

MISSOURI DAMAGES
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I. Bodily Injury Damages

A. Compensatory Damages

1. Legal standards for recovery of compensatory damages

Missouri law entitles a plaintiff to full compensation for any injuries caused by the defendant. *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 130-32 (Mo. banc 2007). To establish his or her case for damages, the plaintiff must show by a preponderance of the evidence that the defendant caused his or her injuries. *Id.*; MAI 4.01. Missouri law also allows a plaintiff to recover for an injury that has not yet occurred if the plaintiff establishes by a preponderance of the evidence that the injury is reasonably certain to occur in the future. *Id.* In addition, the Missouri Supreme Court has held that the plaintiff's evidence that the defendant's conduct placed the plaintiff at an increased risk of suffering possible future consequences is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur. *Swartz*, 215 S.W.3d 127, 130-32.

2. Economic losses that are recoverable

In Missouri, economic damages are damages that arise from the plaintiff's pecuniary injuries, which normally include past, present, and future medical expenses, lost wages, and lost earning capacity. *Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 928 (Mo. Ct. App. 2006).

Regarding the plaintiff's medical expenses, section 490.715.5(2) creates a rebuttable presumption that "the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered." The statute then states that "[u]pon motion of any party, the court may determine, outside the hearing of the jury, the

value of the medical treatment rendered based upon additional evidence, including but not limited to: (a) The medical bills incurred by a party; (b) The amount actually paid for medical treatment rendered to a party; (c) The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.” Section 490.715.5(2).

The Missouri Supreme Court recently held that this statute limits the circuit court’s role to determining whether or not a party presented substantial evidence to rebut the presumption. *Deck v. Teasley*, 322 S.W.3d 536, 539 (Mo. banc 2010). Once the party presents substantial evidence, the party has rebutted the presumption and the jury has the right to weigh the conflicting evidence of value. *Id.* Thus, once the party rebuts the statutory presumption, the party’s evidence of value and the other party’s evidence of actual payment may be admitted at trial as if no presumption exists. *Id.* If the presumption is not rebutted, then the only evidence of the value of medical treatment rendered is the dollar amount necessary to satisfy the financial obligation to the health care providers.

Section 408.040.2 authorizes the circuit court to grant prejudgment interest to a plaintiff as long as the plaintiff sends a prejudgment interest demand to the defendant and his or her demand letter meets section 408.040.2’s statutory requirements. *See also Hayes v. Price*, 313 S.W.3d 645, 653 (Mo. banc 2010).

3. Non-economic losses

Missouri law also allows a plaintiff to recover damages that arise from the plaintiff’s non-pecuniary harm. In the context of medical malpractice damages, Missouri’s legislature defines non-economic damages as “damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages[.]”

Section 538.205. Although this statute is applicable only to medical malpractice, the statute's definition of non-economic damages provides a good, but non-exhaustive list of non-economic damages and is consistent with the common law rule that the jury may award damages to a plaintiff for intangibles like past and future pain and suffering, effect on lifestyle, embarrassment, and humiliation. *Gomez v. Constr. Design, Inc.*, 126 S.W.3d 366, 376 (Mo. banc 2004); *Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 931 (Mo. App. 2006).

4. Statutory limitations on recoverable compensatory damages

Section 516.120(4) creates a five-year statute of limitation period for personal injury lawsuits based on negligence. There are no "caps" on compensatory damages outside the context of actions against health care providers. Prior to the Missouri Supreme Court's decision in *Watts v. Lester E. Cox Med. Ctrs*, Section 538.210 limited a party's non-economic damages in an action against a health care provider to \$350,000. In *Watts*, however, the Court held that Section 538.210 violates the right to trial by jury set forth in Missouri's Constitution insofar as it curtails the jury's determination of damages in common law causes of action. *Watts*, 376 S.W.3d 633, 640-41 (Mo. 2012). (Nevertheless, legislative limits on *statutorily* created causes of action remain valid. See *Sanders v. Ahmed*, 364 S.W.3d 195, 204 (Mo. banc 2012); *Watts*, 376 S.W. at 649 (Russell, J., concurring & dissenting).)

5. Application of joint and several liability

In 2005, Missouri's General Assembly modified Missouri's law on joint and several liability. Under section 537.067.1, a defendant is jointly and severally liable for the amount of a judgment rendered against all defendants only if the jury apportions 51% or more of the fault to that defendant. If the jury apportions less than 51% of the fault to that defendant than that defendant is responsible only for his or her percentage of the fault. Under section 537.067.1(1),

an employer remains jointly and severally liable for judgments against its employee. Under section 537.067.2, liability for punitive damages is several only.

Missouri law allows the jury to apportion fault only among the parties at trial. *Fahy v. Dresser Indus., Inc.*, 740 S.W.2d 635, 641 (Mo. banc 1987). Missouri does not have a procedure that allows the jury to apportion fault to a non-party. *Id.* But Missouri law does allow the defendant to introduce evidence and argue that a non-party was the sole cause of the plaintiff's injuries. *Oldaker v. Peters*, 817 S.W.2d 245 (Mo. banc 1991); *Owens v. Dougherty*, 84 S.W.3d 542, 548 (Mo. App. 2002); *Whisenand v. McCord*, 996 S.W.2d 528, 531 (Mo. App. 1999). The courts have held that this argument is not an apportionment of fault argument but is an argument regarding the defendant's lack of negligence. *Id.*

B. Punitive Damages

1. Legal standards for recovery of punitive damages

To establish his or her case for punitive damages, a plaintiff must show by clear and convincing evidence that the defendant knew or had information from which he, in the exercise of ordinary care, should have known that the alleged negligent conduct created a high degree of probability of injury, and showed complete indifference or conscious disregard for the safety of others. Missouri Approved Instruction 10.02; *Coon v. Am. Compressed Steel, Inc.*, 207 S.W.3d 629, 637 (Mo. App. 2006). The defendant's conduct must be so egregious that it "tantamount to intentional wrongdoing." *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 248 (Mo. banc 2001). Missouri's clear and convincing standard is more demanding than Missouri's preponderance of the evidence standard. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996). Courts typically state that evidence is clear and convincing if it instantly tilts the scales in the affirmative when weighed against the evidence in opposition and if it causes the fact finder to have an abiding conviction that the evidence is true. *Coon*, 207 S.W.3d at 637.

Under current case law, an employer's vicarious liability for his employee's acts includes liability for any awards of punitive damages against his employee. *Flood ex rel. Oakley v. Holzwarth*, 182 S.W.3d 673, 680 (Mo. App. 2005); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 669 (Mo. App. 1978). Although some states require the plaintiff to prove that the employer ordered, participated in or ratified the employees' conduct to hold the employer vicariously liable for the employee's actions, Missouri requires only that the plaintiff prove that the employee was acting within the scope of his employment and that the employee's actions justify a punitive damage award. *Id.*

2. Application to the driver and the motor carrier and circumstances in which punitive damages have been upheld against motor carriers

The Missouri Supreme Court has held that the following factors weigh *against* the submission of a punitive damage claim: 1) defendant did not know of any or knew of very few prior similar occurrences; 2) the plaintiff's injuries were unlikely to occur without the negligence of someone other than the defendant; and 3) the defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred. *Alcorn*, 50 S.W.3d at 247-48.

Regarding industry standards, the Missouri Supreme Court has made two other points. First, the Missouri Supreme Court has stated that evidence that the defendant failed to meet industry standards is "not necessarily relevant" to the issue of punitive damages when a government regulatory scheme regulates the defendant's conduct. *Id.* In that case, the relevant issue is whether or not the defendant conformed to the government's regulatory scheme. *Id.* If so, the defendant's conformity can require the circuit court to deny the plaintiff the right to submit his or her punitive damage claim to the jury. *Id.* When the evidence that the defendant

violated industry standards is relevant, the plaintiff must establish that the industry standards were clear and specific. *Lopez*, 26 S.W.3d at 161.

Counsel should also examine a few specific cases on punitive damages. In *Coon*, 207 S.W.3d at 639, the plaintiff filed a wrongful death claim against a truck driver and his employer. The decedent died while she was driving on a highway and a steel plate flew through her windshield. The steel plate had fallen out of a truck carrying a load of scrap metal. *Coon*, 207 S.W.3d at 639. The jury awarded a punitive damage award to the plaintiff.

On appeal, the appellate court affirmed the punitive damage award. In doing so the court noted that: 1) at trial, the employer admitted that a load had to be secured because the failure to do so would create a high probability of serious injury; 2) despite this knowledge, the employer had no written policy regarding the proper security of loads; 3) rather, the employer made a conscious business decision to allow its drivers to decide whether and how a particular load should be tarped, strapped, chained, or otherwise secured; 4) in doing so, the employer allowed the employee to take into consideration the time it would take him or her to secure the load; 5) the employer had knowledge of prior similar incidents; and 6) the employer's actions violated federal motor carrier safety regulations. *Id.*

In *Flood ex rel. Oakley v. Holzwarth*, 182 S.W.3d 673, 675 (Mo. App. 2005), the truck driver was operating a tractor trailer unit which he owned, but had leased to Shepherd, Inc., on Highway 60 behind a van. *Oakley*, 182 S.W.3d at 675. The truck driver pulled into the westbound lane of Highway 60 in an attempt to pass the van. As the tractor trailer began to overtake the van, the van started to make a left-hand turn onto a side road. A collision occurred between the tractor trailer and the van, and a minor passenger in the van sustained disabling injuries.

The jury returned a verdict for punitive damages against the truck driver and the trucking company. The appellate court affirmed the punitive damage award. In doing so, the appellate

court held that: 1) the truck driver admitted to having methamphetamine in his system on the day of the accident; 2) the truck driver was traveling at least 85 miles per hour in an attempt to escape the repossession company that he believed at the time was chasing him; and 3) the truck driver attempted to pass five automobiles at one time on a highway. *Id.*

In *Garrett v. Albright*, 06-CV-4137-NKL, 2008 WL 795613 (W.D. Mo. Mar. 21, 2008), the court denied the defendants' motion for summary judgment on the plaintiff's punitive damage claim because the plaintiff had produced clear and convincing evidence that defendants had failed to: 1) observe clear industry standards for monitoring safe driving; 2) follow their own corporate policies; 3) abide by the federal motor carrier regulations; 4) prohibit their driver to drive even though he did not provide all of his log books; and 5) follow up on their driver's medical problems.

A punitive damage claim may be made against an employer for failing to adequately train or supervise the driver. Although not a trucking case, in *Porter*, the appellate court held that the "failure to properly train an employee to perform a task that, if improperly performed, threatens death or serious harm can suffice as a basis to award punitive damages." *Porter v. Erickson Transp. Corp.*, 851 S.W.2d 725, 744-47 (Mo. App. 1993) (citing *Blum v. Airport Terminal Servs., Inc.*, 762 S.W.2d 67 (Mo. App. 1988)).

3. Statutory limitations on recoverable punitive damages

In 2005, the Missouri legislature enacted a punitive damage cap that caps punitive damages at the greater of (1) five hundred thousand dollars or (2) five times the net amount of the judgment awarded to the plaintiff against the defendant. Section 510.265. The cap does not apply if the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions in the plaintiff's petition. *Id.*

The legislature has also created the Tort Victim's Compensation Fund. Under section 537.675, one half of any punitive damages award, after the deduction of attorney's fees and expenses, goes to the state. Section 537.675 does not apply to arbitration awards or settlements. The statute does apply to federal court judgments awarding damages under Missouri tort law. *Fust v. Attorney Gen. for the State of Mo.*, 947 S.W.2d 424, 432 (Mo. banc 1997) (interpreting a prior version of the statute.) However, counsel should read *Finley v. Empiregas Inc. of Potosi*, 28 F.3d 782 (8th Cir.1994), which discusses the feasibility of the state collecting its portion of the punitive damage award in federal court. The *Finley* court held that, under a prior version of the statute, a Missouri court could not proceed under Federal Rule of Civil Procedure 69 on a motion to disburse a portion of a federal punitive damage award to the state.

4. Application of joint and several liability

Under section 537.067.2, liability for punitive damages is several only.

ii. Wrongful Death and Survival Damages

A. Wrongful Death Damages

1. Persons legally entitled to recover

Section 537.080 identifies the proper parties to sue for the wrongful death of an individual and creates three classes of persons entitled to sue. The first class of persons entitled to sue are the decedent's spouse, decedent's children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or the decedent's father or mother. Section 537.080.1(1). If there are no persons in class 1 who can bring the wrongful death action then section 537.080.1(2) states that the decedent's brother or sister or their descendants, who can establish his or her right to those damages set out in section 537.090, can maintain the action. Thus, persons in class 2 have no cause of action and cannot participate in the apportionment of damages when there is a class 1 member. *See Call v. Heard*, 925 S.W.2d 840

(Mo. banc 1996). Accordingly, a sister of a deceased person may not share in the wrongful death recovery where, for example, the deceased is survived by his mother. *Id.*

If there are no persons in class 1 or 2 who are entitled to bring a wrongful death action, section 537.080.1(3) states that a plaintiff ad litem may bring the action. A person who is entitled to share in the proceeds of the wrongful death action must file an application asking the court to appoint the plaintiff ad litem. When the plaintiff ad litem brings the action, the law requires the court to distribute the settlement according to the laws of descent “unless special circumstances indicate that such a distribution would be inequitable.” Section 537.095.2. Thus, a person who is entitled to the settlement under Missouri’s laws of intestate succession must file the application asking the court to appoint a plaintiff ad litem.

2. Damages available for wrongful death

Missouri courts have held that the wrongful death act creates a new statutory cause of action that did not exist at common law and does not revive the deceased’s cause of action. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. banc 2009). The wrongful death cause of action is distinct from any underlying tort claims. *Id.* Thus, the wrongful death cause of action is not a transmitted right nor a survival right. *Id.* If an injured party dies as a result of his or her injuries, the plaintiff must file a wrongful death action and wrongful death damages and pre-death damages are merged in the wrongful death action. Section 537.090. If an injured party dies due to a cause other than his or her injuries that make up his or her personal injury cause of action then the plaintiff must file a survival action. Section 537.020. Section 537.090 lists the damages that a jury may award in a wrongful death case:

In every action brought under section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort,

instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable.

Mo. Ann. Stat. § 537.090 (West)

In determining the party's pecuniary loss because of the decedent's death, the jury can consider the financial aid that the decedent was providing to the party. *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 657 (Mo. App. 1997). To establish the likelihood that the decedent would have provided future financial aid to the party, the party may introduce evidence of the decedent's health, character, talents, earning capacity, life expectancy, age, and habits. *Id.* To establish the party's loss of consortium damages, the jury should consider the physical, emotional, and psychological relationship between the party and the deceased. *Id.*

Section 537.090 also allows the jury to award damages for "aggravating circumstances attending the death." The courts have held that damages for aggravating circumstances are similar to punitive damages. *Coon*, 207 S.W.3d at 637. To establish his or her case for aggravated damage, the plaintiff must show by clear and convincing evidence that the defendant knew or had information from which he, in the exercise of ordinary care, should have known that the alleged negligent conduct created a high degree of probability of injury, and showed complete indifference or conscious disregard for the safety of others. *Id.*

3. The legal standards for recovery for wrongful death

As with any other civil case, Missouri wrongful death law entitles a plaintiff to full compensation for any injuries caused by the defendant. To establish his or her case for damages,

the plaintiff must show by a preponderance of the evidence that the defendant's negligence caused his or her injuries and death. *Motley v. Colley*, 769 S.W.2d 477, 479 (Mo. App. 1989).

4. Statutory limitations for recovery of wrongful death damages

Section 537.100 requires the plaintiff to commence his or her wrongful death lawsuit within three years after the cause of action accrues. Section 537.100 also provides a built-in "savings" provision for wrongful death actions. Any proper plaintiff under the wrongful death statute can take advantage of the prior filing by any other proper wrongful death beneficiary because, under the statute, there is only one indivisible claim for the wrongful death of a person against any one defendant. *Denton v. Soonattrukal*, M.D., 149 S.W.3d 517 (Mo. App. 2004). But, the courts have held that the general tolling provisions in section 516.170 for minors, imprisonment and lack of mental capacity does not toll the wrongful death statute. *Bregant by Bregant v. Fink*, 724 S.W.2d 337, 338 (Mo. App. 1987).

Section 538.210 limits a plaintiff's non-economic damages to \$350,000 for a wrongful death claim against a health care provider. *See Sanders*, 364 S.W.3d at 204 (upholding section 538.210 with regard to statutorily created causes of action).

5. The application of joint and several liability

Under section 537.067.1, a defendant is jointly and severally liable for the amount of a judgment rendered against all defendants only if the jury apportions 51% or more of the fault to that defendant. If the jury apportions less than 51% of the fault to that defendant than that defendant is responsible only for his or her percentage of the fault as determined among the party-defendants. Under section 537.067.1(1), an employer remains jointly and severally liable for judgments against its employee. Under section 537.067.2, liability for punitive damages is several only.

6. Comparative Fault

Section 537.085 states that, in a wrongful death action, the defendant may plead and prove as a defense any defense that the defendant would have had against the deceased in an action based upon the same act that caused the death of the deceased if death had not ensued and the deceased brought the action as a personal injury action. This includes a comparative fault defense. *Teeter v. Missouri Highway and Transp. Com'n*, 891 S.W.2d 817 (Mo. banc 1995). For a discussion of the impact of a beneficiary's fault or negligence on the right of the beneficiaries to recover, counsel should read *Teeter* and *State ex rel. Griffin v. Belt*, 941 S.W.2d 570 (Mo. App. 1997).

B. Survival Damages

1. Persons legally entitled to recover

Section 537.020 states that actions seeking recovery for injury or death survive the deaths of the parties. Under section 537.020, the personal representative of the injured party may bring or maintain the action on behalf of the deceased person. By its plain language, section 537.020 applies only to causes of action for personal injuries that do not result in death. Under section 537.080.1, if death results from circumstances entitling the decedent to an action for personal injury, the proper action is a wrongful death action. *Bamberger v. Freeman*, 299 S.W.3d 684, 686-87 (Mo. App. 2009). In that wrongful death action, the decedent's survivors may recover damages for their injuries and recover damages that the decedent suffered between the time of his or her injury and the time of his or her death.

2. Statutory limitations for recovery of survival actions

Section 516.120(4) creates a five-year statute of limitation period for personal injury lawsuits based on negligence.

Section 538.210 limits a plaintiff's non-economic damages to \$350,000 for a survival action claim against a health care provider. *See Sanders*, 364 S.W.3d at 204 (upholding section 538.210 with regard to statutorily created causes of action).

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Since the early 1990's, Jeff has devoted the majority of his time to working for improved safety in the trucking industry. Jeff has served as National Transportation Counsel for Parents Against Tired Truckers (P.A.T.T.) since it was founded in 1994, and shortly thereafter became a board member for Citizens for Reliable and Safe Highways (CRASH). He currently serves on the Executive Committee of the Truck Safety Coalition. He has also served on the boards of directors of the Center for Truck Safety and the Brain Injury Association of Greater Kansas City and Kansas and is a member of the Transportation Research Board's Truck and Bus Safety Committee. Jeff is a frequent speaker on trucking issues at conferences in the legal and truck safety communities and has published multiple articles regarding truck safety and truck crash litigation.

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Tom Hershewe received his law degree from the University of Missouri-Columbia in 2005. While in law school, Tom was a member of the Journal of Dispute Resolution and was inducted into the Order of the Coif. After graduation from law school, Tom clerked at the Missouri Court of Appeals, Western District where he gained extensive experience in legal research and writing, civil procedure, appellate procedure, and a variety of substantive legal areas. Tom now works as an associate at Dollar Burns & Becker, L.C. where he practices in the areas of personal injury litigation, wrongful death, tractor-trailer accidents, motor vehicular accidents, insurance bad faith claims and daycare abuse cases.

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