IMMUNITY, IMMUNITY, IMMUNITY

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In personal injury and contract cases, we frequently encounter immunity defenses. We have ended up in the Court of Appeals a few times in recent years on immunity issues while Missouri courts have expanded sovereign, public official and workers' compensation immunity. Here's the current state of the law for sovereign immunity, municipal immunity, public official immunity, EMT and police officer immunity, co-employee liability in workers compensation, tort and contract immunity

against the State of Missouri, Eleventh Amendment immunity, execution against a sovereign, and public school and teacher immunity.

I. IMMUNITY OF GOVERNMENTAL ENTITIES AND PUBLIC EMPLOYEES

Sovereign immunity has been recognized in Missouri since 1821 and official immunity has been recognized since 1854. *Southers v. City of Farmington*, 263 S.W.3d 603, 611 (Mo. 2008).

Both types of immunity derive from the British common law. Sovereign immunity reflects the British common law idea that the "King can do no wrong." In Missouri, official immunity was adopted in *Reed v. Conway*, 20 Mo. 22 (1854), also from British common law, based on the idea that public officers are immune from liability for discretionary decisions, so long as their motives were "not tainted by fraud or malice." The law surrounding each has application to many different types of political subdivisions and public employees. It is helpful to provide an overview of the laws, and then specify their application to different defendants under current Missouri law.

A. Sovereign Immunity Overview

1. State Sovereign Immunity

The State of Missouri and its governmental divisions are generally immune from suit for torts, as they are sovereigns. RSMo. § 537.600. However, § 537.600 provides that immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is expressly waived in two instances and a third instance is covered in RSMo. § 537.610. Those 3 instances where sovereign immunity is waived are:

> (1) injuries "directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment" and
>
> (2) resulting from the dangerous condition of public property, if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury directly resulted from the dangerous

condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

(3) The third way sovereign immunity is waived is if there is applicable insurance. Under Missouri statute, a public entity can purchase tort liability insurance and statutorily waive sovereign immunity. RSMo. §71.185 and § 537.610.

Four notes on these waivers (and a note on Illinois handling of sovereign immunity):

First, for negligent design claims against the Missouri Highway and Transportation Commission (don't sue MODOT), they have a special defense. If the highway department can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed, they get a complete bar to recovery. § 537.610(2).

Second, RSMo. § 537.600.2 clarifies that the waivers of immunity are ***absolute*** waivers of sovereign immunity.

Third, longstanding case law interpreting the statutes holds that municipalities waive sovereign immunity for governmental functions to the extent they are covered by liability insurance. *Southers*, at 609. Where a party can show the existence of insurance and that it specifically covers the negligence at issue, immunity for public entities has been waived under Missouri statute. *Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432, 434 (Mo. Ct. App. 1997). This is contemplated in the third exception to sovereign immunity.

Unfortunately, many insurance policies now come with a separate endorsement that abrogates the waiver. In a case we argued to the court of appeals, there was a

specific endorsement titled, "Waiver of Governmental Immunity," and the provision stated the carrier will waive sovereign immunity "unless the insured requests in writing that [the carrier] not do so." *See* Appendix. An additional endorsement at the very end of the policy stated:

> "Notwithstanding any other provision, it is expressly agreed that our liability under this policy is limited to only those claims against insureds for which there is no governmental immunity pursuant to the laws of the State of Missouri."

Courts have held these endorsements validly "un-waive" sovereign immunity. Note that this type of waiver applies to tort liability only – not where the State affirmatively takes on obligations like the statutory Second Injury Fund, § 287.220 or the constitutional blind pension fund, Const. Art. 3, § 38(b).

Fourth, under RSMo. § 537.610, the state can waive sovereign immunity with the purchase of insurance as noted above, but such maximum amount of coverage shall not exceed $2 million for each occurrence and shall not exceed $300,000 for any one person. Further, if coverage of the insurance is less than these amounts, immunity is only waived up to the coverage of the amount of insurance. Under the same provision as above, no award for damages against a public entity within RSMo. § 537.600 and RSMo. § 537.650 can include punitive or exemplary damages. RSMo. § 537.610(3).

Lastly, Illinois has a slightly different model. In Illinois, the Illinois Court of Claims has exclusive jurisdiction to hear all claims against the state founded upon any law of the State of Illinois, founded upon any contract entered into with the state, and all claims against the state for damages in cases sounding in tort. 705 ILCS 505/8. Further, pursuant to Court of Claims Act § 22-1, any person who brings a claim for personal injuries in the Court of Claims must file specific notice of the claim within one year from the date of the injury or when such cause of action accrued in the office of the Illinois Attorney General and the Clerk of the Court of Claims. 705 ILCS 505/22-1. This notice is separate from the claim subsequently filed.

2. Municipality Sovereign Immunity

Jungerman v. City of Raytown, 925 S.W.2d 202, 204 (Mo. banc 1996) -- found common law sovereign immunity belonged only to state entities and *sometimes* municipalities. Municipalities are not provided immunity for *proprietary functions* but are immune under sovereign immunity for *governmental functions*. *Id.* Proprietary functions are performed for the benefit or profit of the municipality as a corporate entity. *Id.* On the flip side, governmental functions are those performed for the common good. *Id.*

The operation and maintenance of a police force is a governmental function. *Fantasma v. Kansas City, Mo., Bd. of Police Comm'rs,* 913 S.W.2d 388, 391 (Mo. Ct. App. 1996), *See also, State ex rel. City of Grandview v. Grate,* 490 S.W.3d 368, 371 (Mo. banc 2016). The issuance of bonds for a project is also a governmental function; even though it can be argued this is a for-profit act, it is still performed for the common good. *Cromeans v. Morgan Keegan & Co.*, 1 F. Supp. 3d 994, 999 (W.D. Mo. 2014). Passing ordinances for the use of streets is also governmental. *See Metz v. Kansas City*, 229 Mo. App. 402, 81 S.W.2d 462, 465 (1935); (finding in passing such ordinances, the city acts in a governmental or legislative capacity, in which capacity it exercises its *discretion* in defining the lines and extent of the street and in declaring in what manner and to what extent it shall be improved and thrown open for use. In so acting in such capacity in such matters, it is *not answerable* to an individual for a neglect of duty.)

Further, employees are not entitled to the sovereign immunity of their state or municipality employers. Per *Southers,* even though municipalities act through employees, the waivers of immunity applicable to municipalities and political subdivisions do not abrogate official immunity protections afforded to public employees. *Southers,* at 609.

If municipalities have tort immunity, they still waive immunity with auto and premises claims, and applicable insurance. RSMo. §§ 71.185 and 537.610; *Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo. Banc 1996).

B. **Public Duty Doctrine**

The public duty doctrine is slightly different from Sovereign and Official immunity. First, it is different in that it does not have the long history of application in Missouri. Public Duty Doctrine was first "actually" accepted and applied in Missouri in 1970. *Parker v. Sherman*, 456 S.W.2d 577, 579 (Mo. 1970)). Over 100 years had passed since the first application of sovereign and official immunity. Second, the public duty doctrine cannot apply where there is express waiver of immunity for governmental entities.

The Public Duty Doctrine states that a public employee is not civilly liable for the breach of a duty owed to the general public, rather than a particular individual. *Jungerman,* 925 S.W.2d at 205. This public duty rule is based on the absence of a duty to the particular individual, as contrasted to the duty owed to the general public. *GWT–PAT, Inc. v. Mehlville Fire Prot. Dist.,* 801 S.W.2d 798, 800 (Mo. Ct. App. 1991); *Southers v. City of Farmington*, 263 S.W.3d 603, 611 (Mo. banc 2008).

The public duty doctrine does not insulate a public employee from all liability, as he could still be found liable for breach of ministerial duties in which an injured party had a "special, direct, and distinctive interest." *Southers,* at 612. This exception exists when injury to a particular, identifiable individual is reasonably foreseeable as a result of a public employee's breach of duty. *Jungerman,* 925 S.W.2d at 205. Whether an individual has such a private interest depends on the facts of each case. Therefore, the law is not cut and dry and cases are going to vary.

Southers found that the public duty doctrine applied to police officers engaged in chase and to their supervising officers. In *Souther,* the officer was entitled to use the doctrine because his actions involved a duty to the community at large, and not specific people. *Southers,* at 620-21. The court also found it applied to the supervising officers involved because creating police policies and supervising police officers is a duty owed to the general public. *Id.* at 621.

However, the public duty doctrine will not apply where defendant public employees act "in bad faith or with malice." *See Jackson v. City of Wentzville*, 844 S.W.2d 585, 588 (Mo. Ct. App. 1993) (considering whether the plaintiffs had sufficiently

alleged that the defendant public employees "acted in bad faith or with malice" before assessing if the public duty doctrine would protect those employees). Moreover, the public duty doctrine is not an affirmative defense, but rather, its application negates the duty requirement necessary to prove negligence and leaves plaintiff unable to prove his case. *Southers,* at 612.

Lastly, *Southers* got rid of the availability of the public duty doctrine to governmental entities that would normally be shielded from immunity if the underlying tort of their employees could not be proven. *Id* at 613. Instead, the court noted the legislature had waived immunity expressly for government entities, and that application of the public duty doctrine would negate the statutory waivers as "absolute waivers." RSMo § 537.600(2).

C. Official Immunity

Employees of governments sometimes get Official Immunity, which is a judicially created doctrine. Official Immunity protects public employees for the alleged acts of negligence committed during the scope of their official duties for the performance of discretionary acts. *Davis v. Lambert-St. Louis International Airport,* 193 S.W.3d 760, 763 (Mo. banc 2006). This means the doctrine does not provide protections for torts committed when acting in a ministerial capacity. *Kanagawa v. State,* 685 S.W.2d 831, 835 (Mo. banc 1985).

Classifying an act as discretionary or ministerial depends on the **degree of reason and judgment required.** *Kanagawa,* 685 S.W.2d at 836.

- **Discretionary acts --** require the exercise of reason in determining how or whether an act should be done or course pursued.
- **A ministerial function** is one "of a clerical nature which a pubic officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to a mandate."

Courts use a three-pronged test to determine how to classify an act. You consider: 1) the nature of the public employee's duties; 2) the extent to which the act involves

policymaking or exercise of professional judgment; and 3) the consequence of not applying official immunity.

Because the defense of official immunity is personal to a public employee, it cannot be extended to protect his employing government entity sued under the doctrine of *respondeat superior*. *Southers v. City of Farmington,* 263 S.W.3d 603, 611 (Mo. 2008). A government employer may still be liable for the actions of its employee even if the employee is entitled to official immunity because the doctrine protects the employee from liability, but it does not erase the existence of the underlying tortious conduct for which the government employer can be vicariously liable.

Rush v. Senior Citizens Nursing Home District of Ray County, 212 S.W.3d 155 (2006).

- Mr. Rush was a diabetic patient at a nursing home operated by the county. The nurse who treated him had a protocol that required her to test Mr. Rush's blood sugar four times per day. *Id* at 158. The protocol further had a sliding scale showing the nurse how much insulin to provide to Mr. Rush based on his blood sugar readings. *Id.* The protocol required the nurse to provide two units of insulin if his blood sugar was between 201 and 250. *Id.* On a day when Mr. Rush's blood sugar reached 250, the nurse failed to administer any insulin. *Id.* The nurse failed to follow the protocol for insulin use and failed to give Mr. Rush required insulin multiple times until eventually, he died as a result. *Id.* The Court in Rush determined the nurse's actions were ministerial since she had strict protocols she was required to follow. *Id.* at 161. Even the doctor in the Rush case, who had policymaking duties in general, but did not have discretion with regard to following the protocol, did not have immunity for his acts in failing to follow the protocol. *Id.* Accordingly, neither the doctor nor the nurses were protected by official immunity because the acts did not require any professional judgment.

Richardson v. Burrow, 366 S.W.3d 552 (Mo. Ct. App. 2012).

- Decided in 2012, the Missouri Court of Appeals E.D. held EMT personnel

were performing ministerial duties under EMT protocol and were not entitled to Official Immunity. *Id*. at 552 ("Richardson II"). Richardson II was a wrongful death action against an EMT provider who mistakenly placed an endotracheal tube in the Plaintiff's husband's esophagus rather than his trachea. *Id*. The patient was deprived of oxygen causing an anoxic brain injury resulting in his death. *Id*. at 556. The EMTs in Richardson II were guided by protocol that mandated intubation if a patient's oxygen saturation levels dropped below 80%. This Court reversed and found the EMT was presented with a fixed set of facts, an oxygen level below 80%, that gave rise to a duty to intubate. *Id*. This Court found under the protocol, there was no room for any judgment on the part of the EMT. Therefore, the intubation with respect to the protocol was a ministerial act and the defendant was not entitled to qualified immunity. *Id*.

Geiger v. Bowersox, 974 S.W. 2d 513, 517 (Mo. Ct. App. 1998).

- In *Geiger*, a prisoner ingested wax that medical personnel had put in his pill bottle. *Id*. The Plaintiff sued the nurse who violated protocol by letting someone else fill his prescription and the court found she was not shielded by official immunity. *Id*. The nurse was required to follow protocol and her failure did not make her actions discretionary. *Id*. As a result, the nurse was performing a ministerial duty regardless of whether she followed the protocol since she was simply to perform whatever the protocol mandated.

Horneyer v. City of Springfield, 98 S.W.3d 637, 640 (Mo. Ct. App. 2003)

- Under longstanding Missouri law, a city is not immune for neglect or breach of a ministerial duty, whereas, it is generally immune from suit in its performance of governmental duties.

D. Specific Application of Immunity Law

1. EMTs

Application of official immunity law regarding paramedics includes an additional step in the analysis. Courts must still determine if the action was discretionary or ministerial, however, first courts now ask if the defendant was operating in a "true emergency situation" with limited information available. If so, then their decisions are judged based on the information they had available at the time.

This was first espoused in *Thomas v. Brandt,* 325 S.W.3d 481 (Mo. Ct. App. 2010). In this case, the EMTs encountered a man with chest pains and diagnosed him incorrectly. The paramedics did not take him to a hospital and left the man's home. The paramedics misdiagnosed the man, as he was actually having a heart attack. This misdiagnosis ultimately led to his death as the chest pains were symptoms of a heart attack and it went untreated. The court found the EMTs' actions were discretionary because the *EMTs were making decisions in an emergency situation with limited information*. This analysis is the first step in determining whether an action is ministerial or discretionary.

However, simply because an action is taking place during an emergency does not mean it is automatically discretionary. This was the court's finding in *Richardson v. Burrow,* 366 S.w.3d 552 (Mo. Ct. App. 2012) ("Richardson II"). *Richardson II*, decided after *Thomas*, involved the failure of EMT personnel to intubate a patient properly during transport when the patient's stats fell below 80. Like *Thomas,* the paramedics were operating in an emergency situation. Different from *Thomas,* however, the court found the paramedic did not engage in discretionary conduct because his conduct was mandated by the criteria requiring intubation under the circumstances presented – even if the circumstances were emergent in nature. *Id.* There, the court pointed out that even in a true emergency, an act can still be ministerial. Even in the emergency situation, the paramedic had all information necessary, but just did not act according to the policy correctly.

The first question that is now asked is whether the situation is evolving during an emergency situation. If so, then the court is only going to consider what facts were

available to the emergency personnel *at that time* to determine whether he needed discretion to act.

2. POLICE OFFICERS

Normal traffic accidents and high speed chases where a fleeing vehicle injures someone, constitute some of the vast situations where the defendant is a police officer. The main case applicable to these situations is *Southers v. City of Farmington,* 263 S.W.3d 603, 611 (Mo. 2008). Debra Southers sued the City of Farmington and individual police officers for negligence. The police officers were responding to an emergency and were engaged in a car chase with the suspect. While in chase, the officers crashed into a vehicle, killing two people and injuring Debra Southers as well. The plaintiffs sued the city and the officers involved in the chase and collision.

The issue before the Missouri Supreme Court was who had what immunity. The court ultimately found that the officers who were involved in the accident were immune from suit. The Court in *Southers* stated that the official immunity doctrine applies to officers responding to emergencies. If the conduct is in the course and scope of employment – and for officers an emergency is just that – they are immune from suit. However, if the officer is not responding to an emergency, then they might not be entitled to official immunity. Subsequent cases have attempted to draw a line where acts are discretionary.

Allen v. Trader, 464 S.W.3d 594 (Mo. Ct. App. 2015)

- In *Allen,* a State Trooper gave instructions to a tow truck driver on moving a car out of the way of traffic. Cones were placed blocking traffic at this point. The trooper told the driver there was no debris up ahead, and that he should be okay. However, the driver did have to move debris, and when he did, he was hit by a car. The Defendant trooper had moved the cones allowing cars through. The court found the Defendant trooper was entitled official immunity since determining when it was safe to open the road to traffic after completing the investigation of the first accident was part of Defendant's response to the first accident, so it was a discretionary act.

***State ex rel. Nixon v. Westbrooke*, 143 S.W.3d 737 (Mo. Ct. App. 2004)**

- The state in *Allen v. Trader* was dismissed early pursuant to this case. The court here found that to waive immunity for a dangerous condition, it must be a physical condition created by the state. The trooper moving the cone could not have created a dangerous condition since "the concept of dangerous condition 'does not include property which is not itself physically defective, but may be the site of injuries as a result of misuse or other intervening act.'" *Allen,* at 597.

Throneberry v. Missouri State Highway Patrol, 526 S.W.3d 198, 204 (Mo. Ct. App. 2017).

- Pursuit of a fleeing suspect is recognized as a police officer response to an emergency. *Id*. A police officer's conduct in pursuing a fleeing suspect "involve[s] the kind of discretionary decisions that require professional expertise and judgment that the official immunity doctrine is intended to protect." *Id*. The policy at issue in this case required the officer's consideration of changing circumstances or conditions to make a judgment about whether the risk to public safety associated with continued pursuit is greater than the public safety benefit of making an immediate apprehension. *Id*. at 203. The court said this is the essence of a discretionary act – something that requires the individual officer's use of a judgment call. *Id*. The Plaintiff attempted to argue that the bad faith or malice exception applied, but he had not pled that in his petition, thus the officer was entitled to immunity. *Id*. at 204

3. **FIREFIGHTERS**

A public (not private) fire department is not entitled to sovereign immunity, official immunity, protections of the public duty doctrine, OR the Volunteer Protection Act. An individual firefighter, volunteer or employee is for sure not entitled to sovereign immunity or the Volunteer Protection Act if the negligence occurred while driving.

Rhea v. Sapp, 463 S.W.3d 370, 372–73 (Mo. Ct. App. 2015), as modified (Apr. 28, 2015).

- Margaret Rhea filed a wrongful death suit against multiple defendants

after her car was struck by a fireman responding to a fire. The claims against all defendants except the individual firefighter who caused the accident were settled. The question on appeal was whether the individual firefighter was entitled to official immunity. The firefighter alleged he was performing a discretionary act and the court agreed. *Id.* at 376. The court found the individual firefighter acted in the course of his duties as chief of the fire department when he responded to the fire. *Id.* at 378. Based on the circumstances known to him at the time, the firefighter exercised his discretion when he elected to speed while traveling to the fire. *Id.* This required judgment on behalf of the firefighter in determining the speed he could travel in response to a call from dispatch of a fire on a cattle trailer in the middle of the highway. *Id.*

Even though the individual firefighter violated the internal policies on speeding, the *Southers* court held that "[p]ublic employees' conduct that is contrary to applicable statutes or policies can constitute evidence that their conduct was negligent, but that conduct does not remove their negligence from the protections of the official immunity or public duty doctrines where the provisions at issue indicate no intent to modify or supersede these common law immunity protections." *Southers,* at 617.

McCormack v. Douglas, 328 S.W.3d 446 (Mo. Ct. App. 2010)

- The court considered whether the official immunity doctrine applied to a volunteer firefighter. In *McCormack,* the sheriff's department and the fire district were alerted to a car accident. *Id.* at 448. A dispatcher instructed a volunteer firefighter to drive to a fire station to pick up an ambulance-type vehicle and equipment. *Id.* The volunteer traveled from his residence in a vehicle equipped with activated emergency lights and sirens. *Id.* On his way to the fire station, the volunteer collided with a vehicle driven by a police officer, who died as a result of the collision. *Id.* An accident reconstruction report concluded that the collision was "caused by the [volunteer's] failure to stop or slow his vehicle at [a] stop sign." *Id.* at 449. The district's internal policy required firefighters to "come to a

complete stop, establish eye contact with drivers of other vehicles, wait two seconds, and then proceed with caution." *Id.* The court found the volunteer was entitled to official immunity and there was no bad faith because the volunteer violated the district's policy and without more, the facts amounted to negligence during the course and scope of employment and performing discretionary acts. *Id.* at 451.

Firefighter gets official immunity – if discretion is involved, then they are immune. But if there is insurance, there is no immunity. Does insurance trump official immunity? The firefighter's employer had no immunity because it's a car crash case, and they have insurance. In both of the above cases, the governmental entity settled out prior.

4. VOLUNTEERS - *The Volunteer Protection Act*

42 U.S.C. § 14503 only gives volunteers immunity under specific circumstances. Under this act, a volunteer is not liable if they were acting as a volunteer and they were properly licensed for the activity. 42 U.S.C. § 14503(a)(1) and (2). However, to be entitled to immunity under this statute, the harm cannot be caused by the volunteer operating a motor vehicle for which the state requires the operator to possess a license and maintain insurance. 42 U.S.C. § 14503(a)(4).

The Fire Department itself is not a volunteer, but rather, a governmental entity. 42 U.S.C. § 14503 specifically states nothing in the statute shall be construed to affect the liability of any non-profit organization or governmental entity. 42 U.S.C. § 14503(c). Therefore, fire departments are not entitled to protection under the act at all under any circumstances. As for an individual volunteer firefighter, the harm caused cannot be from the operation of a motor vehicle – which the Volunteer Protection Act specifically states there is no immunity for. Therefore, in cases where the negligence was caused by the operation of a motor vehicle during the course and scope of employment (or volunteer work), the individual is not afforded immunity under this specific act.

5. PUBLIC SCHOOLS AND PUBLIC TEACHERS

First, teachers of public schools are considered public employees. Public employees are sometimes provided official immunity from civil suits for certain actions if they are discretionary, just like other public employees. Second, a public school or school district is a state public entity and therefore allowed to claim sovereign immunity. *Patterson v. Meramec Valley R-III School District,* 864 S.W. 2d 14 (Mo. Ct. App. 1993). The cases involving schools involve negligence on the basis on negligent supervision, while attempting to fall into the dangerous condition exception to sovereign immunity.

Under the law, you would assert a failure to supervise claim or dangerous condition claim. However, the law says that supervisors such as principals are shielded from liability under official immunity for any failure to supervise claims and Courts have also found that a dangerous condition that is not a physical aspect of the property does not waive sovereign immunity under the dangerous condition exception under the statute.

Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988)

- The Missouri Supreme Court held that a dangerous condition may be created by the positioning of various items of property in relation to one another rather than by an intrinsic defect in the property. In that case, a public employee had placed a folding room partition at the foot of a ladder the plaintiff was using while repairing an elevator. *Id.* at 540-41. When the plaintiff descended the ladder, he stepped on the partition, which unfolded and caused the plaintiff to fall and sustain injuries. *Id.* The Missouri Supreme Court noted that while neither the ladder nor the partition was intrinsically defective, the positioning of the items of property "created a physical deficiency in the state's property which created a 'dangerous condition.'" *Id.* at 542.

Boever v. Special Sch. Dist. of St. Louis County, 296 S.W.3d 487 (Mo. Ct. App.2009).

- In this case, the Plaintiff brought suit against a school district and three

employees for failing to supervise their child, which led him to choke. *Id.* at 488. The court said that sovereign immunity applied to the school district because there was not an applicable waiver. The Plaintiffs had alleged negligent supervision as a dangerous condition. However, the court noted that Missouri law found that failure to perform an intangible act, such as failure to supervise or warn cannot constitute a dangerous 'condition' of the 'property' for purposes of waiving sovereign immunity. *Id* at 494; *citing Div. of Motor Carr. & R.R. Safety v. Russell,* 91 S.W.3d 612, 616 (Mo. banc 2002).

Nguyen v. Grain Valley R-5 Sch. Dist., 353 S.W.3d 725, 731 (Mo. Ct. App. 2011)

- The Plaintiffs brought a wrongful death action after their child died from a head injury sustained during school P.E. class. *Id.* at 728. Plaintiff brought suit against the school nurse, the school district, the superintendent, the principal, and the P.E. teachers alleging that the gymnasium was a dangerous condition for children to be running around in; that the activities the children were engaged in were dangerous; that the children were insufficiently supervised; that the P.E. teachers and nurse were negligent in their treatment and handling of Sabrina's injuries; and that the other defendants were negligent in their training and supervision of those teachers and nurse. *Id.* The court found that the supervisors were entitled to official immunity based on a negligent supervision theory since that was discretionary, but the teacher and nurse had not alleged facts sufficient enough to warrant official immunity and thus summary judgment in favor of those defendants based on immunity had been premature. *Id.* at 732.

McCoy v. Martinez, 480 S.W.3d 420, 426 (Mo. Ct. App. 2016)

- Plaintiff brought negligence and negligent supervision action against a school after her daughter, a seventh grader, slipped and fell into a lunch table during her physical education class. *Id.* The Plaintiff alleged negligence and negligent supervision based on (a) Relator's failure to remove the metal tables from the gymnasium floor; (b) instructing students to perform a physical exercise in close

proximity to the metal tables; (c) instructing students to run toward the metal tables and stop abruptly; and (d) failing to take proper precautions to ensure that students would not be injured by the metal tables. *Id.* The court said that it would be easy to have a blanket statement that schools duty to keep the premises safe is always ministerial, but that is incorrect and some violation of a ministerial duty must be alleged. *Id.* Following the rules, as the gym teacher here did, cannot be a violation of a ministerial duty just because it ended up not being safe. *Id.*

6. CONTRACT CASES AGAINST THE STATE

Unlike with tort claims, the state does not have sovereign immunity for contract claims. As recognized by the Missouri Supreme Court, "'when the State enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by contracting.'" *Kubley v. Brooks*, 141 S.W.3d 21, 30 (Mo. banc 2004); *Missouri Corr. Officers Ass'n v. Missouri Dep't of Corr.* ("MDOC I"), 409 S.W.3d 499, 500 (Mo. Ct. App. 2013). The court in *Kubley* applied this doctrine to Plaintiffs' claims in contract and in equity based on long standing Missouri law. Below are some cases:

1. *Palo v. Stangler*, 943 S.W.2d 683, 685 (Mo. App. E.D. 1997) (finding that "the doctrine of sovereign immunity is not applicable" where the action is not in tort);

2. *Goines v. Mo. Dep't of Social Services, Family Support and Children's Div.*, 364 S.W.3d 684, 687 (Mo. Ct. App. 2012) ("In any case involving non-tort claims, 'an enabling statute's provision that the agency can 'sue or be sued' is sufficient to constitute a consent to suit.'")

3. *Gerken v. Sherman*, 351 S.W.3d 1, 12 (Mo. Ct. App. 2011) ("Because in section 207.020 the State consented to suit, the trial court's award of prejudgment interest was not barred by sovereign immunity.");

4. *Wyman v. Mo. Dep't of Mental Health*, 376 S.W.3d 16, 23 (Mo. Ct. App. 2012) ("The phrasing of the waiver provision makes clear that the immunity restored by § 537.600 is immunity "from liability and suit for compensatory damages for negligent acts or omissions," not immunity from claims for equitable relief.")

5. *V. S. DiCarlo Const. Co. v. State*, 485 S.W.2d 52, 54 (Mo. 1972) (the court noted the Plaintiff was not asking the court to disregard the sovereign immunity laws, or find them inapplicable, but rather that sovereign immunity did not bar suit in a contract case and therefore finding an applicable waiver is irrelevant. The court concluded that the General Assembly did not intend a contract completely lacking in mutuality—one obligating the contractor to live up to its promises but imposing no binding obligation or responsibility on the State because they would be immune from suit.)

7. STATE IMMUNITY FROM EXECUTION ON JUDGMENT?

After the end of a typical civil case, if the Plaintiff wins, they are entitled to collect the judgment. For a judgment against a private citizen, this is done through multiple means, but garnishment and other types of execution are possible. Filing a garnishment with the court is a valid avenue. However, when a judgment creditor attempts to execute against the state for a judgment owed, questions of an additional level of immunity afforded to the state come up.

First question, what if the garnishee is a private company and not a state agent – is sovereign immunity still applicable? According to the Missouri Constitution, the State treasurer remains the custodian of the State's money regardless of what bank account it is in. Missouri Constitution makes the Treasurer the "custodian of all state funds and funds received from the United States government." MO. CONST. art. IV, § 15. Missouri Revised Statute § 30.230 provides that:

> "Immediately upon receipt of state moneys the state treasurer shall deposit all state moneys in the state treasury to the credit of the state on demand deposit in banking institutions selected by him and approved by the governor and the state auditor and thereafter withdraw such moneys as authorized by law."

Missouri Revised Statute § 30.240 provides that:

> "The state treasurer shall hold all state moneys, all deposits thereof, time as well as demand, and all obligations of the United States government in which such moneys are placed for the benefit of the respective funds to which they belong and disburse the same as authorized by law. Unless otherwise provided by law, all yield, interest, income, increment, or gain received from the time deposit of state moneys or their

investment in obligations of the United States government shall be credited by the state treasurer to the general revenue."

So it is unlikely the funds will be considered in the custody of a private company, and immunity can still apply -- even if the garnishee is a private bank. Attempting to distinguish the cases below because they were garnishments against the State Treasurer might then prove futile as a result (take my word for it), however the question of whether the second level of immunity is even applicable in contract cases where immunity was never at issue is different.

***Otte v. Missouri State Treasurer*, 141 S.W.3d 74 (Mo. Ct. App. 2004)**

- The court specifically held that the State cannot be executed against for debts in a Chapter 513 action. *Otte* found sovereign immunity prevented an employee from "bringing a Chapter 513 action in execution against the Treasurer." *Id.* At 76. Together, *Otte* and *Nacy* suggest the state is immune from garnishment (and the Court of Appeals agreed).

Nacy v. Le Page, 341 Mo. 1039 (Mo. 1937).

- In this case, the Court was asked to decide whether a garnishment served on the State Treasurer was enforceable. *Id.* at 1041. The Court held that the state can only be sued in such matters as it shall specifically consent to be sued. Essentially this means that the state also has sovereign immunity against garnishment even if it was waived in the underlying case. And like other applications of sovereign immunity, unless the state waives it, there is not much that can be done. Further, according to *Nacy*, since the Treasurer is an agent of the state, the Treasurer himself could not be forced to submit to a garnishment.

Missouri Constitution

- In our current case against the Missouri Dept. of Corrections, the State argued that, according to the Missouri constitution, there is this separate level of immunity because the state's money can only be used in accordance with a specific appropriation by the legislature. Under Article

> IV, Section 28 of the state constitution, "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law." MO. CONST. art. IV, § 28. No case so holds. This mirrors the idea that the legislature has control over the revenue of the state, "the legislature has full power and control over the disposition of" tax revenues. *St. Louis Ctny. v. University City, 491 S.W.2d 497, 499* (Mo. banc 1973) (citation omitted).

However, what if the underlying is not tort, but rather contract, thus sovereign immunity was never applicable to begin with. Further, in Rule 81.09, the Missouri Supreme Court set out the exclusive way to Stay Execution – with a Supersedeas Bond. And the State did not post or request such a bond. Applying this second level of immunity to a contract judgment seems contradictory to why the state is not afforded immunity for contracts *See. V. S. DiCarlo Construction Co., Inc. v. State*, 485 S.W.2d 52, 54 (Mo. 1972) and *Kubley v. Brooks*, 141 S.W.3d 21, 30 (Mo. banc 2004).

Under these cases, "When the State enters into a validly authorized contract, it lays aside ***whatever*** privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by contracting." *DiCarlo*, at 54; *Kubley* at 30. The language of *DiCarlo* is significant. The waiver is "continuing" and "do[es] not imply an intention on the part of the General Assembly to withhold such waiver in cases wherein it had authorized and provided the funds for a particular contract." *Id.* at 56. Taking the law and Missouri Constitution arguments, in tort cases, it makes sense that another level of immunity applies since the Missouri Constitution requires there be an appropriation of funds. The Missouri Legislature cannot see the future and predict who will sue them for an injury.

However, the legislature can see the express terms of a contract they are agreeing to abide by, including compensation under the contract. The funds for a contract are appropriated at the outset of the contract by the legislature in order to adhere to the contract. A finding that the state violated that contract doesn't change the terms requiring an additional appropriation, the money has already been appropriated.

Therefore another level of immunity in the case of a contract seems counter intuitive to the language of *Dicarlo* which specifically found the General Assembly did not intend a contract completely lacking in mutuality—one obligating the contractor to live up to its promises but imposing no binding obligation or responsibility on the State because they would be immune from suit.

8. FLSA IMMUNITY

Absent express waiver, States are afforded sovereign immunity from FLSA claims. *Alden v. Maine* is the case that articulated this rule. In that case, the United States Supreme Court said "in exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design." *Alden v. Maine*, 527 U.S. 706, 730–31, 119 S. Ct. 2240, 2255, 144 L. Ed. 2d 636 (1999). The Court concluded Congress may not use its Article I powers to abrogate the states' sovereign immunity. *Id.* Both the terms and history of the Eleventh Amendment suggest that States are immune from suits in their own courts, and the Federal Government cannot force the State to submit to suit. Further, states retained much of their sovereignty despite their agreeing that the national government would be supreme when exercising its enumerated powers. *Id.* at 713. The Eleventh Amendment provides: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

However, this does not apply to municipalities. In the same case, the Supreme Court made it clear, the immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State, nor does sovereign immunity bar all suits against state officers. *Alden*, at 756. This is contemplated in the plain language of the FLSA which states political subdivisions are considered 'enterprises" as defined by the FLSA, 29 U.S.C. § 203(r)(2)(C) since it is a political subdivision of the State of Missouri, and can be engaged in commerce within

the meaning of the FLSA, under § 203(b), (s)(1)(C) since activities of a political subdivision count as engaged in commerce.

9. MISSOURI MINIMUM WAGE LAW (MMWL)

The law on this is sparse. Missouri's minimum wage law requires an "employer" to pay a minimum wage and an overtime wage for the amount of time in excess of forty hours worked in a week. RSMo. § 290.505.1 Under the MMWL, "employer" means "any person acting directly or indirectly in the interest of an **employer** in relation to an employee." RSMo. § 290.500(4). The definition is so broad that it references the term "employer" within itself. In turn, the same section broadly defines a "person" as "any individual, partnership, association, corporation, business, business trust, legal representative, or any organized group of persons." RSMo. § 290.500(8). This includes any legal person. By its terms though, the MMWL applies only to covered "employers." RSMo. § 290.500(4).

The state and any state agency doesn't "clearly" fit within any of these categories. But it also doesn't *not* fit. The two arguments for and against are as follows.

First: Under the MMWL, if an entity is not a 'person" then it cannot be an "employer" under the statute. In 2010, the United States District Court for the Western District of Missouri examined the MMWL's definition of employer and dismissed plaintiffs' MMWL claims against an ambulance district on these grounds. *See Ingraham v. Dixon Ambulance District,* No. 10-4160-CV-S-ODS, 2010 WL 4531785, at *1-2 (W.D. Mo. Nov. 1, 2010). In that case, the court held that an ambulance district is "a body corporation and political subdivision of the state." RSMo. § 190.010.2. It does not qualify as any of the entities that may be a "person," so it cannot be an employer. If subdivisions are not employers, then this naturally would extend to municipalities. However, the law on this is limited. It is counterintuitive to suggest the state does not have to abide by a state law.

Second argument: RSMo. § 290.500 exempts only fifteen categories of employees from the MMWL. Among these, it exempts "any individual who is employed in any government position defined in 29 U.S.C. §§ 203 (e)(2)(C)(i)-(ii)." R.S. Mo. §

290.500(3)(l). Specifically, this exemption only applies to "any individual who is employed in a government position" who is subject to civil service laws of his or her state, political subdivision or agency and who either (1) holds a public elective office, (2) is selected by the holder of such office to be a member of his personal staff, (3) is appointed by an officeholder to serve on a policymaking level, (4) is an immediate adviser to such an officeholder with respect to the constitution or legal powers of his or her office, or (5) is an employee in a legislative branch or legislative body. This leaves Plaintiffs and most Missouri state and local government employees subject to R.S. Mo. § 290.500 et seq.

If other government employees are covered, it would be senseless to exempt some government employees from the MMWL if no government employees were covered in the first instance as Defendants posit. Regardless, at the present moment, the only 2 cases that have directly looked at this issue have found that the State and other political subdivisions are exempt from liability under the MMWL.

But, if this applies to states and state agencies, then it can also apply to state officials who are acting in their official capacity per *Edwards v. McNeill* which found when a cause of action is stated against a state official in his official capacity, the action is one against the state. 894 S.W.2d 678, 682.

10. EMPLOYMENT DISCRIMINATION AND RETALIATION

The Eleventh Amendment provides that the jurisdiction of the federal courts does not extend to suits brought in federal courts for money damages against a state. *Norris v. Missouri Dept. of Corrections*, 2014 WL 1056906 (E.D.Mo. Mar. 19, 2014). This immunity extends to state agencies and state officers acting in their official capacities. *Kentucky v. Graham*, 473 U.S. 159 (1985). The United States Supreme Court has held that in the Age Discrimination in Employment Act ("ADEA"), Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). Thus, state employees may not bring federal age discrimination claims against their employers. However, state employees are protected

by state age discrimination statutes, and may recover money damages from their state employers, in almost every state. *Id.*

Likewise, the United States Supreme Court has also held that states have sovereign immunity from claims by employees under the Americans with Disabilities Act (ADA) and under Title VII. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

However, public and state entities are not immune to state employment discrimination lawsuits. A Missouri public employee or state employee may file employment discrimination and retaliation claims pursuant to the Missouri Human Rights Act. RSMo. § 213.055. *See Migone v. Missouri Department of* Corrections, 546 S.W.3d 23 (Mo. Ct. App. 2018) (upholding judgments for correctional officer on her sexual harassment and retaliation claims against the Missouri Department of Corrections); *see also, Wallingsford v. City of Maplewood*, 287 S.W.3d 682 (Mo. banc 2009) (reversing summary judgment for employer on former employee's gender discrimination, hostile work environment, retaliation, and intentional infliction of emotional distress claims against the city).

II. CO-EMPLOYEE IMMUNITY

The issue of immunity also arises in the context of work place injuries. If an employee is injured on the job, he or she cannot sue their employer. But what if a co-employee negligently caused the injury – can they sue the co-employee?

Co-employees are not shielded from liability under the Workers' Compensation Act where they engage in affirmative negligent acts that purposefully and dangerously cause or increase the risk of injury, which fall outside their employer's non-delegable duties. MO. REV. STAT. § 287.120.1 (2012). The law surrounding co-employee immunity has a complicated, inconsistent, and evolving history.

A. Brief History of Workers' Compensation Exclusivity and Co-Employee Immunity

The Missouri Workers' Compensation Act provides the exclusive remedy against employers for injuries caused by accidents arising out of and in the course of an

employee's employment. Through the common law, courts extended this statutory immunity to co-employees when they committed negligence in performing a non-delegable duty of their employer. Specifically, the case of *State ex. Rel Badami v. Gaertner* held that a co-employee could not be sued unless there was a showing of "something more" than a breach of an employer's duty to provide a safe workplace. *State ex. Rel Badami v. Gaertner*, 630 S.W.2d 175, 180 (Mo. Ct. App. 1982). The "something more" test required proof that a co-employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.

Subsequently, the 2010 case of *Robinson v. Hooker* was widely interpreted as doing away with immunity involving co-employees. There, Robinson sued a co-employee for damages when the co-employee lost her grip on a high pressure hose which struck Robinson in the eye. Based on a strict construction of the Workers' Compensation Act, which did not specifically reference immunity for "co-employees," the court held that the exclusivity of the Workers' Compensation Act applied only to employers, not to employees, and that Robinson could sue Hooker at common law.

In 2012, in response to the decision in *Robinson*, the Missouri legislature amended section 287.120.1 of the Workers' Compensation Act, and explicitly afforded statutory immunity to co-employees with one exception. Specifically, the 2012 amendment to 287.120.1 grants immunity to co-employees except when "*the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury.*"

Although the Missouri Supreme Court recently issued three opinions addressing co-employee immunity in 2018, those cases interpreted accidents that occurred prior to the 2012 effective date of the revised statute. *See Conner v. Ogletree*, 542 S.W.3d 315, 324 (Mo. banc 2018; *McComb v. Norfus*, 541 S.W.3d 550 (Mo. banc 2018); *Fogerty v. Armstrong*, 541 S.W.3d 544 (Mo. banc 2018).

Only one Missouri court of appeals case has interpreted this statute, and that case is currently on appeal before the Missouri Supreme Court. *See, Brock v. Dunne*,

2018 WL 4309412 (Mo. Ct. App. Sept. 11, 2018). Our office also has a case interpreting the 2012 statute pending before the Missouri Court of Appeals.

B. The Co-Employee Liability Statute: Mo. Rev. Stat. § 287.120.1 (2012)

After decades of conflicting common law addressing co-employee liability, the Missouri legislature codified Missouri's position on co-employee liability in the 2012 statutory revisions to § 287.120.1 (2012) as follows:

> Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment. Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that ***an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury***. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

In some ways, the new statute led to more questions than answers. How does this statute differ from the "something more" test? Does any common law still serve as valid precedent? *Brock v. Dunne*, 2018 WL 4309412 (Mo. Ct. App. Sept. 11, 2018) is the only state appellate case applying the 2012 version of 287.120. There, the appellate court found the amendment did not completely abrogate the common law. Rather, the amendment must be interpreted in conjunction with the common law requirement that an employee owes a duty to fellow co-employees if it is beyond the scope of an employer's non-delegable duties.

C. Elements to State a Claim for Co-Employee Negligence

In any action, including one based upon co-employee liability, the plaintiff must establish that 1) the defendant had a duty to plaintiff; 2) the defendant failed to perform that duty; and 3) the defendant's breach was the proximate cause of the plaintiff's injury. *Brock*, 2018 WL 430941 at *7, quoting *Peters v. Wady Industries*, 489 S.W.3d

784, 793 (2016). To assert a cause of action for negligence against a co-employee, a plaintiff must establish: 1) that the defendant co-employee owed him a personal duty of care, separate and distinct from his employer's non-delegable duties; and 2) the defendant engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury, thereby preventing the co-employee from being shielded from liability under the immunity of MO. REV. STAT. § 287.120.1 (2012); *See Brock*, 2018 WL 430941 at *7.

D. Non-Delegable Duties

Missouri courts have charged employers with the following non-delegable duties: 1) the duty to provide a safe workplace, 2) the duty to provide safe appliances, tools, and equipment for work, 3) the duty to warn employees of dangers of which he or she "might reasonably be expected to remain in ignorance," 4) the duty to provide a sufficient number of suitable fellow servants, and 5) the duty to promulgate and enforce rules regarding employees' conduct to make the workplace safe. *McComb v. Norfus*, 541 S.W.3d 550, 554 (Mo. banc 2018); *Brock*, 2018 WL 4309412 at *7.

As you can see, these non-delegable duties encompass a wide range of scenarios where an employee may be injured. Accordingly, allegations that an employee was injured because his co-worker made his workplace unsafe, or provided him with unsafe tools or equipment, failed to warn of dangers, failed to provide enough co-employees, or failed to promulgate and enforce rules will not be sufficient to assert a civil claim against a co-employee.

E. Getting Around Non-Delegable Duties: 1) The Co-Employee Purposefully Created the Hazardous Condition; or 2) The Risk of Injury was Not Reasonably foreseeable

Missouri case law seems to specify two standards where an employee can sufficiently allege his co-employee owed a personal duty of care separate and distinct from the employer's non-delegable duties: 1) where the co-employee purposefully created the hazardous condition (rather than accidentally) and 2) where the risk of injury to the employee was not reasonably foreseeable.

1. Creating the Hazardous Condition

A longstanding line of cases that still remain good law establish that a co-employee's actions fall outside the employer's non-delegable duties when the co-employee "creates additional danger beyond that normally faced in the job-specific work environment." *Burns v. Smith*, 214 S.W.3d 336, 338 (Mo. banc 2007); *Tauchert v. Boatmen's Nat. Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. banc 1993). Some examples include:

- A supervisor directing an employee to remove a machine guard and clean the rollers while it is running. *Brock v. Dunne*, 2018 WL 4309412 (Mo. Ct. App. Sept. 11, 2018).
- A supervisor who negligently welded a water pressure tank and directed an employee to "[r]un it till it blows." *Burns v. Smith*, 214 S.W.3d 336, 338 (Mo. banc 2007)
- A supervisor who personally rigged a makeshift hoist system to raise an elevator, resulting in an employee's injury. *Tauchert v. Boatmen's Nat. Bank of St. Louis*, 849 S.W.2d 573, 574 (Mo. banc 1993)
- A supervisor who directed an employee to stand on a wooden pallet while he lifted him 15 feet in the air. *Pavia v. Childs*, 951 S.W.2d 700, 701-02 (Mo. Ct. App. 1997).
- A supervisor who directed an employee to climb to the top of a vat of scalding water and remove a grate by hanging from a forklift. *Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922, 927 (Mo. Ct. App. 1995).

The fact that the co-employee in the above-referenced cases "purposefully and intentionally" created the hazardous condition and increased the risk of harm ***outside of what would normally be faced in the job-specific work environment*** is what distinguishes this line of cases from other cases where the co-employee was simply negligent in performing his job duties or in failing to follow rules.

2. Not Reasonably Foreseeable

The recent 2018 Missouri Supreme Court cases further transformed the co-employee immunity interpretation by focusing on whether the injuries were "reasonably foreseeable." These cases (*Conners, McComb,* and *Fogerty*) hold that, "An employer's non-delegable duties are not unlimited; rather, they are limited to injuries that are reasonably foreseeable." *Conner v. Ogletree*, 542 S.W.3d 315, 322 (Mo. banc

2018). In *Conner*, it was reasonably foreseeable that failing to properly train an employee how to drive a forklift would lead to injury; in *McComb,* it was reasonably foreseeable a supervisor would advise a delivery driver to drive in a snowstorm, and in *Fogerty*, it was reasonably foreseeable that a co-employee would fail to provide a safe means for moving stones for construction. As such, none of those co-employees breached a duty separate and distinct from their employer's non-delegable duty to provide a safe workplace, thus precluding their negligence claims. The Missouri Supreme Court has also found that it is reasonably foreseeable for a co-employee to fail to follow employer-created rules. However, in *Brock*, the Court of Appeals held that it is not reasonably foreseeable that an experienced supervisor would direct an employee to break rules, and further, the supervisor's creation of the hazardous condition took his actions outside of the employer's non-delegable duties.

F. Affirmative Negligent Acts

An affirmative negligent act can best be described as an act that creates an additional danger beyond that normally faced in the job-specific work environment. These actions create a separate and extreme risk of injury and death, far beyond that anticipated or contemplated by the ordinary duties and responsibilities of the plaintiff's position of employment. *Brock*, 2018 WL 430941 at *11 *quoting Burns,* 214 S.W.3d at 338. Under Missouri law, a supervisor directing a co-employee to perform an allegedly unsafe task may constitute an "affirmative act" upon which liability may be found. *Brock*, 2018 WL 430941 at *11. The statute does not require proof that the co-employee had a conscious plan to dangerously cause or increase the risk of injury, and that he did so with awareness of the probable consequences; rather the statute merely requires that the negligent act be conducted purposefully and intentionally, rather than inadvertently or by mistake.

G. Cases That Do Not Support the Application of Co-Employee Immunity

***Brock v. Dunne*, 2018 WL 4309412 (Mo. Ct. App. Sept. 11, 2018*)**

- Employee sued his supervisor, claiming the supervisor's actions of removing a safety guard from a laminating machine and ordering plaintiff to clean the machine – while it was still running and without the safety guard equipped –

constituted negligence which invoked the co-employee exception to immunity for workplace injuries under MO. REV. STAT. § 287.120.1 (2012). The Court held, "The actions of Edwards (a properly trained and experienced supervisor), particularly, removing a piece of equipment specifically intended to make the machine safer (thereby creating the danger that an employer has actively taken measures to prevent) and directing Brock to clean the rollers of the machine near the unguarded pinch point while the machine is running, is not reasonably foreseeable to an employer. …[W]e are hard pressed to find that an employer's non-delegable duties extend to the possibility that a supervisory employee – against both logic and an employer's instructions and the machine's warnings – would dangerously modify a machine. *Brock* stands for the proposition that just because an action violates a safety rule, it does not mean that it was automatically foreseeable and falls within the employer's non-delegable duties. The appellate court held the supervisor's actions were not reasonably foreseeable to the employer and fell outside the scope of the employer's non-delegable duties, because he purposefully performed affirmative negligent acts that created an additional danger which would not have been otherwise present in the workplace.

***Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007)**

- Employee filed a personal injury action against his supervisor after he was seriously injured when the supervisor negligently welded a pressurized water tank and instructed the employee to "run it till it blows," and the tank exploded. The Supreme Court held the supervisor's conduct constituted an affirmative negligent act outside of supervisor's duty to provide a reasonably safe place to work, and thus workers' compensation was not employee's exclusive remedy for the injuries he sustained. This case stands for the proposition that a co-employee's actions fall outside the employer's non-delegable duties when the co-employee "creates additional danger beyond that normally faced in the job-specific work environment."

***Murry v. Mercantile Bank*, N.A., 34 S.W.3d 193 (Mo. Ct. App. 2000)**

- Employee of company, which had contracted with bank to provide maintenance services, filed an action for negligence against bank and his supervisor, claiming that they breached their duty to him by requiring him to lift a 5,000 lb. safe. The Court of Appeals held that the co-employee's order to plaintiff to help him move a 5,000 lb safe under threat of being fired was an affirmative act that breached a personal duty of care to Murry as a supervisor/co-employee because such a request increased a fellow employee's risk of injury and went outside the scope of the employer's work duty to provide a safe workplace.

***Pavia v. Childs*, 951 S.W.2d 700 (Mo. Ct. App. 1997)**

- Grocery store employee who was injured in a warehouse when he fell off a pallet elevated by a forklift 15 feet off the floor so he could reach certain store items brought negligence suit against store manager who operated the forklift. The Court of Appeals held the allegations of the petition were sufficient to state a claim for negligence not barred by the Workers' Compensation Act, as the facts alleged showed an affirmative negligent act by the manager creating a hazardous condition beyond the responsibility of employer to provide a safe workplace.

***Hedglin v. Stahl Specialty Co.*, 903 S.W.2d 922 (Mo. Ct. App. 1995)**

- Wife and children of deceased employee, who died after his supervisor directed the employee to climb to the top of a vat of scalding water and remove a grate by hanging from a forklift, brought wrongful death action against employer and supervisor. The Court of Appeals held that the petition sufficiently pled a cause of action against the supervisor beyond a breach of general supervision and safety and, therefore, the supervisor was not subject to workers' compensation statutory immunity from common-law liability. The Court reasoned, "The creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work."

***Tauchert v. Boatmen's Nat. Bank of St. Louis*, 849 S.W.2d 573 (Mo. banc 1993)**

- Injured employee brought action against foreman for negligence where the supervisor personally arranged a faulty hoist system on an elevator and plaintiff was injured. The Supreme Court held that issue of fact, precluding summary judgment for foreman, existed as to whether foreman's alleged act of personally arranging faulty hoist system for elevator was an affirmative negligent act outside scope of his responsibility to provide safe workplace for injured employee, and, therefore, whether foreman was not immune from liability under Workers' Compensation Act. The Court reasoned, "The creation of a hazardous condition is not merely a breach of an employer's duty to provide a safe place to work. Defendant's alleged act of personally arranging the faulty hoist system for the elevator may constitute an affirmative negligent act outside the scope of his responsibility to provide a safe workplace for plaintiff. Such acts constitute a breach of a personal duty of care owed to plaintiff."

H. Cases that Support the Application of Co-Employee Immunity

***Conner v. Ogletree*, 542 S.W.3d 315 (Mo. banc 2018)**

- *Conner* consolidated two cases. In the first case, the Court determined it was reasonably foreseeable to the employer that an employee would fail to follow its promulgated rules and would not properly ensure that power lines were

de-energized before commencing work, and that an injury to another employee would result. Thus, the Court held the supervisor did not breach any duty separate and distinct from employer's non-delegable duty to provide a reasonably safe workplace, thus precluding a negligence claim.

- In the second case, a construction employee brought a negligence action against a co-employee after the employee was injured by a forklift driven by the co-employee. The Court held the co-employee did not breach a duty separate and distinct from the employer's duty to provide a reasonably safe workplace, because it was reasonably foreseeable to an employer that failing to properly train an employee to operate equipment needed to perform his work could result in an injury. Thus, the Court determined in both cases that the plaintiff's injuries were the result of a breach of the employer's nondelegable duty to provide a safe workplace.

***McComb v. Norfus*, 541 S.W.3d 550 (Mo. banc 2018)**

- A delivery driver was killed while driving his route in a winter storm. The driver had informed his supervisors of the dangerous road conditions, but was told to stay on the road to complete his deliveries. The Court found that the dangerous (hazardous) condition that contributed to the driver's death was the icy, slippery roads, which were not created by the defendant co-employees. The Court further found that it was reasonably foreseeable that a supervisor would be negligent in directing a delivery driver to stay on the roads during dangerous weather conditions.

***Nolen v. Cunningham*, 553 S.W.3d 437 (Mo. Ct. App. 2018)**

- Janitor brought action against co-employees for negligence after he was mopping bleachers at university arena and fell off the end of a row. The Court of Appeals held that the duty to protect the janitor was within employer's non-delegable duty to provide a safe workplace and co-employees had no separate and distinct duty that would subject them to liability for janitor's injuries.

***Peters v. Wady Industries*, 489 S.W.3d 784 (Mo. banc 2016)**

- Employee was injured when a stack of dowel baskets fell on him as they were being unloaded to be delivered to a construction site. The plaintiff alleged that defendant breached its duty to plaintiff by allowing the dowel baskets to be stacked in an unsafe manner without bracing or other safety precautions, by failing to provide sufficient and adequately trained help to transport the baskets, and by not providing a proper area to unload the baskets. The Court held that there was no allegation apart from the employer's non-delegable duties. The Court found it significant that the unsafe stacking of the baskets had 'become

standard operating procedure'. The unsafe manner of performing the work had become routine, and thus within the employer's duty to provide a safe workplace.

***Halsey v. Townsend Corporation of Indiana*, No. 1:17 CV 4 SNLJ, 2017 WL 2189459 (E.D. Mo. May, 18 2017)**

- In *Halsey*, plaintiff's decedent suffered a heat stroke while working on a tree trimming crew. The plaintiff alleged that the co-employee "refused the decedent sufficient break periods, that he directed decedent to work despite indications of heat exhaustion, and that he disabled the air conditioning in the trucks, which denied decedent a place to escape the heat." The Court held that the allegations regarding air conditioned trucks fall within the non-delegable duty to provide safe equipment.

***Fogerty v. Armstrong*, 541 S.W.3d 544 (Mo. banc 2018)**

- Employee, who was injured when a front loader fork hit him in the back as it was being used to haul large stones to build a fountain, filed negligence action against co-employee who was driving the front loader. The Court held the co-employee's alleged negligence in fulfilling employer's duty to provide safe means to move stones for construction of a fountain was reasonably foreseeable to the employer, thus precluding employee's negligence claim. The Court reasoned the co-employee did not breach a duty separate and distinct from employer's duty to provide a reasonably safe workplace.

***Kelso v. W.A. Ross Construction Co.*, 85 S.W.2d 527 (Mo. banc 1935)**

- Plaintiff worked with a large crew paving a highway under the supervision of a foreman. The plaintiff worked atop a rock pile and indicated where nearly a dozen trucks should dump rocks and other materials. Once the trucks dumped their loads, the plaintiff shoveled the rocks onto the pile to stack it as high as possible. Before returning to the top of the rock pile to signal the next truck, the plaintiff cleared debris at the base of the pile. Occasionally, truck drivers would back up and dump rocks on the pile on their own initiative. Some, at the direction of the foreman, warned the plaintiff by yelling or honking their horns. Others did not. On the day of the accident, a truck driver negligently failed to warn the plaintiff and backed into him as he was clearing debris from the base of the rock pile. The plaintiff sued his employer for failing to provide him with a reasonably safe workplace. This Court held the employer could have reasonably foreseen this injury and prevented it by taking reasonable precautions. Accordingly, the co-employees were negligent, but their negligence was a breach of the employer's non-delegable duty to provide a reasonably safe workplace.

I. The Bottom Line

For a co-employee to be liable in Missouri for a workplace injury, the plaintiff has to show BOTH:

1. that the defendant co-employee owed a personal duty beyond the employer's non-delegable duty to provide a safe workplace (defendant's conduct created a job hazard beyond the *foreseeable* risks of the tasks assigned to the plaintiff by the employer); AND
2. That in so doing, the defendant co-employee committed an "affirmative negligent act" (i.e, not a mere omission) that was purposeful and put the plaintiff in danger.

J. Current Status of the Law

To date, *Brock v. Dunne*, 2018 WL 4309412 (Mo. Ct. App. Sept. 11, 2018) is the only state appellate case applying the 2012 version of Mo. Rev. Stat. § 287.120.1. The Missouri Supreme Court accepted transfer of this case on January 29, 2019, and oral arguments were heard in May. The Missouri Supreme Court's ruling should hopefully provide further clarification on this ever evolving doctrine. Our office also has a case pending before the Missouri Court of Appeal, but the Missouri Court of Appeals indicated that it is waiting on the Missouri Supreme Court to rule before deciding our case. We will keep you updated….