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The Joshua Hancock Case — Legal Theory and Personal Tragedy

By James E. Godfrey, Jr., Member

Few people expected the St. Louis Cardinals to win the 2006 World Series, but the team's run through the playoffs, culminating in an eventual win over the Detroit Tigers in five games brought St. Louis the first baseball championship in over a quarter century. The subsequent euphoria of a zealous fan base was painfully incised by the untimely and tragic death of a member of that team, Joshua Hancock.

James E. Godfrey, Jr.

In the wake of the automobile accident that claimed the life of the twenty-nine year old bullpen pitcher, a wrongful death suit was filed in the venue of the City of St. Louis which raised several notable legal issues. This case was dismissed by the Plaintiff, Hancock's father, on July 30, 2007.

According to the petition, Hancock was enjoying a night of revelry at Mike Shannon's Steaks and Seafood, in downtown St. Louis, sometime prior to his death. The petition further alleged that Hancock consumed enough alcoholic beverages to become visibly intoxicated, that Hancock left Mike Shannon's around midnight, and that he eventually drove westbound on Interstate 64.

At the same time, per the petition, Jacob Hargrove, an employee driver of Eddie's Towing, had stopped at least partially in the left lane to assist motorist Justin Tolar, whose vehicle had been involved in a one-car accident with the left highway median barrier. Hancock crashed his Ford Explorer into the rear of the tow truck, killing him instantly.

Under Missouri law, a wrongful death action may be commenced by the spouse or children of the deceased, or, in the case of the unmarried Hancock, by the father or mother of the deceased.[1] Noel Dean Hancock, Joshua's father, filed the petition under the statute, approximately one month after the accident, well within the three year statute of limitation for a wrongful death action.[2] All defenses available to defendants against Hancock, had his death not been the result of the accident, remain preserved in the wrongful death action, including contribution.[3]

Count I of the petition sought liability under the Missouri Dram Shop Law[4], specifically alleging that Hancock was not only visibly intoxicated, but also involuntarily intoxicated. Under the Dram Shop Law, since Hancock was over 21 years of age, he had to have been served while visibly intoxicated, which is defined as inebriation "to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction."[5] The statute further provides that no claim under the Dram Shop Law can be brought if the intoxication was voluntary[6], which is why the wrongful death petition pled that Hancock was involuntarily intoxicated.

Burdened with needing to show not only that Hancock was served while visibly intoxicated, but that he, in being so served, became involuntarily intoxicated, his wrongful death beneficiaries faced a steep burden of proof. Civil case law does not directly address this particular reference to involuntary intoxication, which is typically used as a defense to criminal charges or allegations against a tortfeasor.[7] Involuntary intoxication is commonly defined as the "ingestion of alcohol or drugs against one's will or without one's knowledge,"[8] although Missouri has yet to adopt that definition verbatim as law.

Both in Missouri and nationwide, civil case law is starkly lacking in addressing the issue of involuntary intoxication in light of a dram shop law identical or similar to Missouri's, which makes the issue difficult to litigate. Courts may tend to rely upon criminal case law regarding the defense of involuntary intoxication as guidance in cases such as the Hancock suit. While this may lead to a difficult to ascertain standard for the plaintiffs, by analogy the criminal courts have been reluctant to apply involuntary intoxication with any frequency. This creates an inference that Hancock's statutory beneficiaries had a difficult burden ahead of them.

Further impeding the dram shop claim was the finding, after an investigation by the Missouri Division of Alcohol and Tobacco Control, that Mike Shannon's was not at fault in Hancock's death.[9] The Division noted in their investigative report that Hancock was consuming liquor in moderation and appeared normal in conversation and behavior.

In addition to the dram shop claim against Mike Shannon's, Count II of the petition alleged negligence against both Tolar and Hargrove, as well as Hargove's employer, whose vehicles were both in the left lane of the interstate when the accident occurred. In order to have some success on their claim, the plaintiffs had a duty to show that these defendants deviated from their standard of care to other motorists, specifically Hancock himself, due to the location of their vehicles at the time of the crash.

Additionally, several facts did not favor Hancock's survivors' case. Media outlets had reported that Hargrove's tow truck had its yellow lights fully illuminated and he was in the process of aiding a stranded motorist. Hancock, in contrast, was well over the legal limit for blood alcohol content, talking on his cellular phone, exceeding the speed limit, and not wearing a seat belt.

In the event this case would have gone to a jury, an instruction on the comparative fault of Joshua

[1] R.S.Mo. 537.080 (2006).
[2] R.S.Mo. 537.100 (2006).
[3] R.S.Mo. 537.085 (2006).
[4] R.S.Mo. 537.053 (2006). For a more general analysis of this statute, please see Liquor Liability: A Look at Missouri's Dram Shop Law, Gilbert N. Beckemeier, Evans & Dixon Client Newsletter, August 2006.
[5] R.S.Mo. 537.053(4) (2006).
[6] R.S.Mo. 537.053(4) (2006).
[7] R.S.Mo. 562.076 (1999), (The criminal statute regarding intoxication).
[8] Black's, intoxication, involuntary (8th ed. 2004).
[9] Missouri Division of Alcohol and Tobacco Control Report, June 29, 2007.

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To Lien or Not to Lien: The Illinois Courts Have the Question

By Susan L. Brown, Associate

As you may remember from a prior article titled "Hey, Where's My Subrogation Lien? It Was Here A Minute Ago!" published in our February 2007 edition, the Illinois Fourth District Court caused havoc in the business and insurance industry through their decision in *Borrowman v. Prastein*, 356 Ill.App.2d 546, 826 N.E.2d 600, 292 Ill. Dec. 459 (Ill. App. 4th Dist. 2005). The following is an update on cases decided since *Borrowman*.

By way of review, The *Borrowman* case involved the issue of employers or their insurers "waiving" their right to a subrogation lien pursuant to the Illinois Worker's Compensation Act. In *Borrowman*, the Plaintiff settled his Workers' Compensation claim, but later filed a medical malpractice civil suit against Dr. Prastein, the physician who treated him for his work related injuries. In the Plaintiff's Workers' Compensation settlement, the insurer attached an addendum to the settlement which stated that "the above constitutes a full, final, and complete settlement." The Fourth District ruled that this language meant that the insurer intended to waive any rights to a subrogation interest in the Plaintiff's civil case. The court further held that if the employer wished to use the above language in its settlement agreement, it would then have to specifically reserve its statutory lien.

Following *Borrowman*, the First District also addressed this issue in *Gallagher v. Lenart*, 367 Ill. App.3d 293, 854 N.E.2d 800, 305 Ill. Dec. 208 (Ill.App. 1st Dist. 2006). In that case, the Plaintiff settled a Workers' Compensation claim following a car accident. The Plaintiff then filed a personal injury civil suit against the other driver. The language in the Plaintiff's Workers' Compensation settlement stated that the employer agreed "to pay the petitioner $150,000.00 in full and final settlement of all claims under the Workers' Compensation Act." The First District held that the employer's lien was not waived, and that the employer did not waive the lien by failing to specifically reserve the lien in the settlement. The Court further noted that the *Borrowman* decision was rejected as it was at odds with case law, the Workers' Compensation Act, and general principles of statutory and contract construction.

Not to be outdone, the Second District approached the issue in January 2007 in *Harder v. Kelly*, 369 Ill.App.3d 937, 861 N.E.2d673, 308 Ill. Dec. 342 (Ill. App. 2nd Dist. 2007). In this case, Plaintiff was involved in a work related car accident and settled his workers' compensation claim. The Workers' Compensation settlement contract stated that Plaintiff's settlement was "in full and final settlement of all claims...arising out of the accident described and under the terms of the Act." The contract did not specifically mention a lien under section 5(b) of the Act. The Second District followed the decision in *Gallagher* and held that they saw "no reason under the Act or general contract principles why an employer should be required to include an affirmative reservation of rights in a settlement agreement."

The Fifth District also weighed in on the issue in May 2007 in *Burgess v. Brooks*, 312 Ill. Dec. 678, (Ill. App. 5th Dist. 2007). Here, a State employee was injured in a car accident. The employee filed a Workers' Compensation claim against the State of Illinois. The case settled, and the settlement agreement stated that "Each party waives any right to ever reopen this claim under any section of the Act." The Fifth District held that this settlement agreement meant to dispose of all disputes and resolve all issues, including the State's right to assert a lien. The Court further held that the settlement language was a waiver of any and all rights to reopen the claim under any and all sections of the Act, including the lien provision of section 5(b). The Court did not determine whether the rulings in *Borrowman* or *Gallagher* were correct and noted that even if they did follow *Gallagher*, the agreement at issue in their case would not apply as the agreement had an "explicit and affirmative waiver" of the State's rights to assert their lien.

So, after these cases, where do we stand on the issue of an alleged waiver of a workers' compensation subrogation liens? As a practical matter, attorneys have been more careful in drafting their settlement language and have specifically reserved their liens since *Borrowman's* decision in 2005. However, the Illinois Supreme Court recently accepted *Gallagher* for review in order to further clarify the issue.

The Illinois Supreme Court, in an opinion filed on August 9, 2007, affirmed the judgment in *Gallagher* and overruled the decision in *Borrowman*. In reaching their opinion, the Court relied on traditional principles of contract construction and interpreted the contract language at issue in *Borrowman* to be insufficient to amount to a waiver of the employer's workers' compensation lien. The Court further held that "the waiver of a Workers' Compensation lien must be explicitly stated."

Is the question resolved? One would think so with the Supreme Court's unequivocal overruling of the *Borrowman* precedent. However, the *Burgess* case from the Fifth District still leaves us with the nagging question of whether the various appellate courts will still try to keep the *Borrowman* waiver concept alive by attempting to draw razor thin distinctions from the *Gallagher* ruling. Only time will tell. ■

The Joshua Hancock Case... continued from page 1

Hancock would very likely have been submitted, where the jury would assign what percentage of the plaintiff's damages should be assessed against Hancock. That percentage would then be deducted by the judge to determine with the amount of damages, if any, the plaintiffs would be entitled to. In Missouri, a comparative fault system is used wherein the parties to a lawsuit may each be assigned a percentage of fault, or negligence, with respect to the claim. The percentage of fault assigned to the Plaintiffs, even if 99%, would permit the Plaintiffs to cover the remaining 1% from the Defendants.

Besides defending the original negligence claim, the Defendants had a compulsory counterclaim against the plaintiff for damages they suffered in the crash.[11] Jacob Hargrove has publicly commented about emotional and psychological problems, and potentially some physical injuries, resulting from this accident, and both Eddie's Towing and Justin Tolar have potential property damage claims. These claims could have partially or completely offset any remaining judgment against them for the plaintiff's original negligence claim.

In light of the difficult burden of proof that Hancock's father faced in his dram shop claim, and the comparative negligence that was likely to be placed on his son in the negligence claim, and given the probability that counterclaims by several defendants could have been brought, this case had a very slim chance for success. Notwithstanding these problems, local public opinion regarding this lawsuit, specifically within the venue of the City of St. Louis, remains sour against the plaintiff.

Perhaps these were the reasons that the lawsuit was dismissed. Perhaps more prominent were the issues surrounding the negative publicity that this case has brought to Hancock's name as well as the Cardinals organization. If John Doe had filed this lawsuit, rather than the father of a public figure, the lawsuit may have continued on the merits as there would be less media attention and more focus upon the legal theories of the case. The legal and factual questions would remain, however, as to whether an adult patron of a bar could prove that they were involuntarily intoxicated by virtue of being served liquor when appearing to be intoxicated.

Overall, Hancock's survivors may have found it very difficult to prevail on this case, as the circumstances surrounding this tragic death point the blame in the direction of the deceased. This lawsuit was an unfortunate reminder of the incident, and may serve more as social commentary rather than providing an analysis of the law or remembering Joshua Hancock. ■

But I'm his supervisor! He can't sue me!

Liability of Co-Workers and Supervisors under Missouri Workers' Compensation Law

By Lawrence L. Pratt, Member and Susan L. Brown, Associate

Workplace injuries can arise for a variety of reasons, but some are due to the action or inaction of co-workers of the injured employee. Missouri Workers' Compensation Laws generally provide that employers, not co-workers, are liable for workplace injuries regardless of negligence. Section 287.120 RSMo. As such, workplace injuries fall under the umbrella of workers' compensation and employers are released from liability in civil suits. Generally, co-workers are covered by the same immunity as their employers. In some cases, however, an injured employee may sue their co-worker in civil court, provided they can prove that "something more" is present.

The "something more" doctrine is determined on a case-by case basis but first arose in 1982, in the case of *State ex rel. Badami v. Gaertner* 630 S.W.2d 175 (Mo. App. E.D. 1982). In *Badami*, the plaintiff was injured when his hand was pulled into a shredding machine that was not equipped with safety devices. The plaintiff received workers' compensation benefits, but also sued the president and production manager of the company for a breach of duty in failing to provide a safe work environment. The court held that the president and production manager were not individually liable for plaintiff's injuries. The court stated that the plaintiff would have to allege "something more"–such as an affirmative act that caused or increased the risk of injury.

The "something more" doctrine has been evaluated further in a variety of cases since 1982, and most recently has been reviewed by the Missouri Supreme Court in *Burns v. Smith*, 214 S.W.3d 335 (Mo. banc 2007). In *Burns*, the plaintiff was a driver of a concrete delivery truck with an attached water pressure tank. The Defendant, who was Plaintiff's supervisor, welded rusted areas of the water pressure tank, which was over twenty years old. The Defendant admitted that he had vision problems, which caused his welding to be irregular. The Defendant also admitted that after welding the tank, he told Plaintiff to "run it till it blows." Plaintiff drove the truck for a month after Defendant's welding job until the tank exploded, the force of which fractured the Plaintiff's hip. The *Burns* court held that the Defendant's actions were an affirmatively negligent act that created an additional risk and danger to Plaintiff and therefore was "something more" such that the supervisor could be sued individually.

Following *Burns*, the Western District Court of Appeals also discussed the "something more" doctrine in the context of a mesothelioma claim in *State ex rel. Ford Motor Co. v. Nixon*, 219 S.W.3d 846 (Mo. App. W.D. 2007). In that case, employee Dietker worked at the Ford plant and was diagnosed with mesothelioma. He filed a workers' compensation claim, but passed away sometime thereafter. His family filed a wrongful death claim on the grounds that F.X. Scott, the Industrial Relations Manager at Ford, concealed the presence of asbestos in the workplace from Dietker. The Court held that "something more" was not met as there was no indication that Scott gave any directives to Dietker or had any supervisory authority over Dietker. The Court further noted that Scott complied with his duty to provide a safe workplace by telling Ford, rather than Dietker, of potential asbestos dangers.

So why is "something more" something to worry about? Per these cases, and the doctrine itself, the actions of co-workers, supervisors, or managers, etc. can remove the protection of workers' compensation and bring liability directly to the individual, coworker, and the employer. There are no express rules to go by in determining whether an action represents "something more," although it appears that supervisory status, the nature of the activity, the level of risk, and any admissions regarding the activity are factors that are weighed heavily by the court. ■

CASE VERDICTS

Compiled by Susan L. Brown

■ ***Kessler v. Edith Wolff et al.***

FACTS: The Plaintiff sustained an injury to his left foot and ankle in October 2001 while walking down concrete steps at his place of employment in Granite City, Illinois. His employer was located in a strip mall with multiple tenants. Plaintiff alleged that he stepped into a cavity in the concrete, causing his foot to become stuck in the cavity and forcing him to fall to the pavement. Plaintiff obtained conservative treatment for his injury until 2003, and alleged constant pain to his foot and ankle since the injury. Plaintiff sued the owner of the strip mall, the construction company for the strip mall, the strip mall itself, and the realty company.

FINDINGS: At trial, Plaintiff asked the jury for a verdict of $20,000.00. The jury returned a verdict in favor of Defendants.

Lawrence L. Pratt represented Defendants, Edith Wolff et al.

■ ***Edwards v. Shoemake***

FACTS: The Plaintiff was involved in an motor vehicle accident in Columbia, Missouri wherein a vehicle driven by the insured, who was on a Missouri Learner's Permit, backed into Plaintiff's vehicle at the exit of a grocery store parking lot. The insured's vehicle sustained no damage, and Plaintiff's vehicle was noted to have a three-inch scratch. Plaintiff denied being injured at the scene, although she later sought treatment with a chiropractor for injuries to her neck. Plaintiff did not seek emergency room treatment. Plaintiff had been in a prior motor vehicle accident, which she failed to mention to her chiropractor at the time of treatment. Plaintiff claimed over $3,000.00 in medical expenses and a week of lost wages.

FINDINGS: Plaintiff's last demand before trial was $15,000.00. At trial, the Plaintiff asked the jury for a verdict of $10,000.00. The jury returned a verdict in favor of Defendants.

Deborah A. Suter represented Defendant Cornerstone National Insurance Company.

■ ***Thomas v. Thyssenkrupp Elevator Corporation***

FACTS: In this case, plaintiff stepped off a mis-leveled elevator, falling to the floor. Plaintiff claimed multiple injuries including a broken left shoulder, a torn meniscus in her left knee that required surgery, neck pain, back pain, and hip pain. Plaintiff also claimed post-traumatic stress disorder (PTSD), depression, and a phobia of elevators since the accident. Plaintiff treated for these injuries with a variety of physicians from the date of the accident, October 18, 2002, until the present.

Plaintiff sued the elevator company, ThyssenKrupp, for negligence in maintenance and repair of the elevator.

FINDINGS: Plaintiff's last demand was 1.5 million. The jury returned a unanimous verdict assessing zero (0) fault to Defendant ThyssenKrupp.

Lawrence L. Pratt represented Defendant ThyssenKrupp Elevator Corporation.

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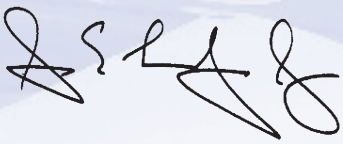

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