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Absurdity As an Indication of Ambiguity in Missouri Contract Law

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NOTE

ABSURDITY AS AN INDICATION OF AMBIGUITY IN MISSOURI CONTRACT LAW[1]

Tumlinson v. Norfolk & Western Railway Co.[2]

> The meaning of particular words or groups of words varies with the "verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning."[3]

In *Tumlinson v. Norfolk & Western Railway Co.*,[4] the Western District of the Missouri Court of Appeals recently held that an indemnification contract containing no patent or latent ambiguity still may be ambiguous if literal application of the contract terms to the facts would work an absurd result.[5] In so holding, the court adopted a minority view that has been applied in only three other states.[6] There are

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1. This Note is dedicated to the memory of Professor George I. Wallach, who sparked this author's interest in the study of contract law.

2. 775 S.W.2d 251 (Mo. Ct. App. 1989).

3. Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 38, 442 P.2d 641, 644-45, 69 Cal. Rptr. 561, 564-65 (1968) (en banc) (quoting Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161, 187 (1965)).

4. 775 S.W.2d 251 (Mo. Ct. App. 1989).

5. *Id.* at 253.

6. Fairbanks Morse & Co. v. Twin City Supply Co., 170 N.C. 315, 322, 86 S.E. 1051, 1054 (1915); Sanders v. General Motors Acceptance Corp., 180 S.C. 138, 145-46, 185 S.E. 180, 182 (1936); Clappenback v. New York Life Ins. Co., 136 Wis. 626, 630, 118 N.W. 245, 246 (1908). The rule was also cited in McCormick v. Phillips Petroleum Co., 114 F. Supp. 167 (D.N.M. 1953), *rev'd*, 211 F.2d 361 (10th Cir. 1954). Missouri courts have applied the absurdity doctrine in interpreting and interchanging the words "or" and "and" in contract and statute. *E.g.*, *Ex parte* Lockhart, 350 Mo. 1220, 171 S.W.2d 660 (Mo. 1943); Dean Operations, Inc. v. Pink Hill Assocs., 678 S.W.2d 897 (Mo. Ct. App. 1984).

significant problems with the absurdity doctrine as applied in *Tumlinson*:. 1) unlike any other state that has adopted the absurdity rule, the court found an absurd result only after considering hypothetical facts, not the actual facts of the case,[7] 2) it allows the court to avoid the plain meaning rule when that rule clearly applies, and 3) it unwisely circumvents the doctrine of unconscionability.[8] Most importantly, the *Tumlinson* court could have avoided these problems and reached the same result without applying the absurdity doctrine, and without compromising well-established precedent. Before analyzing the absurdity doctrine and its implications, this Note will discuss indemnification arising out of an indemnitee's own negligence, the plain meaning rule, and contract ambiguity. An understanding of this background material will be crucial to the analysis that follows.

I. FACTS AND HOLDING

In May 1985, Norfolk & Western Railway Co. (Norfolk) contracted with W. M. Brode Company (Brode) to replace a Norfolk bridge over Wakenda Creek in Carrol County, Missouri.[9] The contract provided that Brode was to indemnify and hold Norfolk harmless from all liability arising out of or connected with construction of the bridge.[10]

The doctrine heretofore was limited to that specific application.

7. *Tumlinson*, 775 S.W.2d at 254.

8. *See id.*

9. *Id.*

10. The pertinent sections of the contract are as follows:

> Section 5.1 Indemnity
> Contractor [Brode] shall indemnify and hold harmless the Company [Norfolk] . . . from and against any and all liability . . . arising from or in connection with (i) any claims for personal injury and/or property loss or damage to whomsoever or whatsoever occurring or arising in any manner out of or in connection with the Work, this Contract, any act or omission of Contractor, its officers, agent or employees upon or about the property or premises of Company, whether or not negligence on the part of Company, its officers, agents or employees, may have caused or contributed to such injury. . . .
>
> Section 1.4 Definitions
> "Work" shall mean all or any part of the Contractor's obligations and other matters referred to in Section 1.1.
>
> Section 1.1 Work
> Except as otherwise provided herein, Contractor shall furnish, at Contractor's costs, all materials, superintendence, labor, equipment, tools, supplies, permits, signs and transportation necessary to

In July 1985, Brode purchased rock from Howard Quarries for construction of the Norfolk bridge.[11] On July 10, 1985, while transporting the rock from Howard Quarries to the bridge site, Ronald Tumlinson was injured when a Norfolk train collided with his truck 2.2 miles from the bridge site.[12] Tumlinson, the original plaintiff in this case, filed suit against Norfolk, who filed a third-party petition for indemnity against Brode.[13] Norfolk settled with Tumlinson before trial.[14]

Norfolk claimed that the construction contract required Brode to indemnify Norfolk for damages arising "out of or in connection with the work."[15] That "work" included the transportation of materials to the bridge site.[16] Norfolk contended that the language was clear, unambiguous, and therefore not subject to interpretation.[17] The trial court found that the contract was ambiguous. To clarify the ambiguity, the court allowed W. L. Brode to testify that such indemnity agreements in the railroad construction industry apply only to the "loss occurring within the project limits"[18]—here, the area between the ends of the bridge and the railroad right-of-way lines. Judgment was entered for Brode; Norfolk appealed.[19]

The Western District of the Missouri Court of Appeals affirmed.[20] The court stated that "[t]he words of the indemnity [contract] taken literally lead to an absurd result which invokes the rule of ambiguity and which allows the court to construe the contract according to the intent of the parties."[21] The court found that sufficient evidence existed to support the trial court's ruling that the parties intended the

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perform, and Contractor shall perform, construct and complete, the following work: Contractor shall replace Bridge Number 516 near Wakenda, MO . . . .

Id. at 251, 253.

11. Howard Quarries hired Alan Wilson, who then hired Ronald Tumlinson, to transport the rock to the bridge site. *Id.* at 252.

12. *Id.*

13. *Id.*

14. Tumlinson and Norfolk settled out of court for $38,000. Norfolk's indemnity claim against Brode for $62,024.91 also included attorney's fees of $24,024.91. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 251.

20. *Id.*

21. *Id.* at 253.

indemnity clause to apply only within the immediate area of the job site.[22] Therefore, neither Tumlinson's accident, nor Brode's duty to indemnify Norfolk, were within the scope of the indemnity agreement.[23]

II. LEGAL BACKGROUND

A. *Indemnification of Negligent Indemnitee*

Parties can make any contract they wish unless it is forbidden by law.[24] It is the parties' responsibility and not the courts' responsibility, to weigh the costs and benefits of the contract they create.[25] The "freedom to contract includes the freedom to make a bad bargain,"[26] and unless fraud is shown, the courts will not grant relief simply because one party has made such a bargain.[27] Courts have specifically recognized that a railroad may contract to be indemnified for any damages that it might incur as a result of its own negligence,[28] as long as the parties to the agreement are on substantially equal footing.[29] Courts will strictly construe such contract provisions because they shift liability away from the negligent party.[30] Most importantly, the indemnification clause must be expressed in clear and unequivocal terms.[31]

The Eighth Circuit Court of Appeals, in *Fix Fuel & Material Co. v. Wabash Railroad Co.*, enforced a contract indemnifying a railroad for damages that occurred partly as a result of the railroad's own negli-

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22. *Id.*

23. *Id.*

24. Roll v. Fidelity Nat'l Bank & Trust Co., 115 S.W.2d 148, 150 (Mo. Ct. App. 1938).

25. Christeson v. Burba, 714 S.W.2d 183, 195 (Mo. Ct. App. 1986).

26. *Id.* (citing Sanger v. Yellow Cab Co., 486 S.W.2d 477, 481-82 (Mo. 1972) (en banc)).

27. Clark v. Clark, 228 S.W.2d 828, 832 (Mo. Ct. App. 1950) (quoting Pavey v. London & Provincial Marine & Gen. Ins. Co., 221 Mo. App. 930, 935, 288 S.W. 788, 791 (1926)).

28. *E.g.*, Terminal R.R. Ass'n v. Ralston-Purina Co, 352 Mo. 1013, 1018, 180 S.W.2d 693, 696 (1944).

29. Pilla v. Tom-Boy, Inc., 756 S.W.2d 638, 641 (Mo. Ct. App. 1988).

30. *See* Bonenberger v. Associated Dry Goods, Co., 738 S.W.2d 598, 600 (Mo. Ct. App. 1987).

31. *Pilla*, 756 S.W.2d at 641.

gence.[32] The indemnity clause covered "any and all losses . . . arising from or growing out of, directly or indirectly, the existence, operation, use or maintenance of said unloading pit, or its removal."[33] The Eighth Circuit focused on the lack of limiting language in the agreement and on the clear extension of coverage to "all losses," including those beyond the work site "arising from or growing out of" the work site activities.[34] In addition to the lack of limiting language referred to in *Fix*, most courts have required such indemnity clauses to provide expressly for indemnity when liability arises from an indemnitee's own negligence.[35] The reason for this requirement is that most indemnity contracts are intended to cover losses resulting from events outside the indemnitee's control or exclusively within the indemnitor's control, and not from the indemnitee's own negligence.[36]

In *Kansas City Power & Light Co. v. Federal Construction Corp.*,[37] an indemnity provision covered "any damage arising from accidents, negligence, or carelessness pertaining to the work."[38] The Missouri Supreme Court refused to extend the indemnitor's obligations in *Kansas City Power & Light* to liability caused by the indemnitee because the clause did not extend indemnification explicitly to situations where the indemnitee was negligent.[39] Although the broad provisions could encompass such liabilities, the failure to expressly provide for indemnitee negligence also failed to provide the intent necessary to enforce the indemnity clause.[40] Nevertheless, the court plainly stated that "one may legally agree to indemnify the other against the results of the indemnitee's own negligence.[41] No Missouri case or statute holds to the contrary.

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32. Fix Fuel & Material Co. v. Wabash R.R. Co., 243 F.2d 110, 115 (8th Cir. 1957). The indemnity contract in *Fix* covered all liabilities that were not caused solely by the indemnitee. *Id.* at 111-12. The indemnitee's (Wabash) train struck and injured the indemnitor's (Fix) employee while the employee was working on the indemnitee's property. *Id.* at 112. There was evidence of indemnitee negligence, but also evidence of the employee's contributory negligence, and therefore, the indemnitee was able to recover from the indemnitor. *Id.* at 114-15.

33. *Id.* at 111-12.

34. *Id.* at 112.

35. Kansas City Power & Light Co. v. Federal Constr. Corp., 351 S.W.2d 741, 745 (Mo. 1961); New York Cent. R.R. v. Chicago & E.I.R. Co., 360 Mo. 885, 897, 231 S.W.2d 174, 177 (Mo. 1950).

36. *Kansas City Power & Light*, 351 S.W.2d at 745.

37. 351 S.W.2d 741 (Mo. 1961).

38. *Id.* at 743.

39. *Id.*

40. *Id.*

41. *Id.*

B. *The Plain Meaning Rule & Ambiguity*

It is clear that Missouri still adheres to the plain meaning rule.[42] The cardinal rule of contract interpretation is to determine the parties' intent and give it effect.[43] Still, a "court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language for there is nothing to construe."[44] An ambiguous contract is one that is "reasonably susceptible of different constructions."[45] Under the plain meaning rule, a court will look no farther than the contract and related writings to determine the issue of ambiguity.[46] This restriction is important because it limits the type of ambiguity that may overcome the plain meaning rule.

Courts have recognized two major types of ambiguities: patent and latent.[47] Patent ambiguities are those "arising upon the face of the document."[48] Extrinsic evidence is not needed to determine if a contract is patently ambiguous.[49] Therefore, patent ambiguity precludes application of the plain meaning rule.[50] Latent ambiguities, on the other hand, "arise where a writing on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain."[51] The essence of the rule is that it does not look at "collateral matter" outside the writing.[52] Because a latently ambiguous contract "appears clear and unambiguous," the plain

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42. J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club, 491 S.W.2d 261, 264 (Mo. 1973) (en banc).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *E.g.*, Busch & Latta Painting v. State Hwy. Comm'n, 597 S.W.2d 189, 197 (Mo. Ct. App. 1980).

48. *Id.*

49. *See id.*

50. *See id.*

51. Campbell v. Dixon, 647 S.W.2d 617, 621 (Mo. Ct. App. 1983) (quoting 32A C.J.S. *Evidence* § 961 (1964)). Raffles v. Wichelshaus, 159 Eng. Rep. 375 (Ex. 1864), may be the most famous case of latent ambiguity. The buyer and seller of goods entered into a contract for goods to be delivered on the ship "Peerless." There were, however, two ships called "Peerless," which arrived months apart. The buyer thought the goods would come on the first, the seller, of course, intended the second. The contract was not ambiguous on its face, but because of the unusual extrinsic facts it was rendered latently ambiguous. The court found that no agreement was reached because of the mutual mistake. *Id.* at 376.

52. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 166-67 (3d ed. 1987).

meaning rule is invoked and no extrinsic evidence of such ambiguity will be considered.[53]

There may be yet another type of ambiguity. In 1895, the Wisconsin Supreme Court first applied the rule that "even an apparently unambiguous contract may be rendered ambiguous and open to construction if its words, taken literally, lead to absurdity or illegality when applied to the facts."[54] This rule permits admission of extrinsic evidence to clarify the ambiguity, thus creating another exception to the plain meaning rule. *Tumlinson v. Norfolk & Western Railway Co.*[55] is the first Missouri case to apply the absurdity rule to find a contract ambiguous. Until recently, only three other states had applied the absurdity rule.[56] No authority, including *Tumlinson*, has addressed yet whether the absurdity exception to the plain meaning rule is a type of latent ambiguity, whether it stands as a separate type of ambiguity, or whether it is a substitute for the doctrine of unconscionability.[57]

III. THE INSTANT OPINION

The *Tumlinson* court[58] addressed Norfolk's contention that the indemnity clause was clear and unambiguous.[59] It did so in the context of Norfolk's claim that the clause would apply to any accident, at any location, involving the transportation of materials to the job site, for which Norfolk could be held liable.[60] The court reasoned that if the indemnity clause was literally applied, Brode could be liable to Norfolk

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53. *Id.*

54. Clappenback v. New York Life Ins. Co., 136 Wis. 626, 118 N.W. 245, 246 (1908); 13 C.J.S. *Contracts* § 481 (1964). The doctrine can be traced to Gilbert v. Dutruit, 91 Wis. 661, 665-66 (1895).

55. 775 S.W.2d 251 (Mo. Ct. App. 1989).

56. Fairbanks Morse & Co. v. Twin City Supply Co., 170 N.C. 315, 322, 86 S.E. 1051, 1054 (1915); Sanders v. General Motors Acceptance Corp., 180 S.C. 138, 145-46, 185 S.E. 180, 182 (1936); Clappenback v. New York Life Ins. Co., 136 Wis. 626, 630, 118 N.W. 245, 246 (1908). The rule was also cited in McCormick v. Phillips Petroleum Co., 114 F. Supp. 167 (D.N.M. 1953), *rev'd*, 211 F.2d 361 (10th Cir. 1954).

57. The similarity between the absurdity doctrine and the doctrine of unconscionability will be addressed *infra* notes 84-95 and accompanying text.

58. Judge Turnage wrote the majority opinion in which Judge Clark joined. Judge Fenner dissented. *Tumlinson*, 775 S.W.2d at 251.

59. *Id.* at 252.

60. The court used Brode's testimony to create a hypothetical situation in which Brode would be held liable if the indemnity clause were enforced as written. Under the hypothetical, steel for the project is brought from Ohio via Norfolk rail cars, and en route, the steel comes loose, hitting a bus filled with 50 people. *Id.*

for any liabilities incurred from any accident, even though Brode might not control the negligent acts.[61] The majority opinion hypothesized that if Norfolk incurred liabilities in Ohio while transporting materials to the bridge site, and if the contract terms were literally applied, then Brode would be liable.[62] The court found this hypothetical outcome absurd, although it never explicitly said that literally applying the indemnity clause to the actual facts of the case would work an absurdity.[63]

The court cited *Sanders v. General Motors Acceptance Corp.*,[64] for the proposition that an unambiguous contract is ambiguous if it leads to absurd results when applied literally to the facts.[65] An absurdity is "a result which is contrary to reason or which 'could not be attributed to a man in his right senses.'"[66] The *Tumlinson* court reasoned that because no sensible person would agree to such an absurdity, the indemnity clause must have some meaning other than its literal meaning.[67] The possible existence of other meanings justified the court's admitting Brode's testimony about the generally accepted meaning of the indemnity clause in the railroad industry.[68] The majority then reasoned that because W. L. Brode was the only witness who testified about the meaning of the clause, the trial court properly could have found in favor of Brode.[69] The majority did not discuss the plain meaning rule, address whether the indemnity clause was latently or patently ambiguous, or whether the absurdity rule was an independent determinant of ambiguity.[70]

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61. *Id.* This situation is not so unusual. If Brode had contracted with UPS for transportation of materials to the bridge site, Brode would not control the loading and transportation procedures of UPS. Yet, Brode might still be liable for loss incurred as a result of such transportation.

62. *Id.*

63. *Id.* at 253. The impropriety of the court basing its opinion upon facts not in issue will not be extensively discussed in this Note. Judge Fenner's dissent, however, criticized the majority's use of hypothetical facts. *Id.* at 254.

64. 180 S.C. 138, 145, 185 S.E. 180, 182 (1936).

65. *Tumlinson*, 755 S.W.2d at 252.

66. *Id.* at 253 (quoting State v. Hayes, 81 Mo.574,585(1884)). Although the court never stated that an absurd result would be achieved by literally applying the contract terms to the facts of the case, it concluded that the *Sanders* rule applied to the instant case because: "It is difficult to imagine a more absurd result than to impose liability on Brode under the facts of the above-mentioned hypothesis." *Id.*

67. *Id.*

68. *See id.*

69. *Id.*

70. *See id.* at 251.

The dissent found there was no ambiguity in the indemnity clause.[71] Judge Fenner contended that the *Tumlinson* accident clearly involved "work," defined in the contract as "materials . . . and transportation necessary" for replacement of the bridge.[72] Therefore, the accident was within the scope of the indemnity clause.[73] He also pointed out that indemnification was to occur "whether or not negligence on the part of [Norfolk], its officers, agents or employees may have caused or contributed to the injury."[74] These clauses, Judge Fenner contended, showed that the parties did not intend to limit Brode's indemnification of Norfolk to the job site.[75] The contract's plain language extended to work such as transporting materials to the job site, as well as to liability incurred as a result of Norfolk's own negligence.[76] Thus, the indemnity clause was not patently ambiguous.[77]

Judge Fenner then addressed the issue of latent ambiguity. He claimed that no latent ambiguity would be created by Brode's indemnification of Norfolk. It was reasonable, he thought, that Norfolk would have sought protection from liability because the proximity of the crossing to the jobsite caused increased construction traffic at the crossing.[78]

Finally, Judge Fenner stated that the application of *Sanders* to *Tumlinson* did not apply because the instant facts would not have rendered an absurd result.[79] Judge Fenner took issue with the majority's use of hypothetical facts because, in his words, they had "no application to the case which actually present[ed] itself."[80]

IV. ANALYSIS

The *Tumlinson* court reached a fair result. If the court had imposed liability on Brode in this case, it would have worked an undeserved, inequitable hardship. The dollar value of the Norfolk-Brode contract is

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71. *Id.* at 253.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 254.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 254. The only absurd result in *Tumlinson* to which *Sanders* would have been applicable was the one posited by the majority in the hypothetical situation it gave.
80. *Id.*

unknown, but it is apparent from the size of the claim[81] that the liability in this case probably exceeded, or at least constituted a substantial percentage of the contract amount. The result was fair also because of the parties' lack of intent for comprehensive indemnification of Norfolk. The main purpose of the Brode-Norfolk contract was to construct a bridge over Wakenda Creek.[82] The contract provided for indemnity of Norfolk, but it was not an insurance policy designed to cover all possible liabilities.[83] If the parties did not even contemplate an accident like Tumlinson's, they could not have intended to provide specifically for indemnity under the facts of this case.[84] Because of this lack of intent, as well as the inequitable hardship that would have resulted if Brode were held liable, *Tumlinson* reached an equitable result. Still, however fair the end result may have been, the equitable considerations did not justify the majority's abandonment of sound legal reasoning.

Many Missouri cases indicate that the *Tumlinson* application of the absurdity doctrine circumvents the common law doctrine of unconscionability. Contracts that provide for indemnity, even when the indemnitee is the sole proximate cause of the liability, are not unconscionable *per se* in Missouri.[85] Thus, there is a presumption of conscionability. *Tumlinson* circumvented this presumption of conscionability by use of the absurdity doctrine. The *Tumlinson* court defined absurdity as "a result which is contrary to reason or which 'could not be attributed to a man in his right senses.'"[86] The definition of unconscionability is almost identical: "such as no man in his senses and not under a delusion would make."[87] Courts do not often find contracts unconscio-

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81. Norfolk's claim for indemnification was $62,024.91, $24,024.91 of which were attorney's fees. *Id.* at 252.

82. *Id.* at 251.

83. *Id.* at 253.

84. *Id.* The majority's hypothetical, although improperly applied to the terms of the contract, demonstrates that it was unlikely the parties had intended to indemnify Norfolk for liability arising solely from its own negligence.

85. *See, e.g.*, Colorado Milling & Elevator Co. v. Terminal R.R. Ass'n, 350 F.2d 273, 278 (8th Cir. 1965); Fix Fuel & Material Co. v. Wabash R.R., 243 F.2d 110, 115 (8th Cir. 1957); Pilla v. Tom-Boy, Inc., 756 S.W.2d 638, 641 (Mo. Ct. App. 1988).

86. *Tumlinson*, 775 S.W.2d at 253 (quoting State v. Hayes, 81 Mo. 574, 585 (1884)).

87. Carter v. Boone County Trust Co., 338 Mo. 629, 651, 92 S.W.2d 647, 657 (1935) (en banc) (quoting W. PAGE, PAGE ON CONTRACT § 641 (1st ed. 1905)); *see also* Ball v. Reyburn, 136 Mo. App. 546, 549, 118 S.W. 524, 524 (1909) (quoting Chesterfield v. Janssen, 2 Ves. Sen. 125, 155).

nable, because such a finding is an interference with the parties' freedom to contract.[88]

A finding of unconscionability requires a weighing of the freedom of contract policy considerations against the considerations of preventing one-sided, inequitable bargains. The *Tumlinson* court probably could not justify a finding that the contract was unconscionable. Enforcement of a contract may be refused only in cases such as failure of consideration, misrepresentation, undue influence, or lack of mutual assent.[89] The Brode-Norfolk contract had none of these characteristics. Professors Calamari and Perillo assert that courts often resort to "imaginative flanking devices" like the absurdity doctrine to defeat offending contracts when they are unable to find any standard characteristics of unconscionability.[90] By using the absurdity doctrine as a flanking device, the *Tumlinson* court avoided the issue of unconscionability, as well as an ultimate finding that the Brode-Norfolk contract was not, in fact, unconscionable.

Tumlinson's result-oriented adoption of the absurdity doctrine may result in confusion in Missouri contract law. Calamari and Perillo have criticized the use of flanking devices like the absurdity doctrine:

> [Such] approaches, although producing justice in individual cases were highly unreliable and unpredictable.
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> The conflict between what courts said they were doing and what it was sometimes obvious they were in fact doing has had an unsettling effect on the law, giving the sensitive a feeling of lawlessness, the logician a feeling of irrationality and the average lawyer a feeling of confusion.[91]

Karl Llewellyn, principle drafter of the Uniform Commercial Code, succinctly stated that such "[c]overt tools are never reliable tools."[92] Particularly onerous and confusing was the *Tumlinson* court's use of hypothetical facts to find absurdity in the Brode-Norfolk contract. The idea of attorneys and judges spending hours in thought to create absurd factual situations, so they might win a case or justify a ruling, is itself absurd. But this is the direction in which *Tumlinson* leads.

The *Tumlinson* court could have affirmed the trial court without considering unconscionability, and without adopting the absurdity doctrine. Courts require that unless indemnification of a negligent indemnitee is clearly and unequivocally stated in the contract, it will

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88. *See* J. CALAMARI & J. PERILLO, *supra* note 52, at 401.
89. *Id.* at 400-01.
90. *Id.* at 401.
91. *Id.*
92. *Id.* (quoting K. LLEWELLYN, THE COMMON LAW TRADITION 365 (1960)).

not be enforced.[93] The Brode-Norfolk indemnity provision covered liabilities "caused" by Norfolk's negligence, but it did not explicitly include situations in which Norfolk was the *sole proximate cause* of the liability.[94] The *Tumlinson* court could have distinguished between being the "cause" and being the "sole proximate cause," and could have ruled that the indemnity provision did not cover the latter situation. This would have avoided consideration of the absurdity doctrine.

In addition to the issue of unconscionability, there is a serious question about the *Tumlinson* court's application of the absurdity rule in lieu of the plain meaning rule. As previously mentioned, the *Tumlinson* court did not discuss whether the absurdity exception to the plain meaning rule was a "collateral matter"[95] showing latent ambiguity, whether it was a separate type of ambiguity, or whether it related to any other common law doctrine. The *Tumlinson* dissent stated that there was no latent ambiguity.[96] This statement, coupled with the majority's silence about latent ambiguity, leads one to believe that the absurdity doctrine is not a type of latent ambiguity.[97] The majority's use of hypothetical facts to arrive at an absurd result clearly indicates that the absurdity does not "arise upon the face of the document"[98] within the meaning of patent ambiguity. If absurdity is a latent ambiguity, the court improperly ignored the plain meaning rule because the rule does not accommodate latent ambiguity. If absurdity is not a latent ambiguity, then it may be a new, previously unrecognized type of ambiguity that is an exception to the plain meaning rule.

Regardless of its label, the absurdity doctrine illustrates the weakness of the plain meaning rule. Absurdity relates to the plain meaning rule in the same way it relates to unconscionability—as a flanking device.[99] Rules of law are compromised by such flanking devices.[100] Like many other jurisdictions,[101] Missouri continues to

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93. Kansas City Power & Light Co. v. Federal Constr. Corp., 351 S.W.2d 741, 745 (Mo. 1961).

94. *Tumlinson*, 775 S.W.2d at 251.

95. Campbell v. Dixon, 647 S.W.2d 617, 621 (Mo. Ct. App. 1983) (quoting 32A C.J.S. *Evidence* § 961 (1964)).

96. *Tumlinson*, 775 S.W.2d at 254.

97. Silence often indicates an adoptive admission because "normal human reaction would [be] to deny such a statement if it were untrue." J. WEINSTEIN, J. MANSFIELD, N. ABRAMS & M. BERGER, CASES AND MATERIALS ON EVIDENCE 688 (8th ed. 1988); *see also* Fletcher v. Weir, 455 U.S. 603 (1982).

98. J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club, 491 S.W.2d 261, 264 (Mo. 1973) (en banc).

99. *See* J. CALAMARI & J. PERILLO, *supra* note 52, at 401.

100. *See id.* at 101.

profess adherence to the plain meaning rule, while covertly finding exceptions when the rule would reach an inequitable result. The absurdity doctrine is only one flanking device toward that end; others may follow, further confusing judges, lawyers, and lay people alike.

The better approach would be to abandon the plain meaning rule. The Uniform Commercial Code,[102] the Restatement (Second) of Contracts,[103] and an increasing number of jurisdictions have abandoned the rule.[104] Professors Corbin,[105] Calamari, and Perillo[106] also have expressed distaste for the plain meaning rule. Judge Traynor succinctly analyzed the rule's weakness:

> A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.[107]

In some cases, as in *Tumlinson*, the rule even compels courts to invoke result-oriented exceptions. The result of this rule is inconsistency and unpredictability.

If Missouri did not adhere to the plain meaning rule, the *Tumlinson* court could have reached the same result by applying customs and usage law. Contracts should be interpreted always in light of applicable customs and usages.[108] Had there been no plain meaning rule, W. L. Brode's testimony about the industry-wide usage of indemnity provisions could have been admitted into evidence properly to prove the meaning of the Brode-Norfolk indemnity clause in the construction industry.[109] This approach would have affirmed the trial court and would have avoided the issues of absurdity and unconscionability.

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101. *E.g.*, Shattuck v. Precision-Toyota, Inc., 115 Ariz. 586, 566 P.2d 1332 (1977); Clemens Mobile Homes, Inc. v. Anderson, 206 Neb. 58, 291 N.W.2d 238 (1980); *In re* Estate of Breyer, 475 Pa. 108, 379 A.2d 1305 (1977).

102. U.C.C. § 2-202 comment 2 (1986).

103. RESTATEMENT (SECOND) OF CONTRACTS §§ 200-04 (1979).

104. *E.g.*, Pacific Gas Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968) (en banc); Hamilton v. Wosepka, 261 Iowa 299, 154 N.W.2d 164 (1967).

105. A. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 542, at 100-10 (1960).

106. J. CALAMARI & J. PERILLO, *supra* note 52, at 167.

107. *Pacific Gas & Elec. Co.*, 442 P.2d at 644.

108. E.O. Dorsch Elec. Co. v. Plaza Constr. Co., 413 S.W.2d 167, 173 (Mo. 1967).

109. *See id.* at 172-73.

The absurdity doctrine may or may not lead to wholesale changes in Missouri contract law. If *Tumlinson* is only an aberration, justice may have been served without adding confusion to the law. But it is only a symptom of the plain meaning rule and not a cure. Until Missouri abandons the plain meaning rule, the absurdity doctrine and similar flanking devices will be potential weapons for imaginative, enterprising trial lawyers and judicial activists, and latent dangers for the unwary.

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