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Chapter 2

INTERPRETATION AND CONSTRUCTION

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I. (§2.1) Introduction

Chapter 1 of this deskbook details the requirements for a valid contract, i.e., what must be present for the courts to enforce the parties’ agreement. This chapter discusses how Missouri courts give effect to the terms of a contract once the parties find themselves in a dispute, which is important not only to counsel representing the parties in a contract dispute, but also to counsel drafting a contract in the first place. A drafter with knowledge of the rules of contract interpretation and construction can draft the contract to avoid disputes or at least put the client in a better position if a dispute arises.

II. (§2.2) Basic Analysis

Wright-Dalton-Bell-Anchor Store Co. v. Barron, 254 S.W. 1, 2 (Mo. 1923), sets forth the five-step analysis that Missouri courts must follow when interpreting the language of a contract:

- (1) that the prime purpose is to ascertain the intention of the parties;
- (2) in so doing the whole instrument must be considered, rather than segregated portions thereof;
- (3) if possible a construction must be given which will give effect to all portions of the instrument;
- (4) if the language is plain and unambiguous, the intent must be gathered from the language used; and
- (5) if the language is ambiguous and doubtful then extraneous matters may be considered in determining the intent of the parties.

Wright-Dalton-Bell-Anchor Store, 254 S.W. at 2.

A. (§2.3) Parties' Intent Is Universal Rule of Contract Interpretation

When interpreting the language of a contract, Missouri courts routinely begin with the “cardinal” or “universal” rule of contract interpretation—giving effect to the parties’ intent at the time that the contract was drafted. See *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995) (describing the importance of the “cardinal” rule); *Robson v. United Pac. Ins. Co.*, 391 S.W.2d 855, 861 (Mo. 1965) (“The real intention of the parties is the universal rule of construction.”). The underlying policy directive of giving effect to the parties’ intent when the parties formed the contract applies even if the parties did not express the contract with completeness and precision. See *Koehler v. Rowland*, 205 S.W. 217, 219 (Mo. 1918). “Greater regard is given the clear intention of the parties than the particular words used in attempting to express it.” *Veatch v. Black*, 250 S.W.2d 501, 507 (Mo. 1952). As long as the intention of the parties clearly appears in the spirit and purpose of the agreement when viewed as a whole, the contract will be given an interpretation in accordance with that intention. See *Koehler*, 205 S.W. at 219. But the corollary to this rule is that the courts will not read the parties’ intention into the agreement when no evidence of that intention exists on the face of the contract. See *Fuchs v. Reorganized Sch. Dist. No. 2, Gasconade County*, 251 S.W.2d 677, 679 (Mo. 1952).

A detailed examination of the facts of particular cases is not particularly illuminating because the rule to give effect to the parties’

intent is so axiomatic as to underlie virtually every case addressing the interpretation of a contract. That said, counsel will be well served to bear this “cardinal rule” in mind when reviewing a disputed contract and should, when possible, express arguments in terms of “the parties’ intent” because this is where a Missouri court will almost certainly start its own analysis.

B. (§2.4) Contract Must Be Considered as a Whole

When determining the parties’ intent, Missouri courts look to the entire agreement and consider it as a whole. *See Brackett v. Easton Boot & Shoe Co.*, 388 S.W.2d 842, 848 (Mo. 1965). In *Brackett*, employees of a shoe company sued the company under their collective bargaining agreement for vacation and holiday time that the employees argued had accrued but was not paid when the shoe company was shut down by its parent company and the employees were laid off. *Id.* at 843–44. The collective bargaining agreement had specific language relating to when vacation time accrued for certain employees, but it was silent on the question of whether unused pro rata vacation pay was owed to employees if they were terminated. *Id.* at 847. The Court in *Brackett* noted, however, that the parties’ agreement did provide for payment of unused vacation pay to employees who were entitled to a pension or who entered military service. *Id.* at 848. The Court thus reasoned that because the parties did include language specifically providing for payment of unused vacation in certain circumstances, the absence of similar language for all employees must have been intentional. *Id.* Thus, the court held that the employees were not entitled to their unused vacation pay. *Id.*

In *Wright-Dalton-Bell-Anchor Store Co. v. Barron*, 254 S.W. 1 (Mo. 1923), the Supreme Court of Missouri had to reconcile two apparently inconsistent clauses in a commercial lease. The plaintiff had leased an undeveloped lot of real estate in downtown Poplar Bluff from the defendant. *Id.* at 1. The parties contemplated that the plaintiff would then erect an inexpensive building on the lot. *Id.* at 2. The plaintiff argued that, if the lease was not renewed, the defendant was required to purchase the building from the plaintiff at the conclusion of the lease. *Id.* at 1.

The Court noted that the lease contained two apparently inconsistent clauses paraphrased as follows:

1. At the termination of the lease, the building *may* be sold to the defendant *if the parties can agree on a price*, or the building may be removed by the plaintiff and sold to a third party, or the parties may agree to renew the lease on terms mutually agreeable.
2. If there is a dispute between the parties as to the purchase price of the building, the dispute *will* be referred to a panel of three arbitrators *who will fix the price of the building*. The decision of the arbitrators is to be conclusive and binding on the parties, and the parties both agree to abide by their decision as to all matters submitted to the arbitrators.

Id. at 2.

Thus, on the one hand, the contract contained a clause stating that the defendant could purchase the building if the parties were able to reach an agreement on price. This clause seemed to indicate that the purchase of the building was voluntary. On the other hand, the contract contained a clause that purported to refer a dispute over price to a panel of arbitrators for a binding decision. This clause seemed to indicate that the purchase of the building was mandatory. The Supreme Court of Missouri reconciled this apparent inconsistency in the contract by looking to the parties' intent as evidenced by the other language in the contract. *Id.* at 4.

The Court noted that the language of the contract indicated that the building would be inexpensive—in fact, the language of the contract rather bluntly referred to it as a “cheap building.” *Id.* at 4. The Court noted that it was less likely that the parties intended to require the defendant to purchase what they described as a cheap building. *Id.* Additionally, language in a different section of the contract contained the phrase “if [the defendant] shall purchase said building.” *Id.* The Court noted that this language seemed to indicate that the parties viewed the purchase of the building as a contingency, not a certainty. *Id.* at 4. Thus, after considering the two apparently contradicting clauses in light of the whole contract, the Court held that the purchase of the building was not mandatory and that the arbitration agreement was only applicable if both parties wanted to transfer ownership of the building but could not agree on a price. *Id.*

For more recent examples of Missouri courts looking to the whole contract to construe certain terms, see *Frank v. Mathews*, 136 S.W.3d 196, 200 (Mo. App. W.D. 2004) (considering blanket exculpatory

language in the context of the entire contract to limit language to inherent risks involved in horseback riding and to not include damages from negligent supervision), and *Textor Construction, Inc. v. Forsyth R-III School District*, 60 S.W.3d 692, 698 (Mo. App. S.D. 2001) (reviewing a contract in its entirety to determine that a construction company had substantially performed its obligations).

C. (§2.5) All Provisions of Contract Must Be Given Effect When Possible

Missouri courts will adopt an interpretation of a contract that gives effect to all of the contract's provisions when possible. "Each provision is construed in harmony with the others to give each provision a reasonable meaning and avoid an interpretation that renders some provisions useless or redundant." *Wildflower Cmty. Ass'n, Inc. v. Rinderknecht*, 25 S.W.3d 530, 534 (Mo. App. W.D. 2000).

In *Wildflower Community Ass'n*, a homeowner built a driveway that ran through his neighborhood's "common area." *Id.* at 533. The community association filed suit, claiming that the homeowner did not have authority to build the driveway across the common area without the association's consent. *Id.* The homeowner relied on language in the parties' Declaration of Restrictions, Covenants, and Easements, which stated that "[e]very member shall have a right and easement to use and enjoyment in and to the common areas." *Id.* at 535. The provision governing the use of common areas did not contain language prohibiting a homeowner from constructing a driveway. *Id.*

The court explained that a restrictive covenant is a private agreement and is subject to the same rules of interpretation as other contracts. *Id.* at 534 (citing *Kling v. Taylor-Morley, Inc.*, 929 S.W.2d 816, 819 (Mo. App. E.D. 1996)). The restrictive covenant at issue defined the term "associated structure" to include, among other things, driveways and improvements built by homeowners on common areas "with the consent of the [community association]." *Wildflower Cmty. Ass'n*, 25 S.W.3d at 535. Though there was no specific language prohibiting a homeowner from constructing a driveway on the neighborhood's common area, the court reasoned that the language in the definition of "associated structure" referring to improvements on common areas "with the consent of the [community association]" evidenced the intent of the parties to, in fact, require consent. *Id.* at 536. *See also Nichols v. Pendley*, 331 S.W.2d 673, 676 (Mo. App. S.D. 1960) (relying on the rule to give effect to all terms of a contract in rejecting

industry custom on paying commissions to a real estate broker in favor of a more stringent rule set forth in the parties' contract).

D. (§2.6) Do Not Look Beyond the Language of the Contract Unless It Is Ambiguous

Missouri courts may not look beyond the language of the contract to interpret it unless that language is ambiguous. *See, e.g., Swaringin v. Allstate Ins. Co.*, 399 S.W.2d 131, 134 (Mo. App. E.D. 1966). If the language is ambiguous, the court may consider extraneous matters. *Id.* Thus, if the language of a contract is plain, straightforward, and susceptible to only one meaning—that is, it is not ambiguous—the contract will be enforced as written. *See Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. banc 1992).

III. (§2.7) Ambiguity

Missouri courts ascertain the intent of the parties to a contract by first looking to the words of that contract and giving those words their “plain, ordinary, and usual meaning.” *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859–60 (Mo. banc 2006). Courts will only look outside the contract if it is ambiguous. *See Ethridge v. TierOne Bank*, 226 S.W.3d 127, 131 (Mo. banc 2007). But what does it mean for a contract to be ambiguous?

A. (§2.8) When Is a Contract Ambiguous?

The Supreme Court of Missouri has explained that a contract is ambiguous when its terms are duplicitous, indistinct, or uncertain. *Ethridge v. TierOne Bank*, 226 S.W.3d 127, 131 (Mo. banc 2007). Stated another way, the contract must be reasonably open to different constructions. *See Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). That said, “A contract is not ambiguous merely because the parties disagree as to its construction.” *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 860 (Mo. banc 2006). Rather, a contract is ambiguous if its terms are susceptible to honest and fair differences. *Id.*

In *Ethridge*, the dispute arose after the grantor of a deed of trust had died. *Ethridge*, 226 S.W.3d at 130. The real estate at issue was owned by both the decedent and his widow. *Id.* The deed of trust securing a loan on that real estate, however, was only in the name of the decedent. *Id.* The bank claimed that the widow was obligated to continue payment in accordance with the deed of trust after her

husband's death. *Id.* The Court held that the widow was not obligated to pay under the deed of trust because the language of the contract failed to list her as a borrower:

The deed of trust defines "Borrower" as David Ethridge, notes that he is married, but indicates—albeit incorrectly—that title is vested solely in him. This is the only definition of borrower in the document and the only description of the property's ownership. The deed of trust does not reference Mary Ethridge or otherwise indicate that another individual is also a borrower or grantor. This definition is not open to different constructions and cannot reasonably be construed to mean that Mary Ethridge also is a borrower under the deed of trust.

Id. at 131. Because the definition of "borrower" was not open to different constructions, it was not ambiguous. *Id.* at 134. Accordingly, the plain language controlled, and the widow was not liable under the deed of trust. *Id.* at 134.

In *Bailey v. Federated Mutual Insurance Co.*, 152 S.W.3d 355 (Mo. App. W.D. 2004), the court determined whether the term "customer" as used in a car dealership's insurance policy was ambiguous. *See id.* at 357–58. The court noted that the appropriate frame of reference for considering whether contract language is ambiguous is the perspective of an average reader: "In determining whether or not a word is ambiguous, we examine the entire contract and apply meanings a person of average intelligence and education would understand. Words are not ambiguous merely because their meaning and application confound the parties." *Id.* at 357 (citations omitted). The court looked to dictionaries and a well-known treatise to determine that the word customer was not open to different meanings and therefore was not ambiguous. *See id.* at 358.

B. (§2.9) Ambiguity in Insurance Contracts

Ambiguity frequently arises in the context of contracts for insurance. As a result, an entire body of law has arisen on the subject of insurance policy ambiguity. *See, e.g., Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156 (Mo. banc 2007). The Supreme Court of Missouri has clearly stated that whether an insurance policy is ambiguous is a question of law. *See Gulf Ins. Co. v. Noble Broad.*, 936 S.W.2d 810, 813 (Mo. banc 1997). The provisions of an insurance policy are ambiguous when, because of duplicity, indistinctness, or uncertainty in the meaning of the words used, the policy is reasonably open to different constructions. *See Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210 (Mo. banc 1992).

“When there is ambiguity in an insurance policy, the Court must interpret the policy in favor of the insured.” *See Todd*, 223 S.W.3d at 160. In doing so, “the courts are not authorized to pervert language or exercise inventive powers for the purpose of creating an ambiguity when none exists.” *State Farm Mut. Auto. Ins. Co. v. Ward*, 340 S.W.2d 635, 639 (Mo. 1960). That is to say, “A court is not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate.” *Rodriguez v. Gen. Accident Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. banc 1991). “Where language in an insurance contract is unequivocal, it is to be given its plain meaning notwithstanding the fact that it appears in a restrictive provision of a policy.” *Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 142 (Mo. banc 1980).

In *Todd*, the Supreme Court of Missouri did not find an ambiguity in an insurance policy that provided two separate, but different, types of coverage. *See Todd*, 223 S.W.3d at 164. Though the language governing the two types of coverage was different, the risks covered were also different. *Id.* Because the definitions and terms applicable for each type of coverage were internally consistent for that type of coverage, the policy was unambiguous, and the Court held that the policy was to be enforced as written. *Id.* at 165.

In contrast, the Supreme Court did find an ambiguity in *Seeck v. Geico General Insurance Co.*, 212 S.W.3d 129 (Mo. banc 2007). In that case, the policy provided: “When an insured is occupying a motor vehicle not owned by the insured . . . this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary.” *Id.* at 132. The policy also contained a limit of liability that read:

The most we will pay is the amount of damage sustained by an insured for bodily injury less the amount paid to the insured by or for any person or organization who may be held legally liable for the bodily injury. . . . However, the limit of liability shall be reduced by all sums: . . . paid because of the bodily injury by or on behalf of the persons or organizations who may be legally responsible. . . .

Id. at 132 n.2. Citing *Ware v. Geico General Insurance Co.*, 84 S.W.3d 99, 102–03 (Mo. App. E.D. 2002), the *Seeck* Court held that these clauses were inconsistent, and therefore ambiguous, because “[i]f a contract promises something at one point and takes it away at another, there is an ambiguity.” *See Seeck*, 202 S.W.3d at 133

(quoting *Lutsky v. Blue Cross Hosp. Serv., Inc.*, 695 S.W.2d 870, 875 (Mo. banc 1985)).

IV. Rules of Construction

A. (§2.10) Interpretation Versus Construction

Missouri courts often use the terms “contract interpretation” and “contract construction” interchangeably. See *Herrick Motor Co. v. Fischer Oldsmobile Co.*, 421 S.W.2d 58, 63 n.1 (Mo. App. S.D. 1967). But the terms are different. When advocating a particular reading of a contract, counsel should be mindful of the distinction between the two terms to avoid possible confusion of the applicable standards.

Courts often use the term “interpretation” when referring generally to the process of applying the terms of the parties’ agreement to the specific facts of a dispute to arrive at a resolution. As a technical matter, however, the term “contract interpretation” refers only to a court’s use of the language of the contract itself to arrive at a decision. As one Missouri court put it, “interpretation is concerned only with ascertaining the sense and meaning of the subject-matter or form of words and stops at the written text.” *Id.* “[C]onstruction” of a contract, on the other hand, refers to the process by which a court determines the meaning and proper effect of a contract by considering the circumstances surrounding the drafting of that contract. *Id.*

Though the distinction between “interpretation” and “construction” is often muddled, it is not merely academic. Missouri courts routinely note that they must first attempt to interpret a contract based only on its language and that they may only look to extraneous matters (i.e., rules of construction) if the language of the contract is ambiguous. See, e.g., *Swarigin v. Allstate Ins. Co.*, 399 S.W.2d 131, 134 (Mo. App. E.D. 1966). Thus, if the language of a contract is plain, straightforward, and susceptible to only one meaning—that is, it is not ambiguous—the rules of construction do not apply and the contract will be enforced as written. See *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210 (Mo. banc 1992).

B. (§2.11) Text-Oriented Rules of Construction

When faced with trying to construe the meaning of a contract, Missouri courts typically start with the language contained in the four corners of the contract. See *Fall Creek Constr. Co. v. Dir. of Revenue*, 109 S.W.3d 165, 170 (Mo. banc 2003). In doing so, courts

routinely draw on certain rules of construction that govern how the contract's language should be read. These rules provide a decision-maker with tools to construe a contract using its own language without resorting to outside evidence or policy concerns. Sections 2.12–2.23 below discuss several of the text-oriented rules of construction that have been recognized by Missouri courts.

1. (§2.12) Rules of Construction Affecting the Meaning of a Certain Word or Phrase

Even a cursory review of Missouri caselaw reveals that contract disputes often turn on the meaning of a certain word or phrase in the parties' contract. Perhaps not surprisingly, Missouri courts have adopted several rules of construction to assist them in determining what definition of a word or meaning of a phrase should be employed in a particular case. Sections 2.13–2.17 below describe the five basic rules used by Missouri courts.

a. (§2.13) Terms Should Be Given Their Ordinary and Usual Meaning

One of the most often-cited rules of construction is that the terms of a contract should be given their plain, ordinary, and usual meaning. *See, e.g., State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. banc 2006); *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003); *ND-Sell, Inc. v. Greater Springfield Bd. of Realtors, Inc.*, 224 S.W.3d 623, 628 (Mo. App. S.D. 2007). The “plain and ordinary meaning” of a term is one that a person of average intelligence, knowledge, and experience would deem reasonable. *See Bailey v. Federated Mut. Ins. Co.*, 152 S.W.3d 355, 357 (Mo. App. W.D. 2004). Missouri courts sometimes use dictionaries to establish the accepted definition of a specific word or phrase. *See Shahan v. Shahan*, 988 S.W.2d 529, 535 (Mo. banc 1999); *see also* §2.15, *infra*. But dictionary definitions are not always used; courts will often simply rely on their own “ordinary” understanding of a word in lieu of citing to extraneous authority. *See, e.g., First Nat'l Bank of Joplin v. Johnson*, 431 S.W.2d 65, 67 (Mo. banc 1968) (resolving a dispute over the meaning of a trust agreement clause by looking to the court's understanding of the “usual, ordinary and natural meaning’ of the words”).

If faced with choosing between a commonplace definition of a word and a more technical definition, Missouri courts will often choose the more commonplace definition. For example, when construing an insurance contract, a court will use the plain and ordinary meaning of a term instead of a technical definition unless it plainly appears that the technical meaning is intended to apply. *See Krenski v. Aubuchon*, 841 S.W.2d 721, 729 (Mo. App. E.D. 1992), *overruled, in part, on other grounds by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 108 (Mo. banc 1996).

As a result of Missouri courts' overarching directive to use the "plain and ordinary" meaning of contractual language, counsel would be well advised to avoid the temptation to advocate a definition that could be described as "strained." *See, e.g., Schneider v. Forsythe Group, Inc.*, 782 S.W.2d 139, 145 (Mo. App. E.D. 1989) (rejecting counsel's proposed interpretation in favor of a "less strained" reading of the contract).

b. (§2.14) Definition Provided by Contract Is Given Deference

Notwithstanding the common dictate to give terms their ordinary and plain meaning, if the contract defines a particular term, Missouri courts will typically accept the parties' agreed definition. *See State Farm Mut. Auto. Ins. Co. v. Ballmer*, 899 S.W.2d 523, 525 (Mo. banc 1995). Though this rule is commonly referenced in cases dealing with insurance policies, it is considered in other contract actions as well. *See Elsberry v. Boulevard Motors, Inc.*, 886 S.W.2d 732, 735 (Mo. App. E.D. 1994) (because an automobile sales contract did not contain the definition of a certain term, the court had to look to the plain and ordinary meaning). One caveat to this rule is that, for the contract definition to apply, the definition itself must be reasonably clear and unambiguous. *See Stotts v. Progressive Classic Ins. Co.*, 118 S.W.3d 655, 663 (Mo. App. W.D. 2003). If the contract definition is itself ambiguous, the court must look to the rules of construction to resolve the ambiguity just as it would with any other contract term. *Id.*

c. (§2.15) Dictionary Definitions Are Commonly Considered

Missouri courts routinely look to dictionaries to establish the “plain and ordinary” meaning of common words or the appropriate definition of technical or legal words. Of course, there are often multiple definitions of a particular term in any given dictionary, and definitions may vary depending on which dictionary is consulted. Missouri courts have noted that they must be careful to consider the contract’s context in applying the appropriate dictionary definition. *See, e.g., Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 906 (Mo. 1971).

In *Wilshire Construction*, the Supreme Court of Missouri faced a dispute over the definition of the word “to.” The plaintiffs were various construction companies that worked on developing a new subdivision. *Id.* at 904. As part of the project, the construction companies placed a down payment with Union Electric Company to cover the costs of bringing in electricity. *Id.* at 905. The contract allowed for a refund of the down payment if the cost to Union Electric was less than 1.5 times the annual revenue Union Electric expected to receive from its customers in the new subdivision. *Id.* The plaintiffs argued that they were entitled to a refund of the down payment because the cost of bring electricity “to said subdivision” was low enough to trigger the right to a refund. *Id.* at 905–06. The plaintiffs contended that because the contract was limited to the cost to bring electricity “to said subdivision,” Union Electric should only be allowed to take into account the cost of extending its electric lines to the boundary of the subdivision and should not be permitted to take into account the cost of installing the lines throughout the subdivision. *See Id.* at 906. Union Electric, of course, argued that they should be permitted to take into account all of the costs of supplying electricity for the subdivision. *Id.*

The Court noted that the dispute boiled down to what definition of the word “to” should be employed. *Id.* The Court noted that Webster’s (2nd International) Dictionary contained nearly two full columns of definitions for the word “to.” *Id.* Those definitions included both the definition advanced by the plaintiffs (generally that “to” means “the terminus”) and the definition advanced by the defendant (generally that “to”

means “for the purpose of”). *Id.* The Court noted that it must resolve the dispute by looking at the potential definitions of the word “to” in the context of the general purpose of the contract. *See id.* at 907. The Court held that, because the general purpose of the contract was to supply the individual dwellings within the subdivision with electricity, the definition advanced by Union Electric—which read “to” to mean inclusive of the individual dwellings—was more in line with the general purpose of the contract. *Id.*

Wilshire Construction highlights the potential limitations of relying solely on dictionary definitions because there is often fodder in dictionaries for multiple points of view, particularly when the operative word is general in nature. Because dictionary definitions can vary depending on the publisher and version, counsel would be wise to consult several different dictionaries before settling on a certain definition. Missouri law has not recognized an “official” or “approved” dictionary. Counsel can locate ample approving authority for nearly all of the major dictionaries, including Webster’s New International Dictionary, Black’s Law Dictionary, Webster’s Collegiate Dictionary, the Oxford English Dictionary, and the American Heritage Dictionary. *See, e.g.:*

- *Hinkeldey v. Cities Serv. Oil Co.*, 470 S.W.2d 494, 500 (Mo. 1971) (Webster’s New International Dictionary)
- *Eisenberg v. Redd*, 38 S.W.3d 409, 411 (Mo. banc 2001) (Black’s Law Dictionary)
- *Mansion Hills Condo. Ass’n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 639 (Mo. App. E.D. 2001) (Webster’s 9th New Collegiate Dictionary)
- *Kirk King, King Constr., Inc. v. Cont’l W. Ins. Co.*, 123 S.W.3d 259, 265 (Mo. App. W.D. 2003) (Oxford English Dictionary)
- *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 303 n.2 (Mo. banc 1993) (American Heritage Dictionary, among others)

d. (§2.16) Words Should Be Considered in Their Context—*Noscitur a Sociis*

Another rule Missouri courts use to construe the meaning of a particular word or phrase in a contract is *noscitur a sociis*. Notable Professor Arthur Corbin defines the rule of *noscitur a sociis* as “the meaning of a word or phrase used in a series is affected by that of the others in that series.” CORBIN ON CONTRACTS § 554, p. 522 (1951). At least one Missouri court has stated the rule more colloquially as “words are judged by the company they keep.” *Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. banc 1988). Generally, *noscitur a sociis* is used to convey the concept that the meaning of a term can be enlarged or restricted by referring to the context in which the term is used. See *First Nat’l Bank of Malden v. Farmers New World Life Ins. Co.*, 455 S.W.2d 517, 523 (Mo. App. S.D. 1970). Though Missouri courts invoke *noscitur a sociis* more commonly in the context of statutory construction, the rule is also applicable to contract interpretation. *Id.*; see also *Harper’s Adm’r v. Phoenix Ins. Co.*, 19 Mo. 506, 510 (1854) (discussing the maxim *noscitur a sociis*: “When a clause stands with others, its sense may be gathered from those which immediately precede and follow it.”).

An example of the rule in operation is helpful to understanding its impact. In *Standard Operations*, 758 S.W.2d 442, the Supreme Court of Missouri had to interpret a commercial lease clause that governed when the lease could be terminated by the landlord. The language at issue in the contract read, in pertinent part, as follows:

No interest of Tenant in this Lease . . . shall be assignable by operation of law. Without limiting the generality of the foregoing, each of the following acts shall be considered an involuntary assignment: (i) if Tenant becomes bankrupt or insolvent, or makes an assignment for the benefit of creditors . . . [or] (ii) if a writ of attachment or execution is levied on this lease An involuntary assignment shall constitute a default by Tenant, and this Lease shall terminate and shall not be treated as an asset of Tenant.

Id. at 443. The tenant company merged with another company and all of the tenant’s assets (including the lease at issue) were assigned to the acquiring company. *Id.* at 442. The landlord argued that the merger resulted in an “assignment by operation of law,” which was prohibited by the above-referenced clause in the lease. *Id.* at 444.

Citing the rule of *noscitur a sociis*, the Court ruled in favor of the tenant and held that, because the language prohibiting assignment by operation of law was surrounded by other language that all related to involuntary assignments, the prohibition against assignments applied only to “involuntary” assignments and not “voluntary” assignments such as what occurred when the tenant merged with another company. *Id.* at 444–45.

e. (§2.17) A General Term That Is Accompanied by a List of Specific Terms Will Be Limited to Include Only Those Things That Are of the Same Kind as the Specific Terms—*Ejusdem Generis*

A rule of construction that is related to, but slightly different than, *noscitur a sociis* is the rule of *ejusdem generis*. The Supreme Court of Missouri has explained that the rule of *ejusdem generis* (“of the same kind”) directs that specific enumeration is useful in determining the scope and extent of more general words. *See Standard Operations, Inc. v. Montague*, 758 S.W.2d 442, 444 (Mo. banc 1988). “Thus a document referring to ‘horses, cattle, sheep and other animals’ will usually be construed as including goats, but not bears or tigers.” *Id.*

In *Fulkerson v. Great Lakes Pipe Line Co.*, 75 S.W.2d 844 (Mo. banc 1934), the Court employed *ejusdem generis* to decide a dispute between a landowner and an oil company. The landowner contracted with an oil company to allow the oil company to run a pipe line across the landowner’s property. *Id.* at 844–45. The contract contained a specific provision requiring the oil company to pay for damages as a result of the installation of the pipe line. *Id.* at 845. The operative language read as follows: “All damages to crops, surfaces, fences, and premises for and because of the laying of each line of pipe and each telegraph and telephone line shall be paid for as soon as said line or lines are completed and shall include maintenance damages, if any.” *Id.* The installation of the pipe line caused damage to the landowner’s fences and crops and left depressions and ridges in the surface of his property. *Id.* The landowner filed suit under the contract to recover for these damages. *See id.* The landowner also sought to recover for the depreciation in the fair market value of his land as a

result of the construction and required maintenance of the pipe line. *Id.* The oil company argued that the requested “depreciation” damages were not of the type covered by the contract language set forth above. *Id.* at 846. The landowner argued that the depreciation was damage to his “premises” and thus was covered by the parties’ contract. *Id.*

The Court drew on the rule of *ejusdem generis*—“where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described.” *Id.* at 847. The Court noted that the specific terms “crops, surfaces, and fences” all related to the physical aspects of the land. *See id.* Thus, the Court ruled that the landowner could not properly recover damages for the intangible loss of depreciation to the market value of his property because that reading of the term “premises” would not place it into a like class with the more specific terms that all related to tangible aspects of the property. *Id.*

Counsel should be aware, though, of an important caveat to the rule of *ejusdem generis*. “[T]he rule has no application where the particular words describe variant and differing things or concepts.” *Jacks-Evans Mfg. Co. v. Christen*, 848 S.W.2d 553, 555 (Mo. App. E.D. 1993) (reversing a trial court’s application of *ejusdem generis* in construing a noncompetition agreement; “[t]he prohibition against participating as a partner or investor is quite different than prohibiting a connection with a competitor as an advisor or consultant.”).

For example, in *Payne v. Grimes Real Estate Co.*, 660 S.W.2d 755 (Mo. App. E.D. 1983), the sellers of a parcel of real estate sought to extend the date for the closing on the sale to allow the sellers to install a water pipe as required in the parties’ contract. *Id.* at 756. The contract contained a clause allowing for an extension of the closing date that read, in pertinent part, as follows: “Both parties . . . authorize [the seller] to extend the closing date of this contract for a time not to exceed 30 days if [the seller] shall consider such extension necessary to complete financing, clearance of title, survey or other necessary arrangements.” *Id.* at 757. Citing the rule of *ejusdem generis*, the buyer argued that the sellers’ excuse did not properly fall under this “necessary arrangements” clause of the contract because installing a water pipe was not of the

same class of issues described by the more specific terms “complet[ing] financing, clearance of title, [and obtaining a] survey.” *Id.*

The court ruled that *ejusdem generis* did not apply in this case because the specific terms “point to nothing in common that would identify anything else as being of a ‘like kind and nature.’” *Id.* Because the general term was not limited by the specific terms that accompanied it, the court held that installing a water pipe was a “necessary arrangement[]” and that the seller was entitled to extend the closing date of the sale under the contract. *See id.* at 757.

2. (§2.18) Rules of Construction Over the Contract as a Whole

Sections 2.12–2.17 above discuss the various rules of construction that Missouri courts employ to arrive at the meaning of a certain word or phrase within a contract. Often, however, disputes are not related to a particular phrase within the contract, but rather to how the contract’s language as a whole should be interpreted. Sections 2.19–2.23 below describe how Missouri courts address these types of disputes.

a. (§2.19) Expression of One Thing Is to the Exclusion of Another—*Expressio Unius Est Exclusio Alterius*

The rule of *expressio unius est exclusio alterius* roughly translates to “the expression of one thing is to the exclusion of another.” Though the rule is more often cited in cases of statutory interpretation, it applies to contract actions as well. *See Gen. Am. Life Ins. Co. v. Barrett*, 847 S.W.2d 125, 133 (Mo. App. W.D. 1993). The rule may be used to decide whether a contract that contains a list of specific terms should be read to encompass anything broader than that specifically listed. For example, in *Johnson v. Thompson*, 251 S.W.2d 645 (Mo. 1952), the Supreme Court of Missouri had to determine whether an employee subject to an employment contract could be fired for drinking on the job. *See id.* at 646. The employment contract contained a specific clause governing when the company had cause to terminate an employee: “[An employee] ‘may be discharged from the service of the Company for good and sufficient causes.’” “These causes

shall include intemperance, incompetency, habitual neglect of duty, gross violation of rules or orders, dishonesty or insubordination'. . . ." *Id.* at 646–47. The Court noted that, because the list of causes for termination were expressly listed and did not include any “catch-all” language, the employer may be limited to only those causes for termination listed. *Id.* at 647. This is because “the express mention of one thing implies the exclusion of another.” *Id.* at 647. The Court went on to hold, however, that the employer did have a specific rule prohibiting drinking on the job. *See id.* Because one of the express grounds for termination was the “gross violation of rules,” the employer did have proper grounds for terminating the employee. *Id.*

For an additional example of a Missouri court applying the rule of *expressio unius est exclusio alterius*, see *Brackett v. Easton Boot & Shoe Co.*, 388 S.W.2d 842 (Mo. 1965).

b. (§2.20) Ambiguities Should Be Construed Against the Drafter—*Contra Proferentem*

Simply stated, the rule of *contra proferentem* is that ambiguous language in a contract should be construed against the party responsible for the ambiguity. *See, e.g., Vill. of Cairo v. Bodine Contracting Co.*, 685 S.W.2d 253, 264 (Mo. App. W.D. 1985). It is not necessary that the party against whom the contract is construed actually be the drafter of the contract language. If the party adopted and submitted the language, that is sufficient. *Id.* Accordingly, a party that uses a “form” contract is potentially just as liable for the negative implications of the form’s ambiguities as if the party had drafted the offending language. *Id.*

The principal question in a case potentially involving *contra proferentem* is whether the language at issue is, in fact, ambiguous. See §§2.7–2.9 above for a discussion of ambiguity. Missouri courts will often avoid the impact of the rule by simply finding that the language at issue is unambiguous. *See, e.g., City of Beverly Hills v. Vill. of Velda Vill. Hills*, 925 S.W.2d 474, 477 (Mo. App. E.D. 1996); *Nation-Wide Check Corp. v. Robinson*, 479 S.W.2d 192, 194 (Mo. App. E.D. 1972).

Unlike most rules of construction—which are premised on an attempt to arrive at the parties’ intent in selecting certain

language—*contra proferentem* is rooted more in the concept of appropriately allocating blame for the faulty language. See *Rathbun v. CATO Corp.*, 93 S.W.3d 771, 781 (Mo. App. S.D. 2002). “Consequently, this rule is employed only as a last resort when other available data bearing on the agreement shed no light on actual intent or meaning.” *Id.* That being said, Missouri courts are not as reluctant to apply this relatively harsh rule in the context of insurance disputes. See, e.g., *Mansion Hills Condo. Ass’n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 637 (Mo. App. E.D. 2001); *Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo.*, 992 S.W.2d 308, 318 (Mo. App. E.D. 1999) (ambiguous language in an insurance policy should be construed against the insurance company that drafted the language). The rationale for applying the rule more strictly against insurance companies is grounded in the notion that the company is in the best position to remove the ambiguity from its own policy language. See *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 211 (Mo. banc 1992) (citing *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2nd Cir. 1947) (Hand, J.)).

c. (§2.21) A Specific Provision in a Contract Is Given Preference Over a General One

There are times when a contract’s own language may be internally inconsistent—or at least countervailing. When faced with a contract that has a general provision conflicting with a more specific provision, Missouri courts will enforce the more specific provision. See *State ex rel. Smith v. City of Springfield*, 375 S.W.2d 84, 91 (Mo. banc 1964).

An example of this rule in operation is found in *Phillips v. Authorized Investors Group, Inc.*, 625 S.W.2d 917 (Mo. App. E.D. 1981). *Phillips* dealt with a dispute between the trustees of a subdivision and a property owner that held real estate within the subdivision. *Id.* at 918. The trustees contended that the property owner had failed to timely pay a yearly assessment and filed suit to collect the unpaid assessment. *Id.* at 919. The property owner argued that the trustees had not fulfilled certain conditions required in the indenture contract before they could properly file a claim for unpaid assessments. *Id.* The court quoted the specific language in the parties’ contract that required the trustees to first file the assessment as a lien with the Recorder of Deeds and that

indicated that the trustees could only file suit if the property owner did not discharge the lien:

[A]ssessments shall become a first lien on the land assessed from the date of recorded assessment filed in the Recorder's Office
. . . the collection [of assessments] may be enforced by suits at law instituted by the Trustees against any property owner of a lot *on which [a] lien shall remain undischarged*

Id. at 920.

The trustees in *Phillips* had not filed liens with the Recorder of Deeds based on the assessments. But they argued that they were still entitled to file suit because other language in the parties' contract granted it the authority to sue for violations of contract provisions. Specifically, the contract stated: "A violation or threatened violation of restrictions or other provisions of this indenture shall give rise to a cause of action for an injunction, damages or both, or other recovery, in favor of Trustees . . ." *Id.* The court held, however, that the language relied on by the trustees was simply a statement of their general right to pursue legal action under the contract. And because Missouri courts "give preference to the specific provisions over the general," this general provision was subordinate to the more specific clauses dealing specifically with suits related to unpaid assessments. *Id.* at 921; *see also Surface v. Ranger Ins. Co.*, 526 S.W.2d 44, 48 (Mo. App. S.D. 1975) (when one clause is general and inclusive in nature and one is more limited and specific, the latter operates as a modification and *pro tanto* nullification of the former).

d. (§2.22) Typed or Handwritten Provisions Prevail Over Form Language

Another rule of construction that Missouri courts recognize when a contract's language is internally inconsistent is that typed or handwritten provisions will prevail over inconsistent form language. *See Emmons v. Winters*, 627 S.W.2d 904, 907 (Mo. App. W.D. 1982). In *Emmons*, the court had to resolve a dispute between two parties to a real estate contract. *Id.* at 905–06. The sellers of a parcel of real estate were presented a preprinted form contract that had, among others, a term that would require the buyers to execute a promissory note and deed of trust "containing usual provisions." *Id.* at 906. Typed onto the form, however, was language that indicated that the

promissory note and deed of trust should be “in a form approved by sellers.” *Id.* at 907. The sellers presented a form contract to which the buyer’s representatives objected because it did not contain “usual provisions.” *Id.* The parties could not agree on the terms of the promissory note and deed of trust, and the sellers filed suit to recover the earnest money that was deposited by the buyer’s representatives. *Id.* at 906.

The court in *Emmons* held that the sellers were entitled to the earnest money because they were within their rights to approve the promissory note and deed of trust. *Id.* at 907. Though the form contract had language indicating that the “usual provisions” should be employed, the contract also had typed language calling for the sellers’ approval. *Id.* “In such case, as a rule of construction, the typewritten language shall prevail over the printed provision, and as the two are in conflict (i.e., in ‘form approved by seller’ vs. ‘containing usual provisions’), the printed provision may be disregarded.” *Id.* (citing *Belt Seed Co. v. Mitchelhill Seed Co.*, 153 S.W.2d 106, 110 (Mo. App. W.D. 1941)).

Counsel should bear in mind, however, that “[t]he rule that a handwritten clause takes precedence over a typewritten clause applies only where there exists an irreconcilable conflict between the handwritten and the typewritten clauses.” *In re Marriage of Buchmiller*, 566 S.W.2d 256, 259 (Mo. App. E.D. 1978). Thus, if the court is able to reconcile the clauses in a contract, it will do so. *Id.*

e. (§2.23) First of Two Conflicting Provisions Prevails

Missouri courts have recognized the rule of construction that, when two provisions of a contract are in conflict, the provision that appears in the contract first will prevail. *See Drucker v. W. Indem. Co. of Dallas, Tex.*, 223 S.W. 989, 991 (Mo. App. E.D. 1920). In *Drucker*, a disability insurance policy stated that it covered disability for 52 weeks from the effective date of the policy. *Id.* at 990. Later in the policy’s language, it indicated that the insurance company was not liable for disabilities that arise within the first 15 days of the policy period. *Id.* at 991. The court held that these 2 clauses could not be reconciled and, citing Blackstone’s Commentaries, that the first clause should be accepted and the second rejected. *Id.* The court also noted that this holding is consistent with the

general rule of construction that ambiguities in an insurance policy should be resolved against the insurer. *Id.*; *see also* §2.33, *infra*.

Counsel should note with caution that Missouri courts since *Drucker*, 223 S.W. 989, have noted that the rule of construction accepting the first of two conflicting contract provisions “is an expedient which a court will very reluctantly employ, usually resorted to when the subsequent clause has been carelessly introduced into the contract.” *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541, 548 (Mo. App. W.D. 1973) (refusing to apply rule); *see also Campbell v. Dixon*, 647 S.W.2d 617, 624 (Mo. App. S.D. 1983) (rule is rarely applied). Given that the rule of accepting the first of two inconsistent clauses has been given short shift by Missouri courts since *Drucker*, coupled with the fact that *Drucker* itself arguably turned on another more commonly accepted rule of construction, counsel would be wise to explore other arguments before relying solely on this rule of construction.

C. (§2.24) Rules of Construction That Incorporate Terms

As often stated, the baseline rule for contract interpretation is to limit the analysis to the four corners of the agreement. *See Fall Creek Constr. Co. v. Dir. of Revenue*, 109 S.W.3d 165, 170 (Mo. banc 2003). Counsel should be aware of a contract’s references to other documents and how the state of the law impacts the agreement. These issues may typically reside in the background; they can, though, sometimes be the hinge on which a case may turn.

1. (§2.25) Contract May Incorporate Language by Reference if It Refers to the Language With Sufficient Definiteness

Missouri courts recognize the well-settled rule of construction that “matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in haec verba.” *Jim Carlson Constr., Inc. v. Bailey*, 769 S.W.2d 480, 481 (Mo. App. W.D. 1989). The Supreme Court of Missouri has noted that the incorporating reference must be “sufficiently definite” to indicate that the parties intended the collateral document to become part of the contract. *See Grand Lodge of United Bros. of Friendship & Sisters of Mysterious Ten v.*

Mass. Bonding & Ins. Co., 25 S.W.2d 783, 785 (Mo. 1930) (incorporating reference was not sufficiently definite). The collateral document need not be a separate agreement. Missouri courts routinely look to “exhibits” that are incorporated into a contract. See *Three-O-Three Invs., Inc. v. Moffitt*, 622 S.W.2d 736, 738 (Mo. App. W.D. 1981) (looking to an exhibit incorporated by reference in a contract to determine the legal description of a piece of property to which an easement was to attach).

Counsel would be well advised to use clear language when incorporating a collateral document into a contract. Missouri courts have given effect to words such as “[the collateral documents] are as fully a part of the Contract as if attached to this Agreement or repeated herein,” *Jim Carlson Construction*, 769 S.W.2d at 481 (emphasis added by court), and “[the collateral documents are] attached hereto and made a part hereof,” *Three-O-Three Investments*, 622 S.W.2d at 738. If the collateral document at issue purports to place some obligation on the contract parties—such as in the case of a list of rules and regulations in a lease—counsel may wish to include a specific clause indicating that the parties agree to be bound by the obligations set forth in the collateral document. See *Welch v. N. Hills Bank*, 442 S.W.2d 98, 100 (Mo. App. W.D. 1969) (enforcing a clause stating “we jointly and severally agree to the rules and regulations as set forth in [a collateral document] issued to us”).

2. (§2.26) Existing Law Is Read Into the Contract

Unless the contract states otherwise, the law applicable to the contract in effect at the time and place of the execution of the contract is “as much a part of the contract as though it were expressly referred to and incorporated in its terms.” *Sadler v. Bd. of Educ. of Cabool Sch. Dist. R-4*, 851 S.W.2d 707, 712–13 (Mo. App. S.D. 1993). Missouri courts use this rule of construction to incorporate statutory provisions as well as judicial precedents. See *id.* The rationale for the rule is based on an assumption that the parties had the legal landscape in mind when they formed their contract. *Id.* at 713.

Though this rule applies generally to all contracts, Missouri courts cite it most frequently when faced with interpreting contracts that govern the relationship of parties that are operating within a regulated industry. See, e.g., *Zellars v. Nat’l*

Sur. Co., 108 S.W. 548, 549 (Mo. banc 1908) (appeal bonds “are to be construed as though the law requiring and regulating them was written in them”); *Sadler*, 851 S.W.2d at 712–13 (interpreting a high school teacher’s employment contract in the context of Chapter 168, RSMo, which regulates the compensation of public school teachers).

In *Sharp v. Interstate Motor Freight System*, 442 S.W.2d 939, 945 (Mo. banc 1969), the Supreme Court of Missouri was faced with interpreting a contract for the sale of one interstate trucking company to another. By federal statute, the sale had to be approved by the Interstate Commerce Commission (ICC). *Id.* at 941. The parties’ contract accounted for the possibility that the ICC may not approve the sale and allowed the prospective buyer to assign the contract to another prospective buyer within 30 days of receiving a “final order” of denial from the ICC. *Id.* at 942. The parties sought approval of the sale from the ICC but were denied. *Id.* Thirty days after receiving a denial from the administrative agency, the seller sought to void the contract. *Id.* at 943. The prospective buyer argued that the parties had not yet received a “final order” on the request for approval of the sale because the ICC’s administrative determination was subject to judicial review. *Id.* at 944. Thus, according to the prospective buyer, it still could seek to assign its rights under the contract to another buyer. *Id.* The seller argued that the ICC’s administrative order was sufficient to trigger the 30-day clock that started ticking upon a “final order” under the contract. *Id.* The Court held that, because a federal statute granted the right of judicial review of the ICC’s order, the statute established that the administrative order was not final until after judicial review was exhausted. *Id.* Because “the laws which exist at the time and place of making a contract . . . enter into and form a part of the contract as if they were expressly referred to or incorporated therein,” the 30-day clock was not yet triggered by a “final order,” and the prospective buyer could assign its rights. *Id.* at 945.

Counsel should note that the rule impliedly incorporating the law in existence at the time and place of the making of the contract is only effective “unless [the] contract provides otherwise.” See *Sadler*, 851 S.W.2d at 712. Thus, if the parties wish to avoid the impact of a certain legal precedent or statute, they might consider employing language in the contract that disavows the objectionable law. Of course, counsel should be mindful not to run

afoul of the rule that a contract for an illegal purpose is void. *See* §§1.45–1.50 of this deskbook.

D. (§2.27) Parties Are Bound by the Construction Evidenced by Their Actions

“[T]he construction put on a contract by the parties thereto in the course of its performance, as evidenced by their actions, is an aid to the court in determining the meaning of an ambiguous contract.” *Tri-Lakes Newspapers, Inc. v. Logan*, 713 S.W.2d 891, 894 (Mo. App. S.D. 1986). The rationale for this rule of construction is that the parties’ intent at the time of the execution of the contract can be inferred from their actions. *Id.* In *Robson v. United Pacific Insurance Co.*, 391 S.W.2d 855 (Mo. 1965), the Supreme Court of Missouri was faced with a surety dispute over whether a party had performed its obligations under a contract. *Id.* at 862. The Court held “that whatever the parties see fit to accept as performance of the contractual obligations will be so regarded by the courts.” *Id.*

Counsel should note that the parties’ actions are not conclusive, except when the evidence reveals that one party construed the contract before the trial in a manner that was inconsistent with its position at trial and against its own interests. *See Norman v. Durham*, 380 S.W.2d 296, 301 (Mo. 1964); *Tri-Lakes*, 713 S.W.2d at 894. But though the evidence of the parties’ actions is not necessarily conclusive, it may be reversible error for a trial court to refuse to consider evidence of the “practical construction placed upon the contract by the parties” when the contract at issue is ambiguous. *See Yerington v. La-Z-Boy, Inc.*, 124 S.W.3d 517, 522 (Mo. App. S.D. 2004).

E. (§2.28) Results-Oriented Rules of Construction

In addition to applying the rules of construction based on the language of the contract, discussed in §§2.11–2.23 above, Missouri courts will, at times, overtly allow the outcome of the disputing parties’ respective positions to influence the construction of a contract. Sections 2.29 and 2.30 below discuss the two most prevalent results-oriented rules of construction—contracts are construed:

1. in favor of validity and against forfeiture; and
2. against unreasonable results.

1. (§2.29) Construe in Favor of Validity and Against Forfeiture

Missouri courts will construe a contract in favor of validity. Thus, “[w]here one construction will destroy a contract and another construction will make it valid, and the party trying to destroy the contract is the party giving it, and who wrote it, then the court should so construe the contract as to be valid.” *Citizens’ Trust Co. v. Tindle*, 199 S.W. 1025 (Mo. banc 1917) (LexisNexis headnote citing 9 Cyc. 586, and note 36; *Ferry Co. v. Railroad*, 128 Mo. 224); *see also Kansas City v. Kansas City Transit, Inc.*, 406 S.W.2d 18, 22 (Mo. 1966) (when a contract is open to two constructions—one making it legal and the other illegal—adopt the construction that makes it legal).

In *Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647 (Mo. App. E.D. 2002), the court had to determine whether a lease for a rock quarry was invalid. A property owner leased its quarry to a family. *See id.* at 649. The lease’s consideration was that the family had to pay \$0.18 per ton of limestone mined from the quarry. *Id.* But the lease did not require a certain minimum amount of limestone to be removed from the quarry, nor did it specifically require that the tenant take any action to mine the quarry. *Id.* at 650. The property owner argued that because the tenant was not required to mine the quarry, and thus ultimately not required to pay for use of the land, the lease was not supported by consideration and was invalid. *Id.* Citing the rule to construe the lease in favor of validity, the court held that the contract had an implied term that the tenant would make good-faith efforts to mine the quarry. *Id.* at 652. Accordingly, the contract was supported by consideration and, therefore, was valid. *Id.*

In the same vein, Missouri courts recognize a rule that “[w]here a lease is susceptible [to] more than one construction, the construction which avoids a forfeiture will be adopted.” *Haeffner v. A.P. Green Fire Brick Co.*, 76 S.W.2d 122, 126 (Mo. 1934).

2. (§2.30) Construe Against Unreasonable Results

Missouri courts will look to the results of a party’s proffered construction of a contract to determine whether the construction would yield an unreasonable result. “An interpretation of a contract or agreement which [yields] unreasonable results, when

a probable and reasonable construction can be adopted, will be rejected.” *Tri-Lakes Newspapers, Inc. v. Logan*, 713 S.W.2d 891, 894 (Mo. App. S.D. 1986) (rejecting a proposed construction of a lease that would result in the landlord having to pay the tenant for having the benefit of having the tenant lease an office building from it).

In *Empire Gas Corp. v. Small’s LP Gas Co.*, 637 S.W.2d 239 (Mo. App. S.D. 1982), two liquid propane companies contracted for the sale of several facilities and their associated propane tanks. The contract set the sale price at \$1,300,000, payable in monthly installments over 10 years. *Id.* at 242. The contract price was premised on the buyer receiving rights to at least 2,800 propane tanks, which were spread out to the seller’s customers over a large rural area. *Id.* at 242. The contract had a clause that allowed 120 days for the buyer and seller to attempt to locate the propane tanks. *Id.* at 243. If less than 2,800 were found, the buyer would receive a scheduled credit on the purchase price for each missing tank. *Id.* At the conclusion of the 120-day period, approximately 1,100 tanks were missing. *Id.* As a result, the buyer was to receive a \$457,000 credit on the purchase price. *Id.* The contract was, apparently, silent on how the credit was to be applied. The buyer argued that its first \$457,000 in monthly payments should be abated, and after the credit was extinguished, the buyer would resume the monthly payments. *Id.* at 247. The court held that this construction of the contract would, in effect, give the buyer “three plants and their assets, ultimately valued at \$843,000, for some four years before [the buyer] became obligated to make any payments whatever.” *Id.* Because the court believed that to be an unreasonable result, the buyer’s proposed construction of the contract was rejected. *Id.*; see also *Standard Meat Co. v. Taco Kid of Springfield, Inc.*, 554 S.W.2d 592, 596 (Mo. App. S.D. 1977) (rejecting a proposed construction of a guaranty that would result in a corporation guarantying its own contract).

F. (§2.31) Policy-Oriented Rules of Construction

In addition to the textually oriented rules of construction, discussed in §§2.11–2.23 above, Missouri courts have recognized that certain policy-based considerations can aid a court in construing a contract. Sections 2.32–2.35 below discuss two general situations in which courts have blatantly allowed policy concerns to guide their construction of a contract.

1. (§2.32) Strict Construction of Certain Clauses

Missouri courts will strictly construe an insurance exclusion or certain future waivers. Counsel should be cautious when facing a potential construction that could turn on the policy grounds discussed in §§2.33 and 2.34 below.

a. (§2.33) Exclusions in Insurance Contracts Are Strictly Construed Against Insurer

Missouri courts have recognized a rule of construction that exclusionary clauses in insurance policies are to be strictly construed against the insurer and to the favor of the insured. *See Allison v. Nat'l Ins. Underwriters*, 487 S.W.2d 257, 262 (Mo. App. W.D. 1972). An exclusionary clause is one that endeavors to restrict coverage. *See Citizens Ins. Co. of N.J. v. Kansas City Commercial Cartage, Inc.*, 611 S.W.2d 302, 306 (Mo. App. W.D. 1980). For example, the insurance policy in *Citizens Insurance* covered damages to shipments in the possession of the insured shipping company. *Id.* at 305. But the policy also contained language that excluded coverage for loss caused by “infidelity of the insured’s employees . . . or damage caused by the dishonesty of any attendant.” *Id.* The shipping company made a claim for losses it incurred when an employee—who was hired on a day-to-day basis—stole a truck. *Id.* at 304. The insurance company argued that the exclusion for an employee-caused loss prevented coverage. *Id.* at 307. Strictly construing the exclusion against the insurance company, the court held that, because the “employee” was only hired on a day-to-day basis and was not working on the day he stole the truck, the exclusion did not apply. *Id.* at 311.

For an exclusion to be enforceable, it must be clear and unambiguous. *See Meyer Jewelry Co. v. Gen. Ins. Co. of Am.*, 422 S.W.2d 617, 623 (Mo. 1968). Of course, as further explained in §2.9 above, Missouri courts resolve all ambiguities in insurance policies against the insurer. Though any ambiguity in an insurance policy may be construed against the insurer, Missouri courts apply this rule “even more strongly against the insurer when the insurer is attempting to rely on an exclusion.” *Vega v. Shelter Mut. Ins. Co.*, 162 S.W.3d 144, 150 (Mo. App. W.D. 2005).

b. (§2.34) Exemptions From Future Acts of Negligence Are Strictly Construed Against Party Claiming Exoneration

Missouri courts impose a relatively strict rule of construction when interpreting a contract clause that purports to waive claims for future acts of negligence. “Although exculpatory clauses in contracts releasing an individual from his or her own future negligence are disfavored, they are not prohibited as against public policy.” *See Alack v. Vic Tanny Int’l of Mo.*, 923 S.W.2d 330, 334 (Mo. banc 1996). But exculpatory clauses are to be strictly construed against the party claiming the benefit of the contract. *Id.* They will never be implied but must be clearly and explicitly stated. *Id.* When at least one of the parties to the contract is unsophisticated, Missouri courts require that the exculpatory language be “clear, unambiguous, unmistakable, and conspicuous” if it is to release a party from its own future negligence. *Id.* at 337. This has been held to require that the clause actually used the words “negligence’ or ‘fault’ or their equivalents.” *Id.* at 337. The contract language at issue in *Alack* read as follows:

Member assumes full responsibility for any injuries, damages or losses which may occur to Member or guest, in, on or about the premises of said gymnasiums and does hereby fully and forever release and discharge Seller and all associated gymnasiums, their owners, employees and agents from any and all claims, demands, damages, rights of action, or causes of action, present or future, whether the same be known or unknown, anticipated, or unanticipated, resulting from or arising out of the Member’s or his guests use or intended use of the said gymnasium or the facilities and equipment thereof.

Id. at 333 n.2. The foregoing language was held not to bar a claim by the gym member against the gymnasium for the gymnasium’s negligence in maintaining a piece of weight equipment because the contract did not specifically use the words “negligence,” “fault,” or their equivalent. *Id.* at 337.

This rule of construction, however, does not apply with the same force when both parties to the contract are “sophisticated.” *See Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 509–10 (Mo. banc 2001). In such a case, the exculpatory clause must still be “clear, unambiguous, [and] unmistakable,” but it is not required to

contain the words “negligence” or “fault” or their equivalent. *Id.* at 509.

Counsel should note that the rule of construction allowing a waiver of future claims with clear, unambiguous, and unmistakable language applies only to claims for future acts of *negligence*. The Supreme Court of Missouri has held that a party may never exonerate itself from future liability for claims of intentional tort or gross negligence. *See Alack*, 923 S.W.2d at 337.

2. (§2.35) Reasonable Expectations of the Adherents to Adhesion Contracts and Insurance Contracts Will Be Enforced

Perhaps the seminal Missouri case on interpreting an adhesion contract is *Estrin Construction Co. v. Aetna Casualty & Surety Co.*, 612 S.W.2d 413 (Mo. App. W.D. 1981). The *Estrin* court explained that an “adhesion contract” is a form contract that is drafted by one party and presented on a take-it-or-leave-it basis. *Id.* at 419 n.3. It is not a product of arms-length negotiation, but rather is used on a mass scale by the party who drafted the form. *Id.* The *Estrin* court noted that adhesion contracts have become “indispensable to commerce in a mass society.” *Id.* at 418 n.3. Accordingly, they are not “inherently sinister” and can be enforceable. *Id.* But because of the take-it-or-leave-it nature of an adhesion contract, the words of the contract alone do not provide the court with sufficient evidence to determine both parties’ expectations in forming the contract. *Id.* at 419. As a result, Missouri courts look to the purpose and circumstances of the transaction to determine the parties’ reasonable expectations and enforce those expectations. *Id.*

For these reasons, only those provisions of an adhesion contract that do not comport with the parties’ reasonable expectations will be held to be unenforceable. *See Hartland Computer Leasing Corp. v. Ins. Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. E.D. 1989). Importantly, the “reasonable expectations” test employed by Missouri courts is objective—not subjective. That is to say, Missouri courts look to what the “average member of the public who accepts such a contract” would expect from the contract. *Id.* at 528–29. The rationale for enforcing the general public’s expectations—as opposed to the individual party’s expectations is that adhesion contracts, by their definition, are standardized and

designed to address the masses, not tailored for a specific individual. *Id.* The result of this rule is that the “reasonable expectations” enforced by Missouri courts “might or might not be what a [given] party actually expected” when signing an adhesion contract. *See Heartland Health Sys., Inc. v. Chamberlin*, 871 S.W.2d 8, 11 (Mo. App. W.D. 1993).

In *Heartland Health Systems*, a mother signed a contract at a hospital in which she agreed to pay for medical services provided to her unemancipated, 18-year-old son. *Heartland Health*, 871 S.W.2d at 2. The mother testified that she did not read the contract before signing it, that she did not understand at the time that she was personally agreeing to pay the medical bills, and that she would not have signed the contract if she had read it. *Id.* Pointedly, the mother testified that: “I signed where [they] told me to sign, so they would give [my son] medical treatment because he needed it because he was bleeding out of his ears, out of his mouth, the bone out of his elbow was sticking out through the skin.” *Id.* at 10. The court held that, though the contract at issue could be fairly described as an adhesion contract, the evidence relating to the mother’s personal expectations and her attendant harrowing experience were not germane to the enforceability of the agreement. *Id.* at 5. Rather, the court looked to the objective reasonable expectations of parties to the contract. *Id.* The court held that a reasonable person would expect to have to pay for medical services provided to the person’s unemancipated child. *Id.* Accordingly, the adhesion contract was held to be enforceable. *See id.*

Missouri courts apply the same basic rules to contracts for insurance. Thus, “the objective reasonable expectations of adherents and beneficiaries to insurance contracts will be honored even though a thorough study of policy provisions would have negated these expectations.” *Alea London Ltd. v. Bono-Soltysiak Enters.*, 186 S.W.3d 403, 415 (Mo. App. E.D. 2006). That said, the reasonable expectations rule cannot be used to supplant an unambiguous term in the policy. *Id.* At least one Missouri court has recognized the apparent tension in requiring an ambiguity before applying the reasonable expectations rule, considering that the rule is supposed to apply even when a thorough study of the policy provisions would have negated the policyholder’s expectations. *See Lambert ex rel. Cobb v. State Farm Mut. Auto. Ins. Co.*, 820 S.W.2d 602, 604 (Mo. App. S.D. 1991). Nevertheless, the law in Missouri is clear that there must

be an ambiguity in the insurance policy before the courts will look to the policyholder's reasonable expectations. *See Alea London*, 186 S.W.3d at 415. Additionally, the insurance policy at issue must be properly considered a contract of adhesion. *See Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 697–98 (Mo. banc 1982). Thus, if the insurance contract was the result of an arms-length negotiation between two sophisticated parties—such as between the insurance company and a large employer in the negotiation of a group health insurance plan—the insurance contract is not an adhesion contract, and the “reasonable expectations” rule is not applicable. *Id.*

V. (§2.36) Parol Evidence Rule

When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 573 (1960). The parol evidence rule is a rule of substantive law and not a rule of evidence. Even if the evidence was received without objection, it must be ignored once the question is raised. *Commerce Trust Co. v. Watts*, 231 S.W.2d 817 (Mo. 1950). The rule excludes only evidence of transactions occurring before or contemporaneous with the written agreement; it does not exclude evidence of subsequent transactions. *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538 (Mo. 1954). Section 400.2-202, RSMo 2000, covers the parol evidence rule as it applies to contracts for the sale of goods. In general it follows the Corbin approach. *See* § 400.2-202, RSMo 2007, at UCC Comment 3.

The rule does not apply to any writing unless the parties have intended the writing to be a final expression of their agreement, and any relevant evidence is admissible to show that the writing is not the final agreement. 3 CORBIN ON CONTRACTS, at § 588. Evidence is admissible to show that a writing is not to become a contract until the occurrence of some condition. For example, parol evidence is admissible to show that a writing purporting to be a land contract was not to be binding unless the vendee was able to obtain a loan from a bank. *Farmers Ins. Exch. v. Farm Bureau Mut. Ins. Co.*, 522 S.W.2d 779 (Mo. banc 1975). Such evidence does not vary the terms of the writing; it shows only that the writing is not a contract. It should be noted, however, that parol evidence is not admissible to show that a duty under a contract was to arise only on the occurrence of a condition. Such evidence would vary

the terms of the writing by showing that what appeared to be an unconditional promise was, in fact, conditional. *Scullin Steel Co. v. Miss. Valley Iron Co.*, 273 S.W. 95 (Mo. banc 1925).

Parol evidence *is* admissible for the purpose of *interpreting* a written contract. *Hardesty v. Mr. Cribbin's Old House, Inc.*, 679 S.W.2d 343 (Mo. App. E.D. 1984). Also, parol evidence may be used to prove that the writing is not the agreement the parties entered into. *See Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (Mo. App. E.D. 1983), *overruled on other grounds by Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. banc 1988).

The rule excludes evidence for the purpose of varying or contradicting the writing; it does not forbid the use of evidence to show that the agreement was entered into as a result of mistake, *Fulton v. Bailey*, 413 S.W.2d 514 (Mo. 1967), fraud, duress, or undue influence, *Employers' Indem. Corp. v. Garrett*, 38 S.W.2d 1049 (Mo. 1931). In these cases, however, the parol evidence can be used only for the purpose of showing that there was no contract or that the contract should be avoided. It cannot be used to prove a contract different from the one that was fraudulently procured. *Dowd v. Lake Sites*, 276 S.W.2d 108 (Mo. 1955).

Parol evidence can be used, for example, to show that:

- no consideration was received to support the promise, *Assocs. Disc. Corp. of Iowa v. Fitzwater*, 518 S.W.2d 474 (Mo. App. W.D. 1974);
- the contract was void because it was for an illegal purpose, *Murray v. Murray*, 293 S.W.2d 436 (Mo. 1956);
- a transfer that appears to be absolute on its face was a transfer as security, *Boyle v. Crimm*, 253 S.W.2d 149 (Mo. 1952); or
- the party named in the contract was really the agent of an unnamed principal, *Baptiste Tent & Awning Co. v. Uhri*, 129 S.W.2d 9 (Mo. App. E.D. 1939).

Parol evidence can be used to contradict mere recitals of fact. Thus, even though a writing acknowledges a receipt of money, parol evidence can be introduced to prove that, in fact, money had not been paid. If, however, the writing also purports to be an agreement to release the

other party from an obligation, parol evidence cannot be used to prove that the amount to be paid was different from that recited or that it was not being accepted in exchange for the release of the obligation. *Bert v. Rhodes*, 258 S.W. 40 (Mo. App. E.D. 1924). If consideration is a mere recital of facts of something done—acknowledgment of receipt of payment—extrinsic evidence may be used to establish failure of consideration. *CIT Group/Sales Fin. Inc. v. Lark*, 906 S.W.2d 865 (Mo. App. E.D. 1995).

Parol evidence is admissible for the purpose of resolving ambiguities. *Modine Mfg. Co. v. Carlock*, 510 S.W.2d 462 (Mo. 1974). Before the evidence is admissible, however, the court must decide whether there is an ambiguity. In the older decisions, it was held that the court must make this decision by looking only to the face of the instrument. The more recent trend is that the court should consider all relevant evidence, including parol evidence, to determine whether the contract or one of its terms is ambiguous. One older Missouri case that was in line with this trend is *Interior Linseed Co. v. Becker-Moore Paint Co.*, 202 S.W. 566 (Mo. 1918). If the judge decides that a term in the agreement is ambiguous, the judge can permit the jury to hear the parol evidence to resolve the ambiguity. The plaintiff's failure to challenge the trial court's refusal to declare an ambiguity in a contract precludes appellate review of parol evidence rule testimony stricken by the trial court. *Waldorf Inv. Co. v. Farris*, 918 S.W.2d 915 (Mo. App. S.D. 1996).

The court in *Boswell v. Steel Haulers, Inc.*, 670 S.W.2d 906 (Mo. App. W.D. 1984), states the procedures the court should follow when there is a claim of ambiguity:

- The court should determine as a matter of law whether the term is ambiguous.
- If the court concludes that the term is not ambiguous, the court should declare the meaning to the jury.
- If the court concludes that the term is ambiguous, extrinsic evidence should be presented to permit the jury to determine the meaning of the term, and the judge must determine whether the extrinsic evidence presented makes a case. In a jury trial, it is error for the trial judge to resolve an ambiguity.

Once the judge determines that there is an ambiguity, the judge must refer it to the jury for resolution. *Mal Spinrad of St. Louis, Inc. v. Karman, Inc.*, 690 S.W.2d 460 (Mo. App. E.D. 1985). Similarly, the existence and content of a rule of custom is a jury question.

Quoting extensively from the Restatement (Second) of Contracts (1981), and following the more recent trend, one Missouri court concluded that, in determining whether a term in a contract is ambiguous, the court should consider all relevant evidence and should not limit itself to the express language of the instrument. *Foley Co. v. Walnut Assocs.*, 597 S.W.2d 685 (Mo. App. W.D. 1980). More specifically, the Court in *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 362 (Mo. banc 1991), stated:

In order to determine the intent of the parties a court will consider the entire contract, subsidiary agreements, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties.

It is generally recognized that if the writing is only a partial and not a complete integration of the agreement, parol evidence can be used to prove consistent additional terms. *Norton v. Bohart*, 16 S.W. 598 (Mo. 1891). Even if it is only a partial integration, parol evidence is not admissible if it contradicts the terms of the writing. *First Nat. Bank & Trust Co. v. Limpp*, 288 S.W. 957 (Mo. App. W.D. 1926). If it is a complete integration, parol evidence is inadmissible even to add terms.

The problem lies in deciding what evidence is admissible for the purpose of determining whether there is a partial or a complete integration. The classical position is that of Williston and Wigmore, which is that whether a writing is a partial or a complete integration depends on the parties' intention. According to these authorities, however, that "intention" is discovered by looking only to what is expressed in the writing. If the intent cannot be found on the face of the writing, the court decides whether the additional term is one that the parties would ordinarily and naturally have included in the writing. If the parties would have included it, the writing is a total integration, and parol evidence would not be admitted to prove the additional terms. 4 SAMUEL WILLISTON, WILLISTON ON CONTRACTS §§ 633 *et seq.* (3rd ed. Jaeger 1961). This kind of approach is found in some of the Missouri cases. *See, e.g., Koons v. St. Louis Car Co.*, 101 S.W. 49 (Mo. 1907).

On the other hand, Corbin is willing to allow the introduction of parol evidence to show the parties' actual intentions with respect to whether the parties intended the writing to be a complete integration. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 538 (1960). The Restatement is generally in accord with Corbin. RESTATEMENT (SECOND) OF CONTRACTS § 214(b) cmt. a, and § 210 cmts. a and b (1981). A Missouri case also seems to be in line with this position. In *Beuc v. Morrissey*, 463 S.W.2d 851 (Mo. banc 1971), the Court permitted the introduction of parol evidence to show an express agreement as to time when the writing contained no time term. It is likely that under the Williston approach the writing would have been considered a complete integration, and the evidence would have been inadmissible. This is the result reached in an earlier court of appeals case, *Ogden v. Atlas Brewing Co.*, 248 S.W. 644 (Mo. App. W.D. 1923), in which the court denied the admission of evidence to prove that the parties had agreed that an employment contract was to last for a fixed period when the writing contained no mention of time. According to that court, the face of the writing showed a contract for employment at will, and proof of the agreement for a fixed time would contradict the implied term. Under the Corbin approach, on the other hand, if the judge, upon hearing the evidence of the express parol agreement concerning the time of performance, is convinced that the parties intended the writing to be only a partial integration, the judge would allow the jury to hear the evidence of the parol agreement to prove a consistent additional term. A similar result was reached in *Garden Park Homes Corp. v. Martin Marietta Corp.*, 507 S.W.2d 368 (Mo. 1974), in which the Court permitted proof of an oral agreement that a minimum royalty would be paid even though the writing contained no mention of a minimum. The Court concluded that the writing was a partial integration and allowed proof of the parol agreement of the minimum as a consistent additional term.

Frequently, contracts contain a "merger" clause—a clause stating that the writing contains all the contract and that there are no other agreements, warranties, etc. Under Williston's approach, such a writing would be a complete integration because the parties' "intent" can be seen from the face of the instrument. The Restatement, on the other hand, takes the position that, even in this case, the parties should be permitted to prove that the writing was not intended to be a complete integration and that consistent additional terms can be proved by parol evidence. RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. e. It is not clear that the Missouri courts will agree with the Restatement. In *Sol Abrahams & Son Const. Co. v. Osterholm*, 136 S.W.2d 86 (Mo. App. E.D. 1940), the court held that evidence showing

warranties not contained in the writing contradicted the merger clause in a lease and, therefore, was inadmissible under the parol evidence rule.

VI. Reformation

A. (§2.37) “Interpretation” by Equitable Remedy

Reformation is a judicial remedy available to correct a contract so that it properly reflects the parties’ intention. *See Lunceford v. Houghtlin*, 170 S.W.3d 453, 464 (Mo. App. W.D. 2005). Put another way, “[r]eformation allows parties to a contract to conform the writing to their intent.” *Elton v. Davis*, 123 S.W.3d 205, 212 (Mo. App. W.D. 2003).

Brown v. Mickelson, 220 S.W.3d 442 (Mo. App. W.D. 2007), is a recent case that illustrates both when reformation should be applied by a trial court and when it should not be applied. *Id.* at 448. *Brown* involved a number of complex real estate transactions. *Id.* at 446. Brown owned three tracts of land. *Id.* Brown first sold “22 acres” to the Mickelsons with the agreement that the Mickelsons would quitclaim back to Brown 12 acres. *Id.* The Mickelsons sold their 10 acres to the Schoenbergs. *Id.* But a survey was done that showed the original parcel to only be 20.11 acres—not 22 acres as listed in the agreement. *Id.* After the sale to the Schoenbergs, the Mickelsons only actually had 10.11 acres to quitclaim back to Brown, which was 1.89 acres less than what he expected. *Id.* Notably, the 1.89 acres in dispute contained a house, barn, and other improvements. *Id.* Brown filed suit for damages against the Mickelsons and to quiet title against the Schoenbergs. *Id.*

The trial court found that reformation was appropriate to correct a mutual mistake between the parties because the writing did not reflect the parties’ true intentions. *See Brown*, 220 S.W.3d at 448. Specifically, the court found that Brown had affirmatively represented to the Mickelsons that the property with the house had 10 acres with it and that the parties’ intention was for the Mickelsons to receive 10 acres of property with the house. *Id.* at 447. Therefore, the court held that parol evidence could be considered to attempt to determine the parties’ true intention. *Id.* at 448.

The court of appeals, however, held that the trial court erred in applying reformation to the contract because “it was impossible for the contract to be reformed to conform to the parties’ true intent”

because of the shortage of land available. *Id.* As discussed in more detail in §§2.38–2.44 below, reformation is an extreme remedy that should be used cautiously by a court. *See Elton*, 123 S.W.3d at 212. Moreover, there are heavy burdens that must be met for a party to succeed in a claim for reformation.

As an aside, one important lesson to be learned from *Brown*, 220 S.W.3d 442 is the danger in describing conveyances of real property in terms of acreage amounts as opposed to survey measurements or “metes and bounds.” The *Brown* court noted that an acre is 43,560 square feet, in whatever shape. *Brown*, 220 S.W.3d at 447 n.2. Moreover, the court noted that “the term acre can be applied to land in any number of forms and merely referring to acreage in the property designation is not a meaningful description.” *Id.* (quoting *Peet v. Randolph*, 157 S.W.3d 360, 364 (Mo. App. E.D. 2005)).

B. (§2.38) Elements of Reformation

The elements of reformation were recently restated in *Ethridge v. TierOne Bank*, 226 S.W.3d 127 (Mo. banc 2007). In that case, the Supreme Court of Missouri enumerated the elements as follows:

For reformation to apply there must be “clear, cogent and convincing evidence” of (1) a preexisting agreement between [all of the parties at issue] in which the parties agreed that a lien would be placed on the property, (2) a scrivener’s mistake in drafting the agreement, and (3) that the mistake was mutual as between the grantors and the grantees.

Id. at 132.

Ethridge involved a transaction whereby Mary and David Ethridge owned a piece of real estate as tenants by the entirety. *Id.* at 129. David Ethridge took a mortgage on the property, but Mary Ethridge was not named in the deed of trust. *Id.* After David Ethridge died, the bank tried to impose the mortgage obligation onto Mary Ethridge. One of the ultimately unsuccessful arguments put forward by the bank was that the deed of trust should be reformed. *Id.* at 132. The Court found that the bank could not meet the three elements enumerated above because Mary Ethridge was not a party to the deed of trust and therefore any mistake in the agreement was not mutual. *Id.*

In contrast to *Ethridge* is *Lunceford v. Houghtlin*, 170 S.W.3d 453 (Mo. App. W.D. 2005), in which the court did find reformation to be appropriate. In *Lunceford*, the plaintiffs were seeking tort damages

arising from a motorcycle accident. *See id.* at 457. The plaintiffs first settled a claim against their own insurance company and signed a general release that purported to release the whole world. *Id.* at 458. The plaintiffs then brought suit against another motorcyclist, who was alleged to have contributed to cause the accident. *Id.* at 457. The other motorcyclist became aware of the first release and claimed that he had been released from liability as a result of that first release. *Id.* The plaintiffs then entered into a “corrected release” with the original tortfeasor that limited the release to only include the original tortfeasor and his insurance company. *Id.* at 458. The court of appeals reversed the trial court’s grant of summary judgment against the plaintiffs on the ground that the “corrected release” was a valid reformation. *Id.* at 464.

In granting the reformation, the *Lunceford* court noted that, “While reformation is ‘an extraordinary equitable remedy,’ it is nevertheless available upon a showing that, due to either fraud or mutual mistake, ‘the writing fails to accurately set forth the terms of the actual agreement or fails to incorporate the true prior intentions of the parties.’” *Id.* The court also noted, in passing, that reformation is not available if the reformation would unfairly impact third parties. *Id.* at n.4. The reformation in *Lunceford* did not unfairly impact the defendants because they “were not party to the prior settlement and neither contributed funds to that settlement nor otherwise compensated the Luncefords for their injuries,” nor was there any showing that the other motorcyclist relied on the original release to his detriment. *Id.*

1. (§2.39) Mutual Mistake

Reformation will only lie in the face of fraud or a mutual mistake. *See Ethridge v. TierOne Bank*, 226 S.W.3d 127, 132 (Mo. banc 2007). A mutual mistake is one that is common to both parties, that is, the written instrument reflects what neither party intended. *See Walters v. Tucker*, 308 S.W.2d 673, 675 (Mo. 1957); *Elton v. Davis*, 123 S.W.3d 205, 212 (Mo. App. W.D. 2003). Specifically, a “mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain.” *Alea London Ltd. v. Bono-Soltysiak Enters.*, 186 S.W.3d 403, 415 (Mo. App. E.D. 2006). “[W]hether parties are laboring under a mutual mistake is normally a question of fact.” *Id.*

In *King v. Riley*, 498 S.W.2d 564 (Mo. 1973), the defendant in a quiet title action sought reformation of a contract for deed. *Id.* at 564. The contract for deed, as drafted by a notary public, called for total price of \$2,500 with a down payment of \$150 and \$50 monthly payments thereafter. *Id.* at 565. Under the contract drafted, the seller was to provide a warranty deed, note, and abstract of title at closing. *Id.* The closing was scheduled to occur 20 days after the contract was signed. *Id.* But the closing never occurred because the parties intended that the seller would tender a deed after all of the payments had been made. *Id.* The problem arose when the seller sold his remaining interest in the land to a third party. *Id.* That third party continued to accept payments from the original buyers until only \$82 remained to be paid. *Id.*

The *King* court held that reformation based on mutual mistake was appropriate because:

In order to establish a mistake in an instrument it is not necessary to show what particular words were agreed upon by the parties as words to be inserted in the instrument. It is sufficient that the parties agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention.

King, 498 S.W.2d at 566. The evidence was undisputed from both the seller and the original buyer that their intention was for the seller to present an executed deed when the last payment was made. *Id.* at 567. Accordingly, the court found that there was a mutual mistake in the drafting of the contract, and the court reformed it to meet the original intention of the contracting parties.

This should be contrasted with *American Family Mutual Insurance Co. v. Bach*, 471 S.W.2d 474 (Mo. 1971), in which the Supreme Court of Missouri declined to reform a contract for automobile liability insurance. *See id.* at 478. In that case, an insured was married just before the renewal date of her policy. *Id.* at 475. The insured went to her insurance agent to inquire into adding her new husband to her policy. *Id.* at 476. The insurance agent advised that it would cost an additional fee to add the husband. *Id.* The newlyweds declined to pay the enhanced premium, but they did renew the original policy. *Id.* The newlyweds thought that the husband would be covered regardless of whether the additional premium was paid. *Id.* The insurance

agent testified that he believed that the husband would be excluded from the policy's provisions covering permissive drivers. *Id.* Shortly thereafter, the new husband was involved in a head-on collision, and the insurance company denied coverage. *Id.* at 477.

The insurance company argued that the contract should be reformed to exclude the husband, arguing that there was a mutual mistake. *Id.* at 479. The Court held that there was no evidence to support a mutual mistake theory. *Id.* Because the couple believed that the husband would be covered regardless of whether additional premiums were paid, the evidence only showed a unilateral mistake on the part of the insurance agent. *Id.* Because reformation requires a meeting of the minds, and the parties had different beliefs as to the effect of the insurance contract, the Court held that reformation was not proper. *Id.* at 480.

2. (§2.40) Fraud

The general rule is that reformation of a written instrument is an extraordinary equitable remedy and should be granted with great caution and only in clear cases of mutual mistake or fraud. *Morris v. Brown*, 941 S.W.2d 835, 840 (Mo. App. W.D. 1997). In *Link v. Kroenke*, 909 S.W.2d 740 (Mo. App. W.D. 1995), the court analyzed whether a mall tenant's claim for reformation of a commercial lease was valid. *Id.* at 745–46. The court noted the general rule that reformation should only be granted in “clear cases of fraud or mistake,” and that the tenant had not properly demonstrated fraud. *Id.* at 745 (citing *Stein v. Stein Egg & Poultry Co.*, 606 S.W.2d 203, 205 (Mo. App. E.D. 1980)). In holding that reformation should not lie, the court restated the familiar nine-element test to show fraud in Missouri:

The elements of fraudulent misrepresentation are:

- (1) a representation;
- (2) its falsity;
- (3) its materiality;
- (4) the speaker's knowledge of the falsity or his ignorance of its truth;
- (5) the speaker's intent that his representation should be acted upon by the hearer and in the manner reasonably contemplated;
- (6) the hearer's ignorance of the falsity of the representation;
- (7) the hearer's reliance on the truth of the representation;
- (8) the hearer's right to rely thereon; and
- (9) the hearer's consequent and proximately caused injury.

Link, 909 S.W.2d at 746. The court found that the tenant did not have the right to rely on the statement and that the tenant could not show that the speaker knew of the falsity of his statement. *Id.* Accordingly, fraud could not serve as a basis to reform the lease at issue. *Id.*

C. Procedure

1. (§2.41) A Claim for Reformation Should Be Filed as a Separate Cause of Action

Reformation is a judicial remedy. See *Lunceford v. Houghtlin*, 170 S.W.3d 453, 464 (Mo. App. W.D. 2005). Accordingly, reformation should be pled in the petition and presented to the trial court. See *Roth v. Phillips Petroleum Co.*, 739 S.W.2d 598, 600 (Mo. App. E.D. 1987) (failure to plead and present the issue of reformation to the trial court prevents that issue from being raised for the first time with the appellate court).

A court may, however, reach the issue of reformation in the absence of a pleading requesting the remedy if the issue is tried by implied consent. See *Lunceford*, 170 S.W.3d at 464. In *Lunceford*, the court found that the issue of reformation was raised in a reply brief and was fully presented to the court such that the issue was adequately presented to the court. *Id.* at 465.

2. Burden of Proof

a. (§2.42) Clear and Convincing Evidence Required

Missouri courts consider reformation to be an extraordinary remedy that should only be granted in “clear cases of fraud or mistake.” *Link v. Kroenke*, 909 S.W.2d 740, 745 (Mo. App. W.D. 1995). Accordingly, the fraud or mutual mistake alleged to support reformation must be established by clear and convincing evidence. See *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 268 (Mo. banc 1973).

Hathman involved a construction contract that contained the words “estimated maximum cost.” *Id.* at 268. The total cost of the building project was more than the estimate. *Id.* at 263. In response to the construction company’s claim for a mechanic’s lien, the building owner counterclaimed seeking a reformation of the contract to change the phrase “estimated

maximum cost” to “guaranteed maximum cost.” *Id.* at 268. The trial court granted reformation, but the Supreme Court of Missouri reversed, stating that “mutual mistake, in order to justify granting the relief of reformation, must be established by clear and convincing evidence,” and “the evidence did not show a mutual mistake of fact.” *Id.*

Another example of the application of this higher burden of proof is *American Family Mutual Insurance Co. v. Bach*, 471 S.W.2d 474 (Mo. 1971) (discussed in detail in §2.39 above). In that case, the insurance company failed to meet its burden to show a mutual mistake. *Id.* at 478. Specifically, the court stated:

For the insurer to be entitled to reformation of this policy of insurance to exclude [the policyholder’s new husband] from liability coverage thereunder the burden was upon the insurer to show by clear, cogent, convincing evidence, beyond a preponderance of the evidence and so as to leave no room for reasonable doubt, that there was an agreement between the parties that [the husband] would be specifically excluded from liability insurance coverage while operating the insured automobile. *Helmkamp v. American Family Mutual Insurance Co.*, Mo.App., 407 S.W.2d 559 [9–12]. The insurer failed to meet and carry that burden of proof.

Am. Family, 471 S.W.2d at 477–78.

b. (§2.43) Admission of Mutual Mistake

The general rule is that reformation must be proven by clear and convincing evidence. *See J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 268 (Mo. banc 1973). If the record shows that the party opposing reformation has admitted the mutual mistake, however, that admission is sufficient evidence to support reformation. *See Everhart v. Westmoreland*, 898 S.W.2d 634 (Mo. App. W.D. 1995). The dispute in *Everhart* arose over the language of a release following the settlement of a personal injury action stemming from an automobile collision. *Id.* at 636. In that case, the parents of an injured child signed a general release as part of the settlement of their son’s claim. *Id.* Later, the parents discovered evidence that another party was also negligent in causing the accident, and the parents sought to reopen the minor settlement case. *Id.* The court reopened the minor settlement and reformed the general release based on the mutual mistake of the parties that only the first defendant

was liable for the accident. *Id.* at 638. The driver that was newly discovered to be liable and his insurer intervened to oppose the reformation and ultimately brought the appeal. *Everhart*, 898 S.W.2d at 637. Both the plaintiff's parents and the original tortfeasor admitted their mistaken belief that only one person was liable. *Id.* The court of appeals held that the admission was itself sufficient to support the reformation of the release. *Id.* at 638–39.

c. (§2.44) What Evidence Is Considered?

While a party seeking reformation must still meet a “clear and convincing” burden of proof, Missouri courts look at the totality of the circumstances to determine whether to apply the equitable remedy. *See Brown v. Mickelson*, 220 S.W.3d 442, 449 (Mo. App. W.D. 2007). Specifically:

In determining the propriety of granting reformation, the trial court has a duty to consider the wording of the contract as signed by the parties, the relationship of the parties, the subject matter of the contract, the usages of the business, the circumstances surrounding the execution of the contract, and its interpretation by the parties.

Everhart v. Westmoreland, 898 S.W.2d 634, 638 (Mo. App. W.D. 1995). Additionally, reformation may be established by circumstantial evidence provided that the natural and reasonable inferences drawn from the evidence clearly and decidedly prove the alleged mistake. *Id.* The modern trend is to allow parol or extrinsic evidence to establish the mistake and to show how the writing should be reformed to conform to the parties' intentions. *See Brown*, 220 S.W.3d at 448; *c.f. Edwards v. Zahner*, 395 S.W.2d 185, 189 (Mo. 1965) (implying that there must be an ambiguity in a written contract to admit parol evidence in support of a claim for reformation).

VII. Modification

A. (§2.45) Contract Modification Generally

The Supreme Court of Missouri has held that “[p]arties to a contract may modify or waive their rights under it or engraft new terms upon it.” *Shutt v. Chris Kaye Plastics Corp.*, 962 S.W.2d 887, 890 (Mo. banc 1998) (citing *Zumwinkel v. Leggett*, 345 S.W.2d 89, 93 (Mo. 1961)).

But the modification must itself be a contract, i.e., it must be based on mutual assent and supported by consideration. *See Eiman Bros. Roofing Sys., Inc. v. CNS Int'l Ministries, Inc.*, 158 S.W.3d 920 (Mo. App. W.D. 2005).

In *Smith v. Githens*, 271 S.W.2d 374 (Mo. App. S.D. 1954), the Missouri common law of contract modification was summarized as follows:

It is entirely competent for the parties to a contract to modify or waive their rights under it and ingraft new terms upon it. The parties to a contract ordinarily are as free to change it after making it as they were to make it in the first instance, notwithstanding provisions in it designed to hamper such freedom. For instance, the time fixed for performance or payment may be enlarged by subsequent agreement. A subordinate and separable part of the contract may be waived or modified by the parties without a cancelation [sic] or avoidance of the whole contract. To be effective as a modification, the new agreement must possess all the elements necessary to form a contract. * * * Moreover, the assent of both parties to a modification is necessary. Such consent is required to vary a contract as much as to make one originally. * * *

* * * The very purpose of the writing is to render the agreement more certain and to exclude parol evidence of it. Nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing, before any breach of its provisions, altogether to waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make it a new one. * * *

Parties to an executory contract, not within the statute of frauds or under seal, may change it by mutual consent so as to make it conform either to the actual agreement between the parties or to the agreement reached as a compromise of their differences arising out of the original contract.

Smith, 271 S.W.2d at 380.

As described by the court in *Smith*, there are three fundamental rules to contract modification:

1. The parties can mutually agree to modify a contract, notwithstanding contractual provisions intended to hamper that freedom.
2. A separable part of a contract can be waived or modified without doing damage to the rest of the contract.
3. A contract modification must itself satisfy the necessary elements to form a contract.

Smith, 271 S.W.2d at 379–80.

B. (§2.46) Parties May Modify Their Contract

“Parties are ordinarily free to modify a contract after making it, notwithstanding any provisions in the contract purporting to limit such freedom.” *Twin River Constr. Co. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682, 690 (Mo. App. E.D. 1983) (citing *Smith v. Githens*, 271 S.W.2d 374, 380 (Mo. App. S.D. 1954)). *Twin River* involved a dispute arising from a construction contract to install a water pipe system for a water district. *Id.* at 684. A detailed provision in the original contract set out how change orders were to be processed. *Id.* at 686. An issue arose when the water district wanted to save costs by using 4" pipe for a lengthy section instead of 6" pipe as originally bid (4" pipe was to be installed at \$1.90 per foot under the contract whereas 6" pipe was \$3.28). *Id.* at 687. Representatives from both parties met and ultimately signed a “change order.” *Id.* The builder later filed suit seeking payment for the difference between 4" and 6" pipe prices by claiming that the change order “did not comply with the change order procedure mandated by the contract, and further . . . was not supported by consideration . . .” *Id.* at 689. The court held that because both parties had different obligations under the change order, i.e., the water district paid less and the builder agreed to perform different work, the change order was supported by adequate consideration and was an enforceable modification of the original contract. *Id.* at 690. Moreover, the court noted the important rule that, “Without a showing of fraud courts are not empowered to ignore a contract on the basis that the consideration is of inadequate value.” *Id.*

In *Brockman v. Soltysiak*, 49 S.W.3d 740 (Mo. App. E.D. 2001), a dispute arose over a construction contract. The contract required a signed writing to support any change order. *Id.* at 745. “Parties may by agreement establish a method of modifying the terms of the contract if the parties accept it as compliance with the contract.” *Id.* “Habitual acceptance of work done on oral change orders in connection with a contract, and payment therefore, results in waiver of a contract clause providing that all orders must be signed.” *Id.* (citing *Winn-Senter Constr. Co. v. Katie Franks, Inc.*, 816 S.W.2d 943, 946 (Mo. App. W.D. 1991)). Because there was evidence of change orders being given and accepted over the telephone, without dispute, the court held that the parties had waived the requirement for a signed writing to modify the contract and enforced the contract, as modified. *Id.*; see also *Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324 (Mo. App. E.D. 1995) (the parties’ established practice of communicating changes or additions to a contract informally constituted a waiver of

the complaining party's rights to literal compliance with their contract's requirement that all modifications be in writing).

1. (§2.47) Oral Contracts Versus Written Contracts

It should be noted that an oral agreement can modify a written contract as long as the contract is not covered by the statute of frauds. See *AAA Uniform & Linen Supply, Inc. v. Barefoot, Inc.*, 81 S.W.3d 133 (Mo. App. W.D. 2002). In *AAA Uniform*, the parties had a written contract for weekly delivery of linens that required payment within ten days of delivery. *Id.* at 134. After signing the contract, however, the parties orally agreed to allow the customer to make monthly payments instead. *Id.* The linen company later sued for breach of contract, and the trial court granted it judgment. *Id.* at 136. The trial court was reversed because it based its judgment solely on the written contract and disregarded the oral modification. *Id.* at 137.

Counsel should be cautious, though, that while *subsequent* oral contracts can modify a written contract, the familiar parol evidence rule will still apply to *prior* negotiations. Specifically, prior negotiations are “totally merged into and obliterated by” a subsequent written contract. See *Louis v. Andrea*, 338 S.W.2d 96, 102 (Mo. 1960); *Poe v. Ill. Cent. R. Co.*, 99 S.W.2d 82 (Mo. 1936). Similarly, a preliminary memorandum is merged into a subsequent formal contract. See *Dill v. Poindexter Tile Co.*, 451 S.W.2d 365 (Mo. App. S.D. 1970).

Counsel should also note that “contracts required to be written under the statute of frauds, including land sale contracts, may not be modified orally.” *Warrenton Campus Shopping Ctr., Inc. v. Adolphus*, 787 S.W.2d 852, 855 (Mo. App. E.D. 1990). That rule, however, is not always simple in its application. In *Warrenton Campus*, the parties entered into a written contract for the sale of real estate. *Id.* at 854. While inspecting the property before closing, the buyers discovered a roof leak. *Id.* The buyers orally agreed to consummate the sale, notwithstanding the roof leak, as long as the sellers agreed to forego certain subsequent payments. *Id.* There was no written manifestation of this agreement. *Id.* The sellers later filed suit seeking the subsequent payments as contemplated in the original written contract. *Id.* The trial court found in favor of the buyers. *Id.*

The court of appeals affirmed the trial court's admission of statements regarding the oral agreement of the sellers to forego the subsequent payments. *Id.* at 855 (citing *George F. Robertson Plastering Co. v. Magidson*, 271 S.W.2d 538, 541 (Mo. 1954)). The court noted that the oral agreement between the buyers and sellers could *not* modify the original contract because of the statute of frauds. *Warrenton Campus*, 787 S.W.2d at 855. But those statements could be, and were, a rescission of the original contract and the formation of a new contract to sell the real estate. *Id.* Interestingly, the court noted that the new contract was unenforceable because there was no writing. *Id.* Notwithstanding this, because the contract was executed, the legal title to the real estate was transferred. *Id.* Therefore, "that lapse [was] moot." *Id.* Accordingly, the court allowed an oral agreement to have the practical effect of modifying a contract required to be in writing under the statute of frauds because of the combination of the parties' statements and their conduct.

2. (§2.48) Exception for Separation Agreements in Divorce Proceedings

One important exception to the general rule that a contract may be modified notwithstanding an agreement to the contrary is in the context of separation agreements in divorce proceedings. *See Richardson v. Richardson*, 218 S.W.3d 426, 429 (Mo. banc 2007). In *Richardson*, the parties' separation agreement, incorporated into the dissolution decree, provided that "[t]he terms of this Agreement shall not be subject to modification or change, regardless of the relative circumstances of the parties . . ." *Id.* "Neither the Agreement, nor the decree, nor the statute authorizes a court to modify the terms of the agreement or the decree on account of subsequent circumstances." *Id.* (citing *Thomas v. Thomas*, 171 S.W.3d 130 (Mo. App. W.D. 2005)). This result is because of § 452.325.6, RSMo 2000, which provides, "Except for terms concerning the support, custody or visitation of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides."

The *Richardson* court explained that the legislature has, by statute, changed the rules for modification of a separation agreement from the common law contract rules to a different statutory rubric. *See Richardson*, 218 S.W.3d at 429. Therefore, courts will enforce § 452.325's mandate that a court will accept

and enforce the parties' separation agreement unless the court finds that agreement to be unconscionable. *Id.*

C. (§2.49) Contract Can Be Modified in Part

Contracts can be modified as to particular provisions but continue to stand as to the residue of the original agreement. *See Cranor v. Jones Co.*, 921 S.W.2d 76 (Mo. App. E.D. 1996). An example of a partial modification is *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003). In *Dunn*, a construction contract change order had language that it allowed remedies as provided by law. The original contract, however, had a broad arbitration agreement. The plaintiff tried to argue that the "remedies at law" language in the later change order also changed the arbitration agreement. *Id.* at 430. The Court disagreed, holding that such a change would be a rescission and that the change order did not "clearly, positively, unequivocally, or decisively state" the intention to change the arbitration agreement. *Id.*

Counsel should be aware, though, that Missouri law also provides that when the same parties enter into a second contract regarding the same subject matter as an earlier contract, the second contract supersedes the first contract, which is considered abandoned by the parties. *See Ragan v. Schreffler*, 306 S.W.2d 494 (Mo. 1957); *Nat'l Sur. Corp. v. Prairieland Constr. Inc.*, 354 F. Supp. 2d 1032 (E.D. Mo. 2004).

D. (§2.50) Contract Modification Must Itself Be a Contract

The general rule in Missouri is that a contract modification is itself a contract, and, as such, it must be supported by consideration. *See Barr v. Snyder*, 294 S.W.2d 4 (Mo. 1956). Moreover, the contract must be based on mutual assent, i.e., an offer and acceptance. *See MECO Sys., Inc. v. Dancing Bear Entm't, Inc.*, 42 S.W.3d 794 (Mo. App. S.D. 2001).

In *Eiman Brothers Roofing Systems, Inc. v. CNS International Ministries, Inc.*, 158 S.W.3d 920 (Mo. App. W.D. 2005), a building owner and a roofer entered into a contract to install a clay tile roof for approximately \$52,000. *Eiman*, 158 S.W.3d at 922. Thereafter, it became apparent that the original plans underestimated the project. *Id.* The parties then agreed to a modified proposal. *Id.* Issues later developed, and the building owner instructed the roofer to stop work about one-third of the way through the project. *Id.* The roofer then

sued on the contract. *Id.* at 921. The building owner argued that the modified proposal was not enforceable because it called for the same work to be done as contemplated by the original contract and, hence, the modification was not supported by consideration. *Id.* The court held that “[a] promise to carry out an already existing contractual duty does not constitute consideration.” *Id.*; *see also Medicare Glaser Corp. v. Guardian Photo, Inc.*, 936 F.2d 1016 (8th Cir. 1991) (agreement to “payments” that are already offset does not constitute consideration sufficient to support contract modification).

E. (§2.51) Modification Versus Reformation

Counsel should be careful to distinguish between a contract modification, which requires consideration, and a contract reformation, which does not. *See, e.g., Lunceford v. Houghtlin*, 170 S.W.3d 453, 464 (Mo. App. W.D. 2005). In *Lunceford*, the plaintiffs were seeking tort damages arising from a motorcycle accident. *Id.* at 457. The plaintiffs first settled a claim against their own insurance company and signed a general release that purported to release the whole world. *Id.* at 458. The plaintiffs then brought suit against another motorcyclist, who was alleged to have contributed to the accident. *Id.* at 457. The other motorcyclist became aware of the first release and claimed that he was relieved from liability as a result of the first release. *Id.* The plaintiffs then entered into a “corrected release” with their insurance company that limited the release to only include that insurance company. *Id.* at 458. The court of appeals reversed the trial court’s grant of summary judgment against the plaintiffs on the ground that the “corrected release” was a valid reformation. *Id.* at 464.

The *Lunceford* court noted the general rule that “parties to a contract are free to subsequently modify their contract, notwithstanding contract language limiting modification” and that “[c]ontract modification entails meeting the same elements as required for formation of the original contract.” *Lunceford*, 170 S.W.3d at 464. Because the corrected release was not supported by new consideration, it did not meet the test of contract modification. *Id.* But the corrected release did not modify the agreement; rather, it reformed the writing to reflect the parties’ original intent. *Id.* Accordingly, *Lunceford* teaches that counsel should consider reformation as a potentially more appropriate “tool” if there is a lack of consideration to support an alleged modification. For a more detailed discussion of reformation, see §§2.37–2.44 above.

VIII. Novation

A. (§2.52) Novation Generally

A novation is the substitution of a new contract for an old one, extinguishing the original contract. *See Moley v. Plaza Props., Inc.*, 549 S.W.2d 633, 635 (Mo. App. W.D. 1977). To prove that a novation has occurred, a party must show:

- a previous valid obligation;
- agreement of all parties to a new contract;
- extinguishment of an old contract; and
- validity of a new contract.

See Spencer v. Millstone Marina, Inc., 890 S.W.2d 673, 676 (Mo. App. W.D. 1994). As with most questions involving contracts under Missouri law, “[t]he parties’ intention is the controlling element.” *Id.*

Novation frequently involves a change in parties to the agreement. *See W. Crawford Smith, Inc. v. Watkins*, 425 S.W.2d 276, 279 (Mo. App. E.D. 1968). Specifically, a novation can be “the substitution by mutual agreement of one debtor or of one creditor for another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one, which is thereby extinguished.” *Id.* An example of this type of novation is discussed more fully in §2.54 below.

The existence of a previous valid obligation is usually stipulated by the parties or assumed when the issue of novation arises—otherwise, the dispute would be a more generalized contract action. *See, e.g., McHenry v. Claspill*, 545 S.W.2d 690, 692 (Mo. App. E.D. 1976). Sections 2.53–2.55 below explain how courts address novation’s other three elements.

1. (§2.53) Agreement of All Parties to New Contract

An essential element of any novation is that all parties must agree to the change. *See Wilson v. Midstate Indus., Inc.*, 777 S.W.2d 310, 312 (Mo. App. W.D. 1989). Missouri courts have been clear that the parties’ intent for novation should never be assumed. *See id.*; *McHenry v. Claspill*, 545 S.W.2d 690, 692 (Mo. App. E.D. 1976).

The question of assent to the novation was the issue on appeal in *Wilson*, 777 S.W.2d at 312. In that case, Midstate Industries owed a payment of \$10,000 to Wilson stemming from the sale of a business from Wilson to Midstate Industries. *See id.* at 311. Before that payment, Midstate Industries sold the business to Midstate-Adkins Foods. *Id.* As part of the sale between Midstate Industries and Midstate-Adkins Foods, it was agreed by all of the parties, including Wilson, that Midstate-Adkins Foods would fulfill all of the obligations that Midstate Industries had to Wilson. *Id.* When Midstate-Adkins Foods failed to make the final \$10,000 payment, Wilson sued Midstate Industries. *Id.* Midstate Industries claimed that the agreement between Midstate Industries and Midstate-Adkins Foods was a novation that released Midstate Industries from any duty to Wilson. *Wilson*, 777 S.W.2d at 311. The court of appeals disagreed. *Id.* at 313.

The court found no evidence that Wilson agreed to release Midstate Industries from the obligation. *Id.* Rather the only evidence was that Wilson consented to Midstate-Adkins Foods' agreement with Midstate Industries to satisfy the \$10,000 obligation. *Id.* Without more, the court found that the terms of the agreement "do not constitute an offer of novation, nor a novation accomplished by the assent of the creditors Wilson." *Id.* This holding was supported by the rule that, "absent such intention [to release the original obligor], a creditor may accept a new obligor as an additional debtor and nevertheless continue to hold the original debtor liable." *Id.*

2. (§2.54) Extinguishment of Old Contract

For the defense of novation to apply, the party seeking novation must show the extinguishment of the old contract. An example of this is *Spencer v. Millstone Marina, Inc.*, 890 S.W.2d 673, 676 (Mo. App. W.D. 1994). In *Spencer*, a former employee of the defendant filed suit under his employment contract. *Id.* at 674. The employer claimed that a subsequent memorandum from it to the employee was a novation of the original contract. *Id.* at 676–77. The court disagreed, finding that the memorandum in question was ineffective to terminate the original contract. *Id.* at 676. Because there was no evidence that the parties agreed to extinguish the original contract, the employer failed to meet its burden to prove the novation. *Id.* at 677.

3. (§2.55) Validity of New Contract

For a party to successfully demonstrate a novation, it must prove the validity of a new contract to replace the original. *See McHenry v. Claspill*, 545 S.W.2d 690, 693 (Mo. App. E.D. 1976). In *McHenry*, the plaintiff was owed money for a plumbing bill by an individual who had died. *Id.* at 692. At the decedent's wake, the plaintiff spoke with the executrix of the decedent's estate about the bill. *Id.* The plaintiff claimed that the executrix agreed to satisfy the bill in her individual capacity; therefore, the plaintiff did not pursue his other remedies, i.e., a mechanic's lien or an action against the decedent's estate. *Id.* In the plaintiff's suit against the executrix, the plaintiff claimed that his agreement with her was a novation of the prior agreement with the decedent. *Id.* The court noted that a novation requires proof of the same elements as any other contract, including evidence "sufficiently definite to enable the court to determine its exact meaning and to definitely measure the extent of the promissor's liability." *Id.* at 693. The court found that the evidence failed to show the elements of the alleged new contract. *Id.* Accordingly, the plaintiff's claim of novation failed. *Id.*

B. Procedure

1. (§2.56) Novation Must Be Pled and Proven

Novation in Missouri is typically used as an affirmative defense, and the burden of proof is on the party asserting the novation. *See Moley v. Plaza Props., Inc.*, 549 S.W.2d 633, 635 (Mo. App. W.D. 1977). Accordingly, novation arises when a party files suit under Contract A and the defending party claims that Contract A was extinguished by a subsequent agreement, Contract B. *See, e.g., Spencer v. Millstone Marina, Inc.*, 890 S.W.2d 673, 676 (Mo. App. W.D. 1994). In *Spencer*, while the affirmative defense was properly pled and presented to the court, the defendant did not have evidence that the parties agreed to extinguish the original contract. *Id.* Therefore, the defendant failed to meet its burden to prove the novation. *Id.* at 677.

In *State ex rel. Premier Marketing, Inc. v. Kramer*, 2 S.W.3d 118, 122 (Mo. App. W.D. 1999), the court analyzed a petition to determine whether there were sufficient factual allegations to satisfy the pleading requirements of a novation. *See id.* The court found that neither the body of the petition nor the documents

attached to it contained enough facts to support the claim of novation. *Id.* The court noted that the petition actually pled facts inconsistent with a novation. *Id.* This case underscores the fact that counsel should be cautious when asserting a novation because of the scrutiny Missouri courts apply to the claim.

2. (§2.57) Burden of Proof

A novation can never be assumed. *See Wilson v. Midstate Indus., Inc.*, 777 S.W.2d 310, 312 (Mo. App. W.D. 1989). Rather, a novation must be pled and proven. *See State ex rel. Premier Mktg., Inc. v. Kramer*, 2 S.W.3d 118, 122–23 (Mo. App. W.D. 1999). The party claiming a novation has the burden to prove the novation by clear and convincing evidence. *See Gen. Ins. Co. of Am. v. Klein*, 517 S.W.2d 726, 730 (Mo. App. E.D. 1974); *Relles v. Wines*, 416 S.W.2d 19, 22 (Mo. App. E.D. 1967). That burden “may be met by direct evidence or by reasonable inference of the intent of the parties drawn from the facts and circumstances.” *McHenry v. Claspill*, 545 S.W.2d 690, 692 (Mo. App. E.D. 1976).