

SHAMBERG, JOHNSON & BERGMAN

—TRIAL ATTORNEYS—

Fall 2006



Welcome

Automotive product liability cases are among the most challenging and complex we handle. Yet, they are also some of the most rewarding, as we have had the opportunity to represent some wonderful people and to make a difference in improving automotive safety for the general public. In this issue, we report on a successful automotive crashworthiness settlement, a difficult \$2.95 million intersection collision settlement and a \$1 million medical negligence verdict.



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Young Man Suffers Severe Brain Injury From Defective Rear Seat and Liftgate

Aaron Wiedmer was severely and permanently injured on October 16, 2003, when the 1996 Jeep Cherokee in which he was a passenger collided with a Wal-Mart tractor/trailer rig on I-29 in St. Joseph, Missouri. Aaron's twin brother, Eric, was driving the

Cherokee, and Aaron was unbelted sitting in the right rear seat when Eric lost control as he was merging onto I-29 from eastbound US Highway 36. The Cherokee veered into the northbound lanes of I-29 where it was struck by the Wal-Mart

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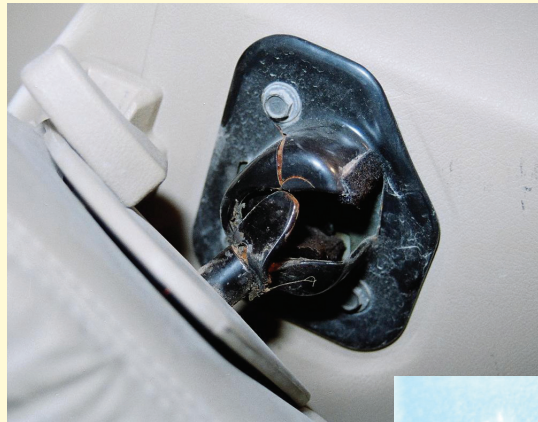
AUTOMOTIVE PRODUCT LIABILITY
Special Edition

truck. During the collision sequence, the Cherokee's rear seat collapsed backwards, throwing Aaron into the rear cargo area. The rear liftgate also fractured and broke away from the vehicle. Aaron was ejected out the rear of the Cherokee and struck his head on the pavement, fracturing his skull and causing a severe traumatic brain injury.

Lynn Johnson and Scott Nutter represented Aaron in a lawsuit against DaimlerChrysler Corporation and others in Buchanan County, Missouri. The suit alleged the Cherokee's rear seat latch assembly and rear liftgate were defectively designed.

Building on our firm's experience gained in prior seat back failure

cases, we developed evidence demonstrating the rear seat latch assembly is designed to maintain the



Jeep Cherokee seat latch

rear seat back in its upright position. In a rear impact collision, the seat back is the primary mechanism of restraint that prevents an occupant from ramping backwards and being ejected from the seat. The Jeep Cherokee's rear seat latch assembly is comprised of a metal rod with a flange that is integrated into the upper corners of the rear seat back. The rod connects to a small metal receiver bolted to the lower portion of the roof-pillar. Other sport utility vehicles, including the Jeep Liberty, are designed with a rear seat latch assembly that resembles a door latch and utilizes a stronger, loop shaped steel rod to lock the seat in its upright position.

Our seat design expert testified that the Cherokee latch assembly is defective because it lacks sufficient strength and structural integrity to hold the rear seat back in its designed, upright position during foreseeable collisions. Testing conducted by our

expert documented that the metal seat back rod breaks away from the receiver under moderate collision forces causing the seat back to collapse. These tests duplicated exactly what occurred to Aaron's seat back in this case. We also developed evidence demonstrating that the stronger door latch/loop design used in other 1996 SUVs would have withstood the collision without failing,



Jeep Liberty seat latch

and Aaron's injury would have been avoided.

With regard to the liftgate, Chrysler designed 1984-1996 Jeep Cherokees with a fiberglass or plastic liftgate structure. Internal company documents revealed that in the early 1990s, Chrysler formed a "liftgate task force" to study the performance of the liftgate and found that it was cracking, sagging and failing from ordinary wear and tear, as well as during all varieties of crash modes. Chrysler's suppliers recommended that it change to an all-steel liftgate or that steel reinforcements be placed within the fiberglass structure. Chrysler ultimately decided to

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*Chrysler Crashworthiness Case
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build the Jeep Cherokee with an all-steel liftgate, but did not incorporate the design change until the 1997 model – one year too late for Aaron Wiedmer. In choosing a plastic liftgate structure, Chrysler's engineers admitted they gave no consideration to crashworthiness and did no testing to evaluate the safety of the liftgate in real world crashes.

Crashworthiness cases are often defended by showing that other manufacturers use the same or similar design and, therefore, the design used must be reasonably safe. However, Chrysler could not identify a single vehicle that utilized the same rear seat latching mechanism as the Jeep Cherokee. We also learned the Jeep Cherokee was the only sport utility vehicle ever made with an all-plastic liftgate. Even the 1996 Grand Cherokee, the Jeep

Cherokee's sister vehicle, had a steel liftgate.

Chrysler defended the case by arguing the collision was a "big hit" and that no rear seat latching assembly or rear liftgate could withstand a 65 mph impact from a 60,000 tractor/trailer. Chrysler developed evidence purporting to show that Aaron would not have been ejected had he been using his seat belt. Chrysler also argued the Jeep Cherokee met all applicable Federal Motor Vehicle Safety Standards (FMVSS) and, in fact, the rear seat assembly exceeded the FMVSS 207 strength requirement by more than 20%.

As with many other automotive crashworthiness cases our firm has handled, discovery of other similar incidents (OSIs) proved key in building plaintiff's case and responding to Chrysler's defenses. In particular, plaintiff found a Florida case involving a side impact

to a 1995 Jeep Cherokee where a fully-belted, rear seat occupant was ejected and killed. In that case, there was no direct impact to the rear of the vehicle. The rear seat collapsed from only the centrifugal forces imparted on it as the vehicle rotated post-collision. The belted occupant slid out from under his lap belt and impacted the liftgate from the inside. That force fractured the plastic liftgate and caused it to break away from the vehicle. Even though we disputed Chrysler's "big hit" defense, this other incident demonstrated the design of the rear seat latching assembly and rear liftgate in this vehicle are so inadequate that they can fail without any impact at all. It also demonstrated that seat belts are not effective in restraining passengers if the seat collapses during a rear end collision.

The case settled for a confidential amount two weeks before trial.

John Shamberg Awarded Phil Lewis Medal of Distinction

John Shamberg was awarded the Phil Lewis Medal of Distinction at the 2006 Convention of the Kansas Bar Association. The KBA's Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in the administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others. It is the most prestigious award given by the KBA and is given only in those years

where it is determined that there is a worthy recipient.

John has devoted his career to civil litigation and participated in major cases that have expanded the rights of injured persons and shaped the development of tort law in the State of Kansas, including the case that abolished governmental immunity in Kansas. Aside from being a great trial lawyer, John is a great person who leads by example and practices law with the highest degree of professionalism and compassion. We are proud to have John Shamberg as our senior member and co-founder of the firm.



Taxi Cab Company Pays \$2.95 Million to Woman Injured During Jackson County Intersection Collision

Eddie Mae Walker was seriously injured on June 2, 1999, when a Yellow Cab Company taxi cab collided with the vehicle in which Eddie Mae was a belted, front seat passenger. Lynn Johnson and Scott Nutter filed a lawsuit in Jackson County, Missouri against Yellow Cab, the cab driver and the driver of Eddie Mae's vehicle. The collision occurred at an unmarked intersection on the County Club Plaza. Liability was disputed with the cab company claiming the other driver failed to stop at the intersection, was driving at a high speed and failed to keep a safe lookout. Although the cab driver testified that he "always" stopped and checked for traffic at unmarked intersections and admitted it would be "reckless and unsafe" to fail to do so, our investigation uncovered an eyewitness who disputed the cab driver's claims. The eyewitness testified that the Yellow Cab barreled through the intersection without stopping or slowing down and struck Eddie Mae's vehicle on its front passenger side. The cab driver's story was also undermined by Yellow Cab's dispatch procedure. Just prior to the collision, the cab driver was parked outside the Capitol Grille waiting for business on a slow night. A call came from

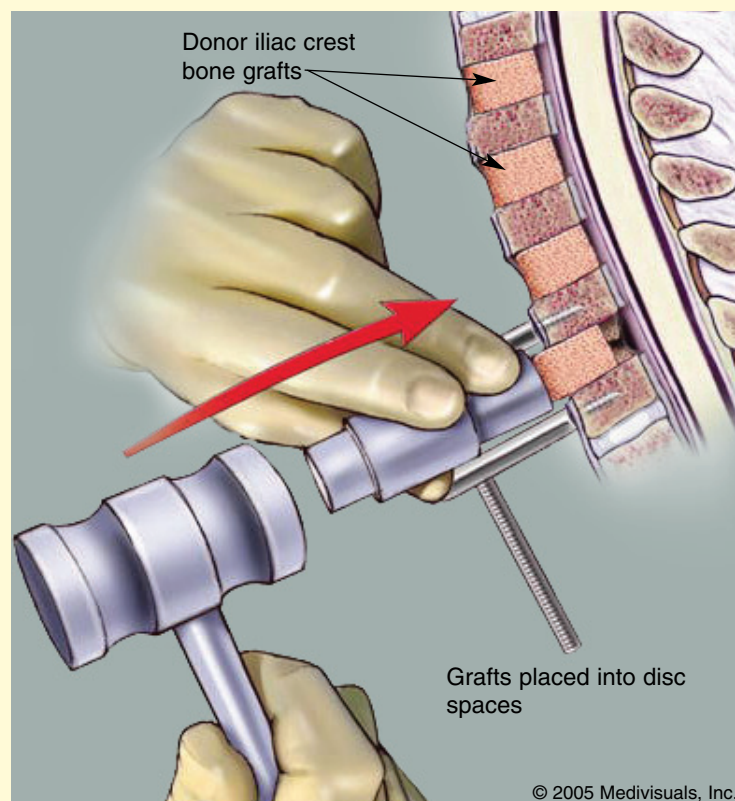
dispatch indicating that someone needed a ride from Houston's Restaurant. The dispatch call goes to all Yellow Cab drivers on a "first come, first served" basis, a practice known by drivers as "rip and run." Plaintiff was prepared to argue that the cab driver was rushing to Houston's to get that business and blew through the intersection in reckless disregard for the safety of others.

The biggest challenge of the case involved proving causation and damages. Simply put, the severe nature of Eddie Mae's injuries did not seem to match the collision, a point the defense repeatedly emphasized. The taxi cab was traveling 35

mph when it struck Eddie Mae's vehicle – which was going only 5 mph. The two drivers were not injured, and Eddie Mae refused treatment at the scene. Later that evening, Eddie Mae was taken to the emergency room with complaints of pain in her face and arm and other soft tissue injuries. She did not suffer any fractures or herniations. Eddie Mae was treated and released with instructions to follow up with her primary care physician.

Eddie Mae did not seek treatment for her neck pain until June 10, a week after the collision. After months of conservative treatment, an October 1999 MRI revealed severe cervical spinal stenosis with

nerve root irritation requiring cervical fusion surgery from C-3 through C-7 involving plating, screws and a bone graft. Eddie Mae also had bulging discs in her lower back, and her treating orthopedic surgeon recommended future lumbar fusion surgery. Moreover, Eddie Mae developed shoulder pain following the collision, and a September 2000 MRI showed a rotator cuff tear requiring surgery. Eddie Mae became totally disabled and unable to return to work as a bus driver – a



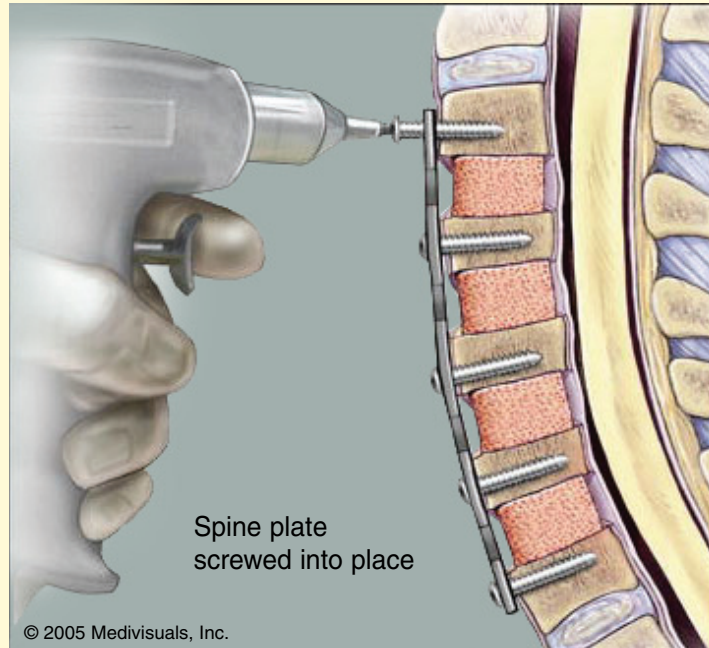
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Taxi Cab Collision Case
Continued From Page 4

job she held for more than 20 years.

There were several hurdles to overcome in proving the collision caused such severe injuries. Eddie Mae was 57 years old, and it was undisputed that she has pre-existing degenerative arthritis in her neck, lower back and shoulder. Eddie Mae was also a large woman and suffered from hypertension and high cholesterol. These conditions, some alone and certainly when combined, could potentially have caused all the injuries with which Eddie Mae was suffering. Based largely on the lapse in time between the collision and the onset of Eddie Mae's symptoms, the defendant's expert orthopedic surgeon was prepared to testify that Eddie Mae's injuries resulted from pre-existing conditions unrelated to the collision.

The case turned on Missouri law with regard to multiple causes of damage and the testimony of Eddie Mae's treating physicians. It was undisputed that but for the pre-existing arthritis in her neck, back and shoulder, Eddie Mae would not have been injured so severely. Under Missouri law, however, a plaintiff with pre-existing conditions can still recover all his/her damages if an event directly caused or "directly contributed to cause" the injuries – as reflected in MAI



19.01. We demonstrated through Eddie Mae's primary care doctor that, prior to the collision, she had no history of neck, back or shoulder pain. In fact, before the wreck, Eddie Mae was very active – working full time as a bus driver and



Post-operative X-Ray

serving, among other activities, as president of the bus driver's union. Testimony from friends, family members and co-workers confirmed that Eddie Mae was previously a happy, healthy and energetic person. They also confirmed that now, as a result of her injuries, Eddie Mae cannot work, cannot walk without assistance, cannot clean her house, mow her yard or otherwise live independently.

Eddie Mae's treating orthopedic surgeons testified that the taxi-cab collision aggravated Eddie Mae's arthritis and caused nerve root impingements and tears that did not previously exist. It was the collision – combined with the arthritis and other factors – that directly caused or at least directly contributed to cause Eddie Mae's disabling injuries and damages. Put differently, had the collision not occurred, Eddie Mae would have continued to be asymptomatic and lived a full, active life. Defendant was left to face the causation testimony of Eddie Mae's treating doctors and the testimony from friends, family and co-workers with a single retained expert who did not know Eddie Mae and had never treated her.

A week before trial, the cab company paid \$2.95 million to settle. We thank co-counsel Marc Bendinelli of Denver, Colorado for his outstanding work in this case.

Failure to Report Abnormal EKG Results in \$1 Million Verdict

An anesthesiologist's failure to inform a 51-year-old northwest Missouri man about an abnormal EKG study resulted in a \$1 million wrongful death verdict in St. Joseph, Missouri.

The events leading up to this eight-day jury trial began on September 23, 2000. Michael F. Shearman, a pharmacist who owned and operated a pharmacy in Savannah, Missouri, went to the emergency room at Heartland Regional Medical Center with severe abdominal pain. Doctors diagnosed him with probable appendicitis and, following consultation with a surgeon, performed an EKG as part of the hospital's routine preoperative procedures. The EKG revealed coronary artery disease and at least one prior heart attack. The staff at Heartland did not share the results of the EKG with Mr. Shearman or his family.

A few hours later, defendant Kenneth R. Young, M.D., a licensed anesthesiologist at Heartland, performed a pre-

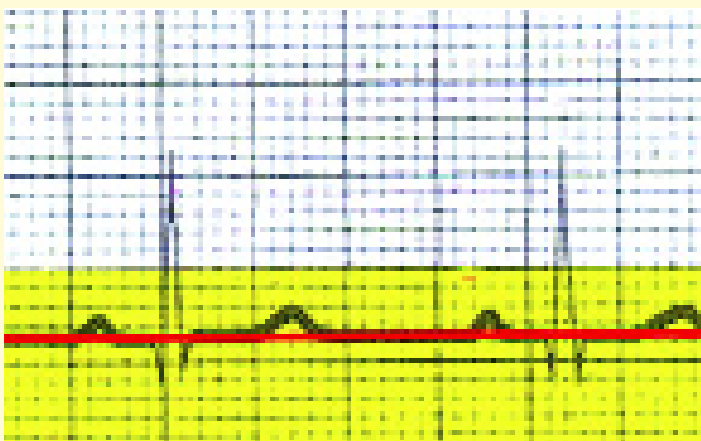
anesthesia physical assessment of Mr. Shearman that should have included a review of the abnormal pre-operative EKG. Dr. Young's review gave surgeon Edward M. Beheler clearance to perform the routine appendectomy. Following surgery, Dr. Young performed a post-anesthesia assessment that, once again, should have included a review of the EKG results. Mr. Shearman was discharged from the hospital four days later without ever knowing about the abnormal EKG.

Nearly 10 months later, on July 22, 2001, Mr. Shearman began mowing their acreage while his wife, Rebecca J. Rotterman, ran errands. She returned later that day to find Mr. Shearman's lawn mower pulled up awkwardly in front of the garage and Mr. Shearman lying dead inside the house on the carpet. The county coroner determined the cause of the death to be natural and did not recommend an autopsy. In accordance with Mr. Shearman's wishes, his family had his body cremated.

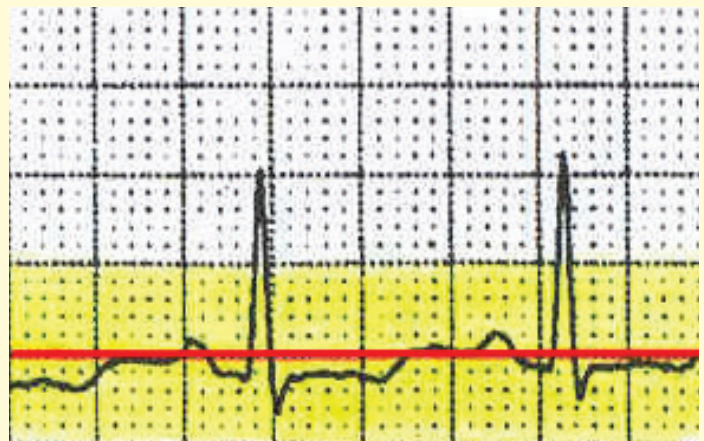
In the months prior to Mr. Shearman's death, the Shearmans were building a new pharmacy that required a significant bank loan. Because of this, the lender recommended that Mr. Shearman increase his life insurance coverage. Mr. Shearman underwent a health screening, including an EKG. The results were pending when he passed away.

A few weeks after Mr. Shearman died, the life insurance company called Mrs. Rotterman to tell her that the company could not approve Mr. Shearman's application. The denial was based in part on an abnormal EKG study taken as part of the application. After talking with one of Mr. Shearman's daughters, Kelly Logan, a medical student, Mrs. Rotterman obtained her husband's medical records, including the EKG report from his September 2000, appendectomy at Heartland Regional Medical Center. Kelly showed her father's Heartland EKG to one of her

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Normal EKG



Abnormal T-wave below baseline

*Failure to Report Abnormal EKG Case
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professors, who needed only a quick glance to declare that the EKG was a sure way to rouse a cardiologist out of bed in the middle of the night.

A pretrial settlement was reached with the surgeon, Dr. Beheler. The case was then tried in Buchanan County Circuit Court before the Honorable Weldon C. Judah. The remaining defendants were Dr. Young for failing to notify Mr. Shearman or his family about the abnormal EKG results obtained during the appendectomy, and Heartland Regional Medical Center for failing to notify its physicians and Mr. Shearman about the abnormal test result.

To prove plaintiffs' case, Lynn Johnson faced two major hurdles at trial. First, with no autopsy and no body to exhume, he had to establish that Mr. Shearman died from coronary artery disease. Second, he had to prove that available medical treatments would have prevented Mr. Shearman's death had he been informed of the abnormal EKG results.

The first hurdle – that Mr. Shearman died from coronary artery disease – was cleared with help from our expert pathologist who testified that considering the circumstances surrounding Mr. Shearman's death and his medical history, he more likely than not died from blockage in his coronary arteries and not from a different type of heart problem or heat stroke, as the defendants suggested. The second hurdle – that medical treatments available

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Pursuit of Medical Negligence Lawsuits Improves Patient Care

In an era where cries for tort reform and allegations of frivolous medical negligence lawsuits have become commonplace, it is heartening to see that trial lawyers and determined plaintiffs can improve the quality of health care for others by pursuing legitimate claims.

Clients frequently tell us that monetary compensation is not their primary goal. Many view their claims as vehicles to ensure that future patients do not suffer from the type of treatment that injured them or their loved ones. Two recent medical negligence cases that Lynn Johnson pursued illustrate how these claims can improve patient safety in our communities.

In the first case, an anesthesiologist failed to inform a northwest Missouri man that a routine EKG revealed that he had suffered from coronary artery disease and had experienced at least one prior heart attack. The plaintiffs alleged that Heartland Medical Center employees had failed to follow the hospital's policies and procedures for ensuring that an EKG report performed as part of a routine surgery was on the patient's medical chart and that the treating anesthesiologist had reviewed it. Before the death and at the time of Mr. Shearman's routine surgery, Heartland's anesthesia service used a set of pre-operative anesthesia orders that listed a number of standard tests and procedures to be routinely performed on patients. The order set consisted only of a stock list, with no boxes for staff or physicians to check off applicable procedures and no signature line for a physician to confirm that the necessary procedures had been performed. Within months of Mr. Shearman's death and after being contacted by his widow, the

hospital replaced its pre-operative anesthesia order sheet with a form requiring staff and physicians to check off procedures that had been ordered and performed, and requiring a physician's signature at the bottom.

The second case involved a surgeon who perforated a client's bowel while performing a laparoscopic cholecystectomy. During the procedure, the surgeon failed to visualize the surgical field after performing the procedure to check for perforations. An expert for the plaintiff testified the surgeon was negligent for failing to check for bowel perforations with a surgical camera. A defense expert, who performed laparoscopic cholecystectomies as part of his medical practice, revealed at his deposition that prior to reviewing this case, it was not his practice to insert a camera into a surgical port to check for perforations. However, since reviewing the case, the surgeon changed his practice and now inserts a camera into the surgical field after performing a laparoscopic cholecystectomy to ensure that no perforations occurred during the procedure. The case settled for a confidential amount shortly before trial.

Even though measures taken to improve the health care of subsequent patients are typically inadmissible in court, our clients have obtained great satisfaction knowing that their oftentimes unpleasant and lengthy pursuit of claims has resulted in safer health care for others. Our firm is not unique in this regard, and we salute all of those who take on these difficult and expensive cases. As demonstrated above, trial lawyers and determined clients make a difference for us all.

Electronic Stability Control Saves Lives

Statistics show that single-vehicle crashes cause more than 21,000 deaths a year, with rollover crashes alone killing more than 10,000. Every day across the country, drivers are forced to make emergency avoidance maneuvers at highway speeds – whether swerving to miss a deer, another vehicle or some object in the roadway. It is at this critical moment that electronic stability control (ESC) can make the difference.

ESC is an active safety system that uses sensors to detect when a vehicle is heading off its intended path and at the threshold of losing control. The sensors monitor conditions such as wheel speed, steering wheel angle, yaw rates, lateral accelerations and throttle position. When a vehicle nears the point of losing control, the system automatically brakes the wheels individually and/or adjusts the engine torque in a manner that acts to put the vehicle back on course. ESC is especially valuable in maintaining control during emergency situations or other circumstances requiring abrupt steering maneuvers.

ESC is being called the most important automotive safety innovation since the air bag and is being compared

to seat belts for its effectiveness in protecting the public from death or serious injury. A recent study conducted by the National Highway Traffic Safety Administration (NHTSA) concluded that ESC or similar stability control technology reduced single-vehicle SUV crashes by 67% and reduced SUV fatalities by 63%. The technology also reduced passenger car single-vehicle crashes by 35% and

Motors began offering it in 1997 on Cadillac cars and in 1998 on the Chevy Corvette. Honda offered ESC on the Accord in 1997. It became standard equipment on all Mercedes vehicles in 1999. Toyota offered ESC as standard equipment on the 4Runner SUV beginning in 2001. However, the automotive industry has generally been slow to respond in incorporating this life-saving technology – especially on rollover-prone SUVs. This is inexcusable, and automotive manufacturers must be held accountable for injuries and deaths that ESC would have prevented.

NHTSA is considering a proposal to require that all vehicles

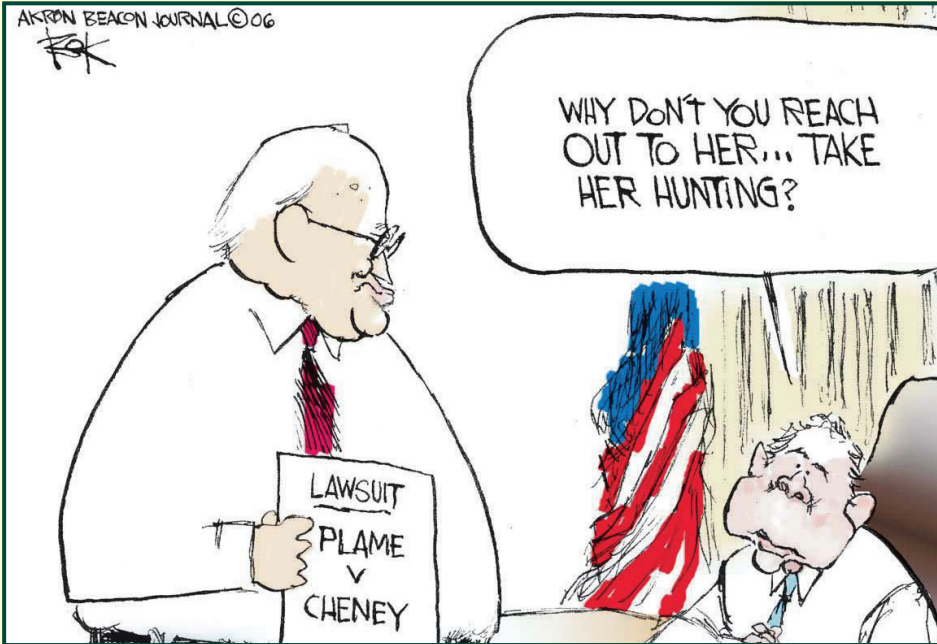
have ESC by the year 2010. The automotive industry must not wait for a government requirement. ESC has been technically and economically feasible since at least the mid-to-late 1990s. Its safety benefits have been proven repeatedly. ESC is critical, life-saving technology that should be on every vehicle sold in the United States today.

Our firm is currently pursuing several cases where an automotive manufacturer's failure to use ESC led to tragic consequences.



fatalities by 30%. A similar study from the Insurance Institute for Highway Safety estimated that more than 7,000 lives a year would be saved if all vehicles were equipped with ESC. The numbers are staggering. Priya Prasad, a well-known safety consultant at Ford Motor Company, recently stated that he will not buy a vehicle without ESC. Don Sherman of Popular Mechanics commented: "It's like having God as your co-pilot."

ESC first became available on certain vehicles as early as 1995. General



*Failure to Report Abnormal EKG Case
Continued From Page 7*

before Mr. Shearman's death would have prevented his untimely passing – was cleared with help from our cardiologist. He testified that through dietary changes, exercising, medications, and more invasive procedures such as angioplasty and stents, Mr. Shearman could have sought treatment that would have prevented his July 22, 2001, death. He also testified about the failure to properly read or inform Mr. Shearman of the abnormal EKG results – which were described as a red flag for a major surgical risk – taken before Mr. Shearman's surgery. Our anesthesiology expert then testified concerning Dr. Young's failure to seek out the pre-op EKG results and his failure to appreciate abnormal heart readings when Mr. Shearman was in the recovery room following the appendectomy.

Plaintiffs settled with Heartland Regional Medical Center after the first week of trial for \$250,000 and then proceeded to verdict against

Dr. Young. After deliberating for almost seven hours, the jury returned with a \$1 million verdict against Dr. Young. More satisfying to the plaintiffs was the fact that shortly after Mr. Shearman's death,

Heartland Regional Medical Center changed its pre-operative anesthesia policies to require that anesthesiologists confirm that an EKG has been performed (see Sidebar on page 7).

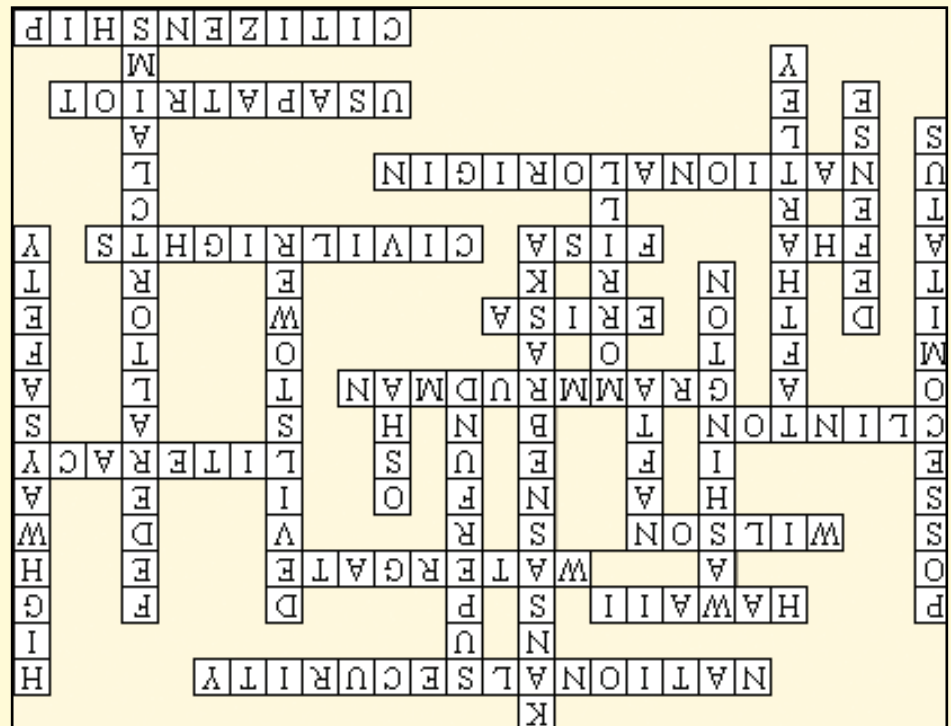
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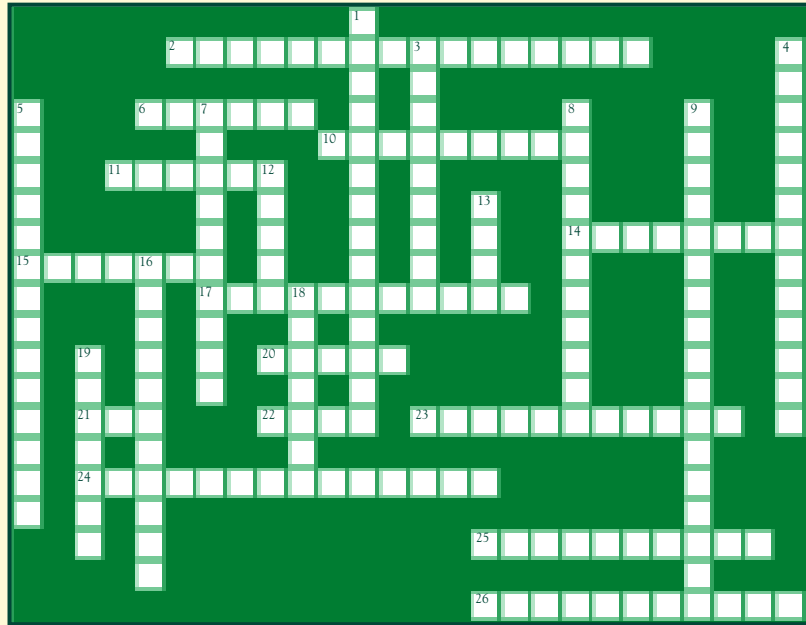
Answers to Acts of Congress Puzzler



Acts of Congress Puzzler

Across

2. The Central Intelligence Agency was established by this 1947 Act. (2 Words)
6. The Admission Act of 1959 made this territory a state.
10. The Ethics in Government Act was passed in the wake of what political scandal?
11. The Selective Service Act, signed by this President, gave the executive branch the power to draft soldiers.
14. The Voting Act of 1965 outlawed the requirement that U.S. citizens take this type of test to qualify to vote.
15. This U.S. President signed into law the Defense of Marriage Act, defining marriage as "a legal union of one man and one woman as husband and wife."
17. The 1985 Act that helped to produce the first balanced federal budget in a quarter of a century. (2 Words)
20. HIPPA and COBRA are amendments to this 1974 Act of Congress establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.
21. The National Housing Act of 1934 created this entity which guarantees home mortgages and provides funding to promote housing construction for low-income people.
22. Recent congressional hearings investigated whether current warrantless wiretapping activities violated the provisions of this act.
23. This act passed in 1964 with a majority vote after the longest filibuster in American history. (2 Words)



24. The Immigration Act of 1924 instituted this "quota" policy and the Immigration Act of 1965 abolished it. (2 Words)
25. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act is also known as what?
26. The Snyder Act of 1924 provided this to native Americans.

Down

1. This 1854 Act repealed the Missouri Compromise, allowed the issues of slavery to be decided by the residents of each territory, caused an eruption of violence in Kansas between pro-slavery and anti-slavery settlers, and some say was a key step on the way to the American Civil War. (2 Words)

3. Following the December 11, 1980 Love Canal disaster, Congress enacted CERCLA also known as what?
4. The National Highway Traffic Safety Administration (NHTSA) was created as a result of this 1966 Act. (2 Words)
5. Passed in 1878, this Act removed the Army from civilian law enforcement and returned it to its role of defending the borders of the United States.
7. What U.S. President signed the U.S. Postal Service Act into law on February 20, 1792?
8. The first National Monument created by Theodore Roosevelt under the Antiquities Act of 1906. (2 Words)
9. The Texas City Disaster of April 16, 1947, was the first ever class action lawsuit filed against the United States Government under this 1946 Act. (3 Words)

12. The "giant sucking sound", a phrase used by Ross Perot during the 1992 U.S. presidential campaign, when referring to the sound of U.S. jobs heading south for Mexico should this Act go into effect.
13. Richard Nixon signed into law this 1970 Act, the goal of which was to ensure that employers provide their workers with an environment free from dangers to their safety and health.
16. Passed by Congress over Truman's veto in 1947, Truman denounced this Act as a "slave labor bill". (2 Words)
18. Cornell University is one of over 69 institutions founded with federal funds under the provision of this 1862 Act.
19. The National Security Act of 1947 established this department of the U.S. Government.

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