the Firm Inquiry

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Inside this issue…

Editors:
Russell F. Watters
Michael Ward

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Don James Receives the Missouri Organization of Defense Lawyers' Highest Award

The Missouri Organization of Defense Lawyers awarded **Donald L. James**, of counsel and founding shareholder of Brown & James, P.C., the Ben Ely, Jr. Award, on June 4, 2011. The Missouri Organization of Defense Lawyers presents the Ben Ely Award on an annual basis to honor those lawyers who have demonstrated the highest moral, ethical, and professional standards in the practice of law and who have made outstanding contributions to both the legal profession and to MODL.

The Ben Ely Award is the highest honor that a defense lawyer may be given in Missouri. Brown & James is extremely proud of Don James and the honor that he has received. He is a true giant in Missouri's legal community and an inspiration to all of the lawyers at Brown & James who have been privileged to work with him over his long career.

Robinson v. Hooker: The Phoenix Rises on Co-Employee Liability

Elaine M. Moss

INTRODUCTION

The Missouri Court of Appeals, in *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010), opened the floodgates to civil claims against co-employees for which the injured employee's exclusive remedy previously would have been limited in Missouri to the remedies afforded by the Missouri Workers' Compensation Law. Co-employee liability – once long eliminated from the fabric of Missouri law by the advent of workers' compensation in the early Twentieth Century – has been restored by the court in *Robinson*. The court so held based on its reading of the Missouri General Assembly's 2005 workers' compensation reforms and its conclusion that these reforms eliminated co-employee immunity under the Missouri Workers' Compensation Law. Thus, under *Robinson*, co-employees are no longer entitled to invoke their employer's immunity and are not barred from suing their fellow workers in tort for workplace injuries. Before the *Robinson* decision, exceptions to statutory immunity under the Missouri Workers' Compensation Law were limited to the "something more" doctrine, a doctrine that was limited to supervisors and which did not apply to co-employees generally.

A discussion of Missouri law governing co-employee liability, including the original limitations on this form of liability, the exclusive remedy afforded by workers' compensation, the return of civil claims for co-employee liability, and insurance coverage for these claims, follows.

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UIM "Escape Hatch" Clauses are Enforceable in Illinois: Illinois Supreme Court Upholds an Insurer's Right to Reject A UIM Arbitration Award and Demand a Trial

Gregory Odom II

The Illinois Supreme Court recently resolved a split among Illinois courts on the issue of whether an insurer can include an "escape hatch" clause in an underinsured motorist policy. An "escape hatch" clause provides that a UIM arbitration award is binding so long as it does not exceed a certain, designated amount. If the arbitration award exceeds that amount, either party has the right to reject the award and proceed to trial. For example, a UIM "escape hatch" clause may provide that arbitration is binding only if the arbitration award does not exceed $20,000.00 (the minimum limit for bodily injury liability in Illinois). Either party may reject the arbitration award if the award exceeds $20,000.00 and demand a trial.

Initially, Illinois courts declined to enforce the "escape hatch" clause in the context of UIM coverage. For example, the Second District of the Appellate Court of Illinois ruled the "escape hatch" clause violated Illinois public policy by unfairly benefiting insurers. *Fireman's Fund Ins. Cos. v. Bugailiskis*, 278 Ill.App.3d 19 (2d Dist. 1996). Specifically, that court concluded the "escape hatch" clause improperly allowed an insurer to reject an arbitration award when it was required to pay any amount. *Id*. at 24. According to the Second District, a UIM carrier would only be obligated to pay benefits to the insured if the arbitration award exceeded $20,000.00, the minimum bodily injury liability limit in Illinois. If the arbitration award was equal to or less than $20,000.00, the underinsured motorist's liability insurance carrier would be responsible for paying that award because all Illinois drivers must maintain at least $20,000.00 of bodily injury liability insurance. *Id*.

Similarly, the Third District of the Appellate Court of Illinois held that UIM "escape hatch" clauses violate public policy and are unenforceable. *Parker v. American Family Ins. Co*., 315 Ill.App.3d 431 (3rd Dist. 2000). Citing the Second District Court's reasoning in *Bugailiskis*, the Third District concluded that UIM "escape hatch" clauses unfairly favor insurers. *Id*. at 435. Specifically, the Third District noted that an "escape hatch" clause allowed an insurer to reject an exorbitant arbitration award, while an insured could not reject a nominal arbitration award. *Id*.

The Fifth District of the Appellate Court of Illinois upheld a UIM "escape hatch" clause, but, in that case, the insured was attempting to enforce the clause. *Kost v. Farmers Auto. Ins. Ass'n*, 328 Ill.App.3d 649 (5th Dist. 2002). The Fifth District noted that "it is of the highest irony that a provision that our courts have found to be against public policy because of manipulative drafting by insurers should now be claimed by a defendant to be a shield against an insured's suit." *Id*. at 655.

In 2006, however, the First District of the Appellate Court of Illinois upheld a UIM "escape hatch" clause. *Zappia v. St. Paul Fire and Marine Ins. Co*., 364 Ill. App. 3d 883 (1st Dist. 2006). According to that court, Illinois public policy favors arbitration of all sorts, and does not require that the arbitration be binding. *Id*. at 887. Moreover, the First District explained that "escape hatch" clauses do not unfairly favor insurers because both parties to an insurance contract are equally entitled to reject an arbitration award under such a clause. *Id*. at 887-88.

Recently, the Illinois Supreme Court addressed the conflicting appellate court opinions on this issue and held that UIM "escape hatch" clauses are enforceable. *Phoenix Ins. Co. v. Rosen*, No. 110679, 2011 WL 1500013 (Ill. 2011). In that case, the Illinois Supreme Court, relying heavily upon statutory provisions governing *uninsured* motorist coverage, first explained that UIM "escape hatch" clauses do not violate Illinois public policy. *Id*. at *8-*11. According to the Illinois Supreme Court, the Illinois Insurance Code provisions governing UM coverage are "inextricably linked" to UIM coverage, and both types of coverage serve the same purpose of placing the insured in the same position he would have occupied if the tortfeasor had carried adequate insurance. *Id*. at *8, *10. Thus, in reaching its decision, the Illinois Supreme Court examined the public policy considerations governing UM coverage.

Regarding UM coverage, the Illinois Insurance Code actually requires the inclusion of "escape hatch" clauses in UM policies. *Id*. Accordingly, the Illinois Supreme Court observed it would be inconsistent to hold that an "escape hatch" clause violates public policy in one context, when the Illinois

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Todd Lubben and Irene Marusic Honored as Up & Coming Lawyers by Missouri Lawyers Weekly

Missouri Lawyers Weekly annually honors those lawyers forty years or younger who are making outstanding contributions and names for themselves within Missouri's Legal Community. This year *Missouri Lawyers Weekly* has singled out **Irene Marusic** and **Todd Lubben** of Brown & James for recognition as Up & Coming Lawyers in Missouri. Todd and Irene will receive their awards on September 15, 2011, at a dinner reception for *Missouri Lawyers Weekly's* 2010 Up & Coming Lawyers honorees.

Reasonableness – A Defense to Judgments under Section 537.065 Agreements No Longer?

Michael Ward

The Missouri Supreme Court has issued a decision of widespread importance and significance to insurers in Missouri, *Schmitz v. Great American Assur. Co*., 2011 WL 1565447 (Mo. banc, April 26, 2011). Under *Schmitz*, insurers may no longer have a meaningful remedy to challenge the reasonableness of a judgment entered against their insureds as part of a Section 537.065 agreement.

Insurers writing liability coverage in Missouri regularly face the consequences of Section 537.065, R.S.Mo. 2000. Section 537.065 permits one claiming damages for personal injury or death and an insured tortfeasor – in advance of a judgment against the tortfeasor – to limit satisfaction of the claim to specified assets of the tortfeasor as well as the liability insurance policies insuring the tortfeasor against the damages claimed.

A Section 537.065 agreement usually follows the insurer's decision to defend its insured under a reservation of rights. Under Missouri law, a decision to defend under a reservation of rights is deemed to be tantamount to a coverage declination that relieves the insured of its duty of cooperation under the policy. In such cases, the following events follow as a matter of course:

- A demand by the insured's personal counsel to withdraw all coverage defenses.
- The discharge by the insured of the counsel provided by the insurer for the insured's defense under a reservation of rights.
- The entry of a Section 537.065 agreement between the plaintiff and the insured.
- A demand by the plaintiff to settle the case within policy limits.
- If the demand is rejected, the plaintiff then obtains a consent judgment against the insured, the terms of which are usually set forth in the parties' Section 537.065 agreement.
- In many cases, the judgment is for the policy limits, if not greater.
- An equitable garnishment action against the insurer follows, and in the case of an excess judgment, possibly a bad faith claim.

Insurers, in the face of this scenario, have very few defenses available to them. The insurer may advance its coverage defenses. The insurer may also theoretically challenge the Section 537.065 agreement on fraud or collusion grounds. However, no Missouri appellate court has upheld a challenge to a Section 537.065 agreement on these bases, despite evidence of often extremely egregious and collusive conduct by the policyholder and the plaintiff.

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Illinois Supreme Court Holds Attorneys Are Not Entitled under the Common Fund Doctrine to Additional Fees for Collecting Damages for Payment of Medical Provider Liens

Tara Lang Gibbons

On March 24, 2011, the Illinois Supreme Court issued an opinion on consolidated cases involving several Southern Illinois hospitals. The facts of the consolidated cases can be summed up quite easily.

Injured motorists filed suits against other drivers allegedly responsible for the accidents that caused their injuries. The injured motorists were treated at the various hospitals. The hospitals filed liens on all settlement proceeds or verdicts collected by the injured motorists.

After the cases were settled, plaintiffs' attorneys filed petitions to adjudicate the hospitals' liens. They alleged under the "common fund" doctrine that the plaintiffs' counsel were entitled to additional attorney fees equal to one-third of the amount of the hospitals' liens. The circuit court granted the petitions, finding the attorneys were entitled to recover thirty percent of the settlement proceeds, plus one third of the amount of the hospitals' liens. This one-third reduction of the hospitals' liens was meant to reflect the hospitals' share of the legal costs incurred to recover the funds to pay the liens. The hospitals appealed.

The intermediate appellate court affirmed the circuit court's rulings. The appellate court ruled the hospitals directly benefitted from the legal work performed by the injured motorists' attorneys; therefore, the hospitals were responsible for their pro-rata share of the injured motorists' legal expenses

The hospitals filed a petition for leave to appeal, and the Illinois Supreme Court heard the case. The court noted: "The common fund doctrine is an exception to the general American rule that, absent a statutory provision or an agreement between the parties, each party to litigation bears its own attorney fees and may not recover those fees from an adversary." *Wendling v. Southern Illinois Hosp. Serv*., No. 110199, 2011 WL 1085186, at *2 (Ill. Mar. 24, 2011) (citing *Morris B. Chapman & Assoc., Ltd. v. Kitzman*, 193 Ill.2d 560, 572 (2000)). The doctrine provides that a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney fee from the fund as a whole. This rule is based upon the equitable concept that beneficiaries of a fund will be

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Missouri Appellate Court Immunizes Humane Society from Liability for Dog Bites

Scott Morgan

Dog bite incidents constitute one of the most common types of liability claims facing homeowners and their insurers. Recently, in dog bite cases, there has been a trend across the United States to place liability on the conveyors of dogs, and not just the dogs' owners. So far, there are very few reported appellate decisions. This spring the Missouri Court of Appeals had occasion in *Rich v. Humane Society of Missouri d/b/a St. Louis Humane Society*, No. ED95112 (Mo. App. E.D., April 26, 2011), to address the question and declined to extend liability for dog bite claims to conveyors.

In *Rich*, Marissa Miles filed a personal injury action against Linda Rich after Rich's Rottweiler bit Miles. Rich filed a third-party action for contribution against the Missouri Humane Society, which had previously conveyed the Rottweiler to her. Rich, in her third-party petition, alleged the Humane Society was negligent in failing to appropriately screen and test the Rottweiler when it knew of screening procedures and tests that could be used to assist in identifying an animal's tendencies for aggression. Other humane societies and shelters use screening procedures and tests to determine where a dog may be safely placed, whether with a family, an individual without children, or an experienced dog owner. In extreme cases, a dog that proves dangerously aggressive and vicious is euthanized.

Rich also alleged the Humane Society was negligent in advising her that she should keep the Rottweiler after it bit a child before biting Miles and failing to warn her of the dangers of keeping the animal. She pointed to the Humane Society's policy not to place dogs that have previously bitten others because of the likelihood that the dog will bite again. Despite this policy, the Humane Society told Rich to give the dog "more time" and offered to have the Rottweiler enrolled in an obedience class, which Rich did.

Ultimately, as the Humane Society might have predicted, the Rottweiler bit again, striking Miles in the face, injuring the muscle and tissues surrounding her right eye and causing a permanent facial deformity. Rich, in seeking contribution from the Humane Society, claimed the Society's failure to appropriately screen the Rottweiler and honestly advise her of her options and risks after Rich told the organization of the Rottweiler's first bite caused or contributed to cause Miles' injuries.

The trial court dismissed Rich's third-party action for failing to state a claim under Missouri law. Thereafter, Miles settled her claim against Rich who proceeded to appeal the dismissal of her contribution claim against the Humane Society.

The Missouri Court of Appeals affirmed the trial court's dismissal. The court explained that Missouri law did not support a common-law negligence claim against the Humane Society because the Society did not possess, harbor, or control the Rottweiler at the time of the bite.

In short, the court held that liability "will not attach to those who do not have control over the animal in question." The court observed that "the negligent act [for which liability may be assessed] is the failure to use reasonable care in exercising control of the animal." Thus, for the imposition of liability, the court concluded "[t]here must … be some right or obligation to control the activity that presents the danger of injury." Since there was no control or possession, the court held the Humane Society could not be liable as a matter of law.

The court's decision in *Rich* virtually immunizes the Humane Society and other conveyors of dogs who later bite and injure third parties despite their knowledge of the dogs' dangerous propensities from tort liability. Under the court's decision, once a humane society, shelter, or other conveyor of a dog relinquishes control and possession to the dog's new owner, the conveyor is immunized from any potential liability regardless of its actions before the conveyance or the advice given the new owner afterwards.

The court in *Rich* emphasized that the conveyor's foresight that the dog might pose a risk of harm to the public is insufficient to state a claim. The court explained that "foreseeability alone is not enough to establish a duty" on the conveyor's part to prevent harm.

At bottom, liability in dog bite cases in Missouri will turn on possession and control. The court's decision in *Rich* makes plain that conveyors of dogs will have no liability for the injuries caused by the dogs once they are relinquished to their new owners, regardless of the nature and extent of the conveyors' undertakings, whether to test and screen the dogs for dangerous propensities before relinquishment, their post-relinquishment advice to the new owners, or their knowledge of the animals' dangerous propensities.

The long-term impact of the court's decision may be a negative one – one that exposes the public to animals with dangerous propensities. Now that conveyors of animals in Missouri are essentially immunized from liability, they will have no incentive to screen their animals before placing them with the public or take any action to prevent future, foreseeable risks of harm. Rather, once conveyors relinquish control and possession, they cannot be subject to liability for the harm that their animals may cause to the public.

Rich is presently appealing the court's decision to the Missouri Supreme Court.

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Case Results

Matthew Fowler, by and through his Next Friend Katie Fowler v. Arrowhead Sale Facility. Jefferson County, Missouri. The minor plaintiff claimed he sustained a head injury on Defendant's property when he was struck by a cattle gate that he claimed was improperly bolted. Following the accident, Plaintiff received a number of sutures on his forehead and claimed post-concussive headaches. The jury found for Defendant. Tried by Irene Marusic.

Recent Professional Liability Developments

Todd A. Lubben

Missouri Courts recently issued a series of decisions that impact defendants facing professional negligence lawsuits. A summary of these recent cases and an analysis of the impact these cases will have on future professional liability cases follow:

A. Missouri Abolishes the Contributory Negligence Defense

In a prior edition of *The Firm Inquiry*, we analyzed the decision of the Western District of the Missouri Court of Appeals in *Children's Wish Foundation International, Inc. v. Mayer Hoffman McCann, PC*, 2010 WL 1656454 (Mo. App. W.D. April 27, 2010). In that case, the appellate court confirmed that the contributory negligence defense applied in certain professional negligence cases involving only economic damages, *i.e.*, no personal injuries. Under that defense, a plaintiff could not prevail on a negligence claim if the jury found the plaintiff to be partially at fault.

Earlier this year, the Missouri Supreme Court reversed the appellate court's decision in *Children's Wish Foundation* and declared that contributory negligence is no longer available to defendants facing professional negligence claims. Under the Supreme Court's decision, *Children's Wish Foundation International v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648 (Mo. banc 2011), defendants are now limited to asserting a comparative fault instruction that would reduce damages based on the plaintiff's percentage of fault instead of completely negating the plaintiff's claim for damages.

In support of its decision, the Supreme Court explained there was no reason to limit the application of comparative fault to only personal injury cases and to the exclusion of economic loss cases. The Court also noted the prevailing view in other states is to apply comparative fault, and not contributory fault, to negligence actions involving economic loss.

The Supreme Court's decision abolishes what was often an exceptionally potent defense in professional negligence claims. A defendant in such cases will now have to rely on the comparative fault defense to reduce a plaintiff's damages in proportion to the plaintiff's fault. In some cases, a defendant may not want to assert the comparative fault defense because it gives the jury the option to "split the baby" and award some money to a plaintiff. With the abolishment of contributory negligence, defendants in professional negligence cases will now face a higher bar to obtain a complete defense verdict.

B. Plaintiff in Legal Malpractice Cases Must Prove Collectability

In legal malpractice cases, a client often alleges he would have obtained a monetary judgment against a defendant in a prior lawsuit. For instance, a client may allege that his attorney failed to file a lawsuit within the statute of limitations and that the client would have obtained a substantial verdict if that lawsuit had been filed and pursued.

In such cases, Missouri courts have generally discussed the client's burden to show the amounts the client would have received in the underlying case "but for" the attorney's negligence. However, until recently, it was unclear whether the client was required to show that he would have been able to collect on the hypothetical verdict that his attorney failed to obtain.

In *Selimanovic v. Finney*, 2011 WL 329334 (Mo. App. 2011), the Eastern District of the Missouri Court of Appeals addressed this question and held the client must show that he would have been able to collect on the judgment that his attorney failed to obtain. The Court in *Selimanovic* first noted that, in legal malpractice actions, "the measure of damage would be the amount a client would have received 'but for' the attorney's negligence." What "would have been recovered" requires consideration of the amount that should have resulted and how much was collectable.

There are various ways for a client to show that he could have collected on the judgment that his attorney failed to obtain. For instance, in *Selimanovic*, the client sought to show that there would have been an insurance policy that would have covered the client's claim if the attorney had obtained a judgment in the client's favor. A client may also try to establish collectability by showing that the "hypothetical" defendant had various assets or sufficient income to satisfy a judgment.

The collectability requirement will present an additional hurdle for plaintiffs in legal malpractice cases to overcome. Plaintiffs will no doubt try to present various types of evidence to meet their burden and the jury will have yet another factual issue to decide.

C. The Trial Court and Not a Jury in a Legal Malpractice Lawsuit Properly Decides Certain Factual Issues

In many legal malpractice cases, a client accuses his former attorney of acting negligently in the prior lawsuit. For instance, the client may argue that he would have prevailed at trial if his attorney had presented certain evidence or made a certain argument. In those circumstances, the trial court in the legal malpractice case is often faced with a difficult decision: Should the trial court or the jury in the legal malpractice lawsuit determine what would have happened in the prior case if the attorney had acted differently?

The Western District of the Missouri Court of Appeals in the recent legal malpractice case of *Eagle Star Group, Inc. v. David Marcus, Esq. and Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP*, 2010 WL 5070954 (Mo. App. W.D. December 14, 2010), addressed this complex issue. In *Eagle Star*, the client claimed his attorneys could have set aside a default judgment by arguing that the client was not properly served. The Court of Appeals determined that in the legal malpractice lawsuit it was proper for the trial court, and not the jury, to determine what would have happened if the attorney had made that argument.

Eagle Star Group, Inc.'s legal malpractice lawsuit arose from a prior lawsuit in which a tenant had alleged that Eagle Star failed to maintain an apartment where she was injured. When Eagle Star failed to respond to the tenant's lawsuit, the tenant sought and obtained a $369,000 default judgment against Eagle Star.

Eagle Star then hired a law firm to address Eagle Star's legal options with respect to the default judgment. On Eagle Star's behalf, the law firm filed a motion seeking to set aside the default judgment. The trial court denied that motion and the default judgment was upheld.

Eagle Star then filed a legal malpractice lawsuit against the law firm claiming the law firm negligently failed to set aside the default judgment. Specifically, Eagle Star alleged the

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Robinson v. Hooker: The Phoenix Rises on Co-Employee Liability

Elaine M. Moss

THE HISTORICAL BACKGROUND OF WORKERS' COMPENSATION LAWS

Before the advent of workers' compensation laws, an employer was not liable for injuries to an employee caused by the negligent acts of a "fellow servant." *Bender v. Kroger Grocery & Baking Co*., 276 S.W. 405, 406 (Mo. 1925). Missouri courts gradually increased the employer's tort liability for these injuries based on the theory that employers have a non-delegable duty to provide a safe place to work. *Id*. If a co-employee was negligent in performing the employer's non-delegable duty, the employer could be held responsible for the resulting injuries to other employees. *Mitchell v. Polar Wave Ice & Fuel Co*., 227 S.W. 266, 269 (Mo. App. 1921).

In 1926, the Missouri Workers' Compensation Act made the employer responsible for providing benefits to injured employees in exchange for the employer's immunity against tort claims for employee injuries. *Gunnett v. Girardier Bldg. & Realty Co*., 70 S.W.3d 632, 635 n. 2, 635-36 (Mo. App. 2002). Over the years, the Act's specific language was revised to address different situations. The scope of the employer's liability is now codified as follows:

> Chapter 287. Workers' Compensation Law
>
> 287.120. Liability of employer set out—compensation increased or reduced, when—use of alcohol or controlled substances or voluntary recreational activities, injury from—effect on compensation—mental injuries, requirements, firefighter stress not affected
>
> 1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

Missouri courts extended the employer's statutory immunity to co-employees for negligence in performing the employer's non-delegable duty to provide a safe workplace. *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 179 (Mo. App. 1982). In *Badami*, the court justified the extension of the immunity to co-employees by limiting the liability of co-employees to those situations in which the injured worker had demonstrated that the co-employee's actions involved "something more" than a breach of the employer's duty to provide a safe workplace. *Id*. at 180. The "something more" test required proof that a co-employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the fellow employee's risk of injury.

THE 2005 AMENDMENTS TO THE WORKERS' COMPENSATION ACT

Before 2005, Section 287.800 mandated that "[a]ll provisions of [the Workers' Compensation Act] shall be liberally construed with a view to the public welfare." Under this standard, courts broadly interpreted the Act to extend benefits to the largest possible class and resolved any doubts over the right of compensation in favor of the employee. *Schuster v. State Div. of Emp't Sec*., 972 S.W.2d 377, 384 (Mo. App. 1998).

In 2005, the Act was amended to eliminate the requirement of "liberal construction." Section 287.800 now provides:

> Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and *any reviewing courts shall construe the provisions of this chapter strictly*. (Emphasis added.)

This change requires the courts to use "strict construction" principles in applying all provisions of the workers' compensation statute.

"Strict construction" means that a "statute can be given no broader application than is warranted by its plain and unambiguous terms." *Harness v. S. Copyroll, Inc*., 291 S.W.3d 299, 303 (Mo. App. 2009). A court can read nothing into the statute, nor can it attempt to discern any legislative intent in passing on the statute.

It is through the lens of strict construction that the Missouri Court of Appeals in *Robinson v. Hooker*, 323 S.W. 3d 418 (Mo. App. W.D. 2010), reconsidered the extent of the immunity granted by the Workers' Compensation Act and concluded that the immunity must be narrowly construed to extend only to the injured worker's actual employer.

SENATE BILL NO. 8 (2011)

Missouri House of Representative member Barney Frank and Senator Jack Goodman introduced bills designed to protect co-employees during the 2011 legislative session of the Missouri General Assembly. Their bills were reconciled into Senate Bill No. 8, which proposed the following amendment to Section 287.120:

> Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability therefor whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

Unfortunately, for employers, employees, and their insurers, the 2011 session of the Missouri General Assembly concluded on May 14, 2011, without the enactment of this bill. Thus, co-employee liability remains the law of Missouri absent future legislation action or court decisions to the contrary. Employers and their insurers now must be prepared to face claims involving co-employee liability for the foreseeable future in Missouri.

THE EFFECTS OF *ROBINSON V. HOOKER*

On its face, the decision in *Robinson v. Hooker* addressed an employee's right to bring an action against a fellow employee outside the framework of workers' compensation. While the court's opinion presents a precise reading of the Workers' Compensation Law, it results in a series of consequences never intended by the legislature when the workers' compensation reform legislation was passed in 2005.

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Reasonableness – A Defense to Judgments under Section 537.065 Agreements No Longer?

Michael Ward

In addition, the insurer has had the right to challenge the judgment on reasonableness grounds. Although this defense was often a burdensome one for an insurer to advance, the defense did provide insurers a measure of relief against some extremely onerous judgments entered as part of a Section 537.065 agreement.

As a general rule, these judgments exceed those that would have been obtained had the case been litigated on the merits in a true adversarial proceeding. The plaintiff and the insured, as part of a Section 537.065 agreement, often stipulate to extremely large judgment amounts to maximize the interest recovery that will inure to the judgment creditor under the insurer's supplementary payments provisions. These large judgments, which often exceed the policy limits, have also provided the predicate for bad faith claims against insurers in Missouri.

The reasonableness defense – in the absence of any judicially enforced coverage defenses – often provided insurers with their last line of defense against judgments under Section 537.065. The reasonableness defense is derived from the Missouri Supreme Court's decision in *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810, 816 (Mo. banc 1997). The Supreme Court, in *Gulf Ins. Co*., held that reasonableness is essential in determining the enforceability of a Section 537.065 settlement. Under *Gulf Ins. Co*., the test of whether the settlement amount is reasonable is what a reasonably prudent person in the position of the defendant would have settled for on the merits of the plaintiff's claim. This test, as defined by the Supreme Court, required consideration of the facts bearing on the liability and damage aspects of the plaintiff's claim, as well as the risks of going to trial.

The reasonableness defense, initially, was not limited to sums specified in settlement agreements as part of a Section 537.065 agreement. Reasonableness remained a defense in cases in which the trial court had judicially determined the amount of the plaintiff's damages. In *Rinehart v. Anderson*, 985 S.W.2d 363 (Mo. App. W.D. 1998), the insured allowed a default judgment to be taken against him as part of a Section 537.065 settlement. Although the parties did not agree on a specific dollar amount before the default hearing, the reasonableness standard was held appropriate.

The reasonableness defense had also been applied in cases involving consent judgments in which the judgment was entered following an evidentiary hearing. For example, in *Auto-Owners Ins. Co. v. Ennulat*, 231 S.W.3d 297, 301 (Mo. App. E.D. 2007), the Eastern District of the Missouri Court of Appeals upheld the insurer's prosecution of this defense in a wrongful death case in which the trial court had held an evidentiary hearing during which the court had considered testimony under oath and the plaintiffs had introduced evidence of the insureds' negligence as well as calling witnesses on the plaintiffs' damages. Significant to the Eastern District's decision was the fact the plaintiffs and the insureds had agreed to the amount of the plaintiffs' damages to be awarded by the trial court and memorialized their agreement in the proposed judgment that they had presented to the trial court for the judge's signature at the conclusion of the hearing. The Eastern District explained the parties, through their agreement, left no issues in dispute before the trial court; therefore, the judgment entered in the plaintiffs' favor was the result of a settlement, rather than a trial on the merits

In *Ennulat*, the trial court, applying the *Gulf Ins*. reasonableness test, reduced a $10 million judgment to $2.4 million. The Eastern District, in affirming the trial court's judgment, emphasized the relevant factor is the sum that a reasonably prudent defendant in the insureds' position would have agreed upon in settling the claim. The court also recited at length the evidence the insurer had offered on the reasonableness question.

> [The insurer's] experts testified to a number of factors influencing a potential verdict in this case. The experts' potential verdicts ranged from $200,000-$750,000. They considered factors such as: comparative fault; workers' compensation exclusivity; Defendants' likeability; the fact that Defendants were doing Decedent a favor; and the possible inadmissibility of the OSHA report. The trial court then determined that a reasonably prudent defendant in Defendants' position would have settled the claim for $2.4 million. The trial court found that the two biggest factors in Defendants' favor were Decedent's comparative fault -- which the experts placed between 20-60% -- and that Decedent was Defendants' statutory employee and therefore, subject to workers' compensation exclusivity.

Other Missouri courts have also addressed the nature of the evidence that may be admitted on reasonableness. In *Gulf Ins. Co*., the Missouri Supreme Court noted the insurer offered detailed evidence of the settlement negotiations between the parties before the judgment's entry as well as testimony from the insured's defense counsel on his case evaluation. In *Norris v. Nationwide Mut. Ins. Co*., 55 S.W.3d 366, 370 (Mo. App. W.D. 2001), the Missouri Court of Appeals noted the plaintiff, in response to the insurer's reasonableness challenge, offered expert testimony from a personal-injury attorney, who testified the plaintiff's settlement was reasonable, as well as other extrinsic evidence, including a list of similar settlements in Missouri. The court in *Norris* also considered comparative fault. Other courts have recognized that the reasonableness defense contemplates discovery on the question. *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 182 (Mo. App. W.D. 2000).

However, the efficacy of the reasonableness defense may be no more. The Missouri Supreme Court, in its recent decision in *Schmitz v. Great American Assur. Co*., 2011 WL 1565447 (Mo. banc, April 26, 2011), has gutted the defense, holding the defense has no application in cases in which the plaintiff obtains a judgment against the insured, regardless of the nature of proceeding or its contractual predicate under Section 537.065. *See also Fostill Lake Builders, LLC v. Tudor Ins. Co*., 2011 WL 1118670 (Mo. App. W.D., March 29, 2011) ("[T]he judgment is reasonable whenever the court accepting the settlement holds a trial and takes evidence on the issue of damages and there is no evidence of fraud or collusion.").

In *Schmitz*, the plaintiffs, in a wrongful death action for the loss of their daughter in an

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Reasonableness – A Defense to Judgments under Section 537.065 Agreements No Longer?

Michael Ward

accident involving a portable rock climbing wall, obtained a $4,580,076 judgment against a minor league baseball club that had hired a third party to provide a portable rock wall for a pregame promotional event. The parents claimed the club was vicariously liable for the rock-wall operator's negligence, with whom they had previously reached a settlement. After the club's insurer denied coverage, the club and the parents entered into a Section 537.065 agreement. A bench trial followed in which the parents introduced evidence of their damages and the club's liability. The club, during the trial, did not object to the parents' evidence or offer any evidence of its own.

In the following equitable garnishment action brought against the club's insurer by the parents to collect on their judgment, the insurer lost each of its coverage defenses under its policy, including its "amusement device" exclusion based on the Supreme Court's determination that the portable rock climbing wall was not an amusement device. The Supreme Court also deprived the insurer of the right to challenge the judgment on reasonableness grounds. The Court explained that reasonableness is only a defense to Section 537.065 settlements, and not to judgments entered as a result of Section 537.065 agreements.

The Supreme Court was not troubled by the fact that the bench trial lacked any semblance of an adversarial proceeding. The Court held the insurer had no basis to complain because it was given the right to defend its insured, and provide for an adversarial proceeding, but chose not to do so when it denied coverage. The Court further observed that the trial court *could* have decided the damage and liability questions adverse to the parents. Finally, the Court held that a reasonableness challenge had no place in an adjudicated case because its application would violate collateral estoppel principles. Restated, once a trial court determines the insured's liability and the plaintiff's damages, the insurer is estopped from relitigating those questions in a later garnishment action.

The Supreme Court's decision in *Schmitz*, for all practical purposes, signals the death knell for "reasonableness" challenges in Section 537.065 cases. Given the breadth of the Supreme Court's decision, claimants and insureds now have a road map, which if followed, will deprive insurers of the right to challenge the reasonableness of any judgment entered as part of a Section 537.065 settlement. So long as they submit the questions of liability and damages to the trial court for determination, regardless of the absence of a true adversarial proceeding, the resulting judgment will not be susceptible to any meaningful challenge.

The ultimate lesson to be drawn from the *Schmitz* case is for insurers to be extremely wary of Section 537.065 and its consequences in those cases in which they extend a reservation of rights defense to the insured or deny coverage outright. An insurer exercising the right to preserve its coverage defenses must be certain of the enforceability of its defenses. Otherwise, in light of the *Schmitz* decision, insurers may no longer have any other meaningful defense to an equitable garnishment action should they lose on their defenses to coverage.

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Illinois Supreme Court Holds Attorneys Are Not Entitled under the Common Fund Doctrine to Additional Fees for Collecting Damages for Payment of Medical Provider Liens

Tara Lang Gibbons

unjustly enriched by the attorney's services unless they contribute to the costs of the litigation. *Id*. (citing *Baier v. State Farm Ins. Co*., 66 Ill.2d 119, 124 (1977)). The doctrine has been applied in numerous types of civil litigation, including class actions, wrongful death cases, and insurance subrogation claims. However, Illinois courts have *never* applied the "common fund" doctrine to a creditor-debtor relationship.

The issue presented by the *Wendling* decision was not one of first impression in Illinois. The Illinois Supreme Court considered this same issue in 1979, in the case of *Maynard v. Parker*. In that case, and in *Wendling*, the Court pointed out that unlike other "common fund" cases, a hospital's recovery of its charges does not depend upon the creation of the fund. Once the services are rendered by the hospital, the debt comes into existence and the hospital is entitled to payment regardless of whether the injured party seeks recovery from a third party. In *Maynard*, the Supreme Court explicitly held the "common fund" doctrine did not apply to a hospital holding a statutory lien. *Wendling*, 2011 WL 1085186 at *2 (citing *Maynard v. Parker*, 75 Ill.2d 73, 74 (1979)).

In short, the "common fund" doctrine is not applicable to debts owed by a litigant. Bills generated by medical providers for injuries sustained by the injured parties for which a third party may be held liable are owed to the medical providers even if the injured party does not pursue a cause of action against a third party. Therefore, medical providers do not benefit from a common fund. In fact, the injured parties benefit by the medical provider asserting the lien instead of vigorously taking action to collect the debt owed for the medical services.

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Robinson v. Hooker: The Phoenix Rises on Co-Employee Liability

Elaine M. Moss

First, under traditional rules governing the master-servant relationship, the master had an obligation to protect its servants from harm whenever they were doing the master's bidding. From an equitable view, this would likely extend to the financial harm suffered by an employee if he injured a fellow employee while doing the master's bidding. This only makes sense – the master is the one to profit from the efforts, so the master is the one who should bear the risks associated with the operations. It defies equitable principles to require an employee, who has been merely negligent, to be held financially accountable for a negligent action taken in the furtherance of the employer's business.

While fellow employees working on an assembly line may not have assets or insurance that would encourage the plaintiff's bar to pursue them, the same logic does not apply to officers, directors, and managers. Likewise, a parent corporation that owns a manufacturing facility operated by its wholly owned subsidiary will no longer be protected. A strict construction of "employer" will mean essentially no one other than the party issuing the paycheck – all others will be fair game for civil actions arising out of work-place injuries in Missouri.

Missouri courts, historically, have been willing to allow workers to pursue claims against third parties, even after their workers' compensation claims have been resolved. For instance, in *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co*., an employee was injured while his employer was painting at the McDonnell Douglas plant. The employee then successfully sued McDonnell Douglas and collected a judgment. McDonnell Douglas was able to file an action seeking indemnification from the employer under the terms of the painting contract. 323 S.W. 2d 788 (Mo. 1959). The Missouri Supreme Court held that nothing in the Workers' Compensation Act prevented such an action by a third party.

The *Robinson* opinion broadens the scope of persons who may be considered third parties. The court's opinion suggests everyone other than the injured employee and the direct employer is outside the protection of the Workers' Compensation Act. Thus, under *Robinson*, a co-employee may qualify as a third party who can be sued at common law for tort liability. *Robinson*, 323 S.W.3d at 424 (citing *Schumacher v. Leslie*, 360 Mo. 1238, 232 S.W.2d 913, 917 (1950)).

Because the universe of potentially liable parties has increased exponentially in Missouri, employers should anticipate far more requests for indemnification agreements, both from employees and other related entities. Now and in the future, the question will be what insurance coverage is available to respond to such demands for indemnification.

INSURANCE COVERAGE

The prospect of co-employee liability in Missouri requires employers and their insurers to be mindful of their insurance coverage. Coverage to employers, but not their employees, may be available under Part Two (or Part B) of the standard-form Workers' Compensation and Employers Liability Insurance policy form developed by the National Council on Compensation Insurance. This form may also extend coverage to employers for indemnification claims brought by those employees who have been sued by their co-employees. Under Missouri law, employees arguably have a right to indemnity on the ground that they were exposed to liability and compelled to pay damages on account of their employer's negligence that exceeds the negligence of the co-employee seeking indemnification. *See Missouri Pac. R. Co. v. Rental Storage & Transit Co*., 524 S.W.2d 898, 911 (Mo. App. 1975).

Under commercial general liability insurance policies, the availability of insurance coverage for co-employee liability under Missouri law is not a model of clarity. As claims are presented, each must be carefully considered on a case-by-case basis.

Under many standard-form commercial general liability policies, employees qualify as insureds, but not for claims involving "bodily injury" to their co-employees. In one case, the Eastern District of the Missouri Court of Appeals has held these limitations on coverage for co-employee liability are sufficient to bar coverage for a wrongful death claim brought by an employee's survivors against his co-employee. *Selimanovic v. Finney*, 2011 WL 329334 (Mo. App. E.D. February 1, 2011). In another case, the Western District of the Missouri Court of Appeals found coverage for an almost identical wrongful death claim brought against a co-employee based on a perceived ambiguity in the exclusions applicable to co-employee liability. *Reese v. U.S. Fire Ins. Co*., 173 S.W.3d 287, 299 (Mo. App. W.D. 2005).

Moreover, although an employee may have no insurance coverage for co-employee liability claims, an employee possessing the status of an "executive officer" under the policy may very well have such coverage. *Martin v. United States Fidelity & Guaranty Co*., 996 S.W.2d 506 (Mo. banc 1999). In the *Martin* case, the Missouri Supreme Court held the limitations applicable to co-employee liability claims did not equally apply to those insureds who qualify as "executive officers" for purposes of insurance coverage.

Finally, in addressing insurance coverage in this context, it is important to carefully consider the applicable policy provisions in light of the individual claiming coverage and the policy's severability clause, which requires each insured seeking coverage under the policy to be treated differently. Thus, while an "employer's liability" exclusion may bar coverage for a claim brought by an employee against his or her employer or an indemnification claim arising from a co-employee liability claim, the same exclusion would be unavailable to bar coverage for a co-employee liability claim brought against an insured employee because – under the exclusion's standard-form language – the insured fellow employee is never the employer of the injured employee. *See, e.g., Baker v. DePew*, 860 S.W.2d 318 (Mo. banc 1993).

CONCLUSION

The full force and effect of the 2005 amendments to the Missouri Workers' Compensation Law are unclear. Certainly, the amendments will lead to more creative civil suits against third parties, including co-employees. The insurance industry will need to respond to these new and expanding risks both in calculating premium and underwriting for the risks.

BROWN & JAMES P.C.
LAW FIRM

Case Results

Epps v. Towler and Shimony. St. Louis City Circuit Court. Alleging negligence on the part of her sibling's physicians led to her sibling's death due to complications from a staph infection, the plaintiff sought damages of $500,000. Brown & James successfully defended the medical malpractice claim, demonstrating the physicians executed to the best of their abilities and could not operate on the patient as a result of an existing heart arrhythmia during her hospital stay. A near-unanimous jury returned a defense verdict for our clients. Tried by David P. Ellington

Dawson v. Innsbrook Corporation. Warren County Circuit Court, Missouri. Alleging a golf course employee struck her, the plaintiff filed suit seeking $500,000 claiming the accident led to prolonged injuries and eventual surgery. After demonstrating that evidence of a collision was circumstantial and medical expert testimony showed the plaintiff's injuries were pre-existing, a defense verdict was unanimously returned for our client after a three-day trial. Tried by Robert W. Cockerham and Matthew R. Leffler.

Simms v. State Farm. St. Clair County Circuit Court, Illinois. Brown & James successfully defended a first-party insurance claim based on the plaintiffs' claim that wind caused the collapse of the ceiling in their home over three rooms, a covered peril under their policy. The plaintiffs' expert, a contractor, testified the wind entered the attic vents, causing pressure to force the ceiling's collapse. After Brown & James presented an expert, a structural engineer, it was determined that the wind did not cause the collapse, and the jury returned a defense verdict. Tried by John P. Cunningham.

Yoakum v. Bryan David Drum and Prazair, Inc. Will County Circuit Court, Illinois. Brown & James successfully defended Praxair, Inc. in a case involving a motor vehicle accident in which the plaintiff claimed the defendant's driver had failed to yield the right-of-way and otherwise use due care. The plaintiff claimed $5,679 in property damage and medical specials. After deliberating for only five minutes, the jury returned a defense verdict. Tried by Haley M. Schumacher.

Wagner v. St. Louis County, et al. St. Louis County Circuit Court. Alleging the negligence of St. Louis County and contractor N.B. West led to water infiltration into her basement, the plaintiff sought damages of $20,000. Brown & James successfully defended the professional negligence action, demonstrating St. Louis County accepted N.B. West's work on the subject project. N.B. West's Motion for Directed Verdict was granted based on the "acceptance" doctrine. Tried by Lawrence B. Grebel.

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UIM "Escape Hatch" Clauses are Enforceable in Illinois: Illinois Supreme Court Upholds an Insurer's Right to Reject A UIM Arbitration Award and Demand a Trial

Gregory Odom II

legislature requires that the identical clause be included in a highly related context. *Id.*

The Illinois Supreme Court next rejected the insured's argument that UIM "escape hatch" clauses are unconscionable. The insured argued that UIM "escape hatch" clauses lacked mutuality and unequivocally favored insurers over insureds. *Id.* at *11. Specifically, the insured claimed the clauses made low arbitration awards binding (which would favor insurers), while making high awards nonbinding (which also would favor insurers). *Id.* at *12.

The Illinois Supreme Court noted that the arbitration provision at issue in that case, when taken as a whole, ensured some measure of fairness between the parties. *Id.* Specifically, the provision allowed each party to select an arbitrator, and those two arbitrators then selected a third arbitrator. *Id.* The parties were allowed to present evidence at the arbitration on the insured's damages and the insurer's liability. *Id.* After the hearing, the arbitrators then reached a decision on the amount of damages, if any, to which the insured was entitled under the policy. *Id.* Thus, according to the Illinois Supreme Court, even if the insured was bound to an award less than $20,000.00, the award was not "crafted by the insurance company for its own benefit." *Id.*

Finally, the Illinois Supreme Court explained that a UIM "escape hatch" clause is not so "inordinately one-sided" as to constitute an unconscionable contract. *Id.* at 13. Rather, the terms of the insurance contract were not hidden from or unclear to the insured when she accepted the terms of the contract. *Id.* In fact, the insured fully complied with the arbitration requirements contained in the UIM arbitration clause, which appeared in the same paragraph as the "escape hatch" clause. *Id.* Consequently, the Illinois Supreme Court determined that the insured was not unfairly surprised when the insurer rejected the arbitration award and demanded a trial. *Id.*

Ultimately, the Illinois Supreme Court overruled the previously discussed appellate court opinions that invalidated UIM "escape hatch" clauses. By upholding the validity of "escape hatch" clauses, the Illinois Supreme Court's opinion has important ramifications for insurers writing policies in Illinois. Specifically, insurers now can include "escape hatch" clauses in UIM policies without fear of those clauses being invalidated by an Illinois court. More importantly, insurers and their counsel can better assess how to defend UIM claims because insurers no longer need to avoid arbitration. Rather, under Illinois law, insurers have the right to reject an unreasonable or unfavorable UIM award and demand a trial.

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Recent Professional Liability Developments

Todd A. Lubben

law firm should have argued that the default judgment was void because Eagle Star had not been properly served with the lawsuit.

Eagle Star correctly noted the return of service that the tenant filed with the trial court in the original lawsuit did not reflect proper service on Eagle Star. Instead, the return of service reflected that the process server had served the Petition on the wife of Eagle Star's president. Since a lawsuit must be served on a corporate officer and not the corporate officer's spouse, the return of service did not reflect proper service under Missouri law.

In the legal malpractice trial, the law firm argued that it would have made no difference had it raised the issue of the improper return of service because the Petition had in fact been properly served on Eagle Star's corporate secretary and treasurer – who also happened to be the spouse of Eagle Star's President. In other words, Eagle Star had been properly served with the Petition even though the return of service did not show proper service. Since service was proper, the law firm argued that asserting improper service would not have accomplished anything because the trial court would have allowed the tenant to amend the return of service to reflect that Eagle Star's corporate officer had been served.

The trial court in the legal malpractice case agreed with the law firm and held the trial court in the underlying action would have allowed the return of service to be amended to reflect proper service on Eagle Star had the law firm raised that issue. Thus, the law firm could not have successfully set aside the default judgment based on the argument that Eagle Star believed should have been asserted. The trial court in the legal malpractice case also excluded Eagle Star's expert witness testimony as to whether the trial court in the original case would have amended the return of service to reflect proper service of process on Eagle Star.

On appeal, Eagle Star argued the trial court should not have decided what the court in the original case would have done if the law firm had raised the issue of defective service. Eagle Star claimed it was a factual issue for the jury, and not the court, to determine whether the trial court in the prior case would have amended the return or set aside the default judgment. Eagle Star further argued that it should have been allowed to have experts testify as to what the trial court in the original case would have done if the issue of the defective return of service had been raised in that case.

The Court of Appeals disagreed with Eagle Star's argument. Instead, the Court held the trial court in the legal malpractice case properly determined whether the original trial court would have set aside the default judgment or exercised discretion to allow amendment of the return of service so that the judgment could be upheld. The Court of Appeals also held the trial court in the legal malpractice case did not err in concluding that the return of service could have been amended and that the original court would have exercised its discretion and granted a motion to amend the return. Finally, the Court of Appeals determined that it was proper for the trial court to exclude the testimony of Eagle Star's experts on the issue of whether the original court would have allowed the amendment to the return of service.

As this case demonstrates, there are instances in legal malpractice cases when the judge, and not the jury, will decide whether a client would have prevailed in the prior case. Although this case does not create a "bright-line" rule, it appears that it is proper for the courts in legal malpractice cases to decide issues that would have been decided by the judge, and not the jury, in the prior lawsuit. However, when a jury would have been called upon to decide issues in a prior case, it is likely that Missouri courts will allow the jury to decide the same issues in the legal malpractice case. Because every legal malpractice case presents its own unique issues, this is a legal issue that will often be decided on a case-by-case basis.

Brown & James Sponsors its Eleventh Annual Downtown St. Louis Blood Drive

Brown & James, P.C. collected forty-two usable units of blood during the firm's annual drive held on April 15 at the firm's downtown St. Louis office. The firm annually sponsors a blood drive with St. John's Mercy Health Care for downtown St. Louis businesses. This year's drive marked the eleventh annual blood drive sponsored by Brown & James.

Mike Ward prepares to make his donation during Brown & James' 11th annual blood drive.

BROWN & JAMES P.C.
LAW FIRM

1010 Market Street, 20th Floor
Saint Louis, Missouri 63101-2000

Brown & James, P.C. Offices

Saint Louis, MO
1010 Market Street, 20th Floor
St. Louis, Missouri 63101-2000
Phone 314.421.3400

Kansas City, MO
1100 Main Street, Suite 1900
Kansas City, Missouri 64105-5176
Phone 816.472.0800

Springfield, MO
300 John Q. Hammons Pkwy., Suite 202
Springfield, Missouri 65806-2550
Phone 417.831.1412

Belleville, IL
525 West Main Street, Suite 200
Belleville, Illinois 62220-1547
Phone 618.235.5590

Little Rock, AR
400 West Capitol Avenue, 17th Floor
Little Rock, Arkansas 72201
Phone 501.492.3404
(Meetings in the Arkansas Office by Appointment Only)

Firm Inquiry Announcements

Tim Wolf presented "Representing Insurers in the 21st Century" at the Council on Litigation Management's 2011 Annual Conference, March 23-25, 2011, in New Orleans.

David Bub presented "The Trial of the Complex Soft Tissue Injury Case" at the PLRB/LIRB 2011 Claims Conference on April 3-6, 2011, in Nashville, Tennessee. At the same conference **Bob Cockerham** presented "Ponzi Scheme Claims: Issues in Coverage & Adjustment."

Christine Vaporean was recently elected to the Board of Directors of BWORKS, a St. Louis non-profit organization whose mission is to increase the probability of positive life outcomes for at-risk youth in the St. Louis area.

Veo Peoples served on a panel at the annual conference of the National Society of Black Engineers, March 23-27, 2011, in St. Louis.

John Cunningham has been recognized by the Illinois Chapter of the International Association of Arson Investigators for his continued service and dedication to the organization in the training of individuals seeking the Certified Fire Investigator (CFI) designation.

Brown & James served as a sponsor at the 2011 Legal Diversity Summit, held May 24. The Summit, a program of the St. Louis Diversity Awareness Partnership, promoted diversity in the St. Louis region. Harvard Law Professor Dr. David Wilkins served as the Summit's keynote speaker.

Brown & James served as the titled sponsor of the Missouri Chapter of the National Society of Professional Insurance Investigators (NSPII) 2011 Advanced Insurance Seminar, May 6, in St. Louis. Attorneys **Bob Cockerham**, **Corey Kraushaar**, **Samuel Vincent**, **Brad Hansmann** and **Richard Gerber** presented a variety of topics.

Joe Swift served as program chair of the 2011 ALFA Transportation Practice Group Seminar, May 4-6, in Dana Point, California.