

SHAMBERG, JOHNSON & BERGMAN

— TRIAL ATTORNEYS —

Summer 2005

Welcome

We are pleased to present the Summer 2005 issue of our newsletter. In this issue we report on a \$1.2 million Missouri verdict, a Missouri automotive product liability settlement, and a Kansas birth trauma settlement. Representation of individuals and families in crisis – whether due to catastrophic injury or death – is our primary mission. Though the work is challenging and the responsibility is tremendous, our greatest satisfaction comes from providing a measure of justice and compensation for our clients.



This interesting case goes back to April 13, 1985, when 5-year-old Lamoni Riordan had part of his foot amputated by a riding lawn mower operated by his father. Lamoni and his 7-year-old brother, Joseph, had been dropped off at the Stake (Community) Center of the Church of Jesus Christ of Latter-Day Saints (Mormon Church) at 81st and Holmes Road in Kansas City, Missouri. Their mother had some errands to run for about an hour on a Saturday and

Missouri Amputation Case Filed Eighteen Years Later

felt it was safe for the boys to be there without any specific supervision. The Riordans' 17-year-old daughter was attending a program inside the Stake Center, and their father Kenneth was there as well, mowing the lawn using a riding lawnmower, which was one of his duties as the custodian for the Stake Center.

Kenneth Riordan was aware that

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Popular UMKC Professor Suffers Severe Brain Injury After Failure of “Rip Stitching” Seat Belt in Mazda Miata

On February 18, 1999, Tim Richards lost control of his 1991 Mazda Miata convertible and was struck on the passenger side by a Dodge Neon. A defectively designed seat belt failed to restrain Tim in the driver’s side occupant space. As a result, Tim’s head violently struck the Miata’s passenger side door structure near the B-pillar area, causing a severe diffuse axonal brain injury.

Lynn Johnson and Scott Nutter represented Tim and his wife, Judith Richards, in a products liability lawsuit in Jackson County, Missouri. The suit alleged the driver’s seat belt in the Miata was defectively designed.

Specifically, the seat belt was equipped with “rip stitching” which was designed to tear during a crash and add six extra inches of slack.

The pre-suit investigation uncovered a strikingly similar case in San Antonio, Texas that involved a 1992 Miata. Although that case resulted in a defense verdict, it was used to show that Mazda had notice of the danger its “rip stitching” seat belt posed during far side collisions. Discovery then revealed that the driver’s seat belts in Miatas manufactured for sale in Japan, Canada and a number of European countries did not use “rip stitching.” Building on this information, plaintiffs’ biomechanical and seat belt design experts performed a series of roll spit tests to compare the performance of the “rip stitching” U.S. seat belt with the seat belt used in other Miatas. The results showed the “rip stitching” caused at least four to six extra inches of lateral head excursion in a quasi-static environment. With the testing as foundation, plaintiffs’ biomechanical expert was prepared to testify that had Tim Richards Miata been equipped with a seat belt without “rip stitching,” like Miatas sold in Japan, Tim’s head would not have reached the passenger door structure and his devastating injuries would have been prevented.



Miata “rip stitching” seat belt pull test

Mazda had several formidable defenses. First, the investigating officer’s accident reconstruction concluded Tim was exceeding the speed limit, and crash testing by Mazda’s experts purported to show the collision would not have been sufficiently severe to injure Tim had he not been speeding. Second, since the Miata is one of the smallest vehicles on the market, it would have been challenging to prove that any seat belt could have prevented Tim’s injuries. Third, the Mazda

*Seat Belt Settlement
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Jurisdictional Ruling Key to Successful Settlement of Kansas Birth Injury Case

On September 15, 2000, newborn Estrella Barragan suffered severe neurological injury during the birth process at St. Catherine's Hospital in Garden City, KS. It was Patricia Barragan's third pregnancy. In her first pregnancy, she delivered twin boys by cesarean section. Patricia's second pregnancy resulted in a healthy boy by "Vaginal Birth After Cesarean" or "VBAC." This case involved her third pregnancy.

It was the intent of the Barragans that Estrella would also be a VBAC delivery. At thirty-eight weeks gestation, Patricia went into labor. While being monitored, Patricia's uterus ruptured, interrupting the flow of oxygenated blood to Estrella. An emergency cesarean section was performed but, unfortunately, due to the amount of time that passed during which Estrella lacked oxygenated blood, she suffered hypoxic-ischemic encephalopathy

("HIE"). Today, Estrella suffers from cerebral palsy and spastic quadriplegia.

Uterine rupture is a known complication of a VBAC delivery, occurring in varying degrees of severity in .05 – 1 percent of VBACs. The consequences can be catastrophic. Thus, the standard of care for VBACs requires the labor and delivery nurses to maintain a high index of suspicion for early signs of uterine rupture. Time is of the essence. Once uterine rupture is suspected, it is incumbent that it be investigated and the obstetrician notified quickly. It is also necessary that the attending obstetrician and other necessary personnel be immediately available to perform an emergency cesarean delivery.

During labor Patricia developed severe pain that was unappreciated and undervalued by the labor and delivery nurses. Non-reassuring fetal monitor-

ing, indicative of fetal distress, also went unappreciated for about one hour. Plaintiffs' evidence was that the quality and nature of Patricia's pain along with non-reassuring fetal heart patterns should have alerted the labor and delivery nurses to get the obstetrician to the bedside at least twenty-five minutes earlier than they did. Once the obstetrician was notified, he appeared at the bedside within six minutes, and delivery by emergency cesarean section was accomplished twenty minutes later. By the time the delivery was performed, however, Estrella had completely extruded through the uterine rupture into the abdominal cavity.

The Barragans were represented by Victor Bergman and Matthew Birch. It was immediately recognized that jurisdiction in federal court, out of Garden City, was crucial to any chance for a favorable plaintiffs' ver-

*Jurisdictional Ruling Key
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Lynn Johnson Elected to Board of Governors of Missouri Association of Trial Attorneys

Lynn Johnson was recently elected a member of the Board of Governors of the Missouri Association of Trial Attorneys (MATA). MATA is an organization of over 1,300 trial lawyers dedicated to representing individuals, workers and their families, promoting issues important to consumers and

protecting and improving the civil justice system. Our firm is proud of its continued leadership in trial lawyer organizations such as MATA, the Kansas Trial Lawyers' Association and the Association of Trial Lawyers of America that work tirelessly to protect the interests of our clients.

*18-Year-old Case
Continued From Page 1*

Lamoni and other children were playing outside that day, but he didn't know exactly where. Just after noon, he was mowing around a tree in reverse. Glancing over his left shoulder, he caught a glimpse of somebody running directly in the path of the lawnmower. He tried to shift the mower out of reverse, but was unable to do so, and the mower ran over Lamoni's right foot, resulting in a traumatic amputation of the forefoot, leaving him with only a heel.

Mr. Riordan always had difficulty controlling and shifting the lawnmower. He had communicated these problems to his supervisor, but nothing was done to train, supervise or help him with the problem. His supervisor died in 1994. The only witnesses to what occurred were Kenneth Riordan and Lamoni Riordan, who does not remember any of the details.

Victor Bergman and Matthew Birch tried the case. Suit was filed on February 15, 2002, in the Circuit Court of Jackson County, Missouri. The defendant Mormon Church removed the suit to The United States District Court for the Western District of Missouri, before the Honorable Ortrie D. Smith. At trial the plaintiff alleged that the defendant-church was vicariously liable for the negligence of Kenneth Riordan acting in the scope of his employment, and also directly liable for negligently failing to properly train and supervise Mr. Riordan after having knowledge that he had difficulty operating the lawnmower.

The defendant argued in a dispositive motion that since Mr. Riordan was

immune from suit due to the doctrine of parental immunity which existed in Missouri in 1985, it could not be sued either as a matter of law. This was rejected by the trial court, and was the subject of defendant's appeal. At trial, defendant argued that Kenneth Riordan was not negligent in the operation of the lawnmower, but rather that this was a sudden and unexpected event that could not have been avoided in the exercise of ordinary care. Further, the defendant argued that the accident was caused by lack of parental supervision and that Mr. Riordan's negligence, if any, was his failure to supervise his son in his capacity as a parent, for which the defendant was not liable.

The parties stipulated to past medical expenses of \$80,651.00. There was no claim for loss of earnings or earning capacity. The future economic damages were hotly contested, based on plaintiff's testimony that he desires to undergo an elective amputation of his leg above the ankle and below the knee to allow him to utilize high-tech, energy-storing prosthetics. The plaintiff testified that he desires to have surgery known as the "Ertl procedure" in which there is a transtibial amputation with the installation of a bony bridge between the tibia and fibula. In support of this procedure was the testimony of Janos Ertl, M.D., an orthopedist from Sacramento, California, who estimated the cost of the procedure at \$57,000.00 – \$60,000.00. The defendant argued that the plaintiff had seen two or three other orthopedists who recommended against having surgery and that in fact, no health care provider, including Dr. Ertl, said that the surgery is necessary. It just might allow plaintiff to improve his functional

capabilities and reduce his level of pain with activity.

A prosthetist testified to plaintiff's future prosthetic needs and costs, based upon on the assumption that the Ertl procedure will be done. An economist then projected the total costs of the future prosthetic needs at \$637,848.00. The jury returned a verdict for past economic damages of \$81,651.00, future economic damages of \$682,976.00 and non-economic damages of \$420,000.00. Plaintiff had made a prejudgment interest demand of \$1,000,000.00 in June of 2002, which amounted to an additional \$159,789.00. Thus, the total recovery was \$1,344,416.00. The eighth circuit affirmed the verdict in August 5, 2005.

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We return referral fees in accordance with the rules of professional conduct.

Our goal is to maximize results for you and your client.

HIPPA Limits “Ex Parte” Meetings with Plaintiff’s Physicians

A recurring concern in personal injury cases is that defense counsel will have “ex parte” meetings with plaintiff’s treating physicians without providing the plaintiff any notice or opportunity to object. For years, the plaintiff’s bar has maintained that such meetings are an inappropriate invasion of the confidential relationship between physician and patient. The defense bar, on the other hand, has argued that the waiver of the physician-patient privilege for personal injury actions contained in K.S.A. § 60-427 (or similar state privilege statutes) removes any barrier to “ex parte” meetings once the plaintiff’s physical condition is at issue. HIPAA’s “Privacy Rule,” which went into effect on April 14, 2003, has rendered the argument moot.

The “Privacy Rule” sets forth standards and procedures for the collection and disclosure of “protected health information.” See 45 C.F.R. §§ 160 et. seq., 164 et. seq.; 65 Fed. Reg. 82462 (Dec. 28, 2000). It supercedes and preempts any contrary provision of state law with only limited exceptions. See 42 U.S.C. § 1320d-7(a)(1) & (2). Except where state law provides “more stringent” protections, the Privacy Rule limits the ability of a health care provider to meet “ex parte” with a defendant’s lawyer and establishes the minimum amount of protection to which a patient is entitled. 45 C.F.R. § 160.203(b).

What does the “Privacy Rule” require? The answer is that a patient must be afforded notice of any intended “ex parte” communications and be given an opportunity to object. One court explained the effect of the “Privacy Rule” as follows:

The recently enacted HIPAA statute has radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment ... Counsel should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA’s regulatory scheme. *Wise counsel must now treat medical witnesses similar to the high ranking corporate employee of an adverse party.*

Law v. Zuckerman, No. CIV. A. CBD-01-1429, 2004 WL 438327, at *5 (D. Md. Feb. 27, 2004) (emphasis added). Of course, if a patient explicitly authorizes “ex parte” contacts, he or she cannot object thereto. Absent an express authorization, however, a defendant’s lawyer who contacts a treating physician “ex parte” runs the risk of sanctions for violating HIPAA, and may expose the unwitting health care provider to liability for disclosing protected health information.



Steve Six Appointed District Judge

Congratulations to our friend and former partner, Steve Six, on being appointed by governor Kathleen Sebelius as a District Judge in Douglas County, Kansas. Though we will miss him, we know Steve will be an exceptional judge and will serve the people of Douglas County with the same distinction and commitment he consistently provided to our firm’s clients.

Across 1) Bus 5) The Apprentice 7) Amazing Grace 10) Fear Factor 14) Kelly Clarkson 15) Two 16) The Bachelor 17) Boxing 18) Survivor 19) Movies
Down 2) StraightGuys 3) AmericasMost Wanted 4) Big Brother 6) Richard Hatch 7) American Idol 8) Ashton Kutcher 9) Simon 11) Abdul 12) Real World 13) Foley 16) Trump

Answers to Reality TV Puzzler

Jurisdictional Ruling Key
Continued From Page 3

dict. Thus, the case was filed in federal court in Kansas City, Kansas on behalf of Gustavo and Patricia Barragan, citizens of Mexico, against the attending obstetrician, St. Catherine's Hospital and two labor and delivery nurses, Denise Harkness and Valerie Rowan. Some months later, the Complaint was amended to join Estrella Barragan as a plaintiff and add Mexican American Ministries and the obstetrician responsible for Patricia's prenatal care, both of whom fell under the Federal Tort Claims Act. After substantial discovery, a decision was made to focus on the negligence of the labor and delivery nurses, so all defendants other than St. Catherine's and Rowan were dismissed. Despite the strenuous efforts of defense counsel, the district court exercised its discretionary supplemental jurisdiction of Estrella's purely state law claims under 28 U.S.C. § 1367, and denied a motion to dismiss the case on juris-

dictional grounds and thus, the case remained in federal court.

As in many medical malpractice cases, the defense focused on causation and damages. In the medical records, the rupture was described as: "Sudden catastrophic event." The defendants argued that the injury suffered by Estrella was immediately profound and injurious. They claimed earlier delivery probably would not have spared Estrella her injuries.

Plaintiffs' experts, on the other hand, testified that such injuries occur over a time continuum, with the most severe injury occurring in the moments closest in time to delivery. Plaintiffs' evidence was that delivery even fifteen minutes earlier would have eliminated a vast majority or all of the sequelae related to the hypoxic insult. Thus, had the labor and delivery nurses acted quickly, delivery would have occurred early enough for Estrella to escape injury.

Another issue was life expectancy, directly related to the amount of future economic damages. Plaintiffs' life care planner opined that Estrella, with optimal care, has an average life expectancy. Defendants' life care planner, Dr. Richard Katz, on the other hand, opined that Estrella has a life expectancy of only fourteen years.

Plaintiffs' experts included two obstetric nurses, two obstetricians, a neonatologist, a pediatric neurologist, a life-care planner and an economist.

Trial of the case was set for May 3, 2005. Despite the fact that none of the defendants' expert depositions had been taken, mediation was held on July 4, 2004. At the mediation, it was discovered that St. Catherine had substantially more insurance coverage than had been represented to the plaintiffs prior to that date. (See Practice Tip below.) Within weeks following the mediation, the case settled for a total of \$4,300,000.00.

Practice Tip: Insurance Coverage

Never assume you know what the extent of insurance coverage is until you have it in writing, and then keep asking. When settling "excess" cases, always make a record of reliance on the amount of insurance represented by defense counsel. At the mediation of the Barragan case, defendants' discovery responses indicated that there was a \$1 million policy covering defendant Valerie Rowan plus \$3.3 million covering St. Catherine's Hospital. During the mediation, however, after negotiations had been going on for a few hours, it was disclosed that there was an excess policy of \$150 million covering St. Catherine's Hospital. The excess carrier was not present at the mediation. According to defense counsel, it was simply an oversight that plaintiffs had not been informed of the coverage. Plaintiffs immediately made a one time only offer to settle for \$4.3 million (all the policies that were represented at the mediation) in order to place the underlying insurance companies at risk for bad faith. This offer was not rejected; rather, the defendants asked that it be left open for ten (10) days. That offer was accepted by the defendants in the days following the mediation.



Miata quasi-static roll spit test

*Seat Belt Settlement
Continued From Page 2*

experts argued the “rip stitching” was necessary to optimize the seat belt’s performance during frontal collisions,

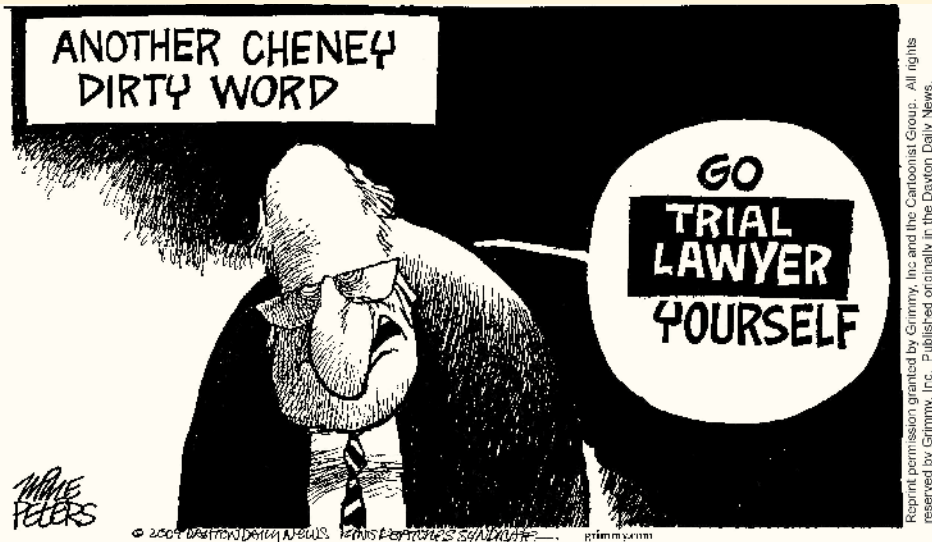
which account for the vast majority of crashes and injuries. Finally, Mazda claimed that “rip stitching” became necessary in U.S. Miatas when air bags were added because the extra slack

reduced the potential for head injuries by softening the impact between the driver and the air bag.

Plaintiffs countered these defense claims with evidence that later models of the Japanese Miata had air bags but no “rip stitching.” Plaintiffs also proved the officer’s speed calculations were flawed and found a witness who testified Tim was driving safely and within the speed limit. Moreover, even assuming that “rip stitching” arguably provides some benefit in certain frontal collisions, it leaves the occupant dangerously vulnerable during side impacts and rollovers and, therefore, violates the manufacturer’s duty to design a seat belt that protects the occupant in all foreseeable crash modes.

Tim and Judy reached a confidential settlement with Mazda shortly before trial. The settlement is more than three times higher than Mazda’s final offer in the similar San Antonio case.

Tim was a professor of foreign languages and literature at UMKC since 1981, head of the Spanish section, and faculty chair of the Arts & Sciences Department. In his “spare time,” Tim taught classes and coached soccer at the Barstow school to pay for his daughter’s tuition. Judy is also a professor and is chair of Modern Languages and Latin American Studies at Park University. Tim and Judy are both widely-published and collaborated on several published translations. Tim, Judy and their family have our heartfelt best wishes.

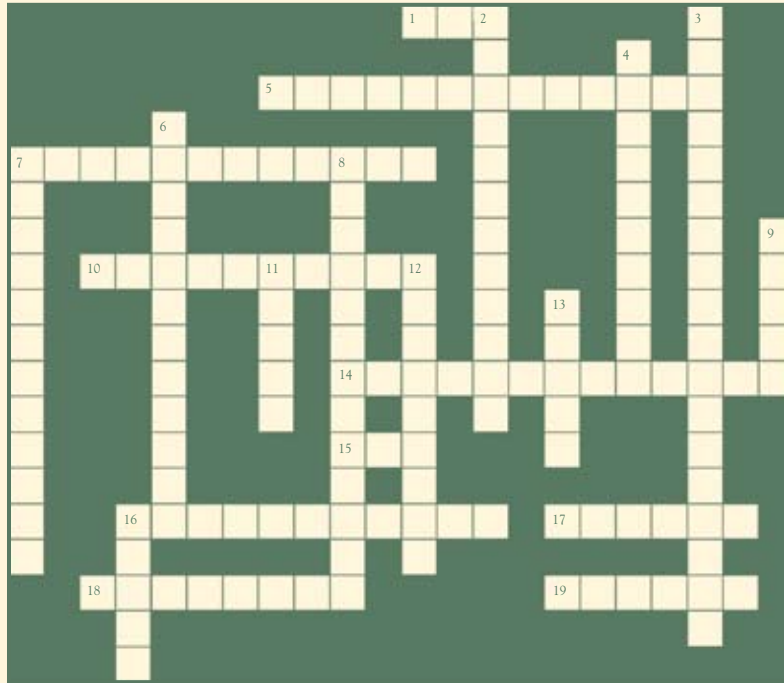


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Reality TV Puzzler

Across

1. What Ty Pennington wants moved at the reveal on "Extreme Makeover: Home Edition"?
5. A Sorcerer's protege, or boardroom schmoozer.
7. Jerry Bruckheimer's trek around the world.
10. Joe Rogan decides if this is a factor for you.
14. America's first Idol.
15. How many days do you have to renovate a room on "Trading Spaces"?
16. The reality show where women battle for a rose.
17. Subject matter for "The Contender" and "Next Great Champ"?
18. The tribal council votes you off which reality show?
19. Matt Damon and Ben Affleck give people a chance to make what in "Project Greenlight"?



Down

2. The Fab Five have an "eye" for whom?
3. John Walsh helped create this show after the death of his six-year-old son.
4. Older, wiser sibling, always watching you.
6. Who was the first "Survivor"?
7. Brian Dunkelman was a host of what reality TV show's first season?
8. "That 70's" TV star who has all of Hollywood looking over his shoulder.
9. This English critic does not make it simple for the "American Idol" contestants.
11. "American Idol's" scandalous female judge.
12. What show are you watching to find out what happens when people stop being polite and start getting real?
13. "News Radio" star who is now hosting "Celebrity Poker Showdown".
16. Who makes the final decision in the boardroom on "The Apprentice"?

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