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NOTE

Resurrection of a Dead Remedy: Bringing Common Law Negligence Back into Employment Law

Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations, 277 S.W.3d 670 (Mo. 2009) (en banc).

AMANDA YODER

I. INTRODUCTION

Prior to the enactment of workers’ compensation laws\(^1\) across the United States and in Missouri, many employees injured on the job were left with no redress. In 1921, less than 3,000 of the nearly 50,000 employees injured in Missouri received compensation.\(^2\) During this time, an estimated 25,000 employees died on the job in industrial accidents but less than twenty percent of their families received compensation.\(^3\) Those families that were compensated still had to bear the cost and delay of litigation.\(^4\) In response, legislatures sought to protect employees from the risks of the workplace and transfer the burden of recovery for injuries from the employee to the employer by enacting workers’ compensation laws.\(^5\)

However, with recent amendments to the Missouri Workers’ Compensation Act (the Act), many feel that the employer can now push the risk of injury back onto the employee without bearing the financial obligations.\(^6\) The


\(^2\) Id. at 416 n.2.

\(^3\) 1d.

\(^4\) Id.


2005 amendments to the Act have significantly curtailed the ability of employees to file claims. The original bargain struck between employer and employee that formed the basis of worker compensation statutes is no longer the same balanced exchange.

The Supreme Court of Missouri addressed this issue and concluded that employees excluded from compensation under the Act now have another option – a common law negligence cause of action. This is a considerable change to the entire statutory system that Missouri has operated under for almost ninety years, leaving both employers and employees in a quandary over how to deal with workplace injuries. Employees do not know which theory to pursue for compensation and employers do not know how to protect themselves against claims of negligence.

II. FACTS AND HOLDING

In Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations (M.A.R.A.), the Supreme Court of Missouri considered a challenge brought by a group of labor organizations regarding recent amendments to Missouri’s workers’ compensation statute. The case arose from the 2005 amendments, namely Senate Bill Nos. 1 and 130, which significantly changed key components of the workers’ compensation system. The most significant changes originated from the 2005 amendment’s more restrictive definition of “accident,” the heightened burden on employees to prove causation, and the complete denial of compensation for particular injuries. These labor organizations claimed that the amendments violated due process, violated the Missouri Constitution’s open courts provision, and lacked a rational basis for the reduction in benefits available to employees. The labor organizations contested the constitutionality of the amendments as a whole in two counts of the complaint, challenged specific statutory language in six counts, and sought a declaratory judgment as to the rights of employees exempted from the Act.

8. Id. at 674 (plurality opinion).
9. Employees will need to pursue compensation under the Act or under common law negligence. However, because an injury is not compensable under both the Act and common law negligence, figuring out which theory to pursue may prove difficult.
11. Id.
14. Id. at 674.
The labor organizations claimed that the amendments as a whole were unconstitutional because they altered the original bargain of the workers’ compensation law.\textsuperscript{15} The bargain established that workers would surrender “the right to sue their employers at common law in exchange for lower but certain compensation, without regard to fault, in all cases of accidental work-related injury.”\textsuperscript{16} The labor organizations argued that if the rights originally established in the bargain were reduced, then the bargain was breached.\textsuperscript{17} The organizations claimed the bargain was of a quid pro quo nature so that if “the legislature [amends the statute, it] must provide . . . [protection equal to or] or greater than that provided in the original [Act].”\textsuperscript{18} The plaintiffs argued that because the 2005 amendments restricted the definitions of “accident” and “injury,” they, in effect, limited some types of injuries that were compensable under the original Act and completely barred other types of work-related injuries.\textsuperscript{19}

The plaintiffs further contended that diminishing the rights originally afforded by the bargain would deprive employees of life, liberty, or property without the procedural or substantive due process of law guaranteed under the Missouri Constitution.\textsuperscript{20} This argument centered on the logic of the workers’ compensation statutes comprising the exclusive remedy for injured employees.\textsuperscript{21} In essence, the labor organizations argued that because the Act constituted the exclusive remedy for injured employees, the 2005 amendments were unconstitutional because they barred claims from both the workers’ compensation system and the courts.\textsuperscript{22}

The Missouri Division of Workers’ Compensation (the Division) countered that the Workers’ Compensation Act was not quid pro quo and the legislature could amend the statutes at any time.\textsuperscript{23} To support this, the Division noted that the courts have upheld previously amended statutes.\textsuperscript{24} The Division contended that the legislature used a rational basis in amending the Act by limiting the types of injuries covered.\textsuperscript{25} Moreover, the Division argued that even if the amendments violated some provision of the U.S. or Missouri Constitution, the labor organizations lacked standing to bring these claims because no actual person or group suffered injury.\textsuperscript{26}

\textsuperscript{15} Id. at 675.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 674.
\textsuperscript{19} MO. REV. STAT. § 287.020 (Supp. 2009).
\textsuperscript{20} M.A.R.A., 277 S.W.3d at 673, 675.
\textsuperscript{21} Id. at 675.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 676.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
The circuit court determined that although a labor organization could bring a claim on behalf of its members, the individual members first needed a justiciable interest. A justiciable interest arises if the individual member has a legally protectable interest that is both adverse to another party's interest and ripe for judicial determination. The circuit court granted judgment as a matter of law in favor of the Division as to the constitutional due process challenges to the statutes. Moreover, the circuit court found the request for declaratory judgment as to the rights of those employees exempt from relief under the workers' compensation statutes to be non-justiciable; thus, the trial court also awarded summary judgment to the Division on this point.

Upon review, the Supreme Court of Missouri found that the labor organizations had legally protectable interests that were genuinely adverse to the Division on all counts. However, the Supreme Court of Missouri held that because the plaintiffs could not show that any person had actually been injured by the Act's amendments, the constitutional and due process claims were not ripe for judicial review. The court, however, did find the employees' request for declaratory judgment regarding the exclusivity requirements of the Act to be justiciable. On this claim the court ruled in favor of the labor organizations, holding that employees exempted from recovery under the workers' compensation statute because of the amended definitions of "accident" and "injury" were not bound by the Act's exclusivity clause. For this reason, the court held that these employees were entitled to pursue recovery for their injuries under common law negligence.

27. Id.
28. Id.
29. Id. at 674. "The trial court held that the [D]ivision was entitled to judgment as a matter of law on counts I and III . . . ." Id. Additionally, it "granted the [D]ivision's motion for summary judgment, holding that all the other counts, including count IV, were not justiciable." Id.
30. Id. at 674.
31. Id. at 677.
32. Id. at 677-78.
33. Id. at 678.
34. Id. at 679.
35. Id. at 680. The exclusivity clause of the Workers' Compensation Act states that "[t]he rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee . . . at common law or otherwise." Id. at 679. This clause bars employees from bringing any other action against an employer for an injury except as provided under the Workers' Compensation Act. Id.
III. LEGAL BACKGROUND

A. History of Workers' Compensation Laws

Originally, the injury of employees while on the job was not a matter of public concern due to the close relationships between employers and their employees. This changed as people moved from occupations in agriculture to manufacturing during the Industrial Revolution. More efficient processes in manufacturing brought about more complicated and dangerous machinery. As a result of the employee-employer relationship, the employer assumed the duty of providing a safe working environment for the employee. If an employee was hurt on the job and his or her employer did not voluntarily provide assistance with the cost of the work-related injury, the employee could pursue recovery only under a common law theory of negligence. However, negligence causes of action offered an unsatisfactory avenue for providing relief to employees. First, employees had the burden to submit sufficient proof to show that the employer was negligent. Second, even if an employee could provide sufficient proof of negligence, it was often difficult for employees to overcome the employer's three defenses to common law negligence: (1) the fellow-servant doctrine, (2) assumption of risk, and (3) contributory negligence.

36. PATRICK J. PLATTER, I MO. WORKERS' COMPENSATION LAW § 1.1 (3d ed. 2004). Prior to the Industrial Revolution, most people worked in agriculture. Id. This type of work fostered a close relationship between "master" and "servant." Id. Often because of this close relationship, employers felt an obligation to assist employees injured at work. Id.

37. Id.

38. Id.

39. Id.

40. Id.

41. Id.

42. Id. These defenses first surfaced in PRIESTLEY v. FOWLER, 3 Mees. & Wels. 1 (1837) and BUTTERFIELD v. FORRESTER, 11 East 60 (1809).

43. PLATTER, supra note 36, § 1.1. In PRIESTLEY, the defense of the "fellow-servant rule" came to light. 3 Mees. & Wels. at 1-7. In PRIESTLEY, the court held that the employer was not liable when one employee harmed another employee. Id. The court considered this an exception to "respondeat superior," in which the master was typically responsible for the actions of a servant "in the scope and course of their employment." PLATTER, supra note 36, § 1.1 (citing PRIESTLEY, 3 Mees. & Wels. at 1-7).

44. PLATTER, supra note 36, § 1.1. "Assumption of risk" also came from PRIESTLEY. Id. This defense put the burden on the employee for working in a dangerous job. Id. The court in PRIESTLEY felt that both the employee and employer were equally aware of the dangerous condition and, if an employee so choose, he or she could work elsewhere. Id.
As the number of work-related injuries increased, the issue of compensating employees for workplace injuries became more of a public concern. Employers began contracting out of liability for employee injuries that occurred at the workplace, and this left employees without redress. 46 In Missouri, reports surfaced that employees were fairly compensated for injuries at work. 47 However, later studies found this to be unsupported. 48 By 1908, many states prohibited this one-sided approach and even extended an employee’s claim to survive him in death. 49 This change in the law began a wave of new legislation that expanded the law to allow claims against managers and coworkers, limitations on employer defenses, extended periods of compensation, and additional types of benefits and treatment for injured employees. 50 Workers’ compensation became one of the first “social insurance” programs extensively developed in the United States. 51

Unfortunately, the results of this initial legislation provided inadequate compensation to employees. 52 States instead began to follow a no-fault compensation model that originated in Germany. 53 When this no-fault system first originated, some states enacted the legislation as compulsory for all employers. 54 Other states, however, allowed an employer to choose whether he or she wanted to compensate employees for work-related injuries under the workers’ compensation statutes or remain liable under common law. 55 Under common law, an employer who was liable for an employee’s injury faced a higher potential payout of compensation to the injured employee. 56 As a result, common law remedies provided the employer with less protection and,

45 ld. The rule of contributory negligence originated in Butterfield. ld. Under this rule, even if the employee could show that the employer was negligent, the employee’s own negligent actions would bar all recovery. Id.

46 ld. § 1.3. Employers would include a release from liability in the employee’s contract. Id. If a person wanted to work for that particular employer, he or she had no other option but to sign the contract and release the employer from any injuries that he or she may incur at the workplace. Id.


48 ld.

49 Platter, supra note 36, § 1.3.

50 Id.

51 Cohn, supra note 47, at 24.

52 Id. at 24-25.

53 Platter, supra note 36, § 1.3.

54 Id.

55 Id.

56 Id. § 1.1.
in effect, encouraged employers to opt in to the workers’ compensation scheme.\textsuperscript{57}

1. History of Workers’ Compensation in Missouri

Problems with properly compensating injured workers surfaced in Missouri.\textsuperscript{58} Before the enactment of the workers’ compensation statutes in Missouri, an employee who wanted to recover for a work-related injury could only pursue a remedy under common law.\textsuperscript{59} However, these employees were met with “the ‘unholy trinity’ or the ‘wicked sisters’ of [the employers’] common law defenses [to negligence]: assumption of risk, contributory negligence and the fellow-servant doctrine.”\textsuperscript{60}

In the early 1900s, Missouri created a commission to study the issue statewide.\textsuperscript{61} The commission found that many employees who were injured on the job remained uncompensated.\textsuperscript{62} The commission reported these findings to the Missouri legislature, and, consequently, a bill was drafted during the 1915 session.\textsuperscript{63} Unfortunately, no bill passed until 1925.\textsuperscript{64} Initially, Missouri allowed employers to choose their own compensation method for employees injured in the scope of their employment.\textsuperscript{65} Slowly, Missouri began requiring more employers to adopt the workers’ compensation method. By

\textsuperscript{57} Id. § 1.3. Many states were hesitant to make the legislation compulsory because they feared it would be struck down as unconstitutional since it restricted the rights of employers and employees. Id.

\textsuperscript{58} See supra Part III.A.


\textsuperscript{60} Id.; see also Reed v. Kan. City Wholesale Grocery Co., 156 S.W.2d 747, 750 (Mo. App. K.C. 1941) (policy was to take the burden off the employee for injuries sustained in due course of employment); Farmer-Cummings v. Future Foam, Inc., 44 S.W.3d 830, 835 (Mo.App. W.D. 2001) (“The purpose of the Workers’ Compensation Act is to provide a method of compensation for injuries sustained by employees through accidents arising out of and in the course of employment and to place the burden of such losses on the industry rather than the injured employee and employee’s family.”), overruled on unrelated grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (en banc).

\textsuperscript{61} PLATTER, supra note 36, § 1.4.


\textsuperscript{63} PLATTER, supra note 36, § 1.4

\textsuperscript{64} Id.

\textsuperscript{65} Employers had the choice of remaining subject to common law negligence claims or choosing to abide by the workers’ compensation system. Id.
1974, the legislation was compulsory for all employers with more than five employees.  

The legislature created Missouri’s workers’ compensation laws as a no-fault compensation system – the laws were considered a “give and take” between employers and employees. These laws guaranteed compensation to an employee for any work-related injury. Although the employee received less than what he or she might have obtained in court through a negligence claim, such recovery was guaranteed and not subject to the uncertainties of a negligence cause of action. In exchange for this certain, albeit reduced, compensation, the employee, with limited exceptions, gave up the right to pursue any other legal claim arising from the injury against the employer. In turn, employers agreed to fund the no-fault system, receiving the certainty attached to knowing that employees’ claims for workplace injuries could be addressed exclusively through the workers’ compensation system.

As the court in Leicht v. Venture Stores, Inc. stated, “The purpose of the Workmen’s Compensation Act is to substitute finite liability for the ‘fortuities’ of the . . . common law remedies.” These workers’ compensation laws were not meant to supplement the common law, but rather to be “wholly substitutional” – the Workers’ Compensation Act became the exclusive remedy for injured employees. As a result, common law actions for negligence against an employer by an employee were abolished.

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66. PLATTER, supra note 36, § 1.4.
68. See Mo. Alliance for Retired Ams. v. Dep’t of Labor & Indus. Relations, 277 S.W.3d 670, 675 (Mo. 2009) (en banc).
70. See id.
71. Id.
73. Todd, 493 S.W.2d at 416.
74. MO. REV. STAT. § 287.120.2 (2000).
75. Gen. Motors Corp. v. Holler, 150 F.2d 297, 298-99 (8th Cir. 1945).
B. Missouri's Workers' Compensation Law Prior to 2005

Prior to 2005, courts construed the term “employer/employee” broadly in order to protect the largest possible class of employees.\(^{76}\) In cases involving a question of whether a person was qualified for compensation under the Act, the person was considered included under the Act.\(^{77}\) Once a court considered a person an employee/employer as provided in Missouri Revised Statute section 287.020, the employee then had the burden of proof to show an accident occurred resulting in an injury and the extent of that injury.\(^{78}\) As applied in workers’ compensation law, the terms “accident” and “injury” are not the same thing;\(^{79}\) an injury results from an accident.\(^{80}\)

Prior to 2005, an accident was something unexpected, defined as an “unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault.”\(^{81}\) Historically, to satisfy the statutory injury requirement, an employee had to suffer an injury to the physical structure of his or her body.\(^{82}\) Additionally, the employee must have exhibited symptoms at the time of the accident or have shown that they naturally flowed from the accident.\(^{83}\) The limitation “to the physical structure of the body” was eventually expanded to include other types of injuries such as emotional injuries, stress, idiopathic injuries,\(^{84}\) and aggravation of pre-

\(^{76}\) Farmer-Cummings v. Future Foam, Inc., 44 S.W.3d 830, 835 (Mo. App. W.D. 2001), overruled on unrelated grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (en banc); Dost v. Pevely Dairy Co., 273 S.W.2d 242, 244-45 (Mo. 1954); Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 911-12 (Mo. 1934); Pruitt v. Harker, 43 S.W.2d 769, 772-73 (Mo. 1931).

\(^{77}\) Burgess v. NaCom Cable Co., 923 S.W.2d 450, 452 (Mo. App. E.D. 1996).


\(^{79}\) Brown v. Douglas Candy Co., 277 S.W.2d 657, 665 (Mo. App. 1955); Cleveland v. Laclede Christy Clay Prods. Co., 129 S.W.2d 12, 16 (Mo. Ct. App. 1939), overruled in part on unrelated grounds by Wentz v. Price Candy Co., 175 S.W.2d 852 (Mo. 1943); Wheeler v. Mo. Pac. R.R. Co., 42 S.W.2d 579, 581 (Mo. 1931).


\(^{83}\) Smith v. Am. Car & Foundry Div., A.C.F. Indus., Inc., 368 S.W.2d 515, 518 (Mo. App. 1963), overruled on unrelated grounds by Hampton, 121 S.W.3d 220.

\(^{84}\) "Idiopathic injuries, or those injuries caused by some inherent quality of the employee such as fainting spells, are often not compensable because they are not unique or exacerbated by the workplace." Drewes v. Trans World Airlines, Inc., 1998 WL 286037, *3 (Mo. App. E.D. 1998), aff’d, 984 S.W.2d 512 (Mo. 1999) (en banc).
existing conditions. Additionally, the accident and injury had to be related to work, meaning that the employment was a “substantial factor” in the resulting injury. The courts decided cases by broadly construing the definitions of accident and injury and applying the “substantial factor” requirement of relation to work. The courts’ interpretations of the law were bolstered by the 2000 amendments to the workers’ compensation scheme, which were considered merely a codification of how courts were already interpreting the workers’ compensation statutes.

Missouri courts required an employee to fulfill several requirements before bringing a workers’ compensation claim. First, an employee needed to illustrate that the injury occurred during an accident as defined in section 287.020 by showing that his or her employment was a substantial contributing factor in causing the harm. This substantial factor requirement merely required an employee to show that the employment was more than a minimal factor in causing the injury. Once this substantial factor requirement was met, the employee needed to demonstrate that the injury was a natural inci-

These could be injuries such as a heart attack, seizure, etc. that an employee suffered because of his or her inherent nature and health.


86. Wolfgeher v. Wagner Cartage Serv. Inc., 646 S.W.2d 781, 785 (Mo. 1983) (en banc).

87. Id. (eliminating the narrow construction of “accident” in § 287.020); Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87, 90 (Mo. 1983) (en banc) (employee had a heart attack and was still compensated), superseded by statute, Missouri Employers Mutual Insurance Company Act, S.B. 251, 87th Gen. Assem., 1st Reg. Sess. (Mo. 1993), as recognized in Kasl v. Bristol Care Inc., 984 S.W.2d 852 (Mo. 1999) (en banc); Kinney v. City of St. Louis, 654 S.W.2d 342, 343-44 (Mo. App. E.D. 1983) (employee did not recover because lack of evidence of “accident” at the workplace); § 287.020.2.


90. See Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. E.D. 1998), overruled on unrelated grounds by Hampton, 121 S.W.3d 220; Kasl, 984 S.W.2d at 853.
dent of the employee’s work.\textsuperscript{91} Natural incidents to an employee’s work benefited the employer and arose out of and in the course of the employment.\textsuperscript{92} Additionally, arising out of and in the course of employment were not the same things – arising out of referred to the time, place, and circumstances being \textit{substantially related} to the employment.\textsuperscript{93} Once the employee established that the injury was incidental to the employment and that the employment was a substantial factor, an employee then needed to show that the proximate cause of the injury was traceable to the employment\textsuperscript{94} and that the employee would not have suffered this injury outside of work.\textsuperscript{95}

\textsuperscript{91} § 287.020.3(2)(c); Willeford v. Lester E. Cox Med. Ctr., 3 S.W.3d 872 (Mo. App. S.D. 1999), \textit{overruled on unrelated grounds by Hampton}, 121 S.W.3d 220.

Risks and activities which may, under some circumstances, arise out of an employee’s employment as an incident of an employee’s employment include: (1) activities for the comfort of an employee; (2) claims arising on an employer’s premises while an employee is entering or leaving employment; (3) violations of an employer’s rules or policies; (4) horseplay; (5) assaults; (6) idiopathic injuries; (7) acts of God; (8) recreational injuries; (9) the receipt of an employee’s paycheck, and the making of arrangements for the handling of future paychecks; (10) activities performed during off-duty periods for the benefit of an employee’s employer when the employee has voluntarily assumed the duties of the employee’s employment due to a desire to advance the employer’s interests; (11) preparation of a vehicle; (12) attendance at social events; (13) the absent-minded stretching of a rubber band picked up from the floor of an employer’s premises; (14) an injury suffered during an extortion attempt involving the taking of the victim’s wife as a hostage; . . . (15) an injury to a service station attendant while on the way to pick up an engine for his drag racing vehicle being sponsored by the service station owner; (16) participation [sic] in an apprenticeship training class; [and] (17) entering and leaving an employer’s premises over a parking lot for an extended period of time.


\textsuperscript{92} Cherry v. Powdered Coatings, 897 S.W.2d 664, 667 (Mo. App. E.D. 1995); James v. CPI Corp., 897 S.W.2d 92, 95 (Mo. App. E.D. 1995); Davison v. Florsheim Shoe Co., 750 S.W.2d 481,483 (Mo. App. W.D. 1988), \textit{overruled on unrelated grounds by Hampton}, 121 S.W.3d 220.


\textsuperscript{94} McCutcheon v. Tri-County Group XV, Inc., 920 S.W.2d 627, 631 (Mo. App. S.D. 1996).
In addition to proving that the employment caused the injury, the employee needed to demonstrate that the injury was compensable under the Act. 96 Prior to 2005, the scope of the workers’ compensation law was much broader. An injury could include deterioration or degeneration because of work-related injuries, both of which were classified as an “occupational disease” under the Workers’ Compensation Act. 97 Similarly, exposure to fumes or chemicals was compensable if it could be shown that the employment had subjected the employee to a greater risk than he or she would have been subjected to in a normal environment. 98 Another important aspect of the pre-2005 Workers’ Compensation Act was compensation for the aggravation of pre-existing, non-disabling conditions even if the injury would not have occurred to a healthy employee. 99 Additionally, the pre-2005 Workers’ Com-

95. See, e.g., Cook v. St. Mary’s Hosp., 939 S.W.2d 934, 939 (Mo. App. W.D. 1997) (citing McCutcheon, 920 S.W.2d at 632). An occupational disease under worker’s compensation law involves additional requirements. § 287.067.1.

96. This is true under both the pre-2005 amendments and under the new 2005 amendments. § 287.020 (detailing all statutory definitions that determine the compensability of an injury); MO. REV. STAT. § 287.020 (Supp. 2008) (same).


98. See Moyer v. Orek Coal Co., 82 S.W.2d 924 (Mo. Ct. App. 1935).

99. Kelley v. Banta & Stude Constr. Co., Inc., 1 S.W.3d 43, 48 (Mo. App. E.D. 1999); Smith v. Climate Eng’g, 939 S.W.2d 429, 436 (Mo. App. E.D. 1996), overruled on unrelated grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (en banc); Hoffman v. Mayberry Bros. Constr., 904 S.W.2d 572, 574 (Mo. App. S.D. 1995), overruled on unrelated grounds by Hampton, 121 S.W.3d 220; Rector v. City of Springfield, 820 S.W.2d 639, 643 (Mo. App. S.D. 1991) (en banc), superseded by statute, Missouri Employers Mutual Insurance Company Act, S.B. 251, 87th Gen. Assem., 1st Reg. Sess. (Mo. 1993), as recognized in Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. 1999) (en banc). The courts have long held that aggravation of a preexisting asymptomatic condition can constitute a compensable injury even though the accident would not have produced the same result in a normal, healthy individual. Mashburn v. Chevrolet-Kan. City Div., Gen. Motors Corp., 397 S.W.2d 23, 29 (Mo. Ct. App. 1965); see also Climate Eng’g, 939 S.W.2d at 436 (cervical spondylosis); Hoffman, 904 S.W.2d at 574 (preexisting asymptomatic aneurysm); Jimenez v. Ford Motor Co., 743 S.W.2d 120, 122 (Mo. App. W.D. 1988) (carpal tunnel syndrome); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 187 (Mo. App. E.D. 1985) (back injury), overruled on unrelated grounds by Hampton, 121 S.W.3d 220; Smith v. Cook Paint & Varnish Co., 561 S.W.2d 730, 732 (Mo. Ct. App. 1978) (retinal occlusion, but compensation denied). This is also true in the case of a preexisting symptomatic condition that is made more symptomatic by or exacerbated by a new accident. Baird v. Ozarks Coca-Cola/Dr. Pepper Bottling Co., 119 S.W.3d 151, 154 (Mo. App. S.D. 2003), overruled on unrelated grounds by Hampton, 121 S.W.3d 220 (Mo. 2003) (en banc); Rector, 820 S.W.2d at 643.
pensation Act provided compensation for mental stress from employment as long as the stress was greater than that experienced by others in the same or similar circumstances. A similar requirement was applied to idiopathic injuries. Only an idiopathic injury caused or aggravated by the individual’s employment was compensable.

Prior to the 2005 amendments, the Workers’ Compensation Act was the exclusive remedy for employees injured at work and covered most accidental injuries an employee would suffer at work. The courts construed these statutes very broadly to provide as many employees as possible with the proper remedies. However, with the 2005 amendments came a narrowing of the coverage to employees in Missouri.

C. Current Workers’ Compensation Law in Missouri

In 2005, significant changes to the workers’ compensation laws affected the types of injuries employees could file. Since the amendments, section 287.800.1 of the Missouri Revised Statutes is strictly construed, which possibly restricts the types of compensable claims. Not only are the definitions in the statute more strictly construed, but an employee now has a higher burden of proof of causation and must show that the employee’s work was a “prevailing factor” in the injury, not merely a “substantial factor.” Where-as previously the employment merely could be one of a few factors that


101. Low, 772 S.W.2d at 904.


103. Alexander, 851 S.W.2d at 528-29.

104. See supra Part III.B.

105. See supra Part III.B.

106. See infra Part III.C.


108. MO. REV. STAT. § 287.020.3(2)(a), .10 (Supp. 2009).
caused the injury, and even as little as a one-third contributor, under the 2005 Amendments the work must be the primary reason for the injury.\textsuperscript{109}

Another major change of the 2005 amendments was the modification of the definition of “accident” under section 287.020.\textsuperscript{110} An “accident” was previously defined as an “unforeseen identifiable event or series of events,” which allowed for the inclusion of injuries caused by repetitive actions or motions over time.\textsuperscript{111} However, this phrase was cut out of the statutory definition in 2005,\textsuperscript{112} therefore, employees may now face obstacles in proving injury from exposure to fumes and chemicals, gradual emotional distress, and aggravating-factor injuries. Thus, the 2005 amendments changed the types of injuries that qualify under the Workers’ Compensation Act.

The newly amended language in section 287.067.2 does not provide compensation for an injury from “[o]rdinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living.”\textsuperscript{113} Accordingly, although exposure to chemicals and fumes is still considered compensable where the employee can show that he or she had greater exposure because of employment, when the exposure has been gradual, the injury may not be compensable under the modified statutory definition of accident.\textsuperscript{114} As a result, while “occupational disease” includes exposure to fumes, chemicals, and repetitive motion injuries,\textsuperscript{115} showing that work was the “prevailing factor” in these injuries, instead of the ordinary deterioration from age and normal day-to-day living, may prove difficult for employees. This difficulty will likely arise out of the proof needed to show a “prevailing factor.”

Section 287.190.6 requires objective medical findings where there are conflicting medical opinions about the cause of a particular injury.\textsuperscript{116} Similarly, if an employee has a work-related injury from the aggravation of a pre-existing condition, the employee will be unable to recover unless he or she can show that work was the prevailing factor in the injury,\textsuperscript{117} which can be very difficult to prove in most aggravated injury cases. In fact, since the enactment of the 2005 amendments, employees with the aggravation of a

\textsuperscript{109} §§ 287.020.3(2)(a), .067.1, .067.3; Cahall v. Cahall, 963 S.W.2d 368372 (Mo. App. E.D. 1998), overruled on unrelated grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (en banc).

\textsuperscript{110} § 287.020.


\textsuperscript{112} Mo. Rev. Stat. § 287.020 (Supp. 2009).

\textsuperscript{113} § 287.067.2.

\textsuperscript{114} §§ 287.020.2, .030; PLATTER, supra note 36, § 4.10; Carney, No. 06-024718, 2008 WL 4889193, at *1 (Mo. Labor Indus. Relations Comm’n Nov. 10, 2008) (employee with carpel tunnel syndrome denied compensation for failing to show that employment was the “prevailing factor”).

\textsuperscript{115} § 287.067; PLATTER, supra note 36, § 4.10.

\textsuperscript{116} § 287.190.6.

\textsuperscript{117} Gordon v. City of Ellisville, 268 S.W.3d 454 (Mo. App. E.D. 2008).
previous injury have rarely been able to show that the injury was work-related by this prevailing-factor standard.118 "Work-related mental stress" is also still allowed under the newly amended statutes.119 However, when an employee is subject to this stress over a period of time, he or she may not be able to show that it was an "accident" as defined by section 287.020.120

Notably, for some injuries there is no chance of compensation under the new Act. Prior to the 2005 amendments, an employee was awarded compensation for an idiopathic injury when he or she could show greater injury due to his or her work.121 However, the 2005 amendments take a "hard-nosed" stance on idiopathic injuries and overrule prior cases that had allowed compensation for idiopathic injuries.122 Also, if an employee suffers from a cumulative trauma injury, he or she has no recovery at all under the 2005 amendments.123 Some within the Missouri Labor and Industrial Relations Commission find this contrary to the intentions of the Workers' Compensation Act.124 For example, in Taylor v. Contract Freighters, Inc.,125 commission member John Hickey expressed his strong disagreement with these newly enacted statutes.126 He believed that these 2005 amendments allowed employers to subject their employees to risk without bearing the financial burden of a resulting injury.127 In fact, in the cases brought to the Labor and Industrial Relations Committee and the courts involving the 2005 amendments,

118. Huskie, No. 06-049702, 2009 WL 2350676, at *6 (Mo. Labor & Indus. Relations Comm'n July 24, 2009) (even though employee suffered injury to his leg while walking on the job site, employee could not show that work was the prevailing factor in his injury and was denied compensation); Leal, No. 06-010724, 2007 WL 4365321, at *14 (Mo. Labor & Indus. Relations Comm'n Dec. 12, 2007) (even though employee injured knee at work, employee was unable to meet the "prevailing factor" standard and was denied compensation).

119. §§ 287.020 , .120; Silva, No. 06-066258, 2008 WL 509869 (Mo. Labor & Indus. Relations Comm'n Feb. 22, 2008).


122. § 287.020.3(3); Ahern v. P & H, LLC, 254 S.W.3d 129, 135 (Mo. App. E.D. 2008) (employee suffered seizure from a previous accident while working; the injury was exacerbated by the fact that employee was a roofer and fell thirty feet during his seizure).

123. See Smith v. Climate Eng'g, 939 S.W.2d 429 (Mo. App. E.D. 1996) (cumulative trauma injury not likely to be compensated because of strict construction of the terms "accident" and "injury"), overruled on unrelated grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (en banc).

124. See infra notes 126-28.

125. No. 06-104584, 2009 WL 1719443 (Mo. Labor Indus. Relations Comm'n June 16, 2009)

126. Id. at *5.

127. Id.
almost all employees have been denied compensation for the types of injuries discussed above.\textsuperscript{128}

Accordingly, many employees injured during employment are likely to be excluded from the Workers’ Compensation Act. Given that the Workers’ Compensation Act was intended to be the exclusive remedy available to employees who have suffered accidents arising out of and in the course of employment,\textsuperscript{129} the statutes as amended leave these excluded employees without redress.\textsuperscript{130}

\section*{IV. INSTANT DECISION}

Several labor organizations filed suit against the Department of Labor and Industrial Relations (DOLIR) to challenge the constitutionality of the 2005 amendments to the Workers’ Compensation Act.\textsuperscript{131} These labor organizations argued that the amendments barred many employees from any compensation for work-related injuries and therefore violated the due process rights of employees.\textsuperscript{132} DOLIR countered by claiming that the Missouri legislature was entitled to amend these statutes at will.\textsuperscript{133} Additionally, DOLIR argued that even if the amendments were unconstitutional, the labor organizations had no standing to bring these claims because they did not represent any harmed individual.\textsuperscript{134}

Although many of the issues brought by the labor organizations were dismissed for lack of standing, the Supreme Court of Missouri decided that no factual issue was needed to render a declaratory judgment on the issue of exclusivity required by the workers’ compensation statutes.\textsuperscript{135} In the plurality opinion by the court, the judges first established that the definitions of “accident” and “injury,” which now limit the recovery of employees under the workers’ compensation system, are used in the exclusivity clause of the

\begin{footnotesize}
\begin{enumerate}
\item[129.] State ex rel. Patton v. Grate, 241 S.W.3d 826, 828 (Mo. App. W.D. 2007) (citing State ex rel. Taylor v. Wallace, 73 S.W.3d 620, 621 (Mo. 2002) (en banc)).
\item[130.] Id.
\item[131.] Id. at 675.
\item[132.] Id. at 676.
\item[133.] Id.
\item[134.] Id.
\item[135.] Id. at 679.
\end{enumerate}
\end{footnotesize}
amendments.\textsuperscript{136} Due to the application of these definitions within the exclusivity clause, the court noted that the newly amended statute leaves some employees outside the realm of the Workers’ Compensation Act.\textsuperscript{137}

The court held that although the workers’ compensation system is the exclusive remedy for those injuries covered under the system, the statute itself states that “other such rights and remedies that are not provided for in the Act are not subject to the exclusivity provisions of the statute.”\textsuperscript{138} In other words, the court established that these other “rights” can be pursued under common law.\textsuperscript{139} Thus, workers excluded from the Act because of the narrowly construed definition of “accidental injury” may bring their claims under common law in the same way a worker could prior to the enactment of the workers’ compensation statutes.\textsuperscript{140} However, the court abstained from demarcating the types of injuries falling under the new statutes, finding that those questions should be addressed on a case-by-case basis.\textsuperscript{141}

In a concurring opinion, Judge Wolff questioned the decision of the court to issue a declaratory judgment but concurred with the plurality under the rationale that no damage was done to the law by this decision, even though the labor organizations may have lacked standing.\textsuperscript{142}

In his dissenting opinion, Judge Teitelman discussed many issues addressed in the plurality opinion. Judge Teitelman first disagreed with the court’s decision that almost all of the constitutional claims lacked standing.\textsuperscript{143} Although the plurality held that most of the labor organizations’ claims were not ripe for review, Judge Teitelman disagreed.\textsuperscript{144} Both the dissent and plurality recognized that business organizations can obtain pre-enforcement declarations for unconstitutional statutes so as not to be constrained by doing business under these statutes.\textsuperscript{145} Judge Teitelman contended that these labor organizations “have a similar interest in working free from the constraints of an unconstitutional law” and should therefore be given the opportunity to challenge the constitutionality of the statutory amendments at issue.\textsuperscript{146} The dissent also recognized the legislature’s power to enact a statute to abolish a common law remedy for personal injury when a statute provides an adequate alternate remedy.\textsuperscript{147} However, the dissent diverged from the plurality in ref-

\begin{itemize}
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id. at 680.
\item \textsuperscript{138} Id. at 679.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id. at 680.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id. at 680-81 (Wolff, J., concurring).
\item \textsuperscript{143} Id. at 681-82 (Teitelman, J., dissenting).
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. at 681.
\item \textsuperscript{146} Id. at 681-82.
\item \textsuperscript{147} Id. at 682-83.
\end{itemize}
ference to the ability of employees to find compensation outside the Workers’ Compensation Act.\textsuperscript{148}

While the DOLIR claimed the Missouri open courts provision was merely procedural, the dissent vehemently disagreed.\textsuperscript{149} Citing the language of the Missouri open courts provision,\textsuperscript{150} the dissent pointed out that the critical portion of this provision affords “certain remedy . . . for every injury to [a] person . . .”\textsuperscript{151} As a result, the dissent argued that although the legislature could abolish a statutory remedy or a common law remedy, the legislature could not abolish all remedies for an injury.\textsuperscript{152} Therefore, the dissent believed this qualified as a due process issue because no court can hold a statute constitutional if it denies a person all redress for an injury.\textsuperscript{153} Additionally, Judge Teitelman said, “If the state cannot deny redress for injuries to property, then surely it cannot deny redress for personal injuries without violating the specific due process guarantee of a ‘certain remedy’ for ‘every injury to person.’”\textsuperscript{154} Therefore, the dissent argued that employees must be given an option of an adequate remedy for injuries they receive at work.\textsuperscript{155}

Correspondingly, the dissent pointed out that other states recognized the quid pro quo nature of the workers’ compensation statutes.\textsuperscript{156} The dissent

\begin{itemize}
\item \textsuperscript{148} Id. at 686.
\item \textsuperscript{149} Id. at 682.
\item \textsuperscript{150} Id. (“That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.” (quoting Mo. Const. art. I, § 14) (emphasis added)).
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id. at 682-83.
\item \textsuperscript{154} Id. at 683 (quoting Mo. Const. art. I, § 14).
\item \textsuperscript{155} Id. at 683.
\item \textsuperscript{156} Id.; see Gluba v. Bitzan & Ohren Masonry, 735 N.W.2d 713, 725 (Minn. 2007) (“[T]he legislature could take many steps to reduce employers’ costs, but if these steps resulted in the denial of benefits to a sufficiently large proportion of workers . . . the workers’ compensation scheme would no longer represent ‘a reasonable trade off’ of workers’ common-law tort rights. . . .”; Judd v. Drezga, 103 P.3d 135, 139 (Utah 2004) (the constitutional right to a remedy is satisfied “if the law provides an injured person an effective and reasonable alternative remedy”); Mello v. Big Y Foods, Inc., 826 A.2d 1117, 1124-25 (Conn. 2003) (“It is settled law that [the open courts provision] restricts the power of the legislature to abolish a legal right existing at common law . . . without also establishing a ‘reasonable alternative to the enforcement of that right’” (citations omitted)); Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 356 (Or. 2001) (“The legislature may abolish a common-law cause of action, so long as it provides a substitute remedial process in the event of injury to the absolute rights that the remedy clause protects.”); Injured Workers of Kan. v. Franklin, 942 P.2d 591, 620-22 (Kan. 1997) (upholding workers’ compensation amendments’ restricted notice provisions and reduced compensation for shoulder injuries, but stating that “[l]he legislature once having established a substitute remedy, cannot . . . emasculate the remedy, by amendments, to a point where it is no longer a viable and suffi-
analyzed several similar open courts provisions from other states that had been evaluated in conjunction with workers’ compensation law. In many of these states, the courts refused to uphold legislation that substantially altered or restricted the rights and remedies of employees injured on the job. The dissent pointed out that, in Missouri, the initial workers’ compensation system provided a speedy process with guaranteed compensation regardless of fault. However, the dissent argued that the 2005 amendments substantially altered the Missouri workers’ compensation statute. The dissent illustrated this point by noting that while cumulative trauma injuries are not technically stricken from recovery, the more stringent standards make recovery practically impossible. The dissent opined that the “prevailing factor” standard of proof is not only a heavier burden from the prior workers’ compensation standard but also is a heavier burden than the common law burden of proof.

Overall, Judge Teitelman believed that this heavier burden resulted in a substantial obstacle for many employees injured at work. The dissent also pointed out that the 2005 amendments completely barred other types of injuries, such as claims for idiopathic injuries. The dissent stated that this was a change from previous statutory language that allowed compensation for an idiopathic injury caused by employment. The 2005 amendments also altered the term “substantially” to require a higher degree of medical certainty. The dissent stated that this change introduced the concept of fault into what was originally a no-fault system and denied payment of benefits for post-injury, non-related activities. While the dissent noted that an alternative remedy existed for those who do not qualify for compensation under the Act, those who are still compensated under the Act may be severely limited in how much they are able to recover.

cient substitute remedy” (citations omitted)); Tex. Workers’ Comp. Comm’n v. Garcia, 893 S.W.2d 504, 521 (Tex.1995) (upholding amendments, but noting that additional restrictions could render benefits “so inadequate as to run afoul of the open courts doctrine”).

158. See sources cited supra note 156.
160. Id.; MO. REV. STAT. § 287.067.3 (Supp. 2009).
162. Id. at 684-85 & n.4 (“This amendment is similar to the ‘major contributing cause’ requirement that was found to violate the Oregon open courts provision if the employee was not provided a common law cause of action.” (quoting Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 362 (Or. 2001)).
163. Id. at 685.
164. Id.
165. Id.
166. Id. at 685-86.
167. Id.
In agreement with the plurality, the dissent found that those employees barred from recovery under the workers' compensation statute were exempt from the exclusivity clause and allowed to file a claim under common law.\footnote{168} However, Judge Teitelman would have taken this reasoning one step further, stating that because the statutes had been substantially altered, even those employees still covered by workers’ compensation statutes have limited recovery and limited rights.\footnote{169} For these reasons, the dissent declared the 2005 amendments to be unconstitutional in their entirety.\footnote{170}

V. COMMENT

The Due Process Clause of the United States Constitution secured several fundamental rights for Americans, including rights to certain remedies for injuries to person and property.\footnote{171} When these rights are impeded, the first duty of the government is to afford protection.\footnote{172} In Poindexter v. Greenhow, the Supreme Court of the United States held that no state can bar an individual from any remedy for an injury to person or property because to do so would be a denial of due process.\footnote{173} These principles are also set forth in the Missouri Constitution, article I, sections 10 and 14 in that “no person shall be deprived of life, liberty or property without due process of law” which includes “certain remedy afforded for every injury to person.”\footnote{174} Accordingly, a statute may not be enacted that eliminates a common law remedy unless an adequate alternative remedy for injury is available.\footnote{175} Therefore, the Supreme Court of Missouri’s decision in M.A.R.A. is consistent with the fundamental due process principles of allowing employees excluded from the Workers’ Compensation Act an alternative remedy.\footnote{176} Although this concept has been vaguely acknowledged in some prior Missouri cases,\footnote{177} those employees with a non-compensable, work-related injury under the Act now have a clear remedy – a remedy in common law negligence.

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168. Id. at 686.
169. Id.
170. Id.
173. 114 U.S. 270, 303 (1884); see also U.S. CONST. amend. XIV, § 1.
175. See Saint Louis County v. Moore, 818 S.W.2d 309, 310 (Mo. App. E.D. 1991); Everett v. County of Clinton, 282 S.W.2d 30, 34 (Mo. 1955); Hickman v. City of Kan., 25 S.W. 225, 227 (Mo. 1894).
The 2005 amendments substantially changed the Workers’ Compensation Act and were intended to narrow the categories of work-related injuries awarded compensation.178 Several other states, including Kansas, Texas, and North Dakota, have made similar changes to their workers’ compensation laws.179 Although none of these courts have struck down the workers’ compensation statutes, they have severely cautioned limiting the remedies available to injured employees.180

In Kansas, the 1993 legislative session altered the workers’ compensation system by including amendments to filing deadlines and the classification of injuries for compensation.181 After these amendments, several labor organizations filed suit for a declaratory judgment to declare the amendments unconstitutional.182 While the Supreme Court of Kansas did not find the amendments unconstitutional, it warned that if an amendment had the practical effect of completely barring an employee’s claim, then the statutes would violate due process.183 The Supreme Court of Kansas reaffirmed this principle in Blair v. Peck: “The legislature, once having established a substitute remedy [by statute], cannot constitutionally proceed to emasculate the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy.”184

Similarly, in Texas, the legislature amended the basis for benefits and decreased compensation amounts under the workers’ compensation scheme.185 In response, several labor organizations challenged the amendments for violating the open courts doctrine of the Texas Constitution.186 The Supreme Court of Texas then analyzed these amendments by comparing them to the common law remedy that the original workers’ compensation law replaced.187 The court determined that the open courts doctrine protected the common law rights that originally existed, not the amending of statutes.188 To qualify as constitutional under the open courts provision, amendments to a previously enacted statute must not unreasonably abridge the common law rights previously abolished by that statute.189 The Supreme Court of Texas then held that these amendments were constitutional because they still pro-

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179. See infra notes 196 and accompanying text.
180. See infra notes 181-96 and accompanying text.
182. Id. at 596.
183. Id. at 603-04.
186. Id. at 520-21.
187. Id. at 521.
188. Id.
189. Id.
vided a more definite remedy than that available at common law and, therefore, did not abridge the common law rights that the statute had abolished.\(^\text{190}\) However, the court warned that there is a point at which the statutes could become so inadequate as to violate the open courts provision of the Texas Constitution.\(^\text{191}\)

The Supreme Court of North Dakota also upheld amendments to the state’s workers’ compensation statutes that limited work-related injury benefits.\(^\text{192}\) However, that court similarly cautioned that while the legislature could amend the workers’ compensation statutes, at a certain point, the bar-gained-for exchange of workers’ compensation statutes would no longer exist.\(^\text{193}\) If this point is reached, the statutes could no longer be upheld.\(^\text{194}\)

Several other state supreme courts have also cautioned against compensation-limiting amendments to workers’ compensation statutes.\(^\text{195}\) Each court stated that while a state legislature could limit the costs to employers, limit the benefits to employees, and change the overall structure to the respective workers’ compensation systems, there is a point at which such amendments would bar such a large portion of the employees for whom the statutes were originally enacted that they would effectively become unconstitutional.\(^\text{196}\)

The stance of the other courts bolsters the support for the Supreme Court of Missouri’s decision in \textit{M.A.R.A.}. The 2005 amendments significantly reduced the compensation and remedy available to injured workers. Therefore, the amendments required an analysis of the employees’ due process rights.\(^\text{197}\) Although the court in \textit{M.A.R.A.} did not strike down the amendments as un-

\textit{\textsuperscript{190}} Id. at 523.
\textit{\textsuperscript{191}} Id. at 521.
\textit{\textsuperscript{192}} Baldock v. N.D. Workers Comp. Bureau, 554 N.W.2d 441 (N.D. 1996).
\textit{\textsuperscript{193}} Id. at 446 n.4.
\textit{\textsuperscript{194}} Id.
\textit{\textsuperscript{195}} These courts include Colorado, Minnesota, Utah, and Connecticut. \textit{See infra} note 196.
\textit{\textsuperscript{196}} \textit{\textsuperscript{See}} Kandt \textit{\textsuperscript{v.}} Evans, 645 P.2d 1300, 1306 (Colo. 1982) (amendments to the definition of “accident” were upheld because they still provided an alternative remedy); Mello \textit{\textsuperscript{v.}} Big Y Foods, Inc. 826 A.2d 1117, 1125 (Conn. 2003) (the legislature may neither restrict nor abolish a common law right without establishing a reasonable alternative way to enforce that right); Gluba \textit{\textsuperscript{v.}} Bitzan \& Ohren Masonry, 735 N.W.2d 713, 725-26 (Minn. 2007) (although the legislature may take steps to limit the costs of compensation for injuries, amendments that limit a large portion of employees from compensation will not be upheld); Breimhorst \textit{\textsuperscript{v.}} Beckman, 35 N.W.2d 719, 735 (Minn. 1949) (there is a limit to how far the legislature may go in limiting the rights of employees to compensation); Smothers \textit{\textsuperscript{v.}} Gresham Transfer, Inc., 23 P.3d 333, 362 (Or. 2001) (the legislature may abolish a common law remedy as long as a reasonable alternative remedy is available); Judd \textit{\textsuperscript{v.}} Drezga, 103 P.3d 135, 139 (Utah 2004) (as long as there is an effective alternative remedy, amendments that restrict compensation will be upheld).
\textit{\textsuperscript{197}} \textit{\textsuperscript{See}} Mo. Alliance for Retired Ams. \textit{\textsuperscript{v.}} Dep’t of Labor & Indus. Relations (\textit{M.A.R.A.},) 277 S.W.3d 670 (Mo. 2009) (en banc).
constitutional, the court did provide an alternative remedy. However, this alternative remedy may be easier in theory than in practice. It is difficult to draw a distinct line between those cases that will fall under the Workers’ Compensation Act and those that will fall under common law. For some work-related injuries, it will be clear that an injury falls under the Act. An injured employee who finds himself or herself in this simple situation can pursue compensation under the Act, as has been the practice for many years. However, some injuries are clearly not compensable under the Act. In this latter situation, an employee will find himself or herself in uncharted waters, and it will become necessary to consider what duties an employer has under common law negligence to determine if a claim for recovery is viable.

The court in *M.A.R.A.* stated, “Workers excluded from the [Act] by the narrower definition of ‘accidental injury’ have a right to bring suit under the common law, just as they could... prior to the initial adoption of the [Act].” Prior to the adoption of the Act in Missouri, employees could sue an employer for common law negligence. There are three elements that must be met for an employee to establish common law negligence: (1) the existence of a duty on the part of the employer to protect the employee; (2) a failure by the employer to perform that duty; and (3) a direct and proximate causal link between the employer’s failure and the plaintiff’s injuries.

An employee has an action for negligence only if an employer’s “con-duct falls below the standard of care established by law for the protection of others.” The duty owed by an employer to an employee requires that the employer use all ordinary care necessary to provide a reasonably safe working environment. A reasonably safe working environment is one where the employer removes those dangers that an ordinary person would remove. Additionally, the employer should provide training and instruments to the employee suitable for the employee’s work. The employer should also ensure that employees use the instruments safely. This does not mean that the employer’s instruments or practices must be the best or most safe way to perform the work, but merely that they are reasonably safe for the em-

198. *Id.* at 680.
199. See *id.* at 681 (Wolff, J., concurring) (“Just how and whether that declaration of law applies in any given case depends on the facts of the case presented.”).
200. *Id.* at 680.
201. See supra note 40 and accompanying text.
203. Harris v. Niehaus, 857 S.W.2d 222, 225 (Mo. 1993) (citing *Restatement (Second) of Torts* § 282 (1965)).
204. Hightower, 445 S.W.2d at 275.
206. Hightower, 445 S.W.2d at 275.
207. *Id.*
ployees. Additionally, the employer’s practices need only be those that are the ordinary use and custom of those in the same trade or business. Whether an employer’s conduct falls short of the standard of care required by law is a question of fact for the jury. However, the jury does not decide the best way for the employer to conduct his or her business. Rather, it is the jury’s task to assess the employer’s conduct in light of the ordinary and customary standard of practice in the business.

Although the common law alternative remedy requires the employee to show the employer’s negligence, the employee does not have to meet the high causation burden required by the Act. Instead, the employer’s act or omission need only be the “reasonable and probable” cause of the employee’s injury. In addition, the employer’s negligent conduct “need not be the sole cause of the injury,” but must be one of the sufficient causes without which the injury would not have occurred. This standard is similar to the pre-2005 amendment “substantial factor” standard under the Act, except that where an employee is partially liable or cannot preclude other causes for the injury, that employee may still recover for the portion of the damages that are attributable to the employment.

As previously discussed, other states have had related issues with their workers’ compensation laws and have provided negligence as an alternative remedy. For a negligence claim to prevail in Kansas, an employer must fail to provide reasonably safe tools, equipment, and working environments. The standard of care is that which an average and ordinary prudent individual in a similar line of business would use. However, employers are not liable for those dangers inherent to the employee’s work or if the employee had knowledge of the danger equivalent to that of the employer.

209. Id.
210. Id.
211. Id.
212. Id.
214. Martin, 981 S.W.2d at 584.
215. Id.
216. MO. REV. STAT. § 287.020.3(2)(a) (2000) (amended 2008); see also supra notes 86-87 and accompanying text.
217. Gustafson v. Benda, 661 S.W.2d 11, 18 (Mo. 1983) (en banc).
218. See supra notes 181-96 and accompanying text.
221. Id.
Similarly, under Texas law, an employer could unsubscribe from workers' compensation laws and remain liable under common law negligence.222 Common law negligence in Texas fundamentally parallels the elements outlined in Missouri.223 The employer's duty includes the use of ordinary care to hire, train, and supervise employees so as to provide a reasonably safe workplace.224 These employers must warn employees of hazards and instructions to safely handle the equipment required for the job.225 Yet this duty does not require employers to take on liability for dangers inherent to the employment or for those dangers that are equally understood by the employee.226

Likewise, employers in North Dakota are required to furnish reasonably safe tools, equipment, and workplaces.227 This duty still does not make the employer liable for dangers inherent to the work or those fully appreciated by the employee.228

Nevertheless, while the employer has the duty to provide a reasonably safe workplace, an employer may use a few potential defenses to push the burden back onto the employee.229 These defenses originated when common law negligence established redress prior to the enactment of workers' compensation laws.230 Some states still apply these original defenses to common law negligence.231

The first defense available to employers is "assumption of risk." Assumption of risk occurs when an employee fully appreciates the danger involved in the employment and continues to work in his or her particular job.232 An employee can only assume the risk of those dangers that are "ordinary and incidental" to his or her employment.233 This assumption of risk

225. Id.
226. Id.
228. Id.
229. See discussion of common law defenses infra notes 232-42 and accompanying text.
230. See supra notes 42-45.
231. See infra notes 232-45 and accompanying text.
233. Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 416 (Fla. 1934).
does not apply to employer negligence, but only applies where the employee takes on the dangers of the employment.\(^{234}\)

An employee has the right to presume that his or her employer took the necessary precautions to provide a safe work environment.\(^{235}\) This assumption does not mean that the employee assumes the ordinary and incidental risks of employment.\(^{236}\) However, the employee assumes the risk if he or she knows of the defect or unsafe working environment and realizes the danger that it poses.\(^{237}\) It is this recognition of danger and full appreciation of potential harm by an employee that forms the basis of the employer’s assumption of risk defense to a negligence action by an employee.\(^{238}\)

The second defense available to employers is contributory negligence. In some states, an employer may have negligently provided an unsafe working environment, but the employee also failed to act like a reasonably prudent person in light of the circumstances.\(^{239}\) In this situation, both parties are considered negligent. Depending on the degree of negligence attributable to each party, the employee may be barred from recovery.\(^{240}\)

Finally, a defense that some states allow an employer is that of third-party liability. If someone other than the employer harms an employee at work, the employer may sue this third party for subrogation in some circumstances.\(^{241}\) This defense does not bar recovery by the employee from the employer for the work-related injury but merely lightens the burden of compensation from the employer.\(^{242}\)

In Missouri, employees may have a slightly less complex system. Following the enactment of the Uniform Comparative Fault Act (the UCFA), the Supreme Court of Missouri adopted a pure comparative fault system for tort actions that essentially combines assumption of risk and contributory negligence.\(^{243}\) This fault system allows for a reduction in damages to the plaintiff based on any comparative fault of the plaintiff or other mitigating factors.\(^{244}\) The system also abrogates previous common law defenses and includes them within the pure comparative fault system.\(^{245}\) However, where the UCFA con-

\(^{234}\) Id.

\(^{235}\) Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 466 (Fla. 1924).

\(^{236}\) Id.

\(^{237}\) Id.

\(^{238}\) Scott v. Norman, 391 S.W.2d 890, 895 (Mo. 1965).


\(^{240}\) Id.

\(^{241}\) Paine v. Water Works Supply Co., 269 N.W.2d 725, 729 (Minn. 1978).

\(^{242}\) Id.

\(^{243}\) Gustafson v. Benda, 661 S.W.2d 11, 18 (Mo. 1983) (en banc) (where a source other than the defendant contributed to the fault, the amount of damages may be reduced by the percentage of comparative fault).

\(^{244}\) Id. at 20.

\(^{245}\) CHARLES H. MCKENZIE & FREDERICK J. ERNST, II MO. TORT LAW § 18.3 (3d ed. 2003).
 inflicted with prior common law defenses, the courts had at times deferred to these common law defenses in determining a particular issue. Prior to the enactment of the Act, Missouri allowed for these three traditional defenses to common law negligence, but the state’s adoption of the UCFA may have eliminated these defenses for employers. It is not clear whether Missouri courts will defer to the common law negligence defenses that originally existed with claims by injured employees or whether they will adhere to the UCFA’s pure comparative fault system now used for negligence claims.

After an employee is injured at work, he or she will need to determine how to obtain compensation for the injury. If the injury falls firmly under the current Act, the answer is simple: the employee will need to pursue compensation under the Act as an exclusive remedy. If pursuing compensation under the Workers’ Compensation Act is not viable, the Supreme Court of Missouri has now provided an alternative remedy: an employee can pursue a common law negligence claim. But after taking a look at what common law negligence may entail for an employee, additional issues are apparent.

At first blush it would seem that when an employee is excluded from compensation under the Act, he or she could simply recover under common law negligence. However, as Judge Teitelman cautioned, some injuries will not qualify for compensation under either the Act or common law negligence even though the injury is related to the work of the employee. This situation may occur where the employee’s injury does not fall under the new definitions for “accident” and “injury,” and yet the employee does not have a

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246. Id.
247. See supra notes 59-60 and accompanying text.
248. See supra Part III.C.
250. See supra Part IV.
252. Pile, No. 06-075121, 2009 WL 3241743 (Mo. Labor Indus. Relations Comm’n Oct. 6, 2009) (dissenting opinion). In Pile, the employee was injured while “rushing to the medicine room” to retrieve medicine for a patient on a particularly busy day. Id. at *3. She turned, tripped, and sprained her ankle, which required several doctor visits and several months off work. Id. at *6-7. However, the Labor and Industrial Relations Commission denied the employee compensation because they determined that the injury resulted from an activity that could have injured the employee outside of work and that, under the 2005 amendments, such an injury does not qualify as compensable. Id. at *9. Therefore, the employee was not covered under the Workers’ Compensation Act. Id. at *10. However, in this situation, the employee would likely not be eligible for compensation under common law negligence either. Here, although there was a work-related accident, the employer did not fail to keep the employment environment up to reasonable standards. See supra notes 200-12 and accompanying text.
viable common law negligence claim.\textsuperscript{253} Unfortunately for these injured employees, no redress is available for their work-related injuries.

Even where an employee’s injury is deemed compensable under the Act, obtaining compensation may still prove difficult because of confusion as to which avenue of compensation to pursue. In this situation, the above guidelines will be helpful in assessing whether a viable case exists against the employer under common law negligence, yet this will still not solve the problem of deciding which avenue of compensation to choose. An employee must determine which available remedy provides a stronger chance of compensation and hope he or she can still pursue the alternative remedy if the first choice proves to be unsuccessful.

Unfortunately, pleading two remedies may raise issues of res judicata. Can the employee take two bites out of the apple? If an employee first chooses to seek compensation under the Act but is unsuccessful, can he or she then try to sue under common law negligence? The circuit courts will likely experience an influx of cases concerning employees injured on the job. Prior to the case of \textit{J.C.W. ex rel. Webb v. Wyciskalla},\textsuperscript{254} employees injured at work were required to file their claims for compensation with the Division of Workers’ Compensation, which had processes in place to deal with the claim, determine compensation, and hear appeals if the outcome was unsatisfactory.\textsuperscript{255} This appeal could be raised in the circuit court of the county where the accident occurred.\textsuperscript{256} However, \textit{J.C.W. ex rel. Webb v. Wyciskalla} ruled that a circuit court has jurisdiction to hear the original claim for compensation.\textsuperscript{257} Because injured employees now have the option of filing their first claim for compensation within a circuit court, this may become the more common occurrence. Filing a claim with the circuit court may allow the injured employee to pursue compensation under either the Act or under common law negligence. Such a result would allow an employee to pursue both of these avenues of compensation and thereby avoid some of the difficult issues mentioned above.

\textsuperscript{253} This case is an excellent example of Judge Teitelman’s point that even though there is an alternative remedy, employees still will be left without redress.

\textsuperscript{254} 275 S.W.3d 249, 253 (Mo. 2009) (en banc) (holding that “Missouri’s circuit courts . . . ‘shall have original jurisdiction over all cases and matters, civil and criminal’”) (quoting Mo. Const. art V, §14).


\textsuperscript{256} Id.

\textsuperscript{257} \textit{J.C.W.}, 275 S.W.3d at 254.
VI. CONCLUSION

The Supreme Court of Missouri in *M.A.R.A.* followed in the footsteps of many other courts across the country. The Missouri’s Workers’ Compensation Act has provided remedies to workers injured on the job since its enactment in 1925.258 However, after the 2005 amendments, the Act excludes many employee injuries once covered by the Act. The Supreme Court of Missouri recognized that these amendments denied some injured employees any remedy and that such employees were therefore properly exempted from the Act.259 Although an alternative remedy is now available, this remedy leaves many questions unanswered. As the fallout of these amendments unfolds, more employees will bring suits against employers under common law negligence. In this way, Missouri’s once faultless system of providing compensation to injured workers will again assign fault to employers and employees for negligence that results in work-related injuries.

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259. *See supra* Part IV.