Summer, 2023

MODL Quarterly Report

Missouri Organization of Defense Lawyers

In this issue ...

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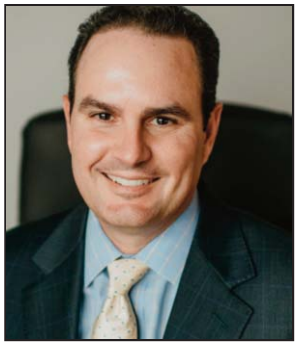
President's Message



Matthew Noce
MODL 2023-24 President
Reichardt Noce & Young LLC
St. Louis, MO

As a seven-year-old running around Tan-Tar-A, I barely understood what a lawyer was, much less the significance of why my dad would tell my sisters and I that we needed to go to the Lake of the Ozarks every year in early June. All I knew was that it meant all the golf I could play (I believe one year I played 81 holes in a single day) and "free" ice cream once I realized all I had to do was tell the server my room number. I also never understood why it was that my dad had to put on a suit and go with other lawyers while my sisters and I played all day.

Now some 36 years later (no one needs to do the math here), I have a true understanding of the important groundwork that my dad and the other founding members of the Missouri Organization of Defense Lawyers were laying at those meetings during the infancy of this wonderful organization. The leadership displayed by our founders over the years is inspiring and continues to provide the roadmap for success that this organization has enjoyed over the past 4 decades since its inception. I am humbled, honored and excited to join the list of Presidents of this fine organization and to serve our members in the coming year.

I would like to start off by thanking all of our members who attended the 38th Annual Meeting at Big Cedar. The program was a huge success in large part due to the leadership provided by our outgoing President, Jim Maloney, and Committee Chair, Josh Engelbart. Both of those individuals were instrumental in putting together an informative meeting with a list of outstanding speakers and CLE programs, as well as an extremely fun family event that I know was enjoyed by all who attended. I would also like to thank Brenda Roling, Brian Bernskoetter and Randy Scherr who have been the backbone of this organization for longer than I can remember. The amount of work that those three put in to ensuring that our Annual Meetings are a success is staggering and certainly appreciated by the Board of Directors who have the pleasure of working with them. In fact, I know that they are already hard at work at planning our next Annual Meeting which will be held

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President's Message *(from page 1)*

at the Chateau on the Lake from June 6 – 8, 2024, so please mark your calendars and plan to attend as we are hoping to continue to build on the success of this past year's meeting.

Moving forward, I hope to follow in the footsteps of the fine leadership examples that I have been privy to during my (extensive) tenure as a member of the Board of Directors and do my part in helping to continue to grow MODL. My goals this year include finding ways to get young lawyers more involved in the organization. I hope to do this by providing CLE programs geared towards helping young lawyers to not only learn practical skills such as strategic planning when presented with a new file, but also develop ways to market their skills such that they can build their own practice. I also plan to continue to encourage firms to send their young lawyers to our judicial luncheons, which provide the opportunity for them to meet and interact with our judiciary in an informal setting with the hope that this will provide our young lawyers with the confidence needed when appearing in front of said judges down the road.

Another goal of mine in the coming year is to continue the advancement of our ListServ and Motion/Order Document Bank. These resources are wonderful tools that are available to our members on the MODL website (www.modllaw.com), and, if utilized properly, can offer a great opportunity for our membership to interact and connect with each other in addition to providing support and guidance on various legal issues of the day. For years, we have all faced situations where our opponents have come to court armed with trial court orders that they obtained through other organizations' ListServs. MODL offers our members the same type of resources, but we all are responsible for developing them, which can only be done by our members' participation. As such, I encourage everyone to join the ListServ (if you have not done so already) and participate in the daily conversations amongst our members. I also encourage everyone to spend a few minutes looking through the Motion Document Bank and uploading any favorable (or even not-so-favorable) court Orders or Judgements addressing key legal issues facing our membership. I truly believe that this type of cooperation by our members, if utilized properly, can be the best incentive to our members.

In closing, one thing I have learned through my time with MODL is that the members are by far the best part of the organization. I have met so many great people over the years through this organization who I now consider to be great friends and look forward to meeting many more this coming year. I encourage everyone to reach out to me with your ideas for CLE's, judges to attend judicial luncheons, possible speakers for the Annual Meeting and other ideas for how we can help improve and grow MODL and serve our members. Please do not hesitate to email me at mhn@reichardtnoce.com or call me at 314-789-1199 with any ideas or questions.

Past President's Message

James Maloney
MODL 2022-23 President
Baker Sterchi Cowden & Rice, LLC
Kansas City, MO

It was my pleasure to spend time with many of you and your families at the MODL Annual Meeting at Big Cedar Lodge! It is certainly a great place to meet, made better by the members of our organization and guests, as well as the hard work that went into the planning the event and CLE presentations. I'd like to extend a sincere "thank you" to all involved in the process – Josh Engelbart, others on the Annual Meeting Committee, and the rest of the Board; Randy Scherr and Brenda Roling; the honorable judges who spoke on our judicial panel and gave their time to the organization; and everyone who spoke/presented at the Annual Meeting. It was a success all around. For those of you who attended, I hope you found it enjoyable and educational.

With the Annual Meeting behind us, my time serving as President is behind us. I have appreciated the opportunity to serve. Thank you to the Board for your time and input in our joint effort to guide the organization through the year. Matt Noce has taken over as our President, and I know MODL is in good hands.

I hope to remain involved with the Board of Directors and leadership of our organization however I can. In the meantime, I will look forward to the next time I get to see you. Never hesitate to reach out to me for anything.

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MODL Amicus Committee Update

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

MODL provided amicus support in *Scott J. Brick, D.O. and Lake Regional Health System v. The Honorable Aaron Koeppen*, Case No. SD37767. The issue presented was the constitutionality of the prompt service statute (SB 871 (2018), which modified 516.105 and 537.100. MODL was involved in getting the bill passed back in 2018. Judge Koeppen of the Circuit Court of Camden County denied Dr. Brick and Lake Regional's Motion to Dismiss under 516.105, RSMO which requires medical malpractice actions to be served within 180 days of filing or dismissed without prejudice (with prejudice if the plaintiff had previously taken or suffered a nonsuit). Here, plaintiff filed a case and did not serve it within 180 days. Dr. Brick and Lake Regional filed a Petition for Writ of Mandamus with the Southern District Court of Appeals, and the Court issued a preliminary writ of mandamus.

On appeal, the preliminary writ of mandamus was made permanent, and Judge Koeppen was ordered to dismiss plaintiff's petition for medical malpractice with prejudice. The Court concluded that section 516.105.2 and Rule 54 were not in conflict and plaintiff was obligated to comply with both. The Court further reasoned, "The statute's specific deadline for serving defendants in medical malpractice cases does not contradict Rule 54's requirement that service be prompt." Because plaintiff failed to serve Dr. Brick and Lake Regional within the time prescribed by section 516.105.2, Judge Koeppen had no discretion to deny their motion to dismiss plaintiff's suit. An application to transfer was filed on May 1, 2023.

We are pleased with the outcome and appreciate the time and effort of Amanda Allen Miller with Meridian Law, LLC 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

Lisa DeBord

I am a partner with the firm of Shook, Hardy, & Bacon. My partners and I were excited to open the firm's St. Louis office in June 2021. My practice is focused on complex product liability and tort litigation. I currently represent a major agribusiness corporation in nationwide environmental contamination claims involving polychlorinated biphenyls (PCBs). Earlier in my career, I represented the same corporation in multi-district litigation arising from commercialization of a herbicide-tolerant seed system and defended another corporation and its employees in litigation filed by 36 plaintiffs who asserted claims of wrongful death, personal injury and PTSD arising out of a workplace shooting. Before entering private practice, I served as law clerk to the Honorable Patricia L. Cohen and the Honorable George W. Draper of the Missouri Court of Appeals.

Originally from Indiana, my husband Jason and I moved to St. Louis in 2006, so that I could attend Washington University, St. Louis School of Law. Jason works in the Business Intelligence group at Charter Communications. We have two young children, Emma and William. In my free time, I enjoy attending our kids' sporting events, walking our two dogs, and reading.

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--proudly presents--

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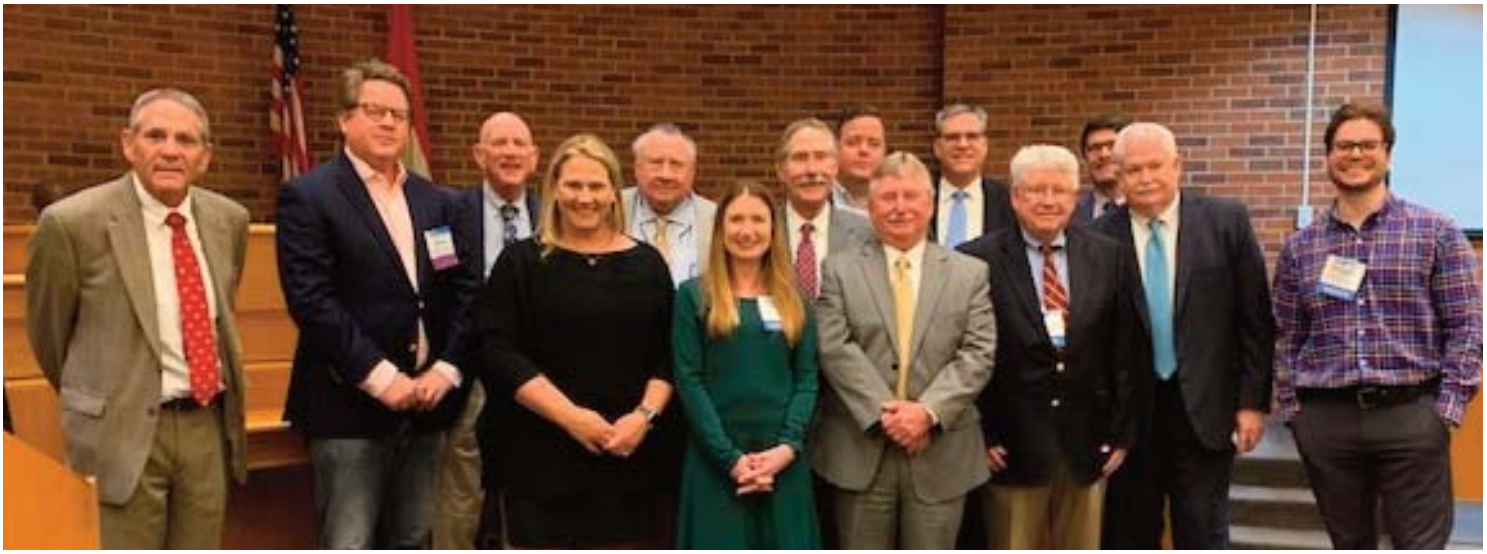
March 29 – 31, 2023

MU School of Law ♦ Columbia, Missouri



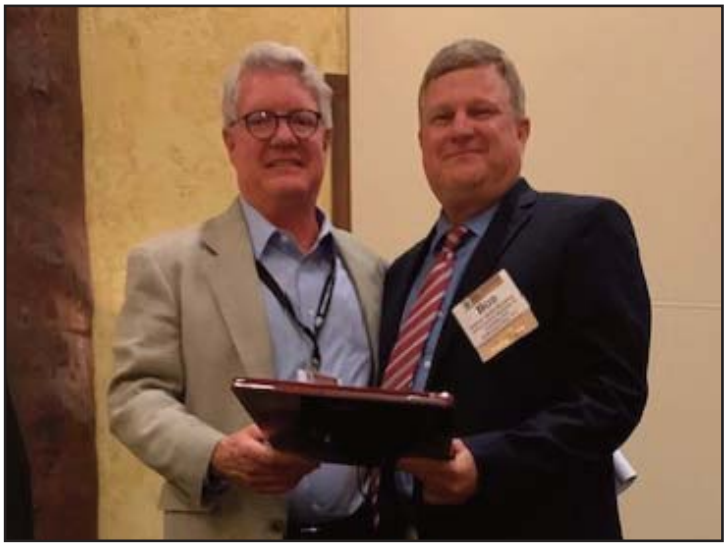
↑ ***Thank you to our outstanding faculty for sharing their time and expertise***

↑ ***Thank you to these outstanding young attorneys who took advantage of this tremendous experience.***

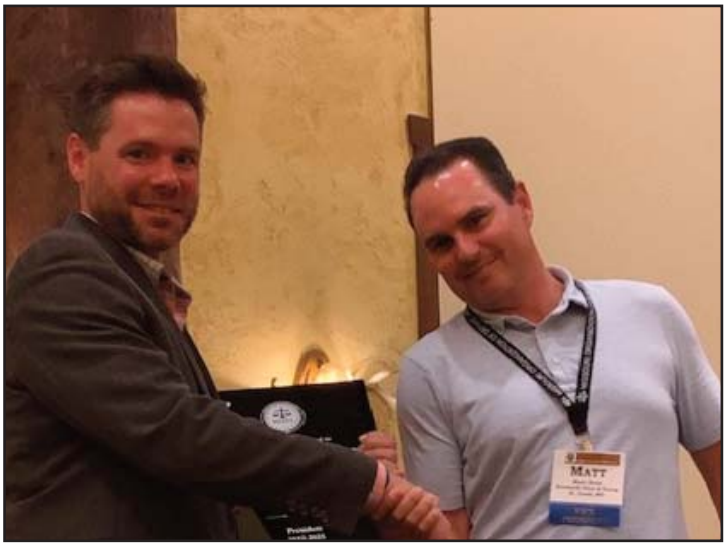
Brooke Parsons was named by the Trial Academy faculty as the Outstanding Student for her performance related to Opening Statement, Direct Examination, Cross Examination, and Closing Argument.

Memories from the MODL 38th Annual Meeting

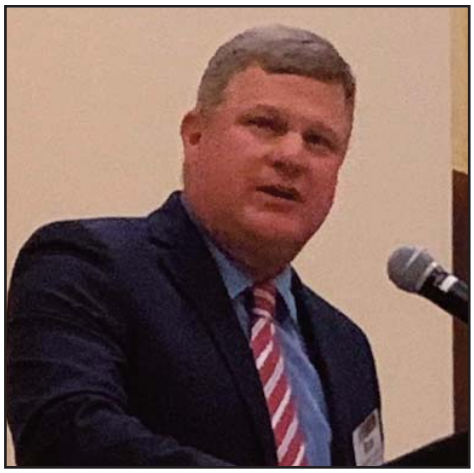
Annual Meeting Award Recipients



↑ *Jack Bangert (left) presents Robert J. Buckley with the Ben Ely, Jr. Award in recognition of his high ethics, morals, competency and devotion to the practice of law and the Missouri Organization of Defense Lawyers.*



↑ *Matt Noce, MODL 2023-24 President (pictured right) congratulates James Maloney and presents him with a plaque for his service as 2022-2023 MODL President.*



→ *Robert J. Buckley thanks the MODL membership for the honor of receiving the Ben Ely, Jr. Award.*

Not Pictured: Brandi Burke was also a recipient of the MODL Service Award for her dedicated service to MODL.

↑ *Jim Maloney, MODL 2022-23 President (pictured left), presents Mark Dunn with the MODL Service Award for his years of dedicated service to MODL.*

↑ *Jim Maloney, MODL 2022-23 President, presents Debbie Champion with the MODL Service Award recognizing her years of dedicated service to MODL.*

Annual Meeting Thank-You's

MODL thanks the Annual Meeting Committee members; the Committe Chair, Josh Engelbart; Randy Scherr; Brenda Roling; and all the sponsors and speakers listed below who made the 2023 MODL Annual Meeting such a great success!

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Blended Judicial Panel

← *MODL member Bill Powell (left) and his son, The Honorable W. Brent Powell*

Moderator:

The Honorable W. Brent Powell ♦ *Supreme Court of Missouri* ♦ *Jefferson City, MO*

Panel Members:

The Honorable Sarah A. Castle ♦ *16th Circuit Court* ♦ *Kansas City, MO*

The Honorable Brouck Jacobs ♦ *13th Circuit Court* ♦ *Columbia, MO*

The Honorable Matthew T. Schelp ♦ *US District Court, Eastern District* ♦ *St. Louis, MO*

The Honorable John P. Torbitzky ♦ *MO Court of Appeals,* Eastern District ♦ St. Louis, MO

Speakers

The Honorable Jeffrey Bates ♦ *Missouri Court of Appeals – Southern District* ♦ *Springfield, MO*

Brian Bernskoetter ♦ *MODL Office* ♦ *Jefferson City, MO*

Nimrod "Rod" Chapel, Jr. ♦ *Chapel Law Group, LLC* ♦ *Jefferson City, MO*

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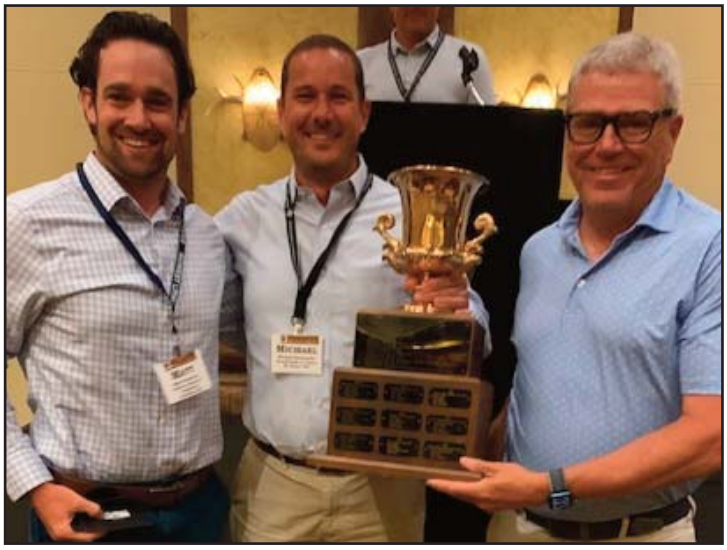
James P. Maloney ♦ *MODL President* ♦ B*aker Sterchi Cowden & Rice, L.L.C.* ♦ *Kansas City, MO*

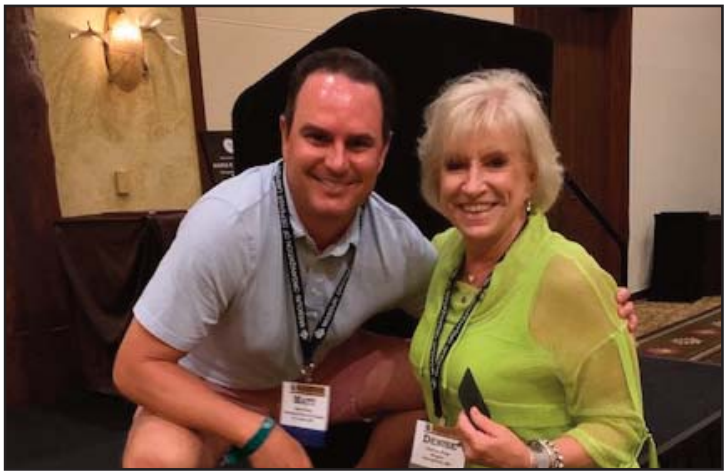
Chris Rackers ♦ *Schreimann, Rackers & Francka, L.L.C.*♦
Jefferson City, MO

Randy J. Scherr ♦ *MODL Executive Director* ♦ *Jefferson City, MO*

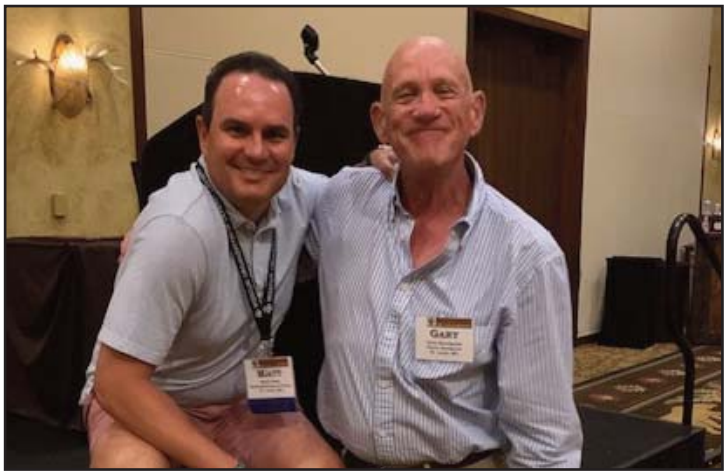
Annual Meeting Golf Tournament



↑ *The winning team (pictured from left): Matt Schwartz, Michael Schroeder, and Scott Summers; (Not pictured): Michael Scott*



↑ *Matt Noce congratulates Deniuse Frey for winning the Longest Putt challenge.*



↑ *Gary Snodgrass (right) celebrates winning the Closest to the Pin challenge with Matt Noce.*

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Meet Judge Marty W. Seaton
Circuit Judge
16th Judicial Circuit of Jackson County

by Kevin D. Brooks ♦ Baker Sterchi Cowden & Rice, LLC ♦ Kansas City, MO

On March 31, 2023, Governor Mike Parson appointed Judge Marty Seaton to the bench. Judge Seaton was appointed to fill the vacancy in Division 10 of Jackson County's 16th Judicial Circuit created by the retirement of Judge Patrick W. Campbell. Many MODL members may be familiar with Judge Seaton as he practiced civil litigation in the Kansas City area as a partner at the law firm of Turner Sweeny & Seaton prior to his appointment to the bench. Judge Seaton recently participated in the following Q & A.

Q. ***What influenced you to want to become a judge? Was there a specific person or experience that drove you to the career path?***

A. My path to the bench, and my decision to pursue the position, was certainly not a direct one. I wish I could say I was one of those kids who grew up dreaming of being a lawyer or a judge, but that was not the case for me. I grew up in a very small town in Southwest, Missouri and came from a family devoid of college or law school graduates. I did not meet an attorney or a judge until I was in my early 20's. The thought had never crossed my mind and it is not something that I ever thought would have been possible. But as I progressed through my life and education, my path crossed with some attorneys and judges who opened my eyes to the good one could do as an attorney or judge.

When I was 20 years old, and a sophomore in college, my parents adopted my sister. She was twelve years old and scared to death about the legal process involved. The adoption hearing was held in front of Judge Eiffert in the old Christian County Courthouse near my hometown. After the hearing, Judge Eiffert took our whole family back into his chambers, shared kind and encouraging words with my sister and answered all of our questions. This brief interaction, my very first with a member of the bench, was something I never forgot and helped me understand that what judges do off of the bench can sometimes be as important as the legal decisions they make.

As the years went on, I met attorneys who went out of their way to provide me with an opportunity to explore the law. I met Springfield attorney David Ansley while I was working my way through college and waiting tables at J Parrino's Italian Restaurant in Springfield, Missouri. He gave me a job as an investigator in his firm after I graduated and let me tag along to his trials and depositions. While in law school, I had the wonderful privilege of clerking for David Rogers, Glenn Ehrhardt and Megan McGuire in Columbia; all of which had a profound influence on my career. Later, I spent 15 years working with some of the most talented attorneys in Kansas City (in my biased opinion) – John Turner and Chris Sweeny at Turner & Sweeny (later Turner Sweeny & Seaton). All of these folks fed my love of the law and demonstrated how to practice law with a passion for advocacy while maintaining empathy and respect for all.

The members of the bench I interacted with here in Jackson County during my time as a law clerk were instrumental in my desire to join the bench. I started my career clerking for Judge Justine Del Muro. Working for Judge Del Muro taught me the importance of making judicial decisions efficiently, extending human decency and respect to every person who enters the courtroom door and the pure satisfaction that comes with being a public servant. That role also gave me the opportunity to get to know every other judge in the courthouse and helped me recognize that it takes all kinds of backgrounds and personalities to run a fair, efficient and high regarded courthouse. Most importantly, I had the privilege and responsibility of taking care of and interacting directly with the jurors called to serve in the Jackson County Courthouse. The folks who diligently reported for jury service were probably the biggest influence on my ultimate desire to join the bench. I feel very blessed to go to work every day in the same courthouse where my professional legal career began and to again be entrusted with taking care of the jurors who grace the Division 10 courtroom.

Meet Judge Marty W. Seaton >p11

Q. ***Describe your practice prior to being appointed to the bench.***

A. In my 15 years of private practice, I primarily handled personal injury, wrongful death, products liability and insurance coverage cases on the plaintiff's side. I worked side by side with John Turner and Chris Sweeny. These two men readily shared their decades of collective knowledge with me and their unmatched work ethic was contagious. While I spent most of my time handling civil litigation cases, my partners always let me take on other kinds of cases, whether they were paying customers or not. This permitted me to get involved in a broad range pro bono and volunteer activities. Over the years I have taken part in Guardian Ad Litem work, represented low income and special needs individuals, regularly volunteered at free legal clinics, and on one occasion, assisted a man in obtaining a commutation of his 80-year criminal prison sentence. All of these experiences helped broaden my understanding of the law beyond my normal practice and have helped me transition to the bench.

Q. ***Did you have a particular philosophy in your practice prior to being appointed to the bench? Do you envision being able to apply that to your work as a judge?***

A. My life long philosophy, passed on to me by my parents, has guided my legal career and my work on the bench. That philosophy is threefold. First, work hard. I'll be the first to admit that I am usually not the most intelligent person, lawyer or judge in the building. However, I have found that if you put in the work, you can still be successful without being a legal savant.

Second, treat everyone with respect, don't burn bridges and be cognizant of issues that may be going on in the lives of those around you, even when the person on the other side of the conversation or interaction may not appear to employ the same philosophy. In private practice I tried hard to treat everyone with whom I came in contact with human decency and recognize that everyone has bad days, personal and professional stresses, and issues beyond my knowledge that may be contributing to the way they are treating you. On the bench, we regularly come face to face with individuals who don't want to be involved in the court system. Even if initially angry or apprehensive about being involved in the process, people appreciate being treated in such a manner and more often than not will mirror your cooperative conduct.

And finally, have the humility to admit what you don't know and be willing to seek out those who can teach you. This was a hard lesson for me to learn as a young attorney as I was trying to impress the more seasoned attorneys and judges around me with my legal skills and knowledge. But working with great lawyers has taught me that being humble only leads to a greater understanding of the law and assists in developing a camaraderie with attorneys in the community from whom I sought out help. The same is true of the judiciary. From the moment I set foot inside of the courthouse doors, almost every judge sought me out to offer help, advice and guidance and let me know that it's not only appropriate, but necessary, to seek out the help of others when wading into unfamiliar legal waters.

Q. ***You were a law clerk in the 16th Circuit early in your career. How did that experience shape you as a lawyer?***

A. Working as a law clerk shaped almost every aspect of my career. It not only educated me on the behind-the-scenes activities of a trial judge, but created the foundation for my network of legal colleagues that I have leaned upon for support throughout my career. I met, and regularly worked with, judges, prosecutors, civil and family law attorneys. I met my first private practice boss, and eventual law partner, after he tried in case in my division. Almost every former law clerk I know got their first job as a result of a connection made as a law clerk. In addition, I got to know many other law clerks who became lifelong friends. If you want to be a civil litigator, especially in Kansas City, I can't think of a better place to start than as a law clerk to a Jackson County Judge.

Q. ***You handle criminal, family, and civil cases in your division. Do you have any preferred practices for the civil attorneys appearing in your division? How can the civil attorneys make your life easier given the size of your docket?***

A. First and foremost, be prepared for any court hearing or trial and be aware that your case is not the only case on the Judge's front burner. I thought I had a pretty good recognition of this, but performing a judicial function my first few weeks quickly reminded me how many balls the Court is always juggling at one time. There are often criminal or domestic attorneys waiting in the wings for your civil hearing to be complete. The judge has a

Meet Judge Marty W. Seaton >p12

mountain of pending motions awaiting attention in chambers. The more efficient civil attorneys can be, the better for the Court.

Also be mindful when you file discovery motions. Most judges, if they are honest, will tell you that discovery motions are the primary element of civil motion practice that clogs up our list of pending motions. The Rules of Civil Procedure exist for a reason and there are certainly times where attorneys need to use the authority provided for in the Rules to resolve discovery disputes. However, a simple act of picking up the phone and calling opposing counsel to see what can be worked out prior to filing a motion can go a long way in resolving or narrowing disputes.

Like discovery motions, extensive pre-trial motions can become a hurdle to efficiently trying a case. Talk to opposing counsel in advance of a pre-trial hearing to find out what motions or issues are actually in dispute. Let the court know about stipulated exhibits in advance and do your best to work out deposition designations. Exchange jury instructions early and talk to opposing counsel about them to see where the true disagreement lies. We are lawyers for a reason. Most of us like to argue. But getting down to the core issues at stake in the trial and arguing about the few issues that are necessary to advocate for your client generally makes a trial better for the parties, lawyers, judges and jurors involved.

Q. ***Do you have any advice for young lawyers starting out in the civil litigation field?***

A. As I mentioned earlier, clerk for a judge if you get the chance. You won't regret it.

Learn jury instructions early in your career. Most young litigators I have met want to be in the courtroom. This is difficult to do in the civil litigation world. I always encourage young lawyers that courtroom time will come more quickly if you become the jury instruction expert in your firm. Learn the MAI and read it front to back (including the chapters at the front of the book that teach you how to use the book). Having a good grasp on MAI instructions will make the entire process of a case more efficient and precise. Draft your initial jury instructions early and use them to guide your pleadings, discovery, deposition outlines and trial preparation materials. You will be amazed how much easier it is to have the facts at hand to prove your claim or defense when the MAI elements have been at the forefront of your mind since the beginning of the case. Most importantly, if you are the attorney in your office that has a good handle on jury instructions, you will become a necessary part of the trial team and find yourself in jury trials sooner than you would otherwise. You will also make judges happy when they see that you understand how to craft a proper verdict director, converse or affirmative defense instruction.

The other piece of advice for a young litigator is simple, but can be hard to do. Be yourself and don't try to mirror the style of the premier or seasoned courtroom advocate in your office. It's easy to watch effective attorneys and conclude that you need to adopt that attorney's style or demeanor to be successful. If you combine your own natural demeanor with hard work, passion for the work and are a student of your craft, you will be successful. Judges and jurors can usually spot an imposter. In the end, it generally makes you a less effective advocate for your client.

Thank you!

On February 24, MODL hosted a webinar entitled "Young Lawyer's Guide to Preparing a Witness for a Deposition." We want to offer our thanks to the presenters who so graciously shared their time and expertise with all who attended.

Matt Noce
Reichardt Noce & Young LLC

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Ryan Turnage
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A Discussion on the Intersection between Accommodating the Public and Protecting the Rights of Employees

by Ryan Turnage ♦ Schnuck Markets, Inc.
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The facts in this article are based on a Complaint that was originally filed in Genesee County, State of Michigan and later removed to the United States District Court for the Eastern District of Michigan Southern Division. *Tonya L. Battle v. Hurley Medical Center, et al*., No. 2:2013cv10680 (E.D. Mich. Feb. 13, 2013). The writer of this article does not have personal knowledge of this public lawsuit beyond that allegations in the lawsuit and cannot attest to veracity of the allegations. This article is written assuming that the facts included below are generally accurate for the purposes of the article. The content of this article is not legal advice. These are points of discussion to consider when a service provider receives a preferential request from a member of the public that violates discrimination laws.

Service providers that are open to the public are faced with balancing customer preferences and legal protections provided to its employees. The following fact pattern is one example of this reality. Tonya Battle, an African American woman, began her employment with Hurley Medical Center as a Registered Nurse in the Neonatal Intensive Care Unit (NICU) in 1988. Hurley Medical Center is a public hospital and municipal subdivision of the City of Flint in the State of Michigan. Ms. Battle was working on October 31, 2012, and caring for an infant patient when the infant's father entered the NICU and asked to speak with the supervising nurse.

The infant's father spoke with the Charge Nurse, Ms. Battle's immediate supervisor, and stated that he did not want any African Americans to take care of his infant baby in the NICU. The Charge Nurse then informed the Nurse Manager, and the Nurse Manager decided to immediately re-assign the infant baby to a non-African American nurse. The Nurse Manager also asked the Charge Nurse to inform Ms. Battle that the Nurse Manager would speak with Ms. Battle the following day.

The following day, the Nurse Manager met with the Director of Nursing for the hospital and the decision was made to officially grant the father's request that no African American employees care for the health of his infant baby. A staff meeting was later held informing the meeting attendees that the hospital would not allow African American employees to care for the infant baby in the NICU. The Nurse Manager called Ms. Battle at home and informed her that African American employees were officially barred from providing medical care services to the infant based on the father's request.

The next day, Ms. Battle returned to work. The assignment clipboard at the hospital included a note that included the words "NO AFRICAN AMERICAN NURSE TO TAKE CARE OF BABY." Allegedly, the hospital's attorney advised the Nurse Manager that African American nurses could not be barred based on the father's request and the father was later informed that his requested could not be honored. Despite the advice, African American nurses were barred from providing medical care to the infant for the next month.

In December of 2012, Ms. Battle filed a complaint with the Equal Employment Opportunity Commission alleging racial discrimination and later filed her lawsuit based on the same facts.

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This article aims to raise these questions for your consideration and discussion:

1. For non-retail service providers like medical facilities, nursing homes, and other care facilities etc., what is the appropriate protocol for responding to and managing preferential demands that are based on protected categories such as race and gender? There is research indicating that some patients prefer receiving medical services from doctors who share the same gender or race. Here, the father's request was not a concern about the efficacy of the hospital's medical care for his child, but a request for the hospital to further his racial animus against African Americans on behalf of his infant child. Flint, Michigan is a diverse city. The request was not only offensive, but unrealistic.

Health providers frequently provide patients with a notice describing the patient's rights and responsibilities. Most notifications explain the patient has the right to be treated with dignity, care, and respect without regard to protected categories, including race and gender. Perhaps this notification is an appropriate opportunity to inform the patient/patient's appropriate representative that the facility/care provider is legally prohibited from discriminating against its employees.

Healthcare facilities, particularly intensive care units and emergency departments, should contemplate the proper protocol for responding to these types of patient requests. The healthcare services required for the infant here were not particularly emergent; however, these departments are high-stress environments where quick decisions must be made. Anticipating that members of the public may make these types of requests better equips the healthcare staff and informs the patient that these requests should not be tolerated.

2. Retail service providers, such as hotels, grocery stores, restaurants, etc. should be prepared to properly respond to this type of request. In this instance, the customer is not always right. Consider a scenario where a patron enters a hotel and requests that only a certain race provide standard housekeeping services to the room and all other races be excluded from that patron's hotel room. Perhaps an appropriate response is to inform the patron that either (1) housekeeping services will not be performed for that patron during the hotel stay; (2) the request is denied; or (3) the patron will not be permitted to stay at the hotel.

Managerial employees for retailers and restaurants should clearly understand that patron requests to violate discrimination laws must not be enforced. If a patron walked into a restaurant or bar in a jurisdiction where openly carrying a firearm was illegal, then the patron would not be permitted to bring the firearm into the facility. Any such request would be denied. Discriminating against persons who are members of protected categories is illegal and any such request should be denied as well.

3. In Ms. Battle's incident, the hospital posted its decision to ban African American nurses from the infant in a way that members of the workplace were aware of the request and aware that the hospital was complicit with the request. In today's climate, many employers tout their work environments as friendly places of inclusion and psychological safety. Psychological safety is basically the belief that members in a workplace are safe to freely communicate ideas, concerns, and admit mistakes without fear of unrealistic and unfair consequences. Employers, especially service providers, should strongly consider its core values and the message that is sent when these types of requests are not handled properly. Honoring the request and publishing the request is offensive and humiliating for the individuals in the workplace. A strong argument can be made that common sense should be the basis for denying these requests because of basic human dignity principles. Discrimination laws are obviously necessary, but even without discrimination laws, such requests should be denied as a matter of human decency.

As a concluding thought, there is an allegation that the hospital was advised by counsel to reject the father's request. The advice was provided after the request was initially approved by the hospital and the statement was posted on the assignment clipboard. Even after the legal advice, it seems the hospital continued to bar African American nurses from providing health services to the infant for one month. This is a helpful reminder that clients can receive accurate legal advice, but the best legal advice is still ineffective without accountability and an action plan spearheaded by the client.

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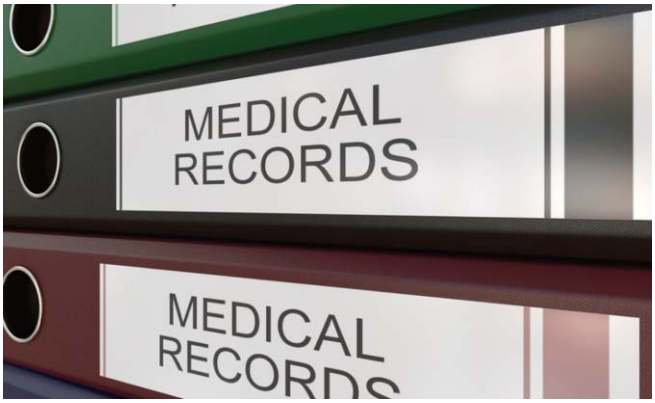

Discovery Issues and the Physician-Patient Privilege

by M. Todd Moulder
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Civil legal defense litigation runs the gamut from defending corporations who are named in product liability cases to corporations who are alleged to have breached contracts to individuals who are involved in motor vehicle accidents or other scenarios resulting in personal injury or property damage to plaintiffs. These fact patterns can result in just as diverse a pattern of discovery requests. Counsel for defendants stand as gatekeepers between plaintiffs' discovery requests and those documents and information that are personal, private, or proprietary and privileged and which should not be discoverable nor disclosed in any fashion. Some of the discovery requests propounded by plaintiffs are actually relevant to both the claims being made and the defenses put forth by defendants. However, as we well know, mere relevancy is just the first hurdle that the plaintiff must cross in order to obtain certain discovery.

This article deals with those scenarios where it appears that a given defendant's medical records are both relevant and needed, either by the plaintiff to defeat a defense or by the defendant to successfully litigate a valid affirmative defense. That issue can arise in the context of a plaintiff seeking the medical records of a defendant under various scenarios. Many times, a plaintiff will set forth facts in their Petition and/or in pre-litigation allegations that indicate that a given defendant was intoxicated, impaired, or otherwise laboring under a deficit of some kind at the time of the accident or occurrence giving rise to their claims. Likewise, a defendant may assert that a plaintiff is, for example, comparatively at fault for exposing themselves to the behavior of a defendant who is clearly impaired, i.e., assumption of the risk. This can give rise to the idea that when the subject defendant has received medical treatment following this subject incident, that a plaintiff is entitled to those medical records, at a minimum, to the extent that they contain evidence regarding intoxication, impairment, or medical testing that might shed light on either the existence of impairment and/or the level of impairment that a defendant may have been laboring under at the time of the accident or other events giving rise to the litigation. The Missouri Supreme Court recently clarified its view on this issue, at least in the context of personal injury and medical records sought from defendants and their discoverability.

On March 1, 2022, the Missouri Supreme Court rendered its decision in *State ex rel. Barks v. Pelikan*, 640 S.W.3d 105 (Mo. en banc 2022). The *Barks* case arises out of a personal injury claim by a passenger in a golf cart. In August 2019, Ms. Barks was driving a golf cart and was involved in an accident in St. Charles County, Missouri. The Plaintiff, Sheila Spencer, was her passenger and she claimed that as a result of the accident, she sustained personal injuries. Ms. Spencer sued Ms. Barks claiming that she was negligent in the operation of the golf cart and also alleged that Ms. Barks was intoxicated while driving the cart.

Ms. Barks denied the claims of Ms. Spencer and asserted a number of affirmative defenses to those claims. She also denied that she was intoxicated while operating the golf cart. Among the several affirmative defenses asserted by Ms. Barks were comparative fault, implied primary assumption of the risk, and implied secondary assumption of risk. Stated more specifically, Ms. Barks claimed that Ms. Spencer "assumed the risk of injury and accident by entering and continuing to ride in the golf cart if the driver of said vehicle was under the influence and, therefore, she is barred from recovery against defendant and/or her fault should be compared and allocated." *See, State ex rel. Barks*, at 106.

As a result of her claims and the affirmative defenses and denials of Ms. Barks, Ms. Spencer served discovery seeking Ms. Barks' medical records from the night of the golf cart incident through the following morning. *Id*. Ms. Barks objected to the discovery of her medical records and claimed those records were protected by the physician-patient privilege. *Id*. Ms. Spencer continued to pursue Ms. Barks' records and filed a Motion to Compel with the Circuit Court of St. Charles County. In the alternative, her Motion requested relief in the form of striking certain of Ms. Barks' affirmative

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defenses. *Id*. In part, Ms. Spencer argued in her Motion to Compel that Ms. Barks had waived the physician-patient privilege by affirmatively asserting or injecting into the case her intoxication via affirmative defense. *Id*.

Following a hearing, the St. Charles Circuit Court sustained Ms. Spencer's Motion to Compel and ordered Ms. Barks to produce her medical records from the evening of the accident and the following morning. Specifically, the order required her to provide records related to "her alleged intoxication on the date of the incident and following day." *Id*. Ms. Barks then filed a Petition for Writ of Mandamus or Prohibition in the Court of Appeals for the Eastern District seeking prevention of the disclosure of her private and personal medical records. The Court of Appeals denied her Petition. Ms. Barks informed the Circuit Court she intended to file a Petition with the Supreme Court and did so on March 26, 2021.

The Missouri Supreme Court began by addressing this issue in the context of the physician-patient privilege. That privilege can be found at R.S.Mo. § 491.060. The portion relied on, or at least referred to by the Missouri Supreme Court, is paragraph 5, which reads as follows:

> 5) A physician licensed pursuant to Chapter 334, a chiropractor licensed pursuant to Chapter 331, a licensed psychologist or a dentist licensed pursuant to Chapter 332, concerning any information which he or she may have acquired from any patient while attending the patient in a professional character, in which information was necessary to enable him or her to prescribe and provide treatment for such patient as a physician, chiropractor, psychologist, or dentist.

The Missouri Supreme Court previously considered a prior version of this statute and the physician-patient privilege in *Rodriguez v. Suzuki Motor Corp*., 996 S.W.2d 47 (Mo. banc. 1999). In *Rodriguez*, the Supreme Court noted that this subsection, as well as others that grant some type of testimonial privilege, are to be construed against the privilege. The *Rodriguez* Court, as well as the *ex rel. Barks* Court, both noted, at least at first glance, and keeping in mind the requirement of strict construction, that the privilege would only seem to prohibit testimony of a physician, chiropractor, or dentist. However, both of these cases observed that the privilege has repeatedly been held to extend to both hospital and medical records. *See, Rodriguez*, 996 S.W.2d at 39. The *Rodriguez* case specifically noted that "blood alcohol testing and hospital records is the kind of information that is subject to the privilege." *Id*.

Both *Barks* and *Rodriguez* explain that in order to invoke the privilege, the party attempting to employ the privilege in a defensive manner must show that the information being sought by the opposing party was "necessary" to the treatment or care of the patient. For example, the *Rodriguez* Court held that blood alcohol tests that were necessary as part of the treatment of the defendant in that case were privileged while those tests that were not necessary for the treatment of the defendant are discoverable and admissible at trial. *Rodriguez*, 996 S.W.2d at 39. The Court also held that the party seeking to invoke the privilege has the burden of proof. However, in most instances, that burden can be satisfied with a showing that the records or information sought were, in fact, hospital records or medical records compiled by medical personnel in the course of treatment of a given patient. *Id*.

While the *Rodriguez* Court quoted from and cited to a previous version of R.S.Mo. § 491.060(5), the *Barks* Court ruled in a similar fashion based on the version resulting from the most recent revisions. The *Barks* Court agreed that the physician-patient privilege applies to medical records and that the privilege exists for the benefit of the patient and belongs to the patient, not the physician. As a result, even when the medical records of a given party are directly relevant to another party's claims or defenses, if they are protected by the privilege, they are not discoverable. *See, Barks*, 640 S.W.3d at 108; *State ex rel. Stinson v. House*, 316 S.W.3d 915, 918 (Mo. banc. 2010). Much like a client seeking advice from an attorney enjoys an attorney-client privilege, the purpose of the physician-patient privilege is to allow a patient to seek and obtain medical treatment which may require a candid conversation and sometimes incriminating admissions, free from fear of the possible embarrassment and invasion of privacy that can occur when these types of admissions and forthright communications are necessary for valid and competent treatment.

This privilege is not without limitations. The *Barks* Court noted that the privilege was not absolute and the mere fact that documents or communications between a physician and their patient fall within the physician-patient privilege does not mean that they are not discoverable and does not completely end the inquiry. *Barks*, 640 S.W.3d at 108. Like most privileges, the privilege can be waived. Waiver primarily comes in two forms: express or implied. *Id*. The most common example we think of when considering a specific express waiver of a privilege is when a plaintiff files a lawsuit claiming personal injury. Courts have routinely held that that constitutes a

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waiver of the physician-patient privilege as they have now placed their medical condition at issue. However, a party can also impliedly waive the privilege. This occurs when that party performs an act showing a clear and unequivocal purpose to divulge confidential or otherwise privileged information. Caselaw dealing with an implied waiver of privilege goes back many decades.

In setting out the parameters of when a waiver is impliedly waived, Missouri Appellate Courts have held:

> To make out a case of implied waiver there must be a clear, unequivocal, and decisive act showing such purpose, or acts amounting to an estoppel. In other words, the intention to waive must plainly appear or else the acts or conduct relied upon as constituting a waiver must involve some element of estoppel.
>
> *Fitzgerald v. Metro Life Ins. Co*., 149 S.W.2d 389, 391 (Mo. App. 1941).

After analyzing the issue of physician-patient privilege and possible express and implied waiver of that privilege, the *Barks* Court returned to the facts at hand. In doing so, the Court noted that the parties agreed that the records being sought were medical records of Ms. Barks and that they fell within the physician-patient privilege. *Barks*, 640 S.W.3d at 110. The sole question for the Supreme Court then was whether or not Ms. Barks had in some fashion waived the privilege by asserting the affirmative defense of assumption of the risk. Ms. Spencer, the Plaintiff, argued that by asserting those particular defenses, Ms. Barks had put her physical condition at issue similar to when a plaintiff puts their physical condition at issue by filing a claim asserting that they have suffered physical injury that required medical treatment. *Id*.

The *Barks* Court analyzed the facts of the *Rodriguez* case in detail in determining whether or not Ms. Barks waived the privilege by asserting the subject affirmative defenses. In the *Rodriguez* case, Suzuki sought medical records of a co-defendant and by doing so was inquiring whether or not they were intoxicated at the time of the accident. *See, Rodriguez*, 996 S.W.2d at 63. The Circuit Court denied Suzuki's request and Suzuki appealed. Suzuki claimed that defendant had waived her physician-patient privilege when she testified to her intoxication at trial in rebuttal to Suzuki's offer of proof and by responding to questions about her intoxication on cross-examination.

The Supreme Court disagreed that that constituted a waiver of the privilege and explained that a denial of an allegation does not constitute a waiver "because to do so would force the patient to choose between suffering judgment by default or waiving the physician-patient privilege." *Id*. By that same reasoning, the Missouri Supreme Court held that merely testifying in rebuttal to Suzuki's offer of proof did not constitute a waiver. The defendant did not waive her physician-patient privilege, "by introducing non-medical evidence at trial." *Id*. at 63-64. "Furthermore, the responses to questions on cross-examination that required her to divulge information about her intoxication are considered 'extorted' and, therefore, involuntary." *Id*. at 64.

The *Barks* Court also cited a case involving a fatality wherein one of the defenses raised to the allegation of liability was that the defendant lost consciousness due to a diabetic condition. *State ex rel. Hayter v. Griffin*, 785 S.W.2d. 590 (Mo. App. 1990). Mr. Hayter denied the allegations of plaintiff and claimed that plaintiff was contributorily negligent. The defendant sought a reduction of damages based on comparative fault. On appeal, one of the key issues was whether defendant's assertion of the affirmative defense of comparative fault likewise constituted a waiver of the physician-patient privilege. *Id* at 593.

The *Hayter* Court held that defendant's affirmative defense did not constitute a waiver of the physician-patient privilege as the mere assertion of comparative fault does not seek damages on behalf of the defendant utilizing that defense. It is purely a defensive position. The Court explained: "[A] defendant who asserts that the plaintiff was negligent and entitled to recover only on the basis of a comparison between the negligence of the parties remains an involuntary participant in the proceedings." *Id*.

The Court in *Barks* found that the situation it was presented with was nearly identical to that presented to the Court in *Hayter*. Ms. Barks was not seeking any type of damages on her own accord but was merely asserting defenses. The Court also reaffirmed the maxim that any affirmative defenses that are not pled are deemed waived. *See, Barks*, 640 S.W.3d at 109. As such, the assertion of the affirmative defenses of comparative fault and assumption of the risk is involuntary because the defendant who fails to plead those defenses waives them. The Court determined it would be illogical and unacceptable to require Ms. Barks to choose between waiving her physician-patient privilege or forfeiting her affirmative defenses of comparative fault and assumption of the risk. *Id*.

The *Barks* Court also observed that even though a review of Ms. Barks' medical records might quickly and unequivocally establish intoxication, or the lack thereof, the mere fact that

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the privileged records may be relevant does not mean that those records are discoverable and, thus, admissible. "The very nature of an evidentiary privilege is that it removes evidence that is otherwise relevant and discoverable from the scope of discovery." *Id*. Finally, the Plaintiff in *Barks* argued that the assertion of the privilege in these circumstances was simply unfair. The Court noted that the privilege always comes at the expense of truth seeking and fact-finding. However, the privilege is set by statute and the Court would abide by the requirements of that statute.

Practical Application

The holding in *Barks*, and the physician-patient privilege and its use by defendants, even in the face of asserting affirmative defenses that arguably might place their own medical condition at issue, constitutes a near iron-clad defense for any defendant being requested to disclose their confidential medical records. From a practice standpoint, the defense attorney must keep in mind that the privilege only applies to those medical records reflecting treatment necessary to treat the defendant. A discussion of the level of intoxication with someone else, for example, an officer in the emergency room, may not be deemed to be necessary for treatment. In other words, those statements made in the presence of the officer may be deemed sufficient to waive the privilege, even if they also appear in the medical records.

The practitioner must also be careful not to waive the privilege. It appears that the primary way that the defendant can waive the privilege is to provide some medical records to a plaintiff, which could possibly be deemed a waiver of all relevant medical records surrounding the events, especially if it is an equivocal and intentional production of the records. It appears from a reading of the *Barks* case that if the production was accidental or inadvertent, that may not constitute a waiver. Likewise, when these requests for records are responded to, it is important that the defense attorney asserts the physician-patient privilege as a reason for not providing the discovery. While many of these types of discovery requests are objectionable for other reasons, a Court would likely rule that a failure to assert the privilege may also constitute a waiver of that privilege.

Replication Error Defense in Toxic-Tort Cancer Cases

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Many, perhaps even most, of the toxic-tort cases we defend these days include allegations that a chemical either manufactured or used by our clients caused the plaintiff to develop one form of cancer or another. These can be difficult cases to defend on causation.

We can attempt to exclude testimony by plaintiff's causation experts, which is not often entirely successful, and we can poke holes in the experts' testimony on cross-examination. But even when we succeed in raising questions in the jurors' minds about the strength of plaintiffs' causation evidence, there is still the lingering question: If the defendant's chemical did not cause the cancer, then what did?

While defendants are not required to prove what caused the plaintiffs' cancer, we often do try to develop an alternative explanation rather than leaving the jury with only plaintiffs' causation theory. We work to develop evidence for alternate exposures and scour the plaintiff's medical records for hereditary/genetic explanations or statements by the treating physicians regarding the cancer's cause.

However, we often fail to find adequate exposures to other chemicals that could have caused the cancer, the plaintiff has never smoked, there is no strong evidence of a family history of cancer, no genetic testing was ever done, and – if they say anything at all about cause – the medical records simply indicate that the cancer is idiopathic or of "unknown etiology." In the end, we are often left with "nobody knows" as the only alternative explanation for the cause of plaintiff's cancer – not particularly satisfying to us as attorneys or to the jurors.

It is common knowledge that cancer is caused by mutations that occur within the body's cells.[1] And it is common knowledge that genetic mutations may be caused by environmental exposures, may be inherited, or may simply be the result random mistakes in cell replication.[2] Random cell mutation could be a useful explanation for cancer, but until recently there was no scientific effort to quantify the impact of random cell mutations on the development of cancer.

In 2015, however, Drs. Cristian Tomasetti and Bert Vogelstein took the first step toward quantifying the impact of random mutations on the etiology of cancer.

Dr. Tomasetti is an applied mathematician and currently is the Director, Center for Cancer Prevention and Early Detection, City of Hope. Formerly, Dr. Tomasetti was a professor at Johns Hopkins University School of Medicine, which is where he worked with Dr. Vogelstein. Dr. Vogelstein is a professor of oncology at Johns Hopkins University School of Medicine. According to Johns Hopkins' website, Dr. Vogelstein is credited as the first scientist to explain the molecular basis of a common human cancer.

It has been shown that different human tissues replicate at different rates.[3] In addition, it has been known for more than a century that some human tissues develop cancers far more frequently than other types.[4] In order to study the impact random mutations that occur in cell division have on the etiology of cancer, Tomasetti and Vogelstein compared the rate of stem cell divisions in various human tissues to the

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1 National Cancer Institute, "How Genetic Changes Lead to Cancer" (https://www.cancer.gov/about-cancer/causes-prevention/genetics/genetic-changes-infographic).

2 Cleveland Clinic, "Genetic Mutations in Humans," (https://my.clevelandclinic.org/health/body/23095-genetic-mutations-in-humans).

3 MIT News, "To divide or not to divide," (https://news.mit.edu/2019/divide-or-not-divide-cell-division-0821). In addition, it has been known for more than a century that some human tissues develop cancers far more frequently than other types. Tomasetti, C. & Vogelstein, B., "Variation in cancer risk among tissues can be explained by the number of stem cell divisions," 34 7 Science 78-81 (Jan. 2, 2015) (Author Manuscript at 1) (Link: Variation in cancer risk among tissues can be explained by the number of stem cell divisions - PMC (nih.gov)).

4 Tomasetti, C. & Vogelstein, B., "Variation in cancer risk among tissues can be explained by the number of stem cell divisions," 34 7 Science 78-81 (Jan. 2, 2015) (Author Manuscript at 1) (Link: Variation in cancer risk among tissues can be explained by the number of stem cell divisions - PMC (nih.gov)).

lifetime cancer risk of cancers in those tissues.[5] First, they identified 31 types of tissues that had been quantitatively assessed and had known rates of stem cell divisions.[6] Next, the rates of cell divisions were then compared to the lifetime risks of various cancers.[7] The results showed a strong Pearson linear correlation (0.804) between the number of cell divisions in a tissue and the likelihood of cancer development within the same tissue, with higher rates of cancer occurring in tissues that undergo higher rates of cell division.[8] Comparing the estimated percentages of environmental factors, hereditary factors, and natural replication, Tomasetti and Vogelstein concluded that only a third of cancer diagnoses could be explained by environmental exposure and inherited dispositions and the remaining two thirds were due to natural replication errors.[9] Tomasetti and Vogelstein concluded: "A linear correlation equal to 0.804 suggests that 65% (39% to 81%; 95% CI) of the differences in cancer risk among different tissues can be explained by the total number of stem cell divisions in those tissues. Thus, the stochastic effects of DNA replication appear to be the major contributor to cancer in humans."[10]

Tomasetti and Vogelstein's 2015 article was met with some harsh criticisms. IARC pointed to limitations in the study including the fact that the study only included persons living in the United States. And IARC complained that Tomasetti and Vogelstein's conclusions "could have serious negative consequences from both cancer research and public health perspectives."[11] In addition, the methodology employed by Tomasetti and Vogelstein was criticized for, among other things, not including an analysis of the impact of environmental factors in the study.[12]

Tomasetti and Vogelstein responded to these criticisms with an expanded study in 2017.[13] Unlike their previous paper that explained the relative risk of cancer, here, Tomasetti and Vogelstein examined not only the correlation between cancer incidence and stem cell division, but also specific cancer types and the contribution of all three potential sources (environmental, hereditary, and natural replication) to the development of each specific cancer.[14] Furthermore, to address the criticism that their last paper was U.S.-centric, they look at the risks of these cancers in 69 countries around the world.[15]

Utilizing data provided by IARC, they studied cancer incidences for 17 different cancer types, which were chosen specifically because stem cell data was available.[16] For each of the 69 countries, the correlation between the number of cell divisions in 17 tissue types and the corresponding lifetime incidence of cancer in said tissues were calculated.[17] The resulting data again showed that there was a strong correlation between stem cell division and cancer incidence in all of the countries analyzed (with a Pearson correlation median rate of 0.80).[18]

Next, Tomasetti and Vogelstein analyzed 32 additional cancer types to determine the relative rate of cancer mutations caused by each of the three factors (environmental, heredity, and random error).[19] Looking at data reported by the Cancer Research UK database (specifically at that of the U.K. female population), Tomasetti and Vogelstein found that the impact of environmental factors in the etiology of specific cancer types had a considerable range. More than 60% of cancers of the lung, esophagus, and skin were attributed to environmental exposures.[20] But cancers of the prostate, brain, and breast showed less than 15% were attributable to environmental factors.[21] After normalizing for the incidence of all 32 cancer types, Tomasetti and Vogelstein calculated that 29% of the gene mutations were caused by

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5 *Id* at 2.

6 *Id*.

7 *Id* at 2-3, 10.

8 *Id* at 3.

9 *Id* at 1.

10 *Id* at 3.

11 IARC, Most types of cancer not due to "bad luck": IARC responds to scientific article claiming that environmental and lifestyle factors account for less than one third of cancers, Press Release No. 231 (Jan. 13, 2015) (Link: Most types of cancer not due to "bad luck". IARC responds to scientific article claiming that environmental and lifestyle factors account for less than one third of cancers (who.int)).

12 See, the Collegium Mazzini (Link: https://www.collegiumramazzini.org/news/detail/128); letters to the journal Science by several authors (Link: Cancer risk: Many factors contribute | Science); as well as Noble, R., Cancer, Bad Luck, and a Pair of Paradoxes, Theory, Evolution, and Games Group (Apr. 4, 2015), Ledford, H., Studies Clash over Causes of Cancer, Scientific American (Dec. 17, 2015).

13 Tomasetti, C., Li L., & Vogelstein, B., Stem cell divisions, somatic mutations, cancer etiology, and cancer prevention, 355 Science 1330 (2017) (Author Manuscript) (Link: Stem cell divisions, somatic mutations, cancer etiology, and cancer prevention - PMC (nih.gov)).

14 *Id* at 2.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*.

19 *Id* at 4.

20 *Id*.

21 *Id*.

environmental factors, 5% were due to hereditary factors, and 66% were attributable to natural replication errors.[22] As a result, the authors reaffirmed their original findings: that natural replication errors play a major role in cancer development.

The work of Tomasetti and Vogelstein has been used with success in defending toxic-tort cases in recent years. In *Donetta Stephens v. Monsanto Company, et al*., Case No. CGC-20-585764, in the Superior Court of the State of California for the County of San Francisco, Bayer/Monsanto employed the replication error defense. Donnetta Stephens alleged that she developed non-Hodgkin's lymphoma ("NHL") as a result of using Roundup at her homes over several decades. Most authorities state that, with a few exceptions, the cause of most cases of non-Hodgkin's lymphoma is unknown, or idiopathic.[23] However, in 2015 the International Agency for Research on Cancer ("IARC") classified glyphosate (the active ingredient in Roundup) as "probably carcinogenic to humans."[24] IARC's monograph on glyphosate played a central role in plaintiff's causation case. Bayer/Monsanto countered with the testimony of Dr. Tomasetti. Dr. Tomasetti testified that 95% or more of NHL is caused by replication errors. His testimony is supported by his work examining rates of stem cell division in tissues.[25] The Stephens case was the second defense verdict in the Roundup litigation.

Dr. Tomasetti testified as a defense expert for Bayer/Monsanto again in the trial of several Roundup claims in *Carl Alessi, et al. v. Monsanto Company*, Case No. 19SL-CC03617, Missouri Circuit Court, 21st Judicial Circuit, St. Louis County, Missouri. Each of the plaintiffs alleged that they had developed NHL due to exposure to Roundup. Dr. Tomasetti testified that about two-thirds of all cancer mutations across all cancer types are attributable to cell division errors. With respect to NHL, Dr. Tomasetti testified that random mutations accounted for 96% of NHL cases.[26] Dr. Tomasetti's general opinions were supported by specific causation experts: Dr. Ran Reshef, oncologist and hematologist at Columbia University, and Dr. Eric Duncavage, professor of pathology and immunology at Washington University School of Medicine in St. Lous. Both Drs. Reshef and Duncavage testified that the NHL developed by plaintiffs Marty Cox, Cheryl Davis, Roberta Fox, and Gary Gentile were caused by a series of naturally occurring, random cell mutations. Bayer/Monsanto again won a defense verdict.

The replication error defense was also asserted by Sterigenics in its recent trial victory in Cook County, Illinois. In *Teresa Fornek v. Sterigenics U.S., LLC, et al*., Case No. 2018-L-010744 in the Circuit Court of Cook County, Illinois, Law Division (one of the cases consolidated into *In re: Willowbrook Ethylene Oxide Litigation*, Case No. 2018-L-010475), plaintiff alleged that she developed T-cell acute lymphoblastic leukemia ("T-ALL") from exposure to ethylene oxide emissions from the Sterigenics' Willowbrook plant. Plaintiff relied heavily on the Environmental Protection Agency's ("EPA") cancer risk assessment for ethylene oxide ("EO"), which indicates that EO is carcinogenic to humans increases the risk of developing lymphohematopoietic cancers (such as leukemia) and breast cancers. Plaintiff also relied heavily on EPA's 2016 Evaluation of Inhalation Carcinogenicity of Ethylene Oxide (CASRN 75-21-8),[27] and EPA's risk assessment for EO using its Integrated Risk Information System ("IRIS"), which allegedly found that EO was 60 times more toxic than previously reported. Sterigenics countered this evidence with the testimony of Dr. Ran Reshef, who relied on the work of Tomasetti and Vogelstein and testified that Ms. Fornek's T-ALL was not caused by exposure to ethylene oxide. Dr. Reshef further testified that Ms. Fornek's T-ALL was most likely caused by genetic mutations that arose out of cell replication errors.[28]

Plaintiffs' counsel have derisively described replication errors as the "bad luck" defense. Unfortunately, Tomasetti and Vogelstein themselves referred to "bad luck" in the abstract for their first article: "These results suggest that only a third of the variation in cancer risk among tissues is attributable to environmental factors or inherited predispositions. The majority is due to 'bad luck,' that is, random mutations arising during DNA replication in normal, noncancerous stem cells."[29] At trial, both Tomasetti and Reshef have clarified that the findings are better described as the result of naturally occurring random cell mutations.

The replication error defense obviously has limitations, such as in lung cancer cases. But it is worth considering in many cases, especially where there is no good evidence suggesting another alternative causation theory.

22 *Id*.

23 American Cancer Society website: What Causes Non-Hodgkin Lymphoma? (cancer.org).

24 IARC Monograph on Glyphosate – IARC (who.int).

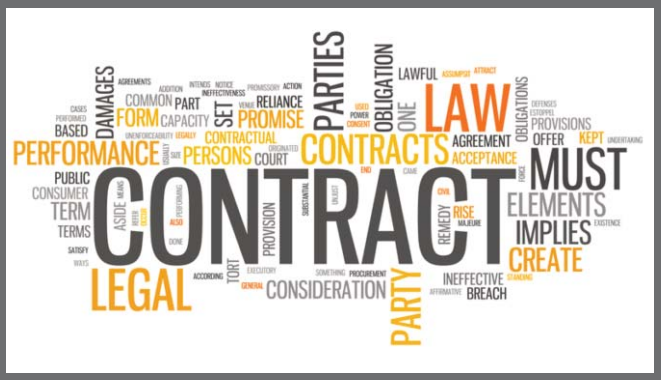
25 Great Lawyers.IO (https://greatlawyers.io/cases/manufacturer-claimed-weed-killer-does-not-cause-cancer/).

26 St. Louis Record, May 11, 2023 (https://stlrecord.com/stories/631026226-defense-witness-says-random-bad-luck-more-likely-cause-of-cancer-in-roundup-trial).

27 Link: Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide, Executive Summary (Final Report) (epa.gov)

28 Trial Transcript, November 14, 2022, 53:1-16.

28 Tomasetti, C. & Vogelstein, B., "Variation in cancer risk among tissues can be explained by the number of stem cell divisions," 34 7 Science 78-81 (Jan. 2, 2015).



Tortious Interference Claims

Court Clarifies Missouri Law on Tortious Interference Claims against Officers of Agents of a Corporate Entity

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A recent decision from Missouri's Western District Court of Appeals clarified that an officer or agent of a contracting entity cannot be deemed a "third party" to the contract who can be sued for tortious interfering with their entity's contracts, and that an officer's or agent's personal interests or use of improper means are not relevant to determining whether they are a "third party." The case is *Halderman v. City of Sturgeon*, No. WD 85066, 2023 WL 3184397 (Mo. Ct. App. May 2, 2023), and the Court held that while allegations that an officer or agent acted from personal interests or employed "improper means" may be relevant to determining whether they acted with an "absence of justification"—the fourth element to a tortious interference claim – these allegations are not relevant to determining whether the officer or agent is a third party to the contract.

The key takeaways of the decision include:

- A cause of action for tortious interference with business expectancy can only lie against a third party to the contract.
- Officers or agents of a contracting entity are not strangers to the entity's contracts, but are deemed to be "the contracting party." Thus, no tort claim can be asserted against officers or agents simply for breaching their own contractual obligations – even if the breach is motivated by improper motives or accomplished by improper means.
- To the extent older Court of Appeals decisions state that corporate officers or agents can be held liable for inducing their corporate employers to breach a contract, if the officers or agents act from personal interests or use improper means, those cases should no longer be followed on this point and are inconsistent with Missouri Supreme Court precedent.
- Regarding precedent, the Court clarified the presumption that the Missouri Supreme Court has not overruled its previous decision unless it proclaims otherwise. In other words, unless there is a contrary showing, the courts should presume that an opinion of this Court has not been overruled *sub silentio*.

Background of the Case

Greg Halderman was the City of Sturgeon's Chief of Police who was terminated by the Board of Aldermen of the City in 2017, and later sued the City and an alderman for, among other things, tortiously interfering with his employment contract.

In 2019, the defendants moved for summary judgment on several claims, including the tortious interference claim against Tyler Patterson (a member of the Board of Alderman when it voted to terminate Halderman's employment in 2017). In support of the tortious interference claim against Patterson, Halderman alleged that his termination was not for the reasons identified in the Board's decision, but that he was fired in retaliation for several incidents, including reporting Patterson for allegedly violating Missouri Sunshine Law (Section 610.023.2 R.S.Mo.) by removing Halderman's personnel file from City Hall. The trial court denied summary judgment on the tortious interference claim but allowed Halderman to amend his petition to add a statutory wrongful discharge claim against the City. A jury trial was held on the wrongful discharge and tortious interference claims in 2021. Ultimately, the jury returned verdicts against Patterson for tortious interference with contract and against the City for wrongful discharge, awarded Halderman $300,000 in compensatory damages on each claim, and charged Patterson an additional $15,000 in punitive damages. The City and Patterson appealed.

Overview of Law Regarding Tortious Interference and Claims against Officers or Agents

A claim of tortious interference with a contract or business expectancy requires the plaintiff to establish five elements: (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendants' intentional interference; (4) absence of justification; and (5) damages. *Ozark Employment Specialists, Inc. v. Beeman*, 80 S.W.3d 882, 893 (Mo. Ct. App. 2002).

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Under Missouri law, a cause of action for tortious interference cannot be stated against another party to the same contract or agents of a party but must lie against a third party only. *See Zipper v. Health Midwest*, 978 , S.W.2d 398, 419 (Mo. Ct. App. 1998). Where the individual being sued is an officer or agent of an entity, the officer or agent acting for the entity are deemed to be the same as the entity for the purposes of tortious interference (and their acts are deemed to be acts of the entity). *Fields v. R.S.C.D.B., Inc.*, 865 S.W.2d 877, 879 (Mo. Ct. App. 1993) ("a claim for tortious interference with contractual relations contemplates interference from a third party, not from a party to the contract itself"). A party to a contract cannot be held responsible for inducing itself to commit a breach or for conspiring to breach it. *See Chrysler Fin. Co. v. Flynn*, 88 S.W.3d 142, 151 (Mo. Ct. App. 2002)("Missouri has never recognized a mere breach of contract as providing the basis for tort liability") (citing *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 230 (Mo. Ct. App. 1995)). Thus, officers and agents acting in their official capacities cannot be liable for tortious interference with their entity's own contracts. *See Paglin v. Saztec Int'l, Inc.*, 834 F.Supp. 1184, 1195-96 (W.D. Mo. 1993) (citing Missouri law).

The Appellate Court's Decision

The appellate court initially noted that Halderman's tortious interference claim focused on the Board's decision to terminate his employment while Patterson was a member. As a member of the Board, Patterson was charged with voting on the decision whether to discharge Halderman as police chief. The appellate court compared Patterson's position as an alderman on the Board to an officer or director for a corporation. Relying on Missouri caselaw, the Court held such persons cannot be liable for tortiously interfering with the contracts of their corporate entity.

The appellate court's primary authority was the Missouri Supreme Court's decision in *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 602 (Mo. 2013). In *Farrow*, the plaintiff brought a tortious interference claim against her supervisor for retaliating against her when she refused and later reported his sexual advances. The Missouri Supreme Court held that plaintiff could not assert a claim against her supervisor since he was acting in his supervisory capacity at the time in question, not as a third party to the employment contract. Similarly, the appellate court in *Halderman* held that Patterson was not a third party who could be liable for tortiously interfering with Halderman's employment contract because he was acting in his position as a member of the Board when he made the decision to terminate Halderman in 2017.

Halderman argued that he could assert a tortious interference claim against Patterson, irrespective of his position as an alderman, in two circumstances: (1) if Patterson was acting in his own personal interest when he terminated Halderman's employment, rather than in the interest of the City; or (2) if Patterson used improper means like misrepresentation or defamation. The appellate court rejected this argument, noting that whether an agent or officer acted from "personal interest" or "used improper means" were not relevant to the issue of whether Patterson was a third party to Halderman's employment contract. Instead, such factors would only be relevant to the fourth element of a tortious interference claim— the "absence of justification element."

The appellate court reasoned that the plaintiff in *Farrow* presented evidence of the supervisor's sexual advances and the supervisor's harassing and retaliatory actions towards her after she reported his behaviors and, yet, the Supreme Court in *Farrow* still held that a tortious interference claim could not be asserted because the supervisor was an agent of his employer. *See also, Reed v. Curators of Univ. of Mo.*, 509 S.W.3d 816, 827 (Mo. Ct. App. 2016) (holding plaintiff could not assert tortious interference claim against two supervisory employees even though plaintiff claimed said employees retaliated against her); *Graham v. Hubbs Machine & Manufacturing, Inc.*, 92 F. Supp.3d 935 (E.D. Mo. 2015) (rejecting argument that defendant supervisor could be held liable for tortious interference claim for reasons of personal financial or other gain because supervisor was agent of plaintiff's employer during time in question).

The appellate court also distinguished another Missouri Supreme Court decision relied on by H*alderman, Bishop & Associates, LLC v. Ameren Corp.*, 520 S.W.3d 463 (Mo. 2017), where the court found in favor of defendant employees on a tortious interference claim because there was no evidence that the employees acted with an "absence of justification." The appellate court noted that the court's decision in *Bishop* was consistent with the Missouri Supreme Court's decision in *Farrow* in that the employees were not held liable for tortiously interfering with a contract to which their employers were a party, even though the results in *Bishop* were reached on a different basis. The appellate court further presumed that the Missouri Supreme Court had not overruled the *Bishop* decision *sub silentio*, unless there was a contrary showing.

Importantly, the appellate court advised that to the extent older Missouri Appellate decisions hold that an officer or agent can be held liable for inducing their employer's breach of its contract if the conduct of the officer or agent is sufficiently egregious, those decisions should no longer be followed on that point.