Shamberg, Johnson & Bergman
Trial Attorneys

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Best Lawyers® Lawyer of the Year 2012

Welcome

While representing catastrophically injured clients who could benefit from medical, rehabilitation and residential care, we see up close the expanding chasm between our clients' needs and dwindling government benefits. Trial attorneys can help some of these people. But even in successful cases, there might not be enough insurance to provide even basic necessities. Our lawmakers must preserve benefits to the disabled and prevent further tort reform if we are to call ourselves a just society.

Jury Verdict Follows Warehouse Injury

A key legal victory transformed a Kansas warehouse injury into a case tried in Jackson County, Mo., under Missouri substantive law, free from Kansas' caps on non-economic damages. Scott Nutter and Douglas Bradley tried the week-long case to a $1.5 million verdict.

Our client, a longtime employee of a Kansas City, Kan., warehouse, was helping load a truck when the truck rolled forward, causing her to fall and suffer a spiral fracture of her femur. Even though it was a workplace injury, the case was free of workers' compensation, because the truck was owned by a Missouri flooring company, allowing the third-party negligence claim. The truck's driver, a Missouri resident, had failed to place blocks under the wheels, failed to put the truck in proper gear, and failed to set the parking brake.

The decision to file the case in Missouri was critical. Had the case been filed in Kansas, Kansas substantive law would have applied, because Kansas applies the law of the location of the accident – *lex loci delicti*. Kansas law would have had several disadvantages: (1) Limit on non-economic damages to

Jury Verdict Continued on Page 5

A spiral fracture of the femur required surgical repair after our client fell from a dock because a driver had not properly secured his truck.

Failure to Implement Policies for Newborn Jaundice Leads to Tragic Brain Injury

A hospital's failure to have policies in place to prevent devastating brain injuries to infants led to a $4.3 million Kansas settlement. Vic Bergman and Dave DeGreeff represented the family.

Daniel Deya was born healthy at Hiawatha Community Hospital in 2009. Tragically, he suffered a preventable brain injury as a consequence of untreated jaundice. Doctors missed the significance of several major risk factors for the development of severe hyperbilirubinemia documented in Daniel's medical record. These included late pre-term birth gestation, incompatibility between his blood and his mother's, male gender, and breastfeeding.

If high-risk infants are not identified, jaundice (increased bilirubin) may progress to severe hyperbilirubinemia. This can cause Kernicterus, a devastating brain injury and the preventable tragedy that occurred in this case, all due to ignorance and disregard for authoritative neonatal health recommendations.

> *Since 2000, national authorities have urged hospitals to adopt policies to assess and screen all newborns for the risk of hyperbilirubinemia before discharge and again during the first week of life.*

At about 23 hours of age, Daniel was first noted to have jaundice. Jaundice in the first 24 hours is always considered pathologic until proven otherwise, requiring measurement of the baby's bilirubin level in the blood. Daniel was discharged home at 41-hours of age. By then, his jaundice had progressed.

At five days of life, Daniel's condition rapidly deteriorated. He was taken to a local clinic where he was diagnosed with severe hyperbilirubinemia and transferred to Children's Mercy Hospital in Kansas City, Mo., where he was diagnosed with severe Kernicterus. Daniel has severe cerebral palsy and now needs 24-hour care for life.

Suit was filed in Kansas federal court against three defendants – Hiawatha Community Hospital, Steffen Shamburg, MD, and Peter Rosa, MD. In addition to claims of doctor and nursing negligence, plaintiffs claimed institutional administrative negligence on the ground that Hiawatha Community Hospital had never adopted policies or procedures for the evaluation, testing and treatment of jaundice, or for screening for the likelihood of severe hyperbilirubinemia (For briefs and a court order on this subject, please visit www.sjblaw.com, Resources, Briefs, Orders & Case Materials.)

Neither the physicians nor the nursing staff understood the significance of jaundice in the first 24 hours of life. Nobody performed a simple risk assessment for the development of severe hyperbilirubinemia. Nobody educated Daniel's family about the significance of jaundice at less than 24-hours of life, or taught them how to examine for the progression of jaundice, or told them that bilirubin levels peak at four to five days of age. The providers gave Daniel's family a false sense of security at discharge from the hospital by inappropriate advice that jaundice is common and not to worry because it always

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Lynn Johnson and John Parisi Scale Kilimanjaro

As Lynn Johnson and John Parisi climbed the final leg of Mt. Kilimanjaro through the pre-dawn darkness, the temperature dropped to zero degrees Fahrenheit, the winds reached 30 mph, and each breath and step nearly induced exhaustion.

"What the hell have I gotten myself into?" John thought and would have said aloud if he had the energy to speak.

Hours later, Lynn and John reached the summit, capping the rugged six-day climb.

The trek started out like many ideas – a half-baked pitch among friends to seek glory. John figured the idea would fade. But Lynn kept pushing plans for the trip. And in March 2012, John, Lynn and friend Dan Sweeney assaulted the highest mountain in Africa – and took a battering for their efforts.

"It was the most wonderful, physically demanding and grueling experience of my life," Lynn said. "Watching the sun rise over the crater from the peak was a spectacular exclamation point to our success of getting to the top."

Kilimanjaro is not as technically challenging as climbs in the Himalayas or Andes, but the extreme elevation – 19,340 feet – low temperatures and high winds make it a treacherous climb over rough terrain. The hike starts through the tropical rain forests at the mountain's base, passes through alpine desert and alien landscapes. Some describe the climb as similar to traveling from the equator to Antarctica in a matter of days.

To acclimate the climbers to the thin air, guides took them well above their campsites each night before descending a bit to sleep at lower elevation. More than halfway up the mountain, the trio had to present themselves to Tanzanian park rangers, who checked permits and looked over the hikers' physical condition before allowing them to attempt the ascent.

John Parisi (left), Lynn Johnson (center) and Dan Sweeney brave the wind and cold for a quick photograph after climbing Mount Kilimanjaro in March 2012.

Slumber during the climb was scarce. The lack of oxygen at high altitudes made sleep difficult, as did cold rain and wind gusts of 40 mph one evening that required tents to be held down by boulders. On the final leg of the climb, the hikers departed their tents at midnight into the dark, freezing cold.

The scene was surreal. Crushed quartzite paved the trail to the top, glistening in the headlamps worn by hikers. The headlamps and quartzite seemed to extend for miles above to the top. The planet Mars was plainly visible, red and striking on the horizon. The Milky Way looked close enough to touch and as vivid as a picture from the Hubble Telescope.

The hikers spent about 20 minutes on the peak as the sun rose. They then turned for the descent, which proved to be nearly as physically demanding as the climb.

"There were several times that if I had enough breath, I would have said some choice words to Lynn for dragging me up the mountain," John said. "But I could never have made it to the top without Lynn and Dan. Their companionship, humor and encouragement were essential."

For a detailed account of Lynn and John's hike up Mt. Kilimanjaro, and for more photos, please visit www.sjblaw.com, News, Firm News.

Digital Animations Help Case in Death of Bob Frederick

The tragic death of Bob Frederick, the beloved longtime athletic director at the University of Kansas and a respected national figure in college athletics, resulted from negligent construction work. Lynn Johnson and David Morantz filed suit in Douglas County, Kan., on behalf of the Frederick family, against Black Hills Energy, the gas utility company that had repaired a leak near the intersection, and the City of Lawrence.

The successful lawsuit revealed violations of construction policies and highlights the value of developing and presenting compelling demonstrative evidence.

An avid and experienced cyclist, Dr. Frederick was riding across a busy intersection in Lawrence, Kan., with a friend when his bicycle struck a hole in the road left over from recent construction. The ensuing fall resulted in a fatal head injury, despite a helmet.

Early discovery revealed a dispute between Black Hills' foreman and a concrete subcontractor about who was supposed to repair the hole at the conclusion of the job. A business records subpoena revealed a second subcontractor who had repeatedly told Black Hills that the hole had not been repaired and who had made futile attempts to make sure the hole was fixed. The city was dismissed from the case as it became clear that the gas company, through franchise agreements, had taken over the responsibility of repairing the job site.

With evidence that Black Hills' foreman had violated company policies and procedures concerning job site supervision and cleanup, much of the case focused on allegations of comparative fault against Dr. Frederick. The defendants claimed that he should have seen the hole and avoided it.

To counter this, demonstrative trial exhibits were developed. Plaintiffs' accident reconstruction and bicycle experts created detailed, multi-view animations that depicted

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Top: A Lawrence police photograph taken shortly after the accident. Center and bottom: Experts created digital animations based on photographs, HD video, "cloud scan" data and information from witnesses.

Digital Animations Continued from Page 4

what Dr. Frederick would have seen as he approached the intersection. The animations used information from the cyclist who was riding with Dr. Frederick at the time of the accident, and members of the Lawrence cycling community. They also incorporated information from motorists who were at the intersection, police photographs, digital "cloud scan" data, and high-definition video shot from cameras mounted on cars and on cyclists' helmets. The animations required numerous visits to the accident scene involving multiple experts and extensive computer work to match photographs taken the day of the accident to video and data collected one year later. The animations can be viewed at www.sjblaw.com, Trial Innovations.

The animations showed that a prudent and safe cyclist approaching the busy intersection would have focussed on the traffic lights and motor vehicles – as the other cyclist stated they were doing at the time of the accident – rather than looking down at the pavement. The animations provided the type of "C.S.I." depictions that many jurors have come to expect. The case resulted in a favorable settlement shortly after the depositions of plaintiff's experts and of the subcontractors who had tried to get the gas company to repair the hole.

The litigation helped hold responsible parties accountable for the accident. Dr. Frederick enjoyed an outstanding reputation, was a respected professor at the University of Kansas and a pillar of the Lawrence community. The strength and determination of Dr. Frederick's family in pursuing this matter and holding the parties responsible was an honor to his memory.

Jury Verdict Continued from Page 1

$250,000 statutory cap; (2) The defendant could allege fault against our client's co-workers and employer, who were not parties to the case and immune from tort claims because of workers compensation; and (3) A risk that our client could be completely barred from recovery if the jury found her 50 percent or more at fault.

Instead, by filing the case in Independence, Mo., Missouri's choice of law analysis applied, requiring the court to determine which state had the "most significant relationship" to the matter. When two or more states have significant relationships, the analysis focuses on the states' governmental interests in the case. With a Missouri plaintiff and Missouri defendants, the Court correctly determined that Missouri law should apply, despite the accident occurring in Kansas, because Kansas had no interest in a case involving Missouri parties.

Under Missouri substantive law, the defendant could not allege fault against our client's co-workers for the method they chose to unload the truck at the Kansas warehouse.

The defendants increased their offers from $150,000 at mediation, to $600,000 a week before trial, $800,000 three days before trial, and $900,000 on the first morning of trial. But the plaintiff held firm in demanding $1 million.

The trial featured testimony from a trucking expert stating that properly securing the truck before loading it would have prevented the accident. Defendants employed a warehouse safety expert to argue that our client was at fault for the methods she and her co-workers used to load the truck. Both sides also called experts in vocational rehabilitation, life care planning and economics.

By stipulation, the amount of our client's medical bills, about $268,000, and the amount paid, about $141,000, both went to the jury. The jury returned with an un-itemized verdict of $1,565,625 with 25 percent fault assessed to our client, resulting in an approximate judgment of $1.17 million. We would like to thank our co-counsel, Brianne Niemann, for her assistance on the case.

Failure to Implement Policies Continued from Page 2

resolves. They also said to use the long-discredited therapy of sunlight to treat Daniel's jaundice.

Each of the three defendants stated they had just one million dollars of insurance coverage. Plaintiff's damage claims included $250,000.00 for non-economic damages, past medical bills of $372,900.00, lost earning capacity of $4,700,000.00, and a life-care plan for over $27,000,000.00. Policy limits of $3 million were offered but turned down, and discovery proceeded.

The Chief Executive Officer of the hospital was subpoenaed to bring all of the hospital liability policies to a deposition, and it appeared that the combined coverage was limited to $3 million. But months later, just before mediation, a separate policy was located providing an additional $1 million of coverage for non-physician employees, i.e. the nurses. A claim was then made personally against the nurses, and the newly-discovered $1 million policy was added to the offer. The plaintiffs then insisted on a contribution from the individual defendants. The case finally settled for $4.3 million, which included all of the insurance coverage, plus $250,000.00 from the hospital, and $50,000.00 from Dr. Rosa.

This case was a tragedy upon tragedy – a completely preventable injury, and a grossly underinsured hospital.

Practice Tip

Counsel Responding to Deposition Changes Have Several Options

Litigators need to watch out for substantive deposition "corrections," which appear to be occurring more frequently. In Kansas, substantive changes run counter to prevailing state and federal case law. In Missouri, the rules of civil procedure permit deposition changes but require that the original and corrected answers be part of the final transcript.

Acceptable corrections or changes to deposition transcripts typically address misspellings, incorrect dates, or mistyped information. These types of changes are permitted. However, substantive changes might not be acceptable. How to respond to such changes is a matter of strategy. Substantive changes might be effectively used to impeach a witness at trial, so the decision might be to acquiesce. In Kansas, the other options are to move to strike the changes, or to reopen the deposition. Substantive changes are usually made with an eye toward motions for summary judgment, and the changes can determine the outcome. In such cases, the strategy would be to move to strike the changes.

Kan. Stat. Ann. § 60-230(e) controls depositions changes and is similar to Fed. R. Civ. P. 30(e). The Kansas federal district court has said that "a deposition is not a take home exam." Odessa Ford LLC v. T.E.N. Investments, Inc., 2008 WL 3077153 at *3 (D. Kan. 2008). Federal case law in Kansas appears to allow the original deposition answers to be used for impeachment at trial. If impeachment is impractical, or if substantive changes will affect summary judgment, counsel can seek to have changes stricken. Kansas federal courts apply a test under Burns v. County Commissioners of Jackson Co. to determine if deposition changes are material and should therefore be stricken. 330 F.3d 1275 (10th Cir. 2003). Material changes, which bear on an essential element of a claim or defense, are examined to see:

1) whether the witness was cross-examined at deposition,
2) whether the witness had access to pertinent evidence at the deposition, and
3) whether the original testimony reflects confusion which the change answers attempts to explain.

In Missouri, Rule 57.03(f) controls deposition changes. It states that any changes "in form or substance" must be accompanied by a statement of reasons for the changes. It also requires that the original answers be considered part of the final transcript. The trier of fact can consider both the original and changed answers. See Mosley v. Texas Cont. Express, 690 S.W.2d 482, 484 (Mo. App. W.D. 1985).

Lynn Johnson and Vic Bergman Win Lawyer of the Year Awards

Lynn Johnson and Vic Bergman have been named "Lawyers of the Year" in the Kansas City area for 2012 by Best Lawyers, a national publication. The coveted awards go to only one attorney in each metropolitan area for each practice area.

Lynn was named "Lawyer of the Year" in plaintiffs' medical negligence. Vic was named "Lawyer of the Year" in plaintiffs' product liability. The awards honor attorneys with standout careers and are decided through extensive peer-review surveys in which attorneys confidentially evaluate their peers.

"Lawyers being honored as 'Lawyers of the Year' are selected based on particularly impressive voting averages received during the exhaustive peer-review assessments we conduct with thousands of leading lawyers each year," Best Lawyers wrote. "Receiving this designation reflects the high level of respect a lawyer has earned among other leading lawyers in the same communities and the same practice areas for their abilities, their professionalism, and their integrity."

Victor A. Bergman
Product Liability Litigation – *Plaintiffs*
Kansas City, MO

Lynn R. Johnson
Medical Malpractice Law – *Plaintiffs*
Kansas City, MO

As a firm, Shamberg, Johnson & Bergman, Chtd. is listed in a related publication, "Best Law Firms," as a top tier firm in the areas of plaintiff's personal injury, product liability, professional liability and medical malpractice law. The "Best Law Firms" rankings appear in the *U.S. News and World Report Guide for 2012*.

Lynn and Vic have both been listed in "Best Lawyers" in the United States since 1987. The firm congratulates Lynn and Vic on their latest achievements.

Referral Relationships

We welcome referrals or will associate with you, and we will be considerate of your relationship with your client.

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

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

Answers to Puzzler: **Across**: 1) Antarctica 6) Hillary 8) Matterhorn 10) Avatar 13) K2 14) Helens 16) Mars 17) Kilimanjaro 18) Ice 19) Communism **Down**: 2) Coffee 3) Oxygen 4) Blanc 5) Catskills 7) Jayhawks 9) Gage 11) Colorado 12) Hawaii 15) Summits

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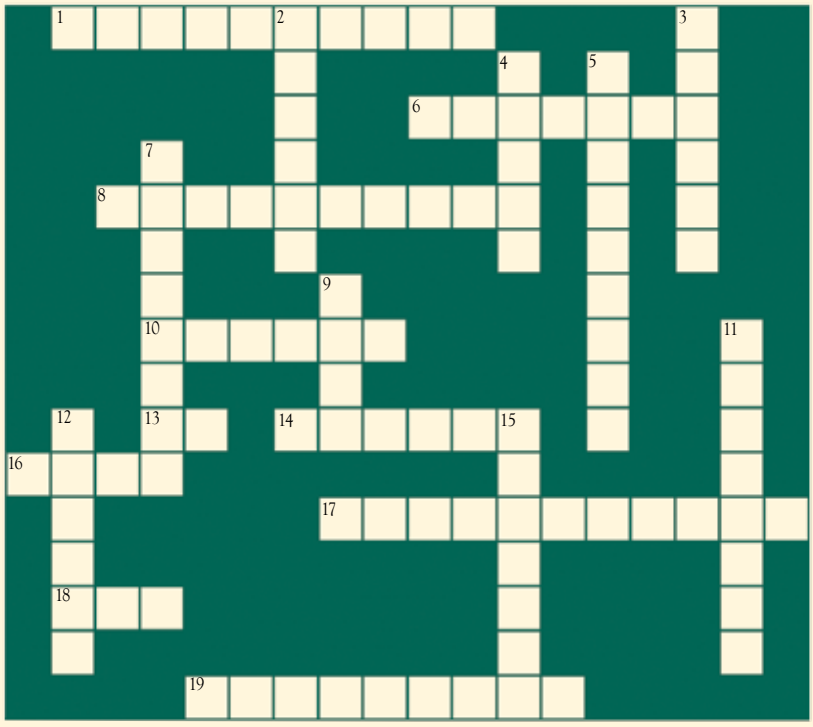
Past results afford no guarantee of future results.
Every case is different and must be judged on its own merits.
The contents of this Newsletter do not constitute legal advice.

Mountains & Hiking Puzzler



Across

1. The Vinson Massif is the highest mountain on this continent and is named for Carl Vinson, a former U.S. Congressman from Georgia who supported research on the continent.

6. Tenzing Norgay was a Nepalese mountaineer famous for summiting Mount Everest with this climber (last name).

8. This sharp Swiss peak was not scaled until 1865.

10. Noah's Ark, according to scripture, landed on Mount _____ in present-day Turkey.

13. This mountain on the China-Pakistan border is the second-highest on Earth and has the second-highest fatality rate for climbers.

14. Mount St. _____ erupted violently in 1980, spewing ash that encircled the globe and blanketed much of Washington state.

16. Olympic Mons, the largest mountain and volcano in the universe is nearly three times the size of Mount Everest, is on this planet.

17. Global warming is an oft-cited reason for the recession of four-fifths of the glacial ices atop Mount _____.

18. Mount Kilimanjaro is only three degrees from the equator but has a permanent ___ cap.

19. Ismail Semani, the highest mountain of the former Soviet Union, used to be called _____ Peak.

Down

2. Although not spectacular in height or size, Blue Mountain in Jamaica is known for the expensive gourmet _____ produced from its slopes.

3. At 12,779 feet, Everest View Hotel is the highest in hotel in the world, requiring fresh ____ to be pumped into each room.

4. After Mount Elbrus in Russia, Mont ____, near the border of France and Italy, is the second-highest peak in Europe.

5. Washington Irving used this mountainous region as the setting for "Rip Van Winkle."

7. The _____ of Mount Oread recently appeared in their 14th Final Four.

9. According to Marvin ___ and Tammi Terrell, none of the mountains in this crossword puzzle are high enough.

11. Pike's Peak, whose summit view inspired "America the Beautiful" is only the 30th highest mountain in this state.

12. Mauna Loa, the largest volcano on Earth, is in this state.

15. In 1985, Richard Bass was the first person to complete the "Seven ____," having topped the highest mountain on each continent.