STATE OF MISSOURI COMPENDIUM OF LAW

Prepared by
Stephen L. Beimdiek
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
www.lashlybaer.com

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Actions against a city**. Pursuant to MO. REV. STAT. § 82.210, no action shall be maintained against a city of more than 100,000 inhabitants, on account of injuries accruing from a defect in any bridge, boulevard, street, sidewalk, or thoroughfare, until written notice has been given to the mayor of that city within ninety (90) days of the alleged damage. The notice must include the place, time, character and circumstances of the injury and state that the injured party will claim damages from the city.

Relationship to the Federal Rules of Civil Procedure

Missouri has its own Code of Civil Procedure, which was adopted on August 10, 1959, and became effective April 1, 1960. It has adopted certain portions of certain federal rules.

Description of the Organization of the State Court System

A) **Structure.** 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.; *see also About the Courts*, MISSOURI COURTS, https://www.courts.mo.gov/page.jsp?id=103114 (last visited March 29, 2021).

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*;* MO. CONST. ART. 5, § 14. Every county has a court, and the courts are organized into forty-six circuits. MO. REV. STAT. § 478.073; MO. REV. STAT. § 478.188. Within the circuit courts are a variety of specialized courts for different types of cases. Examples include juvenile court, family court, drug court and probate court. *About the Courts*, MISSOURI COURTS, https://www.courts.mo.gov/page.jsp?id=103114 (last visited March 29, 2021)..

2) **Court of Appeals.** The Missouri Court of Appeals is divided into three districts: Eastern, Southern and Western. MO. REV. STAT. § 477.040; *About the Court, MISSOURI COURTS,* https://www.courts.mo.gov/page.jsp?id=103114 (last visited March 29, 2021).

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. CONST. ART. 5, § 1; *Supreme Court of Missouri*, YOUR MISSOURI COURTS, https://www.courts.mo.gov/page.jsp?id=103114 (last visited March 29, 2021).

B) **Judicial selection.** Missouri has 423 judges and commissioners. There are seven Supreme Court judges and thirty-two appellate judges on the three geographic districts of the intermediate court of appeals. In the trial courts throughout the state, there are 147 circuit judges, 204 associate circuit judges, and 33 commissioners and deputy commissioners. *Judicial Personnel*, MISSOURI COURTS, http://www. https://www.courts.mo.gov/page.jsp?id=631 (last visited March 29, 2021).

1) **Qualifications.** The qualifications for judge are governed by MO. CONST. art. V, § 21. In most counties in the state, circuit judges and associate circuit judges are elected by popular vote. Vacancies during a term are filled by appointment by the governor until the next general election. *Id.* In the remaining five counties, in the urban areas of Kansas City and St. Louis, circuit and associate circuit judges are selected pursuant to Missouri's constitutional nonpartisan court plan. MO. CONST. ART. 5, § 25(a). All appellate judges, including those on the Supreme Court, are selected pursuant to this plan. *See id.*

2) **Vacancies.** Under the nonpartisan court plan, any person who meets certain constitutional requirements may apply for a judicial vacancy. From that pool of applicants, a commission selects three candidates and forwards its recommendations to the governor. The governor then selects one judge to fill the vacancy. After the judge has served on the bench for at least a year, he stands for retention by the voters at the next general election. A simple majority of "yes" votes keeps the judge in office for a full term. Michael A. Wolff, *Law Matters: How We Choose Missouri Judges*, YOUR MISSOURI COURTS (November 21, 2005), http://www.courts.mo.gov/page.jsp?id=1083.

3) **Tenure.** Missouri judges do not serve for life; they serve only a specified term of years, which varies from four years to twelve years depending on the level of the court, and are required to retire at age seventy. *Id.*; CONST. ART. 5 § 19.

C) **Alternative dispute resolution.** Alternative dispute resolution (ADR) is governed by MO. SUP. CT. R. 17. 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

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

A) **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.

B) **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.

C) **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.

D) **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.

E) **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.

F) **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.*

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

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. *Ambers-Phillips v. SSM DePaul Health Ctr.,* 459 S.W.3d 901 (Mo. 2015) (en banc). 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. App. E.D. 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. App. E.D. 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. 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 of 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. App. W.D. 1990).

E) **Employment**. The statute of limitations for employment actions is generally governed by MO. REV. STAT. § 516.140. 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. *Id.*

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. App. 1970).

G) **Governmental entities**. Pursuant to MO. REV. STAT. § 516.130, a three-year statute of limitations applies to actions against officers and public officials for a breach of duty.

H) **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. App. W.D. 1994) (internal citation omitted).

I) **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, 616-17 (Mo. 1997). Oral or noncontractual 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 160,161 (Mo. App. S.D. 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, 600 (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, 681 (E.D. Mo. 1979).

J) **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, 29 (Mo. App. W.D. 2004). The statute of limitations for personal injury claims is generally five years. MO. REV. STAT. § 516.120(4).

K) **Legal malpractice.** The statute of limitations for legal malpractice actions is governed by MO. REV. STAT. § 516.120. All claims for legal malpractice must be brought within five years even though there might be a written contract for service by the attorney to the client. *Carr v. Anding*, 793 S.W.2d 148, 151 (Mo. App. E.D. 1990). The statute begins to run as soon as the client's injury is capable of ascertainment. *Zero Mfg. Co. v. Husch*, 743 S.W.2d 439, 441 (Mo. App. E.D. 1987). The specific amount of damage to the client does not have to be determined in order for the statute to begin running, as all that is required is that there are *some* damages sustained to the client and that there is some type of claim. *Settle v. Fluker*, 978 F.2d 1063, 1064 (8th Cir. 1992) (emphasis added).

1) **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, 4 (Mo. App. W.D. 1984).

L) **Medical malpractice.** The statute of limitations for medical malpractice actions is governed by MO. REV. STAT. § 516.105. All actions against "health care providers," other than contribution claims, must be brought within two years from the date of the alleged negligent act. Generally, "health care" is defined as "any field or enterprise concerned with supplying services, equipment, information, etc., for the maintenance or restoration of health." *Stalcup v. Orthotic & Prosthetic Lab*, 989 S.W.2d 654, 660 (Mo. App. E.D. 1999) (internal quotation omitted). In addition, MO. REV. STAT. § 538.205(5) provides a comprehensive list of "health care providers," all of which are subject to this section. There are, however, four circumstances that toll the two year statute of limitations:

1) **Foreign objects.** When a plaintiff brings an action based on the 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.

2) **Failure to inform.** When a plaintiff brings an action based on the negligent failure to inform the patient of the results of medical tests, the two year period begins to run from the date of the discovery of such negligence or when the plaintiff should have discovered the failure to warn. *Id.*

3) **Continuing care.** The two year period does not begin to run until the patient-plaintiff is no longer receiving treatment by the defendant-physician. *Green v. Wash. Univ. Med. Ctr.*, 761 S.W.2d 688, 689 (Mo. App. E.D. 1988).

4) **Minor child.** The statute of limitations does not begin to run for a minor until he 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 for 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. 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." *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 103 (Mo. 2005). 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. *Id.*

1) Permanent nuisance actions, or those in which abatement is impracticable or impossible, are subject to the five year statute of limitations period found in 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. App. W.D. 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. 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. App. S.D. 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. App. W.D. 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 under MO. REV. STAT. § 516.105 are not subject to this tolling provision.

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 (2016). 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. App. E.D. 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. App. W.D. 1991).

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.

Statutes of Repose

A) 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.

Missouri took an important first step in creating a statute of repose for product liability claims by debating Senate Bill 7 in committee at the end of January 2021. S.B. 7 (2021). If it passes the Legislature and is signed by the governor, Senate Bill 7 would place Missouri among the many states with some type of statute of repose for product liability claims. The proposed bill sets a statute of repose of fifteen years and would bar claims for personal injury, property damage, wrongful death, or economic loss. *Id.* The time period would begin to run when the product is first sold or leased to any person or otherwise placed in the stream of commerce. *Id.*

B) **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. *Lay v. P & G Health Care, Inc.*, 37 S.W.3d 310, 323-24 (Mo. App. W.D. 2000). 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.** MO. REV. STAT. § 508.010 was amended in 2014 by S.B. 890, 97th Gen. Assem., Second Reg. Sess. The 2014 amendment creates a rule that determines the proper venue in cases where the plaintiff was injured in connection with any railroad operations in a foreign country. The new proper venue is either in the county where the defendant corporation's registered agent is located or in the county of the plaintiff's principal place of residence when first injured if the plaintiff resided in Missouri.

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) **"Principal place of business."** "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. MO. REV. STAT. § 508.010.1.

E) **Non-tort actions.** 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.

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

3) 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.

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

MO. REV. STAT. § 508.010.2.

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. MO. REV. STAT. § 508.010.9.

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.

MO. REV. STAT. § 508.010.5(1)-(2) (2016).

NEGLIGENCE

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. App. E.D. 2004).

Comparative Fault/Contributory Negligence

A) **Pure comparative fault.** Missouri follows a "pure" comparative fault approach, whereby plaintiffs can recover even if they are 99% at fault. If the injuries are extensive, recovery is possible even when plaintiffs are substantially at fault. MO. REV. STAT. § 537.067.

B) **Affirmative defense.** Contributory negligence/comparative fault is an affirmative defense that must be plead according to the provisions set forth in MO. SUP. CT. R. 55.08; MO. REV. STAT. § 537.067 provides additional guidance regarding comparative negligence.

C) **Assumption of the risk.** Under Missouri law, assumption of risk is a separate type of comparative fault that must be pled specifically in order to be asserted as a defense. *King v. Unidynamics Corp*., 943 S.W.2d 262 (Mo. App. E.D. 1997). 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. App. W.D. 1995).

D) **Implied primary assumption of the risk.** Of the three categories of assumption of risk recognized by Missouri law, "implied primary assumption of risk" was recently recognized as also involving apportionment of fault. *Lewis v. Snow Creek, Inc*., 6 S.W.3d 388, 393 (Mo. App. W.D. 1999).

E) **Liability in terms of negligence.** Interestingly, Missouri approved jury instructions do not define fault in comparative fault cases; rather, they frame the issue of liability only in terms of negligence. MAI 37.02.

F) **Burden.** In comparative fault cases, plaintiff bears the burden of establishing that defendant's negligence was the cause in fact *and* the proximate cause of damage suffered. Missouri's definition of proximate cause is "but for" causation. *Guffey v. Integrated Health Servs.*, 1 S.W.3d 509, 518 (Mo. App. W.D. 1999). Causation remains a central consideration in Missouri negligence cases. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 860-66 (Mo. 1993) (en banc).

G) **Proximate cause.** Depending on the weight of the evidence, a defendant's actions may be the proximate cause of the plaintiff's injuries even if other causes were possible. *Long v. Mo. Delta Med. Ctr.*, 33 S.W.3d 629, 637 (Mo. App. S.D. 2000) abrogated on other grounds by *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003) (en banc).

H) **Foreseeability.** The Missouri Supreme Court has declared that, in negligence cases, whether a duty exists usually depends on whether or not a risk was foreseeable. *Lopez v. Three Rivers Elec. Co-op.*, Inc., 26 S.W.3d 151,156 (Mo. 2000) (en banc).

Exclusive Remedy – Worker's Compensation Law

A) In Missouri, worker's compensation is governed by Chapter 287 of the Missouri Revised Statutes, otherwise known as the Missouri Workers' Compensation Law. It provides an exclusive remedy of an employee against his employer for an injury or occupational disease (1) arising out of and (2) in the course of employment. MO. REV. STAT. § 287.020.1 (2016).

B) The Missouri Division of Worker's Compensation has jurisdiction when the injury or disease was contracted while working (1) in Missouri, (2) outside Missouri under a Missouri-made contract, or (3) outside Missouri when employment is principally localized in Missouri. MO. REV. STAT. § 287.110 (2016).

C) The Missouri Worker's Compensation Law requires that:

1) An employer-employee relationship exists.

a) "Employer" includes every "person, partnership, association, corporation, trustee, receiver, the legal representatives of a deceased employer, and every other person… using the service of another for pay." An employer must have five or more employees to be considered an employer under this law. MO. REV. STAT. § 287.030.1.

b) "Employee" is defined as "every person in the service of any employer . . . under any conduct of hire . . . or under any appointment." MO. REV. STAT. § 287.020.1. This language includes volunteers in the definition of employee. *Kennison v. Ranken Technical Inst.*, 44 S.W.3d 899, 901-02 (Mo. App. E.D. 2001) overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc).

2) The employee has sustained an accident or occupational disease.

a) **Liberal construction.** The Missouri Supreme Court liberally extended the definition of "accident" in *Wolfgeher v. Wagner Cartage Servs., Inc.*, 646 S.W.2d 781, 783 (Mo. 1983). Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee.

b) **Accident.** An accident is any unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. *Miller v. Lever Bros. Co.*, 400 S.W.2d 625, 629 (Mo. App. 1966). Unprovoked assaults are included in that definition. MO. REV. STAT. § 287.120.

c) **Occupational disease.** To recover for an occupational disease, the employee must show that the disease is a natural result of the employment, that it is peculiar to the employment, and that there is a known relationship between the disease and the employment. MO. REV. STAT. § 287.063.

3) The accident or occupational disease resulted in some injury to the employee.

4) The accident or occupational disease arose out of, and in the course of, the employment established by the employer-employee relationship.

a) Conditions of the work or the nature of the work duties must have caused the injury to satisfy the "arising out of" test. *Flowers v. City of Campbell*, 384 S.W.3d 305, 310 (Mo. App. S.D. 2012).

b) The injury must have occurred at a time and place during which the employee was performing assigned duties to satisfy the "in the course of" test. *Shinn v. General Binding Corp., Koelling Metals Div.,* 789 S.W.2d 230, 231-21 (Mo. App. E.D. 1990).

c) The employment must be a substantial factor in causing the injury, be seen to have followed as a natural incident of the work, be fairly traced to the employment as a proximate cause, and not come from a hazard or risk unrelated to the employment to which there was equal exposure. MO. REV. STAT. § 287.020.3(2).

d) Missouri courts have developed several doctrines with which attorneys should be familiar when determining whether an injury arose out of, and in the course of, employment. These include:

i. The dual purpose doctrine. *Parsons v. Kay's Home Cooking, Inc.*, 830 S.W.2d 46, 48 (Mo. App. S.D. 1992).

ii. The mutual benefit doctrine. *Bybee v. Ozark Airlines*, 706 S.W.2d 570, 572-73 (Mo. App. E.D. 1986).

iii. The route deviation doctrine. *Garrett v. Indus. Comm'n*, 600 S.W.2d 516, 513 (Mo. App. W.D. 1980).

iv. The implied extension of premises doctrine. *Lammering v. United Benefit Life Ins. Co.*, 464 S.W.2d 511,513 (Mo. App. 1971).

5) The employee gave proper notice of the accident or occupational disease to the employer.

a) The employee must give written notice of the time, place and nature of the injury no later than thirty days after the accident. MO. REV. STAT. § 287.420.

b) If the employer did not provide notice that injuries must be reported within thirty days to preserve an employee's right to compensation, an employee may avoid penalty for late notice. *Parrott v. HQ, Inc*., 907 S.W.2d 236, 239 (Mo. App. S.D. 1995).

c) Within ten days of being notified of an injury, an employer must file a Report of Injury with the Division of Worker's Compensation. MO. REV. STAT. § 287.380.1; 8 C.S.R. § 50-2.010(1)-(2).

D) **The Second Injury Fund**. Missouri's Second Injury Fund encourages an employer to hire workers with physical handicaps. The employer may do so with the understanding that he will only be liable for disabilities sustained as a result of an injury while the employee was in his employ. MO. REV. STAT. § 287.220. Rehabilitation benefits may be covered by the Second Injury Fund pursuant to MO. REV. STAT. § 287.141, and an employee may also receive benefits when he has a prior disability that is industrially disabling. *Wilhite v. Hurd*, 411 S.W.2d 72, 77 (Mo. 1967).

Indemnity

A) **Contractual indemnity**. An action for contractual indemnity—which is governed by a contract's terms—is separate from the action that gives rise to the claim. A claim for indemnity is often pleaded as a cross claim or third-party claim. It requires showing of (1) an agreement between capable parties, (2) consideration supporting that agreement, (3) one party securing or protecting the other against liability and/or loss, and (4) a breach of the obligation to indemnify. *See Lone Star Indus., Inc. v. Howell Trucking, Inc*., 199 S.W.3d 900, 905-06 (Mo. App. E.D. 2006).

An indemnity claim can also be based on a breach of contract, rather than a breach of a contract of indemnity. In such cases, the indemnitee must show that the breach of contract resulted on liability on his part. *Honey v. Barnes Hosp*., 708 S.W.2d 686, 697 (Mo. App. E.D. 1986)

A contractual obligation to defend an action against an indemnitee is separate from the duty to indemnify. Unless otherwise specified, the indemnitee must tender defense of the claim to the indemnitor before he can recover attorney's fees incurred in his defense. *Burns & McDonnell Eng'g Co., Inc. v. Torson Const. Co., Inc.*, 834 S.W.2d 755, 760 (Mo. App. W.D. 1992).

B) **Noncontractual indemnity**. In Missouri, noncontractual indemnity can arise in two circumstances:

1) When an indemnitee discharges a duty that he owes, but the other party should have discharged that duty; if the other party does not reimburse the indemnitee, he has been unjustly enriched. *State ex rel. Manchester Ins. & Indem. Co. v. Moss*, 522 S.W.2d 772, 774 (Mo. 1975) (en banc).

2) When one joint tortfeasor seeks contribution from the other for his apportioned fault, or when one tortfeasor seeks indemnity against a subsequent tortfeasor. *Mo. Pac. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 472-73 (Mo. 1978) (en banc). Note that, in these cases, the indemnitee must plead and prove his *own* liability to the injured party in addition to showing negligence on behalf of the alleged indemnitor.

C) **Noncontractual common law indemnity**. An action for indemnity implied by law requires (1) a discharge of an obligation by the plaintiff, (2) that the obligation discharged is identical to an obligation owed by the defendant and (3) that the defendant will be unjustly enriched if he does not reimburse plaintiff to the extent that his own liability has been discharged. *State ex rel. Manchester Ins. & Indem. Co. v. Moss*, 522 S.W.2d 772, 774-75 (Mo. 1975) (en banc).

D) **Restrictions.** Neither contractual nor common law indemnity can be sought by an indemnitee whose actions (1) do not discharge any duty owed by the indemnitor to a third person or (2) are not taken under any duty owed to the third person. *See id.*

E) **Indemnity differs from subrogation**. An insurer whose rights are subrogated to those of the insured may not bring an independent action for indemnity; the insurer's obligation to its insured is separate from the insured's liability to the victim. *Id.*

F) **Indemnity against one's own negligence**. In cases involving "sophisticated" contracting parties, the Missouri Supreme Court has said that indemnity for one's own negligence need not be stated explicitly. The requirement that one party indemnify the other for "any and all claims" is construed to embrace claims that allege the indemnitee's negligence. *Util. Serv. & Maint., Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910, 914 (Mo. 2005) (en banc). The Courts of Appeals, however, view this exception to the general rule much more narrowly. *Caballero v. Stafford*, 202 S.W.3d 683, 694-95 (Mo. App. S.D. 2006).

Joint and Several Liability

A) Joint liability is applicable where two or more defendants both contributed to a single, indivisible injury by their negligence and are thereby each fully liable for that injury. Several liability is applicable when defendants are only liable for their respective obligations. When a court applies joint and several liability, a plaintiff may seek full recovery from any of the defendants who are jointly liable for the harm.

B) **Statute.** Joint and several liability is governed by MO. REV. STAT. § 537.067.

1) If a defendant is found to bear 51% or more of the fault in a tort action, he is jointly and severally liable for the judgment against the defendants.

2) If a defendant is found to bear less than 51% of fault, he is liable only for the percentage of fault for which the court determines he is responsible.

a) However, if the other defendant was an employee, or if liability for the other defendant's fault has been established under the Federal Employer's Liability Act, then he will also be responsible for the fault apportioned to the other defendant.

3) Defendants are only severally liable for the percentage of *punitive* damages that are attributed to them by the court. This change was instituted as a part of the Litigation Reform Act of 2005 and applies only to actions filed after August 28, 2005.

C) **Recovery from any tortfeasor.** Missouri permits an injured party to recover for any negligent act directly contributing to his injury, regardless of what other negligent act may have contributed to it. Subject to the provisions of MO. REV. STAT. § 537.067, when two or more persons are the cause of a single injury, the plaintiff may recover in the entirety from any one or all of the contributing tortfeasors. *Reese v. U.S. Fire Ins. Co.*, 173 S.W.3d 287, 294 (Mo. App. W.D. 2005).

E) **Public debt.** Where the Missouri Highway and Transportation Commission was a joint tortfeasor wholly responsible for a motorist's injuries, the joint and several statute was not unconstitutional; satisfaction of the motorist's judgment was a public, and not private, debt. *Smith v. Coffey*, 37 S.W.3d 797 (Mo. 2001).

F) **Waiver of challenge.** A defendant who wishes to challenge the joint and several liability statute should do so in his answer to the tort petition that names more than one defendant. Failing to raise the issue at that time causes the defendant to waive appellate consideration of the issue. *Hollis v. Blevins*, 926 S.W.2d 683, 683-84 (Mo. 1996) (en banc).

Strict Liability

A) The doctrine of strict liability holds a defendant liable when he damages the plaintiff by a thing or activity that is unduly dangerous to the place where it was maintained, or in the light of the character of that place and its surroundings.

B) **Inherently dangerous activities.** Strict liability applies to inherently dangerous activities. However, to date, Missouri law has only recognized blasting work and nuclear emissions as inherently dangerous activities. *Clay v. Mo. Highway & Transp. Comm'n*, 951 S.W.2d 617, 624 (Mo. App. W.D. 1997); *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 868 (Mo. App. E.D. 1985).

C) **Abnormally dangerous activities.** The 1977 RESTATEMENT (SECOND) OF TORTS, which employs the term "abnormally dangerous," was not adopted by Missouri until *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 869 (Mo. App. E.D. 1985). Section 520 of the Restatement and *Bennett* list the factors in determining whether an "abnormally dangerous" activity exists. They include:

1) "existence of a high degree of risk of some harm to the person, land, or chattels of others;"
2) "likelihood that the harm resulting from the activity will be great;"
3) "inability to eliminate the risk by the exercise of reasonable care;"
4) "extent that the activity is not a matter of common usage;"
5) "inappropriateness of the activity to the place where it is carried on;" and
6) "extent that the activity's value to the community is outweighed by its dangerous attributes."

Id. at 370; RESTATEMENT (SECOND) OF TORTS § 520 (1977).

D) **Products liability.** Products liability claims may be based on the theory of strict liability. Such claims require that the defendant's product was used in a manner reasonably anticipated and that the product (1) was in an unreasonably dangerous condition when sold and/or (2) was unreasonably dangerous when put to use without knowledge of its characteristics, and that defendant sold the product without giving adequate warning. MO. REV. STAT. § 537.760. Under Missouri law, a defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim provided the manufacturer is also named as a defendant and is capable of satisfying any total recovery made by a plaintiff. MO. REV. STAT. § 537.762.

E) **Animals.** Strict liability has also been applied to a domestic animal owner who knows or has reason to know that his animal is dangerous. *Duren v. Kunkel*, 814 S.W.2d 935, 936-37 (Mo. 1991).

Willful or Wanton Conduct

A) A person is reckless, willful, and wanton when he or she makes a conscious choice to act, either with knowledge of the serious danger to others involved or with knowledge of the facts that would disclose the danger to any reasonable person. Prior to acting, the person must recognize that his or her conduct involves a risk substantially greater in amount than that which is necessary to make the conduct merely negligent.

B) **Intentionality.** Willful and wanton conduct refers to an intentional act. *Engman v. Sw. Bell Tel. Co.*, 591 S.W.2d 78, 81 (Mo. App. W.D. 1979). A clear distinction exists between unintentional injury due to negligence, that is, the failure to observe due care, and injury,

actually or impliedly intentional, due to willful, wanton or reckless conduct. *Cosentino v. Heffelfinger*, 229 S.W.2d 546, 550 (Mo. 1950).

C) **Conscious disregard.** "Willful, wanton, or malicious acts" need not always include an intent to do harm, but an individual must show such a conscious disregard for another's rights for his actions to amount to willful and intentional wrongdoing. Willful, wanton, malicious acts, or acts so reckless as to be in utter disregard of consequences are clearly distinguished from negligence. *Warner v. Sw. Bell Tel. Co.*, 428 S.W.2d 596, 603 (Mo. 1968).

D) **Contrasted with negligence or inattention.** Willful injury will not be inferred when the result may be reasonably attributed to negligence or inattention; "wantonness" is a state of mind that includes the elements of consciousness of one's conduct and realization of the probability of injury to another, or reckless disregard of the consequences, mere inattention does not amount to "willfulness" or "wantonness." *Thomasson v. Winsett*, 310 S.W.2d 33, 38 (Mo. App. 1958).

DISCOVERY

Electronic Discovery Rules

A) Electronic discovery relates to the discovery of electronically stored information. FED. R. CIV. P. 16, 26, 33, 34, 37 and 45 were first amended in 2006 to establish rules relating to electronic discovery. Rule 45 was amended in 2013, and Rules 16, 26, 30, 31, 33, 34, and 37 were most recently amended effective Dec. 1, 2015. In 2006, Mo. Sup. Ct. R. 58.01 was amended so that parties could request "electronic records, and other data" during discovery. Missouri has taken some steps towards accepting these rule changes through Senate Bill 224 (2019). On March 2, 2021, the Missouri Supreme Court adopted the Missouri Legislature's changes to Rules 56.01, 57.01, 57.03, 57.04, 58.01, 59.01 and 61.01. SB 224 (2019); 2021 MISSOURI COURT ORDER 0002 (C.O. 0002)

B) In addition, the 25th Judicial Circuit adopted Rule 32.3 which allows parties to agree on format, or in the absence of an agreement, transmit electronic documents in the format under which it was originally created.

B) However, Rule 26-3.01 of the United States District Court for the Eastern District of Missouri requires that disclosures "be made in the manner set forth in FED. R. CIV. P. 26(a)(1) and (2), except to the extent otherwise stipulated by the parties and or directed by order of the Court."

Expert Witnesses

A) **Expert witnesses**. Expert witnesses are governed by MO. SUP. CT. R. 56.01. Pursuant to 56.01(b)(4)(A), a party may, by interrogatory, be required to disclose the identity of the expert witnesses it expects to call. Information that can be requested by interrogatory includes the expert's (1) name, (2) address, (3) occupation, (4) place of employment, and

(5) qualifications to give an opinion. If the expert's curriculum vitae contains this information, that document may be attached to the interrogatory answers as a response.

Pursuant to Rule 56.01(b)(4)(A), a party may also be asked to state the subject matter of the expert's testimony and the expert's hourly deposition fee.

The facts and opinions to which an expert is expected to testify may be discovered by deposition. Except when it would be unjust to do so, the court will require the party seeking discovery to pay the experts reasonable hourly fees for such depositions. MO. SUP. CT. R. 56.01(b)(4)(B).

1) **Non-retained expert witnesses.** Rule 56.01(b)(5) governs the discovery of non-retained expert witnesses. A party may, by interrogatory, be requested to identify the (1) name, (2) address and (3) field of expertise of any non-retained expert witnesses that it expects to call. Discovery of the facts or opinions held by a non-retained expert are discoverable in the same manner as for lay witnesses.

B) **Challenges to expert testimony.** The standard for challenging an expert's ability to testify under Missouri law is governed by MO. REV. STAT. § 490.065, which provides that a court must consider whether experts in the field reasonably rely on the type of facts and data used by the expert or if the methodology used by the expert is otherwise reasonably reliable. *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 156 (Mo. 2003) (en banc).

C) **Rebuttal witnesses**. Generally, there is no obligation to disclose rebuttal witnesses unless they are called to rebut an alibi. *State v. Menteer*, 845 S.W.2d 581, 586 (Mo. App. E.D. 1992). However, when a defendant has revealed his intent to rely upon an alibi or insanity defense, an undisclosed prosecution witness may not be called to rebut the defendant's alibi. *State v. Mitchell*, 689 S.W.2d 143, 147 (Mo. App. S.D. 1985).

Non-Party Discovery

A) Service of a subpoena to a nonparty witness is governed by MO. SUP. CT. R. 57.09 and MO. REV. STAT. § 491.100. Subpoenas command the people to whom they are directed to attend and give testimony at the time and place specified.

B) Service must be affected not less than seven days before the date on which compliance is required. Reasonable steps should be taken to avoid imposing undue burden or expense on a non-party who is subpoenaed. MO. SUP. CT. R. 57.09.

C) A subpoena may be served by the sheriff, sheriff's deputy, or any other person who is at least eighteen years old and not a party. *Id.*

D) Pursuant to MO. REV. STAT. § 491.280, witnesses shall be paid $25 per day plus mileage, as determined by MO. REV. STAT. § 33.095.

E) Neither the Missouri Revised Statutes nor the Supreme Court Rules of Missouri provide for separate treatment of respondents in discovery.

Privileges

A) **Attorney-client privilege.** The attorney-client privilege is governed by MO. REV. STAT. § 491.060(3), which renders an attorney incompetent to testify concerning any communication made to him by his client in the context of their attorney/client relationship without the client's consent.

1) **Applicability.** The privilege is applicable to (1) information transmitted by a voluntary act of disclosure; (2) between a client and his lawyer; (3) in confidence; (4) "by a means which, so far as the client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted." *State v. Longo*, 789 S.W.2d 812, 815 (Mo. App. E.D. 1990).

2) **Invoking privilege.** The privilege may be invoked by either an attorney or a client. *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. 1995) (en banc). It also attaches to communications made to an attorney's agents with the intent of eventually reaching the attorney. *See Tyler v. Hall*, 106 Mo. 313, 17 S.W. 319, 321 (1891).

3) **Mental condition.** Although the privilege includes both oral and written communications, it does not apply to facts about a client's mental condition that an attorney uncovers as a result of the attorney-client relationship. *Clark v. Skinner*, 334 Mo. 1190, 70 S.W.2d 1094, 1098–99 (1934). The identity of the client is generally not protected, but may be privileged based on a case-by-case determination by the court. *Chamberlin v. Mo. Elections Comm'n*, 540 S.W.2d 876, 880 (Mo. 1976) (en banc); *State v. Smith*, 979 S.W.2d 215, 220 (Mo. App. S.D. 1998).

B) **Confidentiality**. Confidentiality is governed by MO. SUP. CT. R 4-1.6, which states that a lawyer shall not reveal information relating to a client's representation without that client's consent. Exceptions to this confidentiality rule exist to the extent that the lawyer reasonably believes the disclosure to be necessary to (a) prevent death or substantial bodily harm, (b) secure legal advice about his own compliance with the rules, (c) establish a claim or defense on his own behalf in a controversy with the client, or (d) comply with a court order.

C) **Work product doctrine.** The work product doctrine is governed by MO. SUP. CT. R. 56.01(b)(3) in civil cases and MO. SUP. CT. R. 25.10 in criminal cases. It is separate from the attorney client privilege and confidentiality.

1) **Civil cases.** Rule 56.01(b)(3) provides that discovery of things "prepared in anticipation of litigation" shall be allowed "only upon a showing that the party

seeking discovery has substantial need of the materials . . . and is unable without undue hardship to obtain the substantial equivalent . . . by other means." When discovery of such materials is ordered, the court shall still protect the discovery of mental impressions, opinions, and legal theories of an attorney concerning the litigation.

G) **Self-critical analysis**. Common law and statutory law concerning this privilege are developing among a number of state and federal jurisdictions, including Missouri.

1) **History.** The self-critical analysis privilege was first recognized in *Bredice v. Doctors Hosp., Inc.*, which held that there was an "overwhelming public interest" in protecting against the discovery of "peer review" committee reports that contained confidential, candid self-analysis information. 50 F.R.D. 249, 250-51 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973). However, other cases have found that there are "compelling arguments favoring disclosure" of self-critical analysis. *Martin v. Potomac Electric Power Co.*, 54 Empl. Prac. Dec. ¶ 40, 079, 63,298 (D.D.C. 1990).

2) **Missouri federal courts.** The Eighth Circuit has not directly addressed the self-critical analysis privilege. A Missouri District Court has held that the privilege "has not been widely accepted as a basis for nondisclosure in discovery" and has refused to prevent discovery in similar situations. *West v. Marion Labs., Inc.*, No. 90-0661-cv-w-2, 1991 WL 517230, at *3 (W.D. Mo. Dec. 12, 1991).

H) **Other privileges.** Other privileges recognized under Missouri law include the physician-patient privilege (MO. REV. STAT. § 491.060(5)), the spousal privilege in criminal cases (MO. REV. STAT. § 546.260.1), the privilege of communication with clergy (MO. REV. STAT. § 491.060(4)), the privilege of communication between an accountant and a client (MO. REV. STAT. § 326.322), and communication between an insurer and an insured (*State ex rel. Cain v. Barker*, 540 S.W.2d 50, 55 (Mo. 1976)).

Requests to Admit

Requests for admission are governed by MO. SUP. CT. R. 59.01(a). Any party to a lawsuit may serve another party with a written request for admissions as to the truth of factual matters or the genuineness of documents. Failure to respond to a request for admission in a timely fashion constitutes an admission of the matters in the request. *Dana Commercial Credit Corp. v. Cukjati*, 880 S.W.2d 612,615 (Mo. App. S.D. 1994). It is within the court's discretion to decide whether a late response should be permitted. *Id.*

However, effective July 1, 2010, Rule 59.01(a) was amended to require that a request for admissions include at the beginning of the request the following language in all capital letters, boldface type, and a character size that is as large as the largest character size of any other material in the request:

"A FAILURE TO TIMELY RESPOND TO REQUESTS FOR ADMISSIONS IN

COMPLIANCE WITH RULE 59.01 SHALL RESULT IN EACH MATTER BEING ADMITTED BY YOU AND NOT SUBJECT TO FURTHER DISPUTE."

MO. SUP. CT. R. 59.01(a). This requirement was unchanged by the 2021 Amendment. 2021 MISSOURI COURT ORDER 0002 (C.O. 0002)

EVIDENCE AND PROOFS

Accident Reconstruction

A) An accident reconstruction is typically done by an expert witness that testifies to the technical details of a particular incident, usually automobile accidents. The test for whether or not reconstruction evidence is allowable is whether the expert testimony will assist the trier of fact to understand the evidence or determine a fact in issue. MO. REV. STAT. § 490.065.1 (2016). The court must also qualify the testifying witness as an expert based on their knowledge, skill, experience, education, or training. *Messina v. Prather*, 42 S.W.3d 753, 763 (Mo. Ct. App. 2001); MO. REV. STAT. § 490.065.1 (2016). Both the reliability of the basis for the testimony and the underlying physical evidence utilized by the expert must additionally be sufficient.

B) **Exclusion.** Testimony of accident reconstruction experts might be excluded if the expert lacks formal training in the necessary field of study or if they have not observed the crash scene in its original condition. *Knox v. Simmons*, 838 S.W.2d 21, 24 (Mo. App. E.D. 1992). However if proper foundation is laid showing review of all pertinent reports, depositions, and exhibits, then personal observation of the crash site is not needed. *Pyle v. Layton*, 189 S.W.3d 679, 684 (Mo. App. S.D. 2006).

C) **Everyday experience.** While the Missouri Statutes do call for liberal admission of expert testimony such as reconstruction evidence, if the issue on which expert testimony is sought is one of everyday experience, then jurors are deemed competent to decide this issue without the aid of accident reconstruction evidence. *See Inman v. Bi-State Dev. Agency*, 849 S.W.2d 681, 683 (Mo. App. E.D. 1993).

D) **Opinion testimony.** Expert witnesses in Missouri are allowed to testify as to their opinions on ultimate issues. MO. REV. STAT. § 490.065.2. Thus, accident reconstructionists will typically testify as to how and why an accident occurred and if it could have been avoided. The exception to this rule, however, is that when police officers serve as experts, they can only testify as to physical evidence observed at the scene of the accident. *Kearbey v. Wichita S.E. Kan.*, 240 S.W.3d 175, 184 (Mo. App. W.D. 2007). Officer opinions as to who was at fault for the accident must therefore be excluded. *Stucker v. Chitwood*, 841 S.W.2d 816, 820 (Mo. App. S.D. 1992).

Biomechanical Testimony

Biomechanical testimony from an engineer or other expert is treated under the same standard as any other type of expert testimony. First, the testimony must assist the trier of fact in understanding

the particular evidence and issue in the case. MO. REV. STAT. § 490.065. Second, the witness must have a sufficient engineering or other medical background, as well as additional knowledge, skill, experience and training in order to be qualified to give such testimony. *See Mathews v. Chrysler Realty Corp.*, 627 S.W.2d 314, 318-19 (Mo. App. W.D. 1982).

Collateral Source Rule

A) Missouri follows the common law collateral source rule which prevents a defendant from obtaining a reduction in damages by demonstrating that the plaintiff has received or will receive compensation for the losses sustained by an independent source such as insurance coverage. *See Iseminger v. Holden*, 544 S.W.2d 550 (Mo. 1976) (en banc); *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 619 (Mo. 1995) (en banc).

B) **Applicability.** The application of the collateral source rule, however, depends on proof that the plaintiff has contributed funds to the collateral source. *Overton v. United States*, 619 F.2d 1299, 1305-06 (8th Cir. 1980). In other words, if the plaintiff has not incurred any expense, obligation or liability in obtaining such services, then the collateral source rule should not apply. As a result, Missouri defendants have been allowed to introduce evidence of free government benefits previously received by the plaintiff in order to mitigate damages. *See Washington v. Barnes Hosp.*, 897 S.W.2d 611, 621 (Mo. 1995) (en banc).

C) **Admissibility.** The common law collateral source rule was recently modified by the Missouri Legislature and is now governed by MO. REV. STAT. § 490.715. That section includes two situations where evidence of collateral sources or already-paid expenses may be admissible:

1) **Pre-trial payments by defendant**. Section 490.715.2 provides that if prior to trial the defendant, his or her insurer or other authorized representative has paid part of the plaintiff's special damages, evidence of those payments may be introduced as long as the source of the payments is not identified. However, if such evidence is introduced it constitutes a waiver of any right to a credit against a judgment under MO. REV. STAT. § 490.710 (2016).

2) **Evidence of medical treatment rendered**. Section 490.715.5(2) provides that a court can hear and consider evidence that may raise an issue as to the medical treatment's value rendered in a particular case. The statute provides examples of the types of evidence to be considered, including the actual cost of medical care rendered and discounts pursuant to any contract, price reduction, or write offs. MO. REV. STAT. § 490.715; MEDICAL CARE AND TREATMENT—DAMAGES—EVIDENCE, 2017 Mo. Legis. Serv. S.B. 31 (VERNON'S) (West's No. 26); 2021 Missouri House Bill No. 577, Missouri One-Hundredth First General Assembly, First Regular Session. Missouri no longer permits evidence of the amount billed for medical care and if the billed amount has been discounted pursuant to any contract, price reduction, or write-off. *Id.*

Convictions

A) **Character evidence.** Evidence of prior convictions is not admissible at trial as character evidence of the defendant to show he had the propensity to commit the current charge. This ban encompasses a broad range of conduct in addition to "crimes" and in fact, "neither a prior conviction nor a charge is required" for this ban to take effect. *State v. Sladek*, 835 S.W.2d 308 (Mo. banc 1992). However, this prohibition does not apply during the sentencing phase of a proceeding, as both the State and the defense can offer character evidence including prior convictions and criminal acts. *Mann v. State*, 245 S.W.3d 897, 908 (Mo. App. S.D. 2008).

B) **Valid purposes.** However, if the prior conviction is offered for another valid purpose, then the evidence may be admissible at the discretion of the trial court. The Missouri Supreme Court has allowed evidence of other crimes if they tend to establish: (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common plan or scheme, or (5) the identity of the person charged with the crime on trial. *State v. Reese*, 274 S.W.2d 304, 307 (Mo. banc 1954). In addition, prior convictions have been allowed into evidence if they are used for impeachment. *Dishmon v. State*, 248 S.W.3d 656, 663 (Mo. App. S.D. 2008); MO. REV. STAT. § 491.050. This list, however, is not exhaustive.

1) **Criminal.** Evidence of prior convictions has occasionally been held to be inadmissible if they are too remote in time from the current charged offense. *State v. Ellis*, 820 S.W.2d 699, 702 (Mo. App. E.D. 1991). Remoteness, however, usually only affects the weight to be given to the evidence. *State v. Danikas*, 11 S.W.3d 782, 791 (Mo. App. W.D. 1999). When admitting evidence of prior convictions, the judge must follow a judicial balancing test, in that the evidence must not be unfairly prejudicial to any party in the case.

2) **Traffic**. A traffic ticket conviction is a misdemeanor offense. Nevertheless, Missouri Courts have allowed past misdemeanor offenses to be admitted for purposes such as impeaching the credibility of a witness. *State v. Matzker*, 500 S.W.2d 54, 56 (Mo. App. 1973). However, the examination of the witness regarding the prior misdemeanor and other related comments should be limited to the purpose the evidence was offered for. *See State v. Kuever*, 363 S.W.2d 31, 32 (Mo. App. 1962).

Day in the Life Videos

A) Day in the Life Videos can be admissible as demonstrative evidence if they are properly authenticated and are relevant because of their tendency to prove or disprove some material fact. *See, e.g.*, *Wood River Pipeline Co. v. Sommer*, 757 S.W.2d 265, 269 (Mo. App. E.D. 1988). Missouri courts have stated the proper inquiry is "whether it is practical, instructive and calculated to assist the jury in understanding the case." *Repple v. Barnes Hosp.*, 778 S.W.2d 819, 822-23 (Mo. App. E.D. 1989); *St. Louis Univ.Geary*, 321 S.W.3d 282, 290 (Mo. banc 2009).

B) **Balancing.** Courts must balance the probative nature of the video with any prejudicial inflammatory or emotional effect that it might have on the jury. *See Anderson v. Burlington N. R.R. Co.*, 651 S.W.2d 176, 182-83 (Mo. App. E.D. 1983). Trial courts thus have

considerable discretion on this issue and Missouri courts have both admitted and excluded day-in-the-life videos based on the particular facts of each case. *See id.*

C) **Admissible.** For example, these cases have allowed day-in-the-life videos to be used:

1) In *Lawton v. Jewish Hosp.*, 679 S.W.2d 370, 372 (Mo. App. E.D. 1984), the court allowed the admission because the video "provided information essential to a fair jury determination because [the party's] ill health prevented his appearance in the courtroom." However, the court only allowed the tape to be played without sound in order to minimize any potential prejudicial effect. *Id.*

2) In *Long v. Mo. Delta Med. Ctr.*, 33 S.W.3d 629, 645 (Mo. App. S.D. 2000), (abrogated on other grounds by *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003)) the court also allowed the admission due to the video's potential aid to the jury in understanding past and future medical expenses, and because the party was only present for a brief time in court and could not illustrate the care she required as well as the video.

D) **Not admissible.** In contrast, these cases have not allowed day-in-the-life videos to be used:

1) In *Haley v. Bryers Transp. Co.*, 414 S.W.2d 777, 780 (Mo. 1967), the court denied admission because it determined the films to have "the very obvious impact of these films would have been to create sympathy for the plaintiff out of proportion to the real relevance of the evidence." In addition, the court also noted that there were already descriptions of the plaintiff's activities in evidence.

2) In *Repple v. Barnes Hosp.*, 778 S.W.2d 819, 823 (Mo. App. E.D. 1989), the court denied admission because the "plaintiff appeared at trial and was able, with the aid of several appliances and medical devices, to demonstrate her daily activities to the jury through the use of conventional testimony."

Dead Man's Statute

A) Missouri has abandoned the approach of the traditional Dead Man's statute that operated to prevent interested witnesses from testifying about previous transactions with deceased individuals. *Estate of Erikson v. Erikson*, 722 S.W.2d 330, 334 (Mo. App. W.D. 1986). Instead, the Missouri Legislature enacted a 1985 amendment to the previous Dead Man's statute and replaced it with a new version that would apply "to all trials commenced after September 28, 1985." MO. REV. STAT. § 491.010.3.

B) The statute now permits an adverse party to testify about dealings with a person who is deceased or become incompetent, and further allows past relevant statements of the deceased or incompetent party to be admitted under certain circumstances. MO. REV. STAT. § 491.010.2; *In re Estate of Dawes*, 891 S.W.2d 510 (Mo. App. S.D. 1994), abrogated on other grounds by *In Interest of Z.L.G.*, 531 S.W.3d 653 (Mo. App. S.D. 2017).

C) **Purpose.** The purpose of this statue was to permit the receipt of previously inadmissible testimony. As such, the statute is only applicable when the proposed testimony is otherwise

inadmissible hearsay. *See Barnes v. Prudential Ins. Co. of Am.*, 76 F.3d 889, 892 (8th Cir. 1996). As a result, if statements are admissible in their own right through a firmly established exception, the statute does not apply. *Coon v. Am. Compressed Steel, Inc.*, 207 S.W.3d 629, 636 (Mo. App. W.D.); *Imler* v. *First Bank of Missouri*, 451 S.W.3d 282 (Mo. App. W.D. 2014).

D) **Plain language.** According to the plain language of the statute, relevant statements made by the deceased or incompetent party are only admissible if the adverse party or his agent testifies. Where this testimony is lacking, statements made by the deceased or incompetent party should be properly excluded under the statute. *Smith v. Christopher*, 737 S.W.2d 510, 512 (Mo. App. S.D. 1987).

E) **Insufficient statements.** The following items have been held to be insufficient "testimony" by the adverse party so as to admit statements of a deceased or incompetent person:

1) Elicitation by the adverse party of testimony from non-party witnesses about the statements of the deceased or incompetent party. *Smith v. Christopher*, 737 S.W.2d 510, 511 (Mo. App. S.D. 1987).

2) Submission of interrogatories by the adverse party specifically directed at any statements made by the deceased or incompetent party. *Id*.

3) Introduction of deposition testimony of the adverse party. *Estate of Oden v. Oden*, 905 S.W.2d 914, 917 (Mo. App. E.D. 1995).

4) Involuntary testimony by the adverse party, such as being called as an adverse witness by the opposing side. *Frasher v. Whitsell*, 832 S.W.2d 18, 20 (Mo. App. W.D. 1992).

5) Evidence contained in documents, as there is a clear distinction between documentary and testimony evidence. *Estate of Dawes*, 891 S.W.2d at 519.

Medical Bills

A) Generally, the medical bills of a plaintiff are admissible as evidence of damages, regardless of whether the bills were paid for fully or partially by an insurance company. Aside from the exceptions outlined in MO. REV. STAT. § 490.715.5, evidence of the existence of a collateral source of payment shall not be admissible. *See supra* "Collateral Source Rule". This serves to ensure that the jury does not use this evidence improperly to deny the plaintiff the full recovery amount to which they are entitled.

1) **Plaintiff's burden.** In order to recover medical expenses, a plaintiff must prove that the expenses were incurred as a proximate result of the negligence of an opposing party, and that the expenses were both reasonable and necessary given the plaintiff's condition. *Schaeffer v. Craden*, 800 S.W.2d 165, 166 (Mo. App. E.D. 1990). A plaintiff's actual payment of charges is substantial evidence of their reasonableness. *Wright v. Fox-Stanley Photo Prods. Inc.*, 637 S.W.2d 407, 410

(Mo. App. S.D. 1982). However, absent this there must be qualified opinion evidence concerning their necessity and reasonableness. *See Hughes v. Palermo*, 911 S.W.2d 673, 675 (Mo. App. E.D. 1995).

B) **Presumption of value.** Under the Litigation Reform Act of 2005, which applies to cases filed after August 28, 2005, there now exists a rebuttable presumption that the sum necessary to satisfy the financial obligation of the plaintiff for medical expenses represents the value of the medical treatment rendered. MO. REV. STAT. § 490.715.5(2) (2016). However, upon the motion of either party the court may determine the value of the treatment in a hearing outside the presence of the jury based on "additional" evidence as outlined in section 490.715.5(2). *See supra* "Collateral Source Rule."

Offers of Judgment

A) The right to make an offer of judgment comes from statutory provisions found in MO. REV. STAT. §§ 514.230-.250, as well as MO. SUP. CT. R. 77.04. The purpose of these rules is to allow a defendant to avoid court costs by making an offer of judgment which, if accepted, results in a consent judgment. *Fritzsche v. E. Tex. Motor Freight Lines*, 405 S.W.2d 541, 544 (Mo. App. 1966). An offer of judgment is not an admission of liability, but is intended to be an agreement between the parties as to the terms, amounts or conditions of a judgment by confession. *Katz Drug Co. v. Commercial Standard Ins. Co.*, 647 S.W.2d 831, 840 (Mo. App. W.D. 1983). It is neither a defense to an action nor a bar to further prosecution of the suit. *Id.*

B) **Effect.** A defendant who makes an offer more favorable than a judgment ultimately obtained is only liable for the costs incurred before the date of the offer. *Bishop v. Cummines*, 870 S.W.2d 922, 926 (Mo. App. W.D. 1994). The trial court has no discretion as to whether or not to enter judgment after an offer and acceptance of judgment. *State ex rel. Riggs v. Clark*, 14 S.W.3d 719, 721 (Mo. App. W.D. 2000).

C) **Procedure.** Under Rule 77.04, the party defending against the claim may make the offer of judgment at any time more than thirty days before the trial begins. The opposing side then has ten days to accept or reject the offer. *Id.* If the offer is accepted, notice will be filed with the court and the judgment will be entered. However, if the offer is not accepted within ten days or there is no response from the other party, the offer will be withdrawn. *Id.* Contract-like principles apply here in that an acceptance of the offer of judgment which materially alters the offer's terms or introduces new terms will not be considered a valid acceptance. *Caldwell v. Heritage House Realty, Inc.*, 32 S.W.3d 773, 775-78 (Mo. App. W.D. 2000).

Offers of Proof

A) When an attorney's evidence is successfully objected to, he has the chance to make an "offer of proof" or explain what the evidence would have shown had it been allowed into evidence by the presiding judge. This offer both informs the court and opposing counsel of the substance of the excluded evidence so they may take appropriate action; and provides an appellate court with a record so it can determine whether the exclusion was erroneous

and if it prejudiced the proponent. *State v. Peters*, 186 S.W.3d 774, 781 (Mo. App. W.D. 2006).

1) **Procedure.** Offers of proof must be detailed and specific to show the purpose of the evidence. If oral testimony is involved, an offer or proof will require the questions be actually asked of the witness and the expected answers be known to the court outside the presence of the jury. *State v. Comte*, 141 S.W.3d 89, 93 (Mo. App. S.D. 2004).

2) **When not required.** Offers of proof are not necessary, however, where it is clearly evident what the response of a witness will probably be if he is allowed to testify. *Kummer v. Cruz*, 752 S.W.2d 801, 807 (Mo. App. E.D. 1988). In addition, they are not required when the following three conditions are met: (1) there is a complete understanding, based on the record, of the excluded testimony, (2) the objection is to a certain category of evidence, and (3) the record must reveal the evidence would have helped its proponent. *Frank v. Envtl. Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 883-84 (Mo. 1985) (en banc).

Prior Accidents

A) Evidence of other accidents is admissible in Missouri if it is offered for the proper purpose. The most common purposes allowed by Missouri Courts include:

1) Showing the existence of a particular danger, defect or hazard at either a particular place or in a particular product. *Cameron v. Small*, 182 S.W.2d 565, 570 (Mo. 1944).

2) Showing that an injury or result stemmed from a certain cause in the past in order to show the present injury or result also stemmed from the same cause. *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 151-52 (Mo. banc 1998).

3) Showing that the defendant had notice or should have known of a particular danger or hazard. *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 244 (Mo. banc 2001).

4) When it is claimed that a particular instance is very rare, prior accidents can be admitted to rebut this claim and show that such risk or danger was reasonably foreseeable. *Gingerich v. Kline*, 75 S.W.3d 776, 782-83 (Mo. App. W.D. 2002).

B) **Substantial similarity.** In each of these cases, the proponent of the evidence must show that the prior accident is substantially similar to the present accident in both circumstances and cause. *Peters v. Gen. Motors Corp.*, 200 S.W.3d 1, 10 (Mo. App. W.D. 2006). Occurrence must be (1) of like character, (2) occur under the same circumstances (3) result from the same cause as that alleged to have caused the accident in question. *Id*. When offering the evidence to show notice to the defendant, however, less similarity is generally required. *Benoit v. Mo. Highway & Transp. Comm'n*, 33 S.W.3d 663, 670-71 (Mo. App. S.D. 2000).

C) **Discretion.** The trial court has discretion to determine whether the prior accident is sufficiently similar. In addition, the evidence must pass the judicial balancing test and not unfairly prejudice a party or have a tendency to confuse the jury. *Stokes v. Nat'l Presto Indus., Inc.*, 168 S.W.3d 481, 485 (Mo. App. W.D. 2005).

Relationship to the Federal Rules of Evidence

Missouri has yet to completely adopt its own rules of evidence. What rules do exist in Missouri are generally codified in MO. REV. STAT. Chapter 490. In addition, Missouri courts have also selectively adopted portions of the Federal Rules of Evidence. For admissibility requirements and standards, attorneys typically look to Chapter 490 and the federal rules for guidance.

Seat Belt and Helmet Use Admissibility

A) The Missouri Statutes provide that in any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt is not considered to be evidence of comparative negligence. MO. REV. STAT. § 307.178.4.

1) Because there is no reference to "design" or "construction", some cases have held that this statute does not apply to products liability claims. *LaHue v. Gen. Motors Corp.*, 716 F. Supp. 407, 412 (W.D. Mo. 1989).

2) Other cases have interpreted this section to apply to products liability claims because the statute does not define who must be "operating" the vehicle in its plain language. *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 155 (Mo. banc 1998).

B) **Mitigation.** Evidence of failure to wear a seat belt can be admitted in order to mitigate damages, however, but only in limited circumstances. There must be expert testimony showing that the failure to wear a seat belt actually contributed to the injuries claimed by the plaintiff; and if evidence supports that finding, damages may only be reduced by an amount not to exceed one percent of the total amount awarded. MO. REV. STAT. § 307.178.4.

Spoliation

A) The spoliation doctrine applies when a party intentionally destroys or significantly alters evidence, and in some circumstances where there has been destruction of evidence without any satisfactory explanation. *Hamid v. Moore*, 856 S.W.2d 51, 56-57 (Mo. banc 1993). In addition, Missouri courts have used the spoliation doctrine when a party acquires possession of physical evidence and fails to produce or account for it during trial. *See Baldridge v. Dir. of Revenue*, 82 S.W.3d 212, 223 (Mo. App. W.D. 2002).

B) **Intentionality.** To invoke the doctrine, there must be a showing of intentional destruction of an item "under circumstances which give rise to an inference of fraud and a desire to suppress the truth." *Morris v. J.C. Penney Life Ins. Co.*, 895 S.W.2d 73, 77 (Mo. App. W.D. 1995). Negligence alone, however, is not enough to apply the spoliation rule; *Baldridge v. Dir. of Revenue*, 82 S.W.3d 212, 223 (Mo. App. W.D. 2002).

C) **Burden.** The party seeking the benefit of spoliation has the burden of proving this fraud, deceit or bad faith. *DeGraffenreid v. R.L. Hannah Trucking Co.*, 80 S.W.3d 866, 873 (Mo. App. W.D. 2002).

D) **Adverse inference.** If this burden is met, the party who intentionally spoliates evidence is subject to an adverse evidentiary interference. This means that the wrongdoer must admit that the destroyed evidence would have been unfavorable to his position. *See Schneider v. G. Guilliams, Inc.*, 976 S.W.2d 522, 526 (Mo. App. E.D. 1998). The effect of this is that the court infers what the documents would have shown had they been properly produced at trial. If a third person or agent of a party destroys the evidence, however, then this remedy does not apply unless it is shown that the party in bad faith directed the destruction of the evidence. *Id.*

E) **Other remedies.** Missouri law provides additional remedies for spoliation including discovery sanctions for failure to produce documents, attorney discipline if the attorney is involved in the spoliation, and criminal liability for tampering with physical evidence. *See Pikey v. Bryant*, 203 S.W.3d 817, 825 (Mo. App. S.D. 2006); MO. REV. STAT. § 575.100.

F) **Independent tort.** Missouri does not currently recognize spoliation, intentional or negligent, as a basis for tort liability against a party or non-party. *See Fisher v. Bauer Corp.*, 239 S.W.3d 693, 701-04 (Mo. App. E.D. 2007).

Subsequent Remedial Measures

A) Missouri generally follows the Federal Rules of Evidence and generally bars the admission of subsequent remedial measures to prove negligence or culpable conduct in connection with the accident or event in the particular action. *Diversified Metals Corp. v. Aaron Ferer & Sons, Inc.*, 498 S.W.2d 783, 786 (Mo. 1973). The exclusion of this type of evidence is premised on the fact that such measures have limited relevance to show previous negligence, and that it will avoid discouraging proprietors from improving the safety of their property after an injury has occurred. *Danbury v. Jackson Cnty.*, 990 S.W.2d 160, 165 (Mo. App. W.D. 1999).

B) **Strict liability.** In strict liability cases, however, subsequent remedial measures are admissible because the fault and culpability of the defendant prior to the accident is irrelevant under Missouri law. Because the issue in strict liability cases is typically whether there was a defect in the product when the plaintiff was injured, subsequent remedial measures can be probative of this fact. *Pollard v. Ashby*, 793 S.W.2d 394, 402-03 (Mo. App. E.D. 1990).

C) **Exceptions.** Missouri courts have recognized several exceptions to the general ban on the use of subsequent remedial measures depending on the purpose that the evidence is being offered for. Thus, evidence may be admitted when its purpose is:

1) To prove ownership, control, or feasibility of precautionary measures, if controverted. *Hewitt v. Empiregas, Inc.*, 831 S.W.2d 744, 747 (Mo. App. S.D. 1992).

2) To prove the condition of a site at the time of an accident or other event, particularly where that condition is in dispute. *Robinson v. Safeway Stores, Inc.*, 655 S.W.2d 617, 620 (Mo. App. W.D. 1983).

3) To rebut a claim that the conditions at issue could not have been improved upon or made safer. *Hickey v. Kan. City S. Ry. Co.*, 290 S.W.2d 58, 61-62 (Mo. 1956).

4) To impeach a witness's testimony. *Ielouch v. Mo. Highway & Transp. Co.*, 972 S.W.2d 563, 566 (Mo. App. W.D. 1998).

D) **Burden.** The party offering evidence of subsequent remedial measures has the burden of proving that it falls within a recognized exception. *See Atcheson v. Braniff Int'l Airways*, 327 S.W.2d 112, 116-17 (Mo. 1959). If the evidence is admitted through an exception, the court should give a limiting instruction specifically identifying for the jury the purpose for which the evidence should be considered. *See Dick v. Children's Mercy Hosp.*, 140 S.W.3d 131, 143 (Mo. App. W.D. 2004).

Use of Photographs

A) Photographs are a form of demonstrative evidence. They are generally admissible if they are properly authenticated and relevant by reason of their tendency to prove or disprove a material fact, *State v. Weems*, 840 S.W.2d 222, 229 (Mo. banc 1992), or if they illustrate and corroborate a witness's testimony or otherwise assist the jury in some manner. *State v. Ervin*, 835 S.W.2d 905, 918 (Mo. banc 1992).

B) **Shocking photographs.** Missouri Courts have held that relevant and accurate photographs are admissible even if they are shocking, gruesome or inflammatory, or might tend to agitate the juror's feelings. *State v. Davis*, 107 S.W.3d 410, 423 (Mo. App. W.D. 2003). Particularly in criminal cases, these photographs do nothing more than accurately depict the result of the defendant's actions. *State v. Strong*, 142 S.W.3d 702, 716 (Mo. 2004) (en banc). To minimize the impact of these photos, however, courts should only admit the minimum amount necessary. *State v. Knese*, 985 S.W.2d 759, 768 (Mo. 1999) (en banc).

C) **Balancing test.** Photographic evidence is subject to a judicial balancing test and should not be admitted if their probative value is substantially outweighed by their prejudicial effect or if their *sole purpose* is to arouse the emotions of the jurors. *Anderson v. Burlington N. R.R. Co.*, 651 S.W.2d 176, 1-83 (Mo. App. E.D. 1983) (emphasis added).

D) For additional details on specific uses of photographic evidence in both criminal and civil cases, see the Missouri Practice Series at 23 MOPRAC § 1103.1 (2d ed.).

DAMAGES

Caps on Damages

Statutory caps on damages limit the amount of recovery available to a plaintiff in particular causes of actions. However, caps on non-economic damages for medical negligence have been held unconstitutional because they violate the right to trial by jury set forth in the State Constitution.

Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633, 640 (Mo. banc 2012). On the other hand, caps on medical wrongful death claims have been held constitutional, since the wrongful death cause of action was created by statute and not derivative of common law. *Dodson v. Ferrera*, 491 S.W.3d 542, 558 (Mo. banc 2016). The damages cap for non-economic damages in wrongful death actions against medical providers is $700,000.00. MO. REV. STAT. § 538.210.2(3). See Punitive Damages and Unique Damages Issues sections below for additional damage caps in Missouri.

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. App. E.D. 1982). Damages are generally limited to those losses that can be quantified in dollars. *Schwarz v. Gage*, 417 S.W.2d 33, 37 (Mo. 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. App. W.D. 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. App. S.D. 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 and reasonable compensation" to the plaintiff. MO. REV. STAT. § 537.068.

D) **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. App. E.D. 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 produce 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. App. W.D. 1998). Futures damages are a matter of medical opinion and therefore require expert medical testimony.

C) **Hedonic damages.** Hedonic damages are used to approximate the loss of the value of life, and therefore are used in cases involving death or injury. *Cramer v. Equifax Info. Services*, 4:18-CV-1078 CAS, 2019 WL 4468945, at *6 (E.D. Mo. Sept. 18, 2019). 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. App. W.D. 1995).

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 (W.D. 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, 287 (Mo. 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. 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. *A.R.B. v. Elkin*, 98 S.W.3d 99, 104 (Mo. App. W.D. 2003). 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." *Id.*

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. *Bridges v. Van Enters.*, 992 S.W.2d 322, 324-26 (Mo. App. S.D. 1999). 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. *Id.*; *see Graham v. Latco Contractors, Inc.*, 456 S.W.3d 907, 910-11 (Mo. App. S.D. 2015).

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. *See McCarthy v. Sebben*, 331 S.W.2d 601, 604 (Mo. 1960).

   1) **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. App. W.D. 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.

   2) **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

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. App. W.D. 1999); *R & J Rhodes, LLC v. Finney*, 231 S.W.3d 183 (Mo. App. W.D. 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. App. E.D. 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. *Id.*

B) **Examples.** 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 doctor's advice can be considered whether the plaintiff properly mitigated their damages. *Stone v. Duffy Distributors, Inc.*, 785 S.W.2d 671, 677 (Mo. App. S.D. 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 557, 565 (Mo. 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. App. W.D. 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. banc 1998).

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. City of Miner*, 761 S.W.2d 259, 260 (Mo. App. E.D. 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. App. W.D. 1992). In general, punitive damages may be awarded when the defendant intentionally harms the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others. MO. REV. STAT. § 510.261.

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). In order to receive punitive damages, a plaintiff cannot simply allege intentional conduct or deliberate flagrant disregard, but instead must present clear and convincing evidence of the defendant's reckless conduct. MO. REV. STAT. § 510.261. The plaintiff must specifically plead punitive damages and state separately in the petition the amount of such damages to be recovered. MO. SUP. CT. R. 55.19; MO. REV. STAT. § 509.200.

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. App. E.D. 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. App. E.D. 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. 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. App. S.D. 1992).

E) **Limit.** The amount of punitive damages that can be awarded is now limited in Missouri to the greater of $500,000.00 or five times the net amount of compensatory damages. MO. REV. STAT. § 510.265. In determining the appropriate amount of punitive damages within this limitation, 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, 143 (Mo. banc 2005).

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. 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. § 537.610.3 (2016); *Bates v. State*, 664 S.W.2d 563 (Mo. App. E.D. 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 (2016). Creditors are entitled to receive interest at the rate of nine percent (9%) per annum, when no other rate is agreed upon. *Id*.

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, 757 (Mo. App. E.D. 1997). 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.

1) 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. banc 1996).

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 (2016). 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. 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. App. E.D. 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. App. S.D. 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, 340 (Mo. App. S.D. 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. App. E.D. 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. App. E.D. 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. App. S.D. 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. § 507.188.2. Actions resulting in payments of more than $10,000 do require a conservatorship to receive the funds. *Id.*

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. *See* MO. REV. STAT. § 507.184 (2016); MO. SUP. CT. R. 52.02 (2016).

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. banc 1976). 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

A) 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. App. S.D. 2000). It should be noted that the cap is adjusted for inflation and the current cap is now over $500,000.00. MO. REV. STAT. § 537.610.5.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.