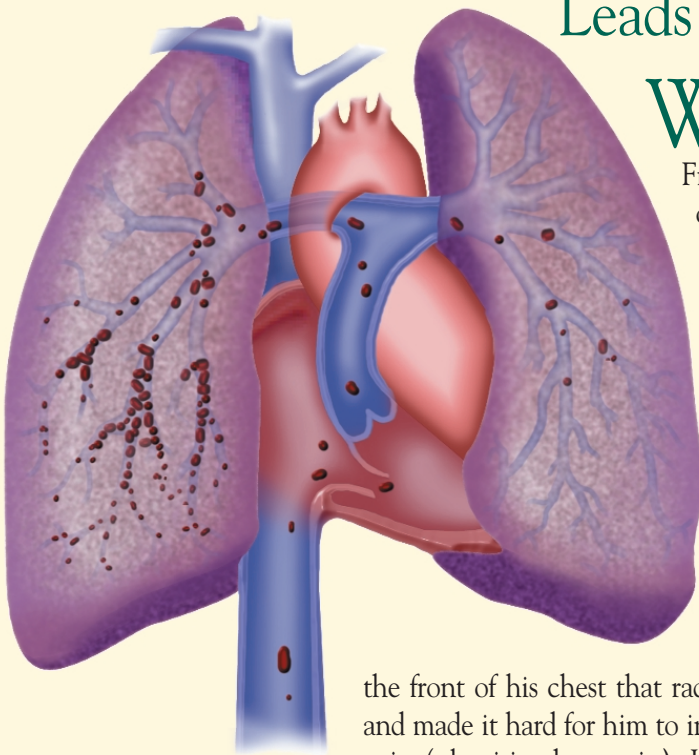


SHAMBERG, JOHNSON & BERGMAN

—TRIAL ATTORNEYS—

SPRING 2001

Fatal Pulmonary Embolism Leads to Liability



While fishing with his friends late one Friday night, 36-year-old Jim Winfrey suddenly developed sharp chest pain, so he went home. On Saturday morning, still in distress, Jim went to the local emergency room, where he was seen by the defendant, Catherine White, D.O.

Jim had sharp pain in the front of his chest that radiated around the lungs and made it hard for him to inhale or exhale without pain (pleuritic chest pain). His respiratory rate was abnormally rapid. With her stethoscope Dr. White heard rales (crackling), no breath sounds on the left, and splinting. The blood gas analysis revealed a borderline low oxygen level. A chest x-ray showed left pleural fluid (effusion) and suspected left lower lobe infiltrates. An EKG was normal. There was no fever, no elevation in the white blood cell count, and no cough. Jim indicated that he had had elbow surgery a week earlier. He also said he had the same pain six years earlier, and it was thought to be pneumonia. Jim's pain improved about an hour after he was given pain medication. The symptoms, test results, and history were nonspecific and did not conclusively support any particular diagnosis.

Dr. White considered pulmonary embolism and pneumonia in her differential diagnosis. She decided not to do the tests that had the best chance to determine if Jim had a pulmonary embolism – a ventilation-perfusion (V/Q) scan or a pulmonary angiogram – because of Jim's previous episode which was thought to be pneumonia and because of the pain relief. Dr. White discharged Jim home with the diagnosis of

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Welcome

Complex product liability and medical negligence cases are among the most difficult and satisfying work we do. For more than 20 years our firm has had the opportunity to investigate, evaluate, and pursue many of these difficult but rewarding cases, such as the successful pulmonary embolism case and the Whirlpool dishwasher fire case reported in this issue of the newsletter. Our firm is also pleased to welcome Matthew E. Birch as an associate attorney with our firm. 🍷

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Woman Burned To Death in Fire Started by Whirlpool Dishwasher

PRIOR RECALL WAS INADEQUATE TO SAVE HER LIFE



McCoy's house burned by a fire which began in the dishwasher.

On February 16, 2000, Lorray McCoy relaxed at her home in Louisburg, Kansas with her daughter Shelly watching a movie and eating a pizza. After the movie, Lorray loaded the family's "New Generation" Kenmore/Whirlpool dish-

washer, turned it on, and the family went to bed. Later that night, Lorray awoke, smelled smoke, and immediately ran to the kitchen to investigate. She saw flames shooting from the dishwasher, screamed to Shelly, and called 911. Shelly yelled back for her mom to get out and that she was coming. Shelly never escaped and was killed by the rapidly advancing fire. Shelly was twenty years old. Our firm, along with our good friend Marvin Barkis of Louisburg, are representing the McCoy's in their suit against Whirlpool, the dishwasher manufacturer, alleging that a defectively designed switch in the dishwasher door overheated, causing the mechanism to catch fire.

Whirlpool is no stranger to claims that its dishwashers have caught fire. In 1994, Whirlpool advised the Consumer Product Safety Commission of a number of fires caused by its dishwashers. Despite this knowledge, Whirlpool took no action to address the problem. Two years later in 1996, after reports of more dishwasher-caused fires, Whirlpool agreed to conduct a recall of the dishwashers it claimed were defective. Rather than following standard engineering principles to determine the

root cause of the fires and recall all dishwashers with defective mechanisms, Whirlpool only agreed to recall certain dishwashers manufactured at a certain plant during a limited time period.

Whirlpool maintains that dishwashers manufactured outside the recall period are safe and do not overheat and cause fires. However, our investigation into other similar incidents ("OSI's") reveals fires started by Whirlpool dishwashers have caused three deaths as well as other fires where no one was injured. Whirlpool dishwashers manufactured outside of the recall period have been the subject of thirty claims that we know of, twenty-eight of which have been settled.

As a result of our firm's efforts to publicize the dangers associated with the defective dishwashers, the *Kansas City Star* and *Forbes* magazine have recently run articles on the alleged defective design and the tragic McCoy fire, and the CPSC has reopened its investigation into the scope of the Whirlpool recall. Lynn Johnson and Steve Bough are representing the McCoy's in their trial scheduled later this year.

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Missouri Insurance Agent's Negligent Failure To Obtain Requested Policy Of Insurance Results in Payment

In May of 1997, Andrea Buening was struck head on by a tire service truck operated by an employee of Monett, Missouri-based Grande Tire Company, resulting in serious and permanent injuries. Grande Tire Company had a moderate amount of insurance coverage on the vehicle and few corporate assets.

In the course of discovery, it was determined that GTC had requested an umbrella insurance policy from its insurance agent to cover the excess risks associated with operating its fleet of trucks. GTC was under the mistaken impression the coverage was in place. Unfortunately, the requested coverage had never been obtained by the agent. The automobile collision case went to trial resulting in a \$5,000,000 judgment against the company. The judgment was partially satisfied with GTC's automobile and garage liability insurance, but the company was still faced with millions in an unsatisfied judgment. Prior to trial, Ms. Buening and GTC entered into an agreement sequencing plaintiff's collection efforts. Ms. Buening agreed first to begin collection from GTC's existing insurance policies; second to look to the proceeds of the claims that would be brought against GTC's insurance agent for failing to obtain requested coverage; and finally to GTC's assets.

The difficult legal issues were how to craft an agreement with GTC, in the Buening case, that would not jeopardize the later claims against GTC's insurance agent and how to success-

fully navigate the numerous defenses to the claims against the agent. A pre-trial demand was made for the total of the available insurance and the limits of the policy which the agent failed to obtain. Without the umbrella policy coverage, GTC did not have the resources to meet the demand and was forced to suffer the consequences – a trial and large judgment. In our claim against the agent, the damages were not just the policy limits of the absent umbrella policy, but the entire consequence of the failure to have the pol-

icy in place, the \$5,000,000 outstanding judgment. To be effective under Missouri law, the pretrial agreement could not limit GTC's liability or there would not be any consequential damages in the subsequent claim against GTC's insurance agent. The defenses to a "failure to obtain" requested coverage case are many. Primary is the "duty to read" the policy which was actually delivered. A careful examination of the law is required to determine whether this

CONTINUED ON PAGE 7

Shamberg, Johnson & Bergman Participates in Fundraiser



Shamberg, Johnson & Bergman participated in a fundraiser at the Negro Leagues Baseball Museum. Along with several friends, the principals in the firm had a private tour of the museum by Buck O'Neil and Museum Director Bob Kendrick. Photograph from L to R: Steve Six, Lynn Johnson, Buck O'Neil, Satchel Paige, Vic Bergman and John Parisi.

Pulmonary embolism (P.E.) is the third most common cause of death and is often not diagnosed until after death. Many of these fatal episodes are preventable tragedies for which health care providers may be liable. These cases may occur in many different medical settings and the medical literature of a variety of medical specialties is replete with articles on P.E. Some authors describe pulmonary embolism as a “diagnostic dilemma” because it may mimic or be confused with numerous other conditions – e.g. infections, trauma, chronic diseases, or even anxiety.

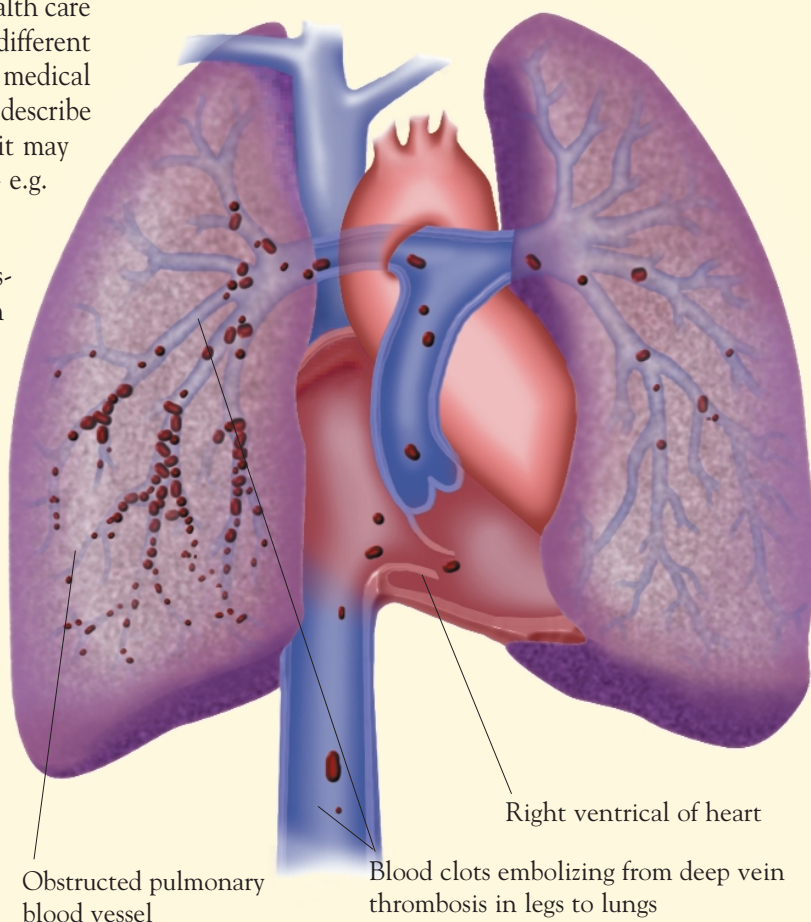
Pulmonary Embolism

A pulmonary embolism is a blood clot that has become dislodged from a thrombus formation in a blood vessel which travels freely into a branch of the pulmonary arteries, interfering with lung function. An embolus may be isolated and of no consequence because of the lungs natural ability to process clots. When there is a shower of small clots or a large thrombi the lungs cannot cope, and the condition becomes symptomatic and life threatening. The underlying cause of the thrombus and emboli may be a circulatory problem (inactivity), injury to a vessel, or a state of hypercoagulability where the blood tends to clot. Ninety-five percent (95%) of the time the cause is deep venous thrombosis (DVT) in the lower extremities.

Usually a good medical history will reveal risk factors for P.E. The two leading risk factors are immobilization and surgery within the last three months. Other significant risk factors are a history of pulmonary embolism, a history of DVT, or estrogen use. In a large number of cases of P.E., however, there is no identifiable risk factor, but the absence of a risk factor does not excuse a missed diagnosis where there is other evidence suggestive of P.E.

A number of medical authors have published algorithms for the diagnostic approach for patients with suspected P.E. (see list of references). While these differ in detail, all of the literature emphasizes the variability in the presentation of pulmonary embolism and the high index of suspicion that physicians need to have for P.E.

The most common symptoms of P.E. are dyspnea (a subjective shortness of breath) and pleuritic chest pain. The most common signs are rapid breathing (>20 breaths-per-minute) and rales (crackles) on chest examination. No single sign, symptom, laboratory test, or radiographic study is conclusive. Chest x-rays, electrocardiograms, and arterial blood gas analysis are standard components of the initial medical work-up whenever P.E. is considered as a possible diagnosis. While abnor-



Pulmonary Embolism Cases – Theories of Liability

1. Failure to use appropriate prophylaxis to minimize the chance for P.E. (e.g. adequate postoperative precautions, failure to correct coagulation disorders of the blood, etc.).
2. Failure to recognize possible P.E. (must have adequate index of suspicion based upon the history, risk factors, signs, symptoms, laboratory results, and x-rays).
3. Failure to follow an acceptable diagnostic protocol to evaluate for P.E.
4. Failure to properly interpret test results.
5. Failure to act in a timely way to reach the diagnosis.
6. Failure to treat appropriately.


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mal results of such tests should increase the index of suspicion, all of these tests can be normal in people with pulmonary embolism. The diagnostic question is whether the index of suspicion of pulmonary embolism is high enough to warrant further investigation through the use of time consuming, expensive and sometimes invasive tests, such as a ventilation-perfusion (V-Q) scan or a pulmonary angiogram. These studies have the best chance to establish or rule out the diagnosis of P.E.

The reason the index of suspicion needs to be high is that, undiagnosed and

untreated, pulmonary embolism has a high mortality rate, but when promptly diagnosed and treated, there is a greater than 90% chance of survival without injury.

In situations where the diagnosis of pulmonary embolism is made for the first time on autopsy, we suggest that a medical-legal investigation focused on the decedent's history, signs and symptoms, and the physician's examination and testing. The algorithms shown in the cited articles, while not necessarily the standard of care, are extremely useful in the evaluation of these cases for litigation. 

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probable pneumonia with left pleural effusion, on antibiotics and pain medicine, with advice to call a pulmonologist on Monday morning to make an appointment.


On Sunday night at home Jim developed severe pain, became unresponsive and was pronounced dead shortly after arrival to the emergency room. An autopsy determined that he died from the effects of massive bilateral pulmonary embolism.

Vic Bergman filed suit in the District Court of Wyandotte County, Kansas, on behalf of Jim's surviving wife and 11-year-old son. The theory of liability was that pulmonary embolism could not be excluded based on the information collected by Dr. White; that Jim should have been admitted to the hospital for further work-up including specifically a ventilation-perfusion (V/Q) scan; that further workup would have led to the diagnosis and treatment of pulmonary embolism; and that with treatment Jim had a

90% chance of survival without injury.

Plaintiffs used experts in the fields of emergency medicine, nuclear medicine, forensic pathology, and economics.

Jim was a personable and popular maintenance specialist at a local hospital. His future lost wages were projected at approximately \$600,000. Jim was a devoted and active husband and father who had many friends and admirers. He was an expert in karate, an active hunter and outdoorsman, the coach of his son's baseball team, and a 4-H leader. He was loving and sociable and enriched his family in many ways.

A limiting feature of the case, besides the caps on recovery under Kansas law, was that Dr. White had \$1,000,000 of liability insurance coverage. On further inquiry during discovery, however, a separate corporate insurance policy was located. Plaintiff argued that this policy provided additional coverage, which was denied by the carrier. Ultimately, the case settled for a single payment of \$1,200,000. 

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Rip Stitching Seat Belts Fail to Provide Safe Occupant Restraint



On June 7, 2000, Lynne Tankersley, a wife and young mother of two small children, was driving home on Highway 10 in Northeast Kansas when her vehicle left the road, rolling several times in a grassy field. Although she was wearing her seat belt, Lynne's 1997 General Motors Blazer was equipped with a rip stitching seat belt (also known as a load limiter or energy management loop) which separated (see picture to the right) releasing an additional sixteen inches of seat belt. The additional slack in the belt allowed Lynne to be partially ejected from the Blazer causing her death during the vehicle roll.

The Tankersley accident is not our firm's first experience with the rip stitching defect. Last year, Lynn Johnson and Steve Bough successfully resolved a case against Subaru for a similar rip stitching defect in a seat belt in

a 1991 Subaru Legacy. (See SJB Newsletter Summer 2000 available at sjblaw.com). The rip stitching design problem is not new to the automobile industry. In 1980, Volvo of America warned the government that a limit needed to be placed on the amount of rip stitching which could be placed in a seat belt. The National Highway Transportation Safety Administration instructed all manufacturers, including General Motors, to be "cognitive of the point made by Volvo... during the development of their [restraint] systems."

Seat belt design is covered in part by Federal Motor Vehicle Safety Standard

209 which requires that lap belts must "remain on the pelvis under all conditions, including collision or roll-over of the motor vehicle." General Motors acknowledges that "a snug-fitting lap/shoulder belt is the prime factor in vehicle crash safety." The federal government recently gave the Chevy Blazer the lowest possible score on a stability index rating system. The new NHTSA rating system allows a vehicle to be assigned a rating from one to five stars, based on how likely the vehicle is to roll over. A single star, which the Blazer 4X2 received, means that a vehicle has a forty percent or greater chance of rolling over. In the 1997 Blazer, the rip stitching seat belt was below the buckle, hidden in the stalk running from the buckle to the floor. When the belt "rips," an additional eight inches of slack is released on both the shoulder AND lap belts, producing 16 extra inches of seat belt.

During the investigation of this case, our firm learned that over 500,000 1997 Chevy Blazers, GMC Jimmys and Oldsmobile Bravadas are equipped with this potentially deadly



seat belt. Unfortunately, Lynne's death is not the only one associated with this hazardous seat belt defect. Last year near Cheyenne, Wyoming, a woman driving a 1997 Blazer was killed when her vehicle left the road,

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defense will apply to the potential claim.

Following entry of judgment, Steve Six of our firm represented GTC in its successful suit against its insurance agent on claims of negligence, breach of fiduciary duty and breach of contract. The case was settled during discovery, and the entire GTC settlement was used to satisfy a portion of the remaining outstanding judgment Ms. Buening held against GTC. 🍷

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rolled and the rip stitching released, allowing an additional 16 extra inches of slack in the seat belt. Shamberg, Johnson & Bergman also learned, through discovery, that this rip stitching seat belt was only a short term solution for General Motors. The seat belt was not used in the 1996 Blazer, nor the 1998 Blazer. Additionally, the rip stitching seat belt was only used on the driver side, not the passenger side. In the Wyoming case, the driver died and the passenger walked away.

The Tankersley family is actively encouraging the federal government to order a recall of these seat belts. The National Highway Transportation Safety Administration is beginning a investigation. Until then, over 500,000 vehicle owners are at risk of death from this alleged defect in a roll-over accident. Lawyers investigating serious automobile injuries should be keenly aware of this type of seat belt defect. We will continue to keep readers posted on the status of this case and the attempts to get this seat belt recalled. 🍷

Matthew E. Birch Joins Firm

We welcome Matthew E. Birch, who joined the firm this past summer. Matt graduated, with distinction, from the University of Missouri-Kansas City School of Law where he served as Managing Editor of the Law Review, Staff Associate on the Urban Lawyer, and Teaching Assistant in the Legal Writing program. He was selected to the Dean's List every semester of law school and received three Dean's Academic Achievement Awards during his career.

Matt graduated from Baker University in 1997 and has lived in the Kansas City area his entire life. Matt is admitted to practice in the state of Missouri



Matthew E. Birch

and in front of the United States District Court for the Western District of Missouri. Matt is a member of several bar and trial lawyers associations and intends to focus his practice on medical negligence, general tort and class action litigation. 🍷



ANSWERS TO PRESIDENTIAL PUZZLER: ACROSS: 2) Breyer 4) butterfly 10) Buchanan 11) Nader 12) Senate 14) Internet 16) fuzzy DOWN: 1) Job 3) Electoral 5) Rangers 6) executions 7) Tipper 8) Thomas 9) pregnant 10) Boies 13) Cheney 15) NRA

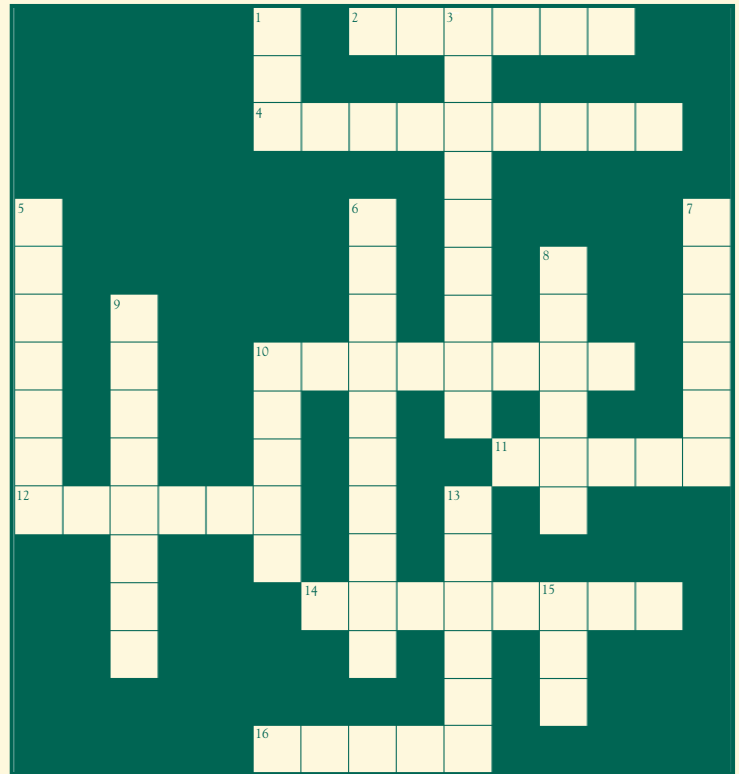
PRESIDENTIAL PUZZLER

ACROSS

2. Justice fearful of harm to the legitimacy of the Supreme Court.
4. Caterpillar ballot grows into what?
10. Candidate who enjoyed "surprising" success in West Palm Beach.
11. Green guy to whom Bush owes thanks.
12. A house evenly divided.
14. Gore's most famous invention.
16. Gore's math.

DOWN

1. Bush indigenous to Southeastern United States.
3. Unpopular college.
5. George W. Bush's favorite baseball team.
6. Texas has more of these than any other state.
7. Al's squeeze.
8. Quiet Justice.
9. What happens when chads are left unsupervised?
10. Lawyer who need not change shoes when going from Supreme Court to tennis court.
13. Dad's Chief of Staff.
15. Bush's trigger-happy office mate.



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