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Recent Cases

CONTRACTS—BY MUNICIPALITY—CONSIDERATION—
SELLER'S MARKET PRICE AT TIME OF DELIVERY

*Bride v. City of Slater*¹

E. L. Bride Company, as the seller, and City of Slater, Missouri, as the buyer, entered into a contract in writing August 28, 1947, in which the Bride Company promised to sell and the City of Slater promised to buy over a six months period beginning September 1, 1947, three or four tank cars of diesel engine fuel per month at a price to be the "seller's market price at the time of shipment."

The buyer purchased and paid for twenty-one tank cars of diesel fuel over a period from September 1, 1947, to March 5, 1948. At the request of the buyer, the

1. 263 S.W.2d 22 (Mo. 1953).

seller on February 28, 1948, shipped two carloads of diesel fuel and on March 1, 1948, shipped two more carloads of diesel fuel again at the request of the buyer. The total price for the two shipments was \$6,468.96, which amount was never paid by the buyer. The seller then brought an action against the buyer for the purchase price.

The trial court dismissed the seller's petition on the grounds that the contract did not satisfy the requirements and provisions of Section 432.070, *Missouri Revised Statutes* (1949) V.A.M.S., in that the contract failed to state in writing a definite price or consideration for the diesel fuel.

The seller appealed to the Missouri Supreme Court where the judgment of the trial court was affirmed on the same grounds.

Section 432.070 reads in part as follows:

"No . . . municipal corporation shall make any contract . . . unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract and such contract, including the consideration shall be in writing. . . ."

This section of the Missouri statutes was first enacted in 1874. The Missouri Supreme Court first construed this section in the case of *Woolfolk v. Randolph*² which arose in 1884. The section was held to require that the consideration be ascertained in rate or amount and stated in terms of dollars and cents in the contract. The purpose of the statute as stated by the court was to avoid the terms of the contract being left in doubt or being left to be determined at a future time. The precaution was taken by the legislature to restrain municipal officials from heedless and ill-considered contracts and to prevent extravagant demands being made by the other contracting party when no consideration had been agreed upon and stated in the contract as required by the statute.

The requirements and provisions set forth in Section 432.070 as to contracting with a municipality are "mandatory" and not "directory" and any contract which fails to comply with those requirements and provisions is void and ineffectual as to creating legal rights and obligations.³

Contracts with municipalities which do not comply with the statutory requirements are said to be ultra vires the municipality because the municipality could not make such a contract; and even if the municipality has received the benefits of the other party's performance, this would not make the municipality liable on either a

2. 83 Mo. 501 (1884); also see *Crutchfield v. City of Warrensburg*, 30 Mo. App. 456 (1888), where Crutchfield, an attorney, had performed legal services for the City of Warrensburg, Mo. but no written contract was entered into and no attorney's fees were agreed upon prior to Crutchfield's performance. After he had performed, Crutchfield submitted his fee to the city and the city refused to pay him. The Kansas City Court of Appeals held on the basis of the statute, Mo. REV. STAT. § 5360 (same as section 432.070) that Crutchfield could not recover because in order for the agreement to be binding it must comply with the requirements of statute governing contracts with municipalities which required that the contract be in writing and the consideration be stated in dollars and cents on the face of the contract.

3. *Donovan v. Kansas City*, 352 Mo. 430, 175 S.W. 2d 874 (1943); *Kansas City v. Rathford*, 353 Mo. 1130, 186 S.W.2d 570 (1945).

theory of ratification, estoppel, or implied contract because the contract was void from the making as it did not meet the statutory requirements.⁴ Also one cannot recover from a municipality for work done or materials furnished under a contract not made in compliance with Section 432.070.⁵

The reason for such holdings would seem to stem from the principal that a person dealing with a municipality is on notice as to the restrictions and limitations imposed upon the municipality's power to contract by the statute and that protection of public funds and the welfare of the taxpayer is more important than allowing a private party redress when he acted with full knowledge of the limitations on the municipality's powers.⁶

In view of the statutory provision involved and the construction the statute has been given, the *Bride v. City of Slater* case was correctly decided. However, in the decision of the *Bride* case, the question as to whether or not a contract of the type therein involved if entered into by two private parties not subject to the requirements of Section 432.070 would or would not be enforceable was not directly answered. The opinion of the court, however, did imply that such a contract would *not* be held enforceable because of indefiniteness of consideration and lack of mutuality.

In deciding *Bride v. City of Slater*, the Missouri Supreme Court discussed with emphasis the case of *Weston Paper Mfg. Co. v. Downing Box Co.*⁷ and it would seem that it approves the holding of that case. The *Weston* case involved a contract for straw board with monthly deliveries and with the price to be fixed by the "seller's standard form of quarterly price fixing." The seller would fix a price every three months and deliveries would be made at that price for the next three months at the end of which the seller would again set a price.

The contract was held void because of indefiniteness as to price and lack of mutuality. It was stated that the seller had the absolute right to fix the price in the future and that there was nothing in the contract to take from him this right as the buyer had no voice in fixing the price nor was the seller influenced by any third party in the price he did fix. The buyer was considered as having no appeal from the price which the seller would arbitrarily set. The presumption was raised that the seller would act dishonestly in setting the price although there was no evidence to that effect.

4. *Kansas City v. Rathford*, *supra* note 3, *Donovan v. Kansas City*, *supra* note 3; *Riley v. City of Rock Port*, 165 S.W.2d 880 (Mo. App. 1942); *Fleshner v. Kansas City*, 348 Mo. 987, 156 S.W.2d 706 (1941); *Cook and Son v. City of Cameron*, 144 Mo. App. 137, 128 S.W. 269 (1910).

5. *Likes v. City of Rolla*, 184 Mo. 296, 167 S.W. 645 (1914); *Cook and Son v. City of Cameron*, *supra* note 4.

6. *Riley v. City of Rock Port*, *supra* note 4; *West Virginia Coal Co. v. City of St. Louis*, 324 Mo. 968, S.W. 466 (1930); *Mullins v. Kansas City*, 268 Mo. 444, 188 S.W. 193 (1916); *Likes v. City of Rolla*, *supra* note 5; *Pryor v. Kansas City*, 153 Mo. 135, 54 S.W. 499 (1899); 10 McQUILLIN, MUNICIPAL CORPORATIONS, pp. 157 and 159 §§ 29.02 and 29.04 (3rd ed. 1950).

7. 293 Fed. 725 (7th Cir. 1923).

The better view is that such a contract would be enforceable and present day law seems to follow that view.⁸

The general rule as to price is:

"To constitute a sale, the price need not be definitely fixed at the time the sale is effected, if the agreement provides express or implied provisions by which it may be rendered certain."⁹

The price in *Memphis Furniture Mfg. Co. v. Wemyss Furniture Co.*¹⁰ was the "price prevailing at time of shipment". It was held that the date for determining the price was present and easily ascertainable and that therefore the contract was valid and binding upon the parties thereto.

In a case similar to the *Weston* case where the seller was to fix the price of soda pulp at the end of each month for the succeeding month, the Pennsylvania Supreme Court had little difficulty in determining that the contract was valid and enforceable.¹¹

It has been held that one who sells to another has the right to protect the buyer from either a future decline of his own selling price or against a future market decline.¹² It would seem logical that since the seller can protect the buyer against future declines in price that the seller would be allowed to protect himself against future increases in price.

When the buyer and seller state that the price shall be the "seller's market price on date of shipment" they are protecting themselves against future fluctuations in the market price of the commodity in which they are dealing. The buyer is assuring himself of a source of supply and the seller is assuring himself of a market on a sliding price scale which will tend to follow the general market price.

In *Burgson and Co. v. Williams, Smithwick and Co.*,¹³ it was stated that:

"The price may be left open to be fixed in a manner agreed on in the contract of sale, as by the market price of the commodity at a certain time and place."

A contract which contained the stipulation that the price was to be the "seller's list price" and which reserved to the seller the right to change his list price from time to time was upheld in *Ken-Rad Corporation v. R. C. Bohannon*¹⁴ as valid and binding on the parties thereto. While the price was not fixed, it was capable of ascertainment

8. 1 CORBIN, CONTRACTS § 98, p. 311 (1950); also Uniform Commercial Code on Sales, § 2, p. 307 (1950 draft) states that: "A price to be fixed by the seller or by the buyers means a reasonable price for him to fix, and he has the burden of establishing its reasonableness."

9. *Hamilton v. O'Rear*, 224 Ala. 625, 141 So. 565 at 567 (1932); *Hoskins v. McLaughlin*, 204 Ark. 56, 161 S.W.2d 395 at 397 (1942). Also see: *Kelly v. Creston Buick*, 293 Iowa 1236, 34 N.E.2d 598 (1948); *Hall v. Watson*, 201 S.W.2d 277 (Mo. 1947); *Packard Fort Worth, Inc. v. Van Zandt*, 224 S.W.2d 896 (Tex. App. 1949).

10. 2 F.2d 428 (6th Cir. 1924).

11. *Jessup and Moore Paper Co. v. Bryant Paper Co.*, 283 Pa. 434, 129 Atl. 559 (1925); 297 Pa. 483, 147 Atl. 519 (1929).

12. *Herz Straw Co. Inc. v. Capitol Paper Co.*, 216 Ind. 568, 24 N.E. 921 (1940).

13. 151 Miss. 351, 121 So. 817 at 818 (1929).

14. 80 F.2d 251 (6th Cir. 1935).

by reference to the manufacturer's list price. There is little difference between "manufacturer's list price" and "seller's market price on date of shipment".

Numerous cases involving the sale of gasoline where the price was to be the "seller's tank wagon price in effect at a certain place on date of delivery" have arisen. In general, this language has been held to be clear in meaning and free from ambiguity and the contracts have been held valid and binding as the price was held to be easily proven and not arbitrary and fictitious.¹⁵

The law today does not follow the view expressed by the *Weston* case and a contract stipulating that the price is to be the "seller's market price on the date of shipment" and with no evidence that the seller acted dishonestly or unreasonably in fixing his market price will be held valid and binding. As long as there is a guide or standard by which the price can be ascertained there is no indefiniteness or lack of mutuality. "Seller's market price on date of shipment" is such a guide or standard.

RICHARD W. DAHMS

TORTS—LIABILITY TO INVITEES OF A PROPRIETOR OF A PUBLIC
BATHING RESORT LOCATED ON A NATURAL STREAM

*Perkins v. Byrnes*¹

On Labor Day 1950 the deceased, four other boys and five girls, went to Byrnes Mill, a rural resort, picnic ground and recreation area, located on Big River. Their purpose was to have a holiday outing, picnic and swimming party. The deceased was an athletic youth, nineteen years of age and five feet nine inches in height. As he and another member of the party waded out towards the center of the river, they could feel the current becoming stronger. When the water was about waist deep, they "pushed off," and immediately a strong undercurrent precipitated them toward a dam located about ninety feet upstream from where the boys went in swimming. The deceased was drowned, and the other swimmer was thrown from the path of the undercurrent and rescued. This action was brought by the parents for the wrongful death of their son, charging that the negligence of the defendants, owners and opera-

15. *Standard Oil Co. v. Wright Oil Service Co.*, 26 F.2d 895 (4th Cir. 1928); *Moore v. Shell Oil Co.*, 139 Ore. 72, 6 P.2d 216 (1931); *Standard Oil Co. of Louisiana v. Petroleum Products Storage Co.*, 163 Tenn. 565, 44 S.W.2d 317 (1931); *Shell Oil Co. of California v. Wright*, 167 Wash. 197, 9 P.2d 106 (1932).

1. 269 S.W.2d 52 (Mo. 1954).

tors of the resort, in failing to warn of the dangerous condition of the river or provide safety devices for the protection of their patrons, caused the death of their son. The trial court directed a verdict for the defendants at the close of all the evidence on the grounds that as a matter of law there was no evidence of negligence or that the deceased was guilty of contributory negligence. The Missouri Supreme Court reversed the judgment of the trial court holding both questions were for the jury.

The first inquiry in this case concerns the status of the deceased after entering on the premises owned by the defendant. The testimony at the trial indicated that the defendant's rural resort was not open for business on the day of the injury and that neither the deceased nor members of his party had paid the customary entrance fee. However, the testimony as to the method of collection of the entrance fee and the absence of signs warning that the resort was closed indicated that the deceased could have reasonably understood that the premises were held open for his enjoyment and that his status on the premises was that of invitee as a visitor on the owner's premises for economic benefit is called in Missouri.² There was no decision on this question other than that the court held that the defendants in their argument tacitly admitted the son's status as an invitee.

An occupier holding his land open to the public has a duty to render the premises reasonably safe for the invitee, both as to natural and artificial conditions thereon.³ It is stated in the instant case that once a proprietor has appropriated a part of a public body of water to the uses of his private venture this standard of reasonable care has been applied to such divergent bodies of water as Lake Ontario,⁴ Great Salt Lake,⁵ Lake Washington,⁶ Lake Rocoopany in Connecticut,⁷ Barren River in Kentucky,⁸ St. Joseph's River in Indiana,⁹ and even to the tidal waters of an arm of the sea.¹⁰

Of course the location of this natural or artificial condition is important in the sense that the occupier's responsibility to visitors as business guests is limited to parts that reasonably appear to have been designed, adopted, and prepared for the accommodation of such persons, in other words, only to those parts to which the invitee reasonably may be expected to go, in view of the invitation given him.¹¹ In the instant case this later point is merely another factor in a consideration of the problem of whether the deceased was an invitee while swimming in the flooded

2. *Twine v. Norris Grain Co.*, 226 S.W.2d 415 (Mo. App. 1950); *Porchey v. Kelling*, 353 Mo. 1034, 185 S.W.2d 820 (1945); *Glaser v. Rothschild*, 221 Mo. 180, 120 S.W. 1 (1909); *PROSSER, TORTS* 636 (1941).

3. *RESTATEMENT, TORTS* § 343 (1934).

4. *Dinnihan v. Lake Ontario Beach Imp. Co.*, 8 App. Div. 509, 40 N.Y. Supp. 764 (4th Dep't 1896).

5. *Larkin v. Saltair Beach Co.*, 30 Utah 86, 83 Pac. 686 (1905).

6. *Grove v. D'Allessandro*, 39 Wash.2d 421, 235 P.2d 826 (1951).

7. *Nordgren v. Strong*, 110 Conn. 593, 149 Atl. 201 (1929).

8. *Waddel's Adm'r v. Brashear*, 257 Ky. 390, 78 S.W.2d 31 (1934).

9. *Bass v. Reitdorf*, 25 Ind. App. 650, 58 N.E. 95 (1900).

10. *Blanchette v. Union St. Ry.*, 248 Mass. 407, 143 N.E. 310 (1924).

11. *Darlington v. Railway Exchange Bldg.*, 353 Mo. 569, 83 S.W.2d 101 (1944); *Murphy v. Fred Wolferman, Inc.*, 347 Mo. 634, 148 S.W.2d 481 (1941); *Glaser v. Rothschild*, 221 Mo. 180, 120 S.W. 1 (1909); 38 *AM. JUR.*, § 133, p. 794; See *Notes*, 33 *A.L.R.* 181 (1924), 43 *A.L.R.* 866 (1926), 46 *A.L.R.* 1111 (1927), 58 *A.L.R.* 136 (1929), and 100 *A.L.R.* 710 (1936).

stream and more specifically while swimming below the dam where he was killed. As stated before, the court does not discuss this question, presumably on the ground that defendants in their argument tacitly admitted his status as an invitee.

What is the extent of the care which a patron may expect from a proprietor on whose premises he enters as an invitee? In Missouri and generally, the proprietor of a place of public amusement is not an insurer of his patrons safety,¹² but has that duty of care which is reasonably adapted to the character of the exhibitions given, the amusements offered, the places to which patrons resort, and also, in some cases, the customary conduct of spectators at such exhibitions.¹³ It is a care commensurate with the particular conditions and circumstances involved in the given case.¹⁴

The court in this case is extending to the proprietor of a public bathing resort located on a natural stream this duty to make known dangerous conditions safe or to give adequate warning to enable a patron to avoid harm. Thus, the court is here applying a well recognized standard of care to another type of business activity, that is, the public bathing resort. This standard has been applied in prior Missouri decisions to such activities as baseball parks,¹⁵ circuses,¹⁶ skating rinks,¹⁷ moving picture theaters,¹⁸ bowling alleys,¹⁹ and amusement parks,²⁰ and has in other states been extended to include the public bathing resort located on a natural body of water.²¹

What steps are required of the proprietor of the public bathing resort in order to discharge his duty of care? The court suggests certain specific steps which the proprietor might take in discharging this duty, that is, by providing such facilities as life boats, life guards, depth notices, and notices warning of high or swift water or dangerous undercurrents. Whether adequate facilities have been provided has ordinarily been held to be a question for the jury.²²

12. *Giles v. Moundridge Milling Co.*, 351 Mo. 568, 173 S.W.2d 745 (1943); *Berberet v. Electric Park Amusement Co.*, 319 Mo. 275, 3 S.W.2d 1025 (1928); 38 Am. Jur., *Negligence*, § 131, p. 791.

13. *Hughes v. St. Louis Nat. League Baseball Club*, 359 Mo. 993, 224 S.W.2d 989 (1950); *Dickinson v. Eden Theatre Co.*, 360 Mo. 941, 231 S.W.2d 609 (1950); *Berberet v. Electric Park Amusement Co.*, 319 Mo. 275, 3 S.W.2d 1025 (1928); See Notes 22 A.L.R. 610 (1923); 29 A.L.R. 29 (1924); 38 A.L.R. 358 (1925); 44 A.L.R. 204 (1926); 53 A.L.R. 856 (1928); 61 A.L.R. 1290 (1929); 98 A.L.R. 558 (1935).

14. *Hughes v. St. Louis Nat. League Baseball Club*, 359 Mo. 993, 224 S.W.2d 989 (1950). This rationale has been stated as follows: "Since the business guest knows that the possessor is to be benefitted by his visit, he is entitled to expect that reasonable care will be exercised to discover existing dangers and these dangers made safe or, at least, a warning will be given to enable the visitor to determine whether to enter the premises. . . . This is important from two points of view: first, in determining whether the defect falls within the duty to make safe or to warn and second, in determining contributory negligence." McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 Mo. L. Rev. 45, 59 (1936).

15. *Hughes v. St. Louis Nat. League Baseball Club*, 359 Mo. 993, 224 S.W.2d 989 (1950).

16. *King v. Ringling*, 145 Mo. App. 285, 130 S.W. 482 (1910).

17. *Reay v. Reorganization Inv. Co.*, 224 S.W.2d 580 (Mo. App. 1950).

18. *Davidson v. Missouri Orpheum Corp.*, 236 Mo. App. 1025, 161 S.W.2d 707 (1942).

19. *Miles v. Ozark Bowl, Inc.*, 250 S.W.2d 849 (Mo. App. 1952).

20. *McCollum v. Winnwood Amusement Co.*, 332 Mo. 779, 59 S.W. 2d 693 (1933).

21. Notes 3, 4, 5, 6, 7, 8, 9, *supra*.

22. *Collins v. Riverside Amusement Park Co.*, 61 Ariz. 135, 145 P.2d 853 (1944); *Vignone v. Pierce and Norton Co.*, 130 Conn. 309, 33 A.2d 427 (1943); *Levy v. Cascades*

On the other hand, there is no obligation to protect the visitor against dangers which are obvious, reasonably apparent, or as well known to such visitors as they are to the owner or occupant.²³ Although either type of conduct will ordinarily bar plaintiff's recovery, there is a difference in circumstance in conduct amounting to assumption of risk and the amounting to contributory negligence. Thus, as is pointed out in the case, there is a difference in circumstance in the hazard of a spectator's being struck by a fly ball while watching a baseball game and what a swimmer may reasonably expect and assume from his host as to the natural or artificial facilities provided for his active participation in the sport. A person assumes the risk by entering freely and voluntarily into any relation or situation which presents obvious danger, and this person may be taken to accept the risk, and to agree that he will look out for himself, and relieve the defendant of responsibility.²⁴ Consequently, those who participate or sit as spectators at sports and amusements assume all the obvious risks of being hurt by such activities as flying balls,²⁵ fireworks explosions,²⁶ or the struggles of the contestants.²⁷

To be distinguished from such assumption of risk is the defense of contributory negligence. This means that the plaintiff's own conduct has been unreasonable in view of the foreseeable risk.²⁸ The difference between the two types of conduct frequently is one between risks which were so obvious that he must be taken to have known of them, and risks which he merely might have discovered by the exercise of ordinary care.²⁹ Both types of conduct are recognized in Missouri as a defense to an action based on the defendant's negligent conduct; yet, the Missouri courts do not verbally distinguish, except in employer-employee relations, between the two types of conduct as separate and distinct defense. Both are included under the defense of contributory negligence, although conduct amounting to assumption of risk is often not a type of conduct which readily fits into the usual concept of contributory negligence.

The supreme court in the instant case refused to accept defendant's contention that no other inference could be drawn from the evidence other than that the deceased did have or obviously should have had knowledge of the danger or that he failed to exercise ordinary care for his own safety. Thus, it could not be said as a matter of law that the defendants were free of negligence or that the deceased was contributorily negligent. Both questions were for the jury.³⁰

EUGENE E. REEVES

Operating Corp., 289 N.Y. 714, 46 N.E.2d 343 (1942); *Byron v. St. George Swimming Club*, 283 N.Y. 505, 28 N.E.2d 934 (1940).

23. *Reay v. Reorganization Inv. Co.*, 224 S.W.2d 580 (Mo. App. 1950); *Summa v. Morgan Real Estate Co.*, 350 Mo. 205, 165 S.W. 2d 390 (1942); *Murray v. Ralph D'Oench Co.*, 347 Mo. 365, 147 S.W.2d 623 (1941); *Morris v. Kansas City Light and Power Co.*, 302 Mo. 475, 258 S.W. 431 (1924).

24. *Ibid.* In Missouri, other than in the employer-employee cases, there is no stated defense of assumption of risk, but conduct amounting to assumption of risk is given its usual recognition as a "kind" of contributory negligence.

25. *Hudson v. Kansas City Baseball Club*, 349 Mo. 1215, 164 S.W.2d 319 (1942).

26. *Scanlon v. Wedger*, 156 Mass. 462, 31 N.E. 642 (1892).

27. *McLeod Store v. Vinson*, 213 Ky. 667, 281 S.W. 799 (1926).

28. PROSSER, *Torts* § 51 (1941).

29. *Ibid.*

30. *Russell v. Johnson*, 349 Mo. 267, 160 S.W.2d 701 (1942); *Mosely v. Sum*, 344 Mo. 969, 130 S.W.2d 465 (1939) (contributory negligence as a matter of law).

WORKMEN'S COMPENSATION—EXCUSING LACK OF NOTICE OF
INJURY BY EMPLOYEE TO EMPLOYER*Brown v. Douglas Candy Company*¹

Plaintiff filed a claim for compensation with the Division of Workmen's Compensation of the Department of Labor and Industrial Relations, alleging that she had suffered an injury "arising out of and in the course of her employment" with the defendant-employer, in the latter's candy factory. The defendants, employer and insurer, admitted that plaintiff was an employee, that she was covered by the Workmen's Compensation Commission law, that she had had a "disc operation", resulting in a twenty per cent disability of the body as a whole, but expressly denied that the injury was caused by accident arising out of and in the course of her employment, and further denied that the employer had received any notice of the alleged injury as required by *Missouri Revised Statutes*, Section 287.420 (1949).²

It is this lack of notice of the injury to the employer ". . . as soon as practicable after the happening thereof but not later than thirty days after the accident . . ." that the case under discussion was concerned with. It will be noted that the statute gives two excuses for failure to give notice; "good cause" or "that the employer was not prejudiced by failure to receive such notice." The referee specially found that "notice of injury to employer by employee was late, but that employer and insurer were not prejudiced by failure to receive such notice." These findings were sustained upon appeal to the commission, and award given to the plaintiff, which was affirmed upon appeal to circuit court. The Kansas City Court of Appeals reversed and remanded with directions to dismiss the plaintiff's claim.

The court stated, citing a number of Missouri cases, that this ". . . requirement of written notice is a reasonable provision for the benefit of the employer. . . ."³ It

1. 277 S.W.2d 657 (Mo. App. 1955).

2. "No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, shall have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the commission shall find that there was good cause for failure to give such notice, or that the employer was not prejudiced by failure to receive such notice. . . ."

Another point presented by the defendants on appeal, was that they should not be liable for her medical, surgical and hospital expenses, since the claimant failed to notify the employer of the injury as soon as practicable, or before she had procured medical treatment. Section 287.140 Mo. Rev. Stat. (1949) states that the employer is to provide such medical treatment required by a compensable injury, unless the employee chooses to select his own physician or surgeon at his own expense. Cases have held that where the employee proceeds to procure medical and surgical treatment without having first given notice to the employer, then such employee is held to have procured such treatment at his own election and hence at his own expense. This point did not have to be discussed by the court, since the entire claim was dismissed.

3. 277 S.W.2d 657, 662 (Mo. App. 1955). See also 2 LARSON: WORKMEN'S COMPENSATION LAW 259 § 78.32 (1952): "The requirement, as has been shown, is no mere technicality. It serves a specific function in protecting the legitimate rights of the employer and the leniency of its enforcement cannot be carried to the point where these rights of the employer are prejudiced."

was recognized that this notice gave the employer an opportunity to investigate the facts while they are still fresh, and to enable the employer to provide medical attention "in order to minimize the disability." However, the plaintiff admitted in her testimony before the referee that she did not tell anybody at the candy factory of the alleged fall on December 15, 1952 until March 23, 1953, more than three months later.⁴

Now, the usual instance of "good cause" for failure to give notice within the specified time is where the injury did not appear until after the time limit;⁵ that is, where . . . "the accident was apparently trivial or the condition produced by the accident is a latent one and not reasonably discoverable," as stated in the principal case.⁶ This ground could not be used by plaintiff, for, although she did not go to a doctor until February 2, 1953, yet she claimed she suffered severe pain immediately after the alleged injury and continuously thereafter, and used various means of home treatment to alleviate the pain complained of. The court stated that it was her duty to promptly report the accident to her employer.

The referee and commission excused the failure to give notice by finding that the employer was not prejudiced thereby. Since no evidence on the question was presented by either party, the question arose as to who had the burden of proof of prejudice or lack of prejudice. This precise question has never been dealt with by the Missouri courts.⁷ The Kansas City Court of Appeals held that the burden was on the employee. "We hold that the burden of proving that notice of the *accident* was given as required by Section 287.420, or a legal excuse for not giving such notice, rests

4. In the claimant's testimony before the referee, she states that immediately after suffering her alleged injury, she called to the forelady for help, and stated that she was in pain; thereafter, the forelady gave the claimant easier work to do. However, on cross examination, the claimant stated that she never told the forelady that she had fallen, and that the first time she ever told anybody at the candy factory of the alleged fall was on March 23, 1953.

5. *Beaty v. Chandeysson Electric Co.*, 238 Mo. App. 868, 190 S.W.2d 648 (1945) (Employee could not have notified employer of the cancerous condition since it was not ascertained until much later); *Buckner v. Quick Seal, Inc.*, 233 Mo. App. 273, 118 S.W.2d 100 (1938) (Injury suffered June 1st, but permanency of injury not ascertained until July 29).

6. 277 S.W.2d 657, 662 (Mo. App. 1955).

7. Though note *Schrabauer v. Schneider Engraving Products*, 224 Mo. App. 304, 25 S.W.2d 529 (1930), where the St. Louis Court of Appeals stated that if the claimant did not prove the giving of the required notice (l.c. 534) ". . . the burden is undoubtedly upon him (employee-claimant) in the first instance, to show that the employer was not prejudiced by failure to have received such written notice." However, in the *Schrabauer* case, the facts showed that the employer had received actual notice, although not the kind required by the statute.

on the claimant; . . ."⁸ Having failed to sustain that burden, she could not recover, and the finding of the commission that the defendants were not prejudiced thereby was not supported by substantial evidence.

The usual instance of lack of prejudice to the employer even though he has not received notice as prescribed, is where the employer has received actual notice in a form other than that required by statute.⁹ Where actual notice of the injury has been given, the burden rests upon the employer to prove prejudice. This seems correct, since where the employer does have actual notice, it would not be likely that he was prejudiced and he should not be heard to complain unless he does prove such prejudice. Horowitz¹⁰ sets forth other grounds for showing no prejudice; "a) that the employee had medical treatment,¹¹ or b) that the insurer or employer was not embarrassed in the defense of the case, or c) by any set of circumstances pointing to no prejudice." So, while the burden is essentially that of proving the negative, which often is difficult,¹² it would seem that there are various grounds which the employee-claimant can use to excuse his failure to notify the employee.

Some states have dealt with this problem by statutes, which specifically place the burden of proof of prejudice upon the employer.¹³ Such statutes are favored by the National Association of Claimants' Compensation Attorneys. In their official publication, the *NACCA Law Journal*,¹⁴ in discussing the New Hampshire case of *Bohan v. Lord & Keenan*,¹⁵ there is set forth the Massachusetts statute which "excuses want of,

8. 277 S.W.2d 657, 664 (Mo. App. 1955). Although the court found no Missouri authority, yet there was a storehouse of authority from other jurisdictions. The court relied on *Bloomfield v. November*, 223 N.Y. 265, 119 N.E. 705, 706 (1918); 58 AM. JUR. 833; and 2 LARSON: WORKMEN'S COMPENSATION LAW 259 (1952). See also 71 CORPUS JURIS 1017; the extensive collections of cases in 145 A.L.R. 1310 (1943); 107 A.L.R. 827 (1937); 92 A.L.R. 521 (1934) and 78 A.L.R. 1283 (1932); and particularly *Cameron Coal Co. v. Collopy*, 102 Okla. 207, 228 Pac. 1100 (1924); *Kangas' Case*, 282 Mass. 155, 184 N.E. 380 (1933); and the English case of *Shearer v. Miller* (1899) 2 F. 114, 37 Sc. L. R. 80 (Ct. of Sess.), quoted in *Hardeman-King Co. v. Hudson*, 151 Okla. 236, 3 P.2d 424 (1931).

9. *Buckner v. Quick Seal, Inc.*, *supra* note 5 (where actual notice was given); *Beaty v. Chandeyson Electric Co.*, *supra* note 5 (where employer learned the same day of the accident); *Evans v. Chevrolet Motor Co.*, 232 Mo. App. 927, 105 S.W.2d 1081 (1937) (where actual notice was given within thirty days); *Johnson v. Scott County Milling Co.*, 101 S.W.2d 123 (Mo. App. 1936) (actual notice within thirty days); and *Schrabauer v. Schneider Engraving Product*, *supra* note 7 (actual notice to foreman).

10. HOROWITZ ON WORKMEN'S COMPENSATION 249.

11. *Duggan's Case*, 315 Mass. 355, 53 N.E.2d 90 (1944) (where employer was not prejudiced by not having received notice, since the employee received adequate medical treatment after he quit, and employer had benefit of testimony as to the condition of the employment at the time of the injury).

12. *Ibid.*, where the court said that the proof of want of prejudice must frequently rest on inference.

13. Cases involving such statutes include: *U.S. Fidelity & Guaranty Co. v. Industrial Accident Commission of Calif.*, 84 Calif. App. 226, 257 Pac. 895 (1927); *Schmidt v. O.K. Baking*, 90 Conn. 217, 96 Atl. 963 (1916); *Yellow Cab Co. v. Industrial Commission*, 315 Ill. 235, 146 N.E. 160 (1925); *Gorton v. Kleinknight*, 74 Ind. App. 267, 128 N.E. 770 (1920); *Brownrigg v. Swift*, 114 Kans. 73, 217 Pac. 278 (1923); *Spence v. Bethlehem Steel Co.*, 197 Atl. 302, 308 (Maryland 1938); *Bohan v. Lord & Keenan, Inc.*, 98 N.H. 144, 95 A.2d 786 (1953); *Snook v. City of Portsmouth*, 10 A.2d 654 (N.J. 1940).

14. Volume 11, page 66 at page 69.

15. *Supra*, note 13.