the trial court did not err when it admitted evidence of two prior incidents of small children being ejected from the type of booster seat issued in this case. The incidents were admitted to establish notice to the defendant of the danger involved with the product. This evidence was not an abuse of discretion and the jury verdict was affirmed.

MODL Trial Academy ... Another Good Year

By Karl W. Blanchard, Jr., Joplin, MO

The 2005 MODL Trial Academy was held March 23-25 in Columbia, Mo. We had a full class of thirty-five students. This year we were privileged to have Judge Jimmie Edwards from St. Louis serve as our trial judge as well as participating in the individual critiques. His observations were very insightful. Any MODL members who see or appear in front of Judge Edwards should thank him for his service.

A new problem was introduced this year that was developed from an actual case handled by some of our members. The materials were extensive and preparation for both the students and faculty was pretty much like getting ready for a real trial. With the new problem came some other changes. First, the Faculty met the morning of March 23rd to attend a short seminar on critiquing presented by Jim Foland. Jim's presentation was excellent and everyone involved agreed that it enhanced the teaching process. It also shortened the time taken for breakout sessions and helped move things along in a timelier manner. In place of the usual voir dire demonstration, John Oliver talked about the applicable law, techniques and practical tips and considerations in doing voir dire. It was a great learning experience for all and will be a permanent change in the format for the foreseeable future.

The nature of the case the new case problem required something of a format change. The majority of the student exercises dealt with presenting a defense theory to absolve the defendant from liability. These involved both cross and direct examination of expert witnesses. It turned out to be an excellent problem and with some minor changes will be used next year. As has become typical, everyone, students and faculty alike, learned from the three-day experience. Bottom line, it was a very good year.

In closing, I want to thank Jim Foland for his presentation - it should be required for every faculty member in the future. Thanks, to Jovita Walker for her help getting not only Judge Edwards, but the staff. Thanks to Mariam Decker for preparing a primer on diabetes that was used by students and faculty alike. Finally, many thanks to Lou Leonatti who not only helped as a member of the faculty, but also put the problem together and wrote the jury instructions.





How Long Is Long? *Life Expectancy Tables as Evidence*

By Chuck McPheeters, Carson & Coil, P.C.

I'll eat when I'm hungry, I'll drink when I'm dry. And if moonshine don't kill me, I'll live 'til I die.

"THE MOONSHINER" (Celtic Traditional)

You've seen it happen: the plaintiff's¹ attorney moves to admit a life expectancy table into evidence, showing her 49-year-old client is expected to live another 28 years or so. The judge, perhaps recalling that Missouri once used a statutory life expectancy table, readily admits the evidence. Of course, the life expectancy table does not take into account the fact the plaintiff has been a smoker for 33 of his 49 years, that he suffers from diabetes, weighs 310 pounds, and has congestive heart failure. It's right there in black and white, backed up by statistics from the United States Government's Centers for Disease Control and the National Center for Health Statistics -- 49-year-old white men will live just about another 28 years. That's 28 years of medical expense, pain and suffering, not to mention the assumed lost wages until retirement age. All for a person whose health is so shaky he probably shouldn't buy green bananas.

Life expectancy tables are compiled by analyzing rates of death throughout the population, using factors such as age and race to come up with statistical averages of longevity. These numbers change over time, most likely due to changes in diet and health care, but also due to changes in the methods of gathering and analyzing the data.

In Missouri cases, courts were long guided by a statutory table, found at 42 V.A.M.S. 801, Table 8. While there may be more recent versions of this table, the only one discovered by this author was printed in 1953. It does not compare well with more recent government compilations. For instance, the statutory table only has predictions for males, not females. In a note accompanying the chart, users are directed that "For female ages over 10 use male five years younger." *Id.* The source material for the statutory chart is, to put it mildly, out of date. The table contains longevity predictions from five different sources, dating as far back as 1858, with the most recent time period being 1941. At that time, the figures for the entire U.S. population showed a life expectancy for a male of any race, at birth, of 63.62 years. The most current figures of national vital statistics (2002) indicate life expectancy for all males, regardless of race, at birth is 74.5 years. The times, they are a 'changin'!

Life tables adjust for mortality over time. In other words, while the table might say the average life expectancy for all newborns in the United States is 77.3 years, it also recognizes that the closer you get to 77 years old, the more likely you are to live past that birthday. So, by the time the average American reaches 30, they have an added life expectancy of 1.4 years, taking them to 78.7. If you're 50, you've really hit your stride, and you're now expected to live to 80.3 years. Reach age 60, and you'll live to be 82. Get to 70, you'll make it to almost 85. This is nothing more than statistical Darwinism, taking into account the fact that the weaker members of the population (and those who didn't see the bus coming as they were crossing the street) have already shuffled off their mortal coil.

There are discrepancies among available tables today, just as between the statutory table and more current data. People looking for life expectancy numbers can access any number of tables. Some are simply calculators based on some statistical sample from the past, such as the one at <http://www.retireweb.com/death.html> which uses insured group annuity experience from the 1970's. Others, such as <http://www.longtolive.com> are just for "fun," if your idea of fun is watching a "Life Clock" count down the hours, minutes and seconds until your ultimate statistical demise. Perhaps more useful is The Commissioner's Standard Ordinary Mortality Table, issued by the federal government for use by life insurance and annuity companies as an aid in determining premium rates. It is updated periodically. Using the same factors as above (all males of any race, at birth), the Commissioner's Table shows a life expectancy of 76.62 years. One Missouri court even approved the use of a life expectancy table found in *Corpus Juris Secundum*. See *Sandifer v. Thompson*, 280 S.W.2d 412 (Mo. 1955).

The "gold standard," however, continues to be the regularly updated compilation from the Centers for Disease Control. This table, or series of tables, covers a wide range of variables. The numbers can be found under the link for "U.S. Life Tables" at <http://www.cdc.gov/nchs/fastats/lifexp.htm>. This document can be printed out in its entirety (39 pages), and has categories for all ages of blacks, whites, black females, white females, black males and white males. There are no separate statistical categories in the official government computations for Hispanic or Asian populations, and the practitioner is left to her own devices in dealing with those issues.

¹ The term "plaintiff", when appropriate, also means "plaintiff's decedent."

How Long Is Long? (Continued from page 6)

It has been said that life expectancy tables, also called mortality tables, are admissible in actions to recover for permanent injury "to show the probable duration of life of the injured plaintiff or the deceased as the case may be, which is an element in estimating damages." *Moore v. Ready-Mix Concrete Co.*, 329 S.W.2d 14, 27 (Mo. banc 1959)(citing 20 Am.Jur., Evidence, Sec.971, p. 821). Of course, the tables do no such thing. They are compilations of statistical averages. They have no accuracy or determinative quality for any given set of individual circumstances. Whether the average black female aged 42 will live another 37.2 years is not logically relevant to the question of whether a particular black female will last out the day, the week or the year. She could get hit by a bus leaving the courthouse. But economists and actuaries love averages. If you were knee-deep in a block of ice, an economist would admit you were cold; but if you set your head on fire he would determine that, on average, you were comfortable. Hardly true, and hardly applicable to the particular facts, but certainly accurate from a statistical standpoint.

So why do we use these totally inappropriate calculations? Because they are all we have. In *Kilmer v. Browning*, 806 S.W.2d 75 (Mo.App. S.D. 1991), the defendant appealed the use of a standard mortality table, arguing that the plaintiff's hemophilia and HIV meant he would not have a "normal" life expectancy. The court disagreed, saying "mortality tables are only guides or suggestions to the finder of fact. Their probative value may be weakened by evidence of ill-health and these matters may be considered by the jury in weighing the testimony." *Id.* at 82. As early as 1896 Missouri courts were allowing mortality tables to be used as evidence. See *Boettger v. Scherpe & Koken Architectural Iron Co.*, 38 S.W. 298 (Mo. 1896). While the objection to the standard tables has often been made because of the non-standard condition of a particular plaintiff, "it is generally not essential to the admissibility of mortality tables to show that the person whose expectancy of life is under consideration conforms to the standards of health and vigor adopted in compiling such tables." *Dorsey v. Muilenburg*, 345 S.W.2d 134, 142 (Mo. 1961).

So how do you combat what may be the only evidence of longevity in the case? Doctors seem loathe to assign a specific "shelf life" to a patient, so their testimony is not often helpful. There may be some help from the same statistical world that provided the original prediction. Certain behaviors carry with them a known statistical effect on mortality. These are known as "Excess Death Rates," or EDRs. For example, heavy alcohol consumption has been shown with a statistical regularity to decrease life expectancy. But this type of EDR evidence may require the employment of an actuary or other expert who can explain how the behavior of the plaintiff has decreased his

longevity. It will still be up to the jury to determine what effect any of this has on the actual facts of the case. How are they to know what to do?

The Missouri Supreme Court actually decided this issue about 45 years ago, and gave us an instruction that ought to be read to the jury whenever a life expectancy table is offered into evidence. In *Moore v. Ready Mix, supra*, the defendants took the unenviable position that the accident itself had so shortened the plaintiff's life that the statistical life tables had lost their relevance. While the court disposed of defendant's argument, it did hold that the trial court's own instruction on the matter was approved, as it allowed the jury to fully understand the importance and acceptable use of life expectancy evidence. The instruction reads:

The court instructs the jury that any mortality table which has been introduced in evidence here is not to be considered by you as in any way conclusive upon your determination of the life expectancy of the plaintiff, but that you must also take into consideration all the other evidence relating to the health and physical condition of the plaintiff.

Moore, supra, 329 S.W.2d at 28. Because of the "non-standard" condition of the plaintiff, it was only with the addition of this instruction that the trial court "properly admitted the mortality table into evidence." *Id.* Of course, every plaintiff is "non-standard" because no plaintiff is a precise paradigm of the American public, so the instruction should be applicable in all cases.

Before a plaintiff can introduce a mortality table, there must be evidence the injury he suffers is permanent. In *Strycharz v. Barlow*, 904 S.W.2d 419 (Mo.App. E.D. 1995), plaintiff Strycharz suffered injuries to his knee. The medical testimony showed the injury was a torn medial cartilage. However, nothing in the transcripts of the trial showed this cartilage tear "would be debilitating for the balance of [plaintiff's] life." *Id.* at 426. The trial court refused plaintiff's offer of the mortality tables, and the appeals court agreed, saying it is only the presence of a life-long debility that would make the tables relevant. "Permanent injury must be shown to warrant the admission of life expectancy tables." *Id.*

Challenging the life expectancy table has its own hurdles, as the defendant in *Sampson v. Missouri Pacific R.R. Co.*, 560 S.W.2d 573 (Mo. 1978), discovered. Plaintiff had placed mortality tables into evidence in that case, over the objection of the defendant. The defendant's point was that plaintiff had a history of heart attacks, making the standard tables irrelevant. The Supreme Court, in one of the few holdings that was unanimous, ruled that the evidence of a history of heart attacks, without more foundation, was of no use to the jury.

"How Long Is Long?" >p8

How Long Is Long? (Continued from page 7)

The defendant apparently never connected the dots - - never asked any medical witness if the type of health problems exhibited by plaintiff would adversely impact his life expectancy! The court ruled that jurors are not medical experts, and "while our common understanding may be that a heart insufficiency is not a matter of good health, the calculus of disability and life expectancy [is] beyond the ken of the average juror." *Id.* at 586.

Mortality tables are fraught with problems. As tools of probability they are no better than the example of the "infinite monkey theorem": that given enough time, and enough monkeys typing at random, one of them will

eventually type out a copy of the Bible. While it may happen at some time, it is highly unlikely that the first monkey sitting at the first typewriter will start by typing out, "In the beginning, God created the heavens and the earth." Similarly, while statistical evidence might be an accurate predictor of average longevity of a large population over an extended period, it is highly unlikely the statistical average will have any real correlation to the people involved in your case. The *Moore* instruction can properly place the duty of determining a plaintiff's longevity back in the hands of the jury, which can then properly take into consideration all of the evidence on the issue.



Calling All MODL Young Lawyers (& Old)!

MODL Annual Meeting June 9-11 Chateau on the Lake

Mark your calendar and make plans now to attend MODL's 20th Annual Meeting, June 9-11, at The Chateau on Table Rock Lake. Held at

one of Missouri's premiere and luxurious resorts, the Meeting promises to be one of our best ever!

This year's theme, Creating Great Trial Lawyers - 20 years of Experience, highlights and honors MODL's esteemed past while celebrating the Organization's many accomplishments. The Meeting features cutting-edge and informative CLEs led by many of MODL's past presidents as well as current trial and appellate judges.

Also planned are some terrific social events! The Meeting kicks off with the poolside Presidential Welcoming Reception. Bring your family and enjoy lots of great food, drink and fun as you catch up with old friends while making new ones. Friday evening will once again feature an outdoor "Best of Missouri" reception, dinner and dance with a great live band. Our ever-gracious President will serve as host both evenings to a late night reception in the Chateau's spacious Presidential Suite.

The Meeting is designed not only for the members but your entire family! In addition to the many Meeting sponsored activities and events, the Branson area offers limitless options for fun; from Silver Dollar City and White

Water to outlet malls and professional shows. The nearby state park marina has boat and watercraft rentals for an afternoon on the lake. The Chateau also offers a Kids Club for our younger attendees as well as Granny-Nanny baby-sitting services for our even smaller guests.

This year's golf tournament will be held at the critically acclaimed, 7000 yard, Branson Creek Golf Club. This Tom Fazio designed course, spread amidst the Ozark Mountains with stunning views, is ranked as the #1 public course in Missouri and 66th on the top 100 list of The Greatest Public Courses in America.

The Annual Meeting is a tremendous opportunity to reconnect with old friends and meet fellow colleagues from every corner of our great State! I would especially like to encourage my fellow young lawyers as well as members who have never attended to come. I promise you won't be disappointed and it will be the first of many more Annual Meetings that you attend.

If you haven't already registered for the MODL Annual Meeting, there is still time. Please return the registration form to the MODL office and call the Chateau to reserve your hotel room.

I look forward to seeing all of you and your families on June 9-11 in Branson!

Bob Buckley,
Annual Meeting Vice -Chair

Maximize the Benefits of Outcome Disclosure with Early Mediation

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I. Introduction

In 2001, the Joint Commission for Accreditation of Healthcare Organizations (JCAHO) first required accredited healthcare facilities to develop procedures for informing patients of unanticipated outcomes. Many defense lawyers perceived this as opening the floodgates of malpractice exposures. Fortunately, the deluge has not occurred. And since then, many resources have appeared to help providers through that process.¹ Clearly, disclosure is with us to stay and we are getting better at it, which are good things.

Unfortunately, the claims management and defense processes have not evolved to support disclosure. As a result of that deficiency, disclosure often leads to an awkward inability to take the discussion to the next logical step: settlement.

Why do we lead our patients eagerly to the proverbial resolution pond with openness about the event and then drop the discussion?² Our more cynical observers would suggest that defense lawyers don't support early resolution because it will adversely affect their income. After all, they are paid by the hour, so the quantity of "defending" determines their earnings. However, the failure to move forward from disclosure to claim resolution can arise from a number of other process-related factors:

- Often, several providers and carriers are involved in the underlying events, and they disagree about evaluation and/or apportionment.
- Defense attorneys are accustomed to pinning down every possible fact before evaluating a case, and are uncomfortable recommending resolution in the face of some factual uncertainty.
- Decision-makers rely on lengthy group processes to justify payment decisions and don't empower front-line claims experts and defense counsel.
- Rigid, hierarchical decision-making structures simply can't adjust to the fast pace required for early resolution.

- Defense decision-makers underestimate the value of the momentum established by disclosure discussions, and its role in identifying the claimant's true needs.
- Decision-makers won't acknowledge the full value of the claim early.
- The healthcare provider wants to settle, but the insurance carrier doesn't, or vice versa.
- If plaintiff attorneys are involved at this stage, they often expect a full fee of one-third to forty percent of the settlement.

If we can address these challenges, we can dramatically change the topography of medical professional liability and improve our clients' experience.

II. Why Early Resolution?

Tort reform only directly affects a subset of the cases, which reach litigation. Mounting evidence strongly suggests that early resolution with or without tort reform leads to lower total payouts and drastically lower expenses for our clients. It also brings more equitable distribution of total malpractice dollars to the universe of claimants, a goal that tort reform can actually sabotage.

Comprehensive early resolution programs also address "no pay" cases, a group which currently absorbs a high percentage of defense costs. We disclose both preventable and unpreventable outcomes, and while payment is not appropriate for most unpreventable outcomes, they still often result in litigation.³ Accordingly, healthcare providers will still benefit from efforts to resolve the non-compensable "issues" that drive claimants to litigate, such as unanswered questions, perceived disrespect and concerns about future care.

Unfortunately, the published studies of early resolution programs have been limited. Some involve facilities in which all defense parties are employed and insured by the same entity.⁴ Others, such as COPIC's 3R's program (a physician insurance company in Colorado), have involved

"Early Mediation" >p10

¹ See, e.g. Healing Words: The Power of Apology in Medicine, Woods, M., Doctors in Touch, 2004; What do I say? Strategies for Communicating Intended and Unanticipated Events in Obstetrics, Woods J., Rozovsky F., Jossey-Bass, (2002).

² See A Mediation Skills Model to Manage Disclosure of Errors and Adverse Events to Patients, Liebman, C and Hyman, C, 23(4) Health Affairs (2004)

³ Patient Safety and Medical Malpractice: A Case Study, Brennan, T. and Mello, M., 139 Annal. Int. Med 267 (2003); "Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform," Brennan, T. and Mello, M, 80 Tex.L. Rev. 1595, 1599-1600 (2002).

⁴ Risk Management: Extreme Honesty May Be the Best Policy, Kramaan, S. and Hamm, G., 131 Ann. Intern. Med. 963 (1999).

only low value cases with unrepresented claimants,⁵ and still others initiate mediation well into the litigation process, as with the well-publicized program at Rush Medical Center.⁶ But the evidence from those studies credibly suggests that the approach can offer substantially lower expense and indemnity losses for our clients if expanded beyond the narrow margins of those efforts.^{7,8}

Our clients, the healthcare providers, also face pressure to resolve patient safety issues that may have led to claims, and we are learning that patients value safety improvement efforts as well. Malpractice claims have always provided good information for patient safety analysis. Unfortunately, lawsuits don't dig up relevant details until years after the event. And the defendants don't hear the patient's or family's comments about their care until a deposition or mediation because the litigation system excludes them from early discussions of causes and solutions. Clinical safety improvement has been subjugated to the need to "protect" information in a litigation environment. Realistic dialog with the patient or family, which often contributes to process improvement, ebbs as the parties circle their wagons.

The defense bar has contributed substantially to this mindset--in good faith, but not necessarily benefiting our clients. Ironically, studies by the Robert Wood Johnson Foundation of very early mediation in the context of physician licensing complaints⁹ as well as other considerable anecdotal evidence¹⁰ demonstrate that most patients have a strong interest in improving the system, which may overcome their interest in financial compensation.¹¹ Lawsuits simply can't do much to move that goal forward.

Also, consider the CFO at your client organization. Uncertainty and wide variability of self-insured losses lead to higher IBNR (incurred but not reported) values and higher values of open case reserves. Auditors require larger reserves on the books to cover those potential losses. Carriers examine their insureds' ability to reduce uncertainty and variability in losses, as those two factors add dramatically to required premiums and internal reserves. Insurers that find a poorly controlled pattern will require higher premiums or refuse coverage.¹² Any of these outcomes leads to a reduction in available capital for the hospital or system. At the end of the day, a history of well-managed losses with early closure reduces the need to tie up the operating capital required as reserves on the balance sheet, funded in a trust, or as insurance premiums lost forever.

III. The Role of ADR

When motivated by honest efforts to address all issues, early mediation can mitigate the perceived risks of early settlement, encouraging the flow of information and candid discussion of all options. By removing roadblocks, it allows the parties to continue an ongoing and productive process on many levels.

Resolving defendant-only disputes.

When potential co-defendants disagree about value or apportionment, they cannot reach a complete settlement with the claimant. This often leads plaintiff to settle with less than all defendants, followed by an unpredictable and disproportionate result for the non-settling party, either higher or lower than the facts would otherwise dictate.

"Early Mediation" >p11

⁵ See *3Rs Newsletter*, http://callcopic.com/publications/3rs/3rs_newsletter.htm, accessed February 16, 2005.

⁶ Rush Hospital's Medical Malpractice Mediation Program: An ADR Success Story, M.D. Brown Illinois Bar Journal, 432-440, August 1998.

⁷ *House Calls*, Jones, A., Corporate Counsel, October 1, 2004.

⁸ The Toro Company has demonstrated significant savings with an early resolution program in personal injury claims, saving 81 percent on claims costs and fees and 61 percent on settlements. *Finishing the Quiet Revolution in Conflict Resolution: Opportunities in the Business Sector*, Stipanowich, T., 4(2) ACResolution 16 (Winter 2005.)

⁹ *Adapting mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, Dauer, E. and Marcus, L., 60 Law and Contemporary Problems 186 (1997). See also: A series in the Baltimore Sun *How Medical Errors Took a Little Girl's Life* (December 14, 2003) and *From Tragedy, A Quest for Safer Care* (December 1, 2003), Niedowski, E., accessed at <http://www.josieking.org/news.html>.

¹⁰ The story of the King family's response to the loss of their young daughter, Josie, speaks volumes about this interest. Their website, www.josieking.org contains news articles and other resources.

¹¹ *Adapting Mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, Dauer, E. and Marcus, L., 60 Law and Contemporary Problems 186 (1997). See also: A series in the Baltimore Sun *How Medical Errors Took a Little Girl's Life* (December 14, 2003) and *From Tragedy, A Quest for Safer Care* (December 1, 2003), Niedowski, E., accessed at <http://www.josieking.org/news.html>.

¹² GAO Report, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Premium Rate Increases*, October 1, 2003, accessed at <http://www.gao.gov/new.items/d04128t.pdf>; *Medical Malpractice Insurance Report: A Study of Market Conditions and Potential Solutions to the Recent Crisis*, Nordman, E., Cermak, D., McDaniel, K., National Association of Insurance Commissioners (2004), accessed at http://www.naic.org/models_papers/papers/MMP-OP-04-EL.pdf.

And the initial settlement is often skewed to the high side because the plaintiff's attorney has to make up for the chance of losing in the subsequent proceedings against the non-settling party. Though the plaintiff usually benefits from these situations, the majority of potential resolutions fail at this point due to differences on the defense side. Defendant-only mediation allows the parties to present a united front and negotiate as a block, eliminating the opportunity for skilled plaintiff counsel to "divide and conquer." In this setting, mediation will also force a meaningful dialogue between insured and insurer.

Sharing information.

Often, mediation occurs after substantial discovery has allowed for the exchange of factual information and can become a very expensive investigation. Mediation offers an ideal forum for simpler but structured sharing that facilitates compromise. Parties to a healthcare professional liability dispute start with a distinct advantage: they know each other in advance. The plaintiff tends to know the defense parties and their relationships to each other, and the defendants have a personal relationship with the patient and generally have almost all of the relevant medical records. If the parties feel they need outside experts, they can informally share their experts' opinions, and use the experts as resources during the mediation process. A skilled mediator can help each party assess the true value, if any, of missing information and then negotiate accordingly. Often missing information doesn't have a big impact on the value of a case.

Exploring true interests.

One key element of mediation is interest-based negotiation. Mediators probe to develop each party's true interests and needs, attempting to develop those into a meaningful settlement. Parties experienced in the mediation process have undoubtedly encountered surprising personal needs underlying a claim. Often, those can be resolved without significant financial impact.¹³ For example, patients of religious healthcare facilities often feel betrayed by what they perceive as a secular approach, and seek reassurance of the religious foundations of the provider to reconcile events with their faith. Most claimants express a very strong desire to make sure the underlying clinical issues that led to their injury have been fixed. That interest has value, and it will be lost in a lawsuit.¹⁴

Adjusting expectations.

Some claimants have unreasonable expectations of high compensation. Often, their claims denied, they are left to find an attorney who understands them. When these parties team up with inexperienced attorneys who don't control their expectations, everyone suffers. An early meeting with a skilled mediator provides an educational forum that may offer a way out for the lawyer. Similarly, plaintiffs' attorneys sometimes use a mediator as an outside party to help manage their clients' expectations. Either way, the healthcare provider has avoided an expensive litigation experience.

Earlier settlements.

Some cases are just going to cost a lot of money. But does any benefit of delayed payment overcome the cost of uncertainty, litigation and the diversion of capital reserves? Generally, it does not. Some plaintiff attorneys recognize that settlements at this stage benefit both the attorney and the client, and will reduce their fees in early mediation sessions. If so, then the ultimate cost of the case will be lower.

Limiting open issues.

Even if the case doesn't settle before litigation, early mediation often helps the parties crystallize the issues and narrow future discovery. Resulting litigation tends to be shorter and less contentious, with an open communication channel established. Once open factual questions have been explored, cases often settle without further formal processes.

IV. Summary

As defense attorneys for healthcare providers (and, logically, other defendants: see footnote 10), we need to help our clients avoid the formidable obstacle they often encounter at the end of a productive disclosure process. Disclosure WILL put those issues on the table, and our historical close-mouthed approach to early claim development wastes the forward momentum of the disclosure process. If we don't support our clients as they continue the dialog, we leave them with wasted opportunities that may, in fact, exacerbate the plaintiffs' anger and frustration. Mediation offers a controlled and neutral environment to move those discussions forward, solving some of the problems generated by our progress in disclosure. And our clients' resources will be better utilized in powerfully defending the cases that require defense.

¹³ *Adapting mediation to Link Resolution of Medical Malpractice Disputes with Health Care Quality Improvement*, Dauer, E. and Marcus, L., 60 *Law and Contemporary Problems* 186 (1997)

¹⁴ The story of the King family's response to the loss of their young daughter, Josie, speaks volumes about this interest. Their website, www.josieking.org contains news articles and other resources.

Old Agendas and the New Spin on the "Failure to Inform" Exception

By Teresa M. Young; Brown & James, P.C.; St. Louis, Missouri

Amidst the Tort Reforms in medical malpractice, one issue is gaining little attention. Plaintiffs are using the newest exception to the medical malpractice statute of limitations, the "failure to inform" exception, as a back door to apply a discovery rule in failure to diagnose cases. Consider the following scenario:

Patient visits his internist, who refers the patient to a radiologist for an x-ray. The radiologist reads the x-ray and reports the results to the internist, who passes them on to the patient. After two or more years, the patient learns that the results, as communicated by the radiologist, were incorrect, either because the radiologist misread the x-ray or failed to communicate the proper result to the internist.

Does §516.105, R.S.Mo. 2000, the medical malpractice statute of limitations, bar the patient's cause of action against the radiologist?

In several pending cases, plaintiffs have argued that it does not. Plaintiffs are presenting a novel argument that under the "failure to inform" exception, the patient's action is tolled until he discovers the radiologist's negligence. The exception, added to the statute in 1999, states in pertinent part:

(2) In cases in which the act of neglect complained of is the negligent failure to inform the patient of the results of tests, the action for failure to inform shall be brought within two years from the date of discovery of such alleged negligent failure to inform, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligent failure to inform, whichever date first occurs . . .

Plaintiffs contend the exception applies to the above scenario because the failure to inform a patient of an accurate test result is tantamount to the failure to inform of any result. Consider the history of the medical malpractice statute of limitations:

Beginning in 1921, the Missouri General Assembly first adopted a legislative policy treating medical malpractice actions as separate from other torts. The legislature set apart medical malpractice actions in two ways. First, it shortened the time limitation to two years. See *Laughlin v. Forgrave*, 432 S.W. 2d 308, 312 (Mo. banc 1968). Second, and perhaps more significantly, the legislature set a separate accrual date for medical malpractice actions. *Id.* The 1921 language included:

All actions against physicians, surgeons, dentists, roentgenologists, nurses, hospitals and sanitariums for damages for malpractice, error, or mistake shall be brought within two years from the date of the act of neglect complained of.

Laws of Missouri, 1921, pp. 197-98; Senate Bill 335. This language remained largely intact through the enactment of §516.140, R.S.Mo. 1945. *Laughlin*, 432 S.W. 2d at 313.

In 1968, the Missouri Supreme Court strictly applied the statute of limitations as enacted by the General Assembly. *Laughlin v. Forgrave*, 432 S.W. 2d 308 (Mo. banc 1968). In *Laughlin*, the defendant doctor performed surgery on the plaintiff's back in 1951. *Id.* at 310. The plaintiff continued to suffer back pain and sought the advice of seven other doctors over the next eleven years. *Id.* In 1962, doctors discovered that a foreign object had been left in the plaintiff's back during the 1951 surgery. *Id.* After doctors removed the object, the plaintiff fully recovered. *Id.*

Plaintiff argued that because she was unable to discover the negligence until 1962, her cause of action should be tolled under the general discovery rule in §516.100. In analyzing the plaintiff's argument, the Missouri Supreme Court examined the history of the medical malpractice statute of limitations. *Id.* at 313. The Court determined that the General Assembly had deliberately set a date by which the limitations would begin to run, separate from that of other torts. *Id.* at 313. Therefore, the Court strictly upheld the language of the statute of limitations and held that the plaintiff's cause of action was not tolled until she discovered the foreign object. *Id.*

The Court, however, expressed its distaste with the result required by the statute, namely, that a plaintiff's cause of action could expire before it was discovered. *Id.* at 314. However, the Court noted this was an issue properly addressed by the General Assembly, and not by the courts. *Id.*

The General Assembly ultimately agreed with the Court. In 1976, the legislature repealed §516.140 and enacted §516.105 as the new medical malpractice statute of limitations. In §516.105, the legislature preserved the language setting the accrual date when the negligence occurred. However, §516.105 created a limited exception for foreign object cases.

In *Weiss v. Rajanasathit*, 975 S.W. 2d 113 (Mo. banc 1998), the Missouri Supreme Court considered the breadth of §516.105 and its exceptions. In *Weiss*, the plaintiff received a routine diagnostic test in 1991, and was told that she would not be consulted if the test results were within the normal range. *Id.* at 116.

"Failure to Inform" Exception >p13

"Failure to Inform" Exception *(Continued from page 12)*

However, despite results that indicated a pre-cancerous condition, the defendant doctor failed to inform the plaintiff of the results. *Id.* Plaintiff did not become aware of her condition until 1995, after she was diagnosed with cancer. *Id.* The defendant doctor pleaded the statute of limitations as an affirmative defense, arguing that plaintiff's action expired in 1993.

The *Weiss* Court noted that while the General Assembly added the "foreign object" exception to §516.105, the legislature had consistently rejected the discovery rule in other medical malpractice actions. *Id.* at 117. The Court rejected any interpretation of the statute that disregarded the statute's plain and unequivocal language requiring medical malpractice actions be brought within two years from the negligent act. *Id.* at 118.

Ultimately, the Court strictly enforced the two-year statute of limitations, and its exceptions, holding that the plaintiff's claim was time-barred. *Id.* at 119. The Court again noted that it was constrained by Section 516.105 from accepting the discovery rule and once again placed the issue at the legislature's doorstep:

The general assembly evidenced its clear intent to limit a discovery rule to cases concerning foreign objects. That is its prerogative. This Court must follow the policy determination expressed there. *Id.* at 121.

The Court reiterated its concerns voiced in *Laughlin v. Forgrave*, and again invited the legislature to address the situation where a plaintiff's cause of action expired before discovery of the negligence. *Id.*

In response, the General Assembly amended §516.105 in 1999 to include the "failure to inform" exception. Missouri appellate courts have had little opportunity to rule on the application of the "failure to inform" exception. And, while the Missouri Supreme Court granted a preliminary writ in a case similar to the above scenario, it ultimately quashed the writ without comment.

The Court's history with this statute teaches two important lessons. First, the Court has consistently recognized the legislature's rejection of a discovery rule generally applicable to medical malpractice actions. Second, while the Court has expressed distaste of statute of limitations that time-bar an action before it is discovered, the Court has strictly applied the statute of limitations as written.

Defendants should mind these lessons in countering plaintiffs' attempts to apply the exception in a failure to diagnose case. Plaintiffs' new argument flies in the face of the General Assembly's consistent rejection of the discovery rule in effectively adding a discovery rule to nearly all failure to diagnose cases.

Moreover, plaintiffs' argument supposes that the legislature implemented this sweeping change by implication. The exception expressly includes only those cases involving a

"negligent failure to inform the patient of the results of tests." The statute does not include any qualifying statements of the results such as "accurate," "correct," or "true." Therefore, heeding the Missouri Supreme Court's directive that the statute be strictly read, these terms should not be implied. Further, if the legislature intended to remove the discovery rule for failure to diagnose cases, it would more likely have done so by explicit language.

Is the patient above time barred from bringing an action against the radiologist? In looking to the history of the medical malpractice statute of limitations, and the strict application of the statute as advocated by the Missouri Supreme Court, it appears that the patient is indeed out of time. Under these standards, a strong argument can be made that the exception applies only where a medical practitioner fails to inform the patient of a result, not where he or she gives a patient an incorrect result.

The conclusive answer to this question will likely be decided by the General Assembly. Even if the Missouri Supreme Court strictly upholds the statute of limitations, it may well call on the General Assembly once again to address the practical effects of applying the statute.

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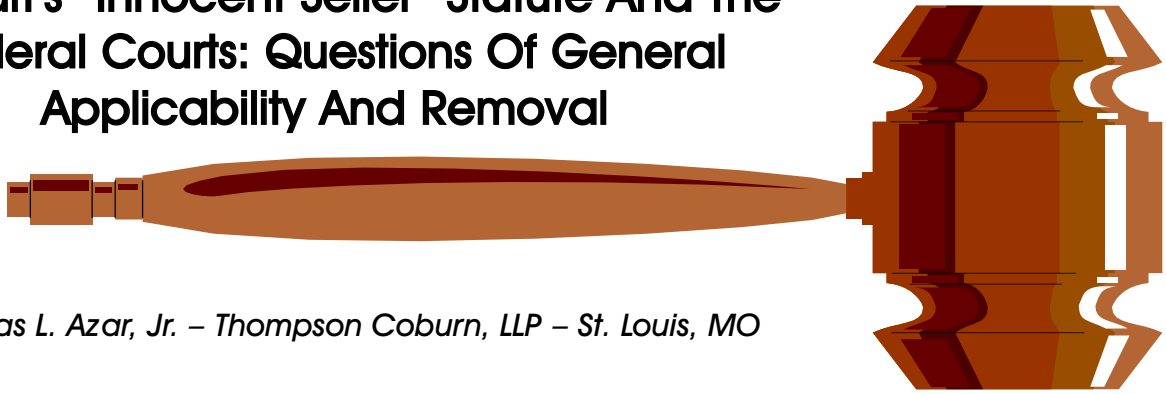


Missouri DRI MODL representative, Clark Cole attended the DRI Executive Directors and State Representatives meeting in Chicago on March 31 and April 1.

MODL members should SAVE THE DATE for the DRI 2005 annual meeting scheduled for October 19-23 at the Sheraton Chicago Hotel and Towers.

If you are not already a member of DRI, Clark strongly encourages you to join this most prestigious of the national defense organizations. There are membership incentives available for new members, especially young lawyers. Visit DRI's website at <http://www.dri.org> or contact Clark at ccole@armstrongteasdale.com for further details.

Missouri's "Innocent Seller" Statute And The Federal Courts: Questions Of General Applicability And Removal



By Thomas L. Azar, Jr. – Thompson Coburn, LLP – St. Louis, MO

Introduction

Missouri's "Innocent Seller" statute, Mo. Rev. Stat. §537.762 (2000), is a boon for retailers whose liability is based solely on their status as sellers in the stream of commerce. By invoking this statute, such "innocent sellers" can seek an interlocutory dismissal from a products liability case where the plaintiff has also sued the product's manufacturer or another seller "higher" in the stream of commerce. In effect, this allows the "innocent seller" to avoid the costly burden of a lawsuit and forces the plaintiff to bring his or her case against the defendant best equipped to assume the risk of a defective product.

While the benefits of invoking the "Innocent Seller" statute are obvious, its applicability in federal proceedings is unclear. Under the *Erie* Doctrine, a federal judge will only permit a defendant to invoke this statute if it is "substantive" rather than merely "procedural." Thus far, federal judges have disagreed on the nature of this statute.

The "Innocent Seller" statute raises interesting questions for defendants wishing to have their cases heard in federal court. Can the dismissal of an "innocent seller" under §537.762 provide a basis for removal to federal court? Can a plaintiff add an "innocent seller" as a party solely to prevent removal?

In Part A, this article briefly discusses the general provisions and limitations of the "Innocent Seller" statute. Part B addresses the arguments for and against applying Missouri's "Innocent Seller" statute in federal court. Part C discusses the statute's implications for defendants seeking to remove their cases to federal court.

A. Interlocutory Dismissal Under Mo. Rev. Stat. §537.762 (2000)

Under Missouri's "Innocent Seller" statute, a defendant whose liability is based solely on its status as a seller in the stream of commerce (*i.e.*, a "downstream seller") may be dismissed from a product liability claim if (1) either the product's manufacturer or another "upstream" seller is properly before the court, and (2) total recovery may be had from the "upstream" defendants. *Malone v. Schapun, Inc.*, 965 S.W.2d 177, 181 (Mo. App. ED 1997). To invoke this statute, the "innocent seller" defendant need only submit a motion and affidavit averring that the "innocent seller" is

aware of no basis of liability to the plaintiff other than the defendant's status as a seller in the stream of commerce. Mo. Rev. Stat. §537.762(3) (2000).

The statute then allows the parties 60 days to conduct discovery on the issues raised in the motion and accompanying affidavit. Mo. Rev. Stat. §537.762(4). If no party can come forward with evidence showing that the defendant is liable on some basis other than its status as a seller in the stream of commerce, "the court shall dismiss without prejudice the claim as to that defendant." Mo. Rev. Stat. §537.762(5). "To the extent that a plaintiff can otherwise obtain 'total recovery,' all liability of a downstream seller, who would otherwise be jointly and severally liable to plaintiff for damages and subject to contribution from the other defendants, is shifted to upstream defendants, including the manufacturer." *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 445 (Mo. banc 2002).

This statute contains several provisions ensuring that plaintiffs will not be prejudiced by the dismissal of an "innocent seller." The requirement that the defendants remaining in the case be able to provide the plaintiff with "total recovery" precludes dismissal where the remaining defendants are insolvent or not subject to process under Missouri law. *Malone*, 965 S.W.2d at 182. Where the plaintiff's likely award will exceed the aggregate insurance coverage of the remaining defendants, dismissal under the "Innocent Seller" statute is not available. See *Gramex*, 89 S.W.3d at 445-46. Only those claims based upon the defendant's status as a seller in the stream of commerce can be dismissed under this statute. *Malone*, 965 S.W.2d at 182. The "innocent seller" does not escape any liability resulting from its own negligence or other conduct. *Id.* A dismissal under the "Innocent Seller" statute is without prejudice and may be set aside for good cause until a final judgment is rendered. Mo. Rev. Stat. §537.762(7).

B. "Substantive" Or "Procedural": Can The "Innocent Seller" Statute Be Invoked In Federal Court?

Under the *Erie* Doctrine, federal courts only apply the provisions of the "Innocent Seller" statute if this statute is determined to be substantive, rather than merely

"Innocent Seller" >p15

“Innocent Seller” (Continued from page 14)

procedural. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 92 (1938). While federal courts have split on this question, the greater weight of authority holds that Missouri’s “Innocent Seller” statute is procedural in nature. See *Drake v. N. Am. Phillips Corp.*, 204 F. Supp. 2d 1204 (E.D. Mo. 2002); *Pender v. Bell Asbestos Mines, Ltd.*, 46 F. Supp. 2d 937 (E.D. Mo. 1999); *Pruett v. Goldline Labs., Inc.*, 751 F.Supp. 1372 (W.D. Mo. 1990). This may change with the Missouri Supreme Court’s recent holding in *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432 (Mo. 2002), which suggests that the “Innocent Seller” statute, under some circumstances, has a substantive effect on a seller’s rights and liabilities.

1. View That The “Innocent Seller” Statute Is Procedural And Not Applicable In Federal Court

While few courts have had occasion to address this question, most federal judges have concluded that the “paramount effect” of the “Innocent Seller” statute is procedural. See *Drake*, 204 F. Supp. 2d at 1206 (Noce, M.J.); See also *Pender*, 46 F. Supp. 2d at 940 n.3 (Perry, J.); *Pruett*, 751 F. Supp. at 1372 (Whipple, J.). This conclusion is based upon the view that the statute ultimately does not affect the liability of the “innocent seller.” *Id.*; see also DENNIS J. DOBBELS, *Missouri Products Liability Law Revisited: A Look at Missouri Strict Products Liability Law Before and After the Tort Reform Act*, 53 Mo. L. Rev. 227, 238 n.42 (1988). Under Missouri’s comparative indemnity rules, a seller with no other basis for liability other than its status as a seller in the stream of commerce is entitled to complete indemnity from the product’s manufacturer. *Welkener v. Kirkwood Drug Store Co.*, 734 S.W.2d 233, 242 (Mo. App. ED 1987). Where a plaintiff sues a single “innocent” seller and the manufacturer, the “Innocent Seller” statute does not affect the seller’s ultimate liability—it merely allows a seller “to be released at an early stage of the litigation, rather than wait until the completion of litigation to obtain indemnity.” DOBBELS, *supra*, at 238.

2. View That The “Innocent Seller” Statute Is Substantive And Should Be Applicable In Federal Court

In at least two instances, federal judges have permitted a seller to seek dismissal under the “Innocent Seller” statute. District Judge Limbaugh, in a proceeding reviewed by the Eighth Circuit Court of Appeals, granted a motion to dismiss the seller of a cane from a products liability action where the plaintiff had also sued the manufacturer. See *Bizzle v. McKesson Corp.*, 961 F.2d 719, 721 (8th Cir. 1992). Similarly, Senior District Judge Sachs granted dismissal under the “Innocent Seller” statute “in the absence of any contest on the merits from plaintiff.” *Letz v. Turbomeca Engine Corp.*, No. 93-1058-CV-W-6, 1993 WL 469182, at *1 (W.D. Mo. Nov. 15, 1993). While Judge Sachs noted that some parts of the “Innocent Seller” statute were clearly

procedural (e.g., the provision allowing the plaintiff 60 days to conduct discovery), he concluded that the statute’s scheme for setting priorities for recovery among defendants was substantive in nature. *Id.*

Judge Sachs’ reasoning is supported by other federal cases on the substantive/procedural dichotomy and by the Missouri Supreme Court’s reasoning in *Gramex*. While the Eighth Circuit has not yet had occasion to address this point, most federal courts have concluded that the rules regarding joint and several liability are a matter of substantive state law under an *Erie* analysis. See, e.g., *Stuckey v. N. Propane Gas Co.*, 874 F.2d 1563, 1571-72 (11th Cir. 1989). In *Gramex*, the Missouri Supreme Court in dicta criticized the federal courts’ characterization of the “Innocent Seller” statute as procedural, suggesting that this statute could significantly impact the rules of joint and several liability where there are multiple “innocent sellers” in a case. *Gramex*, 89 S.W.3d at 445. Additionally, the *Gramex* court noted that this shifting of liability to “upstream” sellers, including the manufacturer, represented a “substantive public policy choice of significant importance.” *Id.* Until the Eighth Circuit has the opportunity to resolve this conflict, the applicability of the “Innocent Seller” statute in federal court will remain in doubt.

C. The “Innocent Seller” Statute And Removal To Federal Court

While the federal courts are in disagreement regarding the “Innocent Seller” statute’s applicability in federal proceedings, there is no such disagreement regarding the statute’s implications for removal to federal court. A dismissal of an in-state seller under the “Innocent Seller” statute is not grounds for removal to federal court. The joinder of an in-state “innocent seller” after removal is not considered fraudulent.

The drafters of Missouri’s “Innocent Seller” statute foresaw that the dismissal of an “innocent seller” had the potential to wreak havoc on a federal court’s jurisdiction. Therefore, the “Innocent Seller” statute provides that the dismissal is merely interlocutory:

No order of dismissal under this section shall operate to divest a court of venue or jurisdiction otherwise proper at the time the action was commenced. A defendant dismissed pursuant to this section shall be considered to remain a party to such action only for such purposes.

Mo. Rev. Stat. §537.762(6). Based upon this language, federal courts have generally concluded that the dismissal of an in-state defendant under this statute does not create grounds for the remaining defendants to remove a case to federal court. See, e.g., *Pender*, 46 F. Supp. 2d at 940.

“Innocent Seller” >p16

“Innocent Seller” (Continued from page 15)

Normally, a case that is non-removable on the initial pleadings becomes removable upon some voluntary act by the plaintiff destroying diversity. In *re Iowa Mfg. Co.*, 747 F.2d 462, 463-64 (8th Cir. 1984). However, courts have generally held that the failure to oppose a motion to dismiss under the “Innocent Seller” statute does not constitute such a voluntary act by the plaintiff. For example, in *Machinsky v. Johnson & Johnson Medical, Inc.*, 868 F. Supp. 269 (E.D. Mo. 1994), the plaintiff brought a products liability action in state court against a Missouri hospital and a New Jersey manufacturer of prosthetics. *Id.* at 270. When the Missouri hospital sought dismissal pursuant to the “Innocent Seller” statute, plaintiff’s counsel did not oppose the motion, and even participated in drafting the order. *Id.* After the Missouri hospital was dismissed, the New Jersey manufacturer removed the case to federal court. *Id.* The court in *Machinsky* remanded to state court, concluding that the plaintiff’s actions did not constitute a “voluntary act” allowing removal. *Id.* At least one court has also concluded that a stipulation of dismissal, entered into by the plaintiff and the “innocent seller,” also does not constitute a voluntary act permitting removal. See *Carney v. BIC Corp.*, 88 F.3d 629, 631 (8th Cir. 1996) (refusing to reconsider Judge Stohr’s remand order based upon stipulation of dismissal, finding that it was not reviewable).

While the general consensus of federal judges in Missouri appears to be that a dismissal under the “Innocent Seller” statute does not allow removal, it is worth noting that federal judges in Mississippi, interpreting a similar statute, have reached a different conclusion. See, e.g., *Henderson v. Ford Motor Co.*, 340 F. Supp. 2d 722, 724-27 (N.D. Miss. 2004). Section 11-1-64 of the Mississippi Code was patterned on Missouri’s “Innocent Seller” statute, and contains a provision identical to §537.762(6). See Miss. Code Ann. §11-1-64(6) (Supp. 2003) (repealed September

1, 2004); Mo. Rev. Stat. §537.762(6). In *Henderson*, a Mississippi District Court concluded that the language of §11-1-64(6) violated the Supremacy Clause of the Constitution by attempting to defeat the federal courts’ removal jurisdiction. *Henderson*, 340 F. Supp. 2d at 726. However, given the current trend in Missouri, a dismissal under the “Innocent Seller” statute is unlikely to allow removal to federal court.

Likewise, at least one court has concluded that the joinder of a seller as a defendant to defeat removal is not fraudulent even if the seller clearly is entitled to dismissal under the “Innocent Seller” statute. See *Dorsey v. Sekisui Am. Corp.*, 79 F. Supp. 2d 1089, 1091 (E.D. Mo. 1999). Judge Shaw’s reasoning in *Dorsey* is based upon the presumption that the “Innocent Seller” statute “does not affect [the dismissed defendant’s] potential liability as an innocent seller in the stream of commerce.” *Id.* at 1092. Given the Missouri Supreme Court’s suggestion in *Gramex* that the “Innocent Seller” statute can substantively affect the liability of “downstream” sellers, see *Gramex*, 89 S.W.3d at 445, the court’s reasoning in *Dorsey* may no longer apply.

Conclusion

By allowing “innocent sellers” an early exit from products liability litigation, the “Innocent Seller” statute can save clients significant time and expense. While a number of federal judges have concluded that this statute is not applicable in federal court, defense counsel would be remiss to concede this point. Armed with the Missouri Supreme Court’s explanation of the “Innocent Seller” statute in *Gramex* and Judge Sachs’ reasoning in *Letz*, defense counsel can make a strong argument that this statute is substantive and thus applicable in federal court.

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