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Kiss and Tell: Making the Case for the Tortious Transmission of Herpes and Human Papillomavirus

Deuschle v. Jobe

I. INTRODUCTION

Recognizing theories of recovery for a tort committed an estimated six million times per year in the United States alone at an annual cost in excess of $4 billion is logical—if not imperative. Not all jurisdictions, however, recognize theories of recovery when the tort in question is the wrongful transmission of herpes and human papillomavirus (“HPV”), two of the most common, incurable sexually transmitted diseases (“STDs”) in America. Nevertheless, in Deuschle v. Jobe, the Missouri Court of Appeals for the Western District of Missouri took a significant step by acknowledging an unmarried sexual partner’s right to bring negligence and intentional tort claims for the transmission of these STDs.

Contending that wrongful transmission causes of action sounding in negligence and intentional tort should be recognized, this Note begins by setting forth the facts and holding of Deuschle, and then provides an overview of genital herpes and HPV. Next, this Note surveys the legal landscape of tortious transmission cases involving these two STDs and examines the public policies that factor into the decision whether to allow tortious transmission actions. After exploring Deuschle in detail, this Note seeks to uncover the roadblocks to recovery that exist even when causes of action are recognized.

II. FACTS AND HOLDING

In 1998, Monica Deuschle and Jason Lee Jobe engaged in an intimate relationship. Shortly thereafter, Ms. Deuschle was diagnosed with genital warts and herpes. As a result of these infections, she filed suit against Mr. Jobe in Boone County Circuit Court.

1. Deuschle, 30 S.W.3d at 216. For information regarding the nature and transmission of herpes and genital warts, see infra notes 29-77 and accompanying text.

2. See infra notes 61, 67, and accompanying text.
3. See infra notes 29-77 and accompanying text.
5. Id. at 218-19.
6. Id. at 216.
7. Id. For information regarding the nature and transmission of herpes and genital warts, see infra notes 29-77 and accompanying text.
8. Deuschle, 30 S.W.3d at 216.
In her complaint, Ms. Deuschle alleged that her paramour knew of his condition and of the likelihood of infecting others through unprotected sex.° Ms. Deuschle claimed, however, that he intentionally failed to inform her of his condition and neglected to take any special precautions to prevent infection while engaging in sexual relations with her. Ms. Deuschle claimed that, due to Mr. Jobe’s omissions, she was infected with both herpes and genital warts.° Ms. Deuschle further asserted that, because of these incurable viral infections, she suffered and continues to suffer a plethora of damages, such as: “significant physical pain”; “significant medical expenses . . . , including physician fees, psychological and therapy fees, [and] medication costs”; “severe psychological and emotional trauma”; an increased risk of cervical cancer; the inability to “have a normal sexual relationship”; and complications associated with future pregnancies. In all, Ms. Deuschle requested actual damages for “past, present, and future medical and health-related expenses,” as well as compensation for “physical, mental, and emotional pain and suffering,” and punitive damages.°

In response to Ms. Deuschle’s complaint for tortious infection with herpes and genital warts, Mr. Jobe filed a motion for judgment on the pleadings.° The trial court sustained Mr. Jobe’s motion, thereby dismissing Ms. Deuschle’s petition for failure to state a claim upon which relief could be granted.

On appeal to the Missouri Court of Appeals for the Western District of Missouri, Ms. Deuschle argued that “infection of a sexually transmitted disease is a recognized cause of action in Missouri” and, in the alternative, that the court should “recognize such a claim if one does not currently exist.”°° Ms. Deuschle’s appeal set forth the requisite elements of this cause of action as: (1) knowledge of infection with an incurable and “contagious sexually transmitted disease”; (2) awareness of the likelihood of infecting an intimate partner when no precautions are taken during sexual contact; (3) failure to disclose the infection to an intimate partner or failure to take “any precautionary measures”; and (4) the resulting infection of such partner with the disease.

After reciting the standard of review for a dismissal based on judgment on the pleadings, the court noted that the cause of action invoked by Ms. Deuschle

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9. Id.
10. Plaintiff’s Petition paras. 4-5, at 1, Deuschle (No. WD 58074).
11. Deuschle, 30 S.W.3d at 216.
12. Id. at 216-17.
13. Id. at 217.
14. Id. at 216; see also Defendant’s Motion for Judgment on the Pleadings, Deuschle (No. WD 58074).
15. Deuschle, 30 S.W.3d at 216, 217.
16. Id. at 217.
17. Id.
had no statutory basis but that "Missouri common law has recognized a cause of action for negligently transmitting herpes" since 1986.\(^{18}\) In these cases, however, the parties were married.\(^{19}\) Nevertheless, the court held that there was "no justification for excluding an unmarried individual from bringing suit against her sexual partner for transmitting herpes under general tort law" due to the trust inherent in such intimate relationships.\(^{20}\)

Specifically, with regard to Ms. Deuschle’s claim of negligence, the court found a duty based on the nature of sexual relationships and the public health policy of preventing the spread of communicable diseases—such as herpes, which is incurable.\(^ {21}\) As a result, the court held "that one has a legal duty to exercise reasonable care by disclosing a contagious venereal disease before entering into sexual relations with another"\(^ {22}\) and that "[i]n an action for negligent transmission of a venereal disease, a person is liable if he knew or should have known that he was infected with a disease and failed to disclose or warn his sexual partner about this unreasonable risk of harm before engaging in a sexual relationship."\(^ {23}\)

The court next turned its attention to foreseeability and established the requisite standard as "whether or not a reasonably prudent person would have anticipated danger and provided against it."\(^ {24}\) The court concluded that the foreseeability of infecting others with an STD exists when the actor is aware or should be aware that he or she has the condition.\(^ {25}\)

Having recognized a cause of action for negligence, identified a duty to inform, and established a standard for foreseeability, the court found the allegations regarding causation and damages in Ms. Deuschle’s petition sufficient to withstand a motion to dismiss.\(^ {26}\) Furthermore, the court noted that intentional tort claims for the transmission of an STD are also recognized in Missouri and that the petition appears to involve such a claim.\(^ {27}\) As a result, the court not only remanded the case to the trial court with a direction that the dismissal for failure to state a claim be reversed on the negligence cause of action, but it also required

\(^{18}\) Id.

\(^{19}\) Id. at 217-18.

\(^{20}\) Id. at 218.

\(^{21}\) Id.

\(^{22}\) Id. at 218-19.

\(^{23}\) Id. at 219.

\(^{24}\) Id. (quoting Hoover’s Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Prods., Inc., 700 S.W.2d 426, 431 (Mo. 1985)).

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Id.
that Ms. Deuschle be allowed to amend her petition to include an intentional tort cause of action.28

III. LEGAL BACKGROUND

This Part will explore: (1) the nature, transmission, occurrence, and prevention of herpes and HPV; (2) the common law tort actions that have been recognized in actions for the negligent and intentional transmission of these two STDs; and (3) public policies behind wrongful transmission claims.

A. An Overview of Herpes and Human Papillomavirus

1. Herpes

A derivative of "herpein," a Greek word meaning "to creep,"29 herpes is a viral infection that has two forms—Type 1, which usually manifests itself as fever blisters or cold sores on the face around the mouth, and Type 2, which generally produces painful, blistered lesions in the genital region and initially includes flu-like symptoms.30 Both forms of the virus are life-long infections, and those infected often experience a primary episode and subsequent recurrences.31 During periods of latency, "the virus retreats to the sacral ganglia, situated near the tail of the spinal cord," where it remains for the life of the infected individual.32

28. Id. at 219-20.
29. THE AMERICAN HERITAGE DICTIONARY 608 (2d College ed. 1985).
30. Nat'l Inst. of Allergy & Infectious Diseases, Nat'l Insts. of Health, Genital Herpes, at http://www.niaid.nih.gov/factsheets/stdherp.htm (last modified Mar. 2001). However, it is not uncommon for someone infected with genital herpes to remain asymptomatic. Id. "Up to [sixty percent] of people who have genital [herpes] infection show no signs of the disease and are unaware that they are infected." Int'l Herpes Alliance, Genital Herpes: The Facts, at http://www.herpesalliance.org/resources03.asp (last visited Oct. 31, 2001).
31. Int'l Herpes Alliance, Genital Herpes: The Facts, at http://www.herpesalliance.org/resources03.asp (last visited Oct. 31, 2001). "Approximately [eighty percent] of persons having a first episode caused by [genital herpes] will have at least one recurrence... The most common scenario is occasional recurrences (about [four] attacks per year). However, a minority will [suffer more] recurrences." Id. “[I]n most cases[,] outbreaks become fewer and weaker over the course of a few years. They usually end within five or six years.” Planned Parenthood, Herpes: Questions & Answers, at http://www.plannedparenthood.org/sti-safesex/herpes.htm (last modified Sept. 2000).
Type 2, commonly referred to as genital herpes, is typically transmitted through sexual activity in which the uninfected partner contacts open lesions on the infected partner's body.\textsuperscript{33} The virus then enters the uninfected partner's body through mucous membranes, usually in the genital area, or through abrasions in the skin.\textsuperscript{34} It is also possible to contract genital herpes through intercourse with an infected, asymptomatic partner.\textsuperscript{35} Once infected with the virus, symptoms associated with the primary episode may "appear within two to [ten] days" and "last two to three weeks."\textsuperscript{36} Subsequent episodes, known as recurrences or outbreaks, tend to be milder than the initial occurrence.\textsuperscript{37} "The frequency and severity of the recurrent episodes vary greatly. While some people have only one or two outbreaks in a lifetime, others may have several outbreaks a year."\textsuperscript{38} Often, outbreaks are "preceded by warning symptoms (also known as prodromal symptoms) such as tingling, itching, burning or pain."\textsuperscript{39}

Diagnosing herpes can be difficult because of the general and varied symptoms among those infected. As a result, "[a]ccurate diagnosis of genital herpes is made most easily and correctly at the time of an active herpes infection, preferably the initial symptomatic infection," and affirmative diagnosis involves the testing of the fluid present in the blister-like lesions.\textsuperscript{40} Blood tests also may be used to detect the presence of herpes virus antibodies; however, while positive results of such tests increase the likelihood of genital herpes infection, the testing of the fluid from lesions is the definitive test.\textsuperscript{41} Once diagnosed with genital


\textsuperscript{34} Id.

\textsuperscript{35} Int'l Herpes Alliance, \textit{Genital Herpes: The Facts}, at http://www.herpesalliance.org/resources03.asp (last visited Oct. 31, 2001). "Up to [sixty percent] of people who have genital [herpes] infection show no signs of the disease and are unaware that they are infected. These people are, however, capable of transmitting the virus to others." \textit{Id.}


\textsuperscript{37} Id.


\textsuperscript{40} Id.

\textsuperscript{41} Id.
herpes, treatment options range from home remedies\textsuperscript{42} that soothe the symptoms to prescription regimens\textsuperscript{43} that speed recovery during outbreaks and retard additional outbreaks.\textsuperscript{44} Nevertheless, these treatments are merely methods of managing the disease because no cure exists.\textsuperscript{45}

In addition to the physical symptoms directly resulting from infection with the herpes virus, there are numerous other problems associated with the disease. First, victims often experience shock and depression.\textsuperscript{46} Second, herpes can increase the risk of human immunodeficiency virus ("HIV") infection because of the open lesions that develop during outbreaks; if both are present, herpes and HIV can interact adversely, aggravating both conditions.\textsuperscript{47} Third, for pregnant women, herpes presents two uncommon-but-dangerous risks to the fetus: (1) miscarriage, if the primary episode of genital herpes occurs during the first trimester; and (2) infection of the baby during birth if the mother is suffering from the primary outbreak at the time and delivers vaginally.\textsuperscript{48} This second risk, known as neonatal herpes, "can cause skin, eye or mouth infections, damage to the central nervous system and other internal organs, mental retardation, or death."\textsuperscript{49}

\textsuperscript{42} Such remedies include: taking warm baths, applying wet tea bags to the irritated area, washing the area with salt water, taking over-the-counter pain relievers, using corn starch to dry the area, and wearing loose clothes. See id.; Planned Parenthood, \textit{Herpes: Questions & Answers}, at \url{http://www.plannedparenthood.org/stisafesex/herpes.htm} (last modified Sept. 2000).

\textsuperscript{43} Treatment of an outbreak with prescriptions for the purpose of shortening it is known as episodic treatment, whereas ongoing use of pharmaceuticals to curtail outbreaks is known as suppressive therapy. Int'l Herpes Alliance, \textit{Genital Herpes: The Facts}, at \url{http://www.herpesalliance.org/resources03.asp} (last visited Oct. 31, 2001). Prescriptions used for both purposes are antiviral medications that halt the virus's reproduction, and they include acyclovir, famciclovir, and valacyclovir. See id.; Planned Parenthood, \textit{Herpes: Questions & Answers}, at \url{http://www.plannedparenthood.org/stisafesex/herpes.htm} (last modified Sept. 2000).

\textsuperscript{44} Planned Parenthood, \textit{Herpes: Questions & Answers}, at \url{http://www.plannedparenthood.org/stisafesex/herpes.htm} (last modified Sept. 2000).

\textsuperscript{45} Id.


Herpes has been a blight on mankind "for at least 2,000 years. It is said to have caused so terrible an epidemic of lip sores in ancient Rome that the Emperor Tiberius banned kissing.”50 It was so prevalent among eighteenth-century French prostitutes that it was recognized as “a vocational disease of women.”51 Today, genital herpes is among the top five most common STDs in the United States52 with an estimated prevalence53 of between forty-five million54 and sixty million,55 and an estimated incidence56 of between five-hundred thousand57 and one million.58 The rate of new infections is highest among teenagers and those in their early twenties, and the infection rate of adolescents and young adults recently has been rising.59 Otherwise, herpes appears to be an equal-opportunity disease—crossing all socioeconomic, racial, ethnic, and geographical boundaries.60 The severity of the problem goes beyond the pain and suffering of the afflicted; in 1994, the total cost of herpes was estimated at $237 million.61

50. Leo, supra note 46, at 62.
51. Leo, supra note 46, at 62; see also 43 AM. JUR. Trials § 2 (1991).
53. Prevalence refers to the number of persons infected with a disease at a given time. Id.
54. Id. Approximately “one in five people in the United States over age [twelve] . . . are infected with . . . genital herpes.” Nat’l Inst. of Allergy & Infectious Diseases, Nat’l Insts. of Health, STD Statistics, at http://www.niaid.nih.gov/factsheets/stdstats.htm (last modified Dec. 1998). Furthermore, genital herpes “is more common in women (approximately one out of four women) than in men (almost one out of five). This may be due to male-to-female transmission being more efficient than female-to-male transmission.” Ctrs. for Disease Control & Prevention, Nat’l Ctr. for HIV, STD & TB Prevention, Div. of Sexually Transmitted Diseases, Genital Herpes, at http://www.cdc.gov/nchstp/dstd/fact_sheets/Facts_genitalherpes.htm (last modified June 2001).
56. Incidence refers to the number of newly diagnosed cases of a condition on an annual basis. HIDDEN EPIDEMICS, supra note 52, at 2.
58. HIDDEN EPIDEMICS, supra note 52, at 2.
59. HIDDEN EPIDEMICS, supra note 52, at 20.
60. HIDDEN EPIDEMICS, supra note 52, at 20.
61. HIDDEN EPIDEMICS, supra note 52, at 5. These costs include expenditures for medical services and supplies, as well as lost wages due to illness. HIDDEN EPIDEMICS,
Although the physical, emotional, and financial costs of herpes cannot be eradicated because there is no cure, these costs can be protracted through the prevention of further infection. The simplest forms of prevention are abstinence by infected persons during prodrome and outbreaks, and the use of latex condoms between recurrences.\textsuperscript{62} Nevertheless, these precautions may not be fail proof because viral shedding may occur when no symptoms are present, and herpes can be transmitted through contact with areas not shielded by condoms.\textsuperscript{63} Currently, additional preventive measures are in the pipeline—including an experimental vaccine that "has proven [seventy-three percent] to [seventy-four percent] effective in preventing genital herpes in women who were considered at high risk for the infection."\textsuperscript{64} However, until such measures are proven effective and widely disseminated, reliance on those infected to abstain from sex, warn partners, and use condoms is the primary defense against the escalation of herpes infection and its associated costs.

2. Human Papillomavirus

HPV also ranks among the top five STDs in the United States with an estimated prevalence of twenty million\textsuperscript{65} and an estimated incidence of 5.5 million.\textsuperscript{66} In 1994, the estimated annual cost of HPV in the United States exceeded $3.8 billion.\textsuperscript{67} Like herpes, HPV is "widespread across racial and ethnic

\textsuperscript{supra} note 52, at 5.


\textsuperscript{63} \textit{Id.}


\textsuperscript{65} HIDDEN EPIDEMICS, \textsuperscript{supra} note 52, at 2. "HPV is likely the most common STD among young, sexually active people." HIDDEN EPIDEMICS, \textsuperscript{supra} note 52, at 18. For a definition of prevalence, see \textsuperscript{supra} note 53.

\textsuperscript{66} HIDDEN EPIDEMICS, \textsuperscript{supra} note 52, at 18. "The rate of new infections for herpes and HPV—both viral STDs—is typically highest during the late teens and early twenties. Among women under the age of [twenty-five], studies have found that [twenty-eight] to [forty-six] percent are typically infected with HPV." HIDDEN EPIDEMICS, \textsuperscript{supra} note 52, at 4. Moreover, "[a]n estimated [seventy-five] percent of the reproductive-age population has been infected with sexually transmitted HPV." HIDDEN EPIDEMICS, \textsuperscript{supra} note 52, at 18. For a definition of incidence, see \textsuperscript{supra} note 56.

\textsuperscript{67} HIDDEN EPIDEMICS, \textsuperscript{supra} note 52, at 5. These costs include medical services and supplies, as well as lost wages due to illness. HIDDEN EPIDEMICS, \textsuperscript{supra} note 52, at
groups" and shows "very little regional variation." However, whereas there are two types of the herpes virus, there are in excess of one hundred varieties of HPV. Of those varieties, fewer than half cause genital warts, also known as venereal warts and condylomata acuminata; these wart-causing strains of HPV are "low-risk" versions of the virus because they do not lead to cervical or other genital cancers, as do some of the non-wart-causing varieties of HPV. Both the wart-causing and non-wart-causing types of HPV are spread through sexual contact with infected persons; however, the wart-causing strains manifest themselves through warts in the genital region that appear "within three months of contact."

Although the warts can be removed, HPV cannot be cured, and the warts often recur. In addition, genital warts can complicate pregnancy because they may "cause obstruction during delivery." Furthermore, "infants born to women

5. However, the estimated $3.8 billion does not include the costs associated with HPV-related cervical cancer. Nat'l Inst. of Allergy & Infectious Diseases, Nat'l Insts. of Health, STD Statistics, at http://www.niaid.nih.gov/factsheets/stdstats.htm (last modified Dec. 1998). If these costs are included, the total expenditures related to HPV in 1994 equaled approximately $4.5 billion. Id.

68. HIDDEN EPIDEMICS, supra note 52, at 4-5.


72. Methods of removal include topical ointments, freezing, burning, laser treatment, injection, and surgery. Nat'l Inst. of Allergy & Infectious Diseases, Nat'l Insts. of Health, Human Papillomavirus and Genital Warts, at http://www.niaid.nih.gov/factsheets/stdhpv.htm (last modified Mar. 2001). There is some evidence that HPV can be eradicated by the immune system. HIDDEN EPIDEMICS, supra note 52, at 18.

with genital warts [may] develop warts in the throat (laryngeal papillomatosis),” a rare—but potentially life-threatening—condition.\footnote{74}

As with other STDs, “[t]he only way . . . [to] prevent HPV infection is to avoid direct contact with the virus.”\footnote{75} Therefore, visible warts should be removed, and latex condoms should be used to “provide some protection.”\footnote{76} Presently, development of a preventive vaccine is underway, but until such medical interventions become available, the burden falls on those with knowledge of their infection to take adequate precautions.\footnote{77}

\section*{B. An Overview of Common Law Actions for the Negligent and Intentional Transmission of Herpes and HPV}

The common law actions by which a plaintiff brings tortious transmission of herpes and HPV claims are: negligence, misrepresentation and fraud, battery, and intentional infliction of emotional distress.\footnote{78} This subsection explores these causes of action in the context of wrongful transmission and examines the elements required in Missouri to bring such claims successfully.

1. Negligence

Negligence is the most frequently asserted cause of action in cases for the transmission of herpes or HPV.\footnote{79} The requisite elements of a prima facie case of

\begin{itemize}
\item \footnote{74} Id.
\item \footnote{75} Id.
\item \footnote{76} Id.
\item \footnote{77} Id.
negligence are: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of the defendant’s duty; (3) causation; and (4) damages.\textsuperscript{59} Furthermore, Section 282 of the Restatement (Second) of Torts establishes the standard for determining negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm,”\textsuperscript{51} and Section 4 of the Restatement defines duty as the requirement that one “conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury . . . of which that actor’s conduct is a legal cause.”\textsuperscript{52}


82. RESTATEMENT (SECOND) OF Torts § 4 (1965).
Using these guidelines, numerous decisions that predate 
Deuschle
have significant language devoted to the duty element. Many courts have based the existence of such a duty between sexual partners on the foreseeability of transmitting the disease. Other courts have engaged in balancing various factors to determine whether a duty exists. In both lines of cases, courts have stressed the defendant’s actual or imputed knowledge of his or her STD infection.

83. See, e.g., Long, 333 S.E.2d at 854 (holding that “[t]he duty owed is the same one that every individual in this state owes another: the duty to exercise ordinary care not to injure others”); Meany, 639 So. 2d at 233-35 (holding that “[t]he duty of the infected partner is either to abstain from sexual contact with others or to warn others of the infection before sexual contact”); McPherson, 712 A.2d at 1045-46 (holding that “one who knows or should know that he or she is infected with a sexually transmitted disease is under a duty to protect sexual partners from infection”); B.N., 538 A.2d at 1178 (holding that “the infected person has a duty to take reasonable precautions—whether by warning others or by avoiding contact with them—to avoid transmitting the disease”); M.M.D., 467 N.W.2d at 647 (holding that where a person should know of his or her diseased condition, “the person has a duty to avoid sexual contact, or at least to inform potential sex partners”—constituting “a legal duty to warn”); R.A.P., 428 N.W.2d at 106-08 (holding that “people suffering from genital herpes generally have a duty either to avoid sexual contact with uninfected persons or, at least, to warn potential sex partners that they have herpes before sexual contact occurs”).

84. See, e.g., Doe, 267 Cal. Rptr. at 567 (stating that “only a slight degree of foreseeability [is] needed to warrant the imposition of a duty of due care” in tortious transmission cases); B.N., 538 A.2d at 1178 (stating that “[a]n important factor used to determine the existence of a duty is foreseeability”); M.M.D., 467 N.W.2d at 647 (stating that “[a] key factor . . . in determining if a legal duty exists is whether the potential injury was a reasonably foreseeable consequence of the defendant’s actions”); R.A.P., 428 N.W.2d at 107-08 (stating that “[t]he foreseeability of potential injury is a key factor . . . in establishing the scope of the legal duty to use reasonable care”); see also 43 AM. JUR. Trials § 7 (1991).

85. See Meany, 639 So. 2d at 233 (citing the relevant factors as the subsequent flow of litigation, the nexus between the conduct and the harm, the economic impact, the nature of the conduct, morality and the victim’s culpability, precedent, and the evolution of cultural norms).

86. See Gabriel v. Tripp, 576 So. 2d 404, 405 (Fla. Dist. Ct. App. 1991) (requiring a showing that “the defendant knew he or she was infected . . . [and] had been informed that said disease could be communicated through sexual intercourse”); Meany, 639 So. 2d at 234 (stating that, “[i]f a defendant has experienced an attack or has sought medical advice concerning such symptoms, he would likely be deemed . . . to possess the requisite knowledge, whether or not an actual diagnosis could be proved”); McPherson, 712 A.2d at 1046 (noting that to be liable for negligent transmission, it must be proven that the defendant knew he or she had the disease); B.N., 538 A.2d at 1179 (stating that “[o]ne who knows he or she has a highly infectious disease can readily foresee the danger that the disease may be communicated to others with whom the infected person comes into

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Typically, these cases do not require the defendant's diagnosis with the STD; rather, symptoms or medical consultation for symptoms usually suffices.\(^7\) If such knowledge exists or can be deemed to exist, the duty owing from the infected defendant to the plaintiff generally has been articulated as the duty to take reasonable precautions to prevent infection—such as a duty to abstain or a duty to warn.\(^8\)

In Missouri, the requisite elements for a prima facie case of negligence mirror the traditional requirements, and they include:

(1) a legal duty on the part of the defendant to conform to a certain standard of conduct to protect others against unreasonable risks; (2) a breach of that duty; (3) a proximate cause between the conduct and the resulting injury; and (4) actual damages to the claimant's person or property.\(^9\)

Moreover, Missouri recognizes that a duty may "arise out of a relationship between the parties[...]. . . derived from a calculus of factors,"\(^9\) including:

- the social consensus that the interest is worthy of protection;
- the foreseeability of harm and the degree of certainty that the protected person suffered injury;
- moral blame society attaches to the conduct;
- the prevention of future harm;
- consideration of cost and ability to spread the

\(^{87}\) See supra note 86 and accompanying text.

\(^{88}\) See Doe, 267 Cal. Rptr. at 568 (adopting the duty set forth in R.A.P., 428 N.W.2d at 108, infra); Gabriel, 576 So. 2d at 405 (establishing the defendant's duty as "informing the plaintiff of the presence of the disease and... securing the plaintiff's consent to sexual intercourse under such circumstances"); Meany, 639 So. 2d at 235 (holding that "the duty of the infected party is either to abstain from sexual contact with others or to warn others of the infection before sexual contact"); B.N., 538 A.2d at 1179 (holding that "the infected person has a duty to take reasonable precautions—whether by warning others or by avoiding contact with them—to avoid transmitting the disease"); R.A.P., 428 N.W.2d at 108 (holding that "people suffering from genital herpes generally have a duty either to avoid sexual contact with uninfected persons or, at least, to warn potential sex partners that they have herpes before sexual contact occurs"); see also 43 AM. JUR. Trials § 7 (1991).

\(^{89}\) Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Prods., Inc., 700 S.W.2d 426, 431 (Mo. 1985).

\(^{90}\) Id. at 432.
risk of loss; [and] the economic burden upon the actor and the community.\textsuperscript{91}

Prior to \textit{Deuschle}, the Missouri Supreme Court cleared the way for tortious transmission claims.\textsuperscript{92} Although almost entirely devoted to abrogating “Missouri’s longstanding rule of interspousal immunity for tort actions” that sound in negligence, the basis of \textit{S.A.V. v. K.G.V.}\textsuperscript{93} was a wife’s allegation that her husband contracted, and “willfully, recklessly and negligently transmitted the disease to [her] without informing her of his infection.”\textsuperscript{94} In \textit{S.A.V.}, the court ordered reinstatement of the wife’s petition based on the abrogation of interspousal immunity and recognition of tortious transmission claims.\textsuperscript{95}

2. Misrepresentation and Fraud

Following negligence, the most common causes of action raised in tortious transmission cases are misrepresentation and fraud.\textsuperscript{96} Although these causes of

\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{See generally} \textit{S.A.V. v. K.G.V.}, 708 S.W.2d 651 (Mo. 1986) (abrogating interspousal tort immunity and allowing a tortious transmission claim).
\textsuperscript{93} 708 S.W.2d 651 (Mo. 1986).
\textsuperscript{94} \textit{Id.} at 652.
\textsuperscript{95} \textit{Id.} at 653.
action commonly arise in the commercial context, courts have been willing to consider them in tortious transmission cases when the following requisite elements are established: "(1) an intentional misrepresentation (2) of fact or opinion . . . (3) that is material and (4) intended to induce and (5) does induce reasonable reliance by the plaintiff, (6) proximately causing pecuniary harm to the plaintiff." Nevertheless, courts specifically have focused on a plaintiff’s ability to show the defendant’s knowledge of or belief in his or her diseased condition, the defendant’s representation of the absence of disease or concealment of disease by silence when there was a duty to speak, and the defendant’s intent to induce the plaintiff’s reliance. The damages and materiality elements have not been pressed as the plaintiff’s diagnosis with herpes or HPV following sexual relations with the defendant is presumably sufficient.

battery based on infection with genital warts, and recognizing all but the battery claim because neither party’s brief addressed that cause of action).

97. See B.N., 538 A.2d at 1182; R.A.P., 428 N.W.2d at 108.
98. DOBBS, supra note 80, § 470; see also 43 AM. JUR. Trials § 15 (1991).
99. See, e.g., B.N., 538 A.2d at 1183-84; R.A.P., 428 N.W.2d at 109; Maharam, 510 N.Y.S.2d at 106; see also 43 AM. JUR. Trials § 15 (1991).
100. See, e.g., Kathleen K., 198 Cal. Rptr. at 276-77; see also 43 AM. JUR. Trials § 15 (1991).
101. See Kathleen K., 198 Cal. Rptr. at 276-77 (stating that “a certain amount of trust and confidence exists in any intimate relationship, at least to the extent that one sexual partner represents to the other that he or she is free from venereal . . . disease” and that “consent to sexual intercourse [is] vitiated by one partner’s fraudulent concealment of the risk of infection with venereal disease”); B.N., 538 A.2d at 1182 (finding that when the defendant “conceal[s] the existence of genital herpes, rather than asserting that he was free of disease,” it suffices for a representation where there is a duty to speak that arises from either a confidential relationship or from a general tort duty); R.A.P., 428 N.W.2d at 109 (holding that “failure to disclose a material fact may amount to a fraudulent misrepresentation in cases where a party has a ‘legal or equitable obligation’ to communicate the information to the other party” and that “people who know that they have genital herpes have a legal duty to take reasonable care to prevent the disease from spreading, and that this duty generally includes, at a minimum, the duty to inform potential sex partners of the possibility of infection”); Maharam, 510 N.Y.S.2d at 107 (adopting the lower court’s holding that a “thirty-one year marital relationship gave rise to an affirmative ‘legal duty to speak’”); see also 43 AM. JUR. Trials § 15 (1991).
103. See Long v. Adams, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) (stating that “[w]e can also dispose of the last element, recognizing that appellant has suffered damage by being afflicted with an incurable disease”). For the nature of herpes and HPV, see also supra notes 29-77 and accompanying text.
Missouri’s elements for misrepresentation generally follow the conventional requirements, but they have been stated slightly differently by the Missouri Supreme Court as:

- a representation; its falsity; its materiality; the speaker’s knowledge of its falsity; his intent that it be acted on by the hearer and in the manner reasonably contemplated; the hearer’s ignorance of its falsity; his reliance on its truth; his right to rely thereon; and his consequent and proximate injury. 104

In addition, Missouri courts recognize that fraud and misrepresentation do not always require an affirmative representation. 105 Silence may constitute fraud when the silent party has a duty to speak, and such a duty arises when one party has superior knowledge that is not reasonably available to the other party. 106 To date, no appellate court in Missouri has decided a claim asserting misrepresentation or fraud for the wrongful transmission of herpes or HPV.
3. Battery

Another common cause of action brought in tortious transmission cases is battery.\textsuperscript{107} The \textit{Restatement (Second) of Torts} describes battery in Section 18:

(1) An actor is subject to liability to another for battery if
- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) an offensive contact with the person of the other directly or indirectly results.\textsuperscript{103}

In addition, Section 8A defines intent as the actor’s “desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”\textsuperscript{109} A leading authority establishes that “[t]he gist of . . . battery is that the plaintiff has been touched, intentionally, in a way that [he or] she has not . . . consented to and that is not justified by some generally recognized privilege. The defendant’s intent to touch in a way the plaintiff has not . . . permitted is what counts.”\textsuperscript{110} As a result, courts considering tortious transmission

\textsuperscript{107} See Judd v. Rodman, 105 F.3d 1339, 1340 (11th Cir. 1997) (alleging and recognizing tortious transmission of an STD, battery, fraud, and intentional infliction of emotional distress arising from infection with herpes); Doe v. Ree, 841 F. Supp. 444, 445 (D.C. Cir. 1994) (alleging negligence, fraud, intentional and negligent infliction of emotional distress, and battery, and upholding summary judgment in favor of the defendant based on a conflict of laws issue); Kathleen K., 198 Cal. Rptr. at 274 (alleging and recognizing negligence, battery, fraud, and intentional infliction of emotional distress for the transmission of herpes); Hogan v. Tavzel, 660 So. 2d 350, 351-53 (Fla. Dist. Ct. App. 1995) (alleging and recognizing negligence, battery, fraud, and intentional infliction of emotional distress for the transmission of genital warts); Gabriel v. Tripp, 576 So. 2d 404, 404 (Fla. Dist. Ct. App. 1991) (alleging negligence, battery, fraud, and intentional infliction of emotional distress for infection with herpes, and recognizing only negligence); Long, 333 S.E.2d at 853, 855 (alleging negligence, battery, and intentional infliction of emotional distress for the transmission of herpes, and recognizing only negligence); McPherson v. McPherson, 712 A.2d 1043, 1044-47 (Me. 1998) (alleging and recognizing negligence, assault and battery, and negligent infliction of emotional distress for transmission of HPV); B.N. v. K.K., 538 A.2d 1175, 1177 (Md. 1988) (alleging fraud, intentional infliction of emotional distress, negligence, and assault and battery in the transmission of herpes, and recognizing all but the assault and battery claim due to the running of the statute of limitations).

\textsuperscript{108} \textsc{Restatement (Second) of Torts} § 18 (1965); see also Dobbs, supra note 80, § 28; 43 Am. Jur. Trials § 13 (1991).

\textsuperscript{109} \textsc{Restatement (Second) of Torts} § 8A (1965).

\textsuperscript{110} Dobbs, supra note 80, § 29.
actions brought under battery have not been willing to let defendants off the hook—even if the sexual contact that led to the infection was consensual. For example, the Maine Supreme Court in McPherson v. McPherson, a suit brought by a wife against her husband for tortious transmission, held, in part, that, in a battery action, "[c]onsent may be vitiated . . . by misrepresentation." Nevertheless, it is still necessary to show that the defendant either desired to infect the plaintiff or, at least, that the defendant knew he or she had the disease, which likely would be transmitted through sexual contact with the plaintiff. Furthermore, the court in Hogan v. Tavzel, a Florida case in which a woman sued her ex-husband for battery because he allegedly infected her with genital warts, stated that "consent to sexual intercourse is not the equivalent of consent to be infected with a venereal disease."

In Missouri, the elements of a prima facie case of battery reflect the contents of the Restatement. These elements are set forth in the Missouri Approved Jury Instructions as an intentional act by the defendant that results in "contact with [the] plaintiff which [is] offensive to [the] plaintiff, and" that "such contact would be offensive to a reasonable person." To date, no appellate court in Missouri has decided a wrongful transmission case for herpes or HPV sounding in battery.

4. Intentional Infliction of Emotional Distress

A fourth, and final, commonly pleaded cause of action in the tortious transmission context is intentional infliction of emotional distress. With regard

111. See McPherson, 712 A.2d at 1046; see also Kathleen K., 198 Cal. Rptr. at 276-77; Hogan, 660 So. 2d at 352-53; 43 AM. JUR. TRIALS § 13 (1991).
112. 712 A.2d 1043 (Me. 1998).
113. Id. at 1046; see supra notes 110-11 and accompanying text.
114. McPherson, 712 A.2d at 1046.
116. Id. at 352 (interpreting RESTATEMENT (SECOND) OF TORTS § 892B, illus. 5 (1977)).
118. See, e.g., Judd v. Rodman, 105 F.3d 1339, 1340 (11th Cir. 1997) (alleging and recognizing tortious transmission of an STD, battery, fraud, and intentional infliction of emotional distress arising from infection with herpes); Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 274, 276-77 ( Ct. App. 1984) (alleging and recognizing negligence, battery, fraud, and intentional infliction of emotional distress for the transmission of herpes); Hogan, 660 So. 2d at 351 (alleging and recognizing negligence, battery, fraud, and intentional infliction of emotional distress for the transmission of genital warts); Gabriel v. Tripp, 576 So. 2d 404, 404 (Fla. Dist. Ct. App. 1991) (alleging and recognizing negligence, battery, fraud, and intentional infliction of emotional distress for
to the criteria for such a claim, Section 46 of the Restatement (Second) of Torts states that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Under this cause of action, the Maryland Supreme Court in B.N. v. K.K. found that a "substantial certainty" or a "high degree of probability" that emotional distress would result from the defendant's acts was sufficient to meet the intent element because "the transmission of genital herpes is substantially certain to produce severe emotional distress [due to] the characteristics of the illness." Furthermore, the B.N. court held that "[o]ne who knowingly engages in conduct that is highly likely to infect another with an incurable disease . . . not only engages in intentional or reckless conduct . . . [but] he or she [also] has committed extreme and outrageous conduct." The Missouri Supreme Court initially recognized intentional infliction of emotional distress as a cause of action in 1965, in part based on the language of Section 46 of the Restatement (Second) of Torts. To date, one tortious transmission case heard by a Missouri appellate court appears to have involved intentional infliction of emotional distress. The plaintiff in that case, State ex rel. M.D.K. v. Dolan, alleged that her husband was aware of his diseased condition, that his failure to warn her was "outrageous," and that she incurred the transmission of genital warts; Long v. Adams, 333 S.E.2d 852, 853, 855 (Ga. Ct. App. 1985) (alleging negligence, battery, and intentional infliction of emotional distress for the transmission of herpes, and recognizing only negligence); B.N. v. K.K., 538 A.2d 1175, 1176-77 (Md. 1988) (alleging fraud, intentional infliction of emotional distress, negligence, and assault and battery, and recognizing all but the assault and battery claim due to the running of the statute of limitations); Smith v. Walker, 11 Pa. D. & C.4th 663, 663-65 (1991) (alleging negligence, fraud, intentional infliction of emotional distress, and battery based on infection with genital warts, and recognizing all but the battery claim because neither party's brief addressed that cause of action).

119. RESTATEMENT (SECOND) OF TORTS § 46 (1965); see also 43 AM. JUR. TRIALS § 17 (1991).
120. 538 A.2d 1175 (Md. 1988).
121. Id. at 1180 (quoting Harris v. Jones, 380 A.2d 611, 614 (Md. 1977)); see also Leo, supra note 46, at 64.
122. B.N., 538 A.2d at 1180-81.
123. Pretsky v. Southwestern Bell Tel. Co., 396 S.W.2d 566, 568 (Mo. 1965), abrogated on other grounds by Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (abrogating the impact rule and recognizing negligent infliction of emotional distress).
125. 968 S.W.2d 740 (Mo. Ct. App. 1998).
"medical expenses, pain, severe emotional distress, embarrassment, and anguish" as result of infection with an STD.\(^\text{126}\)

C. Public Policies

As with most torts, the rationales for recognizing wrongful transmission claims include "redressing the violation of important norms, compensating victims, and discouraging unsafe behavior."\(^\text{127}\) Considering the epidemic proportions of herpes and HPV infection,\(^\text{128}\) the rationale of "discouraging unsafe behavior"\(^\text{129}\) under the guise of public health has been a top priority for courts in allowing these tortious transmission cases.\(^\text{130}\) In R.A.P. v. B.J.P.,\(^\text{131}\) an action in which a husband sued his wife for negligent and intentional transmission of herpes, the Minnesota Court of Appeals stated that "Minnesota courts have long recognized that the preservation of public health is a matter of great public importance [and] [l]egal duties and rules must therefore be designed, whenever possible, to help prevent the spread of dangerous, communicable diseases."\(^\text{132}\) Echoing this sentiment, the California Court of Appeals in Doe v. Roe,\(^\text{133}\) a case in which a woman sued a former sexual partner for negligent transmission of herpes, reasoned that "it is beyond question that our state's policy of preventing the spread of venereal disease is great and that the burden of warning a prospective sex partner is small."\(^\text{134}\) Due to this staunch dedication to preserving the public health, defendants who have claimed that privacy interests should be a bar to disclosure and liability have failed.\(^\text{135}\) The Doe court, following state precedent on the issue, held that "[t]he incidental burden on [the] defendant in forcing him to disclose details of his sex life is not sufficient to outweigh the strong interest of the state in preventing the spread of communicable sexual diseases. Consequently[,] we find no constitutional infirmity in the judgment."\(^\text{136}\)

\(^{126}\) \textit{Id.} at 742.


\(^{128}\) \textit{See supra} notes 29-77 and accompanying text.

\(^{129}\) Abel, \textit{supra} note 127, at 455.


\(^{131}\) 428 N.W.2d 103 (Minn. Ct. App. 1988).

\(^{132}\) \textit{Id.} at 106.

\(^{133}\) 267 Cal. Rptr. 564 (Ct. App. 1990).

\(^{134}\) \textit{Id.} at 567.


\(^{136}\) Doe, 267 Cal. Rptr. at 568; \textit{see also} 43 \textit{Am. Jur. Trials} § 22 (1991).
The rationale of "compensating victims"\textsuperscript{137} is obvious in herpes and HPV cases where there is no cure, and where the emotional, physical, and economic costs are staggering.\textsuperscript{138} As a result, courts have spent little time addressing this justification.

The final rationale, "redressing the violation of important norms,"\textsuperscript{139} appears to be the linchpin on which close cases turn. Although transmitting a venereal disease violates societal norms, the situation from which the infection arises is often out of step with social values. As a result, some courts have refused to allow tortious transmission claims when the infection resulted from illegal or immoral conduct, such as sex outside of marriage.\textsuperscript{140} The Virginia Supreme Court in \textit{Zysk v. Zysk}\textsuperscript{141} denied the claim because it arose out of intimate relations prior to the parties' marriage in violation of the state's fornication statute.\textsuperscript{142} The \textit{Zysk} court stated that "Virginia follows the general rule that "a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequences of that act."\textsuperscript{143}

On the other hand, the Michigan Court of Appeals in \textit{Stopera v. DiMarco},\textsuperscript{144} an action in which the transmission arose out of an adulterous affair, found "a 'culpability exception' to the wrongful-conduct rule where the plaintiff and the defendant have both engaged in illegal conduct, but one is more culpable than the other."\textsuperscript{145} In making this finding, the \textit{Stopera} court allowed the tortious transmission action without "condon[ing] and further encourag[ing] . . . illegality."\textsuperscript{146}

\textsuperscript{137} Abel, supra note 127, at 455.
\textsuperscript{138} See supra notes 61, 67, and accompanying text.
\textsuperscript{139} Abel, supra note 127, at 455.
\textsuperscript{140} See Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990); see also Gabriel v. Tripp, 576 So. 2d 404, 405 (Fla. Dist. Ct. App. 1991) (stating that "if the defendant establishes that the plaintiff was engaged in an illegal act at the time he or she contracted the disease, this will bar any recovery"). But see Long v. Adams, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) (allowing recovery in tort for injury resulting from violation of criminal statute); Stopera v. DiMarco, 554 N.W.2d 379, 381 (Mich. Ct. App. 1996) (allowing an exception to the wrongful conduct rule where one party is more culpable of wrongdoing than the other). See generally 43 AM. JUR. TRIALS § 20 (1991); Mack, supra note 78, at 656-58 (discussing the "wrongful-conduct doctrine" and its application in the tortious transmission arena).
\textsuperscript{141} 404 S.E.2d 721 (Va. 1990).
\textsuperscript{142} Id. at 722.
\textsuperscript{143} Id. (quoting Miller v. Bennett, 56 S.E.2d 217, 218 (Va. 1949)).
\textsuperscript{145} Id. at 381.
\textsuperscript{146} Id.; see also Long v. Adams, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) (noting that "[w]hile we do not here condone the sexual mores of our time, neither can we ignore
IV. INSTANT DECISION

After recapping the facts and procedural history that gave rise to the *Deuschle* case, the Missouri Court of Appeals for the Western District of Missouri first acknowledged the standard of review for a dismissal granted on a motion for judgment on the pleadings. Under this standard, "a trial court properly grants a motion for judgment on the pleadings when the moving party can show that on the face of the pleadings, it is entitled to a judgment as a matter of law." So holding, the court discussed the Missouri Supreme Court's decision in *S.A.V. v. K.G.V.* which first recognized wrongful transmission claims sounding in negligence and intentional tort, and also abrogated interspousal immunity in the negligence context. Furthermore, the court pointed to *State ex rel. M.D.K. v. Dolan*, decided by the Missouri Court of Appeals for the Eastern District of Missouri, which stated in its review of *S.A.V.* that "a wife can sue her husband for giving her herpes." The court next considered the applicability of these tortious transmission actions involving spouses to the case at bar in which the parties were not married. The court found "no justification for excluding an unmarried individual from bringing suit against her sexual partner for transmitting herpes under general tort law." To support this finding, the court quoted the California Court of Appeals

the realities of present day life" and stating that "[i]t is well established that a person can recover in tort for injury suffered as a result of his own criminal activity").

148. *Id.*
149. *Id.*
150. *Id.*
151. 708 S.W.2d 651 (Mo. 1986). *S.A.V.* arose from a situation in which a wife allegedly contracted herpes from her husband and sued him for "willfully, recklessly and negligently transmitting the disease to [her] without informing her of his infection." *Id.* at 652.
152. *Deuschle*, 30 S.W.3d at 218.
153. *Id.* (quoting *State ex rel. M.D.K. v. Dolan*, 968 S.W.2d 740, 745 (Mo. Ct. App. 1998)).
154. *Id.*
decision in *Kathleen K. v. Robert B.*,\(^{155}\) a tortious transmission case involving unmarried partners, as holding that "a certain amount of trust and confidence exists in any intimate relationship, at least to the extent that one sexual partner represents to the other that he or she is free from venereal or other dangerous contagious disease."\(^{155}\) Accepting *Kathleen K*'s holding, the court distinguished *S.A.V.* by noting that the Missouri Supreme Court merely held that marriage was neither a bar nor a prerequisite.\(^{157}\)

After recognizing a cause of action for tortious transmission was available to unmarried partners, the court recapped the four elements of negligence—duty, breach, causation, and damages—and stated that "[d]uty is the only element of negligence that is determined as a matter of law."\(^{153}\) In contemplating the imposition of a duty with regard to the transmission of incurable STDs, such as herpes, the court declared a key policy rationale to be "the importance of preserving public health and welfare by creating legal duties, which help prevent the spread of dangerous, communicable diseases."\(^{159}\) Based on this public policy, the court held that "one has a legal duty to exercise reasonable care by disclosing a contagious venereal disease before entering into sexual relations with another."\(^{160}\) The court explicitly described the duty as follows: "In an action for negligent transmission of a venereal disease, a person is liable if he knew or should have known that he was infected with a disease and failed to disclose or warn his sexual partner about this unreasonable risk of harm before engaging in a sexual relationship."\(^{161}\)

The court subsequently turned its attention to determining the foreseeability of harm "[i]n order to establish whether or not this duty ha[d] been breached."\(^{162}\) Setting forth the general rule that a "duty arises from circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury,"\(^{163}\) the court examined STD transmission from the standpoint of "whether or not a reasonably prudent person would have anticipated danger and provided against it."\(^{164}\) Because it found that "herpes is almost exclusively spread through

\(^{155}\) 198 Cal. Rptr. 273 (Ct. App. 1984).
\(^{156}\) *Deuschle*, 30 S.W.3d at 218 (quoting *Kathleen K.*, 198 Cal. Rptr. at 276-77).
\(^{157}\) *Id.* at 218.
\(^{158}\) *Id.*
\(^{159}\) *Id.*
\(^{160}\) *Id.* at 218-19.
\(^{161}\) *Id.* at 219.
\(^{162}\) *Id.*
\(^{163}\) *Id.* (quoting *Gast v. Shell Oil Co.*, 819 S.W.2d 367, 376 (Mo. 1991) (en banc)).
\(^{164}\) *Id.* at 218 (quoting *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc.*/Special Prods., Inc., 700 S.W.2d 426, 431 (Mo. 1985)).
sexual contact,” the court concluded that “it is foreseeable that one’s sexual partner is susceptible to the contagion if the infected partner is aware he [or she] has the disease or suffers from [the] symptoms of the disease.”165 As a result, the court adopted the reasoning of Berner v. Caldwell,166 a tortious transmission case decided by the Alabama Supreme Court, and held that “[o]ne who knows, or should know, that he or she is infected with genital herpes is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them.”167

Following its holdings (1) that Missouri recognizes an action for tortious transmission, (2) that the action is available to unmarried parties, and (3) that persons with herpes have a duty to abstain from sexual contact with others or to warn others of the infection prior to such contact, the court found that Ms. Deuschle alleged facts sufficient to make a prima facie showing.168 Furthermore, the court noted that Ms. Deuschle’s petition also appeared to invoke an intentional tort theory of recovery but that it did not do so clearly; therefore, the court “direct[ed] the trial court to allow her to amend the petition to allege a specific intentional tort.”169 Finally, the court reversed the judgment of the lower court and remanded the cause “to reinstate Ms. Deuschle’s petition consistent with [the] opinion.”170

V. COMMENT

In Deuschle, the Missouri Court of Appeals for the Western District of Missouri cleared the way for unmarried sexual partners to bring actions in negligence or intentional tort for the wrongful transmission of herpes and HPV. While in line with the majority of jurisdictions that have addressed wrongful transmission between unmarried partners,171 this decision was somewhat

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165. Id. at 218.
166. 543 So. 2d 686 (Ala. 1989), rev’d on other grounds by Ex parte Gen. Motors Corp., 769 So. 2d 903 (Ala. 1999).
167. Deuschle, 30 S.W.3d at 219 (quoting Berner, 543 So. 2d at 689).
168. Id. at 218-19.
169. Id. at 219.
170. Id. at 219-20.
surprising because Missouri is typically conservative on issues arising in the bedroom.\textsuperscript{172}

However, despite this step by the court, the path to recovery is still rife with pitfalls for victims of this tort who seek redress through legal channels. The potential bars to recovery that will be addressed in this Part include: (1) establishing a duty based on the defendant's actual or implied knowledge of the infection; (2) causation; (3) reluctance to bring an action due to discovery into and introduction of the plaintiff's condition and sexual history; (4) statutes of limitations; and (5) judgment-proof defendants.

The first hurdle in establishing a prima facie case for tortious transmission is demonstrating a duty on the part of the infected defendant, at least, to warn the plaintiff of the existence of the disease prior to engaging in intimate relations.\textsuperscript{173} The existence of such a duty hinges on what the defendant knew or should have known with regard to his or her diseased condition at the time.\textsuperscript{174}

The most logical way to prove knowledge, it would seem, is by obtaining the defendant's medical records; however, "it may be difficult to prove the . . . defendant actually had the disease because his or her medical records may be

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  \item \textsuperscript{172} See, e.g., MO. REV. STAT. § 1.205(1) (2000) (stating that "life . . . begins at conception"); MO. REV. STAT. § 188.015(1) (2000) (defining abortion, in part, as "the intentional destruction of the life of an embryo or fetus in his or her mother's womb"); MO. REV. STAT. § 188.028 (2000) (establishing the process by which a minor may obtain an abortion); MO. REV. STAT. § 188.039.2(3) (2000) (requiring physicians to provide women seeking abortions with information on the alternatives to abortion prior to obtaining informed consent to perform the procedure); MO. REV. STAT. § 188.205 (2000) (prohibiting the use of public funds in the performance of, assistance in, or counseling on non-therapeutic abortions); MO. REV. STAT. § 188.215 (2000) (prohibiting the use of public facilities in the performance of, assistance in, or counseling on non-therapeutic abortions); MO. REV. STAT. § 431.061.1(4)(a) (2000) (barring a minor from providing consent on her own behalf to receive an abortion); MO. REV. STAT. § 451.022 (2000) (prohibiting marriage between same sex partners); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (upholding Missouri laws barring the use of public facilities and funds in the provision of non-therapeutic abortions); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983) (affirming the constitutionality of a Missouri law requiring parental consent prior to allowing minors to obtain abortions); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (striking down a Missouri law that required wives to obtain their husband's consent prior to obtaining abortions). As a result, it would not have been surprising for the Deuschle court to have followed the Zysk opinion by the Virginia Supreme Court in holding there can be no recovery for damages resulting from participation in an illegal or immoral act. For a discussion of Zysk, see supra notes 140-43 and accompanying text.
  \item \textsuperscript{173} See supra notes 83-88 and accompanying text.
  \item \textsuperscript{174} See supra notes 86, 99, and accompanying text.
\end{itemize}
unobtainable." For example, the defendant may have used an alias in seeking medical care—thereby, making the records undiscoverable. Another problem is a possible lack of medical records if the defendant never sought care for the condition because he or she suffered no symptoms. This scenario easily could arise because "[u]p to [sixty percent] of people who have genital [herpes] . . . show no signs of the disease and are unaware that they are infected[, although they] . . . are . . . capable of transmitting the virus to others." In addition, HPV often has no "visible signs and symptoms." It is also possible that a symptomatic defendant purposely did not seek care to avoid diagnosis. Furthermore, even if care was sought, the condition may not have been diagnosed accurately—especially herpes, which is notoriously difficult to diagnose.

The next potential barrier is causation. Just because a plaintiff manifests symptoms of herpes or HPV following sexual contact with the defendant does not necessarily lead to the conclusion that the contact was the proximate cause of the plaintiff’s infection. With regard to herpes, a plaintiff may have acquired the disease previously but may not have experienced an outbreak until he or she was re-exposed to the virus through contact with the defendant. Moreover, for those who are predisposed to outbreaks, there can be a two-week gap between exposure and the primary occurrence. Likewise, the wart-causing strains of HPV have a three-month incubation period. As a result, the case could be vulnerable to attack if the victim had prior or subsequent sexual partners.

176. Id.
179. See supra note 40 and accompanying text.
180. Planned Parenthood, Herpes: Questions & Answers, at http://www.plannedparenthood.org/sti-safesex/herpes.htm (last modified Sept. 2000). "Many people carry the virus . . . but do not have their first episode . . . until they are infected another time." Id.
182. See supra note 71 and accompanying text.
183. Winokur, supra note 175; see Kenneth C. Jones, Woman Can Sue Man Who Gave Her Herpes, MO. LAW. WKLY, Nov. 6, 2000, at 14; see also 43 AM. JUR. Trials §
This causation quandary puts a victim's sexual history at issue and highlights the embarrassment inherent in making such a private problem public.\textsuperscript{184} This sensitivity to making one's sexually-related medical condition public may be exacerbated by the psychological "lier effect" and guilt experienced by herpes victims due to the incurable nature of this socially-frowned-upon illness.\textsuperscript{185} Even if a plaintiff overcomes these emotional and social hurdles, a court may allow the admission of potentially prejudicial evidence. In \textit{Judd v. Rodman},\textsuperscript{186} the court allowed into evidence the plaintiff's "prior sexual history, employment as a nude dancer, and breast augmentation surgery."\textsuperscript{187} On appeal, the court held that "this evidence did not constitute reversible error."\textsuperscript{188} The court specifically found, with regard to the "evidence of [the plaintiff's] sexual history and nude dancing, [that] this evidence was substantially more probative than prejudicial [under Federal Rule of Evidence 412] and, therefore, [was] properly admitted at trial."\textsuperscript{189}

Another obstacle involves the running of the pertinent statutes of limitations. This issue typically arises when an STD infection is unknown to a plaintiff for a number of years\textsuperscript{190} or when a plaintiff simply does not bring the action in a timely manner.\textsuperscript{191} In such instances, courts have not tolled statutes of limitations in tortious transmission cases.\textsuperscript{192} As a result, statutes of limitations may preclude wrongful transmission claims from getting out of the gate. Missouri's relevant statutes of limitations are contained in Missouri Revised Statutes Section 516.120, which requires actions for personal injury to be brought within five years and claims based on fraud to be brought within fifteen years of the action giving rise to the claim.\textsuperscript{193}

\begin{itemize}
\item 11 (1991).
\item 184. Winokur, \textit{supra} note 175; see Jones, \textit{supra} note 183, at 14.
\item 185. Leo, \textit{supra} note 46, at 64 (internal quotation marks omitted); see Jones, \textit{supra} note 183, at 14; Winokur, \textit{supra} note 175.
\item 186. 105 F.3d 1339 (11th Cir. 1997).
\item 187. \textit{Id.} at 1340.
\item 188. \textit{Id.} at 1343.
\item 189. \textit{Id.}
\item 190. See \textit{supra} notes 30 and 35.
\item 191. This reluctance may be related to the fact that the plaintiff and defendant have an ongoing relationship, such as an intact marriage.
\item 192. See, e.g., Ruona v. Ruona, No. C2-9201575, 1993 WL 4125, at *1-2 (Minn. Ct. App. Jan. 2, 1993) (upholding the trial court's decision to "deny a motion to amend pleadings when the proposed amendment would serve no legal purpose" with regard to reinstating a "time-barred tort claim"); R.A.P. v. B.J.P., 428 N.W.2d 103, 109 (Minn. Ct. App. 1988) (refusing to create a judicial exception to the statute of limitations because the parties were married).
\item 193. Mo. Rev. Stat. § 516.120 (2000). Specifically with regard to fraud, Section 516.120(5) states: "An action for relief on the ground of fraud, the cause of action in such
A final, case-breaking concern is a source of recovery. Most commonly, this source is a liability insurance policy. However, since the advent of tortious transmission cases in the mid-1980s, “[m]any insurance carriers quickly drafted policy language excluding coverage for sexually transmitted diseases.” Even in the absence of such an exclusion, there may be no coverage based on other policy provisions, such as the intentional and criminal acts exclusions, which are almost universally included in homeowners policies. Intentional act exclusions “explicitly limit[] coverage for intentionally caused losses” and are supported by public policy, which “forbids contracts indemnifying a person against loss resulting from his or her own willful wrongdoing.” Similarly, criminal act exclusions serve the same purpose and may come into play in the wrongful transmission context where a state has criminal statutes relating to the transmission of STDs, fornication, or adultery. Using exclusionary policy provisions, some insurers have been able to avoid indemnifying defendants for case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.” Mo. Rev. Stat. § 516.120(5) (2000). As a result, in the case of fraud, a party has ten years to discover the fraud and an additional five years to bring an action.

194. Defendants may be judgment proof because they have no assets or liability coverage, or because their actions have invalidated any such coverage. See Jones, supra note 183, at 14; Winokur, supra note 175.


196. Eidsmoe & Edwards, supra note 78, at 923-24. The Insurance Services Office’s (“ISO’s”) boilerplate exclusion language for use in homeowners policies states that “[t]here is no liability coverage for bodily injury that ‘arises out of the transmission of a communicable disease by an insured.”’ Eidsmoe & Edwards, supra note 78, at 927 (quoting the Communicable Disease Exclusion Endorsement from the ISO’s homeowners policy). In addition to or in lieu of this exclusion, some insurers have adopted their own versions of such an exclusion, and labeled them the “Sexually Transmitted Disease Exclusion” or the “Sexual Contact Exclusion.” Eidsmoe & Edwards, supra note 78, at 930-32.

197. Eidsmoe & Edwards, supra note 78, at 933-41.

198. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 63, at 383-84 (2d ed. 1996). There is authority for the proposition that intent to transmit an STD, such as herpes, “[c]an be inferred as a matter of law” where “the insured knew or should have known that he had herpes and could transmit it through unprotected sex...” Id. § 63C, at 408 (citing R.W. v. T.P., 528 N.W.2d 869 (Minn. 1995)). The insured’s mere “awareness of a substantial probability of harm [would be] enough to render the resulting injury ‘intentional.’” Id. However, there is also authority to the contrary. Id. (citing State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374 (Tex. 1993)).

199. JERRY, supra note 198, § 63C, at 408.

200. See Eidsmoe & Edwards, supra note 78, at 939-41.
tortious transmission judgments and settlements. These consequences—whether they flow from the fact that the defendant is judgment proof or from the fact that liability insurance exists but excludes coverage—are directly contrary to the goals of recognizing claims for wrongful transmission—or any other tort.

VI. CONCLUSION

Through its decision in Deuschle v. Jobe, the Missouri Court of Appeals of the Western District of Missouri has added Missouri to the ranks of a growing number of jurisdictions that recognize negligence and intentional tort claims brought by unmarried partners for the wrongful transmission of herpes and HPV. The Deuschle opinion, however, does not make recovery a sure thing for those unwittingly infected with herpes or HPV. Before this outcome is achieved, numerous changes in the legislative, medical evidence, insurance, and social norm landscapes must occur. Nevertheless, Missouri victims of tortious transmission at least have an opportunity to right a wrong through legal channels.

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201. See, e.g., R.W. v. T.F., 528 N.W.2d 869, 873 (Minn. 1995) (holding that “[w]e refuse to promote the abdication of personal responsibility by providing insurance coverage when an insured engages in unprotected sexual intercourse despite having knowledge that he is infected with herpes, a highly contagious and serious sexually transmitted disease”). But see, e.g., Milbank Ins. Co. v. B.L.G., 484 N.W.2d 52, 58 (Minn. Ct. App. 1992) (holding, in pertinent part, that “[c]overage is not avoided by an intentional act exclusion unless the insured has acted with intent to cause a bodily injury[, and w]hen the act . . . is intended but the resulting injury is not, the insurance exclusion has no application”); State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 377 (Tex. 1993) (finding that “[a]n insured under [an insurance] policy with an intentional injury exclusion still relies on the policy to provide indemnity against fortuitous, unexpected or undesigned injury”); Loveridge v. Chartier, 468 N.W.2d 146, 157 (Wis. 1991) (reasoning that “the existence of insurance coverage does not necessarily promote the abdication of personal responsibility”). See generally Eidsmoe & Edwards, supra note 78, at 936 (collecting cases).