Volume 1 • May 2007

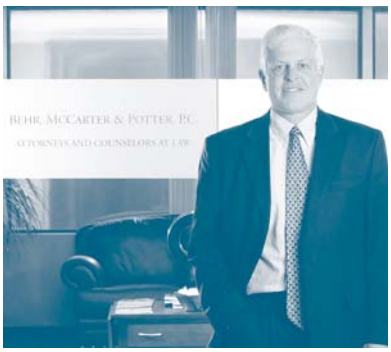
Raising the Bar

The Quarterly Newsletter of
BEHR, MCCARTER & POTTER, P.C.
ATTORNEYS AND COUNSELORS AT LAW

Welcome!

This March we celebrated our firm's fifteenth year in business. In many respects it has been a fast fifteen years. In other respects, it seems like light-years since we opened up our first office with a concrete floor, folding tables, files lined up along the walls and me answering the phone! We took a calculated business risk, worked extremely hard, hired great people and continue to enjoy the journey.

Many things have stayed the same and others have changed dramatically. We are proud that many of our initial clients and friends of the firm are still with us. Our commitment to provide the best legal representation at a fair and reasonable rate has also remained constant and will not change. On the other hand, e-mail, laptops and the "Elmo" have seemingly changed our lives and our practices forever. Who knows what the next fifteen years will bring!



As part of our celebration we are publishing this, the inaugural issue of our newsletter. Our goal is to provide our clients and friends of the firm with articles about legal issues, recent court decisions and other matters we believe may be of interest to you. Much of the newsletter will be dedicated to issues involving the defense of doctors, hospitals and lawyers, to construction law, employment law, municipal law and the defense of trucking and other vehicular accidents. Please feel free to offer suggestions as to which articles were of interest to you and what topics you would like to see addressed.

We are a firm of fourteen attorneys and a total of twenty-four employees. We do our best to hire outstanding people who are excellent at what they do. We believe that every file is the most important file in the office and deserves our utmost attention.

A number of our attorneys have received prestigious awards. Some have proudly served the Bar as presidents of The Lawyers Association and The St. Louis County Bar Association, and Dudley McCarter is a Past-President of The Missouri Bar.

Please let us know how we are doing and let us know your thoughts on this and future newsletters. Feel free to direct your comments to me at ***abehr@bmplaw.com*** or call me at (314) 862-3800. I hope to hear from you soon!

—Tony Behr

In this issue:

Behr, McCarter & Potter, P.C. "Advertising Material: Commercial Solicitations are permitted by the Missouri Rules of Professional Conduct, but are neither submitted to nor approved by the Missouri Bar or the Supreme Court of Missouri." Mo. Rule 4.7.3."

Contact us at: *Behr, McCarter & Potter, P.C.*
Suite 1400, 7777 Bonhomme Ave. • Saint Louis, Missouri 63105
Office: *(314) 862-3800* • ***Facsimile:*** *(314) 862-3953* • ***E-Mail: info@bmplaw.com***

Disclosing Electronically Stored Information

by Tom Hayek

Remember when the only people who would sell you a new version of "windows" were carpenters or hardware stores? Our lives have been forever changed in the past thirty years by those crazy kids Bill Gates and Paul Allen who dropped out of college to start Microsoft. While their electronic progeny have not created the paperless office, they have clearly spawned an enormous paperless source of recordkeeping. Reportedly 90% of business records are now produced electronically and nearly *50%* of those records are never reproduced in paper form.[1] Letters are being replaced by electronic mail, documents are scanned and stored on CDs, and countless revisions are made to documents before being sent out in 'final.'

Not surprisingly, this explosion of electronically stored and transmitted information has found its way into litigation, and that explosion will most certainly reverberate into most business practices. A seminal event which is causing much consternation is the enactment of recent changes to the Federal Rules of Civil Procedure, which specifically address the disclosure of Electronically Stored Information ("ESI"), to an opponent in the course of litigation. While these new rules are applicable only to the federal court system, most states, which have their own individual rules of civil procedure, follow very closely the federal rules. Even without such formalized rules, the discovery of ESI in litigation certainly crosses over both state and federal jurisdictions.

The scope of what information must be produced in litigation is governed by the respective court's rules of civil procedure. In the federal court system, those rules are set forth in Federal Rule of Civil Procedure. The following changes in those rules now make the production of ESI a significant issue:

> A party must, at the outset of a case and without awaiting a discovery request, provide to the other party a copy of, or a description by category and the location of, all ESI in the possession, custody or control of that party, and which that party may use to support its claims or defenses. Rule 26(a)(1)(B).
>
> A party need not provide ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. That same party, however, has to show proof of the undue burden or cost. Rule 26(b)(2)(B).
>
> As soon as practicable, or at least 21 days before a scheduling conference is held, the parties must meet and discuss any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced. Rule 26(f)(3).

You can expect the Courts to place a significant burden on companies in their investigation of the available ESI, and the company may be asked to explain its efforts to locate such ESI. In the case of ***Peskoff v. Faber***, 2006 WL 1933483 (D.D.C. July 11, 2006), the plaintiff claimed that approximately 2 years worth of e-mail messages were not produced by his former employer, however, the employer stated that based upon his search, the e-mails must simply be gone. The Court noted that there were several possible locations where the missing e-mails could be located, including the plaintiffs e-mail account at work, other employee accounts, on hard drives of company computers and backup tapes of the law firm server. The Court then ordered the defendant provide a detailed affidavit specifying the nature of the search the defendant conducted in locating the responsive e-mails. The holding is significant because of the Court's willingness to assert it's own knowledge of ESI systems in evaluating a parties' efforts.

Parties to the lawsuit must also be concerned with what hidden information may lurk in their electronic documents; something called 'metadata.' Examples of metadata can easily be seen in word processing software such as, Microsoft Word®. If you look under the "Properties" feature of a document in Word®, you can see when a document was created, when last accessed, who accessed it, and the time it was edited. More important, however, is a feature known as, "Track Changes" within the Word® software. If turned on for a document, this feature can store changes made, including deletions and comments electronically added by reviewers. Such are typically not visible on a hard copy of the final document, and may not be visible when the document is pulled up on a monitor without the feature being activated by the user.

While it is possible to erase metadata from a document transmitted outside, it is questionable whether or not such is permissible once litigation is anticipated or initiated, and where that document may be at issue. Your outside counsel will be expected to have a working understanding of such terms as metadata, slack space, ambient data, etc.

One issue, which also must be addressed by those who conduct business in an environment where litigation can reasonably be anticipated, is the issue of document retention and "legal holds" on documents once litigation concerning a particular matter is reasonably anticipated. Placing a "legal hold" on a document occurs when an entity receives notice of possible litigation, and takes steps to insure that documents and information related to the legal issues involved in litigation are preserved. Businesses should adopt policies concerning document destruction, including electronic documents and

[1] *St. Louis Daily Record, "Federal Rules Changes", October 31, 2006.*

related information. Such policies should follow a systematic method of document retention presumably retaining documents and information only so long as they have value as defined by the business need or legal environment.[2]

Finally, Courts appear very willing to hold both attorneys and businesses accountable for coordinated and thorough investigative efforts. In the matter ***GTFM, Inc. v. Wal-Mart Stores***, 2000 WL 1693615, (S.D.N.Y. November 9, 2000) the Court entered sanctions against Wal-Mart for inadequate investigation of ESI. Wal-Mart's attorneys relied upon information provided by an executive at Wal-Mart that certain ESI had been destroyed. A subsequent deposition of an information technology person within Wal-Mart revealed that such information was retained for a one-year period and then destroyed. The information was still in existence at the time of the original discovery request but was subsequently destroyed. The court sanctioned Wal-Mart for failing to adequately investigate the electronic file storage.

This article is certainly not an exhaustive discussion of the issue, and we plan to include further discussion of it in future newsletters. §

Municipal Law

by Edward Crites

Our firm defends municipalities and public officials in civil actions across Missouri. Recent appellant court decisions concerning municipal liability are summarized below. Because some are not final, you should verify that they have not been modified before acting upon them. We, of course, would be happy to answer any questions regarding municipal liability.

1. Notwithstanding tort reform, venue for tort actions against a municipality remains exclusively in the county where it is located.

Section 508.050, RSMo, requires that a tort action against a municipality be brought in the county where it is located. But §508.050's applicability has been raised into question by the 2005 tort reform legislation, which provides in §508.010.4 that "notwithstanding any other provision of law" venue for tort actions shall be in the county where plaintiff was first injured. In a case where we represented the municipality, the Missouri Court of Appeals on March 6, 2007 held in ***State ex rel. City of Jennings v. Riley*** that §508.050 continues as the exclusive basis for venue against municipalities in tort actions. The case involved a police pursuit that began in St. Louis County and ended in St. Louis City when the pursued vehicle collided with another motorist. Suit for the innocent motorist's wrongful death was filed in St. Louis City. After the trial court denied our motion to transfer venue, the Court of Appeals granted a writ of mandamus transferring venue to St. Louis County on the basis that §508.050, as the special venue statutes for municipalities, still controls.

2. Official immunity shields police officer but not employer.

In ***Davis v. Lambert-St. Louis Int'l. Airport***, 193 S.W.3d 760 (Mo. Banc. 2006) an airport police officer, responding to an emergency call on airport property, collided with a vehicle driven by plaintiff. Plaintiff sued the police officer for negligence, and the airport for vicarious liability for the officer's negligence. After a verdict for plaintiff, defendants appealed. The officer claimed that the doctrine of official immunity shielded him from tort liability, and the airport likewise claimed the shield of the officer's official immunity. The Missouri Supreme Court held that official immunity protects the police officer from liability for injuries sustained in an automobile accident in which he was responding to an emergency call. But the officer's immunity does not extend to protect the employer from liability for the officer's negligence. Rather, governmental entities are protected by sovereign immunity. Since Missouri statute specifically waives sovereign immunity for injuries resulting from negligent operation of motor vehicles the airport was not shielded from liability. Judgment against the airport was upheld.

3. Amount of municipal statutory damage cap determined as of date of judgment.

Section 537.610.5 RSMo. caps liability awards against political subdivisions of the state at $300,000 for any one person or single accident, adjusted annually by the U.S. Department of Commerce's Implicit Price Deflator. But is the cap adjustment determined as of the date of accident or the date of judgment? That question is answered in ***Robinson v. St. Louis Board of Police Comm'rs***, E.D. 87487, decided by the Missouri Court of Appeals on December 5, 2006. That was a personal injury action also arising from a collision between a passenger car and a police vehicle. After a jury returned a verdict for $500,000, the trial court applied the statutory cap in effect at the time of the judgment (2005) rather than at the time of the accident (2003). The Court of Appeals upheld the trial court, finding that the proper cap had been applied.

4. Plaintiff has burden to prove sovereign immunity waiver.

In ***Maune v. City of Rolla***, 203 S.W.3d 802 (Mo. App. S.D. 2006), a 10-year-old riding his bicycle was injured when he struck a yellow barrier partially blocking the right side of a bridge. After plaintiff sued for his injuries, the city moved for summary judgment on the basis that there was no dangerous condition of property. In support of the motion it supplied an affidavit from its parks and recreation director describing the well-marked, defect-free barrier. After plaintiff never filed an affidavit, nor directed the court to facts raising a genuine dispute, the trial court granted summary judgment. On appeal plaintiff argued that the city had failed to meet its burden to

[2] *See Sedona Guidelines, public comment draft 2004. Comment 3.c.*

address the theories raised in plaintiff's pleading. The Court of Appeals responded that plaintiff misapprehended the burden of proof: it was plaintiff's burden to establish a sovereign immunity waiver, and waiver of sovereign immunity is predicted upon the there being a defect in the property. Because plaintiff failed to present any facts showing that the property had a defect, he failed to meet his burden to prove a sovereign immunity waiver. Summary judgment was upheld.

5. Exclusive control of the property is required for a waiver of sovereign immunity

In ***Ford v. Cedar County***, S.D. 27409, decided December 18, 2006, where a motorcycle driver died from injuries sustained when he lost control approaching a bridge and skidded off an embankment, the survivors sued the county. They sought to come within the dangerous condition of property exception to sovereign immunity, alleging that the county had failed to warn of the unsafe road conditions, including of a bump on the bridge approach and of the upcoming narrow bridge. The county moved for summary judgment on the basis that it lacked exclusive control over a portion of the road because the bridge was under the control of a special road district, not the county. The trial court's grant of summary judgment was upheld on appeal because plaintiff failed to prove that defendant had exclusive control of the dangerous condition of property, and thus failed to come within the waiver of sovereign immunity. §

Employment & Business Law at Behr, McCarter, & Potter, P.C.

by Rich Behr

For many of our clients, Behr, McCarter & Potter, P.C. (BMP) has had the privilege of serving as your counsel in matters relating to professional liability defense, municipal law, or construction related litigation. What you may not realize, however, is that we also offer expertise in the areas of employment and business law. BMP has represented clients in employment cases involving claims of retaliatory discharge, age, sex and race discrimination, sexual harassment, hostile work environment, alleged violations of the Americans with Disabilities Act (ADA), and other assorted federal and state employment law charges. We have also successfully represented clients with breach of contract claims, disputes over non-competition clauses, unlawful interference with business relationships and other business-related disputes.

Age and Sex Discrimination:

In September 2006, Rich Behr and Jason Kinser successfully defended one of our client hospitals in a case involving allegations of age and sex discrimination. In a trial which lasted one week in the United States District Court for the Southern District of Illinois, Rich and Jason obtained a verdict for the Gateway Regional Medical Center. In the case of ***Moyer v. Gateway Regional Medical Center***, 05-0552-MJR, a 53 year old female in the security department alleged that a younger male employee was illegally promoted ahead of her. She further alleged that she was demoted from a supervisory position, removed from regular overtime shifts and harassed due to her age and gender. Through pre-trial motions, BMP convinced the federal court to summarily dismiss the plaintiff's "failure to promote" claim and, after a week long trial, obtained a jury verdict in favor of Gateway Regional Medical Center on all remaining counts.

ADA Case:

A month after winning the Moyer case, BMP successfully defended another hospital in an American with Disabilities Act (ADA) claim. In ***McLorn v. Heartland Regional Medical Center***, 5CV-4198-GPG, the employee alleged that Heartland Regional discriminated against him by failing to accommodate his disability, a severe allergy to the synthetic latex gloves. Employees are required to wear such gloves in the Hospital's Environmental Services Department. As an accommodation, Heartland gave the plaintiff cotton gloves to wear under his synthetic latex gloves, but the cotton did not lessen the irritation. The employee eventually stopped wearing any gloves at all. Because the employee's duties required him to wear the protective gear and the employee refused, Heartland terminated him.

Approximately ten months after termination, the former employee filed suit in federal court under the ADA claiming that Heartland: 1) failed to accommodate his disability, 2) terminated him because of his disability and 3) otherwise discriminated against him. Most employers today are aware of the dangers of failing to reasonably accommodate a person with a true disability. However, many employers may not be aware that the ADA allows an employee to file a claim even if they are not truly and presently disabled. The ADA allows employees to pursue claims if their employer regards the employee "as if" he or she were disabled or if the employer treats the employee differently because the employee has a "record of" a past disability. 29 C.F.R. § 1630.2. In the McLorn case, BMP convinced the federal court to grant summary judgment in favor of Heartland Regional on the grounds that the employee's synthetic latex allergy did not "substantially limit" any of his major life activities to the extent that the employee could legally be considered as "disabled."[3] Similarly, the court concluded that Heartland never treated the employee differently based on any "perception of" or "record of" disability.

---

[3] ***See Kupstas v. City of Greenwood***, *398 F.3d 609, 612 (7th Cir. 2005).*

Business-Related Disputes:

Finally, BMP has considerable experience helping clients solve their business-related legal issues. We can help you creatively avoid a lawsuit, or if need be, protect your interests if a lawsuit is necessary. For example, we recently assisted a business who had an employee, of significant importance to the company, who left her position to work for a competitor. The employee's employment agreement contained a non-competition clause. The employee was cautioned not to breach the agreement, however, she ignored the warning and went to work for a competitor. Apparently feeling confident of her position, the former employee filed suit against her former employer alleging the employer breached the contract and asked the court to declare the non-competition clause unenforceable. In addition to defending the suit brought by the employee, BMP filed a counterclaim asserting that the employee owed her former employer damages for breach of the non-competition clause. BMP successfully defeated the employee's Motion for Summary Judgment asking the court to declare the non-competition clause unenforceable. Within three months thereafter, BMP forced the employee into settlement under terms requiring the employee to pay our client a significant sum.

We look forward in our future newsletters to addressing a specific employment or business-related issue that may affect your business. In the meantime, please do not hesitate to contact us for any assistance you may need. §

When Does Missouri's Medical Malpractice Statute of Limitation Begin to Run?

by Weldon Johnson

There are provisions of Missouri law which may, to the surprise and frustration of a hospital or physician, delay the start of the two year statute of limitations. We were recently asked to review a case in which an individual with a number psychiatric conditions claimed that due to the alleged mishandling of his medications, there was a time period in which the patient was unable to realize that the alleged malpractice had occurred. Consequently, the patient claimed that the statute of limitations was "tolled" during this time period pursuant to Section 516.100 of the Missouri Revised Statutes. When a statute is "tolled," it does not begin to run when the alleged malpractice occurs, but rather is delayed until some act or event in the future occurs. After a thorough review of the facts of the case, including the complete medical chart of the treating physician, we advised that the statute of limitation had run because there was no valid reason to toll the statute. Accordingly, the potential plaintiff had no viable claim.

As most are aware, Missouri has a two-year statute of limitation for the filing of a lawsuit asserting claims of medical malpractice.[4] The statute is described as an "occurrence" type statute of limitations because it specifically provides that the lawsuit must be, "brought within two years from the date of occurrence of the act of neglect complained of."

But what happens if the potential plaintiff is a minor or is mentally incapacitated at the time the alleged negligent acts occurs; or better yet, claims that due to the alleged negligent act, he or she was unable to appreciate the fact that negligence had occurred. There are certain statutes of limitation in Missouri, other than the one applicable to medical malpractice actions, which delays the running of the statute until the damages from an alleged act of negligence are capable of ascertainment. Missouri Revised Statute 516.100 provides:

> "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment"

Furthermore, Section 516.170, of the Missouri Revised Statutes, provides that under certain circumstances causes of action may brought, within the required statutory period, after certain disabilities are removed. Those "disabilities" include the person being under twenty-one years old. This statute, however, specficially excludes the medical malpractice statute of limitation.

In the case of medical malpractice actions, Missouri courts have consistently held that there are only four circumstances that can toll the two year statute of limitation. ***Davidson v. Lazcano***, 204 S.W. 3d 213, 216 (Mo. App. E.D. 2006.) "Section 516.105 contains three exceptions-the "foreign object" exception, the "failure to inform" exception and the "minor child" exception. Sections 516.105(1)-(3)." Id. In addition to theses three specific exceptions, the Supreme Court of Missouri has also recognized a "continuing care" exception to the statute of limitations. See ***Montgomery v. South County Radiologist, Inc.***, 49 S.W.3d 191 (Mo. banc 2001). This "continuing care" exception applies when the patient continues to be treated by the physician in question for the condition that is at issue. Based on the dictates of the Missouri Revised Statutes and the current case law, the only four circumstances that can toll the two year medical malpractice statute of limitations are the "foreign object", "failure to inform", "minor child" and "continuing care" exceptions.

With this being said, however, there are times when the statute of limitation has been deemed tolled notwithstanding the dictates of Section 516.105. The Missouri Supreme Court has held that the two-year statute of limitation on medical malpractice claims can be tolled when a physician leaves the State of Missouri to reside in another state, pursuant to Section

---

[4] *See RSMo. §516.105.*

516.200 of the Missouri Revised Statutes. See ***Poling v. Moitra***, 717 S.W.2d 520, 523 (Mo. banc 1986). Further, the two-year statute of limitation is deemed tolled when the health care provider has fraudulently concealed facts that give rise to a medical malpractice action. See ***Smile v. Lawson***, 435 S.W.2d 325, 327 (Mo. banc 1968). The "[f]raudulent concealment by a health care provider of facts that give rise to an action in malpractice may constitute an "improper act" sufficient to toll, under section 516.280, RSMo 1994, any applicable statute of limitations." ***Batek v. Curators of University of Missouri***, 920 S.W.2d 895, 900 (Mo. banc 1996).

So while at first glance the tolling of the medical malpractice statute of limitation may seem to be somewhat restricted and/or limited pursuant to the specific exceptions set forth in Section 516.105, it is also clear that under certain situations the statute may be tolled for other reasons. Therefore, each case must be analyzed based on it own facts and circumstances. §

News & Announcements

Behr, McCarter & Potter is happy and proud to announce that two of our partners, Tony Behr and Dudley McCarter, have each been selected to be included in the 2007 edition of ***The Best Lawyers in America***. Selection to this peer-reviewed, advertisement free publication is based upon 1.8 million confidential evaluations by the top attorneys in the country. §

Meet Our Attorneys: Julia Bruzina

Julia's practice is focused on defending physicians and institutions in cases of alleged medical malpractice cases, as well as defending trucking companies in cases arising out of major accidents. Julia began her legal career with our firm as a clerk, after receiving her Bachelor's degree from Vanderbilt University, majoring in Political Science and History. Julia then attended Saint Louis University Law School, graduating in 2003. In addition to clerking with our firm during law school, Julia also served on the Executive Board of the St. Louis University Law Journal, and published the article ***Erickson v. Bartell***: The "Common Sense" Approach to Employer-Based Insurance for Women. Julia was born and raised in St. Louis, Missouri. §

BEHR, MCCARTER & POTTER, P.C.
ATTORNEYS AND COUNSELORS AT LAW
§
7777 Bonhomme, Suite 1400
St. Louis, Missouri 63105
§