

HOW TO HANDLE AND SETTLE SMALL PERSONAL INJURY CASES

Gary K. Burger
BURGER LAW
BurgerLaw.com 314-542-2222

Solo and small firm attorneys deal with small personal injury cases from different perspectives depending on their type of practice. Lawyers who do not concentrate their practice, or do not have extensive experience, in personal injury may be leery of handling those cases. Effectively handling small personal injury cases can be relatively straight forward and fully serve an attorney's clients. Personal injury cases can be a profitable legal area for attorneys.

Most personal injury cases arise from automobile or premises liability accidents. In our adversarial legal system, a person usually will only receive fair compensation for personal injuries with the assistance of an attorney. Section I below will address basic vehicle accident law. Section II will set out basic premises liability law. Section III will discuss how to handle these small personal injuries. Section IV will discuss resolution of the personal injury claim. Section V will discuss filing suit. This paper will not address the third most common claim-Workers Compensation claims.

I. VEHICLE ACCIDENT LAW

Accidents and injuries caused by operation of a motor vehicle can be the most often cases encountered in personal injury practice. Many statutes and regulations have been promulgated, and a large body of statutes and case law has developed, in this area.

A. Standard of Care & Burden of Proof

Automobile negligence cases are governed by common law and comparative fault principles, but numerous Missouri statutes set standards of care applicable to many circumstances. To recover against Defendant for negligence in operation of an automobile, a plaintiff must show: a motorized vehicle was being operated by the defendant or her agent or employee; the vehicle was operated negligently, with or without a statutory violation; and that negligent operation proximately caused damages to Plaintiff. *Rooney v. Lloyd Product Co.*, 458 S.W.2d 561 (Mo.1970). Proximate cause exists if the defendant's conduct causes plaintiff's injury, which would not have occurred but for the conduct, and the injury was reasonably foreseeable. *Donham v. Samo*, 838 S.W.2d 170 (Mo. App.W.D. 1992). If multiple tortfeasors cause plaintiff's damages, liability is apportioned at trial under comparative fault principles. See generally MAI 17.01 et seq for legal standards.

Whether or not a vehicle is operated negligently often turns on the applicable standard of care. A vehicle operated off the public road and on private property, where

the statutory guidelines for operating motor vehicles do not apply, must be operated with ordinary care and according to the “rules of the road.” *Doolin v. Swain*, 524 S.W.2d 877 (Mo.banc 1975). Vehicle passengers and pedestrians must exercise ordinary care as well. *Venavle v. S.O.R., Inc.*, 713 S.W.2d 37 (Mo. App.1986); *Miller v. Eaton*, 733 S.W.2d 31 (Mo. App.1987). However, operation of a vehicle on a public road or highway must be done to the highest degree of care. Mo. Rev. Stat. § 304.010. The scope of §304.010 includes the state, county, and municipal roads, streets, avenues, parkways, and alleys. *Doolin*. Common carriers, such as bus and truck companies, must also exercise the highest degree of care. *Ferkel v. Bi-State Transit Dev. Agency*, 682 S.W.2d 91 (Mo. App.1984). See MAI 11.02 for definitions of ordinary case and highest degree of care.

B. Negligence

Negligence encountered in automobile cases includes: violating a traffic signal; failure to keep a proper/careful lookout; failure to operate a vehicle in a safe and prudent manner; failure to yield the right-of-way to plaintiff; failure to sound a warning; failure to swerve, slacken speed or otherwise take evasive action after a danger was or should have been ascertained; operating a vehicle too fast under the circumstances; rear ending another vehicle and failure to yield a right of way to another car or pedestrian. See MAI 7th 17.04, 17.05, for more examples of automobile negligence. One effective tool of establishing liability in automobile accident cases is asserting a negligence per se cause of action. If the defendant violated a statutory rule of the road, local traffic, or a specific safety regulation, it constitutes a per se violation of defendant’s duty of care, and negligence is not required. *Rooney v. Lloyd Metal Products*, 458 S.W.2d 561 (Mo. 1970). At trial, plaintiff need only prove a violation of the applicable rule and that damages were proximately caused to the plaintiff to recover against the defendant. See MAI 17.17-18.

Fainting or a momentary or permanent loss of consciousness while driving is a complete defense if a loss of consciousness was unforeseeable. *Ferkel v. Bi-State Transit Dev. Agency*, 682 S.W.2d 91 (Mo.App.E.D. 1984). The failure to wear a seat belt is not admissible as evidence of comparative negligence in Missouri. Mo. Rev. Stat. §§ 307.178, 307.178.3. However, if the defendant is able to assert through expert testimony that a failure to wear a seat belt contributed to plaintiff’s injuries, the jury may reduce damages to plaintiff in proportion to such failure, not to exceed one percent (1%). §307.178.3 (1) (2). Evidence of intoxication is relevant to the issue of negligence. *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo.banc. 1991). *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo banc 1996). In addition, Missouri law permits the liability of facilities serving alcohol to intoxicated persons who are subsequently involved in accidents. See Mo. Rev. Stat. §§ 311.310, 537.1053; *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1986).

C. Defendants

A lawyer has a duty to identify all potential defendants in a case. Often, the more defendants in a case means the more potential money available for settlement. Thus, be creative in identifying defendants and establishing viable claims against them. A defendant in a vehicle negligence case may be the operator of the vehicle, the operator's employer or joint venturer, a common carrier, the owner of the vehicle engaged in some negligence in permitting another to drive the vehicle, plaintiff's own insurance company if the main defendant was uninsured or under insured, another person operating that negligently entrusted the vehicle to the negligent driver or any other defendant whose negligence proximately caused the accident.

If the defendant vehicle driver is working in the course and scope of her employment at the time of the accident, her employer or principle can be vicariously liable for the employee/agent's negligence. *See McClure v. McIntosh*, 770 S.W.2d 406 (Mo.App.1989). Note that Plaintiff may use a rebuttable presumption of agency if the employer owned or controlled the vehicle at the time of the accident and the driver was an employee at the time of the accident. *Johnson v. Bi-State Dev. Agency*, 793 S.W.2d 864 (Mo.banc.1990). A common carrier may be a defendant under a vicarious liability theory if it furnishes the vehicle operator with signs or insignia on the vehicle in connection with a lease to drive the vehicle if: the signs were on the truck at the time of the accident; and the carrier failed to take reasonable steps to remove the signs. *Johnson v. Pacific Intermountain Express Co.*, 662 S.W.2d 237 (Mo.1983). Note that for automobile collision cases that arise in Missouri, even a non-resident defendant is subject to suit in Missouri. *Mo. Rev. Stat. §506.210, 506.500.*

If the defendants are a governmental entity or its employee, special rules apply. Generally, government or the municipal corporations have sovereign immunity for claims against them. *Mo. Rev. Stat. §537.600.* But §537.600.1(1) contains an exception for claims for compensatory damages for injuries caused by the negligence of public employees operating vehicles within the course and scope of their employment. *Peoples v. Conway*, 897 S.W.2d 206 (Mo.App.E.D.1995). Note that although the governmental entity may be sued, often their agents and employees cannot be sued individually due to official immunity. Public employees are immune from the liability for the performance of discretionary, rather than ministerial, duties. Thus, a police officer operating a motor vehicle responding to an emergency is performing discretionary duty, but parking a car or routine vehicle operation is a ministerial function with no immunity for negligence. *Brown v. Tate*, 888 S.W.2d 413 (Mo.App.W.D. 1994); *Bachmann v. Welby*, 860 S.W.2d 31 (Mo.App.E.D. 1993). *Southers v. City of Farmington*, 263 S.W. 3d 603 (Mo. banc 2008).

D. Uninsured & Underinsured Coverage

The plaintiff may need to take advantage of uninsured or underinsured motorist coverage provisions in her own automobile insurance company. All auto insurance policies in Missouri must contain uninsured motorist coverage for \$25,000.00 per person and \$50,000.00 per occurrence. Mo. Rev. Stat. §303.030, 379.203. A uninsured motorist provision protects the plaintiff to the same extent as if the defendant had the minimum insurance requirements in Missouri. *Raster v. State Farm Mut. Auto Ins. Co.*, 668 S.W.2d 132 (Mo.App. 1984). An uninsured motor vehicle is a vehicle that is not insured. *Brake v. MFA Mutual Ins.*, 525 S.W.2d (Mo.App. 1975). If the plaintiff is driving another vehicle, she will have uninsured coverage through the vehicle owner's insurance company. A plaintiff is entitled to uninsured motorist coverage if they are entitled to recover damages from the defendant. The details of the applicable uninsured motorist coverage will not be exhaustively addressed here. If an attorney is faced with the denial of an uninsured motorist benefits, an attorney should identify the reason for denial and assess the legal position of the client. An attorney should evaluate an uninsured motorist coverage case as if the defendant had insurance. In the event the uninsured motorist insurance company refuses to settle, an action against the insurance company may be maintained under a breach of the insurance policy contract and vexatious refusal/bad faith theories. Note that some insurance policies require timely reporting of phantom vehicle accidents or other circumstances where it is likely that no insurance on the part of the Defendant would be identified. Underinsured coverage should be provided if the Defendants liability insurance coverage is inadequate to fully compensate the Plaintiff.

Stacking of uninsured motorist coverages is possible in only one circumstance. If the plaintiff has an insurance policy with more than one car, she is entitled to stack the uninsured motorist coverage from each motor vehicle covered under the policy in which she is a named insured, even if it is a single insurance policy. *Cameron Mut. Ins. Co. V. Madden*, 533 S.W.2d 538 (Mo. 1976); §371.203. Anti-stacking provisions in insurance policies are void regarding named insureds in the policy – regardless of whether uninsured coverage is provided by the same or different insurers. *Galloway v. Farmers Insurance Co., Inc.*, 523 S.W.2d 7339 (Mo.App. 1975). For additional uninsured cases and stacking see *Nationwide Insurance Co. v. Duggar*, No. SD 33484 (Mo. Ct. App. S.D. 2016); *Corrigan v. Progressive Ins. Co.*, 411 S.W.3d 306, 310 (Mo.App.E.D.2013); *Ritchie v. Allied Property & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. banc 2009); *Niswonger v. Farm Bureau Town & Country Ins. Co. of Missouri*, 992 S.W.2d 308 (Mo.App. E.D.1999).

II. PREMISES LIABILITY

Premises liability and slip and fall cases are the second most often encountered cases after auto cases. Premises liability depends on the breach of duty of the landowner juxtaposed with why the injured person was on the land.

A. Standard of Care & Burden of Proof

The standard for recovery against a land owner, and the burden of proof and jury instruction therefore, is dependent on the injured person's status, as invitee, licensee or trespasser. An invitee is someone who enters onto the land with consent of and benefit to the owner or the possessor of the land. *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426 (Mo. 1993). No specific invitation is necessary, and businesses open to the public attract invitees. *Carter v. Kinney*, 896 S.W.2d 926 (Mo. 1995). For an invitee to recover for a slip and fall case she must show that: a dangerous condition existed on the premises; the owner/possessor knew, or should have known, of the condition; and the owner/possessor failed to use ordinary care to remove, remedy or warn of the dangerous condition. *Barbel v. Central Markets*, 896 SW.2d 746 (Mo.App. 1995). Due to the greatly different standards of proof, being able to characterize the plaintiff as an invitee is important.

A licensee occupies land for the licensee's own purposes, such as using a path across land as a short cut. *Seward*. A licensee must prove: a dangerous condition existed on the property; the landowner/possessor had actual knowledge of the dangerous condition; the plaintiff lacked knowledge of that condition and could not have discovered it using ordinary care; the owner/possessor knew or should have known that the plaintiff was unaware of the condition and could not discover it; and the owner/possessor failed to use ordinary care to remove, remedy or warn of the condition. *Wells v. Goforth*, 443 S.W.2d 155 (Mo. 1969). A trespasser is a person entering on the land without consent or privilege from the landowner to enter the land, with permission being expressly or impliedly denied. *Seward*. A trespasser must show that: a dangerous condition existed on the premises; the landowner/possessor had actual knowledge of the condition; and the owner/possessor also actual knowledge of the presence of the trespasser. *Seward*. Note that this trespasser standard has exceptions such as the Attractive Nuisance Doctrine, recurring trespasser, dangerous condition in a public right of way, or intentional action to injure the trespasser. *Anderson v. Cahill*, 485 S.W.2d 76 (Mo. 1972).

To recover for premises liability, the defendant must control of the premises where the injury occurred. *Dildine v. Frichtel*, 890 S.W.2d 683 (Mo.App. 1994). Thus, a landowner who leases an entire premises to a tenant or relinquishes complete control to an independent contractor for a construction project, generally cannot be liable to the tenant's or the contractor's invitees. A landlord is liable to a tenant or a tenant's invitee only if: the landlord has knowledge of the dangerous condition that is concealed and is not discoverable by the tenant; the dangerous condition occurs in a common area or joint use area; or the landowner is responsible for making repairs and negligently fails to do so. *J.M. v. Shell Co.*, 922 S.W.2d 759 (Mo. 1996). If an attorney is faced with peculiar fact situations such as a criminal attack on the plaintiff by a third person, inherently

dangerous activity on the land or similar issues, a particular assessment for those unique circumstances must be done.

The plaintiff must show that the property hazard at issue was not known or reasonably discoverable by her as an element of her claim. *Harris v. Neihous*, 857 S.W.2d 222 (Mo. 1993). A landowner or occupier is not required to remedy a condition that generally affects all property in the area, such as snow, ice, or rain. *Wills v. Springfield General Osteopathic Hosp.*, 804 S.W.2d 416 (Mo. App. 1991). Thus, if a landowner does not shovel its parking lot and an injury occurs she is not liable. However, if the landowner does shovel her lot and someone does slip and fall, the landowner should be liable. When handling ice or snow cases, make sure that the plaintiff was injured as a result of improper and inadequate shoveling, and not natural accumulation. *See generally* MAI 22 for verdict director and law regarding owners and occupants of land.

B. Defendants

The potential Defendants in a premises liability action are the landowner, tenants, occupiers of the land, and the person or entity hired to maintain and repair the premises. There may be other potential defendants depending on the facts of a particular case, such as products liability.

Governmental entities can be liable for injuries from dangerous conditions on public property. *Caldweir v. McGaham*, 894 S.W.2d 237 (Mo.App. 1995). The focus of such a claim should be that the dangerous condition of the property at issue, whether road, park or other property, was caused by the negligence of the municipality, or negligent or defective design. *Yates v. Butler*, 929 S.W.2d 264 (Mo. App. 1996). Municipalities will often defend premises liability cases with the theory that if the jury believes that there was a enough notice to the city that a dangerous condition existed, *a fortiori* the plaintiff should have known of the dangerous condition and should have avoided or should be charged with some type of contributive fault for failing to do so. Note that to succeed in a claim against a municipality or government entity, plaintiff must prove actual notice of dangerous condition prior to the time of the injury. §537.600. **In addition**, Missouri statutes and some city charters require notice given to the mayor or other officer of the municipal corporation within a specific time period after injury for a subsequent claim to be valid. See e.g. Mo. Rev. Stat. §82.210. Thus, if the defendant is a municipality, carefully analyze and establish that your client has come to you within the time limitations, and immediately provide notice to the Mayor of the municipality by certified mail, return receipt requested so that you can prove compliance with those requirements. This is not a statute of limitations that can be waved or tolled, but a prerequisite to the claim. Note that governmental entities have their damage exposure limited by §537.610. Effective January 1, 2001 those sovereign immunity limits are

\$2,079,420.00 for claims arising out of single accident of occurrence, and \$311,913.00 for only one person in a single accident or occurrence.

C. Additional elements of a claim

A premises liability action should establish: the status of the plaintiff as invitee (licensee); description of the dangerous condition of the property; the necessary level of knowledge of defendant and plaintiff regarding the dangerous condition; that the defendant was negligent in causing the defective condition, or failing to correct or warn of the dangerous condition; and damages to plaintiff proximately thereby. Note that the likely defenses raised in slip and fall cases are that the hazard was open and obvious or was due to general weather conditions and not the fault of the defendant.

A negligence per se action can be maintained against a landowner for violation of local building codes. Just like in vehicle statutes and regulations, premises have building codes setting out standards for the safe habitation and use of land and buildings. Proving a building ordinance violation and resulting damages is sufficient to recover against the landowner. Building codes also establish a standard by which the negligence of the Defendant can be measured. Please note that there are specific proof requirements to place building ordinances into evidence, including copies of the building code and the ordinance of the municipality adopting the building code. There are uniform national building codes that municipalities adopt, such as the BOCA National Building Code. Also, punitive damages may be obtained in premises liability actions if the necessary outrageous conduct, knowledge of a high degree probability of injury to a specific class of persons by a dangerous property condition. *Litchfield v. May Dep't Storage Co.*, 845 S.W.2d 516 (Mo. App. 1992).

Premises liability jury instructions are at MAI 4th 22.01-22.10, and the verdict directing instruction using comparative fault principles is MAI 37.01. The defense will use converse instructions trying to establish that the dangerous condition was open and obvious and that the plaintiff failed to keep a careful lookout.

III. HANDLING THE CASE

Most people with a personal injury claim do not want to progress their claim to a jury trial. For lawyers handling the case on a contingency fee basis, the less time expended in a case makes that case more profitable. But the threat of trial or a big verdict drives up the value of your case. I try cases pretty often, and think that increases the value of my better cases. So, a personal injury case should be handled to obtain the best result in the most effective manner. The section will address the client interview and investigation of the claim.

After being contacted by the client regarding a personal injury case, it is important to meet with the client and have them agree to have an attorney represent them as soon as possible. Many times failure to do so in a timely fashion results in the client being represented by another attorney in the competitive environment that attorneys face in personal injury matters. When interviewing the client the following information should be obtained:

- Name, address, phone number, birth date, social security number
- Date, location, time, place of the incident
- Identity of the defendant, police officer responding to the scene, police office/highway department/municipality that would have the police report in the case.
- Details of the accident, to follow questions to identify negligence on the part of the defendant or inquire as to potential comparative negligence on the part of the plaintiff.
- Witnesses to the accident.
- Medical care obtained to date including names of medical providers.
- Insurance information regarding plaintiff and defendant.

The client should be advised that the attorney will investigate the case and pursue the claim on behalf of the client and deal with the insurance company, or proceed to a trial if that is what is to be required of the attorneys' services. The attorney should explain the fee arrangement: that the attorney will not be charging them on an hourly basis, and instead a contingency fee agreement would be used. Typically, attorneys charge one-third of the amount recovered as a contingency fee. There are occasions where a higher fee may be warranted for exceptional circumstances, additional work on appeal or other circumstances. The client should be advised that the attorney will advance all expenses on their behalf, but that at the end of the case, the client will be ultimately responsible for expenses. In most personal injury cases, the plaintiff is represented by an attorney on a contingency fee basis. Pursuant to Rule of Professional Conduct 1.5 (c) (Rule 4-1.5 of the Missouri Supreme Court Rules), a contingency fee may be charged to a client. The rule requires that a contingent fee agreement be in writing, state the method by which the fee is to be determined, including the percentages which accrue in the event of settlement, trial or appeal, state what expenses are to be deducted from the recovery and whether those expenses are deducted before or after the fee calculated. Rule 1.5 also requires a statement at the end of the case setting out the outcome of the matter, showing the remittance to the client and the method of its determination. Pursuant to Rule 1.5 (e), lawyers may divide a fee, even though they are not in the same firm, only if: (1) the division is in proportion to the service performed by each lawyer or, by written agreement both lawyers assume joint responsibility for the representation; (2) the client is advised and does not object to the participation of those lawyers; (3) the total fee is reasonable.

The new attorney should have the client sign a contingency fee agreement and one or two medical authorizations so that medical records may be obtained later. A basic sample contract is as follows:

I, _____, hereby retain and authorize the law firm _____ to represent me, in my claim against _____, and anyone else who may subsequently be determined to be liable on said claim which arose out of ____.

Law Firm agrees to investigate and prosecute said claim so far as in the firm's best professional judgment said claim appears meritorious. Law Firm will receive for their services one-third (33.33%) of any amount recovered in this case as attorney's fees, Law Firm will receive for their services forty-percent (40%) of any amount recovered.

Client understands and agrees that any and all costs and expenses incident to the investigation, preparation, and/or prosecution of this claim remain client's responsibility and that the Law Firm is advancing these costs as part of this contingency fee agreement. If there is a financial recovery, client will pay the Burger Law Firm back those expenses. Client understands and agrees that if there is no financial recovery, the Law Firm will not seek reimbursement for any costs or expenses. However, client agrees that any costs or expenses will be paid to the Law Firm immediately if the firm is terminated by client before the conclusion of the claim(s). Internal office costs, such as copies, postage, faxes, telephone charges and other expenses will not be itemized and will be charged at a maximum one percent (1%) of the total recovery.

A medical authorization should authorize a medical care provider to provide the law firm with copies of all medical records and bills, that a copy of the authorization is a good as the original, and should be notarized.

After the attorney has been hired by the Plaintiff, a number of things should be done immediately. First send a letter thanking the new client (sample attached). Second, the attorney should obtain the police report from the appropriate entity (especially in an auto case). It should be readily ascertainable through telephone calls where the police report is located and most police departments will provide copies of reports for a nominal fee. Once it is obtained, the police report should identify the parties involved, the circumstance of the accident, and the conclusions of the officer regarding activities and negligence of the parties involved.

Third, attorneys should send a lien letter to both the Defendant and her insurance carrier. A lien letter puts the insurance company on notice that an attorney is involved in the case and that communication should be directed to that attorney. Within a reasonable time thereafter, the insurance company must acknowledge the lien and contact the attorney. The insurance industry is regulated and there are Missouri statutes and regulations which seek to ensure that insurance claims adjusters behave fairly and appropriate toward claimants. A lien letter can simply state:

This is to advise you that we _____ in a claim he has against your insured arising from the accident on _____.

I have a contract with _____ whereby I will receive a fee contingent upon the amount recovered, whether by compromise or suit, and claim thereby a lien in accordance with Missouri law.

Please acknowledge my lien in writing at your earliest convenience at the below address.

I also request that you preserve evidence in this claim in your or your insured's possession. Photos, statements, physical objects may be important in resolving this dispute between the two parties. If you have any photos of your insured's vehicle, please provide them.

Additional language can be added such as a request to contact the lawyer to discuss the claim. If the attorney encounters difficulty in getting a response to a lien letter or other problems with insurance claims personnel, consult the Unfair Claims Settlement Practices Act, Mo. Rev. Stat. §375.1007, which provides, among other things, that the insurance company must acknowledge a lien letter in a timely manner. If a vehicle driver who caused damages to the Plaintiff does not have automobile insurance, the attorney will want to put the Plaintiff's insurance company on notice of a claim. In addition, if the Plaintiff has underinsured motorist coverage, and there is an indication damages Plaintiff sustained is greater than the policy limits of the Defendant's insurance, the Plaintiff's underinsurance motor carrier should be put on notice of the claim.

At that point, the attorney must decide what other investigation should be conducted prior to attempting to resolve the case with insurance company. This may entail photographs of the accident scene, interviews of witnesses, and even hiring an expert to review the facts and circumstances of the accident if the case warrants that expense. Note that prior to filing suit, the defendant is usually not represented by counsel, and thus, there is no prohibition from speaking with or taking a recorded statement from the defendant by Rule 4.2 of the Rules of Professional Conduct. An attorney needs to establish the facts/evidence necessary to impose liability against the

defendant and to establish plaintiff's damages. These include the basic facts of the accident to show that the defendant was negligent and the plaintiff was not. This can also include facts like the defendant apologizing to the plaintiff, the Defendant admitting fault, knowledge of a defective property condition, and other such admissions.

A useful tool in premises liability cases is to identify and interview employees or agents of the defendant regarding the dangerous condition of the premises which caused the injury. It is invaluable to have statements of the defendants or her employees or agents admitting prior knowledge of such a dangerous condition, and these constitute admissions of the defendant. *Bynote v. National Supermarkets*, 891 S.W.2d 117 (Mo. 1995). Additional evidence to seek are prior similar incidents involving the same area of the premises. Note that subsequent remedial measures of a dangerous condition, although they are not generally admissible, may be admissible to show control of the premises, feasibility of protective measures, or the actual condition of the premises at the time of the incident if the Defendant contends there was no defect. *Brooks v. Elders, Inc.*, 896 S.W.2d 744 (Mo. App. 1995). If an aggressive defense is made on these issues, the exceptions can swallow the rule and a forward thinking attorney may be able to get those remedial measures in evidence.

IV. RESOLVING THE CASE

The vast majority of personal injury claims are resolved prior to filing suit. Missouri law mandates that vehicle drivers have certain minimum insurance to insure Missouri citizens can be compensated for injuries sustained in these cases. Often, owners of premises who also have insurance to address injuries happening around their property. If the defendant has insurance coverage for the personal injury, attempts to settle the case should be made. Often, the most efficient use of an attorney's time from a business stand point is to settle these cases. However, a lawyer's primary duty is to his client and zealous representation of that client. If the Defendant is reasonable and is willing to resolve a case in a fair manner and deal good faith, both of these potentially competing interests can be easily reconciled. If a Defendant is willing to negotiate a case, it is usually in the best interest of the client to settle at a reasonable amount. Most injury victims do not desire to spend a significant amount of their time and life in litigation to recover for their personal injuries. Most injured individuals would rather settle a case if that settlement gives them an adequate and fair recovery for the damage incurred. However, there is no reason to be quick to settle any case: if the Defendant is not willing to pay you what you believe is a reasonable value for the case, push and push and push to zealously represent your client.

A. When/how to settle

Once an attorney has investigated the case and has obtained the evidence needed to support the case, she is ready to discuss liability with the insurance claims adjuster.

However, no case should be settled until the plaintiff reaches their maximum medical improvement from the accident. It is highly recommended that prior to settling the case and releasing the plaintiff's legal rights, maximum medical improvement and/or cessation of medical care is reached. Only at that time can the full damages from the accident be ascertained and valued. So, an attorney should wait until their client finishes medical treatment for injuries before making a settlement demand. There may be occasions where an injured individual has permanent pain or permanent medical condition. This is different than maximum medical improvement: because with that person their maximum medical improvement leaves them with continuing pain.

Once the plaintiff has reached her maximum medical improvement, an attorney should obtain her medical records and bills from all medical care providers. These providers will charge for the cost of their records. Note that a medical provider in the State of Missouri is limited to charging for records. Mo. Rev. Stat. §191.227.1. Once medical records are obtained, those should be forwarded to the insurance company's representative so that they can conduct an independent evaluation of the medical records. In the normal course of settling a claim at this stage an attorney does not usually provide a medical authorization to the claims adjuster. Most claims adjusters are willing to settle cases based on medical records provided by the claimant's lawyer only. When medical records are obtained, an attorney should make sure that they obtain an affidavit as to the authenticity and the business record nature of those records, so that they can be admitted as evidence at trial by affidavit.

Once the insurance company has the liability and the medical damage information, it's time to try and settle the case. Attorneys have different methods, theories and tactics about resolving personal injury cases. The following thoughts are provided with the caveat that attorneys other than the author may have different and better ways to negotiate cases. Plaintiff's damages determine the value of the case, and include past and future medical costs, property damage, pain and suffering, disability and disfigurement, and other miscellaneous damages. The value of an automobile negligence case depends on the severity of impact and damages caused to the injured individual. There is no hard and fast rule for determining the value of these cases. An attorney may want to consult other attorneys about the basic facts of the case to analyze the value of a case. An attorney can review verdict reporters or other information to determine what the fair settlement value of a case would be.

The first demand, and subsequent negotiations, should be done with an eye towards how insurance companies think. Attached are a couple sample demand letters. An insurance adjuster will set a reserve or estimate of where they think the case could be settled at the beginning of the case. The insurance adjuster is looking to get the best settlement for her company and to pay an attorney and the injured individual the least amount possible. Most insurance adjusters want to look good for their company and

their supervisors so the trick is to settle the case while making the attorney happy, the injured party, and the claims adjuster not unhappy (or at least try and settle it at that level). Because of the way insurance companies think about cases, it is better to start high in your settlement demand. Don't be too high in trying to settle the case to put yourself in an impossible position where you can't settle the case. Regardless of your technique, the goal in settlement negotiations is to get the insurance company to offer the maximum amount prior to filing suit. In fact, it can be an effective tactic to tell the claims agent that you're ready to file suit and that she should get her best offer on the table prior to doing so. Once that offer is made, the attorney is to evaluate the claim to see whether if that is adequate to settle the case.

Another effective technique is to address concerns of a claims agent of why she won't pay more money in a case. This may be looking at past chiropractic records to establish that prior medical treatment was unrelated to the specific part of the body injured in the instant case, obtain additional statements and other information from witnesses that support your case, or other such activity. Having the claims agent identify specific reasons that are preventing her from paying your client the fair value of the claim, and then addressing those concerns, can be effective. Remember not to be too greedy. It may be in your client's best interest to take a settlement now versus pursuing a case to trial to obtain a little more money. If litigation costs and attorneys' fees are taken into account, the injured individual may not obtain a significant net increase in recovery for the personal injury at trial. An attorney must make the ultimate recommendation to the client whether to take a settlement or to file suit and proceed to trial. If the latter decision is made, the attorney will need to make the commitment to the client to pursue the case through trial. It also should be noted that sometimes by filing suit, an attorney can place the evaluation of the case in front of an attorney, rather than a claims agent, can establish venue in a place that may change the value of the case, or can accomplish other tactical goals to attain additional settlement money in a case. Mediation is a great settlement tool at the appropriate time.

B. Medical Bills and Liens

An injured individual may have outstanding bills from the medical providers, or may have had insurance companies or other entities pay for medical care for the injuries caused by the defendant. An attorney should consider part of her representation to her client to address any outstanding medical bills and lien issues with a view towards obtaining the maximum financial result for her client. This means negotiating with medical providers and lien holders to minimize their share of any settlement or judgment in a personal injury matter.

1. Medical Bills

Medical providers have the legal right to place a lien on an injured individual's personal injury claim for medical care provided to treat injuries sustained from that accident. If the medical care is for another accident, no lien right is provided by statute. If a medical provider does not provide a formal written notice of lien to the attorney or liability insurance company, there is no lien and the financial obligation is left to the injured individual.

Prior to paying a medical bill and/or lien, an attorney may want to try to negotiate that bill down to a lower figure. Insurance companies regularly devalue chiropractic medical care in evaluating cases and when chiropractor bills are paid directly from insurance policies, such as health insurance or a med pay provision in an auto insurance policy, chiropractor's bills are closely screened with less treatments authorized and less cost per treatment than may appear on the chiropractic bill that has been presented to the attorney. An attorney may want to contact the chiropractor and inquire about a marginal reduction in the chiropractic bill, which is a savings that can be passed along to the client/patient. In fact, some insurance claim agents have an expectation that the chiropractor bill will be reduced after settlement and negotiate the case with that view. Whether explicit or implicit, chiropractor bills are just not valued by insurance companies as highly, regardless whether this conduct is appropriate. Often, hospitals, ambulance services and physicians will discuss reducing the amount of the bill in order to facilitate a settlement. If a client has an expectation of a certain amount of net money they will receive after attorney's fees and costs, reduction of bills and liens is a way to arrive at that figure.

2. Insurance Liens

Many times a health insurance company or other payor of medical bills of the plaintiff will seek a subrogation lien against any proceeds of settlement received from a third party based on that same medical care. It is against Missouri public policy for a party who has paid for medical treatment for an injured individual to assert a subrogation interest if that individual pursues a claim for damages for those same medical costs against a third-party. *Schweiss v. Sisters of Mercy, St. Louis*, 950 S.W.2d 537 (Mo.App. 1997). However, if health care payor is governed by the Employment Retirement Income Security Act ("ERISA") or is Medicaid or Medicare, it may contractually agree with the injured individual that if they recover from a third-party damages for medical treatment for which the payor paid benefits, the payor is entitled to recover those payments from the injured individual as a subrogation interest. If an insurance company asserts a lien, an attorney should advise the lienor that proof is needed that the insurance company is governed by ERISA. Absent such proof, the attorney should deny the validity of the liens and advise the lienor of such denial. If the

lienor is not an ERISA plan, an attorney should never satisfy the lien. Should the lienor assert a non-ERISA lien, they should be advised that the lienor should pursue some type of declaratory judgment or other legal action to assert that lien. If the case is settled with a lien issue pending, the client should be so advised. An attorney may wish to leave the disputed sums in her trust account for a period of time to give the lienor a reasonable opportunity to pursue any legal action to assert a lien. After a reasonable time to pursue the claim has elapsed, the remaining trust money should be paid out by the attorney to the client.

3. Workers' Compensation Liens

If a person is injured in the course and scope of their work, they have a claim under Missouri's Workers' Compensation Act. As a general rule, it is usually better to settle the workers compensation case, and then settle the civil case. Mo. Rev. Stat. § 287.150 gives the employer and/or its insurance carrier a subrogation interest against a third-party tortfeasor for recovery of compensation benefits. That lien is determined by a formula set forth in *Ruediger v. Kallmeyer Brothers Service*, 501 S.W.2d 56 (Mo.banc. 1973). Just like with other liens, even once the compensation lien has been reduced by *Ruediger*, an attorney may also wish to try to negotiate the compensation lien down to an even lower amount to facilitate settlement and/or maximize her client's recovery. If the civil case is settled before the compensation case, the entire amount of the civil settlement will be a setoff in the workers' compensation case, and may swallow any recovery – as workers' compensation benefits are usually lower. Note, however, each case is different and those differences may necessitate tactics different than the general recommendation to resolve the compensation case first.

Note that the workers' compensation lien only attaches to recovery from third persons that cause the damage. If an attorney is pursuing to recover uninsured insurance or under insured insurance proceeds, know that a workers' compensation lien does not attach. Uninsured and under insured coverage is a contractual right of the injured party which with an insurance company, it is not a recovery against the third-party under Missouri Statute or interpretive case law. *Barker v. Palmarin*, 799 S.W.2d 117 (Mo.App. 1990), See *Barker v. H&J Transporters, Inc.* 837 S.W.2d 735 (Mo.App. 1992).

C. Mechanics of settlement

Generally, the party paying the money for the release gets to draft the release. Thus, the insurance company will prepare a release for the plaintiff to execute. An attorneys' representation is not over once an oral agreement with the claims agent to settle a case has been obtained. To the contrary, the attorney should be careful in release issues, winding up cases and closing files.

An insurance company will generally send the settlement draft and the release. Some insurance companies have a policy of not sending the settlement draft until a release is obtained. Not to worry, without the payment of consideration of the settlement amount, the release, like any contract, is not enforceable. Typically, the settlement draft will have both the client's name and the attorney's name or firm name on it. Once a settlement draft is received, both the client and the authorized person from the law office need to sign the check prior to it being deposited. The settlement draft should be deposited in the attorney's trust account maintained pursuant to Missouri Rules of Professional Conduct. Once the settlement draft has cleared the bank, the attorney is ready to distribute funds from the settlement. Pursuant to Missouri Rules of Professional Conduct, a lawyer must provide the client with a settlement statement or letter setting forth the total amount of settlement, the attorney's fees paid, the total expenses being reimbursed by the client to the attorney, and the net amount to the Plaintiff. This ensures, in writing, that your client is apprized of the details of the settlement and the fee being paid. A check from the lawyer's trust account is issued for the net amount to the client, a check is issued to the attorney's law firm for fees earned in the case, and a check to the attorney's firm for expenses advanced on behalf of the client is issued.

It should be noted that if there are multiple defendants in the case, and a Plaintiff settles with one of those defendants, care must be made in signing a release. Under Mo. Rev. Stat. §537.060, a Plaintiff can settle with certain defendants, but not others. If that settlement is in good faith, it bars contribution claims against the settling defendant, and the agreed settlement sums are credited against any judgment obtained from the non-settling defendants. Note that if the plaintiff gives a general release releasing all claims, the release bars the plaintiff from recovering from any defendants. *Rudisill v. Lewis*, 796 S.W.2d 124 (Mo.App.W.D. 1990).

V. FILING SUIT

If settlement negotiations with the insurance company fail, or for other purposes, a lawsuit can be filed. Potential defendants in the case must be analyzed to ascertain where the most advantageous venue for a jury trial may be obtained. Under §508.010 suit must be filed in the County in which the Plaintiff was first injured. This is the venue statute for all tort cases.

A petition for personal injury damages should establish jurisdiction of the court, establish venue in that court, set out the basic facts of the accident, state the allegations of negligence against the Defendant, and state the damages approximately caused by that negligence. Detailed pleadings are not required, but sufficient detail must be presented so that the Defendant can be apprized of the allegations against her. The petition should also contain an ad damnum provision which need not set a specific monetary amount, but state an amount that is fair and reasonable within the

jurisdiction and limits of the court. To plead a negligence per se case, use a separate count citing the specific statute/regulation must be pled. Sample Petitions are attached.

Once the lawsuit is filed, discovery should be commenced right away. The quicker plaintiff's counsel is able to get the case to trial, the more pressure is put on defendants, the happier the plaintiff will be, and the quicker the recovery will have in the case, whether by settlement or judgment. In the final analysis, the only real leverage a plaintiff's lawyer has to obtain money from a Defendant is trial and judgment. This presentation will not go further into details of trial strategy and discovery.

A. Limitation of Actions

Limitations of Actions for most personal injuries in Missouri is five years from the accrual of the cause of action. Mo. Rev. Stat. §516.120. These limitations may be tolled for children through age 21. §516.170. If a person dies as a result of the accident, an unlawful death action must be maintained within three years. §537.100. Note that under §516.190 if a claim accrues in a foreign jurisdiction, the other state's statute of limitations will apply. §516.190. A practitioner must be very careful to determine a foreign state statute of limitation for these situations. Note that the cause of action is commenced with the filing of the action, but that the Plaintiff must be diligent in procuring service of process on defendants. *Ostermueller vs. Potter*, 868 S.W.2d 110 (Mo. Banc 1993).

B. Referral to Another Attorney

During the course of representing a client for a personal injury, an attorney may decide that the client and attorney would be better served by referral of the case to another attorney. This decision may be reached for a variety of reasons. An insurance company may refuse to settle a case, and the handling attorney may want a different attorney to file a lawsuit and try the case. An attorney may be presented with a case that has significant damages and the attorney may not feel comfortable handling a high damage case. The personal injury may present other issues that warrant transfer to another attorney. Many attorneys decide to specialize in certain areas of the law, and although as shown by this presentation personal injury cases can be effectively handled, an attorney may not wish to devote her time or take cases to trial and actually litigate these accident cases to trial.

If a case is referred to another attorney, the referring attorney should receive a portion of the fee. The attorney should be guided by Rule of Professional Conduct 1.5 in sharing fees with other attorneys. An attorney should never share a fee with a non-attorney. Usually referral fees foster efficient case distribution where attorneys with experience in handling certain types of cases can dedicate their time and expertise to those cases. In addition, referring a case to an attorney who specializes in handling

larger personal injury cases or specializes in trying personal injury cases of differing damage levels, enables the plaintiff to be provided the best legal representation possible. An attorney may elect to investigate and pursue a case, but realize that what is needed is the filing of a lawsuit and aggressive representation, and possibly through trial, to obtain the best result for her client. The fact that an attorney's practice is not geared towards litigating and trying personal injury cases should not prevent that attorney from handling those cases in a claims stage.