

**MISSOURI COURT OF APPEALS-WESTERN DISTRICT
DIVISION 1
CYNTHIA L. MARTIN, PRESIDING JUDGE,
THOMAS H. NEWTON, JUDGE, AND GARY D. WITT, JUDGE
MARCH 11, 2019
NORTHWEST MISSOURI STATE UNIVERSITY
MARYVILLE, MISSOURI**

WD81570

State of Missouri, Appellant,

v.

Cale D. Seymour, Respondent.

The State of Missouri appeals from the circuit court's judgment granting Cale D. Seymour's motion for judgment of acquittal. The State had charged Seymour, who was the owner of Cale Seymour Construction LLC, with failure to insure liability under Workers' Compensation Law in violation of section 287.128 of the Missouri Revised Statutes. The misdemeanor information stated that "between August 3, 2011, through October 3, 2013, . . . [Seymour] was an employer, and knowingly failed to insure his workers' compensation liability pursuant to Chapter 287, RSMo." Dwight Miller, an investigator and supervisor within the Missouri Department of Labor, Division of Worker's Compensation Fraud Unit, testified that, on February 3, 2014, the Fraud Unit received a referral from the Division of Labor to investigate Seymour. On that date, Miller assigned the case to himself and began investigating Seymour by doing some database searches with the Missouri Secretary of State, Employment Security, Department of Revenue, and the National Council on Compensation Insurance. From these searches, Miller discovered that Seymour had workers' compensation coverage for some months but not others. Specifically, Miller found that Seymour had coverage on file from January 18, 2005, through August 3, 2011. Miller said the records he reviewed showed suspicious activity for the third and fourth quarters in 2011, in that they showed Seymour reported that he had no employees but also reported paying over \$10,000 in wages to employees. Miller testified that, as a result of his investigation on February 3, 2014, he knew that Seymour did not have workers' compensation insurance for his company. Miller testified, however, that when he finds such an anomaly in the records he attempts to contact the employer to ascertain whether the information obtained during the investigation is accurate. Miller contacted Seymour by telephone on May 19, 2014. During this telephone call, Seymour admitted that he did have employees at the end of 2011 through 2013. Miller said the only thing he gained out of the telephone conversation with Seymour was confirmation that Seymour had employed one or more employees on the months that he reported that he did not have any. However, Miller said that he knew before he telephoned Seymour that Seymour had "the number of employees" needed for insurance to be mandated. After his telephone call with Seymour, Miller contacted Seymour's insurance company to verify Seymour's policy coverage dates. Thereafter, Miller referred the case to the Attorney General's Office for prosecution. On May 17, 2017, the State charged Seymour with knowingly failing to obtain insurance coverage from August 3, 2011, to October 3, 2013. After the close of the State's evidence, Seymour moved for judgment of acquittal, arguing that the statute of limitations had expired prior to the filing of the State's initial information on May 17, 2017. The circuit court agreed. The circuit court found that the prosecution was time-barred because the discovery date of Seymour's alleged criminal

conduct was February 3, 2014, and that more than 3 years elapsed before the filing of the State's information. The State now appeals.

Appellant's point on appeal:

The trial court erred in granting Defendant's motion for judgment of acquittal and holding that the action was time-barred under Section 287.128.11 because the statute of limitations contained therein had not run, in that the State charged Mr. Seymour with knowingly failing to obtain workers' compensation insurance on May 17, 2017, and this was within three years of the discovery of the offense on May 19, 2014, the date Mr. Seymour admitted to knowingly failing to obtain insurance coverage under Chapter 287 between August 3, 2011, through October 3, 2013.

WD81830

Jennifer A. Britt, Respondent,

v.

Jeremy M. Otto, Respondent, and

American Family Mutual Insurance Company, S.I., Appellant.

American Family Mutual Insurance Company, S.I., appeals from the circuit court's judgment denying American Family's motion to intervene and confirming an arbitration award of \$5,998,027 in favor of Jennifer Britt and against Jeremy M. Otto. The dispute between the parties stems from an automobile accident. On September 9, 2017, Britt was involved in a motor vehicle accident with a motor vehicle driven by Otto. Otto was insured by a policy of insurance issued by American Family. American Family took the position that the policy limited coverage to \$100,000, and Britt took the position that the policy provided more than \$100,000 in coverage. In particular, Britt informed American Family that she disagreed that the policy limits were only \$100,000 because American Family's policy contained a supplemental provision requiring American Family to pay her first aid in addition to the policy limits. In a letter to American Family dated October 4, 2017, Britt extended a settlement offer to release Otto from liability "for her personal injury claims against him in exchange for all applicable policy limits and payments." On January 2, 2018, American Family sent Britt's attorney a letter, stating that it was accepting Britt's settlement demand "for all policy limits applicable to our insured, Jeremy Otto, which are \$100,000.00." On January 5, 2018, Britt sent American Family an e-mail disputing American Family's position that the amount owed was only \$100,000, stating that, in addition to the \$100,000 policy limits, the policy provides that American Family will pay "expenses incurred by an insured person for first aid to others at the time of an auto accident involving your insured car." In a letter dated February 5, 2018, American Family reiterated its acceptance of Britt's settlement demand for all applicable policy limits of \$100,000. On February 28, 2018, American Family filed suit against Britt in the United States District Court to enforce the settlement agreement, which remains pending. On March 6, 2018, Britt and Otto executed an "Arbitration Agreement" and a separate section 537.065.1 agreement in which they agreed to binding arbitration with respect to all issues arising out of the September 9, 2017 motor vehicle accident. Otto notified American Family of his section 537.065.1 agreement and provided American Family a copy of the Arbitration Agreement. In his letter, Otto requested that American Family inform him whether it wanted to participate in the arbitration. In a letter dated March 16, 2018, American Family advised

Otto it would not agree to participate in the arbitration of Britt's claims. Thereafter, an arbitrator heard testimony and arguments presented by Britt and Otto, and the arbitrator issued an arbitration award of \$5,998,027 in favor of Britt on her claims against Otto. On April 13, 2018, Britt filed this lawsuit seeking a judgment confirming the arbitration award. Otto provided American Family a copy of the arbitration award and demanded that American Family pay it. On April 19, 2018, American Family filed its motion to intervene in the lawsuit, which the circuit court denied. On May 31, 2018, the circuit court entered a final judgment confirming the arbitration award and awarding Britt \$5,998,027, plus post judgment interest. American Family now appeals.

Appellant's points on appeal:

1. The circuit court erred in denying American Family's timely motion to intervene as a matter of right and entering final judgment against Otto because there is no substantial evidence to support the circuit court's denial of American Family's motion to intervene and the circuit court misapplied the law in that section 537.065.2 conferred upon American Family an unconditional right to intervene in Britt's lawsuit against Otto before the entry of judgment as a result of Otto's section 537.065.1 agreement with Britt and the denial of American Family's right to intervene deprived American Family of due process.
2. Alternatively, the circuit court erred in denying American Family's timely motion to intervene as a matter of right and entering final judgment against Otto because there is no substantial evidence to support the circuit court's denial of American Family's timely motion to intervene and the circuit court misapplied the law in that (1) American Family had a direct and immediate interest in the subject matter of Britt's lawsuit against Otto in light of American Family's contractual rights to defend Otto against Britt's claims and to settle Britt's claims, American Family's agreement to provide Otto a defense against Britt's claims without reservation, the January 2, 2018 settlement agreement, and the Federal Court Action to enforce the settlement agreement; (2) the final disposition of Britt's lawsuit against Otto materially prejudiced American Family's contractual rights to defend Otto against Britt's claims and to settle Britt's claims; and (3) American Family's interests were not adequately represented by the existing parties as a result of Otto's entry into the Arbitration Agreement and section 537.065.1 agreement with Britt.
3. Alternatively, the circuit court erred in denying American Family's timely motion to intervene permissively and entering final judgment against Otto because the circuit court abused its discretion in that (1) American Family's proposed claims and defenses shared common questions of law and fact with the main action regarding the January 2, 2018 settlement agreement, the validity of the Arbitration Agreement, and the enforceability of the Arbitration Award; and (2) the denial of American Family's motion to intervene was clearly against the logic of the circumstances before the circuit court, arbitrary, and unreasonable in light of the evidence of Britt's and Otto's efforts to strip American Family of its contractual rights and Otto's breach of his contractual obligations.

WD81063

State of Missouri, Respondent,

v.

Jimmie L. Verge, Appellant.

Jimmie L. Verge appeals from the circuit court's judgment convicting him, following a jury trial, of two counts of murder in the second degree, one count of robbery in the first degree, one count of assault in the first degree, and four counts of armed criminal action. The sufficiency of the evidence to support the convictions is not at issue in this appeal. Verge, along with his cousins, Anthony Murphy and Gerrod Woods, decided to rob an acquaintance, Fanadous Groves, and take his handgun. On December 14, 2015, Murphy and Woods were in the backseat of a car driven by Kameron Gimes, and Groves was in the front passenger seat with his handgun in his lap. Murphy told Gimes that he needed to go to the area of 73rd and Wabash in Kansas City. As Gimes was driving, he saw an SUV following them. Wood's friend, Rickey Brown, and Verge were in the SUV. While they were driving, Murphy was on his telephone with Verge. Gimes again told his passengers that he thought someone was following them. Woods and Murphy told Gimes that it was Brown, who had money to buy marijuana from Gimes. Gimes pulled over his car, and Brown pulled his car in behind him. Verge, who was still on the phone with Murphy, walked up to the passenger side of Gimes's car. When Gimes asked if that was "Jimmie," Woods reached over the seat and grabbed Groves around the neck. At that point, Groves and Verge began shooting. Groves fired up and behind him, and Verge fired into the side of the car numerous times. Brown drove away in his vehicle. Gimes opened the car door and ran and hid at a nearby business. Gimes had been shot once in the mouth and twice in the back. After waiting for a while, Gimes returned to his car. Groves and Woods were outside the car on the ground and were dead. Gimes put Groves's body in the car and drove Groves to the hospital. Groves's gun was not anywhere around the scene or on Groves. Both murder victims died from multiple gunshot wounds. On December 16, 2015, Verge, using his Facebook account under the nickname "Shoe Go Get'em," posted a message saying, "I seen my cousin get killed the other day, so I just be trippin." He then used the Facebook messaging feature to have a conversation with a friend named Seanisha Renee. Some of the messages had been deleted, but there was one from Renee asking, "[W]here did the other one happen[?]" Verge replied, "All at the same time," and then he said, "73rd he killed my cousin I killed him an [sic] hit his homie." Verge told Renee to "delete this whole . . . convo when we done." At trial, the State introduced the Facebook records through a business records affidavit that was not notarized. When interviewed by police, Gimes originally lied about who committed the murder because he wanted to seek revenge on Verge. Eventually, Gimes told the truth about the crimes and gave police the names of Murphy, Brown and Verge. After getting the names of the perpetrators, the police went through Woods's cell phone, which they recovered from the scene, and found a telephone number for "Jimmie." The police subsequently got telephone records for Verge's telephone number. The records showed that Verge was on the telephone with Murphy leading up to the crimes. Further, cell phone tower analysis showed that, immediately prior to the murder, Murphy's telephone followed the path Gimes drove from Raytown to Wabash while Verge's telephone stayed in the area of the crime scene. At trial, the State introduced Verge's telephone records through a business records affidavit that was not notarized. Verge's defense at trial was alibi. Verge's brother testified that Verge was with him from 11:00 A.M. on the day of the shootings and that Verge never left Cortez Brown's house on that night. Verge's telephone records showed that Verge and his brother made several telephone calls to one another throughout the day and evening on the day of the shootings. The State used Verge's telephone records to impeach the credibility of Verge's brother. Brown also testified at the trial. He said that Murphy

was going to steal Groves's gun, that he followed Gimes's car, and that Verge approached Gimes' car and "linked up" with Groves, leading Groves to start shooting. A jury found Verge guilty of two counts of murder in the second degree, one count of robbery in the first degree, one count of assault in the first degree, and four counts of armed criminal action. Verge now appeals.

Appellant's points on appeal:

1. The trial court abused its discretion, in violation of Mr. Verge's rights to due process and a fair trial, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§10 and 18(a) of the Missouri Constitution, and § 490.692, when it admitted Facebook records attributed to Mr. Verge pursuant to a business records affidavit, because, to be a valid affidavit, a document must be notarized or otherwise verified under oath by a person qualified to give an oath, in that the document purporting to be a business records affidavit for the Facebook records was not notarized, rendering the records inadmissible.
2. The trial court abused its discretion, in violation of Mr. Verge's rights to due process and a fair trial, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§10 and 18(a) of the Missouri Constitution, and § 490.692, when it admitted phone records for [the] phone number . . . , which was attributed to Mr. Verge, pursuant to a business records affidavit, because, to be a valid affidavit, a document must be notarized or otherwise verified under oath by a person qualified to give an oath, in that the document purporting to be a business records affidavit for the phone records was not notarized, rendering the records inadmissible.
3. The trial court plainly erred, in violation of Mr. Verge's rights to due process and a fair trial, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution, when it failed to instruct the jury on self-defense and defense-of-others, because a trial court must instruct a jury on self-defense and defense-of-others when such an instruction is supported by the record when viewed in the light most favorable to giving the instructions, in that there were no self-defense or defense-of-others instructions given in the case and the facts of the case supported giving self-defense and defense-of-others instructions.
4. The trial court plainly erred, in violation of Mr. Verge's rights to due process and to be free from double jeopardy, under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §19 of the Missouri Constitution, when it entered convictions for three counts of armed criminal action, because the armed criminal action statute limits the unit of prosecution for an armed criminal action conviction to one criminal transaction and a conviction for multiple counts of armed criminal action based on a single criminal transaction violates double jeopardy, in that, viewing the evidence in the light most favorable to the State, Mr. [Verge] committed the [two] counts of first-degree murder during the same criminal transaction, so he can only be guilty of one count of armed criminal action.

WD81831

Raquel Hopper, Appellant,

v.

HNB National Bank and One Home Realty, Inc., Respondents.

Raquel Hopper appeals from the circuit court's judgment granting HNB National Bank's motion for summary judgment and granting One Home Realty, Inc.'s motion to dismiss. Hopper was a self-employed real estate agent that contracted with One Home Realty. On October 29, 2014, One Home sent Hopper to show a property to a potential buyer. HNB was the owner of the property, and HNB had contracted with One Home Realty for One Home Realty to list the property for sale and to provide property management services for the property. The property being shown by Hopper was occupied and possessed by a tenant pursuant to a lease. Prior to October 29, 2014, a representative of One Home Realty had inspected the property and informed HNB of the presence of a dog with dangerous propensities. While showing the property, Hopper was bit by a dog and suffered injuries. The tenant was the owner of the dog that bit Hopper. Hopper filed suit against HNB and One Home Realty. In her petition, Hopper alleged that HNB knew or could have known that the tenant's dog had dangerous and vicious tendencies, that HNB had a duty to exercise ordinary care to keep its premises free from a dangerous condition, that HNB breached its duties to Hopper and was negligent by failing to remove the dog, failing to warn Hopper about the dog's vicious propensities, and by failing to restrain or barricade the dog, and that as a direct and proximate result of HNB's negligence she suffered injuries and damages. Hopper also alleged that One Home Realty had a duty to exercise ordinary care to keep her safe from dangerous conditions, that One Home Realty breached its duties to Hopper and was negligent by failing to remove the dog, failing to warn Hopper about the dog's vicious propensities, and by failing to restrain or barricade the dog, and that as a direct and proximate result of One Home Realty's negligence she suffered injuries and damages. HNB filed a motion for summary judgment arguing that it could not be liable under section 518 of the Restatement (Second) of Torts, which sets forth theories of negligent liability for domestic animals. HNB asserted that it could not be liable for injuries caused by a dog that it never owned, harbored, or possessed. One Home Realty filed a motion to dismiss on the grounds that Hopper's amended petition failed to state a claim against One Home Realty because One Home Realty did not own the dog that bit Hopper and did not own the property where the dog bite occurred. One Home Realty asserted, therefore, that it did not owe any duty to Hopper regarding the property or dog. The circuit court granted both HNB's motion for summary judgment and One Home Realty's motion to dismiss. Hopper now appeals.

Appellant's points on appeal:

1. The trial court erred in entering summary judgment in favor of Defendant HNB because the Second Restatement of Torts section 518 does not apply to the exclusion of the common law duty of an owner to warn invitees of the presence of a dangerous condition on the property in that the tenant's vicious dog constituted a dangerous condition on Defendant HNB's property which Defendant HNB had notice of before the dog attacked Plaintiff.
2. The trial court erred in granting Defendant One Home's Motion to Dismiss because in viewing all the facts of Plaintiff's amended petition as true, liberally construing the alleged facts in favor of Plaintiff and giving the petition the benefit of every reasonable intent favorable to the pleader, the Amended Petition

adequately asserted a claim against Defendant One Home in that Plaintiff's amended petition sets forth facts alleging all the necessary elements of a negligence claim against Defendant One Home: duty of care to Plaintiff, Defendant's breach of duty and resulting injury.