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Raising the Bar

The Quarterly Newsletter of
Behr, McCarter & Potter, P.C.
Attorneys and Counselors at Law

Medical Malpractice • Trucking • Legal Malpractice • Insurance Defense • Construction • Employment • Municipal • Aviation

From the Duck Blind

"The Big 3"

Three wonderful things happened in my life twenty-five years ago. I met my wife, I graduated from law school and I was introduced to duck hunting by a good friend. It was a defining year… my family, work and play were all set into motion. Little did I know that twenty-five years later my life would revolve around *"The Big 3."*

In 1983 I was a third-year law student and my wife Angie was a nursing student at St. Louis University. We met in the fall and the rest is, as they say, history. Six children and a couple of thousand kids' sporting events later, I find myself wondering where all of the years have gone. Family is and always will be the driving force in my life.

I also started my first full-time job in 1983 as an associate in a growing litigation firm in downtown St. Louis. Medical malpractice law was so exciting back then, and fortunately, still is today. Over the years, I have seen a medical malpractice crisis, two successful tort reforms in Missouri and two failed tort reforms in Illinois. I have also had the privilege of mentoring with some of the great trial lawyers in the area and better yet, opposing others in the courtroom. I have been fortunate to find two partners who share similar values and have been two of my best friends for the last fifteen years.

"Ever been duck hunting?" Little did I know that these four words would also change my life. Truth be told, there is nowhere I'd rather be than in a duck blind. Whether it is with one of my five boys, my buddies, or just my dog and me, time spent in the blind is precious. I am a firm believer that to keep the batteries charged one needs to get away once in a while. Some of my best closing arguments have been written under a clear blue sky in a flooded corn field.

So I thought my first column for *"Raising the Bar"* would be an informal one giving you a little insight into your lawyer. I have decided to call my periodic column *"From the Duck Blind."* Hopefully future columns will provide more relevant information about hot topics in the law. But then again, you might rather want to hear about that last flight of mallards pitching into the decoys!

Enjoy this issue of our Newsletter and feel free to call any of us anytime.

— Stephen J. Potter

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Recent Developments in Employment Law

by Richard J. Behr

Over the past year and a half, there have been some significant changes in the landscape of employment law. This article will address those changes in federal, Missouri and Illinois courts.

• Federal Courts

The hot button political issue of immigration has touched employers nationwide. Employers hiring new employees must complete a new I-9 Immigration Form. This new form became mandatory as of December 26, 2007 and applies to all employers regardless of size or location. The I-9 is used to establish the employment eligibility of persons being considered for employment, thereby requiring the employer to hire only those persons who are eligible to legally work in the United States. This new requirement applies to each new employee, unless: **(a)** the employee is providing domestic services in your private household, and the services are sporadic, irregular or intermittent or **(b)** the employee is providing services as an independent contractor and not as your own employee.

While not as recent as the new I-9 requirement, an equally important development affecting employers across the nation was announced by the U.S. Supreme Court in the case of *Burlington Northern and Santa Fe Railway, Co. v. White,* (June 2006). In *White*, the Supreme Court significantly broadened the scope of anti-retaliation cases under federal discrimination law (TITLE VII). The *White* court greatly expanded the interpretation of "adverse employment action" allowing an employee to pursue a discriminatory retaliation suit against his employer. Prior to *White*, an employee could recover against his employer for discriminatory retaliation only if the employee suffered some concrete employment action affecting his pocketbook (i.e., termination, salary cut, benefit cut). Since *White*, employees can recover on retaliation claims for "non-pocketbook" injuries adversely affecting the employee, such as being reassigned to a less desirable job or shift. The focus now is on whether the changed employment condition might well have "dissuaded a reasonable worker from making or supporting a charge of discrimination." The practical affect of this change is that employers will have a more difficult time disposing of these claims through pre-trial dismissal or summary judgment thereby forcing employers to choose between settlement or trial.

• Missouri Courts

This past August, the Missouri Supreme Court decided a case that may have the most widespread effect on Missouri employment law of any case over the last few years. In *Daugherty v. The City of Maryland Heights*, the Missouri Supreme Court changed the standard of proof applied in discrimination cases under the Missouri Human Rights Act. Reversing a trial court's grant of summary judgment in favor of the employer, the court found that there was nothing in the Missouri Human Rights Act requiring a plaintiff to prove that the protected characteristic (race, sex, religion, age, ethnicity) was a "substantial" or "determining" factor in the employment decision at issue. The court then changed the standard to whether or not the protected characteristic was a "contributing" factor in the employer's decision. This change significantly lowers a hurdle for plaintiff employees seeking recovery.

Missouri employers facing retaliatory discharge or other employment-related claims often face plaintiffs seeking damages for "emotional distress." Just a few years ago, a Missouri lawyer would be correct in advising his employer/client that the plaintiff could only recover money damages for such "emotional distress" if the plaintiff could produce proof of actual physical injury. Traditionally, Missouri courts required objective medical evidence of emotional distress. However, the recent cases of *Dean v. Cunningham* (Mo. 2006) and *Bogan v. General Motors* (8th Circuit 2007) changed all that. Now, plaintiffs can recover damages for emotional distress without any objective medical proof of actual physical injury. Instead, plaintiffs can establish their right to damages for emotional distress and humiliation based merely on their own testimony, or by inference from the circumstances. Clearly, the *Cunningham* and *Bogan* decisions provide plaintiffs with another weapon in their arsenal of employment claims.

• Illinois Courts

As of January 1, 2008, Illinois employers will be more likely to face employment discrimination litigation in Illinois state

courts. Recent changes to the Illinois Human Rights Act ("IHRA") have opened the gates of Illinois state courts to employees claiming discrimination. Prior to January 1, 2008, employees wishing to assert violations under the IHRA were required to initially file claims with the Illinois Department of Human Rights and wait for its decision. Now the IHRA allows employees to bypass the state agency and avoid the pitfalls of federal court by filing their lawsuit directly in Illinois state courts with the right to a jury trial.

The IHRA prohibits discrimination with respect to any condition of a person's employment based on that person's status as a member of a "protected class." Under the IHRA, "protected class" refers to race, color, religion, sex, national origin, citizenship status, age (40 and older), marital status, arrest record, physical and mental disability, military status, sexual orientation and unfavorable discharge from military service. This new availability of a state court forum to plaintiff employees could very well result in an increase in employment discrimination and harassment cases for the future. Illinois employers should take this opportunity to: **(a)** ensure that they have comprehensive anti-discrimination policies in place, and **(b)** train their HR professionals and supervisors in recognizing and properly enforcing these policies.

If you have questions about these recent employment law changes, please do not hesitate to contact Richard Behr or Jason Kinser at Behr, McCarter & Potter, P.C. at (314) 862-3800. §

Event Data Recorders: Valuable Evidence in Vehicular Accident Cases

by Timothy J. Reichardt

The government defines an Event Data Recorder (or "EDR") as "a device or function in a vehicle that records the vehicle's dynamic, time-series data during the time period just prior to a crash event or during a crash event, intended for retrieval after the crash event." In other words, an EDR is a "black box" for a motor vehicle. Typically, sensors placed throughout the vehicle relay information to the EDR's central processor, which is located in a secure area of the vehicle (e.g., under the driver's seat). While EDRs have been installed in vehicles for years to ensure proper airbag deployment, EDRs have become more sophisticated and now allow for the recording and storage of numerous data elements, such as speed, brake application and functioning, and safety belt use. These increased data recording, storage, and retrieval capabilities have drawn the interest of the government and the motor carrier industry.

• *Federal Regulations Addressing EDRs*

Recently enacted federal regulations set forth specific requirements for most vehicles, including commercial trucks, manufactured on or after September 1, 2010 if that vehicle is equipped with an EDR. While these regulations do not mandate EDR installation, they establish uniform, national requirements for vehicles equipped with EDRs concerning the collection, storage, and retrievability of crash event data. Specifically, in response to a crash event, an EDR must capture and securely store certain data elements (e.g. speed, brake application) for a designated time interval and in a specific format. For example, an EDR must be able to record the speed of the vehicle, braking status, and percentage use of the accelerator pedal for the five seconds prior to a crash event. An EDR must also record safety belt status, the number of crash events, the time between crash events, whether the anti-lock brake system worked, engine RPM, and so on. In all, 42 data elements must be recorded and stored in compliance with the technical requirements set forth in the regulations. Motor vehicle manufacturers must ensure that a data retrieval tool is commercially available for its EDR systems installed.

The noted purpose for enacting these regulations was to ensure that "EDRs record, in a readily usable manner, data valuable for effective crash investigations and for analysis of safety equipment performance… [to] help provide a better understanding of the circumstances in which crashes and injuries occur." Separately, the Federal Motor Carrier Safety Administration ("FMCSA") has recognized the "EDR devices can benefit the commercial vehicle industry and society as a whole." Specifically concerning motor carrier fleets, the FMCSA has stated that EDRs may help reduce operational costs and promote operational efficiency. Namely, motor carriers may implement EDR systems that record information well in excess of that required by these regulations; thus, presenting an opportunity for motor carriers to monitor the actions of their drivers and, in turn, ensure that their drivers are abiding by the laws of the road and the rules of the company. Along the same lines, widespread acceptance of the reliability of EDRs is likely to favor insurers of motor carriers both in claims investigation and in terms of reduced defense costs because of the potential for quicker resolution of valid claims.

• *Admissibility of EDR Evidence*

As EDRs continue to become more prevalent, EDR data will be introduced in an increasing number of vehicular accident cases. Courts have generally admitted EDR evidence when the

accuracy and reliability of the data collection, storage, and retrieval is verified by a qualified expert. While no Missouri case has discussed the admissibility of EDR evidence, an Illinois court has addressed a challenge to the admissibility of EDR evidence. In *Bachman v. General Motors Corp.* (Ill. App. Ct. 2002), Plaintiff sued GMC for injuries sustained when Plaintiff's 1996 Chevrolet Cavalier collided with an oncoming vehicle. Plaintiff alleged that the Cavalier's airbag inadvertently deployed prior to the collision, thus causing the collision. At issue on appeal was whether the trial court erred by allowing evidence of data downloaded from the Cavalier's EDR and admitting related expert testimony explaining the data and the underlying methodology behind the EDR. In affirming the trial court's admission of this EDR evidence, the Court of Appeals held that "the process of recording and downloading [EDR] data does not appear to constitute a novel technique or method." The data was found to be reliable because the EDR data was subject to adequate peer review and the process of recording and retrieving such data was sufficiently established to have gained general acceptance in the relevant scientific community.

The federal regulations pertaining to EDRs should provide further assurance to courts that EDR evidence is accurate, reliable, and not subject to manipulation by its proponents. The *Bachman* case illustrates the current tendency of courts to admit properly presented EDR evidence. Given the specific parameters now required of EDRs manufactured after September 1, 2010, courts should be less likely to question the veracity and reliability of evidence that is shown to fall within these parameters.

Assuming that EDR evidence is properly presented at trial and admitted by the court, such evidence is the most credible and objective reflection of the facts of a vehicular accident. Such objective evidence, which now must be absolutely "tamper-proof" by law, may, in some cases, help neutralize any preconceived juror bias against motor carriers in a case involving serious personal injury. §

"We're not in Kansas Anymore:" Illinois' Mechanic's Lien Law Presents Traps for Even the Wary

by Jason W. Kinser

As the economic line separating Missouri from the "Metro East" continues to blur, many Missouri based construction firms are finding themselves doing more work in Illinois than ever before. While new business is always welcomed, there are important differences in the laws of the two states—particularly with respect to the perfection and enforcement of mechanic's liens—that Missouri construction professionals should be aware of before undertaking any work in Illinois.

As in Missouri, the mechanic's lien in Illinois is purely a creature of statute and is also one of the most valuable tools a construction professional has to ensure that he or she is paid for the work or materials they provide to a particular project. However, in Illinois, the statutory deadlines for giving notice of intent to file a lien, recording the actual lien, and instituting enforcement proceedings are drastically different than the deadlines imposed by Missouri law. Moreover, Illinois' law imposes several additional requirements on prospective lien claimants that are not required of lien claimants in Missouri. Further complicating matters, several provisions of Illinois' mechanic's lien law have been interpreted differently by Illinois' appellate courts. Consequently, the requirements for perfecting and enforcing a lien claim in Illinois may be slightly different from county to county. Stated simply, assuming that your procedure for perfecting a lien in Missouri will work in Illinois could have severe consequences, including the loss of your lien rights.

Proper notice to the owner of the land to be liened is the cornerstone of any lien claim. Depending upon your position in the chain of contract, failing to give the owner notice of your intent to file a lien within the time and in the manner prescribed by the statute will likely result in the forfeiture of your lien claim. Making matters worse, the rules in Illinois as to when, to whom, and how notice must be given are highly complex and technical and must be strictly followed.

As a general rule, subcontractors (including material suppliers) and sub-subcontractors are required to serve the owner of the property to be liened with a notice of intent to record a lien within 90 days of the final provision of work or materials to the project. Any person or entity with a security interest in the property, such as a mortgagee, should also be served with the notice. Contractors who have a contract directly with the owner or the owner's agent, on the other hand, are generally not required to give the 90 day notice, and need only record their lien claim within four months of the final provision of work or materials to perfect their lien. Recording the lien claim prior to the expiration of the four month deadline is essential to ensure that the lien affects the rights of not only the original owner, but also subsequent purchasers and third parties such as lenders. A contractor's lien that is recorded more than four months, but within two years, of the last provision of work or materials will be effective, but only as against the original owner of the property.

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Exactly who is a subcontractor and who is "contractor," as that term is defined by Illinois law, is not always clear, and you should not rely solely on the application of a particular label given in a contract or invoice. Further, it is often difficult for a remote material supplier or sub-subcontractor to determine precisely where they fit in to the chain of contract, and thus determine whether the 90 day notice is required. The involvement of escrow agencies, construction management firms, or other intermediaries can further confuse the situation.

Because of the highly technical nature of Illinois' lien law and the relatively short deadlines it imposes, construction professionals should take action to address delinquent accounts sooner rather than later in order to protect their lien rights. Prospective lien claimants should also take into consideration the considerable time that is often required to properly prepare and assert a lien claim in Illinois. Title work is usually required in order to ascertain the true identity of the owner of the property and to obtain a valid legal description of the property—information which must be included in any recorded lien. Additional time should be budgeted for preparation and recording of the actual lien documents.

When payment problems arise on a project in Illinois, asserting a lien can increase both the likelihood of getting paid and the ultimate amount collected. Although the deadlines imposed in Illinois are generally far shorter than those imposed by Missouri law, do not assume that you have missed your opportunity to assert a lien if more than 90 days have elapsed since you last provided work or materials to the project. There are important exceptions to the general rules discussed in this article which may operate to extend the time you have to assert a lien. Due to the complexity of the law governing the perfection and enforcement of liens in Illinois, we recommend consulting with your attorney as soon as any payment issues arise to ensure that your lien rights are protected and asserted to the greatest extent possible. §

News and Announcements

Behr, McCarter & Potter, P.C. congratulates Tony Behr (Medical Malpractice Law, Personal Injury Litigation, and Product Liability Litigation, left) and W. Dudley McCarter (Commercial Litigation, right) on their selection to ***Best Lawyers in America 2008***.

Tim Reichardt of our firm recently was elected to the Board of Directors of the Missouri Chapter of the March of Dimes.

Another one of our attorneys, Joe Blanner, was recently quoted in *U.S. News and World Report* magazine, commenting on construction litigation in St. Louis. §

Meet Our Attorneys: Amy Shasserre

Amy Shasserre celebrated her first anniversary with the Firm this January. Since joining the Firm, Amy has focused her practice on the defense of professional liability claims against doctors, hospitals, and lawyers. In addition, Amy provides counsel to individuals and organizations in general corporate matters and construction matters. Amy started her legal career defending personal injury cases, and also worked in house at a transportation company ranked by Forbes as one of "America's Largest Private Companies" before joining the Firm.

Before attending law school, Amy graduated magna cum laude from St. Louis University with a bachelor's degree in Business Administration. Amy went on to earn her Juris Doctor degree at Washington University School of Law in St. Louis, Missouri. While in law school, Amy enjoyed participating in the Law-Related Education program, whereby she and a partner would go into elementary schools for an hour each week to teach fifth grade students basic legal concepts.

Amy has been on a cattle drive in Montana and has been snorkeling in Belize, but closer to home she enjoys canoe trips on the Black and Meramec Rivers. She volunteers her time with Our Little Haven and the Young Variety Club. §

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