SHAMBERG JOHNSON AND BERGMAN

WINTER 2019

ISSUE 39

## IN THIS ISSUE



An insurance company's failure to pay the full extent of a plaintiff's property damage claim for the above vehicle resulted in a $20.75 million personal injury and property damage judgment.

FEATURE ARTICLE

# PROPERTY DAMAGE CLAIM RESULTS IN SETTLEMENT FOR INSURER'S BAD FAITH

Scott Nutter, Daniel Singer and Richard Budden recently concluded a Kansas breach of contract/bad faith case with a $7.5 million settlement. This is the latest in a series of successful bad faith cases handled by Shamberg, Johnson & Bergman.

The case arose from a rear-end crash that left a young woman paraplegic. The defendant's auto insurance carrier offered its driver's $25,000 policy limits 37 days after the wreck, without a demand from the plaintiff. Kansas law is well established that an insurance carrier has an affirmative obligation to initiate settlement discussions and offer policy limits, especially in clear liability, catastrophic injury cases. Many of our firm's bad faith cases arise from similar facts where — unlike here — the carrier makes no effort to settle the case in the face of substantial excess exposure. Here, the prompt offer of policy limits presented a significant challenge to a bad faith claim.

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# WELCOME

## SHAMBERG JOHNSON AND BERGMAN

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## 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.

Personal injury practitioners experienced a momentous year in 2019. The Kansas Supreme Court's abrogation of the state's cap on noneconomic damages removed a significant hurdle for plaintiffs and upheld the right to trial by jury. The decision followed more than 30 years of efforts by plaintiffs attorneys, including Shamberg, Johnson & Bergman, Chtd., to overturn the cap and allow juries to decide the full measure of noneconomic damages. Our firm will continue to fight to preserve the right to trial by jury and to protect personal injury victims.

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Bad faith in this case stemmed from the carrier's handling of the property damage claim. After making efforts for several months to resolve that part of the claim, the plaintiff grew frustrated and hired an attorney. The plaintiff then made a demand of $15,000 for property damage, and indicated suit would be filed on all claims if the property damage demand was not accepted. The carrier responded with an offer of $13,269.23. The plaintiff filed suit for both personal injury and property damage the following week. The case was ultimately tried to a jury, resulting in a $20.75 million judgment.

The plaintiff then entered into a *Glenn v. Fleming*, 247 Kan. 296, 799 P.2d 79 (1990), agreement that included a covenant not to execute and an assignment of the insured's breach of contract/bad faith claims to the plaintiff. Upon learning of the agreement, the carrier preemptively filed a declaratory judgment action in federal court. We filed suit against the carrier in state court shortly thereafter. The federal action was ultimately dismissed under *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942), and its progeny, and the case was litigated in state court.

We argued the property damage demand was an express condition of settling the bodily injury claim for policy limits, and that it was unreasonable for the carrier to reject that demand over a difference of $1,730.77. Discovery also revealed that the insurance carrier failed to inform the insured of the demand. The insured later testified he would have paid the $1,730.77 difference himself to settle the case and avoid a lawsuit. The carrier argued it did everything right in affirmatively offering policy limits 37 days after the wreck without a settlement demand, and that the property damage claim was separate and could not give rise to bad faith on the injury claim.

The case settled for $7.5 million. We thank our co-counsel Roger Johnson of Johnson, Vorhees & Martucci in Joplin, Mo., who handled the underlying case.

The $7.5 million settlement follows a long line of insurance breach of contract/bad faith handled by our firm, including a recent $11.5 million judgment against an insurer for its negligent handling of a claim after a plane crash, and settlements of $10.25 million, $4 million, $1.875 million and $1.275 million against insurers following motor vehicle collisions.

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01

## KANSAS SUPREME COURT STRIKES DOWN CAP ON NONECONOMIC DAMAGES

The Kansas Supreme Court has struck down a longstanding cap on noneconomic damages in all personal injury cases, affirming the state's constitutional guarantee of a right to trial by jury.

The holding in *Hilburn v. Enerpipe* declared the cap on noneconomic damages to be "facially unconstitutional." It wipes Kansas' statutory cap from the books, meaning the cap does not apply to any type of personal injury case. 442 P.3d 509 (2019)

Since the 1980s, the Kansas Legislature has passed and the Kansas Supreme Court has analyzed forms of noneconomic damages caps in personal injury cases. Noneconomic damages include pain, suffering, disability, disfigurement, mental anguish and loss of enjoyment of life. Since 1988, Kansas' cap applied to all types of personal injury cases, from motor vehicle collisions to medical negligence cases.

*Statue and entryway at the Kansas Judicial Center*

In 2012, the Kansas Supreme Court upheld the cap, formerly found at K.S.A. § 60-19a02, in a medical negligence case, *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012). The Court in *Miller* ruled that the cap did not violate Kansans' rights to trial by jury (Section 5 of the Kansas Bill of Rights) and remedy by due process of law (Section 18), because in limiting these rights the Legislature also provided a benefit to claimants — a statutory requirement that healthcare providers carry liability insurance. This satisfied what had come to be known as the *quid pro quo* test. After *Miller*, questions remained about whether the cap would withstand scrutiny outside of the medical negligence realm, where a legislative scheme mandating liability insurance or similar substitute remedy did not exist.

*Hilburn* involved a Kansas resident who was injured when a tractor-trailer owned and operated by a Texas company rear-ended the car she was in. The jury's verdict included $301,509.14 in noneconomic damages, which the trial court reduced to $250,000 — the cap at the time the collision occurred. The Kansas Court of Appeals upheld § 60-19a02, reasoning that liability insurance requirements for trucking companies satisfied the *quid pro quo* test.

The Kansas Supreme Court did not reach the adequacy or presence of a substitute remedy. Instead, it abandoned the *quid pro quo* test and analyzed whether § 60-19a02 violated Section 5, which states, "The right of trial by jury shall be inviolate." On this question, the Court determined that by passing the cap, the Legislature sought to substitute its inexact, general judgment on noneconomic damages for the specific judgment of a jury. This violated

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the right of trial by jury and was unconstitutional, the Court held.

The Court's opinion is lengthy and includes a concurring opinion, which raised questions about the analytical framework used to reach the holding while ultimately joining in that analysis and concurring in the final result. But the Court's ultimate holding is clear. Section 60-19a02 violated Section 5 and is "facially unconstitutional." A statute that is unconstitutional on its face is *void ab initio*, rendering the cap on noneconomic damages null and void in all cases. A dissenting opinion acknowledged this when it wrote that the majority in *Hilburn* opinion had overturned the Court's previous holding in *Miller*, which had upheld the cap in the context of medical negligence cases.

Equally important, the Court found that Section 5's guarantee to a right to trial by jury is a fundamental constitutional right, meaning that statutes that touch on that right do not enjoy a presumption of constitutionality.

*Hilburn* helps balance the scales of justice by ensuring that all Kansans who are unfortunate enough to be injured by the fault of others have the right to have a jury of their peers and neighbors decide the full measure of their losses.

Shamberg, Johnson & Bergman co-wrote an amicus brief in *Hilburn* and is proud to have participated in the briefing of all Kansas Supreme Court cases that challenged and ultimately overturned the cap since the 1980s.

02

## FT. RILEY CASE SHINES LIGHT ON MATERNAL DEATHS

A Federal Torts Claim Act case for the death of a mother shortly after delivering her first child settled for $1.25 million following protracted discovery after the U.S. government denied the claim in the administrative phase. The mother's passing is sadly part of a growing and disturbing trend of maternal deaths in the United States.

The Federal Torts Claim Act (FTCA) allows for claims of liability against federal government agencies for the acts of their employees. But those claims must first proceed through an administrative phase before suit can be filed, under 28 USC §§ 2401(b) and 2675(a). Failure to comply with serving proper notice of an administrative claim can result in dismissal of a claim.

The case arose after the delivery of a healthy baby boy at Irwin Army Community Hospital in Ft. Riley, Kan. After the Department of the Army denied a claim brought on behalf of the mother's surviving husband and son, David Morantz and Lynn Johnson filed suit in federal

### DISTURBING TREND OF U.S. MATERNAL DEATHS

- Each year, 700 to 900 women die in the United States from causes related to pregnancy or childbirth.
- From 2000 to 2014, the rate of U.S. maternal deaths increased.
- Maternal mortality rates have been falling in other wealthy countries.
- U.S. maternal mortality rates are high among African-American and low-income women, as well as women in rural areas.
- Possible causes of maternal deaths in the United States include older ages of new mothers, a high rate of unplanned pregnancies, an increased rate of C-section deliveries, and difficulty in obtaining needed medical care.
- Preeclampsia is associated with 8 percent of U.S. maternal deaths, or 50 to 70 each year.

**HOLIDAY MUSIC TRIVIA ANSWERS**

**ACROSS:** 1) Pretty 5) Diamond 6) Ghost 9) Elvis 10) Autry 11) German 13) Holiday 15) Cuban 16) Garland 18) Ethiopia 19) Legend
**DOWN:** 2) Thanksgiving 3) Montgomery 4) Crosby 7) Denver 8) Nutcracker 12) Charlie 14) Carew 17) Alice

*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.*

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court in the District of Kansas. The suit alleged that healthcare providers at the hospital failed to transfer the patient to a higher-level facility that could better manage a high-risk pregnancy, failed to suspect and treat post-partum hemorrhage, and failed to suspect and treat respiratory depression following administration of medications. The suit also alleged that providers failed to timely start resuscitative procedures when they found the mother unresponsive, about nine hours after a C-section delivery.

Because several doctors and nurses involved in the mother's care were military personnel, their postings had changed between the delivery and discovery in the lawsuit, requiring depositions across the country. Deposition testimony revealed that a nurse supervisor had strongly opposed admitting the expectant mother to the labor and delivery unit at Ft. Riley because of concerns for preeclampsia, or pregnancy-related hypertension, and the number of nurses and patients on the unit. If not managed properly, preeclampsia can develop into HELLP syndrome, which consists of the breakdown of red blood cells, elevated liver enzymes and low platelets. HELLP syndrome impairs the blood's ability to clot, which can lead to severe bleeding.

Prior to delivery, the nurse manager went up the chain of command and advocated transferring the expectant mother to a higher-level care facility. Her concerns were overruled by her military superiors.

Our firm retained two experts in maternal fetal medicine, one in critical care/airway management, one in pathology, and a forensic economist. The defense retained experts in maternal fetal medicine, emergency medicine and toxicology. The case resolved after expert discovery was completed.

The case highlights a tragic recent development in the United States. According to a 2017 study by Propublica, a non-profit investigative journalism outlet, the United States leads the developed world in the rate of maternal deaths — anywhere from 700 to 900 each year. The number of maternal deaths increased each year from 2000 to 2014 in the United States, according to the study. Reasons range from new mothers being older than they used to be, to a fragmented health system that makes it difficult for new mothers to get needed care, and to an increase in C-section deliveries, like in this case, that can lead to major complications.

A study by the CDC Foundation found that more than 60 percent of pregnancy-related deaths in the United States were preventable. At the same time, infant mortality is at the lowest rate in American history, suggesting that America's healthcare system needs to refocus on maternal health and in preventing tragedies like this case.

03

## SJB WELCOMES DIANE PLANTZ, M.D.

The firm is pleased to announce the addition of Dr. Diane Plantz.

Diane graduated from the University of Missouri—Kansas City School of Law in December 2018. While in school, she was a member of the University of Missouri—Kansas City Law Review and the Client Counseling Team. Prior to law school, Diane practiced pediatric emergency medicine for 20 years, most recently at Children's Mercy Hospital. While at Children's Mercy, she also served on the Ethics Committee providing ethics consultation and the Institutional Review Board. After graduating from Vanderbilt School of Medicine, Diane completed her pediatric residency at Mount Sinai in New York, followed by a pediatric emergency medicine fellowship at Cincinnati's Children's Medical Center.

Diane looks forward to continuing to serve the Kansas City community by focusing on clients who have been harmed by medical negligence and suffered complex personal injuries. For more than 20 years as a practicing physician, Diane placed her patients first. Diane will do the same for our clients by combining her medical expertise and knowledge with her legal skills.

Diane is licensed in Missouri and is applying for licensing in Kansas.

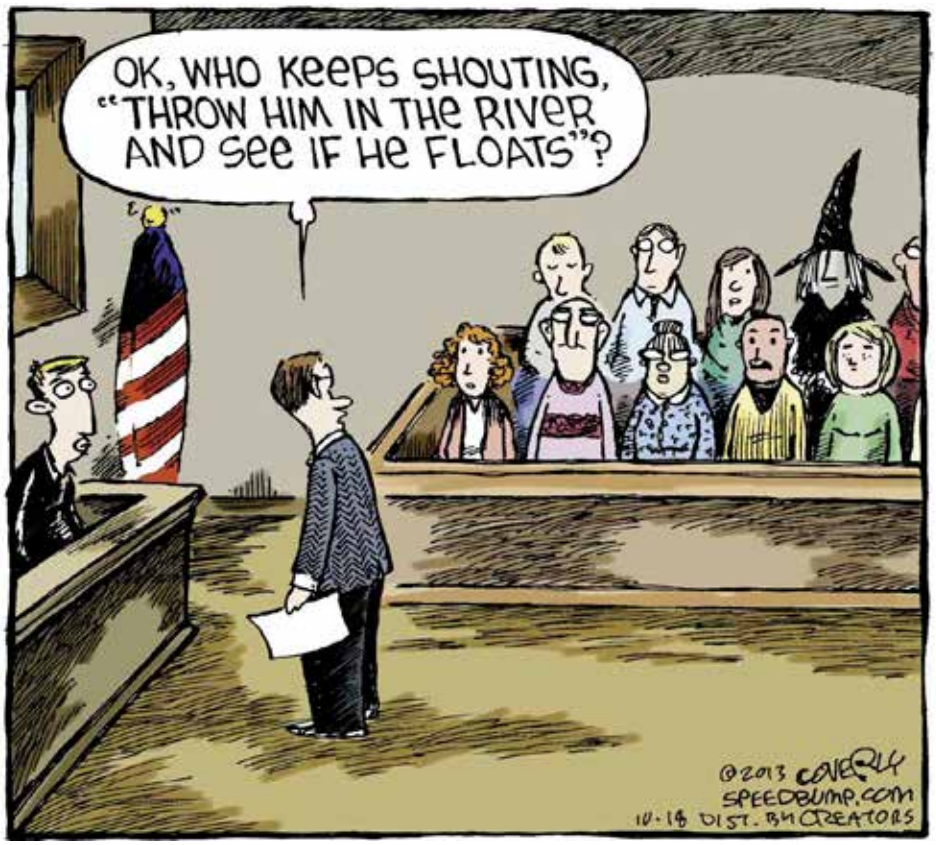
04

## CHANGES IN LAW HELP EVEN THE FIELD IN MEDICAL MALPRACTICE CASES

For years, attorneys who handle medical negligence cases have fought on an uneven playing field. Medical negligence cases are often difficult to handle in an economically feasible manner. Arbitrary caps on noneconomic damages have made many medical negligence cases particularly difficult.

But recent developments are leveling the playing field and helping severely injured patients obtain fair compensation for noneconomic loss. As examples, two medical negligence cases recently handled by Matt Birch resolved for a total of $9 million when, in the past, arbitrary caps on damages would have prohibited our clients from receiving full and fair compensation. Economic damages have never been capped in Kansas or Missouri. But noneconomic damages were limited by law. The noneconomic damage caps harmed our clients with permanent, disfiguring, life-altering losses the most. Now, severely injured patients have a chance to obtain full and fair compensation.

First, in Kansas, the longstanding cap on noneconomic damages no longer exists. In *Hilburn v. Enerpipe LTD*, 442 P.3d 509 (Kan. 2019), the Kansas Supreme Court held that the cap on noneconomic damages was unconstitutional on its face and therefore, the cap no longer applies to personal injury cases in Kansas. The fact that the Court held the cap to be "facially" unconstitutional, makes clear that the holding applies to all cases in which noneconomic damages are at issue, including medical negligence cases.

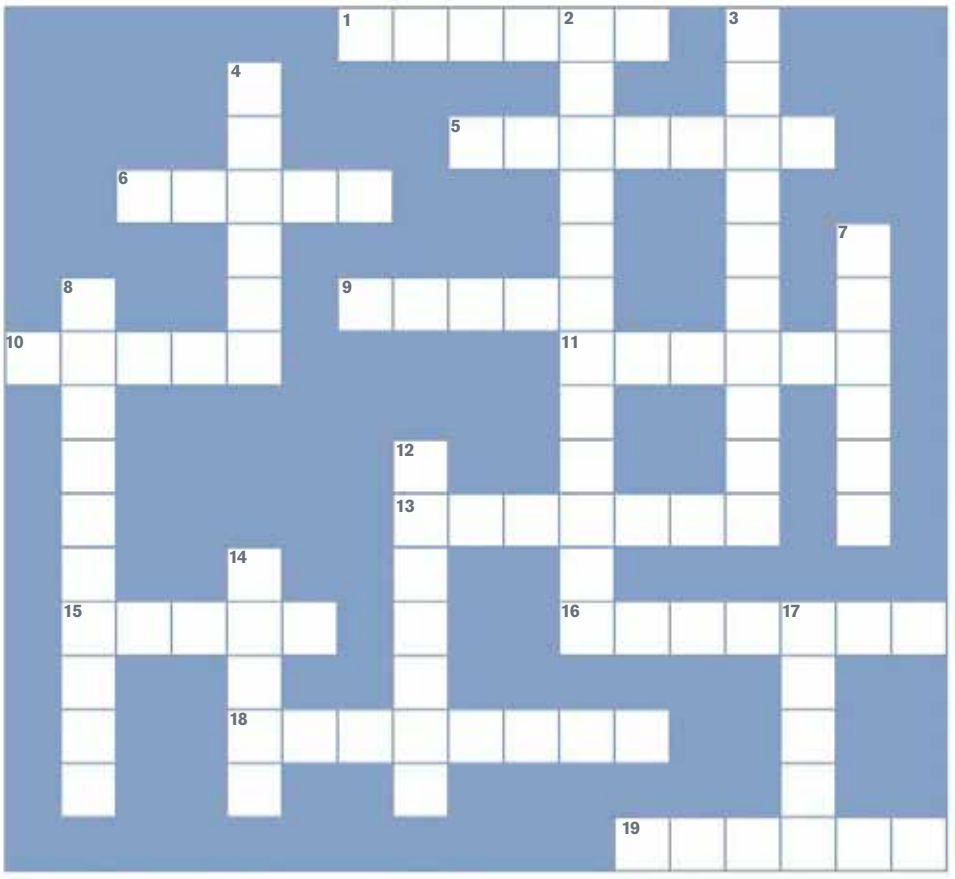



Second, in Missouri, the likelihood is low that the state's statutory cap on noneconomic damages is enforceable. In *Watts v. Lester E. Cox Med. Ctr.*, 376 SW3d 633 (Mo. 2012), the Missouri Supreme Court struck down the arbitrary cap on medical negligence damages in existence at the time as violating the right to trial by jury enshrined in the Missouri Constitution.

After *Watts*, the Legislature attempted to enact a new cap on noneconomic damages by "repealing" the common law tort of medical negligence and enacting a statutory medical negligence action. Mo. Rev. Stat. 538.210 (2015). It is our approach to pay little or no attention to this statutory cap. The cap is unconstitutional on its face, because when it comes to the right to trial by jury in Missouri, "'[n]o legislative change in procedure can impair it' and 'all the substantial incidents and consequences that pertained to the right to trial by jury [in 1820] are beyond the reach of hostile legislation.'" Emily Mace, *Missouri's Statutory Cause of Action for Medical Negligence: Legitimate Application of Legislative Authority or Violation of Constitutional Rights*, 81 Mo. L. Rev. 899 (2016) (quoting *Elks Investment Co. v. Jones*, 187 SW 71, 74 (Mo. 1916)).

Therefore, in Kansas, and likely in Missouri as well, there are no longer caps that arbitrarily limit a patient's ability to recover noneconomic damages. This results in an increased ability to obtain reasonable and fair compensation for severely injured clients.

# HOLIDAY MUSIC TRIVIA



## ACROSS

1. Willie Nelson's "_____ Paper" tells about a street vendor selling pencils and papers during the holiday season.

5. Neil _____ went to high school with Barbara Streisand and recorded "The Christmas Album" in 1992.

6. "It's the Most Wonderful Time of the Year" references a Victorian tradition of telling scary _____ stories on Christmas.

9. First name of singer who holds the record for the highest selling Christmas album.

10. Cowboy crooner Gene _____ hit Number 1 on the U.S. charts singing Rudolph the Red-Nosed Reindeer in 1949.

11. "Silent Night" was composed first in 1818 in this language.

13. "White Christmas" was the theme song for the 1942 movie "_____ Inn."

15. "Do You Hear What I Hear?" was written in 1962 as a plea for peace during the _____ Missile Crisis.

16. Actress Judy _____ sang "Have Yourself a Merry Little Christmas" in the 1944 movie "Meet me in St. Louis."

18. "Do They Know It's Christmas?" was performed in 1984 by British and Irish musical stars to raise funds to fight famine in _____.

19. John _____ and Kelly Clarkson recorded an updated version of the controversial song "Baby, It's Cold Outside" this year.

## DOWN

2. "Jingle Bells" was created in 1857 for what holiday.

3. "Rudolph the Red-Nosed Reindeer" was published by department store _____ Ward in 1939 as a booklet.

4. Bing _____'s "White Christmas" is the world's best-selling holiday music single. Crosby.

7. John _____ collaborated with The Muppets in 1979 to release "A Christmas Together."

8. Ilyich Tchaikovsky composed The _____ as a Christmas ballet to premier in St. Petersburg, Russia.

12. American jazz pianist Vince Guaraldi performed the 1965 soundtrack album for "A _____ Brown Christmas."

14. Adam Sandler sang about hall-of-fame baseball player Rod _____ in "The Chanukah Song" in 1994.

17. In 1969, Arlo Guthrie sang that "It all started about two Thanksgivings ago, two years ago, on Thanksgiving, when my friend and I went up to visit _____ at the restaurant."

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