



DEFENSE STRATEGIES FOR MINIMIZING PLAINTIFFS' DAMAGES AND PLAINTIFFS' VERDICTS

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The best way for the defendant to keep down the damages is to win on the issue of liability. However, in many cases defense counsel may believe that there is a greater than 50% chance that the plaintiff will win. In some cases, the defendant is clearly at fault, and may be egregiously at fault. In all of these circumstances, a primary goal of defense counsel is to minimize the potential damages that a jury may award to the plaintiff at trial.

In those cases where liability is not clear, part of the strategy of keeping damages down is to present a very good defense on the issue of liability. Even if there is an eventual plaintiff's verdict, disputed liability will probably keep the damages down. This can be in a direct fashion such as reduction of the verdict based on plaintiff's comparative fault; or on a jury psychology level. Jurors, who really aren't sure about defendant's fault, are less likely to follow the recommendations of plaintiff's counsel in closing argument to award an amount that is extremely generous to the plaintiff. Doubts about liability can also be a factor in jury room debates, where eventually nine jurors need to agree to the same verdict and the same amount of damages.

In this chapter, defense tools for minimizing damages and the use of pre-trial motions for damage control will be considered.¹

1. LOOKING AT DEFENSE TOOLS FOR MINIMIZING DAMAGES

Later in this section, we will look at specific legal concepts and pertinent case law that defense counsel can employ in attempting to minimize the damages awarded by the jury. There are significant numbers of pretrial and trial strategies, however, which can have a significant impact upon the eventual verdict in a case. A lot of these tactics or strategies will be discussed in detail during day two of this seminar. A brief overview will be presented here, focusing on the defense goal of minimizing damages.

(a) Investigation

The quality of investigation which is done immediately following, or shortly after, the accident or occurrence is extremely important. Usually, defense counsel does not have significant involvement at that investigative stage. The investigation is conducted either by an insurance carrier, a defendant corporation, or investigators hired by the defendant or the defendant's insurer. Defense counsel should, however, carefully review the evidence developed by that investigation as soon as the file is sent to them. If there are gaps, defense counsel should attempt to have them filled at the earliest opportunity. This may involve something as simple as ordering a police report. However, especially if the accident is work related, there are numerous sources of information that may have not yet been pursued. Workers' compensation files are sometimes a fruitful source of information and contradictory statements. Certain industrial accidents or accidents involving products may have been investigated OSHA, or other government regulatory groups. Those reports can be very helpful in defending the case and in minimizing damages.

(b) Jurisdiction, Venue, and Removal

When defense counsel gets the lawsuit, the initial focus should be upon issues relating to jurisdiction and venue. Myriad cases have been decided in the Eastern District Court of Appeals and the Missouri Supreme Court, relating to the ongoing battle in which plaintiffs try to file cases in St. Louis City, and defense attorneys try to have the cases transferred to St. Louis County or some other conservative forum. See generally State ex rel. Kertz v. Neill, 90 S.W.3d 467 (Mo. 2002); State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. 2001) (opinion of Judge Wolff, *concurring in part and dissenting in part*) (recommending the merger of city and county for jury purposes); State ex rel. BJC Health System v. Neill, 86 S.W.3d 138 (Mo.App.E.D. 2002); Krueger v. Pulitzer, Inc., 85 S.W.3d 61 (Mo.App.E.D. 2002). State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820 (Mo. 1994).

Missouri Supreme Court Rule 51.045 requires that a Motion for Change of Venue be filed within the time allowed for responding to an adverse party's pleading, or if no responsive pleading is permitted, then within thirty days of service of the last pleading. If these time frames and procedures are not adhered to, the Motion to Transfer Venue is not timely filed and the issue of improper venue is waived. State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28 (Mo.App.E.D. 2002). Defendants should also take care in terms of the pleadings, motions, and discovery that are filed, because they may be a basis for waiver of venue as well. . See Missouri Supreme Court Rule 55.27(g); State ex rel. Antoine v. Sanders, 724 S.W.2d 502 (Mo. 1987); see also 2 Mo.Prac., Methods of Practice: Litigation Guide § 3.15 (4th ed. 2002). Defense counsel should also note that Rule 51.045 provides that, within ten days after the filing of the Motion to Transfer for improper venue, an opposing party may file a reply denying the allegations and creating an issue for the court to decide. However, if a reply is not filed within that time, a transfer of venue "shall be ordered to a court where venue is proper."

Though it is not as frequently used, defense counsel should also keep in mind the provisions of Rule 51.04, allowing for a change of venue based on the prejudice of the inhabitants of the county, and Rule 51.03, which allows a change of venue as a matter of right regarding suits filed in a county of 75,000 or less inhabitants.

Also, if the case presents diversity of citizenship or a federal question, prompt consideration must be given to the issue of removal to federal court. The petition for removal must be filed within 30 days or it is waived. See 28 U.S.C. §1446(b). Defense counsel should alert their clients to the need for prompt referral. Referral of a file to defense counsel on the 28th day or later, certainly increases the possibility these issues will be missed or that time will expire before the appropriate action is taken. Sometimes plaintiffs' attorneys will offer adjusters a 40+ day extension after service in which to keep negotiating. If the file isn't referred out in a timely manner (i.e. long before the extension expires), defense counsel may get the file after the time has passed for challenging venue or removing the case to federal court.

Once venue is established and pleadings and discovery commence, there are a number of motions that can be filed before the time of trial that will help limit or control damages. They will be the subject of the next section of this chapter.

(c) Jury Selection

During trial itself, the initial tool in minimizing damages is the selection of a favorable jury. Some jurors are more analytical, more suspicious and more reluctant to return large verdicts. Insurance carriers and corporations have been attempting to get out the message regarding limitation of jury verdicts for some period of time. However, recently it has become a hot political topic at both a national and state level under the banner of "tort reform", so the questions concerning size of verdicts have received a lot more media attention. If the country is becoming more conservative, as some analysts believe, will that trend have an effect on reducing the size of future jury verdicts in Missouri? We will have to wait and see, but it is something to think about when picking juries and evaluating cases. The size of jury verdicts and their possible effects on doctors, businesses, and society is something that more jurors will have previously considered than in the past.

Some jurors may be much more sympathetic or empathetic to a person who has serious injuries; jurors may also have something in their background, which makes them more likely to "give away" the insurer's or corporation's money. Anger at insurers for claims denial or cancellation, or bad experiences with a corporate employer, are certainly on this list.

Since defense counsel certainly doesn't want to talk about insurance, sometimes defense attorneys have to read between the lines when jurors respond to the insurance question or the prior claims questions to detect the biases that may be present.

Honest jurors may have belief systems or past life experiences, which significantly affect their desire or willingness to return large verdicts, even if they make their best effort to be impartial and open minded. Certain jurors will be sufficiently biased or prejudiced that they will openly express the bias in a way that allows them to be stricken for cause. Defense counsel should strike for cause any overtly hostile or prejudiced juror displaying pro-plaintiff or large verdict propensities. This promotes justice, but also saves pre-emptive strikes for the "closer calls."

Jury selection is primarily focused on both the plaintiff and defendant trying to get the best possible jurors for their position, which in an adversary system presumably results in a fair jury being selected. However, voir dire is also a time during which attorneys can build a relationship with the jurors and a time when defense counsel can educate jurors about issues in the case. This education can include topics such as burden of proof, standard of proof, causal relationship, and the requirement that jurors follow the law as ruled by the judge and as presented in the instructions. All of these topics can be of assistance to defense counsel in limiting the size of a plaintiff's verdict. If the jurors understand these topics, they may more clearly understand the instructions, which can then form a basis for defense counsel's closing argument on those topics.

(d) Credibility of Defense Counsel

Both opening statements and closing arguments will be discussed in detail later in this book, but obviously they are both crucial in keeping down the amount of damages. Defense counsel should remember that the credibility or lack of credibility of the plaintiff's attorney and the defense attorney can be crucial in determining the amount of damages. Since plaintiffs have the burden of proof, plaintiff's attorneys sometimes make promises in opening statement as to what the evidence will show and then fail to deliver the promised evidence. Plaintiff's counsel may also reach conclusions in closing argument based upon weak facts or testimony, which lack credibility. These occurrences present real opportunities for defense counsel to call into question the integrity of the plaintiff's whole case. Even if there is liability, and even if a jury is going to return a plaintiff's verdict, overstatements or broken promises by plaintiff's counsel can have a significant impact on minimizing the verdict and keeping the jury's verdict reasonable from a defense perspective. Overreaching by plaintiff's counsel in hopes of a large verdict may backfire and also affect the credibility of the plaintiff's entire case, resulting in a lower verdict. Conversely, the defense attorney who makes disingenuous arguments, or who has been obnoxious during the course of a trial, may find that the plaintiff's verdict is substantially larger than expected, due to their own conduct.

(e) Credibility and Jury Appeal of Plaintiff and Defendant

Perhaps even more important is the credibility of the plaintiff and defendant in a case. A plaintiff who lies or conceals is doing tremendous damage to his case, and this dishonesty must be pointed out by defense counsel. The damaging testimony of a plaintiff not need consist of direct and overt lying, but can consist of the plaintiff consistently or dramatically exaggerating his injuries or losses.

The plaintiff's background can also make a huge difference in an amount that a jury can award. A prior criminal record, if for a serious offense, a recent offense, or an offense involving truth and veracity can cast doubt on the plaintiff's credibility and therefore raise questions concerning plaintiff's testimony and claimed injuries. Investigation of prior claims and prior medical records is perhaps one of the most crucial tools available to defense counsel. With respect to past claims, if the case is one that has some material value, defense counsel should not rest on merely looking into those prior claims acknowledged by the plaintiff in the plaintiff's discovery responses. Insurance companies have access to index bureaus that can retrieve past claim information. Workers' compensation records and other public records may also provide significant information. Court records contain information regarding prior litigation. This information about a plaintiff can prove to be extremely valuable, especially if a plaintiff fails to disclose it.

In the really serious injury cases, defense attorneys will almost certainly have a consulting physician, who will probably review records, perform a medical examination, assist defense counsel and testify at trial. However, even in the less serious cases, the careful review of prior medical records can be crucial. There are many possible mitigating factors, even if the plaintiff proves that an injury was causally related to the defendant's negligence. Pre-existing injuries to the same part of the body are the most obvious. However, there are certain systemic conditions, lifestyle choices, or other factors that may prove very important. Many people develop bulging discs or herniated discs in the absence of any trauma. If a plaintiff with seemingly minor injuries is sent to a pain management specialist, carefully examine what other health conditions or problems may exist in the person's life that may have either caused significant pain or may render the person vulnerable to experiencing pain in an exaggerated manner. Prior medical records may also contain damaging admissions, which can be helpful to the defense.

The psychological problems of plaintiffs can be a valuable source of information to defendants, and can provide alternate explanations for exaggerated complaints of pain. However, defense counsel needs to tread very carefully when interjecting psychological issues into the case, since jurors may deem this evidence to be inappropriate, if not clearly related to plaintiff's injuries or complaints. When a plaintiff claims psychological injury in a personal injury case, in circumstances where the injuries are not devastating, there should be a very careful investigation. A significant part of the population suffers from depression at some point in their lives in the absence of trauma. The fact that a party may be depressed following a non-devastating accident may be a matter of chance or may be a matter of other variables, which are totally unrelated to the accident. Also, when a plaintiff opens the issue of psychological damages, defense counsel should use that as an opportunity to seek very broad medical and psychological/psychiatric discovery. Since ailments and conditions throughout the body may affect a person's mood, anxiety level, state of mind, or mental health, and since many drugs or medications have side effects, defense counsel may wish to take the position that the plaintiff's entire medical and psychological history has been placed at issue. That opens the door to examine the plaintiff's entire medical and psychological history or at least the complete history for a number of years before the accident to the present. This may cause even seemingly remote events to become quite relevant. If a plaintiff, who suffers from depression at a time subsequent to an occurrence, is found to have a history of sexual abuse by parents, relatives, or close confidantes, the causal relationship between the depression and the personal injury may certainly be called into question.

In addition to raising questions of credibility, prior injuries, prior medical conditions, or prior psychological problems may call into question the causal relationship between the accident and the alleged damages. These issues, questions, or doubts that are developed through evidence can be quite significant in minimizing the amount of a plaintiff's verdict. This potential for reducing a verdict is very directly related to "burden of proof" and "verdict directing" instructions that are given at the end of a case. Casual relationship is always an element of a personal injury action. Sufficient uncertainty or doubt about casual relationship can be the basis for a defendant's verdict in circumstances, even where the plaintiff has experienced legitimate pain and discomfort and where the defendant is negligent. Doubts regarding injury or causation also lead to argument as to whether the plaintiff has met the burden of proof. These doubts help keep verdicts down, even when the jury finds for the plaintiff.

Finally, defense counsel should always give serious consideration to the "smell test". If a plaintiff is claiming devastating injuries in a minor impact automobile case, the defendant has an easy theme for minimizing damages. It is certainly logically possible that a person may be severely injured in a minimal impact occurrence, just like it is possible that someone may walk away without a scratch from a horrible and devastating motor vehicle collision, where the car is demolished and where it appears no one could have walked away. However, the burden of proof comes down to what jurors view as probable based on a preponderance of the evidence. Sometimes things are obvious, sometimes they are a close call, but on other occasions, the claim and the facts upon which the claim is based just don't pass the "smell test".

(f) Comparative Fault

Perhaps the most widely applicable legal doctrine available to defendants to reduce the amount of a plaintiff's verdict in a personal injury case is the doctrine of comparative fault. The first aspect of the comparative fault doctrine was judicially adopted in the case of Missouri Pacific Railroad v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. banc 1978). In that case, the Supreme Court held that a joint tortfeasor could seek contribution from another joint tortfeasor, and abandoned the distinction of active and passive negligence. Subsequently, in Gustafson v. Benda, 661 S.W.2d 11

(Mo. banc 1983), the Court adopted a comprehensive system of pure comparative fault by which the plaintiff can recover from the defendants for those damages attributable to the defendant's fault, even if the plaintiff is more negligent than the defendants.

These principles are, of course, of great value to a defendant in cases where fault is in dispute, and where multiple parties including the plaintiff may be deemed to have fault. It is much better for defendants if they can focus upon the plaintiff's fault in a trial, than if two defendants are battling with each other regarding issues of their fault. Sometimes plaintiffs can exploit this situation and receive larger verdicts, because the focus of the trial becomes centered on the fight between the defendants concerning liability, and the plaintiff has a clearer shot at hammering home points to support a larger jury verdict based on the plaintiff's damages and injuries.

The system of pure comparative fault has been modified by statutes. Section 537.067 RSMo sets forth the procedure by which the amount that is not collectible from a defendant is reallocated amongst solvent parties, when the jury has assessed a percentage of fault to the plaintiff. In medical malpractice actions, apportionment of fault is governed by Section 538.230. Section 538.230-2 states that "any defendant against whom an award of damages is made shall be jointly liable for the share of the judgment allocated to those defendants whose apportioned percentage of fault is equal to or less than such defendant."

Attorneys should be aware that the doctrine of comparative fault is limited to claims for "damages for injury or death to persons or harm to property." Murphy v. City of Springfield, Missouri, 738 S.W.2d 521 (Mo.App.S.D. 1987); See also Chicago Title Insurance Co. v. Mertens, 878 S.W.2d 899, 902 (Mo.App.E.D. 1994). In economic injury cases, contributory negligence remains an absolute defense. Miller v. Ernst & Young, 892 S.W.2d 387, 388 (Mo.App.E.D. 1995). Since this is a seminar on personal injury, this discussion of contributory negligence may seem like a digression. However, consider a legal malpractice case, which is based on the alleged failure of a plaintiff's attorney to file a personal injury action in a timely manner. Legal malpractice cases are cases for economic loss, not cases for personal injury. Therefore, the negligent or wrongful conduct of the plaintiff, if determined by the jury to be negligent, may constitute an absolute bar to recovery under the doctrine of contributory negligence.

(g) Reduction of Damages Due to Settling Tortfeasor

Another tool for the reduction of damages is created in a multi-defendant case, where one party defendant settles, or where there has been a pre-litigation settlement by a potential tortfeasor. Section 537.060 RSMo states that a release given in good faith to one tortfeasor does not release other tortfeasors unless it so provides. However, a general release discharges all other joint tortfeasors as well as the party released. Rudisill v. Lewis, 796 S.W.2d 124 (Mo.App.W.D. 1990). Section 537.060 RSMo also provides that the releasing party's claim is to be reduced by the stipulated amount of the agreement, or the amount of consideration paid, whichever is greater, and that the party who is released is discharged from liability for contribution as to all other tortfeasors.

However, defense counsel needs to conduct appropriate discovery to make sure they know of all settlement agreements, and they need to plead and prove the amount paid in order to get a reduction in the judgment. This is the holding of the recently decided Supreme Court case of Norman, et al. v. Wright, M.D., S.C. 84650, hand down date of 3/18/03. In that case, Dr. Wright sought apportionment of fault and reduction of damages, which had not been pled by Dr. Wright. Apportionment of fault issues had been waived by Dr. Wright in a pre-trial conference. Following the verdict against Dr. Wright, defense counsel moved to reduce the verdict by the \$100,000.00 settlement reached with two other defendants. That settlement had been approved by the trial court a year earlier. This was granted by the trial court, but the Supreme Court reversed and remanded, saying that since Dr. Wright had failed to plead and prove the affirmative defense of reduction under §537.060 RSMo, such reduction was inappropriate. The Court said that to the extent that Julien v. St. Louis University, 10 S.W.3d 150 (Mo.App.E.D. 1999), was inconsistent with the opinion, that Julien should no longer be followed.

(h) Contractual Limitations in Uninsured and Underinsured Motorist Cases

Defense counsel should also be mindful that uninsured and underinsured motorist cases are contract cases as well as personal injury cases. Therefore, contractual defenses are very important and can reduce the amount of a potential verdict. Since uninsured motorist (UM) coverage is statutorily mandated, the courts construe uninsured motorist cases in light of public policy, Ezell v. Columbia Insurance Co., 942 S.W.2d 913 (Mo.App.S.D. 1996) and Galloway v. Farmers Insurance Company, Inc., 523 S.W.2d 339 (Mo.App.W.D. 1975), as well as in terms of the clarity or ambiguity of the policy language. Though the courts construe UM policies liberally in favor of coverage, courts should not create coverage where not exists. Ezell, supra. Since underinsured (UIM) motorist coverage is not statutorily mandated, if the insurance company uses clear, unambiguous language in its exclusions, limitations, and conditions, those insurance policy provisions will be enforced. A substantial amount of case law exists regarding contractual limitations on damages regarding UM and UIM cases, but since an extended discussion is outside the general scope of this chapter, it will not be discussed in detail. Those desiring more information can review the Missouri CLE Series, Insurance Practice, Fourth Edition, Chapter 6, supplemented in 2000 and authored by James W. Reiner and Gretchen G. Myers, as a starting point for further research.

Several other doctrines are available to defense counsel in their efforts to minimize damages and verdicts. Below are summaries of relevant Missouri case law relating to those doctrines.

(i) Mitigation of Damages

Mitigation of damages is such a doctrine, and though it is most frequently applied to contract actions, the doctrine also applies to personal injury cases. A plaintiff's failure to mitigate will not bar her entirely from recovery. Failure to mitigate will only prevent recovery of any damages that the injured party would not have incurred had she taken reasonable steps to avoid them. See Mo. Prac., Personal Injury and Torts Handbook § 5.6 (2002-03).

A plaintiff's failure to mitigate damages is an affirmative defense. State v. Polley, 2 S.W.3d 887, 892 (Mo.App.W.D. 1999). As such, a defendant must raise the issue in the pleadings. See Missouri Rule of Civil Procedure 55.08. Under Rule 55.08 the party raising the affirmative defense must put its opponent on notice of such defense; otherwise, the defense is waived. Polley, supra at 892. See also Greene County v. State, 926 S.W.2d 701, 704 (Mo.App.W.D. 1996). Failure to mitigate is closely related to and often discussed in conjunction with the issue of comparative fault. See Tillman v. Supreme Express and Transfer, Inc., 920 S.W.2d 552 (Mo.App.E.D. 1996). As discussed above, the Missouri Supreme Court adopted a system of pure comparative fault for personal injury tort actions. Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983).

The two primary opportunities for using mitigation in the personal injury context are failure to seek employment and failure to seek medical care. A injured party's failure to seek employment typically arises when his injury prevents his continuing employment in his present capacity. The plaintiff is not entitled to recover all of his lost future earnings. He may recover only "the difference between what he was able to earn before the injury and what he earned or *could* have earned thereafter." Kauzlarich v. Atchinson, Topeka, and Santa Fe Railway Co., 910 S.W.2d 254, 256 (Mo. banc 1995) (internal quotations omitted) (emphasis added). Kauzlarich involved an injured railroad employee who brought suit under the Federal Employers' Liability Act. There, the Missouri Supreme Court commented that, "loss of wages as a consequence of the failure to return to gainful employment is the employee's choice, rather than a proximate result of the defendant's conduct." Id. The evidence in Kauzlarich established that the injured employee withdrew from a training program for a new position with his current employer, that he had previous work experience in other fields, and that he owned and operated a small business. Id. at 258. Expert testimony established that he may have been able to return to desk work, and that there were other available opportunities in the marketplace. Id. The court held that this evidence supported a mitigation instruction. Id.

The injured party also has a duty to exercise reasonable care in seeking medical treatment. Love v. Park Lane Medical Center, 737 S.W.2d 720, 723 (Mo. banc 1987). To this effect, defense counsel may show that the injured party would have benefitted from a simple operation or surgical procedure. The procedure must not pose a serious risk to the injured party. See King v. City of St. Louis, 155 S.W.2d 557, 565 (Mo.App. 1941). If the injured party chooses not to

undergo the procedure, his damages may be reduced in proportion to the amount his injuries would have been reduced by such procedure, less the cost of the procedure and compensation for the pain accompanying it. Id.

Evidence of a plaintiff's failure to follow physician's instructions also supports a contributory fault jury instruction. Stone v. Duffy Distributors, Inc., 785 S.W.2d 671 (Mo.App.S.D. 1990). In Stone, the plaintiff suffered back pain after his truck collided with three kegs of beer, which fell out of the defendant's truck. The plaintiff's doctors instructed him to refrain from strenuous activity. At trial, the defendant introduced evidence that the defendant did not comply with this instruction. There was also evidence that the plaintiff's failure to comply resulted in further injury. Based on this evidence, the court held that a jury could find that the plaintiff's failure to follow his doctor's instructions contributed to his damages. Id. at 677. This evidence supported the contributory fault instruction.

Missouri Approved Instruction 6.01 is appropriate when there is evidence of mitigating circumstances. Tillman, supra at 554; see also Shady Valley Park & Pool v. Fred Weber, Inc., 913 S.W.2d 28 (Mo.App.E.D. 1995). Expressing the failure to mitigate as a percentage of fault reducing damages is the proper method to account for the plaintiff's conduct. Love, supra at 725. An instruction combining the elements of comparative fault and mitigation is not appropriate when the plaintiff did not cause or contribute to the injury-causing event. Tillman, supra at 554. In Tillman, the plaintiff was a passenger in an tractor-trailer collision. The case was tried only on the issue of damages, the defendant asserting that the plaintiff failed to seek employment. The trial court submitted an instruction combining the two elements, although the plaintiff did not contribute to the accident. The court reversed, recommending that the trial court should have given an instruction based on MAI 6.01. Id. Compare Tillman to Stone, where the plaintiff contributed to his injuries by ignoring doctor's orders, and the court upheld the contributory fault instruction.

(j) Exceptions to the Collateral Source Rule

A doctrine which generally benefits plaintiffs is the collateral source rule, which prohibits introduction of evidence relating to the compensation the plaintiff receives from a collateral source, if the evidence has no other relevant purpose. Perkins v. Runyan Heating and Cooling Services, Inc., 933 S.W.2d 837 (Mo.App.W.D. 1996). The most frequently encountered examples of the collateral source rule are health insurance payments or disability payments. However, the collateral source rule is not absolute, and there are situations where a court will allow a defendant to introduce evidence of a collateral source payment in an effort to minimize damages. The first occurs when a plaintiff "opens the door" to the issue by introducing evidence regarding her financial condition. Here, the court may allow the defendant to show that the plaintiff received third party financial assistance. Moore v. Missouri Pacific Rail. Co., 825 S.W.2d 839 (Mo. banc 1992). "Whether the plaintiff injects his financial condition through inadvertence or purposefully, it is the raising of plaintiff's financial condition with the jury that permits the opposing party to attack his claims of financial distress by showing that other financial assistance was available." Moore, supra at 843. In Moore, the plaintiff, during cross-examination, volunteered that he could not continue therapy because he had no money. The court then allowed the defendant to inquire about his collateral source payments.

Missouri courts have split on the application of the doctrine to gratuitous services. The Western District recently commented that the collateral source rule will not apply to render evidence inadmissible when the plaintiff has "incurred no expense, obligation, or liability in securing the insurance coverage in question." Duckett v. Troester, 996 S.W.2d 641 (Mo.App.W.D. 1999). In Duckett, the plaintiff, a collegiate cheerleader, was covered by insurance that her school provided. The court held that the defendant school official's use of the term "we" when referring to the school's insurance did not implicate the collateral source rule. Id.

The collateral source rule does not apply when the collateral source of payments is the defendant. Hamilton v. Slover, 440 S.W.2d 947 (Mo. 1969). A defendant's advance payment to the plaintiff, based on possible tort liability, will be credited or deducted from any judgment in favor of the plaintiff. The law in this area is largely statutory. Section 490.710.2 is the set-off or credit provision. This rule prevents a plaintiff from obtaining a windfall or double recovery. The statute also provides that evidence of such an advance payment by or for the tortfeasor is not admissible as an admission of liability. §490.710.1 RSMo. Missouri courts, however, have held that §490.710 does not apply to payments made under a contractual obligation to pay medical expenses under the medical payments coverage of the defendant's insurance policy. See Wegeng v. Flowers, 753 S.W.2d 306 (Mo.App.W.D. 1988).

When the defendant, or a party on her behalf, makes an advance payment of a plaintiff's special damages, the defendant may introduce evidence that someone other than the plaintiff has paid those amounts in an effort to minimize recovery. §490.715.2 RSMo. However, if the defendant elects to introduce such evidence, she waives the set-off provision of section 490.710.2. Id.

When two or more tortfeasors are involved, payment or settlement made by one tortfeasor to the plaintiff is deducted from the plaintiff's total damages. Haley v. Byers, 394 S.W.2d 412, 416 (Mo. 1965). In the event of such a *payment* by a joint tortfeasor, the court should instruct the jury to reduce the plaintiff's damages by the funds received from the joint tortfeasor. Id. When one joint tortfeasor *settles* with the plaintiff, and the plaintiff discharges the joint tortfeasor from liability, the court should deduct that amount from the jury's verdict. § 537.060 RSMo; See also Leonard Missionary Baptist Church v. Sears, Roebuck and Company, 42 S.W.3d 833 (Mo.App.E.D. 2001); § 538.230 RSMo (personal injury actions against health care providers). If the settlement exceeds the jury's verdict, such settlement satisfies the judgment against remaining joint tortfeasors. In comparative fault situations, the court should first deduct the settlement amount from the verdict and then apportion the damages between the plaintiff and any remaining defendants. Jensen v. ARA Services, Inc., 736 S.W.2d 374 (Mo. banc 1987).

A final exception to the Collateral Source Rule arises in the rare cases when a tortfeasor provides treatment or services to the injured party. An example is Kansas City v. Martin, where the plaintiff sustained injuries as a result of the city's negligence. 391 S.W.2d 608 (Mo.App.W.D. 1965). Doctors at the city's own hospital treated the plaintiff at no charge. The defendant city was then relieved of any obligation for damages for those services. Id.

(k) **Remittitur**

Defense counsel should keep in mind that sometimes a jury is going to make a very large award for the plaintiff. If the award seems excessively large, defense counsel may file a Motion for Remittitur, which gives the trial court the opportunity to review and reduce a damage award; but don't count too heavily on remittitur, because it is not often granted.

As a historical note, the State of Missouri adopted remittitur in 1831. McAllister v. Mullanphy, 3 Mo. 38 (1931); see also Steuernagel v. St. Louis Pub. Serv. Co., 238 S.W.2d 426 (Mo. banc 1951), MoBarCLE: Damages §23.1 (2001). The Missouri Supreme Court halted the practice in 1985, citing confusion and inconsistency of application. See Firestone v. Crown Center Redevelopment Corp., 693 S.W.2d 99 (Mo. banc 1985). Just two years later, the legislature codified both remittitur and the parallel practice of additur. §537.068 RSMo. The statute reads as follows:

A court may enter a remittitur order if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for the plaintiff's injuries and damages. A court may increase the size of a jury's award if the court finds that the jury's verdict is inadequate because the amount of the verdict is less than fair and reasonable compensation for plaintiff's injuries and damages.

A court's analysis of remittitur focuses on three factors:

1. Whether the award is excessive in light of the evidence and the standard of fair and reasonable compensation?
2. Whether the excessiveness is the product of passion, prejudice, or other jury misconduct or judicial error that requires a new trial rather than an adjustment to damages?
3. If remittitur is appropriate, by how much should the award be changed?

Bishop v. Cummines, 870 S.W.2d 922, 926 (Mo.App.W.D. 1994). There is no black-letter formula to determine whether the award is excessive. See Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202 (Mo. banc 1991). Excessiveness can be determined by examining (1) whether the evidence supports the award, and (2) whether the award exceeds fair and reasonable compensation. See MoBarCLE: Damages § 23.5 (2001).

Remittitur is not always the appropriate remedy. It is appropriate when the verdict is excessive in light of the presented evidence. Toppins v. Schuermann, 983 S.W.2d 582, 588 (Mo.App.E.D. 1998). Remittitur is not appropriate when the excessiveness is the result of jury passion or prejudice. Id. In the later instance, only a new trial can remedy the discrepancy. See Barnett v. La Societe Anonyme Turbomeca France, 963 S.W.2d 639 (Mo.App.W.D. 1998).

The court in Othman v. Wal-Mart Stores, Inc. 91 S.W.3d 684 (Mo.App. E.D. 2002), affirmed the trial court's refusal to remit a jury award in a personal injury case. The jury awarded \$250,000 in damages and found the injured fifty percent at fault. The plaintiff received \$125,000. In examining the reasonableness of the award, the court identified the following factors: (1) loss of income, both present and future, (2) medical expenses, (3) plaintiff's age, (4) the nature and extent of plaintiff's injuries, (5) economic considerations, (6) awards given and approved in comparable cases, and (7) the superior opportunity for the jury and the trial court to evaluate plaintiff's injuries and other damages. The court held that the jury award was not excessive, noting the drastic changes to the injured's lifestyle, the pain and suffering of his treatment, and his subsequent medical bills. Othman, supra. Defendants arguing in favor of remittitur should frame their arguments around these seven factors, as other Missouri courts have conducted similar inquiries in other personal injury cases. See Lay v. P & G Health Care, Inc., 37 S.W.3d 310, 333 (Mo.App.W.D. 2000); Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439 (Mo. banc 1998).

One court's surface examination of a jury award included comparisons to other wrongful death awards and the plaintiff's damage request during closing argument. Coggins v. Laclede Gas Company, 37 S.W.3d 335 (Mo.App.E.D. 2000). In Coggins, plaintiffs brought a wrongful death suit after their son died as a result of an explosion. The jury awarded the plaintiffs \$4.5 million in damages. Finding that the award was not excessive, the court focused first on the son's pain and suffering and the relationship with his parents. It also noted that the award was less than what plaintiff's counsel requested in closing argument. The defendant argued that remittitur was appropriate, because this award was the largest in the state in a wrongful death case. The court countered that only verdicts much larger than \$4.5 million have been remitted on appeal in Missouri. It concluded by asserting that the award was not so grossly excessive as to shock the conscience.

In Crawford v. Shop 'n Save Warehouse Foods, Inc., a child suffered injuries after falling from a shopping cart in defendant's store. The jury returned a \$100,000 award for the child and a \$25,000 award for the parents. The trial court remitted the parent's award to \$7,907.10 (which was likely the amount of medical bills). On appeal, the court held that the trial court abused its discretion in granting defendant's motion for remittitur. Here, the court focused its inquiry on the child's future medical expenses and care, and the enduring trauma associated with the injuries. Crawford, 91 S.W.3d 646, 654 (Mo.App.E.D. 2002).

In Section 1, a number of legal principles, evidentiary tools, and trial tactics have been considered that defense counsel can use to minimize plaintiffs' damages and minimize plaintiffs' verdicts.

2. USING PRE-TRIAL MOTIONS FOR DAMAGE CONTROL

This section will primarily focus on those motions which are filed near the end of the discovery phase, at the time of a pre-trial conference, or at the meeting in chambers on the day of trial.

It should be understood, however, that discovery related motions, which occur earlier in the case, may be very important to defense counsel in minimizing damages. If a plaintiff is proving recalcitrant concerning discovery, where normally plaintiffs provide answers or documents, defense counsel should have a heightened sense of awareness as to what is not being disclosed and pursue those issues either by motions or by follow up questions at the time of depositions.

Motions concerning the ability of experts to testify and the permissible scope of their testimony have increased in significance during the last ten years. This is especially true in federal court, given the parameters of Federal Rule of Evidence 702 and the United States Supreme Court decisions in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Under Daubert, expert testimony is admissible if the trial judge can insure that the evidence is based on scientific, technical, or other specialized knowledge or is reliable, and that the evidence will assist the trier of fact or is relevant. Scientific knowledge must be more than belief or

conclusions. It must be fact or theory grounded in methods and in the proper application of the procedures of science. Daubert makes federal judges gatekeepers, whenever expert testimony is offered.

In a Daubert hearing, the federal judge applies Rule of Evidence 104(a) to qualify the expert witness and make a preliminary finding as to whether his or her reasoning or methodology is scientifically grounded and can properly be applied to the facts of the case. See “Getting Your Security Expert over the Daubert Hurdle” Clifford Britt, Trial Magazine, December, 2001. Kumho makes clear that the Daubert test is not a definitive checklist. There must be a case by case determination of reliability and admissibility with the trial judge being given “considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” Kumho at 1176.

The courts in Missouri have not adopted Daubert. Expert testimony in Missouri is governed by Section 490.065 RSMo, which allows admission of expert testimony if the scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or determine a fact at issue. Section 490.065 provides as follows:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefore without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert’s opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

The statute requires testimony to be reliable and based on facts or data ‘reasonably relied upon by experts’ in the field, but it does not require the expert’s principles or techniques to be widely applied in the relevant scientific community. Section 490.065.3 RSMo; State Board of Registration for the Healing Arts v. McDonagh, D.O., W.D. No. 60501, hand down date, March 25, 2003 (subject to motion for rehearing or transfer).

The Court, in Long v. Missouri Delta Medical Center, 33 S.W.3d 629,643 (Mo.App.S.D. 2000), stated as follows:
No Missouri appellate court has considered since the United States Supreme Court’s decision in Kumho, whether to apply the Daubert multi-factor test to non-scientific evidence. However, it seems apparent that applying Frye to scientific evidence and Daubert to non-scientific evidence would only create more confusion for trial judges in determining whether to admit expert testimony. Until the Missouri Supreme Court dictates otherwise, we think the admissibility of expert testimony regarding non-scientific

evidence can be assessed under Section 490.065 RSMo without applying any of the Daubert factors.

The Court in McDonagh, D.O., analyzed these issues in detail:

In Frye, 293 F. at 1014, the court held that, to be admissible, expert testimony must be based on scientific principles generally accepted in the relevant scientific community. The Frye rule has been adopted in civil and criminal cases in Missouri.

State v. Stout, 478 S.W.2d 368, 371 (Mo.1972);

Alsbach v. Bader, 700 S.W.2d 823, 828-30 (Mo.banc 1985).

The rule was modified by the Missouri Supreme Court in State v. Biddle, 599 S.W.2d 182, 191 (Mo.banc 1980), which held that “wide scientific approval” of the reliability of the scientific method employed is required for admission of expert testimony...

Since the enactment of the statute in 1989, the

Missouri Supreme Court has declined to directly decide whether section 490.065 supercedes application of the Frye rule in the same manner that Daubert changed the admissibility requirements for

expert testimony in federal courts. See Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852, 860 (Mo.banc 1993). In

Lasky v. Union Elec., 936 S.W.2d 797, 801 (Mo.banc 1997), the Court gave remand instructions that the trial court was to “be

guided by section 490.065... in evaluating the admission of expert testimony.” Notably, the Court did not discuss either Frye or

Daubert in directing application of the statute. All three districts of the court of appeals have expressed confusion about the

applicable standard in the wake of Lasky and the absence of a

clear directive that Frye has been overruled. See Long v. Mo. Delta Med. Ctr., 33 S.W.3d 629, 943 (Mo.App.S.D. 2000);

M.C. v. Yeargin, 11 S.W.3d 604, 618-19 (Mo.App.E.D. 1999);

McReynolds v. Mindrup, No. WD 60747, 2002 WL 31162729,

*6 n. 2 (Mo.App.W.D. Oct. 1, 2002). There is uncertainty about whether section 490.065 supplants the Frye rule in civil cases

and whether an evaluation of expert testimony under section

490.065 requires consideration of Frye or the Daubert factors.

The possible evolution of the standards applicable to experts is, of course, an area which deserves monitoring. However, if you believe that the plaintiff has an expert that is acting far outside of his area of expertise, is grossly exaggerating damages, or is unreliable and rendering opinions which are not of the type rendered by other experts in the field, a motion based on §490.065 RSMo should be filed. Practically, many Missouri courts will not rule on these issues until the expert testifies at the time of trial. However, an effort should be made to have a pre-trial hearing on the issue, or at a minimum, it should be part of the pre-trial Motions in Limine that are filed, so that the trial judge has sufficient time to consider and research the issue and to be made clearly aware of the legal arguments for the exclusion of the expert’s testimony.

Motions in Limine cover a very broad range of subject matters. Pre-trial motions in limine allow parties to ask the court for a preliminary ruling, typically on an evidentiary matter, before the proponent attempts to introduce the evidence during trial. The Missouri Supreme Court has repeatedly maintained that such in limine rulings only represent a “preliminary expression of the court’s opinion as to the admissibility of evidence.” Wilkerson v. Prelutsky, 943 S.W.2d 643, 646 (Mo. banc 1997), Brown v. Hamid, 856 S.W.2d 51, 55 (Mo. banc 1993). When a court grants a motion in limine, the proponent of the excluded evidence must make an offer of proof at trial. Wilkerson, supra at 646. There are two reasons for the offer of proof. The primary reason is to preserve the record for appeal. The second reason is to allow the court to further examine the evidence and the proponent’s claim of admissibility. As noted above, the court’s in limine

ruling is only its preliminary expression and the court is not bound by its previous ruling during trial. Evans v. Wal-Mart Stores, Inc., 976 S.W.2d 582, 584 (Mo.App.E.D. 1998). Unforeseen circumstances or events during trial may effect the court's decision on the admissibility of evidence previously excluded. Id.

Defense motions in limine may seek to exclude evidence relating to liability, damages, or both. A motion to exclude the testimony of a plaintiff's expert may accomplish both of these goals. In Wilkerson, supra, a medical malpractice suit, the trial court granted the defendant's motion in limine, excluding a physician's testimony relating to standard of care, causation, or damages. The physician treated the plaintiff and the court only allowed him to testify as to the plaintiff's treatment. Wilkerson, supra at 646. The court affirmed a judgment in favor of defendants.

In Evans, supra, the plaintiff suffered injuries when a box fell off of a shelf at a department store. The plaintiff sought to introduce the testimony of an expert-a manager of other various department stores. The expert was to testify regarding the "custom and practice" of stacking merchandise. The court granted the defendant's motion to exclude this expert testimony. On appeal, the court upheld a jury verdict in favor of the defendant. Evans, supra at 584-85.

Defendants can also use motions in limine to exclude otherwise damaging evidence. One Missouri court granted a defendant's motion to exclude evidence of the defendant's marijuana use before an automobile accident. Choate v. Natvig, 952 S.W.2d 730 (Mo.App.S.D. 1997). The defendant driver tested positive for marijuana use after the accident. The court granted the defendant's motion, excluding the defendant's deposition testimony regarding her marijuana use and her invocation of the Fifth Amendment. The jury verdict assessed no percentage of fault to this defendant. Like many other appellate cases reviewing motions in limine, the appellate court did not review the exclusion, because the plaintiff failed to make a sufficient offer of proof at trial. Id. at 733.

There are very many issues or subject matters that can be addressed in a Motion in Limine. Sometimes the issues will be clear, and the judge will express an unequivocal opinion regarding the issue. If that opinion is concerning exclusion of evidence, defense counsel needs to remember to make the objection at the time of trial, since Motions in Limine are only preliminary rulings. If the objection is not asserted during the course of the trial, the issue will probably be deemed to have been waived. Frequently, judges will reserve rulings on Motions in Limine until they see how certain facts develop at the time of trial. Even under such circumstances, the Motions in Limine are extremely valuable, because they raise the issue in a clear way, where there is an opportunity for an extended discussion. This is not always possible in the heat of trial with a jury present. It is also a courtesy to the court, because it allows the court time to seriously consider the issue and to have the ability to place the legal or evidentiary issue in the context of the case as a whole.

CONCLUSION

We have considered the various tools, strategies, and pre-trial motions available to defense counsel in the effort to minimize plaintiff's damages and minimize the verdict, if the plaintiff prevails. These materials do not purport to be exhaustive. Creative defense counsel may utilize many different legal principles, evidentiary tactics, trial strategies, and pertinent motions to achieve the defense goal of minimizing the plaintiff's recovery at trial.

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