Winter, 2023

# MODL Quarterly Report

Missouri Organization of Defense Lawyers

## In this issue ...



## The MODL Quarterly Report


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## President's Message


***James Maloney***
***MODL 2022-23 President***
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I hope everyone has been making it warmly and safely through the winter!

Since our last newsletter, we have had some developments that make me excited for the direction of our organization. One example started with a simple request on the MODL Listserv for information about a particular life care planner who is a favorite expert of the plaintiffs' bar, information such as deposition transcripts and other materials that might be of use in cross-examination. Several others chimed in expressing a similar interest, and several of our members contributed information and insights. Interest and contributions snowballed to the point that we were able to put together a webinar/roundtable discussion for further discussion and collaboration. We had over 100 people attend virtually for what was otherwise an unplanned event and was spurred on by the initiative of our members in using our organization as a resource. This is great to see! Thank you to all who contributed and participated.

We are also in an interesting time of the year with the Missouri General Assembly in session. As I write, the 2023 Regular Session is in its early stages, so much remains to be seen. However, there are several interesting bills in both the Senate and the House of Representatives that our organization will be supporting. Among them are bills to change the statute of limitations for injury claims from five years to two years, to modify the collateral source rule with respect to the admissibility of medical bills and the actual cost of treatment, to amend Section 537.058 concerning settlement demands and the use of same in suits against insurers for extra-contractual damages, and to establish the Uniform Interstate Depositions and Discovery Act. In the past, MODL members have helped the organization support legislation likely to be beneficial to clients we represent by, among other things, testifying in support of bills in Senate and House committee hearings. We hope to be able to continue those efforts in this session. If you would like to volunteer, please feel free to reach out to me or the MODL office.

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## President's Message *(from page 1)*

Finally, I wanted to note that the firm with which I have practiced for the past 13 years—Foland, Wickens, Roper, Hofer & Crawford, P.C.—recently merged with Baker Sterchi Cowden & Rice, LLC. I am excited about the merger and the opportunities it presents. Going forward, we will be operating under the Baker Sterchi name. My new email address if you would like to reach me is james.maloney@bakersterchi.com.


## Grab the Family and Join Us at the MODL 38th Annual Meeting June 1-3, 2023

***Big Cedar Lodge ♦ Ridgedale, MO***


**Fun for all the family!**

**Enjoy some time on the links!**

**And ... even learn a thing or two!**

# 2023 Missouri Legislative Session

***by Randy Scherr & Brian Bernskoetter***
***R J Scherr and Associates ♦ Jefferson City, MO***

The Missouri Legislature is currently working through the second half of the 2023 Session with over 2,300 bills filed.

The House continues to work swiftly and efficiently through their calendar. Meanwhile, the Senate has ground down to a very slow pace after controversial legislation was brought to the floor for debate. Although it appeared negotiations were ongoing, they quickly fell apart resulting in very little floor action.

There seems to be little if any interest in any tort reform by certain legislative leaders in the House. And in the Senate, we are seeing the effects of plaintiff's firms' contributions to members of the "conservative caucus."

There are less than eight weeks remaining before the mandatory adjournment date of May 12th. It will also be full steam ahead to get a budget done and to the Governor by the May 5th deadline as the FY2024 budget is anticipated to be the largest spending plan in the state's history.

### 2023 Bills of Interest Currently Being Tracked

**HB 84 and SB 394**

**Summary:** This bill establishes the "Uniform Interstate Depositions and Discovery Act" and provides procedures and processes for when a subpoena for discovery or deposition is submitted in Missouri by a foreign jurisdiction, which is defined in the bill as a state other than Missouri.

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**HB 128**

**Summary:** This bill modifies provisions relating to tort actions based on improper health care. This bill removes "long-term care facilities" from the definition of "Health Care Provider" in Chapter 538, RSMo. The Chapter creates a statutory cause of action for damages against health care providers based on improper health care. Under the provisions of this bill, long term care facilities would not be subject to the statutory cause of action created under this Chapter.

**HB 272**

**Summary:** This bill, by Rep. Alex Riley, modifies the statute of limitations for personal injury claims from five years to two years. Currently, actions for personal injury or bodily injury or relating to uninsured motorist coverage or underinsured motorist coverage must be brought within five years from the date the injury occurred. This bill reduces the time frame to two years from when the injury occurred.

**HB 273**

**Summary:** This bill, by Rep. Alex Riley, modifies the rule for determining the admissibility of evidence of collateral source payments in civil actions. The bill prohibits any party from introducing evidence of the amount billed for medical treatment if the amount has been discounted, written-off, or satisfied by payment of an amount less than the amount billed.

**HB 336**

**Summary:** This bill creates provisions relating to employer liability for injuries from required immunizations. The bill establishes the "Required Immunization Liability Act," which states that an employer that requires its employees to receive an immunization as a condition of employment shall be liable for damages or injury resulting from the required immunization.

**HB 799**

**Summary:** This bill specifies that an expert witness will be compensated by the defense counsel, prosecutor, or court a reasonable hourly fee for any time required to provide testimony or in preparation of such testimony by the expert witness, including any time the expert witness waits inside a courtroom to provide testimony.

**HB 941 and SB 482**

**Summary:** These bills modify provisions relating to workers' compensation Administrative Law Judges. As of January 1, 2024, all Administrative Law Judges (ALJs) of the Division of Workers' Compensation shall be subject to a defined term depending on the tier under which the ALJ is classified. Initial terms will be based on the total months of service, as specified in the bill. The ALJs shall serve a four-year term after the initial term unless removed from office as stated in the bill.

**HB 1009**

**Summary:** This bill modifies provisions relating to a time-limited demand to settle. This bill replaces the term "time-limited demand" with "settlement demand." The bill specifies that, in any lawsuit alleging damages outside of what is covered in the contract against the tortfeasor's liability insurer, any prior settlement demand to settle a claim will not be considered to have been a reasonable opportunity to settle the claim unless the demand was in writing; referenced Section 537.058, RSMo; was sent certified mail; remained open for acceptance by the liability insurer for at least 90 days from the date the demand was received by the insurer; and contained certain material terms described in the bill.

**SB 467**

**Summary:** This bill modifies provisions relating to determination of fault of parties and nonparties in civil actions. In all tort actions in which any party contends that damages were caused by the alleged fault of more than one person or entity, the trier of fact shall determine the amount of fault attributable to each person or entity, regardless of whether the person or entity is a party to the action and regardless of whether the person or entity has settled or been released from liability.

**SB 708**

**Summary:** This bill modifies various provisions relating to civil actions, including the funding and financing of civil and administrative claims, collateral source rule, statutes of limitations, settlement demands to liability insurers, determination of fault, statutory public nuisance actions, and disclosure requirements in civil actions for latent injuries.

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## 2023 Legislative Session *(from page 3)*

**SJR 31**

**Summary:** This bill modifies provisions relating to the judiciary, including judicial lobbying activities, and the nonpartisan court plan.

This proposed constitutional amendment, if approved by the qualified voters provides that:

- no person serving as a judge shall accept directly or indirectly a gift of any tangible or intangible item, service, or thing of value from any paid lobbyist or lobbyist principal.
- repeals the nomination and submission by Appellate Judicial Commission and provides for the appointment of those judges by the Governor with the advice and consent of the Senate
- provides that no member of the bar serving on a nonpartisan judicial commission shall actively be engage in the same area of practice as another member of the bar serving on the same commission.

To read the bills go to:
https://house.mo.gov/LegislationSP.aspx?year=2023&code=R

http://modllaw.com

# MODL Amicus Committee Update

by Rachel A. Riso
MODL Amicus Committee Chair
Ellis Ellis Hammons & Johnson, P.C.

MODL provided amicus support in *Estate of Jansen v. Valmont Industries*, Case No. WD84369.

The issue presented was whether there was personal jurisdiction over a foreign corporation for a wrongful death/products claim. The trial court granted summary judgment in favor of Valmont Industries, Inc. and Valmont Highway Distribution Limited for lack of specific personal jurisdiction. The Western District handed down an opinion affirming the grant of summary judgment. The Application for Transfer to the Supreme Court was denied on December 20, 2022. We are pleased with the outcome and appreciate the time and effort of Thomas Weaver and Paul Brusati with Armstrong Teasdale in authoring the amicus brief.

If your firm would like to request MODL amicus assistance for an appeal or writ, please go to www.modllaw.com, click on "Amicus Briefs," and complete the Amicus Committee Request form. Please contact the Chair of the Amicus Committee, Rachel A. Riso, rriso@eehjfirm.com, with any questions. Missouri Rule 84.05(f) governs the submission of Amicus Curiae briefs.

# Board Member Spotlight

## Carter Ross

I'm Senior Litigation Counsel at Shelter Insurance Companies in Columbia, and have been at Shelter 25 years. Before Shelter, I was in private practice for 10 years in the Kansas City area. I was a partner in a firm, then started a solo office. I represented plaintiffs, and that has given me valuable insight for the defense side.

Throughout my career, I've almost exclusively practiced tort and insurance law.

In addition to joining MODL's Board of Directors last June, I recently became MODL's State Representative to DRI.

My wife, Denise, and I have two grown children, so we're empty-nesters. We enjoy outdoor activities, especially the trails and parks around us, and cooking outdoors, particularly grilling/smoking on our Green Egg. And we spend quite a bit of time spoiling our six-year old rescue lab/hound dog, Aja.

We also enjoy reading, and watching movies, series, and documentaries, and I particularly like history.

# Judge J. Hasbrouck Jacobs

## Presiding Circuit Judge, Missouri's 13th Judicial District

*by Glen R. Ehrhardt ♦ Rogers Ehrhardt ♦ Columbia, MO*

The Honorable J. Hasbrouck "Brouck" Jacobs was originally appointed Circuit Court Judge in Division 1 of the Thirteenth Judicial Circuit (Boone and Callaway Counties) in 2017. When appointed, he was the youngest Circuit Court Judge in Missouri. In 2018, Judge Jacobs was elected after having knocked on over 8,000 doors. He fondly recalls that during his campaign, "When knocking on doors, I told people I am the youngest Circuit Court Judge in Missouri and if I lose the race, I will be the youngest ex-Circuit Court Judge in the State!"

Judge Jacobs is currently serving his second term as the Presiding Judge for the Thirteenth Judicial Circuit, having been chosen by his colleagues for that role. In this position, he has general authority over 100 staff; decides case assignments; helps set court policies and administrative rules; and works with State of Missouri and Boone County officials on many court system issues. His current caseload includes civil, criminal and family law. He strives to lead by example by treating all with courtesy and fairness.

Judge Jacobs grew up in the Orlando, Florida area. He knew at an early age he desired to follow in the footsteps of both his grandfather and father who were attorneys. His father practiced with a small Orlando civil firm with the Orange County School Board being his largest client. When Judge Jacobs was in middle school, his father felt a calling to go into the ministry and went to seminary where he became an Episcopal priest. Judge Jacobs' grandfather was an attorney and claims manager for State Farm before being elected a Circuit Court Judge in Orange County (Orlando) where he served for over 30 years, including a stint as presiding judge. During high school and college, Judge Jacobs spent a great deal of time at the courthouse watching his grandfather preside over trials. He recalls several medical malpractice trials and also a two-week employment discrimination trial involving the Orlando Magic. He describes his grandfather as a "Christian gentleman" who was respected by both the legal community and citizens he served.

Judge Jacobs attended the University of Florida undergrad and received a history major. He attended Florida A&M Law School, graduating in 2008. After graduation, he worked for a year and a half in the Orange County State Attorney's Office as a prosecutor. Through a mutual acquaintance, he met his wife, Janie Jacobs, M.D., who received her medical degree from the University of Missouri-Kansas City School of Medicine in 2009. Judge Jacobs jokes that while he was a Floridian and Janie was a Missourian, upon their marriage they compromised - he became a Missourian. He notes they have been comprising in the same way ever since. While his wife was completing a pediatric residency at St. Louis Children's Hospital (2009-2012), he practiced in the St. Louis County Prosecuting Attorney's Office.

In 2013, Judge Jacobs and his wife moved to Columbia, Missouri. He worked in the Boone County Prosecutor's Office under the tutelage of then Boone County Prosecuting Attorney Dan Knight, who was a friend and mentor. As a prosecutor in Florida and Missouri, Judge Jacobs tried over 50 jury trials.

Judge Jacobs enjoys presiding over both jury and bench trials and endeavors to maintain a courtroom in which attorneys enjoy trying cases. He strives to make efficient use of everyone's time. He appreciates attorneys who make the effort to "pick up the phone and speak to opposing counsel to try to work things out" in advance of court hearings or trials. He has noted over the years that attorneys often fail to speak to each other until they are in the courtroom and strongly believes many items could be worked out or resolved if the parties simply spoke to each other.

His advice to young lawyers is to try to watch as many trials as possible to gain experience and to "learn from mistakes" which everyone makes. He regularly attends Boone County Bar Association meetings and strongly believes it is important for all attorneys to do so.

As to Judge Jacobs' hobbies, he enjoys reading history and biographies, and watching college sports. He frequently attends Mizzou football and basketball games with his son. He and his wife also have twin daughters. They are active as a family in their church and many activities, including little league and gymnastics involving their children.

In an interesting side note, Judge Jacobs serves alongside Boone County Circuit Court Judge, Jeff Harris, whose father, Bob Harris, was the founding partner at Boone Clinic (now Tiger Pediatrics) where Janie Jacobs has practiced as a pediatrician since 2013.

# Missouri Appellate Court Again Emphasizes the Limits of Civil Claims Against Co-Employees for Workplace Injuries Under Common Law: *Channel v. Walker,* 655 S.W.3d 362 (Mo. App. W.D. 2022)


*by Jeffrey D. Upp*
*Turner, Reid, Duncan, Loomer & Patton, P.C.*
*Springfield, Missouri*

## Introduction and Recent History of Co-Employee Liability Claims

In *Channel v. Walker*, the Western District Court of Appeals again examined a workplace injury claim asserted against a co-employee that arose between the 2005 and 2012 amendments to Missouri's Worker's Compensation Law. During this period, and under certain circumstances, Missouri's workers' compensation statutes permitted a plaintiff to pursue a negligence action against a co-employee for an injury sustained in the course of work. The *Channel* court reemphasized that such claims are governed by the common law and, thus, they are barred where the duty alleged to be breached "was part of the employer's duty to protect employees from reasonably foreseeable risks in the workplace." *Channel v. Walker*, 655 S.W.3d 362, 371 (Mo. App. W.D. 2022).

In 2012, the legislature amended Missouri's Workers' Compensation Law "to provide co-employees immunity from common law liability for accidents occurring in the workplace." *Brock v. Dunne*, 637 S.W.3d 22, 27 (Mo. banc 2021). Thus, in claims accruing after the 2012 amendment, co-employees are immune from claims for workplace injuries unless they "engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Mo. Rev. Stat. § 287.120.1. The 2012 amendment, however, does not limit the relevance of *Channel* to claims accruing between 2005 and 2012.

The 2012 amendment did not dispense of the common law analysis of co-employee negligence claims. The Missouri Supreme Court has recognized, "The [2012] amendments to section 287.120.1 do not create a cause of action but rather establish immunity for co-employees for common law liability. Because no new cause of action was created by section 287.120.1, plaintiffs must establish a common law claim to be entitled to recovery." *Brock v. Dunne*, 637 S.W.3d 22 (Mo. banc 2021). Accordingly, a plaintiff asserting a co-employee negligence claim accruing after the 2012 amendment must still plead and prove a viable common law co-employee negligence claim. If a plaintiff fails in this regard, there can be no claim against the co-employee; and even if a plaintiff pleads and proves such a claim, it is still subject to the affirmative defense of the immunity created by the 2012 amendment to Section 287.120.1, R.S.Mo.

Thus, though Missouri's Workers' Compensation Law has been amended since the events giving rise to the claims in *Channel* to further limit the instances in which a co-employee can be held liable for workplace injuries, the common law analysis of such claims remains relevant. *Channel* provides yet another example of the limited nature of such claims, even when analyzed under common law principles.

## Background

On August 2, 2011, Thomas Channel ("Decedent") suffered a fatal workplace injury after being exposed to extreme heat while making deliveries for his employer Cintas Corporation ("Cintas"). *Id*. at 365-66. Thereafter, Sarah Channel, Lauren Channel, and Mary Channel ("Appellants") asserted wrongful death claims against Decedent's co-employee supervisor, Stephen Walker ("Walker"), Cintas, and additional defendants. *Id*. at 365.

Appellants ultimately dismissed their claims against all defendants except Walker. *Id*. Notably, Appellants dismissed their wrongful death claims against Cintas after the conclusion of the related workers' compensation litigation. In the workers' compensation proceedings, the Administrative Law

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Judge found that Decedent's death was an accident arising out of his employment, and the final award was affirmed on appeal. *See id.* at 367.

In their claims against Walker, Appellants generally alleged that Walker breached a duty of care separate and distinct from Cintas' non-delegable duties as an employer to provide a safe workplace. In particular, Appellants alleged that Walker placed Decedent on an extended delivery route, with inadequate safeguards against heat-related injuries, and ignored Decedent's concerns regarding the same in an effort to make Decedent quit his job with Cintas. *Id*. Appellants claimed this conduct created a "transitory risk" resulting in Decedent's death, for which Decedent could be held liable at common law. *Id*.

Walker moved for summary judgment on Appellants' claims against him arguing that he was entitled to judgment as a matter of law because he did not violate a personal duty of care owed to Decedent that was separate and distinct from his employer's non-delegable duties to provide a safe workplace. *Id*. at 367. In the summary judgment proceedings, Appellants admitted that Decedent's death was caused by a hazard or risk related to his employment with Cintas, namely his activity of driving his truck on a very hot day, while making frequent stops, pickups, and deliveries; that Decedent's death was not caused by an intentional act of Cintas or Walker; and, generally, that Decedent's death was the result of exposure to extreme heat in the course of his work with Cintas. *Id*. at 367-68. Additionally, several of the Administrative Law Judge's findings in the workers' compensation proceedings against Cintas arising from Decedent's death were introduced into the summary judgment record and admitted by Appellants. *Id*. at 368.

On January 3, 2022, the circuit court granted Walker's motion for summary judgment, concluding that Walker's actions were within his job descriptions with his employer and that Walker did not breach any independent duty owed to Decedent. Appellants' appeal followed.

## The Appeal

On appeal, Appellants argued that the trial court erred in entering summary judgment in favor of Walker because "where a transitory risk is created by the negligence of a co-employee in carrying out the details of their work, the co-employee breaches an independent duty of care that is separate and distinct from the employer's nondelegable duty to provide a safe workspace." *Id*. In particular, Appellants argued that "Walker created a transit risk by intentionally exposing [Decedent] to injury with the purpose and intent of forcing [Decedent] to quit his job and in violation of workplace policy, resulting in [Decedent's] death." *Id*. (internal quotations omitted).

In addressing Appellants' arguments, the Western District recounted the common law regarding claims against co-employees for workplace injuries, stating:

> If a co-employee has been assigned to perform nondelegable duties of the employer, such assignment exists because of the master-servant relationship and, absent the master-servant relationship, the co-employee would have no independent duty. Accordingly, an injured employee is barred from bringing common law negligence actions against a co-employee when the co-employee was performing a nondelegable duty owed by the employer. An injured employee, however, may bring a common law action for negligence against a co-employee if the injured employee can establish the co-employee owed a duty separate and distinct from the employer's nondelegable duties.

*Id*. at 370 (citation omitted).

The Court also explained that the common law permits claims against co-employees for workplace injuries where the co-employee's negligence in carrying out the details of his work creates a "transitory risk," which "is a risk that can be considered so unforeseeable to an employer as to remove it from the employer's nondelegable duty to provide a safe workplace." *Id*. at 371 (citation omitted). "An unforeseeable transitory risk has been described by the Missouri Supreme Court as including situations where the place of work was not unsafe, and the hazard was not brought about by the manner in which the work was being done." *Id*. (citation omitted).

In ultimately affirming summary judgment entered in favor of Walker, the Court compared Appellants' claims to those at issue in *McComb v. Norfus*, 541 S.W.3d 550 (Mo. banc 2018), which also involved the on-the-job death of a commercial motor vehicle driver during extreme weather. In doing so, the Court recognized that in both cases, the extreme weather conditions leading to the workplace fatality were not caused by the co-employee, and the risks posed by extreme weather were reasonably foreseeable to the employer. *See Channel*, 655 S.W.3d at 372. Thus, Appellants' claims fell within the scope of Cintas' non-delegable duties and were barred. *Id*.

In addressing Appellants' claims that Walker's conduct was designed to force Decedent to quit his job, the Court first noted it was "difficult to reconcile" Appellants' admissions in the summary judgment proceedings that Decedent's death

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was not caused by any intentional act of Walker and was essentially the result of a hazardous work environment with the allegation that Walker engaged in purposeful acts to force Decedent to quit his job, with those purposeful acts leading to Decedent's death. *Id*. at 373. And, nevertheless, the conduct of Walker allegedly designed to force Decedent to quit fell within Cintas' non-delegable duties. *Id*.

Because Appellants "failed to show that Walker's actions/inactions represented a transitory risk such that Walker breached an independent duty of care that was separate and distinct from the employer's nondelegable duty to provide a safe workplace," the Court affirmed the trial court's grant of summary judgment in favor of Walker. *Id.*

## Conclusion

Given the frequency of amendments to Missouri's Workers' Compensation Law, in particular those portions addressing co-employee liability, the Missouri Supreme Court and Missouri appellate courts have had several occasions to address co-employee liability claims. *Channel* reemphasizes the common law analysis of such claims, which remains relevant to claims arising after 2012, and their limited scope.

Further, *Channel* demonstrates that factual and legal issues raised and decided in parallel workers' compensation litigation against an employer can meaningfully aid the defense of civil claims against a co-employee arising from the same workplace injury. Considering that a workers' compensation claimant is theoretically attempting to establish that the workplace injury occurred due to the claimant's work conditions, so as to recover workers' compensation benefits, facts presented and established in the workers' compensation litigation may directly conflict with a viable civil claim against a co-employee, where the plaintiff must establish the co-employee breached a duty separate and distinct from the employer's nondelegable duties to provide a safe workplace. In *Channel*, several facts at issue in the Appellants' workers' compensation claim against Decedent's employer were introduced into the summary judgment record by Walker and admitted by Appellants. These admissions led to a well-developed record of uncontroverted material facts at the summary judgment stage, and, in turn, on appeal.

# Case Law Updates

*by Kerensa Cassis*
*Shook, Hardy & Bacon ♦ Kansas City, MO*

## *M.O. v. GEICO Gen. Ins. Co.*

No. SC 99732, 2023 WL 152802
(Mo. Jan. 10, 2023)

### Summary

Insurer had statutory right to intervene in claimant's lawsuit within 30 days of notice of agreement between claimant and insured, before judgment could be entered confirming arbitration award in favor of claimant.

### Background

During November and December 2017, M.B. and M.O., two consenting adults, had sexual relations in M.B.'s vehicle. During these relations, M.B.'s vehicle was insured by GEICO. M.O. subsequently contracted anogenital human papillomavirus ("HPV"), which M.O. claims she contracted from M.B. during their sexual relations in M.B.'s vehicle.

M.O. sent a demand letter to GEICO, requesting GEICO to pay the applicable limits of M.B.'s policy for bodily injury due to her contracting HPV from M.B. in his GEICO-insured vehicle. GEICO denied coverage. Without informing GEICO, M.O. and M.B. entered into an agreement pursuant to RSMo § 537.065 providing that M.O.'s claims would be submitted to arbitration and that M.O. would only seek recovery from GEICO, not M.B.

The arbitrator awarded M.O. $5.2 million. M.O. informed GEICO of the § 537.065 agreement but did not tell GEICO she had already received an arbitration award. M.O. then sued M.B. in Jackson County Circuit Court, without informing GEICO. Twenty-five days after notice of the § 537.065 agreement, GEICO filed a motion to intervene. While GEICO's motion to intervene was pending, the circuit court granted M.O.'s application to confirm the arbitration award and entered a $5.2 million judgement against GEICO. The

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court then allowed GEICO to intervene. GEICO appealed, and after the Court of Appeals affirmed, the Supreme Court granted transfer.

## Analysis

The Supreme Court held "[t]he plain language of § 537.065.2 confers a statutory right to GEICO, as the insurer, to intervene within 30 days after notice of an agreement between M.O. and M.B., before a judgment may be entered." Because the circuit court did not grant GEICO's timely intervention before it entered judgment, the trial court erred.

## Conclusion

GEICO was statutorily entitled to intervene, within 30 days of notice of the § 537.065 agreement, in the pending lawsuit between its insured M.B. and M.O. Because its timely intervention was filed before judgment, the circuit court judgment is vacated and the case is remanded.

# *Bridgecrest Acceptance Corporation v. Donaldson*

648 S.W.3d 745 (Mo. 2022), as modified (Aug. 30, 2022).

## Summary

The Missouri Supreme Court reversed the circuit court's rulings and found the arbitration agreement legally valid, conscionable, and not precluded by collateral estoppel. Specifically, the Court found that consideration in the underlying installment contract was adequate to support the arbitration agreement and no separate consideration was necessary.

## Background

In two separate cases,[1] Bridgecrest Acceptance Corporation sought a deficiency judgment in circuit court against consumers who had defaulted on car payments. In both cases, the consumers brought counterclaims against Bridgecrest, alleging unlawful and deceptive business practices. Bridgecrest moved to dismiss or stay the consumers' counterclaims and compel the matters to arbitration pursuant to an arbitration agreement the consumers signed. The circuit court overruled Bridgcrest's motions.

## Analysis

Bridgecrest suggests the circuit court erred in overruling its motions to compel arbitration because (1) the installment contract contained adequate consideration to support the arbitration agreement; (2) was conscionable; and (3) Bridgecrest was not collaterally estopped from enforcing the arbitration agreement.

As an initial matter, the Court determined the incorporation provisions in the installment contract and arbitration agreement demonstrate the arbitration agreement and the installment contract together formed a single, integrated contract. In support of the consideration issue, Bridgecrest maintained the consideration supporting the installment contract provided the consideration for the arbitration agreement. Abrogating contradictory case law, including *Caldwell v. UniFirst Corp*., 620 S.W.3d 236, 238 (Mo. App. 2020), the Court determined "if the consideration given in exchange for the installment contract was adequate, it likewise supported the arbitration agreement."

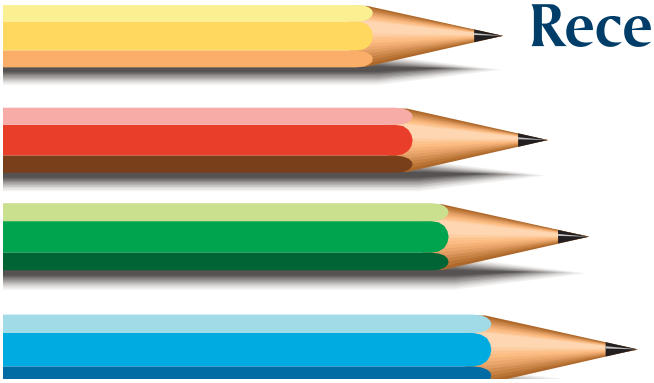
Next, the Court analyzed whether the terms of the arbitration agreement were unconscionable where it is one-sided or lacks mutuality and makes illusory promises that enable Bridgecrest to unilaterally divest itself of an obligation to perform under the agreement. In distinguishing the Bridgecrest provision from the unconscionable provision in *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 431 (Mo. banc 2015), the Court found the arbitration agreement does not allow Bridgecrest to unilaterally divest itself of its obligation to arbitrate and does not infect the agreement with unconscionability.

Finally, the Court addressed whether Bridgecrest should be estopped from enforcing its arbitration agreement because Bridgecrest unsuccessfully sought to invoke the same arbitration agreement in *Haight v. DriveTime Car Sales Company, LLC*, No. WD81164, 2018 WL 2407506 (Mo. App. May 29, 2018) (unpublished), in which the circuit court and Court of Appeals determined the arbitration agreement was invalid. The Court found this argument lacking merit where the issue presented in *Haight* was remarkably different than those presented here and renders collateral estoppel inapplicable to Bridgecrest's motions to compel arbitration.

## Conclusion

The Court determined the circuit court erred in overruling Bridgecrest's Motions to Compel arbitration, reversing the circuit court's ruling.

1 This appeal considers two separate cases: *Bridgecrest Acceptance Corp. v. Jones*, No. ED 109348, 2021 WL 3088746, at *1 (Mo. Ct. App. June 29, 2021) and *Bridgecrest Acceptance Corp. v. Donaldson*, No. ED 109349, 2021 WL 3087541, at *1 (Mo. Ct. App. June 29, 2021).



# Recent Ruling Underscores Risk the ALI's Restatement of the Law, Liability Insurance Poses to Missouri Law

*by Laura A. Foggan and Rachel Jankowski*[1]
*Crowell & Moring LLP • Washington, DC*

The American Law Institute's ("ALI") Restatement of the Law, Liability Insurance ("RLLI") has proven highly controversial, and has an uneven track record in the courts. Recognizing that the RLLI overreaches through purported "black-letter" rules that would create new law – including new rights and remedies, several legislatures -- including Missouri's -- acted to contain its application and impact.[2] Unfortunately, courts and litigants have been slow to learn of Missouri's law and meanwhile have continued to cite and rely on the RLLI.

Mo. Rev. Stat. § 1.016, effective August 28, 2022, makes clear that secondary sources, including the RLLI, are not the law or public policy of the state:

> A secondary source, including a legal treatise, scholarly publication, textbook, or other explanatory text, does not constitute the law or public policy of this state to the extent its adoption would create, eliminate, expand, or restrict a cause of action, right, or remedy, or to the extent it is inconsistent with, or in conflict with, or otherwise not addressed by, Missouri statutory law or Missouri appellate case law precedent.

Mo. Rev. Stat. § 1.016. With this statute on the books, courts and litigants applying Missouri law should not look to the RLLI as a source for new causes of action or remedies, although that is what happened in a recent federal district court decision applying Missouri law.

The decision in *Pets Alone Sanctuary of Lincoln Cnty. v. Midwest Fam. Mut. Ins. Co.*, No. 4:22-CV-775 PLC, 2022 WL 16758603 (E.D. Mo. Nov. 8, 2022), cited to Section 12 of the RLLI suggesting insurers are not vicariously liable for defense counsel's conduct, but may be liable for conduct relating to selection or oversight of counsel. Pets Alone Sanctuary and several of its board members faced counterclaims in an action the insured initiated. The insurer agreed to defend the counterclaims and retained a law firm to do so.

The law firm obtained dismissal of the board members, and prepared to defend Pets Alone Sanctuary at trial. The day before trial, the firm provided information to the insurer that "could drastically increase the award of compensatory and punitive damages against" Pets Alone Sanctuary. *Id*. at *3. It also advised Pets Alone Sanctuary that the newly acquired information affected how the firm could conduct the defense and raised ethical concerns for the firm. Although the firm shared its intent to withdraw as counsel the next day, it represented and advised Pets Alone Sanctuary during

**"ALI's Restatement" >p11**

[1] Ms. Foggan is a partner and Ms. Jankowski is an associate in the Insurance/Reinsurance Practice at Crowell & Moring LLP in Washington, DC. Ms. Foggan served as the insurance industry's liaison to the ALI's Restatement of the Law, Liability Insurance project.

[2] See, e.g., Ark. Code Ann. § 23-60-112 (2019) ("A statement of the law in the American Law Institute's Restatement of the Law, Liability Insurance does not constitute the public policy of this state . . ."); Ariz. Rev. Stat. Ann. § 20-110 (2022) (a secondary source on insurance is not authoritative if it purports to create, eliminate, expand or restrict a cause of action, right, or remedy or if it conflicts with applicable law); Ky. Rev. Stat. Ann. § 446.082 (2020) (a restatement "shall not constitute the law or public policy of the Commonwealth of Kentucky. No Kentucky court shall treat any such publication or text as controlling authority."); Mich. Comp. Laws § 500.3032 (2020) ("In an action brought in a court in this state, the court shall not apply a principle from the American Law Institute's 'Restatement of the Law, Liability Insurance' in ruling on an issue in the case unless the principle is clearly expressed in a statute of this state, the common law, or case law precedent of this state."); N.D. Cent. Code § 26.1-02-34 (2019) ("A person may not apply, give weight to, or afford recognition to, the American Law Institute's 'Restatement of the Law, Liability Insurance' as an authoritative reference regarding interpretation of North Dakota laws, rules, and principles of insurance law."); Ohio Rev. Code Ann. § 3901.82 (2018) ("The Restatement of the Law, Liability Insurance that was approved at the 2018 annual meeting of the American law institute does not constitute the public policy of this state and is not an appropriate subject of notice"); Okla. Stat. § 12-2411.1 (2021) (a restatement "shall not constitute the law or public policy" of Oklahoma); Tenn. Code § 56-7-102(c) (2021) (providing an insurance policy "must be interpreted fairly and reasonably, giving the language of the policy of insurance its ordinary meaning"); Tex. Civ. Prac. & Rem. § 5.001(b) (2019) ("In any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute's Restatements of the Law are not controlling."); Utah Ins. Code § 31A-22-205(1) (2020) ("A restatement of the law of liability insurance is not the law or public policy of this state if the statement of law is inconsistent or in conflict with" state law or the state or federal Constitutions).

settlement discussions with the counterclaimants the next morning. During the negotiations, the insurer declined to increase its settlement offer beyond the amount authorized before the newly acquired information. The case settled above the amount authorized by the insurer, and Pets Alone Sanctuary used its own funds to pay the difference.

Pets Alone Sanctuary then sought to hold the insurer liable for a failure to provide a full and complete defense to the counterclaims. The court dismissed the claim for breach of the duty to defend because "[n]othing in the petition suggests that Attorneys' refusal to defend the case at trial was guided by anything other than their independent professional judgment." *Id*. However, the court found Pets Alone Sanctuary had stated a plausible bad faith claim because it alleged the insurer withheld payment for a covered loss and demanded the policyholder fund a portion of the settlement to avoid paying a judgment. *Id*.

The claim in *Pets Alone Sanctuary* seeking to hold the insurer liable for defense counsel's conduct ventured into a controversial topic, where the RLLI purports to expand remedies available to policyholders for attorney malpractice. The law has long recognized that the route a policyholder unsatisfied with its attorney's representation must pursue is a claim for malpractice against the attorney. Here, the policyholder sought instead to recover directly from its insurer for the law firm's actions. While not ultimately reaching these issues, *Pets Alone Sanctuary* improperly lends credence to the idea that insurers can and should face direct liability when defense counsel fails to protect the policyholder's interests. In doing so, it cites to the RLLI, which the Missouri legislature has stated does not constitute the law or public policy of the state on matters of new law.

Section 12 of the RLLI, titled "Liability of Insurer for the Conduct of Defense," creates a new area of tort liability for insurers not found in the common law. It provides:

> (1) If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in so doing, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.
>
> (2) An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.

Restatement of the Law, Liability Insurance § 12 (2019).

The RLLI's proposal in Section 12(1) would impose direct liability on insurers for any "harm" caused by defense counsel negligently selected by the insurer, creating a new remedy for policyholders harmed by their counsel's negligent act or omission. This would make insurers gatekeepers over attorney competence, assigning to them responsibilities that the legal system already places elsewhere. Attorney competence is overseen by the bar licensing process and professional responsibility rules, which require attorneys to accept only those assignments for which they are competent. An attorney responsible for a negligent act or omission is an independent professional whose actions are not attributable to an insurer.

Similarly, Section 12(2) makes the insurer liable for "harm" to the policyholder caused by the insurer overriding defense counsel's independent professional judgment. Again, counsel is an independent professional responsible for his or her own conduct, and there is no vicarious liability for an independent contractor's actions. The RLLI's Section 12 would expand rights and remedies available against insurers in ways not recognized in existing Missouri law. It is exactly the kind of secondary source Missouri's legislature warned does not constitute the law or public policy of Missouri.

Fortunately, *Pets Alone Sanctuary* recognized that insurers are not vicariously liable for defense counsel's malpractice, but it left open the question – unchallenged by the insurer in that case (*see Pets Alone Sanctuary*, 2022 WL 16758603, at *3 n.3) – whether through its own actions the insurer could become liable for harm caused by defense counsel. The court ruled that: "Assuming, without deciding, that an insurer may be liable for the actions of counsel it retained to defend the insured, the petition does not plead sufficient facts to draw a reasonable inference that the Defendant breached its duty to defend." *Id*. at *3. The troubling dicta came about when the court said that "insurers are not vicariously liable for defense counsel's errors but . . . may be liable for their own misconduct, such as overriding defense counsel's independent professional judgment." *Id*. at *3 n.3 (citing *Sapienza v. Liberty Mut. Fire Ins. Co.*, No. 3:18-CV-3015 RAL, 2019 WL 5206289 (D. S.D. Oct. 16, 2019)). Since counsel has a legal and ethical obligation to exercise independent professional judgment, failing to do so cannot be attributed to anyone other than the attorney who falls short of his or her duty. As the court itself stated, there is no direct liability to the insurer for a defense attorney's malpractice.

**"ALI's Restatement" >p12**

While at most *Pets Alone Sanctuary* engenders confusion in the law through its dicta and its citation to and improper reliance on the RLLI, the RLLI poses ongoing challenges for insurers. ALI Restatements are meant to present an orderly and accurate statement of the U.S. common law,[3] but some recent projects, including the RLLI, have moved away from codifying existing law to become more subjective and thus more controversial. The final products now resemble what the authors say the law ought to be, rather than a restatement of what the law is.

In a 2015 opinion, U.S. Supreme Court Justice Antonin Scalia explained that "modern Restatements . . . are of questionable value, and must be used with caution" because "[o]ver time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . .. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.[4] These concerns are reflected in the "aspirational" nature of the RLLI. Critics point out the RLLI often adopted minority positions, increasing insurers' liability and proposing "dramatic changes to liability insurance law."[5]

RLLI's Section 12 is a prime example of a deviation from the common law and a dangerous one that, if mistaken for law, could significantly alter the insurer-policyholder-defense counsel relationship, creating instability for insurers, policyholders and counsel, and leading to higher litigation costs. Unfortunately, *Pets Alone Sanctuary* is not the only court that has looked to Section 12 for guidance. While no court has yet applied Section 12 to impose direct liability on an insurer, the cases suggest there is such a risk. S*ee, e.g., Progressive Nw. Ins. Co. v. Gant*, 957 F.3d 1144 (10th Cir. 2020) (no direct liability where policyholder had not presented evidence to support a finding that the insurer was unreasonable in thinking that counsel would provide competent representation and had not proven the necessary nexus between the insurer's actions and the alleged harm); *Clarendon Am. Ins. Co. v. R.E.P. Custom Builders, Inc.*, No. CV-20-08078-PCT-DJH, 2022 WL 1642952 (D. Ariz. May 24, 2022) (suggesting RLLI Section 12 aligns with other Arizona principles that may impose liability on insurer for harm caused by negligent acts or omissions of counsel hired by the insurer, when the insurer directs the conduct in a way that overrides the counsel's duty to exercise independent professional judgment); *Sacred Heart Health Servs. v. MMIC Ins., Inc.*, No. 4:20-CV-4149-LLP, 2022 WL 595888 (D.S.D. Feb. 28, 2022) (distinguishing RLLI Section 12 in finding claim was not seeking to hold insurer liable for the malpractice of defense counsel, but rather for abandoning the defense of its insured); *Sapienza v. Liberty Mut. Fire Ins. Co*., 389 F. Supp. 3d 648 (D. S.D. 2019) (insurers are not vicariously liable for the conduct of defense counsel but suggesting insurer could face liability for providing an inadequate defense, if the insurer directed the conduct of counsel in a manner that overrode the lawyer's duty to exercise independent professional judgment); *Country Mut. Ins. Co. v. Martinez*, No. CV-17-02974-PHX-ROS, 2019 WL 1787313 (D. Ariz. Apr. 24, 2019) (agreeing with proposition that, if an insurer retained unqualified counsel or specifically directed counsel to take inappropriate action, an insurer could be held liable for a breach of the duty to defend).

*Pets Alone Sanctuary* is an important warning. Even with a Missouri statute on the books directing that the RLLI does not reflect the law or public policy of the state on questions of expanding rights and remedies, the court uncritically repeated a viewpoint expressed by the RLLI. This underscores the need for Missouri defense counsel to help educate judges about Missouri law limiting the use and application of secondary sources such as the RLLI, and the RLLI's deviation from the common law. These steps are vital to ensure courts do not improperly rely on the RLLI for law or public policy to create, eliminate, expand, or restrict the state's insurance law.

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[3] The ALI itself says restatements are meant to "aim at clear formulations of common law . . . and reflect the law as it presently stands or might appropriately be stated by a court." ALI Style Manual, 2015.

[4] *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring and dissenting in part) (citations omitted).

[5] Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. Pa. J. Bus. L. 718, 721 (2020).