Shamberg, Johnson & Bergman
Trial Attorneys

Spring 2014 *Issue 34*

Rural Jury Awards Major Medical Damages

Shamberg, Johnson & Bergman, Chtd., won a $2.2 million jury verdict in rural Franklin County, Mo., for 85-year-old Katherine Shea, who was severely injured in a motor vehicle accident.

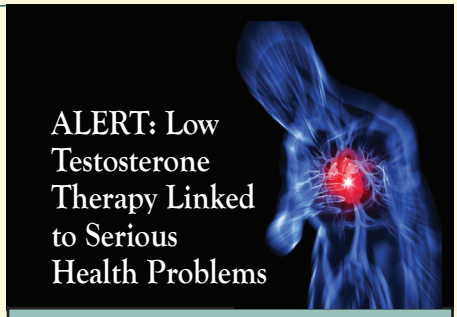
As Katherine was on a two lane road that paralleled Interstate 44, a 17-year-old employee of a local diner approached from the opposite direction. He swerved across the center line to avoid a dog that he would later testify was on the edge of the road. Although Katherine moved right to try to avoid the teenager's vehicle, the two hit head on – entirely in Katherine's lane of traffic.

Lynn Johnson and John Parisi represented Katherine in a claim against the 17-year-old driver and his employer, the Du Kum Inn, a longtime diner that was owned by the teen's aunts.

Katherine was extricated from her car and flown to St. Louis for emergency care. She sustained multiple orthopedic injuries, including fractures to her hip, pelvis, ribs, ankles, feet, elbow, knee, and hand.

Rural Jury Continued on Page 2

A plaintiff's exhibit shows the sight line and time the defendant had to avoid striking our client's vehicle.



ALERT: Low Testosterone Therapy Linked to Serious Health Problems

Our firm is handling claims on behalf of men injured by testosterone drugs or therapy. Recent medical research has found that prescription testosterone therapy (patches, gels, oral extended release, and injections) caused an increased risk of stroke, heart attack, deep vein thrombosis (DVT), pulmonary embolism (PE) and even death. Products linked to these risks are: Androgel, Androderm, Axiron, Testim, Fortesa, Striant and Delatestryl. Testosterone therapy medication was originally approved by the U.S. Food and Drug Administration to treat limited medical conditions, such as hypogonadism, which cause abnormally low testosterone levels. The pharmaceutical industry has more recently marketed testosterone as a lifestyle drug; promoting it as a miracle cure for the symptoms of natural aging such as energy loss, stress, mood changes,

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In This Issue

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Based on the testimony of the 17-year-old driver, the report of the Missouri Highway Patrol and the opinions of our accident reconstruction expert, we alleged the teenager was negligent for driving too fast on a blind curve, failing to keep a proper lookout to see the dog in time to stop or slow his vehicle, crossing the center line into oncoming traffic, and failing to move back into his lane of traffic after passing the dog.

Defendants argued that the teenager acted reasonably to avoid the dog, which they claimed created an emergency. One of the aunts argued the teenager was not in the scope and course of his employment, claiming the teen was merely doing a favor for the other aunt. At the close of evidence, the Court ruled as a matter of law that the teenager was acting within the scope of his employment and/or agency for the Du Kum Inn.

Testimony from Katherine's friends and family illustrated that before the collision Katherine was a vibrant woman whose health corresponded to someone 20 years younger. She lived independently in her own home, drove wherever she needed to go, and did her own shopping, laundry, cooking and cleaning. She had painted the interior of her house without help and had done all of her yard work.

On October 3, 2013, after four days of trial and four hours of deliberation, a Franklin County jury returned a verdict of $2,162,000. In addition, Katherine is entitled to pre-judgment interest in the amount of $100,335. The jury heard evidence that Katherine's paid medical bills totaled $185,000 and that the amount billed by providers totaled $800,000. The present value of Katherine's future care requirements, as presented by plaintiff's expert, was approximately $2 million.

Shamberg, Johnson & Bergman, Chtd., is proud to have represented Katherine and pleased with the jury's verdict in favor of this most deserving and wonderful client. The funds will allow Katherine to live as independently as possible for the remainder of her life.

Low Testosterone Continued from Page 1

depression, lethargy, and reduced sex drive. The marketing has been so aggressive that by 2017 sales of testosterone drugs are predicted to reach $5 billion. A January 2014 study found that during the first 90 days of use the risk of a heart attack nearly tripled for men younger than 65 with a history of heart disease, and doubled in all men over 65. That study came on the heels of a November 2013 report, published in The Journal of the American Medical Association, which found a nearly 30 percent increased risk of a stroke, heart attack or death in a group of men over 60 who were given testosterone therapy.

The FDA recently issued a medical safety alert warning men of the potential risks and side effects associated with testosterone therapy. Public Citizen, a consumer advocacy group with more than 300,000 members/supporters, petitioned the FDA to add a black box warning about the increased risks of heart attacks and other cardiovascular dangers to all testosterone-containing drugs currently on the market.

Please visit www.sjblaw.com for more information or call us at 816-474-0004.

Missouri Jury Finds for Plaintiff in Medical Negligence Case

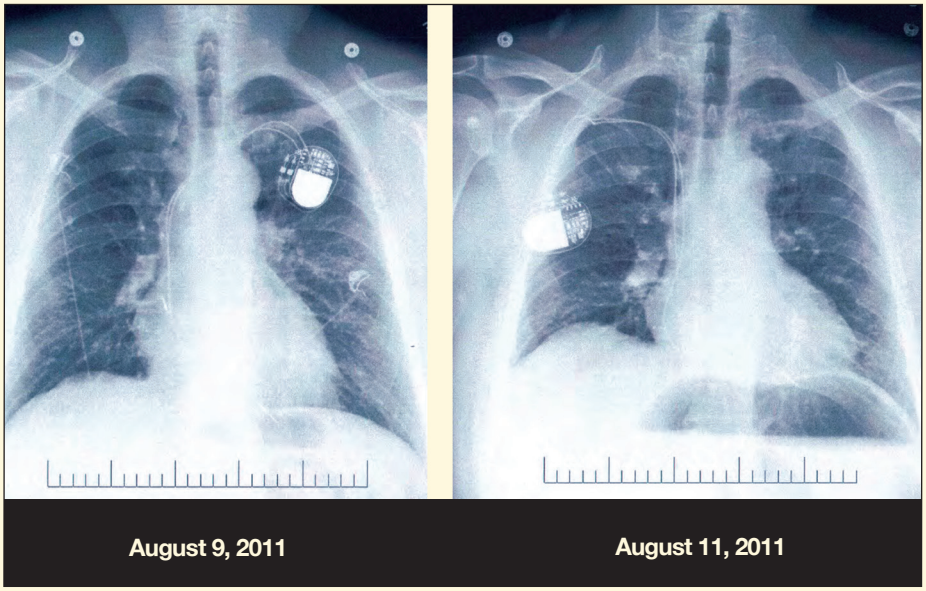
A Cole County, Mo., jury returned a $340,000.00 verdict for a medical negligence victim who suffered an injured collar bone during a botched pacemaker implantation surgery. The venue is widely considered to be very difficult for plaintiffs, particularly in medical negligence cases.

Vic Bergman and David DeGreeff successfully pursued the case against Jefferson City, Mo., interventional cardiologist Jeffrey Sanders, MD. While injuring the plaintiff's clavicle during the May 2010 implant procedure, Dr. Sanders implanted the lead wires in the wrong vein. Our client, a 63-year-old farmer, cried out in pain during the surgery. But the medical records made no mention of that, or of the severe pain he experienced on discharge from the hospital.

Plaintiff's urgent calls to Dr. Sanders' office over the following weeks complaining of pain at the implant site were documented: "It hurts horribly bad;" "Can't take much more;" "So severe was on his hands and knees." But the defendant only ordered a chest x-ray, prescribed Xanax, and on one occasion waited to see the plaintiff at a scheduled appointment five weeks later, at which Dr. Sanders sent him to physical therapy. The pain subsided in intensity during the following year but was always significant upon exertion.

In May 2011, the plaintiff was doing some physical work around his farm and suddenly suffered deep vein thrombosis ("DVT") in his entire left upper extremity, requiring surgery. The clavicular injury had caused a "periosteal reaction," a bony growth, which eventually compressed the subclavian vein and caused a DVT. At trial, both plaintiff and defense experts agreed the DVT was directly related to the clavicular injury during the implant procedure. Ultimately, the plaintiff had the pacemaker surgically removed at Barnes-Jewish Hospital in August of 2011 and had another one implanted on the other side. That improved the situation greatly.

Dr. Sanders admitted he injured the plaintiff's clavicle, and that the DVT and removal of the pacemaker resulted from that, but contended this is a complication that can occur even with acceptable technique. He argued plaintiff's problem was hard to diagnose, because plaintiff's reports of symptoms were inconsistent. He denied any fault. Plaintiffs made no claim for lost income or loss of earning capacity. The only economic damages claimed by plaintiffs were medical bills totaling about $115,000.00, with payments made of about $57,000.00 to satisfy the bills. The jury was given both figures by agreement.



At trial, jurors saw x-rays comparing the defendant's pacemaker placement (left) and the correct placement (right).

We tried to engage the defendant in settlement discussions, but he refused to make an offer.

During the week-long trial, plaintiffs called experts in cardiac electrophysiology and radiology, as well as our client's current treating cardiologist. The defendant called a cardiology expert, the director of the University of Missouri at Columbia's cardiac electrophysiology fellowship program.

The jury deliberated for six hours before returning a 9-3 verdict, awarding our client his past paid medical expenses of $57,000.00, $200,000.00 for past non-economic damages, $57,000.00 for future economic damages, and $25,000.00 in past non-economic damages for our client's wife's loss of consortium claim.

Kansas Interventional Radiologist Settles for Policy Limits

Advances in interventional radiology have saved many lives. But the specialty still has its limitations, as illustrated by a recent Johnson County, Kan., wrongful death case that resulted in a policy limits settlement.

In September 2010, a 60-year-old husband and father of three adult sons underwent a chest x-ray in advance of joint replacement surgery. The x-ray revealed that an inferior vena cava (IVC) filter placed more than two years earlier had migrated to the juncture of the IVC and the right atrium of the heart. The patient was referred to an interventional radiologist to determine whether and how the filter should be removed.

Two days later, the interventional radiologist tried to remove the filter percutaneously by inserting wires through the jugular and femoral veins. During removal, the filter tore a 4 cm hole in the patient's right atrium. The patient's blood pressure plummeted, resulting in severe brain damage. The patient died two days after the procedure.

Lynn Johnson and David Morantz pursued a case on the family's behalf against the interventional radiologist, claiming that the filter's position in or near the right atrium made percutaneous removal too risky. At deposition, the interventional radiologist testified that before the procedure he had consulted with a cardiothoracic surgeon, who he claimed had recommended percutaneous removal.

The Petition was amended to add the cardiothoracic surgeon. His deposition contradicted the interventional radiologist's claims. Medical records confirmed that the cardiothoracic surgeon had never formally consulted on the case before the percutaneous removal. He moved for summary judgment based on the lack of a legal duty.

Plaintiff did not oppose this motion but obtained a ruling preventing the interventional radiologist from alleging fault against the cardiothoracic surgeon at trial — based on the principle that a party who a court has determined has no legal duty cannot appear on the verdict form for comparative fault.

Barbs on the filter (inset) tore the IVC and right atrium on removal.

The case proceeded against the interventional radiologist. Plaintiff's interventional radiology experts opined that the percutaneous removal was a doomed approach because of how long the filter had been in or near the right atrium. CT studies performed in 2008 confirmed that the filter had migrated to within or near the right atrium two years before the subject surgery. That meant the tissue of the IVC and right atrium had grown, or endothelialized, around portions of the filter, including the hooks/barbs designed to hold it in place. The experts testified that the interventional radiologist should have checked the films before attempting removal, which should have dissuaded him from the procedure.

Expert testimony also focused on the type of IVC filter in the patient. Some filters are temporary and designed to be removed. Such filters have uni-directional hooks/barbs, which help hold the filter in place while allowing the filter to be retracted percutaneously. The patient had a permanent filter. It had dual-directional hooks/barbs, making it more likely to catch and tear the vessel walls during removal.

Plaintiff also hired an expert in pathology to help illustrate how tissue had grown around the filter and how the endothelialized filter tore the walls of the IVC and right atrium during removal. An economic expert testified about the future earnings of the decedent, who worked as a sales executive.

The case settled for the interventional radiologist's $1 million policy limits before the depositions of defendant's experts. Much of the value of the case resulted from the likelihood that a jury would return significant Wentling damages for the loss of a husband and father of an extremely close family. The decedent was survived by his wife of 37 years and three adult sons, all of whom were prepared to testify in detail about the guidance, teaching and counseling they continued to seek from their father even after leaving the house.

Shamberg, Johnson & Bergman, Chtd., is honored to have represented such a close and loving family.

Refusal to Provide Coverage and Defense Costs Insurance Company

In the latest of several insurance "bad faith" cases, Shamberg, Johnson & Bergman successfully pursued an insurance company for its failure to defend a permissive driver in an automobile collision case. The case follows a $10.25 million bad faith settlement in 2012 and two other recent claims reported on in this issue.

In 2007, our client's car was struck at an intersection on his way to work, resulting in severe neck, shoulder and head injuries. Proof of who had the green light was thin. The defendant driver claimed he had the green light. Our client could not remember the collision. No independent witnesses were found.

The defendant was insured for $50,000.00. His insurer initially said it had talked with its insured and would defend him. But after suit was filed, the company denied the defendant both coverage and a defense, based on lack of cooperation, leading to an un/underinsured case against our client's insurers that settled in 2011 for $755,000.00.

Following the un/underinsured case, Lynn Johnson and David Morantz obtained a default judgment against the driver. A garnishment action was then filed against the defendant's insurance company on the theory that the company negligently or in bad faith refused to defend and provide coverage for its insured. Kansas law imposes a burden of proof on insurance companies who deny a defense based on an insured's alleged lack of cooperation to show that the lack of cooperation materially prejudiced the defense of the case.

The garnishment action was then removed to federal court, and the insurance company hired counsel for the driver. The insurer then attempted to set aside the default judgment, but the driver assigned his rights against his insurance company to our client. The insurance company then sought to intervene in the state court case to try to set aside the default judgment. The state court allowed the company to intervene for the limited purpose of contesting damages but did not allow the company to challenge the procedural validity of the default judgment.

Both sides sought an interlocutory appeal. The plaintiff argued that when the insurance company denied coverage to its insured, it forfeited its right to contest any aspect of the default judgment. The insurance company argued it should be permitted to contest the amount of the default judgment and the underlying liability upon which the judgment was based. Both requests for interlocutory review were denied. Both sides then sought direct appeals, which were dismissed for lack of jurisdiction, because the insurance company's rights had not been fully and finally terminated by the trial court's ruling.

Discovery then proceeded in state court to challenge the amount of the default judgment. At mediation, the case settled for $1,875,000.00, costing the insurance company an extra $1,825,000.00 nearly 36 times its policy limits.

"Bad Faith" Claims Can Succeed in Kansas

Two recent settlements by Shamberg, Johnson & Bergman illustrate that Kansas "bad faith" insurance claims can be very successful if handled with an appreciation for the procedural intricacies of this area of practice and the wide range of legal issues involved.

Bad faith claims arise when the damages clearly exceed the policy limits, yet the insurance company makes no offer, unreasonably delays making an adequate offer, makes an inadequate offer, or refuses to cover and/or defend an insured. In cases of clear liability where the risk of a judgment in excess of policy limits exists, Kansas law requires liability insurance companies to make a timely investigation and initiate settlement negotiations. This independent fiduciary and contractual duty does not depend on a demand from the claimant. If the insurer may be able to protect its policy holder from excess liability, then, under Kansas law, the insurer must initiate settlement.

In one of our recent cases, a University of Kansas freshman was pinned between two cars after one car rear ended another car stopped in the middle of a street. Both legs had to be amputated above the

Continued on Page 6

"Bad Faith" Claims (continued)

Bad Faith Continued from Page 5

knees. All liability insurers involved quickly offered policy limits except for the insurer for the driver of the stopped car. The insurance company for the stopped car had a $25,000.00 liability policy but did not respond to reasonable requests for information from plaintiff's counsel and did not offer the policy limits before suit was filed. The policy limits were eventually offered post-suit, despite no demand ever being made.

David DeGreeff, along with Vic Bergman, refused the policy limits offer and proceeded with a bad faith claim. We argued the insurer failed in its duty to promptly offer its policy limits in light of the damages clearly exceeding the $25,000.00 policy. The claim against that defendant and his carrier ultimately settled at mediation for $1,125,000.00, 45 times the policy limits.

In another of our cases, a 35-year-old southeast Kansas mother was driving two of her children on a rural highway when a semi-truck ran through a stop sign and pulled in front of her car. Our client's feet were crushed, requiring multiple surgeries to try to repair them. The semi-truck driver carried $500,000.00 in insurance. Scott Nutter and David DeGreeff handled the bad faith action, along with referring counsel Brianne Thomas of Boyd & Kenter, PC, who wisely turned down a settlement offer for less than the policy limits after making a policy limits demand. Ms. Thomas complied with the insurance company's repeated requests for additional information about the client's injuries and damages. The insurance company eventually offered its policy limits pre-suit and less than 30 days after the less-than-policy-limits offer was rejected. But Kansas law prevents an insurer from curing bad faith with a subsequent offer.

We argued the company failed in its duty to negotiate in good faith and to protect its insured when it rejected the initial policy limits demand by offering less than half of its limits. We hired experts to analyze our client's damages. We then entered into a Glenn v. Fleming agreement, by which the semi-truck driver assigned our client his bad faith claim in exchange for a covenant not to execute against personal assets. The case ultimately settled at mediation for $1,325,000.00, nearly three times the policy limits.

David Morantz Becomes Partner

Shamberg, Johnson & Bergman is pleased to announce that David R. Morantz has been made a partner in the firm.

David is a trial attorney representing the victims of general torts, with an emphasis in transportation, medical negligence and products liability cases. David has represented clients in federal and state courts and has argued cases before the Kansas Court of Appeals and Supreme Court.

David is a member of the Missouri Association of Trial Attorneys and the Kansas Association for Justice. In 2013, David won the KsAJ Thomas E. Sullivan Award in recognition of significant promise and commitment as a developing leader for the association.

David joined the firm in 2005 after graduating from the University of Kansas School of Law, where he was an articles editor on the Kansas Law Review and was honored as the top student in the area of intellectual property during his final year of law school.

Prior to law school, David worked as a newspaper reporter for The Associated Press and for the Omaha World-Herald. David focused his reporting on exposing shortcomings in municipal services. He won several awards in recognition of outstanding reporting and writing. While in law school, David helped teach reporting and editing at KU's William Allen White School of Journalism.

Besides journalism stints in South Carolina and Nebraska, David has always called the Kansas City area home. He earned his undergraduate degree in journalism from the University of Kansas. When not at work, David enjoys spending time with his wife, Carrie, and their children, Lucy, Stanley and Rebecca. David also enjoys coaching and playing soccer, cycling and cooking.

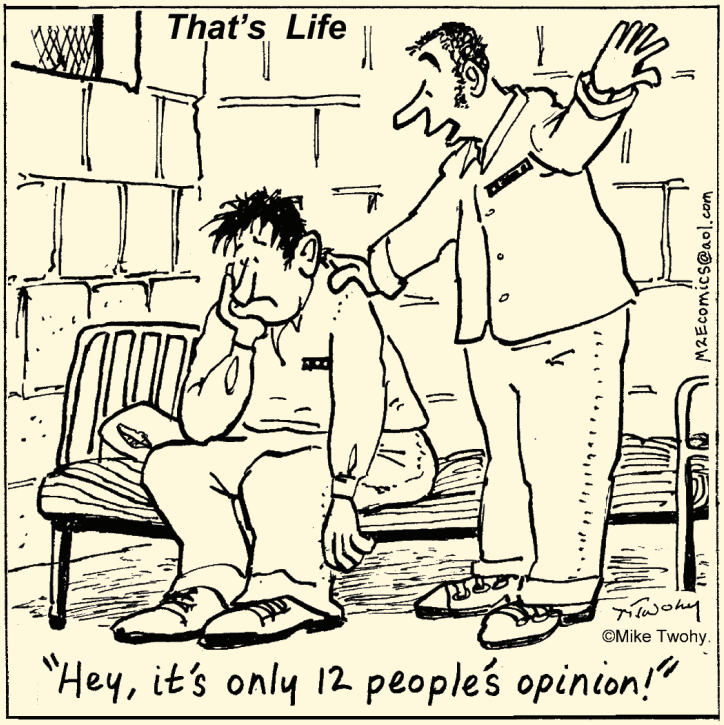
Missouri Appellate Ruling Allows Punitive Claims Against Employer

The Western District of the Missouri Court of Appeals affirmed a $1.5 million jury verdict obtained in a warehouse injury case tried in Jackson County, Mo., by Scott Nutter and Douglas Bradley. The opinion is Wilson v. Image Flooring, LLC, 400 S.W.3d 386 (Mo.App. W.D. 2013).

The court upheld the trial court's determination that Missouri law controlled issues of comparative fault and damages, even though the injury occurred in Kansas. It rejected defendants' argument that the trial court should have applied Kansas law, which was not only where the negligence and injury occurred, but also where the parties relationship formed, and where the defendant conducted business.

Under Missouri's choice of law analysis, the law of the state with the most significant relation to the case controls substantive issues. The Court of Appeals held that with respect to rules of recovery (comparative fault and non-economic damages), the domicile of the parties in Missouri was a more significant contact, because Missouri has a greater interest in applying its compensation laws to its own residents.

The Court of Appeals also reversed the trial court's dismissal on summary judgment of plaintiff's punitive damages claim against the truck driver's employer. This effectively dismissed plaintiff's individual negligence claims against the truck driver's employer under McHaffie v. Bunch, 891 S.W.2d 822, a 1995 Missouri Supreme Court case that prohibits claims of direct negligence against an employer who admits vicarious liability for an employee's actions.



In dicta, the court in McHaffie contemplated a punitive damages exception to this bar. This exception would allow plaintiffs to pursue punitive damages against an employer for the employer's negligent hiring, training, supervision, or entrustment.

This exception has been widely litigated and has caused a split of authority in Missouri federal courts, because no Missouri appellate court had specifically addressed exception. As a matter of first impression, the Western District Court of Appeals in our case held that the dicta in McHaffie was persuasive and if faced with the issue now, it said the Missouri Supreme Court would determine that such exception exists.

Without the punitive damages exception, evidence of an employer's conscious disregard for the safety of others would be barred when the employer has admitted vicarious liability. The case was remanded for a hearing on punitive damages.

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. Stonehenge 5. summer 6. dogwood 9. April 10. party 12. egg 15. eternal 17. dandelion 18. Medical 19. earlier

Down: 2. Nevada 3. east 4. Vernal 7. Greeks 8. Franklin 11. Texas 13. Lauderdale 14. Pacific 16. fever

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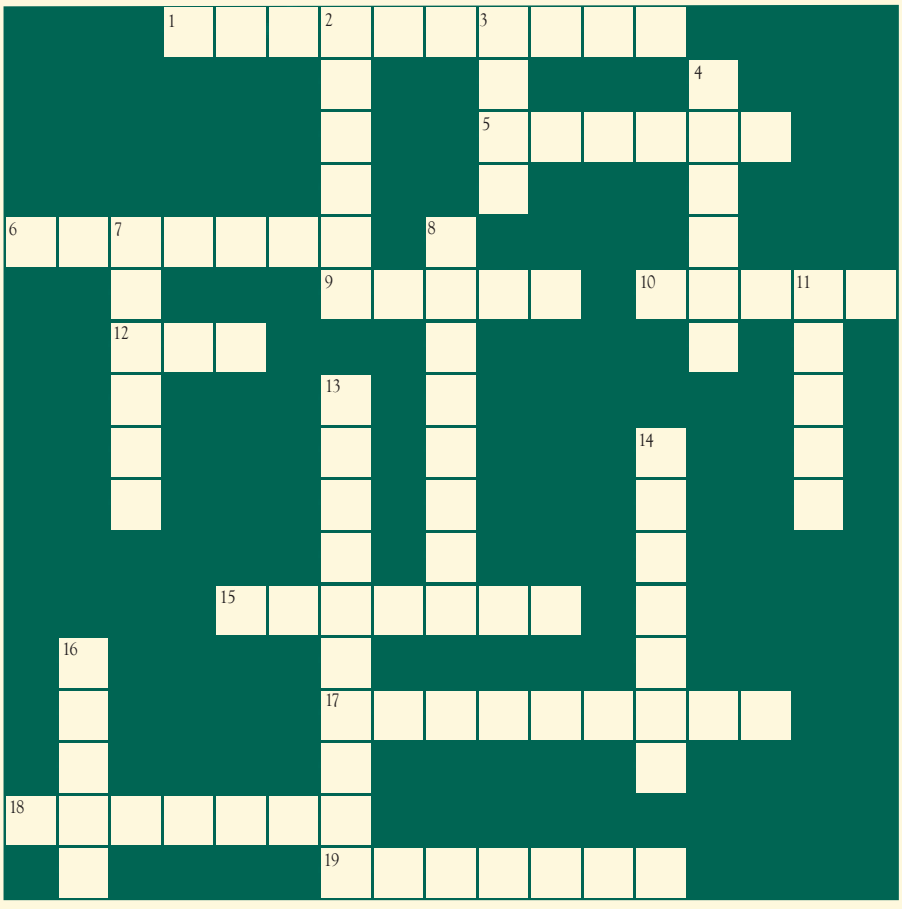
Past results afford no guarantee of future results.
Every case is different and must be judged on its own merits.
The contents of this Newsletter do not constitute legal advice.

Spring Trivia



Across

1. England's ancient _____ marks the position of the rising sun on the first day of spring.
5. In Europe, daylight savings time is known as _____ time.
6. "Blackberry winter" and "_____ winter" are terms for a spring cold spell.
9. According to the National Weather Service, this month has the greatest number of severe storms.
10. Robin Williams: "Spring is nature's way of saying, 'Let's _____!'"
12. According to myth, an ____ can be balanced on its head on the first day of spring.
15. This year, like every year since 1989, hope springs _____ that the Kansas City Royals will return to the playoffs.
17. Despite the eyesores it creates in yards, this springtime flower can be used as a flower and as a food.
18. In 2002, the American _____ Association warned that "Spring break is no longer an innocent respite from the rigors of college academics; it's potentially life threatening."
19. According to one study, spring now begins three weeks _____ in Colorado's Rocky Mountains than it did in the 1970s.

Down

2. According to the Farmer's Almanac, this state has the two U.S. cities with the latest average last spring frost date.
3. An equinox is one of two days each year when the sun rises due _____ and the moon rises due west.
4. The _____ equinox marks the first day of the year with 12 hours of daylight and 12 hours of night.
7. The ancient _____ believed the rebirth of goddess Persephone signaled the start of spring.
8. Last name of U.S. founding father who first conceived of daylight savings time.
11. This state has the greatest number of tornadoes on average each year.
13. Some say spring break originated in 1936 when a swimming coach at Colgate University took his team to an Olympic size pool in Ft. _____, Fla., to get swimmers back in shape after winter.
14. The musical "South _____" featured the song "Younger Than Springtime."
16. More than a myth? In spring, people may experience physiological change due to changes in diet, hormone production and temperature – known as "spring _____."