



Missouri Organization of Defense Lawyers

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Winter, 2005

President's Report

By Susan Ford Robertson, MODL President

Here are the areas MODL is working on in 2005:

Assistance to the Judiciary in Budgetary Matters and in Retaining the Independence of the Judiciary

Though Governor Blunt's budget includes full funding for the judicial branch of government, the judiciary remains a prime target for budget cuts. MODL remains committed to assisting the judiciary in ensuring that appropriate and adequate funding exists for our court system. Prior to the announcement of the budget, there were rumors that the judiciary might experience a 25% cut in revenue. Since 96% of the judiciary's budget is in personnel, and a large portion of that is statutorily mandated salaries that may not be cut (for example, salaries for judges and circuit clerks), a 25% reduction in funding would have to occur at the circuit court level and could mean that 1 in 2 non-statutory circuit court personnel could lose their jobs.

The judiciary's budget is estimated to comprise slightly more than only 1% of Missouri's general revenue budget, however, an estimated 33% to 50% of Missourians are affected by court cases each year. A 25% reduction in revenue would have a devastating impact upon the availability and quality of justice and could have far-reaching consequences upon the economic growth and stability of businesses in this state. Other states that have experienced judiciary budget cuts have had to reduce the operating hours of the courts and even reduce the number of days the courts are open. Courts have had to prioritize the types of cases that can be heard and some categories of legitimate cases are unable to be heard, including, non-violent misdemeanors, traffic, divorces without children and small claims matters. MODL remains committed to assist the judiciary to ensure that adequate funding remains for our judiciary.

MODL is also committed to ensure the continued existence of the Missouri Non-Partisan Court Plan. Recently, the MODL Board of Directors passed a resolution, **"The Missouri Organization of Defense Lawyers is in favor of the Missouri Non-Partisan Court Plan and would oppose any attempt to repeal or substantially change the Missouri Non-Partisan Court Plan."** The Missouri Bar is also committed to the retention of the non-partisan court plan. The Missouri Bar has recently created the Commission on the

Independence of the Judiciary. I have been asked to serve on this Commission charged to advise the Missouri Bar Board of Governors how to defend The Missouri Court Plan from attack, including any modification that may serve in any manner to weaken the existing plan for judicial selection on a non-partisan basis presently in place and to identify the appropriate involvement of The Missouri Bar in defending the judiciary and individual judges who may from time-to-time be subject to unfair or inaccurate criticism.

Three House Joint Resolutions have been filed addressing the judiciary. **House Joint Resolution 10** asks to submit to the qualified voters of Missouri an amendment repealing Section 25(a) of Article V of the Constitution of Missouri and adopting a new one that states that any person who is appointed by the Governor for a vacancy on the Supreme Court shall be subject to the advice and consent of the Senate, as provided for in Section 51 of Article IV of this Constitution. **House Joint Resolution 11** reads the same but applies to any Governor appointment to the Court of Appeals. **Senate Joint Resolution 16** would set Supreme Court Judge's terms at five (5) years, rather than the present 12 years and require a 2/3 vote rather than a simple majority for retention. MODL is in the process of reviewing these resolutions and MODL will continue to monitor and oppose any effort designed to repeal or substantially change the current Missouri Non-Partisan Court Plan.

Assistance to the Legislature on Issues Regarding Tort Reform, Workers' Compensation and Insurance

MODL members have been active in providing comments and advice on bills filed in the areas of tort reform, workers' compensation and insurance regulation. Many MODL members have been active in these areas since the last period of significant tort reform back in the mid 1980s. Many MODL members remain committed to ensuring that in the areas of tort reform for cases involving medical negligence, that an accurate framework and history be applied so that whatever is proposed, filed and passed is fair and meaningful and designed to bring change to the relevant areas that need change.

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Recently, I had an opportunity to speak at a symposium at Washington University's Center for the Study of Ethics and Human Values on "Medical Malpractice and Tort Reform: Finding Truth and Common Ground." The symposium, open to the public, had a large attendance and speakers presented viewpoints from the perspective of patients, insurers, legislators, doctors, employers and plaintiffs' and defendants' attorneys. The symposium, moderated by Bill McClellan of the *St. Louis Post-Dispatch*, provided an all-day interaction between the public and those of us on the panel who included, Michael Delaney, President and CEO of Healthcare Services Group, Dr. Norman Druck, Immediate Past President of St. Louis Metropolitan Medical Society, Dr. Gregg Laiben, Medical Director of Primaris, David Wooster of Mellon Financial Corporation, Ken Vuylsteke of Fox & Vuylsteke and Senator Joan Bray.

One of the most valuable parts of the symposium were the opening remarks by Bob Rosenthal who provided a wonderfully succinct and informative history of issues regarding medical malpractice in Missouri. Bob, as one of the most civil, dignified and experienced medical malpractice defense attorneys in this state, set the tone for the symposium by providing a relevant framework of the history of medical malpractice in Missouri. He explained that originally in Missouri, charitable hospitals had immunity and as a result, there were few lawsuits filed against medical providers. He contrasted recent years where there has been a tremendous surge in medical malpractice litigation. He explained that back in the 1970s, several large, multi-lines insurance companies came into Missouri but they then began to back out in the 1980s. As a result, physicians started insuring themselves, hospitals began to become self-insured and there was a negotiated and agreed to legislative tort reform package including caps on non-economic damages. The changes resolved the perceived crisis.

However, in the past few years there have been changes and many continue to debate the reasons why. Some reasons offered include that in the 1990s out-of-state medical insurance companies were allowed to come into Missouri and charge low premiums that forced Missouri companies to drop their premiums and merge with other large insurance companies. One by one the companies went bankrupt leaving physicians and surgeons exposed. Another circumstance was the Scott decision that resulted in an increase in exposure and a decrease in predictability for damages estimation that translated into an increase in insurance rates. A third consideration was the occurrence of insurers either quitting or dramatically limiting who those companies insured. This left few insurers of medical providers in Missouri. Those few insurers who were left increased their premiums and they tried to avoid insuring the high-risk specialties or high-risk areas. Physicians began having real problems handling the increase in premiums. Doctors' overhead continues to

increase but in this time of managed care and HMOs, the doctors cannot pass on the increase in cost to the patients.

These circumstances have lead to doctors in high-risk areas being unable to afford to retire as "tail" policies are very expensive and many cannot afford to continue to practice in the face of very high premiums. Physicians are worried that if they are sued and the case is dismissed, this may affect their ability to get insurance. Doctors may agree to settle but this can also affect their ability to get insurance. Patients are worried that they may find a shortage of specialists in high-risk areas.

He suggested that new legislation was necessary but that we cannot lose sight of the fact that the legislation needs to be reasoned. Medical mistakes do occur and legitimate cases are filed. Access to the courts cannot be denied. He provided a wonderful tone and framework for the panelists and the public to focus on why there is a problem and how best to solve it.

Bob's comments and reminder of how we have gotten to where we are today are useful as our legislature addresses how to enact fair and meaningful reform that will assist in bringing relief to the medical providers; will assist in continuing to ensure we have access to affordable and quality healthcare; and will assist in ensuring fair and meaningful access to the courts for plaintiffs seeking monetary compensation when medical providers are negligent. MODL will continue to provide comments, advice and assistance to the legislature on issues involving tort reform, as well as in the areas of insurance and workers' compensation.

Planning for the 20th Anniversary of MODL

Please remember to mark your calendars to attend this year's Annual Meeting. This is the 20th anniversary of MODL and the theme is "Creating Great Defense Lawyers — Twenty Years of Experience." MODL plans to honor the 19 Past MODL Presidents in a special Presidents Reception during the Annual Meeting and many of the speakers during the CLE programs will be former MODL Presidents. The meeting is June 9-11, at Chateau on the Lake in Branson, Missouri. I hope to see you there.

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:

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From The Capitol: MODL Legislative Report

Legislature Set to Pass Tort Reform and Workers Comp Reform as Priorities

By Randy Scherr, MODL Lobbyist

Two top priorities of Governor Matt Blunt and the 2005 Missouri General Assembly are quickly working their way through the legislature.

The Missouri House Committee on Judiciary has cleared a major tort reform bill (HB 393) and sent it to the full House, which is expected to take up the bill the week of February 14th. The bill includes:

- Repeal of joint and several liability;
- Major venue reform requiring cases be filled in the county where the plaintiff was first injured;
- Caps on punitive damages;
- Caps on non-economic damages in medical malpractices cases at \$250,000;
- Revises the affidavit of merit;
- Supersedes bonds limited at \$25,000,000;
- Changes to the collateral source rule;
- Changes to pre- and post-judgment interest statute; and
- Increases the seat belt comparative fault percentage from 1% to 50%.

The bill is expected to pass easily in the Missouri House. However, several of these provisions are expected to undergo considerable change in the Missouri Senate.

The Senate has taken up and passed a major Workers Comp Reform Act and sent it to the House for its consideration. Both the Workers Comp Reform bill and the Tort Reform bill are expected to be on the Governor's desk prior to the legislative spring break beginning March 17th.

Several MODL Officers and Legislative Committee members have spent a significant amount of time working with the sponsors of this year's Tort Reform legislation to fine tune several provisions of interest. Those members include: MODL President Susan Ford Robertson, Past President Randa Rawlins, Legislative Committee Chair Jeff Brinker, Committee Member Mariam Decker and Board Member John Roark.

Another major issue of interest before the 2005 General Assembly is a constitutional change to the Missouri non-partisan court plan. During the 2004 legislative session, a constitutional amendment was proposed to repeal the

major portions of the Missouri Court plan. MODL was very active in defeating that effort. This year's proposed changes are less encompassing and would provide for Senate approval of nominees to the Missouri Supreme Court and the Court of Appeals, as well as place term limitations on Judges on the Supreme Court. The three joint resolutions have yet to be assigned to committee.

MODL Board host Lawyer Legislators

MODL Board of Directors and the Legislative Committee hosted a dinner on January 24th for the lawyer legislators of the 2005 Legislature. The function offered a valuable opportunity for the MODL members to discuss Tort Reform legislation and other issues of interest with lawyers in the General Assembly.

Bills of Interest

The following is a list of the bills of interest being monitored by MODL:

- HB 85** Allows health care professionals deployed during a declared state of emergency to be immune from certain civil liabilities.
- HB 148** Changes the laws regarding workers' compensation.
- HB 269** Creates a cause of action for injury to emergency personnel caused by the tortious actions of another person.
- HB 270** Changes the laws regarding exclusion from jury service and the postponement of jury service.
- HB 347** Creates a procedural prerequisite for filing lawsuits for alleged defective residential construction.
- HB 366** Limits landowner liability when inviting people onto their property for state administered activity.
- HB 383** Repeals the sovereign immunity waiver imposed on multi-state compact agencies for their proprietary functions and modifies the law regarding sovereign immunity with respect to public employees.
- HB 393** Revises various statutes relating to claims for damages and the payment of such claims. Revises Med Mal laws and other Tort laws.



Recent Cases of Importance

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

I recently attended a Regional Meeting for the Association of Defense Trial Attorneys. A jury consultant, Dr. Hale Starr who has been consulted in over 3,000 jury trials, spoke at the meeting.

A couple of interesting issues that she raised perplexed this lawyer from central Missouri.

First, she indicated that between 60%-70% of jurors, after the first day of trial, will go to the lawyer's website to find out more about the lawyer. Evidently, this is a check that the jurors use to determine the credibility of the attorneys presenting the case.

Second, their studies have found that when jurors have been instructed not to refer to newspapers, listen to the radio or television about a case, which they are hearing, the instruction is followed. However, the jurors don't believe this extends to the Internet. They believe it is appropriate to look at the Internet and if they find some information about the trial, they may peruse it because they don't believe they are violating the court's instruction.

During the seminar, Dr. Starr looked at me and said you are a white male. I said, "Yes, I am and I am 55 years of age." She told me that I have two strikes against me in the trial of a case. Elaborating, she said if my opponent is a female 45 years of age or younger, the public perceives her as a young lawyer who is not part of the old guard and not part of the perceived problem with the judicial system.

While you take time to digest all of this information. Let me discuss a couple of recent cases of significance.

Sanctions In Worker's Compensation Case

The decision in *Brewer vs. Republic Drywall and Insurance Company of North America (INA)*, 145 SW 3rd 506 (Mo App S.D.) imposed sanctions in a worker's compensation case. The employer/insurer's answer was stricken as a sanction by the administrative law judge for its failure to produce its corporate representative for a deposition. INA maintained that it didn't have a contractual obligation with the employer because there was no showing that the worker compensation coverage existed. The Court upheld the Industrial Commission's award of sanctions. It noted that in administrative proceedings there is a power to compel depositions pursuant to §287.560 RSMo. This grants the administrative law judge the power to strike pleadings and enter awards against any party who fails or refuses to comply with a lawful order of an administrative law judge. The INA refused to produce a representative for

deposition by the employer. The Court held that the employer was entitled to compel the attendance of the witness and to compel the production of books and papers and therefore imposed an appropriate sanction.

Heart Attack Not Compensable

Wagner-Jones vs. Harbert Yeargin Construction Company, 145 SW 3rd 511 (Mo.App S.D. 2004) presents the rare worker's compensation decision in which benefits are denied for a heart attack. In this case, the employee was working at Fort Leonard Wood as a carpenter and was found on the floor in a mess hall near a beverage counter. He had no pulse, was unconscious and not breathing and attempts to revive him were unsuccessful. An autopsy was performed and the cause of death on the Death Certificate was listed as cardiac arrest. Years prior to his death, the employee had a fainting episode where his heart rate was irregular. The medical history indicated that his father had died at a young age from heart problems

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- HJR 10** Proposes a constitutional amendment requiring advice and consent of the Senate for Supreme Court nominees.
- HJR 11** Proposes a constitutional amendment requiring Senate confirmation of Supreme Court and Court of Appeals nominees.
- SB 1** Amends various provisions of workers' compensation law.
- SB 52** Prohibits recovery of non-economic damages for injuries incurred during certain motor vehicle violations.
- SB 53** Requires appointment of St. Louis City Circuit Clerk.
- SB 168** Creates a process to resolve disputes arising out of alleged construction defects in residential property.
- SB 220** Restores sovereign immunity to Metro and KCATA and precludes certain actions against public employees.
- SB 271** An Act relating to Tort Reform.
- SJR 16** Joint Resolution relating to the Judges of the Supreme Court.



Open Government and Access to Public Records

The Philosophical Debate

By Jay L. Smith; Assistant Chief Counsel; Missouri Department of Transportation

A sometimes quiet but fairly significant battle rages over public access to documents and records held by governmental entities. Both sides of the debate point to real and specific issues of concern in this ongoing saga. Choosing sides in this debate can be difficult. Open government isn't necessarily an easy or inexpensive thing when faced with the public's high expectations and unlimited demands for the governmental agency to both fulfill its overriding mission and to also have sufficient time and resources to quickly meet large information demands.

On the other hand, a certain level of public trust in government is an absolute necessity. That trust can be facilitated by readily providing requested information, unless the information is clearly protected by law or is otherwise confidential in nature.

Perhaps, the focus is misplaced in arguing that absolute trust in one's government is the real goal or necessity. Equally arguable is that a certain level of distrust in one's government, or at least the ability to question your government's actions, is a better attribute, if not the true necessity.

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Important Cases *(Continued from page 4)*

and that his brother and sister had also died from heart related problems. The employee refused the advice of his orthopedic surgeon to seek an evaluation by a cardiologist. He looked tired for six months prior to his death and complained of chest pain. On the date of his death, he felt uncomfortable in his chest area, the back of his head and both arms. His wife indicated that the employee had prayed aloud for the Lord to give him strength and wisdom to survive. The Court held that there was no showing that the heart attack was work related and upheld a denial of worker compensation benefits.

Adopted vs Natural

Any case that generates over 40 head notes at least deserves a comment. This case is *Commerce Bank, N. A. vs. Blasdel, 141 SW 3rd 434 (Mo.App. W.D., en banc 2004)* and involves a dispute between adopted children and natural born children over the distribution of money from three trusts. Commerce Bank filed a declaratory judgment action and both the natural and adopted children filed claims against each other for tortious interference with their inheritance expectancy. The trust provided that after the death of all the named beneficiaries, the corpus would be distributed in equal shares per stirpes to the living lineal descendants of Bendena and Mathilde. The Court upheld Missouri law by finding that the adopted children were entitled to an inheritance from the adopted parents as if they were natural born children. Since this was a declaratory judgment action to construe the trust, the rules which required that the distributee or potential distributees

file a will contest or action for discovery of assets in the probate court did not apply. This tortious interference case is based upon § 774b of the Restatement of Torts 2nd which indicates that liability is limited to cases in which the actor interfered with the inheritance or gift by means that are independently tortious in character.

Premises Liability

Another interesting case on premises liability is *Dick vs. Children's Mercy Hospital, 140 SW 3rd 131, (Mo. App. 2004)*. Janet Dick was taking her son for tests at Children's Mercy Hospital. While walking in the hospital's parking garage, she broke her left foot when she stepped on an unmarked column base. She developed Reflex Sympathetic Dystrophy and incurred over one million dollars in medical expenses. The jury returned a verdict for the Defendant based on the Defendant's argument that it was not aware of the condition of the column base that had been in use for three years with no complaints. When the city inspector issued the Certificate of Occupancy for the garage, he did not note this as a defect. The trial court granted the Plaintiff's motion for a new trial and the appellate court reversed holding that the trial court abused its discretion. At trial, Children's Mercy Hospital admitted that the city building code required that the base of the column be painted bright yellow and that this was not done. Plaintiff, however, did not plead a theory of negligence per se and as a result, the verdict could not be against the weight of the evidence based on a theory that was not pled.

No matter which side of the debate you favor, all can agree that open government is an important element of our democratic republic. Distrust of a powerful government that hinders individual and collective rights delayed the formation of our federal government. At that time, those involved in the debate knew full well what a government lacking in direct accountability could do in trampling state and individual rights. Many, if not most of the people debating the formation of the United States had a well-founded fear of a lack of accountability. Accountability can exist only in an environment where those governed know what those governing are doing. Absent this knowledge, there can be no accountability to the voters.

In what seems a weekly ritual, there is another newspaper article discussing a governmental body being challenged under the Missouri Sunshine Act, found at §610.010 RSMo, et seq. Usually, the issue is highlighted by some press-related organization. Sometimes the organization or person seeking the information has requested an opinion from the Attorney General and legislators routinely propose amending the current law. On occasion, a governmental entity is found to have violated the Act in a lawsuit or admits to the violation in return for ending the lawsuit. When the challenge is over, it is not uncommon for a court or prosecutor to find that confusion over the statute was the reason for noncompliance, not a willful or knowing intent to violate the Act. Considering the relatively minor monetary consequences of violating the Act (unless there are significant attorney fees awarded after completion of the challenge), it is possible that intentional violations of the Act do occur. Despite the recent amendment increasing the monetary penalty and adding the “knowing violations” category, in rare cases are the penalties so stiff that the monetary consequences of the lawsuit alone causes the governmental body to consider the consequences of its actions so severe that such a mistake will never happen again.

I don't believe governmental entities intentionally violate the law in this area. Impacts on budgets, be they large or small, is not the only, or perhaps even the greater of the consequences that hurt the offender. Public opinion and bad press are more likely to be bigger incentives to follow the law. Whether you agree or disagree that the Act is clear and contains sufficient deterring penalties, what is clear is that many legislators, past legislators, media-types, governmental entity employees and members of the general public believe that the Act needs further amendment.

People have different ideas on how to amend the Act. There appear to be two prevalent criticisms of the Act. First, the Act treats meetings and records in nearly the same way. This approach creates confusion for the public and interpretation problems for a governmental entity.

It might make more sense to redraft the Act to deal with meetings and records under separate procedures or sections.

Second, some people argue that the penalty portions of the Act are not sufficient to deter violation of the Act. Again, I doubt that many governmental bodies chose to willingly violate the Act because no governmental body wants to be seen as flaunting the law. Nevertheless, any amendment to the Act should treat these two issues as a priority.

Government as Steward

Governmental entities that face significant litigation have a justified concern over the release of some information. Information seemingly available under the Sunshine Act might not be discoverable in a lawsuit due to the nature and scope of the request. For example, discovery in litigation is generally held within a somewhat narrow scope, bounded by the concept of relevance and tempered by the burdensomeness of the request. Conversely, a similar request under the Sunshine Act has no such limitations. Of course, the governmental entity can estimate the cost of providing access to certain documents and, if the requester cannot afford the cost, the request can go unfulfilled. Recent revisions to the Act limiting what can be charged for copies and the time it takes to search for and assemble the documents certainly makes a request for documents more affordable for the requester. Making record searches and obtaining copies of documents less costly may be a good thing for the requester, but for the governmental body, countless hours of staff time can be spent responding to these requests. Staff time costs money and the expenditure of staff time and money on Sunshine Act requests can impact the governmental body's ability to accomplish its mission.

There should be a point at which the governmental entity should not be expected to spend its resources to respond to a burdensome Sunshine request. In other words, shouldn't the costs of record production be borne in large part by the requestor? Such a system would ensure that burdensome and overbroad requests get funded by the entity requesting the extensive information, rather than by taxpayers in general. We want our governmental entities to be good stewards of its limited public funds, and if the mission is bigger than the checkbook, it doesn't make sense to spend those limited funds on responding to burdensome personal requests of the public and media. Nevertheless, is it a valid justification to deny the requester information just because he or she cannot afford to have the governmental entity compile the information? Just as there should be a balance in all things, there has to be a balance in the open records process.

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Tough Issues – Easy Analysis

Once the debate over the inherent strengths and weaknesses of the Act is concluded, the parties in a lawsuit face a fairly simple review of the language of the Act.

In general, openness and access is presumed for all documents unless a specific exemption to providing the documents is contained in the Act itself. To be exempt from public release, a document must either fall within the list of excluded documents in the Act, or some other law must direct that the document not be available. If there is no exemption, the document is subject to disclosure.

The Act's failure to distinguish between records and meetings further complicates this analysis. If the request is for documents, then the analysis is usually fairly straightforward.

If the issue involves meetings, then there are any number of twists and turns to which the Act can be put. I recently read an opinion interpreting, for the "umpteenth time," whether or not some subgroup of a governmental entity should be subject to the Act and therefore required to post advance notice and conduct an "open" public meeting. Of course, the subgroup was subject to the Act, as most of the subgroups ahead of it had been. In this case, however, the courts did not address this specific subgroup, so the dance goes on. As in the case of records, the analysis of the courts has been fairly straightforward in applying the Act to meetings. In most instances, subgroups of governmental entities have been subjected to the rules regarding public meetings and the advance posting of agendas for those meetings. So again, the analysis is fairly easy.

Traps and Roadblocks

It is predictable that governmental entities will want to discuss certain items in private before a public decision is made. That desire, and perhaps legitimate need, arises in most, if not all, governmental bodies. The question is asked, "do we have to open the meeting." The answer is, "yes, unless the topic of the meeting allows it to be closed." Governmental entities, and/or subgroups thereof, are allowed to close meetings for the statutorily enumerated reasons. Those reasons are fairly self-explanatory. One reason, however, may not be as self-explanatory as the others.

In 1998, the General Assembly amended §610.010 RSMo, by adding subsection (6), designating that "public record" shall not include, "any internal memorandum or letter received or prepared for or behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, unless such records

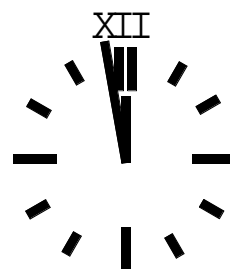
are retained by the public governmental body or presented at a public meeting." When subsection (6) is read with §610.021, which allows meetings to be closed when they relate to "...(14) [r]ecords which are protected from disclosure by law...", then it appears that the purpose of the amendment was to allow governmental entities to meet as a body and receive and discuss information for the purposes of deliberating on what to do. Presumably, the ability to meet and discuss things in private allows those participating to debate and question information with more openness than in a public setting. This openness allows for better decision-making in the representation of the public. Closing the meeting for deliberations, however, shrouds the decision-making behind a curtain of exclusion. Perhaps the topic discussed merits such an exclusion, but it is arguable that the exclusion creates at least as much attention as the topic itself generates. In an attempt to legislate a difficult area, the General Assembly left potentially confusing language in the Act, relating to the words, "retained" and "presented". These two words will certainly be the genesis of future litigation.

Open government, like all relationships, takes work. The desire to fully and openly discuss topics in a private meeting should be tempered by the cost to the entity in excluding non-members and potentially creating an atmosphere of distrust. The Act should not be an impediment to open and full discussion of a topic not enumerated as an exception to open meetings. Open government requires that issues be discussed "in the open", which for the most part governmental entities agree.

We're Marking Time Until ...

The Second Annual
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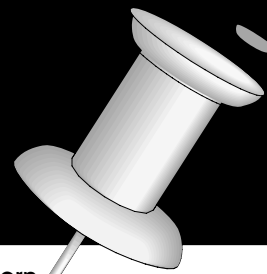


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Amicus Report

Western District Declines To Address Issue Of Whether Evidence That Plaintiff's Medical Bills Were Satisfied By Less Than Amount Charged Is Admissible In A Civil Action

By Robyn Greifzu Fox; Moser and Marsalek; St. Louis, MO



In *Sammy Kay Porter v. Toys-R-Us, Delaware, Inc.*, 2004 WL 2157438 (Mo. App. W.D. September 28, 2004), the Western District declined to address the issue of whether the trial court erred in excluding evidence that the plaintiff's medical bills were satisfied by less than the amount charged. The question of whether the Missouri Supreme Court's holding in *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. banc 2003), applies to civil cases remains unanswered.

In *Farmer-Cummings*, the claimant appealed from an order of the Labor and Industrial Relations Commission awarding claimant compensation for past medical expenses actually paid by third party insurers but disallowing recovery for fees adjusted from the original bills based on an agreement between the insurer and the health care provider. The Supreme Court held that the claimant was not entitled to compensation for medical expenses for which she had no liability due to write-offs and fee adjustments. The Supreme Court explained:

. . . [T]he aim of Missouri's workers' compensation law is to remedy the losses incurred by an employee as a result of a compensable injury. [Citation omitted.] To award Ms. Farmer-Cummings compensation for medical expenses for which she had no liability would result in a windfall rather than compensation.

The Supreme Court remanded the case to the Commission for further evidence to determine whether claimant was liable for the fees that were written off as a fee adjustment. The claimant's recovery would only be reduced by the amount of the write-off or fee adjustment if the claimant was no longer liable for these amounts. In other words, the claimant could only recover the amount that was actually paid for the medical services and not seek recovery for amounts for which the claimant was not liable because they had been written off or adjusted downward due to an agreement between the employer's insurer and the healthcare provider.

The issue of whether this limitation also applies to civil actions arose in *Sammy Kay Porter v. Toys-R-Us, Delaware, Inc.* Sammy Porter was a customer in the Toys-R-Us in Columbia, Missouri. As she walked through the stroller aisle, a stroller fell off the display shelf and struck her. Ms. Porter sued Toys-R-Us under a negligence theory, claiming a Toys-R-Us employee dislodged the stroller while adjusting a car seat on the shelf behind the stroller and also claiming improper stacking of merchandise. The jury returned a verdict in Ms. Porter's favor on the stacking count and awarded her \$300,000.00 in damages.

Following oral argument, the Western District requested that the parties file supplemental briefs on the issue of whether or not the Supreme Court's holding in *Farmer-Cummings v. Personnel Pool of Platte County* should be extended to civil cases. MODL provided the Court with an *amicus* brief on this issue. MATA also filed an *amicus* brief.

MODL's *amicus* brief was prepared by Clark Cole of Armstrong Teasdale LLP. In the brief, it is suggested that a plaintiff should be precluded from submitting artificially inflated medical expense figures that neither the plaintiff nor any collateral source incurred or paid; and, if a plaintiff does submit such inflated expense figures, the collateral source rule should be no bar to a defendant's introduction of all available evidence to challenge these figures. The brief explains:

Compensation for tort injuries is based upon the premise that a tort victim "is not entitled to more than he or she has lost." *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 395 (Mo. banc 1986). Compensatory damages are intended to redress the actual loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. *State Farm Mut. Auto. Ins. Co. v. Campbell* 123 S.Ct. 1513 (2003). "While entitled to be made whole by one compensatory damage award, a party may not receive the windfall of a double recovery." *R.J.S. Sec., Inc. v. Command Sec. Services, Inc.*, 101 S.W.3d 1, 17 (Mo. App. W.D. 2003). Double recovery constitutes unjust enrichment. *Id.* An award of damages that includes compensation for expenses that were actually avoided creates a windfall or double recovery. *Forney v. Missouri Bridge and Concrete, Inc.*, 112 S.W.3d 471, 475 (Mo. App. W.D. 2003). When possible, the courts can, and should prevent double recovery. *Equal Opportunity Employment Commission v. Waffle House*, 122 S.Ct. 754, 766 (2002). If a plaintiff is allowed a windfall, or compensation for more than the loss they realized, that compensation "violates the common law of Missouri." *Nesselrode*, 707 S.W.2d at 395.

The Western District ultimately declined to address the issue in *Porter v. Toys-R-Us*. The Western District explained, ". . . the posture of this particular case does not allow us to isolate and decide the pinpoint issue framed by the Court in *Farmer-Cummings*." *Porter supra* at 8.

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Loss of Chance Re-Visited

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Nearly thirteen years have passed since the Missouri Supreme Court first recognized a cause of action for lost chance of recovery in *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo. 1992). Since 1992, courts and litigants have had occasion to confront a number of issues raised by this judicially created cause of action. Although the Missouri Supreme Court has further defined a cause of action for loss of chance primarily by means of jury instructions,² other Missouri Appellate Courts have addressed a number of issues over the years,³ and the Missouri Legislature has likewise addressed who may assert this type of claim.⁴ Even though the Appellate Courts have addressed and provided answers to several of these issues, many issues remain.

Within the past few months, two appellate decisions have addressed loss of chance claims: *LaRose v. Washington University*, 2004 Mo. App. LEXIS 1705 (E.D. November 9, 2004) and *Downey v. University Internists of St. Louis, Inc.*, 2004 Mo. App. LEXIS 1558 (E.D. October 26, 2004). *LaRose*, addressed questions of the submissibility of a loss of chance claim based on the testimony of plaintiff's experts and the proper method to determine the percentage of a lost chance of survival. *Downey* dealt with whether a verdict that finds a plaintiff lost a 5% chance of survival but awards no damages is inconsistent and merits a new trial. This article will discuss these two most recent loss of chance

decisions and how they better define this type of action. To provide context for these latest decisions, a brief overview will be provided of the *Wollen* opinion and earlier post-*Wollen* appellate decisions that have delineated the nature and scope of a cause of action for loss of chance in Missouri. Further, this article will offer the author's analysis and observations concerning several aspects of the rationalization of the scope and applicability of this particular cause of action.

I. *WOLLEN v. DEPAUL HEALTH CENTER*

In *Wollen*, the Missouri Supreme Court first recognized a cause of action for lost chance of recovery in medical malpractice cases.⁵ *Wollen*, 828 S.W.2d at 685. The legal issue in *Wollen* was whether a plaintiff widow of a cancer victim sufficiently pled causation to state a claim for wrongful death where her petition alleged that had her decedent been properly diagnosed with cancer as of a certain date, he would have had a 30% chance of survival and cure. *Id.* at 682.

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The Court further noted that defense counsel in *Porter* did not have the benefit of the *Farmer-Cummings'* decision and its reasoning during the trial of the *Porter* case. Therefore, the record was not fully developed on this issue.

Until there is a resolution to the issue of whether the holding in *Farmer-Cummings* applies to civil cases, it may be beneficial to develop this issue through discovery and at trial. For example, in civil actions involving claims of personal injury, documents that indicate the amounts of any write-offs or fee adjustments to medical bills could be compiled through discovery. In addition, evidence that establishes the plaintiff is not liable for these write-off and adjustment amounts could be obtained for use at trial. Stipulations by the parties may also be used to establish the relevant amounts. In addition, motions in limine may be utilized to prevent evidence of medical expenses that have been written-off or adjusted and for which the plaintiff is no longer liable. If evidence of medical expenses that includes amounts that were written-off and/or adjustments is permitted, an offer of proof to establish the amounts of these write-offs and adjustments should be considered.

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² See Missouri Approved Jury Instructions (MAI) [2002] Sections 21.08 through 21.15, 36.24 through 36.27.

³ See Section II below for a brief summary of other loss of chance decisions.

⁴ See §537.021(1) RSMo. (2000), amended in 1993 to authorize court appointment of a plaintiff ad litem to pursue loss of chance of recovery or survival action either as the sole theory of recovery or as an alternative to a wrongful death claim.

⁵ The court in *Wollen* expressly stated that the loss of chance cause of action was limited to medical malpractice claims. *Id.* at 685. The Eastern District Court of Appeals has declined to extend the loss of chance action to an inmate's federal civil rights action under 42 U.S.C. § 1983 where no medical malpractice was asserted. See *In re Kemp v. Balboa*, 959 S.W.2d 116, 119 (1997).

The Missouri Supreme Court held that the trial court properly dismissed the plaintiff's cause of action for wrongful death because this allegation failed to allege facts to show that the defendants' alleged negligence caused the decedent's death. *Id.* at 683. The Court, however, remanded the case with instructions to the trial court to permit plaintiff to amend her petition to plead a cause of action under the survivorship statute⁶ as personal representative of the decedent's estate for the purpose of pursuing a loss of chance of survival claim. *Id.* at 686.

In upholding the trial court's dismissal for failure to state a claim upon which relief could be granted for wrongful death, the Missouri Supreme Court noted that the wrongful death statute⁷ requires that the decedent's death "result[] from" the negligence of the tortfeasors. *Wollen, supra*. The issue in a failure to diagnose case is whether and to what extent a court or jury can permissibly infer that the death results from negligence. Where ultimate facts are alleged with reasonable medical certainty that had the correct diagnosis been timely made, "there is a cure that works in the overwhelming majority of cases," a wrongful death claim is stated. *Id.* at 682. Only where death from a disease caught at a particular stage "is rare unless either the doctor or the patient is negligent at some stage of the treatment process" does a plaintiff have the ability to prove that "but for" negligence, death would not have resulted. *Id.* On the other hand, if the facts pled only establish that the decedent had a statistical chance of survival and cure that was lost due to alleged negligence, then a wrongful death claim is not stated and only a survival action for loss of chance of recovery is allowed as a matter of law. *Id.* at 686.

Thus, in those cases where a patient has a disease or condition which is amenable to treatment that can cure or increase the chance of survival in a large number of cases but for which there is a "real chance" treatment may fail, even if the disease or condition is timely diagnosed, "it is impossible for a medical expert to state with 'reasonable medical certainty' the effect of the failure to diagnose on a specific patient." *Id.* at 682.

Under such facts and evidence, all that can be said is that negligence on the part of the defendant might have contributed to the death of the decedent and such facts fail to establish that the defendant's negligence was a substantial factor in causing the death of the decedent. *Id.* The Missouri Supreme Court expressly declined to adopt the causation theory that a wrongful death claim is stated where the plaintiff merely alleges that the defendant's negligence was a "substantial factor" that contributed to the death. *Id.* at 683.⁸

II. OVERVIEW OF POST-WOLLEN APPELLATE DECISIONS ADDRESSING LOSS OF CHANCE

Since *Wollen*, Missouri appellate courts have addressed the loss of chance theory of recovery in several reported decisions. One of the first cases addressing this type of action was *State of Missouri ex rel. Tang v. Steelman*, 897 S.W.2d 202 (Mo.App. S.D. 1995). In this case, the Southern District Court of Appeals addressed the issue of standing, or legal capacity, for a loss of chance action. The court held that a decedent's daughter in her individual capacity lacked standing to sue for lost chance of recovery.⁹ *Id.* at 203. In a footnote, the court declined to address whether plaintiff was barred by the two-year statute of limitations of §516.105, RSMo. (1986) for medical malpractice claims not involving death, from amending her petition to substitute herself as plaintiff in her representative capacity.

Later in 1995 after the *Steelman* decision, the Western District Court of Appeals affirmed a trial court's judgment on the pleadings in a case brought by the surviving parents of an AIDS¹⁰ patient who attempted to assert both a wrongful death and loss of chance of survival claim. *Morton v. Mutchnick*, 904 S.W.2d 14,16-17 (Mo.App.1995). With respect to the loss of chance claim, the majority held that because the decedent had a disease for which there was no known cure and for which medical treatment could only have extended the decedent's life for a short time, the trial court properly granted defendant's judgment on the pleadings. *Id.* at 18.

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⁶ §537.020, RSMo. (2000).

⁷ §§537.080 *et seq.*, RSMo. (2000).

⁸ Less than two years later, the Missouri Supreme Court reiterated that the *Wollen* decision made it clear that the "but for" causation test continues to apply to the vast majority of cases in Missouri, with the only exception being those "two fire" cases involving two independent torts, either of which is sufficient in and of itself to cause the injury. *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 862-63 (Mo. 2003); **Also see** *Harvey v. Washington*, 93 S.W.3d 93, 96 (Mo. 2003) (holding "but for" causation established in a case involving two independent, sufficient causes of death).

⁹ Although the plaintiff was the personal representative of the decedent's estate, she never sought timely leave to amend to recite this fact, nor did she seek leave to have herself appointed as plaintiff *ad litem*. Because plaintiff as an individual was legally a separate person from plaintiff as a personal representative, she lacked standing to bring a loss of chance claim. *State of Missouri ex rel. Tang v. Steelman*, 897 S.W.2d at 203.

¹⁰ Acquired Immune Deficiency Syndrome.

The majority observed that, under *Wollen*, a loss of chance claim is available only for that class of cases in which the chance of recovery is sizable enough to be material. *Id.*¹¹

In 1996, the Southern District Court of Appeals held that a plaintiff properly pled a claim for negligence not resulting in death in a failure to diagnose case. *Glidewell v. S.C. Management, Inc. d/b/a Twin Rivers Regional Medical Center*, 923 S.W.2d 940, 948.¹² Because the plaintiff pled that had the physician properly diagnosed his rectal cancer, he had a “great chance of surgical cure and survival,” he pled sufficient facts to establish “but for” causation under *Wollen* and stated a proper claim for negligence upon which relief could be granted. In other words, plaintiff sufficiently pled that there was a “reasonable medical or scientific certainty” that the physician’s negligence caused the harm. *Id.*

The statute of limitations for a loss of chance claim was directly addressed in 1996 by the Eastern District Court of Appeals in *Smith v. Tang*, 926 S.W.2d 716.¹³ In a majority opinion, the court held that the trial court properly dismissed plaintiff’s action under the two-year statute of limitations in §516.015, RSMo. (1986), because such action was not commenced within two years of the date of the alleged negligence. *Id.* at 719. Further, the savings statute¹⁴ did not prevent the limitations bar where the original action was filed by the plaintiff in her individual capacity rather than in her representative capacity. *Id.* Likewise, because plaintiff as personal representative is a completely different person than plaintiff individually as an alleged wrongful death survivor, the re-filed action does not relate back to the date of filing of the original action under Missouri Rule of Civil Procedure 55.33(c), even if the re-filed action somehow constituted an amendment to the earlier filing. *Id.*

The early post-*Wollen* decisions discussed above primarily addressed issues of pleading, standing, and limitations. Beginning in 1997 with the Eastern District Court of Appeals decision in *Baker v. Guzon*, 950 S.W.2d 635, the appellate courts have begun to focus more on the submissibility of wrongful death and loss of chance claims. In *Baker* a wrongful death verdict in plaintiff’s favor was upheld on appeal in a failure to diagnose infection case. *Id.* at 647. Plaintiff had three experts who proffered causation testimony. One expert testified that, with proper care, the decedent had a 70% chance of survival and the decedent, more likely than not, would have been in the group of patients with such chance of survival. A second expert for plaintiff believed the decedent lost an 80% chance of survival because of the defendant’s negligence and, more likely than not, would have been in the surviving group. *Id.* at 638-39. The Appellate Court found such testimony to be “equivocal” and insufficient under *Wollen* to make a submissible case of causation to support a wrongful death action. *Id.* at 644. A third expert for plaintiff, however, did not opine on direct examination as to any statistics on survival or non-survival. Rather, this expert responded, “Yes” to the question of whether the defendant’s actions “more probably than not . . . did” cause the death of plaintiff’s decedent. *Id.* at 643. The court held that using the words “more probably than not” and “did” in the same sentence was sufficient to establish “but for” causation and make a submissible case of wrongful death even though such expert conceded on cross-examination that the decedent had a 25% chance of dying even with proper treatment. *Id.* at 647.

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¹¹ The court acknowledged but declined to address defendants’ assertion that the loss of chance claim was barred because not brought within two years of the date of death. *Id.* at 17.

The court noted in a footnote that loss of chance actions could involve loss of limb and did not address whether the important date for limitations purposes for loss of chance claims involving a death was the date of the alleged negligence as opposed to the date of death. *Id.*, n.1. The majority also held that a claim for wrongful death was not stated because plaintiffs could not plead nor prove that, based on reasonable medical certainty, plaintiffs’ decedent’s death resulted from defendants’ failure to diagnose the decedent’s pre-existing AIDS. *Id.* at 16-17 (citing *Wollen*).

¹² In *Glidewell*, the plaintiff patient successfully sued the defendant hospital for negligence on the basis of vicarious liability for a physician’s negligent failure to diagnose colorectal cancer. On appeal, the hospital asserted failure to state a claim upon which relief could be granted. The hospital argued that the plaintiff could not state a loss of chance of

recovery claim while he was still alive (*Glidewell* died during the pendency of the appeal and his daughter, as personal representative was substituted as respondent). Because plaintiff abandoned his loss of chance theory during the pre-trial conference and because his petition failed to assert a claim other than loss of chance, the hospital argued that the trial court erred in failing to dismiss plaintiff’s pleadings. The Appellate Court found that the plaintiff sufficiently pled a negligence claim and declined to address the issue of whether the death of the patient is a required element of a loss of chance of survival claim. *Id.* at 947-48.

¹³ The plaintiff in this case was the same daughter of the decedent in the *Steelman* case from the Southern District Court of Appeals discussed above. In the instant case, plaintiff appealed the trial court’s dismissal of her loss of chance claim on limitations grounds after she re-filed an action in a different Circuit Court in her capacity as personal representative of the deceased patient.

¹⁴ §516.230, RSMo. (1986).

The Western District Court of Appeals held that a plaintiff sufficiently established “but for” causation to support a claim of negligence where the plaintiff’s expert testified that he had “no doubt whatsoever” that a particular medical condition existed at the time of defendant’s negligence and was “ninety-eight percent certain” that the patient’s injury was caused by such medical condition. *Wright v. Barr*, 62 S.W.3d 509, 525 (2001). The court rejected the defendant’s contention on appeal that plaintiff should have been limited to a loss of chance of recovery action under *Wollen*, noting that because there was no claim of failure to diagnose, a “lost chance of recovery” theory is simply not applicable to this case.” *Id.*

Although neither a loss of chance nor a wrongful death case, the Western District Court of Appeals similarly addressed the submissibility of a medical malpractice action in light of expert opinion testimony regarding causation. *Davolt v. Highland*, 119 S.W.3d 118, 124-27 (2003). In *Davolt*, the plaintiff alleged the defendant doctor negligently performed a spinal decompression surgery. *Id.* at 123. Plaintiff’s expert testified that had the surgery been performed as required by the standard of care, plaintiff would have had “better than 90 percent” chance of a good or excellent result. *Id.* at 126. He also testified that, within a reasonable degree of medical certainty, plaintiff’s symptoms were caused by the “incomplete decompression.” Citing *Baker*, the Western District found that the defendant was not entitled to either a directed verdict or a JNOV because such expert testimony sufficiently established “but for” causation to support a submissible case of medical malpractice. *Id.* at 127.¹⁵

III. RECENT APPELLATE DECISIONS DISCUSSING LOSS OF CHANCE

In two recent decisions, the Eastern District Court of Appeals has addressed loss of chance issues. See *LaRose v. Washington University*, 2004 Mo. App. LEXIS 1705 (E.D. November 9, 2004) and *Downey v. University Internists of St. Louis, Inc.*, 2004 Mo. App. LEXIS 1558 (E.D. October 26, 2004). The *LaRose* decision involves submissibility issues and the method of calculating the percentage of lost chance of survival. *Downey*, on the other hand, addresses whether a verdict finding that a plaintiff lost a 5% chance of survival, but awards no damages, is inconsistent and merits new trial.

A. *LaRose v. Washington University*

The *LaRose* case is noteworthy for several reasons.¹⁶ *LaRose*, 2004 Mo. App. LEXIS 1705. The plaintiffs were Richard LaRose as personal representative of the Estate of Gail LaRose¹⁷, and Richard LaRose individually. At the time of the appeal, Mr. LaRose’s claim on behalf of the estate was for his wife’s loss of chance of survival and was based on the assertion that defendants failed to timely diagnose Gail LaRose’s ovarian cancer. Mr. LaRose also brought a loss of consortium claim on his own behalf. The jury found in plaintiffs favor on both claims, awarding damages and determining that plaintiffs’ decedent lost a 57% chance of survival. The trial court then reduced the amount of both verdicts by the percentage for loss of chance¹⁸ as well as by the percentage of fault assessed to a settling co-defendant.

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¹⁵ One of the more surprising statements within the court’s opinion was the court’s observation that *Wollen* has “been subsequently questioned or overruled on other grounds not relevant to this opinion.” *Davolt*, 119 S.W.3d at 126, n.7. This assertion is not accompanied by any citation to case or other authority. This statement may prove prophetic and perhaps implies disagreement with *Wollen*’s proportional reduction of plaintiff’s damages in those cases where plaintiff’s evidence of the percentage chance of recovery or survival exceeds 50%. Also see Section III below for a discussion of the apparent erosion of the scope of the loss of chance cause of action.

¹⁶ This case discusses the court’s reduction of a verdict in plaintiffs’ favor under circumstances that included a verdict for the personal representative on a loss of chance claim, a verdict for the surviving spouse on a loss of consortium claim, reduction of the verdicts for each plaintiff by applying the percentage chance of survival found by the jury, reduction of the future damages portion of the verdict for the personal representative because of the cap on non-economic

damages, and a further reduction of the verdicts by the percentage of fault attributed to a settling defendant. *LaRose*, 2004 Mo. App. LEXIS 1705 (E.D. November 9, 2004). This opinion also found that a separate non-economic damages cap under §538.210 applies to the consortium claim, citing *Wright v. Barr*, 62 S.W.3d 509 (Mo.App. E.D. 2001). The court additionally held that the wife’s loss of ability to perform household services is a proper element of future economic damages rather than future non-economic damages subject to the statutory cap.

¹⁷ Presumably, Gail LaRose was alive at the time of trial because the opinion speaks of her testimony at trial and her percentage chance of five-year survival as of the time of trial. Apparently, she died during the pendency of the appeal and her surviving husband as personal representative of her estate was substituted as respondent for the appeal.

¹⁸ See MAI 36.25 [2002] for a form of verdict for a lost chance of survival claim. This form no doubt was modified to assess fault to the settling co-defendant rather than the decedent.

On appeal, the non-settling defendant, Washington University, sought JNOV on several grounds. One basis for challenging the verdict was the defendant's assertion that plaintiffs' expert testimony on causation was insufficient to make a submissible case. Plaintiffs' expert testified that decedent's ovarian cancer was present and diagnosable at the time of the alleged negligence.¹⁹ The expert further testified that, more likely than not, the bone scan abnormality was due to an ovarian tumor and that if an ultrasound had then been performed, the ovarian mass would have been detected and the decedent's ovarian cancer diagnosed and treated. Had the ovarian cancer been diagnosed in June 2000, plaintiffs' oncology expert testified that the decedent would have had a 60% chance of living five years. The Eastern District held that this testimony was sufficient causation evidence to make a submissible case.

Washington University also argued on appeal that the verdict was excessive because the evidence did not support the decedent having a 57% chance of survival. Defendant asserted on appeal that the loss of chance must be calculated by determining the chance of survival at the time plaintiff alleges the cancer should have been diagnosed less the chance of survival at the time the disease actually was diagnosed. Plaintiff's oncology expert testified that at the time the ovarian cancer was diagnosed in 2001, Gail LaRose had a 60% chance of surviving five years. At the time of trial, Gail LaRose had suffered a recurrence of the cancer and her chance of five-year survival was three to five percent.

The appellate court expressly rejected defendant's argument that the loss of chance is calculated as the difference between the percentage chance of survival when diagnosis should have been made and the percentage at the time such diagnosis was made. Rather, the court held that the proper percentage is the difference between the percentage chance of survival when diagnosis should have been made and the percentage chance of survival at the time of trial.

B. *Downey v. University Internists of St. Louis, Inc.*

In *Downey*, the Eastern District Court of Appeals awarded plaintiff a new trial where the jury found for the plaintiff on her loss of chance claim and determined that the decedent lost a 5% chance of survival, but awarded no monetary damages. *Downey v. University Internists of St. Louis, Inc.*, 2004 Mo. App. LEXIS 1558 (E.D. October 26, 2004). The appellate court held that the verdict was inconsistent in that the jury found that the decedent lost a material chance of survival due to defendants' negligence but awarded no damages. The court observed that the harm suffered by the decedent was the loss of the chance of recovery and that an award of damages logically must follow from a finding of liability to compensate for such harm suffered. By awarding no damages, the jury valued the decedent's life at nothing. In ordering a new trial, the Eastern District noted "Missouri appellate courts have generally treated a verdict that finds a defendant negligent but awards no damages as inconsistent and invalid."

In this case, plaintiff Betty Downey pled both wrongful death and loss of chance claims, but apparently elected to submit on her loss of chance claim.²⁰ Plaintiff alleged negligence on the basis of failure to diagnose her deceased husband's lung cancer from the chest x-rays taken in December 1996. With respect to causation, plaintiff's experts testified that had the lung cancer been diagnosed in December 1996, Mr. Downey would have had a 50% to 70% chance of survival. When his cancer was diagnosed in November 1998, Mr. Downey only had a 1% chance of survival and, in fact, died before trial.²¹ The jury initially returned a verdict finding in plaintiff's favor but determined that the decedent lost no percentage chance of survival.

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¹⁹ The alleged negligence was failure in June 2000 to follow up an abnormal bone scan with an ultrasound.

²⁰ The verdict director submitted was MAI 21.08 as modified by MAI 19.01 applicable to multiple causes for loss of chance of survival. The Committee Comment (2002 Revision) to MAI 21.08 discusses §537.021, RSMo. (2000), noting that the proceeds of a loss of chance action are for the benefit of the applicable class of wrongful death survivors and that this theory may be maintained "as an alternative theory in a wrongful death case." Because wrongful death and loss of chance claims are "mutually antagonistic" (See *Wollen*, 828

S.W.2d at 685), a plaintiff asserting both claims must elect one theory of recovery based on the evidence submitted to the jury.

²¹ As discussed above, the *LaRose* opinion (handed down about three weeks later) stated that the proper comparison for determining the lost percentage chance of survival is the difference between the chance of survival at the time the diagnosis allegedly should have been made and the chance of survival at the time of trial. Under this view, Mr. Downey's chance of survival at the time of trial was known to be zero since he died of lung cancer before trial.

The trial court refused to accept this verdict, finding it inconsistent. The jury then returned a verdict finding the percentage chance of survival lost to be 5% but awarding no damages.²²

On appeal, the defendants found liable asserted that the verdict was permissible on two grounds: 1) the verdict was consistent because a finding of damage was not required nor is damage an essential element in a loss of chance claim in that the word “damages” does not appear in the loss of chance verdict director;²³ and 2) the jury could have determined that no chance of survival was lost because the decedent died or would have died from a number of other serious diseases and medical conditions. The Eastern District rejected both arguments finding the first argument “unpersuasive” because the last finding required on the verdict director (i.e., “Fourth, such negligence directly caused or contributed to cause Patrick Downey to lose all or a material part of such chance of survival.”), “does constitute a finding of damages.” The second argument was rejected because the evidence showed Mr. Downey died of cancer rather than the other comorbidities.²⁴

IV. ANALYSIS AND DISCUSSION

Since *Wollen* was decided in 1992, lower appellate courts have been defining the scope and applicability of this doctrine. As discussed in Sections II and III above, among other things these courts have addressed, standing to sue, statute of limitations, sufficiency of facts pled to state a claim, and sufficiency of causation evidence.

Many questions remain concerning the scope and applicability of a claim for lost chance of survival.²⁵ To date, this cause of action has not been extended by Missouri courts beyond medical malpractice cases. In fact, the Western District has expressly held that this cause of action is inapplicable in those medical malpractice actions not involving a theory of failure to diagnose a disease or condition. *Wright v. Barr*, 62 S.W.3d 509, 525 (Mo.App. 2001); See also *In re Kemp v. Balboa*, 959 S.W.2d 116, 119 {Mo.App., E.D. 1997} refusing to extend the loss of chance doctrine to a prisoner civil rights claim not asserting medical malpractice). But at least one appellate decision permitted a patient to bring a loss of chance of survival claim before death. *LaRose, supra*. In *Glidewell*, 923 S.W.2d at 948, the Southern District Court of Appeals recognized but declined to decide this same issue.²⁶ There is also authority that hindsight is used to measure the percentage chance of survival lost by alleged negligence. *LaRose, supra*. (the percentage chance of survival lost is measured by the difference in the percentage chance of survival at the time of the alleged negligence as compared to the percentage chance of survival at the time of trial). Finally, although some courts and commentators suggest that full recovery of damages be permitted in those cases where the percentage loss of chance is more than 50% but less than 100%,²⁷ *Wollen* and later decisions support reducing damages by the percentage chance of recovery lost even in those cases where there is evidence of greater than a 50% chance of

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²² The opinion does not disclose which verdict form was used, although MAI 36.24 [1995 Revision] likely was used. This form first requires the jury to enter a finding in favor of either the plaintiff or the defendant and then instructs the jury to find damages, if any, by category and specifically permits the jury to find “none” if the jury does not find damages in a particular category. The jury is then instructed to find the percentage chance of survival lost due to the defendant’s negligence.

²³ MAI 21.08 [1995 Revision].

²⁴ The court noted that there was no evidence that these other diseases and conditions necessarily would have caused death, no evidence of the extent to which any of these diseases and conditions would have shortened Mr. Downey’s life expectancy, and no evidence he died or would have died from these conditions in August 1999 when he expired. The appellate court noted that if these conditions shortened his life expectancy, they might operate to reduce his damages but would not eliminate them entirely.

²⁵ One source for a discussion of some of these open issues is Restatement of the Law, Third, Torts: Liability for Physical Harm (Basic Principles)(Tentative Draft No. 2, March 25, 2002) Section 26, Comment n. For those interested in a more detailed, theoretical discussion of the loss of chance doctrine and the

potential scope of its applicability, Professor David A. Fischer from the University of Missouri-Columbia Law School, has published a very informative law review article. See *Tort Recovery For Loss of Chance*, 36 Wake Forest L. Rev. 605 (2001).

²⁶ In the *LaRose* case, the patient arguably suffered harm from the loss of chance of survival in that, at the time of trial, the patient’s cancer had recurred. It is not clear whether a cause of action would be recognized for a loss of chance of recovery in the absence of evidence of harm. In other words, it is an open question whether Missouri courts would permit a plaintiff/patient to seek damages under a loss of chance of recovery theory under circumstances where the alleged negligence reduced the chance of survival yet it remained uncertain whether the plaintiff/patient’s disease or condition would recur and harm would result. The damages instruction for loss of chance of survival in MAI 21.09 [1996 Revision] contemplates that the patient has died.

²⁷ See Restatement of the Law, Third, Torts: Liability for Physical Harm (Basic Principles)(Tentative Draft No. 2, March 25, 2002) Section 26, Comment n.

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survival in the absence of negligence. *Wollen*, 828 S.W.2d at 686; *LaRose*, 2004 Mo. App. LEXIS 1705 (E.D. November 9, 2004) (plaintiff's evidence of 57% chance of survival); *Downey*, 2004 Mo. App. LEXIS 1558 (E.D. October 26, 2004) (evidence of 50-75% chance of survival).

A. Narrowed Scope of Loss of Chance Cause of Action

One issue raised by the post-*Wollen* lower court decisions is whether the scope envisioned by the Missouri Supreme Court for applicability of the loss of chance doctrine has been substantially narrowed by permitting wrongful death claims where there remains a statistically significant chance of death. The *Wollen* decision clearly states that the loss of chance cause of action, and the resulting percentage reduction in a plaintiff's damages, applied in all medical malpractice, failure to diagnose cases unless there was either: 1) proof within reasonable medical certainty that had a timely diagnosis been made "there is a cure in the works in the overwhelming majority of cases;" or 2) the "disease is fatal except for a small number of spontaneous remissions or cures." *Wollen*, 828 S.W.2d 681, 682. The Court explained that so long as there is a significant chance of either survival or death, the statistics cannot tell whether the decedent would have survived if properly diagnosed. *Id.* at 685. The Court noted that "statistical evidence – **without more** – does not give the jury a basis to believe that the decedent belongs to either the group that lives or the group that dies." *Id.* Further, "regardless of whether the lost chance of survival is greater than or less than 50%, it is impossible to prove that the decedent's death resulted from the failure to diagnose and treat." *Id.* Thus, even where the evidence involves expert opinion testimony that, with timely diagnosis and treatment, the decedent had a 70% chance of survival, a wrongful death claim cannot be maintained and the only viable theory of recovery is for loss of chance of survival. *Id.* at 686.

The Eastern District Court of Appeals declined to apply *Wollen* in a case where plaintiff's expert opined that the decedent more likely than not would have survived death, even where such expert conceded that the decedent had a statistical chance of dying even with timely diagnosis and treatment. *Baker v. Guzon*, 950 S.W.2d 635 (1997). In *Baker*, the court held that plaintiff made a submissible wrongful death case where one of plaintiff's three experts on direct examination opined that the alleged negligence "more probably than not . . . did" cause the death of plaintiff's decedent. *Id.* This same expert conceded on cross-examination that the decedent had a 25% chance of dying even with proper diagnosis and treatment. *Id.*

The appellate court held that expert opinion on direct examination that the negligence "more probably than not" did cause the decedent's death was sufficient to establish "but for" causation to make a submissible case for wrongful death.²⁸ *Id.*

Does the *Baker* decision represent a substantial narrowing of the applicability of the loss of chance cause of action as defined by the Missouri Supreme Court in *Wollen* or is it a logical extension of that doctrine? The argument that *Baker* represents a narrowing of the scope of the doctrine is that the Missouri Supreme Court expressly sanctioned application of the doctrine to those cases where there is a "real chance" that treatment may fail even if the disease or condition is timely diagnosed. *Wollen*, 828 S.W.2d at 682. The Court's observation that a wrongful death claim was appropriate in a failure to diagnose case only where death from a disease caught at a particular stage is "rare unless either the doctor or the patient is negligent" further illustrates that the Court envisioned that a plaintiff's recovery would be proportional in the majority of the failure to diagnose cases. *Id.* If Betty Baker had as much as a 25% chance of dying with timely diagnosis, it would be a speculative leap of faith for any expert to opine that, more likely than not, she would have lived.

The counter-argument, accepted by the appellate court in *Baker* is that in *Wollen*, the Missouri Supreme Court expressly recognized that the loss of chance cause of action was applicable only where "statistical evidence – without more – does not give a jury a basis to believe that the decedent belongs either to the group that lives, or the group that dies." *Id.* at 686. In *Baker*, the something "more" was the expert's opinion that the decedent, more likely than not, did die as a result of negligence. *Id.* at 647. Thus, the expert opinion that, more likely than not, the delay in diagnosis caused the death, is a sufficient basis for the jury to find "but for" causation. Under the applicable standard of review, to determine whether a submissible case of "but for" causation is made, the court considers only the evidence in the light most favorable to plaintiffs, giving them all reasonable inferences. *Id.* at 641. Because plaintiffs' expert opined that, more likely than not, this decedent would have survived, there was sufficient testimony to establish the causal link between the alleged negligence and the death.

Given the fact that the makeup of the current Missouri Supreme Court is completely different than the Court that decided *Wollen* in 1992, the relevant question is not so

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²⁸ The Eastern District Court of Appeals relied on its pre-*Wollen* decision in *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App.1986), in finding that the concession of plaintiff's expert on cross-examination that the decedent had a 25% chance of dying

even with proper care merely clarified that the expert's opinion was based on "reasonable" rather than "absolute" medical certainty.

much whether *Baker* is consistent with *Wollen*, but whether the current Missouri Supreme Court would arrive at a similar result. For a number of reasons, an outcome similar to *Baker* seems probable when and if the current Missouri Supreme Court addresses this issue. For example, most jurisdictions that recognize a loss of chance cause of action apparently apply it to reduce damages proportionally only where the evidence is that the percentage chance of survival or recovery lost is less than 50%.²⁹ Both the Missouri Legislature, through amendment of §537.021, and the Missouri Supreme Court by virtue of jury instructions,³⁰ mandate that the damages awarded in loss of chance of survival cases are for the benefit of those members of the class of wrongful death survivors and are the same categories of damages as provided for in a wrongful death, medical malpractice claim. It would not be surprising if the Missouri Supreme Court were to modify *Wollen* by deciding that plaintiffs should not be required to take a proportional reduction of damages in those cases where death, more likely than not, could have been avoided under even statistical evidence. Such an approach seems less of a strain than would be involved in trying to distinguish *Wollen* by characterizing statistical opinion testimony as merely showing that the opinion was based on “reasonable” rather than “absolute” certainty.³¹

Assuming that trial and appellate courts adhere to the reasoning in *Baker*, one would expect that under most circumstances, it would be more advantageous to plaintiffs to seek full recovery of damages through a wrongful death theory rather than proportional damages under a loss of chance theory.³² For that reason, one can expect in many cases for a plaintiff’s expert’s causation testimony to mirror the testimony sanctioned in *Baker* even though such expert may concede that the decedent had a statistically significant chance of dying from the disease even with timely diagnosis and treatment.³³

Given the standard of review on appeal,³⁴ a more viable means of opposing a wrongful death claim in this type of fact pattern, perhaps would be to challenge the admissibility of the expert’s opinion on foundational grounds. In other words, one would object on foundational grounds to the admissibility of testimony that the particular decedent would “more likely than not” have been in the group of patients that would have survived the disease with earlier diagnosis. The argument would be that neither the expert’s personal experience nor his or her knowledge, skill, education or training provides a reliable basis for this opinion as to a particular decedent. This foundational inquiry is inherently disease-specific. For some diseases, there are medical studies which demonstrate that certain categories of patients have statistically better outcomes than others based on factors such as age, sex, co-morbidities, risk factors, etc. For other diseases, there are not. Given the relatively low standard for the admissibility of expert opinion in Missouri,³⁵ the circumstances where this type of opinion can be excluded on foundational grounds appear slim. Further, at least one Appellate Court has held recently that an attack on the foundation for such opinion is waived if not made at the time of deposition.³⁶

V. CONCLUSION

Since adoption of loss of chance as a theory of recovery by the Missouri Supreme Court in 1992, lower Appellate Courts have further defined the scope and applicability of this cause of action. Although courts have provided guidance on some issues, many questions remain unanswered. Despite language in *Wollen* that calls for broad application of the doctrine in medical malpractice failure to diagnose cases, Missouri courts may permit wrongful death claims even where there is expert opinion testimony that the decedent had a statistically significant chance of dying with timely diagnosis and treatment.

²⁹ See Restatement of the Law, Third, Torts: Liability for Physical Harm (Basic Principles)(Tentative Draft No. 2, March 25, 2002) Section 26, Comment n.

³⁰ See, e.g., MAI 21.09 and 36.24.

³¹ *Baker v. Guzon*, 950 S.W.2d at 647.

³² The most recent loss of chance decisions in *LaRose* and *Downey*, however, apparently involved plaintiffs’ elections to submit loss of chance claims with proportional recovery even though plaintiffs adduced expert opinion testimony that the percentage chance of recovery lost was greater than 50%. One explanation, perhaps, was that plaintiffs’ experts in those cases were unwilling to opine that the decedent, more likely than not, would have survived “but for” the alleged delay in

diagnosis and treatment. In other words, these experts were unable to supply the jury with the something “more” in terms of the decedent being in the group that would have survived the disease as required by *Wollen*.

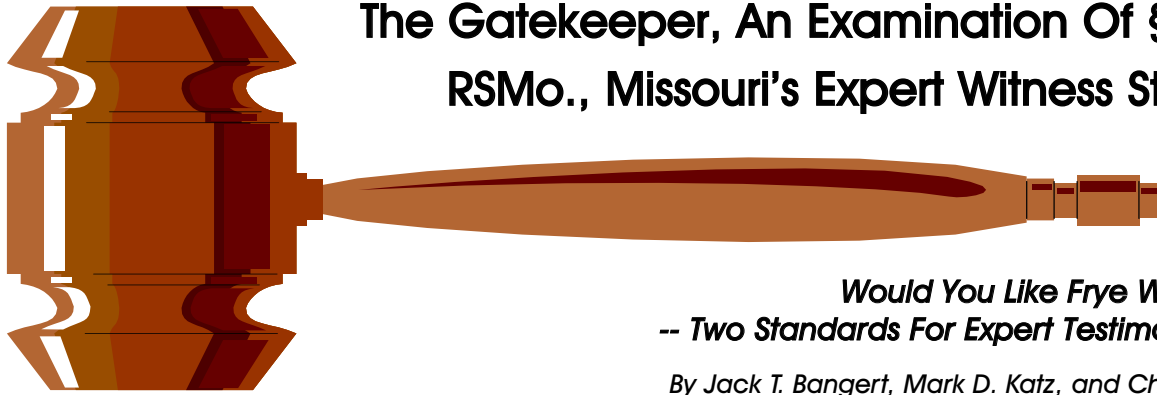
³³ This has happened to the author of this article twice with wrongful death cases tried to a jury verdict and on multiple occasions in cases that remain pending, have settled, or ultimately were dismissed.

³⁴ *Harvey v. Washington*, 93 S.W.3d 93, 96 (Mo. 2003); *Baker v. Guzon*, 950 S.W.2d at 641.

³⁵ See, e.g., §490.065, RSMo. (2000); *Brooks v. SSM Healthcare*, 73 S.W.3d 686, 693-96 (Mo.App. S.D. 2002).

³⁶ *Brooks v. SSM Healthcare*, 73 S.W.3d at 693-96.

A Judge's And Practitioner's Guide To The Role Of The Gatekeeper, An Examination Of § 490.065 RSMo., Missouri's Expert Witness Statute



Would You Like Frye With That Statute? -- Two Standards For Expert Testimony In Missouri --

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INTRODUCTION

"Out of clutter find simplicity."

- Albert Einstein

In the wake of the *Daubert*¹ decision, clutter might seem a generous description of Missouri decisions on the admissibility of expert opinion testimony. Fueled by the multiplicity of arguments advanced by litigants, Missouri courts were pulled by *Frye*², on the one hand and *Daubert* on the other, on occasions, even announcing their decisions under *both* standards. See e.g. *Whitman's Candies, Inc. v. Pet, Inc.*³ Out of this clutter, the Missouri Supreme Court has stated that simplicity may be found in the form of a Missouri statute, §490.065 RSMo. The explicit instruction, at least in civil cases, is: "Read the statute;" and implicitly, for now at least, *Frye* remains the standard in criminal cases.

The statute, §490.065 RSMo., appears to be reasonably straightforward:

§490.065. Expert witness, opinion testimony admissible - hypothetical question not required, when

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and 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.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

FROM FRYE TO McDONAGH IN CIVIL CASES

Historically, prior to the enactment of the statute, Missouri practitioners were guided by the federal ruling of *Frye v. United States*, 54 U.S. App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). The *Frye* test, as it is commonly known and adopted in Missouri and in other jurisdictions was based on the following passage:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1019. This 'general acceptance' test was adopted by the Missouri Supreme Court for the admissibility of expert testimony regarding new scientific techniques **in both civil and criminal cases**. See e.g. *Alsbach v. Bader*, 700 S.W.2d 823, 828 (Mo. 1985); See also *State v. Stout*, 478 S.W.2d 368, 371 (Mo. 1972). The Court modified the rule in *State v. Biddle*, 599 S.W. 182, 191 (Mo. 1980), adding that "wide scientific approval" of the reliability of the scientific method employed is required for the admission of expert testimony.

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¹ 509 U.S. 579 (1993).

² 54 U.S. App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

³ 974 S.W.2d 519 (Mo. Ct. App. W.D. 1998)

In 1993, the United States Supreme Court handed down *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); a sea-change in how federal courts handled opinion testimony under the federal rules of evidence, and the ripples were felt in Missouri jurisprudence. In *Daubert*, the Court ruled, “the *Frye* test was displaced” by the Federal Rules of Evidence and “should not be applied in federal trials.” *Id.* at 589.

The Court ruled that FRE 702 provided a more flexible framework and assigns to the federal trial judge “the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based upon scientifically valid principles will satisfy those demands.” *Id.* at 597. The “general acceptance” test is not a necessary precondition for admissibility under the Federal Rules. *Id.* The *Daubert* court suggested a non-exclusive list of suggested measures the courts can employ in their role of gatekeeper in determining whether to admit expert testimony, for example: 1) whether the theory or technique can be tested; 2) whether the theory or technique has been subjected to peer review; 3) the known or potential rate of error; and 4) general acceptance. *Id.* at 593-595.

In this context, Missouri courts have been challenged to define a consistent standard for the admission of expert testimony in civil actions. This is certainly understandable in light of the formal adoption by the Missouri Supreme Court of the *Frye* test, which was then abrogated (at least under the Federal Rules) by the U.S. Supreme Court in *Daubert*. Although §490.065 RSMo. explicitly states it applies to civil actions, the three appellate districts in the Missouri have each rendered separate opinions that have left Missouri attorneys without a clear picture of whether the Missouri statute, *Frye*, or *Daubert*, provides the guidance for the admissibility of expert testimony. In addition, there was no clear pronouncement from the Missouri Supreme Court as to whether or how the Statute supplanted the *Frye* test. But see *Lasky v. Union Electric Co.*, 936 S.W.2d 797, 801 (Mo. 1997), wherein the Court simply states without additional comment, “on remand the trial court shall be guided by section 490.065, RSMo, in evaluating the admission of expert testimony.”

The Missouri Supreme Court attempted to quell the confusion recently in *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003). In *McDonagh*, the Court considered an appeal by the Board of the Administrative Hearing Commission’s finding of no cause to discipline Dr. McDonagh’s medical license. The issue in the case centered around the standard for admissibility regarding expert testimony on a particular, and not widely utilized, type of treatment for vascular disease, known as chelation therapy. The Board argued that the proper test to use for determining admissibility of expert testimony was the *Frye* general acceptance test.

Dr. McDonagh argued that the *Daubert* ruling made *Frye* irrelevant and that the court should use the *Daubert* analysis or the guide set forth in §490.065.

The Court began by discussing the “confusion” and inconsistent rulings among the district courts of appeal since the adoption of §490.065 and the application of the *Frye* and *Daubert* tests in the face of the Court’s decision in *Lasky, supra*. See *McDonagh*, at 153, n.9. The Court then held:

To clarify, however, this Court expressly holds that to the extent that cases since *Lasky* have suggested that the standard of admissibility of expert testimony in *civil* cases is that set forth in *Frye* or some other standard, they are no longer to be followed. The relevant standard is that set out in section 490.065.

Id. at 153 (emphasis added). The Court discussed the similarities and differences between the language of §490.065 and the Federal Rules as analyzed in *Daubert*, as they appear to be identical in most respects. However, the Court noted the important and determinative differences that should guide Missouri trial courts and practitioners:

But, section 490.065.3 goes on to require that the facts or data on 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 that these facts and data “must be otherwise reasonably reliable.” Sec. 490.065.3. Thus, *section 490.065.3 expressly requires a showing that the facts and data are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert’s testimony.* The court must also independently assess their reliability. *Id.*

Id. at 156 (emphasis in original). The *McDonagh* Court went on to clarify that under the Missouri statute, “[t]he relevant field must be determined not by the approach a particular doctor chooses to take, but by the standards in the field in which the doctor has chosen to practice.” *Id.*

To those who might see the Court’s approach as a restatement of the *Frye* test, the Court gave the following caution:

By so stating, this Court is not in effect readopting the *Frye* standard under another name. Nothing in section 490.065 suggests that the conclusions reached in reliance on these facts and data must be in conformity with the general medical consensus or must be generally accepted. As under *Daubert* and cases applying it, such acceptance is but one factor of the relevant inquiry.

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Section 490.065.3 simply requires the court to consider whether the facts and data used by the expert are of a type reasonably relied on by experts in that field or if the methodology is otherwise reasonably reliable. If not, then the testimony does not meet the statutory standard and is inadmissible.

Id. at 157. Hence, the “general acceptance” standard has become merely a factor to be considered by the trial court. Likewise, the non-exclusive factors of *Daubert* are not required to be considered by the court in determining whether to accept expert testimony in civil cases but may be used as a tool to help the trial judge in determining whether such testimony is *reliable* and *will assist the trier of fact*. *Id.*; but, see *Goddard v. State*, 144 S.W.3d 848 (Mo. Ct. App. S.D., 2004).

Clearly the Missouri Supreme Court wanted to eliminate strict reliance on the federal decisions and rules as they had been previously applied and used by the courts in Missouri. Justice Stith, in her concurrence, gave succinct advice to Missouri practitioners regarding expert witnesses under the Court’s ruling in *McDonagh*:

Forget *Frye*. Forget *Daubert*. Read the statute. Section 490.065 is written, conveniently, in English. It has 204 words. Those straightforward statutory words are all you really need to know about the admissibility of expert testimony in civil proceedings. Section 490.065 allows expert opinion testimony where “scientific, technical or other specialized knowledge will assist the trier of fact...”

Why would an 80-year-old federal court of appeals case trump a Missouri statute directly on point? . . .

. . . why would a Missouri statute directly on point be disregarded in favor of a United States Supreme Court decision on the Federal Rules of Evidence, which have not been adopted in Missouri?

McDonagh, at 161 (Stith, J., concurring in part and dissenting in part).

FRYE IS STILL ALIVE IN CRIMINAL CASES

As stated above and as explicitly discussed in *McDonagh*, §490.065 RSMo. only applies to civil cases. The Southern District Court of Appeals recently pointed out in *State v. Keightley*, 147 S.W.3d 179, n. 7 (Mo. Ct. App. S.D. 2004), “We are cognizant of our supreme court’s holding in *State Bd. Of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2004), stating that Section 490.065, and not *Frye*, is the applicable standard for determining the admissibility of expert testimony in civil cases. This does not, however, affect the applicability of *Frye* to criminal cases.”

The *Keightley* court then held:

Missouri courts follow the *Frye* standard in determining the admissibility of scientific evidence in criminal cases. *State v. Ralph Davis*, 814 S.W.2d 593, 600 (Mo. banc 1991). Under that standard, scientific evidence may be admitted only if the procedure is “sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Id.* (quoting *Frye* at 1014). The failure to hold a *Frye* hearing does not require reversal unless the evidence was improperly admitted because there was insufficient evidence to prove that the scientific evidence had gained general acceptance in the scientific community. *State v. Salmon*, 89 S.W.3d 540, 544 (Mo.App. W.D. 2002).

Id. The authors of this article have found no pronouncement from the Missouri Supreme Court adopting a new rule other than the *Frye* test for determining the admissibility of expert testimony in criminal cases. Therefore, the *Frye* test of “general acceptance” modified by the “wide scientific approval” standard should continue to guide criminal law practitioners in Missouri.

At least, for the time being, Missouri has two standards for the admission of expert opinion testimony. In civil cases, the courts and litigants should look to the Missouri statute, by way of *McDonagh*, for guidance on experts. In criminal cases, the *Frye* test appears to be unchallenged by statute or decision and is the law of the land in Missouri.

SOME PRACTICAL POINTERS

The Supreme Court’s admonition to “read the statute” should be the primary guide in resolving questions about expert witness testimony. The Court has suggested that *Daubert* and other federal cases may offer some guidance, but the statute is preeminent. Below are some questions attorneys should be prepared to answer and some statements they should be prepared to live by.

Section 1 of the statute suggests the following questions:

1. Does the proposed testimony
 - a. provide scientific, technical or other specialized knowledge?
 - b. that will assist the trier of fact?
 - c. in understanding the evidence or determining a fact in issue?
2. Is the witness qualified by knowledge, skill, experience, training or education?

Section 2 clarifies that an expert witness may testify to the ultimate issue to be determined by the trier of fact.

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Expert Witness *(Continued from page 19)*

Section 3 provides the standard by which the facts and data relied upon by the expert are to be judged. See, *Goddard*, 144 S.W.3d at 455.

1. Are the facts and data upon which an expert bases his or her opinion or inference
 - a. made known to the witness at or before the hearing?
 - b. of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject?
 - c. otherwise reasonably reliable?

Arguably, the question of “junk science” should be resolved in section 1 of the statute. See e.g., *Goddard v. State*, 144 S.W.3d 848, 855 (Mo. Ct. App. E.D., 2004) (“[W]hen a litigant wishes to challenge the underlying scientific principles of an expert’s opinion, i.e., his or her ‘scientific knowledge,’ section 490.065.1 is the applicable standard.”) However, the authors believe that the touchstone of the statute lies in section 3’s last two prongs set forth above, and that these principles should guide Missouri judges and practitioners in arguing and determining the admissibility of novel scientific or technical theories.

It is the authors’ further opinion that the statute, as evidenced by its seemingly definitive language (“must be otherwise reasonably reliable”), instructs the jurists of this state to use their instincts grounded in logic as a sort of discretionary smell-test. If the proposed expert’s testimony is not grounded in provable and reliable facts, it should not be admitted. Likewise, as all evidence should, the proposed testimony must be grounded in basic logic. Of course, as indicated by the Missouri Supreme Court in *McDonagh*, the factors of both *Daubert* and *Frye* are perhaps helpful in assisting the trial judge in making this

discretionary decision but are not binding, unless the matter is criminal where *Frye* remains the guiding principle.

The Supreme Court has interpreted the language of Section 3 on only two occasions. In *McDonagh*, the court focused on “the relevant field,” as being determined – in the medical context – by the field in which the physician witness has chosen to practice. *McDonagh*, 123 S.W.3d at 156. In *McGuire v. Seltsam*, 138 S.W.3d 718 (Mo. banc 2004), the Court found that the expert *assumed* facts, without having been provided evidence confirming the existence of the facts. In deposition, the expert admitted that her normal practice would be to establish the facts through actual evidence rather than by assumption. Accordingly, the court deemed the opinion inadmissible. *Id.* at 721-22.

Finally, and almost as a side note, section 4 of the statute dispenses with the need to use a hypothetical question to establish an expert’s opinion – unless the trial judge sees fit to require a hypothetical question.

CONCLUSION

In conclusion, it seems likely that sections 1 and 3 of the statute will be the focus of considerable attention in the coming years. While the Missouri Supreme Court has announced that the principles of *Daubert* are not binding, they may be used by courts as factors in determining whether the proposed opinion testimony is reasonably reliable and helpful to the trier of fact. However, at least in the context of civil proceedings, without any more specific, alternative and competing means to analyze opinion testimony, it is the authors’ opinion that *Daubert* may become the exclusive standard by default. See e.g., *Goddard*, *supra*.



Ink It In!
March 31 - April 1

Mark your calendars now for the Second Annual Associated Industries of Missouri (AIM) Human Resources Conference, once again co-sponsored by the Missouri Organization of Defense Lawyers. This year’s conference, to be held March 31-April 1 at the Holiday Inn Executive Center in Columbia, Missouri, promises something for everyone involved in Human Resources and Employment and/or Benefits Law.

Sessions for this year’s conference include strategies with respect to workers’ compensation, drug testing and unemployment issues, as well as how to handle issues involving whistleblowers (including tips on compliance with Sarbanes Oxley provisions). Attendees will hear from Plaintiff’s counsel Mary Ann Sedey on “Why Plaintiff’s Lawyers Take an Employment Case,” and will learn how electronic discovery issues impact employment cases. Other topics include health savings accounts and the new wage and hour regulations.

A highlight of this year’s conference will be the luncheon keynote address by Supreme Court Justice Mary Rhodes Russell on Thursday and the always popular Panel of Legislators to be held Friday morning.

Mark your calendars now for this instructive conference. Even better, drop a note to your clients and friends in the HR world who might benefit from this program. Of course, there will be plenty of time for networking and exchanging ideas, as well. See you this spring in Columbia!