Trial Strategy and Tort Reform

Presented by: Gary Burger and John Rahoy

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BURGER LAW

INJURY TRIAL ATTORNEYS

John is an experienced trial lawyer with a successful record defending clients in difficult jurisdictions. John has tried more than 70 jury trials to verdict, including many in the Circuit Court of the City of St. Louis, one of the most challenging plaintiff venues in the nation. John has been recognized by his peers for inclusion in The Best Lawyers in America and is a former director of the Federation of Defense & Corporate Counsel.

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Roadmap

1. Trial Strategies; Voir Dire; Opening
2. Bill v. Paid – Deck v. Teasley's Impact
3. What You Can and Cannot Say in Closing
4. Experts and Daubert
5. Interpleader and Insurance Company Tactics
6. Bad Faith
7. Stacking UM and UIM

TRIAL STRATEGIES

- Can defense lawyer admit liability in opening, get credit with the jury and get away with it?
- Can plaintiff lawyer not put in medical expenses and *prevent* defense lawyer from putting in medical expenses?
- Can defense lawyer read medical records to jury in close?
- Opening statement
- Do not argue
- Why plaintiff's attorneys will transcribe and use it against you in closing
- Will male closing about you and your untruthfulness
- Do use exhibits authenticated in discovery
- Take your time and allow the jury to take it in
- Do use jury instructions

VOIR DIRE

- USE JURY INSTRUCTIONS
- BE AUTHENTIC WITHOUT BEING FAKE
- CHALLENGE JURORS TO ADMIT THE INSTRUCTIONS RULE
- ASK JURURS IF THEY WILL CONSIDER EVIDENCE THAT ARE CASE SPECIFIC
- USE GRAPHIC PHOTOGRAPHS OF INJURY TO MAKE SURE SYMPATHY IS NOT AT ISSUE
- HAMMER SYMPATHY MORE THAN ONCE
- DISCUSS THAT SYMPATHY, EMPATHYOR FEELLING SORRY FOR IS NOT IN THE INSTRUCTIONS.
- Be careful with your stereotypes in choosing jurors
- File Jury selection memo or have the statute with you.
- Ask Jurors is they can return a large verdict if the evidence supports it.
- Get other lawyers good voir dire – practice it and hone it down. Many lawyers take too long.

Opening

Proper use of opening statement

1. Do not argue your case
    a. Allow the other side to attack the argument
    b. Other side can obtain transcript before closing and attack your argument in opening as being untruthful;
    c. Under promise and then overperform in trial
    d. Be intentional in opening – why are they here, what are the facts and what do you want them to do.

Bill v. Paid – How Tort Reform Changed Medical Expense Damages

- 2005 Missouri tort reform amended Mo. Rev. Stat. § 490.715 to address valuation of med expenses with provision establishing rebuttable presumption as to the value of med treatment being "the dollar amount necessary to satisfy the financial obligation to the health care provider."
  - Δ could offer evidence med expenses were paid but not by whom

- Collateral Source Rule prohibited Δ from introducing evidence that part of plaintiff's wage loss was paid for by independent party, such as insurer. *Deck v. Teasley*, 322 S.W.3d 536, 538 (Mo. banc 2010)
  - Reasoning being that defendants should not benefit from discounts made to plaintiffs full-price med bills

Bill v. Paid – 2

- July 5, 2017- Gov. Greitens signed MO SB 31, which made carve-outs to the Collateral Source Rule. These include:
  - If Δ/Δ's insurer/Δ's rep paid portion of plaintiffs med expenses, these expenses are not recoverable from Δ
  - Changed "value" of med expenses to now be defined as, "a sum of money not to exceed the dollar amounts paid by or on behalf of a plaintiff or a patient whose care is at issue plus any remaining dollar amount necessary to satisfy the financial obligation for medical or treatment by a health care provider after adjustment for any contractual discounts, price reduction, or write-off by any person or entity." *SB 31*.

What You Can and Cannot Say in Closing Argument

- **Improper**:
  - Per diem argument. *Faught v. Washam,* 329 S.W.2d 588, 601- 04 (Mo. 1959)
  - Comment on failure to call a witness – unless fact witness. *Simpson v. Johnson's Amoco Food Shop, Inc.,* 36 S.W.3d 775, 777 (Mo. App. 2001).
  - Reading a statute to the jury is improper and, if in reading the statute, counsel misstates the law or misleads the jury, it is reversible error. *Lasky v. Union Elec. Co.,* 936 S.W.3d 797, 802 (Mo. App. 1997).
  - Golden rule. *Henderson,* 68 S.W.3d at 473.
  - dismissed or abandoned pleadings because the pleadings are irrelevant and are used for the purpose of prejudicing the jury. *Liberty Hills Dev. Inc. v. Stocksdale,* 742 S.W.2d 209, 213-14 (Mo. App. 1987).
  - "send a message" arguments in which punitive damages are not sought. *Beis v. Dias,* 859 S.W.2d 835, 840 (Mo. App. 1993).
  - It is improper to suggest, by one means or another, that the real defendant is an insurance carrier. *Collins v. Nelson,* 410 S.W.2d 570, 577 (Mo. App. 1965)
  - Remarks Tending to Create Bias or Prejudice

What You Can and Cannot Say in Closing Argument - 2

- **Improper**:
  - Statements to arouse prejudice which are not made within the scope of legitimate argument. See *Delaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 537 (Mo. App. 1991)
  - refer to opposing party as a criminal. *Henderson v. Hassur,* 225 Kan. 678, 693, 594 P.2d 650, 663 (1979)
  - make reckless assertions intended to arouse prejudice against litigant; the effect of these statements cannot always be cured by withdrawing them from consideration
- Proper to argue falsity of statements of both party and attorney
- Proper to tell the jury about whether it is a treating physician versus IME paid expert
- Proper to discuss promises made by them in voir dire and opening
- Proper to call out exaggerations of the party
- Proper to discuss evidence and use demonstratives

What You Can and Cannot Say in Closing Argument - 3

- *Per Diem* Argument
  - Appealing to jury to follow formula in measuring damages for pain and suffering is unfair. *Faught v. Washam,* 329 S.W.2d 588, 601- 04 (Mo. 1959).
  - **Permissible** in telling jury what counsel considers is fair comp for injuries. *Huxoll v. Nickell,* 205 Kan. 718, 726-27, 473 P.2d 90, 96-97 (1970).
  - **Permissible** to display chart showing number of months of pain/suffering. *Timmerman v. Schroeder,* 203 Kan. 397, 402-03, 454 P.2d 522, 526-27 (1969).

- Adverse Inference Rule
  - Failure of party to call witness who has knowledge of facts/circumstances vital to case raises presumption that testimony will be unfavorable to party failing to offer testimony. *Simpson,* 36 S.W.3d at 777-78; *see generally*, 1 Ill. Non-Pattern Jury Inst. Civil § 5.01.
  - Witness not equally available to both parties? Prejudicial error for trial court to prevent party to whom witness is not equally available from requesting jury to draw adverse inference about failure to produce. *Simpson,* 36 S.W.3d 778.
  - **Improper** to argue negative inference from opponents failure to produce witness if witness is equally available to both parties. *Elliot v. Koch*, 558 N.E.2d 493 (3d Dist. 1990).

Daubert and Expert Disclosure

- *Daubert* hearings can be used to determine whether an expert is qualified, however, full hearing is often not required. Written memos are instead used to argue factors. Even if do not strike the whole expert, what opinions can you curtail and exhibits can you keep out.
- Treating physicians have been shown to go both ways under *Daubert* standard; some judges require full reports/disclosures while others do not consider them experts. Full disclosure with full facts and report for preliminary matters like class certification or preliminary injunctions? YES.
- Important to check both Local Rules and Judge's standing orders (if he/she has them) to determine how particular judge handles challenges to expert testimony/opinions. *See eg* Standing Order of Judge Amy St. Eve, Northern District of Illinois.
- Practical Expert Tips:
  - Make sure the expert's opinions are well-established within their field; unconfirmed theories will not pass under a Daubert standard; make sure you provide full and adequate record to expert – or they will be hamstrung.
  - Do not use an expert if you do not have to
  - Make sure the expert you have selected actually adds something to the jury's understanding of the case

Interpleader and Insurance Company Tactics to Avoid Bad Faith

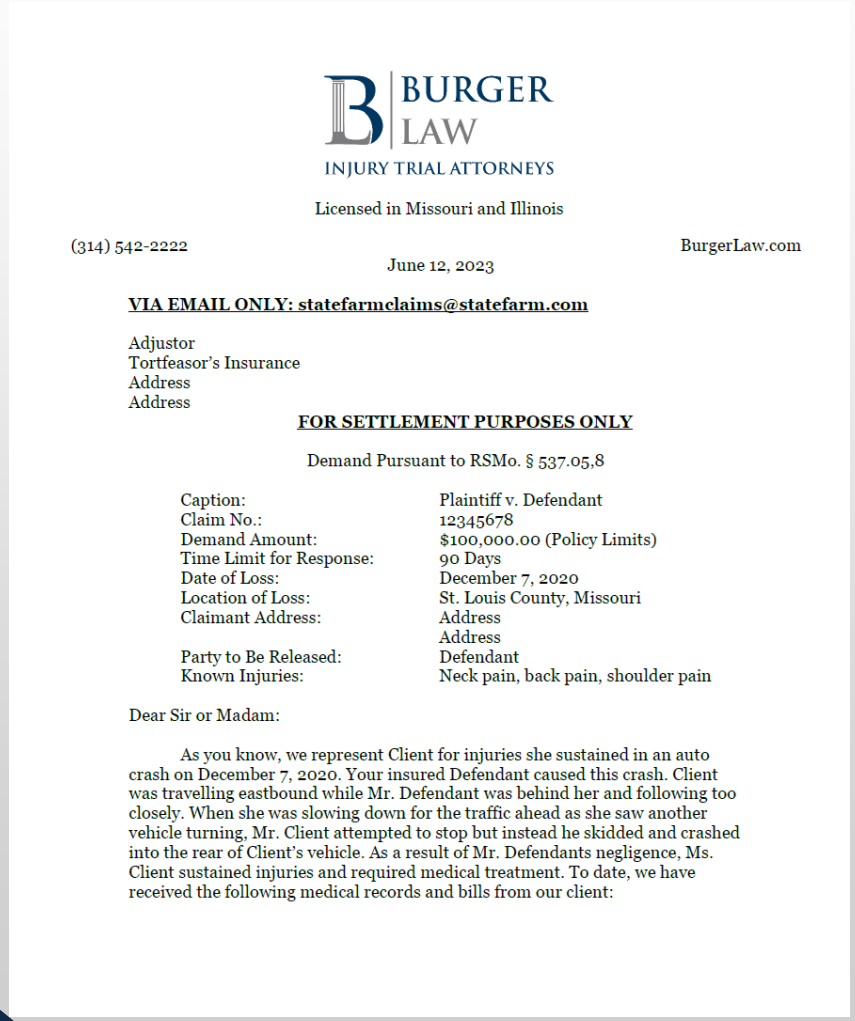
- Amended RSMo § 507.060 (Cum. Supp. 2018)- insurer can avoid bad faith liability by filing interpleader action within 90 days of first settlement offer or demand for payment by claimant
  - Following this first filing, insurers name all claimants against insured as Δs
  - Then, all applicable limits of coverage are deposited into the court within 30 days of court's order granting interpleader
  - Finally, defending the insured(s) continues as usual
- When is it used?
  - Insurers use this to avoid bad faith liability claims in cases where there is insufficient coverage for multiple claimants

Current State of Bad Faith

- Does that letter and the statute matter? Can you get bad faith other ways?
- How much is bad faith a threat? What if do not get a verdict above limits?
- How often successfully used to get a recovery well over the limits?
- Can arbitrated awards be collaterally attacked?

Bad Faith Letter

Full Example Letter included with Written Materials in Google Drive



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INJURY TRIAL ATTORNEYS

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June 12, 2023

VIA EMAIL ONLY: statefarmclaims@statefarm.com

Adjustor
Tortfeasor's Insurance
Address
Address

FOR SETTLEMENT PURPOSES ONLY

Demand Pursuant to RSMo. § 537.05,8

Caption:	Plaintiff v. Defendant
Claim No.:	12345678
Demand Amount:	$100,000.00 (Policy Limits)
Time Limit for Response:	90 Days
Date of Loss:	December 7, 2020
Location of Loss:	St. Louis County, Missouri
Claimant Address:	Address Address
Party to Be Released:	Defendant
Known Injuries:	Neck pain, back pain, shoulder pain

Dear Sir or Madam:

As you know, we represent Client for injuries she sustained in an auto crash on December 7, 2020. Your insured Defendant caused this crash. Client was travelling eastbound while Mr. Defendant was behind her and following too closely. When she was slowing down for the traffic ahead as she saw another vehicle turning, Mr. Client attempted to stop but instead he skidded and crashed into the rear of Client's vehicle. As a result of Mr. Defendants negligence, Ms. Client sustained injuries and required medical treatment. To date, we have received the following medical records and bills from our client:

Remember to:

- Send by certified mail with a return receipt;
- Provide list of medical providers with address;
- Provide list of employers with address;
- Provide signed HIPAA

Uninsured & Underinsured Coverage

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. *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 (or phantom). *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.

If uninsured motorist claim is denied, identify the reason for denial and assess the legal position of the client. Evaluate a UM case as if the defendant had insurance. In the event the UM 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.

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 UM and UIM - Missouri

- An insured who suffers damages in an accident with an uninsured motorist is entitled to "stack" all policies under which he is insured and collect benefits under each. *Famuliner v. Farmers Insurance Co.*, 619 S.W.2d 894 (Mo.Ct. App. 1981) at 897 *citing Cameron Mutual Insurance Co. v. Madden*, 533 S.W.2d 538 (Mo. Banc. 1976).
- Missouri law typically allows construction of policies in such a way that multiple uninsured motorist coverage may stacked. Provisions in policies purport to prohibit stacking of uninsured motorist coverage and violates public policy reflected in R.S.Mo. Section 379.203. *Krombach v. Mayflower Ins. Co. Ltd.*, 827 S.W. 2d. 208, 212 (Mo. Banc. 1992).
- Stacking of underinsured can occur but much harder; anti-stacking and carefully worded limits are more often recognized in UIM

- 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).

Thank you!

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