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Risky Business: Breakfast Sandwiches, Course of Employment, and Revisiting Missouri Workers' Compensation Law

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NOTE

Risky Business: Breakfast Sandwiches, Course of Employment, and Revisiting Missouri Workers' Compensation Law

Boothe v. DISH Network, Inc., *No. SD 36408, 2020 WL 7706398 (Mo. Ct. App. Dec. 29, 2020), rev'd en banc*, 637 S.W.3d 45 (Mo. 2021).

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I. INTRODUCTION

Since its inception, the Missouri Workers' Compensation scheme has presented interesting and complex problems regarding workplace risk allocation. To avoid workplace injuries, employees and employers engage in significant preventative behaviors. One such action by employers is employee monitoring. Clearly, however, constant workplace monitoring is not feasible. This inherent limitation leads to this Note's initial inquiry: at what point do the actions of employees taken out of sight of their employers create compensable claims under the existing Missouri Workers' Compensation system, and what inefficiencies may result from requiring that employers provide compensation for the injuries that arise from such actions? *Boothe v. DISH Network, Inc.* provided a new perspective on this question while evaluating an employee's claim deriving from a vehicular accident.

Part II of this Note summarizes the facts and procedural background of Boothe's employment dispute in *Boothe v. DISH Network, Inc.* Part III outlines the legal background relevant to the ruling of the Missouri Court of Appeals, providing a brief primer on pertinent workers' compensation, scope of employment, and economic principles. Part IV details the *Boothe* court's divided ruling, which ultimately held that the "risk source directly leading to [Boothe's] injuries [was] the inherent road and driving conditions of his employment[.]"[1] Part V evaluates relevant takeaways,

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discusses various business and societal impacts, and opines on future consequences of the decision on Missouri employment law.

II. FACTS AND HOLDING

Plaintiff Gary Boothe served as an installer/service technician for Defendant DISH Network, Inc. ("DISH") since 2006.[2] To make service calls, Boothe drove a van issued by DISH.[3] Boothe drove the van during work hours, and after work, he drove it back to his home near Licking, Missouri.[4] Four towns – St. Clair, Potosi, Iberia, and Richland – bordered Boothe's service territory.[5] Thus, Boothe often traveled on Interstate 44, two-lane state highways, and country roads to reach customers' homes.[6] Boothe was the only DISH employee assigned to this service territory.[7]

During Boothe's four-day workweek, DISH required him to first check in between 7:10 and 7:15 a.m. to obtain his daily route and required list of equipment.[8] With only fifteen minutes to load his van, Boothe was expected to leave his home by 7:35 a.m. so he could arrive to his first customer appointment at approximately 8:00 a.m.[9]

The morning of Sunday, July 23, 2017, began much like any other routine work morning for Boothe.[10] After checking his work schedule at 7:15 a.m. and discovering that his first appointment was in Plato, Missouri, a thirty to forty-five minute drive, Boothe departed his home at 7:26 a.m.[11] Boothe purchased two packs of cigarettes, a soda, and a breakfast sandwich at a convenience store approximately six miles from his home and twenty-four miles from Plato.[12] Boothe left the convenience store at about 7:41 a.m.[13] Six minutes later, at 7:47 a.m. and less than a mile away

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[1] Boothe v. DISH Network, Inc., No. SD 36408, 2020 WL 7706398, at *3 (Mo. Ct. App. Dec. 29, 2020), *rev'd en banc*, 637 S.W.3d 45 (Mo. 2021).

[2] *Id.* at *1–2.

[3] *Id.* at *2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

from the convenience store, Boothe choked on his breakfast sandwich while driving.[14] Upon blacking out, Boothe crashed into a short pillar near the side of Highway 32.[15] Boothe's body hit a pole in the middle of the van, resulting in injuries to his back and neck.[16]

Notably, DISH had a safety rule prohibiting employees from eating or drinking while driving, a rule that Booth was aware of.[17] The record further reflects that DISH issued Boothe a distracted driving warning in 2014, in part for eating and drinking.[18]

DISH denied Boothe compensation for his injuries, arguing that he did not make the requisite showing that his injuries arose "out of and in the course of his employment" as required under Missouri Revised Statutes ("RSMo") § 287.020.3(2).[19] Boothe's workers' compensation claim for past and future medical treatment and disability was granted by an Administrative Law Judge ("ALJ"), subject to a thirty percent penalty, due to Boothe's violation of DISH's safety rule.[20] The Labor and Industrial Relations Commission, in a 2-1 split decision, reversed the ALJ's ruling, determining that the "risk source" was Boothe's decision to eat breakfast while driving.[21] The Missouri Court of Appeals for the Southern District again reversed, finding DISH was liable and remanding to the Labor and Industrial Relations Commission.[22] The appellate court held that the "risk source directly leading to [Boothe's] injuries [was] the inherent road and driving conditions of his employment[.]"[23]

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[14] *Id.*

[15] *Id.*

[16] *Id.* Specifically, "[a]ccording to medical records, Boothe suffered 'cervical-thoracic injury, lumbar strain, concussion, [and] right flank and chest contusions' as the result of his single-van accident." *Id.* at *2, n.2.

[17] *Id.* at *2.

[18] *Id.*

[19] *Id.* at *1.

[20] *Id.* at *2.

[21] *Id.*

[22] *Id.* at *3.

[23] *Id.* On transfer from the Missouri Court of Appeals for the Southern District, the Supreme Court of Missouri held that Boothe's injuries did not arise out of and in the course of his employment. *See* Boothe v. DISH Network, Inc., 637 S.W.3d 45 (Mo. 2021) (en banc), *reh'g denied* (Feb. 8, 2022). In an opinion authored by Judge Mary R. Russell, the court determined that "Boothe's injury's risk source was eating while driving, which created a risk of choking and led to the accident resulting in injury." *Id.* Specifically, as applied to RSMo § 287.020.3(2)(b), the court found eating while driving unrelated to Boothe's employment. *Id.* Rejecting the arguments that Boothe's tight schedule, limited ability to eat lunch, and the nature of the roads he was driving on contributed to the accident, the court reasoned that "DISH did not require him to eat breakfast after starting work for the day, and, as Boothe acknowledged, he could have had breakfast [before leaving for his shift.]" *Id.* The court also concluded that Boothe failed to establish that he was not equally exposed to eating while driving

III. LEGAL BACKGROUND

This Part begins by introducing workers' compensation law generally and in Missouri. Next, it examines basic scope-of-employment principles. Finally, it concludes by providing a brief overview of agency costs and relevant economic principles.

A. Workers' Compensation

Missouri Workers' Compensation law traces its roots to 1925 with the passage of the Workmen's Compensation Act ("the Act").[24] Before this point, employees could seek to recover from their employers for workplace injuries under the common law theory of negligence, but defenses such as the fellow-servant rule, assumption of risk, and contributory negligence often barred recovery.[25] Under this strict regime, the employee had to show "the accident resulted *solely* from the employer's negligence," leading to paltry recovery rates by employees.[26]

While the overarching purpose of the Workmen's Compensation Act was to "place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment," the Act signifies a compromise between employers and employees, much like

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in nonemployment life, citing a misplaced reliance on the absence of evidence by Boothe in an effort to make the necessary showing under RSMo § 287.020.3(2)(b). *Id.* (noting that Boothe "allege[d] that he [ate] meals at home on his days off and that no evidence demonstrated he [ate] while driving outside of work."). Finally, the court referenced a number of recent Supreme Court of Missouri opinions supporting affirmation of the Commission's denial of workers' compensation benefits. *Id.* (citing Schoen v. Mid-Missouri Mental Health Ctr., 597 S.W.3d 657, 660–61 (Mo. 2020) (en banc); Annayeva v. SAB of TSD of City of St. Louis, 597 S.W.3d 196, 200 (Mo. 2020) (en banc); Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504, 511–12 (Mo. 2012) (en banc); and Miller v. Mo. Highway & Transp. Comm'n, 287 S.W.3d 671, 674 (Mo. 2009) (en banc)).

[24] Breanna Hance, *"Equal Exposure" Brews Frustration for Employees: Court Filters Personal Comfort Doctrine Through Workers' Compensation Amendments Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504 (Mo. 2012) (En Banc)*, 78 MO. L. REV. 573, 579 n.54 (2013).

[25] *Id.* To prevent the ability of an employee to sue an employer for injuries deriving from a co-employee's negligence, an exception to the doctrine of *respondeat superior* arose known as the "fellow servant" rule, "holding an employer was not liable for an employee's injury resulting from the negligence of a co-employee." Connor v. Ogletree, 542 S.W.3d 315, 320 (Mo. 2018) (en banc) (citing McDermott v. Pac. R. Co., 30 Mo. 115, 116 (Mo. 1860)) ("[A] servant, who is injured by the negligence or misconduct of his fellow servant, can maintain no action against the master for such injury.").

[26] Hance, *supra* note 24, at 579–80 (quoting Bass v. Nat'l Super Markets, Inc., 911 S.W.2d 617, 619 (Mo. 1995) (en banc)) (emphasis added).

insurance.[27] Indeed, in exchange for the removal of the threat of suit and potentially more costly damages, employers promise to compensate employees for their workplace injuries, capped at a fixed amount and only in a well-defined set of circumstances, under a theory of strict liability.[28] Under this scheme, employers may have to pay out claims more frequently, but face reduced risk exposure.[29] Conversely, employees trade maximum collection potential for a higher probability of recovery.[30] Both parties benefit from more efficient resolution of workplace disputes.[31]

For a Missouri worker to succeed on a workers' compensation claim, she must show that the injury "has arisen out of and in the course of employment."[32] The Missouri Legislature provides that an injury arises out of and in the course of employment only if:

> (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
>
> (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.[33]

For decades, a series of common law doctrines, such as the personal comfort doctrine, were invoked to interpret the "arising out of and in the course of employment" element.[34] Under the personal comfort doctrine, "certain unavoidable acts that minister to [a worker's] personal comfort are considered 'incidental' to his or her employment when committed at work."[35] The advent of the new workers' compensation system, however,

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[27] *Id.* at 580–81 (2013) (quoting Wolfgeher v. Wagner Cartage Serv., Inc., 646 S.W.2d 781, 783 (Mo. 1983)).

[28] *Id.* at 581.

[29] *Id.* at 580–81.

[30] *Id.* at 581.

[31] *Id.*

[32] MO. REV. STAT. § 287.020.3(1) (2017).

[33] MO. REV. STAT. § 287.020.3(2) (2017).

[34] Hance, *supra* note 24, at 583.

[35] *Id.* at 583. "The inevitable facts of human beings in ministering to their personal comfort while at work, such as seeking warmth and shelter, heeding a call of nature, satisfying thirst and hunger, washing, resting or sleeping, and preparing to begin or quit work, are held to be incidental to the employment under the personal comfort doctrine." Drewes v. Trans World Airlines, Inc., 984 S.W.2d 512, 514 (Mo. 1999) (overturned due to legislative action 2005) (citing Bell v. Arthur's Fashions, Inc., 858 S.W.2d 760, 763–64 (Mo.App.1993); Cox v. Tyson Foods, Inc., 920 S.W.2d 534, 537 (Mo. 1996) (en banc)).

substantially eroded such an expansive interpretation of the personal comfort doctrine.[36]

In 2005, Missouri made significant legislative amendments to its workers' compensation law.[37] Specifically, the legislature modified the relevant standard of review and included a further instruction regarding the "arising out of and in the course of employment" element.[38] Strict, rather than liberal construction under the prior statute, is now required.[39] Judges and commissioners are also now instructed to "weigh the evidence impartially without giving a benefit to either party."[40] Thus, under the 2005 amendments, employees must carry a heavier burden.[41] Finally, the amendments also narrowed the scope of the "arising out of and in the course of employment" requirement by further refining the types of acts that did or did not fall within this requirement.[42]

The Missouri Court of Appeals for the Southern District developed a two-part, causal-connection test.[43] First, a worker must correctly identify the risk source or injury-causing activity.[44] If a worker succeeds in that identification, the court then compares that risk source or activity to nonemployment life.[45] In other words, the central inquiry becomes whether or not the employee would have been equally exposed to a particular risk outside of the workplace.[46]

In *Miller v. Missouri Highway & Transportation Commission*, a road repair crew member felt his knee pop while walking briskly toward a truck to retrieve repair materials – his knee later required surgery.[47] The Supreme Court of Missouri denied the crew member's workers' compensation claim on the theory that "his work did not require him to walk in an unusually brisk way" and the risk involved – walking – was

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[36] Hance, *supra* note 24, at 585.

[37] *See* S.B. 1 & 130, 93rd Gen. Assemb., Reg. Sess. (Mo. 2005).

[38] Hance, *supra* note 24, at 586.

[39] *Id.*

[40] *Id.* "Prior to the 2005 amendments, the act's provisions were required to be construed liberally in favor of compensation. § 287.800, RSMo 2000." Miller v. Mo. Highway & Transp. Comm'n, 287 S.W.3d 671, 673 (Mo. 2009) (en banc).

[41] Hance, *supra* note 24, at 586–87.

[42] *Id.* at 587.

[43] *Id.* at 590.

[44] Boothe v. DISH Network, Inc., No. SD 36408, 2020 WL 7706398, at *3 (Mo. Ct. App. Dec. 29, 2020), *rev'd en banc*, 637 S.W.3d 45 (Mo. 2021) (quoting Gleason v. Treasurer of Missouri-Custodian of Second Injury Fund, 455 S.W.3d 494, 499, (Mo. Ct. App. 2015).

[45] *Id.*

[46] *Id.* (quoting Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504, 511 (Mo. 2012) (en banc 2012).

[47] Miller v. Mo. Highway & Transp. Comm'n, 287 S.W.3d 671, 671–72 (Mo. 2009) (en banc).

"one to which the worker would have been exposed equally in normal non-employment life."[48]

In *Pile v. Lake Regional Health Systems*, a registered nurse underwent surgery on her foot after she stumbled on a carpet and turned her ankle and foot while moving quickly out of a patient's room.[49] She was later diagnosed with chronic tendonitis in her foot, which the court found to be consistent with prolonged walking as required by her job.[50] The Missouri Court of Appeals for the Southern District reversed the Labor and Industrial Relations Commission's denial of workers' compensation benefits, finding that the risk to the nurse was not walking, but rather "the risk of tendonitis due to prolonged walking."[51] Moreover, the Court held that the nurse was *not* equally exposed to this hazard or risk while not working as a registered nurse.[52]

B. Scope of Employment

Principles of agency and tort are helpful for illustrating various scope of employment doctrines. Agency is a fiduciary relationship between two parties wherein one acts on behalf of the other.[53] The agent is an individual who acts on behalf of the principal.[54]

An employer-employee relationship is a type of agency relationship and exists where an employee agrees to both work on behalf of an employer and be subject to the employer's control or right to control the "physical conduct" of the employee.[55] This means that the central inquiry is the manner in which the job is being performed, as opposed to what the job is trying to accomplish.[56]

This Note's focus is on the duties owed by principals directly to their agents with respect to workers' compensation. Nevertheless, traditional tort and agency law related to a principal's liability to third parties for the actions of her agents illustrates the classical scope-of-employment doctrines relevant to the two-part workers' compensation test explored above.[57] For a tort to reside within the scope of employment, three requirements must usually be satisfied: (1) it is the type of action the

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[48] *Id.* at 674.

[49] Pile v. Lake Reg'l Health Sys., 321 S.W.3d 463, 464–65 (Mo. Ct. App. 2010).

[50] *Id.* at 465.

[51] *Id.* at 468.

[52] *Id.* at 467–68.

[53] RESTATEMENT (SECOND) OF AGENCY § 1 (AM. LAW INST. 1958).

[54] *Id.*

[55] *See id.* §§ 1–2. Employees are distinguished from independent contractors, who can be both agents and non-agents. *See id.* § 2(3).

[56] *See id.* § 1–2.

[57] *See id.* § 219.

employee is employed to perform, (2) it is within the authorized time/space limitations for the employment, and (3) it is committed with a purpose to serve the employer - alternatively, it was foreseeable.[58] The Restatement (Second) of Agency also provides insight as to the types of conduct that may be said to reside within the scope of employment.[59] Notably, for the purposes of *respondeat superior* liability in Missouri, "[w]hether an act was committed within the scope and course of employment is not measured by the time or motive of the conduct, but whether it was done by virtue of the employment and in furtherance of the business or interest of the employer."[60]

C. Agency Costs

Finally, agency costs and other relevant economic principles help frame the employment issues addressed in *Boothe*. Agency costs are welfare losses borne from agency or like relationships.[61] Workers' compensation claims paid by employers that arise out of sub-optimal decision making by employees – agents – are one type of agency cost.[62]

Agency relationships require a separation of ownership and control.[63] For example, in *Boothe*, DISH owned the company van, but Boothe was often responsible for controlling it.[64] DISH collects the subsequent value generated by the productive resources it owns, such as the company van

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[58] *See id.* § 228. "Purpose" is often commonly understood to be fairly liberally construed, thereby suggesting leniency with its application. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968). While the Restatement's "purpose to serve the employer" approach presents the majority view, the classical case *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968), illustrates the substantial minority approach by substituting the third prong of § 228 with a foreseeability approach (i.e., was the conduct by the employee foreseeable). Since "purpose to serve the employer" is a subjective inquiry, as viewed from the agent's state of mind, the *Bushey* approach has a somewhat greater appeal from an analytical standpoint by eliminating such a difficult inquiry.

[59] *See* RESTATEMENT (SECOND) OF AGENCY § 229 (AM. LAW INST. 1958).

[60] Cluck v. Union Pac. R.R. Co., 367 S.W.3d 25, 29 (Mo. 2012) (en banc) (quoting Daugherty v. Allee's Sports Bar & Grill, 260 S.W.3d 869, 873 (Mo. Ct. App. 2008) (emphasis removed)). "Respondeat superior imposes vicarious liability on employers for the negligent acts or omissions of employees or agents as long as the acts or omissions are committed within the scope of the employment or agency." Indep. Living Ctr. of Mid MO, Inc. v. Dep't of Soc. Servs., MO HealthNet Div., 391 S.W.3d 52, 58 (Mo. Ct. App. 2013) (quoting Papa John's USA, Inc. v. Allstate Ins. Co., 366 S.W.3d 116, 120 (Mo.App. W.D.2012)).

[61] *See* THOMAS A. LAMBERT, HOW TO REGULATE: A GUIDE FOR POLICYMAKERS 94 (2017).

[62] *See* discussion *infra* Part V, Section B.

[63] *See* LAMBERT, *supra* note 61, at 94.

[64] Boothe v. DISH Network, Inc., No. SD 36408, 2020 WL 7706398, at *2 (Mo. Ct. App. Dec. 29, 2020), *rev'd en banc*, 637 S.W.3d 45 (Mo. 2021).

and Boothe's labor.[65] DISH also clearly determined that it was most efficient for Boothe to drive the van to and from his home.[66]

Problems arise, however, when unfaithful agents do not put productive resources to their optimal use, resulting in allocative inefficiencies.[67] In order to curb these inefficiencies, principals often expend significant resources, including through supervision, to minimize resulting losses to social welfare.[68] Agents may even expend resources themselves to prove that they are not in fact unfaithful to their principals.[69] This results in further waste and inefficiency. Therefore, taken together, agency costs are the sum of (1) monitoring costs, (2) costs expended by agents to prove their faithfulness, and (3) allocative inefficiencies that nonetheless result when agents act unfaithfully.[70]

The following example focuses primarily on the third prong. For example, consider a workplace vehicular accident due to an unfaithful act by the agent that results in a workers' compensation claim that is significant enough to cause a supply-side "shock" to the market.[71] Allocative inefficiencies are numerous – the payout on the workers' compensation claim, damage to the company property, and loss of labor due to the injury to the employee.[72] Because the principal-employer must expend resources to address these problems, all else being equal, fewer resources remain to produce the same level of output at the same price.[73] Under a standard economic analysis, these allocative inefficiencies have the effect of creating what is known as an efficiency or deadweight loss,[74] depicted in the following graph by the shaded region:

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[65] *Id.*; *see* LAMBERT, *supra* note 61, at 94.

[66] *Boothe*, 2020 WL 7706398, at *2.

[67] *See* LAMBERT, *supra* note 61, at 94 (defining allocative inefficiencies as where "[p]roductive resources are moved away from the use in which they would produce the most value and toward some use that maximizes the controlling agent's welfare.").

[68] *See id. at 95.*

[69] *See id.*

[70] *See id.* at 95–96.

[71] One might wonder what an unfaithful act amounts to. This might be an employee that takes a frolic and goes a block out of her way to pick up her dry cleaning while using the company vehicle. Or a more subtle illustration might see an employee that allows himself to daydream on the job, thus diverting his attention away from the task at hand. By a supply-side "shock" to the market, this is meant to indicate a situation resulting in a constraint on supply or disruption to production, followed by a resultant increase in price for a particular good or service. *See* LAMBERT, *supra* note 61, at 94.

[72] It is important to keep in mind that the inefficiencies described here arise from the unfaithful act by the employee, *not* from the workers' compensation system.

[73] *See* LAMBERT, *supra* note 61, at 94.

[74] *See* ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 381 (9th ed. 2015). Deadweight loss is commonly seen in the study of monopolies. *Id.* A monopolist who

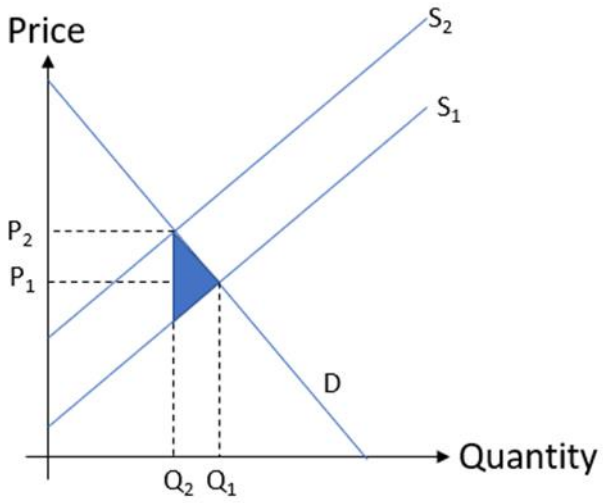

Figure 1[75]

Figure 1 reflects the market supply and demand curves. The supply curve shifts from S_1 to S_2 due to the payout on the workers' compensation claim, damage to the company property, and loss of labor due to the injury to the employee.[76] With the upward shifting supply curve and a constant demand curve comes a resultant decrease in equilibrium quantity demonstrated by the shift from Q_1 to Q_2 and an increase in equilibrium price from P_1 to P_2.[77] Another important consequence is the resultant decrease to consumer surplus and increase to producer surplus – the

charges a single price to all buyers will produce at a lower quantity and sell at a higher price than would a competitive industry operating under the same cost conditions. *Id.*

[75] Where Quantity ("Q") is plotted on the horizontal axis and Price ("P") is plotted on the vertical axis. Demand ("D") is the downward-sloping line, whereas the Supply ("S") lines are upward sloping. Subscripts "1" and "2" indicate time ("t") at t=1 and t=2, respectively. The property known as the law of supply refers to how the quantity supplied rises as the price of a product rises. *Id.* at 28. The property often called the law of demand refers to how the quantity demanded rises as the price of a product falls. *Id.* The equilibrium quantity and price refer to the price-quantity pair at which both buyers and sellers are satisfied, or alternatively, the price-quantity pair at which the supply and demand schedules intersect. *Id.* at 29.

[76] *See id.* at 39 (noting that factors that shift a supply curve upward include, but are not limited to, higher wages, higher prices for raw materials, the expectation of higher prices, and bad weather). This Note's Author recognizes that where there is only one firm in the supposed market, the welfare loss from a single-price monopoly may alone result in the creation of a deadweight loss. *Id.* However, the focus in the present example is on non-optimal production *caused by* the payout on the workers' compensation claim, damage to company property, and loss of labor due to the employee's injury. *Id.*

[77] *See id.* at 40.

triangular regions above and below, respectively, the horizontal dotted lines.[78]

The economic losses borne by the employee resulting from the agency relationship are also material. Employees have just as great, if not a greater incentive to ensure their own safety than does the employer. Because of deadweight loss discussed above, employers have a strong incentive to shift the economic risk of their activities to their employees. Workers' compensation, of course, seeks to create a compromise position to make these costs more efficient to determine. However, from the employee's perspective, such a compromise may result in a sub-optimal solution. Labor is akin to a perishable good, and if an employee's workplace injury keeps him off the job for an extended period, he may not fully be able to recoup these lost hours and wages.

This example is heavily simplified. If the principal-employer is so large that it is effectively able to internalize the costs borne by such a workers' compensation claim, such as by carrying insurance, or by maintaining a very large pool of vehicles and employees, then consumers may not feel the effects of the accident. Similarly, the employee might carry her own supplementary insurance policy to mitigate a workers' compensation shortfall. Moreover, this example only looks at one individual firm. If the firm does not hold, say, a monopoly position, then consumers, when faced with the prospect of higher prices, will simply shift their consumption from one good or service to another, assuming the availability of a suitable substitute, or even cease their consumption altogether.[79] Overall, however, the above example illustrates that under the right set of circumstances, agency costs *can* operate to decrease the total amount of social welfare.[80]

IV. INSTANT DECISION

In *Boothe*, the Missouri Court of Appeals held that the "risk source directly leading to [Boothe's] injuries [was] the inherent road and driving conditions of his employment[.]"[81] This Part examines the principal opinion's application of the relevant two-part test, as well as DISH's argument that Boothe should be denied compensation for his injuries because he violated a company rule. Finally, this Part concludes by briefly examining the concurring and dissenting opinions.

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[78] *See id.* at 144–45, 331–34. Consumer surplus is defined as the "dollar measure of the extent to which a consumer benefits from participating in a transaction." *Id.* at 144. Producer surplus is defined as "the dollar amount by which a firm benefits by producing a profit-maximizing level of output." *Id.* at 331.

[79] *Id.*

[80] *See* LAMBERT, *supra* note 61, at 94–95.

[81] *Boothe*, 2020 WL 7706398, at *1.

A. The Plurality Opinion

The plurality opinion, written by Chief Judge Jeffrey W. Bates, reversed the Labor and Industrial Relations Commission's conclusion that Boothe's injuries did not arise out of and in the course of his employment because it found that the "risk source directly leading to Boothe's injuries [was] the inherent road driving conditions of his employment[.]"[82] In reaching this conclusion, the court first interpreted RSMo § 287.020.3(2).[83]

DISH did not challenge the ALJ's finding that RSMo § 287.020.3(2)(a) was satisfied.[84] It did not dispute that Boothe established that the van accident was the prevailing factor in causing the injuries to his upper body.[85] Rather, Boothe's appeal regarded interpretation and subsequent application of RSMo § 287.020.3(2)(b).[86]

For Boothe to succeed under RSMo § 287.020.3(2)(b), he needed to satisfy the two-part, causal-connection test.[87] This meant identifying the risk source, or injury-causing activity, and then "compar[ing] [] that risk source or activity to normal nonemployment life."[88]

The court quickly found that Boothe met the first part of the test.[89] The risk source was not Boothe's act of choking on his breakfast sandwich, but rather, the van accident.[90] Turning to leading Supreme Court of Missouri cases,[91] the court found support in its conclusion that the risk source tended to be the "immediate cause of injury."[92]

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[82] *Id.*

[83] *Id.* at *3.

[84] *Id.* at *1. Recall that under RSMo § 287.020.3(2)(a), "[i]t is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury[.]" MO. REV. STAT. § 287.020.3(2)(a) (2017).

[85] *Boothe*, 2020 WL 7706398, at *3.

[86] *Id.* Recall that under RSMo § 287.020.3(2)(b), "[i]t does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life." MO. REV. STAT. § 287.020.3(2)(b) (2017).

[87] Boothe, 2020 WL 7706398, at *3.

[88] *Id.* (quoting Gleason v. Treasurer of State of Missouri-Custodian of Second Injury Fund, 455 S.W.3d 494, 499 (Mo. Ct. App. 2015).

[89] *Id.* at *4.

[90] *Id.* The court observed that "[t]he van accident caused 'the violence to the body structure." *Id.* (quoting Taylor v. Contract Freighters, Inc., 315 S.W.3d 379, 381 (Mo. Ct. App. 2010)).

[91] *See, e.g.*, Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504, 511 (Mo. 2012); Miller v. Missouri Highway & Transp. Comm'n, 287 S.W.3d 671, 674 (Mo. 2009); *see also* Annayeva v. SAB of TSD of City of St. Louis, 597 S.W.3d 196, 200 (Mo. 2020); Schoen v. Mid-Missouri Mental Health Ctr., 597 S.W.3d 657, 660 (Mo. 2020).

[92] Boothe, 2020 WL 7706398, at *4.

The court next turned to the second prong, and again quickly found in Boothe's favor.[93] It was undisputed that Boothe's job required frequent driving.[94] It was also undisputed that during Boothe's days off from work, he was not driving as frequently as he was during a usual work week, instead often staying home and restoring old cars.[95] The court concluded that Boothe was not equally exposed to the risk source in his normal nonemployment life, and thus "established the requisite 'causal connection between the injury at issue and the employee's work activity.'"[96]

Finally, the court disposed of DISH's argument that since Boothe violated the company's rule prohibiting employees from eating or drinking while driving, Boothe's conduct could not be said to reside within the course of his employment.[97] The court rejected this argument for two reasons.[98] First, by eating a breakfast sandwich while driving, Boothe disobeyed a "reasonable rule adopted" by DISH, as distinguished from conduct cutting "deeper into the relationship of the parties than any mere rule."[99] In other words, Boothe's conduct did not completely sever and terminate the underlying employer-employee relationship.[100]

Second, the court turned to RSMo § 287.120.5, a Missouri statute specifically addressing safety-rule violations:

> Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any *reasonable rule* adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be *reduced* at least twenty-five but *not* more than fifty percent; provided, that it is shown that the employee had *actual knowledge* of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a *reasonable effort* to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.[101]

By the plain text of the statute, the court reasoned that to adopt DISH's argument would be to "render § 287.120.5 meaningless."[102]

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[93] *Id.*

[94] *Id.*

[95] *Id.* at *5.

[96] *Id.* (quoting Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504, 510 (Mo. 2012)).

[97] *Id.* at *5 (citing Fowler v. Baalmann, Inc., 234 S.W.2d 11 (Mo. banc 1950)).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* (quoting MO. REV. STAT. § 287.120.5 (2016)) (emphasis added).

[102] *Id.*

B. The Concurring Opinion

Judge Daniel E. Scott concurred with the plurality opinion, concluding simply that the essential condition for Boothe's injuries was driving, not eating.[103] Judge Scott noted the "ever more [fine]" distinctions and line drawing required in cases like *Boothe*, acknowledging that, while he agreed with the outcome reached by the plurality opinion, reasonable minds could still differ.[104] The concurrence remarked in a footnote that it would have taken a different route "had Boothe choked to death or claimed choke-related injuries."[105]

C. The Dissenting Opinion

Judge Don E. Burrell dissented from the plurality opinion, finding that the risk source that caused Boothe's injuries was his act of eating the breakfast sandwich.[106] Judge Burrell explicitly rejected the plurality's conclusion that the risk source was the "inherent road and driving conditions of [Boothe's] employment."[107] Further, the dissent found fault with the causal chain of events presented by the plurality opinion.[108] In the dissent's view, when Boothe choked on his breakfast sandwich, this "created an objective symptom of 'blacking out.'"[109] It was only from Boothe's blacking out that the work van, now uncontrolled, left the highway and crashed into the pillar on the side of the road, resulting in additional personal injuries.[110] Therefore, the dissent would have affirmed the order denying Boothe compensation for his injuries.[111]

V. COMMENT

This Part first critiques the risk source identifications made by the plurality, concurring, and dissenting opinions in *Boothe*. Next, this Part presents the business impact and societal considerations with brief remarks on possible future impacts of the decision.

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[103] *Id.* at *6 (Scott, J., concurring). *Sine qua non* is defined as "something absolutely indispensable or essential." *Sine qua non*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sine%20qua%20non [https://perma.cc/W3JJ-BC6D] (last accessed Feb. 16, 2021).

[104] *Boothe*, 2020 WL 7706398, at *1 (Scott, J., concurring).

[105] *Id.* at *6, n.3.

[106] *Id.* at *6 (Burrell, J., dissenting).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

A. Boothe *Takeaways*

The plurality opinion in *Boothe* might be seen as taking a significant step towards expanding the reach of Missouri workers' compensation. The case raises questions about how the plurality opinion accords Missouri precedent. It also raises issues of statutory interpretation, economic consequences, and other practical concerns. Despite these concerns, the plurality opinion's ruling resolves *Boothe* by minimizing the impact that could result from the approach taken by the dissent.

Judge Don E. Burrell dissented from the plurality opinion, finding that the risk source that caused Boothe's injuries was his act of eating the breakfast sandwich.[112] Rejecting the plurality's premise that the "inherent road and driving conditions of [Boothe]'s employment" was the risk source, Judge Burrell highlighted the plurality's faulty casual chain of events.[113] In short, per the dissent, eating the breakfast sandwich caused Boothe to choke, which caused him to blackout, lose control of his work van, and crash, which resulted in his injuries.[114]

At first blush, this is an analytically satisfactory framework. In fact, it may be an even more accurate causal chain than that mapped by the plurality opinion. Identification of the risk source, then, is clearly the key difference between the decisions reached by the plurality and the dissent.

In the middle of the risk sources cited by the two opinions, however, is a combination of the two sources – Boothe's act of eating the breakfast sandwich under the inherent road and driving conditions.[115] This, it would seem, would be the middle-ground approach taken by the concurrence.[116]

Recall that the distinction between the decisions reached in *Miller* and *Pile* was the level of risk exposure outside of the workplace setting. In *Miller*, the court determined that the risk involved – walking – was "one to which the worker would have been exposed equally in normal non-employment life."[117] In *Pile*, however, the Court held that the nurse was *not* equally exposed to "the risk of tendonitis due to prolonged walking" while not working as a registered nurse and/or supervising nurse.[118]

These cases prove useful to addressing the risk-source inquiry faced in *Boothe*. The dissent did not inquire into the comparative level of risk exposure inside and outside of the workplace setting, simply leaving the

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See id.* at *2 (majority opinion).

[116] *Id.* at *6 (Scott, J., concurring).

[117] Miller v. Mo. Highway & Transp. Comm'n, 287 S.W.3d 671, 672, 674 (Mo. 2009).

[118] Pile v. Lake Reg'l Health Sys., 321 S.W.3d 463, 468 (Mo. Ct. App. 2010).

inquiry at the breakfast sandwich.[119] The dissent likely figured that Boothe was just as likely to choke on his breakfast at home as he was at work, which seems reasonable. However, under the middle-ground approach hypothesized above, was Boothe equally exposed to the risk of choking on his breakfast sandwich *while* driving? The facts don't support this, as it was undisputed that during Boothe's days off from work, he was not driving as frequently as he was during a usual work week, instead often staying home and restoring old cars.[120]

By the holding in *Miller*, an otherwise non-risky activity must be viewed within the context of workplace conditions where it is performed. Walking, by itself, is not risky. Eating, by itself, is not risky. But isolating otherwise harmless or minimally risky activities, when risk is compounded, does not seem to be an analytically savory approach in the employment space. As sharply observed by the concurrence, advocacy and resolution of *Boothe* require a splitting of hairs and the opportunity for reasonable minds to still differ.[121] Or more simply put, *Boothe* is a close case, but it can be addressed.

B. Business Impacts and Societal Considerations

The decision reached by the plurality opinion has the clear consequence of expanding business liability. For businesses that cannot internalize the various costs related to a workers' compensation claim, this could result in higher prices and lower output quantities.[122] If businesses shift these higher prices to their employees and consumers to maintain their bottom line, total societal wealth may decrease.

Is the result fair to employers? The answer to this question is unclear. While the *Boothe* result would seem to suggest the answer to this question is 'no,' recall that the original Workmen's Compensation Act was viewed as a bargain between employers and employees.[123] And under current Missouri law, an employee's award may be reduced by at least twenty-five but not more than fifty percent where some degree of fault can be attributed to the employee.[124]

Moreover, the plurality opinion raises fundamental questions regarding human behavior and agency costs. Arguably, the principal opinion's decision does not go far enough in encouraging good behavior on the part of employees and reducing agency costs. Consider that DISH

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[119] *Boothe*, 2020 WL 7706398, at *6 (Burrell, J., dissenting).

[120] *Id.* at *4 (majority opinion).

[121] *Id.* at *6 (Scott, J., concurring).

[122] *See supra* text accompanying note 71.

[123] Hance, *supra* note 24, at 581.

[124] MO. REV. STAT. § 287.120.5 (2016).

had an express rule against eating while driving.[125] Not only was Boothe aware of this rule, but he had received a prior warning about distracted driving, including eating while driving.[126]

Fortunately, there exist some remedial options for employers like DISH to address these problems. DISH could monitor their service technicians while driving to ensure they are not distracted or breaking company rules, such as through cameras installed in the vans. Or they could deploy a more technologically complex driver and occupant monitoring system.[127] Such technology could monitor for driver distraction, send a warning or alert, and even intervene if necessary.[128]

Alternatively, DISH could engage in research to modify its scheduling policies to ensure its technicians have reasonable time to arrive at their job sites. By inquiring into the type of schedules that seem to lead employees to eat while driving – early morning jobs, stacked appointments during the lunch hour without a break, or late evening jobs – DISH could then modify their workloads accordingly. However, taken together, such technologies and scheduling policy modifications serve as a perfect example of significant agency costs directed at monitoring.[129] While such agency costs may result in a marginal decrease in undesirable employee behavior, they do nothing to ultimately improve the DISH consumer television experience, thus resulting in a decrease in the total social welfare.[130]

The *Boothe* decision may expand liability for employers in Missouri under a limited set of defined circumstances. However, in analyzing future workers' compensation claims, it is important to consider the balance between identification of the risk source and the employee's exposure to the risk outside of the workplace. As *Boothe* demonstrates, the risk source viewed in isolation may be relatively harmless, but when placed within the greater employment context, may assume a heightened degree of threat. Finally, *Boothe* illustrates that when determining the right level of deterrence, employers must keep a sharp eye on *all* key stakeholders, including employees, management, and shareholders, amongst others.

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[125] *Boothe*, 2020 WL 7706398, at *2 (majority opinion).

[126] *Id.*

[127] Megan Lampinen, *What's next for driver and occupant monitoring systems?*, AUTOMOTIVE WORLD (June 17, 2020), https://www.automotiveworld.com/articles/whats-next-for-driver-and-occupant-monitoring-systems/ [https://perma.cc/6LQT-6VVY].

[128] *Id.*

[129] *See* discussion *supra* Section III C.

[130] *See supra* text accompanying note 29.

VI. CONCLUSION

Within a framework of significant interpretations from the Missouri courts, the plurality opinion in *Boothe* reversed the Labor and Industrial Relations Commission, finding DISH liable, and holding that the "risk source directly leading to [Boothe's] injuries [was] the inherent road and driving conditions of his employment."[131] Although the court was divided, the plurality's findings do raise some issues for employers in light of the prior decisions in this area and the fact-based nature of the inquiry. In short, the plurality's ruling gives Missouri courts limited autonomy to make a fact-based inquiry about a workplace risk source and the employee's exposure to such a risk source outside of the workplace but should not be taken as fundamentally altering the nature of the "arise out of and in the course of employment" analysis.[132] Regardless, this may well result in increased burdens for some Missouri employers.

[131] *Boothe*, 2020 WL 7706398, at *3.

[132] MO. REV. STAT. § 287.020.3(2) (2017).