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NOTE

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I. INTRODUCTION

Nearly four decades ago, the Supreme Court of Missouri issued an opinion that continues to generate confusion on what constitutes a joint venture. *Johnson v. Pacific Intermountain Express Co.* not only distorted the elements required to establish a joint venture but also provided for the business organization's wrongful creation by operation of law through implication.[1] Upon this shaky foundation, corporate law jurisprudence in Missouri has grappled for decades with the same essential questions of what constitutes a joint venture and how this species of partnership may come into existence.

Within the past decade alone, Missouri courts have entertained several suits brought by plaintiffs relying on the flawed law espoused in *Johnson*.[2] Not only does this expose corporate entities to recurring litigation over the same or similar issues, but it also provides for uncertainty at the crucial intersection of law and business in which these entities pursue their economic

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1. Johnson v. Pac. Intermountain Exp. Co., 662 S.W.2d 237, 238 (Mo. 1983) (en banc).

2. *See e.g.*, Bader Farms v. Monsanto Co., 431 F.Supp. 3d 1084, 1093–1096 (E.D. Mo. 2019).; Riley v. A.K. Logistics, Inc., No. 1:15-CV-00069-JAR, 2017 WL 2501138 (E.D. Mo. June 9, 2017); Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822 (W.D. Mo. Apr. 15, 2013); Appellant's Reply Brief, Marathon Reprographics, Inc., et al., v. J.E. Dunn Constr. Co., 584 S.W.3d 822 (Mo. Ct. App. 2019) (No. WD82392), 2019 WL 2718911, at *8, *12.

aspirations. It is time for the Supreme Court of Missouri to disavow the faulty reasoning and bad law for which *Johnson* stands.

This Note discusses the development of joint venture law within Missouri jurisprudence. Part II of this Note considers the facts and holding of *Johnson*[3] within the context of the legal background in which it was decided. Part III then highlights the trend found in lower courts of ignoring the holding of *Johnson* in light of the recent developments in joint venture jurisprudence. Part IV discusses how the *Johnson* holding was wrong at the time it was decided, and how its flawed reasoning has allowed for confusion and conflicting case law for Missouri courts and litigants. This Note concludes by illustrating the need for the Supreme Court of Missouri to address the confusion perpetuated by *Johnson* and provide the clarification necessary for entrepreneurs and corporations to conduct business in reliance on firmly established law once again.

II. LEGAL BACKGROUND

In Missouri, it is generally agreed upon that a joint venture is an association of two or more persons to carry out a single business enterprise for profit.[4] Essentially, a joint venture is a species of partnership that lasts for a specific duration of time or until the completion of a particular project or goal.[5] Therefore, a joint venture satisfies the traditional elements of a partnership business organization.[6]

In analyzing the formation of a joint venture, "there must be a community of interest in the accomplishment of a common purpose, a mutual

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3. *Johnson*, 662 S.W.2d at 238.

4. Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5, 14–15 (Mo. 1970) ((quoting State ex rel. McCrory v. Bland, 197 S.W.2d 669, 672 (Mo. 1946) (en banc)); 46 AM. JUR. 2D *Joint Ventures* § 1 (2020); Howard v. Winebrenner, 499 S.W.2d 389, 396 (Mo. 1973)).

5. *See* Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5, 14–15 (Mo. 1970); *see also* UNIF. P'SHIP ACT § 202 (amended 2013) (UNIF. LAW COMM'N 1997). UNIF. P'SHIP ACT § 202 cmt. b (amended 2013) (UNIF. LAW COMM'N 1997) (citing Jonathan Woodner Co. v. Laufer, 531 A.2d 280, 285 n.7 (D.C. 1987)) (An arrangement labeled a 'joint venture' is a partnership if the arrangement meets the criteria stated in Subsection (a). In fact, in many jurisdictions, the law of general partnerships applies almost without analysis to joint ventures in which the co-venturers share profits.").

6. *See* UNIF. P'SHIP ACT § 202 (amended 2013) (UNIF. LAW COMM'N 1997).

(a) Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) An association formed under a statute other than this [act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this [act].

Id.

right of control, a right to share in the profits and a duty to share in the losses as may be sustained."[7] Thus, the three elements that constitute a joint venture are: (1) multiple persons; (2) sharing managerial control or the right of managerial control; and (3) sharing in the profits and losses of the organization.[8]

These three elements, or a variety of the same, were primarily introduced by *Jeff-Cole Quarries, Inc. v. Bell*,[9] and continue to be referenced as indications of the existence of a joint venture.[10] Furthermore, *Jeff-Cole* highlighted the fact that Missouri courts were hesitant to imply the existence of joint ventures where a different arrangement was expressly created.[11] This is especially the case where a joint venture is alleged when a business organization is in operation for a period of years.[12] This was the legal background at the time *Johnson* was decided.[13]

Johnson presented the issue of whether or not two corporate entities created a joint venture by implication where a freight broker contracted a shipping entity to transport a load of steel across the country.[14] During the transport, the tractor trailer struck and killed a motorist.[15] The establishment of a joint venture between the two entities would enable the plaintiff to hold

7. *Howard*, 499 S.W.2d 389, 396 (Mo. 1973) (citing Bell v. Green, 423 S.W.2d 724, 730–31 (Mo. 1968) (en banc)).

8. *Id.*

9. *Jeff-Cole Quarries*, 454 S.W.2d at 15–16.

10. *See e.g.*, Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999); Rosenfeld v. Brooks, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995).

11. *Jeff-Cole Quarries*, 454 S.W.2d at 16 ("The existence of a different type of express contract is in itself inconsistent with a claimed relationship of a joint [v]enture by implication."). This hesitation on behalf of Missouri courts continues to be the trend today. *See* Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822, at *2 (W.D. Mo. Apr. 15, 2013) ("Where an express written contract between the parties establishes a specific business form, Missouri courts have been reluctant to imply the existence of a joint venture."); Marathon Reprographics, Inc. v. JE Dunn Constr. Co., et al., No. 1616-CV29350, at*3, n.3 (Cir. Court of Jackson Co., Mo. Dec. 13, 2018) ("The Barfield Court first acknowledged Missouri Courts were moving away from implying joint venture agreements when corporate entities were involved.").

12. *Jeff-Cole Quarries*, 454 S.W.2d at 16 (citing Morrison v. Caspersen, 323 S.W.2d 697 (Mo. 1959)). A defining characteristic of a joint venture is its specified duration of time, rather than indefinite – *i.e.*, a partnership.

13. Johnson v. Pac. Intermountain Exp. Co., 662 S.W.2d 237, 239–45 nn.1–21 (Mo. 1983) (en banc).

14. *Id.* at 238.

15. *Id.*

the broker vicariously liable for the negligence of the driver in causing the accident.[16]

Thomas Johnson was killed on November 19, 1978, in an automobile collision with a tractor trailer unit, leased by Tabor, and driven by Brown.[17] Johnson's widow, Cathy, obtained a judgment against Pacific Intermountain Express Company ("P.I.E.") and Marlo Transport Corporation ("Marlo") for $750,000.[18] The defendants appealed to the Missouri Court of Appeals, Southern District, which subsequently affirmed the judgment.[19] The case was transferred to the Supreme Court of Missouri, which heard the case as an original appeal.[20]

Tabor owned and leased two tractors which operated with eighteen-wheel trailer units.[21] Brown and Singleton were employed as drivers of the tractor trailers.[22] None of the three men possessed a common carrier license for the transportation of freight from the Interstate Commerce Commission ("ICC") or any state authority.[23] Their operation consisted of picking up a load of produce on the West Coast and then hauling it to the East Coast.[24] After the eastbound produce was delivered, the drivers would look for a westbound load, which usually involved the leasing of the equipment to a common carrier possessing ICC authority.[25]

The load for the fatal trip was arranged by Marlo in its capacity as a freight broker.[26] Marlo did not operate trucks for shipping purposes, nor did it possess any ICC authority.[27] Marlo arranged for a load of steel to be hauled from Franklin Stainless Corporation in New York to Broken Arrow, Oklahoma by Brown in the 1978 Kenworth.[28] The tractor trailer unit, in addition to operating without the required ICC authority, carried a load that

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 239.

22. *Id.*

23. *Id.* A state issued common carrier license, or certificate, permits the licensee to transport goods and passengers through intrastate commerce by way of the state's public highways. *See e.g.*, MO. REV. STAT. § 390.051 (2012).

24. *Johnson*, 662 S.W.2d at 239 n.3 (Mo. 1983) (en banc) (citing 49 U.S.C. § 303(b)(6) (now 49 U.S.C. § 10526(a)(6)(B) Supp. V 1981)) (providing an exemption from operating authority for the shipment of agricultural commodities in interstate commerce).

25. *Id.* at 239. Leases of this kind are permitted under certain conditions by ICC regulations. 49 C.F.R. § 1057.4 (1978) (current version at 49 C.F.R. § 376.12 (2018)).

26. *Johnson*,662 S.W.2d at 240.

27. *Id.*

28. *Id.*

was over the weight limit for several states on the route.[29] Consequently, the drivers selected a route designed specifically to avoid weigh stations.[30] There was no evidence Marlo knew of the overload, selected the desired route, or knew of the effort to avoid possible involvements with "the law."[31]

Prior to embarking on the journey, Marlo paid an advance to the drivers.[32] Marlo was to collect the freight charges from the shipper, or consignee, and retain a twenty-five percent fee for its brokerage services.[33] The remainder of the shipping fee was to be remitted to Tabor for the drivers' services and use of the 1978 Kenworth.[34] However, the freight was never delivered.[35]

P.I.E.'s involvement in the case at hand is not significant to the focus of this Note; however, a brief discussion of P.I.E.'s role is necessary for a more complete understanding of *Johnson*'s holding. P.I.E. was a major interstate carrier of freight at the time of the accident in 1978.[36] Singleton and Tabor testified to several dealings with P.I.E. prior to the accident, in which they transported cargo under the aforementioned equipment-lease regulatory scheme.[37] While P.I.E. disclaimed any knowledge of any lease or dealings with Brown, Tabor, or Singleton, a P.I.E. sign was still affixed to the Kenworth at the time of the accident from a previous shipment.[38]

Nonetheless, the court, while admitting the evidence was "sketchy," stated that the jury, in finding P.I.E. liable for negligence, could have found: (1) the 1978 Kenworth made its last westbound trip under P.I.E.'s operating authority ten or twelve days before the accident; (2) it carried signs previously furnished by P.I.E.; (3) P.I.E. made no effort to collect the signs at the end of the run; and (4) at least one sign was on the tractor at the time of accident.[39] Despite the court's hypothetical jury findings, there was no evidence that the fatal trip was made under P.I.E.'s authority or with its knowledge, or that

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* There was no discussion as to the nature of this advance in the opinion. More specifically, whether this advance was for the drivers' expenses along the route (similar to the advance provided by P.I.E.), or if the advance was a portion or the whole of the payment to the drivers for their services, was never determined.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; *see* 49 C.F.R. § 1057.4 (1978) (current version at 49 C.F.R. § 376.12 (2018)).

38. *Johnson*, 662 S.W.2d at 240. Singleton testified that there had been discussion that the P.I.E. sign might also be helpful in avoiding law enforcement along the route due to the overload. *Id.*

39. *Id.*

P.I.E. had any interest in the revenues of the shipment.[40] Therefore, the plaintiff's claim against P.I.E. depended upon a constructive agency theory derived from the federal statutes and ICC regulations.[41]

The dispute in *Johnson* centered on the jury instructions for both Marlo and P.I.E. concerning their vicarious liability.[42] The liability of P.I.E. was affirmed based upon "statutory policy rather than a conventional respondeat superior [principal-agent] theory."[43] However, this Note is only concerned with the liability imposed upon Marlo by the court's characterization of the arrangement between Marlo and Tabor-Singleton as a joint venture.

Marlo's vicarious liability was put forth in "Jury Instruction Number 8:"

> Lee Brown, Jr., was operating the Kenworth Truck within the scope and course of his agency for Marlo Transportation Corporation at the time of the collision, and
>
> Acts were within the "scope and course of agency" as that phrase is used in this instruction if:
>
> There were performed by Lee Brown, Jr. to serve the interests of Marlo Transportation Corporation according to an express or implied agreement with Marlo Transportation Corporation, and
>
> Marlo Transportation Corporation either controlled or had the right to control the physical conduct of Lee Brown, Jr.[44]

Marlo argued that under the arrangement it had no control, or right of control, over Brown as he headed west in the tractor trailer.[45] Instead, Marlo asserted that it properly retained the proprietor of the tractor trailer, as an independent contractor, to achieve a particular result but not the method by which the delivery was accomplished.[46] Therefore, Marlo argued there was no basis for its vicarious liability.[47]

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40. *Id.*

41. *Id.*

42. *Id.* at 239.

43. *Id.* at 245.

44. *Id.* at 241.

45. *Id.*

46. *Id.*; *see* RESTATEMENT (SECOND) OF AGENCY § 2(3) (A.M. LAW INST. 1958).

> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

Id.

47. *Johnson*, 662 S.W.2d at 241.

The court first considered the "practicalities of the situation rather than the legalities."[48] By this reference, the court highlighted the facts used to find that an implied joint venture existed between the two entities.[49] In the typical practice of a freight broker, Marlo was in touch with a customer who needed to transport a load of steel.[50] Marlo then fulfilled this need by entering into an arrangement with Brown and Singleton, as lessees of Tabor's tractor trailer, to transport the shipment to Oklahoma.[51] Marlo and the truckers did not memorialize their agreement in writing but "rather operated informally."[52] Marlo was tasked with collecting payment from the customer and retained twenty-five percent for its brokerage services under the agreement.[53] The court's final "practicality" was that neither party expressed concern about the lack of operating authority in accordance with ICC regulations.[54]

Upon returning to the "legalities," the court concluded that the arrangement formed by the entities was a joint venture because "the parties undertook a particular project, for mutual benefit and profit."[55] Without much analysis, the court hastily concluded, not only that the arrangement sufficiently satisfied the requisite elements of a joint venture, but also that an implied joint venture existed between the two corporations.[56] Therefore, the majority affirmed the judgment against Marlo based upon the existence of an implied joint venture between the corporate defendants.[57]

Even at the time *Johnson* was decided, the Supreme Court was divided over several aspects of the case, including the majority's finding of a joint venture between Marlo and Tabor.[58] While each of the dissenting judges disagreed with holding P.I.E. liable, only Judge Welliver dissented in

48. *Id.* In referring to the practicalities, the court is referring to the conduct of the parties within the arrangement.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 242.

58. *Id.* at 246–48. Chief Judge Rendlen and Judges Gunn and Billings concurred with Judge Blackmar's opinion for the majority. Judge Higgins concurred in the portion of the opinion affirming the judgment against Marlo, but dissented in the affirmance of plaintiffs' judgment against P.I.E. Judge Donnelly dissented from the majority's affirmance against both defendants writing "Today, the [c]ourt ignores settled Missouri law and implants, again without rationale, a scheme for redistribution of property." *Id.* at 246 (Donnelly, J., dissenting). Finally, Judge Welliver dissented from the majority in its affirmance of the judgment against both P.I.E. and Marlo.

affirming the judgment against Marlo.[59] His dissent was two-fold, arguing that the court erred in finding that Marlo and the defendants "undertook a particular project, for mutual benefit and profit," and that there was a basis to conclude that Marlo had an "equal right of control."[60]

III. RECENT DEVELOPMENTS

The elements that constitute a joint venture are generally agreed upon. Naturally, there may be some discrepancies in the wording of particular elements but substantively, the same requirements must be met: (1) multiple persons (2) who combine their skills and resources, (3) share in managerial control over the enterprise, and, as a result, (4) share in the profits and losses of said enterprise.

Joint venture litigation typically concerns two main issues: (1) the threshold or degree to which the elements of a joint venture are satisfied based upon the facts and circumstances of any given dispute; and (2) the definition of terms within these elements. In other words, issues have often centered on whether both parties possessed sufficient managerial control, or whether the distribution method between the parties actually constitutes profit sharing. Either way, both issues must be satisfied and present for an agreement to constitute a joint venture by law.[61]

Like partnerships, joint ventures may be express or implied.[62] A "joint venture may be established without any specific formal language to enter into a joint enterprise; it may be implied or proven by facts and circumstances showing such enterprise was entered into."[63] However, joint ventures differ from partnerships in the deference given to the parties' arrangement if another

59. Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237, 246–48 (Mo. 1983) (en banc).

60. *Id.* at 248 (Welliver, J., dissenting).

61. Eads v. Kinstler Agency, Inc., 929 S.W.2d 289, 292 (Mo. Ct. App. 1996); Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5 (Mo. 1970).

62. Rosenfeld v. Brooks, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995); *see Jeff-Cole Quarries*, 454 S.W.2d at 15; Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822, at *2 (W.D. Mo. Apr. 15, 2013) (quoting Scott v. Kempland, 264 S.W.2d 349, 354 (Mo. 1954)) ("A joint venture may also be 'implied and inferred, in whole, or in part, from the acts and conduct of the parties and from proven facts and circumstances showing that such enterprise was in fact entered into.'").

63. *Jeff-Cole Quarries*, 454 S.W.2d at 15 (citing *State ex rel. McCrory v. Bland*, 197 S.W.2d 669, 672 (Mo. 1946) (en banc)).

business organization is created by the express terms of the agreement.[64] This is in part because the parties must *intend* to form a joint venture.[65]

A. Ritter v. BJC Barnes Jewish Christian Health Systems

In *Ritter v. BJC Barnes Jewish Christian Health Systems*, the Missouri Court of Appeals, Eastern District, considered whether a joint venture existed between two corporations.[66] In that case, Mary Jo Ritter, on behalf of a former patient's estate, sued the Barnes Jewish Christian Hospital and its parent corporation for negligent medical care resulting in the patient's death.[67] Building upon the framework set forth in *Jeff-Cole*[68] and *Rosenfeld*,[69] the *Ritter* court recognized that the existence of an express contract forming a different business organization is "in itself inconsistent with a claimed relationship of a joint venture by implication."[70] Therefore, courts will not imply the existence of a joint venture where evidence indicates that a different business organization was created by the parties.[71] Moreover, joint ventures between two corporations must be contractually agreed upon.[72] Joint ventures between corporations are rarely implied, especially when there is an express agreement to the contrary.

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64. "Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999) (quoting Rosenfeld v. Brooks, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995) ("The existence of a different type of express contract is in itself inconsistent with a claimed relationship of a joint venture by implication."); Binkley v. Palmer, 10 S.W.3d 166, 170–71 (Mo. Ct. App. 1999) (declining to imply a joint venture or partnership where the evidence demonstrated only the existence of a contract for services, which contained "clear disclaimers" of a joint venture or partnership relationship).

65. *Jeff-Cole*, 454 S.W.2d at 16 (emphasis added).

66. Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377 (Mo. Ct. App. 1999).

67. *Id.* at 381.

68. *Jeff-Cole*, 454 S.W.2d at 16 ("The existence of a different type of express contract is in itself inconsistent with a claimed relationship of a joint venture by implication.").

69. Rosenfeld v. Brooks, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995) ("[I]t is inappropriate for a court to imply a joint venture where, as here, it is evident that there is a different business form involved.").

70. *Ritter*, 987 S.W.2d at 387.

71. *Id.*

72. *Jeff-Cole*, 454 S.W.2d at 15 (citing State *ex rel.* McCrory v. Bland, 197 S.W.2d 669, 672 (Mo. 1946) (en banc)) ("[T]here need be no express agreement to share losses, for if the status is established, such an agreement may be implied; and also, that a corporation may, by contract, become a part of a joint venture.").

B. Barfield v. Sho-Me Power Electric Cooperative

In *Barfield v. Sho-Me Power Electric Cooperative*, the United States District Court for the Western District of Missouri dealt with the notion of an implied joint venture between two corporations.[73] In that case, a putative class action was brought against Sho-Me Power Electric Cooperative and KAMO Electric Cooperative, among others.[74] The class, representing about 3,000 landowners, sued the defendants for misusing electric transmission line easements.[75] The suit alleged that the two cooperatives formed a joint venture by distributing telecommunications services via the same fiber-optic cable networks and soliciting customers from the same website.[76]

In considering the plaintiffs' allegations, the court recognized that Missouri courts have been hesitant to imply the existence of a joint venture between corporations.[77] In arguing that Missouri courts have found the existence of an implied joint venture between corporations, the plaintiffs cited *Hobart-Lee Tie Co. v. Grodsky*.[78] *Hobart* held a jury may infer that two corporations formed a joint venture where one corporation agreed to advance money to the other and take charge of its clerical work, the corporations shared equally in the profits, and eventually formed a single corporation.[79] However, in differentiating *Hobart* from the dispute at hand, the *Barfield* court pointed out that the corporations had "an *express agreement* to act in ways that mapped on to the elements of a joint venture, such as the right to share profits and control."[80]

Alternatively, the plaintiffs relied on *Johnson* in arguing that the right to share profits was not a necessary element in the formation of a joint venture.[81] Again, however, the court struck down the plaintiffs' argument.[82] The court cited Judge Welliver's dissent in *Johnson*, and noted that his characterization of the arrangement formed between the corporate defendants as instructive to

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73. Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822 (W.D. Mo. Apr. 15, 2013).

74. *Id.* at *1.

75. *Id.*

76. *Id.* at *2.

77. *Id.* at *3; *see Morrison v. Caspersen*, 323 S.W.2d 697, 701–02 (Mo. 1959); *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1027 (E.D. Mo. 2009) ("Corporations may become members of joint ventures only by express agreement or contract."); Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999); Rosenfeld v. Brooks, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995).

78. Barfield, 2013 WL 12145822, at *3 (citing Hobart-Lee Tie Co. v. Grodsky, 46 S.W.2d 859 (Mo. 1931)).

79. *Id.*

80. *Id.* (emphasis added).

81. *Id.* at *4.

82. *Id.*

the case at hand.[83] "[T]he majority's interpretation of the relationship as a joint venture was not in line with precedent, as the broker earned a fee upon hiring a driver for his clients, and had no further participation in or control over the transaction after that point."[84] The *Barfield* court supported its conclusion, and Welliver's dissent, by also citing more recent Missouri cases holding that the right to share in profits is a necessary element of a joint venture.[85]

Ultimately, the *Barfield* court held that the plaintiffs failed to produce sufficient evidence of an express agreement between the defendants to form a joint venture.[86] The court concluded that this deficiency in the plaintiffs' evidence was fatal to their assertion that a joint venture was ever formed between the defendant corporations.[87]

Even more recently than *Barfield*, Missouri courts at several levels have continued to entertain claims which have relied on *Johnson* for the proposition that corporate entities may impliedly form joint ventures through their "actions" rather than their intentions.[88] This is despite the weight given to the parties' intent to form a joint venture in joint-venture analyses.[89] Moreover, the facts relied on by the *Johnson* court in finding an implied joint venture set a relatively low bar, and rather inaccurate standard, for the satisfaction of the elements of joint ventures.[90]

C. Riley v. A.K. Logistics, Inc.

In *Riley v. A.K. Logistics, Inc.*, the United States District Court for the Eastern District of Missouri heard a dispute arising out of a rear-end collision between a semi-truck and a motorcycle on Interstate Highway 55 in New

83. *Id.* (citing Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237, 247–48 (Mo. 1983) (en banc)).

84. *Id.* (citing Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237, 247–48 (Mo. 1983) (en banc)).

85. *Id.*;*see* Jones v. St. Charles Cnty., 181 S.W.3d 197, 202 (Mo. Ct. App. 2005); Hatch v. V.P. Fair Found., Inc., 990 S.W.2d 126, 138 (Mo. Ct. App. 1999) (holding joint ventures "require[] that the parties have a right to share in the profits and a duty to share in the losses.").

86. Barfield, 2013 WL 12145822, at *6.

87. *Id.* ("At most, the record indicates that Sho-Me and KAMO had a close and cooperative business relationship.").

88. Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237 (Mo. 1983) (en banc).

89. *See* Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5 (Mo. 1970).

90. *Johnson*, 662 S.W.2d at 241–42 (Mo. 1983) (en banc) (finding that defendant corporations impliedly formed a joint venture where one party received a fixed 25% brokerage fee and had no managerial control after its initial arrangement of the shipment).

Madrid County, Missouri.[91] The plaintiff alleged that the semi-truck driver was employed by A.K. Logistics at the time of the accident, and also that the driver was carrying a shipment for the third-party defendant, C.H. Robinson.[92] The plaintiff sought to hold C.H. Robinson liable on several theories, including joint liability consequential to its status as a joint venturer with A.K. Logistics.[93] The facts and issues of the dispute were very similar to the ones adjudicated in *Johnson*.[94]

The *Riley* court noted a significant difference between the formation of agency relationships and the formation of joint ventures.[95] In analyzing the formation of agency relationships, the parties' intent to form such a relationship is only one of many factors to be considered. However, "the parties' intent to form a joint venture is given significant, *if not controlling*, weight in a joint-venture analysis."[96]

The defendants argued they were not engaged in a joint venture because they: (1) did not intend to form a joint venture; (2) did not share a common pecuniary interest; and (3) did not have equal control or the right to equal control in managing the enterprise.[97] Their denial of a common pecuniary interest was based on the payment structure of the defendants' contractual agreement which was similar to the one between Marlo and Tabor, Singleton, and Brown in *Johnson*.[98] While the defendants admitted that they each certainly had a shared economic interest in the enterprise, their chosen payment structure – a fixed per-delivery fee – did not equate to profit sharing.[99] Additionally, their contractual agreement stated that A.K. Logistics was an independent contractor and expressly disclaimed the formation of a joint venture.[100]

Again, the plaintiff here relied heavily on *Johnson* in urging the court to find the characterization of the defendants' relationship was not controlling.[101] To support his argument, the plaintiff contended that the terms of the express

91. Riley v. A.K. Logistics, Inc., No. 1:15-CV-00069-JAR, 2017 WL 2501138, at *1 (E.D. Mo. June 9, 2017).

92. *Id.*

93. *Id.*

94. *Id.*; *Johnson*, 662 S.W.2d 237.

95. *Riley*, 2017 WL 2501138, at *8.

96. *Id.* (emphasis added) (citing Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5, 16 (Mo. 1970)) ("The existence of a different type of express contract is in itself inconsistent with a claimed relationship of a joint [v]enture by implication."); *see* Rosenfeld v. Brooks, 895 S.W.2d 132, 135 (Mo. Ct. App. 1995).

97. *Riley*, 2017 WL 2501138, at *9.

98. *Id.*; *see Johnson*, 662 S.W.2d at 241–42.

99. *Riley*, 2017 WL 2501138, at *9 (A.K. Logistics received a fixed per-delivery fee for each successful delivery.).

100. *Id.*

101. *Id.*

agreement supported a finding of a joint venture because both parties shared control over the shipment.[102] In essence, because of this "shared control over the load," the court, like the *Johnson* court, should have "implied that a joint venture existed between the broker and carrier because the entities had undertaken 'a particular project, for mutual benefit and profit.'"[103]

Despite the plaintiff's reliance on *Johnson*, the court found that while A.K. Logistics and C.H. Robinson did share an economic interest, the two entities did not share profits or control over the enterprise.[104] The court pointed to the fact that A.K. Logistics was not involved in, and had no control over, the price C.H. Robinson negotiated with its customers.[105] In other words, the benefit to A.K. Logistics was derived from separate, third-party agreements between C.H. Robinson and its clients.[106] Because A.K. Logistics had no control over the agreements C.H. Robinson entered into, the enterprise lacked both profit-sharing and mutual control between the defendant corporations.[107] Therefore, the court held as a matter of law that A.K. Logistics and C.H. Robinson were not engaged in a joint venture.[108]

A.K. Logistics lack of control over the agreements parallels Tabor's lack of control over the agreements entered into by Marlo. As a freight broker, Marlo sought out shippers to deliver its clients' cargo.[109] Just like C.H. Robinson, Marlo had an interest in finding a contractor who could transport the cargo for a reasonably affordable rate so that each entity involved in the enterprise stood to gain a profit.[110]

D. Marathon Reprographics, Inc. v. JE Dunn Constr. Co., et al.

More recently, the Jackson County Circuit Court adjudicated a joint enterprise dispute concerning similar issues.[111] In that case, the plaintiff,

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102. *Id.*

103. *Id.* (citing Johnson v. Pac. Intermountain Exp. Co., 662 S.W.2d 237, 241–42 (Mo. 1983) (en banc)).

104. *Id.* at 11.

105. *Id.*

106. *Id*.

107. *Id*.; s*ee Ritter v. BJC Barnes Jewish Christian Health Sys.*, 987 S.W.2d 377, 388 (Mo. Ct. App. 1999) ("Merely sharing an economic interest is not sufficient to form a joint venture. There must be some evidence of the parties participating and having control over the enterprise."); *see also Tuggles v. Thompson*, 183 S.W.3d 611, 617 (Mo. Ct. App. W.D. 2006) (all parties having joint and several control over the enterprise is an indication of joint venture).

108. *Id.* at 10.

109. Johnson v. Pac. Intermountain Exp. Co., 662 S.W.2d 237, 240 (Mo. 1983).

110. *Riley*, No. 1:15-CV-00069-JAR. at 241.

111. Marathon Reprographics, Inc. v. JE Dunn Constr. Co., et al., No. 1616-CV29350 (Cir. Court of Jackson Co., Mo. Dec. 13, 2018).

Marathon Reprographics, Inc. ("Marathon"), brought suit against J.E. Dunn Construction Company ("JE Dunn") and Site 10.01, Inc. ("Site 10.01") for several claims arising out of an alleged joint venture concerning the development of project management software.[112] JE Dunn filed a summary judgment motion arguing that it and Marathon were not engaged in a joint venture as a matter of law.[113]

Marathon argued that all four of the elements from *Ritter*[114] need not be met in order to establish a joint venture.[115] Marathon cited *Manley v. Horton*[116] for this proposition.[117] However, the court refuted Marathon's contention by clarifying that the *Manley* court "was referring to the evidentiary elements in the case and not to the legally required joint venture elements."[118] Therefore, the "great weight of case law" requires a plaintiff to establish all four elements.[119] The court declared that *Barfield*[120] was instructive in the court's analysis and its holding that "the right to share in profits is a necessary element of a joint venture."[121] Moreover, because Missouri courts hold parties must have equal control over the enterprise, a failure to show joint control is "dispositive of whether a joint venture exists."[122]

In a footnote, the court also highlighted the fact that where an express written agreement between the parties establishes a specific business organization, Missouri courts are again hesitant to find the existence of a joint venture.[123] However, similar to *Johnson*,[124] there was no formal written

112. *Id.* at *1.

113. *Id.* at *2.

114. Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999). *See supra* Section II for Missouri Joint Venture Elements.

115. *Marathon*, No. 1616-CV29350 at *3.

116. Manley v. Horton, 414 S.W.2d 254, 260 (Mo. 1967) ("The stated elements are matters to be considered in [the determination of a joint venture], but they are not conclusive, jointly or severally.").

117. *Marathon*, No. 1616-CV29350 at *3.

118. *Id.* at *3.

119. *Id.* ((citing Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999)); Eads v. Kinstler Agency, Inc., 929 S.W.2d 289, 292 (Mo. Ct. App. W.D. 1996); Howard v. Winebrenner, 499 S.W.2d 389, 396 (Mo. 1973).

120. Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822, at *4 (W.D. Mo. Apr. 15, 2013).

121. *Marathon,* No. 1616-CV29350 at *3 (quoting Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822, at *4 (W.D. Mo. Apr. 15, 2013)).

122. Id.

123. *Id.* at 4 n.4.

124. Johnson v. Pac. Intermountain Exp. Co., 662 S.W.2d 237, 241–42 (Mo. 1983) (en banc).

agreement between the entities, yet Marathon insisted there was evidence of an express, oral agreement between the entities to form a joint venture.[125]

Specifically, Marathon contended: (1) JE Dunn would use Marathon's software on agreed-upon construction projects in exchange for preferential pricing; (2) Marathon and JE Dunn would jointly market their IT-collaborated construction services and use their combined capabilities for their shared financial benefit; and (3) both entities would have an equal voice in the control and direction of the partnership.[126] To support the establishment of this oral agreement to form a joint venture, Marathon presented evidence that the parties had previously discussed creating a joint venture.[127]

However, the court could find no evidence that the entities intended to share in profits and losses.[128] This finding was partially based on Marathon's acknowledgment of testimony, which confirmed the absence of profit-sharing.[129] Additionally, the court also found no evidence that Marathon had an "equal voice" in the enterprise because JE Dunn had the sole authority to decide on which projects to use Marathon's software.[130] Finally, the parties each conceded that they maintained control over their own employees and systems.[131] Therefore, because Marathon failed to demonstrate that the two entities shared in profits and losses and also possessed joint and several control over the project, Marathon's contention that the parties formed a joint venture failed as a matter of law.[132]

Despite the holding in *Marathon*, confusion remains as to what may constitute a joint venture in Missouri. Ambiguity as to whether joint ventures between corporations may be implied further exacerbates this confusion despite recent cases to the contrary.[133] Marathon could just have easily cited *Johnson*, instead of *Manley*, for the proposition that joint ventures between corporations may be implied, just as the plaintiff did in *Riley*.[134] In the same vein, Marathon could have also cited *Johnson* for the proposition that profit-sharing is not an essential element in establishing a joint venture like the plaintiff in *Barfield*.[135] The *Marathon* court likely would have struck down

125. *Marathon*, No. 1616-CV29350 at *4.

126. *Id*.

127. *Id*. at 5.

128. *Id*.

129. *Id*.

130. *Id*.

131. *Id*.

132. *Id*. at 6; *see* Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999).

133. *See e.g.*, Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822, at *2 (W.D. Mo. Apr. 15, 2013).

134. Riley v. A.K. Logistics, Inc., No. 1:15-CV-00069-JAR, 2017 WL 2501138, at *9 (E.D. Mo. June 9, 2017).

135. *Barfield*, No. 11-CV-04321-NKL at *4.

these arguments citing the decisions in the respective cases, and profit-sharing has generally been accepted as a necessary element in a finding of a joint venture. Regardless, the same issues continue to be litigated and disputed in Missouri courts.

E. Bader Farms, Inc. v. Monsanto Co.

There is a case, *Bader Farms, Inc. v. Monsanto Co.*, currently before the United States District Court for the Eastern District of Missouri concerning whether a joint venture was established between defendant corporations in the development and marketing of certain seeds and herbicides.[136] In that case, Bader Farms, Inc. and Bill Bader are suing Monsanto Co. and BASF Corporation for the destruction of the plaintiffs' peach orchard based on activities arising out of the defendants' alleged joint venture.[137] Despite an express contractual agreement forming an independent contractor relationship, which also explicitly disclaimed the establishment of a joint venture between the corporate defendants, the court has overruled the defendants' summary judgment motion disclaiming joint venture.[138] In the same case, an additional issue has been raised regarding whether a duty to share in the losses of the enterprise is a necessary element in establishing a joint venture.[139] The court held "[t]he requirement of 'shared losses' is not a strict one under Missouri law."[140] Relying on these two issues, the court overruled defendants' summary judgment motion "despite the defendants' stated intention not to form a 'partnership.'"[141]

The *Barfield* court was one of the first to expressly acknowledge that Missouri courts were moving away from implying joint venture agreements when corporate entities were involved.[142] This trend is further compounded by courts' hesitation to imply joint ventures when another business organization is expressly created.[143] Nonetheless, the same arguments continue to manifest conflicting outcomes.

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136. Bader Farms v. Monsanto Co., MDL No. 1:18md2820-SNLJ, at *11 (E.D. Mo. Dec. 31, 2019).

137. *Id*. at *1.

138. *Id.* at 16–17.

139. *Id.* at 16.

140. *Id*. (citing *Morley v. Square*, 2016 WL 1615676, at *6 (E.D. Mo. Apr. 22, 2016); *compare* Hatch v. V.P. Fair Found, Inc., 990 S.W.2d 126, 138 (Mo. Ct. App. 1999) (holding joint ventures "require[] that the parties have a right to share in the profits and a duty to share in the losses.").

141. *Bader Farms*,MDL No. 1:18md2820-SNLJ, at *16..

142. Marathon Reprographics, Inc. v. JE Dunn Constr. Co., et al., No. 1616-CV29350, at *3, n3 (Cir. Court of Jackson Co., Mo. Dec. 13, 2018).

143. *See e.g.*, Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999) (quoting Rosenfeld v. Brooks, 895 S.W.2d 132, 135 (Mo.

A joint venture remains essentially "an association of two or more persons to carry out a single business enterprise for profit."[144] However, recent cases have refined the elements that constitute a joint venture. A joint venture is established when the following criteria are met: "(1) an express or implied agreement among members of the association; (2) a common purpose to be carried out by the members; (3) a community of pecuniary interest in that purpose; and, (4) each member has an equal voice or an equal right in determining the direction of the enterprise."[145] The parties must intend to create a joint venture which may be evidenced by actively participating and sharing in profits, all parties having joint and several control, and having a duty to share in losses.[146] Furthermore, Missouri courts are hesitant to imply joint ventures between defendant corporations. The hesitation is exacerbated when there is an express agreement between the defendant corporations evidencing the creation of a different business organization or arrangement.

IV. DISCUSSION

Subpart A of this Part discusses the inconsistencies and error in *Johnson*'s holding and also the practical significance of its undesired effect. Next, Subpart B analyzes the importance of distinguishing a joint venture from a traditional arms-length arrangement and is discussed by focusing on the legal ramifications of each relationship. Finally, building off of these relevant distinctions, Subpart C examines the corporate law of Delaware,[147] culminating in a solution to help clarify joint venture jurisprudence in Missouri.

A. Johnson*'s Flawed Analysis*

The holding in *Johnson* was incorrect in imposing joint liability upon Marlo based on a finding of joint venture between it and the truckers. While

Ct. App. 1995) ("The existence of a different type of express contract is in itself inconsistent with a claimed relationship of a joint venture by implication."); Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5, 16 (Mo. 1970) ("The existence of a different type of express contract is in itself inconsistent with a claimed relationship of a joint [v]enture by implication.").

144. *Ritter*, 987 S.W.2d at 387.

145. *Id.*

146. *Id.*(citing Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5, 16 (Mo. 1970)).

147. Delaware is considered to be the leading jurisdiction and benchmark in state corporate law. More than sixty-seven percent of all Fortune 500 companies are incorporated in Delaware. DELAWARE DIVISION OF CORPORATIONS, ANNUAL REPORT STATISTICS (April 24, 2020) https://corp.delaware.gov/stats/ [https://perma.cc/5FH4-95L5].

the *Johnson* court's decision to hold P.I.E. liable was a stretch,[148] the legacy of the court's joint venture analysis, or lack thereof, has inflicted the most damage by perpetuating confusion surrounding the elements establishing joint venture in Missouri. Since the decision, *Johnson*'s faulty reasoning has continued to find its way into the briefs and arguments of plaintiffs seeking to hold corporate defendants liable for damages based on findings of joint ventures.

The *Johnson* court's joint venture analysis was flawed for three reasons.[149] It incorrectly held: (1) Marlo's twenty-five percent brokerage fee constituted a share in the profits of the enterprise; (2) Marlo exercised sufficient managerial control over the operation of the enterprise; and (3) the enterprise constituted an implied joint venture despite the lack of an express contractual agreement establishing one.[150]

First, the court did not give any reasons for finding that Marlo's twenty-five percent brokerage fee satisfied the requisite element of profit sharing.[151] The court even enumerated the profit-sharing requirement, yet failed to sufficiently explain how the element was satisfied.[152] Consequently, the omission opened *Johnson*'s holding to the interpretation that profit sharing is not an essential element in establishing a joint venture.[153]

Second, the court glazed over the facts in finding that Marlo had exercised sufficient managerial control, or possessed the right of control, over the enterprise equal to that of Brown, Singleton, and Tabor.[154] Later on, the court contradicted this finding in admitting that "Marlo . . . could not exercise effective control while the truck was on the highway but, as is usual in joint ventures, the participants had their assigned roles in the total project."[155] Accordingly, the court reasoned, "No showing of right of control over and above that which follows as of course from a showing of joint venture need be made."[156]

148. Johnson v. Pac. Intermountain Exp. Co., 662 S.W.2d 237, 245 (Mo. banc 1983) ("The conclusion we reach is based on statutory policy rather than a conventional respondeat superior theory.").

149. See id at 241–42.

150. *Id.*

151. *Id*.

152. *Id*.

153. *See* Barfield v. Sho-Me Power Elec. Coop., No. 11-CV-04321-NKL, 2013 WL 12145822, at *4 (W.D. Mo. Apr. 15, 2013) (where plaintiffs relied on *Johnson* for the proposition that the right to share in profits, and subsequently the duty to share on losses, were not necessary elements in forming a joint venture).

154. *Johnson* 662 S.W.2d at 241–42.

155. *Id*. at 242.

156. *Id*.

The court used Marlo's actions as a freight broker, prior to the physical shipment of the steel, as evidence of its managerial control.[157] Because Marlo was "instrumental in launching and directing the truck journey," coupled with the fact that Marlo did not obtain a regular, certified carrier for the shipment of steel, the court believed Marlo played a sufficient role in the death of Johnson.[158] Therefore, Marlo must be found culpable based upon a theory of implied joint venture. This non sequitur approach by the court, *i.e.*, culpable therefore liable, is further exemplified by the court's focus on refuting Marlo's assertion of an independent contractor-employer relationship, rather than satisfying the elements of a joint venture.[159]

The court noted that Missouri courts have been hesitant to uphold claims of immunity based upon independent contractor status.[160] The court tried to couch the establishment of a joint venture, and Marlo's vicarious liability, in a "tendency to find that truck operators are agents or servants rather than independent contractors."[161] This tendency referenced by the court was exemplified in *Madsen v. Lawrence*.[162] However, the issue in *Madsen* concerned whether a dump truck driver was considered an employee or an independent contractor when he negligently allowed his dump truck to roll down a hill and strike the minor child.[163] The *Johnson* court conflated the test in *Madsen* – master-servant versus independent contractor – with an analysis for whether a joint venture existed.[164]

As the only dissent in affirming the judgment against Marlo, Welliver rightly focused on Marlo's status as a freight broker and its role in the shipping industry.[165] While recognizing that Marlo had an economic interest in the delivery of the freight, Welliver pointed out that Marlo had no further legal

157. *Id*.

158. *Id.* "Marlo's case is not helped by the fact that it did not try to place the load with a regular, certified carrier, having regular routes and published tariffs, but rather did business with itinerant truckers with no semblance of operating authority." *Id.*

159. *Id*.

160. *Id.*; *see e.g.*, Madsen v. Lawrence, 366 S.W.2d 413, 415 (Mo. 1963).

161. *Johnson*, 662 S.W.2d at 242 ((citing Madsen v. Lawrence, 366 S.W.2d 413, 415 (Mo. 1963)) (holding that trial court did not abuse its discretion in granting a new trial where evidence introduced justified a finding that a driver of a dump truck was a servant rather than an independent contractor)).

162. *Madsen*, 366 S.W.2d at 418–19.

163. *Id.* at 415.

164. *See id. Id.* (citing Barnes v. Real Silk Hosiery Mills, 108 S.W.2d 58 (Mo. 1937)) ("A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or subject to the right of control by the master."); *Cf. Johnson*, 662 S.W.2d at 241.

165. *Johnson*, 662 S.W.2d at 247 (Welliver, J., dissenting). A freight broker places shippers in contact with clients who need products shipped to various locations throughout the country.

interest at stake with respect to the fee once Brown agreed to haul the freight.[166] Therefore, because Marlo's participation in the transaction ended at this point, the court erred when it found that "[t]he parties undertook a particular project, for mutual benefit and profit."[167]

In finding no basis for the majority's characterization of the payment system as a profit-sharing arrangement, Welliver also argued there was no basis for finding that Marlo had "equal right of control" in the arrangement.[168] He pointed to the fact that Marlo could not have controlled the operation of the truck, even by the exercise of reasonable care.[169] Therefore, given the autonomy with which the driver acted in choosing the desired route, Welliver was convinced that the driver acted more like an independent contractor.[170]

The *Johnson* court seemed inclined to hold Marlo liable for policy reasons, rather than based upon satisfying the elements which constitute a joint venture.[171] As previously discussed,[172] the effects of this inclination have repeatedly appeared in litigation by plaintiffs relying on *Johnson*'s holding to establish an implied joint venture between two corporations on rather loose evidentiary grounds.

B. Practical Implications of Johnson*'s Flawed Analysis*

Traditionally, parties to a contract agree on the obligations and expected performance prior to the execution of the contract. These obligations are imposed by contractual duty, rather than by law. Very few non-waivable, contractual duties are imposed by law.[173] By leaving these obligations to be decided by the parties, the law encourages negotiation at the outset of the contractual agreement. However, as the nature of the relationship changes, the degree to which the law imposes standards of conduct changes as well.

Joint venture is considered a species of partnership, differing only in the enterprise's specified duration.[174] As such, joint ventures are subject to the

166. *Id.* at 248.

167. *Id.* (quoting *Johnson*, 662 S.W.2d at 241).

168. *Id.* (quoting *Johnson*, 662 S.W.2d at 241).

169. *Id*.

170. *Id*.

171. *See id.* at 242 (majority opinion) ("This is not a situation in which Marlo should be allowed to escape liability by asserting independent contractor status."); *Id.* at 248 (Welliver, J., dissenting) ("The result reached by the majority cannot be viewed as other than basing liability for damages on the depth of the defendant's pocket without regard to the degree of the defendant's fault.").

172. *See supra* section III.

173. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

174. Stram v. Miller, 663 S.W.2d 269, 277 (Mo. Ct. App. 1983).

rules and fiduciary obligations governing partnerships.[175] Among these fiduciary obligations are a duty of care and a duty of loyalty in the conduct of business transactions furthering the enterprise.[176] The imposition of these fiduciary obligations stems from the unique relationship participants share with one another in a joint venture. The elements of joint venture allude to this point. As joint venturers, each has control over the other's resources and a joint interest in the profits of the enterprise.[177] Therefore, it makes sense for the law to impose heightened standards of conduct on a relationship where one is trusted with the financial assets of another.[178] In addition to these fiduciary duties, each participant is jointly and severally liable for both the debts and obligations of the enterprise and for any tortious conduct committed in furtherance of the enterprise.[179]

The distinction between these two types of relationships has significant practical implications. By asserting the existence of a joint venture, a plaintiff is seeking to impose duties and obligations upon the parties that do not exist in an arms-length contractual relationship.[180] Thus, by altering the legal status of an agreement, a plaintiff may significantly alter the legal consequences and, subsequently, the legal remedies available to her.[181]

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175. Denny v. Guyton, 40 S.W.2d 562, 572 (Mo. 1931) (en banc) ("[R]ights as between the adventurers are governed by the same rules that govern partnerships."); J. Leo Johnson, Inc. v. Carmer, 156 A.2d 499, 502 (Del. 1959) ("The relationship of joint adventurers is fiduciary in character and imposes upon all of the participants the utmost good faith, fairness and honesty in dealing with each other with respect to the enterprise."); *see also* UNIF. P'SHIP ACT § 409 (amended 2013) (UNIF. LAW COMM'N 1997) ("A partner owes to the partnership and the other partners the duties of loyalty and care stated in subsections (b) and (c).") (stating partners owe the partnership and other partners fiduciary duty of loyalty).

176. *See* Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. . . A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.").

177. Unif. P'Ship Act § 409(a), (h) (amended 2013) (Unif. Law Comm'n 1997).

178. Scanwell Freight Express STL, Inc. v. Chan, 162 S.W.3d 477, 481 (Mo. 2005) (en banc) ("A fiduciary relationship is established when one reposes trust and confidence in another in the handling of certain business affairs.").

179. *See* UNIF. P'SHIP ACT § 306 (amended 2013) (UNIF. LAW COMM'N 1997) ("Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all debts, obligations, and other liabilities of the partnership unless otherwise agreed by the claimant or provided by law.").

180. *See, e.g.*, Birdsong v. Bydalek, 953 S.W.2d 103, 121 (Mo. Ct. App. 1997) (explaining that fiduciary duty to another party arose out of joint venture).

181. *See* Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237, 241 (Mo. 1983) (en banc).

In practice, the establishment of a joint venture, and its corresponding obligations, provides two primary avenues through which plaintiffs may seek compensation from corporate defendants. The first is through utilization of joint and several liability imposed upon the entities by law.[182] Through this avenue, third parties with deeper pockets may be held liable for injuries sustained by plaintiffs as a result of activities conducted in furtherance of the joint venture.[183] This avenue is illustrated in *Johnson*[184] and *A.K. Logistics*.[185]

The second avenue is opened by the heightened fiduciary duties that participants owe to one another while engaged in a joint venture.[186] Instead of simply owing a duty of good faith and fair dealing in an arms-length transaction, joint venturers owe to one another fiduciary duties of care and loyalty in furtherance of the joint venture.[187] For example, in a case where a traditional, arms-length agreement has fallen through, a wronged party may allege that the agreement actually constituted a joint venture, and therefore impose fiduciary duties upon the other that had not previously existed. This avenue was pursued in *Marathon*.[188]

Despite this, lower courts have begun to ignore the low standard set in *Johnson* for the establishment of a joint venture between defendant corporations, in favor of the precedent acknowledged in *Barfield*.[189] Even in the face of this trend, the continued existence of *Johnson* in Missouri's corporate law jurisprudence gives plaintiffs' lawyers an argument to proffer in litigation.

In citing *Johnson*, a plaintiff's lawyer need simply argue a shared economic interest in an enterprise between two corporate entities in order to raise the question of whether the contractual agreement may in fact be a joint venture.[190] Even if the allegation of joint venture is a frivolous one, the

182. UNIF. P'SHIP Act § 306 (amended 2013) (UNIF. LAW COMM'N 1997) ("Except as otherwise provided . . . all partners are liable jointly and severally for all debts, obligations, and other liabilities of the partnership unless otherwise agreed by the claimant or provided by law.

183. *See, e.g.*, Johnson, 662 S.W.2d at 238.

184. *See id.*

185. *See* Riley v. A.K. Logistics, Inc., No. 1:15-CV-00069-JAR, 2017 WL 2501138 at *1 (E.D. Mo. June 9, 2017).

186. *See* Unif. P'Ship Act § 409 (amended 2013) (Unif. Law Comm'n 1997).

187. *Id.*

188. *See* Marathon Reprographics, Inc. v. J.E. Dunn Constr. Co., No. 1616-CV29350 at *1 (Cir. Court of Jackson Co., Mo. Dec. 13, 2018).

189. *Id.* at *3 n.3.

190. *See* Johnson v. Pac. Intermountain Express Co., 662 S.W.2d 237, 241 (Mo. 1983) (en banc).

question of its existence may be enough to survive a summary judgment motion and allow costly litigation to continue.[191]

C. Moving Forward from Johnson

Moving forward, it is pivotal to understand the difference between sharing in the revenue of an enterprise and sharing in the profits of one in order to avoid altering the legal status of enterprises. In this context, revenue refers to all incoming cash flow generated from an enterprise, whereas profit refers to incoming cash – *i.e.*, revenue – less expenses. Sharing in the profits of an enterprise imposes a duty on the parties to also share in the losses of the same, should there be any.[192] "Losses," in this context, may include liability for any debt obligations incurred by either partner over the duration of the joint venture, or liability for tortious conduct committed by either partner. Conversely, sharing in revenue simply imposes a contractual duty to share in the expected revenue of an enterprise. There is no duty to share in the losses or satisfy the financial liabilities of the joint venture.[193] The existence of either method of distribution will certainly evidence the existence of a shared economic interest in an enterprise. However, the ability to distinguish one form of distribution from the other will clarify the legal status of the enterprise, and subsequently the duties and liabilities owed by the parties participating in the enterprise.

This better understanding may be realized through clarification of the requisite elements of joint venture. From this foundation, courts may be better equipped to distinguish the difference between arrangements that qualify for the categorization of joint venture and those that do not; the significance being the duties the law imposes upon the respective relationships.

Delaware's corporate law jurisprudence has recognized the significance of this duty to share in the losses as a requisite element in establishing joint venture.[194] The Delaware Supreme Court laid out a general description of

191. *See e.g.*, Bader Farms v. Monsanto Co., 431 F. Supp. 3d 1084, 1093–1096 (E.D. Mo. 2019).

192. UNIF. P'SHIP ACT § 409(a) (amended 2013) (UNIF. LAW COMM'N 1997) ("Each partner is entitled to an equal share of the partnership distributions and . . . is chargeable with a share of the partnership losses in proportion to the partner's share of the distributions.").

193. *See* Meredith Dev. Co. v. Bennett, 444 S.W.2d 519, 523 (Mo. Ct. App. 1969) ("It is a general rule that . . . partners and joint venturers impliedly agree to share losses in the same proportion as profits."); Binkley v. Palmer, 10 S.W.3d 166, 172 (Mo. Ct. App. 1999) (distinguishing revenues and profits).

194. Warren v. Goldinger Bros., Inc., 414 A.2d 507 (Del. 1980); N.S.N. Int'l Indus., N.V. v. E.I. DuPont De Nemours & Co., No. C.A. 12902, 1994 WL 148271, at *8 (Del. Ch. Mar. 31, 1994) (holding that a joint venture, and therefore a fiduciary relationship, had not been formed where there was no agreement to share in the losses

joint ventures, similar to the set laid out in *Jeff-Cole*.[195] However, unlike Missouri, the Delaware Supreme Court has since opted for further specification of its requisite elements in 1980,[196] and in doing so moved away from a "broad definition of 'joint venture.'"[197] In Delaware today, a joint venture may be established by the following elements: (1) a community of interest in the performance of a common purpose; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in the losses which may be sustained.[198]

Likewise, several decades ago. the Supreme Court of Missouri set forth a generalized description of elements that established joint venture.[199] Years later, however, this description of elements was relegated to *indicia* of the existence of a joint venture.[200] Rather than solidifying their necessity in the creation of a joint venture, the Supreme Court of Missouri labeled them as instructive characteristics in a joint venture analysis.[201] While this was insightful, and certainly intended to be helpful in an analysis, the court's instructive, rather than binding, list of elements has had the opposite effect on the development of Missouri's corporate law jurisprudence.[202]

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of the enterprise); Wah Chang Smelting & Ref. Co. of Am. v. Cleveland Tungsten Inc., No. Civ. A. 1324-K, 1996 WL 487941, at *5–6 (Del. Ch. Aug. 19, 1996).

195. J. Leo Johnson, Inc. v. Carmer, 156 A.2d 499, 502 (Del. 1959); *cf.* Jeff-Cole Quarries, Inc. v. Bell, 454 S.W.2d 5, 16 (Mo. 1970).

196. Warren, 414 A.2d at 509 (quoting Kilgore Seed Co. v. Lewin, 141 So.2d 809, 810–11 (Fla. Dist. Ct. App. 1962)).

197. *Wah Chang*, 1996 WL 487941 at *4. ("Twenty-five years after recognizing a broad definition of 'joint venture' in *J. Leo Johnson,* the Supreme Court explained, in modified language, the elements of a "joint venture" in *Warren v. Goldfinger Brothers, Inc.*. . .").

198. Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, No. 4119-VCS, 2010 WL 975581, at *2 (Del. Ch. Mar. 4, 2010) (quoting Warren v. Goldinger Bros., Inc., 414 A.2d 507, 509 (Del. 1980)).

199. As a general rule, in order to constitute a joint adventure, there must be a community of interest in the accomplishment of a common purpose, a mutual right of control, a right to share in the profits and a duty to share in the losses as may be sustained." Howard v. Winebrenner, 499 S.W.2d 389, 396 (Mo. 1973) (citing Bell v. Green, 423 S.W.2d 724, 730–731 (Mo. 1968)).

200. "Indications of a joint venture include: actively participating and sharing in the profits, all parties having joint and several control, and having a duty to share in losses." Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999) (citing *Jeff-Cole*, 454 S.W.2d 15, 16)).

201. *Jeff-Cole*, 454 S.W.2d at 15.

202. "[I]t appears clear that the 'shared losses' factor is not a strict requirement in Missouri." Bader Farms v. Monsanto Co., 431 F. Supp. 1084, 1096 (E.D. Mo. 2019) (citing *Morley v. Square*, Nos. 4:14-CV-172, 4:10-CV-2243 (Consolidated), 2016 WL 1615676, *at 8 (E.D. Mo. Apr. 22, 2016)).

To remedy this issue, the Supreme Court of Missouri should recognize that the following elements constitute a joint venture: (1) a community of interest in the performance of a common purpose; (2) joint managerial control or right of control; (3) share in the profits of the enterprise; and (4) a duty to share in the losses of the same, should there be any. Not only does this list correspond to those that the court has previously recognized for joint venture, but the elements fully recognize the characteristics of this particular business organization and warrant the heightened legal status that goes with it.

Delaware recognized the importance of detailing the elements that establish joint venture decades ago.[203] Moreover, several jurisdictions have also followed suit in requiring the duty to share losses as an element in establishing joint venture.[204] As a result, Delaware and many other jurisdictions have avoided, for the most part, the confusion experienced because of *Johnson*. It is time for Missouri to do the same.

V. CONCLUSION

Joint ventures are unique entities derived from partnerships and, as a consequence, the laws which govern them have developed out of partnership law and through the common law. This development has given rise to the discrepancies in not only the elements required to form such entities but also to what degree these elements need be satisfied. This effect is innate to the nature of the common law system. However, when disputes over the same

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203. Wah Chang Smelting & Ref. Co. of Am. v. Cleveland Tungsten Inc., No. Civ. A. 1324-K, 1996 WL 487941, at *5 (Del. Ch. Aug. 19, 1996). "Although the definition in *J. Leo Johnson* states that a joint venture involves a 'single business enterprise,' often joint ventures are highly intricate relationships that consist of 'more than just one business transaction' and often involve the acquisition and operation of a complex entity." *Id.*

204. *See, e.g.*, J.R. Simplot Co. v. Nestle USA, Inc., No. CV 06-141-S-EJL, 2009 WL 564194, *at 8 (D. Idaho Mar. 4, 2009) (holding that the duty to share in losses is a required element for joint venture) (citing Warren v. Goldinger Bros., Inc., 414 A.2d 507, 509 (Del. 1980)); St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 535 (Tex. 2002) ("[A] joint venture exists "if the persons or entities concerned have . . . (3) an agreement to share losses. . ."); Radaker v. Scott, 855 P.2d 1037, 1040 (Nev. 1993) ("A joint venture is a contractual relationship in the nature of an informal partnership wherein two or more persons conduct some business enterprise, agreeing to share jointly, or in proportion to capital contributed, in profits and losses."); Fetter v. Schink, 902 F. Supp. 2d 399, 403 (S.D.N.Y. 2012) ("In order to establish a joint venture under New York law, . . . (5) there must be a provision for the sharing of both profits and losses."); Censor v. ASC Techs. of Connecticut, LLC, 900 F. Supp. 2d 181, 201 (D. Conn. 2012) ("To constitute a joint venture, courts in Connecticut prescribe a five part test that requires that . . . (5) there must be a provision for sharing of both profits and losses.").

issues continue to be relitigated due to ambiguity in the law, action must be taken to lift the fog.

Joint ventures formed as a result of the economic interests of the persons and entities that entered into them. Contrary to this notion, joint ventures are often used as mechanism for holding those persons or entities liable in tort. Certainly, one who negligently harms another should be held liable in remedying that injury. However, when corporations expressly disclaim the formation of such organizations and then cannot subsequently rely on those express provisions within the four corners of their agreements, waste occurs.

Clarification of the law establishing and governing joint ventures is needed to remedy this uncertainty. In turn, this clarification will decrease the waste by reducing transaction costs associated with the litigation arising from the ambiguity, thereby promoting efficiency. Corporate entities will no longer have to guess what the law is, nor will they be forced to relitigate elements which have been firmly cemented in legal or statutory precedent. The effect being corporate entities transacting and participating in commerce in greater volume because of their increased reliance on the legal ramifications of the business organizations they choose as a means to their economic ends. It is time for the Supreme Court of Missouri to provide this clarification.