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Overview of the State of Missouri Court System

A. Trial Courts

1. Circuit Courts

a) The circuit courts are the primary trial courts in Missouri, and they have general jurisdiction over almost all civil and criminal matters. Every Missouri county has a court, and these courts are organized into 45 regional circuits throughout the state. Each circuit consists of many divisions such as circuit, associate circuit, small claims, municipal, criminal, family, probate, and juvenile. The type of case determines the division to which a particular case is assigned.

i. Associate Circuit Judges - hear civil cases involving claims of less than $25,000, and other cases as set by statute, such as unlawful detainer actions. May also hear any case if so assigned by the presiding judge of the Circuit.

ii. Circuit Judges - may hear all types of cases. Though some circuit courts may be designated as "family court" or a "probate court," these are not separate courts, but are merely recognized divisions of the Circuit Court.

B. Appellate Courts

1. Supreme Court

a. Composition--seven judges. Judges elect one member to serve as chief justice every two years. Generally sits en banc.

b. Jurisdiction--

i. Original--Supreme Court has original jurisdiction to determine remedial writs, quo warrant, writs of prohibition and mandamus. Has original jurisdiction over matters involving the discipline of attorneys, and contested statewide elections. Is permitted by its supervisory authority over all Missouri courts to establish rules of practice.

ii. Appellate

a. The Supreme Court has exclusive appellate jurisdiction over cases involving:

(i) the validity of a treaty or statute of the United States;

(ii) the validity of a Missouri statute of provision of the Missouri constitution; (iii) the construction of the revenue laws of the State;

(iv) the title to any state office; and

(v) punishments imposing death.

b. The Supreme Court will hear appeals of cases first heard by the court of appeals if an application for transfer to the Supreme Court filed by a party is sustained by either the court of appeals or the Supreme Court.

c. The Supreme Court must hear appeals of cases transferred to it by the court of appeals where a dissenting judge certifies the opinion contrary to a previous opinion of the Supreme Court or the court of appeals.

2. Appellate Courts

a. Composition - there are three districts of the Missouri Court of Appeals—the Western, Eastern and Southern Districts. The Western District has 11 judges. The Eastern District has 13 judges. The Southern District has 7 judges. Districts may sit en banc, but typically sit in division panels of three judges.

b. Jurisdiction - the court of appeals may issue and determine original remedial writs. General appellate jurisdiction extends to all appeals from the inferior courts within the counties in each district, unless a matter is within the exclusive jurisdiction of the Supreme Court.

Procedural

A. Venue

1. General Rules for Proper Venue

a. Non-Tort Cases – The following rules apply only if there is no count alleging tort. They apply whether the defendants are individuals, not-forprofit corporations, or for-profit corporations. The former "corporate defendants only" venue statute and the former special venue statute for not-for-profit corporations have been repealed. These non-tort rules also apply to limited liability partnerships, and they probably also apply to limited liability companies.

   i. All Defendants Residing in the Same County in Missouri

      1. One Defendant – If there is only one defendant and that defendant resides in Missouri, venue is proper in the county in which (i) that defendant resides; and (ii) the plaintiff resides and the defendant may be found and served with process.

      2. Multiple Defendants – If there are multiple defendants, and all reside in the same Missouri county, venue is proper in that county. In that situation, venue is probably also proper in the county in which the plaintiff resides if all the defendants are found and served with process therein.

   ii. Several Defendants Residing in Different Counties – If there are several defendants and they reside in different counties, venue is proper in any county in which any of the defendants reside.

   iii. Several Defendants – Mixed residents and nonresidents – If there are several defendants and they reside in different counties, venue is proper in any county in which any of the defendants reside.

   iv. All Defendants Nonresidents of Missouri – If all defendants are nonresidents of Missouri, venue is proper in any Missouri county.

b. Tort Cases

   i. Venue is determined as of the date the plaintiff is first injured. (RSMo § 508.010.9)

   ii. First Injury - first injury is defined as the location where the trauma or exposure occurred, rather than where the symptoms are first manifested. (RSMo § 508.010.14)

iii. For actions accruing in Missouri – proper venue is the county in which the action accrued. (RSMo § 508.010.4)

iv. For actions accruing outside Missouri:

1. Individual Defendant – venue is proper where the individual defendant resides OR if plaintiff was a Missouri resident at the time she was first injured, the county that was plaintiff's principal residence. (RSMo § 508.010.5(2))

2. Corporate Defendant – the county where the corporation's registered agent is located OR the county of plaintiff's principal residence, if plaintiff resided in Missouri on the date of first injury.

3. Multiple Defendants – in any county in which an individual defendant resides or a defendant corporation's registered agent resides.

2. Special Venue Rules for Particular Types of Defendants or Plaintiffs

a. Defendant LLPs – The statute creating LLPs in Missouri provided that suits against LLPs would be governed by the general venue rules. However, in non-tort cases, venue of a suit against an LLP is broader, given that LLPs may have multiple residences (every county in which the LLP has an agent or office for doing its customary business, as well as the counties in which its registered agent and registered office are located.)

b. Plaintiff or Defendant Counties – If any of the plaintiffs is a county, the following venue rules apply:

i. If there is no count alleging a tort, the case may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside or in the county in which the plaintiff county is located, if at least one defendant can be found and served in that county. If the suit is based on contract, the suit can also be brought in the county in which the plaintiff county is located or in the county in which any party to the contract resides.

ii. If there is any count alleging a tort, venue in suits by counties is probably governed by general tort venue rules.

B. Statute of Limitations

The following statute of limitations are pertinent:

1.	Personal Injury	5 yrs (RSMo § 516.120)
2.	Property Damage	5 yrs (RSMo § 516.120)
3.	Written Contract	10 yrs (RSMo § 516.110)
4.	Oral Contract	5 yrs (RSMo § 516.120)
5.	Conract Under Seal	10 yrs (RSMo § 516.110)
6.	Wrongful Death	3 yrs (RSMo § 537.100)
7.	Breach of Warranty	4 yrs (RSMo § 400.2-725)
8.	Fraud	5 yrs (RSMo § 516.120)
9.	Libel / Slander	2 yrs (RSMo § 516.140)
10.	Workers' Compensation	2 yrs (RSMo § 287.430)

Tolling – The limitations period can be tolled by either minority status or mental incapacity. (RSMo 516.170). Further, if a defendant is a resident of the state, his absence from the state will toll the statute of limitations if: (1) he is absent from the state when the cause of action accrues (in which case it begins to run when he returns); or (2) he is present in state when the cause of action accrues and he subsequently leaves the state and establishes residence in another state. The statutory period does not run while the action is stayed by injuction or statutory prohibition. The statutory period does not run while the defendant absconds or conceals himself, or while he, by any other improper act, prevents the commencement of the action.

Savings Statute (RSMo § 516.230) - If a plaintiff files suit within the statute of limitations, and the suit is dismissed without prejudice, the Missouri "savings statute" permits the plaintiff to re-filewithin one year after the dismissal. The savings statute extends, but does not shorten, the applicable statute of limitations – if a dismissal occurs before theexpiration of the statute of limitations, the plaintiff has either one year under the savings statute or the remainder of the statute of limitations period, whichever period is longer, in which to refile. The savings statute applies to voluntary and involuntary dismissals without prejudice. The savings statute can only be used once.

Borrowing Statute (RSMo § 516.190) – This section makes another state's statute of limitation applicable when the cause of action "originates" in another state. A cause of action "originates" or accrues in the state where the alleged damages are sustained and capable of ascertainment.

C. Time for Filing An Answer

Pursuant to Rule 55.25(a) of the Missouri Rules of Civil Procedure, a defendant shall file an answer within 30 days after the service of a summons and petition, except where service by mail is had, in which event a defendant shall file an answer within thirty days after the acknowledgement of receipt of summons and petition or return registered or certified mail receipt is filed in the case or within forty-five days after the first publication of notice if neither personal service nor service by mail is had.

D. Dismissal Re-Filing of Suit

Missouri Rule 67.02 provides that a plaintiff may voluntarily dismiss the case at any time: (1) before a jury panel is sworn for voir dire examination (in jury trials);or (2) before the introduction of evidence at trial (in bench trials). If these timeliness requirements are not met, a plaintiff may only secure a voluntary dismissal without prejudice on stipulation of the parties or by court order.

Liability

A. Negligence

1) Common Law Negligence

In order to recover for negligence the plaintiff must prove: (1) the defendant owed a duty of care; (2) the defendant breached that duty; (3) damage to the plaintiff; and (4) proximate cause between the breach of duty and the plaintiff's damage. *Virginia D. v. Medesco Inv. Corp.,* 648 S.W.2d 881, 886 (Mo. banc 1983).

a. Standard of Care

i. Medical Professionals – a national standard of care is applied to medical professionals. However, some allowances are made for the type of community in which the medical professional maintains his/her practice.

ii. Owners/Occupiers of Land – duty of care depends on whether plaintiff is trespasser, licensee or invitee.

iii. Violation of Statute of Ordinance – violation of an ordinance or statute is negligence per se.

2) Comparative Fault

Missouri follows the doctrine of pure comparative fault in accordance with the

Uniform Comparative Fault Act §§ 1-6, 12 U.L.A. Supp. 35-45 (1983). Pursuant to the UCFA, in an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. *See Children's' Wish Foundation Intern, Inc. v. Mayer Hoffman McCann*, 331 S.W.3d 648, (Mo. 2011).

B. Negligence Defenses

1. Assumption of Risk

Missouri law recognizes three types of assumption of risk: (1) express; (2) implied primary; and (3) implied secondary. *Ivey v. Nicholson-Mcbride,* 336 S.W.3d 155, 158 (Mo. App. W.D. 2011). A finding of express assumption of risk will completely bar recovery. *Id.* Implied primary assumption of risk involves the question of whether the defendant had a duty to protect the plaintiff from the risk of harm. Under this type of assumption of risk, the defendant is relieved from the duty to protect the plaintiff from well known incidental risks of the parties' voluntary relationship because the plaintiff's participation in the activity acts as consent to relieve the defendant of this duty. If the plaintiff sustains an injury from such a risk while in the relationship, the defendant, having no duty, cannot be found negligent. Assumed risks arise from the nature of the activity itself rather than from a defendant's negligence.

Implied secondary assumption of the risk occurs when the defendant owes a duty of care to the plaintiff but the plaintiff knowingly proceeds to encounter a known risk imposed by the defendant's breach of duty. In implied secondary assumption of risk cases, the question is whether the plaintiff's action was reasonable or unreasonable. If the plaintiff's action was reasonable, he is not barred from recovery. If the plaintiff's conduct was unreasonable, it is to be considered by the jury as one element of fault. *Lewis v. Snow Creek, Inc.,* 6 S.W.3d 388, 395 (Mo. App. W.D. 1999).

2. Last Clear Chance – the last clear chance doctrine does not apply. Comparative fault replaced the all-or-nothing system present with the contributory negligence defense and the last clear chance doctrine.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Punitive Damages

Under Missouri law, punitive damages are intended to punish the defendant and deter similar conduct by the defendant and others. They are not intended to compensate the plaintiff. Punitive damages are not a matter of right. Punitive damages are a matter of discretion. They may not be awarded unless the jury awards actual or nominal damages. Moreover, the trial judge determines whether punitive damages may be submitted under the law and facts in the case before it. The award or denial of punitive damages and their amount are matters entirely within the discretion of the jury. The jury's assessment may not be interfered with unless it plainly appears that there has been an abuse of discretion. An abuse of discretion is an act by the jury so out of all proper proportion to the factors involved that it reveals improper motives or a clear absence of the honest exercise of judgment.

RSMo § 510.263 provides that all actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party. However, this section does not eliminate the question of punitive damages from the first portion of the bifurcated trial. The issues of actual and punitive damages are both submitted to the jury in the first stage of the proceeding. Then, only if the jury determines that the defendant is liable for punitive damages, is a second hearing held to determine the amount. The issues regarding liability for actual and punitive damages are not heard separately under the statute. Evidence of the defendant's net worth is admissible during the second stage of the trial. Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising for causes of action for libel, slander, assault, battery, false imprisonment, criminal conversion, malicious prospection or fraud.

Moreover, even if RSMo. § 510.263 does not apply to a particular action, the trial court can grant a defendant's request for bifurcated trial by separating the punitive damages issue for separate presentation to the jury under Rule 66.02[6] *See Bradshaw v. Deming*, 837 S.W.2d 592 (Mo.App. W.D. 1992), *Thornbrugh v. Poulin*, 679 S.W.2d 416 (Mo.App. S.D. 1984), *Mitchell v. Pla-Mor, Inc.,* 361 Mo. 946, 237 S.W.2d 189 (1951), and *Wolf v. Goodyear Tire and Rubber Co.*, 808 S.W.2d 868 (Mo.App. W.D. 1991).

D. Negligent Hiring and Retention

Missouri courts have long recognized that negligence in hiring an unfit employee may be a grounds for recovery by an individual injured by that employee's negligenct or intentionally tortious acts, but the claim is hard to establish. Missouri courts do not allow claims for negligent supervision where the employer will be liable, in any event, under the doctrine of respondeat superior.

To establish a claim for negligent hiring, a plaintiff must allege that: (1) the employer knew or should have known of the employee's dangerous proclivities; and (2) the employer's negligence was the proximate cause of the plaintiff's injuries. *Gibson v. Brewer,* 952 S.W.2d 239, 246 (Mo. banc 1997). Missouri courts follow the Restatement (Second) of Torts § 317 for claims of negligent hiring. The cause of action requires evidence that would cause the employer to foresee that the employee would create an unreasonable risk of harm outside the scope of his employment.

E. Negligent Entrustment

The doctrine of negligent entrustment developed as an exception to the general rule that the supplier of an instrumentality is not liable to an injured party for its negligent use by another. The theory provides for recovery when the supplier knows that the party to whom the instrumentality is being entrusted is incompetent. Negligent entrustment focuses on the liability of the supplier of an injury-causing instrumentality for negligence in entrusting it to an incompetent user, and not on liability for a defect in the instrumentality itself, or on liability for causing the user's incompetence. If an employer has admitted *respondeat superior* liability for its employee's negligence, the plaintiff may not proceed against the employer under a theory of negligent entrustment. *McHaffie v. Bunch*, 891 S.W.2d 822, 827 (Mo. banc 1995). Because the employer becomes strictly liable for the employee's negligence under *respondeat superior*, a separate assessment of the employer's fault for negligent entrustment could result in a greater assessment of fault to the employer than is attributable to the employee. *Id*.

F. Dram Shop

Bar Owner or Tavernkepper Liability

1. Missouri’s dramshop statute provides that a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against a liquor licensee when it can be proven by clear and convincing evidence that the seller knew or should have know:

    a. That intoxicating liquor was served to a person under the age of 21 years old; or

    b. That intoxicating liquor was served to a “visibly intoxicated” person. (RSMo §537.053.2)

    c. “Visible intoxication” is defined as “significantly uncoordinated physical action or significant physical

disfunction." (§537.053.3)

d. An individual's blood alcohol content is not prima facie evidence of visible intoxication. (RSMo §537.053.)

2. There is no social host liability

G. Joint and Several Liability

In Missouri, tort-feasors can be jointly and severally liable for the harm caused to a plaintiff. However, under tort reform, joint and several liability applies to a defendant only if that defendant is at least fifty-one percent at fault. A plaintiff may sue all or any of the joint or concurrent tort-feasors and obtain a judgment against all or any of them. When one or multiple tort-feasors satisfies a judgment, that tort-feasor has a right to contribution from the other tort-feasors in proportion to the negligence of each individual tort-feasor. *See Hance v. Altom*, 326 S.W.3d 133 (Mo. App. S.D. 2010) and *Millentree v. Tent Restaurant Operations, Inc.,* 618 F. Supp.2d 1072 (W.D.Mo. 2009).

H. Wrongful Death and/or Survival Actions

Missouri law recognizes separate actions for wrongful death and survivorship claims.

1. Who May Sue

a. RSMo § 537.080 specifies or delineates who may sue in a wrongful death action. The classes of plaintiffs are as follows:

i. Class One: The spouse or children, or the surviving lineal descendants of any deceased children, whether the child is natural or adopted, legitimate or illegitimate, or the father or mother of the deceased, whether natural or adoptive.

ii. Class Two: If there are no persons in Class One entitled to bring the wrongful death action, then the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set forth in RSMo § 537.090 because of the death.

iii. Class Three: If there are no persons in Class One or

Two entitled to bring the wrongful death actions, then a plaintiff ad litem may file suit. The plaintiff ad litem shall be appointed by the court having jurisdiction over the action.

b. Only one wrongful death action may be brought against a defendant for the death of any one person.

c. A lower class member cannot file a wrongful death action if a higher class member survives and can file suit. *Griffin v. Belt*, 941 S.W.2d 570, 572 (Mo. App. W.D. 1997).

d. Where two or more may assert a cause of action for wrongful death, it is not necessary for a plaintiff to join all other permissible plaintiffs as long as the plaintiff has made a diligent effort to notify all parties with a cause of action. RSMo § 537.095.1.

2. Settlements

Under Missouri law, the court is required only to apportion the settlement proceeds in proportion to the losses it determines each person has suffered as a result of the decedent's wrongful death. *See Banner ex rel. Bolduc v. Owsley*, 305 S.W.3d 498 (Mo. App. S.D. 2010).

I. Vicarious Liability

A. Respondeat Superior

Missouri recognizes the doctrine of respondeat superior. Under the doctrine, an employer is liable for the misconduct of an employee where the that employee is acting within the course and scope of his employment. *Green v. Neill,* 127 S.W.3d 677, 678-79 (Mo. banc 2004). An act is within the course and scope of employment if: (1) even though not specifically authorized, it is done to further the business or interests of the employer under his "general authority and direction" and (2) it naturally arises from the performance of the employer's work. If the act is fairly and naturally incident to the employer's business, although mistakenly or ill advisedly done, and did not arise wholly from some external , independent or personal motive, it is done while engaged in the employer's business.

A principal is liable vicariously for his agent's acts if the principal manifests his consent to, or knowingly permits, the agent's exercise of authority, and

if the third party believes, with a reasonable, good faith basis for doing so, that the agent has authority and relies on the agent's apparently having authority to act. When a principal cloaks his agent with apparent authority, the principal can be vicariously liable to wronged third parties even when the agent acts wholly out of personal motive or with the purpose of defrauding his principal and even when the principal is innocent and deprived of any benefit. The principles of apparent authority are broader than the principles of respondeat superior.

B. Parental Liability for Children

1. Parents or guardians of any unemancipated minor, under the age of eighteen, are statutorily liable for up to $2,000 in damages if the child:

a. Purposefully "marks upon, defaces or in any way damages property." (RSMo § 537.045.1)

b. Purposefully causes personal injury to any individual. (RSMo §537.045.2)

2. A judge may order the parent, or guardian and/or minor to work for the owner of the property damaged or the person injured in lieu of payment. (Mo. Rev. Stat. §537.045.3).

C. Automobile Owner Liability for Driver – Missouri does not apply the "family car" or "permissive use" doctrines to impose liability on an automobile owner for the tortuous conduct of a driver.

J. Exclusivity of Workers' Compensation

Missouri's exclusive remedy statute is RSMo § 287.120.

The exclusive remedy provision of Missouri workers' compensation law is in a state of flux. In 2005 the Missouri Workers' Compensation Act was amended to require that all courts strictly construe the provisions of the Act. This strict construction mandate had unintended consequences. First, the Missouri Court of Appeals held that negligent co-employees, who previously enjoyed immunity under the Act, could be sued for negligence. *Robinson v. Hooker,* 323 S.W.3d 418 (Mo. App. W.D. 2010). Next, the Missouri Court of Appeals held that occupational disease claimants were no longer required to file claims within the workers' compensation system. *KCP&L v. Cook,* 353 S.W.3d 14 (Mo. App. W.D. 2011).

The erosion of the exclusive remedy provision prompted a legislative response. In 2012 the Missouri legislature reinstated co-employee

immunity under the Act, but it failed to place occupational disease claims back within the Act's exclusive coverage. Thus, at present, occupational disease claimants can choose to either pursue their claim through the workers' compensation system or sue in civil court.

Damages

A. Statutory Caps on Damages

In 2012 the Missouri Supreme Court rewrote the law on damages caps. In *Watts v. Lester E. Cox Med. Ctrs.,* a medical malpractice case, the Court held that statutory caps on damages were unconstitutional as applied to common law claims that predated the Missouri Constitution. 376 S.W.3d 633 (Mo. 2012). The Missouri Constitution provides "that the right of a trial by jury as heretofore enjoyed shall remain inviolate." In light of this language, the Court held that statutory caps are unenforceable for claims like medical malpractice, which existed before the adoption of the Missouri Constitution.

On the other hand, for statutorily created causes of action, like wrongful death, damages caps are still enforceable. See RSMo § 538.210

Punitive Damages – Missouri statute provides that no award of punitive damages against any defendant shall exceed the greater of $500,000 or five times the net amount of the judgment awarded to the plaintiff against the defendant. (RSMo § 510.265).

B. Compensatory Damages for Bodily Injury

Compensatory damages are measured by the loss or injury sustained. There must be a wrong done to one person by another *and* a consequent injury or loss to permit recovery because of the wrong committed. Even though the law may presume damages in some cases and allow a nominal recovery, there must be a real injury to sustain a substantial recovery. The ultimate test for damage is whether the award will fairly and reasonably compensate the plaintiff for the injuries.

In regards to medical expenses, there exists a rebuttal presumption that the amount actually paid to the healthcare provider represents the value of the treatment. (RSMo § 490.715). Section 490.715 also provides the procedure for rebutting this presumption:

"Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to: (a) the medical bills incurred by a party; (b) the amount actually paid for medical treatment rendered to a party; (c) the amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of recovery."

C. Collateral Source

Generally, collateral source evidence is inadmissible, with a few exceptions.

Missouri statute provides:

> If prior to trial a defendant or his or her insurer or authorized representative, or any combination of them, pays all or any part of a plaintiff's special damages, the defendant may introduce evidence that some other person other than the plaintiff has paid those amounts. The evidence shall not identify any person having made such payments.

(RSMo § 490.715).

D. Pre-Judgment/Post judgment Interest

Missouri's pre-judgment interest statute is RSMo § 408.040. In all nontort actions, interest is allowed at a rate of nine percent per annum from the date judgment is entered until satisfaction. In tort actions, interest is allowed at the federal funds rate plus five percent per annum from the date of judgment until satisfaction.

Section 408.040 also permits prejudgment interest when the amount of the judgment exceeds the amount demanded before trial. Prejudgment interest is calculated ninety days after the demand or offer was received. The demand must be in writing and sent by certified mail. The Missouri Supreme Court has declined to award interest where a party failed to send demand by certified mail as prescribed by the statute. *Emery v. Carnahan,* 159 S.W.3d 387, 403 (Mo. banc 1998). Moreover, in making a demand under section 408.040 practitioners are cautioned to distinguish multiple claims and apportion the demand accordingly. Failure to do so may result in denial of a claim for prejudgment interest. *McCormack v. Capital Electric Const. Co.,* 159 S.W.3d 387, 403 (Mo. App. W.D. 2004).

Courts will include punitive damages in determining whether a judgment exceeds a claimant's settlement offer or demand. *Werremeyer v. K.C. Auto Salvage Co.,* 134 S.W.3d 633, 636-37 (Mo. banc 2004).

From a practical standpoint, defendants are not rewarded for promptly rejecting a plaintiff's offer of settlement. Defendants are better off allowing the offer to remain open for 90 days because prejudgment interest only runs from the expiration of the 90-day period or upon rejection of a demand offer made without a counter-offer.

E. Damages for Emotional Distress

Damages for emotional distress are recoverable under Missouri law for the

negligent infliction of emotional distress and for intentional infliction of emotional distress. Otherwise, emotional distress, in general, is recoverable as an element of damages in many separate causes of action. *See Schumann v. Mo. Highway & Transp. Comm'n,* 912 S.W.2d 548, 554 (Mo. App. W.D. 1995) ("lost enjoyment of life is a compensable element of general damages in a personal injury case"). But if the cause of action allows only for pecuniary damages, damages for emotional distress are not available under it. *See State ex rel. BP Prods. N. Am. Inc. v. Ross,* 163 S.W.3d 922, 929 (Mo. banc 2005). Aside from negligent infliction of emotional distress, the Missouri Approved Jury Instuctions do not contain a verdict-directing instruction for claims of emotional distress. Therefore, damages for emotional distress are generally calculated under the general principle of compensatory damages that will fairly and justly compensate the plaintiff for damages caused by the defendant.

F. Wrongful Death and/or Survival Action Damages

RSMo 537.090 specifically allows for the recovery of pecuniary losses suffered by reason of the death. If the proper party plaintiffs demonstrate reasonable probability of pecuniary benefit from the continued life of the decedent, they are entitled to recover. *Domijan v. Harp,* 340 S.W.2d 728, 734 (Mo. 1960). The jury has broad discretion in calculating pecuniary damages and may consider monetary losses of every kind that necessarily result from the death. Factors to be considered by the jury in evaluating pecuniary damages under § 537.090 include financial aid expected to be received from the decedent, which can be shown through evidence of the decedent's: health; character; talents; earning capacity; life expectancy; age; and habits. *Kilmer v. Browning,* 806 S.W.2d 75, 81 (Mo. App. S.D. 1991).

Funeral expenses can be recovered. (RSMo § 537.090).

Noneconomic damages are recoverable. Recovery is permitted for the loss, occasioned by the death, of "the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training and support…" (RSMo § 537.090).

Plaintiffs may recover for suffering of the decendent between the time of the injury and death. (RSMo § 537.090). Punitive damages are available when aggravating circumstances are shown.

The Missouri Supreme Court recently upheld the constitutionality of the statutory cap on noneconomic damages against health care providers, but only for statutorily created causes of action, like wrongful death. *Sanders v. Ahmed,* 364 S.W.3d 195 (Mo. 2012).

Survivial actions:

A survival action must be brought by the personal representative of the injured decedent. RSMo § 537.020. If a cause of action for death or personal injury that does not result in death exists, it is sufficient to authorize and require appointment of a personal representative by the probate court upon the written application of one or more

of the decedent's beneficiaries. RSMo § 537.020.2. If the decedent is alleged to have been liable for the injury or death of another, the existence of the cause of action is sufficient to authorize and require the appointment of a personal representative upon the written application of any person interested in the cause of action. *Id.*

Although some jurisdictions hold strictly that an action for punitive damages may only be brought the injured party, Missouri law permits the personal representative of decedent's estate to seek punitive damages that the decedent would have been able to seek. The rule is that, when the cause of action for which punitive damages might be recovered survives, the right to punitive damages also survives. *State ex rel. Smith v. Greene,* 494 S.W.2d 55, 60 (Mo. banc 1973).

G. Punitive Damages

Under Missouri law, punitive damages are intended to punish the defendant and deter similar conduct by the defendant and others. They are not intended to compensate the plaintiff. Punitive damages are not a matter of right. Punitive damages are a matter of discretion. They may not be awarded unless the jury awards actual or nominal damages. Moreover, the trial judge determines whether punitive damages may be submitted under the law and facts in the case before it. The award or denial of punitive damages and their amount are matters entirely within the discretion of the jury. The jury's assessment may not be interfered with unless it plainly appears that there has been an abuse of discretion. An abuse of discretion is an act by the jury so out of all proper proportion to the factors involved that it reveals improper motives or a clear absence of the honest exercise of judgment. RSMo § 510.263 provides that all actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party. However, this section does not eliminate the question of punitive damages from the first portion of the bifurcated trial. The issues of actual and punitive damages are both submitted to the jury in the first stage of the proceeding. Then, only if the jury determines that the defendant is liable for punitive damages, is a second hearing held to determine the amount. The issues regarding liability for actual and punitive damages are not heard separately under the statute,. Evidence of the defendant's net worth is admissible during the second stage of the trial. Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising for causes of action for libel, slander, assault, battery, false imprisonment, criminal conversion, malicious prospection or fraud.

Moreover, even if RSMo. § 510.263 does not apply to a particular action, the trial court can grant a defendant's request for bifurcated trial by separating the punlitive damagd issued for separate presentation to the jury under Rule 66.02[6] *See Bradshaw v. Deming*, 837 S.W.2d 592 (Mo.App. W.D. 1992), *Thornbrugh v. Poulin*, 679 S.W.2d 416 (Mo.App. S.D. 1984), *Mitchell v. Pla-Mor, Inc.,* 361 Mo. 946, 237 S.W.2d 189 (1951),

and *Wolf v. Goodyear Tire and Rubber Co.*, 808 S.W.2d 868 (Mo.App. W.D. 1991).

H. Diminution in Value of Damaged Vehicle

The general measure of damages for damage to or destruction of personal property is the difference in fair market value of the property immediately before and immediately after the event causing the damage. This is known as the "diminution in value" test. *Carnell v. Dairyman's Supply Co.,* 421 S.W.2d 775 (Mo. 1967). For example, one way to determine the measure of damages in an automobile collision case is to calculate the difference in value of the car before and after the collision. If the property cannot be restored to its fair market value before the damage occurred, the measure of damages is the difference in fair market value before the damage and after the repair, plus the cost of repair. Another way to arrive at the same result is to say that the plaintiff is entitled to recover both the cost of repairing the item and the difference in its fair market value before the damage and after the repairs are done. *Rook v. John F. Oliver Trucking Co.,* 556 S.W.2d 200 (Mo. App. E.D. 1977).

"Fair market value," for purposes of calculating the amount of damage to personal property, "refers to the price the property would bring if sold by a willing seller to a willing buyer who is under no compulsion to buy." *Sharaga v. Auto Owners Mut. Ins. Co.,* 831 S.W.2d 248, 253 (Mo. App. W.D. 1992). In the case of goods held as stock for resale and not for consumption, the measure of damages is computed as the difference between the wholesale fair market value of the merchandise after the loss or destruction and the wholesale market value and delivery costs immediately before the loss or destruction occurred. *Farer v. Benton,* 740 S.W.2d 676 (Mo. App. E.D. 1987).

I. Loss of Use of Motor Vehicle

In addition to being entitled to damages as measured by the "diminution in value" or "cost of repairs" tests, the owner of damaged personal property may be entitled to damages for the loss of the use of the property while it remains unrepaired. *Stallman v. Hill,* 510 S.W.2d 796 (Mo. App. W.D. 1974). Loss-of-use damages are limited to the period of time reasonably required for repair, which is the time required by the exercise of proper diligence to secure repair. *Crank v. Firestone Tire & Rubber Co.,* 692 S.W.2d 397 (Mo. App. W.D. 1985). The claimant has the burden of proof with respect to the issue of reasonableness of time. Stallman, 510 S.W.2d at 798.

Loss-of-use damages are generally measured by the fair market rental value of the property involved. *Johnson v. Linder,* 618 S.W.2d 265 (Mo. App. E.D. 1981). The plaintiff's evidence regarding loss of use must not be speculative but rather must bring the issue outside the realm of conjecture or speculation. The evidence must be sufficient that a just or reasonable estimate can be drawn. In addition, claimants have a duty to mitigate loss-of-use damages because claimants must not unreasonably delay in having the property repaired. If unreasonable delay is found, the claimant will not be

awarded for loss of use during the period of time beyond the time that is deemed reasonable. Stallman, 510 S.W.2d at 798-99. But the property owner is not bound by the original time estimate for repairs when further damage is found during the repair process.

Evidentiary Issues

A. Preventability Determination

Although there does not appear to be a Missouri case directly on point, existing Missouri case law suggests that a court would analyze a "preventability" investigation as a "subsequent remedial measure." See *Cupp v. AMTRAK,* 138 S.W.3d 766, 776 (Mo. App. E.D. 2004). Under Missouri law, evidence of subsequent remedial measures is inadmissible in negligence actions. *Id.* The policy behind such a rule is twofold: (1) if precautions taken after the accident could be used as evidence of previous improper conditions, no one, after an accident, would make improvements; and (2) subsequent changes are irrelevant to establish what the previous condition was. *Id.* The public policy rationale for excluding evidence of post-accident remedial measures does not apply if the measures in question were planned, provided for, or undertaken prior to the accident. *Id.* Thus, evidence of a post-accident investigation may be admissible where it is offered to prove that the defendant was aware of the alleged danger prior to the accident. See *id.*

Evidence of a remedial measure may be admissible if it tends to prove the feasibility of precautionary measures that could have been taken. *Loyd v. Ozark Elec. Coop., Inc.,* 4 S.W.3d 579 (Mo. App. S.D. 1999). However, such evidence is likely inadmissible where the defendant makes no claim that the allegedly dangerous condition at the time of the accident could not have been made safer. *Fletcher v. City of Kansas City,* 812 S.W.2d 562 (Mo. App. W.D. 1991).

B. Traffic Citation from Accident

"It has been the consistent rule in Missouri that evidence that a traffic citation was or was not issued is inadmissible in a negligence case because it is prejudicial and brings before the jury a false issue." *McNabb v. Winkelmann,* 661 S.W.2d 825, 827 (Mo. App. E.D. 1983). However, in the event that the driver previously pleaded guilty to a traffic citation, the plea of guilty is admissible to impeach the credibility of the driver in a subsequent case. See RSMo § 491.050; *Hacker v. Quinn Concrete Co.*, 857 S.W.2d 402, 414 (Mo. App. W.D. 1993).

C. Failure to Wear a Seat Belt

RSMo § 307.178 requires the use of a seatbelt for most front seat occupants of passenger cars. However, § 307.178.3 sharply limits the degree to which evidence of failure to obey this law may be used against the injured motorist:

> In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence.

At most, a defendant can use this evidence, under some circumstances, to mitigate damages, but by no more than one percent of the amount awarded. § 307.178.3(2).

D. Failure of Motorcyclist to Wear a Helmet

Pursuant to RSMo § 302.020.2, every person operating or riding as a passenger on a motorcycle upon any highway shall wear protective headgear at all times the vehicle is in motion. The failure of a motorcyclist to wear protective headgear, where such a duty exists, or the failure to properly secure protective headgear, may be admissible on the issue of comparative fault. See *Talley v. Swift Transp. Co.,* 320 S.W.3d 752, 755-756 (Mo. App. W.D. 2010).

E. Evidence of Alcohol or Drug Intoxication

The Missouri Supreme Court has held that evidence of intoxication is relevant and material to a witness's ability to see, hear, perceive, and observe as well as when it is pleaded as an independent act of negligence. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104(Mo. banc 1996). Attorneys should also be aware of *Hosto v. Union Electric Co.*, 51 S.W.3d 133 (Mo. App. E.D. 2001). In *Hosto*, the court refused to allow evidence of alcohol consumption of the plaintiffs' decedent to show comparative fault. The court upheld the trial court exclusion of the evidence on the ground that there was no evidence that the decedent had consumed alcohol on the day of the accident.

F. Testimony of Investigating Police Officer

A police officer, like any other witness, may testify regarding appropriate matters. The officer's personal opinions about the cause of the collision are inadmissible. *Ryan v. Campbell '66' Express*, 304 S.W.2d 825 (Mo. banc 1957). But an officer may give testimony concerning things that he or she is trained to do, such as identifying marks on the road as skid marks, or measurement of tire marks. See *Penn v. Hartman*, 525 S.W.2d 773 (Mo. App. E.D. 1975). Even when a police officer may be qualified as an expert witness in an auto injury case, hearsay statements on which the officer based his opinion are generally inadmissible. See *Edgell v. Leighty*, 825 S.W.2d 325 (Mo. App. S.D. 1992).

A police officer may not testify about whether or not he issued a citation to a driver. *Hacker v. Quinn Concrete Co.,* 857 S.W.2d 402, 407 (Mo. App. W.D. 1993).

G. Expert Testimony

If a trier of fact lacks the scientific, technical, or other specialized knowledge to understand specific evidence, a witness possessing knowledge, skill, experience, training, or education with regard to that evidence may testify as an expert. RSMo § 490.065. The court must consider whether the facts and data that the expert relies on "are of a type reasonably relied on by experts in that field or if the methodology is otherwise reasonably reliable." *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 157 (Mo. banc 2003). If the court finds that the testimony does not meet this standard, the testimony is inadmissible. *Id.*

In at least one case the Missouri Supreme Court held that basic issues in automobile crashes, like the point of impact and the position of the vehicles in the roadway, are not appropriate subjects for expert testimony. *Housman v. Fiddyment*, 421 S.W.2d 284, 292 (Mo. banc 1967). These issues “are routinely decided by Missouri juries without the aid of expert witnesses” because “nearly all jurors are experienced motorists.” *Id.*

H. Collateral Source

Pursuant to RSMo § 490.715, evidence of collateral sources is generally inadmissible. However, if prior to trial a defendant or his insurer pays all or part of a plaintiff’s special damages, the defendant may introduce evidence that some person other than plaintiff paid those amounts. § 490.715.2. The evidence shall not identify the person having made such payments. *Id.* If the defendant introduces evidence that it has already paid part of plaintiff’s damages, the defendant waives any right to a credit against the ultimate judgment, if any. § 490.715.3.

I. Recorded Statements

Out-of-court statements of persons who are not parties may be admitted as exceptions to the hearsay rule when the person making the statement is unavailable to testify at trial and at least one of the following is true: (1) prior testimony under oath; (2) statements against the declarant's interest; (3) statements made under belief of impending death ("dying declarations"); or (4) statements concerning personal or family history.

Of course, the primary requirement is that the person be unavailable. Although at one time the only recognized unavailability was the death of the declarant--the ultimate unavailability--there are now myriad situations in which the declarant has been held to be unavailable, thus making the hearsay evidence admissible under these exceptions. The formal test is "that whenever the testimony of the witness is unavailable as a

practical proposition, his declaration should be received." *Sutter v. Easterly*, 189 S.W.2d 284, 295 (Mo. 1945).

J. Prior Convictions

RSMo § 491.050 provides any prior criminal convictions may be proved to affect the credibility of witness in a civil or criminal case.

K. Driving History

A certified copy of an individual's driving record is admissible in evidence in all Missouri courts. RSMo § 302.312.2.

Missouri adheres to the majority rule that substantive character evidence is only admissible in criminal cases. See *Haynam v. Laclede Eled. Coop., Inc.*, 827 S.W.2d 200, 205 (Mo. banc 1992). As such, evidence in a civil case that a driver had a good driving record is generally inadmissible. *Williams v. Bailey,* 759 S.W.2d 394, 396 (Mo. App. S.D. 1988). "The fact that Bailey was previously a good driver or a good person does not tend to establish that he was not negligent at the time the fatal accident occurred, and evidence of his prior good record was therefore inadmissible." *Id.*

L. Fatigue

There is scant Missouri case law regarding the admissibility of evidence of fatigue and hours of service violations. At least in the context of FELA, the Missouri Court of Appeals has held that an hours of service violation may support a claim against the railroad for negligence per se. See *Bailey v. Norfolk & W. Ry.*, 942 S.W.2d 404 (Mo. App. E.D. 1997).

M. Spoliation

"Spoliation" is the intentional destruction, mutilation, alteration or concealment of evidence. *Fisher v. Bauer Corp.*, 239 S.W.3d 693, 701 (Mo. App. E.D. 2007). In Missouri, if a party has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth, that party is subject to an adverse evidentiary inference. *Id.* However, Missouri has not recognized spoliation, either intentional or negligent, as the basis for tort liability against either a party or a non-party to the action in which the evidence was to be used.

Settlement

A. Offer of Judgment

Missouri Rule of Civil Procedure 77.04 provides that a party who is defending against a claim may, at any time more than 30 days before trial, serve a written offer allowing the

plaintiff(s) to take judgment against the defendant for money or property or to such effect as outlined in the offer, plus costs accrued to date. Inclusion of costs in the offer is necessary for it to be valid. If the offer is not accepted and the claimant does not obtain a judgment more favorable than the offer, the costs incurred after service of the offer are taxed against the claimant. Therefore, to be an effective settlement tool, an offer of judgment must be served before significant discovery expenses, which will be taxed as court costs, are incurred. As a practical matter, an offer of judgment made after all of the discovery has taken place may have some psychological value and probably ensures that the offer will be communicated to the client, but there is no penalty in rejecting the offer other than in the taxing of costs as discussed above.

B. Liens

A Missouri hospital or clinic, supported in whole or in part by charity, may acquire a lien for the reasonable cost of services upon the personal injury claim of a person admitted to the hospital under RSMo §§ 430.230 and 430.235. The lien is not valid in workers' compensation claims. For the lien to be effective, RSMo § 430.240 requires that written notice be sent by registered mail with return receipt requested to the tortfeasor and the tortfeasor's insurance carrier, if known, before the payment to the injured party.

Under Missouri's workers' compensation law, "the employer shall be subrogated to the right of the employee" in claims in which a third person is liable to the employee. RSMo § 287.150.1. Section 287.150.3 provides that "any part of the recovery paid to the employee [after the employer's subrogation interest has been satisfied] . . . shall be treated by [the employee] as an advance payment by the employer on account of any future installments of compensation." The Second Injury Fund, RSMo § 287.220.1, also acquires this same right of subrogation under the statute. The employer's share of the proceeds is prorated. The employer is obligated to pay its "proportionate share of the expenses of the recovery, including a reasonable attorney fee." *Ruediger v. Kallmeyer Bros. Serv.*, 501 S.W.2d 56, 57 (Mo. banc 1973). An employer's negligence--such as the violation of explicit Missouri safety statutes--does not cause the employer to forfeit its subrogation rights under § 287.150. *Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 55 (Mo. banc 1998).

In regards to Medicaid, RSMo § 208.215.1 states that the Department of Social Services is subrogated to the rights of a recipient of Medicaid assistance. Section 208.215.2 further authorizes the Department of Social Services to maintain an action "in the name of the state of Missouri against the person" liable to the Medicaid recipient.

C. Minor Settlement

Missouri Rule of Civil Procedure 52.02(n) provides that the powers and duties a next friend, guardian, or guardian ad litem is to exercise for minors and incompetents are those set forth in the Missouri statutes, including but not limited to: employment of an attorney (RSMo § 507.182); power to settle claims (RSMo § 507.184); power to

substitute conservator for next friend or guardian ad litem (RSMo § 507.186); and disposition of proceeds (RSMo § 507.188). The authority for next friends, conservators, guardians, and guardians ad litem to settle claims for minors is set forth in RSMo § 507.184. Missouri Rule of Civil Procedure 52.02(n) makes the statute applicable to settlement of incompetents' claims.

A representative, with court approval, may waive a jury and submit all issues to the court for determination, including the proposed settlements. § 507.184.1. A representative of a minor may enter into contracts to settle claims; the settlements are subject to court approval. § 507.184.2. Although a settlement is often reached before the filing of suit for an injured minor, a friendly suit is required for the court to approve the settlement.

D. Negotiating Directly With Attorneys

Under Missouri law, claims professionals are permitted to negotiate settlement directly with attorneys. The acts of an adjuster acting within the apparent scope of her authority are binding upon the insurance company. See *Goralink v. United Fire & Cas. Co.,* 240 S.W.3d 203, 209 (Mo. App. E.D. 2007). "[T]he facts and circumstances in a case can properly create a reasonable inference that an adjuster had the authority to adjust, settle, and bind the insurer." *Id.*

However, claims professionals should be weary of running afoul of Missouri's prohibition against the unauthorized practice of law. A claims professional, of course, cannot file pleadings or otherwise practice law. See *Risbeck v. Bond*, 885 S.W.2d 749, 750 (Mo. App. S.D. 1994).

E. Confidentiality Agreements

Under Missouri law, confidentiality agreements are valid and enforceable. A confidentiality provision, along with the other terms of a settlement agreement, can be enforced by filing with the court a motion to enforce settlement.

F. Releases

Because a release is a contract it is governed by general principles of contract law. *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. banc 1993). In addition, it will act as an affirmative defense. *Warren v. Paragon Techs. Group, Inc.*, 950 S.W.2d 844(Mo. banc 1997). Generally speaking, a valid release is an absolute bar to all claims covered by the release. *Sohn v. Show Petroleum Inc.*, 581 F. Supp. 23 (E.D. Mo. 1984).

A general release disposes of the entire subject matter or cause of action involved. *Blackstock v. Kohn,* 994 S.W.2d 947, 954 (Mo. banc 1999). Any questions regarding the scope and extent of a release are to be determined according to what may fairly be said to have been within the contemplation of the parties at the time the

release was given. This, in turn, is to be resolved in the light of all the surrounding facts and circumstances under which the parties acted. *Montrose Sav. Bank v. Landers*, 675 S.W.2d 668 (Mo. App. W.D. 1984). The preceding legal principle applies even though the language of the covenant itself, given a literal reading, indicates a general release from all obligations and liabilities. *Slankard v. Thomas*, 912 S.W.2d 619, 624 (Mo. App. S.D. 1995). If the language of the release is plain and unambiguous on its face, it will be given the full effect within the context of the agreement. *Blackstock v. Kohn*, 994 S.W.2d at 954. A covenant not to sue is considered a release for purposes of determining its legal effect. *Montrose Sav. Bank v. Landers*, 675 S.W.2d 668 (Mo. App. W.D. 1984).

"The law presumes that a release is valid." *Angoff v. Mersman*, 917 S.W.2d 207 (Mo. App. W.D. 1996). The policy behind this presumption is "to encourage freedom of contract and the peaceful settlement of disputes." *Id.* at 210.

Generally speaking, a client cannot avoid the effect of release simply by arguing that he did not read it. Persons who are competent to contract are also presumed to know the contents of the contracts they sign. *Mason v. Mason*, 873 S.W.2d 631, 635 (Mo. App. E.D. 1994). That presumption is not rebutted simply because the client does not read the contract or have it read before signing it. *Haines v. St. Charles Speedway, Inc*., 689 F. Supp. 964 (E.D. Mo. 1988). This is true even if the person is illiterate because it is as much a duty to procure someone to read or explain it as it is for the person to read it. *Zeilman v. Cent. Mut. Ins. Ass'n,* 22 S.W.2d 88, 92 (Mo. App. W.D. 1929).

While the common-law rule that the release of one joint tortfeasor releases the others has been abrogated by statute, a claimant may nevertheless secure only one satisfaction of damages. *Slankard*, 912 S.W.2d at 624. Therefore, **what** the claimant is releasing is as important as **whom** the claimant is releasing. For example, a document common to bodily injury claims is a partial release executed by a claimant upon receipt of advance payments, often in the form of medical bills, lost wages, or property damage. The insurance carrier's goal is control of the claimant in hopes of early settlement, but if that is not achieved, the carrier will be entitled to an offset in the total amount paid against any judgment. *E.g., Abbey v. Heins*, 546 S.W.2d 553 (Mo. App. E.D. 1977). Nevertheless, a general release that purports to release all tortfeasors from all liability and claims for damages still will be upheld. *Rudisill v. Lewis*, 796 S.W.2d 124 (Mo. App. W.D. 1990).

G. Voidable Releases

Under Missouri law, an unrepresented individual cannot unilaterally void a release, however, common defenses to enforcement include: duress (*Landmark N. County Bank & Trust Co. v. Nat'l Cable Training Ctr*s., Inc., 738 S.W.2d 886 (Mo. App. E.D. 1987)); fraud (*Kestner v. Jakobe*, 412 S.W.2d 205 (Mo. App. S.D. 1967)); mutual mistake (*Wells v. Peery*, 656 S.W.2d 275 (Mo. App. E.D. 1983)); lack of consideration (*Howell v. St. Louis Steel Erection Co.*, 867 S.W.2d 677, 681 (Mo. App. E.D. 1993)); and incapacity (*Nelson v. Browning*, 391 S.W.2d 873, 877 (Mo. 1965)(holding that a

release executed by a minor is voidable at the minor's option)).

Transportation Law

A. State DOT Regulatory Requirements

Missouri has adopted by statute the Federal Motor Carrier Safety Regulations. (http://www.mshp.dps.mo.gov/MSHPWeb/PatrolDivisions/CVE/faqs.html). A listing of all applicable safety regulations can be accessed through the Missouri Department of Transportation website at: http://www.modot.org/mcs/.

B. State Speed Limits

Missouri's speed limits are governed by RSMo § 304.010, which provides in pertinent part that it is unlawful to operate a motor vehicle in excess of the following speeds:

(1) upon rural interstates and freeways: 70 (seventy) MPH;
(2) upon rural expressways: 65 (sixty-five) MPH;
(3) upon interstate highways, freeways or expressways within an urbanized area: 60 (sixty) MPH;
(4) All other roads and highways in Missouri not located in an urbanized area: 60 (sixty) MPH.

C. Overview of State CDL Requirements

The Missouri CDL manual can be accessed at http://dor.mo.gov/forms/Commerical_Driver_License.pdf.

(1) Missouri's classification system is as follows:
- (A) Any combination of vehicles with a Gross Combination Weight Rating (GCWR) of 26,001 or more pounds provided the Gross Vehicle Weight Rating (GVWR) of the vehicle(s) being towed is in excess of 10,000 pounds. (Holders of a Class A license may also, with any appropriate endorsements, operate all vehicles within Class B and C.)
- (B) Any single vehicle with a GVWR of 26,001 or more pounds or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR. (Holders of a Class B license may also, with any appropriate endorsements, operate all vehicles within Class C.)
- (C) Any single vehicle less than 26,001 pounds GVWR or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR. This group applies only to vehicles which are placarded for hazardous materials or are designed to transport 16 or more persons, including the operator. A holder of a Class A, B or C license may drive all vehicles which may be driven by a holder of a Class E or Class F license.

(2) Missouri CDL Eligibility
- (A) Age: 18 years (intrastate until age 21); 21 years (interstate if otherwise eligible)

(B) Residency: Driver must be a Missouri resident.
(C) Lawful Presence: Driver must be a United States citizen or a permanent resident alien.

(3) Missouri Nonresident CDL Eligibility
(A) Age 18 years (intrastate until age 21); 21 years (interstate if otherwise eligible)
(B) Missouri Employment: Driver must be employed by a Missouri employer and have a Missouri address. An employment letter must be provided at time of license/permit application.
(C) Residency: Driver must be a resident of a country other than the United States, Mexico, or Canada. Residents of Mexico and Canada must apply for a CDL in their home country since those countries meet U.S. licensing requirements.

NOTE: Driver must meet all Missouri licensing and testing requirements. Driver's license or permit expiration date cannot be issued beyond the date of driver's lawful presence in the United States as determined by your immigration documents.

(4) Hazardous Materials Endorsement

A driver of a motor vehicle used to transport hazardous materials in a type, quantity, or both, as to require placarding under the Hazardous Materials Transportation Act (46 U.S.C. section 1801) and the Hazardous Materials Regulations (49 CFR part 172,subpart F) must have qualified for and obtained an H endorsement. Driver must be at least 21 years of age and a U.S. citizen or permanent resident alien. Driver must also pass the hazardous materials written endorsement test at a Highway Patrol testing office each time driver applies for renewal or add additional endorsements to driver's CDL in order to keep the H endorsement. Driver will be required to submit driver's fingerprints and be subject to a security threat assessment.

Note: Additional endorsements include: Passenger (any vehicle designed to carry 16 or more persons including the driver); Tank Vehicle (any vehicle that contains a permanently mounted cargo tank rated at 119 gallons or more or a portable tank rated at 1,000 gallons or more and the tank is used to haul a liquid or liquid gas); Double/Triple Trailer (any vehicle pulling two or more trailers); and School Bus.

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Pursuant to RSMo § 303.030.5, all Missouri drivers must maintain liability coverage of not less than $25,000 because of bodily injury or death of one person in any accident, $50,000 because of bodily injury or death of two or more persons in any one accident, and $10,000 because of injury or destruction of property of others in any one accident.

B. Uninsured Motorist Coverage

1. UM/UIM coverage required

Missouri's UM statute can be found at RSMo § 379.203. UM coverage is required under Missouri law. § 379.203. The statute addresses: the basic principles and requirements of UM coverage; insolvency of an insurance company as a trigger to UM coverage; the UM insurer's entitlement to recovery from responsible parties; and failure to file a report of financial responsibility with the DOR as prima facie evidence of uninsured status. UIM coverage is not mandatory and can be waived.

The amount of UM coverage is not limited to the minimums of the financial responsibility law; it may be purchased in varying amounts. UM coverage only applies to personal injury, it does not cover property damage, and it does not provide any protection to the uninsured motorist.

2) Procedure for making a UM/UIM claim

The insured motorist may sue his or her carrier directly without having to show an unsatisfied judgment as a condition precedent to recovery. *Schreiner v. Omaha Indem. Co.*, 854 S.W.2d 542 (Mo. App. E.D. 1993). This is a contract action, and the ten-year statute of limitations applies. *Edwards v. State Farm Ins. Co.*, 574 S.W.2d 505 (Mo. App. W.D. 1978).

3) Exclusions

Policy exclusions in UM/UIM policies are generally enforceable. An exclusion of coverage to a named insured while occupying another owned automobile has been invalidated as contrary to public policy as expressed in § 379.203. *Shepherd v. Am. States Ins. Co.*, 671 S.W.2d 777

4) Workers' Compensation Benefits

Missouri courts have held that any provisions in an automobile policy that sums received by the insured as workers' compensation benefits would reduce the amount paid under the policy, as applied to the policy's UM coverage, were void as against public policy as evidenced by the statutes requiring this coverage. *Cano v. Travelers Ins. Co.*, 656 S.W.2d 266 (Mo. banc 1983);

5) Stacking

Anti-stacking provisions in an insurance policy that limit the insured's recovery to only one policy limit are prohibited by public policy in a UM case in accordance with § 379.203. *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 542 (Mo. banc 1976). There are no statutory requirements in Missouri, however, for UIM coverage and, therefore, an insured's ability to stack the coverage is ordinarily determined by contract. If the policy is ambiguous in disallowing stacking or if it treats UIM coverage the same

as UM coverage, stacking will be permitted. *Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo.*, 992 S.W.2d 308 (Mo. App. E.D. 1999).

C. No Fault Insurance

Missouri does not utilize no-fault insurance. Missouri drivers are fairly unrestricted in deciding how to pursue compensation following a car accident. An injured Missouri driver, passenger, or pedestrian may choose to file a claim with his own insurer, to file a claim with the other driver's insurer, and/or file a lawsuit for damages against a driver who may be at fault for the accident.

D. Disclosure of Limits and Layers of Coverage

Under Missouri law, the disclosure of policy limits is not required by statute but such information is subject to discovery in civil actions and is commonplace in interrogatories.

E. Unfair Claims Practices

Missouri statute prohibits any unfair or deceptive practices in the insurance business. RSMo §§ 375.930, et seq. The Missouri Department of Insurance promulgates regulations defining unfair trade practices. Missouri courts have held that a violation of the Unfair Claims Practices Act, RSMo §§ 375.1000, et seq., does not provide an insured plaintiff with a private right of action against the insurer. It should be noted that the Missouri statutory definition of "unfair practices" does not specifically prohibit any single isolated act by an insurer absent a finding of "conscious disregard" but prohibits the commission or performance of certain specified acts "with such frequency to indicate a general business practice." RSMo § 375.934.

F. Bad Faith Claims

A bad faith claim requires proof of the following elements: (1) the liability insurer has assumed control over negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer acts in bad faith, rather than negligently. *Rinehart v. Shelter Gen. Ins. Co.,* 261 S.W.3d 583, 595 (Mo. App. W.D. 2008). The existence of bad faith is a question of fact to be determined on a case-by-case basis. *Id.* In situations where an insurer fails to inform the insured of settlement offers and the status of negotiations, the second requirement that the insured demand that the insurer settle the claim is not necessary to show bad faith. *Id.* Ultimately, bad faith is a state of mind provable by direct or circumstantial evidence. *Id.* The evidence must establish that insurer intentionally disregarded the insured's best interests in an effort to escape its full responsibility under the policy. *Id.*

Because a third-party claimant is a stranger to the contract, the insurer owes no duty

regarding settlement to the third-party claimant. Thus, a third-party claimant may only seek to garnish the insurance policy for its benefit but may not bring a claim against the insurance company for bad faith unless the claimant obtains the rights of the insured. *Linder v. Hawkeye-Sec. Ins. Co.*, 472 S.W.2d 412 (Mo. banc 1971). In Missouri, an insured's bad-faith claim against the insurer is assignable. *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 564 (Mo. App. S.D. 1990). Punitive damages are allowed as the action sounds in tort.

G. Coverage – Duty of Insured

Under Missouri law, an insured has a duty to cooperate. Cooperation clauses are valid and enforceable. *Riffle v. Peeler,* 684 S.W.2d 539 (Mo. App. W.D. 1984). If an insured fails to cooperate with the insurance company, the insured may have violated the contract, which would relieve the insurance company of its contractual duty to defend and its implied duty to settle. Cooperation clauses are valid and enforceable in Missouri. The insurer must exercise reasonable diligence in obtaining the insured's cooperation and prove substantial prejudice from the noncooperation. *Id.* But when the insurer meets these standards, the insured will be held to have breached the insurance contract. *Id.*

H. Fellow Employee Exclusions

Fellow employee exclusions are valid and enforceable under Missouri law. See *Reese v. United States Fire Ins. Co.,* 173 S.W.3d 287 (Mo. App. W.D. 2005). It is important to note that Missouri law holds that a person who is injured by a fellow employee's negligence in the operation of an auto while both are in the course of their duties has, as the sole remedy, the remedy provided under The Workers' Compensation Law. *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. banc 2002). An employee's injuries that occurred when a fellow employee was driving him home after work did not arise out of the employment. *Auto. Club Inter-Ins. Exch. v. Bevel*, 663 S.W.2d 242 (Mo. banc 1984).