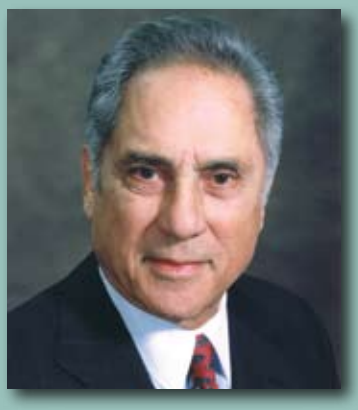
Shamberg, Johnson & Bergman
Trial Attorneys

Fall 2009

In Memoriam

John E. Shamberg

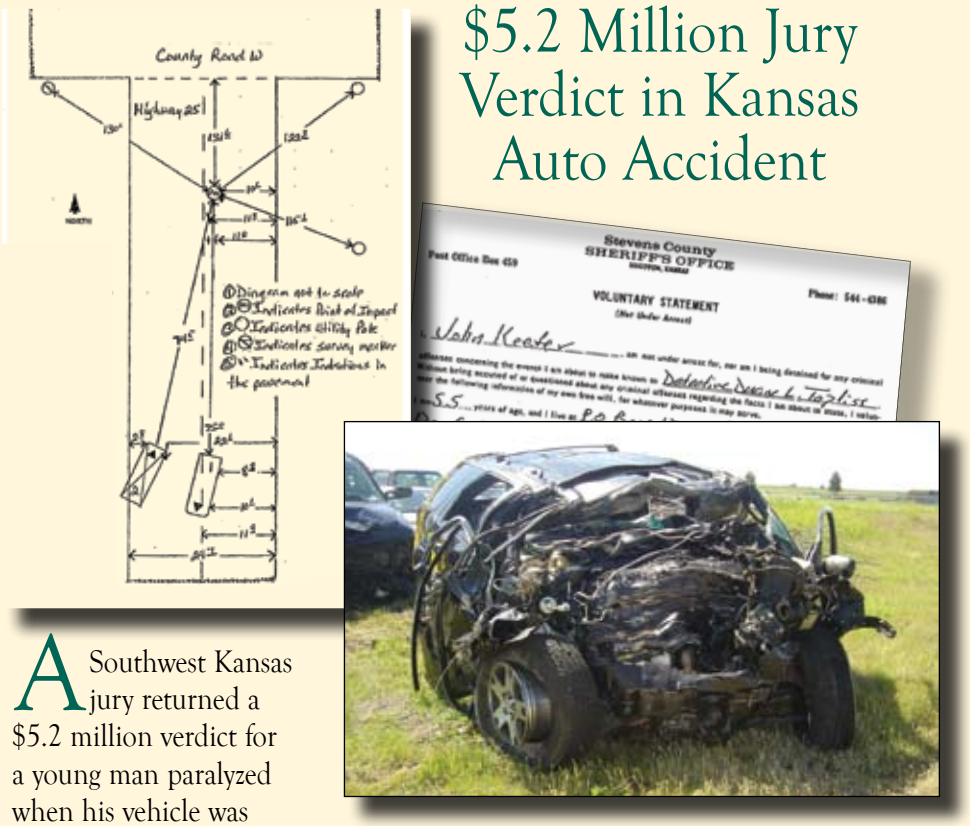


July 15, 1913 – July 9, 2009

With sadness, we announce the passing of our founder, mentor, partner and friend, John Shamberg.

John was a legal lion, an inspiration and role model for all our attorneys, a visionary. He was loved by his clients and respected by his peers. He was the consummate professional who strived mightily to strengthen the civil justice system. We are committed to carry on John's tradition of professionalism and passion. John is missed, leaving a void that can never be filled.

$5.2 Million Jury Verdict in Kansas Auto Accident



A Southwest Kansas jury returned a $5.2 million verdict for a young man paralyzed when his vehicle was struck by an oil and gas driller on his way home from an overnight shift.

Lynn Johnson and David Morantz pursued the case against the driller and his employer, Murfin Drilling Co., Inc.

On the morning of June 14, 2005, 16-year-old Paul Logan Clark was driving himself and a friend north from Hugoton in Stevens County, Kan. At the same

Verdict Continued on Page 7

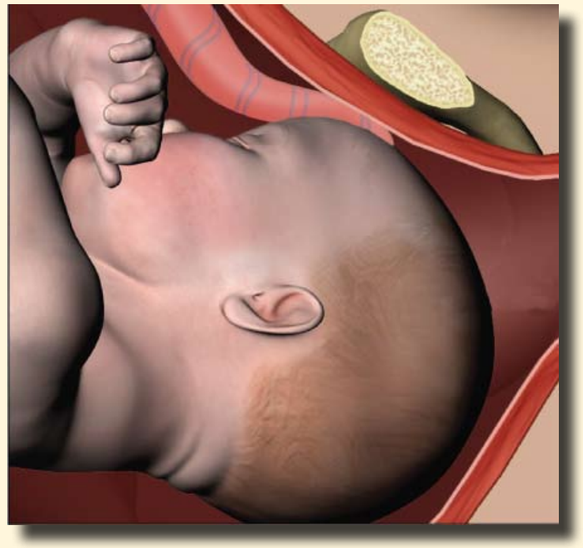
In This Issue

$5.2 Million Jury Verdict in Kansas Auto Accident 1
Birth Injury Case Settled 2
Jury Verdict Against Homeowner From Ladder Fall 3
"Ready, Aim Don't Fire:" 6

Birth Injury Case Settled: Cerebral Palsy Was Preventable

The negligence of an obstetrician and of labor and delivery nurses at Salina Regional Health Center resulted in a $4.72 million settlement. The case, which was handled by Vic Bergman and Matt Birch, exhausted the defendants' available insurance coverage and included $20,000 of the physician's personal assets.

On an early morning in February 2006, our client, Adriane, presented to the Salina Regional Health Center in active labor at 39½ weeks gestation. Four hours later, her daughter, Kylee, was delivered by emergency cesarean section, asphyxiated and permanently injured as a result of the physician's and nurses' delay in responding to signs of catastrophic umbilical cord compression.



Umbilical cord compressed between fetus' head and mother's pelvis.

From the moment a fetal heart monitor was placed on Adriane shortly after admission at 3:30 a.m., signs of umbilical cord compression accompanied every contraction. The on-call obstetrician, Dr. David Prendergast, had not met Adriane until he first came to her room shortly before 7 a.m. During that visit, he ruptured the membrane, producing a severe variable deceleration in the baby's heart rate. This was a red flag for umbilical cord occlusion. But it went unnoticed or ignored by Dr. Prendergast and the Salina Regional nurses. For the next 15 minutes an alarm on the fetal heart monitor sounded several times. Each time, it was turned off remotely from the nurses' station, with no further evaluation of Adriane or Kylee.

At about 7:15 a.m., Dr. Prendergast came back to Adriane's room. The fetal heart monitor strip for the previous 15 minutes was intermittent, difficult to interpret, and unreliable. At his deposition, Dr. Prendergast admitted that careful inspection of the fetal heart monitor strip for that crucial 15 minutes showed repetitive severe variable decelerations. Had these been noticed and appreciated, rapid evaluation and intervention would have occurred. But nothing was done.

At about 7:18 a.m., Dr. Prendergast told the nurse to have Adriane start pushing, because dilatation was complete. When she started pushing, the fetal heart rate appeared clearly on the monitor at 60 beats per minute — a rate incapable of pumping blood to vital organs, including the brain. Because Dr. Prendergast had left the floor after giving the nurse the instruction to have Adriane start pushing, four minutes passed before personnel could find him and get him to the bedside. He ordered an emer-

Birth Injury Continued on Page 4

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Jury Verdict Against Homeowner From Ladder Fall

A Johnson County jury returned a $1.2 million verdict for a mentally challenged laborer who fell from a ladder while trimming a tree. The verdict followed a refusal by the defendant's insurance carrier to pay its $100,000.00 policy limits early in the case.

In September 2004, the defendant homeowner was under pressure from the City of Shawnee to cut low-hanging branches in front of his house. Rather than pay a $600 bid to a professional service, the defendant hired Richard Payne, a 33-year-old family friend with *mental disabilities*, for $8 an hour to help trim trees.

Mr. Payne had virtually no experience trimming trees, but the defendant did. The defendant leaned an extension ladder against the tree limb, and Mr. Payne climbed the ladder to cut branches. After extending the ladder to 20 feet to clear a high branch by mere inches, Mr. Payne expressed concern about the ladder's placement. It was leaning against the branch they intended to cut, and it was placed in the street at a steep incline. The defendant assured Mr. Payne that the placement was fine. He said he would climb it himself if was able.

Mr. Payne climbed the ladder and began to cut. The end of the branch began to drop. When it dropped low enough, the defendant grabbed the branch and jerked it down, causing it to break at the cut. The remaining portion of the branch sprung up and cleared the top of the

Ladder Fall Continued on Page 5

An exhibit shown at trial demonstrated the height and position of the ladder and plaintiff before the fall.

Birth Injury Continued From Page 2

gency c-section. Kylee was born obviously asphyxiated and nearly dead.

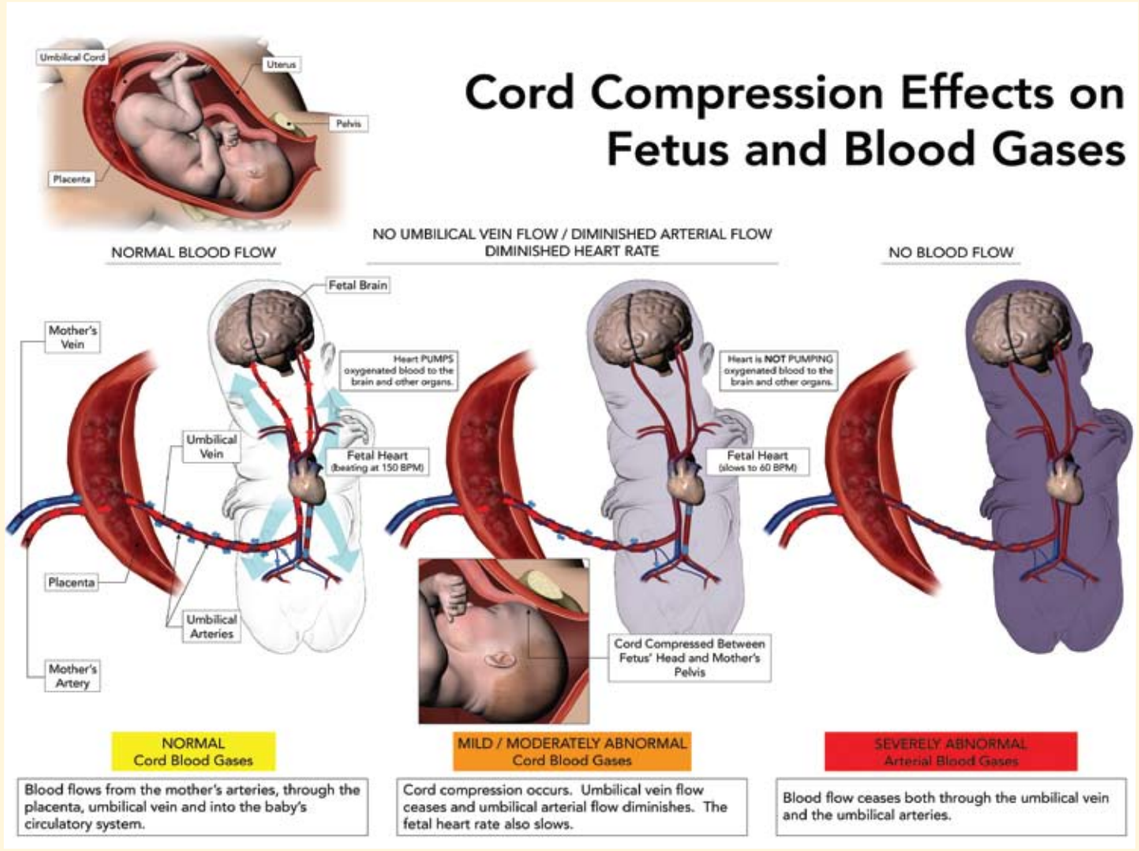
The delay in recognizing the cord compression and the consequent deprivation of oxygen, caused hypoxic ischemic encephalopathy and cerebral palsy. Kylee will never walk, talk or find gainful employment. She will always require 24-hour skilled care.

Plaintiff's experts, and several defense experts, stated that had Kylee been delivered before pushing began, she would have suffered no injuries.

An early mediation did not resolve the dispute. At a second mediation that followed expert discovery and significant additional expenses, Salina Regional offered to settle the case for $3.7 million, which represented all remaining insurance funds after payment on another claim. Dr. Prendergast offered to settle the case for his $1 million insurance coverage. Upon plaintiffs' counsel's insistence, Dr. Prendergast paid an additional $20,000 in personal assets to help offset plaintiffs' litigation expenses incurred between the two mediations.

Experts were used in obstetrics, labor and delivery nursing, neonatology, pediatric neurology, neuroradiology, placental pathology, life expectancy and economics.

This case is another in a long line of obstetrical negligence/birth injury cases handled by Shamberg, Johnson & Bergman, Chtd., dating back to the early 1980s.



Shamberg, Johnson and Bergman, Chtd., produced this exhibit to accompany an animation that illustrated the sequence of injury.

Electronic Records Clear Up Confusion

Obtaining complete electronic medical records can uncover the truth and shed light on confusing medical charts. Two excellent examples of this came from the obstetrical case reported in this issue.

Both examples involve the "audit trail," a computer log showing entry dates and times, display dates and times, user names, and input locations for all entries or changes to entries in an electronic medical chart. Such systems are mandated by 45 C.F.R. § 164.312. Many institutions have policies requiring each practitioner to have their own card or code to access the computer system and prohibiting the sharing of cards or codes with other practitioners. Therefore, it is possible to tell exactly who made each entry on the electronic chart, at what time, and at what location.

The first example of the importance of the audit trail came when the fetal heart monitor failed to detect a pulse. A "signal loss alert" was sounded but was then turned off. At his deposition, the obstetrician testified that he assumed someone had turned it off but that he had little understanding of how nurses or doctors would do so.

After the deposition, plaintiffs' counsel requested the entire electronic medical record, including the audit trail, which detailed actions taken by doctors and nurses, including turning off the "signal loss alert." According to the audit trail, the doctor had personally acknowledged the "signal loss alert." This rebutted his defense that he did not learn of the baby's dangerously low heart rate until it was too late. It also cast doubt on his professed lack of understanding of how the alert functioned.

The second example involved a nurse who testified that according to entries she made in the chart, she had come to the mother's bedside on two occasions during critical times in the case. The audit trail, however, showed that the computer entries supposedly evidencing her presence in the mother's room were made either hours later or from locations outside of the mother's room.

The audit trail also made clear that many notes that appeared to be contemporaneous were entered after the nurses' shifts were completed and after learning of the bad outcome. Finally, the audit trial showed that several entries had been modified or deleted.

Attorneys handling medical negligence cases should request full electronic medical records when trying to make sense of confusing electronic charts.

Ladder Fall Continued From Page 3

ladder, which then twisted and fell. Mr. Payne struggled to hang on to the branch but fell to the pavement. He fractured both wrists and tore his right rotator cuff, resulting in a frozen shoulder and a fixed claw deformity of his right hand.

Prior to the lawsuit, the defendant's home owner's insurance company, State Farm, refused a policy limit demand of $100,000.00. After discovery began, defense counsel offered to settle the claim for $100,000.00. Recognizing that insurers cannot normally cure bad faith under Kansas law, Shamberg, Johnson & Bergman, Chtd., sought a consent judgment and assignment of a bad faith claim from the defendant. The defendant refused, despite facing exposure well in excess of his policy limits. Shortly before trial, counsel learned that State Farm had agreed to indemnify the defendant for an excess judgment, in essence rewriting the policy without limits.

Victor Bergman and Shannon Kempf tried the case, using an expert arborist to explain how "reaction wood" caused the severed branch to thrust upward, springing the limb above the ladder and shaking Mr. Payne so violently that he could not hang on. Because the defendant had not provided safety gear, Mr. Payne was at nature's mercy. Plaintiff argued that the defendant should have hired a professional tree-trimming service rather than take advantage of Mr. Payne.

At the end of the five-day trial, the jury awarded $600,000 for medical expenses, $100,00 for lost wages and $500,000 for pain and suffering. The jury assigned 51 percent of the fault to the defendant and 49 percent to Mr. Payne.

"Ready, Aim, Don't Fire:" Hunting Accident Settled for Policy Limits

Despite safety precautions taken by hunters, serious accidents still occur. These incidents often involve members of the same hunting party and result from the accidental discharge or unsafe handling of a firearm, or from the victim being out of sight. In some cases, the victim is mistaken for game. See, e.g., Dick Cheney.

Such a case was recently and successfully handled by Victor Bergman and Aaron Kroll of Shamberg, Johnson & Bergman, Chtd. On April 17, 2007, the plaintiff and the defendant were turkey hunting together on private land in Jefferson County, Kansas. Both were part of a three-man hunting party that had split off in a fan-like direction in order to cover territory out of the line of fire from the other hunters. Without notifying the other members of the party that he had left his position, the defendant positioned himself on a hill top near the center of the designated hunting area where the plaintiff was located. After hearing some rustling behind a group of bushes for approximately 15 seconds, defendant fired his shotgun at what he believed was a turkey.

What the defendant thought was a turkey, however, turned out to be the plaintiff, whose left side from his waist to his head was filled with close to one hundred lead pellets. As a result, the plaintiff sustained traumatic and permanent injuries. A lawsuit filed on behalf of the plaintiff alleged that the defendant was negligent for violating hunting safety and game laws requiring the defendant to identify the intended target before discharging his firearm. Counsel for the defendant countered by claiming that the plaintiff was negligent for failing to wear blaze orange and in failing to call out to defendant during the hunt, even though neither is required under the Kansas hunting safety and game law regulations.

At the time of the incident, the plaintiff worked as a propane deliveryman and operated a cattle and farming business. The plaintiff returned to his propane delivery job with difficulty and continued his farming and cattle operation, making economic damages difficult to prove.

Plaintiff's counsel retained experts who testified at deposition that the plaintiff should no longer perform manual labor on his farming and cattle operation, and should be limited to light duty work. Given the nature of the plaintiff's injuries, the experts also testified that the plaintiff suffered a 30 to 40 percent reduction in his pre-injury wage earning capacity as a propane gas deliveryman. Furthermore, the plaintiff was at a high risk of sustaining severe future injury if he continued his farming and ranching.

After significant discovery was conducted by the parties, the case was settled for the policy limits of the defendant's insurer of $500,000.

Verdict Continued From Page 1

time, a southbound driller for Murfin was driving two of his crew members home from a rig site in his personal vehicle. The Murfin driller, possibly from fatigue, swerved across the center line. Mr. Clark tried but could not avoid the oncoming pickup truck.

The resulting collision left Mr. Clark paralyzed from the waist down and killed his 14-year-old friend, who was in the passenger seat.

The bulk of the litigation and discovery focused on whether Murfin's driller was in the "scope and course" of his employment at the time of the accident, and thus, whether Murfin was vicariously liable for its driver's negligence.

As discovery ended, Murfin moved for summary judgment, arguing that, as a matter of law, the driver was not in the scope and course of employment at the time of the accident. Murfin relied primarily on the "coming and going rule," which holds that employees driving to and from work are typically not in the scope and course of their employment.

Our attorneys filed a cross motion for summary judgment, asking the court to rule as matter of law that Murfin's driver was in the scope and course of employment when the accident occurred. Plaintiff's arguments relied on evidence that the driver was making crew members ride with him to and from rig sites and making them transfer their mileage reimbursements to him through Murfin's payroll department.

Plaintiff's arguments also relied on workers compensation documents prepared after the accident. A third party that Murfin had employed to handle workers compensation claims determined soon after the accident that Murfin's driller and his crew members should be covered by workers compensation, because the accident occurred while they were on the job.

Deposition testimony established that, under agency law, Murfin had adopted or ratified the determinations of its workers compensation agent and acknowledged that the employees were within the scope and course of their employment.

Plaintiff then argued that principles of equity prohibited Murfin from arguing in a vicarious liability case that its workers were not on the job after taking the position in a workers compensation matter that the workers were, in fact, on the job—and thus achieving tort immunity from potential suits by injured employees and third parties.

Adopting plaintiff's arguments, the trial court ruled that the driller was in the scope and course of his employment at the time of the accident. Faced with a possible appeal regarding this issue, plaintiff settled with Murfin for $4 million, plus $50,000 from the driller's private insurance, shortly before the jury returned its verdict.

For attorneys pursuing claims of vicarious liability against employers, this case highlights the importance of pursuing evidence of how companies have handled workers compensation claims. For briefs on this issue, please visit our website, www.sjblaw.com.

Answers To Puzzler: *Across*: 5. Lett 6. Bonjiconti 8. Buccaneers 12. Elliott 13. Athanas 18. Valerio 19. Ward 22. Thorpe 23. Gatorade 24. Collinsworth *Down*: 1. Jesus 2. Four 3. Simpson 4. Vikings 7. Lacrosse 9. Eye 10. Swann 11. Pacman 14. Bradshaw 15. Broncos 16. Wall 17. Florida 20. Page 21. Martin

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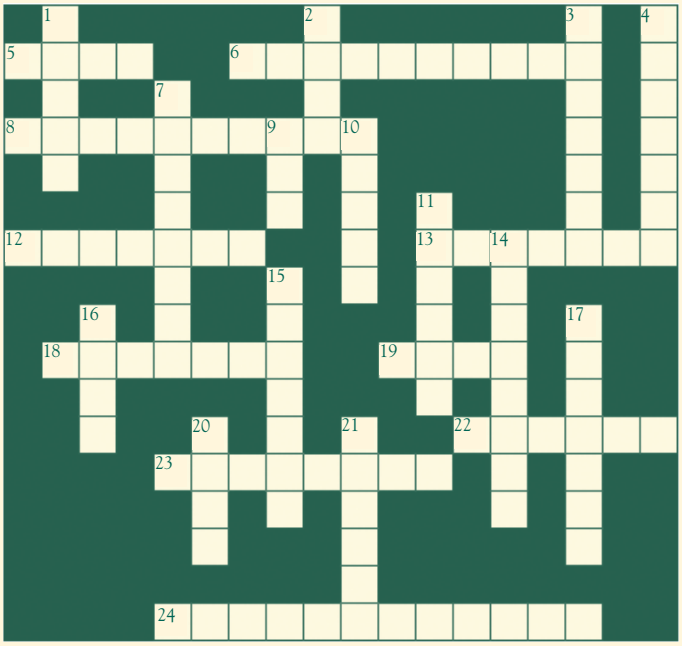
Past results afford no guarantee of future results.
Every case is different and must be judged on its own merits.
The contents of this Newsletter do not constitute legal advice.

Football Puzzler



Across

5. Dallas Cowboy Leon ___ fumbled the ball in Super Bowl XXVII after Don Beebe of the Buffalo Bills chased him down near the end zone.
6. Last name of former Miami Dolphin who earned his law degree while playing for the New England Patriots and later criticized studies showing the health risks of smokeless tobacco.
8. This NFL team (mascot) lost the first 26 games it played.
12. Last name of Chiefs place kicker who missed three field goals in 1996 playoff loss to Indianapolis Colts.
13. Last name of former Kansas City Chiefs tight end who serves in the Jackson County (Mo.) legislature.
18. Chiefs lineman Joe _____ caught three touchdown passes from Joe Montana.
19. Last name of Heisman Trophy winner who was so disappointed in the NFL draft that he left for the NBA.
22. Legendary athlete Jim ____ was the first president of the NFL, then known as the American Professional Football Association.
23. The Chiefs were the first NFL team to drink _____ on the sideline of a regular season game.
24. Last name of former Cincinnati Bengal and current broadcaster who graduated from the University of Cincinnati College of Law in 1991.

Down

1. After sacking quarterbacks, Reggie White often told them, "_____ loves you."
2. Before 1909, a field goal resulted in ____ points.
3. Last name of first professional football player to run for more than 2,000 yards in one season.
4. Along with the Buffalo Bills, this team has lost all four of its Super Bowl appearances (mascot).
7. NFL Hall of Famer Jim Brown was also inducted into the hall of fame of this sport, largely from his time at Syracuse University.
9. Former Cleveland tackle Orlando Brown sued the NFL for $200 million for a career-ending injury to this body part after being hit by a penalty flag.
10. Last name of former Chiefs head coach whose father was a professional wrestler.
11. Arcade game nickname of cornerback notorious for, among other things, allegedly "making it rain" at a Las Vegas club.
14. Last name of former Steelers quarterback and current television analyst who, according to a former Cowboys linebacker, "couldn't spell 'cat' if you spotted him the 'C' and the 'A.'"
15. After a 20-month investigation, the NFL ruled that this team (mascot) circumvented salary cap rules during a period in the 1990s when it won back-to-back Super Bowls.
16. In 1997, Redskins quarterback Gus Ferrotte celebrated a touchdown run by head butting a ____, which knocked him out of the game.
17. Along with California and New York, this state has the most NFL teams.
20. Alan ____ was a former "Purple People Eater" who later became a member of the Minnesota Supreme Court.
21. First name of former Kansas State kicker injured while celebrating a field goal.