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Successive Torts Resulting in a Single, Indivisible Injury: Plaintiffs, Prepare to Prove the Impossible

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Successive Torts Resulting in a Single, Indivisible Injury: Plaintiffs, Prepare to Prove the Impossible

Carlson v. K-Mart Corp.[1]

I. INTRODUCTION

In most lawsuits, plaintiffs' medical experts can accurately allocate plaintiffs' injuries to a specific, causal factor. In some instances, however, two events may combine to cause an injury that is incapable of rational apportionment, even by the most learned medical expert. In such a case, the indivisible injury doctrine may relieve a plaintiff of the difficult burden of proving which tortfeasor caused her injuries. The indivisible injury doctrine, however, does not benefit all plaintiffs who have suffered an injury that cannot be apportioned. As illustrated by the instant case, certain plaintiffs must prove the impossible, namely, which tortfeasor caused their injuries, even though doing so may be a medical impossibility.

II. FACTS AND HOLDING

On June 8, 1992, while shopping at K-Mart in Independence, Missouri, Georgia Carlson was injured when boxes containing crockpots fell from an elevated shelf and struck her in the face and head.[2] That same day, Carlson sought treatment at a hospital for numerous injuries, including injuries to her back.[3] In the weeks following the accident, Carlson's back pain intensified, and she sought further medical treatment.[4] Tests performed on Carlson's injured back revealed a protruding disk in her lumbar spine and helped explain the cause of her back pain as well as the numbness she was experiencing in her right thigh.[5] These tests further revealed that Carlson had degenerative disk disease, a disease that is often asymptomatic and a normal part of the aging process.[6]

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1. 979 S.W.2d 145 (Mo. 1998). Note: The Missouri Supreme Court remanded this case because of an error regarding the trial court's damage instruction. *Id.* at 148. This Note, however, focuses on issues of liability, which were upheld by the Missouri Supreme Court. *Id.* Therefore, the majority of this Note's information and analysis is derived from the Western District's opinion, *Carlson v. K-Mart Corp.*, No. WD53151, 1998 WL 6951, at *1 (Mo. Ct. App. Jan. 13, 1998), *aff'd in part, rev'd in part*, 979 S.W.2d 145 (Mo. 1998).
2. *Carlson*, 979 S.W.2d at 145.
3. *Id.*
4. *Id.*
5. *Id.* at 145-46.
6. Carlson v. K-Mart, 979 S.W.2d 145, 146 (Mo. Ct. App. 1998).

On December 12, 1992, a drunk driver involved in a high-speed chase with the police struck the rear of Carlson's car.[7] As an ambulance rushed Carlson to a hospital, she complained that her back hurt more than it had previously.[8] Notwithstanding her complaint, the hospital released her after a fifty minute examination.[9] In the months following the automobile accident, Carlson's back pain continually worsened, and during March of 1994, surgery was performed on the injured region.[10] Surgery, however, failed to alleviate Carlson's symptoms.[11] Carlson's subsequent diagnosis was bleak: her back condition would likely persist for life and would certainly require future medical treatment.[12]

Carlson sued only K-Mart for her injuries. At trial she argued that the accident at K-Mart and the automobile accident combined to create one injury "which was not susceptible to division on any rational basis."[13] As such, she claimed that she was entitled to recover all damages from K-Mart.[14] To prove this theory, Carlson presented several expert medical witnesses.[15] These witnesses, however, were unable to medically determine the effect of the K-Mart incident on Carlson's back problems.[16] K-Mart, on the other hand, argued that Carlson's back condition was not caused by its negligence but by either the automobile accident or the degenerative back disease.[17]

Although the jury returned a verdict in Carlson's favor and awarded her $100,000, Carlson appealed the verdict. On appeal, Carlson claimed that the circuit court erred by refusing to accept her modified damage instruction.[18]

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Carlson v. K-Mart Corp., No. WD53151, 1998 WL 6951, at *3 (Mo. Ct. App. Jan. 13, 1998), *aff'd in part, rev'd in part*, 979 S.W.2d 145 (Mo. 1998). Carlson sought the benefit of the indivisible injury doctrine. As will be explained more fully in Part III of this Note, the indivisible injury doctrine allows plaintiffs to hold multiple tortfeasors jointly and severally liable if their negligence combines to create an injury which is not susceptible to division on any rational basis.
14. *Carlson*, 1998 WL 6951, at *1.
15. *Id.* at *2.
16. Carlson v. K-Mart Corp., 979 S.W.2d 145, 146 (Mo. 1998).
17. *Id.* at 148.
18. *Carlson*, 1998 WL 6951, at *2. Because multiple possible causes of Carlson's back injury existed, the trial court gave the jury the following verdict directing instruction:

Your verdict must be for Plaintiff if you believe:

First, there were boxes stored on the overhead shelf of the Kitchen Corner and as a result the aisles in the Kitchen Corner were not reasonably safe, and

Carlson contended that the trial court "denied her the benefit of recovering for her 'indivisible injury'"[19] by failing to modify the damages instruction. The appellate court disagreed.[20] The court rejected Carlson's theory that the indivisible injury doctrine applied to the facts of this case because the two separate accidents lacked a causal relationship and were greatly separated in time.[21] Therefore, the court concluded that Carlson could only recover from K-Mart the damages that were proximately caused by K-Mart's negligence.[22]

Carlson appealed the appellate court's decision to the Missouri Supreme Court, and the court reversed the decision of the court of appeals.[23] The Missouri Supreme Court held that when a verdict directing instruction is modified to extend liability for damages directly caused by or contributed to by a defendant's negligence, the damage instruction must "track the verdict directing instruction." As such, Carlson was prejudiced by the trial court's rejection of her proffered damage instruction, and she was entitled to a new trial on the issue of damages.[24]

Second, Defendant knew or by using ordinary care could have known of this condition, and

Third, Defendant failed to use ordinary care to remove it, barricade it, or warn of it, and

Fourth, such failure directly caused or directly contributed to cause damage to the plaintiff.

Carlson, 979 S.W.2d at 146 (quoting MISSOURI APPROVED JURY INSTRUCTIONS 17.02 (5th ed. 1996) (hereinafter MAI) as modified by MAI 19.01).

The trial court's damage instruction, however, stated the following:

If you find in favor of Plaintiff, then you must award Plaintiff such sum as you believe will fairly and justly compensate Plaintiff for any damages you believe she sustained and is reasonably certain to sustain in the future as a direct result of the K-Mart occurrence.

Id. at 147 (quoting MAI 4.01).

Carlson's proposed damage instruction mirrored the verdict directing instruction in that it allowed her to be compensated for damages "she sustained and is reasonably certain to sustain in the future . . . directly caused or contributed to be caused by the incident at K-Mart." *Carlson*, 979 S.W.2d at 147.

19. Carlson v. K-Mart Corp., No. WD53151, 1998 WL 6951, at *2 (Mo. Ct. App. Jan. 13, 1998), *aff'd in part, rev'd in part*, 979 S.W.2d 145 (Mo. 1998).

20. *Id.* at *8.

21. *Id.*

22. *Id.*

23. Carlson v. K-Mart, 979 S.W.2d 145, 145 (Mo. 1998).

24. *Id.* at 148.

III. LEGAL BACKGROUND

A. Missouri Approach to the Indivisible Injury Rule

The indivisible injury doctrine may be summarized as follows:

> Where the concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, either is said to be responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tortfeasor, and the injured person may at his option or election institute suit for the resulting damages against any one or more of such tortfeasors separately, or against any number or all of them jointly.[25]

Plaintiffs who have suffered a single, indivisible injury are required to make a prima facie showing that the injury was a proximate result of the tortfeasors' conduct.[26] The burden then shifts to the defendants to deny liability or prove that the injury is, in fact, capable of apportionment.[27] If this showing is not made, each tortfeasor will be held jointly liable for the plaintiff's injuries.[28]

Multiple rationales have been proffered as the basis for the indivisible injury rule. The first rationale is primarily evidentiary in nature and contends that the injured plaintiff should not be required to prove the impossible, namely, what portion of her damages are assignable to the respective defendants when each of the defendants caused a single harm.[29] This rationale seeks to avoid placing a trier of fact in the position of making a completely arbitrary apportionment of damages.[30] The second rationale, on the other hand, relates to the plaintiff's substantive, prima facie claim. This rationale states that multiple tortfeasors causing a single injury may be held jointly liable "not because one tortfeasor is responsible for the act of the other, but because the conduct of each is regarded as a cause of the injury."[31]

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25. 74 AM. JUR. 2D *Torts* § 62 (1974).

26. J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 19.03 (rev. ed. 1988).

27. *Id.*

28. *Id.*

29. *See* Carlson v. K-Mart Corp., No. WD53151, 1998 WL 6951, at *3 (Mo. Ct. App. Jan. 13, 1998), *aff'd in part, rev'd in part*, 979 S.W.2d 145 (Mo. 1998); LEE & LINDAHL, *supra* note 26, § 6.02.

30. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 52, at 347 (5th ed. 1984).

31. LEE & LINDAHL, *supra* note 26, § 19.03.

Distinguishing between joint and several liability and the indivisible injury rule often proves to be quite difficult.[32] In fact, the *Carlson* court stated that joint and several liability and the indivisible injury rule are "simply specific instances of the same basic rule."[33] An early Missouri case, *Meade v. Chicago, Rock Island & Pacific Railway*,[34] illustrates this point. In *Meade*, a train station employee doused the defendant, a hobo, with benzene while he slept on a bench.[35] When the plaintiff awoke, his legs were engulfed in flames.[36] The defendant denied setting the plaintiff ablaze and presented evidence tending to show that a third party lit the match which ignited the plaintiff.[37] The court determined that the defendant was jointly and severally liable for the plaintiff's single injury even if the defendant did not light the match.[38] The court likened the act of pouring benzene on the plaintiff to a trespass and stated that "the innocent or culpable act of a third person may be the immediate cause of the injury and still an earlier wrongful act may have contributed so effectually to it as to be regarded as the efficient, or at least the concurrent and responsible cause."[39] In *Meade*, the court did not refer to the indivisible injury rule and simply relied on a joint liability theory. Nevertheless, the rationales for applying the indivisible injury rule were present. Quite simply, the plaintiff suffered one injury, burns to his legs. Because the plaintiff was asleep when both negligent acts occurred, the plaintiff was unable to rationally apportion liability among the

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32. Under joint and several liability, the plaintiff is permitted to join joint tortfeasors in one action or sue each tortfeasor individually. LEE & LINDAHL, *supra* note 26, § 19.02. Joint and several liability may arise in a variety of contexts. LEE & LINDAHL, *supra* note 26, § 19.01.

Professor Prosser indicated that multiple defendants may be jointly liable in the following situations:

> (1) where there is concerted action by the defendants resulting in the same injury; (2) where there is vicarious liability; (3) where there is a common duty owed by the defendants to the plaintiff; (4) where there is concurrent causation of a single, indivisible result which neither defendant would have caused alone; (5) where there is concurrent causation of a single indivisible injury which either defendant would have caused alone; (6) where there are successive injuries; (7) where there is damage of the same kind which is difficult to apportion; (8) where there are acts innocent in themselves which together cause damage; and (9) in the case of alternative liability.

LEE & LINDAHL, *supra* note 26, § 19.01.

33. *Carlson*, 1998 WL 6951, at *3. Professor Prosser would likely agree with this characterization of the indivisible injury rule because he included "single indivisible injur[ies]" in his list of situations where joint liability is appropriate. LEE & LINDAHL, *supra* note 26, § 19.01.

34. 68 Mo. App. 92 (1896).

35. Meade v. Chicago, Rock Island & Pacific Ry., 68 Mo. Ct. App. 92, 96 (1896).

36. *Id.*

37. *Id.* at 96-97.

38. *Id.* at 99-100.

39. *Id.* at 100.

defendants. This proof difficulty was not fatal to the plaintiff's case, however, because the court allowed him to hold the one known negligent actor jointly liable for his total injury.[40] Thus, the *Meade* court satisfied the evidentiary rationale for the indivisible injury rule. The causation rationale was satisfied as well. The *Meade* court stated:

> No wrongdoer ought to be allowed to apportion or qualify his wrong, and as a wrong has actually happened whilst his own wrongful act was in force and operation, he ought not be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put into operation by his own wrongful act.[41]

Both acts (pouring the benzene over the plaintiff and lighting the match) contributed to the plaintiff's indivisible injury, and both actors were jointly liable for the plaintiff's damages.

Regardless of the similarity between the indivisible injury rule and joint liability, early Missouri decisions refused to merge the two doctrines into one rule. The case regarded as the first modern Missouri decision to apply the indivisible injury rule is *Brantley v. Couch*.[42] In *Brantley*, three cars proceeded eastbound down Gravois Avenue in St. Louis.[43] The first automobile, driven by Mr. Eftink, stopped at an intersection because the light had changed from green to yellow.[44] Unable to stop quickly on the rain-slicked streets, the second car, driven by Mr. Thompson, collided into the first car.[45] Shortly thereafter, the third car in the trio, driven by Mr. Couch, crashed into the rear of the second car.[46] The plaintiff, a passenger in the second car, suffered whiplash as a result of the chain collision and sued all three drivers.[47]

At trial, the plaintiff stated that the impact of her car hitting the first car "moved [her] forward just a little . . . [and] was slight."[48] The second impact—the third car hitting plaintiff's car from behind—occurred just seconds after the first impact and with enough force to "throw[] [plaintiff] back in the seat."[49] Although the two collisions significantly differed in force, medical experts were unable to definitively state which impact caused the plaintiff's injury.[50] The jury returned a verdict in favor of the plaintiff and against the

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40. *Id.* at 104.
41. *Id.* at 101.
42. 383 S.W.2d 307 (Mo. Ct. App. 1964).
43. *Id.* at 309.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 311.
49. *Id.*
50. *Id.* at 311-12. Because the plaintiff failed to prove causation, the trial court

remaining two defendants, but the trial court set aside the verdict against Thompson.[51] The plaintiff appealed the trial court's order with respect to Thompson, and the court framed the issue in this fashion: Was there "sufficient evidence from which the jury could reasonably find that plaintiff's indivisible injury was the proximate result in whole or in part of the negligence of Thompson in causing the first impact?"[52] In light of the inconclusive medical evidence regarding the divisibility of the injury and the short time interval between collisions, the court of appeals answered this question in the affirmative and determined that the trial court erred in setting aside the verdict against Thompson.[53] In short, the operation of the indivisible injury rule exposed Thompson to full liability for the plaintiff's injury regardless of his actual, causal impact on that injury.[54]

The successive collisions in *Brantley* were nearly instantaneous. Following *Brantley*, however, courts wrestled with the applicability of the indivisible injury doctrine when plaintiffs sought the benefit of the rule to hold a defendant liable when independent negligent acts with distinct time intervals combined to cause a single injury. One such case is *Barlow v. Thornhill*.[55] In *Barlow*, the defendant struck the car in which the plaintiff was a passenger.[56] The plaintiff described this accident as a "light impact."[57] Following the accident, the plaintiff did not notice any physical pain, and he exited the vehicle while the drivers exchanged insurance information.[58] After ten to fifteen minutes, it began to rain, and the parties to the accident reentered their respective vehicles.[59] Another car struck the plaintiff's car in the rear after the plaintiff reentered his vehicle.[60] This accident was more severe, and following this accident, the plaintiff experienced serious physical side effects such as vomiting, difficulty breathing, and neck and rib pain.[61] Furthermore, the plaintiff subsequently developed severe psychological problems.[62] At trial, the plaintiff's medical experts testified that although the second accident was much more severe than the first, the plaintiff's psychological problems resulted from both accidents, and it was impossible to

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granted Mr. Eftink's motion for summary judgment. *Id.* at 309.

51. *Id.* at 309.
52. *Id.* at 311.
53. *Id.* at 312.
54. *Id.*
55. 537 S.W.2d 412, 419 (Mo. 1976).
56. *Id.* at 414.
57. *Id.* at 415.
58. *Id.* at 414.
59. *Id.* 414-15.
60. *Id.*
61. *Id.* 415.
62. *Id.* at 415-16. Although there was no objective evidence of a neurological disorder, one of the plaintiff's medical experts diagnosed the plaintiff with "post-traumatic psychoneurosis with conversion reaction, marked traumatic fixation with total invalid reaction." *Id.* at 416.

apportion the amount of damage attributable to each accident.[63] The defendant argued that the fifteen minutes that transpired between the accidents distinguished this case from *Brantley* and precluded application of the indivisible injury doctrine to the case.[64] The court concluded, however, that

> There is no arbitrary time limit the court could promulgate as being the 'cutoff point' for application of the rule. The gist of the rule with respect to injuries is not so much the time separating the collisions as it is the impossibility of definitely attributing a specific injury to each collision.[65]

Based upon this reasoning, the court determined that the fifteen minute interval did not preclude the application of the indivisible injury doctrine.[66]

In *Barlow*, the Missouri Supreme Court downplayed the impact of time on the application of the indivisible injury doctrine. As a result, injured plaintiffs sought to take advantage of the language in *Barlow* to hold independent tortfeasors liable for a single injury even though the negligent acts were widely separated in time and space.[67] *State ex rel. Retherford v. Corcoran*[68] is an example of such a case. In *Corcoran*, the plaintiff was involved in three separate automobile accidents.[69] The first accident occurred on May 25, 1977 in St. Louis County, the second accident transpired on June 25, 1977 in St. Charles County, and the final accident occurred October 25, 1978 in St. Charles County.[70] The plaintiff sued all three defendants and alleged that each successive injury aggravated the injuries sustained in the first accident.[71] The plaintiff also claimed that she was unable to causally separate the degree of injury among the three accidents and, therefore, common liability existed among the defendants. The appellate court disagreed.[72] Notwithstanding the liberal language in *Barlow*, the *Corcoran* court stated that in this case there were "three separate accidents widely disparate in time and place . . . .[D]ifficulty of proof does not create joint

63. *Id.* at 416.
64. *Id.* at 419.
65. *Id.*
66. *Id.*
67. *See* McDowell v. Kawasaki Motors Corp. USA, 799 S.W.2d 854, 861-62 (Mo. Ct. App. 1990) (claiming that motorcycle manufacturer's defective component and truck driver's negligence combined to produce indivisible injury); Schiles v. Schaefer, 710 S.W.2d 254, 267 (Mo. Ct. App. 1986) (claiming that multiple physicians who treated decedent over a period of approximately eighteen days were liable for decedent's wrongful death); Brickner v. Normandy Osteopathic Hosp., Inc., 687 S.W.2d 910, 912-13 (Mo. Ct. App. 1985) (claiming that three physicians negligently failed to diagnose decedent's cancer and were liable for decedent's wrongful death).
68. 643 S.W.2d 844 (Mo. Ct. App. 1982).
69. *Id.* at 845.
70. *Id.*
71. *Id.*
72. *Id.* at 846.

liability for these independent and unrelated torts. Each defendant has liability for, and only liability for, the injuries sustained by plaintiff as a result of that defendant's accident."[73] Therefore, the court required proof as to each defendant's contribution to the plaintiff's injury.[74]

The heavy emphasis on temporal and spatial arrangement in *Corcoran* conflicted with language in *Barlow* which indicated that these factors were relatively unimportant. Furthermore, and perhaps more importantly, both the *Corcoran* and *Barlow* courts seemed to disagree about the underlying rationale for the indivisible injury rule. On the one hand, the Missouri Supreme Court, in *Barlow*, announced that the basis for the rule was primarily evidentiary: A plaintiff should not be required to prove the extent of each tortfeasor's damage when doing so is nearly impossible.[75] On the other hand, the Missouri Court of Appeals for the Eastern District of Missouri in *Corcoran* assumed a factually-oriented stance: The facts of the case, rather than difficult problems of proof, dictated the applicability of the doctrine.[76] The Missouri Supreme Court in *State ex rel. Jinkerson v. Koehr*[77] resolved the conflict in favor of the court of appeal's interpretation.

Factually, *Jinkerson* involved a situation similar to the aforementioned cases.[78] The plaintiff's misfortune involved two distinct automobile accidents, the first occurring on March 12, 1986 in St. Louis County.[79] The second

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73. *Id.*

74. *Id.*

75. Barlow v. Thornhill, 537 S.W.2d 412, 419 (Mo. 1976).

76. State *ex rel.* Retherford v. Corcoran, 643 S.W.2d 844, 846 (Mo. Ct. App. 1985).

77. 826 S.W.2d 346, 348 (Mo. 1992).

78. As an aside, not all indivisible injury cases involve automobile chain collisions. For example, in *Sanders v. Wallace*, 817 S.W.2d 511 (Mo. Ct. App. 1991), a tractor rolled down an incline and injured a farmhand. The plaintiff, the farmhand, brought a products liability action against the manufacturer of the tractor for failure to equip the tractor with a manual brake as well as a negligence claim against the owner of the tractor. The plaintiff claimed that both negligent acts combined to cause his injuries. The court agreed, stating:

> The defendants are clearly joint tortfeasors in the sense that they are persons whose independent acts have coalesced to cause a single indivisible injury. Where concurrent or successive negligent acts or omissions of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person, and it is impossible to determine in what proportion each contributed to the injury, each is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the act of the other tortfeasor.

Id. at 517 (citations omitted).

The court determined that either defendant could have prevented the plaintiff's injuries and held that both defendants were responsible for the entire injury. *Id.*

79. State *ex rel.* Jinkerson v. Koehr, 826 S.W.2d 346, 346 (Mo. 1992).

accident transpired on February 26, 1987 in the City of St. Louis.[80] The precise issue before the court was whether the Circuit Court of St. Louis County had venue over the action against the defendant in the first accident.[81] The plaintiff claimed that the defendant in the first accident shared liability with the defendant in the second accident because "the injuries sustained in the two accidents were not separate and distinct but inseparable and indistinguishable."[82] Therefore, the plaintiff argued that both defendants were jointly liable, and venue could be established over both defendants in the City of St. Louis.[83] The Missouri Supreme Court disagreed because the facts of the case "[did] not call for the application of joint liability."[84] In reaching this conclusion, the court looked to Missouri's permissive joinder rule which allows multiple defendants to be joined in one action:

> [I]f there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.[85]

The court specifically noted that "[t]he two accidents alleged in the . . . petition did not arise out of the same transaction or occurrence."[86] As such, "each defendant [was] responsible for the injuries caused in the accident in which he or she was involved,"[87] and the plaintiffs were required to independently establish venue for each cause of action notwithstanding the fact that each defendant contributed to a single, indivisible injury.[88]

In deciding whether the indivisible injury rule applied to the case, the Missouri Supreme Court in *Jinkerson* clearly opted for the factually-based approach used in *Corcoran*. Subsequent courts have adhered to the rule announced in *Jinkerson*.[89] The state of the law of indivisible injuries in Missouri, once awash with conflicting precedent and competing policies, is now quite clear. The Missouri Court of Appeals for the Western District of Missouri in *Carlton v. Phillips*[90] aptly described the state of the law when they declared,

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80. *Id.*
81. *Id.* at 347.
82. *Id.* at 348.
83. *Id.* at 347-48.
84. *Id.* at 348.
85. MO. REV. STAT. § 507.040 (1994); State *ex rel.* Jinkerson v. Koehr, 826 S.W.2d 346, 348 (Mo. 1992).
86. *Jinkerson*, 826 S.W.2d at 348.
87. *Id.*
88. *Id.*
89. *See, e.g.*, Carlton v. Phillips, 926 S.W.2d 8, 12 (Mo. Ct. App. 1996).
90. 926 S.W.2d 8 (Mo. Ct. App. 1996). The court in *Carlton* refused to apply the

"[i]t is apparent . . . that multiple defendants in separate, unrelated, yet successive auto accidents cannot be held jointly liable under Missouri law as it now stands."[91]

B. Outside Jurisdictions' Approach to the Indivisible Injury Rule

Missouri is not alone in dealing with difficult issues associated with application of the indivisible injury doctrine. Just as Missouri debated the issue, courts outside Missouri have addressed whether temporal proximity is necessary for application of the indivisible injury rule. Litigation on this issue has produced mixed results. For example, the Michigan Supreme Court in *Maddux v. Donaldson*[92] entertained a dispute involving a plaintiff injured as a result of two successive automobile collisions separated in time by only thirty seconds.[93] Although recognizing the general rule that plaintiffs must apportion damages among tortfeasors,[94] the *Maddux* court noted that, in the context of single, indivisible injuries, this requirement contravened policy concerns when it stated,

> When we impose upon an injured plaintiff the necessity of proving which impact did which harm in a chain collision situation, what we are actually expressing is a judicial policy that it is better that a plaintiff, injured through no fault of his own, take nothing, than that a tortfeasor pay more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create . . . . It is clear that there is a manifest unfairness in putting on the injured party the impossible burden of proving the specific shares of harm done by each. Such results are simply the law's callous dullness to innocent sufferers.[95]

Although the second collision occurred only thirty seconds after the first impact, the court mentioned that the timing of the collisions was "without legal significance . . . . [because] [t]he reason for the rule as to joint liability for damages was the indivisibility of the injuries, not the timing of the various

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indivisible injury doctrine when the plaintiff had been injured in two separate automobile accidents. *Id.* at 11-12. The accidents, which occurred two months apart, caused injuries to the plaintiff's cervical spine. *Id.* at 10. The plaintiff's treating doctors testified that they could not, within a reasonable degree of medical certainty, determine what proportion of the plaintiff's injuries were attributable to each accident. *Id.*

91. *Id.* at 12.

92. 108 N.W.2d 33 (Mich. 1961).

93. *Id.* at 34.

94. *Id.* at 35.

95. *Id.* at 35-36 (quoting John H. Wigmore, *Joint-Tortfeasors and Severance of Damages*, 17 ILL. L. REV. 458 (1923)).

blows."[96] The *Maddux* court concluded that there was "no reason why [the] tortfeasors should escape liability because of the very complexity of the injury created by their wrong"[97] and allowed the plaintiff to hold either tortfeasor liable for the entire injury.[98]

Similarly, in *D & W Jones, Inc. v. Collier*,[99] the Mississippi Supreme Court implicitly rejected the importance of temporal proximity with respect to the propriety of the indivisible injury doctrine. In *Collier*, an owner of a commercial catfish operation sued five farmers whose property bordered the five hundred acre catfish complex.[100] The plaintiff alleged that the farmers knowingly applied Toxaphene, a pesticide toxic to aquatic life, to their crops during 1974.[101] This toxin subsequently contaminated or killed the plaintiff's catfish and prohibited their harvest the following year.[102] Because the plaintiff was unable to prove the precise amount of damage caused by each defendant, he claimed that the combined application of Toxaphene over a period of several weeks during 1974 produced the entire result.[103] The Mississippi Supreme Court agreed and held that the bordering farmer's "separate, concurrent and successive negligent acts"[104] caused a single, indivisible injury to the plaintiff's catfish operation.[105] As such, the defendants were jointly and severally liable for their negligent acts notwithstanding the fact that the Toxaphene was applied over the course of several weeks.[106]

Not all courts outside Missouri follow the *Maddux* and *Collier* approach and denounce the importance of the temporal proximity between independent torts which produce indivisible injuries. For example, the Wisconsin Supreme Court in *Caygill v. Ipsen*[107] prohibited joinder of two tortfeasors whose negligent acts injured the plaintiff but occurred five months apart and in different locations.[108] Although the *Caygill* court noted that denying joinder of defendants

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96. *Id.* at 38. For another example of a court diminishing the importance of time between independent negligent acts with respect to application of the indivisible injury rule, see *Hawaiian Ins. & Guar. Co. v. Mead*, 538 P.2d 865, 871-72 (Wash. Ct. App. 1975) (noting that time between the negligent acts is not the determinative factor in indivisible injury cases).

97. *Maddux*, 108 N.W.2d at 38.

98. *Id.*

99. 372 So. 2d 288 (Miss. 1979).

100. *Id.* at 288-89. The plaintiff also sued two businesses involved in the aerial application of pesticide. *Id.* at 289.

101. *Id.* at 289.

102. *Id.* at 290.

103. *Id.* at 293-94.

104. *Id.* at 294.

105. *Id.*

106. *Id.*

107. 135 N.W.2d 284 (Wis. 1965).

108. *Id.* at 286.

in a case of this type may be quite "harsh,"[109] the court nevertheless required that the plaintiff prove her damages with "reasonable certainty."[110] Because the plaintiff could not medically apportion damages in accordance with this standard, the separate accidents were not allowed to be joined in one action.[111] The *Caygill* court did not, however, "rule out the possibility of joinder where the acts are consecutive but are closely enough related in a time sequence to constitute one event."[112]

IV. THE INSTANT DECISION

Although the language in the aforementioned cases indicated that temporal proximity was not a necessary ingredient to the application of the indivisible injury doctrine, the fact remains that, in the cases where the rule was found to be applicable, the independent negligent acts occurred relatively close in time. This trend did not bode well for Carlson who, notwithstanding the Missouri Supreme Court's language in *Jinkerson*, sought to hold K-Mart entirely responsible for her damages even though two additional factors, the subsequent auto accident and the degenerative disk disease, may have contributed to her injury.[113] After reviewing this case authority, the Western District initially noted:

> While we do not see that some sort of common factual basis or causal connection is logically necessary given the original policy behind the indivisible injury rule, we note that the unmistakable trend of developments in the law of negligence in Missouri has been to require some factual, causal, or temporal connection between the events causing injury.[114]

The court admitted, however, that this "unmistakable trend"[115] placed a difficult burden upon Carlson and other similarly situated plaintiffs when it stated:

> We see no easy answer to the difficulty faced by plaintiff in the circumstances of this case, where the inability to scientifically fix the

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109. *Id.* at 290.

110. *Id.*

111. *Id.* at 291; *see also* Georges v. Duncan, 295 A.2d 809, 811 (Md. Ct. Spec. App. 1972) (citing *Caygill* as authority and refusing to join defendants whose negligent acts occurred four months apart and resulted in a single injury to the plaintiff), *cert. denied*, 268 Md. 748 (1973).

112. *Caygill*, 135 N.W.2d at 289; *see also* Duran v. Mission Mortuary, 258 P.2d 241, 251 (Kan. 1953) (requiring that independent acts of negligence be "related and interwoven in [a] point of time").

113. Carlson v. K-Mart Corp., No. WD53151, 1998 WL 6951, at *1 (Mo. Ct. App. Jan 13, 1998), *aff'd in part, rev'd in part*, 979 S.W.2d 145 (Mo. 1998).

114. *Id.* at *7.

115. *Id.*

> degree of the injury caused by one defendant creates problems of proof, yet there is no causal relation between the two incidents, and the incidents are not closely connected in time. Plaintiff has an interest in receiving full compensation for the injuries caused by the defendant. The defendant has an interest in having liability be determined according to the defendant's actual fault. In a case in which plaintiff's injuries flowing from defendant's tortious conduct cannot be determined due to the fact of injury from another source, there is special tension between these two interests. It appears that, under the ruling in *Jinkerson*, plaintiff may be precluded from going to trial against both defendants in the same cause unless there is a causal or close temporal relationship between the two incidents. Thus, the interrelatedness of the procedural rule and the substantive law may augment the challenge for a plaintiff unable to apportion the respective injuries.[116]

Nevertheless, in adhering to Missouri precedent, the court bowed to the great weight of outside authority and refused to allow Carlson the benefit of the indivisible injury rule.[117] Relying heavily on *Jinkerson* and *Carlton*, the court concluded that Carlson could only recover damages that were proximately caused by K-Mart's negligence because both accidents lacked a causal relationship and were widely separated in time and space.[118]

V. COMMENT

Two theories provide guidance in determining whether a court decision is correct. First, an objective individual may consider a case to be correctly decided in light of prior precedent. Another objective person may believe that a judicial decision is correct if the interests of justice are served. Under the latter view, prior case authority may guide the decision, but if that precedent dictates an unfair outcome, it is rejected so that a proper outcome is reached. This dilemma, of course, does not exist if case law dictates a just result. When the interests of promoting justice and following precedent clash, however, conflict ensues, and one interest must be sacrificed in favor of preserving the other. As the *Carlson* court recognized, this clash of interests was profoundly at issue in the instant case.

The *Carlson* court clearly adhered to prior precedent. In fact, the decision in *Jinkerson* effectively predetermined the outcome in *Carlson*. By requiring plaintiffs seeking application of the indivisible injury doctrine to prove that the independent torts causing the injury arose "out of the same transaction, occurrence, or series of transactions or occurrences,"[119] the *Jinkerson* court

116. *Id.* at *9.
117. *Id.*
118. *Id.*
119. MO. REV. STAT. § 507.040 (1) (1994).

essentially precluded application of the indivisible injury rule when the independent torts are widely separated in time and space. As a result, Carlson faced an uphill battle because the two accidents occurred nearly six months apart and in different locations.[120] Clearly, both accidents were not part of the "same transaction, occurrence, or series of transactions or occurrences."[121] Because no other theory of joint liability supported Carlson's claims,[122] she faced the difficult, if not impossible, task of apportioning K-Mart's responsibility for her back injury. This outcome precisely followed *Jinkerson*'s mandate, and is correct in light of the Missouri Supreme Court's ruling in that case.

Whether the *Carlson* outcome served the interests of justice, fairness, and equity is another matter, however. It is true that the jury awarded Carlson $100,000 for her injury, but justice does not hinge solely on the monetary outcome of a case. Justice requires that the means used to achieve a result be equitable, efficient, and evenhanded.

Following *Jinkerson*, plaintiffs with an indivisible injury are required to prove the impossible.[123] Apportioning damages to the defendant is critical to a plaintiff's prima facie case because apportionment directly relates to the elements of causation and damages, elements of proof fundamental to a negligence cause of action. Now, simply because of the nature of her injury, an injured party risks not collecting for her injury because she is unable to apportion damages to the defendant. Furthermore, even if a plaintiff survives a motion for directed verdict, the trier of fact will be forced to arbitrarily allocate a percentage of fault to the single defendant before the court. For the plaintiff, this is a risk. In a typical personal injury case, a significant percentage of a plaintiff's damages arise from medical expenses. Such damages are fixed, easily calculable, and do not involve speculation.[124] Therefore, because the nature of a plaintiff's injury prevents her from being able to specifically allocate the exact amount of

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120. Carlson v. K-Mart Corp, 979 S.W.2d 145, 145-46 (Mo. 1998).

121. MO. REV. STAT. § 507.040 (1) (1994).

122. Aside from indivisible injuries arising out of the same transaction, occurrence, series of transactions or occurrences, joint liability under Missouri law may be established if 1) the defendants participated in concerted action, 2) the defendants had a common duty to the plaintiff, or 3) the defendants are vicariously liable. *See* Brickner v. Normandy Osteopathic Hosp., Inc., 687 S.W.2d 910, 912 (Mo. Ct. App. 1985). None of these theories supported Carlson's claim.

123. This fact is illustrated by the instant case. At trial, no medical expert "testified that it was possible to segregate the injury or exacerbation caused by the automobile accident from the injury caused by the K-Mart incident." *Carlson*, 979 S.W.2d at 146. Another expert, however, was of the opinion that "any effect of the automobile collision was negligible, and that all of plaintiff's problems were attributable to the incident at K-Mart." Carlson v. K-Mart Corp., No. WD 53151, 1998 WL 6951, at *2 (Mo. Ct. App. Jan. 13 1998), *aff'd in part, rev'd in part*, 979 S.W.2d 145 (Mo. 1998). Furthermore, the medical experts disagreed whether Carlson's degenerative back disease played a role in causing her back pain. *Carlson*, 979 S.W.2d at 146.

124. This refers only to past, not future, medical expenses.

damages to the defendant, the jury will likely reduce the plaintiff's award or award nothing whatsoever. Hence, a plaintiff will be left without full compensation for her actual medical expenses. This outcome is especially troubling for plaintiffs with modest resources because, for such plaintiffs, reimbursement of medical expenses is of critical importance. Unfortunately, the indivisible injury doctrine as applied in Missouri fails to achieve this end. First, poorer plaintiffs will likely be financially unable to individually sue each defendant. In such a case, any hope of recovery is lost. Even if an injured plaintiff can afford to individually sue each tortfeasor, the heightened burden of proof imposed by the indivisible injury doctrine significantly reduces the plaintiff's chances of recovery. Quite simply, poorer plaintiffs are substantially affected and disadvantaged by this rule.

Injured plaintiffs are not the only parties who will suffer under this result, however. The judicial system will suffer as well. Under Missouri's interpretation of the indivisible injury doctrine, plaintiffs who have incurred single injuries from independent tortfeasors must sue each tortfeasor individually rather than combining defendants in one action and allowing the defendants to prove the extent of their fault. Under this scenario, an injured plaintiff may bring multiple lawsuits, and, in each one, present inconclusive medical evidence as to the cause of her injury. Because the trier of fact will be forced to arbitrarily allocate damages in a number of cases, the court system risks subjecting the parties to inconsistent verdicts if a plaintiff decides to try each defendant separately.

This is precisely the outcome that jurisdictions applying the indivisible injury rule without temporal requirement sought to avoid. Now, both the evidentiary and causation rationales for the rule are thwarted. Traditionally, the evidentiary rationale, the indivisible injury rule, and, on a larger scale, joint and several liability, "obviate[d] a plaintiff's burden of proving which share of the injury each of the several defendants was responsible for; the burden of proof [was] removed from the innocent plaintiff and placed upon the wrongdoers to determine themselves."[125] As illustrated by the instant case, Missouri has turned the evidentiary rationale on its head and shifted the burden of proof back to a plaintiff to apportion her damages.

The second rationale, the causation rationale, attempted to place every defendant before the court because each tortfeasor proximately caused the plaintiff's injury.[126] The *Jinkerson* rule, as applied in the instant case, works in piecemeal fashion, however. A plaintiff can sue each and every defendant individually with the hope that, in the end, she will be fully compensated. Clearly, this result fails to promote judicial efficiency. Under the doctrine as it now stands, plaintiffs must separately sue independent tortfeasors even though the degree and severity of a plaintiff's damages are legal and factual questions

125. LEE & LINDAHL, *supra* note 26, § 19.02.
126. *Id.* § 19.03.

common to all defendants. Judicial resources are wasted by this inefficient process. This is especially troubling in light of today's overburdened court system.

VI. CONCLUSION

The indivisible injury rule penalizes plaintiffs simply because of the *type* of injury received. Under Missouri law, innocent plaintiffs who received single, indivisible injuries must place every tortfeasor before the court and attempt to prove the impossible. Specifically, plaintiffs suffering from single, indivisible injuries must apportion their damages among the tortfeasors even though doing so is medically impossible.

This outcome, although not in conflict with prior case authority, is at odds with the guiding principles of justice, fairness, and equity. The original causation and evidentiary rationales behind the indivisible injury rule were founded on these principles. Court decisions like *Carlson* and *Jinkerson*, however, have stripped these rationales from their proper place in Missouri law. Quite simply, these rationales have suffered an indivisible injury of their own—death.

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