SHAMBERG JOHNSON AND BERGMAN

FALL 2016

ISSUE 36

IN THIS ISSUE

Above: A memorial service honored the victims of the April 13, 2014, shootings at Kansas City area Jewish facilities. Shamberg, Johnson & Bergman, Chtd., is pursuing claims against Wal-Mart for the sale of the shotgun used in the deaths of Dr. William L. Corporon and Reat Underwood.

FEATURE ARTICLE

GUN CASES SEEK TO HOLD WAL-MART ACCOUNTABLE IN SHOOTING DEATHS

Shamberg, Johnson & Bergman is pursuing two cases against Wal-Mart in connection with the April 2014 shooting deaths at the Kansas City area Jewish Community Center.

Both cases seek to hold Wal-Mart accountable for allowing the straw purchase of the shotgun used in those killings. Both cases have survived motions to dismiss based on a federal law designed to limit claims against the firearms industry.

Gun makers and retailers enjoy broad protection from many negligence claims under the Protection of Lawful Commerce in Arms Act ("PLCAA"). 15 U.S.C. 7901 et seq. PLCAA was designed to prevent lawsuits against gun makers and sellers for injuries and deaths caused by the unlawful use of firearms.

However, exceptions to PLCAA's immunity include claims where the seller negligently entrusted a weapon to a dangerous person and where a purchase involves a false entry on federal gun sale forms by a dealer or by a buyer. This later exception commonly involves straw purchases — where a person legally allowed to buy a weapon purchases a weapon on behalf of someone prohibited by law from buying a weapon.

The cases against Wal-Mart stem from the sale of a shotgun to a straw purchaser. On April 13, 2014, an avowed white supremacist shot and killed 14-year-old Reat Underwood and Reat's grandfather, Dr. William L. Corporon, outside the Jewish Community Center in Overland Park, Kan. Four days

Continued on next page

WELCOME

SHAMBERG JOHNSON AND BERGMAN

Lynn R. Johnson
Victor A. Bergman*
John M. Parisi
Scott E. Nutter
Matthew E. Birch
David R. Morantz
Daniel A. Singer
Richard L. Budden
Paige L. McCreary
John E. Shamberg (1913-2009)

*Of counsel

Shamberg, Johnson & Bergman
2600 Grand, Suite 550
Kansas City, MO 64108
816-474-0004

sjblaw.com

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.

This issue highlights the spectrum of cases handled by Shamberg, Johnson & Bergman. From medical negligence to trucking to firearms, our firm has taken pride in thoroughly investigating and vigorously prosecuting plaintiffs' claims for more than 60 years. To learn more about our firm, our history and our successes, or to contact us, please visit www.sjblaw.com.

Continued from previous page

earlier, the shooter took a southwest Missouri man to a Wal-Mart in Republic, Mo., to buy the shotgun used in the shootings. The shooter was a convicted felon and prohibited by law from buying firearms.

The lawsuits allege that the shooter initiated the purchase of the gun but claimed to not have identification on him. So he offered that his companion would complete the purchase. The companion later pleaded guilty in federal court to making the straw purchase.

The ATF document that buyers and sellers must fill out as part of a sale requires the seller to certify their belief that transferring the gun to the purchaser is legal. The document (ATF Form 4473) also states the purchaser is not the "actual buyer" if they are acquiring the weapon on behalf of someone else. And the form provides an example of a prohibited straw purchase.

The firearms industry has warned gun retailers for several years about the dangers of straw purchases and has sponsored an educational campaign that offers increased training for sellers to spot and prevent straw purchases. According to one ATF study, straw purchases account for 46 percent of its investigations into illegal gun trafficking.

It is important to note that the claims against Wal-Mart do not seek to change existing gun laws and regulations or infringe on Second Amendment rights. Rather, the claims, and others like them for similar straw purchases, seek to hold gun sellers responsible for violating existing gun laws.

To learn more about Reat Underwood, William Corporon and their family's efforts to honor their memories, please visit givesevendays.org.

01

TRUCKING CASES FILED IN FEDERAL COURT FACE PLEADING SCRUTINY

Trucking cases filed in federal court face heightened pleading scrutiny under a string of recent decisions. As a result, attorneys filing trucking cases should do more than merely allege violations of the Federal Motor Carrier Safety Regulations ("FMCSR").

In 2007 and 2009, the U.S. Supreme Court held that federal complaints must detail

Failure to properly use safety chains, which are indicated next to the white arrows, allowed a rear trailer to detach and cause a truck driver to drive into an embankment.

allegations that, if accepted as true, present a claim "that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)). This "plausibility" standard, or the "Twombly/Iqbal" standard, has been widely viewed as increasing the federal pleading standard. The District of Kansas used the standard recently to dismiss a trucking case for lack of specificity in the complaint.

In that case, *Drake v. Old Dominion Freight Line,* the complaint used language found in many trucking complaints alleging violations of the FMCSR against the trucking company for negligent hiring, retention, training, qualification and supervision, among others. The court ruled that the complaint did not include details supporting the allegations against the company, and, therefore, that the allegations failed to meet the Twombly/Iqbal standard.

Shamberg, Johnson & Bergman has a long and successful history pursuing trucking cases, including winning the largest personal injury jury verdict in Kansas in *Frederick v. Swift Transp.* (D. Kan. 2008). Three recent cases the firm has pursued or is pursuing continue this legacy.

In March 2016, a recently retired Iowa couple was headed toward Arizona to visit family. Along the way, they stopped to visit their children and grandchildren. While driving west on Interstate 40 in New Mexico, an eastbound tractor-trailer crossed the median and slammed into the couple's vehicle, demolishing the car and pushing it down a 30-foot embankment.

The husband, who was driving, was killed in the crash. The wife died two days later. Scott Nutter and John Parisi pursued wrongful death and survival claims on behalf of the couple's children. The case resolved at a pre-suit mediation.

In January 2015, a truck driver attempting a U-turn on Interstate 70 caused a collision that killed another truck driver. Authorities said the defendant driver attempted an illegal U-turn in an emergency vehicle turnaround west of Colby, Kan. As the defendant tried to cut across both westbound lanes to start the U-turn, a tractor-trailer behind him hit the brakes and unsuccessfully tried to avoid a collision.

The trailing driver died in the ensuing inferno. Lynn Johnson and David Morantz are pursuing wrongful death and survival claims on behalf of the second driver's widow and sons.

In October 2014, a truck driver lost control during a rainstorm while on Interstate 70 near Columbia, Mo. The driver was pulling double trailers, and the rear trailer detached, blocking the westbound lanes. Our client – also a truck driver – steered into the embankment to avoid the trailer, but the resulting crash left him severely injured.

Scott Nutter immediately dispatched a reconstruction team and sent preservation letters demanding access to the trucking equipment, onboard data and operational docu-

Continued on next page

A collision between two tractor trailers on Interstate 70 near Colby, Kan., resulted in the death of one driver and an inferno that shut down the highway.

A truck driver attempting to make a U-turn on Interstate 70 blocked both lanes of traffic and forced a collision with another truck.

Continued from previous page

ments. The reconstruction team discovered the truck driver failed to use safety chains to properly secure the second trailer, in clear violation of the FMCSR and company policy. The onboard recording device showed the driver had his cruise control set in excess of the speed limit during hazardous weather conditions, also against trucking safety regulations. We then discovered the driver had a history of crashes and safety violations. The case settled shortly after suit was filed.

02

FAILURE TO TIMELY DIAGNOSE AIRWAY EMERGENCY LEADS TO SETTLEMENT

A Kansas medical negligence case with limited medical expenses resulted in a substantial settlement from a head and neck surgeon and hospital, based in part on *Wentling* damages.

The case stemmed from a surgery to remove a neck tumor from a 65-year-old gentleman, who was not married and had three adult daughters. Following surgery, the patient required multiple medications for increased blood pressure, despite losing significant blood during the surgery.

After he was transferred to the hospital's medical-surgical floor, nurses became concerned about bleeding near the surgical site and complaints of neck tightness. Nurses called the surgeon three times during the evening to report their concerns. During the second call, a nurse noted firm swelling near the surgical site. Among head and neck surgeons, the swelling is a recognized sign of a possible hematoma that can threaten the airway. The surgeon instructed the nurse to apply a pressure dressing.

The nurse then called an ICU nurse to assess the patient. At deposition, the ICU nurse did not remember many details of his communications with the floor nurses. Based on the incomplete memory of the ICU nurse and other nurses, David Morantz renewed a motion to compel production of the hospital's factual findings from its peer review of the case. According to documents ordered produced by the court, the ICU nurse had told floor nurses after his assessment that the patient would lose his airway without surgical intervention.

The floor nurse then called the surgeon a third time, stating that the swelling was expanding and that the patient was complaining of airway obstruction. While awaiting the surgeon's arrival, a nurse noted stridor, a high-pitch wheezing sound that indicates a narrow airway. The surgeon arrived at the patient's bedside about 30 minutes after the final phone call. Upon arrival, the surgeon decided to take the patient back to the operating room and left to prepare for surgery. The patient's airway then swelled shut, resulting in a severe anoxic brain injury. The patient never regained consciousness. Several days later, he was removed from life support.

Plaintiffs identified experts in head and neck surgery and airway management who testified the surgeon should have immediately returned to the hospital or ordered a stat airway assessment after the second and third phone calls. Plaintiffs' nursing expert testified that nurses should have obtained an immediate airway assessment when the surgeon did not timely address their concerns or return to the hospital.

Because the patient was not married and was no longer supporting his adult daughters, we could not claim a loss of financial support. However, plaintiffs argued that the loss of their father's teaching, counsel, guidance, comfort and companionship—which the Kansas Supreme Court upheld as economic damages in *Wentling v. Medical Anesthesia Svcs.*, 237 Kan. 503 (1985) — accounted for significant damages. The case, which settled for $750,000.00, shows the importance of highlighting *Wentling* losses, which are not subject to Kansas' cap on non-economic damages, and of obtaining factual information gathered by healthcare providers during peer reviews.

03

MEDICAL NEGLIGENCE VERDICT UPHELD ON APPEAL

The Kansas Court of Appeals has affirmed in its entirety a $2.88 million verdict obtained in 2014 by attorneys Scott Nutter, John Parisi and Daniel Singer on behalf of Vernon and Gail Burnette, for the wrongful death of their son, Joel Burnette. The verdict against Dr. Kimber Eubanks and his clinic, PainCARE P.A., is one of the largest ever obtained in a Johnson County, Kan., medical negligence case.

The Court of Appeals held that the evidence proved the alleged medical negligence was both the legal and factual cause of Joel's tragic death. Joel took his own life as a result of the physical and emotional pain from the negligent treatment. Rejecting every argument the defendants raised on appeal, the Court stated: "Dr. Eubanks and the Clinic ask us to ignore 30 years of precedent and reverse the district court. This we will not do."

The case arose following epidural steroid injections. One of the injections occurred despite the presence of an infection and carried the infection next to the spinal cord, resulting in arachnoiditis/cauda equina syndrome. Joel was left disabled due to nearly constant spine and leg pain, difficulty with ambulation and neurogenic bowel.

After deliberating more than two days, the jury returned a verdict for the Burnettes. They awarded $2.88 million, assessing 75 percent of the fault to Dr. Eubanks and 25 percent to the staff of PainCARE P.A.

On appeal, in addition to various technical points, the defendants argued that their alleged "contribution" to Joel Burnette's death was not sufficient to support a finding that they "caused" his death.

The Court of Appeals disagreed, finding that the purpose of Kansas law is to hold negligent parties accountable for their proportional responsibility for a wrongful death. "[I]f your negligence contributes to the cause of death and it is foreseeable, then you can be held liable for that death in proportion to your percentage of fault . . . We are mindful that the jury here could have found Dr. Eubanks caused the wrongful death and set his fault at 100 percent or the Clinic at 100 percent. Instead, the jury assessed fault at 75/25 percent, respectively." The Court concluded: "Every negligent act of the doctor and the Clinic employees lead to a conclusion of cause in fact as well as legal cause. But for their negligence, it was foreseeable that Joel would have become infected. Then, due to the infection, Joel contracted arachnoiditis and because of the arachnoiditis, Joel committed suicide. The fundamental rules of fault compel our rejection of Dr. Eubanks' argument on this point."

The case can be found at *Burnette v. Eubanks*, __ P.3d__, 2016 WL 3067360, (Kan. App. 2016).

ANNOUNCEMENT

PAIGE McCREARY JOINS FIRM

Paige McCreary

The firm is pleased to announce the addition of Paige McCreary. Paige joined the firm last year after a year-long internship with the firm.

Paige graduated from the University of Kansas School of Law, where she participated in Moot Court and interned for the Hon. Gary Sebelius at the United States District Court for the District of Kansas. Previously, Paige earned her undergraduate degree in English at the University of Kansas, graduating from the honors program and also with distinction.

Paige is licensed in Kansas and Missouri. She focuses her practice on automobile accidents, product liability, medical negligence and pharmaceutical class actions.

While not at work, she spends time reading, watching movies and exploring the art, music and culture of Kansas City. She is involved in the Young Friends of the Art at the Nelson Atkins Museum of Art. She is also involved with several local bar associations.

04

DERMATOLOGY CASE SETTLES FOR POLICY LIMITS EARLY IN DISCOVERY

Shortly after filing suit in Kansas state court, Shamberg, Johnson & Bergman obtained a $1 million policy limits settlement on behalf of a client whose physicians failed to diagnose a skin lesion as melanoma.

In early 2012, our client presented to her dermatologist with a suspicious spot on her shoulder. A specimen was excised and sent for pathological evaluation. The physician who studied the sample diagnosed basal cell carcinoma, a common and very treatable form of skin cancer that rarely metastasizes or kills.

During the next two years, our client was seen regularly at the same practice. In late 2013, the lesion began to grow and change color. In January 2014, another specimen was excised and diagnosed as stage IV melanoma, which is almost always curable in its early stages but very dangerous as it progresses to later stages. Stages I and II carry 5-year survival rates between 80-90%, compared to 10-20% at Stage IV.

A dermatopathologist subsequently reexamined the first specimen taken in 2012 and concluded that the previous physician had misread the slide. It was melanoma that had gone undiagnosed and untreated for two years.

One possible explanation for the misread slide was the defendant physician was a dermatologist but not a dermatopathologist. We alleged — based in part on admissions found on the defendant's website — that the standard of care requires a medical group lacking a dermatopathologist to send samples to an outside laboratory where more qualified physicians can perform the needed analysis. Indeed, the first time a dermatopatholigst reviewed the 2012 specimen, he immediately identified the melanoma. The same is true of the 2014 sample, which the defendant clinic did send to an outside dermatopathologist, leading to the correct but late diagnosis.

Once our investigation confirmed that a competent dermatopathologist would have diagnosed melanoma in 2012, Scott Nutter and Daniel Singer filed suit on behalf of our client. After exchanging opening discovery responses, we immediately arranged to take our client's deposition to preserve her trial testimony, given the advanced stage of her cancer. Without further litigation, the case resolved for $1 million, the maximum coverage available to the settling parties.

Though it is rare for a medical negligence action to settle without completion of even the defendants' depositions, the objective nature of the alleged negligence prompted swift mediation and resolution of the case, as did the credibility of our client and harm this misdiagnosis caused her.

"I will instruct the members of the jury to disregard that last tweet from the defendant"

COLLEGE FOOTBALL AND BASKETBALL TRIVIA

ACROSS

1. This St. Joseph's University mascot has been flapping its wings non-stop at college basketball games since 1956.

3. Former Brigham Young University quarterback Steve _____ graduated from law school in 1994.

5. Uga, the canine mascot of the University of _____, featured in the true-crime novel and film *Midnight in the Garden of Good and Evil*.

7. Big 12 basketball referee John _____ has been described as the most recognized, loathed and wanted referee in the NCAA.

8. Former University of Southern California quarterback Patrick _____ graduated from Loyola Law School in 1982.

10. Sportscaster and former University of Maryland basketball star and Kansas City King Len _____ graduated from Harvard Law School in 1987.

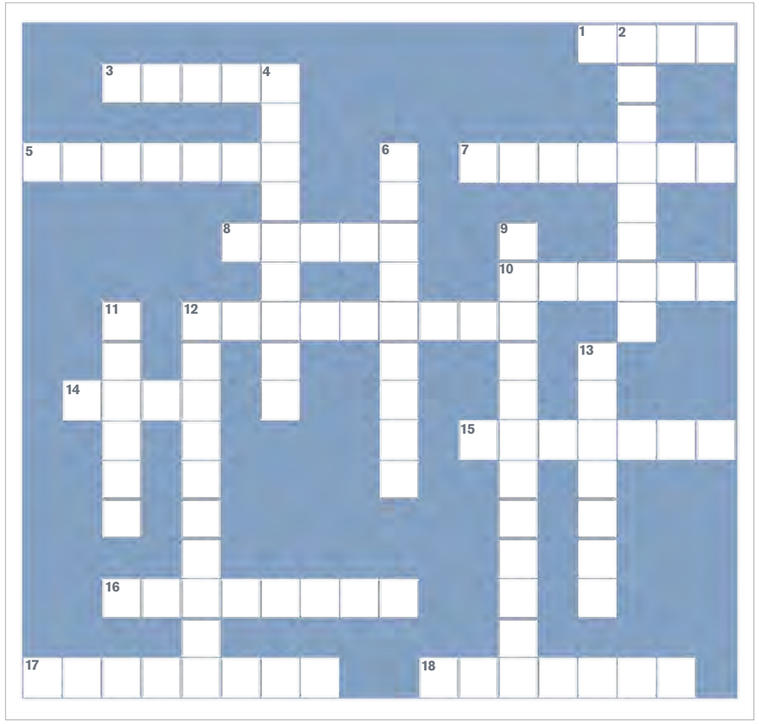
12. Ivy League schools Yale and _____ claim the most national football championships, although none since 1950.

14. In 1935, to save money on its way to play the University of Miami in the first Orange Bowl, Manhattan College travelled three days by _____.

15. Kenny Sailors, who popularized the jump shot in college basketball, led the University of _____ to the national title in 1943.

16. Legendary college football coach Bear Bryant served at Alabama, Texas A&M, Kentucky and what other school.

17. From 1953 to 1957, the University of _____ won 47 games, the longest winning streak in college football.



18. Former U.S. Senator Bill _____ led the Princeton Tigers to the 1965 Final Four and scored 58 points against Wichita State in the now defunct consolation game.

DOWN

2. In 1967, the NCAA outlawed dunking in an effort to curb the scoring of Lew _____.

4. Martin _____ holds the record for the longest field goal without a kicking tee, 65 yards, in an NCAA game.

6. The oldest rivalry in FBS college football is between Wisconsin and _____.

9. Built in 1895, Franklin Field at the University of _____ is the NCAA's oldest football stadium.

11. At the start of each season and to prevent blisters, legendary basketball coach John _____ taught his players how to properly put on their socks and tie their shoes.

12. Tony Dorsett won the 1976 Heisman Trophy while playing for the University of _____.

13. Basketball statistician Ken _____ is also an instructor of atmospheric sciences at the University of Utah.

ANSWERS TO COLLEGE FOOTBALL AND BASKETBALL TRIVIA PUZZLER:

ACROSS:
1)Hawk 3)Young 5)Georgia 7)Higgins 8)Hayden 10)Elmore 12)Princeton 14)Boat 15)Wyoming 16)Maryland 17)Oklahoma 18)Bradley

DOWN:
2)Alcindor 4)Gramatica 6)Minnesota 9)Pennsylvania 11)Wooten 12)Pittsburgh 13)Pomeroy

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.

2600 Grand, Suite 550
Kansas City, Missouri 64108

SHAMBERG JOHNSON AND BERGMAN

SHAMBERG JOHNSON AND BERGMAN

NEWSLETTER

FALL 2016

sjblaw.com