

# CAC Advisor

## Missouri and Illinois Updates

### Can a Subcontractor Have Liability to a Third Party after Acceptance?



Craig R. Koltz

Construction sites are supposed to be a symphony of trades working for a common purpose. Subcontractors and trades perform their individual tasks under the

careful eye of the general contractor. The symphony culminates with the completion of a new home, building, or addition.

However, sometimes the symphony is full of sour, flat notes. The trades overlap. Subcontractors focus so much on their own task they miss the larger picture. Errors occur. But as so often happens, the "errors" are found long

after the subcontractor has left the project – usually after an accident or loss happens. The third party looks for someone to blame.

For a subcontractor, the job has been forgotten. Most often, the subcontractor was fully paid. In those instances, can a third party sue the subcontractor for improper work?

For over one hundred years, Missouri provided a defense to subcontractors of the "acceptance doctrine." The general rule, as stated in *Casey v. Wrought Iron Bridge Co.*, 89 S.W. 330, (1905), is that the acceptance of work by a general contractor (or owner) relieves the subcontractor from liability to third parties for damages

subsequently sustained by reason of its negligence in the performance of its duties. When the work is "accepted," they relinquish control of the work to the general contractor. Then, the general contractor deprives the subcontractor of any opportunity to correct the wrong. Courts assume the general contractor conducted a reasonably careful inspection. If he "accepts" the defective condition, he accepts the defects and the negligence that caused them as his own.

The "acceptance doctrine" applies even without formal acceptance by the general contractor. In *Becker v. Setien*, 904 S.W.2d 338 (1995), the Western District Court of Appeals ruled that "practical acceptance" (continued on page 3)

### Who is John Doe?



David T. Ahlheim

About 15 years ago, it became in vogue for plaintiffs' attorneys to add the name John Doe into the pleadings. It was used in cases where the plaintiffs did not know the exact identity of the defendant or simply had no idea if a defendant even existed. The purpose of this was to make sure all possible defendants in a case were named. By naming all possible defendants plaintiffs sought to toll the statute of limitations and thereby avoid having their claims dismissed as untimely. This trend waned for a number of reasons.



James F. Maher

However, we have noticed a marked increase lately in Plaintiffs' lawyers naming "John Doe" defendants in their Petitions. It makes good sense to revisit: what exactly does identifying a "John Doe" defendant mean?

The Missouri Supreme Court recently examined a case in which the Plaintiff named John Doe defendants in *State ex rel. Holzum v. Schneider*, 342 S.W.3d 313 (Mo. 2011). In this case, the plaintiff injured her head during a fall and died. Three years after her death, the plaintiff's son attempted to sue the doctors and health care providers who treated his mother for medical malpractice. The petition named several John Doe defendants because the identities of some of the doctors and health care providers were unknown. (continued on page 2)



## Who is John Doe?<sup>(continued from page 1)</sup>

In addressing the situation the court emphasized the high standard that is required to properly name a defendant in the petition. There is “nothing inherently fatal to an action in which the petition uses the wrong name, even a ‘John Doe’ designation.” *State ex rel. Holzum*, 342 S.W.3d at 317. However, “the identity of the actual person should be ascertainable from the contents of the petition so that when the party gets notice of the lawsuit, he knows or should know that there has been an action brought against him.”

Therefore, in order for a petition to properly name the party in a lawsuit it must (1) provide the party notice that they are named in the lawsuit and (2) adequately identify the proper party. The notice requirement is fairly black and white. A defendant is provided notice

of a lawsuit by being served a copy of the petition. The core idea is that the defendant must know or should know, but for a mistake concerning their identity, the action would have been brought against them.

Rules against “John Doe” defendants are stricter in Illinois. Illinois Courts have held “absent an authorizing statute, a fictitious party cannot be designated as an appropriate party.” *Suarez v. Ro-Mar Terminal Warehouse Co.*, 244 Ill. App. 3d 228, 230 (Ill. App. Ct. 1st Dist. 1993). Even so, it does not toll any statute of limitations. *Hailey v. Interstate Machinery Co.*, 121 Ill. App. 3d 237, 238 (Ill. App. Ct. 3d Dist. 1984).

Federal Courts have taken a strict approach to “John Doe” defendants too. Federal Rule of Civil Procedure 3

provides explicit instructions on filing a Complaint. Filing a complaint naming a “John Doe” defendant does not toll the statute of limitations. *Sassi v. Breier*, 584 F.2d 234, 235 (7th Cir. 1978).

In reality, naming a “John Doe” defendant means very little. It does not toll the statute of limitations. Except in rare circumstances, it does not put a party on notice of a lawsuit. The “John Doe” defendant is a flawed attempt to preserve claims against any and all potential defendants. The reality is if the plaintiffs were able to adequately identify the proper defendant and put them on notice, then they should be able to properly name the defendant in petition. ☹️

## Does Liability End with Your Insured’s Death? What a “Defendant ad Litem” Means to You <sup>By David T. Ahlheim</sup>

Under Missouri law, if a defendant is deceased, a plaintiff may ask for the appointment of a “defendant ad litem” as an alternative to forcing a probate estate to be opened. RSMo. § 537.021.1. Typically, if the defendant is deceased, any person who agrees to be appointed as a “defendant ad litem” can be appointed. In cases our firm has handled, friends of a plaintiff’s lawyer or other lawyers can be appointed by the court. The defendant ad litem serves in the capacity of the deceased’s legal representative. *Smith v. Tang*, 926 S.W.2d 716, 721 (Mo.App. E.D. 1996). Under most circumstances, the appointment of a defendant ad litem is to easily get a viable defendant to start a cause of action and trigger the defendant’s insurance policy.

In our most recent dealings with the defendant ad litem statutes, plaintiffs often confuse the defendant ad litem statute as a direct action against the deceased insured’s insurance carrier. This exact issue was just addressed by the Court of Appeals in *Morgan v. State Farm Fire & Casualty Co.*, 344 S.W.3d 771 (Mo. Ct. App. 2011).

The case arose out of multiple deaths in an ATV accident in Southern Missouri. Suit was filed against a defendant ad litem with the hopes of triggering the deceased’s State Farm policy. State Farm elected not to defend the case because it felt no coverage existed. Plaintiff then obtained a judgment against a defendant ad litem of \$500,000.

In the resulting equitable garnishment, State Farm asserted its policy defenses to the underlying judgment. Plaintiff argued that State Farm waived its policy defenses as it was essentially a party to the underlying action as a defendant ad litem.

The Court clarified Missouri law on this issue by holding that the insurer was not a “party”, real or in abstentia, in the underlying action. The defendant ad litem statute specifies the judgment is only binding to the same effect as a judgment taken against a personal representative. RSMo. § 537.021.1. Therefore, an insurer can still raise policy defenses as to whether indemnity is owed to the underlying judgment.

While dealing with a “defendant ad litem” is not the norm, its inclusion can muddy the waters substantially for lawyers and claims handlers alike as evidenced by this case. A defendant ad litem is essentially a vehicle to avoid opening probate estate and has no direct effect on coverage issues. ☹️

# The Duty to Mediate in Good Faith

By David T. Ahlheim and James F. Maher

In recent years, all courts have become very supportive of the mediation process. Missouri has codified their mediation rule as Missouri Rule of Civil Procedure 17. Comparatively, Illinois has adopted the Uniform Mediation Act codified as 710 ILCS 35. Federal Rule of Civil Procedure 16, in conjunction with local rules, provides a mechanism to refer matters to mediation, such as the Western District of Missouri's Early Assessment Program (EAP).

Courts do not require that parties settle the case at mediation, but what they do require is that the parties "mediate in good faith." Often, the designated neutral is required to file a report with the court advising if the neutral believed the parties "mediated in good faith." Of course this raises the question, what is good faith in the context of mediation?

Good faith means the parties must follow court directives regarding mediation. In *Nick v. Morgan's Foods*, the court ordered the defendant to (1) prepare a mediation memorandum detailing their position in the case and (2) have a corporate representative with authority to settle the case present at mediation. 99 F.Supp.2d 1056, 1063 (E.D. Mo. 2000). The court believed the Defendant did not prepare a mediation memorandum and did not send a representative with authority to settle the case. When presented with this information the court found Defendant did not mediate in good faith and consequently ordered monetary sanctions against the Defendant.

Recently a trial court in Missouri ordered the imposition of sanctions

on a party for failure to mediate in good faith. See *Buemi v. Kerckhoff*, 2011 Mo. LEXIS 205 (Mo. Aug. 2, 2011). Specifically, a party had signed a "mediated settlement agreement;" however, that party later refused to be bound by the settlement. The trial court found that the party had executed the mediated settlement agreement with the intent that it was not binding on them. They concealed the intent and they eventually submitted a settlement proposal that varied significantly from the terms of the mediation. The trial court imposed sanctions totaling \$122,425.



Good faith is evidenced in several ways and is often case specific. Most often, we do not see problems with failing to live up to the agreements as in *Buemi*.

The biggest issue we run into is similar to the *Nick* matter and whether

a person with authority is present. Participation by phone is frowned on by most mediators. It is always exponentially better to have a person present for a court ordered mediation. This often requires an insurance representative with real authority to travel to the mediation site rather than sending "a warm body" or participating by telephone. On some matters where it has been determined that no substantive offers are to be made, personal attendance should be strongly considered to show the court the effort made to say "no." When there are insurance coverage issues, personal attendance is required.

As evidenced by these cases, courts have real power to police and sanction what it believes is improper conduct in a mediation. As such, it is important to consider these factors when mediating a lawsuit. ☞

# Subcontractor Liability to a Third Party (continued from page 1)

of the work of the sub-contractor by the general contractor or owner is all that is necessary in order to relieve the sub-contractor of liability.

Limited exceptions to the "acceptance doctrine" exist when there are public policy concerns and equitable considerations. Exceptions apply to situations where: (1) the structure was so defectively constructed as to be imminently dangerous to the safety of others; (2) the defects are so concealed that a reasonably careful inspection would not have disclosed them; and (3) the departure from the specifications could not be discovered by reasonable investigation. *Becker*, 904 S.W.2d at 348.

Generally, the "acceptance doctrine" is applied to personal injuries matters resulting from a single event of a subcontractor's negligence. However, Missouri Courts have ruled that the Acceptance Doctrine is not limited to personal injuries, but can be applied to property damage, which results from a subcontractor's negligence. Even in property cases, the three main exceptions still apply. But, in addition, the "acceptance doctrine" does not apply when the damage began *prior* to acceptance. One of the four exceptions typically is at issue in most construction defect matters.

The "acceptance doctrine" is a valuable tool for subcontractors, particularly in cases where a third party sustains personal injuries as a result of a single incident caused by its negligence. In these situations, this rule will provide strong opportunities for summary judgment for subcontractors. This rule also applies to matters where negligence leads to property damage. However, the applicability of the "acceptance doctrine" in property damage cases is not as cut and dry, as the subcontractor will have the burden of showing that the negligence, which led to the property damage, was not concealed and the property damage itself occurred only after acceptance. ☞

## Premise Liability and the Government – Is there a Dangerous Condition?

By David T. Ahlheim

Suing a governmental entity on a premises case raises several different issues than a typical defendant. In several premises liability cases that we are defending, protection under the sovereign immunity statute is a major affirmative defense. Under sovereign immunity, a governmental entity (public school district, city run parking garages, etc.) is immune from civil liability except under certain limited statutorily permissible circumstances. Most often in premises cases, the issue is whether a “dangerous condition” existed on the governmental property and whether that “dangerous condition” is sufficient to be a waiver under RSMo. §537.600.

When interpreting what is a dangerous condition and whether a waiver exists, RSMo § 537.600.1(2) must be strictly construed. “Failure to perform an intangible act, whether it be failure to supervise or warn cannot constitute a dangerous condition of the property for purposes of waiving sovereign immunity.” *State ex rel. Division of Motor Carrier and Railroad Safety v. Russell*. 91 S.W.3d 612 (Mo.banc 2002). “Likewise, a lack of warnings, barriers or similar preventative measures does not constitute a dangerous condition under the statute. *Boever v. Special School District of St. Louis County*. 296 S.W.3d 487, 493 (Mo. App. E.D. 2009).

In April, the Missouri Court of Appeals in *Eppenberger v. Metro. St. Louis Sewer Dist.*, 344 S.W.3d 226, re-affirmed its four point test to determine if a waiver of sovereign immunity relating to “dangerous conditions” exists. The four point test is:

1. That the property was in dangerous condition at the time of the injury;
2. That the injury directly resulted from the dangerous condition-that is, that the dangerous condition was the proximate cause of the injury;

3. That the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury that was incurred; and
4. That a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

In *Eppenberger*, the Court felt that Plaintiff created a factual issue sufficient to defeat Metropolitan Sewer District’s (MSD) Motion for Summary Judgment. Indeed, Plaintiffs allegations that MSD “extensively redesigned, reconstructed and rechanneled the River Des Peres” were more than intangible acts or preventative measures. As such, the Court found that MSD likely waived sovereign immunity.

Consistent with these rulings, in premises cases, allegations must focus only on the physical conditions that existed at the time of the accident. It cannot require the action of a third party to create a dangerous condition. One of the few twists that have been approved by Missouri Courts involves lighting. The lack of adequate lighting can create a “dangerous condition” in an otherwise normal environment. However, it is only actionable if it renders the property unsafe for its intended public purpose. *Oldaker v. Peters*, 869 S.W.2d 94 (Mo. App. 1993).

When looking at a premise case, it is important to consider whether there is a means or way to raise an affirmative defense of sovereign immunity. It is also important to look and make sure that the Plaintiff has adequately pleaded the actual physical dangerous condition. ☞

## Firm Updates

Childress Ahlheim Cary LLC is proud to announce *Justin C. Wilson* and *James F. Maher* have joined the firm as associate attorneys.

*Rebecca Cary* received a “defense win” from a jury when they awarded Plaintiff \$13,000.00 in a rear end collision. Plaintiff brought suit for aggravation of a pre-existing condition resulting in back surgery. Plaintiff demanded \$350,000 and claimed nearly \$100,000 in special damages. The 4 day jury trial occurred in Jackson County, Missouri-Kansas City.

# Settlement Agreements and Medical Liens - "Mirror Image" Acceptance

The Missouri Court of Appeals recently affirmed the traditional contract principle that a valid settlement agreement cannot exist without a definite offer and a "mirror-image" acceptance. *Reppy v. Winters*, 2011 Mo. App. LEXIS 1025 (Mo. Ct. App. 2011). The re-application of the "mirror-image" rule to settlements may create real problems in settling cases with non-monetary issues, such as liens.

In *Reppy*, the claimant was seriously injured in a head-on collision. Counsel for claimant made a policy limits demand of \$30,000 to the other driver's auto liability insurer. Counsel's demand made no mention of indemnification for medical liens. Insurer accepted with the caveat that claimant would be responsible to indemnify the insurer and the insured regarding any relevant medical liens. Counsel for claimant denied this request. Subsequently, the insurer was provided notice of a \$90,000 medical lien and claimant filed suit. Counsel for the insured filed a motion to dismiss and motion to enforce settlement which was granted by the trial court.

In overturning the trial court, the *Reppy* Court determined that a settlement contract does not exist in the absence of a definite offer and a "mirror image" acceptance. Under Missouri law, any acceptance that includes new or variant terms from the offer presented amounts to a counter-offer and a rejection of the original offer. The auto liability insurer's acceptance was not unequivocal

because it added a condition regarding lien indemnification. In order to settle a case, there must be an agreement reached on all issues and not just the amount of the settlement.

However, this case should be an immediate "red flag" for all insurers. In



this case, a demand was made to settle within policy limits. Because the insurer conditioned the payment of policy limits, no settlement was reached. This is a classic case where an insurer can be set up for bad faith refusal to settle within the policy limits when the damages clearly exceed the available limits. See *Johnson v. Allstate Insurance Co.*, 262

S.W.3d 655 (Mo. Ct. App. 2008). Such allegations of "bad faith" can significantly provide additional exposure beyond policy limits.

The need to protect the insurer (and insured) from liens is understandable and often necessary especially with the additional exposure from failing to properly protect Medicare and Medicaid "super liens."

Unfortunately, there is no easy solution to the two competing interests of: (1) settling within policy limits when necessary to avoid bad faith; and (2) obtaining protection from Medicare, Medicaid and other liens. Most often, weighing competing interest is case specific and requires careful evaluation. At this point, the best solution is to recognize the potential dangers ahead and proceed cautiously.

Lastly, when negotiating, please be aware that agreement on a number or even policy limits does not mean there is a valid and enforceable settlement. Resolution of all issues, including medical liens, must be done before the case is settled. ☹



Joseph V. Lesinski

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**Childress Ahlheim Cary LLC**

Attorneys at Law

At Childress Ahlheim Cary LLC we have not forgotten that the practice of law is a service profession. Our firm is committed to providing an unsurpassed level of representation and personal service to our clients. We believe maintaining close ties and providing open lines of communication with our clients ensure the quickest and most efficient handling of cases. Our lawyers provide thorough and prompt services in all aspects of our defense practice.

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