STATE OF MISSOURI RETAIL AND HOSPITALITY COMPENDIUM OF LAW

Prepared by
Dysart Taylor Cotter McMonigle & Montemore, P.C.
4420 Madison Avenue, Suite 200
Kansas City, MO 64111
(816) 931-2700
www.DysartTaylor.com

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Pre-Suit Notice Requirements/Prerequisites to Suit

Structure

A) Missouri courts consist of three levels: the trial courts (also known as the circuit courts), an intermediate appellate court (the Missouri Court of Appeals) that is divided into three regional districts, and the Supreme Court of Missouri. Mo. Const. Art. 5, § 1

1) **Circuit courts**. The circuit courts are Missouri's trial courts and have jurisdiction over nearly all civil and criminal matters. MO. REV. STAT. § 478.070, 478.220, Const. Art. 5, § 14. Every county has a court, and the courts are organized into forty-five circuits. MO. REV. STAT. 478.073 (Beginning January 1, 2017 there will be forty-six circuits, *See* MO. REV. STAT. 478.188).

2) **Court of Appeals**. The Missouri Court of Appeals is divided into three districts: Eastern, Southern and Western. MO. REV. STAT. § 477.040.

3) **Supreme Court**. The Supreme Court of Missouri is the state's highest court. The court's seven judges generally sit together ("en banc") to decide all matters that come before it. The Supreme Court has exclusive jurisdiction over five types of cases on appeal:

a) The validity of a United States statute or treaty;
b) The validity of a Missouri statute or constitutional provision;
c) The state's revenue laws;
d) Challenges to a statewide elected official's right to hold office; and
e) Imposition of the death penalty.

MO. REV. STAT. § 477.040

Judicial selection

A) **Qualifications:** Citizenship and age qualifications for judges are governed by Article 5, Section 21 of the Missouri Constitution.

1) Supreme and Appellate Court Judges must be: U.S. citizens for at least 15 years, qualified voters of Missouri for 9 years preceding their selection, and at least 30 years of age. Mo. Const. Art. 5, § 21
2) Circuit Judges must be: U.S. citizens for at least 10 years, qualified voters of Missouri for 3 years preceding their selection, and be at least 20 years of age. *Id* .

B) **Selection.** Judges in Missouri are selected by either popular vote or pursuant to Article 5, Section 25 of Missouri's Constitution which is referred to as *Missouri's Non Partisan Court Plan*.

1) Election. Election of judges occurs in 110 of the state's 114 counties, which comprise 40 of the state's 45 judicial circuits. Under this method voters choose these judges in popular elections where judges and judicial candidates designated by their political

party affiliation. MO. CONST. ART. 5, § 25(c)(2). Vacancies in for circuit judges in counties where they elect by popular vote are filled by appointment by the governor until the next general election or until the previous term is complete. MO. CONST. ART. 5, § 25(c)(1).

2) Missouri's Non Partisan Plan. In the Supreme Court, all appellate courts and in the remaining five counties where elections do not occur, circuit and associate circuit judges are selected pursuant to Missouri's constitutional nonpartisan court plan. MO. CONST. ART. 5, § 25(a). Under the Missouri Plan any person who meets the constitutional requirements may apply for a judicial vacancy. *Id.* From that pool of applicants, a commission consisting of citizens, attorneys and a judge selects three candidates for the judicial vacancy. *Id.* The commission forwards these candidates' names to the governor who then selects a judge from among the three candidates. After the judge has served on the bench for at least a year, the judge stands for retention by the voters at the next general election. *Id.*

C) Tenure. Supreme Court and appellate judges: 12 years; Circuit judges: 6 years. MO. CONST. ART. 5 § 25(c)(1).

Alternative dispute resolution

A) Alternative dispute resolution (ADR) is governed by MO. SUP. CT. R. 17 (2015). An ADR system may be established by any judge or judicial circuit. There are no rules or statutes which make ADR mandatory in Missouri. Pursuant to Rule 17, ADR includes the following options:

1) Arbitration, a process in which one neutral person hears both sides of a controversy and decides the matter; the arbitrator's decision is not binding but guides the parties in settling their lawsuit;
2) Early neutral evaluation, a process which brings parties together in the early pretrial period to receive a non-binding assessment from an experienced neutral evaluator;
3) Mediation, a process in which a neutral third party facilitates communication between the parties to promote a settlement;
4) Mini-trial, a process in which a neutral third party issues an advisory opinion regarding the merits of a case presented by the parties; and
5) Summary jury trial, a process in which jurors hear abbreviated case presentations; there are no witnesses, and the jurors delivery an advisory verdict to facilitate an informal settlement process.

Service of Summons

A) Service of Summons is governed by MO. REV. STAT. § 506.150.

B) Persons. Service on a person includes (1) personal service and (2) substituted service. Substituted service requires leaving a copy of the summons and petition at the individual's dwelling with a family member over the age of fifteen. Substituted service can also be satisfied by delivering copies to an agent authorized by appointment or required by law or,

in the case of an infant, disabled or incapacitated person, to his legally appointed conservator.

C) **Public corporations**. Personal jurisdiction over Missouri public corporations is acquired by serving the chief executive officer of the corporation. If the chief executive officer cannot be served, the court may designate an officer to be served.

D) **Private corporations**. A private corporation may be served by (1) leaving a copy of the summons with a corporate officer, partner, manager or agent or (2) leaving a copy of the summons at any business office with the person who has charge of that office.

E) **Mailing.** Service upon an individual, domestic or foreign corporation, partnership, or other unincorporated association can be made by mailing a copy of the summons and petition by first-class mail, postage prepaid, to the person to be served. Two copies of a notice and acknowledgement form must also be included. A person served who does not return the acknowledgement within thirty days shall be ordered to pay the costs of personal service.

F) **Geographic scope.** Pursuant to MO. REV. STAT. § 506.170, all process may be served anywhere within the state and may be forwarded to the sheriff of any county for the purpose of service.

G) **Waiver of service** is also governed by MO. REV. STAT. § 506.150. "When a defendant shall acknowledge in writing, endorsed on the writ, signed by his own proper signature, the service of such writ, and waive the necessity of the service thereof by an officer, such acknowledgment shall be deemed as valid as service in the manner provided by law." *Id.*

H) **Nonresidents.** Pursuant to MO. REV. STAT. § 506.192, service on nonresidents shall be made in accordance with MO. SUP. CT. R. 54.20.

Statute of Limitations

A) Statutes of Limitations are governed by Chapter 516 of the Missouri Revised Statutes. Chapter 516 delineates five categories of limitations based on their respective limitation periods (ten years, five years, four years, three years, and two years) and provides examples of the types of actions that fall within each category.

B) **Statutory construction**. Statutes of limitation are to be construed to effectuate the intent of the legislature. *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. 1968). If a general statute of limitation conflicts with a statute of limitation that is specific to a certain type of case, the specific statute will generally prevail. *Id.*

1) **Exceptions.** Exceptions to or situations not clearly within the terms of a statute of limitations cannot be brought in through statutory construction. Courts are not at liberty to extend the coverage of statutes of limitations. *Excel Drug Co., Inc. v. Mo. Dept. of Revenue*, 609 S.W.2d 404, 409 (Mo. 1980).

2) **Application.** It is up to the court to determine whether a statute of limitations applies. A plaintiff cannot avoid a statute of limitations by attempting to bring suit under an alternate theory when a statute of limitations is clearly applicable. *See Arbuthnot v. DePaul Health Ctr.*, 891 S.W.2d 564 (Mo. Ct. App. 1995).

C) **Written and oral contracts**. The statute of limitations for an action on contract, written or oral, is five years. MO. REV. STAT. § 516.120. However, the statute of limitations on an action that involves the payment of money or property is ten years. MO. REV. STAT. § 516.110.

1) **Accrual.** A plaintiff's cause of action on contract accrues upon the defendant's failure to perform at the time and in the manner contracted. *Armistead v. A.L.W. Group*, 155 S.W.3d 814 (Mo. Ct. App. 2005). The statute of limitations begins to run when suit may be maintained, but not until time allowed for correction of the situation has passed.

2) **Sale of goods.** MO. REV. STAT. § 400.2-725 establishes a four-year statute of limitations for breach of contract for the sale of goods. Parties may contract to reduce the limitation to a period not less than one year, but they may not contract to extend it. The statute of limitations in these cases accrues when the breach occurs, regardless of one party's lack of knowledge of the breach.

D) **Contribution**. The statute of limitations for contribution actions is governed by MO. REV. STAT. § 516.120 (2015). Any claim for contribution by a joint tortfeasor must be brought within five years from the date of the existence of a joint obligation on a liability shared by the tortfeasors. *Rowland v. Skaggs Cos., Inc.*, 666 S.W.2d 770, 773 (Mo. 1984) (en banc). Parties may bring contribution claims in anticipation of some form of liability, but the statute of limitations begins to run only when an actual liability exists. When one tortfeasor agrees to settlement with a plaintiff, the date on which the limitation period begins to run is the actual date of the settlement – not the date of the original accident. *Greenstreet v. Rupert*, 795 S.W.2d 539, 541 (Mo. Ct. App. 1990).

E) **Employment**. The statute of limitations for employment actions is generally governed by MO. REV. STAT. § 516.140 (2015). An employment claim such as one for unpaid wages, unpaid overtime or any other claim under the Fair Labor Standards Act of 1938 must be brought within two years after the cause accrues.

F) **Fraud**. The statute of limitations for fraud and fraudulent misrepresentation is governed by MO. REV. STAT. § 516.120. Actions based on fraud must be brought within five years from the date that the fraud was discoverable by the aggrieved party. *Norden v. Friedman*, 756 S.W.2d 158, 163 (Mo. 1988) (en banc). If a party can show that the fraud was not discoverable within ten years, then the statute of limitations does not begin running until that ten-year period is over. Thus, a party has a maximum of fifteen years to commence the suit MO. REV. STAT. § 516.120(5); *Anderson v. Dyer*, 456 S.W.2d 808, 811-12 (Mo. Ct. App. 1970).

G) **Improvements to realty**. The statute of limitations for construction actions and for actions based on improvements are generally governed by MO. REV. STAT. § 516.097. Any action to recover damages from economic loss, personal injury, property damage or wrongful death arising out of a defective or unsafe condition of any "improvement" to real property shall be commenced within ten years of the date on which such improvement is completed.

1) This limitation only applies to actions against any person whose sole connection with the improvement is performing or furnishing the design, planning or construction, including architectural, engineering or construction services, of the improvement.

2.) As used in this section, "improvement" is defined as "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Fueston v. Burns & McDonnell Eng'g Co. Inc*., 877 S.W.2d 631, 636 (Mo. Ct. App. 1994) (internal citation omitted).

H) **Indemnity**. In Missouri, indemnity claims based on a written contract are governed by a ten-year statute of limitations. *Hughes Dev. Co. v. Omega Realty Co*., 951 S.W.2d 615 (Mo. 1997). Oral or non-contractual indemnity claims are governed by a five-year statute of limitations pursuant to MO. REV. STAT. § 516.120(1). The statute of limitations for an indemnity action does not begin until the indemnitee is found liable to a third party. *Oliver v. Blackwell*, 2 S.W.3d 160 (Mo. Ct. App. 1999). When the right to indemnity is created by law rather than by contract, the statute of limitations does not commence until the person with that right has paid – or been compelled to pay – the amount for which he seeks indemnification. *Simon v. Kan. City Rug Co.*, 460 S.W.2d 596 (Mo. 1970). Missouri law also provides that the statute of limitations for a joint tortfeasor's suit for indemnity begins to run at the time of settlement – not at the time of the original accident. *Federated Mut. Ins. Co. v. Gray*, 475 F. Supp. 679 (D.C. Mo. 1979).

I) **Personal injury.** The statute of limitations for personal injury claims begins to run when the cause of action has accrued to the person asserting the claim. Accrual occurs when a breach of duty has occurred, or when a wrong has been sustained. *D'Arcy & Assocs., Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25 (Mo. Ct. App. 2004). The statute of limitations for personal injury claims is generally five years. MO. REV. STAT. § 516.120(4).

J) **Attorney-client relationship.** The continuation of the attorney-client relationship will not postpone the commencement of the running of the statute. *Brower v. Davidson, Deckert, Schutter & Glassman, P.C.*, 686 S.W.2d 1 (Mo. Ct. App. 1984).

K) **Foreign objects.** When a plaintiff brings an action based on negligence in allowing a foreign object to be introduced into the plaintiff's body to remain there, the two-year period begins to run either from the date of the plaintiff's discovery of the object or the date that the negligence should have been discovered, whichever date is first. MO. REV. STAT. § 516.105.

L) **Minor child.** The statute of limitations does not begin to run for a minor until he or she becomes eighteen years old. The 2005 Tort Reform Act added an additional rule for actions brought after August 28, 2005, which sets a limitation period of ten years from the date of the act of neglect complained of or two years from the minor's eighteenth birthday. MO. REV. STAT. § 516.105(3).

M) **Property damage**. The statute of limitations for property damage actions is governed by MO. REV. STAT. § 516.120 (2015). Actions to recover damages for an injury done to real or personal property, as well as trespass, permanent nuisance and condemnation actions, shall be brought within five years after the cause of action accrues. The statute begins to run not when the wrong was actually done, but when the resulting damage is sustained and is capable of ascertainment. If one or more item of damage is involved, then the statute begins to run with the last item of damage so that full and complete relief can be obtained. *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 103 (Mo. 2005).

1) Permanent nuisance actions, or those in which abatement is impracticable or impossible, are subject to the five-year statute of limitations period. MO. REV. STAT. § 516.120. However, those nuisances which are temporary, or abatable, are instead subject to the ten-year statute of limitations period found in MO. REV. STAT. §516.010. *Moore v. Weeks*, 85 S.W.3d 709, 719 (Mo. Ct. App. 2002).

2) When a trespass is "continuing" or when there are repeated wrongs that are capable of being terminated, successive causes of action accrue every day the wrong continues or each time it gets repeated. *Cacioppo v. Sw. Bell Tel. Co.*, 550 S.W.2d 919, 925 (Mo. Ct. App. 1977).

N) **Survival**. The same statute that provides for a two-year statute of limitations for medical malpractice actions also applies to claims for lost chance of survival. *Caldwell v. Lester E. Cox Med. Ctrs.*, 943 S.W.2d 5, 9 (Mo. Ct. App. 1997) (citing MO. REV. STAT. § 516.105). Similarly, actions for loss of consortium with underlying medical malpractice claims are also subject to this same period of limitation. *Kamerick v. Dorman*, 907 S.W.2d 264, 267 (Mo. Ct. App. 1995).

O) **Tolling**. A number of different statutes enumerate specific instances where the applicable statute of limitations is tolled. For example, MO. REV. STAT. § 516.170 provides that in actions under MO. REV. STAT. §§ 516.100-.370, if the person bringing the claim is a minor under the age of twenty-one or is mentally incapacitated, the statute of limitations is tolled until such disability is removed. Claims such as those for intentional torts, contract actions, and personal injury are within the scope of this section. However, actions for medical malpractice are not subject to this tolling provision. MO. REV. STAT. § 516.105.

P) **Wrongful death**. The statute of limitations for wrongful death claims brought under MO. REV. STAT. § 537.080 is governed by MO. REV. STAT. § 537.100. All actions for wrongful death must therefore be brought within three years from the day of the death of the person for whom the death suit is instituted. *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 186 (Mo. Ct. App. 1982). This three-year period applies in all wrongful death actions. Thus, if

a wrongful death claim is brought on the basis of medical malpractice, the longer three-year statute of limitations applies. *Wilson v. Jackson*, 823 S.W.2d 512, 513 (Mo. Ct. App. 1992).

1) Tolling. Unlike medical malpractice actions, the wrongful death statute of limitations is not tolled during the minority of the plaintiff. *Bregant v. Fink*, 724 S.W.2d 337, 338 (Mo. Ct. App. 1987). However, the timely filing by a class member tolls the statute of limitations for other class members that may subsequently join the litigation. *Snead v. Zephyr Transp. Inc.*, 819 S.W.2d 776, 778 (Mo. Ct. App. 1991).

2) In addition, if a defendant leaves Missouri and is not subject to being personally served, the statute of limitations is tolled for the period of the defendant's absence. However, if the defendant is subject to service of process under the long arm statute, the statute is not tolled. MO. REV. STAT. § 537.100.

Q) **Statute of Repose.** A statute of repose is different from a statute of limitation. Statutes of repose limit the time for filing an action after a certain event occurs, even though a cause of action might not have accrued; statutes of limitation limit the time for initiating a proceeding after a cause of action has actually accrued. In essence, statutes of repose limit the time during which causes of action can arise.

R) **Real property**. MO. REV. STAT. § 516.097, which governs tort actions against architects, engineers or builders of defective improvements to real property, is a statute of repose. Such tort actions must be brought within ten years of completion of improvement – not within ten years of the accrual of the cause of action. The statute does not apply if the only connection to the product that failed was the assembly of a pre-fabricated product. *O'Reilly v. Dock*, 929 S.W.2d 297 (Mo. Ct. App. 1996). However, when a manufacturer or distributor also installs his product into the building, the statute of repose may be raised as a defense pursuant to MO. REV. STAT. § 516.097.2.

Venue Rules

A) Venue is governed by Chapter 508 of the Missouri Revised Statutes.

B) **Time requirement**. Under Missouri law, venue is determined as of the date the plaintiff was first injured. This is a change from the previous language, in which venue was determined as the case stood when brought. MO. REV. STAT. § 508.010

1) A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested. *Id.*

C) **Transfer venue.** The process for initiating a change in venue when venue is improper is governed by MO. SUP. CT. R. 51, and requires that any Motion to Transfer Venue based upon a claim of improper venue must be filed within sixty days of service on the party seeking transfer. MO. SUP. CT. R. 51.045(a).

D) **Non-tort actions.** Under MO. REV. STAT. § 508.010 in a non-tort action, venue is proper:

1) If the defendant is a Missouri resident, in the county within which the defendant resides, or in the county in which the plaintiff resides and the defendant may be found.

1) If there are several defendants who reside in different counties, in any such county in Missouri.

2) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides.

3) If the defendants are all nonresidents, in any county in Missouri.

F) **Tort actions.** In a tort action where the plaintiff was first injured in Missouri, venue is proper in the county where the plaintiff was first injured by the alleged act. *Id.*

G) **Tort injuries outside of Missouri.** In a tort action where the plaintiff was first injured outside of Missouri, venue is proper:

1) If the defendant is a corporation, in any county where the defendant's registered agent is located or, if the plaintiff's principal place of residence was in Missouri when he was injured, in the county of his principal place of residence on the date of injury.

2) If the defendant is an individual, in any county of the defendant's principal place of residence in Missouri, or in the county of plaintiff's principal place of residence in Missouri if such principal place of residence was in Missouri on the date plaintiff was first injured.

3) "Principal place of residence" refers to the county which is the main place where an individual resides in Missouri. There is a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence.

NEGLIGENCE

A) In order to prove negligence, a plaintiff must prove that the defendant owed a duty to the plaintiff, the defendant breached that duty, and the defendant's failure directly and proximately caused the plaintiff's injury. *Schembre v. Mid-Am. Transplant Ass'n*, 135 S.W.3d 527, 531 (Mo. Ct. App. 2004).

1) Direct Causation is when the injuries or damage would not have occurred "but for" the conduct of defendant. *Heffernan v. Reinhold*, 73 S.W.3d 659, 664-65 (Mo. Ct. App. 2002).

2) Proximate cause is determined by looking backwards after the conduct occurred and "examining whether the injury appears to be a reasonable and probable consequence of the conduct." *Heffernan v. Reinhold*, 73 S.W.3d 659, 664-65 (Mo. Ct. App. 2002).

Premises Liability

A) Premises liability is a negligence action based on a property's unsafe or defective condition. A claim cam be brought when injury or damage was caused by an unsafe or defective condition of the property. *Haney v. Fire Ins. Exch.*, 277 S.W.3d 789, 791 (Mo. Ct. App. 2009).

Proper Defendant

A) The party who owns or controls the property, which has the unsafe or defective condition, is the proper defendant in premises liability actions. *Haney v. Fire Ins. Exch.*, 277 S.W.3d 789, 791 (Mo. Ct. App. 2009). "A party exercises its control over the premises when, *inter alia*, (1) it exercises its right to direct the use of the premises; or (2) it exercises its right to admit people to the premises and exclude people from it." *Medley v. Joyce Meyer Ministries, Inc.*, 460 S.W.3d 490, 496-97 (Mo. Ct. App. 2015).

Independent Contractor Exception

A) "Under the independent contractor exception to premises liability, if a landowner relinquishes possession and control of its property to an independent contractor during the period of work, the duty of care shifts to the independent contractor." *Key v. Diamond Int'l Trucks*, 453 S.W.3d 352, 360 (Mo. Ct. App. 2015).

The duty of a landowner depends on the status of the person who enters their property:

A) A person entering upon the premises, can be one of three statuses, an invitee, licensee or trespasser. *Woodall v. Christian Hosp. NE-NW*, 473 S.W.3d 649, 653 (Mo. Ct. App. 2015), *reh'g and/or transfer denied* (Oct. 8, 2015), *transfer denied* (Nov. 24, 2015).

1. **Duty Owed to Trespasser**
    - **a.** Generally there is no duty owed to a trespasser. *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211, 219 (Mo. Ct. App. 2003)
    - **b. Exception - *Attractive Nuisance* -** A possessor "owes a duty of care to child trespassers for a dangerous artificial condition he maintains at a place on the land that children are likely to trespass." *Fields v. Henrich*, 208 S.W.3d 353, 359-61 (Mo. Ct. App. 2006).

2. **Duty to Licensee**
    - **a.** A possessor owes a duty to make safe dangers that the possessor knows of to a licensee. *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211, 219 (Mo. Ct. App. 2003).

3. **Duty to Invitee**

    - **a.** A possessor owes an invitee the "the duty to exercise reasonable care to protect him or her against both known dangers and those that would be revealed by

inspection." *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211, 219 (Mo. Ct. App. 2003)

b. In order to satisfy that standard the party in control of the property must:

(1) "exercise reasonable care;

(2) disclose to the invitee all dangerous conditions which are known to the [owner or occupier] and are likely not to be discovered by the invitee; and

(3) see that the premises are safe for the reception of a visitor, or at least ascertain the condition of the land, to give such warning that the invitee may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it."

Key v. Diamond Int'l Trucks, 453 S.W.3d 352, 360 (Mo. Ct. App. 2015).

Duty to Remove Snow or Ice

A) There is no duty to remove naturally accumulating snow or ice that is a condition general to the community. *Hill v. Barry Cty.*, 434 S.W.3d 115, 115 (Mo. Ct. App. 2014)

B) **Exception**. If the landowner, occupier or owner has made an agreement or has engaged in some sort of course of conduct in removing the snow or ice, then a duty of exercising ordinary care exists in the removal. See *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 847 (Mo. 1997); *Gorman v. Wal-Mart Stores, Inc*., 19 S.W.3d 725 (Mo. Ct. App. W.D. 2000).

Fireman's Rule

A) "The owner or occupier of a premises is not liable to a public safety officer, such as a policeman, firefighter or the like, who is injured by reason of the dangerous condition of the premises, if the officer was responding to an emergency at the time of the injury." *Gray v. Russell*, 853 S.W.2d 928 (Mo. 1993).

B) **Exception**. The Fireman's Rule does not apply if the "hazard was concealed or hidden." *Kilventon v. United Missouri Bank*, 865 S.W.2d 741 (Mo. Ct. App. W.D. 1993).

Known or Obvious Dangers

A) If the danger is open and obvious then no duty is owed by the possessor. *Privitera v. Coastal Mart, Inc.*, 908 S.W.2d 779, 780 (Mo. Ct. App. 1995). However, a duty may be owed if the possessor still anticipates harm might occur even though the condition is open and obvious. *Holzhausen v. Bi-State Dev. Agency*, 414 S.W.3d 488, 494-95 (Mo. Ct. App. 2013).

Slip and Falls

A) A storeowner is liable to a business invitee for an injury resulting from a dangerous or unsafe condition on the premises if the storeowner had "actual or constructive knowledge of the condition in time to have remedied the condition prior to the injury." *Porter v. Toys 'R' Us-Delaware, Inc.,* 152 S.W.3d 310, 316 (Mo. Ct. App. 2004), *as modified* (Nov. 23, 2004). Knowledge is imputed onto the storeowner if an agent or employee of the storeowner knew of the dangerous condition. *Id.*

B) In order to establish constructive knowledge or notice, "the condition must have existed for a sufficient length of time or the facts must be such that the defendant should have reasonably known of its presence." *Id.*

C) A sign or cone, put out by a business owner, can become a dangerous condition if not placed appropriately or in consideration of other factors such as likelihood of the sign or cone becoming a tripping hazard itself. See *Rycraw v. White Castle Sys., Inc.,* 28 S.W. 3d 495, 499 (Mo. Ct. App. 2000).

Protection Against 3rd Persons

A) Generally, business owners do not have a duty to protect business invitees from the criminal acts of third parties. *Hudson v. Riverport Performance Arts Centre,* 37 S.W.3d 261, 264 (Mo. Ct. App. E.D.2000).

B) Exceptions.

1) **Special Acts and Circumstances Rule.** A duty may arise "when a person, *known to be violent,* is present on the premises or an individual is present *who has conducted himself so as to indicate danger* and sufficient time exists to prevent injury." *Williams v. Barnes & Noble, Inc.,* 174 S.W.3d 556, 561 (Mo. Ct. App. 2005).

2) If one voluntarily assumes a duty to protect the safety of an invitee, then a duty to exercise reasonable care exists. *Hudson v. Riverport Performance Arts Ctr.,* 37 S.W.3d 261, 266-67 (Mo. Ct. App. 2000)

   a) In order to establish that a business has assumed a duty to protect its business invitees from the actions of third parties, a party must how that there was an "express assurance of safety to the invitee and the invitee relied on those assurances." *Hudson v. Riverport Performance Arts Ctr.,* 37 S.W.3d 261, 266-67 (Mo. Ct. App. 2000).

Joint and Several Liability

A) In Missouri, "if a defendant is found to bear fifty-one percent or more of fault, then such defendant shall be jointly and severally liable for the amount of the judgment rendered against the defendants. If a defendant is found to bear less than fifty-one percent of fault,

then the defendant shall only be responsible for the percentage of the judgment for which the defendant is determined to be responsible by the trier of fact." Mo. Ann. Stat. § 537.067 (West).

Assumption of Risk

A) A plaintiff will be unable to recover if the court finds that the "plaintiff voluntarily consented to accept danger of known and appreciated risk, and that she comprehended actual danger and intelligently acquiesced in it." *Eide v. Midstate Oil Co.*, 895 S.W.2d 35, 40 (Mo. Ct. App. 1995).

Contributory Negligence

A) "Missouri courts have consistently held that where a duty to look exists it is contributory negligence to fail to see what is *plainly visible.*" However, a person will not be contributorily negligent if he/she fails to look when there is no reason to anticipate danger. *Rider v. The Young Men's Christian Ass'n of Greater Kansas City*, 460 S.W.3d 378, 384 (Mo. Ct. App. 2015), *reh'g and/or transfer denied* (Mar. 3, 2015), *transfer denied* (May 26, 2015). A person is required to look while walking "as an ordinarily careful and prudent person would under the circumstances." *Peck v. Olian*, 615 S.W.2d 663, 666-67 (Mo. Ct. App. 1981).

Dog Bite

A) An owner will be held strictly liable for any injuries caused by a dog that "possesses abnormally or vicious propensities" no matter what steps the owner tries to take to warn of the dog. *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211, 218 (Mo. Ct. App. 2003).

B) The Missouri Rule, recognizes that in dog bite cases there exists a two-tier system of liability, predicated on the dog's dangerous propensities. *Duren v. Kunkel*, 814 S.W.2d 935 (Mo. 1991).

1) As to a dog that possesses abnormally dangerous or vicious propensities, the rule makes it clear that regardless of what steps are taken to warn or protect from those dangers, of which the owner has actual or constructive knowledge, the owner will be strictly liable for any injuries caused by the dog.

2) In other words, Missouri public policy provides that if an owner wants to knowingly maintain a vicious dog, he or she will be strictly liable for the injuries caused by the dog. With respect to a dog that does not possess known vicious dangerous propensities, the rule reflects "a degree of freedom from potential liability" in recognition of the fact that dog is considered man's best friend. *Duren*, 814 S.W.2d at 937.

3) However, the *Duren* Court makes it clear that that degree of freedom from liability is not absolute. Logically, just because a dog has great social utility does not mean that its possessor should get a free pass where its normally dangerous propensities present

a foreseeable danger to certain classes of entrants on the land. Many conditions of land that present a foreseeable danger may have some utility to the possessor, but that fact has not been recognized as a basis for total immunity from liability. Rather, the law of premises liability balances the utility of maintaining such conditions against protecting the safety of certain entrants on the land. For instance, although a working well may have great utility to the land owner who maintains it, he or she is not cloaked with total immunity in this state from liability for a foreseeable danger created by that well.

4) Thus, under the second tier of the Missouri Rule, the law has recognized that a possessor of land can be held liable to an invitee or licensee entering on the land for a foreseeable danger created by the normally dangerous propensities of a dog.

Wilson ex rel. Wilson v. Simmons, 103 S.W.3d 211, 218 (Mo. Ct. App. 2003)

C) Thus, in a dog bite case pled on a premises liability theory, the possessor is subject to liability for harm to licensees if the dog presents a foreseeable danger to a licensee of which the possessor is aware; and a possessor is subject to liability for harm to an invitee if the dog presents a foreseeable danger to the invitee of which the possessor knows or should have known. *Id.*

Products Liability

A) **537.760. Products liability claim defined.** As used in sections 537.760 to 537.765, the term "products liability claim" means a claim or portion of a claim in which the plaintiff seeks relief in the form of damages on a theory that the defendant is strictly liable for such damages because:

(1) The defendant, wherever situated in the chain of commerce, transferred a product in the course of his business; and

(2) The product was used in a manner reasonably anticipated; and

(3) Either or both of the following:

(a) The product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold; or

(b) The product was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and the plaintiff was damaged as a direct result of the product being sold without an adequate warning.

MO. REV. STAT. § 537.760

B) Retailer Liability

1) A retailer will be strictly liable for damages if the retailer "sells a product in a defective condition, unreasonably dangerous to the user or consumer" and the product was the direct cause of the damage that occurred. *Welkener v. Kirkwood Drug Store Co.,* 734 S.W.2d 233, 240-41 (Mo. Ct. App. 1987).

2) If a retailer's role is purely one of a seller in the stream of commerce, then the retailer may be dismissed from a product's liability lawsuit in which the manufacturer is also a named party and from whom the plaintiff can totally recover damages from. MO. REV. STAT. § 537.762.

C) Duty of Supplier

1) "A supplier has a duty to warn of foreseeable and latent dangers related to the proper and intended use of the chattel or product." *Thompson v. Brown & Williamson Tobacco Corp*., 207 S.W.3d 76, 98 (Mo. Ct. App. 2006).

DAMAGES

Calculation of Damages

A) Damages are typically those that flow as the natural, necessary, and logical consequences of a wrongful act or default of the defendant. As a general principle of law in Missouri, a party may not recover twice for the same injury or damage item. *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982). Damages are generally limited to those losses that can be quantified in dollars. *Schwarz v. Gage*, 417 S.W.2d 33, 37 (Mo. Ct. App. 1967).

B) The following types of damages are among those generally available in Missouri and are considered when calculating the total amount of relief to be awarded:

1) **Actual damages**. These are measured by the loss or injury actually sustained. Actual damages resulting directly from the defendant's wrongful act must not be too remote to be traceable to the wrongful act and must not result from an independent origin. *Shannon v. Welch*, 858 S.W.2d 748, 753 (Mo. Ct. App. 1993).

2) **Special damages.** These are damages that actually result from the commission of the defendant's act, but are not such a necessary result that they will be implied by law. Special damages must be specifically pled under MO. SUP. CT. R. 55.19.

3) **Nominal damages.** These are typically awarded in situations where some legal right has been invaded but no actual damages were suffered or proven. *Tindall v. Holdon*, 892 S.W.2d 314, 321 (Mo. Ct. App. 1994). However, nominal damages are not available in tort actions when actual damages are an element of the cause of action.

4) **Punitive damages.** See section on Punitive Damages below.

C) **Remittur and additur.** Both the trial court and the appellate court have remittitur and additur power over a jury's verdict. That is, the courts have the ability to raise or lower the figure of the jury's damage award if it determines the returned amount is not "fair." Contractual limitation. In personal injury cases, the parties may also specifically contract to limit the damages that can be recovered. MO. REV. STAT. § 537.065.

Available Items of Personal Injury Damages

A) **Past medical bills**. A plaintiff may recover damages from past medical bills provided that he show that the charges were reasonable and that the services rendered were necessary. *Wright v. Fox-Stanley Photo Products*, Inc., 639 S.W.2d 407, 410 (Mo. Ct. App. 1982). For information on determining the actual amount of damages as well as the effect of insurance proceeds, see the Collateral Source Rule and Medical Bills sections in Evidence and Proofs.

B) **Future medical bills**. A plaintiff may recover damages from future medical bills provided that he produces competent medical evidence showing future conditions of the kind asserted as damages will result from the original injury. The degree of probability of such damages must be greater than a mere likelihood; it must be reasonably certain to occur. *Hobbs v. Harken*, 969 S.W.2d 318, 324 (Mo. Ct. App. 1998). Futures damages are a matter of medical opinion and therefore require expert medical testimony.

C) **Hedonic damages**. The award of hedonic damages has not yet been authorized in Missouri. The question was presented but did not have to be decided in *Schumann v. Mo. Highway & Transp. Comm'n*, 912 S.W.2d 548 (Mo. Ct. App. 1996).

D) **Increased risk of harm**. Recovering for increased risk of harm involves the showing of some type of permanent injury. The plaintiff essentially is arguing that because of the defendant's actions they have increased their future susceptibility to disease and injury. Missouri follows the 50% rule which allows a plaintiff to recover only upon proof that it is more likely than not the plaintiff will develop a disease or injury in the future, or that the plaintiff has a greater than 50% likelihood of doing so. *See Thomas v. FAG Bearings Corp*., 846 F. Supp. 1400 (Mo. 1994).

E) **Disfigurement**. A person is considered "disfigured" if they are made less complete, perfect or beautiful in appearance or character by the injury in question, or lack the symmetry of a complete person. *Elliot v. James Patrick Hauling, Inc*., 490 S.W.2d 284 (Mo. Ct. App. 1973). Missouri recognizes disfigurement as a form of compensatory damage. In workmen's compensation situations, however, damages cannot exceed the value of forty weeks of compensation. MO. REV. STAT. § 287.190.4.

F) **Loss of normal life**. This refers to the inability due to injury of a person to enjoy life that the individual has experienced. Missouri treats any claims for loss of a normal life within the categories of disability and loss chance of survival. As such there is no separate area of compensable damages available.

G) **Disability**. Disabilities are recognized as a basis for compensatory damages in Missouri. This includes physical infirmities, the absence of normal physical, intellectual, or moral powers, impairment of earning capacity, and loss of physical function that reduces efficiency. Moreover, defendants can be liable for the aggravation of an existing disability, if the aggravation is caused by the negligence of a defendant, and a plaintiff may recover such damages as proximately result from the activation of a dormant or latent disease. *Immekus v. Quigg*, 406 S.W.2d 298, 302 (Mo. Ct. App. 1966).

H) **Past pain and suffering**. If there is a physical injury, the injured party may also recover compensatory damages for bodily pain, humiliation, mental anguish and other forms of suffering that occur as a necessary and natural consequence of the tortious conduct. There is no fixed measure or standard available for determining the amount of pain and suffering damages. All that is required is that the amount awarded is "fair and reasonable." *A.R.B. v. Elkin*, 98 S.W.3d 99, 104 (Mo. Ct. App. 2003).

I) **Future pain and suffering.** Damages for future pain and suffering may also be awarded provided that the plaintiff shows it is reasonably certain to occur in the future.

J) **Loss of society.** Loss of a deceased's society, or, as sometimes expressed, loss of consortium, comfort, companionship, and protection is an element of damage. Recovery in a wrongful death suit for this protects the emotional or sentimental aspects in family relationships that are lost due to another's negligence. Missouri recognizes loss of society as a separate cause of action distinct from wrongful death, and therefore such a claim is still viable even if a plaintiff settles his personal injury claims. *Bridges v. Van Enters.*, 992 S.W.2d 322, 324-26 (Mo. Ct. App. 1999).

K) **Lost income, wages, earnings.** For past earnings, or pre-trial losses, if the plaintiff was gainfully employed at the time of the injury and would have likely continued that employment but for the injury, loss of earnings can typically be recovered. Such earnings or wages must be proven to a reasonable certainty, typically utilizing documentation such as tax or employment records.

L) **Future lost wages.** For future lost wages, claims must be supported by evidence to permit the jury to compute the loss without conjecture or speculation. *Dillard v. Atchison, T. & Santa Fe. Ry.*, 882 S.W.2d 211, 214 (Mo. Ct. App. 1994). Evidence usually includes expert testimony from rehabilitation experts on the types of work the plaintiff is able to perform and the average wages for that suitable work.

M) **Deductions.** Missouri courts do not permit jury instructions addressing the issue of the effect of income taxes, Social Security, retirement contributions or other withholdings. An award for lost wages should not be subject to these deductions and instead reflects gross salary. *See Gander v. FMC Corp.*, 892 F.2d 1373, 1383 (8th Cir. 1990).

Lost Opportunity Doctrine

A) The lost opportunity doctrine, otherwise known as the lost chance doctrine, is a determination of proximate cause made by the trier of fact. It allows plaintiffs to pursue a cause of action and recover damages for losing their lawful chance at something, usually survival, good health, or earnings/wages. Missouri courts have allowed such actions provided that the loss is "sizeable enough to be material" and, if proved by statistics, "statistically significant." *See, e.g., Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681 (Mo. 1992) (en banc); *Danisco Ingredients USA, Inc. v. Kan.City Power & Light Co*., 999 S.W.2d 326 (Mo. Ct. App. 1999). R & J Rhodes, LLC v. Finney, 231 S.W.3d 183 (Mo. Ct. App. 2007).

Mitigation

A) Generally, one who suffers damages through a party's breach of a legal duty must make reasonable efforts to minimize the resulting damages. *Shaughnessy v. Mark Twain State Bank*, 715 S.W.2d 944, 954-55 (Mo. Ct. App. 1986). Failure to mitigate damages does not bar the plaintiff entirely from recovery, but it does prevent recovery of the damaged dollars that would not have been incurred had the plaintiff taken cautious and reasonable efforts to avoid them.

B) Examples of areas where Missouri courts have recognized the duty of a plaintiff to mitigate damages include:

1) In personal injury matters, the plaintiff's failure to follow a doctor's advice can be considered with regard to whether the plaintiff properly mitigated his/her damages. *Stone v. Duffy Distributors, Inc.*, 785 S.W.2d 671, 677 (Mo. Ct. App. 1990). In addition, evidence that a simple surgical operation would provide relief – without serious risk – can also form a basis for mitigation of damages. However, a plaintiff is not required to risk a serious operation and hazard his life for the benefit of the wrongdoer. *King v. City of St. Louis*, 155 S.W.2d 498 (Mo. Ct. App. 1941).

2) If an injury is aggravated by a person's unreasonable refusal to accept or seek medical aid, the person's damages may be minimized in proportion to the amount the injuries would have been reduced had the person sought aid. *Stipp v. Tsutomi Karasawa*, 318 S.W.2d 172, 175-76 (Mo. 1958).

3) In property damage matters, parties injured by monumental nuisances have a mitigation responsibility. Recovery is thus limited by the amount that a plaintiff acting with foresight, caution and reasonableness could have avoided. *Fletcher v. City of Independence*, 708 S.W.2d. 158, 171-75 (Mo. Ct. App. 1986), overruled on other grounds by *Collier v. City of Oak Grove*, 2007 WL 1185982 (Mo. Ct. App. 2007).

4) A wrongfully discharged employee must attempt to mitigate damages by seeking other employment. *Wolf v. Mo. State Training Sch. for Boys*, 517 S.W.2d 138, 142- 43 (Mo.

1975) (en banc), overruled on other grounds by *McGhee v. Gibson*, 973 S.W.2d 847 (Mo. 1998) (en banc).

C) **Burden**. The defendant bears the burden of showing that the plaintiff had the opportunity to mitigate damages and must show the reasonable, prospective consequence of mitigation. *Smith v. Miner*, 761 S.W.2d 259, 260 (Mo. Ct. App. 1988).

D) If there is evidence of mitigation of damages present, Missouri Approved Instruction 6.01 is the appropriate form to be submitted to the jury.

Punitive Damages

A) Punitive damages are intended to punish the defendant and deter similar conduct by the defendant and others in the future. They are not intended to compensate the plaintiff. *Bradshaw v. Deming*, 837 S.W.2d 592, 594 (Mo. Ct. App. 1992). In general, punitive damages may be awarded when the defendant's conduct is outrageous and reckless, or when there is "complete indifference to or conscious disregard for the safety of others." *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 73 (Mo. 1990) (en banc). If however, the defendant acts in good faith and in the honest belief that his act is lawful, he is not liable for punitive damages even though he may be mistaken as to the legality of his act. *Thomas v. Commercial Credit Corp.*, 335 S.W.2d 703, 706 (Mo. Ct. App. 1960).

B) **Application**. Because of the penal nature of punitive damages, they are seen as an extraordinary and harsh remedy that should only be applied sparingly. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996) (en banc). In order to receive punitive damages, a plaintiff cannot simply allege outrageous or wanton conduct, but instead must present clear and convincing evidence of the defendant's reckless conduct. *Misischia v. St. John's Mercy Med. Ctr*., 30 S.W.3d 848, 866 (Mo. Ct. App. 2000). The plaintiff must specifically plead punitive damages and state separately in the petition the amount of such damages to be recovered. In actions where exemplary or punitive damages are recoverable, the petition shall state separately the amount of such damages sought to be recovered. MO. REV. STAT. § 509.200 (2015); MO. SUP. CT. R. 55.19. However, in actions for damages for an alleged tort, no dollar amount or figure shall be included in the demand, "but the prayer shall be for such damages as are fair and reasonable." MO. SUP. CT. R. 55.19.

C) **Separate cause of action**. Punitive damages are not a matter of right, and the claim for them is not a separate cause of action. A claim for punitive damages must be brought in conjunction with a claim for actual damages. *Klein v. Gen. Electric Co.*, 728 S.W.2d 670, 671 (Mo. Ct. App. 1987). Moreover, actual or nominal damages must first be awarded by the trier of fact as a prerequisite to the awarding of punitive damages in a case. *O'Conner v. Follman*, 747 S.W.2d 216, 220 (Mo. Ct. App. 1988).

D) **Bifurcated trial.** At the request of either party, all actions tried before a jury involving punitive damages are required to be conducted in a bifurcated trial before the same jury. MO. REV. STAT. § 510.263 (2012). During the first stage of the proceedings, the jury merely determines any liability of the defendant for punitive damages. If the jury does find

some liability, then the second stage of the trial is held and the jury then determines the amount of punitive damages that should be awarded. Only at this second stage can evidence of the defendant's net worth be introduced and considered by the jury. *Schroeder v. Lester E. Cox Med. Ctr., Inc.*, 833 S.W.2d 411, 425 (Mo. Ct. App. 1992).

E) **Limit**. In determining the appropriate amount of punitive damages, the following authority is controlling:

1) Constitutionality. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003), the United States Supreme Court outlined three factors to determine whether punitive damages are excessive:
   (1) "the degree of reprehensibility of the defendant's misconduct;"
   (2) "the disparity between the harm and the punitive award;" and
   (3) "the difference between the punitive award and penalties authorized or imposed in comparable cases."

The Missouri Supreme Court has adopted *State Farm* and cited to it with approval. *See, e.g., Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140 (Mo. 2005) (en banc).

2) Other factors. Missouri courts have also considered a number of other factors in assessing the appropriate amount of punitive damages including: (1) the degree of malice and nature of the tort, (2) the nature, type and extent of injury, (3) criminality, if any, of the acts meriting the punitive award, and (4) the defendant's financial position. *See, e.g., Peak v. W.T. Grant Co.*, 386 S.W.2d 685 (Mo. Ct. App. 1964).

F) **Insurability.** Missouri only permits insurability of punitive awards that are vicariously assessed against the insured as a result of the acts of another for whom the insured is legally responsible. *Ohio Cas. Ins. Co. v. Welfare Fin. Co.*, 75 F.2d 58, 60 (8th Cir. 1934).

G) **Tort Victims Compensation Fund.** Missouri has established a Tort Victims Compensation Fund through MO. REV. STAT. § 537.675. The statute provides that 50% of a final punitive damages award judgment, after deductions for attorney's fees and expenses, must be received by the State. This applies to all final judgments, but not to settlement agreements.

H) **Governments.** The State of Missouri and certain other public entities are not subject to punitive damages. *See* MO. REV. STAT. § 537.600; *Bates v. State*, 664 S.W.2d 563 (Mo. Ct. App. 1983).

Recovery of Pre and Post-Judgment Interest

A) **Prejudgment interest.** Prejudgment interest is generally recoverable in claims based on contracts or accounts due from the time that the debt became due or demand for payment is made, provided the amount of debt is liquidated or is readily ascertainable. MO. REV. STAT. § 408.020. Creditors are entitled to receive interest at the rate of nine percent (9%) per annum, when no other rate is agreed upon. *Id*.

1) As a general rule, prejudgment interest is not recoverable in a tort claim. However, there are two major exceptions to this rule. First, if the defendant's tortious conduct confers some sort of benefit upon him, the plaintiff is entitled to prejudgment interest. *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 496 (Mo. Ct. App. 1997).

2) Second, MO. REV. STAT. § 408.040.2 allows prejudgment interest on tort claims when "a demand for payment has been made" in writing and sent by certified mail with an affidavit from the claimant describing the nature of the claim and the claimed damages and the "amount of the judgment or order exceeds the demand for payment." However, Missouri law does not permit an award for prejudgment interest against health care provider defendants. MO. REV. STAT. § 538.300.

3) An express allegation for the recovery of prejudgment interest is not required by statute. An open ended prayer for relief such as "and for such other relief as the Court seems just and proper" is sufficient. *Call v. Heard*, 925 S.W.2d 840, 853-54 (Mo. 1996) (en banc).

B) **Post-judgment interest.** Post-judgment interest may be recovered "on all money due upon any judgment or order of any court from the date judgment is entered by the trial court until satisfaction be made by payment, accord or sale of property." MO. REV. STAT. § 408.040. Missouri courts recognized that "post-judgment interest is awarded on the theory that it is a penalty for delayed payment of the judgment." *Green Acres Enters., Inc. v. Freeman*, 876 S.W.2d 636, 641 (Mo. Ct. App. 1994).

1) Post-judgment interest accrues from the date of the final judgment and not from the date of the jury verdict in the case. *Johnson v. BFI Waste Sys. of N. Am., Inc.*, 162 S.W.3d 127, 129-30 (Mo. Ct. App. 2005).

Recovery of Attorney Fees

A) Missouri courts follow the "American rule" which, with certain exceptions, requires that litigants bear the expense of their own attorney fees. *Burris v. Burris*, 904 S.W.2d 564, 571 (Mo. Ct. App. 1995).

B) **Exceptions.** There are generally four exceptions to this rule however, as stated in *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327, 339 (Mo. Ct. App. 1991), and therefore attorney fees can be recovered in these situations:

1) recovery of fees pursuant to contract;

2) recovery authorized by statute;

3) recovery as an item of damage to a wronged party involved in collateral litigation; and

4) reimbursement when ordered by a court of equity to balance benefits.

C) **Factors.** In awarding attorney fees, trial courts should consider a number of factors including "the time spent, nature and character of services rendered, nature and importance of the subject matter, degree of responsibility imposed on the attorney, value of property or money involved, degree of professional ability required and the result." *Union Ctr. Redevelopment Corp. v. Leslie*, 733 S.W.2d 6, 9 (Mo. Ct. App. 1987).

Settlements Involving Minors

A) "In any proceeding involving a minor, they are to be considered wards of the court and their rights must be jealously guarded as provided by statute." *Y.W. by and through Smith v. Nat'l Super Markets, Inc.*, 876 S.W.2d 785, 787 (Mo. Ct. App. 1994). As such, all settlements involving minors require court approval. MO. REV. STAT. § 507.184. This requirement maximizes the protection afforded to a minor's legal action and insures that any settlement is in the best interests of the child. *Fiegener v. Freeman-Oak Hill Health Sys.*, 996 S.W.2d 767, 774 (Mo. Ct. App. 1999).

B) **Probate.** In probate actions, a minor's claim may be raised by a next friend, guardian ad litem, or guardian or conservator. While each of these parties has the right to settle the minor's claim, it must be approved by the court. MO. REV. STAT. § 507.184. However, if the amount of the settlement will result in a payment to the minor, after attorney fees and expenses, of $10,000.00 or less, the entire settlement may be finalized without the need for appointment of a conservatorship or a resort to the probate division. MO. REV. STAT. § 507.188.1. Actions resulting in payments of more than $10,000 do require a conservatorship to receive the funds.

C) **Parents' rights.** A parent, through the simple fortuity of their parental relationship with the minor, does not have a legal right to settle the minor's claim. Instead, a natural guardian must be appointed by the court to represent the minor's interests. *Y.W. by and through Smith*, 876 S.W.2d at 788. In determining whether a parent should be appointed, courts may consider whether the parent has the necessary knowledge and ability to act under the circumstances, and whether a conflict of interest exists between the parent and the child. *Id.*

D) **Local rules.** Local rules govern when the appointment of a guardian ad litem is appropriate and the factors a court should consider when determining who should fill that position. The court considers the guardian ad litem's recommendations for settlement but ultimately must make its own independent determination on whether to accept, modify or reject the propose settlement, while keeping the interests of the minor child in mind. MO. REV. STAT. § 507.184; MO. SUP. CT. R. 52.02.

Taxation of Costs

A) Generally, "an item cannot be a taxable cost in a case unless it is specifically authorized by statute or an agreement of the parties." *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 44 (Mo. 1976) (en banc). Missouri statutory law provides that, "[i]n all civil

actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." MO. REV. STAT. §514.060.

B) Taxable costs are usually classified as "court costs" and include, but may not be limited to, the following:

1) Assessments of costs of appeal.
2) Deposition costs regardless of whether or not the deposition was used at trial.
3) Fees paid to special process servers.
4) Costs upon a voluntary or involuntary dismissal.
5) Costs in suits involving the partition of land.
6) Costs associated with condemnation proceedings.
7) Costs associated with declaratory judgment actions.
8) Costs associated with administrative agency proceedings
9) Costs associated with dissolution of marriage suits.
10) Court reporter fees such as obtaining transcripts.
11) Witness fees except those for experts.
12) Jury costs.
13) Various filing fees associated with the action depending on the type.

See MO. REV. STAT. § 488.012.3 (providing list of amounts for some items). Unique Damages Issues

C) Damages for tort claims against the State of Missouri and other public municipalities are capped at $2 million for all claims arising out of a single accident or occurrence and at $300,000.00 for any one claim. MO. REV. STAT. § 537.610.2. This cap includes both pre- and post-judgment interest. See *Benoit v. Mo. Highway & Transp. Co.*, 33 S.W.3d 663, 673 (Mo. Ct. App. 2000). It should be noted that the cap is adjusted for inflation and the current cap is now over $500,00.00. MO. REV. STAT. § 537.610.5. (2015).

MISSOURI DRAM SHOP

Dram Shop Act, Missouri Revised Statute 537.053

A.) Under Missouri law, Mo. Rev. Stat. 537.053 authorizes a cause of action against a liquor licensee when the sale of intoxicants to an obviously intoxicated person was the proximate cause of injury or death. More specifically, the Missouri Dram Shop Act provides a remedy to third persons injured as a result of the sale of liquor to an intoxicated driver.

B.) The statute was amended in 2002 and now currently states:

a. "… a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises when it is proven by clear and convincing evidence that the seller knew or should have known that intoxicating

liquor was served to a person under the age of twenty-one years or knowingly served intoxicating liquor to a visibly intoxicated person."[1]

b. Missouri's Dram Shop Act, however, does not permit a cause of action against a commercial seller of packaged liquor who sells to a minor.[2]

C.) In Missouri, dram shop owners are subject to a higher evidentiary standard ("clear and convincing evidence") than required in most civil cases ("preponderance of evidence").

a. Clear and convincing evidence is "evidence that tilts the scales in the affirmative when weighed against the evidence in opposition and clearly convinces the fact finder of the truth of the proposition to be proved."[3]

Visible Intoxication and Blood Alcohol Content

A.) Under Mo. Rev. Stat. 537.053(3), "a person is 'visibly intoxicated' when inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction." [4]

B.) With respect to blood alcohol content, "[a] person's blood alcohol content does not constitute prima facie evidence to establish that a person is visibly intoxicated within the meaning of this section, but may be admissible as relevant evidence of the person's intoxication." [5]

C.) Missouri courts have clarified the requirement to show the level of impairment. Direct evidence, as well as circumstantial evidence and expert testimony may be presented to prove a defendant knowingly served intoxicating liquor to a visibly intoxicated person if such evidence is relevant and admissible. [6]

D.) Therefore, in a dram shop case a plaintiff is not required to produce evidence that someone actually observed the intoxicated person.

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[1] Mo. Rev. Stat. Section 537.053.2 (2002)

[2] *Snodgras v. Martin & Bayley, Inc*. 204 S.W.3d 638, 640 (Mo. banc. 2006)

[3] **Nokes v. HMS Host USA, LLC, et al.**, 353 S.W.3d 6, 12 (Mo. Ct. App. W.D. 2011)

[4] Mo. Rev. Stat. Section 537.053.3

[5] *Id.*

[6] **Nokes,** *353* S.W.3d 6 at 12

Social Hosts

A.) There is no common-law dram shop liability on the part of a social host who serves alcohol in his home to an intoxicated guest who subsequently injures a third party. [7]

B.) The legislature only intended to shield a particular class of commercial vendors of alcoholic beverages, and not social hosts, from civil liability for serving alcoholic beverages. [8]

Children and Minors

A.) The Dram Shop Act does not permit a cause of action against a commercial seller of packaged liquor who sells to a minor; rather, it permits a cause of action only against a person licensed to sell intoxicating liquor by the drink for consumption on the premises. [9]

B.) Social hosts have neither a statutory nor common-law duty to refrain from providing alcoholic beverages to individuals under 21 years of age. The Courts have reasoned that social hosts do not receive any pecuniary gain from furnishing of alcoholic beverages, and generally a social host lacks expertise required to evaluate quantity of alcohol a guest can safely consume, whereas commercial vendors are able to insure themselves against risks of furnishing alcoholic beverages while that protection is not presently available to social hosts. [10]

[7] *Harriman v. Smith*, 697 S.W.2d 219 (Mo Ct. App. E.D. 1985)

[8] *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547, 550-51 (Mo. banc. 1987)

[9] *Snodgras*, 204 S.W.3d 638 at 640

[10] *Andres*, 730 S.W.2d 547 at 550-51