

JOURNAL OF THE

# MISSOURI BAR

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**TWO YEARS  
SINCE MMPA  
REFORM: HOW  
HAS IT CHANGED  
MISSOURI  
CONSUMER  
LITIGATION?**  
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**ROOTED IN LAW**  
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# 173

## TWO YEARS SINCE MMPA REFORM: How HAS IT CHANGED MISSOURI CONSUMER LITIGATION?

In 2020, lawmakers modified the Missouri Merchandising Practices Act in response to concerns about misuse and excessive litigation. What's the state of consumer litigation two years later? by **Jennifer J. Artman & Cary Silverman**

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## ROOTED IN LAW

Parents and children. Spouses. Siblings. These are just some of the family dynamics you'll see in Missouri's many law firms. Whether a passion for law is passed down through nature or nurture, there's no mistaking the impact lawyers can have on the generations that follow them.

by **Hannah Kiddoo Frevert & Nicole Roberts-Hillen**



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The JOURNAL OF THE MISSOURI BAR encourages all Missouri Bar members to contribute articles for publication.

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# PERSONAL CONNECTIONS

JOHN GRIMM

I'VE BEEN AROUND LAWYERS MY ENTIRE LIFE. MY DAD WAS A SMALL-TOWN, GENERAL PRACTICE LAWYER WHO BECAME A JUDGE WHEN I WAS 10 YEARS OLD. AS KIDS, MY BROTHERS AND I WOULD OCCASIONALLY GO WITH HIM AS HE TRAVELED TO COURTHOUSES THROUGHOUT SOUTHEAST MISSOURI. EARLY ON, I LEARNED THAT THERE WERE A LOT OF REALLY GOOD LAWYERS IN MISSOURI.

In the 50 years since that time, this perception has been affirmed time and time again. That has been no less true during this past year. **From Maryville to Holcomb, Brookfield to Springfield, and many places in between, I have had the opportunity to meet many outstanding lawyers in every part of the state.**

The common denominator among the lawyers I've met at local bar association meetings? A genuine affection for their colleagues.

Occasionally, however, I hear "older" lawyers – those who seem to be closer to my age now – nostalgically suggest that lawyers don't treat each other as well as they used to. While that may be true in some instances, I have not witnessed this being a widespread problem.

Those of us who have been practicing for a while need to set an example for newer lawyers. It's easy to be friendly and professional to those with whom we've been practicing for 20 years or more. But it is equally

important to be courteous, patient, and kind to newer lawyers.

**My firm belief is that lawyers treat each other better when they take time to know their colleagues.** This means leaving the office on occasion and meeting with other lawyers. Take the time to get involved in The Missouri Bar and other legal organizations. Make phone calls and personal visits instead of relying so much on email or text messages to communicate.

**One fantastic option for meeting other lawyers and judges is coming up soon at the Annual Meeting of The Missouri Bar, which will be held Sept. 14-16 in Springfield.** Nationally known speakers, more than 14 hours of continuing legal education programming, and great social events will be available. Detailed information can be found at MoBar.org.

Many of us have discussed some of the "lessons learned" from the pandemic, including the ability to productively work away from the traditional office, as well as the time and cost savings by attending meetings and other events virtually. To be sure, The Missouri Bar has used those lessons to guide its member engagement and increase CLE offerings beyond what had been previously possible.

Still, my view is that we do not develop the personal relationships through video and telephone conferencing that can be critical to a successful law practice.

I hope to see you in Springfield this September. **It has been my honor to serve as president of The Missouri Bar this past year. I look forward to seeing and working with lawyers from around the state in the years to come.** 



John Grimm



For more information, scan the QR code or visit [MoBar.org/AnnualMeeting](http://MoBar.org/AnnualMeeting).



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# LEARNING AND SHARING

## MISCHA BUFORD EPPS

**IN JUNE, I HAD THE OPPORTUNITY TO ATTEND THE MUCH-ANTICIPATED UNVEILING OF THE NEW FREEDOM SUITS MEMORIAL IN ST. LOUIS. THE 14-FOOT BRONZE STATUTE STANDS TALL ON THE EAST PLAZA OF THE CIVIL COURTS BUILDING DOWNTOWN, SERVING AS A REMINDER OF MANY THINGS.**

It reminds us of the brave enslaved plaintiffs who, decades ago, fought for their freedom.

It reminds us of the role our courts have in applying law and maintaining justice for all.

**And it reminds us that we, as lawyers and judges, play an essential role in our legal system and the defense of the rule of law.** We have the responsibility to continue learning how we can even better serve our clients and communities. As Hon. David C. Mason noted during the unveiling ceremony, “We have to do better every day.”

As executive director of The Missouri Bar, I see first hand how lawyers across our state are working hard to do better by volunteering in their communities, participating in bar committees, and improving access to the legal system and the quality of legal services. **Missouri lawyers are always eager to learn – and always eager to help.**

That was clear during the 2022 Solo & Small Firm Conference in June. It was fantastic to interact with so many of you, and it was the first time I'd spoken face-to-face with some attendees – though I'd chatted with them via Zoom. The comradery and enthusiasm that solo and small firm practitioners bring to the conference was readily apparent during the many learning sessions and networking opportunities. Special thanks to conference

chair Maureen Brady and all who served on the planning committee.

**I hope to see many of you Sept. 14-16 as we gather in Springfield for the 2022 Annual Meeting and Judicial Conference.** Annual Meeting will feature multiple educational offerings, networking, and opportunities to celebrate and commemorate our proud profession. In one of our plenary sessions, Judge Mason and Prof.

Anne Twitty will discuss the history of the freedom suits and their impact on law and society. Attendees will also hear the story of Milly Sawyers and her quest for justice in Missouri.

In addition, Stephen S. Davis and Charles W. Hatfield will take to the main stage to speak on laws and litigation surrounding free and fair elections, a particularly timely topic as we continue to peel back the layers of the Jan. 6 events and head into the full swing of the 2022 election cycle.

**These meeting plenaries are an opportunity to grow our knowledge – of both current legal matters and the history that surrounds them.** In turn, we can

share that information with our colleagues and fellow Missourians. If you're like me, you're hearing comments from those around you regarding recent court decisions, elections, the judicial process, and day-to-day challenges facing Missourians of all walks of life. Many people are anxious, upset, or simply confused.

**As lawyers, we can use our voices to offer some clarity.** We can share our knowledge – about the legal system and our courts – with those we encounter. Doing so helps create a more informed society that better understands our legal system and its work. 

Best regards,  
Mischa



Mischa Buford Epps

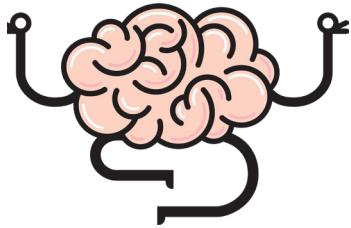
## IN BRIEF

### FREEDOM SUITS MEMORIAL UNVEILING

Several hundred judges, lawyers, elected officials, and Missouri residents gathered at the Civil Courts Building in downtown St. Louis June 20 for the unveiling of the new Freedom Suits Memorial. The 14-foot bronze memorial honors 300-plus Black Missourians who fought for their freedom in the 1800s in court with the assistance of lawyers, judges, and jurors. The monument sits on an 8,000-pound black granite base, engraved with the names of enslaved plaintiffs. Read more about the freedom suits and what the monument means to local legal professionals at [News.MoBar.org/Freedom-Suits-Memorial-Unveiled-in-Downtown-St-Louis](http://News.MoBar.org/Freedom-Suits-Memorial-Unveiled-in-Downtown-St-Louis).



### REMEMBERING WELLNESS



Ready for radical self-care? Try declaring a specific time each day as your hour of self-care, then spend it doing what refreshes and renews you.

### MOBAR MEMORY



Lawyers and their guests filled Jefferson City's Hotel Governor during The Missouri Bar's fifth Annual Meeting in 1949. Attendees heard updates on criminal law, The Missouri Plan, juvenile courts, and more. Don't miss your chance to attend this year's meeting in Springfield!

**The Missouri Bar's 2022 Annual Meeting** will be Sept. 14-16 in Springfield and online.

Lawyers with deficiency plans must complete and file their **MCLE hours** online by Sept. 30.

The **2022 Estate, Trust, & Elder Law Institute** will be Oct. 20-21 in St. Louis.

*For more information, visit  
[MoBar.org](http://MoBar.org)*

### 'THE MILLY PROJECT' FILM PREMIERES

The Missouri Bar Young Lawyers' Section hosted the premiere of "The Milly Project" film on June 21 at Saint Louis University School of Law, as well as a showing of it at the Polsinelli Conference Center on June 23 in Kansas City.

The award-winning film is an adaptation of a play that tells the true story of an enslaved woman named Milly Sawyers who fought for and legally won her freedom in Springfield before the Civil War. "The Milly Project" details the struggles Sawyers faced while fighting for her freedom and the trials and tribulations Black residents faced over hundreds of years.

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## MEET #MOLAWYERS – ANNE-MARIE BROCKLAND



*Anne-Marie Brockland is a partner at Casey, Devoti & Brockland in St. Louis and president of the Bar Association of Metropolitan St. Louis Board of Governors. From Katy, TX, Brockland graduated from Saint Louis University School of Law and joined The Missouri Bar in 2007.*

**Why did you want to become a lawyer?** In college, I worked with children with autism, and so when I first thought of going to law school, I saw it as a way for me to help children with disabilities get the services they need through the school districts. Obviously, as a trial lawyer, I took a turn from that – but I do get a lot of pleasure out of helping my birth injury clients in that regard when they need it.

**You recently became the first millennial to lead BAMSL as president of its Board of Governors. What does that milestone mean to you and the future of the profession?** Millennials make up the largest segment of the workforce today. I see my ascension to the presidency of BAMSL as just a natural extension of that fact. The legal profession has been one of the slowest to turn the page when it comes to work-life balance and has notoriously been resistant to change. But with the largest makeup of the workforce being millennials, and millennials now reaching higher positions, I believe the profession is in the midst of a revamping. We are a hard-working generation, but also expect to be treated fairly and enjoy feeling a sense of loyalty in our work environment.

**How does being a millennial lawyer influence the way you lead?** Technically, I'm a geriatric millennial (although I prefer, ahem, "seasoned" millennial). As such, I have one foot in the door of the digital world and the other in the analog world. I both understand why some feel they need face-to-face interaction in the workplace and others prefer to use technology to help make the workday more efficient. There is a happy medium there, and good leaders must find it for their organizations to stay relevant (and fully staffed). We are working hard to accomplish that.

**What is a unique skill you bring to your job?** I don't like to do things a certain way just because they have always been done that way. I'm also an "idea" person. My husband tells me I have a very powerful brain, although he does not mean it as a compliment!

**If you had your own late-night talk show, who would you invite as your first guest?** Jad Abumrad, founder and former host of the public radio program Radiolab.

*Editor's note: These responses have been edited for clarity and brevity. Do you know someone who should be featured in Meet #MOLawyers? Let us know by emailing [nhillen@mobar.org](mailto:nhillen@mobar.org).*

## OUT OF THE OFFICE

Shelly Dreyer finds thrill in climbing mountains, as seen here in this photo taken with fellow lawyer Erica Mynarich. At 14,278 feet, Gray's Peak was the first "14er" she's scaled.

"I started climbing when a friend at CrossFit climbed Mount St. Helens," Dreyer said. "Due to the pandemic, I missed climbing the last two years. However, next year I am [planning to] do the Everest Base Camp trek."



Share your "Out of the Office" photo with us for a chance to be featured in *In Brief*. Email [hkiddoo@mobar.org](mailto:hkiddoo@mobar.org) or tag us on social media using #MOLawyersLivingWell.

## ANNUAL MEETING

Annual Meeting will be Sept. 14-16 at University Plaza Hotel in Springfield. Attendees will have a chance to learn and network during CLE sessions, awards luncheons, and the Best of Missouri event at Hammons Field,

home of the Springfield Cardinals. Those who are unable to attend in person can still participate by registering for the virtual option, which includes access to the plenary sessions on Sept. 15, as well CLE tracks, YLS New Lawyer Series, Ethics Series, and "Lunch and Learn" sessions Sept. 19-23. For more information, scan the QR code or visit [MoBar.org/AnnualMeeting](http://MoBar.org/AnnualMeeting).



# THE FLAG

W. DUDLEY MCCARTER<sup>1</sup>

## CONTRACT MUST INCLUDE STATUTORY NOTICE OF ARBITRATION FOR ARBITRATION TO BE COMPELLED

*Wind v. McClure*, 643 S.W.3d 691 (Mo. App. E.D. 2022).

Mark McClure appealed the circuit court decision to deny his motion to compel arbitration in a breach of contract action filed by Todd J. Wind and Todd J. Wind Enterprises, LLC. The circuit court ruled that since the parties' Asset Purchase Agreement failed to include the notice of arbitration statement required by § 435.460, RSMo, the court ruled their agreement to arbitrate was unenforceable. The Missouri Court of Appeals-Eastern District affirmed this ruling in *Wind v. McClure*.<sup>2</sup>

Section 435.460 requires each contract containing a binding arbitration provision to "include adjacent to, or above the space provided for signatures a statement, in ten point capital letters, which read[s] substantially as follows: 'THE CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.'"<sup>3</sup> "The language of the statute is clear and unambiguous. The requirement is absolute, and all contracts containing an arbitration provision must include the prescribed notice statement."<sup>4</sup> In *Hefele v. Catanzaro*,<sup>5</sup> the Court of Appeals held that if an arbitration agreement subject to § 435.460 does not contain the mandatory notice statement, then it will not be enforced.

McClure argued the court should "apply a judicially created exception to the unambiguous statutory requirements of § 435.460."<sup>6</sup> In support of his argument, McClure argues *Forest Hill Country Club v. Fred Weber, Inc.*<sup>7</sup> suggests that noncompliance with § 435.460 may be excused if the evidence shows the parties had "actual notice" of the arbitration provision. "Section 435.460 requires that all contracts containing an arbitration provision must include the prescribed notice language. The statute provides no exception to compliance. Allowing a broad, judicially-created 'actual notice' exception for the inclusion of the required statement undermines the purpose of § 435.460 and is at odds with the statutory language," the Court of Appeals ruled.<sup>8</sup> Since the Asset Purchase Agreement did not contain the mandatory notice language, the arbitration provision is unenforceable and Wind cannot be compelled to arbitrate. It also noted the *Forest Hills* suggestion of compliance with § 435.460 being excused upon proof of actual notice to the parties of the arbitration provision, "should no longer be followed."<sup>9</sup>

## TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOTION TO SET ASIDE DEFAULT JUDGMENT

*370/Missouri Bottom Road/Taussig Road Community Improvement District v. Ice Zone Partners, LLC*, 2022 WL 1217754 (Mo. App. E.D. 2022).

Ice Zone Partners, LLC, appealed the trial court's denial of its motion to set aside the default judgment entered against it and in favor of Missouri Bottom/Taussig Road Community Improvement District (MB-CID) and 370 Missouri Bottom Road/Taussig Road Transportation Development District (MB-TDD). MB-CID and MB-TDD filed a lawsuit alleging Ice Zone failed to pay tax assessments levied by MB-CID and MB-TDD for 2017 through 2020. The circuit court found that Ice Zone's registered agent acted recklessly when he left town following MB-CID and MB-TDD filing the lawsuit and knowingly failed to check his mail for nearly six months during which time MB-CID and MB-TDD served him with their first amended petition, which Ice Zone failed to answer in a timely manner.<sup>10</sup> The Missouri Court of Appeals-Eastern District found "no abuse of discretion" and affirmed the circuit court's ruling.<sup>11</sup>

The decision whether to grant a motion to set aside a default judgment is at the trial court's discretion, and an appellate court will only interfere if the record convincingly demonstrates abuse.<sup>12</sup> An abuse of discretion occurs when the "ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary

that the ruling shocks the sense of justice and indicates a lack of careful consideration."<sup>13</sup> Appellate courts accord more deference to the circuit court's decision to set aside a default judgment and "are more likely to reverse a judgment denying a motion to set aside a default judgment than one granting relief."<sup>14</sup>

Rule 74.05(d) provides that a default judgment may be set aside "[u]pon motion stating facts constituting a meritorious defense and for good cause shown," so long as the motion to set aside is filed within one year after the entry of the judgment.<sup>15</sup> Rule 74.05(d) defines "good cause" to include "a mistake or conduct that is not intentionally or recklessly designed to impede the judicial process." As the party seeking to set aside the default judgment, Ice Zone had the burden to prove it had a meritorious defense to MB-CID and MB-TDD's claims and that Ice Zone had good cause for its default.<sup>16</sup> The failure to prove either element requires denial of the motion.<sup>17</sup> "Thus, the trial court did not abuse its discretion when it concluded that Ice Zone failed to establish the element of good cause to set aside the default judgment," the Court of Appeals found.<sup>18</sup>



W. Dudley McCarter

## UNSUCCESSFUL INTERVENOR HAS NO STANDING TO APPEAL

*Yuncker v. Dodds Logistics, LLC, 2022 WL 1548013 (Mo. App. W.D. 2022).*

Zurich America Insurance Co. appealed the Jackson County Circuit Court judgment confirming an arbitration award that found Keith Dodds and Dodds Logistics, LLC, negligent following an October 2020 accident involving a tractor-trailer (driven by Dodds) and a motor vehicle (driven by Thomas Yuncker). The court awarded damages to Yuncker and Christopher Gutierrez, who was a passenger in Yuncker's vehicle. Zurich said the circuit court erred in failing to rule on its post-judgment motion to intervene, denying or impliedly denying its motion to vacate or set aside the judgment, and entering the judgment without proper notice to Zurich under § 537.065.2. Because Zurich was not a party to the lawsuit nor aggrieved by the circuit court's judgment entered on May 26, 2021, the Missouri Court of Appeals-Western District found that Zurich had no standing to appeal under § 537.065.2 and dismissed the appeal.<sup>19</sup>

Zurich's motion to intervene was filed after the circuit court's entry of a Rule 74.01(a) judgment that resolved all issues then pending before the court and was therefore eligible for appeal, triggering Rule 75.01. Zurich's motion to intervene was not an authorized after-trial motion because such motions must be filed by parties to the underlying matter.<sup>20</sup>

"Though a motion to intervene is not an authorized after-trial motion, it is nonetheless a motion that is allowed to be filed after a Rule 74.01(a) judgment is entered ... Because a post-judgment motion to intervene is not an authorized after-trial motion, it must be ruled on, if at all, within the 30-day window contemplated by Rule 75.01 ... When a post-judgment motion to intervene is not ruled on within 30 days of entry of a Rule 74.01(a) judgment, the judgment becomes final for purposes of appeal under Rule 81.05(a), and the movant, who is not aggrieved by the judgment, remains a non-party to the proceeding, the same status the movant had when the judgment was entered."<sup>21</sup>

Since Zurich was not a party to the lawsuit when the circuit court entered its May 26, 2021, judgment, Zurich did not become a party to the lawsuit when it filed a post-judgment motion to intervene. The Court of Appeals ruled Zurich also remained a non-party to the lawsuit, unaggrieved by the judgment, when the circuit court failed to rule on the motion to intervene during the 30-day window contemplated by Rule 75.01, the court notes.

## HOMEOWNER'S ASSOCIATION HAD NO DUTY TO LIGHT PRIVATE PROPERTY

*Reddick v. Spring Estates Homeowner's Association, 2022 WL 1548150 (Mo. App. E.D. 2022).*

Appellant Michael Reddick brought a wrongful death lawsuit against his parents and their neighbor following his wife's fatal fall from a wall adjoining their properties. Reddick settled with his parents and their neighbor before

filings amended petitions adding the Spring Lake Estates Homeowner's Association as respondents. Reddick argued the circuit court erred in granting summary judgment to the association because the association had a duty to adequately light the subdivision. The Missouri Court of Appeals-Eastern District affirmed the judgment for the homeowner's association in *Reddick v. Spring Estates Homeowner's Association*.<sup>22</sup>

To prevail on a negligence claim in a wrongful death case, a plaintiff must prove: (1) the defendant owed a duty of care to the decedent; (2) the defendant breached that duty; (3) the breach was the actual and proximate cause of the decedent's death; and (4) the plaintiff suffered damages as a result of the breach.<sup>23</sup> Reddick acknowledged in his appellate brief that a Missouri court has not found a duty by a homeowner's association in these circumstances.

In Reddick's case, the homeowner's association has no control over the private property on which the decedent fell. He argued the association undertook a duty to light the area where his wife fell because it contemplated lighting the subdivision and installed five streetlights in common areas. "Reddick is correct insofar as a defendant who assumes a duty, by conduct or contract, may be liable for injuries caused by the unsafe performance of the assumed duty."<sup>24</sup> "However, a defendant's liability is no broader than the duty assumed."<sup>25</sup> "[B]y discussing lighting the subdivision and installing five streetlights in common areas, the Association did not assume a duty to adequately light every area of the subdivision, including the private property where the decedent fell," the Court of Appeals ruled.<sup>26</sup> 

### Endnotes

1 W. Dudley McCarter, a former president of The Missouri Bar, is a partner in the St. Louis law firm of Behr, McCarter, Potter, Neely & Hyde.

2 *Wind v. McClure*, 643 S.W.3d 691 (Mo. App. E.D. 2022).

3 Section 435.460, RSMo (2016).

4 643 S.W.3d at 695.

5 727 S.W.2d 475 (Mo. App. E.D. 1987).

6 643 S.W.3d at 696.

7 691 S.W.2d 361 (Mo. App. E.D. 1985).

8 643 S.W.3d at 698.

9 *Id.*

10 *370/Missouri Bottom Road/Taussig Road Community Improvement District v. Ice Zone Partners, LLC*, 2022 WL 1217754, 1 (Mo. App. E.D. 2022).

11 *Id.* at 1.

12 *Brungard v. Risky's, Inc.*, 240 S.W.3d 685, 687-88 (Mo. banc 2007).

13 *Vogel v. Schoenberg*, 620 S.W.3d 106, 111 (Mo. App. 2021).

14 *Id.*

15 *Id.*

16 620 S.W.3d at 111.

17 *Id.*

18 2022 WL 1217754 at 5.

19 *Yuncker v. Dodds Logistics, LLC*, 2022 WL 1548013 (Mo. App. W.D. 2022).

20 See *State ex rel. AJKJ, Inc. v. Hellmann*, 574 S.W.3d 239, 242 (Mo. banc 2019).

21 2022 WL 1548013 at 4 (citing *State ex rel. AJKJ, Inc.*, 574 S.W.3d).

22 2022 WL 1548150 (Mo. App. E.D. 2022).

23 *Scales v. Whitaker*, 615 S.W.3d 425, 429 (Mo. App. E.D. 2022).

24 2022 WL 1548150 at 6 (citing *Bowan v. Express Med. Transp., Inc.*, 135 S.W.3d 452, 457 (Mo. App. E.D. 2004)).

25 *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 920 (Mo. App. W.D. 2004) (citing *Teichman v. Potashnick Constr. Inc.*, 446 S.W.2d 393 (Mo. banc 1969)).

26 2022 WL 1548150 at 6.

### Lawyer Well-Being

Because of the passion of John Gunn, Athena Dickson, Whittney Dunn, Erica Mynarich, and many other leaders of The Missouri Bar, the issue of lawyer well-being has been placed in the spotlight over the past couple of years, including in recent issues of the Journal of The Missouri Bar. Indeed, during his term as president, Gunn and the Hon. George W. Draper III convened a roundtable meeting with stakeholders from around the state to discuss lawyer well-being.

Following that roundtable, The Missouri Bar created the Lawyers Living Well Special Committee. That committee is focused on addressing various issues of mental health that Missouri lawyers are faced with. The special committee has three main goals: (1) identify effective methods to educate members and those with whom they interact with about well-being; (2) identify attitudes, perceptions, and other factors that produce stigma or other barriers to well-being for members, and recommend measures to reduce that stigma; and (3) identify policy-based strategies to improve and promote the well-being of members of The Missouri Bar.

I am humbled and honored to be a member of the special committee and to have participated in the well-being roundtable. Although mental health and well-being have always been matters that I've cared about, my participation on the special committee has given me a newfound appreciation of these issues. Over the past two years (which also happens to have coincided with a global pandemic), I have learned a lot about mental health and have reassessed the status of my own well-being.

This fall, I hope to pass on some of the things I've learned to the next generation of Missouri lawyers. Spearheaded by Erin McClernon and Prof. Chuck Henson, I and several other members of the special committee will teach a course at the University of Missouri School of Law that focuses on life skills for thriving lawyers.

The start of the fall semester just happens to overlap with Suicide Prevention Awareness Month in September. When I was a toddler, my uncle died by suicide. This experience

is not unique to me as practically everyone I know has lost someone to suicide. For me, I was too young when my uncle died to understand what happened. My memories of him are mainly based on stories from family. From what I've been told, he had a gregarious personality and a dapper sense of style. Part of me has always wondered if things could have turned out differently. My uncle was a veteran and served in the military during a very different era than we're in today.

So, as we approach the beginning of Suicide Prevention Awareness Month, I encourage all of us to take stock of our mental health and to continue to do what we can to support our fellow Missouri lawyers. One step we can take is to participate in QPR training. QPR stands for Question, Persuade, and Refer. QPR training teaches simple, practical, and proven steps anyone can take to respond to someone in crisis, and it can save lives. QPR is the most widely taught suicide prevention gatekeeper training in the world.

As I've heard multiple judges and attorneys say (and I can personally attest), being a lawyer is hard. It's also stressful. To reduce the stress and difficulties that sometime come with the profession, I try to decompress by spending time with family and friends, traveling, and woodworking. I'm hopeful that all of us can find healthy ways to decompress and reduce stress as members of this demanding profession that we chose.

Also, please remember that the Missouri Lawyers' Assistance Program (MOLAP) has services, free of charge, available to help members of The Missouri Bar, immediate family members who reside with them, and law students. And the Lawyers Living Well Special Committee will continue to work diligently to develop programs and resources for Missouri lawyers that facilitate our wellness and that of those who surround us.

### David McCain Jefferson City

*Editor's Note: If you or someone you know is struggling with mental health, help is available. In an emergency, dial 988 to speak with a professional on the National Suicide Prevention Lifeline. Lawyers and law students also have free, confidential counseling through MOLAP. Learn more at MoBar.org/MOLAP.*

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# TWO YEARS SINCE MMPA REFORM: HOW HAS IT CHANGED MISSOURI CONSUMER LITIGATION?

JENNIFER J. ARTMAN & CARY SILVERMAN<sup>1</sup>

AFTER SEVERAL YEARS OF HEARINGS, THE MISSOURI LEGISLATURE ENACTED SIGNIFICANT CHANGES TO THE MISSOURI MERCHANDISING PRACTICES ACT (MMPA) IN 2020. SENATE BILL 591 RESPONDED TO CONCERN WITHIN THE BUSINESS COMMUNITY THAT THE STATE'S CONSUMER PROTECTION LAW HAD LED TO MISUSE AND EXCESSIVE LITIGATION. NOW, NEARLY TWO YEARS AFTER THE AMENDMENTS TOOK EFFECT, WE CAN EXPLORE THE ADOPTED CHANGES AND THEIR IMPACT IN LITIGATION.

## What led to the 2020 reforms?

The MMPA was initially created to protect consumers by declaring any deception, misrepresentation, or unfair practice in connection with the sale of advertisement of any merchandise to be unlawful.<sup>2</sup> But as the Supreme Court of Missouri has recognized, the statute's language is "unrestricted, all-encompassing and exceedingly broad."<sup>3</sup> Application of this broad language devolved. "For better or worse, the literal words cover every practice imaginable and every unfairness to whatever degree."<sup>4</sup>

Between 2000 and 2009, there was a 678% increase in reported MMPA decisions.<sup>5</sup> While the MMPA was "initially celebrated as empowering consumers," critics noted that



"the expansion of the original statute tipped the balance from protecting consumers to encouraging excessive consumer litigation."<sup>6</sup> The growth of consumer litigation in Missouri impacted nearly every industry, including food and beverages, cosmetics, household goods, automobiles, and financial and technology services, among others.

Missouri became known as a hot jurisdiction for consumer class actions.

Particularly popular were lawsuits targeting "natural" food products, which alleged that the products did not qualify due to the presence of ingredients such as citric acid or the leavening agent sodium acid pyrophosphate; genetically modified corn or soy; or the product's processing.<sup>7</sup>

Also common were "slack fill" claims, which alleged that a consumer would expect a product to contain more than the amount accurately stated on the label simply due to the size of its packaging.<sup>8</sup> For example, these lawsuits argued over the amount of Mike and Ike and Hot Tamales that could fit in a box.<sup>9</sup> In addition, traditional personal injury complaints sometimes included MMPA claims, potentially as a means to seek recovery of attorneys' fees that would not otherwise be available; circumvent core elements of a claim or avoid defenses; or raise settlement demands. Plaintiffs used this strategy in product liability,<sup>10</sup> medical malpractice,<sup>11</sup> and other litigation with mixed results.

Excessive MMPA litigation impacted the reputation of Missouri's civil justice system. For example, a Washington Post headline read, "A man is suing Hershey for 'under-filling' his box of Whoppers," after a court denied a motion to dismiss an MMPA claim.<sup>12</sup> In that instance, the plaintiff admitted in a deposition that he had purchased the candy some 600 times over 10 years and was well aware of how much candy the boxes contained. A federal judge ultimately granted summary judgment for the chocolate maker, but only after two years of costly litigation.<sup>13</sup>

A few law firms that specialize in MMPA litigation filed most of these lawsuits,<sup>14</sup> often using template complaints. In some instances, the firms repeatedly relied on the same individual to serve as the representative plaintiff in lawsuits targeting different companies and products.<sup>15</sup>

## Six significant changes to the MMPA

After six years of legislative efforts to bring the MMPA back in line with the statute's original intention, Gov. Mike Parson signed Senate Bill 591 into law on July 1, 2020. This law has applied to all MMPA claims filed since Aug. 28, 2020.<sup>16</sup> The bill included long-sought amendments to the MMPA, as well as changes to Missouri punitive damages law that are beyond the scope of this article. There are six significant changes to the MMPA.

### *Adopting an objective and reasonable consumer standard*

The 2020 amendments addressed the absence of a requirement in the MMPA that the allegedly deceptive practice targeted in a lawsuit would mislead a reasonable consumer. Missouri courts had generally recognized this principle, but it was never explicit.<sup>17</sup> In 2018, however, the Court of Appeals indicated that a reasonable consumer's understanding of a term or whether a practice is unfair or deceptive is a question of fact that typically cannot be resolved any earlier than a motion for summary judgment.<sup>18</sup> Trial courts frequently cited that decision, *Murphy v. Stonewall Kitchen*, to deny motions to dismiss.<sup>19</sup> The inability to obtain dismissal at any early stage, the cost of prolonged litigation, and the intrusiveness of discovery pressured defendants to settle meritless MMPA claims.

As a result of the 2020 legislation, the MMPA now requires a plaintiff to prove that he or she acted "as a reasonable consumer would in light of all circumstances."<sup>20</sup> Critically, the amendment empowers judges to "dismiss a claim as a matter of law where the claim fails to show a likelihood that the method, act, or practice alleged to be unlawful would mislead a reasonable consumer."<sup>21</sup> This provision, which may be the most significant of the reforms, instructs courts to grant a motion to dismiss when it is objectively clear that no reasonable consumer would be misled by advertisement, label, or other practice targeted in the lawsuit. It gives courts the ability to reject absurd claims as well as those that are based on a technical regulatory compliance issue before businesses incur substantial litigation costs that pressure them into settlements. Courts elsewhere that have experienced a surge of consumer class actions – such as those alleging that consumers buy vanilla-flavored products expecting the flavor to derive solely from or predominantly by vanilla beans<sup>22</sup> or that "diet" sodas are weight-loss products<sup>23</sup> – have relied on the reasonable consumer doctrine to dismiss such claims.<sup>24</sup>

### *Requiring causation*

Prior to the 2020 reforms, MMPA plaintiffs did not necessarily have to show they relied upon (or were even influenced by) an alleged misrepresentation.<sup>25</sup>



Individuals who purchased a product might seek compensation even if they were unaware of the purportedly misleading statement or it played no part in their decision to purchase the product. The statute simply required the claim to be "in connection with" a sale or advertisement of merchandise.<sup>26</sup>

The MMPA now requires a plaintiff to show that the allegedly unfair business practice would "cause a reasonable person to enter into the transaction" that resulted in damages.<sup>27</sup> This language explicitly incorporates the element of causation into the MMPA, which, in appropriate circumstances, may require a consumer to show he or she relied on the targeted practice when deciding to purchase a product or service.

The new law also indicates that class representatives must establish both reasonableness and causation.<sup>28</sup> This provision advances the principle that a class member is not injured and has no grievance under the MMPA claim when that person "did not care" about the aspect of the product at issue or "knew about" the product's features, but "purchased . . . [the] products anyway."<sup>29</sup> In other words, it is not enough that a practice theoretically could have misled a consumer. The challenged practice must have actually led the plaintiff to purchase the product.<sup>30</sup>

### *Requiring definitive and objective evidence of damages*

The 2020 amendments more closely define recoverable damages in MMPA claims beyond simply authorizing courts to award "actual damages."<sup>31</sup> Plaintiffs must now establish "damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty."<sup>32</sup> This standard applies to class action representatives, while class members must "establish individual damages in a manner determined by the court."<sup>33</sup> These changes to the statute are intended to reduce the use of creative theories to seek damages where consumers did not experience an actual loss. They also preclude courts from simply presuming that because a class representative experienced a loss, others who purchased the product are automatically entitled to recovery.

### *Requiring a reasonable relationship between the judgment and fees*

The new law does not alter the availability of attorneys' fees in MMPA class action litigation, but it requires the fees awarded to bear a "reasonable relationship" to the amount of the judgment (or, for equitable relief, to the time expended).<sup>34</sup> Prior to this legislation, prevailing plaintiffs' lawyers could seek substantial amounts for fees in MMPA litigation alleging trivial claims or nominal losses.

The 2020 amendment is intended to ensure that fee awards to lawyers do not dwarf the money set aside for consumers who claim to have experienced a financial loss. It should also preclude court approval of class action settlements in which consumers are slated to receive worthless injunctive relief – such as minor labeling changes, added disclaimers, or commitments of quality control improvements – to justifying a fee award in the hundreds of thousands of dollars.

## *Prohibiting misuse of the MMPA in personal injury lawsuits*

The 2020 law adds a provision to the MMPA that does not permit use of the consumer protection statute to recover damages for personal injury or death when a claim is available under Chapter 538, which governs medical malpractice litigation.<sup>35</sup> Consumer protection laws are intended to provide a remedy for financial losses that result from a consumer being misled when purchasing a product or service. They are not intended to provide a means to recover for physical injuries, which are addressed through tort law.<sup>36</sup> As discussed earlier, in some cases, however, personal injury complaints have included MMPA claims. This strategy may be used to attempt to circumvent traditional requirements for showing negligence, a product defect, or that a product caused a physical injury to avoid federal preemption when targeting the safety or labeling of a federally approved product, or to seek attorney's fees that are not otherwise recoverable.<sup>37</sup> The new law takes a step in addressing this use of the consumer protection law by unequivocally prohibiting the inclusion of MMPA claims in medical malpractice actions. Courts should apply the same principle in other personal injury and wrongful death cases.

## *Clarifying the statute of limitations*

Finally, the new law clarifies when a claim accrues under the MMPA for purposes of applying the statute of limitations. Specifically, a cause of action accrues on the date of the purchase or lease that forms the basis of the MMPA claim, or when the plaintiff first receives notice of the allegedly unlawful practice.<sup>38</sup> This codifies a standard expressed in case law, providing consistency for all litigants.<sup>39</sup> It does not alter the amount of time plaintiffs have to file MMPA claims, which remains subject to the state's generally applicable five-year statute of limitations.<sup>40</sup> It should, however, reduce attempts to stretch Missouri's five-year statute of limitations in litigation involving consumer goods and services, which is already longer than the time provided by most state consumer protection laws.<sup>41</sup>

## **Effect of the 2020 amendments on litigation**

These changes to the MMPA have applied to all cases filed on or after Aug. 28, 2020. Missouri courts and federal courts interpreting the law have issued few reported decisions in MMPA cases filed since that time. The initial indications suggest that some courts may not be aware of the amendments or, nevertheless, continue to apply pre-2020 case law when deciding motions to dismiss.

For example, in a complaint filed about two months after the 2020 amendments took effect, plaintiffs alleged that consumers were misled to believe that malt beverage products named "Margarita," "Mojito," "Sangria," and "Rosé" contained tequila, rum, or wine. The U.S. District Court for the Western District of Missouri relied upon the 2016 *Murphy v. Stonewall Kitchen* holding that whether a reasonable consumer would be deceived by a product label is generally a question of fact that cannot be resolved on a motion to dismiss.<sup>42</sup> Nor did the federal court, in its May 2021 ruling, acknowledge the 2020 amendments when

evaluating whether the plaintiff had adequately pled that the alleged misrepresentation was material to a reasonable consumer's decision to purchase the product or that consumers experienced an ascertainable loss.<sup>43</sup>

Similarly, when the U.S. District Court for the Eastern District of Missouri declined to dismiss a claim alleging that the marketing of certain personal care products as "natural" violated the MMPA, its ruling did not refer to the 2020 amendments.<sup>44</sup> That complaint was filed three months after the amendments took effect. There, the court also relied upon *Murphy's* now-repudiated holding.<sup>45</sup> The federal court did not require the complaint, which alleged the plaintiff paid a premium due to its natural labeling (even as she used a coupon for 40% off),<sup>46</sup> to indicate "damages with sufficiently definitive and objective evidence to allow the loss to be calculated with a reasonable degree of certainty," as the 2020 amendments require.

An August 2021 ruling from the same federal court recognized the wording of the amended MMPA permitting a court to dismiss a claim on the basis that a reasonable consumer would not be misled as a matter of law while also quoting *Murphy's* holding that whether a practice is unfair or deceptive is a question of fact.<sup>47</sup> In that instance, the court denied a motion to dismiss a claim alleging that hand sanitizing products had the ability to kill 99.99% of germs.

At least one court has applied the 2020 amendments to dismiss an MMPA claim that was tacked onto a malpractice lawsuit. That lawsuit stemmed from a custody modification proceeding in which a mother became dissatisfied with a court-appointed guardian ad litem, reunification therapist, and forensic psychologist involved in the custody case.<sup>48</sup> The trial court dismissed the claims because the 2020 amendments to the MMPA, which were in effect when the plaintiff filed her lawsuit, "specifically prohibit plaintiffs from using the MMPA as a vehicle to bring claims that should be filed under Missouri's malpractice statute."<sup>49</sup> The plaintiff also did "not allege that the Defendants' unlawful practices caused her to enter into the transactions at issue," failing to satisfy another element of the 2020 law.<sup>50</sup> "In fact," the trial court observed, the plaintiff was "ordered by the Court to use the Defendants' services."<sup>51</sup> The Missouri Court of Appeals-Eastern District affirmed, holding that the mother's failure to challenge the trial court's finding that the 2020 amendments precluded her claim was fatal to her appeal.<sup>52</sup>

## **Conclusion**

The 2020 legislation made key changes to the MMPA that are intended to ensure that the statute continues to protect consumers from deceptive practices while curbing elements of the law that facilitated and made it difficult to dismiss spurious claims. There are few court rulings applying the amended statute, possibly due to the pandemic or a tendency to settle claims before they reach a ruling. The limited decisions available suggest that courts have not yet fully recognized the significance of the changes. Until that occurs, Missouri may remain a hotbed for consumer class actions.

## Endnotes



Jennifer Artman



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1 Jennifer Artman is a partner in Shook, Hardy & Bacon L.L.P. in Kansas City. Cary Silverman is a partner in the firm's Washington, D.C.-based Public Policy Group. Both testified for the American Tort Reform Association in support of amendments to the MMPA during a multi-year effort toward enactment.

2 Section 407.020, RSMo (2016).

3 *Ports Petroleum Co. of Ohio v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001); see also *Lane House Constr., Inc. v. Triplett*, 533 S.W.3d 801 (Mo. App. E.D. 2017) (quoting same).

4 *Ports Petroleum*, 37 S.W.3d at 240.

5 See Joanna Shepherd, *The Expanding Missouri Merchandizing Practices Act* 13 (Am. Tort Reform Found. 2014). [http://www.judicialhellholes.org/wp-content/uploads/2017/02/103114\\_MMPAreport.pdf](http://www.judicialhellholes.org/wp-content/uploads/2017/02/103114_MMPAreport.pdf).

6 *Id.* at 12.

7 See Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. CIN. L. REV. 1, 7 n.50 (2018) (compiling “natural” claims filed by St. Louis-based Armstrong Law Firm).

8 See Silverman, 86 U. CIN. L. REV. at 7 n.52 (documenting slack fill cases filed by

Rolla, Missouri-based Steelman, Gaunt & Horsefield).

9 See Mike Curley, *Mike and Ike Slack-Fill Suit Dismissed After Deal Reached*, LAW360, Nov. 14, 2018 (discussing private individual settlement of *White v. Just Born Inc.*, No. 2:17-cv-04025 (W.D. Mo.) after the court denied class certification).

10 For example, in product liability actions, MMPA claims have alleged that a manufacturer generally marketed a product as safe and effective as an alternative to showing that a product is defective or to avoid the potential for federal preemption of state tort claims targeting FDA-approved product labeling or designs. See, e.g., *Crocker v. Allergan USA, Inc.*, 4:18 CV 1288 DDN, 2018 WL 7635923 (E.D. Mo. Dec. 7, 2018), report and recommendation adopted, 4:18-CV-1288-SNLJ, 2019 WL 1242680 (E.D. Mo. Jan. 24, 2019) (remanding a case alleging issues with respect to use of a Lap-Band medical device, where allegations included negligent failure to warn, negligence, negligence per se, negligent misrepresentation, strict product liability, fraudulent concealment, and a violation of the MMPA); *Moore v. Bayer Corp.*, 4:18 CV 262 CDP, 2018 WL 4144795 (E.D. Mo. Aug. 29, 2018) (dismissing a complaint alleging 14 claims of negligence, product liability, fraud, warranty, and violation of the MMPA, seeking recovery for personal injuries arising out of being prescribed and implanted with a permanent birth control, following a personal jurisdiction challenge); *Zaccarello v. Medtronic, Inc.*, 38 F. Supp. 3d 1061, 1071-72 (W.D. Mo. 2014) (finding plaintiff's manufacturing, design, failure to warn, and negligence per se claims related to medical device preempted, but allowing MMPA claim alleging manufacturer misrepresented or omitted facts in connection with the sale or advertisement of the device to proceed); *Plubell v. Merck & Co.*, 289 S.W.3d 707, 714-15 (Mo. App. 2009) (affirming certification of class action brought under MMPA alleging manufacturer failed to disclose the risks of Vioxx without the need for plaintiffs to show individual reliance, causation, or loss).

11 For instance, in *Sherman v. Mo. Prof'l's Mutual Physician*, 599 S.W.3d 207 (Mo. App. W.D. 2020), a plaintiff initially sued her doctor, his practice, and his wife for malpractice and general negligence after an infection developed following a cosmetic surgery. The court dismissed the malpractice claims after the plaintiff failed to file the required affidavit of merit. See *id.* at 210. The plaintiff then sought leave to amend the complaint to drop the malpractice claim and add an MMPA

claim against the doctor and his wife, alleging that the doctor's wife was misrepresented as a licensed medical professional, which led to a coverage dispute between the doctor and his insurer. See *id.* at 211, 216. The Court found coverage of the MMPA claim barred by the fraud exclusion to the policy and that the insurer had no duty to defend the doctor after dismissal of the medical malpractice claim. See *id.* at 216-17; see also *Butala v. Curators of Univ. of Missouri*, WD 82810, 2020 WL 1433401 (Mo. App. W.D. Mar. 24, 2020), transferred to Mo. S. Ct., 620 S.W.3d 89 (Mo. banc 2021) (noting MMPA claims by Mizzou BioJoint Center patients against both Curators of the University of Missouri and individual doctor defendants).

12 Abha Bhattacharai, *A Man is Suing Hershey for ‘Under-Filling’ His Box of Whoppers*, WASH. POST, May 25, 2017.

13 *Bratton v. Hershey Co.*, No. 2:16-CV-4322-C-NKL, 2018 WL 934899, at \*1 (W.D. Mo. Feb. 16, 2018).

14 See Silverman, 86 U. CIN. L. REV. at 7.

15 See *id.* at 9 (demonstrating the repeated use of Jason Allen, Erika Thornton, Lois Bryant, Julie George, and Tonya Kelly as class representatives for MMPA claims).

16 Section 510.262, RSMo (2016).

17 *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 310-11 (Mo. App. E.D. 2016) (reversing dismissal of claim alleging cupcake mix was not natural because it contained sodium acid pyrophosphate, a common leavening agent disclosed on the ingredient list).

18 See *id.* at 312.

19 See, e.g., *Hawkins v. Nestle USA Inc.*, 309 F. Supp. 3d 696, 704 (E.D. Mo. 2018); *White v. Just Born, Inc.*, 2017 WL 3130333, at \*7 (W.D. Mo. July 21, 2017); *Bratton v. The Hershey Co.*, 2017 WL 2126864, at \*8 (W.D. Mo. May 16, 2017).

20 Section 407.025(1)(2)(a), RSMo (2016).

21 Section 407.025(1)(2), RSMo (2016).

22 See, e.g., *Barreto v. Westbrae Nat., Inc.*, 518 F. Supp. 3d 795, 804 (S.D.N.Y. 2021) (soymilk); *Steele v. Wegmans Food Mkts., Inc.*, 472 F. Supp. 3d 47, 50 (S.D.N.Y. 2020) (ice cream); *Cosgrove v. Blue Diamond Growers*, 2020 WL 7211218, at \*4 (S.D.N.Y. Dec. 7, 2020) (almond milk); *Richardson v. Only What You Need, Inc.*, 2020 WL 6323775, at \*5 (S.D.N.Y. Oct. 27,



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2020) (protein beverage).

23 See *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019); *see also Excevarria v. Dr Pepper Snapple Group, Inc.*, 764 Fed. App'x 108 (2d Cir. 2019); *Manuel v. Pepsi-Cola Co.*, 763 Fed. App'x 108 (2d Cir. 2019).

24 See also *Harris v. Mondelez Global LLC*, 2020 WL 4336390, at \*2-3 (E.D.N.Y. July 28, 2020) (reasonable consumers would not interpret Oreo cookies made with “real cocoa” as unprocessed cocoa); *Troncoso v. TGI Friday's Inc.*, 2020 WL 3051020, at \*7 (S.D.N.Y. June 8, 2020) (reasonable consumers do not expect bags of TGI Friday's Potato Skin snack chips to be similar in taste or substance to a restaurant appetizer); *Critch v. L'Oréal USA, Inc.*, 2019 WL 3066394, at \*5 (S.D.N.Y. July 11, 2019), *aff'd*, 959 F.3d 31 (2d Cir. 2020) (reasonable consumers do not expect a pump on a cosmetics bottle to dispense every ounce of its contents); *Fermin v. Pfizer Inc.*, 215 F. Supp. 3d 209, 212 (E.D.N.Y. 2016) (reasonable consumers are not led to believe that a bottle of Advil has more pills than indicated on the label based on the size of the container).

25 See, e.g., *Plubell*, 289 S.W.3d at 714 (finding the MMPA does not require consumer reliance on an unlawful practice or that an unlawful practice caused a purchase).

26 Section 407.020(1), RSMo (2016).

27 Section § 407.025(1)(2)(b), RSMo (2016) (emphasis added).

28 Section 407.025(5)(1), RSMo (2016) (requiring a class representative to act “as a reasonable consumer would in light of all circumstances” and that the practice would “cause a reasonable consumer to enter into the transaction that resulted in damages”).

29 *State ex rel Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 862 (Mo. banc. 2008) (finding lower court abused discretion in certifying class alleging that Coca-Cola's marketing misled consumers to believe fountain Diet Coke has the same sweetener as bottled Diet Coke because the class “could include millions who were not injured and thus have no grievance” under the MMPA); *see also White v. Just Born, Inc.*, 2018 WL 3748405, at \*6 (W.D. Mo. Aug. 7, 2018) (applying Coca-Cola to deny class certification of slack fill claim targeting candy boxes because class would include members who knew how much space was in the box but continued to purchase the product).

30 See *Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008) (“[C]ausation is a necessary element of an MMPA claim.”).

31 Section 407.025(1)(1), RSMo (2016).

32 Section 407.025(1)(2)(c), RSMo (2016).

33 Section 407.025(5)(3), RSMo (2016).

34 Section 407.025(5)(3), RSMo (2016).

35 Section 407.025(3), RSMo (2016).

36 *Craft v. Philip Morris Cos., Inc.*, 190 S.W.3d 368, 380 (Mo. App. E.D. 2005).

37 See *supra* notes 9 and 10.

38 Section 407.025(4), RSMo (2016).

39 See, e.g., *Ball v. Friese Const. Co.*, 348 S.W.3d 172, 179 (Mo. App. E.D. 2011).

40 See *Boulds v. Chase Auto Finance Corp.*, 266 S.W.3d 847 (Mo. App. E.D. 2008) (applying Mo. Rev. Stat. § 516.120).

41 See Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 30 (2006) (finding most statutes of limitations are in the two to three-year range).

42 *Browning v. Anheuser-Busch, LLC*, No. 20-cv-00889, 2021 WL 1940645, at \*2 (W.D. Mo. May 13, 2021).

43 See *id.* at \*3-4.

44 See *Early v. Henry Thayer Co.*, No. 4:20-cv-01678, 2021 U.S. Dist. LEXIS 136746, \*37-40 (E.D. Mo. July 22, 2021).

45 *Id.* at 40.

46 *Id.* at 41-42.

47 *Macormic v. Vi-Jon, LLC*, No. 4:20-cv-1267, 2021 WL 6119166, at \*6 (E.D. Mo. Aug. 6, 2021).

48 *Tolu v. Reid*, 639 S.W.3d 504 (Mo. App. E.D. 2021).

49 *Id.* at 515.

50 *Id.* (emphasis added).

51 *Id.*

52 *Id.* at 534-35. Even if the plaintiff was able to overcome this and other obstacles, the Eastern District found that the appointment of a GAL did not constitute “purchase” of services by the mother, “let alone for ‘personal, family or household purposes’ for purposes of asserting an MMPA claim.” *Id.* at 535.



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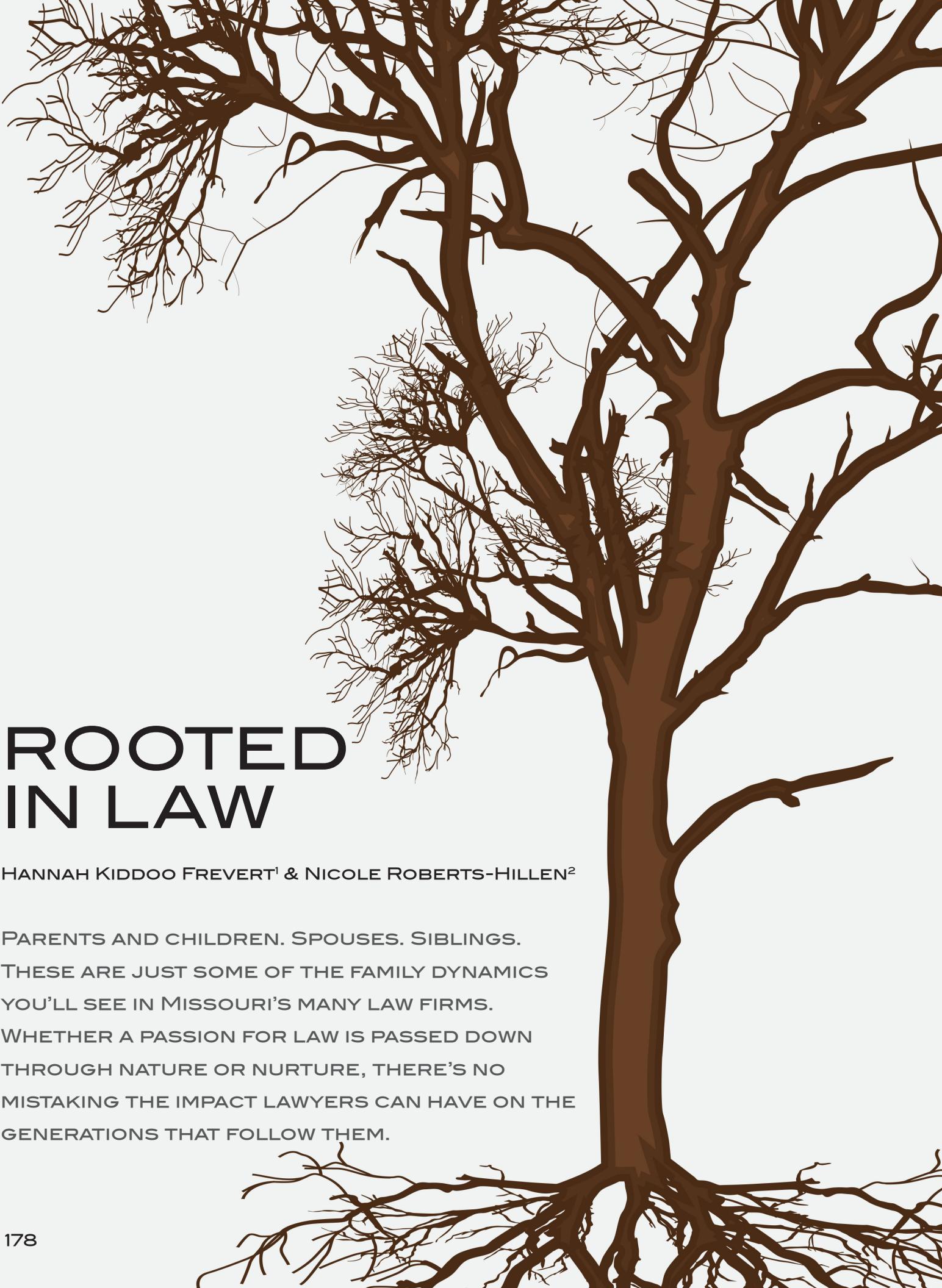
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The Missouri Bar's Lawyers Living Well Special Committee was established in 2021 to evaluate and provide direction in areas surrounding lawyer wellness. During The Missouri Bar Board of Governors' May 13 meeting, committee chairs Athena Dickson, Whitney Dunn, and Erica Mynarich presented the special committee's report, which describes its work over the past year to promote lawyer well-being.

The committee maintains three working groups that each had recommendations on how to improve lawyer wellness in the areas of education, stigma, and policy. Read the special committee's recommendations and report at MoBar.org/Guidelines-Reports.



# ROOTED IN LAW

HANNAH KIDDOW FREVERT<sup>1</sup> & NICOLE ROBERTS-HILLEN<sup>2</sup>

PARENTS AND CHILDREN. SPOUSES. SIBLINGS.  
THESE ARE JUST SOME OF THE FAMILY DYNAMICS  
YOU'LL SEE IN MISSOURI'S MANY LAW FIRMS.  
WHETHER A PASSION FOR LAW IS PASSED DOWN  
THROUGH NATURE OR NURTURE, THERE'S NO  
MISTAKING THE IMPACT LAWYERS CAN HAVE ON THE  
GENERATIONS THAT FOLLOW THEM.

# LEAVING A LEGACY

Carla Fields Johnson, Wesley Fields, and Denise Fields always knew their father, Taylor Fields, was an outstanding lawyer. But when the three decided to follow in their dad's footsteps and enter the legal field, the pride they felt continued to grow.

"As much as I admired him for the lawyer he was," Denise says, "I had that much more admiration for him when I started working for him."

Taylor was a well-known Kansas City lawyer who founded Fields & Brown, where he focused on employment law and labor relations for more than 30 years. He graduated from the University of Missouri-Kansas City School of Law and was admitted to The Missouri Bar in 1971. For his commitment to and strides in the legal profession, he was recognized by several local bar associations and inducted into the National Bar Association Hall of Fame. Taylor passed away July 28, 2021, at 77 years old.

Taylor's children emulated his career path. Carla was admitted to The Missouri Bar in 1995, Wesley in 1998, and Denise in 2007. Carla and Denise worked with their father at Fields & Brown, where Carla is now partner and Denise is senior associate. Wesley has been at Bryan Cave Leighton Paisner for nearly 25 years and is currently managing partner of the Kansas City office.

"I'm proud of the fact that we are a family of lawyers, but I'm also proud of his legacy, not only to us but to the Kansas City community and the bar association," Wesley says.

The Fields siblings focus on various practice areas – Carla enjoys education, insurance practice, and workers' compensation defense; Wesley focuses on banking and health care legal work; Denise pursues labor and employment, insurance practice, and education litigation.

While each ultimately pursued law, they said it wasn't

because their dad pressured them into the profession. Denise jokes that the only pressure they felt was for one of them to attend University of Missouri, where Taylor received his bachelor's degree in chemical engineering. Denise fulfilled that hope, graduating from Mizzou with a bachelor's degree in journalism.

Instead of encouraging them to become lawyers, Taylor led by example – showing his three children why being a lawyer is fulfilling. Carla, Wesley, and Denise recall being awestruck by their dad's involvement in the community, as well as his speaking and writing skills.

Despite being the youngest, Denise was the first to know her career path.

"I remember being in elementary school and knowing I wanted to be a lawyer, and I never wavered from it," she says.

Wesley, on the other hand, initially planned to pursue a medical degree – before realizing the operating room wasn't a right fit for him. The idea of becoming a lawyer didn't come to fruition until he was in college and started taking classes that were in line with the concepts taught in law school.

Carla says she never seriously considered a career outside of law. After attending law school, she immediately joined Taylor at Fields & Brown and remembers having a difficult time working with her father at first – finding a balance between being his daughter and his employee. Overtime, the two were able to separate work from home, she says.

It created a great experience since Carla felt like she could learn without pressure or fear of failure.

"As a young lawyer, you're going to make mistakes and there's always a fear of the repercussions of making decisions that may not be the right decision, but I never had to deal with that," she says. "I wasn't going to be ridiculed or treated in a way that wasn't helpful to my growth."

"It was very important to him that we grew as lawyers," Carla adds, fighting back tears.

One valuable lesson Wesley says he learned from his dad was the importance of nurturing and growing relationships with clients and other lawyers. But he can also recall some more humorous lessons. On one of Wesley's first days at Bryan Cave Leighton Paisner, he arrived at the office at 7:30 a.m. and was eagerly looking for work assignments. He remembers calling Taylor and being surprised that his father wasn't in the office that early.

"Dad laughed and said, 'You have a long way to go,'" Wesley says with a smile. "Now (25 years later), I can't think of too many days when I've gotten to the office that early."

Denise joined Fields & Brown



several years after graduating law school and remembers key moments, like when she tried a case with her dad and watched him argue before the Supreme Court of Missouri.

"Those are things that you just don't normally get to experience with your dad," she says, wiping away tears. "I really do feel like my dad was the smartest person I know."

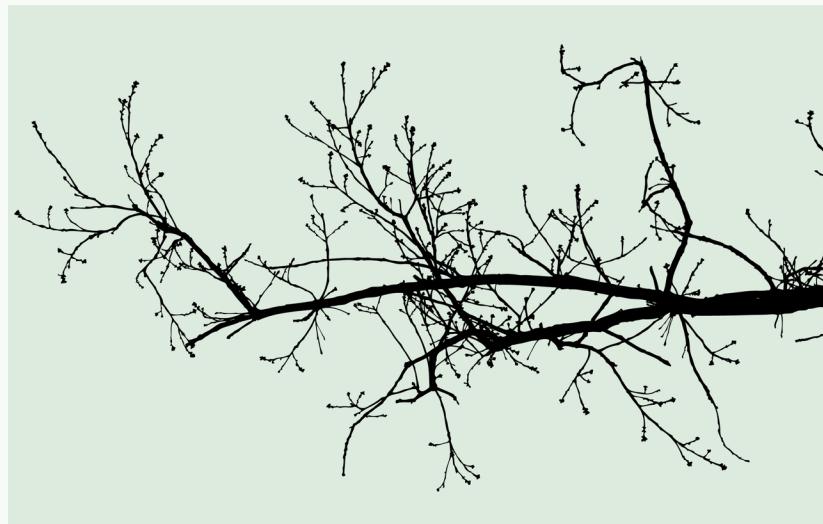
Since Taylor's passing, Carla says she sees constant reminders of him around the office, and now better understands why he approached certain managerial tasks as he did. She praises her dad for navigating the legal industry and managing a law office, especially considering what the landscape of the legal industry looked like in the 1970s and 1980s.

When Taylor entered the legal profession in 1971, there were few Black lawyers and even fewer Black-owned law firms. Having institutional clients as a Black-owned law firm was almost unheard of, Wesley says, but his father saw the value and focused on that when founding Fields & Brown in 1987.

Taylor was a well-known civil rights trailblazer in the Kansas City area. He volunteered on the UMKC Alumni Association Board of Directors to help increase the number of minorities attending law school. He served on numerous community boards – including as chairman of the Black Archives of Mid-America Board of Directors –

and founded Harmony in Grandview, an organization dedicated to promoting racial and ethnic harmony.

"Where I am today, my sisters are today, other African-American lawyers are today in terms of the client mix that we have, that to me is what stands out more than anything – the evolution of the practice of law for an African-American lawyer in Kansas City," Wesley says, adding he is proud of his dad's impact on the legal community and was excited about the future of the profession. - NRH



## THREE GENERATIONS

Scott Pettit remembers feeling excited and overwhelmed when he first joined his father, Walter Pettit Jr., at the family business, Pettit Law Firm, in 1985. He took note of that feeling when his son, James Pettit, joined the firm 28 years later. Scott made it his goal to work closely with James his first few years until James felt comfortable in the legal profession. Sitting in the meeting room at Pettit Law Firm nearly a decade later, Scott praised his son for his talent and professionalism.

"I'm not worried at all about you handling all of these cases. You're doing a great job," Scott says to James, who smiles and nods his appreciation.

The moment is the epitome of Pettit Law Firm's 65-year-old foundation – trust, communication, and a welcoming family atmosphere.

In 1957, Walter moved to Aurora to join forces with litigation lawyer J. Hal Moore and started practicing law in the small town. Over the next six decades, Walter grew the law firm – now known as Pettit Law Firm. During that time, he

has mentored countless lawyers, including his son and grandson.

Scott and James joined Pettit Law Firm shortly after graduating from law schools in 1985 and 2013. The firm has grown to also include one associate attorney and five support staff members, one of those employees being Scott's wife.

"I always tell people I wasn't smart enough to get a job outside of family, but I also wasn't dumb enough to either,"



James says with a laugh. "I really enjoy working where we are and it's a lot of fun."

While James has only officially been with the firm for about nine years, he jokes that he's worked there for 25 years, having grown up living a few houses down from the office.

"I walked across the neighbors' backyards daily to steal snacks out of the breakroom for a long time," he says. "I remember at a young age changing trash bags, doing literally [every] job in the business, all the way now to an attorney."

From an early age, James heard community members compliment his dad and grandfather, and he was proud of his family's impact. The pride flourished into a desire to become a lawyer.

"Seeing the number of people you can help and the real impact you can have on people on a daily and consistent basis pays dividends for good feelings," James says, as Scott nods in agreement.

Unlike James, the legal profession wasn't as set in stone for Scott. He initially wanted to follow in his grandfather's footsteps and enter the banking industry. After some encouragement from Walter, Scott took tests for two graduate school fields – banking and law. Achieving higher scores on the LSAT, Scott's future career in the legal profession was sealed.

Since Scott joined 37 years ago, the law firm has evolved dramatically as each lawyer focuses on different areas of law. In his early years at the law firm, Scott worked on probate, estate planning, real estate, and domestic issues. He now practices in employment, workers compensation, and personal injury. After Walter semi-retired a couple of years ago, James started taking on his areas of practice, like probate and estate planning. He also does juvenile work, business transactions, real estate, and civil litigation.

Even in semi-retirement, Walter routinely offers guidance to James and Scott from the comforts of his home or during family dinners. And the only distance between Scott and James is a short walk down the hallway, making brainstorming or advice sessions common.

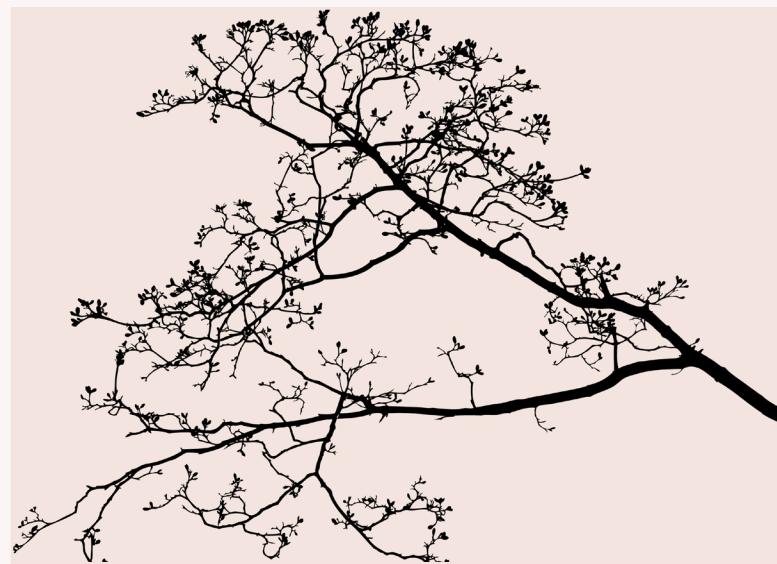
Gaining that institutional knowledge from lawyers, let alone family members, is invaluable, James and Scott say.

"It's just been a really good nurturing environment for me for the 37 years I've been doing it," Scott adds, noting he strives to continue to foster that encouragement for his son and other staff.

Creating and maintaining a family atmosphere isn't always easy, but the Pettits have found a way to make it look effortless. The Pettits feel comfortable being transparent with each other about work or life issues and understand each other's work ethic. They also know how to handle disagreements without it becoming personal. While it can be tempting to put disputes on an emotional level – especially when it comes to family – it's important to remain level-headed and enter disagreements with an open mind and understanding, James says.

The key is constant communication and trust, James and Scott add.

"Mom and dad were really good about making sure we always knew we were on the same team, whether it was business or doing yard work," James says. - NRH



## FULL CIRCLE

Gary and Anita Robb have practiced law for three decades. As a husband-and-wife team, they've built up Robb & Robb, a Kansas City firm focusing on aviation law that's nationally recognized and sought out by clients from across the country.

"For 36 years, I was able to share a passion and a journey with my wife, and law partner, and best friend, and I thought I had reached a pretty high level of contentment and gratitude and happiness," Gary says. "But I had no idea."

On March 16, 2020, just as a global pandemic was putting the world on pause, two more Robbs joined the team: Gary and Anita's son, Andrew, and Andrew's wife, Brittany – both direct from New York City.

While this might seem like a natural transition, it was all but expected. For starters, Gary and Anita never pressured Andrew to pursue a career in law.

"We never suggested, or implied, or hinted our kids should become lawyers," Anita says.

And even once Andrew declared an interest in the

profession, there was never a promise he'd be guaranteed a job at the family firm. When friends would see the Robbs out at dinner, they'd inquire as to when Andrew was coming home to take over. Those asking were met with a laugh and told that Andrew was heading to New York. And that's exactly where he went, along with Brittany, after law school.

But as they settled in at larger firms in the Big Apple, they realized they were ready to return to their Missouri roots.

"It just didn't fit with the people that we were," Andrew says of the situation. And so, in the fall of 2019, they approached Gary and Anita about joining Robb & Robb, a proposal the founders welcomed with open arms.

Today, nearly three years later, Anita says she can't imagine it any other way.

"Now that Brittany and Andrew have come along, we actually like to say we don't know how we functioned for 36 years without them," Anita says. "It's really a mystery to us."

There's no average day or week at Robb & Robb, just the promise of high-stakes, complex litigation.

Many times, the Robbs are working with families facing major, life-changing tragedies spurred by aviation incidents. The Robbs believe that having the love of a family wrapped in their advocacy and practice allows them to better connect with and relate to clients.

"We are a family law firm that helps families. There is something really powerful in that," Brittany says.

Despite being the only Robb not tied to the firm by blood, the bond Brittany shares with Gary and Anita is unmistakable, likely because the Robbs have known Brittany since she was 15, when she and Andrew first met during high school. And though some might guffaw at the thought of working with their spouse or extended family, all these years later, Brittany notes that she thinks of Gary and Anita as "in-loves" rather than "in-laws."

Such a unique situation provides for unique client solutions. Because the Robbs spend so much time

together, they note there's really no separation between the personal and professional – and they wouldn't want it any other way.

"Some of the best ideas come out of the more informal, personal interactions," Brittany says.

While most families might chat about weather, sports, or politics at get-togethers, the Robb family often discusses work. That might mean forming strategy while strolling around the neighborhood or having a breakthrough idea over Sunday breakfast.

"We talk about our cases constantly." Andrew says.

"When you're not tied to the billable hour, we end up talking about cases with a lot more freedom."

For Gary and Anita, there's a distinct joy in seeing Andrew and Brittany develop in the profession.

"What I have enjoyed as much as anything has been seeing their growth," Gary says. "We're astounded at what great lawyers they are becoming."

"They are just as passionate and invested in it as we are," Anita adds.

And viewing Gary and Anita through a professional lens has offered Andrew a new way of seeing his parents.

"Beyond just being a family law firm, we're friends," he says.

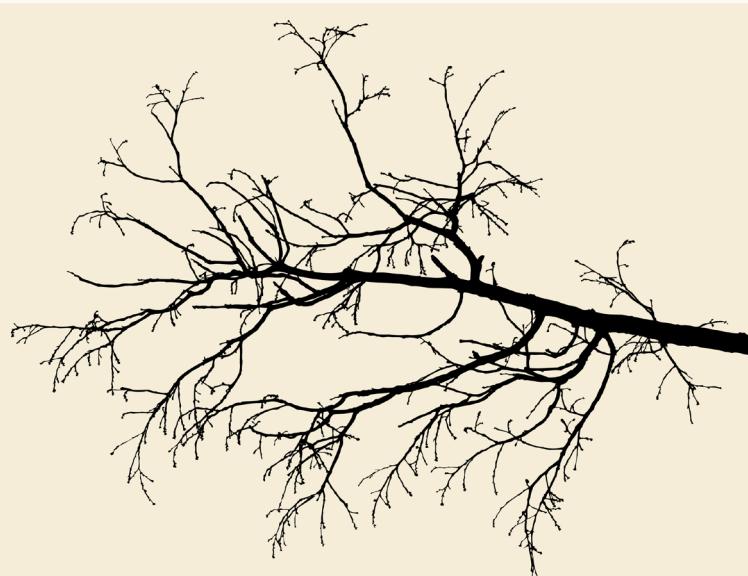
Of course, no family or firm is without its disagreements.

"We're all very big personalities," Anita says. But the Robbs actively work to share various approaches and information in a healthy way, and, ultimately, the different ways they approach work complement each other. As Anita notes: "It doesn't matter whose idea it is – it just matters that we get to the right place." - HKF 

#### Endnotes

1 Hannah Kiddoo Frevert is editor of the Journal and assistant director of communications at The Missouri Bar.

2 Nicole Roberts-Hillen is assistant editor of the Journal and communications coordinator at The Missouri Bar.



## DISCIPLINARY ACTIONS

### SUSPENSIONS

May 6, 2022 Kirsten Alexis Staples  
#64179  
9528 W. Aspen Glow Dr.  
Las Vegas, NV 89134

### PROBATIONS

April 5, 2022 Nancy J. Fisher  
#62474  
1658 E. St. Louis  
Springfield, MO 65802

June 2, 2022 Richard Wayne Johnson  
#52416  
PO Box 7529  
Kansas City, MO 64116

June 14, 2022 Syreeta L. McNeal  
#60207  
3610 Buttonwood Dr., Ste. 200  
Columbia, MO 65201

### REINSTATEMENTS

May 11, 2022 Mark D. Murphy  
#33698  
10801 Mastin St., Ste. 790  
Overland Park, KS 66210-1775

### DISBARMENTS

April 19, 2022 Shannon Peterson  
#69532  
4717 Grand Ave., Ste. 300  
Kansas City, MO 64112

May 11, 2022 James Edward Gore  
#58522  
4005 NW 73rd St.  
Kansas City, MO 64151

June 28, 2022 Corey Michael Swischer  
#52013  
110 N. Cedar St., PO Box 484  
Nevada, MO 64772

July 5, 2022 Molly Marie Metza  
#68581  
532 W. Hickam Dr.  
Columbia, MO 65203-9143

July 7, 2022 Richard Blong Dempsey Jr.  
#46671  
PO Box 8309  
St. Louis, MO 63132



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# ASK AWAY! TECH Q&A FOR MISSOURI LAWYERS

JEFFREY R. SCHOENBERGER<sup>1</sup>

**IN SPEAKING WITH MISSOURI LAWYERS DURING THE 2022 SOLO & SMALL FIRM CONFERENCE IN JUNE, SOME COMMON QUESTIONS EMERGED, FROM WHICH EVERYONE CAN BENEFIT. BELOW ARE SIX FREQUENTLY ASKED QUESTIONS, ALONG WITH MY TYPICAL ANSWERS.**

**Question 1:**  
**My clients are comfortable with purely virtual meetings and communication, but I want to make sure I'm corresponding with them securely.**

**Answer:** For email, review the email encryption paper on the Missouri Bar's online Practice Management center. I use a version of Microsoft 365 for Business (E3) that simplifies encryption for the sender and receiver. Another good option is Identillect, which offers plugins for Outlook and Gmail. Missouri lawyers can even receive a discount.

For text messaging, options include the prominent WhatsApp and smaller apps like Threema, where you establish an encrypted channel between two phones by showing each other one-time, app-generated QR codes.

Another option is the new Clio for Clients app, which allows a lawyer and client to message and exchange documents – the lawyer via the Clio website and the client via a mobile app that includes a document scanner. Clio also offers a discount to Missouri lawyers via The Missouri Bar.

**Question 2:**  
**I see value in paperless, accessible-anywhere files. If I don't have a scanner, what should I get? And, once I've scanned my documents, how do I find the one(s) I'm looking for?**

**Answer:** If you're seeking a desktop scanner, look to the sheet-fed and flatbed recommendations in the Practice Management Forms Bank on connect.MoBar.org. There are also portable printer and scanner recommendations. My default desktop recommendation is the ScanSnap iX1600. It works over Wi-Fi, scans up to 50 sheets at a time, and can

automatically upload the scan to cloud storage providers. If you need mobility, try using a smartphone-based scanner app. Most smartphones have incredible cameras so a standalone scanning app, like Readdle's Scanner Pro (iOS only) or SwiftScan (iOS and Android), often satisfy. Additionally, an increasing number of apps – like Apple's Notes, Dropbox, and Clio for Clients – have document scanning tech built into them.

For finding the documents, I suggest two steps. First, use the resource on "Managing Your Documents Without a DMS" in the Forms Bank for guidance on good folder organization and file naming. Second, utilize a search utility more powerful than anything built into Windows or macOS. For Windows users, I recommend X1 Search (\$79 per year). For Mac users, I recommend HoudahSpot (\$34). Both programs let you build "stacked searches" like: all Word documents, edited in the last year, containing the phrase 'summary judgement' in the document text.

**Question 3:**  
**How do I protect my data from ransomware?**

**Answer:** Suffering a ransomware attack means your computer is infected with a virus that encrypts your files. The attackers then offer to sell you the decryption key. Malware protection and backups are the best defenses. Enable the built-in firewall software on Windows or macOS. Additionally, for Windows, make sure the protections available in Virus & Threat Protection Settings are active. XProtect, macOS' analogous feature, is always active. Find more details about using "AntiVirus and Antimalware Software" in the Forms Bank.

**Question 4:**  
**What tech do I need to be able to work on-the-go?**

**Answer:** I don't advise anyone to inflict work on their vacation. But, if you want a change of scenery, like working in a park or at a client's location, I recommend: 1) an iPad Air with Magic Keyboard and Apple Pencil (\$749 for the cellular iPad; \$300 for the Magic Keyboard; and \$130 for the Apple Pencil); 2) comfortable headphones; and 3) an app that turns your smartphone's camera into a document scanner (see Question 2).

### Question 5:

**What resources are available to keep up on legal technology happenings?**

**Answer:** The bar's Practice Management center is updated monthly with new content. The bar also offers many on-demand CLEs on practice management and technology. Outside of the bar, the Legal Talk Network offers many legal-oriented podcasts. Those with a tech-focus include the Digital Edge and Digital Detectives.

### Question 6:

**What if I have more questions?**

**Answer:** We're here to help! Schedule a 30-minute Ask the Expert consult or email us at [mobarlpm@affinityconsulting.com](mailto:mobarlpm@affinityconsulting.com). There are no costs for Missouri lawyers.

### Endnotes



Jeffrey R. Schoenberger is a lawyer and senior consultant for Affinity Consulting. Schoenberger specializes in practice management advisory services, including content development, CLE presentations, and member consultations. He is also Affinity's designated Apple expert. Schoenberger received a B.A. in history from Yale University and J.D. from the University of Virginia.



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# IMPROVED WRITING FROM READING OTHER WRITERS

DOUGLAS E. ABRAMS<sup>1</sup>

IN 1954, A 12-YEAR-OLD JUNIOR HIGH SCHOOL STUDENT WROTE TO JUSTICE FELIX FRANKFURTER SEEKING ADVICE ABOUT HOW TO PREPARE TO BECOME A LAWYER.<sup>2</sup> “THE BEST WAY TO PREPARE FOR THE LAW,” FRANKFURTER ANSWERED, “IS TO COME TO THE STUDY OF LAW AS A WELL-READ PERSON.”<sup>3</sup> READING OTHER WRITERS, HE EXPLAINED, ENABLES FUTURE LAWYERS TO “ACQUIRE THE CAPACITY TO USE THE ENGLISH LANGUAGE ON PAPER AND IN SPEECH AND WITH THE HABITS OF CLEAR THINKING.”<sup>4</sup>

#### Continuing legal education

Justice Frankfurter offered his young correspondent sound advice about the intimate link among reading, writing, and lawyering. Reading works from other writers with an eye toward developing one’s own writing skills, however, should continue even after receiving a law degree and entering the legal profession. A lawyer’s quest for improved writing skills remains a lifelong pursuit.

Speaking about writers generally, novelist Ernest Hemingway likened the ongoing quest for improvement to a lifelong apprenticeship. “We are all apprentices in a craft where no one ever becomes a master,” he said.<sup>5</sup> If a writing apprenticeship (and a career-long one, at that) was good enough for Pulitzer Prize recipient and Nobel Laureate Hemingway, it is good enough for lawyers. Eminent voices echo Frankfurter and Hemingway with



Douglas E. Abrams

perspectives about reading that are helpful to writers of all ages, including lawyers. Henry David Thoreau, for example, called reading a “noble intellectual exercise.”<sup>6</sup> President Theodore Roosevelt attested that “I am a part of everything I have read.”<sup>7</sup> Roosevelt wrote 13 books before he became president and another 23 during and after his presidency.<sup>8</sup> The president knew what he was talking about. In our own time, J.K. Rowling, author of the popular “Harry Potter” series, specifically urged aspiring writers of all ages to “read as much as you can, like I did. It will give you an understanding of what makes good writing and it will enlarge your vocabulary.”<sup>9</sup> Rowling’s advice should resonate with lawyers because UC Berkeley Dean William L. Prosser was right that law is “one of the principal literary professions” and “the average lawyer in the course of a lifetime does more writing than a novelist.”<sup>10</sup>

#### Educative tools

A wide array of books and other writings, including many that find places on office desks or bedroom night tables, can provide instructive reading for lawyers who seek to improve their own dexterity with the written language. As the lawyer absorbs a writing’s content, the lawyer also pays attention to the writer’s expression. A lawyer’s literary smorgasbord depends on personal taste and professional obligations. Fiction and non-fiction classics, for example, remain instructive because they have generally withstood the test of time. Quality contemporary fiction and non-fiction works have generally withstood commentary and editorial review. Well-crafted articles in leading newspapers or national magazines can also offer writing that is worth emulating. So can solid legal texts and, win or lose, even well-written briefs and other submissions filed by opponents or others in contested matters. The list could continue.

Turning to the government sector, U.S. Supreme Court opinions, liberal and conservative alike, mark some of the most articulate legal writing emerging from the public arena today.

In the Journal of The Missouri Bar's March-April 2022 issue, I wrote about the example often set by U.S. presidents. Some presidents express themselves better than others, but "[f]or their substance and style, printed texts of carefully crafted presidential speeches can remain treasure troves for lawyers who seek to sharpen their own writing by reading the articulate writing of others ... Texts of prepared presidential speeches, which administration speechwriters typically draft and closely edit, remain valuable learning tools for lawyers who invest time to read the texts on the printed page."<sup>11</sup>

### The good and the bad

What about books, articles, and other written works whose wordy, stodgy, antiquated, or otherwise difficult expression a lawyer must read to fulfill professional obligations to clients? This troubled writing may seem worthy of criticism, not of emulation. Even these works, however, can offer readers instructive lessons by demonstrating how *not* to write. As in many other areas of everyday life, a person can learn from others' failures as well as from their successes. Distinguishing between good and bad writing is itself a worthwhile exercise that pays rich dividends to lawyers of all ages who seek to refine their own winning styles. 

### Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 22 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded more than 44,000 times worldwide (in 153 countries). His latest book is "Effective Legal Writing: A Guide for Students and Practitioners (West Academic 2d ed. 2021)," from which portions of this article are taken. Copyright 2021 by West Academic Publishing. Reprinted by permission.

2 *Advice to a Young Person Interested in a Career in the Law*, THE BETTER CHANCERY PRACTICE BLOG (June 20, 2010), <https://betterchancery.com/2010/07/20/advice-to-a-young-person-interested-in-a-career-in-the-law/> (visited May 22, 2022).

3 *Id.*

4 *Id.*

5 Robert Schmuhl, *Process vs. Product: For Some, the Act of Writing Can Be as Important as the Finished Work*, CHI. TRIB., Apr. 2, 2000, at 14.3 (quoting Hemingway, N.Y. J.-AM., July 11, 1961).

6 Henry David Thoreau, *Walden*, in WORKS OF HENRY DAVID THOREAU 116 (Lily Owens ed., 1981).

7 James G. Stavridis, *Read, Think, Write: Keys to 21st-Century Security Leadership*, JOINT FORCE Q., Oct. 2011, at 111 (quoting President Roosevelt).

8 *Books Written by Theodore Roosevelt*, THEODORE ROOSEVELT CTR., <http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o274790> (visited May 10, 2022).

9 They Said It, THE SUNDAY MAIL (Queensland, Australia), Feb. 24, 2013, at 6 (quoting Rowling).

10 William L. Prosser, *English As She Is Wrote*, 7 J. LEGAL EDUC. 155, 156 (1954-1955).

11 Douglas E. Abrams, *Writing By Presidential Example: The First Inaugural Addresses of Reagan and Obama*, J. MO. BAR 86, 86 (Mar.-April 2022).



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# EIGHTH CIRCUIT AFFIRMS TAX COURT FINDING OF DISGUISED DISTRIBUTIONS WAS NOT A RENTAL PROPERTY

SCOTT E. VINCENT<sup>1</sup>

The 8th U.S. Circuit Court of Appeals recently affirmed a tax court decision denying deductions for management fees paid to a corporation's shareholders. In *Aspro, Inc. v. Commissioner of Internal Revenue*,<sup>2</sup> the Court of Appeals found that the management fees were disguised distributions to the shareholders that were not deductible by the corporation.

## Background

Aspro, Inc. is an asphalt-paving corporation organized under Iowa law and treated as a subchapter C corporation for federal tax purposes. During the years in question, Aspro was owned by three shareholders, including two business entities and Milton Dakovich, who was also the president of Aspro.

Aspro had a history of paying its shareholders "management fees" almost every year, but Aspro had not paid dividends since the 1970s. During the years in question, Dakovich received salary, director fees, and bonuses, in addition to management fees. There were no written agreements between Aspro and its shareholders for management services, and Dakovich did not have a written employment contract with Aspro.

The IRS denied Aspro's deductions for management fees for the tax years 2012 through 2014, finding that the management fees were not ordinary and necessary business expenses under Code §162. The tax court sustained the IRS findings, determining that the management fees were not paid as compensation for services but were instead disguised distributions of corporate earnings.

Code § 162 allows deductions for expenses that are ordinary and necessary in carrying on a trade or business, including reasonable salaries and compensation for personal services. Regulations § 1.162-7(b)(1) provides that compensation deductions will be disallowed if a purported salary or similar payment is actually a profits distribution by the corporation. Regulations § 1.162-7(b)(3) limits "reasonable compensation" to an amount that would ordinarily be paid for like services by like enterprises under like circumstances. The Court confirmed this requires a factual determination, and

notes that in prior cases the 8th Circuit Court has applied multiple factors to make reasonable compensation determinations, including whether profits were paid to the shareholders as dividends; the nature, extent, and scope of the employee's work; and prevailing rates of compensation for similar positions in comparable concerns.

## Eighth Circuit Court analysis and decision

The 8th Circuit Court rejected Aspro's arguments and affirmed the tax court's holdings. The court first rejected Aspro's claim that the tax court abused its discretion in excluding testimony by two of Aspro's expert witnesses. The 8th Circuit Court did not find an abuse of discretion by the tax court in excluding testimony from the two experts, based on findings that one expert's "report does not offer an opinion as to the value of the various services at issue in this case nor does he apply scientific principles and methods,"<sup>3</sup> and the other expert's report did not "articulate what principles and methods he used, if any, to conclude that 'valuable services' were provided."<sup>4</sup>

Next, Aspro challenged the tax court's holding that none of the management fees paid by Aspro to its entity shareholders were deductible. The 8th Circuit Court found that the tax court did not clearly err in finding that Aspro failed to meet its burden that any portion of the management fees paid to its entity shareholders was reasonable. The Court of Appeals found that Aspro provided no evidence "showing what 'like enterprises under like circumstances' would ordinarily pay for like management services."<sup>5</sup> The Court of Appeals recited the tax court findings that Aspro produced no written management-services agreement or documentation of a service relationship, no evidence of how management fee amounts were determined, and no evidence that either shareholder entity billed or invoiced Aspro for any services.<sup>6</sup> The 8th Circuit Court also emphasized Aspro's history of paying management fees to shareholders without making any distributions of profits, further noting that Aspro paid management fees to its shareholders roughly in proportion to their ownership interests in



Scott E. Vincent

the corporation. Based on these findings, the 8th Circuit Court found that the tax court did not clearly err in concluding that all management fees paid to Aspro's entity shareholders were nondeductible. Finally, the Court of Appeals addressed whether management fees paid to Dakovich were deductible as reasonable payments purely for services. As with the other shareholders, the 8th Circuit Court found that Aspro presented no evidence of what similar companies would pay as management fees (over and above salary and bonuses) in like circumstances, including Dakovich's status as an employee. The court also relied on the IRS expert's conclusion that Dakovich received salary and bonus substantially higher than the industry average and median, and that management fees in addition to this salary and bonus was not reasonable. The IRS expert also found that Dakovich's combined excess compensation and management fees were closely aligned with his ownership interest in Aspro, as was the case with the entity shareholders.

Based on these findings of excess compensation, alignment of the management fees with ownership interests, and lack of any shareholder dividends, the 8th Circuit Court held that the tax court did not clearly err in finding that Aspro failed to meet its burden of showing that the management fees paid to Dakovich were

reasonable. The court further concluded that payments to Dakovich were therefore disguised distributions and were not purely for services actually performed.

## Conclusion

The 8th Circuit Court decision in *Aspro* demonstrates key lessons for taxpayers attempting to justify C corporation management fees to shareholders. Aspro did not have written management fee agreements, did not make any dividend distributions of profits, and was not able to show a reasonable market basis for the amounts paid as management fees. If these facts had been different, it seems likely the court would have allowed at least some management fee deductions for the corporation. Importantly, this case also demonstrates a potential area of audit interest by the IRS, which likely includes both C corporation management fees and compensation. 

## Endnotes

<sup>1</sup> Scott E. Vincent is the founding member of Vincent Law, LLC in Kansas City.

<sup>2</sup> 32 F.4th 673 (8th Cir. 2022).

<sup>3</sup> *Id.* at 676.

<sup>4</sup> *Id.* at 677.

<sup>5</sup> *Id.* at 678.

<sup>6</sup> *Id.*



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**Ernst Frederick “Fred” Beihl Jr.**, age 89, of Kansas City, on Jan. 5, 2022. Beihl practiced with Shook, Hardy & Bacon for 45 years. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1955.

**John P. Best**, age 68, of Collinsville, IL, on Jan. 19, 2021. Best worked as a lawyer for Mears Group Quanta Services, Inc. He graduated from the University of Illinois School of Law and joined The Missouri Bar in 2006.

**Donald Chamberlin Bollard III**, age 78, of Overland Park, KS, on April 29, 2022. He joined The Missouri Bar in 1944.

**Jeffrey W. Bruce**, age 64, of Belton, on May 22, 2022. Bruce founded The Bruce Law Firm, where he practiced labor and employment law along with civil rights litigation. He graduated from the University of Missouri-Kansas City School of Law and joined The Missouri Bar in 1985.

**Wayne Barrett Chapin III**, age 51, of Shawnee, KS, on Feb. 20, 2022. Chapin practiced law for 22 years. He graduated from the University of Kansas School of Law and joined The Missouri Bar in 2000.

**James M. Clampitt**, age 73, of Mexico, on Nov. 30, 2021. Clampitt practiced law for several years and served in the U.S. Air Force. He graduated from Regent University School of Law and joined The Missouri Bar in 1999.

**John Robert Cullom**, age 65, of Kansas City, on May 22, 2022. Cullom joined The Missouri Bar in 1981 and practiced in the Kansas City area.

**Hon. Lawrence O. Davis**, age 87, of Union, on June 25, 2022. Davis served as Franklin County prosecuting attorney and magistrate judge. He was later elected circuit court judge. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1958. Davis served in the U.S. Air Force.

**John V. Doheny**, age 63, of St. Louis, on April 17, 2022. Doheny was a private practice tax lawyer for over 30 years. He graduated from the University of Dayton School of Law and joined The Missouri Bar in 1986.

**John J. Donnelly Jr.**, age 93, of St. Louis, on April 11, 2022. Donnelly was a lawyer for 70 years in the St. Louis area and served in the Air Force Reserves. He graduated from Saint Louis University School of Law and joined The Missouri Bar in 1951.

**Hon. James Nickolas Foley**, age 86, of Bevier, on May 28, 2022. Foley served as assistant prosecuting attorney, prosecuting attorney, and associate circuit judge of Macon County. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1962.

**Brian J. “BJ” Gepford**, age 64, of Independence, on April 16, 2022. Gepford practiced law in the Kansas City region and rural Missouri. He graduated from the University of Missouri-Kansas City School of Law and joined The Missouri Bar in 1984.

**Hon. James R. Hartenbach**, age 80, of St. Charles, on April 1, 2022. Hartenbach was a judge for the Circuit Court of St. Louis County and served in the military. He joined The Missouri Bar in 1966.

**James L. Homire Jr.**, age 92, of Eureka, on May 6, 2022. Homire practiced law in St. Louis for almost 50 years and served in the U.S. Marine Corps. He joined The Missouri Bar in 1958.

**Robert “Bob” Harold Houske**, age 58, of Kansas City, on June 22, 2022. Houske co-founded Houske & Rollins, P.C., and served as counsel to Foland, Wickens, Roper, Hofer & Crawford, P.C. He graduated from the University of Missouri-Kansas City School of Law and joined The Missouri Bar in 1989.

**Hon. Laurance M. Hyde**, age 94, of Reno, NV, on April 25, 2022. Hyde was a circuit court judge in Missouri before he became a law professor and dean at the National Judicial College in Reno. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1952. Hyde served in the U.S. Army.

**Daniel Kingdon Knight**, age 55, of Columbia, on June 4, 2022. Knight was prosecuting attorney for Boone County. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1992.

**Jerome “Jerry” Kraus**, age 82, of St. Louis, on March 26, 2022. Kraus practiced law for more than 50 years and served in the U.S. Army. He graduated from Washington University School of Law and joined The Missouri Bar in 1963.

**Randy C. Morris**, age 66, of Aurora, CO, on Sept. 14, 2021. He joined The Missouri Bar in 1955.

**Phillip Irving Morse**, age 79, of St. Charles, on June 9, 2022. Morse was an appellate attorney for the Social Security Administration and an assistant U.S. attorney for the Federal Western District of Michigan. He later moved to St. Louis, where he worked in private practice for 38 years. He graduated from the University of Notre Dame School of Law and joined The Missouri Bar in 1984. Morse served in the U.S. Army Honor Guard and Military Police Company in Germany.

**Thomas P. O'Donnell**, age 80, of Kansas City, on April 25, 2022. O'Donnell founded O'Donnell and Albertson before becoming a partner at Wirken and King, and Polsinelli, White, Vardeman, & Shalton. He was also an adjunct professor at the University of Missouri-Kansas City. O'Donnell graduated from the University of Missouri School of Law and joined The Missouri Bar in 1975.

**Charles F. "Chuck" Ohmer**, age 92, of St. Louis, on May 23, 2022. Ohmer joined The Missouri Bar in 1953 and practiced law for over 50 years.

**Patricia D. Perkins**, age 71, of Jefferson City, on May 26, 2022. Perkins worked at the Missouri State Auditor's and Missouri Attorney General's offices before being appointed to the Public Service Commission. After retiring from the state, she provided pro bono legal services through the Samaritan Center. She received The Missouri Bar's 2021 Pro Bono Publico Award. Perkins graduated from the University of Missouri School of Law and joined The Missouri Bar in 1980.

**Preston Scott Pulido**, age 51, of Kansas City, on Feb. 24, 2022. Pulido worked as corporate counsel for Swiss Re for 20 years. He graduated from the University of Kansas School of Law and joined The Missouri Bar in 1995.

**Stephen H. Romines**, age 80, of Mountain Grove, on Jan. 23, 2022. Romines worked as legal counsel for the Federal Aviation Administration and House of Representatives Committee on Internal Security before setting up a law practice in Mountain Grove and joining Home Building & Loan Association. He later became managing director of First Home Bank. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1966.

**James David Russell**, age 69, of St. Peters, on Sept. 1, 2019. Russell was a lawyer at Peabody Coal; Thompson Coburn; DTE Energy; and Prairie State. He graduated from the University of Illinois School of Law and joined The Missouri Bar in 1975.

**Hon. Robert G. Russell**, age 86, of Warrensburg, on April 17, 2022. Russell was judge of the 17th Judicial Circuit Court and later returned to private practice. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1963. Russell served in the U.S. Army.

**Hon. James Brendan Ryan**, age 85, of Prairie Village, KS, on Feb. 19, 2022. Ryan was a circuit court judge in St. Louis for 20 years before becoming a mediator at Thompson Coburn and Alaris. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1961.

**William A. Sanford**, age 89, of Edwardsville, IL, on Feb. 12, 2022. Sanford served as vice president of industrial relations for Ameren and prosecuting attorney for Bellefontaine Neighbors. Sanford graduated from Saint Louis University School of Law and joined The Missouri Bar in 1964.

**Margaret Aileen Schlachter**, age 91, of Springfield, on May 26, 2022. Schlachter worked for the Missouri Court of Appeals-Southern District. She graduated from the University of Missouri School of Law and joined The Missouri Bar in 1986.

**Staci Olvera Schorgl**, age 48, of Lexington, on May 4, 2022. Schorgl was a partner with Bryan Cave Leighton Paisner Law Firm. She graduated from the University of Missouri-Kansas City School of Law and joined The Missouri Bar in 1999.

**Hon. Vernon Eugene Scoville III**, age 68, of Blue Springs, on April 4, 2022. Scoville was an associate circuit court judge and served as a state representative in the Missouri House. He graduated from the University of Missouri-Kansas City School of Law and joined The Missouri Bar in 1979. Scoville served in the U.S. Army.

**William Alford Shull III**, age 71, of Warrensburg, on June 30, 2022. Shull practiced law at Legal Aid of Western Missouri. He graduated from the University of Missouri School of Law and joined The Missouri Bar in 1979.

**David L. Smith**, 71, of Chesterfield, on May 14, 2022. Smith was a partner at Kramer & Frank. He graduated from Saint Louis University School of Law and joined The Missouri Bar in 1976.

**Hon. Charles Lee Stitt**, age 87, of Lee's Summit, on Feb. 12, 2018. Stitt was an associate circuit judge for the Jackson County Circuit Court and served in the U.S. Marine Corps. He graduated from the University of Missouri-Kansas City School of Law and joined The Missouri Bar in 1968.

**Richard James Tompkins**, age 80, of High Ridge, on May 16, 2022. Tompkins practiced law for 32 years and served in the U.S. Army. He graduated from the University of Memphis School of Law and joined The Missouri Bar in 1974.

**Christopher T. Tucker**, age 59, of O'Fallon, on Nov. 16, 2021. Tucker practiced law in Missouri and Illinois. He graduated from Saint Louis University School of Law and joined The Missouri Bar in 1987.

**Warren E. Van Norman**, age 98, of Scottsdale, AZ, on Dec. 17, 2021. Van Norman was general counsel and corporate secretary of American Investment Company. He graduated from the University of Nebraska School of Law and joined The Missouri Bar in 1965.

**Daniel DeVore Watt**, age 74, of St. Louis, on June 17, 2022. Watt worked in trust administration at various banks and opened the St. Louis branch of Northern Trust. He graduated from the University of Missouri-Kansas City School of Law and joined The Missouri Bar in 1972.

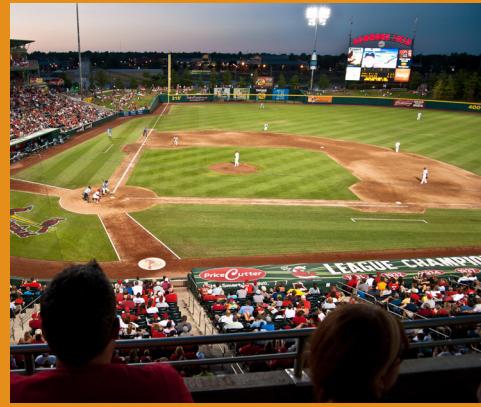
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# SUPREME COURT ADOPTS NEW RULE 5

In an order issued May 31, 2022, the Supreme Court of Missouri repealed and adopted a new Rule 5 pertaining to attorney disciplinary matters. Rule 5 had not been revised significantly since its adoption in 1995. These revisions were made in an effort to restructure the rule to reflect and clarify current disciplinary practices and procedures. The majority of changes to the rule are not substantive in nature. The changes include:

- Giving the chief disciplinary counsel and advisory committee the authority to issue guidance letters to lawyers regarding the rules of professional conduct despite a finding of insufficient probable cause;
- Allowing the chair of the advisory committee to exercise his or her discretion to permit the filing of an answer out of time upon a showing of excusable neglect;
- Authorizing hearings before a disciplinary panel to proceed virtually when in the public's best interest;
- Requiring Missouri-licensed lawyers to self-report within 10 days of being disciplined in another jurisdiction or pleading guilty to or being convicted of any crime;

- Requiring lawyers suspended or disbarred to wind up their law practices within 15 days of the suspension or disbarment order and submit to the Court a verified certificate of compliance attesting to complete performance of all obligations under the rule, including notification of clients and delivering their law licenses to the clerk of this Court;
- Increasing the fee for a reinstatement petition to \$1,000; and
- Clarifying that lawyers may provide confidential information to legal ethics counsel when seeking an informal ethics opinion, and legal ethics counsel has no duty to report possible Rule 4-8.3 violations when disclosures are made in the course of seeking an informal ethics opinion.

The full order, which takes effect Jan. 1, 2023, is available on the Missouri Courts website at [courts.mo.gov/page.jsp?id=187056](https://courts.mo.gov/page.jsp?id=187056).

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## SUPREME COURT RULE CHANGES

In an order dated May 31, 2022, the Supreme Court of Missouri repealed Rule 5, entitled “Complaints and Proceedings Thereon,” consisting of subdivisions 5.01 to 5.34, inclusive, and in lieu thereof adopted a new Rule 5, entitled “Complaints and Proceedings Thereon,” consisting of subdivisions 5.01 to 5.34, inclusive.

In that same order, the Court repealed subdivision (d) of subdivision 6.06, entitled “Return to Active Status,” of Rule 6, entitled “Fees to Practice Law,” and in lieu thereof adopted a new subdivision (d) of subdivision 6.06, entitled “Return to Active Status.”

In that same order, the Court adopted a new subdivision 7.16, entitled “The Missouri Bar Complaint Resolution Program; The Missouri Bar Lawyer-to-Lawyer Dispute Resolution Program – Guidelines,” of Rule 7, entitled “Establishing and Providing for the Government of the Missouri Bar.”

The order will become effective Jan. 1, 2023.

The complete order may be read in its entirety at [courts.mo.gov](http://courts.mo.gov).

The Supreme Court of Missouri, in an order dated June 28, 2022, repealed subdivision 2.02, entitled “General Policy,” of Court Operating Rule 2, entitled “Public Access to Records of the Judicial Department,” and in lieu thereof adopted a new subdivision 2.02, entitled “General Policy.”

In that same order, the Court adopted a new subdivision

19.10, entitled “Redaction Requirements,” of Rule 19, entitled “Infractions, Misdemeanors or Felonies – General.”

In that same order, the Court adopted a new subdivision 55.025, entitled “Redaction Requirements,” of Rule 55, entitled “Pleadings, Motions, and Hearings.”

In that same order, the Court adopted a new subdivision 84.015, entitled “Redaction Requirements,” of Rule 84, entitled “Procedure in All Appellate Courts.”

The order will become effective July 1, 2023.

The complete order may be read in its entirety at [courts.mo.gov](http://courts.mo.gov).

In an order dated June 28, 2022, the Supreme Court of Missouri sat the Expanded Remote Access Implementation Date as July 1, 2023.

The order will become effective July 1, 2023.

The complete order may be read in its entirety at [courts.mo.gov](http://courts.mo.gov).

In an order dated June 28, 2022, the Supreme Court of Missouri adopted a new subdivision 17.28, entitled “Filing to Disposition Time Standards,” of Court Operating Rule 17, entitled “Case Processing Time Standards.”

The order became effective July 1, 2022.

The complete order may be read in its entirety at [courts.mo.gov](http://courts.mo.gov).



## SUPREME COURT OF MISSOURI

### en banc

June 28, 2022

Effective January 1, 2023

In re: New and Revised Committee Comments, Historical Notes, and Comments to the  
MAI-Civil Instructions

### TABLE

#### MAI 38.00 GENERAL COMMENT (Comment – New)

MAI 38.01(A) VERDICT DIRECTING – MISSOURI HUMAN RIGHTS ACT – EMPLOYMENT DISCRIMINATION  
(for actions accruing before August 28, 2017)  
(Historical Note – Revision)

MAI 38.01(B) VERDICT DIRECTING – MISSOURI HUMAN RIGHTS ACT – EMPLOYMENT DISCRIMINATION  
BY REASON OF DISABILITY – EXISTENCE OF DISABILITY DISPUTED (for actions accruing before August 28, 2017)  
(Historical Note – Revision)

MAI 38.02 VERDICT DIRECTING – MISSOURI HUMAN RIGHTS ACT – LAWFUL JUSTIFICATION (for actions accruing before August 28, 2017)  
(Historical Note – Revision)

MAI 38.03 VERDICT DIRECTING – WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY  
(Committee Comment – Revision)

MAI 38.06 VERDICT DIRECTING – MISSOURI HUMAN RIGHTS ACT – EMPLOYMENT DISCRIMINATION (for actions accruing on or after August 28, 2017) (Historical Note – Revision)

MAI 38.07 VERDICT DIRECTING – MISSOURI HUMAN RIGHTS ACT – EMPLOYMENT DISCRIMINATION BY REASON OF DISABILITY – EXISTENCE OF DISABILITY DISPUTED (for actions accruing on or after August 28, 2017) (Historical Note – Revision)

MAI 38.08 MISSOURI HUMAN RIGHTS ACT – BUSINESS JUDGMENT RULE  
(for actions accruing on or after August 28, 2017) (Historical Note – Revision)

MAI 38.09 MISSOURI HUMAN RIGHTS ACT – DAMAGES (for actions accruing on or after August 28, 2017)  
(Historical Note – Revision)

MAI 38.10 MISSOURI HUMAN RIGHTS ACT – VERDICT FORM (for actions accruing on or after August 28, 2017)  
(Historical Note – Revision)

## ORDER

1. New and revised Committee Comments, Historical Notes, and Comments to the MAI-Civil Instructions listed above, having been prepared by the Committee on Jury Instructions – Civil and reviewed by the Court, are hereby adopted and approved.
2. The Committee Comments, Historical Notes, and Comments revised as set forth in the specific exhibits attached hereto must be used on and after January 1, 2023, and may be used prior thereto; any such use shall not be presumed to be error.
3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

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PAUL C. WILSON  
Chief Justice

### **38.00 [2023 New] General Comment (Approved June 28, 2022; Effective January 1, 2023)**

A. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form). See S.B. 43 (2017), § 213.101.6, RSMo (2017), 99<sup>th</sup> General Assembly,

which states it “hereby abrogates all Missouri-approved jury instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.”

B. S.B. 43 (2017), 99<sup>th</sup> General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever’s Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006)

regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

C. MAI 38.03 [2012 Revision] (verdict directing—wrongful discharge in violation of public policy), applies to both non-public and public employees for common law causes of action for wrongful termination in violation of public policy and common law causes of action to protect whistleblowers from retaliation. See *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo. banc 2010) and *Kunzie v. City of Olivette*, 184 S.W.3d 570, 574-75 (Mo. banc 2006).

D. For a statutory whistleblower cause of action for non-public employees, S.B. 43 enacted the “Whistleblowers Protection Act,” effective August 28, 2017. Section 285.575.3, RSMo, provides: “This section is intended to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts. This section, in addition to chapter 213 and chapter 287, shall provide the exclusive remedy for any and all claims of unlawful employment practices.” The Act seems to explicitly recognize and codify the common law for wrongful discharge in violation of public policy and further seems to explicitly recognize the remedy provided for retaliatory discharge in a Workers Compensation setting under § 287.780, RSMo.

E. Under § 285.575, RSMo (2017), (the Whistleblower’s Protection Act), the person’s status as a protected person must be the motivating factor for any adverse decision or outcome. The term “motivating factor” is defined in § 285.575.2(5) as “the employee’s protected classification actually played a role in the adverse decision or action and had a determinative influence on the adverse decision or action.” See, MAI 38.05, MAI 38.06, and MAI 38.07 for the language used when submitting the concept of “motivating factor.”

F. Under § 285.575.7(3), RSMo (2017), (the Whistleblower’s Protection Act), an employee must show by “clear and convincing evidence” that the “conduct of the employer was outrageous because of the employer’s evil motive or reckless indifference to the rights of others” in order to be awarded double damages. The statute does not heighten the burden of proof for causation or other damages.

G. According to § 285.575.2(2), the Whistleblower’s Protection Act does not apply to “the state of Missouri or

its agencies, instrumentalities, or political subdivisions, including but not limited to any public institution of higher education, a corporation wholly owned by the state of Missouri, an individual employed by an employer, or corporations and associations owned or operated by religious or sectarian organizations[.]” See § 285.575.2(2), RSMo (2017).

H. For actions accruing before August 28, 2018, statutory whistleblowing claims by public employees could be brought under § 105.055, RSMo, *et seq.*, as amended in 2010 by H.B. 1868. Under § 105.055.7(3), RSMo (2010), “A public employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf has reported or was about to report, verbally or in writing, a prohibited activity or a suspected prohibited activity.” The clear and convincing standard applies to only one element of the cause of action. Section 105.055, RSMo (2010), did not adopt or incorporate a “motivating factor” standard or any standard. In 2010, *Fleshner v. Pepose Vision Institute, P.C.* 304 S.W.3d 81, 94-95 (Mo. banc 2010), the Court approved the “contributing factor” standard for causation in wrongful discharge in violation of public policy cases.

I. In 2018, in S.B. 1007, the General Assembly amended the statutory cause of action, Public Employee Whistleblower Statute, § 105.055, RSMo. That statute defines public employee, § 105.055.1(2), RSMo, and public employer, § 105.055.1(3), RSMo. Section 105.055, RSMo (2018), did not adopt or incorporate the “motivating factor” standard or any standard. However, in *Fleshner v. Pepose Vision Institute, P.C.* 304 S.W.3d 81, 94-95 (Mo. banc 2010), the Court approved the “contributing factor” standard for causation in wrongful discharge in violation of public policy cases.

J. Under § 105.055.7(3), RSMo (2018), “A public employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf has reported or was about to report, verbally or in writing, a prohibited activity or a suspected prohibited activity.” The clear and convincing standard applies to only one element of the cause of action. Once such conduct is established, “the burden shall be on the public employer to demonstrate that the disciplinary action was not the result of such a report.” See § 105.055.7(3), RSMo (2018).

K. Section 105.055.3(1), RSMo (2018), requires at a minimum that the employee reasonably believes that the employer’s activity is prohibited, e.g., a violation of any law, rule, regulation or policy; mismanagement; or other acts listed in the statute.

L. Section 213.070, RSMo, Additional Unlawful Discriminatory Practices, provides a cause of action for

unlawful retaliation, stating it is unlawful discriminatory practice to “retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter[.]” *McCrainey v. Kansas City Missouri Sch. Dist.*, 337 S.W.3d 746, 754 (Mo. App. 2011), held that a “plaintiff need only have a good faith, reasonable belief that the conduct he or she opposed was prohibited by the MHRA in order to prevail on a retaliation claim[.]” and concluded “that a plaintiff can oppose a practice which is not actually unlawful under the MHRA, yet still proceed with a retaliation claim based on his or her opposition to that practice.” *Id.* at 753. The Committee takes no position on whether “a good faith, reasonable belief” is a submissibility issue for the judge or a jury question.

**38.01(A) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing before August 28, 2017)**

[No change to Instruction or Notes on Use.]  
**Committee Comment (2022 Revision)**  
[No change to Committee Comment.]  
**Historical Note (2023 Revision)**  
**(Approved June 28, 2022; Effective January 1, 2023)**  
(MAI 38.01(A) replaces the prior MAI 31.24 (2005 New).

S.B. 43 (2017), 99th General Assembly states it “hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing

factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

**38.01(B) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing before August 28, 2017)**

[No change to Instruction or Notes on Use.]

**Committee Comment (2022 Revision)**

[No change to Committee Comment.]

**Historical Note (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

(S.B. 43 (2017), 99th General Assembly, states it “hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. If such action conflicts with Art V, § 5 and Art I, § 13 of the Missouri Constitution (1945), then see MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App.

2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

### **38.02 [2018 Revision] Verdict Directing—Missouri Human Rights Act—Lawful Justification (for actions accruing before August 28, 2017)**

[No change to Instruction or Notes on Use.]

**Historical Note (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

(MAI 38.02 replaces the prior MAI 31.25 (2005 New).

S.B. 43 (2017), 99th General Assembly states it “hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever’s Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated

by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

### **38.03 [2012 Revision] Verdict Directing--Wrongful Discharge in Violation of Public Policy**

[No change to Instruction or Notes on Use.]

**Committee Comment (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

A. If the case involves constructive discharge, demotion, or adverse job consequences, this instruction can be easily modified. For cases involving such claims, see *Bennartz v. City of Columbia*, 300 S.W.3d 251, 258 (Mo. App. 2009) (the public-policy exception to the at-will employment doctrine may be established with evidence of constructive discharge); *Bell v. Dynamite Foods*, 969 S.W.2d 847, 853 (Mo. App. 1998), abrogated on other grounds by *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81 (Mo. banc. 2010) (constructive discharge is recognized in common law actions for wrongful discharge claims based upon the common law public policy exception to at-will employment).

B. In *Fleshner*, 304 S.W.3d at 92, the employee was discharged for talking to federal investigators about the employer’s violation of Fair Labor Standards Act requirements to pay overtime compensation. The Court expressly adopted a public policy exception to the “at will” doctrine where the employee is discharged for reporting violations of law to authorities or for refusing to perform illegal acts. *Id.*

C. The public policy must be found in a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. However, the public policy need only be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body, and there need not be a direct violation by the employer of that same statute or regulation. Additionally, “there is no requirement that the violation that the employee reports affect the employee personally, nor that the law violated prohibit or penalize retaliation against those reporting its violation.” *Id.* at 97. Moreover, the public policy is applicable to communications made to federal or state officials as well as to the employee’s supervisors. *Id.* at 97. See also, *Margiotta v. Christian Hospital Northeast-Northwest*, 315 S.W.3d 342 (Mo. banc 2010).

D. In *Fleshner*, the Court also cited the “contributing

factor” standard expressed in MAI 31.24 with approval as the standard for causation in this type of wrongful discharge case. *Fleshner*, 304 S.W.3d at 94-95. But see, S.B. 43 (2017) and Historical Note at MAI 38.01(A) and 38.01(B).

E. In *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 103 (Mo. banc 2010), the Court extended the public policy exception to the at-will doctrine to “contract employees” in addition to “at-will” employees.

F. The Court, under the facts in *Keveney*, also determined that in order to survive a motion to dismiss, an employee must plead the following in order to state a cause of action for wrongful discharge under the public policy exception:

- (1) That the employee refused to perform an illegal act or act in a manner contrary to public policy;
- (2) That the employee was discharged; and
- (3) That there is a causal connection between the employee’s discharge and the employee’s refusal to engage in the actions at issue.

*Id.* at 103.

G. The *Margiotta* case limited the public policy exception by excluding situations in which the claimed “public policy” is vague or general and not a specific statute, rule, regulation, or constitutional requirement. The Court found that the two regulations cited in *Margiotta* were vague statements and did not specifically proscribe conduct in the alleged incidents. One regulation was extremely broad as to patient safety, and the other regulation clearly dealt with building safety and not patient treatment. For these reasons the Court found that summary judgment was appropriately granted. *Margiotta*, 315 S.W.3d at 347-48.

H. In *Bennartz*, 300 S.W.3d at 261-62, the court held that a municipal employee could not maintain a wrongful discharge cause of action against the defendant municipality under the public policy exception because there was no evidence that the defendant municipality had waived sovereign immunity. See e.g. *Kunzie v. City of Olivette*, 184 S.W.3d 570, 574-75 (Mo. banc 2006) (wherein the Supreme Court of Missouri reversed the trial court’s dismissal of a public employee’s common law claim of wrongful discharge under the public policy exception because discovery had not yet been conducted as to whether the government entity being sued had waived sovereign immunity pursuant to § 537.610, RSMo).

I. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014). But see, S.B. 43 (2017) and Historical Note at MAI 38.01(A), 38.01(B) and 38.05.

### **38.06 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing on or after August 28, 2017)**

[No change to Instruction or Notes on Use.]

#### **Committee Comment (2022 Revision)**

[No change to Committee Comment.]

#### **Historical Note (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

S.B. 43 (2017), 99th General Assembly states it “hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever’s Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

### **38.07 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing on or after August 28, 2017)**

[No change to Instruction or Notes on Use.]

### **Committee Comment (2022 Revision)**

[No change to Committee Comment.]

### **Historical Note (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

S.B. 43 (2017), 99th General Assembly states it “hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

### **38.08 [2018 New] Missouri Human Rights Act—Business Judgment Rule (for actions accruing on or after August 28, 2017)**

[No change to Instruction, Notes on Use, or Committee Comment.]

### **Historical Note (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

S.B. 43 (2017), 99th General Assembly states it “hereby abrogates all Missouri approved instructions specifically

addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

### **38.09 [2018 New] Missouri Human Rights Act—Damages (for actions accruing on or after August 28, 2017)**

[No change to Instruction, Notes on Use, or Committee Comment.]

### **Historical Note (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

S.B. 43 (2017), 99th General Assembly states it “hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI

38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever’s Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.

#### **38.10 [2018 New] Missouri Human Rights Act—Verdict Form (for actions accruing on or after August 28, 2017)**

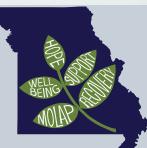
[No change to Instruction, Notes on Use, or Committee Comment.]

**Historical Note (2023 Revision)**

**(Approved June 28, 2022; Effective January 1, 2023)**

S.B. 43 (2017), 99th General Assembly states it “hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017.” See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it “hereby expressly abrogates” the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. banc 2007) regarding “contributing factor;” as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo. App. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever’s Enterprises, Inc.*, 388 S.W.3d 206 (Mo. App. 2012) regarding a “but for” instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo. App. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases retain validity for actions arising prior to August 28, 2017. Portions of these decisions were expressly abrogated for the limited purposes enumerated by the Missouri legislature in S.B. 43 for cases arising on or after August 28, 2017. These appellate decisions remain good law on all other issues decided.



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## NOTICES OF CORPORATE DISSOLUTION

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### NOTICE OF ARTICLES OF DISSOLUTION BY VOLUNTARY ACTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST C&C MANAGEMENT OF PERRYVILLE, INC.

On May 19, 2022, C&C Management of Perryville, Inc., a Missouri corporation, filed its Articles of Dissolution with the Missouri Secretary of State. Dissolution was effective on May 19, 2022.

You are hereby notified that if you believe you have a claim against C&C Management of Perryville, Inc., you must submit a summary in writing of the circumstances surrounding your claim to C&C Management of Perryville, Inc. at 1515 E. Malone Ave., Sikeston, Missouri, 63801. The summary of your claim must include the following information: (1) the name, address, and telephone number of the claimant; (2) the amount of the claim; (3) the date on which the event on which the claim is based occurred; and (4) a brief description of the nature of the debt or the basis for the claim.

All claims against C&C Management of Perryville, Inc. will be barred unless the proceeding to enforce the claim is commenced within two years after the publication of this notice.

### NOTICE OF ARTICLES OF DISSOLUTION BY VOLUNTARY ACTION TO ALL CREDITORS OF AND CLAIMANTS AGAINST CAPE GIRARDEAU LICENSE BUREAU, INC.

On May 23, 2022, Cape Girardeau License Bureau, Inc., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. Dissolution was effective on May 23, 2022.

You are hereby notified that if you believe you have a claim against Cape Girardeau License Bureau, Inc., you must submit a summary in writing of the circumstances surrounding your claim to Cape Girardeau License Bureau, Inc. at 1515 E. Malone Ave., Sikeston, Missouri, 63801. The summary of your claim must include the following information: (1) the name, address, and telephone number of the claimant; (2) the amount of the claim; (3) the date on which the event on which the claim is based occurred; and (4) a brief description of the nature of the debt or the basis for the claim.

All claims against Cape Girardeau License Bureau, Inc. will be barred unless the proceeding to enforce the claim is commenced within two years after the publication of this notice.

### NOTICE OF WINDING UP FOR LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST COTTAGES SENIOR HOUSING OF BELTON, LLC

On May 16, 2022, Cottages Senior Housing of Belton, LLC, a Missouri limited liability company (the "Company"), filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The dissolution was effective on that date.

You are hereby notified that if you believe you have a claim against the Company, you must submit a written summary of your claim to the Company in care of Joseph L. Harstine, Seigfreid Bingham, P.C., 2323 Grand Blvd., Suite 1000, Kansas City, MO 64108. The summary of your claim must include the following information:

1. The name, address, and telephone number of the claimant;
2. The amount of the claim;
3. The date on which the claim is based occurred;
4. A brief description of the nature of the debt or the basis for the claim; and
5. Whether the claim is secured, and if so, the collateral used as security.

All claims against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after publication of this notice.

### NOTICE OF WINDING UP FOR LIMITED LIABILITY COMPANY TO ALL CREDITORS OF AND CLAIMANTS AGAINST COTTAGES SENIOR HOUSING OF KANSAS CITY, LLC

On May 16, 2022, Cottages Senior Housing of Kansas City, LLC, a Missouri limited liability company (the "Company"), filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The dissolution was effective on that date.

You are hereby notified that if you believe you have a claim against the Company, you must submit a written summary of your claim to the Company in care of Joseph L. Hiersteiner, Seigfreid Bingham, P.C., 2323 Grand Blvd., Suite 1000, Kansas City, MO 64108. The summary of your claim must include the following information:

1. The name, address, and telephone number of the claimant;
2. The amount of the claim;
3. The date on which the claim is based occurred;
4. A brief description of the nature of the debt or the basis for the claim; and
5. Whether the claim is secured, and if so, the collateral used as security.

All claims against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after publication of this notice.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
EWY SERVICES, LLC**

On May 3, 2022, EWY Services, LLC, a Missouri limited liability company (hereinafter "Company"), filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

Any claims against the Company may be sent to: South County Senior Law & Estate Planning Center, LLC, Attn: Thaddeus C. Ortman, 5518 Telegraph Road, Suite 101, St. Louis, MO 63129. Each claim must include: claimant's name, address, and telephone number; amount of claim; date on which the claim arose; basis for the claim; and documentation in support of the claim.

All claims against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS AND CLAIMANTS AGAINST  
HSAC REAL ESTATE HOLDINGS, LLC**

On April 28, 2022, HSAC REAL ESTATE HOLDINGS, LLC, a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The effective date of the company's dissolution and commencement of winding up of its business was that date.

HSAC REAL ESTATE HOLDINGS, LLC requests that all persons who have claims against the company present them immediately by letter to HSAC REAL ESTATE HOLDINGS, LLC, 6230 Regina Road, Hillsboro, MO 63050.

All claims must include the following: the name and address of the claimant; the amount claimed; the basis of the claim; and documentation of the claim.

Pursuant to § 347.141 of the Revised Statutes of Missouri, as amended, any claim against HSAC REAL ESTATE HOLDINGS, LLC will be barred unless a proceeding to enforce the claim is commenced within three years after the last publication of this notice.

**NOTICE OF ARTICLES OF DISSOLUTION  
BY VOLUNTARY ACTION  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
INSTITUTIONAL AGENCIES CORPORATION**

Institutional Agencies Corporation, a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State on Dec. 21, 2021, effective Dec. 31, 2021.

Any claims against Institutional Agencies Corporation must be sent to Institutional Agencies Corporation, 3201 W. 67 St., Shawnee Mission, KS 66208. Each claim should include the following information: the name, address, and telephone number of the claimant; the amount of the claim; the basis for the claim; documentation supporting the claim; and the date(s) on which the event(s) on which the claim is based occurred.

All claims against Institutional Agencies Corporation will be barred unless a proceeding to enforce such claim is commenced within two years after the date this notice is published.

**NOTICE OF ARTICLES OF DISSOLUTION  
BY VOLUNTARY ACTION  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
THE KYSER FAMILY, INC.**

On May 12, 2022, KYSER FAMILY, INC., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. Dissolution was effective May 12, 2022.

Said corporation requests that all persons and organizations who have claims against it present them immediately by letter to the corporation at: KYSER FAMILY, INC., 28815 Masterson Road, Cleveland, Missouri 64734.

All claims must include the name and address of the claimant; the amount claimed; the basis for the claim; and the date(s) on which the event(s) on which the claim is based occurred.

NOTICE: Because of the dissolution of KYSER FAMILY, INC., any claims against it will be barred unless a proceeding to enforce the claim is commenced within two years after the publication date of the notices authorized by statute, whichever is published last.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
L. W. KASTEN PROPERTIES, LLC**

On May 26, 2022, L. W. Kasten Properties, LLC filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary for State.

All persons with claims against L. W. Kasten Properties, LLC may submit any claim in accordance with this notice to Chris N. Weiss, Lichtenegger, Weiss & Fetterhoff, LLC, 2480 E. Main St., Suite E, Jackson, MO 63755. All claims must include the name, address, and telephone number of the claimant; the amount claimed; the basis for the claim; the documentation of the claim; and the date(s) when the event(s) for which the claim is based occurred.

All claims against L. W. Kasten Properties, LLC will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

**NOTICE OF ARTICLES OF DISSOLUTION BY  
VOLUNTARY ACTION  
TO ALL CREDITORS AND CLAIMANTS AGAINST  
MARKO'S DISTRIBUTING, INC.**

On June 3, 2022, Marko's Distributing, Inc. filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. The dissolution was effective on May 24, 2022.

You are hereby notified that if you believe you have a claim against Marko's Distributing, Inc., you must submit a summary in writing of the circumstances surrounding your

claim to Marko's Distributing, Inc. at the following address: Marko's Distributing, Inc., C/O Robert Cowherd, Attorney at Law, P.O. Box 228, Chillicothe, MO 64601. Telephone: 660-646-0627.

The summary of your claim must include the following information:

1. The name, address, and telephone number of the claimant.
2. The amount of the claim.
3. The date on which the event on which the claim is based occurred.
4. A brief description of the nature of the debt or the basis for the claim.

All claims against Marko's Distributing, Inc. will be barred unless the proceeding to enforce the claim is commenced within two years after the publication of this notice.

**NOTICE OF ARTICLES OF DISSOLUTION  
BY VOLUNTARY ACTION  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
NORTHWEST MULTIPLE LISTING SERVICE, INC.**

On May 25, 2022, Northwest Multiple Listing Service, Inc., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. The dissolution was effective May 25, 2022.

You are hereby notified that if you believe you have a claim against Northwest Multiple Listing Service, Inc., you must submit a written summary of your claim to the corporation in care of William A. Findley, 28094 Lake Ridge Drive, Maryville, MO 64468. The summary of your claim must include the following information: 1) the name, address, and telephone number of the claimant; 2) the amount of the claim; 3) the date of the event on which the claim is based; and 4) a brief description of the nature of the debt or the basis for the claim.

All claims against the corporation will be barred unless a proceeding to enforce the claim is commenced within two years after publication of this notice.

**NOTICE OF ARTICLES OF DISSOLUTION BY  
VOLUNTARY ACTION  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
POPLAR BLUFF LICENSE BUREAU, INC.**

On May 25, 2022, Poplar Bluff License Bureau, Inc., a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. Dissolution was effective on May 25, 2022.

You are hereby notified that if you believe you have a claim against Poplar Bluff License Bureau, Inc., you must submit a summary in writing of the circumstances surrounding your claim to Poplar Bluff License Bureau, Inc. at 1515 E. Malone Ave., Sikeston, Missouri, 63801. The summary of your claim must include the following information: (1) the name, address, and telephone number of the claimant; (2) the amount of the claim; (3) the date on which the event on which the claim is based occurred; and (4) a brief description of the nature of the debt or the basis for the claim.

All claims against Poplar Bluff License Bureau, Inc. will

be barred unless the proceeding to enforce the claim is commenced within two years after the publication of this notice.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS AND CLAIMANTS AGAINST  
SEASONS ENTERTAINMENT GROUP, LLC**

On May 25, 2022, Seasons Entertainment Group, LLC ("LLC"), a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State, Charter #LC0760698.

All claims against LLC should be submitted in writing by mail to the LLC in care of Elizabeth Jones, 10 Willowyck Court, St Louis, MO 63141. Claims must include name and address of claimant; amount claimed; date claim arose; brief description of basis of claim; and documentation of claim.

Deadline for receipt of claim by LLC is 90 calendar days from date of this notice. All claims against LLC will be barred unless a proceeding to enforce the claim is commenced within three years after publication of this notice.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
SERVICE CONCEPTS, LLC**

On May 20, 2022, Service Concepts, LLC, a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The notice was effective May 20, 2022.

Said company requests that all persons and organizations who have claims against it present them immediately by letter to the company at:

Robert M. Wise  
16529 Thunderhead Canyon Court  
Wildwood, MO 63011

All claims must include the name and address of the claimant; the amount claimed; the basis for the claim; the date(s) on which the event(s) on which the claim is based occurred; the documentation of the claim; and a brief description of the nature of the debt or the basis for the claim.

NOTICE: All claims against Service Concepts, LLC, will be barred unless commenced within three years after the date of the publication of this notice.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
STEGAR, L.L.C.**

On May 23, 2022, Stegar, L.L.C., a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The notice was effective May 23, 2022.

Said company requests that all persons and organizations who have claims against it present them immediately by letter to the company at:

Gary Delgman  
17 Clarkson Farm Drive  
Chesterfield, MO 63017

All claims must include the name and address of the claimant; the amount claimed; the basis for the claim; the date(s) on which the event(s) on which the claim is based occurred; the documentation of the claim; and a brief description of the nature of the debt or the basis for the claim.

**NOTICE:** All claims against Stegar, L.L.C. will be barred unless commenced within three years after the date of the publication of this notice.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
SULGROVE PROPERTIES, LLC**

On April 4, 2022, Sulgrove Properties, LLC, a Missouri limited liability company, filed its Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State.

Said limited liability company requests that all persons and organizations who have claims against it present them by letter immediately to the company in care of: Rick J. Muenks, Attorney at Law, 3041 S. Kimbrough Ave., Suite 106, Springfield, Missouri 65807. Claims must include name and address of claimant; amount of claim; basis of claim; and documentation of claim.

Pursuant to § 347.141 RSMo, any claim against Sulgrove Properties, LLC will be barred unless a proceeding to enforce the claim is commenced within three years after the publication of this notice.

**NOTICE OF WINDING UP  
FOR LIMITED LIABILITY COMPANY  
TO ALL CREDITORS AND CLAIMANTS AGAINST  
TEKTON HOMES, LLC**

On May 18, 2022, Tekton Homes, LLC, a Missouri limited liability company (the "Company"), filed a Notice of Winding Up for Limited Liability Company with the Missouri Secretary of State. The dissolution was effective on that date.

You are hereby notified that if you believe you have a claim against the Company, you must submit a written summary of your claim to the Company in care of SBLG Registered Agent, Inc., 2900 NE Brooktree Lane, Suite 100, Kansas City, MO 64119. The summary of your claim must include the following information:

1. The name, address, and telephone number of the claimant;
2. The amount of the claim;
3. The date on which the claim is based occurred;
4. A brief description of the nature of the debt or the basis for the claim; and
5. Whether the claim is secured, and if so, the collateral used as security.

All claims against the Company will be barred unless a proceeding to enforce the claim is commenced within three years after publication of this notice.

**NOTICE OF ARTICLES OF DISSOLUTION  
BY VOLUNTARY ACTION  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
THE BONNIE CLARK CORPORATION**

On May 31, 2022, The Bonnie Clark Corporation, a Missouri corporation, filed its Articles of Dissolution by Voluntary Action with the Missouri Secretary of State. The dissolution was effective May 31, 2022.

You are hereby notified that if you believe you have a claim against The Bonnie Clark Corporation, you must submit a written summary of your claim to the corporation in care of Martha Atwater, 635 Ferndale Road S., Wayzata, MN 55391. The summary of your claim must include the following information: 1) the name, address, and telephone number of the claimant; 2) the amount of the claim; 3) the date of the event on which the claim is based; and 4) a brief description of the nature of the debt or the basis for the claim.

All claims against the corporation will be barred unless a proceeding to enforce the claim is commenced within two years after publication of this notice.

**NOTICE OF ARTICLES OF DISSOLUTION  
BY VOLUNTARY ACTION  
TO ALL CREDITORS OF AND CLAIMANTS AGAINST  
TRI-COM, INC.**

Tri-Com, Inc., a Missouri corporation, filed voluntary Articles of Dissolution by Voluntary Action with the Missouri Secretary of State on April 27, 2022.

Any and all claims against Tri-Com, Inc. may be sent to Checkett, Pauly, Bay & Morgan, LLC. Attn: Sarah, P.O. Box 409, Carthage, Missouri 64836. Each such claim should include the following: the name, address, and telephone number of the claimant; amount of the claim; the basis of the claim; and any and all pertinent documents supporting the claim.

**NOTICE:** Any and all claims against Tri-Com, Inc. will be barred unless a proceeding to enforce the claim is commenced within two years after the date of publication of this notice.

Date of Publication: Aug. 10, 2022.



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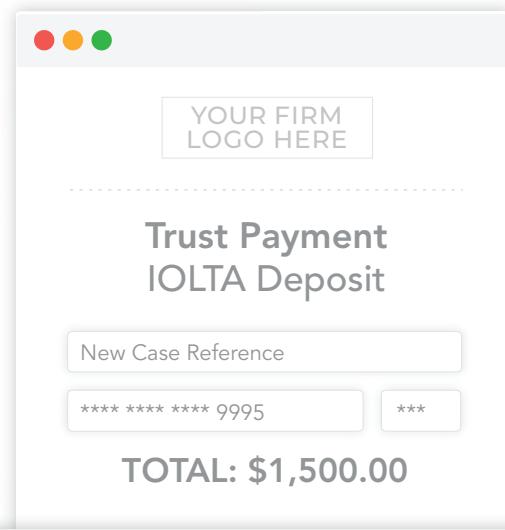
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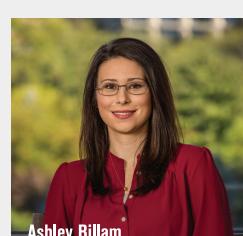
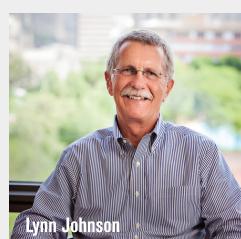
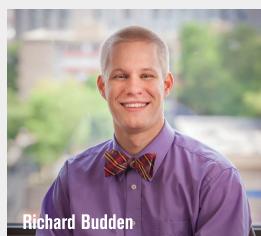
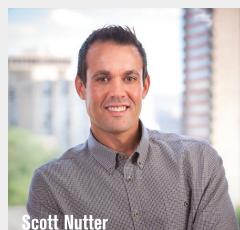
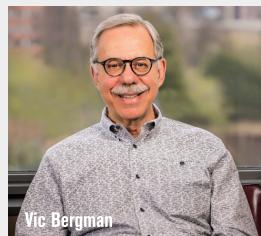


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