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## Brad Hansmann to Receive the Missouri Bar's Lon O. Hocker Award



The Missouri Bar will award Brad Hansmann the prestigious Lon O. Hocker Award at the Bar's Annual Meeting on October 1. The award, named after a distinguished St. Louis trial lawyer, is presented annually by the Missouri Bar Foundation to three lawyers 36 years of age or younger – one each from the St. Louis, Kansas City, and outstate Missouri areas – who have demonstrated unusual proficiency in the art of trial advocacy. Past recipients are recognized as among the finest trial lawyers in Missouri. The Lon O. Hocker Award was established in 1954 by Mary B. Hocker to memorialize her late husband's great faith in the American legal system as the foundation for freedom and the cornerstone for justice. ■

## Take Home Liability: Illinois Extends an Employer's Potential Liability to the Employee's Family Members in Toxic Tort Cases

Greg Odom



Does an employer owe a duty of care to protect its employees' family members from hazardous substances? By answering "yes" to that question in a recent opinion, the Fifth District of the Appellate Court of Illinois dramatically expanded an employer's potential liability and validated an emerging theory of liability: "Take-home exposure." In *Simpkins v. CSX Corp.*, 2010 WL 2337778 (Ill. App. 5 Dist. 2010), the Fifth District concluded that an employer owes a duty of care to the family members of employees who bring home asbestos fibers on their work clothes.

In *Simpkins*, the plaintiff filed a complaint in the Circuit Court of Madison County, alleging she contracted mesothelioma due to exposure to asbestos brought home on her husband Ronald's work clothes. The plaintiff named as a defendant CSX

Corporation, the successor to Ronald's former employer. The plaintiff alleged CSX negligently failed to take precautions to protect Ronald's family from take-home asbestos exposure.

CSX filed a motion to dismiss plaintiff's lawsuit, arguing under Illinois law it owed no duty to the families of its employees. The trial court granted CSX's motion to dismiss. In doing so, the court explained that no Illinois court had previously imposed a duty upon employers to protect its employees' family members from chemical exposure.

On appeal, the Fifth District reversed the trial court's decision, concluding CSX owed a duty of care to Ronald's family members, including the plaintiff, to protect against asbestos exposure. Because no Illinois opinion previously addressed this issue, the Fifth District reached its decision based upon general principles of Illinois negligence law.

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# Missouri Supreme Court Stacks Statutory Liability Coverage Under Auto Policies

Matt Diehr



The Missouri Motor Vehicle Financial Responsibility Law (MVFRL) provides that vehicle owners and operators must maintain a certain degree of financial responsibility. The MVFRL, in turn, imposes certain requirements for insurers and the liability insurance policies they issue to Missouri drivers. Sections 303.010-303.370, R.S.Mo. 2000.

Section 303.025 requires owners and operators of motor vehicles to “maintain... financial responsibility... with a motor vehicle liability policy which conforms to the laws of this state.” To determine what kind of liability policy conforms to Missouri law, a review of the MVFRL is necessary.

Section 303.190.2 states an owner’s policy shall designate which vehicles it covers and “shall insure the person named

therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages,” as follows: \$25,000 because of bodily injury to or death of one person in any one accident, \$50,000 because of bodily injury to or death of two or more persons in any one accident, and \$10,000 because of injury to or destruction of property of others in any one accident. Section 303.190.3 requires an operator’s policy to “insure the person named as insured therein . . . for damages arising out of the use by him or her of any motor vehicle not owned by him or her” up to the same minimum limits.

When an insurance policy has an exclusionary clause that would bar coverage, these provisions of the MVFRL -- providing coverage for \$25,000, \$50,000, and \$10,000

-- can render an otherwise valid exclusion partially invalid up to the statutory minimum requirements. *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 479, 480 (Mo. banc 1992). Missouri courts so hold to give effect to the MVFRL, the plain purpose of which “is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators.” *Id.*

On January 12, 2010, the Missouri Supreme Court handed down its decision in *Karscig v. McConville*, 303 S.W.3d 499 (Mo. banc 2010), which addressed two significant aspects of the MVFRL. First, the Court clarified the difference between an owner’s and an operator’s policy – and, thus, whether Section 303.190.2 or Section 303.190.3 dictates the policy’s requirements. Not surprisingly, the Court

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## Emotional Distress Covered by UM Policies

Carolyn Geoghegan



The Missouri Supreme Court has opened the doors to permit the recovery of damages under uninsured motorist (UM) policies for emotional distress in cases in which the insured has sustained no bodily injury. The Supreme Court’s decision may impact areas of insurance law beyond the UM context and permit courts to conclude that liability coverage for “bodily injury” may be interpreted to afford coverage for strictly mental injuries.

In *DeRousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891 (Mo. banc 2009), a body was ejected from an uninsured motorist’s vehicle during an accident. The body hit the windshield of Debra DeRousse’s car as she drove down the highway, rolled off her hood, and fell under her car. Once she was able to stop, she saw the body and realized she knew the victim. While she was not physically injured and sought no medical treatment, DeRousse suffered emotional and mental injuries following the accident, including

vomiting, nightmares, migraines, nausea, and anxiety. She was prescribed medication for anxiety and depression and eventually received counseling.

DeRousse sought coverage for her mental injury under her State Farm UM coverage. State Farm denied her claim and she sued for coverage. The trial court granted summary judgment for State Farm, finding UM coverage for “bodily injury” did not encompass emotional and mental distress. The Missouri Court of Appeals, Eastern District, affirmed the trial court’s summary judgment for State Farm, rejecting DeRousse’s argument that there was a growing trend in the case law that defined “bodily injury” to include mental or emotional injury without physical manifestations.

*DeRousse v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 792066 (Mo. App. E.D. 2009).

DeRousse, in support of her claim, relied on a Western District case, *Lanigan v. Snowden*, 938 S.W.2d 330 (Mo. App. W.D. 1997); however, the Eastern District found that decision to be in the minority and further found it distinguishable because State Farm’s

definition for “bodily injury” was unambiguous in contrast to the definition at issue in *Lanigan*.

The State Farm policy defined “bodily injury” as “bodily injury to a person and sickness, disease or death which results from it.” The Eastern District found the definition clearly referred to conditions of the body and excluded mental suffering or emotional distress, citing *Citizens Ins. Co. of America v. Leiendecker*, 962 S.W.2d 446 (Mo. App. E.D. 1998), as the majority rule in Missouri. The court in *Leiendecker* interpreted a homeowner’s policy and, relying on two older Eastern District cases, held that “bodily injury,” as defined by the policy, required some *physical* harm to the person claiming bodily injury to establish coverage.

DeRousse further argued the trial court’s ruling for State Farm should be reversed because the court’s interpretation of her policy did not comply with the Missouri Motor Vehicle Financial Responsibility Law, Section 379.203.1, R.S.Mo. 2000. Section 379.203.1 requires auto liability insurers to provide UM coverage for “***bodily injury, sickness***

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## Emotional Distress Covered by UM Policies

Carolyn Geoghegan

or disease, including death” caused by the owners and operators of uninsured motor vehicles. (Emphasis added.)

Again, the Eastern District disagreed, finding no conflict with the statute, which the court found to be “virtually identical” to State Farm’s “bodily injury” definition.

The Missouri Supreme Court saw the question differently, however, and sided with DeRousse. The Supreme Court held the trial court erred in granting summary judgment for State Farm because the policy failed to provide the coverage mandated by state law. At oral argument, State Farm conceded its policy language was not as broad as Section 379.203.1’s mandate. Because the policy’s language was less broad than that of the statute, the Court held the statute’s broader language controlled.

The Supreme Court further found the statute’s language to be ambiguous because it

was not evident to the Court whether the word “bodily” modified only the word “injury” or whether it also modified the phrase “sickness or disease.” Applying statutory construction rules, the Supreme Court held the term “bodily” modifies only “injury” and not the phrase “sickness or disease, including death.” As a result, the Supreme Court concluded DeRousse’s mental injuries were compensable under the statute’s “sickness” or “disease” prongs. The Supreme Court reached essentially the same result as in *Lanigan v. Snowden* where the Western District found the policy’s “bodily injury” definition to be ambiguous because it was unclear whether “bodily” also modified “sickness or disease.”

It is unclear whether the Missouri Supreme Court’s decision will be limited to cases involving UM benefits. However, as the Missouri Supreme Court has now decided that the word “bodily” does not modify “sickness or

disease,” we anticipate that claimants will now rely on the Court’s decision to seek coverage for mental and emotional harm, in the absence of any actual bodily injury, under other types of insurance policies as well.

For example, in the *Leiendecker* case, the insureds sought coverage for emotional distress under their homeowner’s policy after their life insurance broker had defrauded them. The definition of “bodily injury” under the policy was similar to that in Section 379.203.1, R.S.Mo. -- “bodily harm, sickness or disease...” *Leiendecker*, 962 S.W.2d at 451. While in that case, the Court rejected the insured’s argument that the definition in the policy was ambiguous, the *DeRousse* decision will likely impact future decisions unless the policy definition includes specific language excluding mental injury and emotional distress and does not conflict with any applicable statutory law. ■

## Mandatory Relation Back: *Krupski v. Costa Crociere, S.p.A.*

John McLeod



Federal Rule of Civil Procedure 15(c) permits an amended complaint to relate back to a previously filed complaint if the proper party knew or should have known within the time of service that but for a mistake in identity, the plaintiff would have asserted the claims against the proper party. The “mistaken identity” problem often arises with corporations and usually occurs when different corporate entities run separate parts of a business. In *Krupski v. Costa Crociere, S.p.A.*, \_\_ U.S. \_\_, 130 S.Ct. 2485, 2490 (2010), the United States Supreme Court interpreted Rule 15(c) and found relation back is mandatory if the requirements of Rule 15(c) are met.

The plaintiff in *Krupski* injured herself while on a cruise ship. She purchased her ticket from Costa Cruise Lines, N.V., an entity serving as the sales and marketing entity for Costa Crociere, S.p.A., in the United States. The back of the ticket

contained the terms of the purchase contract and specifically identified Costa Crociere as the cruise line’s owner and operator.

Following her injury, Krupski notified Costa Cruise of her claim. Costa Cruise asked for additional information to facilitate a pre-litigation settlement but did not inform Krupski that Costa Crociere was the actual owner of the cruise ship. A settlement was not reached and litigation followed. Krupski named Costa Cruise as the defendant who owned, operated and managed the cruise line.

After plaintiff filed her complaint, Costa Cruise informed plaintiff on three separate occasions it was not the proper defendant and also identified Costa Crociere as the interested party. After Costa Cruise filed a motion for summary judgment, plaintiff sought and obtained leave to file an amended complaint naming Costa Crociere as a defendant. Costa Cruise was dismissed from the case after Costa Crociere was served and entered an appearance. Costa Crociere then moved to dismiss plaintiff’s

claims, arguing her claims were barred by the statute of limitation because the claims did not relate back to the previously filed complaint. Costa Crociere contended plaintiff knew the identity of the proper defendant and deliberately chose not to sue it. The district court agreed, dismissing plaintiff’s claims. The Eleventh Circuit Court of Appeals affirmed.

The Supreme Court reversed the Eleventh Circuit and found Krupski’s claims did relate back to her original complaint. The Court addressed the two bases relied on by the lower courts -- first, whether Krupski knew the identity of the proper party; and second, whether Krupski waited too long to seek leave to amend her complaint.

The Court quickly dispatched the first argument. The Court held, by focusing on Krupski’s knowledge of the proper party, that the lower courts failed to follow the requirements of Rule 15(c). Rule 15(c) specifies the knowledge of the “party to be brought in by amendment” determines

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## Mandatory Relation Back: *Krupski v. Costa Crociere, S.p.A.*

John McLeod

when relation back applies. If that party knew or should have known it would have been sued but for a mistake, then the amended complaint will relate back. Rule 15(c) contains no reference to the amending party's knowledge except that the amending party made a mistake. Thus, in the typical case, the proper inquiry is whether the *defendant* knew or should have known it would have been sued but for a mistake in identity -- not what the plaintiff knew.

Costa Crociere argued when a plaintiff knows of the existence of two possible defendants, the plaintiff's choice in suing one defendant rather than the other shows a deliberate action. A deliberate course of action is not a mistake and thus renders Rule 15(c) inapplicable. The Supreme Court found this argument unpersuasive. Although a deliberate choice may be the antithesis of a mistake, "[t]he reasonableness of the mistake is not at issue." The Court found a plaintiff may be simply unaware of the legal ramifications of suing one defendant over the other. This type of mistake does not preclude the application of Rule 15(c).

The Supreme Court did offer some guidance to defendants and the lower courts in addressing this type of situation. If the contents of the original complaint and the plaintiff's conduct "compel the conclusion" the decision to name one defendant over the other was the product of "a fully informed decision" rather than a mistake, "the

requirements of Rule 15(c)(1)(C)(ii) are not met." Thus, a plaintiff's actions, both before and during litigation, may be used to demonstrate Rule 15(c) does not apply by proving the plaintiff made a fully informed decision when naming the defendant in the lawsuit.

The Court also reversed the Eleventh Circuit's finding that the plaintiff waited too long to seek leave to amend her complaint. The Court rejected any notion that the plaintiff's dilatory conduct supported the district court's decision to deny her leave to file an amended complaint because the amended complaint did not relate back to a previously filed complaint. The Court held "the Rule mandates relations back once the Rule's requirements are satisfied; it does not leave the decision whether to grant relation back to the district court's discretion."

The Supreme Court specified the plaintiff's undue delay has no bearing on whether an amended complaint will relate back. However, "to the extent plaintiff's postfiling conduct informs the prospective defendant's understanding of whether the plaintiff initially made a 'mistake concerning the proper party's identity,' a court may consider the conduct." Otherwise, the plaintiff's conduct is irrelevant to the relation back issue.

The Supreme Court's decision in *Krupski* will immediately impact district court rulings on Rule 15(c) issues. First, the Supreme Court's holding drastically

alters the current state of the law in many circuit and district courts. For example, the Eighth and Seventh Circuits both reviewed the decision to deny relation back under the abuse of discretion standard. Both circuits have affirmed decisions denying relation back based on the plaintiffs' lack of diligence in seeking leave to amend their complaint and name the correct party. The Supreme Court's decision essentially overrules these cases because *Krupski* now requires that amended complaints relate back to the earlier filing if the plaintiff satisfies the requirements of Rule 15(c). The Court's holding also removes the district court's discretion from the equation.

The Supreme Court did not address how a scheduling order changes or affects the decision to allow an amended complaint to relate back. This issue was not present in *Krupski* because the plaintiff moved for leave to amend within the time allowed by the district court's scheduling order. The Court noted this fact when it rejected the Eleventh Circuit's finding that the plaintiff did not act diligently.

If a plaintiff seeks leave to file a complaint outside the time allowed by the scheduling order, defendants will have a stronger argument that the amended complaint should not relate back. A variety of factors will likely affect the judge's decision if this situation arises, including how long after the deadline did the plaintiff move to amend and whether the trial date will be affected if the amended complaint is allowed. These factors may allow the judge to deny leave to file an amended complaint because plaintiff failed to comply with the scheduling order.

The Supreme Court's decision in *Krupski* changes the way federal district courts will address the application of Rule 15(c). District court judges now lack the discretion to deny a relation back if the plaintiff satisfies the requirements of Rule 15(c) and seeks leave to amend the complaint within the time allowed by the scheduling order. While the plaintiff still bears the burden of demonstrating that Rule 15(c)'s requirements are met, *Krupski* will likely cause the district courts to err on the side of caution and allow an amended complaint to relate back. ■

### Firm Inquiry Announcements

#### Speakers Available

Brown & James lawyers routinely speak on various legal and insurance topics to bar and industry groups. We are available to speak to your organization on topics of your interest and for purposes of satisfying your CLE, CE, or annual training requirements. Contact Michael Taylor for more information, [mtaylor@bjpc.com](mailto:mtaylor@bjpc.com) or (314) 242-5255.

#### Insurance Law Update E-Newsletter

Brown & James recently launched our monthly e-newsletter, *Insurance Law Update*, with legal news, recent decisions, announcements, and more from Missouri, Illinois, Kansas, and Arkansas. Sign-up on our website by clicking "Subscribe to Our Newsletter" under News & Publications.

# Insured's Bankruptcy Filings Sinks Subsequent Claim Presentation

Jon Morrow



Missouri courts recently affirmed the importance and usefulness of an insured's prior bankruptcy as evidence that an insured has misrepresented the nature and extent of his or her personal property claim. Both the Missouri Court of Appeals for the Eastern District and the United States District Court for the Eastern District of Missouri have ruled that an insured's prior bankruptcy was highly relevant and, in one case, entitled the insurer to summary judgment.

In *Eckerd v. Country Mut. Ins. Co.*, 289 S.W. 3d 738 (Mo. App. E.D. 2009), the Eckerds filed a breach of contract action against Country Mutual arising out of an October 2005 fire loss. The insureds claimed Country Mutual had wrongfully denied their personal property claim. In its answer, Country Mutual asserted the insureds had acted fraudulently and made material misrepresentations.

At trial, in support of its defenses, Country Mutual cited the discrepancies between the personal property that the insureds claimed was damaged in the fire compared to the personal property they claimed to have in their April 2005 bankruptcy. For example, the insureds claimed a \$25,000 Jesse James poster was damaged in the fire. However, no such poster was listed on their bankruptcy schedules only six months before the fire.

After the jury returned a verdict for Country Mutual, the Eckerds appealed, claiming, in part, the trial court had improperly admitted the evidence of the prior bankruptcy. Specifically, they argued the evidence was not relevant and raised collateral issues that unnecessarily confused the jury.

The appellate court rejected these arguments. The court held the bankruptcy court evidence was admissible and directly relevant to the material issue in the case, namely, whether or not the insureds had made material misrepresentations in the presentation of their personal property claim. The court further held the jury could have deemed the insureds' differing statements to the bankruptcy court and their insurer to be fraudulent or material misrepresentations. In the end, the court characterized the bankruptcy proceedings to be "highly relevant."

Again, in *Mathes v. Mid-Century Ins. Co.*, 2008 WL 2439744 (E.D. Mo.), the Honorable Stephen Limbaugh of the United States District Court for the Eastern District of Missouri addressed the issue of an insured's prior bankruptcy. In that case, the insured had made a \$93,166.70 personal property claim after a fire. Six months before the loss, the insured declared bankruptcy and, under the penalty of perjury, claimed that he owned \$800.00 in personal property. Based on the vast discrepancy, the insurer denied the insured's claim.

The insured then brought a breach of contract action against Mid-Century, claiming the company had wrongfully denied his personal property claim. Mid-Century filed a summary judgment motion seeking a ruling that the discrepancy between the bankruptcy pleadings and the personal property claim was a material misrepresentation as a matter of law.

In response to the motion, the insured made several arguments. First, he argued that he listed "resale value" on his bankruptcy pleading and "replacement cost" on his insurance claim, which accounted for the discrepancy. The court rejected this argument, stating it could not reconcile the large divergence between the two numbers.

The insured also argued that he relied on his attorney to calculate the bankruptcy values and his public adjuster to calculate the personal

property claim. He claimed he should not be held accountable for his good faith reliance on these individuals. The court rejected this argument as well, citing the fact that the insured had affirmed the accuracy of both numbers with his signature. The court further observed that, absent extraordinary circumstance, an individual's failure to read or understand a document he signs will not relieve him of a mistake.

Ultimately, Judge Limbaugh ruled there was insufficient evidence for a jury to find that the insured did not "knowingly and/or willfully" conceal material facts relating to the claimed loss.

Based on these two cases, it is clear that an insurer can use discrepancies in prior bankruptcy pleadings against an insured. Additionally, if the discrepancy is patently obvious, the insurer may be entitled to summary judgment on the issue of an insured's material misrepresentations. In all investigations in which an insured's property claims presentation raises questions, any bankruptcy records need to be obtained. These documents and representation made in the bankruptcy court provide fertile and useful information in determining whether the insured's claim for the value and numbers of items is believable and verifiable. ■

## BROWN & JAMES<sup>PC.</sup> LAW FIRM Case Results

*Julia Parmelee v. The Standard Fire Ins. Co.*  
United States District Court, Eastern District of Missouri. Plaintiff and her ex-husband were in the process of getting divorced when a fire destroyed their home. Before the fire, the couple had agreed on a split of the personal property and agreed that the husband would get the house although a final decree had not yet been entered at the time of the fire. The wife's personal property was out of the house at the time of the fire. The adjuster calculated the loss and paid the husband and mortgagee on the loss in full. The wife brought suit claiming that as a named insured on the homeowner's policy, her name should have been on each of the checks. Because

her name was not included on any of these checks, she claimed that Standard breached the insurance policy and she was entitled to the full amount that was paid out, which was in excess of \$600,000. The court ruled the policy's language was clear and that the insurer must pay the named insured UNLESS others listed in the policy were legally entitled to receive payment. The court found that all payments made by the insurer were made to persons or entities that were legally entitled to receive payment. Therefore, the court entered summary judgment for the insurer and against the wife. Tried by Russell Watters, Patrick Bousquet and James Howard.

# Missouri Supreme Court Adopts Progressive Loss Doctrine as Trigger for Cause of Loss

Patrick A. Bousquet



The Missouri Supreme Court recently handed down a decision that could have a substantial impact on Missouri insurance law. In *D.R. Sherry Constr., Ltd. v. American Family Mut.*

*Ins. Co.*, the Court upheld a judgment for the insured by reaching several potentially significant conclusions. No. SC 90442, 2010 WL 2513794 (Mo. banc 2010). Most notably, the Court held that in a progressive loss property damage case, a policy is triggered if the **cause** of the loss was present during the policy period, even if the resulting damage is not apparent until after the policy period.

In August 2003, the insured, D.R. Sherry Construction, Ltd. (“Sherry”), constructed and sold a house after a final inspection revealed no apparent problems. In the spring of the following year, the home’s purchasers

discovered cracks in the foundation and drywall. Sherry confirmed their existence, and an inspection revealed that the house was unlevel, which was causing recurring cracks in the foundation. Sherry agreed to repurchase the house in March 2005 when the homeowners threatened suit. Sherry apparently did not obtain the consent of its liability insurer, American Family, before entering into the repurchase agreement. After repurchasing the house, Sherry made a claim on the policy at issue, which was denied because it had been canceled in September 2003, and the first damage was not discovered until April 2004.

In November 2005, Sherry filed suit against American Family for breach of contract and vexatious refusal to pay. The trial court, after allowing the jury to determine the scope of coverage, entered judgment for the insured. The Missouri Court of Appeals subsequently

upheld this decision, and the case came before the Missouri Supreme Court.

Most significantly, in making a finding of coverage, the Court employed a cause-based analysis of whether there had been an “occurrence” during the policy period. American Family acknowledged that structural damage was present during the policy period, but argued that any damage to the property was not apparent until after the policy had been canceled for approximately seven months. The Court, however, agreed with the trial court that this was irrelevant. The Court noted an “occurrence” may be the “result of a process.” Citing two Missouri appellate court cases, the Court concluded the damage to the house’s foundation constituted an “occurrence” because the **cause** -- *i.e.*, the house being unlevel -- was present during the policy period, though the actual damage was not apparent until after the

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# Missouri Supreme Court Stacks Statutory Liability Coverage Under Auto Policies

Matt Diehr

held the distinguishing feature is ownership. The Court explained: “An ‘owner’s policy’ insures a person who owns a vehicle, while an ‘operator’s policy’ insures a person who operates a vehicle owned by another.” The Court emphasized “the distinction between the two should rest on the insured’s ownership or lack of ownership of the vehicle involved in the accident.”

Second, the Supreme Court in *Karscig* reiterated that the minimum statutory coverage under the MVFRL may be stacked. In that case, Mark Karscig was injured by a vehicle driven by Jennifer McConville. McConville was driving a vehicle owned and insured by her parents but also held a separate operator’s policy. The Court held the insurer under each of these two policies provided coverage to Karscig for the statutory minimum of \$25,000 despite an anti-stacking provision in the operator’s policy issued to McConville. The Court reasoned the statutory scheme of the

MVFRL did not limit coverage for this amount to one particular type of policy or to one particular statutory recovery.

From the Court’s decision, another important lesson can be drawn. When determining whether a given owner’s or operator’s policy provides coverage, it is important to note that Missouri courts have defined the word “use” very broadly as it appears in the MVFRL. *State Farm Mut. Auto. Ins. Co. v. Liberty Mut. Ins. Co.*, 883 S.W.2d 530, 532-34 (Mo. App. E.D. 1994). One may be “using” a vehicle while doing anything that “involves employment of the vehicle for some purpose or object of the user,” rather than simply the operation of the vehicle, which is limited to “the driver’s direction and control of its mechanism for the purpose of propelling it as a vehicle.” For instance, courts have held the operation of rental vehicles by drivers not authorized under the rental contract can constitute “use” by the renter “in the sense that it

was something he wanted to bring about, as is shown by his lending of assistance in making the vehicle available.” *Royal Indem. Co. v. Shull*, 665 S.W.2d 345, 347 (Mo. banc 1984).

McConville’s “use” of the vehicle in *Karscig* was obviously not an issue; she was involved in a very serious accident while behind the wheel. However, Missouri courts’ broad definition of the word “use,” when considered in tandem with *Karscig*’s holding permitting the stacking of multiple auto liability policies -- owner’s and operator’s policies alike -- for damages arising out of an auto’s “use,” suggests that in the future there may be many more claims for coverage for the statutory minimum under the MVFRL. ■

# Missouri Supreme Court Issues Three Opinions on Wrongful Discharge Claims

Christine A. Vaporean



On February 9, 2010, the Missouri Supreme Court issued three opinions that change the law governing wrongful discharge for violation of public policy. This cause

of action is an exception to Missouri's employment-at-will doctrine that several districts of the Missouri Court of Appeals have recognized for more than a quarter of a century, but which had never been formally recognized by the Missouri Supreme Court. The Supreme Court's new opinions not only formally recognize the cause of action, but also set parameters for its scope, resolve a dispute between the Eastern and Western Districts of the Missouri Court of Appeals on the causation element, and expand the cause of action to contracted employees.

## The Cause of Action

Missouri's employment-at-will doctrine allows an employer to terminate a non-contractual employee (an "at will" employee) for any reason or no reason at all. The Missouri Human Rights Act (MHRA) creates one exception to the doctrine: employees may not be terminated because of their membership in a protected class of persons, *i.e.*, their race, color, religion, national origin, sex, ancestry, age, or disability. Section 213.055, R.S.Mo. 2000. In this respect, Missouri law generally comports with its federal counterpart as codified in Title VII of the Civil Rights Act of 1964, the ADA, and the ADEA, amongst other laws.

Since the Western District's 1985 opinion in *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. App. W.D. 1985), Missouri courts have recognized a second exception to the employment-at-will doctrine in the form of wrongful discharge actions based on violations of public policy. In short, an employer may not terminate an employee for the employee's refusal to violate the law or because the employee reported violations of the law to his superiors or public authorities. *Id.* at 878. As a common-law action, a public policy exception case is not subject to the procedural requirements of the MHRA. Until now, the exact parameters of the action were spelled out only in opinions from the Missouri Court of Appeals, which at times differed between the

Court's several districts.

To prevail on a wrongful discharge claim based on the public policy exception, a plaintiff must prove she engaged in a protected action, that she was discharged, and that her protected action was the cause of the discharge. The Missouri Supreme Court's 2010 triumvirate of opinions affirm these general elements, further define what constitutes "protected action," redefine the causation element, and broaden the action to contractual employees as well as at-will employees.

## The Protected Conduct:

### *Margiotta v. Christian Hospital Northeast Northwest*

The Missouri Supreme Court in *Margiotta v. Christian Hosp. Northeast Northwest*, No. SC90249 (Mo. banc, February 9, 2010), affirmed the principle articulated by appellate opinions since *Boyle* that the public policy exception to the employment-at-will doctrine is a narrow one. To qualify for its protection, the employee must show the act the employee refused to perform or reported was illegal or contrary to a strong mandate of public policy. Thus, the claims must be based on a constitutional provision, statute, regulation, or rule promulgated by a government body; however not every statute or regulation gives rise to a claim. A plaintiff must cite the specific law that was violated, and the law cited must amount to a clear mandate of well-established public policy, the violation of which constitutes serious misconduct. Vague statutes will not suffice because they would require judicial interpretation of what public policy requires and would prevent employers from knowing what duties were imposed upon them. The Missouri Supreme Court held this exception is not so broad as to grant protected status to a plaintiff for making complaints about acts or omissions he merely believes to be violations of the law or public policy. Instead, the legal duty is imposed upon employers by laws that clearly give notice of their requirements.

Furthermore, the Supreme Court held a plaintiff must demonstrate the public policy mandated by the relied-upon provision is actually violated by his discharge. However, the employee need not show he was personally

affected by the violations, nor must there be an allegation that an anti-retaliation provision in the law has been violated. Rather, the employee must show how the reported conduct violates the laws upon which he relies for his claim; a "mere citation" will not suffice.

## The Causation Requirement: *Fleshner v. Pepose Vision Institute, P.C.*

Before the Missouri Supreme Court's opinion in *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81 (Mo. banc 2010), the Eastern District of the Missouri Court of Appeals had held the protected action, which was necessary to sustain the cause of action, had to be shown to be the exclusive cause of the employee's discharge. *Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147 (Mo. App. E.D. 1995). The Western District of the Missouri Court of Appeals had not specifically disagreed, but had questioned the Eastern District's analysis and suggested the appropriate language for a jury instruction was that the termination occurred "because of" the employee's protected conduct. *Brenneke v. Dept. of Mo., Veterans of Foreign Wars*, 984 S.W.2d 134 (Mo. App. W.D. 1998).

The Supreme Court resolved this conflict by overturning both district's cases and holding the appropriate causation standard is the "contributing factor" analysis, which it created to apply to MHRA actions in the controversial opinion, *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007). The Court's decision marks a significant departure from both appellate court decisions and dramatically weakens the causation requirement adopted by the Eastern District.

The Supreme Court reasoned that exclusive causation is not the proper standard in these cases because it would deter employees from reporting their employers' violations of the law or from refusing to violate the law themselves. The Court noted the "because of" standard is used in federal jury instructions and observed that the standard reflects the general federal standard for Title VII cases that the conduct

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# Contributory Negligence Defense Not Abolished in Professional Negligence Cases

Todd A. Lubben



The Western District of the Missouri Court of Appeals, in the recent case of *Children's Wish Foundation International, Inc. v. Mayer Hoffman McCann PC*, 2010

WL 1656454 (Mo. App. W.D. April 27, 2010), confirmed that the contributory negligence defense may apply in certain professional negligence cases. Under that defense, a plaintiff cannot prevail on a negligence claim if the jury finds that the plaintiff is partially at fault.

In *Children's Wish Foundation*, an accounting firm was accused of overstating a charitable organization's contributions by \$1.3 million. As a result of the erroneous financial statements, the organization incurred legal fees in a tax dispute while also suffering damage to its reputation.

At trial, the accounting firm argued the \$1.3 million overstatement was the charity's fault because the organization had provided the accounting firm with erroneous records. The court sided with the accounting firm and allowed the accounting firm to proceed on the "contributory negligence" defense. Based on that defense, the jury was instructed to return a verdict for the accounting firm if the jury believed the charitable organization's negligence contributed to its damages. The jury entered a defense verdict for the accounting firm.

On appeal, the charity argued it was improper to instruct the jury on the contributory negligence defense. The charity sought a comparative fault instruction that would only reduce its damages based on its percentage of fault instead of completely negating its claim for damages. The organization cited a 1983 Missouri Supreme Court opinion that purported to abolish contributory negligence in favor of a comparative fault scheme.

The Missouri Court of Appeals rejected the charity's appeal, confirming that contributory negligence may apply in negligence claims for economic loss. In general, contributory negligence was only abolished in negligence actions seeking to recover damages for injury or death to a person. Thus, contributory negligence was only partially abolished, and the emerging trend in Missouri has been to uphold contributory negligence as a defense

in economic loss negligence cases. This means that contributory negligence may apply in professional negligence cases where the client has only suffered monetary damages.

However, the Missouri Court of Appeals limited the ability of an accountant or other professional to obtain a defense verdict based on the defense. According to the court's decision, a professional may not escape liability by showing that the client should have performed the professional's duties. For instance, the accounting firm in *Children's Wish Foundation* was hired to perform an audit and locate the client's mistakes. The accounting firm therefore cannot prevail by showing that the client negligently made the same mistakes the accounting firm was hired to locate. Applying the contributory defense in that situation would unfairly shift the professional's duties to the client. In contrast, in a similar situation, an accounting firm could rely on the contributory negligence defense if the client relied on the audit while knowing that it was inaccurate or if the client actively misled the auditors.

Thus, although the contributory negligence may apply in professional negligence cases, the court's opinion suggests the limitation on that defense will apply in many situations. Specifically, the court noted that it will be the exception, and not the rule, where clients may be considered at fault for a professional's

purported duties undertaken to a client.

The court also emphasized the importance of defining the scope of the duties that the professional has agreed to perform for a client. Since professionals can only be liable for mistakes that arise out of a duty specifically undertaken to a client, professionals should take great care in making sure the scope of their duties are clearly set forth in an initial letter or contract. A carefully crafted engagement letter could avoid a future lawsuit involving services that the professional never planned on providing to the client.

The *Children's Wish Foundation* decision is important in Missouri professional negligence cases. Contributory negligence is a strong defense that permits a defendant to completely avoid liability even if the plaintiff is only partially at fault. However, the defense cannot be based on a client's failure to perform the professional's job.

The application and scope of that limitation will likely be an issue of debate in professional liability cases for years to come. Indeed, we have not seen the last act of the *Children's Wish Foundation* case. On June 29, 2010, the Missouri Supreme Court took transfer of the case. As soon as the Missouri Supreme Court rules on the issue of contributory negligence, we will report it to you in *The Firm Inquiry*. ■

## BROWN & JAMES<sup>PC</sup> LAW FIRM Case Results

*Lewis Elder v. Airosol Co., Inc.* St. Louis City, Missouri. Plaintiffs filed suit in excess of \$10 million against the defendant alleging claims of strict liability design defect and strict liability failure to warn after a refrigeration cylinder sold by the defendant exploded and killed an HVAC repairman. The decedent placed the cylinder under hot water (160 degrees) causing the cylinder to explode. The defendant's expert witness testified the cylinder's design and labeling complied with all industry standards and that the decedent violated a number of state and

federal laws in his business, including repeatedly refilling the refrigeration cylinder, which compromised its structural integrity. Expert testimony also established that, while it was permissible to heat the refrigeration cylinder with lukewarm water, a reasonably careful HVAC repairman would know not to place the refrigeration cylinder in 160-degree hot water. After a 10-day trial and a three-hour deliberation, the jury returned a unanimous defense verdict. Tried by Corey L. Kraushaar and Christopher J. Seibold.

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## Missouri Supreme Court Adopts Progressive Loss Doctrine as Trigger for Cause of Loss

Patrick A. Bousquet

policy expired. *Id.*, citing *Scottsdale Ins. Co. v. Ratliff*, 27 S.W.2d 531 (Mo. Ct. App. 1996), and *Stark Liquidation v. Florists Mut. Ins. Co.*, 243 S.W.3d 385 (Mo. Ct. App. 2007).

Ultimately, this decision could prove quite significant, particularly to coverage for construction defect or progressive loss claims in general. First, the Supreme Court expressly stated that, when an insurance policy is ambiguous and there exists a genuine factual dispute regarding the intent of the parties, the issue of coverage goes to the jury. This seems to greatly expand the jury's role in determining the scope of coverage, and, indeed, a departure from prior Missouri Supreme Court precedent. See *Tomnitz v. Employers' Liability Assur. Corp.*, 121 S.W.2d 745, 752 (Mo. 1938)

(noting that while specific questions as to terms with more than one possible meaning may be submitted to the jury, "[i]t is the exclusive province of the court to construe a written instrument . . . [and] in the end, the court must determine the interpretation of the contract with such light as the verdict may afford on the question submitted to the jury.").

Second, the Court held that even when the damage was not apparent during the applicable coverage period, a claim may nonetheless be covered by an insurance policy if the *cause* of the damage was present during the policy period. This arguably constitutes a stark turn from prior cases that held that the time of an "occurrence" is not when "the wrongful act was committed," but "when the complaining

party was *actually damaged*." Indeed, the decision also strays from the Court's decision in *Tomnitz*, discussed above, on the trigger issue as well, because *Tomnitz* seemed to indicate that in progressive loss cases, courts look to the time of the injury-in-fact and not the time of the cause of the injury. In *Tomnitz*, the Court held that coverage for silicosis was triggered when the disease was *acquired*, not when the initial exposure took place.

This decision will change the way carriers analyze their duty to defend and coverage allocation over several policy periods. There is no question that now, in Missouri, the courts have adopted the progressive loss trigger theory when determining dates of occurrence. ■

### BROWN & JAMES<sup>PC.</sup> LAW FIRM Case Results

*Charles D. Machon and Song S. Machon v. Washington University, Bradley Freeman and Barnes-Jewish Hospital.* St. Louis City, Missouri. The plaintiff complained of abdominal pain after being rushed by helicopter to the hospital and admitted to the ICU. After determining the plaintiff had a condition associated with decreased blood flow to the abdomen, the ICU doctors administered antibiotics and fluids that led to vital sign improvements and no more abdominal pain. The following morning the plaintiff began to deteriorate and underwent exploratory surgery during which the doctors discovered the plaintiff's dead bowel. Plaintiffs filed suit in excess of \$5 million, claiming the defendants failed to diagnose his condition and that the dead bowel was a result of a blood clot. The defense presented expert testimony that a clot could not have been the problem. The defense also argued that additional testing could not be performed due to the plaintiff's kidney failing and an MRA, additional testing that allegedly should have been performed, could not be used in acute settings because the plaintiff would have to be moved to

another area of the hospital where monitoring was difficult. After only an hour, the jury returned a defense verdict. Tried by Robert S. Rosenthal and Halle Dimar.

*Bowdish v. Twenty Seven-O-Five Holding Co.* St. Charles County, Missouri. The defendant, a landscaping company, was hired to clear ice and snow from an apartment complex's roads and sidewalks. The plaintiff, who slipped, fell, and broke his hip, claimed the defendant was responsible for his fall by not adequately clearing ice near his car. After the defense established the plaintiff's extensive medical history with falls and propensity to falling, the jury returned a defense verdict. Tried by Jackie M. Kinder.

*Neil Capps v. Theresa Black and Brenda Holst.* Moniteau County, Missouri. The passenger injured in a crossover accident sued the host driver and insured. The plaintiff claimed he suffered a herniated cervical disc and radiculopathy requiring future surgery. In pre-trial discovery, it was discovered that the plaintiff's memory was incorrect and that the host driver had crossed the center line, and not Holst, who was Brown & James' client. The defense also

presented expert testimony that the plaintiff's medical conditions were pre-existing and the jury awarded Holst a defense verdict. Tried by Michael B. Maguire.

*Qmed v. Bade Roofing Co.* St. Clair County, Illinois. Brown & James represented the plaintiff in a subrogation action who filed suit for water damages resulting from a negligently install roof. After the roof came off in a thunderstorm, the plaintiff sustained water damages of \$480,235. After a four-day trial, the jury returned a verdict for the plaintiff, awarding the full amount of \$480,235. Tried by Richard Gerber and Matt Leffler.

*Assurance Co. of America v. Secura Ins. Co.* St. Louis County, Missouri. The trial court entered summary judgment for Brown & James' client Zurich Insurance Company in a dispute between two insurers over which company had a duty to defend and indemnify an insured for a construction defect claim. As a result of the court's ruling, Zurich recovered \$500,000 from the other insurer. Tried by Tim Wolf.

# BROWN & JAMES<sup>PC.</sup>

LAW FIRM

## Case Results

*Festus-Crystal City Elks v. Crystal City Properties, L.L.C.* Jefferson County, Missouri. In 2003, developer Crystal City Properties, L.L.C. made improvements on land adjoining the Festus-Crystal City Elks Lodge. Brown & James' client, R&K Excavation, Inc., was then hired to perform site development work on the project. During and after the construction, the Elks complained of foreign debris appearing on their land and contended the development diverted the natural waterflow in the area causing trash and contaminants to be carried onto the Elks' property and pond. The Elks sought damages for trespass, punitive damages, and unreasonable diversion of surface water. The punitive damages claim was dismissed for lack of evidence and the Elks did not submit their claim against R&K Excavation for unreasonable diversion of surface water. After approximately four hours of deliberation, the jury came back with a defense verdict for R&K Excavation, Inc. Tried by Lawrence B. Grebel and Robert T. Plunkert.

*Coutts v. Farm Bureau Town & Country Ins. Co. of Mo.* Jackson County, Missouri. Plaintiffs sustained a fire loss to a rental home they owned with an insurance policy through Farm Bureau. Farm Bureau investigated the claim and concluded the fire was intentionally set by the home's tenant. Farm Bureau denied the claim based on a provision in the insurance policy excluding coverage for damage caused by vandalism committed by a tenant. At trial, the insureds claimed the tenant's actions did not constitute vandalism because she was allegedly mentally ill. Farm Bureau maintained that the tenant's actions did constitute vandalism and that the exclusion was applicable. The jury agreed and rendered verdict for Farm Bureau. Tried by Robert L. Brady.

*Wilson v. Farmers Ins. Exchange.* Kansas Court of Appeals. The Kansas Court of Appeals affirmed a summary judgment for Brown & James' client, Farmers Insurance, in a declaratory judgment action in which Farmers obtained a declaration that it had no duty to defend or indemnify its insured. Tried by Michael A. Childs.

*Utility Trailer Sales of Kansas City, Inc. v. MAC Trailer Manufacturing, Inc.* United States District Court, District of Kansas. Brown & James' client, the defendant, was accused of breach of contract, tortious interference with an

existing contract, and tortious interference with a prospective business expectancy. The plaintiff sought \$902,500 at the beginning of trial and later reduced its demand to \$400,000 during trial. After a week-long trial, the jury returned a defense verdict. Tried by David R. Buchanan and Derek H. MacKay.

*Curtis Huelsman v. State Farm.* Clinton County, Illinois. Plaintiff filed suit for \$10,000 in fire damage to his car after his insurer denied coverage. The case proceeded to bench trial and after the plaintiff was unable to prove any breach of the policy's terms, the court entered judgment for Brown & James' client. Tried by Matt Young.

*Robert J. Kluge et al. v. James E. Switzer, Defendant Ad Litem for Angela J. Hindes.* Henry County, Missouri. In a wrongful death crossover automobile accident case, Brown & James' client clearly crossed the center line striking the plaintiff. Plaintiff was severely injured and permanently disabled as a result of the accident. Before trial, the defendant offered to enter a consent judgment for \$2 million; however, the plaintiffs' lawyer stated he would never take less than \$5 million. After a week-long trial, the jury returned a judgment of only \$500,000. Tried by Derek H. MacKay.

*Sundae Mundy v. Cowboys 2000, Inc.* Greene County, Missouri. Plaintiff was a patron of the defendant's night club when she claimed she was randomly assaulted with a beer bottle while on the dance floor, resulting in facial injuries and the loss of her front teeth. She testified the assault took place within a matter of seconds. Her boyfriend was seated two to three feet away from her, watching her dance, but was unable to prevent her from being struck. The plaintiff claimed the club's security was inadequate in number and not properly trained, and that the club had a history of violence in that there were 26 police reports in less than two years involving assault claims. After a three-day trial, the jury rendered a defense verdict for Brown & James' client. Tried by Irene J. Marusic.

*Maxine Nichols v. Mark Twain Center Partners.* Ralls County, Missouri. After falling and fracturing her elbow, which required two surgeries to repair, the plaintiff filed suit against the property owner of a retail outlet on whose sidewalk she fell. Claiming the sidewalk was uneven and the cause of her fall, she sought damages of \$87,000. The defense argued that as a long-time visitor of the area with a second residence at a nearby lake, the plaintiff frequently visited the property and retail location, and was more than familiar with its layout and the

sidewalk's intricacies. After going to trial, the jury returned a defense verdict. Tried by Irene J. Marusic.

*Happel v. Watters.* Marion County, Missouri. The plaintiffs alleged the defendants removed approximately 40 large trees from their property without permission. They sought treble damages and asked for total damages of over \$75,000, refusing to settle for anything less than \$48,000. With the defendants clearly liable for the removal of the trees, a jury trial was held on damages only. Following the trial and a separate bench trial on the treble damages issue, the plaintiffs were awarded only \$21,000 for the value of the removed trees. Tried by John D. Cooney.

*Essex Ins. Co. v. Clarinet, LLC.* United States District Court, Eastern District of Missouri. Brown & James' client, Essex Insurance received a summary judgment on a claim for insurance coverage for costs of approximately \$1.1 million associated with the demolition of the historic Switzer Building in St. Louis. Essex also received summary judgment on the defendants' counterclaims for breach of contract and bad faith. Tried by Joseph R. Swift and Joshua B. Stegeman.

*Abigail Gerling v. Lynn Voss.* Franklin County, Missouri. Plaintiff was a three-year-old girl who sustained a severe bite to her face by the defendants' dog. Plaintiff presented evidence that his dog had previously bit a young child, which the defendants denied. The child had a severe two-inch laceration to her face which required scar revision surgery. Plaintiff also claimed to be suffering from post-traumatic stress disorder. Plaintiff's medical specials were approximately \$17,000 with future medical specials claimed to be approximately \$50,000. After a two-day trial, the jury returned a defense verdict. Tried by David P. Bub.

*Murphy v. Safeco Ins. Co.* United States District Court, Eastern District of Missouri. Claiming a 2007 car accident was responsible for injuries requiring surgery, the plaintiff sued the defendant for \$150,000 for breach of insurance contract after the defendant denied coverage. After expert testimonies by orthopedic surgeons, the defense argued the plaintiff's pre-existing spinal conditions were not worsened by the accident and that the plaintiff should only be awarded \$25,000. The jury returned a verdict for the defendant, awarding the plaintiff only \$25,000 and nothing on the plaintiff's vexatious-refusal-to-pay claim. Tried by Bradley R. Hansmann.

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## Take Home Liability: Illinois Extends an Employer's Potential Liability to the Employee's Family Members in Toxic Tort Cases

Greg Odom

In Illinois, the existence of a duty depends upon whether the parties stand in such a relationship to each other that the law imposes upon the defendant an obligation to act in a reasonable manner for the benefit of the plaintiff. *Id.* at \*4. (citing *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 436 (Ill. 2006)). To determine whether the parties stand in a relationship sufficient to impose a duty upon the defendant, Illinois courts examine the following four factors: (1) the foreseeability of the harm; (2) the likelihood of the injury; (3) the magnitude of the burden involved in guarding against the harm; and (4) the consequences of placing on the defendant the duty to protect against the harm. *Id.*

Ultimately, the Fifth District concluded that each factor warranted the imposition of a duty upon an employer to protect its employees' family members from asbestos exposure. As to foreseeability, the Fifth District explained: "It takes a little imagination to presume that when an employee who is exposed to asbestos brings home his work clothes, members of his family are likely to be exposed as well." *Id.* at \*6. The Fifth District further concluded the likelihood of injury to the plaintiff was sufficient to impose a duty upon CSX, given the scientific evidence linking frequent asbestos exposure to the development of mesothelioma. *Id.* at \*7.

Regarding the potential burden of imposing a duty of care upon an employer to protect the families of its employees from asbestos exposure, the Fifth District determined that any burden was slight when compared to the harm sought to be prevented. *Id.* at \*7-\*8. The court provided examples of precautionary measures CSX could have taken to protect against the harm, including: (1) providing warnings to employees; (2) providing safety instructions to employees; (3) testing its products for asbestos; and (4) imposing employee hygienic practices. *Id.* at \*8. The Fifth District concluded that none of these measures would have imposed a significant burden upon CSX.

Finally, the Fifth District addressed the potential consequences of imposing a duty upon the defendant. CSX argued that imposing

such a duty of care upon it would expose it to limitless liability. For example, CSX claimed that a housekeeper or babysitter who regularly launders an employee's clothes may be regularly exposed to asbestos fibers and now would have a cause of action against the employer. *Id.* at \*8. The Fifth District rejected that argument, explaining the court's decision was limiting to subjecting employers to a duty of care to the *immediate* family members of employees to protect against take-home asbestos exposure. *Id.* at \*9 (emphasis added).

While the Fifth District indicated it had limited its holding to immediate family members of employees, the court left open the possibility for more expansive employer liability. The Fifth District noted that, "should a proper case arise, we can consider whether the duty extends to others who regularly come into contact with employees who are exposed to asbestos-containing products." *Id.* Thus, CSX may have correctly argued that an employer now could face liability for exposing

non-family members who come into close contact with an employee's work clothes.

Overall, the *Simpkins* opinion has several important ramifications. First, under Illinois law, employers now owe a duty of care to the family members of employees to protect against asbestos exposure. Additionally, depending upon the facts of future cases, Illinois courts may extend this duty of care to non-family members who frequently came into contact with an employee's work clothes. Finally, and perhaps most importantly, the Fifth District has validated the "take-home exposure" theory gaining prominence in asbestos litigation. The Fifth District's decision has created a new class of plaintiffs, while leaving the limits of employer liability undefined. Thus, in future asbestos litigation, counsel must be prepared not only to defend against an employee alleging direct exposure to asbestos, but also against those alleging exposure by coming into contact with an employee's work clothes. ■

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## Missouri Supreme Court Issues Three Opinions on Wrongful Discharge Claims

Christine A. Vaporean

be the "motivating factor" in the discharge. The Court also rejected the "motivating factor" standard without detailed explanation, as it did in *Daugherty*. Instead, the Court held the "contributing factor" standard, as applied in MHRA cases, should be applied in all future wrongful discharge claims based on public policy violations.

### *Application of the Doctrine to Contracted Employees:*

#### *Keveney v. Missouri Military Academy*

Before the Missouri Supreme Court's opinion in *Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo. banc 2010), wrongful discharge actions based on public policy violations were limited to at-will employees. The Supreme Court has now expanded the action to be available to

employees under contract as well. The Court reasoned: "An employer's obligation to refrain from discharging an employee who refuses to participate in or conceal actions inconsistent with public policy does not depend on the terms and conditions of the employment contract." *Keveney*, 304 S.W.3d at 102. Further, the Court held the remedies in a breach of contract action and a wrongful discharge action are distinct. The Court noted breach of contract actions fail to vindicate the violated public interest or provide a deterrent against future violations, implying, without specifically holding, that punitive damages would be available to a plaintiff in such a case. Finally, the Court reasoned it is inconsistent to allow an at-will employee to recover for wrongful discharge but deny the same right to a contract employee. ■

If anyone receiving The Firm Inquiry would prefer to receive it by e-mail, simply e-mail Michael Taylor at [mtaylor@bjpc.com](mailto:mtaylor@bjpc.com) and Brown & James will arrange for it to be sent electronically to you. The Firm Inquiry is a quarterly publication and is offered as a service to the clients and friends of Brown & James, P.C. The Firm Inquiry does not constitute legal advice or a legal opinion and is not an adequate substitute for the advice of counsel.

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### Firm Inquiry Announcements

#### Amnesty Day

Brown & James lawyers participated in St. Clair County's (IL) Amnesty Day, July 24, offering *pro bono* legal advice to those accepting deals from the county to quash traffic and misdemeanor violations with no arrests or questions asked.

**Tim Wolf** has been asked by the Council on Litigation Management to teach a course on "Reservations of Rights and the Insured's Right to Personal Counsel" at the QBE Insurance Company on October 14, 2010, in Bellevue, Wash.

**Veo Peoples** was recently featured in *The St. Louis American* as part of the newspaper's annual "Diversity: A Business Imperative" section. Veo, a veteran intellectual property lawyer, serves as a mentor for the firm's minority attorneys. *The St. Louis American* is one of the nation's oldest and most respected African-American publications.

**Bob Brady** and **David Bub** spoke on case law update issues at the March 18, 2010 Springfield Claim Manager's Association Meeting.

**Patrick Mickey** was featured in St. Louis University School of Law's spring 2010 *St. Louis Brief* profiling alumni. Patrick is a 2002 graduate and serves as an adjunct professor for trial advocacy.

**Todd Lubben** was recently elected to the board of directors of HavenHouse, a St. Louis non-profit organization providing affordable lodging, care and support for families traveling to St. Louis for medical care.

**Tim Wolf** recently gave a presentation on changes to UIM and UM case law in Missouri at a meeting of the Chartered Property Casualty Underwriters Society.

**Elaine Moss** recently authored 2010 updates for Chapters 4 and 5, Analyzing Insurance Policies, *New Appleman's Insurance Law and Practice Guide* (published 2007).

**James Howard** spoke on the subject "Ethics and Resolution Strategies" at the Managing Liens and Subrogation in Auto Accident Litigation seminar for the National Business Institute in Clayton, Mo., Aug. 13.

**Joe Swift** moderated the discussion on "Comprehensive Safety Analysis 2010" at the 2010 ALFA International Transportation Seminar, April 28-30, Marco Island, Fla.

**Steve Schwartz** moderated "Strategies for Avoiding Claims Against Officers & Directors and Related Coverage Issues" at the 2010 ALFA International Employment Practices Liability Insurance Seminar in New York, June 16-18.

**Larry Grebel** presented "Ex Parte Communications with Physicians" at the Missouri Organization of Defense Lawyers' Trial Academy, April 29, Lake Ozark, Mo.

**Larry Grebel** and **Patrick Mickey** spoke at a Lorman CLE presentation on AIA contracts to local attorneys, architects, and engineers in Clayton, Mo., June 15.

**Joe Swift** will speak on "CSA 2010 BASICS Training: Dealing with the Roadside Inspection" at the Arkansas Trucking Seminar, Sept. 15-17, in Fayetteville, Ark.