

# SHAMBERG, JOHNSON & BERGMAN

## —TRIAL ATTORNEYS—

Summer 2010

### \$3.8 Million Settlement Results From System Breakdown and Drug Toxicity

A breakdown in the health care system tragically injured a Johnson County attorney, resulting in a \$3.835 million settlement.

Our client, a bright young research attorney at the Kansas Court of Appeals, wanted to become pregnant. She and her husband sought the assistance of

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### Welcome

The personal injury attorneys of our firm intend to be comprehensive and relentless in the investigation and preparation of our cases. That includes identification and verification of all existing insurance policy limits. We believe the cases reported in this edition illustrate the benefits of this approach, which include two cases in which insurance coverage far in excess of that represented by defense counsel was uncovered. In the past editions of this newsletter we have reported several other instances of this problem. Please visit our website, [www.sjblaw.com](http://www.sjblaw.com), to see our previous newsletters and call us if you need a personal injury attorney to assist you.

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# Punitive Damages Claim Results in Medical Malpractice Recovery

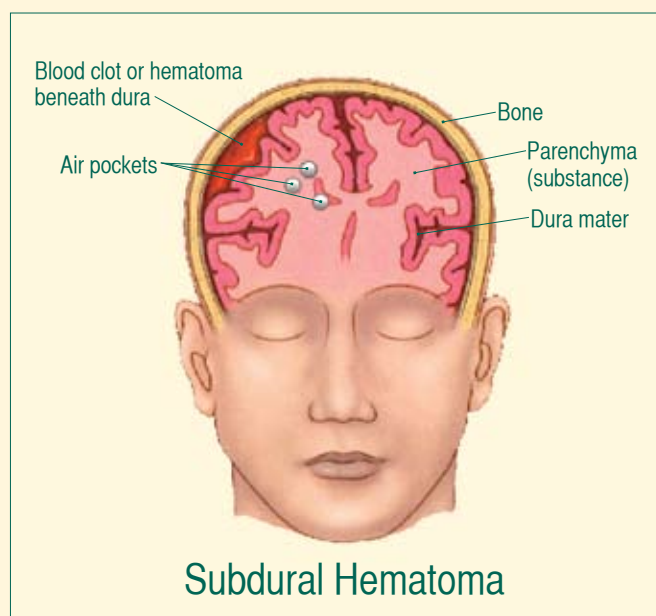
Discovery of a neurosurgeon's egregious behavior provided grounds for a highly unusual claim of punitive damages in a medical malpractice case. The case settled soon after the Court allowed Vic Bergman and Matt Birch to assert their punitive damages claim.

Maribeth Chase was a healthy and active 77-year-old woman, who lived on her own but began experiencing mild headaches and difficulty doing cross-word puzzles. Doctors diagnosed a subdural hematoma – a pocket of blood between the surface of the brain and

the dura (the tough membrane covering the brain). She was referred to Robert Tenny, M.D., the on-call neurosurgeon at Shawnee Mission Medical Center, who ordered a burr hole evacuation, which is a routine and relatively low risk neurosurgical procedure, to remove the blood.

Dr. Tenny performed the surgery, assisted by a nurse, a nurse anesthetist, and a surgical technician. Afterwards, he told the family that “the operation went great.” His operative note described a routine procedure. When Mrs. Chase woke up in the recovery room, however, it was immediately apparent that something had gone drastically wrong. She was paralyzed on one side of her body and unable to speak. Dr. Tenny was advised of this by telephone and ordered a CT scan, which showed a large new hemorrhage in Mrs. Chase's brain and pockets of air deep in the substance of the brain (parenchyma). The only way for air to get into the parenchyma was penetrating trauma from a surgical instrument.

The next day, an MRI confirmed the existence of an enlarging hematoma in Mrs. Chase's brain. Plaintiffs' neurosurgery experts said surgery was necessary at that time to remove the hematoma, alleviate the pressure, stop



*Air pockets resulted from penetrating trauma during surgery.*

the bleeding, and allow the brain to heal. But surgery was not done. Dr. Tenny appropriately ordered an operating room, but did not tell the family. He later cancelled the operating room without explanation.

Before leaving the hospital Dr. Tenny wrote: “Patient is a DNR [do not resuscitate] per patient request as noted on pre-op advanced directive (family aware).” In fact, the family was unaware of this, and Mrs. Chase had a medical directive in the hospital chart to the contrary.

That same day, Dr. Tenny called his insurance company to report that Mrs. Chase was injured in surgery. But he told Mrs. Chase's children that their mother had suffered a stroke, never mentioning the surgical injury.

That evening, a neurologist evaluated Mrs. Chase and saw that the CT scan

*Punitive Damages Claim Continued on Page 7*

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## Trucking Accident Leads to Other Claims and Insurance

What began as a simple rear-end truck accident turned into a complex case with multiple parties, claims and issues ranging from negligent maintenance to insurance agent coverage errors. In the end, the case settled for \$2.95 million.

In 2007, Diana White was severely injured when she was rear-ended by an ABC Specialty, Inc. tow truck in Cass County, Missouri. After some initial discovery, ABC offered to pay the limits of its \$1 million auto policy. Plaintiff declined, instead choosing to take the depositions of the tow truck driver, his supervisor, the operations manager and the owner of ABC Specialty to see if there were other possible claims or insurance coverage.

Attorneys Scott Nutter and Doug Bradley learned during the depositions that the driver had a history of other acci-

dents and citations, that he had failed a drug test while working for ABC, and that ABC did not make the driver submit to a drug test following the collision, as required by company policy. The tow truck driver testified the tow truck's ABS warning light had been on, that he had reported the problem to the company and that his brakes had "locked up," causing him to lose control when he tried to avoid the collision.

Depositions revealed that a related company, ABC Specialty Sales, was responsible for performing maintenance on the tow truck. The operations manager

for ABC Specialty Sales testified that he knew the ABS warning light was on but chose not to fix it based on his belief that ABS brakes are not a proper safety feature for tow trucks. Finally, the owner of ABC Specialty testified that his insurance agent mistakenly failed to obtain a requested \$3 million umbrella liability policy.

Armed with this information, plaintiff hired an ABS expert to testify that the brakes malfunctioned and that ABC Specialty Sales' failure to properly maintain and repair the brakes fell below the acceptable standard of care. Plaintiff

also hired an accident reconstruction expert who opined the ABS failure contributed to cause the collision, because the driver would have been able to maintain control and avoid the collision, or, at the very least, would have hit our client's truck at a greatly reduced speed. The insurance carrier for ABC Specialty Sales agreed to pay its \$1 million

policy limits to avoid an excess judgment and risk a claim for bad faith.

Plaintiff also pursued a claim against Austin Insurance, Inc. – the Kentucky insurance agency that allegedly failed to obtain an

*Other Insurance Continued on Page 7*



*The 2007 wreck involving a tow truck led to the discovery of multiple insurance policies and to a \$2.95 million settlement.*



## Common Pain Medications Can Cause Acetaminophen Toxicity

Acetaminophen is a unique medication. Essentially, the maximum recommended dosage — 4 grams in 24 hours — is also the maximum safe dosage. Acetaminophen toxicity can cause liver damage. Today, the most common pain medications prescribed are combinations of hydrocodone bitartrate and acetaminophen. Unfortunately, doctors often consider only the dosage of the narcotic when writing the prescription — forgetting that the dosage of acetaminophen might exceed the 4 gram daily limit. For example, Vicodin ES consists of 7.5 mg hydrocodone bitartrate and 750 milligrams of acetaminophen per tablet. Under no circumstances should a patient take more than 5 tablets in a

given 24-hour period, yet the prescription often exceeds the 4 gram limit for acetaminophen.

These medications are often prescribed for post-operative patients, including patients having undergone laparoscopic surgery. Perforated bowel or other viscus is a known complication of abdominal surgery and often results in infection. Liver injury, such as that caused by acetaminophen toxicity, impairs the body's ability to fight infection. As the patient suffers more pain from the perforated bowel or other organ, he or she takes more pain medication and thereby continues to reduce his or her body's ability to combat the developing infection. Because of this danger, practitioners should pay attention to acetaminophen dosages when reviewing cases.

### *\$3.8 Million Settlement Continued From Page 1*

a local obstetrician, who diagnosed the attorney with a condition affecting her fallopian tubes. Following two unsuccessful surgeries, she was referred to a local reproductive endocrinologist, who advised that a surgery to remove her fallopian tubes would improve her chance of becoming pregnant. During that procedure, her bladder was perforated, which went unrecognized, and she was discharged home.

At discharge, she was prescribed one to two tablets of Lortab 5.0 to be taken every three to four hours for pain. Lortab 5.0 contains 500 mg of acetaminophen per tablet. The recommended dosing instructions are one to two tablets every four to six hours. *But the total daily dosage should not exceed eight tablets.* Her mother took the prescription to a pharmacy to be filled.

Before filling any prescriptions, Kansas pharmacists must perform a drug utilization review (DUR), in part to ensure that the dosing instructions are appropriate. At the pharmacy, the automated DUR process generated a “high dosage alert” on the prescription. The on-duty pharmacist

cleared the alert and filled the Lortab prescription.

None of the written material provided to the patient referenced the maximum safe dosage of acetaminophen.

Early the next morning, the attorney continued to have abdominal pain and could not urinate. A partner covering for the endocrinologist called in a stronger pain relief prescription—Vicodin ES, one to two tablets every four to six hours. Vicodin ES contains 750 milligrams of acetaminophen per tablet. The usual dosage is one tablet every four to six hours but the total daily dosage should not exceed 5 tablets. Again, a “high dosage alert” was generated and cleared by the pharmacist. The mother again picked up the medication, and again, no written or verbal information discussed the amount of acetaminophen or the maximum safe dosage.

About noon that day, the attorney's husband took her to the emergency department and told a physician that his wife was suffering from urinary retention. The emergency department physician ordered a catheterization, which yielded a surpris-

ingly small amount of urine. He spoke by phone with the covering endocrinologist and concluded that the patient had not been drinking enough. He sent her home with instructions to follow-up in two weeks or sooner “if symptoms worsen”.

Throughout the next two days conditions worsened. The covering endocrinologist eventually suggested that the patient return to the emergency department. Doctors there diagnosed acetaminophen toxicity and suspected a perforated bowel.

During surgery to remove what turned out to be a perforated bladder, the attorney “coded” twice. Following the surgery, she was non-responsive. She developed an infection of the heart valve, which resulted in strokes. Following the strokes, she was comatose and ventilator dependent. Doctors feared she would be in a persistent vegetative state.

Miraculously, she awoke from her coma after two months. To the delight of her family, she retained the warm disposition and charm that everyone remembered. Despite this miracle, the brain injury left her with profound deficits. She lost the

use of much of the right side of her body and developed an extremely painful condition in her left leg that greatly limits its use. Most devastating, however, are cognitive deficits, which have prevented her from returning to work as an attorney.

According to plaintiff's experts, our client was hit with a "perfect storm" of medical errors. The excessive acetaminophen she was prescribed caused an acute liver injury.

The liver injury impaired her ability to fight a bacterial infection that seeded in her abdomen. The bacterial infection resulted from urine leaking through the bladder perforation. The infection ultimately spread to her heart valve.

Matt Birch and John Parisi filed suit in Johnson County, Kan., against the hospital, the reproductive endocrinologist, the covering partner, the emergency

physician who sent the attorney home and the pharmacy. The case involved approximately 40 depositions, including approximately 20 experts from across the country. The case also involved extensive briefing on the issue of a pharmacist's duty to warn and the extent to which pharmacists are protected by Kansas' learned intermediary doctrine. Ultimately, the Court denied the pharmacy's motion for summary judgment. ■

## Companion Truck Accident Case Settles for \$2.85 Million

Swift Transportation paid \$2.85 million to settle a wrongful death claim arising from a March 2006 tractor/trailer collision in New Mexico that killed Dennis Bottorff.

The companion trucking accident case, Frederick v. Swift, was tried in November 2008 by Lynn Johnson, Scott Nutter and Doug Bradley. It resulted in a \$23.5 million verdict for the plaintiffs. Fredrick is on appeal. A decision is expected by the Fall of 2010. (Please see our Spring 2009 newsletter for more details).

The accident occurred in the middle of the night in a remote area with no eyewitnesses. The Swift truck driver claimed the Yellow truck, driven by Mr. Bottorff, rear-ended her as she was trying to turn into a rest area. The investigating state trooper accepted the Swift driver's statement and cited the decedent driver's alleged inattentive

driving and following too closely as causes of the accident.

Our investigation determined that it was not possible for the Swift driver to turn into the rest area and arrive at the Swift tractor/trailer's point of impact position and orientation without backing up. Our experts conducted full-scale turn testing with an exemplar tractor and trailer to support our conclusion. Aggressive discovery against Swift, including a court-ordered database search, revealed the Swift driver was hired despite failing the CDL exam seven times and flunking out of another truck driving school.

The Swift truck driver did not receive required training, had dozens of logbook falsifications, had just been promoted to the transcontinental fleet despite poor job performance reviews and was running late on her first cross-country trip when

the accident happened. Post-accident drug testing records showed the Swift driver tested positive for methamphetamine.

Mr. Bottorff was survived by his wife and adult daughter. We estimated Mrs. Bottorff had sustained economic losses of approximately \$650,000.00, which included future lost income and fringe benefits. The case settled shortly before trial.

The key to the case was an early start on the investigation—three weeks after the accident—and the inspiration our attorneys received from the Bottorff and Frederick families' belief in Dennis as a driver and as a person. Had our firm been contacted later, the vehicles probably would have been salvaged and the marks on the highway would have disappeared. Another key was the relentless and aggressive discovery against Swift. ■



Shamberg, Johnson and Bergman, Chtd., produced this animation to illustrate the sequence of the truck accident.

## Settlement Requires Changes at Hospital

An \$850,000.00 settlement with a southwest Missouri hospital for failing to diagnose lung cancer also resulted in policy changes at the hospital to help ensure patient safety.

John Parisi handled the case on behalf of a former over-the-road truck driver who suffered a shoulder injury on the job. After conservative treatment failed, a surgeon recommended surgery and ordered a chest x-ray. A radiologist noted a lung tumor on the x-ray and recommended follow up diagnostic testing or a biopsy.

Following her October 2005 shoulder surgery, our client continued to be treated by the surgeon and an occupational therapy specialist. Even though she underwent an additional shoulder surgery in December of 2005 and had follow-up treatment, she was never informed of the presence of the tumor. It was not until April of 2007 that another physician at the same institution identified the tumor, by then greatly enlarged, and had it biopsied. In May 2007 our client was diagnosed with Stage IV non-small cell lung cancer which was by that time inoperable. The cancer had spread into surrounding tissue and bone requiring extensive radiation and chemotherapy treatment.

Although it was undisputed that the radiology report was sent to the surgeon

and that copies were placed in the client's chart, both doctors testified that they never saw the report until it was presented to them when the cancer was finally diagnosed 18 months later. Both testified that had they been provided with the report, they would have ordered a biopsy and referred the patient to an oncologist for treatment.

As in most cancer cases, the defendants contested causation, arguing that the delay did not make any difference in the client's outcome. However, our experts were ready to testify that the tumor grew from Stage I to Stage IV during the 18 month delay and that in October 2005, when the tumor should have been recognized and was at Stage I, our client had a 70 percent chance of surviving five years. Most patients with Stage IV lung cancer do not survive more than a year.

Despite her dire prognosis we are delighted to report that at the time of this newsletter our client has responded to treatment and remains cancer free. As part of the settlement, she insisted that a provision be included to ensure that what happened to her will not happen to anyone else. The settlement requires the hospital to implement a policy requiring radiologists to notify physicians of any critical findings and that the patient be informed of such a finding. If the patient

is no longer at the hospital, the patient must be contacted and told of the finding. Had such a policy been in place in October 2005, our experts were ready to testify that she would not have progressed to Stage IV lung cancer.

We would like to acknowledge the work done on the case by Bill Manson, of the Adler & Manson firm, who served as co-counsel.

**POSSIBLE SIGNS** of non-small cell lung cancer include a cough that doesn't go away and shortness of breath.

Sometimes lung cancer does not cause any symptoms and is found during a routine chest x-ray. Symptoms may be caused by lung cancer or by other conditions. A doctor should be consulted if any of the following problems occur:

A cough that doesn't go away.

Trouble breathing.

Chest discomfort.

Wheezing.

Streaks of blood in sputum

Mucus coughed up  
(from the lungs).

Hoarseness.

Loss of appetite.

Weight loss for no known reason.

Feeling very tired.



## The Firm Welcomes David C. DeGreeff

The firm is pleased to announce the addition of Dave DeGreeff. Dave spent the first 6 years of his career as a trial lawyer for defense firms of various sizes ranging from 6 to 300+ attorneys. During his time at those firms he developed a strong desire to represent plaintiffs and help individuals and families in their time of greatest need. It was that, along with Dave's vast litigation experience, which made him the perfect fit for our practice.

Dave is licensed to practice in the states of Missouri and Kansas, and focuses his practice on medical negligence, automobile/trucking accident, and products liability litigation.

Other Insurance Continued From Page 3

umbrella policy for ABC Specialty, Inc. Plaintiff made a tentative agreement with ABC Specialty to limit her recovery to available insurance in exchange for ABC Specialty's assignment of the proceeds from any claim against Austin Insurance. As plaintiff was preparing to try the case against ABC Specialty to the court and request a damages finding in excess of \$10 million, the errors and omissions carrier for Austin Insurance agreed to pay its \$1 million policy limits.

Plaintiff then settled with ABC Specialty for \$955,000.00, the remaining limits of the \$1 million auto policy, for a total settlement of \$2.95 million.

This is another example of finding additional insurance policy limits after investigating the possibility of other coverage and claims. In this case, two days of depositions led to an additional \$2 million for a very deserving client.

A similar result was achieved in a recent Kansas motorcycle-truck accident case. Our client was seriously injured and his wife killed when they were struck by a construction company truck. The company initially claimed that it had only \$300,000.00 in auto liability coverage. Further investigation revealed a \$500,000.00 umbrella policy. We then discovered that the company owner claimed his insurance agent had made a mistake and that the owner had allegedly requested \$1 million in auto liability coverage instead of \$300,000.00. Finally, the driver's personal auto policy also provided \$100,000.00 in coverage. Therefore, rather than accepting the insurance carrier's initial representations and settling the case for \$300,000.00, the discovery of additional claims and coverages eventually resulted in a total settlement of \$1.3 million.

Punitive Damages Claim Continued From Page 2

showed the air in the parenchyma, which could not result from a stroke. He called Dr. Tenny, who stuck with the story that nothing unusual happened in surgery and that Mrs. Chase suffered a stroke. Unsatisfied with this explanation, the neurologist that night asked the hospital risk manager to review the case. Under questioning by the risk manager the next morning, Dr. Tenny claimed that during the surgery, while he was turned away from Mrs. Chase to cut a drain, the surgical technician performed an unauthorized, inappropriate and forceful irrigation into the frontal burr hole site, injuring Mrs. Chase's brain.

When Dr. Tenny identified the alleged surgical technician to the risk manager, however, he named a technician who had not been involved in the surgery.

After further peer investigation, Shawnee Mission Medical Center took disciplinary action against Dr. Tenny, who lost his surgical privileges there.

By the time the Chase family learned that their mother had sustained a penetrating injury and did not have a stroke, the window of opportunity to intervene surgically had already passed. Mrs. Chase died about two weeks later.

Shamberg, Johnson & Bergman, Chtd., filed a negligence claim in the District Court of Johnson County, Kan. The court later granted plaintiff's motion to add a claim for punitive damages. (See [www.sjblaw.com](http://www.sjblaw.com) for the brief and orders on these issues.) Shortly before trial, the case settled for \$1.01 million, including Dr. Tenny's insurance limits of \$1 million and \$10,000.00 of his own money.

The Kansas Board of Healing Arts has had the case since April 2007 without any final resolution to date.



Answers to Supreme Court Trivia Puzzler  
Across: 1. Bork 3. Jackson 6. Harvard 8. O'Connor 9. Eisenhower 14. Taft 16. Story 18. Carter  
Down: 1. Burger 2. Rehnquist 4. Cardozo 5. Brandeis 7. Know 10. White 11. Roosevelt  
19. Whitaker  
12. NAACP 13. Jay 15. Lyric 17. Miers

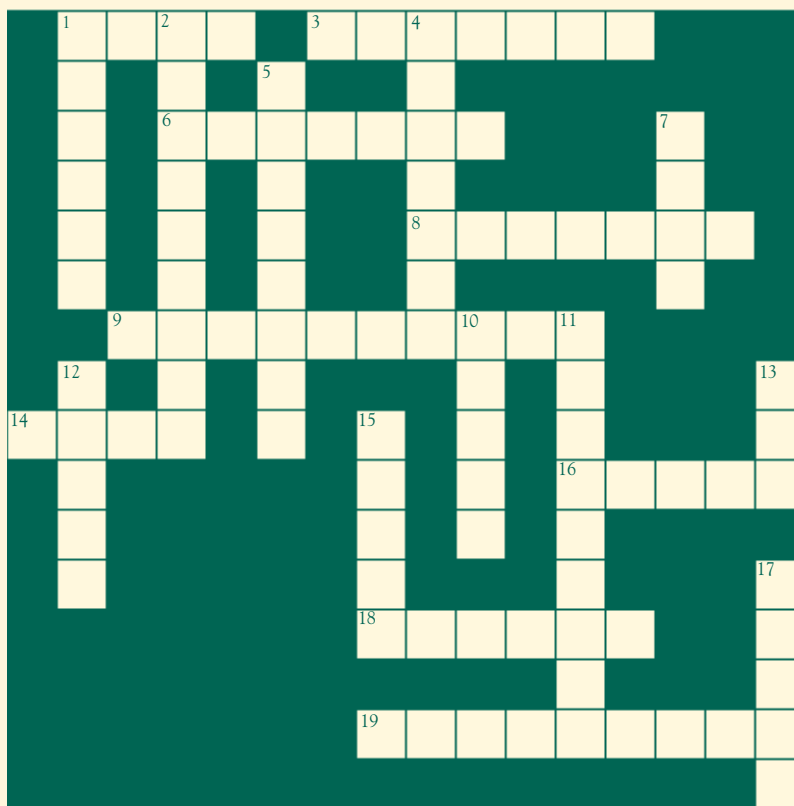
Past results afford no guarantee of future results.  
Every case is different and must be judged on its own merits.  
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### Supreme Court Trivia Puzzler

#### Across

1. This Reagan appointee was the last nomination to fail to win a majority confirmation in the full Senate (last name).
3. While serving as an associate justice of the Court, Robert \_\_\_\_\_ was the chief United States prosecutor at the Nuremberg Trials. He was also the last justice appointed who did not hold a law degree.
6. If Elena Kagan is confirmed by the Senate, every sitting supreme Court justice will have attended either Yale or \_\_\_\_\_ law school.
8. During her tenure on the Court, this justice was often called "the most powerful woman in America (last name).
9. This president complained that two of his biggest mistakes in office were appointing Earl Warren and William Brennan to the Supreme Court.
14. The only U.S. president to also serve as chief justice (last name).
16. At the age of 32, Joseph \_\_\_\_\_ was the youngest justice to be appointed.
18. Only president to serve a full term who did not have a chance to nominate a Supreme Court justice (last name).
19. Charles \_\_\_\_\_, a Kansas native, is the only Supreme Court justice to have graduated from the University of Missouri-Kansas City School of Law (Then the Kansas City School of Law).



#### Down

1. Last name of former chief justice who worked full-time in the accounting department of an insurance company while attending law school at night.

2. Last name of chief justice who added four gold stripes to his robe after being inspired by the Lord Chancellor's costume in a Gilbert and Sullivan production.
4. Last name of justice who was the cousin of poet Emma Lazarus, author of "The New Colossus", which appears on the Statue of Liberty.
5. The first Jewish Justice.
7. Justice Potter Stewart famously said of obscenity: "I \_\_\_\_\_ it when I see it."
10. Before accepting a Rhodes scholar to study at Oxford, this justice led the NFL in rushing (last name).
11. Besides George Washington, this president appointed the most justices - nine - to the Supreme Court (last name). He also had the highest percentage of confirmations - 100%.
12. Prior to joining the Court, Thurgood Marshall argued Brown V. Board of Education on behalf of this organization.
13. The first chief justice (last name).
15. Justice John Marshall Harlan wrote in 1971 of the right to wear a jacket reading "F-- the Draft" in a county courthouse: "One man's vulgarity is another's \_\_\_\_\_."

17. This unsuccessful nominee described President George W. Bush as the most brilliant man she had ever met (last name).