BURGER LAW
INJURY TRIAL ATTORNEYS

More Client Success Stories

Four More Years of Victories for Burger Law Clients

Gary Burger

Client Success Stories

Four More Years of Victories at Burger Law

By Gary Burger

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Introduction

Since forming Burger Law, I quickly committed myself to organizing my contact list and sending an emailed newsletter every other week to friends, lawyers, colleagues, and clients. I've told stories of our clients' successes, legal issues, my life, and some views on where law meets society.

These biweekly emails have been a great way for me to connect more with friends and colleagues, whose responses to my newsletter are always a bright spot in my day.

A more interesting side of these newsletters is that they have become something bigger. When put together, they tell the story of Burger Law, from our first newsletter announcing the firm, to our latest client win. The first volume of Client Success Stories tells the story of the first two years of our firm. This volume follows us along the next four, through early 2022. It is fun to follow these stories along our journey, and watch this firm grow.

We call it client success stories as it is the client on whom our firm and legal representation is focused and their successes we celebrate. And our client's success mirrors the firm's success Many thanks to the clients who have made this happen.

Thanks also to two of our lawyers, Genavieve Perino and Michael Sheldon, who helped achieve many of these successes for our clients and contributed to the content as well. Thanks also to Martina Doytcheva, our Law Clerk, who compiled this book; Joe Dalton, our Marketing Manager, who edited this manuscript; our COO, Casey Fluegel, who oversaw the process; and to the lawyers, paralegals, and staff who have contributed to the newsletters over the years. Additionally, I'd like to thank my entire team for helping build four more years of success stories, and my family for their love and support.

So, without further ado, I present to you, four more years of successes: *More Client Success Stories*.

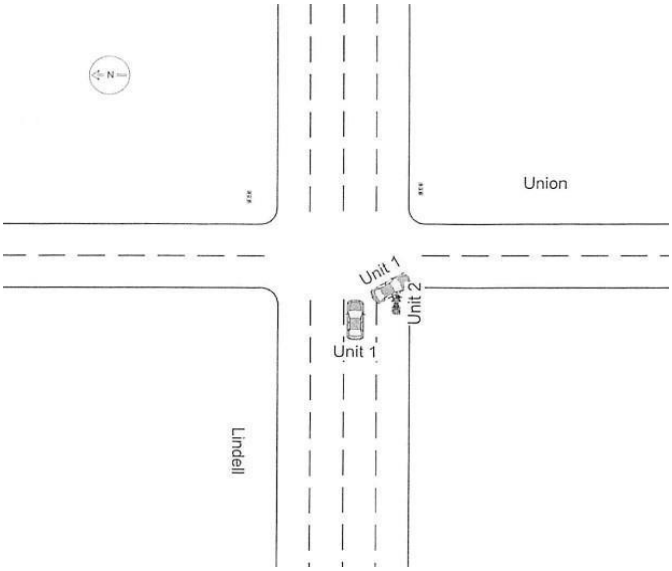
Happy New Year

January 2018

But first, here's my ten **"by the numbers" 2017 review**.

1. 3 Offices now - St. Louis, Belleville and Chesterfield
2. 4 lawyers now work at our firm and three paralegals
3. 5 Star review average on Google
4. 25 puppies my wife Kristen and I fostered in 2017
5. 25 -- The number of years I have been practicing law, which is also the age of my law clerk
6. 112 cases resolved in 2017
7. 117 lawsuits filed in 2017
8. 153 depositions taken by Burger Law Lawyers in 2017
9. **173 Google reviews for our main downtown office**
10. 322 open cases right now

Cyberstalking, Circuses, and Custody of Pets -- New Laws for Illinois and Tennessee in 2018



Illinois passed more than 200 bills in 2017 that took effect yesterday.

This includes combating the **opioid epidemic.** Senate Bill 772 requires doctors to check the Prescription Monitoring Program database to see if a patient has been prescribed a controlled substance by another doctor before writing that patient a prescription. This makes it harder to "doctor shop" drugs from multiple physicians.

Health laws are changing: psychiatrists don't have to be in the same room as a patient and physicians can do virtual medical care. Here's the NPR story I heard this morning on this very topic. Although virtual therapy visits for the opioid addict are slow to catch on.

Also, Senate Bill 314 requires insurance companies to cover breast MRIs if a mammogram detects dense breast tissue, which is a risk factor for cancer, according to the American Cancer Society.

Other new laws treat pets as children in divorce cases, ban circus elephants, and make cyberstalking a potential hate crime.

Tennessee is making changes too. Using a hand phone while driving in a school zone is a Class C misdemeanor.

Finally, the biggest law many know about taking affect January 1 is a federal law -- the changes to the federal tax system. If you are a small business owner, make sure to check in with your accountant on what might change for you. If you are an individual, read up on the changes.

Settled Auto/Work Comp Case

We recently settled an auto claim for one of our clients. Darius had two claims arising from his accident. We settled his workers comp claim earlier but his auto case took a little longer.

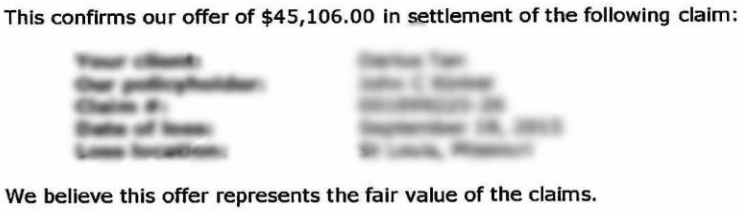
Darius was injured September 18, 2015 on his motorcycle when **a car from the left lane attempted turned right in front of him**. I try to get the word out to share the road and watch for Motorcycles.

Darius had lacerations and bruising, and injuries to his legs, neck, teeth and head. Check out the photo below to see how the accident happened.

Darius's leg injury would not resolve on its own. His swelling continued and eventually, doctors relieved the swelling by performing calf incision, irrigation and debridement.

Darius also had wage loss claims. Darius had multiple employers he missed work for from the accident. Due to the case taking a while to settle, we had to send multiple demands for his injuries and updates to his wage loss claim throughout the process.

After no offer for a long time the defendant's insurance company offered $45,000, barely enough to cover his medical and work comp lien. So, we filed suit and litigated the case and was able to double the first offer, **settling for $90,000.** Here's the letter with the low offer:



This confirms our offer of $45,106.00 in settlement of the following claim:

[redacted]

We believe this offer represents the fair value of the claims.

We negotiated the Workers' Comp lien asserted in the case. Even after settling the case, it has taken almost 2 months to get the check from the other side. But finally, we are happy our client will ring in the new year with this behind him.

25 Puppies in 2017

My wife fostered 25 puppies through various organizations in 2017. I helped too :-).

This is up from 16 in 2016. Kristen is amazing at caring for them and finding them homes. We adopted one out at our Christmas party a couple weeks ago and thought we would take a break.

But Kristen got a call that Gateway Pet Guardians found **5-week-old puppies out in the cold**. So, we took three in to ring in the New Year. With this weather they would not have made it.

The three in the back we picked up December 28th. The one in the front is older - 3 months - and decided she would play mom by carrying them around by the scruff of their neck. #supercute.

Thanks to my staff for this awesome Christmas gift - Here's me as a bobblehead.

Hi there, friend, and Happy MLK Day!

Martin Luther King's "I Have a Dream" speech was given almost 55 years ago.

We have progressed in King's dream that his children, **"live in a nation where they will not be judged by the color of their skin, but by the content of their character."**

But our president picked this week to question admitting darker skinned immigrants from Haiti and Africa and instead white people from Norway. Racial ranking in immigration challenges our progress.

Did you know choosing immigrants from countries as a race litmus test was raised by conservatives in the 1920s? This led to race superiority theories in Germany and Italy before and during WWII.

This 1924 immigration reform was discussed and promoted by Trump campaign spokesmen Jeff Sessions and Steve Bannon.

I try not to be controversial in these emails, but as Dr. King said in his Dream speech: "Our lives begin to end the day we become silent about the things that matter."

Below will talk about some good news about race relations, a funny video fail of mine with my son Jordan, influenza and a court victory last week by Nicole Grotowski.

First, here's some wisdom by the Rev. Dr. Martin Luther King Jr.:

"Injustice anywhere is a threat to justice everywhere. We are in an inescapable network of mutuality, ties in a single garment of destiny. Whatever effects one directly, affects all indirectly." Letter from Birmingham Jail

"So, I have tried to make it clear that it is wrong to use immoral means to attain moral ends. But now I must affirm that it is just as wrong, or even more so, to use moral means to preserve immoral ends."

The arc of the moral universe is long, but it bends toward justice.

Words that are still relevant today as our president is making comments about people from other countries.

A Bit of Good in all the Bad

While disheartening, recent stories about those working to help others and denouncing Trump's comments are welcomed.

Senator Dick Durbin confirmed Trump made those "vile" comments repeatedly during an immigration meeting in which the Senator was present. Senator Durbin describes Trump's words as "sickening and heartbreaking words." The full story is here.

Senator Durbin wasn't the only one to rebuke Trump's words - many reacted to the news. Another great story about an area Judge is truly inspiring.

A story was recently published on Federal District Judge Richard E. Webber. Judge Webber's story is astounding, you can check out the full article here. Understanding he can make a difference, Judge Webber makes it a purpose to **meet with all of the people he sends to prison, to let them know in his words, he cares about them.** Here's an excerpt:

At one point, the judge, who is white, ***knelt before one of the men*** *in the all-black audience to say how sorry he was for sending so many young black men to prison — and to drive home his main point. "I'm here to tell you that I care about you,"*

Judge Webber says for many, they tell him he is the first person to ever tell them that. Judge Webber encourages them to take classes and graduate high school or get their GED, and when they do, **they often send their certificate to him.**

Judge Webber says the only way change is ever going to happen is if "everybody rolls up their sleeves and puts aside a lot of their preconceived ideas and looks for new ways to really solve some of these problems that aren't being solved"

Justice for our Clients

This week, one of our attorneys, Nicole Godowsky, had a great victory for a young woman who was sexually assaulted on a college campus. As happens too often, the University did not accommodate the young rape survivor, and refused to remove the perpetrator from campus.

He attended class with her and there was no school recourse, contrary to Title IX. The woman was forced to see her attacker on campus daily as she attended class despite the fact that her perpetrator continued to harass her.

Thanks to the work of Burger Law, the woman was able to get a hard-fought full order of protection barring the rapist from campus until well after she graduates. He can't be within 500 feet of her, go near her home, or go anywhere near where she works. Justice prevails and clients are safer due to the work of our attorneys!

Get a Flu Shot

Many people think the flu is no big deal and don't take symptoms seriously. We had a client a few years ago whose husband exhibited flu like symptoms. In her claim, we sued two emergency room physicians who failed to timely diagnose and treat sepsis in Lisa's husband.

There are many signs of sepsis infection and it can originate from anything. Sepsis is a general term referring to infections. However, when a bacterium becomes a sepsis infection, it can lead to cascading events that can bring on death quickly.

The flu can be fatal. As a part of her mission, Lisa helps raise sepsis awareness after her husband died.

She has truly taken his memory and her love of him and made lemonade out of lemons by trying to save the lives of other people who get sepsis infections. Below is a billboard she has put up.

There are other stories about the potential dangers of the flu and other infections that arise in the winter that many people shrug off. A San Diego Navy veteran was hospitalized in the Intensive Care Unit after his flu like symptoms (headache, chills, body aches) turned into difficulties breathing and renal failure.

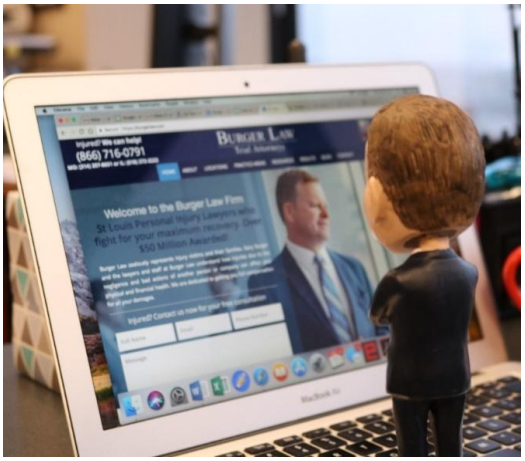
After a healthy 21-year-old man died this year from complications of the influenza virus, Time Magazine did an article outlining specifically what the flu does and how it can turn fatal.

Texting and Driving Reminder

As conditions worsen in the winter season, I want to remind everyone about the dangers of texting and driving. Texting and driving and other distracted driving are one of the leading causes of accidents.

In 2018, states like Tennessee are cracking down on texting enacting more laws to ensuring the safety of others and lower the incidents of distracted driving.

Here I am working hard this week. Check out the Burger Law blog pictured here for more stories like the ones in this newsletter.



Hi there, Friend!

Can you believe how nice it has been this week? Check out the photo I took a year ago today (below).

Hard to believe it's January in the Midwest when it's 60 degrees outside. Hope you enjoyed it.

Below I give my top 10 tips on addressing liens in cases and have an Illinois CLE coming up on 2/23.

Compel

I argued a motion to compel last week against the Missouri Department of Corrections in Cole County and won each of the 9 points raised. The challenge is that I am about 6 weeks away from trial and the documents were previously ordered to be produced.

Apparently, I'm not the only one. As illustrated by a recent Post-Dispatch article, the Missouri Attorney General has been sanctioned in different courts for not complying with orders to produce documents and information.

In my case we are helping a class of corrections officers because Missouri will not pay them for the time it takes them to get through metal detectors and airlocks, get keys and radios and walk back into the bowels of the prison to relieve the prior shift. It's called pre and post shift activity, or donning and doffing.

It's part of their job, they're required to do it and their bosses admit it's really important. Officers work about a half hour a day without being paid.

We try this case in March and hope to be successful. I'll let you know.

Ours is only the most recent employment case with the Department of Corrections. They have had numerous verdicts against them for other bad employment practices.

The DOC just will not listen - they tell me they are going to take a writ on some of the discovery. We will keep going till we persuade them of the wisdom of our position.

Liens

I get lots of questions about liens from lawyers and clients. We handle them in almost every case. I delivered a detailed presentation on it last year.

Here are my top ten tips on addressing liens.

1. Is it properly asserted? Certified mail? No lien for in-state, non-ERISA health insurance benefits.

2. Is the amount accurate? Many times, medical providers and Medicaid have the bills wrong. Sometimes, medical in the lien is not related to the incident. You wouldn't just pay a personal bill without checking the accuracy.

3. Start working on liens early - don't wait until the case is settled. Start contacting lien providers to see whether they will reduce. Send them the first low offer so they know how hard you are working for a recovery.

4. Always reduce the lien. Most lien providers will reduce them. I typically try to reduce a lien by 1/3. Some are tough so you may not get this every time. Know your arguments why they should reduce - bills too high, take less with insurance, had a lawyer to collect, etc.

5. But do not be too unfair in reducing - that doctor/nurse/PT/chiro helped your client and you want them advocating in your cases.

6. If you can't reduce a lien that should be reduced, file a Motion to Adjudicate Lien in court. The court has inherent authority to establish a fair value of the lien. If a medical provider saw someone once and billed $10,000.00, that's not fair. You would be amazed how the other side caves or doesn't show up at the hearing. E-mail me if you want a form motion.

7. Use the Missouri or Illinois lien reduction statutes, these are powerful tools to ensure that a claimant gets half the net recovery after attorney's fees and expenses and ensures that the lien holder cannot sue your client later. Email me for the statutes and my Excel spreadsheets that calculate the pro rata lien reductions.

8. Always talk with your client and explain liens and how they relate to the case. By the time the case is settles, the client should understand liens, their importance and how they are involved in the settlement. Remember that the client got a good benefit from the lien and medical care which contributed to the recovery, so liens are a necessary part of the case.

9. Liens are good. Having all the creditors assert liens means that when a case is over your client doesn't have anyone chasing them to get paid. We often encourage lien holders to place liens so that we can make sure that if they are reduced and that the client gets a good deal on those bills and they are free and clear of any charges related to the claim.

10. Don't be afraid of ERISA liens. Just because an ERISA lien holder can assert Federal Court jurisdiction and won't reduce does not mean that they will stick to their position. Are they going to really pay a lawyer to file suit? I leave the ERISA lien in my trust account and call them in 6 months.

Good morning, Friend,

I've just spent about three weeks being in depositions every day. I am going to discuss a couple settlements obtained right after depositions below and a zero offer to $100,000 full policy settlement. But first I wanted to thank my friend and **court reporter, Karen Russo**.

I am blessed to have used the **same court reporter in my litigation work for 20 years.** Karen Russo is simply an amazing court reporter and person.

Karen and I have done hundreds, likely over a **thousand, depositions together**. I spend my time in depositions concentrating on winning my case and doing all of the litigation tactics I use. I never have to worry about whether she is keeping up or has got my back.

She gets every word said, which is important because that's how we win cases.

She is such a stable, amazing professional that, frankly, I take it for granted. Sometimes we are around people in our life that we just count on to be steadfast, rock solid, and always there. I often thank her, but have not in an email like this.

Thanks, Karen. You're a fantastic court reporter and consummate professional.

Karen has been in the trenches with me in some amazing cases and amazing depositions. We couldn't even begin to relate the amazing stories and crazy testimony we have gotten together.

Last Thursday at the end of 10 hours of depositions of some California PhD experts against my case (and with only a couple 5 minutes breaks), I turned to Karen:

Me: “It has been a while since we've done a 10-hour deposition, hasn’t it?”

Karen: “Yeah, you're slowing down as you get older.”

Me: “I guess I am. I am not giving you carpel tunnel today am I.”

Karen: “You already did long ago.”

The other thing I sometimes do is brag to the witnesses in depositions that Karen and I have been doing this for a long time together - usually when she reads back a question they haven't answered.

Typically, I tell them that Karen has been doing this for 40 or 50 years (as an age joke). She can't really respond -- we are on the record and she has to report everything I am saying. I have made this joke at least 50 times - it is only funny to me.

Karen also has an amazing life and is a devoted mother, community volunteer and supportive partner to her husband - an amazing cook. He has a fantastic St. Louis based restaurant and catering company called Russo's Catering.

I can't say enough about Karen. She is the type of person who just quietly goes about her life and her business - winning daily. I have not heard her brag or a cross word in 20 years. She brightens everyone's day, supports her family friends and community and is an absolute joy to be around.

Three Settlements after Deposition

Depositions are an important step in resolving cases that are being litigated and well worth the energy and time that goes into them.

At Burger Law, we take depositions very seriously, and prepare our clients with videos, over the phone, and in person interviews for their depositions. We also have our team researching details of the defendants for their depositions, with no stone unturned.

People talk about how we push forward in cases and take a lot of depositions. They are extremely valuable. Below I give a few examples of cases we have recently settled due to depositions and the testimony given by either my client, or the defendant, that sways them into either accepting liability, or understanding the gravity of the injury and their role in it.

Hit and Run

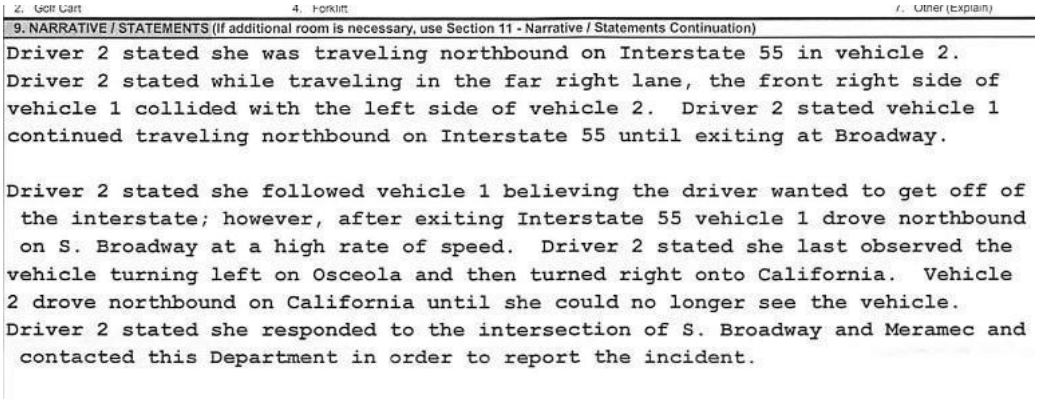
I recently wrote about my client Joe and promised I would give an update. I ended the last update saying we had asked for the depositions of the defendants. They settled the day before the defendant's depo and after Joe did a great job at his.

Joe testified the other driver hit his car then sped off, went the wrong way on a street downtown and even opened their trunk to prevent their license plate being read.

They followed the car and were able to get the license plate. We found the owner of the car and sued them. They said they did not know who was driving - but it was their daughter's car. So, we sued the daughter - then she said she did not know who was driving. I guess it runs in the family.

But we knew we would get to the bottom of it, and depositions were how we did it. We settled his case for more than four times his medical bills.

Check out the police report below for the entire story of what happened with this hit and run.



2. Golf Cart 4. Forklift 7. Other (Explain)

9. NARRATIVE / STATEMENTS (If additional room is necessary, use Section 11 - Narrative / Statements Continuation)

Driver 2 stated she was traveling northbound on Interstate 55 in vehicle 2. Driver 2 stated while traveling in the far right lane, the front right side of vehicle 1 collided with the left side of vehicle 2. Driver 2 stated vehicle 1 continued traveling northbound on Interstate 55 until exiting at Broadway.

Driver 2 stated she followed vehicle 1 believing the driver wanted to get off of the interstate; however, after exiting Interstate 55 vehicle 1 drove northbound on S. Broadway at a high rate of speed. Driver 2 stated she last observed the vehicle turning left on Osceola and then turned right onto California. Vehicle 2 drove northbound on California until she could no longer see the vehicle. Driver 2 stated she responded to the intersection of S. Broadway and Meramec and contacted this Department in order to report the incident.

Next Day Settlement

Chris was sitting on a retaining wall when it collapsed. He was injured but the defendant would offer almost nothing. We fought with the defendants for months. They wouldn't budge.

In deposition, the corporate designee stated they had no system for checking the safety of the retaining walls on their complex, have no way of ensuring their safety, and said they had a database where they kept records of any incidents, but not wall failure.

The day after the deposition, the defendants nearly doubled their offer, and we were able to settle the case.

From $0 to $100,000 Full Policy Settlement

Our client, Rick Dunlap, stopped at Edvald's Deli on the Hill for lunch, while hauling materials on the job. After Rick had parked and gotten out of the truck, he realized he left the keys in it. Rick reached back in and his open door was **smashed by another car.**

The streets are narrow in that neighborhood - especially at lunch time with cars parked on both sides of the street. The Defendant had all kind of stories - Rick opened his door into her and it was his fault. The police talked to her and she cried and apologized.

The Police Report noted that the Defendant was at fault. But she called them later and added an addendum to the report that Rick suddenly opened his door, hitting her car. The Insurance company **originally denied liability completely and found Rick to be 100% at fault. Here's the letter:**

Our investigation has determined that your client, Richard Dunlap, is at fault as he opened the vehicle door into our insured vehicle..

We have found your client 100 percent responsible and respectfully decline payment for your damages.

The Defendant bent Rick's door while he was holding on to it - pulling his shoulder. She was speeding. Rick tore his rotator cuff in the accident and needed surgery. After getting his surgery, and some physical therapy we made a policy limit demand. **The insurance company refused to make an offer on the case until after Rick's deposition.**

Rick did an amazing job at his deposition and was well prepared. We work really hard to have our clients advocate for their case well in their depos.

Three days later they offered the full policy limits of $100,000. Rick is a great and honest guy and I was honored to represent him. He also went back to work just two days after his shoulder surgery, with his arm in a sling, because he is such a hard worker.

Below are pictures from the case. See how narrow the street is the Defendant was speeding through. She had stopped at the stop sign in the photo, hundreds of feet away, when Rick first exited the truck. Yet she claimed he suddenly opened the door and hit her.

We are happy to have gotten Rick such a great result but **the battle continues. Rick's health insurance was provided through his work and they were self-insured. They denied health insurance coverage claiming that they didn't have to pay if a third party was at fault.**

Also, Rick did not file a worker's compensation claim because he was such a loyal employee and wanted to solely pursue his civil claims.

Rick is no longer with the company and has started a new job. We will not stop fighting until Rick's medical bills are paid for by his health insurance or by the company's worker's compensation insurance. We are happy to continue to fight for clients like Rick to get them full compensation.

Depo King.

-Gary Burger

Hey, Friend,

I am excited about this newsletter - hope you enjoy it.

We are almost out of winter, but still take slip and fall cases at the firm. Below read about three slip and fall settlements, a great story about our client Edna and her bad lawyer, and a new book.

Dangers of Social Media and Driving Scholarship

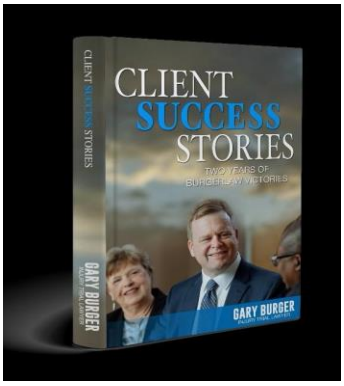
Burger Law is excited to announce our 2018 Dangers of social media and Driving Scholarship. We will support a student passionate about **raising awareness of the risks of using social media while driving**.

We will award $2,000 towards the education of a student who creates a plan to teach their peers about the dangers of distracted driving. Please visit our scholarship page to learn how you or someone you know can apply. We will implement the idea of the scholarship winner.

So many crashes are caused by distracted driving, and with the numbers only continuing to rise, Burger Law wanted to be a part of the change, by alerting young people to the dangers.

By engaging people to think through solutions, maybe together we can help stop people from using social media and texting while driving.

NEW BOOK



If you like these newsletters, you'll love my new book, "Client Success Stories."

I took all the newsletters I wrote over the last two years on client success stories, tips for cases, and social media more, and collected them in this book in case anyone has trouble falling asleep. JK - it's pretty good and a fun read.

The newsletters chronicle what happened at the firm since its inception and in the world. Biweekly over 104 weeks.

This book is available for free at BurgerLaw.com.

Slip and Fall

With the conditions St. Louis has been seeing (rain + falling temperatures=ice) I thought I would discuss sip and fall law in Missouri.

I had two clients ask us to navigate the slip and fall law labyrinth. Mary and Dora didn't know each other but had the same story. Both were going shopping at a grocery store, walked through a parking lot to get there and slipped and fell on 'black ice' they did not see.

Even crazier, after each fell at the respective stores, **the managers attempting to help them fell too!** It was a very dangerous condition.

As is increasingly common, neither store owned or maintain the parking lots exclusively reserved for their use. And the company that owned the lot hired someone else to plow and salt. This is pretty typical. But this doesn't let the owner off the hook as many believe -- **A landowner has to keep its property free from dangerous conditions under Missouri Law.** MAI 22.03 (7th Ed.). This states the landowner only **could** know of a dangerous condition - **not should**. So, the owner is on the hook.

Further, Missouri courts have long held that, in parking lot cases, **the store using the lot owes a non-delegable duty to its invitees to provide a reasonably safe parking lot**. *Cannon v. S. Kresge*, 116 S.W.2d 559 (1938); *Demo v. H & H Inv. Co.*, 527 S.W.2d 382 (Mo. App., 1975); *Groce v. Kansas City Spirit, Inc.*, 925 S.W.2d 880, 885

(Mo. App. W.D., 1996); *Turcol v. Shoney's Enterprises, Inc.*, 640 S.W.2d 503 (Mo. App. E.D. 1982); *O'Connell v. Roper Elec. Co.*, Inc. 498 S.W.2d 847 (Mo. App. 1973).

Although a landowner is not required to remedy a dangerous condition that generally affects all property in an area, they are required to address a property hazard that was known or reasonably discoverable – such as snow and ice! *Harris v. Neihous*, 857 S.W. 2d 222 (Mo. App. 1993); see also *Gorman v. Wal-Mart Stores, Inc.*, 19 S.W.3d 725, 732 (Mo. App. 2000)

We were pleased to have got settlements for our clients even with the complicated law. Check out the video below to see some of our attorneys discuss slip and fall law.

Slip and Fall 2

Our client, Edna Walters, slipped on grease at a Denny's restaurant in May of 2015. Edna and her husband asked the manager for the restaurant's insurance information, but the manager refused to provide it. Edna and her husband are the kindest folks you could ever meet.

Edna learned that she had suffered a fractured vertebrae and a sprained wrist. In the coming weeks, Denny's continually refused to own up to its responsibilities, and Edna hired another lawyer, Jo Ann Karll of High Ridge

That legal representation did not go good for Edna. Incredibly:

- Ms. Karll **refused to talk to Edna about her case**.
- Ms. **Karll never talked** to her on the phone and never returned a single phone call.
- Edna never met with any other attorney at the Karll Law Firm.
- Ms. Karll did not even *attempt* to negotiate a settlement of Edna's case until six months after she was done treating.
- Ms. Karll says she sent a demand letter, but Edna never gave her authority to do so or an amount.
- The **claims representative denied ever getting a demand letter - it was never sent**.
- The claim rep never talked to Ms. Karll or a lawyer at her office.
- Ms. Karll asserted a lien in the case for over $4,000 - but would never talk to me.
- Edna only talked to Ms. Karll's paralegal. Same with me and the claim rep.

Edna came to me in December 2016, confused and angry with the legal system. She goes to church with the mother of a high school friend of mine and asked her for help. We were able to get a copy of the case file, and settled Edna's case within 3 months. This was after the other lawyer had it for a year and a half.

We settled Edna's case for $41,500 - she had less than $15,000 in medical expenses and had fractured her vertebrae before.

Unfortunately, Ms. Karll pursued Edna with an attorney's lien on the case of about $4,159.86. This, despite having done minimal work and dropping Edna's case down a black hole. We didn't think that was fair.

Missouri law says that if a client decides to terminate a lawyer, a lawyer is entitled to be compensated based on the amount of work they have put into the case, and their hourly rate. We reviewed the invoice that Ms. Karll had submitted and found numerous abnormalities which we believe suggested that Karll had inflated her invoice/lien.

For example, she claimed she spent loads of time: reviewing inconsequential, pro-forma Medicare documents; negotiating lien reductions which normally are done by paralegals in five minutes, drafting form letters, and drafting and sending demand letters.

We told Ms. Karll's paralegal this was not fair. I say Ms. Karll's office because, like Edna, we were **never able to speak with Ms. Karll** ourselves. We did offer to pay $1,000 because Ms. Karll's office did do some work on the file, and did incur expenses of about $250.

I regularly treat lawyers fair if I get a file later and have never written about something like this. But Ms. Karll's conduct (or lack thereof) makes all lawyers look bad.

The Missouri ethics rules recommend using the Missouri Bar's Fee Dispute Resolution Committee to resolve liens. We did so and arbitrated the case before a volunteer.

Do you think Ms. Karll showed up at the hearing to get her fees? NO. The arbitrator awarded her exactly what I had offered 9 months earlier.

To date, neither I, Edna or the claim rep have ever talked to Ms. Karll.

177th Google Review of Burger Law (by Edna):

I would just like to raise Gary Burger up today. If anyone needs a good attorney and one that will treat you right and fight for you, then Gary is the one to choose!! I had previously had a bad experience with another attorney and a special friend recommended Gary to me and I took her advice and within 3 months his firm had gotten in touch with the insurance adjuster and was well on the way for a settlement.

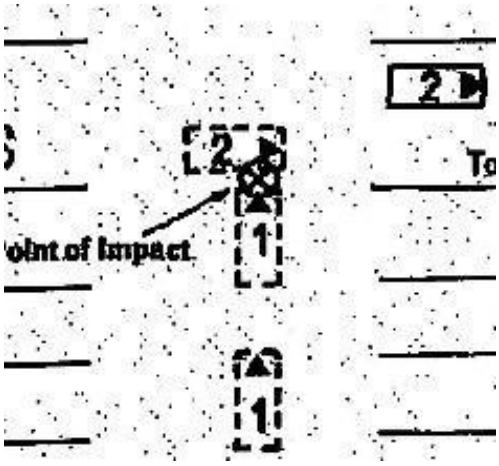
When he took over the case it had been going on for a year and a half and there was no sign of any settlement and no correspondence from the firm. **I am eternally grateful to Gary for his kindness, courtesy, and knowledge of the case and was so impressed by the way he handled the opposing firm. My case is completely**

closed now and I am so glad that I was referred to him. Thank you, Gary, for a job well done!!

Settlement after Filing Suit

We recently secured a great result for our client Joan. Joan was leaving the parking lot at a mall when a car crashed into her on the passenger side. The other driver was cited for driving at excessive speeds and failure to yield.

Despite this, the insurance company refused to send us an offer in the case. We filed suit and after the discovery process, the defendant's attorney agreed to a great settlement. We were happy to fight for Joan and get her a great settlement. Here's the police diagram and photo.



We settled her claim for $40,000 - which was a great result. Know how, to settle a case for $40,000? Don't take $35,000. We didn't. Thanks for letting us help, Joan. Proud to represent you.

Couldn't keep up with all of the book signings for my new book so I had to send my assistant.

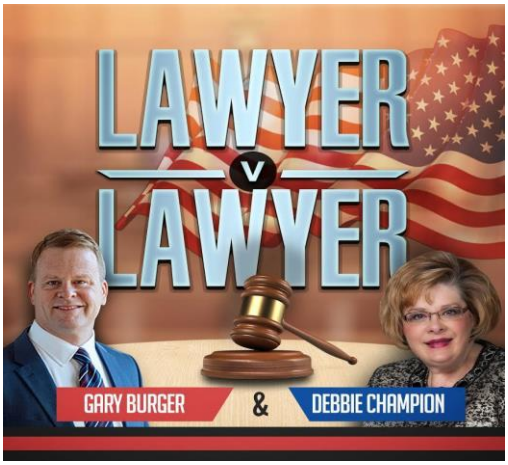
-Gary Burger

Hey, Friend,

I am excited to announce the start of a new adventure: The Lawyer v. Lawyer Podcast.

You can check out our podcast on our youtube, our website, and wherever you listen to podcasts!

In the podcast, I partner with Debbie Champion of Rynearson, Suess, Shnursbusch & Champion to debate civil litigation issues and **teach listeners the tricks of the trade.**



Debbie is a well-known and successful civil litigation defense lawyer who has represented clients and defended claims for over 25 years. With my tenure fighting for injury victims against the people and insurance companies that Debbie represents, **we have over 50 years of civil trial experience.**

Never listen to a podcast before? Why not start now? **In Lawyer v. Lawyer Debbie and I try to educate lawyers and laymen about civil litigation issues.** We have different views and styles of how to succeed in these claims and obviously litigate on opposite sides of these cases.

We think that this will be an exciting show. It should also be a great tool for young lawyers to learn how to practice, or improve their practice, of law. Please subscribe today and enjoy.

If you have any issues, you would like us to address in our podcast or any ideas, let us know. We are also looking for guests to come on the show to provide their insight, so if you are interested, shoot me an email.

Lastly, look for our **upcoming CLE** later in the spring where we will be teaching classes as well as **recording podcasts** to be aired later.

Another Car Crash Settlement

We utilize the techniques I discuss in my podcast Lawyer v. Lawyer all the time.

We recently got a **great settlement for our client Jake.** Jake was side swiped and pushed off the road in a hit and run accident. A hit and run driver is considered an uninsured driver under all car policies. But a witness got the license plate number, and police were able to find the driver who hit Jake, but the driver did not have insurance.

We filed an uninsured claim with Jake's insurance company, and attempted to settle the case. When we were close to an agreement, the insurance company stopped communicating with us. After two months of trying to resolve this claim, we filed suit, something we do often. Less than a week after we filed suit, the insurance company remembered our phone number and reached out to us. We informed them that the amount we were willing to settle for had increased because we were forced to file suit. The insurance company **initially balked, but increased their offer by 25% and we were able to get Jake a great resolution to this case.**

We were so happy to help Jake out and get him a great settlement.

Happy Spring, Friend,

In this email I would like to tell you about a great lawyers marketing conference in St. Louis on May 17, 18, 2018, called MaxLawCon - with fantastic presenters from around the country.

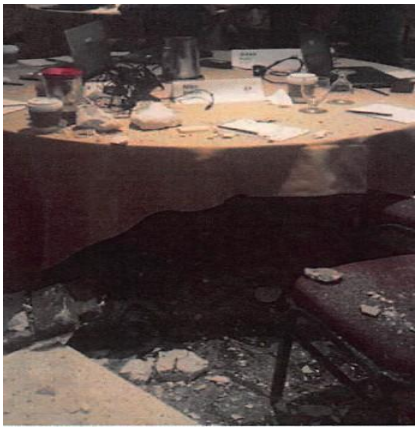
It has its origins from an amazing podcast called Maximum Lawyer, put on by my friends Tyson Mutrux and Jim Hacking. Their riveting show focuses on marketing and operating law firms. It was named one of the top 100 podcasts by the ABA and has gained national prominence.

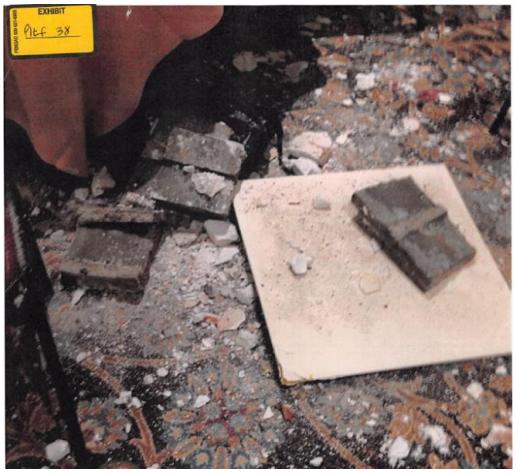
I discuss the maximum lawyer conference and podcast, and my podcast Lawyer v. Lawyer, more below. But first, I would like to tell you about a case with tons of legal issues we have had to navigate.

The Case of the Falling Cement Block

Niko is an accountant from New York who was at the Sheraton Hotel in Clayton for an accounting conference. You might think this is a slip and fall or a car accident case.

Nope. While he was sitting in class, **a cement block came through the ceiling** and landed on his head. After the dust cleared, it looked like this:





Niko went to the emergency room twice that day; the second time because his headache and concussion symptoms increased. He then went back to New York. Niko became caught up in the New York Workers' Compensation system, which is complex.

Niko had head and neck problems and received care from a few physicians. Pretty quickly they said there was not much they could do for him - he ended up not having much medical treatment.

He went back to work for a couple of months, but eventually had to stop to give his concussion a rest. The good news is that he then went back to work and had additional success. He now has moved on to an even better job.

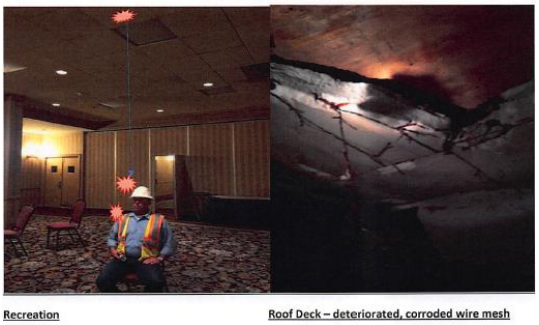
Niko is the kind of guy you love to represent - good, hard working, pull himself up with his own bootstraps kind of guy. However, his case took many twists and turns.

We found out the hotel management company wasn't really the right defendant. We then had to sue a trust run by Goldman Sachs which actually owns the hotel, and two different roofing companies. We proceeded through over a year of litigation where we had many discovery requests, depositions, and many documents produced trying to sort everything. We eventually did.

The Goldman Sachs folks hired a management group in Texas which hired and Atlanta roof consultant and then a national roofing company to repair the roof at the Clayton Sheraton. The roofing company in turn hired a Kansas subcontractor to do the actual work.

While replacing the roof, a worker fell through the roof. He caught himself and only went waist deep. Here are the reenactment photos and photos of the hole he left when he fell:

Conference room – Different



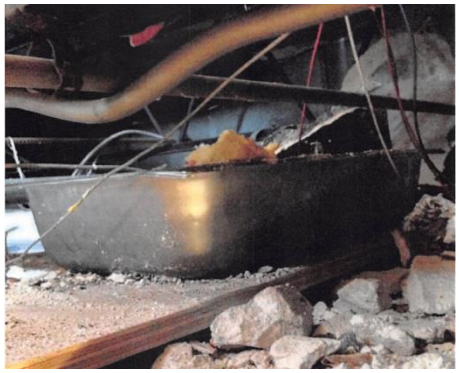
Recreation

Roof Deck – deteriorated, corroded wire mesh

Case solved? No.

The roofing company insisted that only the roofer's leg went through the roof and not any cement blocks. So how did the cement block fall on Niko's head?

The roofers did an investigation - when they looked above the ceiling and below the roof, they found that **numerous boards with drip pans were there to collect the water under the leaky roof**. They figured the cement block was up there and became dislodged by the roof failure. Here's what they saw:



The roofing companies blamed it on the hotel. We learned that a year before the incident the hotel owner had a consultant recommend immediate roof replacement and that the roof was weak. The roofing company said they didn't know about it.

Of course, the hotel blamed it on the roofers. They said all roofs can be weak and have problems. The roofing company should have inspected the roof and looked underneath it to see what might be above the ceiling. Here's a picture that shows that the roof was so weak it was disintegrating:

We went around and around with many depositions with all of the defendants pointing the fingers at each other. This is usually good in cases as the other defendants help us prove our case.

Regardless, **why put a conference under an old roof being repaired?**

Of course, the defendants had many contracts and indemnity provisions between them. There were cross claims against the roofing companies on their contractual indemnity claim. You would think that would be straight forward - but it was denied and litigated.

Also, the medical was challenging in the case. The employer had controlled the medical in the New York workers compensation claim - so the doctors reports and medical

records were unclear about Niko's symptoms, diagnosis, medical condition, and the type of treatment received.

There was also a workers' compensation lien under New York law. Cliffhanger alert:

The end.

Happy Spring Friend,

Despite the recurring snow, spring is sprung. This means baseball and 4-part yard work between freezing gray days.

Below, I tell a little story about one of my cases: strange truck crash on the wrong side of the road. But first some Dickinson:

A Light exists in Spring

Not present on the Year

At any other period –

When March is scarcely here

A Color stands abroad

On Solitary Fields

That Science cannot overtake

But Human Nature feels.

As the Cardinals take the field.

And nothing generates more family bonding or elicits more complaints than yard work. New stone path!

Sad Truck Crash

Alejandro (Alex) is driving his tractor trailer eastbound on highway 70. He and his co-driver, Uiolo, drive from California regularly across the United States for CRST, a large national transportation company. They take turns driving; and can drive 22 hours a day under Federal Law.

As they come through Warren County, Missouri, there is intermittent rain. Uiolo is in the sleeper and Alex has the accelerator pegged 100%, going full throttle at 64 mph (as we later learn from the ECM or black box data recorder). A jeep and a mustang pass him on the left.

He does not notice as the jeep skids on balding tires, hits the center barrier and slows down. Having nowhere to go, the mustang quickly strikes the jeep and angles to the right into the semi.

The mustang hits the front left wheel of Alex's tractor; its right front quarter panel is ripped by the spinning lug nuts of the tractor wheel.

Alex continues on past the two wrecked cars, veers a bit to the right and then about 3 or 4 seconds later goes left. He applies his breaks right before the median but it doesn't slow the 70,000-pound tractor trailer.

It tears through the median and its wire barricade, turning over onto its right side and into oncoming highway 70 west traffic. Sadly, the first vehicle Alex strikes is ripped in half and instantly kills the driver: a kind grandmother and bedrock of a fantastic family.

A GM pickup simultaneously hits the CRST truck. Its driver, Ammon, has driven the same route many times home from 30 years at the General Motors plant. He goes from 39 miles an hour to 0 in an instant.

Both the Missouri Highway Patrol and our expert reconstructed the crash and testified a 39 mph change in velocity often kills occupants. It severely injures Ammon.

Tom is driving in the left lane a little behind Ammon. He is a professional tractor driver with a 30-year stellar driving record. He sees Alex coming through the median into his lane. He looks straight ahead at the roof of the tractor cab (Alex's tractor is sideways and stopped on the road at this point).

Tom knows if he hits the fiberglass top of that cab its occupants will die. Tom steers left and crashes his tractor into Alex's trailer. Within a second, he feels another impact as the tractor trailer following him (too close) rear ends him. After the severe impacts Tom and his tractor remain inside Alex's trailer.

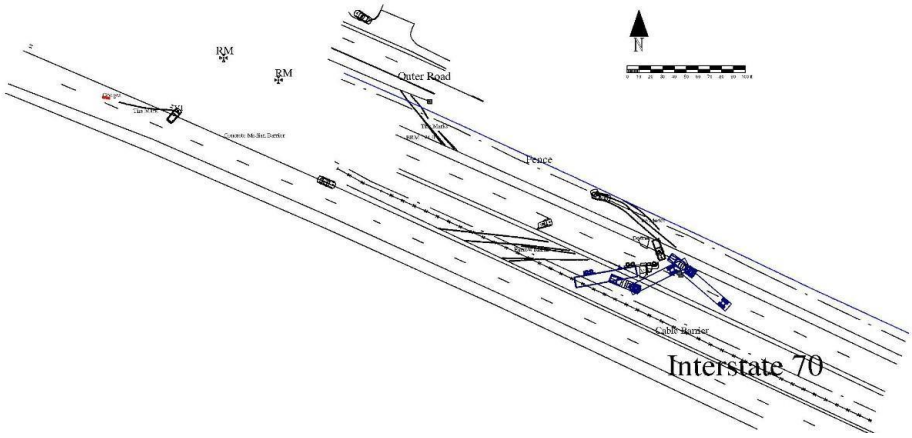
Tom is in the trailer for 4 and a half hours. The Highway Patrol does not realize he is there for a couple hours until they compare tractors and trailers and conclude a tractor is missing.

The amazing highway patrol and fire department saw open the trailer and Tom's tractor and get him out.

During his wait, Tom struggles to breathe (with a collapsed lung) and live, and listens to badly injured cows (in the truck that rear ended him) being shot.

We are working hard to steward Ammon and Tom through their recovery and help them recover from their injuries. We take depositions, retain experts and put in long hours analyzing the facts and law to prove their case.

Sadly, again, this type of life ending and changing crashes happen daily on America's roads. Be safe out there.



Bullhorn

On a lighter note, do you ever get someone a Christmas present on a lark, hoping it's a good idea? I got a Bullhorn for my wife/kids for Christmas.

As it turns out, it's the smartest thing I've done in a long time. It wonderfully gets teenagers out of bed.

LIME BIKE

Excited to have Lime Bike in St. Louis. If you have not seen them yet, here ya go:

Limebike is a private corporation from California that started last year. It operates in cities in 13 states and college campuses. You download the Limebike app on your phone and pay only a dollar an hour to ride the bike. The app shows you where the bikes are.

Limebike copied Lyft and Uber and tried to get ahead of any problems that might arise. They require riders to obey the local laws prior to riding. Their long User Agreement requires the rider obey all laws in the city and sets out general rules for riding the bike.

But just like Apple's agreement no one ever reads, people don't read the User agreement before they ride. **It includes a strong waiver of all liability**. It also has a bunch of smart safety rules, like safe riding, don't carry stuff on the bike and only one person on a bike at a time.

We see this in a lot of places and have litigated contracts that waive liability. Check out this article on a recent case we had to go to court to throw out the liability waiver in an apartment lease.

Limebike has problems where cities' local Limebike laws require helmets, since Limebike does not provide them. Groups in many cities are coming together to fix these issues by providing helmets or having designated places for bike drops to lower the instances of bikes blocking sidewalks, entry ways, and streets.

All of this boils down to potential legal issues for Limebike. The concept has been heralded by many cities and Limebike has received numerous awards for their activism to change the world.

Like many original ideas, this one is bound to transform the law and drag it forward where business and technology are headed.

Try Limebike next time you're downtown.

BIKES FOR KIDS

We are pleased to announce a new program to help kids in our community: Burger Law announces its **Bikes for Kids** program. We will provide free bikes to 10 children starting in May.

We are doing this in a partnership with Big Shark Bicycles' Location, Urban Shark.

At Burger Law, we want to show our support for children in our local community who are making a difference. We are excited to announce our first annual Bikes for Kids Giveaway where we will award one child a brand-new bike all summer long.

We need your help selecting our winner by nominating a kid you believe has made a positive impact in our community.

Many local children dedicate their time giving back to the community, whether that be by volunteering at a local soup kitchen or cleaning up city parks. We would like to reward one kid who demonstrates a strong commitment to his or her community.

If you know a child who fits this description and would love a new bicycle this summer, nominate him or her!

Have fun riding this year.

Thanks,

Gary Burger

Happy Tuesday Friend,

Below, I share a great trip my daughter and I took to New York, an auto crash success, and a reminder about our CLE on May 29.

But first did you know Missourian Harry Truman was born 134 years ago today in Lamar Missouri? Here a few quotes from our 33rd president:

You want a friend in Washington? Get a dog.

I never did give anybody hell. I just told the truth and they thought it was hell.

It's a recession when your neighbor loses his job; it's a depression when you lose yours.

America was not built on fear. America was built on courage, on imagination and an unbeatable determination to do the job at hand.

If you can't convince them, confuse them.

Harry Truman beat New York governor Thomas Dewey in a close presidential race. Aspects of the election foreshadowed later ones. Truman lost the popular vote but won the electoral college like our last election. Dewey barely won his home state of New York.

New York

Third Party candidate Henry Wallace, a former Democratic Vice President who ran to the left of Truman and was nominated by the local American Labor Party, finished a strong third, with 8.25 percent.

This crazy 1948 election yielded the famous incorrect Chicago Tribune incorrect headline - Dewey Defeats Truman. Learn more here.

My daughter and I had a little get away to check out New York last weekend. We visited many sites - museums, the Top of the Rock, and Central Park.

We also got to see the new Broadway musical hit Mean Girls. It was great. Just nominated for 12 Tony Awards.

May 29 CLE

Me, Debbie Champion, Robert Cohen, and Michael Downey will present a special 3-hour CLE on May 29 at my building at 500 North Broadway.

3 hours of Missouri CLE credit, including 1 hour of ethics credit. Register soon.
All profits go to Legal Services of Eastern Missouri.

They're going to be so good we will record them for future Lawyer v. Lawyer podcast segments.

In the first hour **Debbie and I will argue Motions to Compel** in front of Judge Cohen - discovery issues most often encountered in personal injury litigation.

Motions, Memoranda and case law and arguments provided. **See how Debbie and I do against each other. And remember - NO WAGERING.**

The second hour Debbie and I present each of our **Top 10 Trial Tips.** We will share our most effective techniques in a variety of circumstances - voir dire, opening, testimony, demonstrative evidence, instructions and closing from 50 years of trial experience.

In the last hour, **Michael Downy will teach ethics questions and answers most often encountered in injury litigation.** Mike always clearly shows how to navigate tough ethics issues.

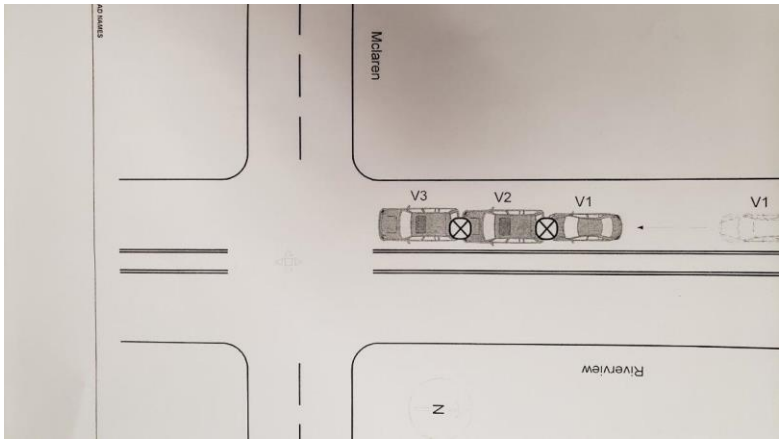
And, as usual, at the end Debbie, Michael, and I will field **questions from the group about legal problems facing litigants.** These are great sessions: everyone learns from complex issues that attendees are faced with.

This is a unique opportunity. Hone your skills and improve your practice. Join past Burger Law CLE folks like Doug B: ***"Best CLE I have ever attended - nuts and bolts education and tricks shared. Thanks Gary."***

Seven Times Original Offer

We recently settled a case for 2 sisters who were involved in an auto accident. A driver rear ended then into another car while they were stopped at a stop light.

After their medical treatment was done, they tried to settle on their own. The insurance company offered $3000, less than the medical bills for these sisters.



We filed suit, completed discovery, scheduled depositions and litigated this case aggressively.

The day of depositions the opposing counsel called and settled for $10,000 **each.**

Third Prius Crash

Then we settled my client's third wreck in a Prius. We have represented her in all three crashes - for some reason people keep rear ending her.

She got medical right away, but the case was complicated by the prior injuries to the same part of her body. We did not give up and kept fighting for her.

We filed suit, pushed the case, and were able to get her a great $40,000 settlement.

Hopefully the third time's a charm so it should be safe to ride with her now.

Happy Tuesday Morning, Friend,

I have embarked on a beekeeping adventure. My wife got me bees for Christmas (isn't that romantic). I did a bunch of work to put the hives in my yard, took some classes, and my bees came a few weeks ago.

The bees come in a nucleus colony - an established colony with a queen, worker bees and drones in five frames. I put them in my hive.

Over the last few weeks, they have built comb into the empty frames, increased in numbers and are flourishing. I go check them once a week to make sure they are doing well. I monitor the continuing larvae production by the queen, brood (new bee) development, that they are getting nectar and pollen and are doing well.

Here's a pic of me looking at one of the frames and an apiary selfie.

When I go check out the hive, I wear protective stuff to keep from getting stung. Here's a pic of Jackson wanting to help.

But we keep the dogs away because bees have a natural aversion to dark furry animals and sometimes attack them.

Did you know that honey bees are not native to America, but come from Europe and Asia? The first honey bees brought to America in modern times were by colonists in 1622.

There are over 4,000 bee species native to America, but none produce honey. Here's an interesting article. The honey bee and its social hive is run by one queen who communicates to her workers by emitting pheromones.

I'll let you know how we do with our bees this year. If you are a beekeeper and want to share experiences, please email me or give me a call. I would love to come and check out your hives.

Bikes for Kids

Bikes for Kids St. Louis is proud to announce our first winner of the summer – McKinley CLA Middle School 8th grader, Malcolm Hinkebein!

Malcolm was nominated by his teacher and McKinley Athletic Director, Paul Husch, for being so outstanding at the school.

“Malcolm is a great student who for the past seven years has donated his hair for St. Baldrick’s,” Paul said. “Outside of that, he is always willing to lend a helping hand to the

other students at McKinley. ” It was through the Helen Fitzgerald Irish Grill and Pub’s annual St. Baldrick’s events that Malcolm raised money and shaved his head since 2010.

When Peggy Schneider, organizer of the Helen Fitzgerald event, learned about Malcolm’s nomination, she said: “Malcolm has been shaving at our Helen Fitzgerald’s St. Baldrick’s event for years, along with his mom and brother, so they have really made it a true family event. Even though he is young, he *truly gets* why he is donating. He wants to help kids with cancer and he cares about others, which means a lot to us.”

On an even bigger scale, the St. Baldrick’s Foundation caught wind of Malcolm’s dedication to kids and CEO Kathleen Ruddy was thrilled. “St. Baldrick’s is so grateful to kids like Malcolm, for volunteering their time and their hair to raise money for childhood cancer research,” the CEO said. “Malcolm exemplifies what is best about young people and their inherent nature to want to help those in need. To see kids helping other kids is truly amazing and we are so proud of Malcolm and all that his has done to help kids with cancer.”

He was awarded a brand-new bicycle from Urban Shark cycle shop, compliments of Burger Law. I was moved by such a young man making such a big difference. He was surprised he could inspire others.

“Did you ever think that you could inspire an adult?” Gary asked Malcolm.

“You are making such a difference and it’s inspiring to see your dedication to childhood cancer. We are so proud of you.”

Great Settlement

We recently settled a case for our client Arvind.

Arvind was driving around a curve when another driver crossed into his lane going and crashed into the driver's side of Arvind's car.

The impact broke Arvind's arm. He was taken immediately to a hospital, and within two weeks, had surgery to insert a rod and screws into his wrist to fix his fracture.

After surgery, Arvind did physical therapy and was released from care with minimal pain. We pursued the driver who hit Arvind. Bur discovered he had lied to the police and did not have insurance.

So, we filed an Illinois uninsured claim with his insurance company, State Farm.

These can sometimes be difficult as the insurance company has to do their own investigation to ensure there was no third-party insurance involved. Once they completed their investigation, they accepted coverage. But they still negotiated tough and we had to push to get a great recovery.

We fought hard to Arvind and got a great settlement. His medical expenses alone were nearly $30,000 with his surgery and physical therapy.

After negotiating with the insurance company, we just settled his claim for **over $92,000.** This will easily cover his medical expenses - with almost double those expenses going directly to his pocket!

MaxLawCon 2018

Last Friday I got to present at the Maximum Lawyer Conference in St. Louis.

It was held at SLU LAW and had over 70 attendees for a full seminar of marketing tips for attorneys.

I spoke about launching a law firm - and gave 75 tips to remember in 45 minutes.

The entire conference was a lot of fun. The presenters were incredible and I know everyone walked away from it ready to try out some new ideas!

Listen to the Maximum Lawyer podcast for marketing lessons.

Fighting hard to reduce Liens

Our client Tenesha came to us after an automobile accident in St. Claire, County Illinois where she was rear-ended. She had severe injuries to her neck, back and shoulders costing her thousands in medical bills.

We ended up getting a great settlement for Tenesha for her overall claim. But we didn't stop there. Whenever we settle a case, we make it a priority to put **as much in our clients' pockets that we can.** This means negotiating down their medical liens with providers.

Tenesha's chiropractor, **Shiloh Chiropractic**, overcharged her. He refused to negotiate a reduction to a more reasonable price. He tried to charge about $250 per visit and wanted $5600. Our office communicated with his office extensively, but he still refused. We tried to take a third off his bill and explained the ridiculously high bill. (He had refused to take her insurance).

We filed a motion to adjudicate the lien with the court. This gets the court involved in the negotiations. The court will then decide the final amount a doctor is entitled to.

The chiropractor immediately hired an attorney to represent them in the motion. At that time, we received a notice from opposing counsel attempting to collect the debt plus interest and attorney's fees. They increased it to over $7000!

Then Shiloh's lawyer went to a court appearance and got the matter ruled on Ex Parte - without us being there. We filed a Motion to set that aside (which we would have won).

After negotiations with opposing counsel, a subpoena for the chiropractors entire file, and communications about why the chiropractor did not bill Tenesha's health insurance that they had on file, they agreed to a reduction.

They ended up taking off the attorney's fees and interest and r**educed the bill by 1/3. This was the original reduction we had asked for prior to filing a motion.**

We were happy to help Tenesha get a great settlement and happier to fight so hard to keep the payment to her chiro fair. **I hate bullies.**

Good morning, Friend,

Below, I share a story from my CLE last week, my latest Bikes for Kids gift to Vera and some interesting case successes.

But first, I wanted to tell you about my new favorite Instagram account: crimebikes. It's a random group of Limebike users who hilariously stage lime bike pseudo crimes and post photos.

Bikes for Kids Update

We had a wonderful Bikes for Kids giveaway on Saturday. Vera got a new bike and was very thankful. I totally surprised her.

Bikes for kids rewards great kids through a nominating process who go above and beyond with a bike every couple of weeks throughout the summer.

Vera helps special needs kids get off the bus and to their classrooms. She has volunteered for this and does this every day. She helps battle stereotypes of these children and facilitates having them being part of the school community.

Here's me, Vera and her family and teacher who nominated her.

Trial Tips From CLE

We had a really successful CLE last week. A special thanks to Debbie Champion, Robert Cohen, and Michael Downey for their great presentations.

We argued discovery motions before Judge Cohen and had a blast!

We were able to raise a lot of money for Legal Services of Eastern Missouri in the process.

Clients and litigants can learn a lot from this and the 70 lawyers who attended sure did. These are thorough and detailed briefs with arguments from both sides on the most argued discovery disputes.

Debbie and I also presented each of our **Top 10 Trial Tips.** We shared our most effective techniques in a variety of circumstances - voir dire, opening, testimony, demonstrative evidence, instructions and closing from 50 years of trial experience.

Here are some highlights from that list below.

1. Highlight good quotes from the medical records to read to the jury.

Sometimes these are duplicative of what an expert has said, but that's all the better.

2. When cross examining a witness, read from their deposition and be prepared with exact line cites.

Whether its quotes about an expert needing to start from neutrality that they agreed with in their deposition or missing materials experts say themselves they didn't use to come to a conclusion -- cite to the line number! If they don't agree with you on the stand, then you are ready.

3. Use illustrations to show medical procedures.

These can be really effective visually to show the juror the extent of the injuries and help with pain and suffering.

4. Deal with problems in your case before the defendant does.

Take the wind out of their sails. We knew plaintiff had prior neck problems so we……, some may say plaintiff should have avoided the accident because …… So, we investigated and analyzed that and ……

5. Think about how you look by objecting.

The Jury is watching. What does the jury see or think of objections? Approach the bench instead or don't object.

I had a great time and I learned a lot from Debbie's top ten tips too.

Confidential slip and fall settlement

We achieved a great settlement for our client Shawn after mediating the case last month. Shawn slipped on lettuce at a local grocery store. He was pushing his baby in a stroller and also was pushing a cart; so, he did not see the lettuce. He fell on his outstretched shoulder and side.

Shawn had to have rotator cuff surgery on his shoulder because of this fall. He also injured back and neck and had to get multiple pain injections. Physical therapy helped too.

Through litigation, we discovered there was a video of the incident clearly showing Shawn's fall. Defendants claimed that the store was checked every hour for slip and fall hazards such as the lettuce and denied liability. So, we filed suit and pushed the case.

And we got the store's surveillance video which showed Shawn falling but did not show workers checking for slip and fall hazards near where Shawn fell. Also, we were able to show that the store was inspected incredibly fast, and not very closely. The video also showed store employees sweeping up lettuce after the accident, right where Shawn fell.

The defendant and the store manager continued to deny liability despite all the evidence. In their depositions, store managers denied the lettuce was even there, contrary to their internal reports and what the video showed.

Always report an incident when injured at a business. Often, as in this case, internal reports and video evidence prevent companies from changing their story later. I was

able to use that evidence to show store employees were completely wrong and had changed their story in their depositions.

We fought hard to get the evidence needed to win the case. Filing suit and forcing production of the video and report really helped. As did our great client who helped us throughout.

The Court ordered us to medicate the case. We were able to mediate the case with the great mediators at United States Arbitration and Mediation (US A&M) to achieve an excellent result for our client.

We have hard fought for success in slip and fall and premises liability cases. And with many verdicts and settlements in a wide array of circumstances.

$270,000 Bike Premises Settlement

We had a great result in a bike premises liability case against AT&T and Holloran Contracting for $270,000. Our client, had a terrible bike crash but made a miraculous recovery. It happened when he was riding his bicycle on the sidewalk along Baxter Road from his house to the post office to mail a letter.

Our client Kim is super safety conscious – he wore an orange vest (like a construction worker) and had on his helmet. It had just rained and the sidewalks were damp. He only had time to think there was something amiss with the sidewalk before his bicycle flipped and he crashed.

He determined after he woke up that he crashed into an area that had been dug out and the sidewalk removed – but water had pooled in and filled in this area following the rain.

Kimball got up, was a little bit out of it and warned a jogger about the hole. He walked home pushing his bike. His wife took him to the emergency room and he received treatment – he had facial lacerations and head trauma.

Holloran Contracting did not obtain a permit to remove the sidewalk as required by St. Louis County ordinance. Neither did AT&T. Holloran and AT&T pointed the finger at each other about who was supposed to pull the permit.

The lawsuit was both a dangerous condition of property and negligence claim, as well as negligence per se claims against both entities.

We deposed a 42-year public works official with St. Louis County. He testified that:

- AT&T and Holloran did not get a permit to do this work.
- A permit should have been requested to remove the sidewalk. The main purpose behind the state and county ordinances is the health and safety of the public.
- The statute and ordinance require that there be barricades and sidewalk closed signs and they "are a must"
- The County received a call from Ms. Nill complaining about the absent sidewalk and did not know about it. They argued with her and said no project was going on.
- St. Louis County went and put a "sidewalk closed" sign up to warn people of the empty sidewalk, after Mr. Nill crashed.
- They did not figure out who was doing this work until 7 days after Mr. Nill's injury.
- It is important to put barricades and signs up so no one is injured when a sidewalk is removed.
- Defendant Holloran did not have "sidewalk closed" signs at all.
- Holloran violated the ordinance and statute by not getting a permit or signage
- AT&T got a ticket for an ordinance violation.

During the initial emergency room visit Mr. Nill was diagnosed with a closed head injury and facial fractures. He was admitted for observation and later released.

About a month later, Kimball's wife took him to the emergency room and stated that he "didn't seem right" and that he had been having headaches. He was admitted and found to have a right frontal subdural fluid collection/hematoma that needed to be evacuated.

The next day Kimball underwent a Frontal Craniotomy for Subdural Hematoma procedure. The neurosurgeon cut open his head, removed his skull and the dura (membrane around the brain). "As soon as the dura was opened, there was spontaneous emanation of high pressure chronic subdural fluid." A hemorrhage was repaired as well.

Less than a week after the surgery on November 18, 2014, Kimball was taken back to the emergency room for confusion and slurred speech and hand and arm numbness and loss of use. Mr. Nill underwent treatment for his right shoulder pain shortly after the crash as well.

Over the next few months, Mr. Nill continued his follow-up care with his doctors. He was prescribed anti-seizure medications and underwent additional head scans to monitor him after the surgery. He had an amazing recovery and is 100% now.

Happy Monday Friend,

Yesterday was a great Father's Day for me - I got to share it with **my new son, William Lewis**. He was born May 22 and is not quite four weeks old. Kristen, I and our other kids are super excited to have an addition to our wonderful family. Kristen's an amazing mom.

Below, I present some stories and articles on how to get third party recoveries outside of work comp for serious on-the-job injuries. But first, baby pics.

What really matters in life is our family. I hope this email finds you as blessed as I am. I spend my best time in life being a father and relish it.

William's first name comes from my grandfather, William Herrmann and Kristen's maiden name - Williamson. His middle name is Lewis - from Meriwether Lewis, the Corps of Discovery explorer.

I could talk about my kids all day- but let's turn to some cool cutting edge legal issues we have been battling.

Co-Employee Negligence Cases

I attended a hearing Friday to argue against a motion to dismiss a co-employee negligence case. Our client James was tragically killed because his co-employees had him ride in the back of a trailer with unsecured trash cans and a broken rear gate.

The driver (without a commercial driver's license) went around a turn too fast, sending the cans into James. It knocked him out the back of a trailer and struck his head - he was not wearing head protection. This was all in violation of company policy and Missouri law.

Missouri law allows you to sue co-employees in some circumstances for on-the-job injuries. Under Section 287.120 R.S.Mo., employers are immune from civil suits brought by their employees with their exclusive remedy in the worker's compensation system.

Co-employees are also immune from a civil suit **unless *the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury*.**

Missouri Courts views the exception to immunity narrowly and what constitutes an "affirmative negligent act" is not well defined. It's not susceptible of reliable definition, and the question is very fact intensive and determined on a case-by-case basis. *Burns v. Smith*, 214 S.W.3d 335, 338 (Mo. 2007).

The Missouri Supreme Court in *Badami* created a "something more" test to better define this issue, which was codified under the current statute. *State ex rel. Badami v. Gaertner,* 630 S.W.2d 175 (Mo.App.1982).

The Court also referenced another case where it was found that negligent driving was not enough to meet the "something more" standard, "[a] simple allegation of negligent driving by a co-employee ... [was] not 'something more' than an allegation of a breach of the duty to maintain a safe working environment." *Taylor, 73 S.W.3d at 622–23.*

The Court reasoned that negligent driving was "not the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions."

Under the "something more" test simple auto accident negligence will not meet the standard. The standard is more akin to recklessness and requires an "affirmative act" of negligence. A supervisor can be held to this standard as long as he commits an affirmative negligent act and does not simply fail to supervise his employees properly.

Third Party Liability for Workplace Injuries

Another way to get a recovery in addition to work comp, is reflected in a case I recently tried a case for our client JD Walker in the Illinois Court of Claims. JD was injured when an Illinois state worker pushed large amounts of snow off of an overpass onto his Semi-Truck causing him severe injuries.

When a third party causes your injuries while you are in the scope of your employment, you have a worker's compensation claim against your employer *and* a civil claim against the third party responsible.

It is important to file a report of injury with your employer so you can pursue benefits including medical care through the work comp system. However, you should also pursue your civil claims against the third party to ensure a full recovery.

These cases can be complicated. Sometimes I have advised clients not to file a claim for compensation, when the third party has a large amount of insurance coverage available, so they can control their own treatment, see their own doctors, and not be limited to the medical treatment provided by their employer.

When you have a worker's compensation claim and receive medical treatment through the Missouri Work Comp system, your employer's insurance company will have a lien on your civil case. I recently handled a case with a large work comp lien described below.

We are still awaiting a judgment from the Illinois Court of Claims and I look forward to reporting the results of that trial when the Court reaches its decision.

Confidential Settlement and Reducing Work Comp Liens

I recently mediated a case and got a great confidential settlement for my client George. George was injured by a defective door which cut off the tip of his finger. He was working as an installer at a location owned and operated by a third party.

We achieved a great result for George, but since his medical treatment was paid for by his employer through the work comp system, he had a large work comp lien on his case. Under Missouri law these work comp liens are resolved in a very specific way.

Missouri law requires that work comp insurers accept a reduced lien which is calculated using the *Ruediger Formula*. I discuss Missouri Worker's Compensation subrogation in detail in Chapter 13 of my Work Comp book. You can grab a free copy at BurgerLaw.com.

Here is a helpful breakdown which explains how to figure out these liens under R.S.Mo. 287.150 and the *Ruediger Formula*:

1. Total amount paid in Worker's Compensation _____

2. Total amount paid in civil claim _____

3. Divide line 1 by line 2 and write here: _____

4. Take line 2, subtract attorney's fees and costs – write here _____

5. Multiply line 3 times line 4 = subrogation amount owed _____

Here are a few more important notes about work comp subrogation:

- The Work Comp claim must settle first. And this is better for your client.
- The attorney fee is taken out of the subrogation claim. The employer's subrogation interest is reduced if your contract provides that all expenses apply to both the workers' compensation and the civil claim – and they are to be paid from the civil claim. A higher fee in the civil claim reduces the subrogation interest.

- The Employer/Insurer's subrogation interest includes the amount paid in medical.
- A spouse's loss of consortium settlement arising out of the third-party claim can be protected from subrogation. The Court of Appeals approved a third-party wrongful death settlement where $2,000.00 was for the Claimant's death count and $166,000.00 was for the pre-death loss of consortium claim of Claimant's widow. See *Bridges v. Van Enterprises, 992 S.W.2d 322 (Mo. App. S.D. 1999)*.
- When calculating subrogation, comparative fault must be determined by the trier of fact and a settlement for an amount less than a verdict DOES NOT annul the findings of comparative fault. *Kerperien v. Lumberman's Mutual Casualty Co.,* 100 S.W. 3d 778 (Mo. Banc 2003).

My two sons. :-).

Thanks for reading.

-Gary Burger

Hi, Friend,

Hope you have a great week, well, interrupted by July 4.

Below, I share a story on our amazing young attorney Mike, a recent Illinois under-insured win, an appeal we are filing with the Appellate Court and some great Lawyer V. Lawyer podcasts.

But first, did you know:

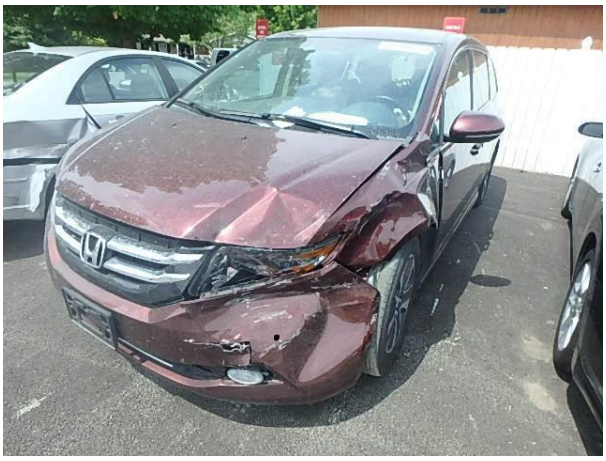
- The Declaration was signed August 10, 1776, not July 4th?
- July 4th was not the day the Founders intended to be remembered as Independence Day? It was July 2.

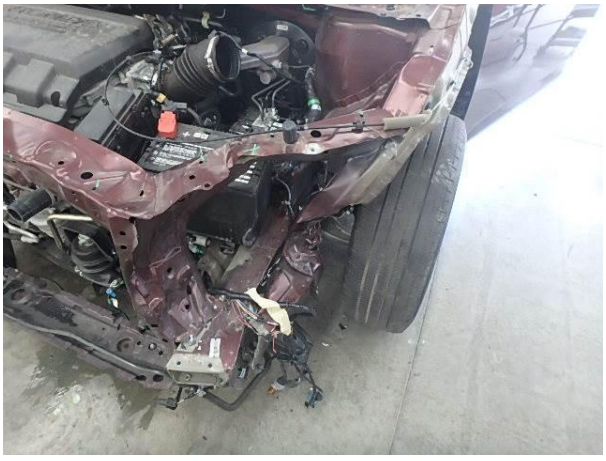
- There were hundreds of copies made with one permanently displayed at Wash U law school? Here's an article. The copies are known as the “Dunlop broadsides”. They were used to spread the news of the Declaration throughout the colonies.

- The Declaration has only left Washington D.C. twice. First during the War of 1812, and second during World War II when it was stored at Fort Knox
- Three US Presidents have died on 7/4. Thomas Jefferson, John Adams and James Monroe all died on the Fourth of July. Adams and Jefferson both died on the 50th anniversary of the Declaration’s passage. James Monroe died 5 years later on July 4, 1831.
- There was a 44-year difference between youngest and oldest signers - Benjamin Franklin was the oldest signer at 70 years old.
- Signers held a wide array of occupations - 24 lawyers, 11 merchants, 9 farmers.
- Every 4th of July the Liberty Bell in Philadelphia is tapped (not rung) 13 times in honor of the original thirteen colonies.

Uninsured Claim in Illinois

We recently settled an uninsured claim for our client Andy in Illinois for $92,000. Andy was injured when a car crossed over the center line and hit him head on. The other driver was driving too fast around a curve and caused the violent collision. Check out the photos below.





After Andy was hit, the defendant showed him an insurance card. We put the insurance company on notice, but they claimed they did not insurance the other driver.

After some back and forth with the insurance company, it turns out they had dropped him for failure to pay premiums. Surprise to Andy - No insurance.

We were able to switch gears quickly and filed an uninsured claim against Andy's own insurance. Andy needed wrist surgery for numerous fractures that required plates and screws. But he recovered well and is back to running his businesses.

We were able to get Andy a great settlement so he can put this all behind him. Great to represent such a great guy.

Appeal to Eastern District

Last week we filed an appeal to the Eastern District Appellate Court. We did so because a trial court granted summary judgment against us based on Sovereign and Official Immunity for a City and its EMS employees.

Public officials are not protected by official immunity for "torts committed when acting in a ministerial capacity," and immunity only applies to discretionary acts. *Southers v. City of Farmington, 263 S.W.3d 603, 610 (Mo. Banc 2008).*

The Missouri Supreme Court has explained that "a discretionary act requires 'the exercise of reason in determining how or whether an act should be done or course pursued.'" *Kanagawa v. State, 685 S.W.2d 831, 836 (Mo. banc 1985).*

A ministerial act is performed "in a prescribed manner, in obedience to the mandate of legal authority, without regard to [the public official's] own judgment or opinion concerning the propriety of the act to be performed." *Richardson v. City of St. Louis, 293 S.W.3d 133, 139 (Mo. App. E.D. 2009).*

EMS workers are protected by immunity only in situations where they are exercising discretion and not simply following protocol. *Richardson, 293 S.W.3d at 142.* When "presented with fixed and designated facts giving rise to a duty," EMS workers are not immune. *Richardson v. Burrow, 366 S.W.3d 552, 556 (Mo. App. E.D. 2012) ("Richardson II").*

Whether an act is discretionary is "made on a case-by-case basis, considering (1) the nature of the public employee's duties; (2) the extent to which the act involves policymaking or exercise of judgment; and (3) the consequences of not applying official immunity." *Southers, 263 S.W.3d at 610.*

Moreover, the law only gives official immunity to state employees if they are performing a duty that requires their professional judgment or discretion. This is a discretionary duty.

The law does not afford immunity if there is a set protocol that instructs the employees on exactly what to do given a specific set of facts since no professional judgment would be required. This is a ministerial duty.

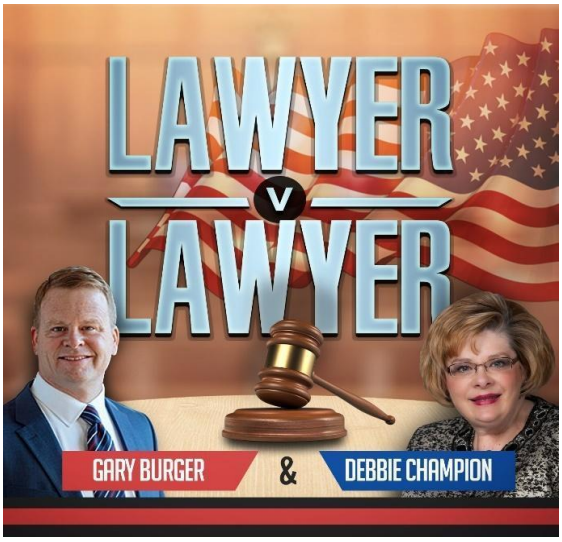
Missouri statute specifically says Sovereign immunity is waived if the City has purchased liability insurance to cover the at issue negligence. The city in this case bought insurance to cover the negligence of EMS personnel.

Under Missouri statute, a public entity can purchase tort liability insurance, and in doing so statutorily waive sovereign immunity. *R.S. Mo. §71.185 and § 537.610.* Courts have interpreted these statutes and have long held Municipalities waive sovereign immunity for governmental functions to the extent they are covered by liability insurance. *Southers at 609.*

Where a party can show the existence of insurance and that it specifically covers the negligence at issue, immunity for public entities is waived. *Brennan v. Curators of the Univ. of Mo., 942 S.W.2d 432, 434 (Mo. App. W.D. 1997).*

In our brief we argued hard that the EMS personnel were performing ministerial duties. Can't wait to give my oral argument.

Podcasts from my Continuing Legal Education Class



Thanks to everyone who came out to the May 29 CLE with Debbie Champion, Robert Cohen, Mike and I. It was a fun day and everyone learned a lot.

Check out these episodes:

Episode 15 - Discovery Motion arguments before Judge Cohen - Part 1

Episode 16 - Discovery Motion arguments before Judge Cohen - Part 2

You can find these episodes of our podcast on YouTube and your favorite podcast platform.

Hey, Friend,

Hope your summer is going great. Mine is. Had a great road trip with our family for a family reunion in Chicago last weekend. Read to the end learn about Illinois Liens, a $220,000 settlement, and our social media and driving scholarship. First - road trip pic:

Poll question - are my shorts great or the greatest shorts ever?

DANGERS OF SOCIAL MEDIA & DRIVING SCHOLARSHIP UPDATE

We are excited about our 2018 Dangers of social media and Driving Scholarship. We will support a student passionate about **raising awareness of the risks of using social media while driving**.

We will award $2,000 towards the education of a student who creates a plan to teach their peers about the dangers of distracted driving. Please visit our scholarship page to learn how you or someone you know can apply. We will implement the idea of the scholarship winner.

So many crashes are caused by distracted driving and the numbers are only continuing to rise., Burger Law wanted to be a part of the change, by alerting young people to the dangers.

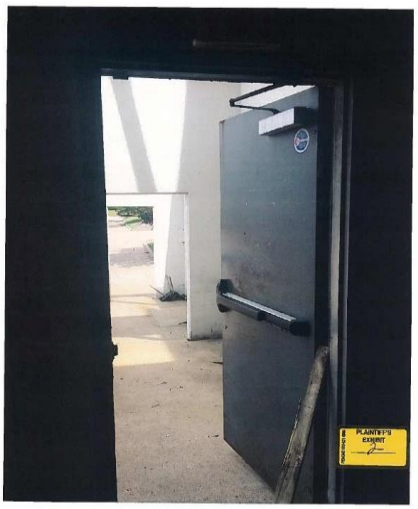
By engaging people to think through solutions, maybe together we can help stop people from using social media and texting while driving.

$220,000 Settlement for partial finger amputation

George Robinson was making a delivery to a Defendant's warehouse. As he was going through a door to make a delivery for his employer, he tried to hold it open for an exiting UPS delivery man. The door unexpectedly sucked close and traumatically amputated part of his right index finger.

He was working at the time and pursued a Workers' Compensation claim. We did not represent him in that and he settled that case. He then came to us and we pursued a premises liability claim for the dangerous condition of the door.

I took the designee deposition of the Defendant and made the case. He admitted that because of the exhaust fans in the warehouse, a draft would suck at the door at issue and cause it to close hard. This was a longstanding problem and the draft could slam the door hard.



There was also a door closer apparatus at the top of the door which had never been repaired or adjusted. Door closers usually work to slow how doors close so that people's digits are not slammed in a door jam. He admitted this did not work for a long time with the door at issue, had never been repaired and had never been adjusted.

We conclusively proved the Defendant had knowledge of this hard door closing and its danger for a long time prior to the incident at issue in this case. Defendant's designee admitted the door was unsafe. He agreed that the force with which the door closed was very hard.

We thought we would succeed in showing the jury that the door suddenly slamming shut was a dangerous condition of Defendants premises. Defendant knew of but did not warn of this condition. The Defendant failed to either prop the door open or maintain the door closer to ensure that injuries like what happened to Mr. Robinson would occur. Or it could warn of the condition or do other changes to affect the draft.

George had an initial revision of the right index finger at the level of the middle distal phalanx and later needed another surgery to remove parts of the finger to help healing and try to stop some pain George experienced.

In his deposition, Mr. Robinson complained of daily pain and aches, numbness and sensitivity in his finger. He complained of swelling which increased over the course of the day. He was a piano player and essentially stopped playing because the amputated finger throws him off. He cannot type well with his shortened finger on a keyboard.

George had about $20,000 in billed medical expenses and we settled his claim for $220,000. We paid off his work comp lien after successfully reducing it.

Illinois Lien Law Different than Missouri

Eliminating or even reducing medical liens in Illinois is no easy task and must always be considered before settling a claim. The Illinois legislature has made it clear that medical providers will recover all or at least a substantial amount of their medical bills when rendering services to an individual involved in a lawsuit.

Medical lien reduction in Illinois is governed by the Healthcare Services Lien Act (770 ILCS 23/1). The Act abolished the Illinois Supreme Court holding in *Burrell v. Southern Truss, 176 Ill. 2d 171, 679 N.E.2d 1230 (1997).*

Prior to the Health Care Services Lien Act there were numerous lien statutes.
In Burrell the Illinois Supreme Court held that each category of lien holder, and there were many, was entitled to assert a lien of up to 33.3% of the settlement amount which could lead to no recovery for a plaintiff.

The Healthcare Services Lien statute consolidated all other healthcare liens into 2 categories: healthcare professionals such as licensed physicians, dentists, optometrists, psychologists or physical therapists; and health care providers like licensed hospitals, surgery centers, home health agencies, and emergency medical providers.

The charges must be reasonable and total health care services liens cannot exceed 40% of the gross settlement. Each category is limited to 20% of the gross settlement and 40% combined. If the lien amount is more than the statutory percentage of the gross each provider within that category is to share on a pro-rata basis.

Illinois Courts are reluctant to reduce liens outside the boundaries of the Statute. In a recent case **we attempted to reduce multiple medical liens from uncooperative medical providers.** One particular surgical charge was quite expensive and our client had got a bad result and needed a second surgery. The court noted that the total amount of lien was within the statutory boundary and there was no provision for reducing a lien due to a bad surgical result.

However, we were able to extinguish the lien of the provider who at first accepted our client's insurance but reversed the payments when he learned that his patient was a plaintiff in a lawsuit.

While the Illinois healthcare lien statute protects providers and professionals bills up to 40% of the gross settlement amount the statute places strict requirements on the placing the lien.

The lienholder must provide written notice containing the name and address of the injured person, the date of the injury, the name of the health care provider and the name of the party liable to the injured party.

The lien must be served by registered or certified mail or in person on the injured person and the liable party. Failure to provide proper notice will likely lead to the lien being extinguished or reduced.

Me with our latest Bikes for kids' winner. So excited to help deserving kids get new bikes.

-Gary Burger

Good News, Friend,

Last Wednesday, a Cole County Jury returned a verdict for $113,714,632.00 for the class of Corrections Officers I represent. This was the latest chapter in a case I have litigated for years. From my voir dire, through opening, 16 live witnesses, the defense case and closing, it was a true pleasure to see our civil justice system working in Missouri's capital.

The front-line Corrections Officers and Sergeants testified at trial that the Department of Corrections required them to perform pre and post shift work but refused to pay them for it. The jury awarded a little more than the amount I requested in closing. We presented damage evidence for the 11-year class time period to pay for the wages earned in pre and post shift activity by the 13,000 class members.

They calculated our expert's report and testimony to arrive at a damage figure to the dollar. I am grateful to the 711-year team of lawyers, legal professionals and clients who gave their all for years to accomplish this.

I am so lucky to have been able to represent these hard working and honorable men and women Corrections Officers fight the Missouri Department of Correction's dishonorable system. My clients and I hope this verdict tells the DOC to stop making their officers work and refusing to pay for it.

I asked the hard-working jury to hold the DOC responsible for not fully paying their employees. Because the DOC breached its agreement with its officers, it is responsible for all the harm it caused. I asked the jury to not "leave anyone behind" in the verdict for this large veteran-comprised workforce. We put on a strong case and our evidence sought to simply show the damages to the class.

The court entered Judgment on the verdict on Friday where we also obtained a declaratory judgment that the DOC violated its agreement with the class and their Union, MOCOA. I hope the Department of Corrections takes this opportunity to pay this verdict and change its system for the hard-working officers continuing to work and not getting fully paid.

The officers are forced to go into the prison, report, get keys and radios, go through metal detector and x-ray machines, go through airlocks, scan ID, fingerprint IDs, and they then pass through a number of the gates to their post

When they get to their post, they have to exchange information with the person they are relieving in order to be able to do their job. For all this, the state refused to pay them. For years.

Thanks to our team

I was really lucky to have a great team supporting our clients. Mike Flannery has been my partner in this case for years and showed what an amazing lawyer he is throughout. His great legal mind and wise counsel was invaluable. Katie Van Dyck is an amazing writer and trial lawyer as well and proved an unstoppable force throughout.

Thanks to my amazing paralegal for 10 years Casey Fluegel, almost lawyer Taylor Morthland, veteran lawyer Mike Smith, paralegal Natasha Vij and all our class plaintiffs Tom Hootselle, Oliver (Tim) Huff, and Dan Dicus. Wow - what a team. I humbly thank you.

Top 11

11. Blind crossing 7 of 9 defense witnesses and greatly helping our case. This means cross examining them without knowing what they were going to say or deposing them before. And getting one I had deposed to admit the DOC did not pay their employees for this because of "cost," or the "tremendous cost of it."

10. Me telling the jury the same thing in opening and close - showing we delivered what we promised in 5 days of evidence.

9. Ken M. testifying - crew cut, long bearded gentleman whose appearances were deceiving. He is a veteran who served tours of duty in Iraq and Afghanistan. He worked his way up through the Corrections Officer rank to become a computer specialist at SCCC prison in Southeastern Missouri. He testified that he figured out a way to provide data for the Defendant to produce to Plaintiffs in the case showing the time officers worked on the pre and post shift activity.

His boss threw out all the people with long time that would increase damages - the Major only used short time data of officers who spent less time in the security envelope. He thought it was wrong and "cooking the books."

8. During cross examination of our expert, the defense lawyer likened his work to his son shooting archery and sometimes, the arrows go off mark. So, if you make a little error in the beginning of an analysis it is going to change all the results. He also likened it to golf or bowling.

My response: This is not about weekend games - it's about wage loss for hard working officers; and our expert was not an amateur archer or bowler, rather he was a professional economist - much more like the professional bowlers or archers who hit the bullseye or bowl a strike every time.

7. The Defendant answered Interrogatories and Request for Admission stating that they made everyone do the same pre and post shift activity and never paid anyone for it. Incredibly, they had a Warden testify that they did not have unpaid pre and post shift activity, they staggered shifts, and at his prison there were no damages for pre and post shift activity.

I cross-examined him and pointed out how different his testimony was from all discovery answers - interrogatories and recent Requests for Admissions. Because of defendant's discovery abuse, the Court correctly instructed the jury not to consider his testimony.

6. The overwhelming support from the officers who are underpaid and work hard. As one officer put it - "not only do they make us come in early and don't pay us for our time, if we ever take too long to do the pre and post shift activity we get written up." Or Connie M. saying about her 2006 request for timeclocks, "like every other employer has."

5. The chance to pick a jury where I am only asking for wage loss damages. I am used to talking to jurors about pain and suffering damages, emotional distress and other types of damages. It was great during voir dire to be able to say that we are not asking for those kinds of damages and just want damages for work people have already worked in the past.

4. When defendant was improperly comparing parts of the damage analysis rather than saying they were mixing apples and oranges, I suggested they were "shooting arrows in a bowling alley," which drew laughs from the jury.

3. That the jury gave the class our full damages - a little more than I asked for. This was a truly hard-working jury (and not just because of the result). They were attentive, took notes throughout, and really paid attention. In deliberations they asked for my expert's reports and added up the damages, to the dollar of everything our economist expert said should be awarded to minimally and conservatively compensate the class. They awarded every dime. Thanks William Rogers of Lindenwood University.

2. Our team was amazing. We put together a team of my firm (Casey and Taylor worked so hard) and Mike Flannery and Katie Van Dyck of the Cuneo, Gilbert, LoDuca law firm.

I did most of the trial work, but Mike took a lot of witnesses, Katie was amazing on the written briefs and other work, and our team together with our support staff we were able to try this complicated case and well serve our clients.

1. Hearing my three clients, Tim Huff, Thomas Hootselle, and Dan Dicus testify on the stand. I almost cried. These gentlemen stood up to the system and worked so hard to be leaders for their fellow officers. They testified great and held up so well under cross examination. Both their character and the veracity of our case is shown through their testimony.

Me talking about the case on the news after the verdict.

Thanks for reading.

-Gary Burger

Happy Labor Day, Friend,

And it's a tough day for Labor. Regardless of your point of view, the rules governing employers and workers rights are changing. Labor has taken hits in many other states and 2018 seems the year from the legislature for Missouri. Although, workers won in the August election.

Labor and Unions certainly are not as celebrated or considered as important as they once were. In Missouri, the tension between unions and employers is tight and many battles are being waged right now. Here are six recent examples:

First, in our August election, voters rejected a "right to work" law that would have hampered union organizing in the state. "The result deals a setback to state Republicans who have long sought to make Missouri a right-to-work state, while handing a victory to labor groups whose power has been diluted by the Supreme Court and GOP-dominated state legislatures."

Second, Former Governor Grietens signed numerous laws changing labor rules before he resigned.

The legislature passed a sweeping change requiring most public sector unions to hold recertification votes to continue their representation, limit the topics on which they can bargain, and require annual employee permission to deduct dues from paychecks and spend money on political causes.

Third, Unions representing teachers and other public employees sued one week ago to try to block a new Missouri law that they claim imposes "a raft of harsh restrictions" that "effectively eviscerates" their right to organize and bargain on behalf of employees.

Fourth, the legislature and former Governor knocked out the Merit System for the majority of state employees. The bill crossed the finish line on the last day of the legislative session. No one campaigned on it and it didn't get much press. Gov. Greitens signed it on his last day in office.

The **loss of basic work protections for state workers means far-reaching consequences for the workforce** and the economic vitality of the area. Gone is any job security for civil servants who have dedicated their lives to public service.

State workers already are retaliated against. **With this law change, more retaliation and gamesmanship with people's jobs is coming.** Here's the statute:

R.S.Mo. 36.025: Except as otherwise provided in section 36.030, all employees of the state shall be employed at-will, may be selected in the manner deemed appropriate by their respective appointing authorities, shall serve at the pleasure of their respective appointing authorities, and may be discharged for no reason or any reason not prohibited by law.

Fifth, everyone is losing job protection contrary to the statute. It provides, in R.S.Mo. 36.030: "Employees in eleemosynary [charitable] or penal institutions shall be selected on the basis of merit." But the Corrections department has decided that its employees are "at will" contrary to the statute.

Sixth, Missouri Proposition B, the $12 Minimum Wage Initiative, is on the ballot in Missouri as a change to a state statute on November 6, 2018. Our current minimum wage is $7.85 an hour.

A "yes" vote supports increasing the state's minimum wage each year until reaching $12 in 2023 and then making increases or decreases based on changes in the Consumer Price Index.

It's not as quick as opponents would have you think: The measure would increase the minimum wage from $7.85 (2018) to $8.60 in 2019; $9.45 in 2020; $10.30 in 2021; $11.15 in 2022; and $12.00 in 2023.

A "no" vote opposes increasing the state's minimum wage each year until reaching $12 in 2023 and then making increases or decreases based on changes in the Consumer Price Index.

Faith in Department of Corrections Weakens

That the DOC has decided its employees are "at will" is really ironic. They have an incredible history of retaliating against their employees for complaining about unlawful working conditions.

Two weeks ago, we obtained a $113 Million verdict against them for failing to fully pay their corrections officers. We also obtained a declaratory judgment that the DOC violated its agreement with the class and their Union.

The officers are forced to go into the prison, report, get keys and radios, go through metal detector and x-ray machines, go through airlocks, scan ID, fingerprint IDs, and they then pass through a number of the gates to their post.

They are not paid for this and it's the most important time at the prison.

Here's our team in the jury box after the verdict.

The next day, the Jefferson City Paper, the News-Tribune, published an editorial outlining many of the retaliation verdicts against the DOC and noting the loss of confidence in the department.

The editorial talked about our verdict as the latest in a string of adverse court decisions:

"Thursday's news that a jury awarded close to $114 million in unpaid/overtime compensation to corrections officers left us speechless.

Apparently, it also left the Missouri Department of Corrections speechless; they're not talking about it.

We reported on Thursday a lawsuit filed Aug. 14, 2012, accused the department of requiring corrections officers throughout the state to do work before and after assigned shifts without being paid for that mandated work.

In a trial held before Cole County Presiding Judge Pat Joyce, a jury ruled in favor of the plaintiffs Wednesday, finding the DOC had breached its agreements with the corrections officers, and awarded the hefty price tag.

The state almost certainly will appeal, and anything can happen in an appeal.

But in the court of public opinion, it's one more indication of problems within the department."

Of all the places to make employees "at will" the DOC is not one of them.

Goodbye seersucker

This weekend marks the last time we can fashionably wear seersucker. Summer suits are fun, but have their place.

Did you know that the thin, striped fabric used to make clothing for spring and summer wear originally came from the Middle Eastern region of the world? The name is derived from two Persian words, *shir-o-shakar*, which literally means milk and sugar. This was probably figuratively used as the fabric is marked by both smooth and rough stripes; thus, allowing the fabric to be held away from the skin, creating better air circulation.

See you next May.

Please donate to Pedal the Cause

I am riding (a bike not a scooter) in Pedal the Cause again this year and raising money to help find a cure for cancer. This is an amazing event attracting hundreds of cyclists and raised millions of dollars. I'm gonna shoot for 63 miles this year.

Scooters

Speaking of scooters, Lime and Bird have scooters all over downtown now. they are pretty cheap to ride. Download the app and give them a try. They add a lot of fun to downtown - whether you work there, go to a cards game, or visit for tons of other fun stuff to do.

My daughter and I had fun on some Friday riding around the Arch grounds.

Have a Super September.

And thanks for reading.

-Gary Burger

Hey, Friend,

Below, I discuss a truck crash case we just concluded and a settlement of a case in Illinois showing the dangers of electing Supreme Court Judges. But first, **an update on the $113 Million Verdict in the Correction officer class action case.**

We filed an extensive **Motion to Amend the Judgment**, approve a Distribution Plan for the Class, pay our class representatives service fees, and pay us attorney fees and expenses.

We argued the Motion last Thursday, and the court granted all the Amendments to the original Judgment we requested. In the argument I remarked on the hard work we did to secure the Verdict and the local and national import and news about it.

In addition to the very high amount of the judgment, we obtained **important equitable relief against the Department of Corrections to prohibit them from continuing to rip off corrections officers and to fix their broken system.**

We will continue the fight. We anticipate an appeal and continued opposition by the DOC and Attorney General Hawley. Email us if you have any questions about the case that are not answered here or on our webpage.

Here are some quotes from a recent article in the Jefferson City Paper about my argument and the Court's order.

Burger said the more the person worked, the more they potentially could get. Under the system they are proposing, the highest amount paid would be around $34,000, but there are many who would get less than $600. He said the average would be around $5,000.

Joyce approved part of the plan Burger argued for which was a stipulation making the DOC implement a system that would accurately track the amount of time its officers work.

Joyce ordered in no more than 90 days from Friday, the DOC shall implement a system that maintains comprehensive, accurate and reliable records of all time worked by Corrections officers and payment for pre- and post-shift work. DOC also shall make all such records available to the Missouri Corrections Officers Association, the plaintiffs in this case and Joyce for inspection upon request.

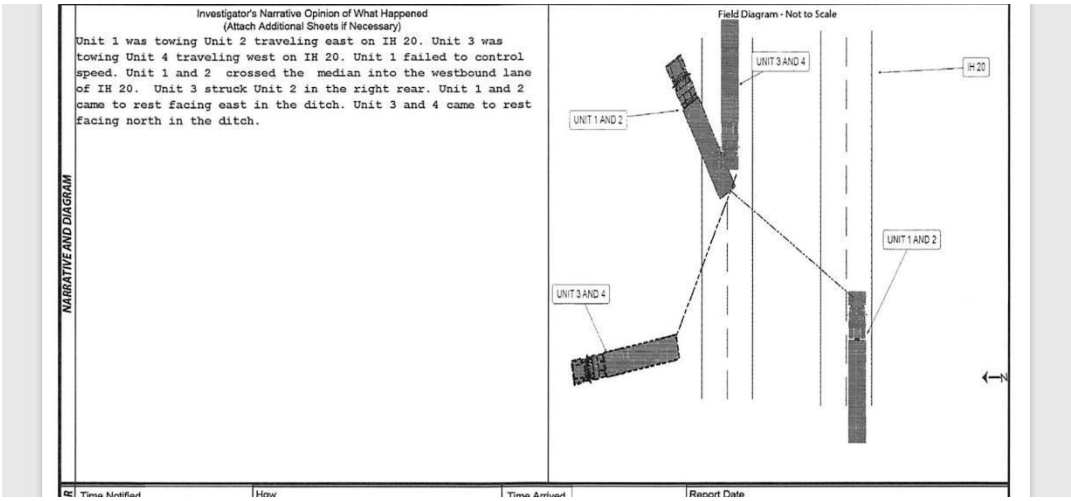
Truck Driver v. Truck Driver

We represent the family of Finely Felty. I regret I did not know him before his death. We represent his widow, Dorothy, and have now completed the case.

I am not at liberty to disclose the amount of the settlement. But the story of his demise and how we ensured all the many liens in the case were resolved bears telling.

Finley was a tractor trailer driver, as was the driver who killed him, Handrijono Oetomo. They were traveling in opposite directions on Interstate 20 west of Dallas Texas.

Oetomo crossed the median into the westbound lane of Interstate 20. He was struck by Finley's tractor and came to rest facing east in the ditch. Here's the police diagram - Finley is in unit 3 and 4.



Finley had little or no time to react. These skid marks indicated that he moved a little bit to the left to try to avoid the trailer and smashed the front of his trailer into the back passenger side of the trailer

We hired an expert and the defendant did as well. I traveled to Dallas to inspect the vehicles. The black box or ECM data from both vehicles do not provide any information about the crash.

Oetomo drove at excessive speed for the circumstances and on the wrong side of the road. He may have also been driving too close to vehicles in front of him which may have prompted him to turn to the left.

The defendant tested the brakes of Finley's vehicle and found them in disrepair. They tried to put fault on Finley for this. However, we were able to show repair reports showing he had his brakes repaired within a month before the crash in New Mexico.

We also had a good claim against Oetomo's employer, Cargo Solutions. They negligently hired Oetomo. Why? He did a similar thing the year before and killed someone else.

They must have known he killed Wanda Huddleston on February 17, 2016 when he was on the wrong side of the road in Lindale, Texas. They settled that claim for $1.4 Million four months before Oetomo killed Finley.

Oetomo fled the United States, likely because of the two people he had killed while driving. He shouldn't be on our roads.

Another part of this story is the hard work we did in resolving all liens in the case. W**e insisted that any recovery in the case would not be reduced** by property damage claims to the tow tractor and trailers, loss of the cargo and Finley's work comp benefits.

As I have always said, **the extra work in reducing and eliminating liens does as much good for a family as the settlement number from the defendant in the first place.**

State Farm to Pay $250 million Settlement for Karmeier Campaign Donation Lawsuit

We fight State Farm all the time in cases.

Did you know that State Farm **has agreed to a $250 million settlement** for a federal lawsuit which accused the company of **breaking federal racketeering laws by donating extra money to the election campaign of Illinois Supreme Court Justice Lloyd A. Karmeier and failing to disclose the amount?** The case is *Hale v. State Farm*.

Plaintiffs were represented by the Clifford Law Offices. They were representing the class in a suit against State Farm, challenging the company's authorization to use non-factory vehicle parts for vehicles involved in accidents - called *Avery v. State Farm*.

The 1999 $1 billion jury verdict against State Farm in the Avery case was reversed by the Illinois Supreme Court in 2005. Judge Karmeier was the deciding vote on the case. Millions of dollars were funneled into Karmeier's 2004 campaign by State Farm and other insurance companies before deciding the case.

When Karmeier was challenged by Plaintiff's, State Farm lied about the number of contributions given.

The settlement provides benefits to over 4 million current and former State Farm policyholders who were members of the class in *Avery v. State Farm*.

In 2015, a federal judge in the Southern Illinois district approved class-action status for a lawsuit by policyholders who alleged that State Farm directed campaign contributions that made their way to the coffers of the committee to elect Karmeier to the Illinois Supreme Court. Judge Karmeier was not named in the suit.

As we approach election season, **this case highlights the importance of the Missouri Plan.** The Missouri Plan provides that the governor selects judges, who are recommended by a non-partisan commission. These judges are retained by citizen vote.

This system ensures that our States judicial selection is not controlled by partisan campaign spending. In states such as Illinois where judges are elected, **insurance companies have the opportunity to spend millions of dollars, buy judicial influence, and potentially change the outcome of important cases.**

A number of states have adopted the Missouri plan, and we should be proud of our State and our judicial system. We must also fight to preserve this plan and keep politics out of our judiciary.

Here's me getting ready to shoot a video about the case with Tim and Dan after I changed out of trial clothes.

Greatest shorts ever?

-Gary Burger

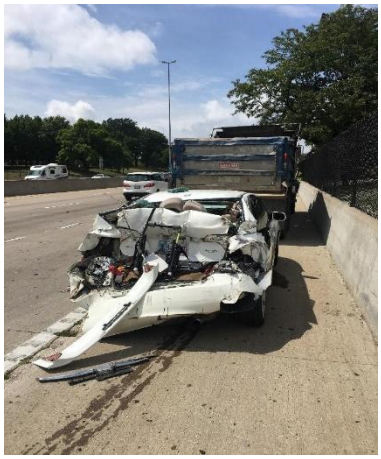
Can you believe it's October, Friend?

Below, I discuss a few settlements we recently had - dump truck case and a slip and fall. I also post links to two new podcasts of Lawyervlawyer where we discuss amazing trial tips. **There's also a link to the recent Fox 2 story about the $113 Million Verdict in the Correction Officer class action case.**

And yesterday I rode Pedal the Cause. Thanks to all my donors. I rode 67.5 miles over 3 and 3/4 hours at an average speed of 18 mph. The hills were tough - I'm really sore today.

$116,000 Settlement against dump truck driver

We were able to get a great settlement for our clients Luis and Kelsey. They were stopped in traffic on Interstate 64 when a dump truck crashed into the back of their car.



The truck driver was not paying attention to the flow of traffic, and hit their car with incredible force, crushing the trunk, and back seat, while sending glass flying into the car. Luis and Kelsey's car was pushed into the vehicle in front of them and caused a second impact.

They were both immediately taken to the hospital, and received treatment for their injuries. Both sustained injuries to their neck and back, and Luis had cuts on his head from the broken glass.

The insurance company dragged their feet in offering a fair settlement for our clients (surprise). We prepared and forwarded the lawsuit and they nearly doubled their offer.

We settled **Luis' case for $66,000 and Kelsey's for $50,000, getting both nearly four times their total medical bills.**

New(s) Story about $113 Million Verdict

The consequences of our large verdict against the State are still being felt. Chris Hayes of Fox 2 News did an extensive report on the case last week.

One of my quotes: "They're the biggest police – they're the biggest officer force in the State of Missouri, with anywhere between 4,000 and 5,000 officers at any one time," Burger said. "And they are paid lower and they are forgotten."

Lawyer v Lawyer Podcast - TOP 20 TRIAL TIPS

Check out two great episodes of my Lawyer v Lawyer podcast. These are getting popular. Listen on iTunes or Android.

Debbie Champion and I did 2 episodes on our top 20 trial tips. You can find them wherever you listen to podcasts.

$0 to $70,000.

We got a great settlement for Rhonda Griffin in her slip case. Rhonda was at the Florissant Hill Plaza for a fundraiser for her high school reunion class - she is an active alumnus.

She was leaving a store when she hurt her knee.

She stepped off a curb onto the parking lot and was walking on asphalt when she slipped and twisted her knee. She did not fall but had immediate knee pain and complained about it to nearby business owners.

She didn't see why she slipped, so looked. What she found out was surprising: there was a drain from the roof onto the parking lot that causes water and buildup of slick algae on the parking lot.

We have all encountered this while walking in creeks - slick algae where there is constant moisture. As it builds up these areas can be very slick and dangerous.

Not what you want on a parking lot with customers going in and out of stores from their cars. She came back the next day and took pictures.

She not only saw this herself, she inquired of the owners of two stores she had been visiting. We learned there was a constant slick spot there and they had complained about it to the owner. We took recorded statements of them.

We tried to settle the case, but nothing was offered.

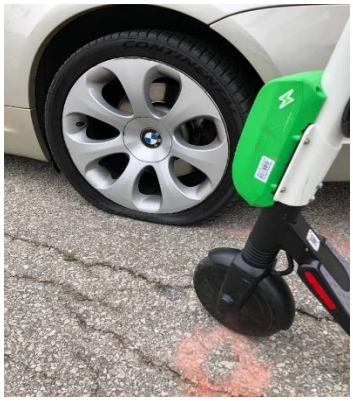
We filed suit and litigated the case (as we usually do). We exchanged discovery, got pictures from the Defendant and took a designee deposition of the Defendant.

The defendant made some significant admissions. He wasn't a bad guy, and acknowledged that this could be a dangerous condition on this property but wasn't particularly sure.

We established liability and then pushed for a settlement. We got an amazing settlement for Rhonda. **We took this case from a zero offer to a $70,000 settlement**.

Rhonda was psyched about the result - we got her $30,000 more than she expected.

Well, got a flat tire on the way to the office last week. Boy, do I love the new scooters downtown.



I pulled off the highway, parked my car, called a tow truck and scootered to the office.

Thanks for reading.

-Gary Burger

Hey, Friend,

A lot is going on in October - although not Cardinal baseball.

My client Ramona received some awards for her amazing work to curb gun violence.

Took another case from $0 to $100,000.

Started winterizing my bees. Did more podcasts.

Had a bunch of lawyers ask me to work with them on some hard cases so I wrote an article with Jake Thomeczek on co-counsel rules (and yes, it's a plug to ask for case referrals).

Multiple choice question: Here's a picture of William after I told him the news last week that:

a) Ariana Grande and Pete Davidson called off their engagement;

b) global warming is going to be largely irreversible by the time he can vote and not much is being done about it;

c) **another story** in the post about our $113 Million verdict notes that AG Hawley **is losing $27,000 a day by not paying the verdict**

d) Burger Law is almost **three years old**;

e) Shower doors are exploding; or

f) Honey bees warm themselves all winter by vibrating their flight muscles - and can keep the temperature at the cluster around the queen to 93°.

Our Incredible Client's Story

I would like to share with you a little bit about my amazing client Ramona Fortner. I represent her in an automobile accident that we are settling right now. That is not the point of this story.

Ramona was doubly stricken with two tragedies. She has lost two of her children to gun violence. What she did with what life has thrown at her is amazing.

For over a decade Ramona has gone into the community and advocated to try and curb black on black crime. She speaks at community events and churches to get the messages out that African Americans should not kill each other. Regardless of the reason.

She advocates taking snitching out of their vocabulary and tries to spread love and peace in the wake of these tragedies.

Because of her quite persistent and strong action, **Ramona has gotten some attention and awards**. She was recently featured in a Huffington Post article.

In that article, a reporter for Huffington post attended a gathering at a Saint Louis church to hear stories of police violence against African Americans. She told the story of Ramona, who while listening to everyone's stories asked, "what about killing us? When are we going to deal with that?"

Ramona told her story and left, but the reporter felt deeply for Ramona's story and followed her. That was just the first talk they had together.

Ramona told the woman about her son, Malik and how he was killed by someone in a case of mistaken identity for someone else who had robbed the shooter. How after that, her focus has been on the concern she has that the focus on police violence detracts for all the violence occurring in her neighborhood.

The reporter talks about how much she has learned from Ramona and how it will take rallying as a community to advocate to end violence.

Ramona is an incredible person and we are honored to help her, in her accident, and in her goals to help her community in any way we can.

Attorney Referrals

Burger Law frequently co-counsels with lawyers throughout the Midwest in personal injury cases.

What many lawyers don't realize is that the Missouri Rules of Professional Conduct promote referrals and co-counsel relationships.

Rule 4-1.1 tells us that clients are best served by an attorney with the legal knowledge, skill, thoroughness and preparation reasonably necessary for competent representation.

Moreover, Rule 1.5(e) helps facilitate fee splitting and ensures fees are split in a manner that is fair to both attorneys. Both of these rules were designed to ensure that a client in need has the best possible lawyer for their case.

We share contingency fees with referring lawyers per ethics Rule 1.5(e). This ensures that fees are split in a fair and ethical manner. We are always willing to take calls from lawyers and offer our thoughts about cases and legal issues for free.

We can help other lawyers through direct referrals, co-counseling, and serving as trial counsel.

Here are my top ten things to know about co-counseling:

1. We work under the referring lawyer's fee agreement. No one knows the client like the referring lawyer. She and the client arranged a fee agreement that worked best given the client's legal issue.

2. Division of fees does not have to be proportional to services rendered. Rule 4-1.5(e) permits lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole.

Comment 7 to the rule notes that "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."

3. Our fees are reasonable. Rule 4-1.5(a) requires that lawyers charge fees that are reasonable under the circumstances. The same rule requires that expenses for which the client will be charged must be reasonable. At Burger Law, we keep our fees reasonable and our costs low.

4. We take cases from out-of-state attorneys. The Missouri Bar expressly allows Missouri attorneys to serve as co-counsel and split fees with an attorney not licensed in Missouri. Informal Opinion No. 2018-05.

Like in all co-counsel scenarios, sharing a fee with an out-of-state attorney is allowed when the division is in proportion to the services performed by each lawyer or if each lawyer assumes joint responsibility for the representation; if the client agrees to the association in writing; and the total fee is reasonable.

5. Transparency and open communication with clients are essential. Enforceable fee sharing agreements require the client to be notified of the agreement in writing. Rule 4-1.5(e); *Londoff v. Vuylsteke*, 996 S.W.2d 553, 558-59 (Mo. App. E.D. 1999).

While informing the client of how much of the fee each attorney will receive is not required, Rule 4-1.5, Comment 7, doing so is a good way to foster trust and positive relationships with your clients.

Before we get to 6 - 10 - Here's me working the hives and Dubya and I at his first political fundraiser.

6. To be enforceable, fee-splitting agreements must comply with the Rules of Professional Conduct. The Missouri Court of Appeals has held that "an agreement to share attorney fees that does not comply with Rule 4-1.5(e) is unenforceable." *Neilson v. McCloskey*, 186 S.W.3d 285, 28 (Mo. App. E.D. 2005). At Burger Law, we have the experience to make a fee-splitting agreements that are fair and enforceable for the attorneys involved.

7. We can take your case to trial. At Burger Law, we understand that you might not need outside assistance until your case is set for trial. Rule 4-1.5(e) specifically contemplates that lawyers may need special help in taking a case to trial. See Rule 4.15(e), Comment 7.

8. We can help with the cost of litigation. Complex personal injury, medical malpractice, and workers' compensation cases often entail a lot of up-front expenses. At Burger Law, we generally finance cases and pay all expenses.

9. We can help with expert witnesses. Finding the right expert witness can make or break your case. We can help find, depose, and examine the expert that will help maximize the client's recovery.

10. We are the lawyers other lawyers trust. Attorneys regularly turn to Burger Law to serve as co-counsel for their clients. We present CLEs to help teach other attorneys the ins and outs of civil litigation.

At any given time, a large percentage of our practice is made up of cases involving car wrecks, truck crashes, medical malpractice, wrongful death, and workers' compensation claims.

Lawyer v Lawyer Podcast - Falwell Experts

More awesome Lawyer v Lawyer podcasts. Debbie Champion and I did great episodes on Experts - You can find them wherever you listen to podcasts.

$0 to $100,000.

Our client was injured the beginning of February 2016 while traveling on Graham Rd. She was traveling in the far-right lane when she slowed and stopped her vehicle for traffic ahead.

The Defendant was traveling behind her and at the last minute attempted to change lanes to the far-right lane and violent collided with the rear of our client's vehicle.

The rear portion of the vehicle was destroyed, and the vehicle was totaled.

Our client suffered severe injuries to her head, neck and back. After an MRI, an orthopedic surgeon found our client had a herniated disc at C5-6 as well as encroachment on her nerve root multilevel disc degeneration, and posterior protrusion.

The MRI of the shoulder revealed a full-thickness tear of her rotator cuff and a 5 mm tendon retraction. A Wash U surgeon did a rotator cuff tear repair and tendon retraction.

In total, our client had $50,000 in medical bills. We demanded the policy limits but never received a response from the insurance company. We had to file suit, take depositions, and even had the case close to trial before the policy limit offer came to the table.

The insurance company blamed her injuries on degeneration rather than the accident. We were happy we could help our client and fight the insurance company for the policy limits.

William loves watching our salt water fish tank. Very relaxing. The biggest impact from global warming will be the pH change in oceans that kill those ecosystems.

I hope he gets to see them when he is my age.

-Gary Burger

Friend:

A week from today is voting day.

Will you be voting?

Will you be glad when the campaigning and rhetoric is over?

Seems like it's a contentious and divided time in America - but we all passionately believe in our issues and passionately discuss them. May less "discuss" than "post." I much prefer political discussions with friends than dogmatic social media posts.

I will be working as a lawyer at the polls again next Tuesday - I've done that for about 10 years. I've worked at other polling places over the years. My favorite was a resident's garage in the hill area at least 20 years ago.

Farther below I discuss another interesting legal victory for a client, more news on our class action victory, class action podcasts and scuba diving, but first a little more on voting.

Midterm elections always generate lower voter turnout than presidential elections. While the latter have had turnouts of about 50–60% over the past 60 years, only about 40 percent of those eligible to vote actually go to the polls in midterm elections.

In addition to a 1/3 of Senators and all House of Representatives, almost 70% of states choose governors at midterms.

My friend Grant Doty wrote a great article this week, published this week in the St Louis American. Grant and I ran cross country in high school together (he was much better).

Since then, Grant served our country as a career Army officer, went to law school and now practices law in St. Louis. With all the news and fake news about voting, I thought I'd share Grant's three voting Myths for this election.

Voting Myth 1. If I moved and did not update my voter registration, I am no longer registered to vote.

***Fact*. The majority of people who move remain registered to vote in Missouri.**

Voting Myth 2. If I have the wrong address on my driver's license, this will prevent me from voting given Missouri's new photo identification law.

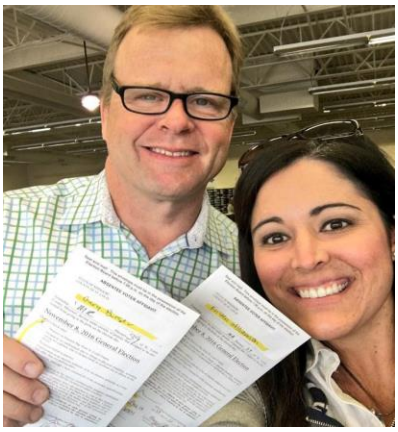
***Fact*. A current address on your photo identification is not required to vote. The law does not even mention the voter's address for any form of primary identification (e.g., driver's license, non-driver license, military identification, passport, etc.). In fact, neither passports nor military IDs even list addresses.**

Voting Myth 3. If I don't have photo identification, lose it just before Election Day, or leave it at home, this will prevent me from voting.

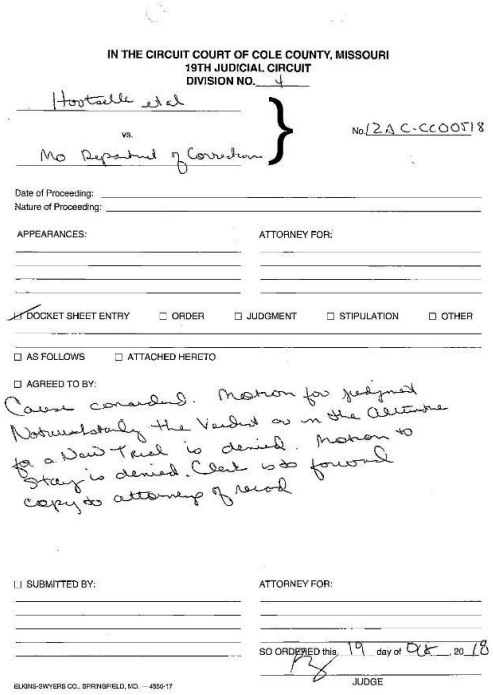
***Fact*. It is estimated that 5 percent of registered voters in Missouri lack the prescribed non-expired Missouri or federal photo identification. But as long as those voters present a secondary form of identification – such as a college ID, the voter notification card they got in the mail, or a current utility bill, bank statement or other government document – they can still vote.**

Here's a pic of us voting two years ago - all smiles.

Please exercise your franchise and vote a week from today. Thanks.



In the News



IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19TH JUDICIAL CIRCUIT
DIVISION NO. 4

Hostetter et al
vs.
Mo Department of Corrections
No. 12AC-CC00518

Date of Proceeding:
Nature of Proceeding:

APPEARANCES: ATTORNEY FOR:

☒ DOCKET SHEET ENTRY ☐ ORDER ☐ JUDGMENT ☐ STIPULATION ☐ OTHER

☐ AS FOLLOWS ☐ ATTACHED HERETO

☐ AGREED TO BY:

Cause considered. Motion for judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied. Motion to Stay is denied. Clerk is so forward copy to attorneys of record

☐ SUBMITTED BY: ATTORNEY FOR:

SO ORDERED this 19 day of Oct 2018

JUDGE

ELKINS-SWYERS CO., SPRINGFIELD, MO. — 4550-17

Our class action verdict for the biggest officer force in Missouri continues to make the news

I was quoted in the **New York Times**: Josh Hawley, Missouri Senate Candidate, Oversees an Office in Turmoil. “One, two, three lead trial lawyers this year, at least three, it kept changing, and that was evident in the trial,” he said. “It’s highly unusual. This is a big case.”

We **won our post-trial Motions** in the case. Here's the order. The State will now appeal.

Assistant Instructor

I have been a scuba diver for many years now. That journey began with a one-day dive in Mexico 10 years ago. I learned in a bay from a guy in a little skiff in Spanish. I went down and followed a turtle for 45 minutes and came up. The folks on the surface were scared and thought they lost me.

Since then, I have done well over a thousand dives, dove in many different oceans and seen many wonders under the sea. There's an amazing universe under water most people do not appreciate.

I have also trained and been certified as a cave diver. Again - amazing worlds and wonders underground in Northern Florida and Mexico. Cave diving is one of the most challenging and rewarding things I have done in my life.

I have had the good fortune of working at Bonne Terre Mine for years as a dive master and dive Guide. **I led dives there on Sunday - a group of great divers from Pennsylvania**. We have divers from **all over the country and the world** come to enjoy the Mine. It's for open water certified divers who also get to experience deep earth diving.

The gratitude continues with being able to dove with my wife, Kristen, and son Jordan. In December my daughter Lucy is going to join us - we plan to have 4 certified divers in the family and spend New Year's Day under water in the Cayman Islands. Really looking forward to that.

And, I finally got around to completing my assistant instructor training and got (another) dive card. Here it is:

Here are some cool underwater pics from Bonne Terre.

If you're a diver and interested - you have my standing invitation to bring you to the Mine to dive. The cost is reasonable and we take open water divers.

0 to $205,000

On November 16, 2014, my client was driving his vehicle southbound on South Breese Street in Waterloo, Illinois when another driver failed to stop at a stop sign and entered the intersection right in front of my client's car.

The client had back injuries, and complained of back pain at the scene, stating he would seek medical attention on his own. The police report indicated our client had the right-of-way at the intersection.

I settled his claim with the liable party for policy limits of $25,000 with the consent of our client's insurance company. We then asserted a claim against his med pay and underinsured coverage.

Before the crash our client had no neck or back problems or any treatment for such. Two hours after the crash, he went to Red Bud Regional Hospital with complaints of neck pain, upper back pain, lower back pain, and left leg pain.

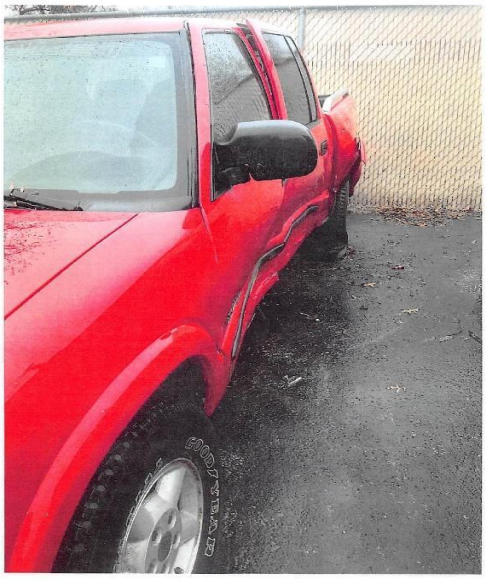
He underwent CT scans of his cervical and lumbar spine, which revealed a "prominent bulging disk at L5-S1." He was discharged that same night, prescribed Percocet for his pain and told to follow up with a doctor for his complaints.

Our client went to an orthopedic surgeon, a physical therapist and a chiropractor. He had injections to try to help control the pain.

Eventually he underwent a micro lumbar discectomy L5-S1 procedure on at Christian Northeast Hospital. In his post-surgical follow up he still had symptoms - no back pain, but continued left leg and neck pain.

But he stopped treating – continuing to work and go to school (he is young). His doctor released Nicholas from all restrictions and told him to follow up if necessary. His medical bills were around $46,000.

His insurance company totally denied the claim initially. So, we filed suit in Illinois for the underinsured. Claim. Although a claimant can file a lawsuit, Illinois has mandatory arbitration if the policy so provides – and every policy does.



We kept up the pressure and obtained the medical payment benefits. Then we picked arbitrators and set the arbitration. We did additional discovery depositions etc.

Well, shortly before the arbitration we settled the claim for $130,000 in new money. This is important as the insurance company had a credit for $75,000 against whatever we collected as we had already obtained that relief for our client.

We effectively obtained a $205,000 recovery for our client. But we navigated recoveries from the tortfeasor, big med pay, arbitration and litigation and underinsured recovery. Happy to get this good result for a great client.

Oh, and he had another lawyer before us. The other lawyer is a good and well-known firm – so we agreed to co-counsel with then and shared the attorney fee.

HOW TO WIN A $113 MILLION CASE

More awesome Lawyer v Lawyer podcasts.

We had Michael Flannery as a guest the last two weeks where we discuss a lot of **details about our $113 Million verdict**. There are two more episodes on the same topic coming out the next two weeks.

You can find them wherever you listen to podcasts.

Important to educate everyone about the vote. Can you believe women did not have the right to vote in America until 98 years ago?

-Gary Burger

Winter is Coming, Friend:

All of a sudden winter is here. I'd like to talk about slip and fall law in winter weather and a quick case success, but first let's honor our veterans and the 100th anniversary of the end of World War I.

America as the world leader rests on our democratic ideals, our constitution and freedoms and our resolve to fight for our way of life all over the world. Our military and veterans do the hard work in implementing democracy around the globe. We have unparalleled reach on our planet, and we have veterans to thank.

So, thank you. The toll of our wars in the last 100 years fell on our men and women who served our country.

I was moved by a Facebook post yesterday of my friend, Mark Schoon, about World War I. With his permission, here it is:

It was known and The Great War and The War to End All Wars. We know it as World War I.

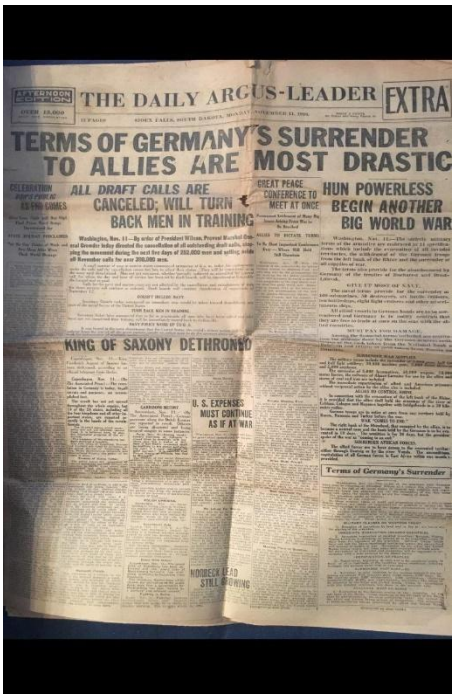
70 million soldiers were involved. 9 million were killed over the 4 1/2 years of the war—an average of 6,000 per day.

For comparison 8,000 troops have been killed in Iraq and Afghanistan in 15 years.

One battle had as many deaths as the entire Vietnam War.

Fighting stopped 100 years ago today. Never forget.

Thanks to my grandmother for saving this newspaper from 100 years ago today and other newspapers from that era.



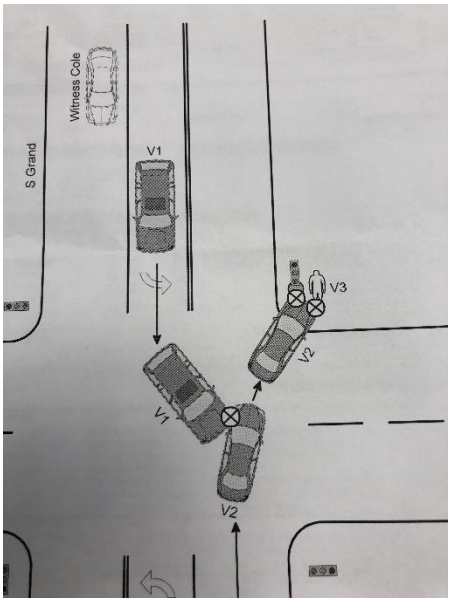
Missouri's most famous WWI veteran? - **Harry S. Truman**. He fought in the Vosges Mountains, St. Mihiel and Meuse-Argonne offensives.

Truman served in France from April 13, 1918, through April 9, 1919.

$100,000 in three months

Picture this: it's a hot and sticky sunny day in June, you're walking down the street with your favorite soda in hand on your way back to your house. All of a sudden, a car slams into another car on the street beside you, sending one of the cars onto the sidewalk and onto you.

This is exactly what happened to Tony earlier this year. The impacted car hit our client and pinned him to a fence. He was just walking down the street coming back from the neighborhood 7-11 when the carelessness of a driver impacted his life forever.



Tony sustained massive injuries because of the recklessness of one of the drivers, and as a result had to undergo extensive medical care.

He had a number of fractures, but needed no surgery and thankfully recovered well. Tony even has little recollection of the incident due to the head trauma.

Here is a picture of the diagram of the accident from the police report. Our client is the figure pinned by the car.

As everyone well knows, the costs of medical treatment add up fast. We got our client a $100,000 settlement for the insurance policy limits and **completed the case three months after the crash.**

Mr. Burger,

Please accept this as a follow-up to my telephone message on September 17, 2018. The Standard Fire Insurance Company (hereafter, Travelers) is in receipt of your Assistants email dated September 10, 2018 in which you advised of your clients injuries several of which were fractures. Based on your clients injuries and medical treatment that have been verbally communicated by you, please be advised that Travelers hereby extends a bodily injury policy limits settlement offer of $100,000 as full and final settlement of [redacted] bodily injury claim inclusive of all liens known and unknown.

Please relay this offer to your client and contact me when you are prepared to proceed to settlement.

The driver's insurance company reviewed the details of the accident and the medical treatment, and offered the maximum bodily injury policy settlement.

Happy Veterans Day.

And thanks for reading.

-Gary Burger

Happy Holidays, Friend:

I cannot believe it's already the holiday season. Below I introduce one of our new lawyers, talk about a recent case we settled for a client and some complicated law surrounding government immunity I keep running into.

What Happens if the Defendant is a Government or Government Agency?

Sometimes the defendant in a case is a city, county, state or an agency of one of them. This can complicate a lawsuit. We recently had a case go up on appeal on these complicated issues and wanted to talk about them.

There are 2 types of immunity government defendants might be entitled to. The first is called **sovereign immunity.** The Federal Government has broad immunity and carefully limits when it can be sued. Under the Federal Tort Claims Act, an administrative procedure is set up for claims when the U.S. government or its employees are negligent. 28 U.S.C. § 1346(b).

States are also entitled to sovereign immunity for negligence claims. Under the 14th amendment to the U.S. Constitution, States reserve their immunity. In Illinois the Illinois Court of Claims has been set up to address these cases.

No jury is permitted, a hearing officer conducts the hearing and Makes recommendations to the Illinois Claims Commission and that body renders a decision. We tried a case there which is pending now.

In Missouri, injured people can bring a civil claim in one of three situations - but they get a jury trial. § 537.600 sets out the immunity guidelines, damage caps and exceptions.

The first situation states are not entitled to immunity is regarding **premise liability**. For example, if you fall on a state property due to defect in the physical property. There could be a missing step, or a hole that hasn't been covered. Under those situations, Missouri law says sovereign immunity is waived by the state and they can be sued for any injuries that happened as a result of the defect.

The second situation is where a state employee is on the job and gets into a **car accident.** Missouri law says under those situations, the State is liable for its employees' actions.

Finally, states waive sovereign immunity for governmental functions to the e**xtent they are covered by liability insurance.** Where a party can show the existence of insurance and that it **specifically covers the negligence at issue**, immunity for public entities is waived.

Under all other circumstances regarding negligence, however, a state is entitled to immunity and cannot be sued. We have come across this numerous times with state

government, city government, county government, public schools, government buildings, etc.

Sovereign immunity is a doctrine that stems from old English law, where our laws originate, that the monarch can do no wrong.

To be entitled to official immunity, public employees must be carrying out a discretionary act for their governmental job. The law defines this as an exercise of reason in determining how or whether an act should be done or course pursued.

This is the counter of a ministerial act, which doesn't require any reasoning on behalf of the employee. During ministerial acts, a government employee is liable for any negligence. The latest Supreme Court treatment of this issue was in Southers v. City of Farmington.

We see this issue get litigated more often to try to determine what a ministerial act is in different public jobs. For example, one case it came up in involved EMS who failed to provide adequate treatment to a 9-month-old baby with a tracheostomy tube. Because of their negligence, the baby suffered prolonged oxygen deprivation and is now brain dead.

They argued that they used their discretion in determining what should be done, and felt as if doing nothing was an option, so that's what they chose. Our argument was that their protocols demonstrated there was a clear set of guidelines on what to do, making it ministerial.

We have also seen this come up in a car accident involving a police car. While the police officer in the car is not liable for performing a discretionary duty, his employer has waived liability under the law and is the only defendant that can be sued.

These are difficult cases to try to win and immunity is often addressed on summary judgment.

We defeated assertions of summary judgment in our Hootselle class action trial as immunity does not attach to breach of contract cases.

Success Story

We recently settled a case for a client who was rear ended on the highway while caught in traffic by a driver who was not paying attention and driving at an excessive speed. The force of the crash then caused our client to rear end the driver in front of them.

The client accumulated $7,000 in medical bills. The insurance company initially offered $12,357.34. the client was not that significantly injured. We continued to press and threaten litigation.

After several weeks of negotiations, we were able to settle the case an additional $4,142.66 at $16,500.00. We were able to get a great recovery in the client's pocket with will make the holidays a little brighter.

Dangers of Social Media and Driving

We have a scholarship for the best marketing and ad campaign to curb distracted driving. We see people on their phones driving all the time. We have had over 150 applications over the last year. Tune into the next newsletter for our winner.

Happy Holidays from Fredericksburg.

Thanks for reading.

-Gary Burger

It's the end of the year, and time to reflect. Below I discuss interesting jury instruction issues in a medical malpractice case I tried a couple weeks ago, announce our scholarship winner for our Dangers of Social Media and Driving Scholarship and have yet another ladder video.

But first, the end of the year is a good time to assess. Here's a great quote by actor Douglas Fairbanks: "In taking stock of ourselves, we should not forget that fear plays a large part in the drama of failure. That is the first thing to be dropped."

To that end, here is **Burger Law's 2018 by the numbers**:

- Amount awarded in jury verdicts and judgments: **$113,714,362**
- Cases tried to a jury and won: 1
- Cases tried to a jury and lost: 1 (very proud of this fight)
- Jury verdict average $56,857,181
- Cases that were set for trial and settled within a month of trial: 11
- Google 5 Star reviews: 373.
- Or paste this in your browser: https://www.google.com/search?q=Burger%20Law&ludocid=4038651204211241775&lrd=0x87df2d6752993ec9:0x380c2bdf5eb6f32f,2,5
- Employees: 8 - here's a pic of four of our new additions - very excited to have them on board:

- Burger Law YouTube videos: 244 – You can find them at youtube.com/burgerlaw
- Lawyer v. Lawyer podcast episodes with Debbie Champion: **30** – available wherever you find your podcasts!
- Bi-weekly emails sent: 24
- Average Number of people who open our bi weekly emails: 2,012
- Cases/clients with current open files: 314
- New dive cards: 2 dive control specialist and assist and instructor
- Dives:78 (way too low- lets change this for 2019)
- Cases closed - most settled, a few lost or dismissed: 307
- Books published on website: 4
- Hosted CLE's: 1
- Presented CLE's: 4
- Scholarships awarded: 1
- Appellate Briefs written: 2
- Appellate cases lost: 1
- Additional kids: 1
- Additional bees: 12,000

Advanced Trial Law: Can you submit a case to a jury on two different legal theories?

Q: Do you have to elect your remedy before going to the jury?

A: Sometimes

Typically, you do have to elect your remedy and submit one legal theory for each claim of damages before going to a jury. Courts don't want double recovery or inconsistent verdicts.

However, a plaintiff may submit two different legal theories for the same injury so long as: 1) the theories are not factually or legally inconsistent, i.e., proof of one theory does not disprove the other; and 2) the theories do not permit the jury to award a double recovery. *Whittom v. Alexander-Richardson Partnership, et al.*, 851 S.W.2d 504 (Mo. banc 1993).

In a case we tried two weeks ago, we submitted the case on two theories: 1) that the psychiatrist Dr. Mattingly committed medical negligence which resulted in the death of his patient and others, and 2) a legal theory under famous cases Tarasoff v. Regents of Univ. of Cal., 17 Cal.3d 425 (Cal. 1976), and Bradley v. Ray, 904 S.W.2d 302 (Mo.App. W.D. 1995), where because Dr. Mattingly knew or should have known of the risk of danger his patient presented to others, he was negligent in failing to warn them of that danger.

Because these two theories are not inconsistent (proof of medical negligence would not disprove failure to warn, and vice versa), and because we were only seeking one remedy (wrongful death damages), we were able to submit both legal theories to the jury.

An illustration in MAI guided us. Illustration 35.15 shows how you can submit two verdict directors and one verdict form to avoid multiple recoveries for the same injury. So, you structure your verdict directors so that the jury can elect two different liability theories but just have one amount of damages to assess.

We effectively did this by organizing our verdict form in three parts. Part I asked the jury to determine liability only on our medical negligence claim. Part II asked the jury to determine liability only on our failure to warn claim. Part III required the jury to determine the total amount of damages, which would be the same for either (or both!) claims.

The jury was free to elect one or both theories of liability. Email me if you'd like a set of the instructions we used.

Submitting two different legal theories can give the plaintiff an advantage, because some jurors may resonate more with one theory than the other. The way we structured our verdict form alleviated the concern of a double recovery (which would lead to possible error), and also enabled us to determine which theory(ies) the jury relied on in the event of an appeal.

Other **examples where you can submit two theories** to obtain one recovery include:

- *Palmer v. Hobart Corp.*, 849 S.W.2d 135 (Mo. Ct. App. 1993) (plaintiff whose hand became lodged in meat grinder was permitted to submit jury instructions for both design defect patterned off MAI 25.04 and failure to warn patterned off of MAI 25.05);
- *Davis v. Cleary Bldg. Corp.*, 143 S.W.3d 659, 669 (Mo. Ct. App. 2004) (plaintiffs' claims for breach of contract and fraudulent misrepresentation were not inconsistent legal theories, and as such, did not require election of remedies or election of recovery);
- *Host v. BNSF Railway Co.*, 460 S.W.3d 87 (Mo.App. WD 2015) (liability under FELA could be based on alternative theories of general negligence and negligence per se due to violation of the Locomotive Inspection Act);
- *Whittom v. Alexander-Richardson Partnership*, et al., 851 S.W.2d 504 (Mo. banc 1993) (plaintiffs were improperly required to elect between their theories of prescriptive easement and common-law dedication).

In contrast, e**xamples where you cannot submit two theories**:

- *Oliver v. Ford Motor Credit Co. LLC*, 437 S.W.3d 352, 363 (Mo. Ct. App. 2014) ("Under Missouri law, a party must choose between a legal remedy for money damages and an equitable remedy for rescission of the contract but not both.");
- *Trident Grp., LLC v. Mississippi Valley Roofing, Inc.*, 279 S.W.3d 192, 198 (error in awarding damages for both breach of contract and professional negligence in installing roofing system due to double recovery).

Congrats Kate

Burger Law established a competitive scholarship to affect change surrounding social media and driving.

It began over a year ago and we have received 150+ applications from passionate young people all over the US. The scholarship awards $2,000 towards the education of a young student, either finishing their last year of high school or in an undergraduate/graduate institution, who demonstrates a way to effectively change the behavior of social media and driving.

There were 3,477 deaths and 391,000 injuries in the U.S. from car accidents due to distracted driving in 2015, and that number is only rising. Looking at your phone for only five seconds while driving at 55 miles per hour is equal to driving the length of a football field – with your eyes closed!

Our winner is Kate Kouplen from Jenks Oklahoma!

Kate is a senior in high school who really blew us away both with her submission and who she is in her community.

Kate is not only an academic superstar, she also tutors for Kumon, is involved in a long list of clubs, and has hundreds of volunteer hours with organizations within her community.

Kate's solution presented for the Dangers of social media and Driving Scholarship is very compelling. She proposes to launch a public awareness campaign called **"Focus on Your Speed, NOT on Your Feed."**

In this proposed awareness campaign, Kate calls for the use of billboards, tv, radio, and social media to promote the campaign. She also would call for the support of local and national law enforcement agencies to spread the message.

Working on both the national and local levels to spread the awareness, this campaign would permeate into the lives of drivers from every age and walk of life.

To address the dated laws that only limit texting and driving and not social media and driving, Kate would have driver's education programs include this message to inform new drivers before they hit the roads.

We are grateful for every application we received, and this choice was a difficult one to make.

Congratulations to Kate for her hard work and her creative solution!

We will be taking action around Kate's "Focus on Your Speed, NOT on Your Feed" proposal, so keep your eyes out for what we've got in store!

Screen time is not Drive time - be careful out there.

Chocolate Santa anyone?

Thanks for reading and Merry Christmas.

-Gary Burger

Hey, Friend:

It’s the beginning of a new year - a time for renewal, resolutions and resolve. And for family and taking time out to enjoy life.

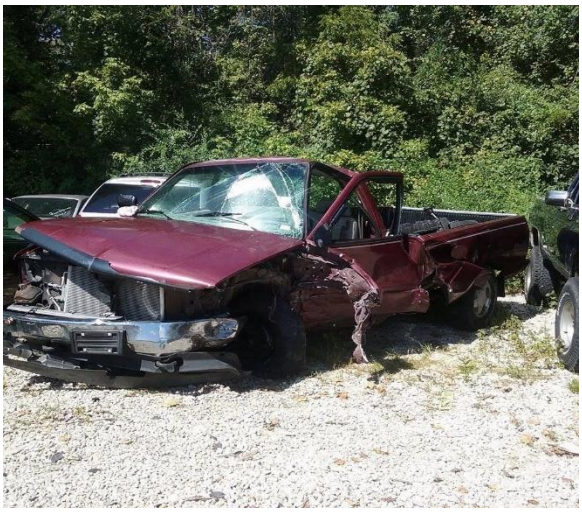
I write this email from a family vacation on Cayman Island. My family and my brother and parents are here for a week to scuba dive and hang.

Below I discuss that, a settlement and a great Motion we won striking two of three experts on the other side of a case I tried as cumulative.

Here's my kids enjoying family time and sites of Cayman Island:

And here's my son and I taking an underwater selfie yesterday:

$100,000 Policy limit settlement with Allstate



Our client Brad was injured in a crash on September 5, 2017. Everybody's nightmare - the defendant swerved and crossed over the center-line into oncoming traffic and crashed into our client head on.

Brad was taken via ambulance from the scene of the accident to St. Anthony's emergency room. He was bleeding from the laceration to the right side of the back of his head and had stiches.

During his transport and admission in the emergency room it was noted that Brad had pain in his neck, left shoulder, head, left chest, left tibial area, ankle and foot. He did a good job getting medical treatment and later had CTs and MRIs for continued symptoms.

He had lingering neck issues and a left Achilles tendon strain and left ankle instability. He was recommended to have a left ankle arthroscopy with debridement and left ankle Bostrom procedure. He had injections instead and eventually healed.

But he still had residual symptoms. Brad's medical specials totaled $29,888.13.

We made a policy limit demand and threatened the defendant's insurer, Allstate, with a bad faith claim if they did not settle. **We prevailed and settled the claim for $100,000.** We put a lot of that in Brad's pocket before Christmas.

Advanced Trial Law: How to Strike Cumulative experts

Q: Can a party have multiple experts testify in a medical malpractice trial?

A: Sometimes

This is the second in a series of advanced trial articles. Last email we discussed multiple verdict directors for one verdict form. Here we show how **we successfully struck two of three experts in a medical malpractice case we recently tried.**

We wanted to as more expert witnesses create the risk the jury will resolve differences in expert testimony by the *number* of experts called, giving the defendant an advantage. And it's more expensive.

To avoid this, we filed a motion to strike the experts as prejudicially cumulative, even if they are otherwise qualified.

We designated one expert to testify regarding the psychiatric standard of care and causation. The defendant designated three: Dr. Adam Sky, Dr. Douglas Jacobs, and Dr. Leo Sher – all psychiatrists.

Prior to even taking the experts' depositions, we filed a motion to strike, and the court entered an order striking one of the three experts as cumulative. We then deposed defendants' two remaining experts, Dr. Sky and Dr. Jacobs.

When asked in his deposition, Dr. Sky testified that he did not disagree with any of Dr. Jacob's opinions or have any additional different opinions. We attached that portion of the transcript to our second motion to strike, and argued that the experts' opinions were nearly identical and thus cumulative: both thought the defendant did not breach the standard of care.

In response, defendant claimed that the experts were not cumulative because Dr. Jacobs specialized in suicide, whereas Dr. Sky specialized in the clinical care of elderly psychiatric patients.

We argued there was no material difference in their testimony, and that the defendant cannot attempt to persuade the jury by the sheer number of experts when their testimony is the same. The Court agreed, and **struck Dr. Sky as cumulative.**

Defendant relied on the **latest Supreme Court case on this issue**, *Shallow v. Follwell*, 544 S.W.3d 878 (Mo. Banc 2018). There, the plaintiffs brought a wrongful death medical malpractice action alleging the physician negligently perforated the decedent's bowel during hernia surgery, causing septic shock, and did not treat the bowel perforation after the decedent was readmitted.

In response to plaintiff's one expert, defendant called four – a board-certified doctor in general surgery and critical care medicine, a cardiologist, vascular surgeon, and colorectal surgeon. The plaintiffs argued that allowing four experts to testify was needlessly cumulative.

The Court rejected this argument: "While the expert testimony overlapped at times, the experts testified about their own specialties and offered their own parts…when the expert testimony did overlap, the overlapping testimony went to the issue of the standard of care and causation – "the very root" of a wrongful death action arising from medical negligence." *Id.* at 884.

Nevertheless, the Court acknowledged that **the number of experts who may testify is not limitless;** rather, the probative value of testimony must be weighed against the risks it poses of unfair prejudice. *Id.* at 885.

We distinguished our case from *Shallow* by emphasizing both of defendant's remaining experts were psychiatrists with materially similar opinions. In contrast, the four experts in *Shallow* practiced in different specialties, and although their opinions overlapped, they had unique testimony to contribute. The Court agreed.

Some **takeaways** from our experience include:

- If a defendant designates multiple experts to testify regarding the same issues, file a motion to strike ***before*** expert depositions to avoid unnecessary costs of deposing expensive experts.
- When deposing multiple experts, **asking if their opinions differ from one another is a win-win**; either they agree on everything and are subject to being stricken as cumulative, or they disagree and discredit each other.
- If multiple experts are permitted to testify at trial, timely objections are important. "When portions of a witness' testimony are alleged to be cumulative and portions of the testimony are not, an objection to the cumulative evidence must be made after each question seeking to elicit the objectionable testimony." *Shallow*, 544 S.W.3d at 884 n. 2 (Mo. Banc 2018).
- Highlight the similarity of the experts' specialties and opinions through their deposition testimony, CVs, or the designations themselves.

Note that in Missouri, **a qualified expert may testify if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue**…" Mo. Rev. Stat. § 490.065 (2018).

The circuit court enjoys considerable discretion in the admission or exclusion of evidence, including expert testimony. *Shallow*, 544 S.W.3d at 885. As with other evidence, the probative value of admitting expert testimony must be weighed against the risks it poses of unfair prejudice, cumulativeness, confusion of the issues, misleading the jury, undue delay, or waste of time. *Id.* at 883.

New Truck Crash Case - No load shift problem.

-Gary Burger

Happy Monday, Friend:

TOP V&S 2018

2019 Missouri Lawyers V&S winners announced

By Scott Lauck
slauck@molawyersmedia.com

The 2019 Missouri Lawyers Awards will honor attorneys for their accomplishments in 2018. Missouri Lawyers Media already has announced the qualitative winners, including Lawyers of the Year Joseph D. "Chip" Sheppard III, Dan Viets and Michael B. Hill.

Now, we are announcing the winners of our quantitative awards. These are Missouri-licensed attorneys who scored the biggest civil victories in Missouri courts in 2018, based on our Verdicts & Settlements database. These awards honor settlements and trial victories, including wins for both the defense and plaintiffs. New this year: We are considering plaintiffs' verdicts and plaintiffs' judgments in separate categories, given the different burdens needed to persuade juries and judges.

The winners will be honored at the Missouri Lawyers Awards on Jan. 25 at the Four Seasons Hotel St. Louis. The full rankings of the year's biggest verdicts and settlements will be published in our annual Top V&S edition on Feb. 4.

Top plaintiffs' verdicts

1 · $4.69 billion

In *Ingham et al. v. Johnson & Johnson*, a St. Louis jury gave one of the largest awards in state history to a group of women who alleged they contracted ovarian cancer from talcum powder.

Eric Holland, Patrick Dowd and **Seth Crompton,** Holland Law Firm, St. Louis; **Thomas Neill,** Gray, Ritter & Graham, St. Louis

2 · $113.7 million

In *Hootselle et al. v. Missouri Department of Corrections*, a Cole County jury sided with Missouri prison employees on claims that they had to perform unpaid activities before and after their shifts.

Gary Burger, Burger Law Firm, St. Louis; **Michael J. Flannery,** Cuneo, Gilbert & LaDuca, St. Louis

[SEE V&S ON PAGE 10]

January 2019

I was in the Missouri Lawyers Weekly twice last week - in a way that really exemplifies what a trial lawyers' practice is like. Two awards for top verdicts in 2018.

We were featured in an article where we got the second highest verdict in Missouri in 2018 at $113.7 million. That was our class action case against the Missouri Department of Corrections.

The second matter was a verdict report **where we lost a case.** I have written about this case a bit in a few recent emails. It was a medical malpractice case in St. Charles.

It was a tough trial and a tough loss, but I was just as proud of the work we did for the family in that case as in our big class action victory. We fought the right fight and tried the right case. I got to intimately know a tremendous family and really good people that I will count as lifelong friends.

One of my early mentors taught me in trial practice: "**Don't get too high on the highs or too low on the lows.**" Being the same newspaper edition for a really great victory and a really tough loss at the same time really exemplified this.

Ironically, **both trials are featured in an upcoming awards ceremony by the Missouri Lawyers Weekly Publication**. We got **both the second highest Plaintiff's verdict and the 5th best defense verdict.**

I know my practice and firm are doing the right thing when fighting like this - regardless of the outcome.

Even with my record setting loss, my average jury verdict in 2018 was $56.85 Million. Not too shabby.

Recent Result

We represented Connie's family in a medical malpractice and wrongful death claim. We fought hard and worked the case up to within 10 days of trial. The terms of the resolution are confidential.

Connie lived in Franklin County, Missouri and had prior heart problems. She was seen and treated by a cardiologist for many years.

In September of 2015 she was taken by ambulance to the local emergency room where she was treated by an emergency room physician. Many ER doctors today are not employed by the hospital, but instead are locum tenens.

This means that they are not employed by the hospital but work through an independent contracting company which supplies emergency room doctors or nurses on a more temporary basis.

We alleged in the case that the doctor breached the standard of care or rules of his profession. Connie had chest pain and bilateral arm pain and obvious heart attack symptoms. The ER doctor knew this, a heart was in his differential diagnosis and he ordered blood work which included a troponin test.

The significance of the troponin test was especially important in this instance as the ECG revealed a T-wave abnormality and inversions - the person reading the ECG thought there was likely a problem.

However, the doctor did not do a second troponin test -- which the standard of care requires. He never diagnosed her with heart problems, instead diagnosed her with acid reflex and digestive issues and he discharged her.

Within 12 hours of her being discharged, Connie had a massive heart attack, and went to the hospital. She never woke up from that and died in the hospital a few days later.

Troponin is an enzyme that is given up when heart failure or myocardial infarction are indicated. The standard is to do multiple troponin test over time to see if a heart attack is occurring -- even if the first test is negative.

A single troponin test is not accurate. This is because troponin builds up over time. And it's especially true for women. Women often don't exhibit the classic arm or chest pain that men do in heart attacks.

So, it is even more important for women to be kept in the emergency room or admit them in a hospital for a short period of time to do troponin test every 6 to 8 hours to see if troponin level is increasing. If so, you do a cardiac procedure where you relieve the artery occlusions and provide adequate blood flow to the heart.

The doctor in this case did not do that and it led to the sad death of Connie. We did a lot of work in the case including deposing all the parties, our liability expert as well as a cardiologist expert. In fact, the defendant's own expert said he would have performed two troponin tests if he were the doctor caring for Connie in that situation.

We fight hard for our medical malpractice clients to get justice for them.

Connie was the glue that held her family together- she kept everyone in contact and was a really kind and sweet woman. The family was persistent that they pursue this case because they wanted to make sure this did not happen to anyone else.

We believe we successfully instituted some changes to reduce the risk of this happening to others. We are happy to do this work and get this good result for Connie's family.

Tort Deform - 2019

With the new year comes a new political landscape for attorneys and their clients. Since this time last year, Missouri has seen changes in Governor, Lieutenant Governor, Attorney General, Treasurer, U.S. Senator and numerous house and senate seats throughout the state. These officeholders and the laws they propose and pass can have a tremendous effect on our clients.

The Missouri legislator began their 100th session in Jefferson City. For all lawyers and fans of our civil judicial system, watch out for tort reform.

Every year business interests and lobbyists try to roll back Americans rights under the 7th Amendment to the Constitution, and this year is no different. They lobby and market to try to say that people ripped off by individuals or companies that lie to them or cheat them, or break the safety rules that protect us all, shouldn't be held responsible for their actions.

The Seventh Amendment guarantees the right to a jury trial in civil cases. This includes the right of a plaintiff to have his or her damages (i.e., the amount of money he or she receives) determined by a jury. Time and time again, we have seen certain legislators in Missouri attempt to restrict this right.

Specifically, we anticipate that the legislature will

- try to protect product manufacturers who negligently make and sell dangerous or faulty products - limit who can bring products liability cases and the amount of damages that can be awarded in products liability cases
- further attack consumer safety in 2019
- further restrict where lawsuits can be brought this session. Under current Missouri law, a lawsuit with multiple lawsuits can be brought in any venue, so long as venue would be proper for one of the defendants. The legislature is attempting to make it so claims cannot be joined in this manner. This would mean that a single plaintiff would have to file multiple lawsuits against defendants in different venues.

As we know, we already have tort reform in Missouri and every other State. Many restraints on where someone can file a lawsuit, caps on certain kinds of damages, time limits to pursue claims, strong restraints on the kinds of evidence that can get in before a jury already exists and are already more than adequately levels the playing fields.

If we do more tort reform our civil justice system will go to:

Remember if you ever talk to your representatives for yourself, see these articles as we go this year in politics that we need a level playing field and fairness for all, which is one of the things that makes America great.

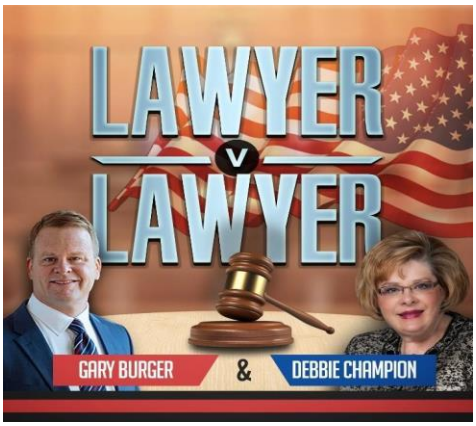
The way it is supposed to work is that it does not matter if you are rich or poor when you come to Court that you get a fair trial. Instead, what these companies try to do is make the playing field uneven and gaining advantage before it ever starts. The want to start on the 50-yard line rather than the 20 in their drive to succeed in defeating claims against them.

My little email and newsletter and my opinion is not going to nearly mark it as well as the area Chambers of Commerce and others get their false message out. So, remember to keep these ideas as a filter when you hear these bogus messages from the folks trying to wreck the Missouri Court plan and our civil justice system.

No matter what twists the legislators throw at us, Burger Law will continue to represent our clients with the skill, knowledge, and experience necessary to achieve great results. If you have questions about how legislative action may affect your case, please give us a call.

Lawyer v. Lawyer:

We have a brand-new series of 3 episodes of Lawyer v. Lawyer with Debbie Champion. In these episodes we discuss all mediation with USA&Ms' Kim Kirn.



Kim is an experienced mediator and lawyer with a lot of experience in different parts of the law. She has had a private practice where she represented clients as well as being in house counsel for many years. I have used Kim in mediations to good success and she has spent a lot of time practicing in Illinois which is an additional asset as a mediator for cases with venues in those locations.

In these podcasts, we discuss everything about mediation from how to win, good tactics to use and when to use mediation, and Debbie and I each give our super top-secret tricks and tactics from both plaintiff and defense side about how to succeed in mediation. Available now, wherever you listen to podcasts!

Hey, Friend:

A new study ranks the deadliest stretches of highway in the Metropolitan St. Louis area.

The highway on the top of the list might be surprising. It is not 270, 44 or 55. The deadliest highway is a half mile stretch of Page Ave in Wellston, St. Louis, between Sutter and R.M. Moore Avenues.

A small and inconspicuous part of Highway D in North County. There were three fatal crashes resulting in three deaths between 2015-16. That is a remarkably high number considering that it is just half a mile.

This leads us to the question: **What makes this stretch of Page Ave so dangerous?**

There are two-way stop sign intersections along the road and there is an alarming lack of street lights. The lack of clear road signs and signals is how one-way accidents are caused. People constantly disobey traffic laws when it comes to stop signs.

It's called the St. Louis Stop - it's in the Urban dictionary. Definition: an action where you come up to a stop sign look both ways but never actually make a complete stop.

They gun it through intersections to beat traffic or don't come to a complete stop and roll through, colliding with drivers on the highway. If these intersections had traffic

lights, drivers would have more cause to obey the rules of the intersection, and less deaths are likely to occur.

But this is a state highway, and is out of the control of the city of Wellston. It falls into MODOT jurisdiction, and traffic lights take considerably more money than a stop sign.

The street lights, however, do fall into city jurisdiction. And considering the deadly toll this highway has had on drivers, it is important to take action to prevent the loss of life.

In Missouri, auto accidents kill more people under the age of 54 than anything else.

I represent people who have lost loved ones in auto accidents all the time, and what I do is look at the contributing factors and the laws that are in place that should protect drivers. It is important to remember that intersections are one of the most dangerous places when on the road.

Cannot get Defendant's Medical records in Illinois

At the end of 2018 the Illinois Supreme Court delivered an opinion that leaves a lot of questions for Plaintiffs going into the new year. In *Palm v. Holocker,* the Court found where the defendant's medical condition is not at issue, they can invoke the physician-patient privilege to bar production of medical records.

However, this standard invokes a lot of uncertainty on what qualifies as "at issue," despite the court attempting to flush out a hardline rule

In *Holocker,* Plaintiff alleged that the defendant was negligent when he hit her while she was crossing the sidewalk. She alleged he failed to keep and maintain a safe and proper lookout, failed to stop at the stop sign, and failed to yield the right-of-way to Plaintiff.

These are the most common types of negligence allegations.

The Defendant answered and alleged that plaintiff was negligent in that she improperly crossed a street when it was unsafe to do so, failed to keep a proper lookout; and was under the influence of an alcoholic or narcotic substance that impaired her ability at the time of the accident."

During discovery, **Defendant admitted he had a medical condition,** diabetes, but refused to answer anything beyond. The Plaintiff's argued that his diabetes had affected his eyesight and they were entitled to his medical records to find out because his sight was at issue because it was relevant to whether it caused the Defendant to hit the Plaintiff.

The trial court found that plaintiff had legitimate reasonable cause to believe that defendant had sight problems that could have been related to the accident and that plaintiff had "a right to look for that."

The appellate court reversed. Plaintiff argued that "an issue" simply means relevant. The appellate court disagreed. The court held that section 8-802(4) of Illinois law applies

only when a defendant affirmatively places his or her health at issue and that a plaintiff cannot waive someone else's privilege.

The court held that "[n]either the nature of a plaintiff's cause of action nor factual allegations in a plaintiff's complaint waive a defendant's physician-patient privilege."

For a prior analysis of these legal issued in a CLE I did, see briefs we have on our website here. These cover the Missouri law as well.

This has potential implications. The holding could also be phrased as where a defendant's health is at issue, the medical records are relevant and Plaintiff can obtain them. But what is "at issue."? It is not simply what is relevant -- but only when a defendant affirmatively places his or her health at issue.

What does it mean for a defendant to place their health at issue? In effect, only when the defendant essentially admits negligence is the Plaintiff able to obtain the defendant's medical records.

$222K Car crash settlement

Our client Chris was injured on February 29, 2016. The car crash occurred when foam from a truck owned by Defendant Ragsdale Construction came out of his truck bed on Interstate 55. This caused another car to swerve and strike a vehicle, pushing it into Chris's vehicle.

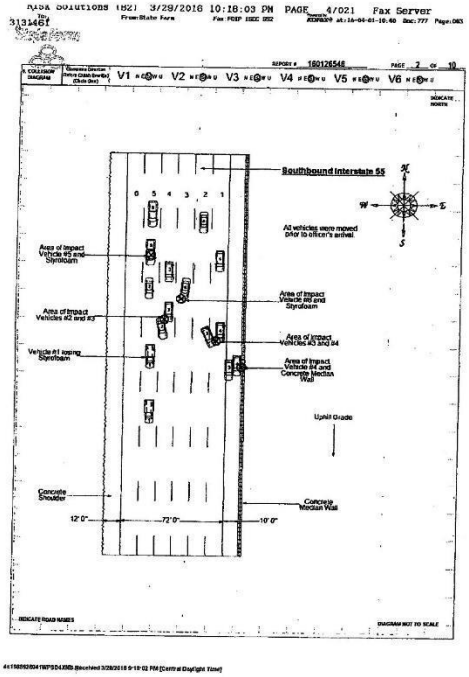
Chris then crashed into the median. We took depos and showed that folks on the highway saw a metal plate vertical in the back and thought it about to come off.

The defendant truck driver (Tucker) agreed that the people who were stopping didn't know what was coming out of his truck-a piece of Styrofoam or a chunk of metal. Tucker never looked to see why the Styrofoam was getting out onto the road. He didn't really inspect it.

Tucker admitted to me in deposition that:

- The lady in the car behind him said that the metal panel stood up and thought it was going to flip out of the back of the truck.
- "Everything was up in the air."
- drivers thought it was going to fall out for at least 5 seconds.
- it is not safe to carry a load without visually being able to see it
- he could not see his load through the windows or the mirrors.
- Had he known what was going on he would have not continued and would have pulled over and put another strap on.
- He had additional straps that he did not use.
- He could have put 3 or 4 on, rather than just the 1.
- After the incident, he didn't do anything but change the way he drove with that load.
- There has been no change with Ragsdale.

- state law required him to secure the load
- he could have put plywood over the whole top of the load to avoid the incident.



5 vehicles were involved in the accident:

Chris sustained injuries to his left leg, neck, back, and head – the more severe injuries were to his head and neck. He had an MRI which showed a small brain hemorrhage. He received chiropractic care for his neck and back. His neck MRI showed disc bulges. Chris did physical therapy and had four neck injections.

Chris's brain and neck injury also caused him to experience dental issues, as clinching his neck and jaw caused him to grind his teeth. He saw Dr. Nikodem multiple times for broken teeth and dental implants.

Chris experienced severe headaches for four to five months. He had cognitive difficulties, including memory loss and difficulties with focus and concentration. Although his symptoms have improved, Chris still has occasional headache and cognitive difficulties and neck pain.

Chris's billed medical expenses were $41,872.30, with paid medical being much less. And after a mediation, we settled the case! It was the quickest mediation I have ever done - it was the day of the big snowstorm.

Update From Last Newsletter

In the last newsletter I talked about an award I was getting from Missouri Lawyers Weekly for the Corrections Officer's case I have talked about.

The event took place on Friday the 25th of January. It was a great event. To see all of the attorneys there honored for all the hard work they do for their clients was great to see and be a part of.

There were amazing cases, incredible people helping others, and funny stories shared. I am honored to have gotten to be a part of it this year.

Here's Taylor, Casey and I. Taylor and Casey were my main trial assistants and did amazing support work to get that verdict. Thanks team.

You can't see what the award says so here is a close up.

-Gary Burger

Happy Sunday, Friend:

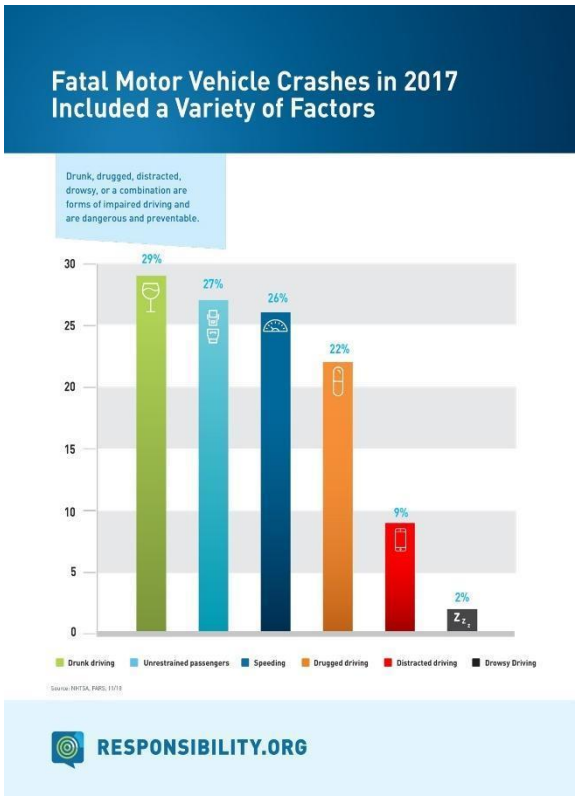
A lot of exciting news at the firm recently. Updates on class actions and lime bikes are below, along with a discussion of a bunch of drunk driving cases we currently have.

But first, puppies. Yes, we started fostering again (for my wife Kristen's birthday. They are too cute (William too) - available at the APA this Saturday.

We Sue Drunk Drivers

I take great pride in helping people in car wreck cases where the defendant is intoxicated with alcohol or drugs. It seems like defendants hire lawyers who get them out of the criminal case. Sometimes people get multiple drunk driving convictions.

I tend to think that for every time a drunk driver is caught, they have done it a hundred other times. So, having a civil lawsuit and real consequence helps make them change their behavior and makes the roads safer for all of us.



Sometimes these settle quickly - but you would be surprised at how many we have to litigate for a long time.

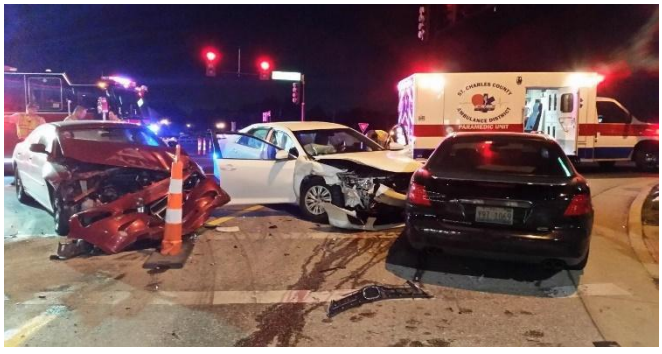
We file suit in them at the first hint of low offers. We file a regular negligence count and a separate "per se" count. We say:

- Plaintiff was injured because of Defendant ____'s negligence in violation of R.S. Mo §577.010, when Defendant drove while intoxicated to the extent that Defendant's driving ability was impaired, which caused him to crash into Plaintiff's vehicle.
- Defendant was negligent per se for violating R.S. Mo §577.010.

Then we ask for punitive damages- that the defendant be punished for drunk driving and to dissuade him/her from doing it in the future. We plead:

- Defendant acted with deliberate indifference or reckless disregard for the safety of others, including Plaintiff, making an award of punitive damages appropriate in this case.

Serious injuries and damages happen when people drive drunk:



My client Elizabeth was stopped on Nichols Rd. at the intersection of 5th Street, waiting to make a right turn onto Northbound 5th Street in St. Charles.

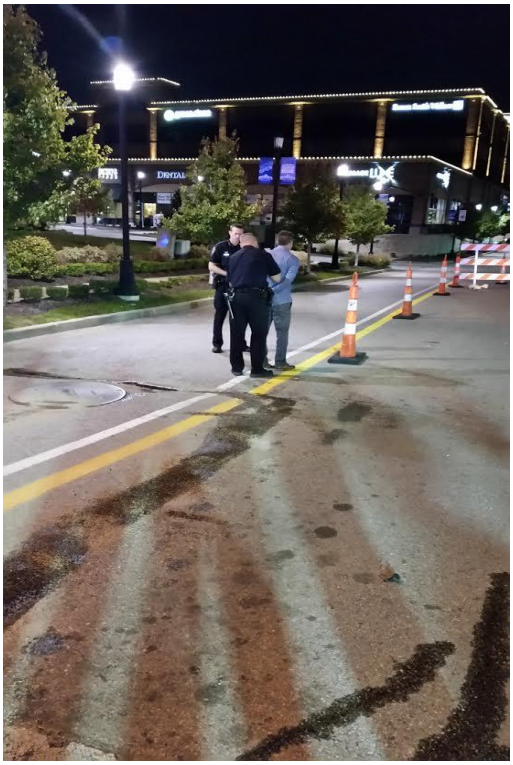
The drunk driver tried to turn left onto Southbound 5th street and crashed into the front of an oncoming vehicle

and then into the driver side of Elizabeth's stopped vehicle.

Luckily, Elizabeth was more shocked than hurt. But the insurance adjuster would not offer much and kept saying the medical expenses are low.

And she insisted we had no conviction on record for the DUI and downplayed it. How did we know he was drunk?

Glad Elizabeth took pictures at the scene. Here's how we knew:



There is no insurance coverage for punitive damages. Seeking them puts pressure to settle. Because if they do not settle, and there is a punitive damages verdict and judgment, the insurance company can be on the hook for it.

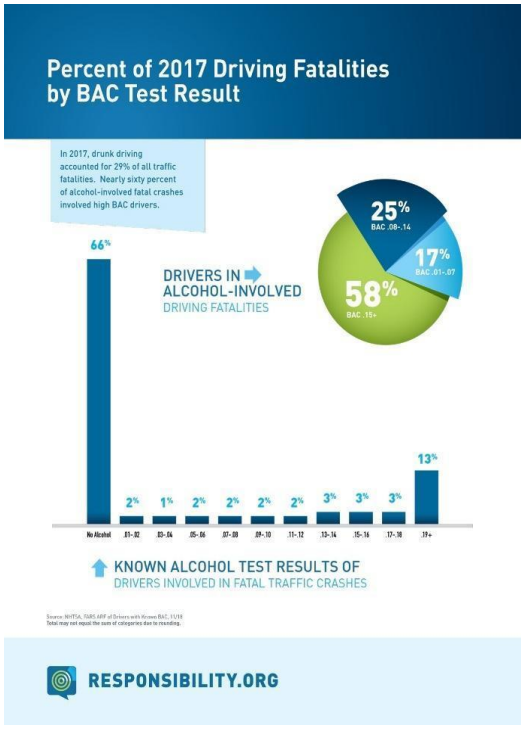
Defendants may try to delay resolution of the criminal case to help in the civil case. That's ok by me - I file suit and try to take a deposition of the defendant right away.

This forces the defendant to take the 5th and not testify. If he does, he can jeopardize his criminal case. If he doesn't answer my questions, we get a jury instruction presumption that the defendant's answer would have been against his interest.

Alcohol impaired driving fatalities have steadily declined since I was in high school.

But my experiences are personal - I meet and represent the victims and their families after. I could fill your inbox with stories and pictures of these tragedies.

We settled a case for **$5 Million** for the family of a man killed in a car - tractor trailer crash.



In the early morning hours of June 15, 2013, our client was leaving a casino and went through an intersection on a green light. A tractor trailer proceeded southbound on South Broadway in St. Louis, Missouri violated a red traffic signal and crashed into our client's truck.

It was a disastrous impact with both vehicles traveling in different directions. The tractor trailer took out some light poles and its cargo was spilt all over the road. The trucking accident impact not only caused a lot of property damage to the neighbor but also destroyed both vehicles.

We filed suit and proceeded with litigation on behalf of the family. We also conducted a quick and extensive investigation to identify some amazing liability evidence and to secure the evidence at the scene.

We had an investigator at the location of the crash quickly. We were able to show through the timing of the lights that the tractor trailer went through the red light. We interviewed witnesses who also so advised.

We obtained the autopsy and toxicology reports which slammed home liability.

We were also able to show because of the skid marks of the tractor trailer that it not only ran the red light that it was over the center line and was on the wrong side of the road at the time of the impact. We were able to show from witness accounts that the tractor trailer was speeding at the time of the accident.

These were all difficult things to show as our client died in this crash and the witnesses were limited for this early morning incident.

We were also able to keep the venue in the City of St. Louis. The truck accident case was originally filed in the City of St. Louis. The Defendant sought to remove the case to Federal Court. However, we opened an Estate for the deceased truck driver.

We also currently represent Dionna in St. Louis County. She was driving on the exit ramp from Interstate 64 at McKnight Road and came to a stop at the signal

The intoxicated defendant was also exiting Interstate 64 at McKnight, behind Plaintiff's vehicle.

He rear-ended the plaintiff's vehicle. She had no warning. The claim rep would not settle fairly so we filed suit and litigated.

We just settled the case for $70,000.

If you have a drunk driving case, pursue it vigorously.

We get the defendant's medical records and criminal records to prove the intoxication. We get them to admit it in depositions or Requests for Admissions. We try these cases to make sure our clients are fully compensated.

Meeting great lawyers

I attended the Lawyers' Weekly event for the biggest verdicts and settlements a couple weeks ago. It was really fun to see and meet so many hard working and successful lawyers.

Humbled to be counted in their group. Really inspires me to keep up my efforts to stay at the top of my field. The Lawyers' weekly photographer captured me visiting with another class action lawyer from the western side of the state.


Award.

Lawyers

Gary Burger and John Schirger are among the attorneys honored in the Top V&S category for largest reported plaintiffs' verdicts of the year.

Contempt

We have moved for contempt against the Missouri Department of Corrections for failure to comply with the Court's Order in our Class Action Case. We will let you know how the hearing goes.

How cute are these two?

-Gary Burger

Good Day, Friend:

Thought I would update you on our class action case.

At my request, last Thursday the Circuit Clerk of Cole County issued garnishments to two banks used by the State of Missouri for $118 Million to try to satisfy our judgment against the State.

We also filed a Contempt Motion as the State has not complied with the trial court's order.

I go into more detail below. Then: podcasts and videos with my mom, advise about another court order affecting the State and goodbye Lime bikes.

Top 10 Correction Class Action Updates

1. We filed a **Motion for Contempt** against the State and the Department of Corrections because they have not complied with the court's order. That Motion is scheduled for hearing on April 1, 2019, in Cole County Circuit Court.

2. We filed the Contempt Motion because the Defendant: (1) is not compensating its COs for the pre- and post-shift duties they perform every day; (2) has not implemented a timekeeping system to record the time its COs spend performing those duties; and (3) has not provided notice to Class Counsel, MOCOA, or the Court of any efforts to change those practices.

This conduct is **direct violation and in contempt of the Court's Amended Judgment**.

3. Defendant was required to seek a supersedeas bond "at or prior to the time of filing notice of appeal" to cover the wages earned by the COs while the appeal is pending in order for the Amended Judgment to be stayed. *State ex rel. GTE N., Inc. v. Missouri Pub. Serv. Comm'n*, 835 S.W.2d 356, 366 (Mo. App. W.D. 1992); Mo. Sup. Ct. R. 81.09(a); Mo. Ann. Stat. § 512.080.1.

An appeal bond is used to stay the issuance of an execution until the cause can be passed upon and disposed of by the appellate court." A bond guarantees that a party's ability to collect on a judgment is not impaired although execution is deferred, if that party is successful on appeal. *Id.*; *see also Green v. Perr*, 238 S.W.2d 922, 923 (Mo. App. St. Louis 1951) ("purpose of a supersedeas bond is to stay the execution or enforcement, pending the appeal, of any order or judgment which commands or permits some act to be done"); *Roussin v. Roussin*, 792 S.W.2d 894, 898 (Mo. App. E.D. 1990).

4. The DOC made no efforts to obtain a bond, and without one in place, there are no funds available to reimburse Plaintiffs' Class for their wages.

5. At the same time, the DOC's defiance of the Court's Amended Judgment is resulting in significant lost wages for Plaintiffs' class, with unpaid overtime accruing at a rate of approximately $787,989 every month.

6. In the Motion for contempt, we ask for and order: (1) **finding Defendant in contempt of court**; (2) ordering the immediate implementation of the policies and procedures set forth in Paragraph 7 of the Amended Judgment entered on September 14, 2018; (3) awarding Class Plaintiffs the attorneys' fees and costs incurred as a result of Defendant's contempt; and (4) s**anction the DOC $1,575,978 per month since the date of judgment to be paid to the class and distributed per the Court's Amended Order and Judgment.**

7. **At my request, the Cole County Circuit Clerk garnished two banks in which the State of Missouri holds money for over $118 Million on Friday.**

03/07/2019	**Execution/Garnishment Issued** This is garnishment 19-GARN-273 for MISSOURI DEPARTMENT OF CORRECTIONS; Directed to Attorney for service. cm; returnable date: 08-APR-2019; Garnishee: CENTRAL BANK MADISON ST.Garnishment created for attorney to retrieve electronically. Print two copies of garnishment created to issue for service and return.
	Interrogatories Filed
	Execution/Garnishment Issued This is garnishment 19-GARN-272 for MISSOURI DEPARTMENT OF CORRECTIONS; Directed to Attorney for service. cm; returnable date: 08-APR-2019; Garnishee: JEFFERSON BANK.Garnishment created for attorney to retrieve electronically. Print two copies of garnishment created to issue for service and return.
	Request for Execution/Garnish Request for Execution of Garnishment; Garnishment Interrogatories; Electronic Filing Certificate of Service. **Filed By:** GARY KARL BURGER **On Behalf Of:** THOMAS HOOTSELLE JR, DICUS DANIEL, OLIVER HUFF, BILLIE SINCE, AMANDA STRANGE, MORGAN STRANGE
	Request for Execution/Garnish Request for Execution of Garnishment; Garnishment Interrogatories; Electronic Filing Certificate of Service. **Filed By:** GARY KARL BURGER **On Behalf Of:** THOMAS HOOTSELLE JR, DICUS DANIEL, OLIVER HUFF, BILLIE SINCE, AMANDA STRANGE, MORGAN STRANGE
	Motion Hearing Scheduled **Scheduled For:** 04/01/2019; 1:00 PM ; PATRICIA S JOYCE; Cole Circuit
	Hearing Continued/Rescheduled At request of attorneys, by filing notice of hearing, motion hearing rescheduled for 4-1-19 at 1 pm. **Hearing Continued From:** 03/15/2019; 11:00 AM Motion Hearing

8. The case is still being appealed by the State of Missouri.

9. The record on appeal was completed and filed with the Western District Court of Appeals on January 28, 2019.The State's brief is due March 29, 2019.

10. With interest, the verdict is now almost $119 Million.

Trial advice with mom

So excited to have my mom working hard with me at the firm.

She and I did **three episodes of our Lawyer v. Lawyer podcast together.** We discuss a wide range of topics about litigation strategy and techniques.

Podcast gold.

Protecting State Employee Unions

A federal court has ruled that the State of Missouri cannot use SB 1007 to infringe on unions rights to collectively bargain.

The State of Missouri is using SB1007 to try to end collective bargaining agreements with its employees' unions and eliminate grievance procedures. Not sure why they want aggrieved employees to run to court.

If they are successful, it will be a new area of litigation. Here's the court order:

18AC-CC00407 - AMERICAN FEDERATION OF ET AL VS STATE OF MO ET AL (E-CASE)

Case Header | Parties & Attorneys | Docket Entries | Charges, Judgments & Sentences | Service Information | Filings Due | Scheduled Hearings & Trials | Civil Judgments | Garnishments/ Execution

This information is provided as a service and is not considered an official court record.

Sort Date Entries: (•) Descending ( ) Ascending Display Options: All Entries

03/08/2019	**Counsel Status Hrng Scheduled** **Scheduled For:** 03/29/2019; 9:00 AM ; JON EDWARD BEETEM; Cole Circuit
	Order It is ORDERED AND DECREED that the Defendants are preliminarily enjoined from interpreting and applying SB 1007, the PAB's Emergency Rules, the PAB's Proposed Rules, and any policies seeking to effectuate SB 1007 and PAB's Rules, in a manner that 1) infringes on or is inconsistent with the right to collectively bargain and/or 2) impairs the rights of the parties created by the AFSCME contract. Defendants shall during the pendency of this lawsuit 1) bargain in good faith with AFSCME, SEIU and CWA over the terms of successor CBAs, without any constraint from SM 1007, maintain the terms and conditions of the AFSCME CBA during negotiations for a successor CBA, as required by its evergreen clause, process grievances that were filed during the terms of the AFSCME and CWA CBAs, without any constraint from SB 1007, the PAB's Emergency or Proposed Rules or Defendant's policies effectuating SB 1007 and This order shall remain in effect until final judgment is rendered or superseded by further Court order. Plaintiffs shall post a bond in the amount of $100 within 3 days of the date of this Order. The mater is placed on the 03/29/2019 law day at 9 am for scheduling of further proceedings in this cause. Counsel may schedule a telephone conference in lieu of appearance. The Court does not conduct telephone conferences on law days. /s/JEB/jw **Filed By:** JON EDWARD BEETEM
02/07/2019	**Proposed Judmt/Dec Dis Filed**

Bye Bye Lime Bike

Ten months after bike sharing companies turned St. Louis streets into a mishmash of brightly colored bicycles, Lime, which first launched its fleet in April 2018, is calling it quits on the traditional pedals-and-gears mode of transport.

In a statement, Lime spokesman Norm Sterzenbach confirmed that the company — which at one point managed a St. Louis bike fleet of 1,500 — is now acting to replace the bike stock with its electric scooters.

"In St. Louis and the surrounding communities, Lime riders are overwhelmingly choosing Lime electric products as their preferred micro mobility vehicles," Sterzenbach said. "In the coming weeks we will be replacing Lime bikes with electric scooters throughout the greater St. Louis metro."

Started taking my oldest son on college visits. Here we are visiting UT- Austin.

-Gary Burger

Happy Sunday Funday, Friend:

I am heading out of town today for a college visit with my oldest son. So, I thought I'd send an early Sunday email. I love Sundays - what's your favorite Sunday quote?

"Easy like a Sunday morning."

"A Sunday well spent brings a week of content."

"Sunday. A day to refuel your soul and be grateful for your blessings. Take a deep breath and relax. Enjoy your family, your friends, and a cup of coffee."

Below I discuss some Motion practice we had in the last couple weeks - More Definite and Certain and some more videos with my mom, and a motion we won in Illinois involving underinsured motorist coverage and Statutes of Limitations.

But I also thought I'd share that I'm excited that my bees made it through the winter. Both hives. As the weather starts warming up, they are getting more active and the queen is making more bees (brood). But the weather is variable so they don't quite know what to do.

I am providing them sugar and pollen to get a jump start on real spring. Hopefully we will get more steady warm weather soon.

More Definite Statement Motions

We faced two Motions for More Definite Statements last week.

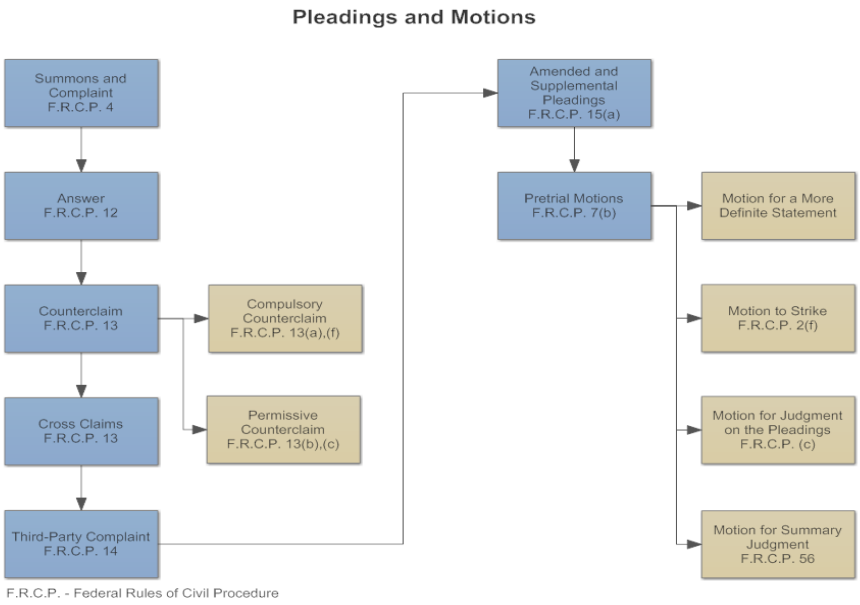
Defense attorneys file Motions for a More Definite Statement in both state and federal court. When Burger Law files suit on behalf of its clients, we sometimes encounter and respond to these types of motions – and usually win. Other times, we know we will likely lose, and instead of fighting it, we preemptively amend our Petition or Complaint to avoid a trip to court.

But what is a Motion for a More Definite Statement? Why are these motions filed? How should plaintiff attorneys respond to these motions?

Missouri and Illinois are fact-pleading states. *ITT Commercial Fin. Corp v. Mid Atl. Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993); 735 ILCS 5/2-603(a). A legal complaint/petition must contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Mo. Sup. Ct. R. 55.27(d); *City of Chicago v. Baretta U.S.A. Corp*, 821 N.E.2d 1099 (Ill. 20024).

The purpose of this standard is "to enable a person of common understanding to know what is intended." *Gardner v. Bank of America, N.A.*, 466 S.W.3d 642, 646 (Mo. App. E.D. 2015). A Petition or Complaint **is good enough when it invokes principles of substantive law which entitle the pleader to relief and lets the defendant know what the plaintiff will do at trial.** *See Kantel Communications, Inc. v. Casey,* 865 S.W.2d 685, 691 (Mo. App. W.D. 1993).

The Missouri Rules of Civil Procedure let a party to move for a more definite statement of matters pled without "**sufficient definiteness and particularity" to enable the opposing party to respond or prepare for trial."** Mo. Sup. Ct. R. 55.27(d); see



also 735 ILCS 5/2-615(a). These motions are not a test of the truth or evidence supporting the pleading, only the clarity of the pleading itself. *Hartvedt v. Harpst,* 172 S.W.2d 65 (Mo. 1943).

A party might also file a Motion for a More Definite Statement when the facts alleged are vague or broad. *See, Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 865 (Mo. App. E.D. 1985). One example is when the defendant is trying to figure out particular types of injuries in a negligence case. See, *Bennet* at 865.

Defendants also commonly file them when there are multiple claims and more than one defendant, and it is unclear if the Plaintiff is suing all defendants for all claims. Also, in employment cases where the alleged wrongful conduct spanned a long period of time, **defendants will file these motions asking plaintiffs to say the exact date**

of each wrongful act, because some recovery might be barred by the statute of limitations.

Defense attorneys will also often file Motions for a More Definite Statement to test the adequacy of a Petition alleging violations of the Missouri Merchandising Practices Act (MMPA), as the MMPA has a heightened particularity standard, requiring more detail. *See Gardner v. Bank of America, N.A.,* 466 S.W.3d 642 (Mo. App. E.D. 2015). This is true when any fraud is alleged, such as fraudulent misrepresentation.

In fact, this just happened to us! In a case where we are suing major drug companies for, among other things, misleading consumers about the safety of their drugs, defendant filed a Motion for a More Definite Statement saying we did not provide enough details to state a MMPA claim.

Genavieve Fikes and Jake Thomeczek researched the law, filed a response, and stood our ground in court. But, alas, we lost and now have to amend our pleadings.

What are your options when defense counsel files a Motion for a More Definite Statement? You can, of course, fight the Motion. In doing so, you should point out that under Missouri's fact-pleading standard, a pleading is sufficient so long as it gives the defendant enough information to respond.

I always say, **it's not like the defendant is going to go ahead and admit anything just because I amend it, so what's the point.** Apparently, that argument won't work all the time.

Often it may be simpler – and save you a trip to the courthouse, to just amend your pleading and cure any defects described in the defendant's motion. This is what we did in response to a Motion for More Definite Statement in our second case. Defendants rightfully claimed we needed to plead fraud allegations with more specificity, including the "who, when, where, and how" details of a fraudulent statement.

Rather than fight a legitimate motion, we just conceded and preemptively filed an Amended Petition, which the court would have made us do anyway. Burger Law has the experience necessary to deal with Motions for a More Definite Statement and other complex pleadings. If you need help with a complex case, call us to discuss co-counsel and referral opportunities.

Summary Judgment Win Yields $50,000 Settlement

We won a Summary Judgment Motion against our client Tony which enabled us to settle his Underinsured Motorist Claim for $50,000. We put the insurance company on notice of the claim properly.

Email me if you want the full briefs on the issue. Here's the Court's Order:

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT

MONROE COUNTY, ILLINOIS

FILED

NOV 01 2018

CLERK OF THE CIRCUIT COURT
MONROE COUNTY, ILLINOIS

COUNTRY PREFERRED INSURANCE COMPANY,

Plaintiff,

v.

TONY A. WEBB,

Defendant.

No. 17-MR-72

ORDER

Plaintiff, Country Preferred, moves for Summary Judgment on the basis that Defendant's claims are barred by the policy requirement that any suit, action or arbitration be commenced within two years of the date of the accident. Defendant, Tony Webb, moves to dismiss Plaintiff's action for Declaratory Judgment.

Defendant argues that he complied with the two-year limitation requirement of the policy by sending the letter of October 13, 2016, attached as Exhibit A to Plaintiff's motion, citing Hale v. Country Mutual Ins. Co.

Plaintiff argues that the October 13, 2016 letter did not commence a "suit, action or arbitration" citing numerous cases from other districts, including Rein v. State Farm Mut. Auto Ins. Co., which expressly declined to follow the reasoning of Hale.

I find that the language contained in the letter of October 13, 2016 is sufficiently factually similar to that in the Hale case to warrant the same ruling. It served the purpose of notifying Plaintiff of the underinsured motorist claim.

I recognize that a conflict exists among the Appellate Court Districts on this issue and that I am bound by the decisions of the Fifth District.

Plaintiff cites the Illinois Supreme Court case of Country Preferred Ins. Co. v. Whitehead as resolving the conflict between the districts on this issue. The Whitehead Court decided a public policy issue. The language referred to by Plaintiff where the Court addresses the comments of the dissenting Appellate Justice regarding her perception of what was or was not decided in the Circuit Court is dicta and not the precedential holding of the case.

Plaintiff's Motion for Summary Judgment is denied. Defendant's Motion for Judgment on the pleadings is granted as to Plaintiff's Complaint for Declaratory Judgment only.

ENTERED: 11/1/18

HON. DENNIS B. DOYLE
Circuit Judge

Happy Spring, Friend:

Spring has sprung after what seems like a long winter. Trees are budding, flowers are starting and I'm starting to get out and about with the family.

Below, I discuss a workers compensation settlement, how we plead Merchandising practice Act violations against Opioid Manufacturers, a video about our firm, and my favorite hiking area near St. Louis.

But first, Cardinals opening day - William and I were ready.

$43,000 plus a ton of medical and past TTD Workers' Compensation Settlement

We recently settled a Workers' Compensation claim that was a battle from the beginning.

Our client Gregg was a long-time employee of James Mulligan Printing, Co. While lifting a stack of paper to put into a printing press, he felt a pull and tear in his left shoulder.

Ultimately, doctors diagnosed him with bicipital tendinitis and a rotator cuff tear. Gregg required surgery on his shoulder, and missed time from work while recovering.

When Gregg returned to work after his surgery, his manager moved him to a different printing press that paid him about 60% of his pre-injury wage. This was a form of retaliation, albeit more subtle. We fought it and filed a Hardship requesting full past temporary total disability ("TTD"), or lost wages.

Gregg's employer refused to pay. We litigated and did depositions. We mediated the hardship and obtained $11,000.00 in compensation for him for changing his job.

Gregg's employer refused to comply with the Workers' Compensation law, and would not have paid Gregg this money without the judge's order.

Greg is reluctant to pursue a civil retaliation claim as he values his job and the bad managers that made this decision have since been fired. We have about three other retaliation claims now where folks have been flat out terminated because of their on-the-job injury.

Physicians chosen by James Mulligan Printing Co.'s insurance carrier provided all of Gregg's medical treatment, but the insurance carrier dramatically undervalued the severity of his injury and his claim.

Gregg's employer required that he undergo a functional capacity evaluation to determine his restrictions and ability to work. These physical therapists, again chosen by Gregg's employer, determined that Gregg could handle a "very heavy demand vocation." Subsequently, they only offered 7.5% disability of the shoulder to settle his claim.

Unwilling to accept such an inadequate offer, we mediated Gregg's claim in front of an administrative law judge to get her recommended settlement value. The employer's counsel downplayed Gregg's injury, whereas we vigorously advocated for Gregg and highlighted how this injury still affects him daily.

The judge recommended a settlement value of 27.5% disability of the shoulder – well above the 7.5% the employer was trying to pay!

When negotiating settlement with opposing counsel, we reiterated how poorly Gregg's employer treated him, and were able to convince them to offer even more than the judge's recommendation.

We were pleased to settle Gregg's claim for 30% disability of the shoulder, which based on his wage rate, came out to $32,334.76. Additionally, we obtained $11,000 in disputed TTD payments, and additional 14 weeks of undisputed TTD payments, and payment of all of his medical bills.

Our client is pleased with our work – it was a long and hard-fought case.

Opioid Update

We have multiple lawsuits against Opioid Manufacturers for their dangerous products killing our clients. We sued them under strict and negligent products liability. But, were also sure to sue them for fraud.

We use the Missouri Merchandising Practices Act ("MMPA"), R.S.Mo. § 407.020 provides, in part, as follows:

The act, use, or employment of any person of any deception, fraud, false pretense, false promise, false misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce ... in or from the state of Missouri, **is declared to be an unlawful practice.**

In our lawsuits we allege that Defendant has employed and used deception in connection with the sale and advertisement of opioid medications in the State of Missouri.

We allege the Defendant knowingly directly and indirectly represented and advertised to our client and his physicians that Defendant's opioid product(s):

1. were a safe and effective method of long-term pain management;
2. were safe for human consumption;
3. could be used as directed by defendant and physicians with a low risk of addiction, withdrawal, suicide or death;
4. are safe if taken appropriately; and
5. are safe and not dangerous when used in the dosage, manner, and/or frequency or duration prescribed, recommended, and/or suggested in their labeling.

We allege and show that Defendant knowingly misrepresented and/or concealed:

1. its opioid product(s) risk of addiction, withdrawal and suicide;
2. the dangerous nature of its opioid product(s), in that the labeling of the product implied that the opioids were safe for human consumption;
3. that opioids carry an unreasonably high risk of addiction and death when put to a reasonably anticipated use;

4. that opioids are not appropriate for management of longer-term chronic pain;
5. that long-term opioid users need higher doses of opioids to obtain the same level of pain relief;
6. opioids are unsafe if not taken appropriately; and
7. opioids are health-endangering and unreasonably dangerous, even when used in the dosage, manner, and/or frequency or duration prescribed, recommended, and/or suggested in their labeling.

We have to show that the decedent purchased and used the Defendant's opioid products for personal (non-commercial) purposes under the MMPA.

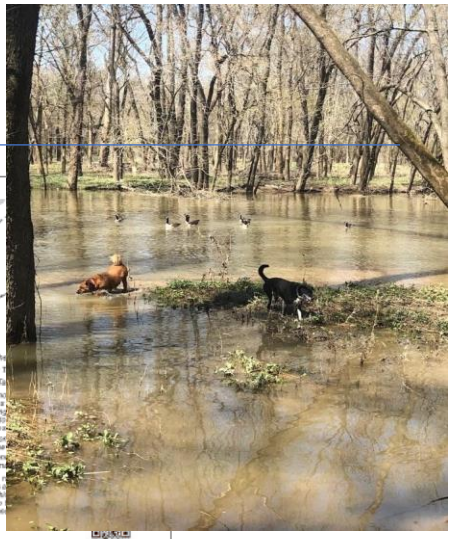
We allege and prove that as a direct and proximate result of Defendant's deceptive practices, Plaintiff's Decedent sustained damages, including addiction, withdrawal, and eventual death.

Our clients' families are entitled to recover their actual damages, attorney's fees, and other equitable relief under R.S.Mo. § 407.025.

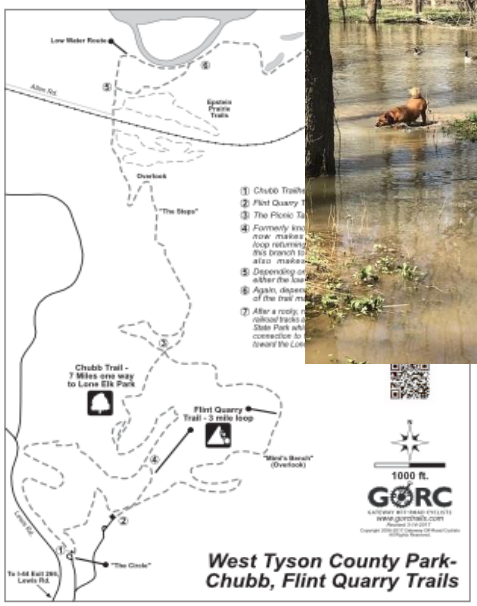
Best Hiking Trail near me

If you typed this into Google, I do not know what you get, so I thought I'd share my favorite hike close to me. Super-secret not a lot of people like other locations.

It's really West Tyson Park in St. Louis County - but I go to the back side near the Meramec River and The Chubb Trail.



Water was, of course, super high. Here's the kids and I hiking and the dogs chasing the geese:



Good day, Friend:

Come join us for our **CLE on May 29 at the MAC downtown**. Full day CLE with all your ethics needs for the year. Come hear and learn law and running your business - you will **increase the value of your practice**. Guaranteed.

Below, I also discuss two settlements from last week and Gardening with my kids on this **Earth Day.**

Lawyer v. Lawyer CLE

We are doing another CLE with an all-star lineup people presented in connection with Debbie Champion and I's Lawyer v. Lawyer podcast. As usual, this will be a great nuts and bolts CLE and have presentations with robust written material. Sign up NOW.

Approved for **7 hours** of Missouri CLE Credit including **2 hours of Ethics Credits and FREE jokes presented by me**.

May 29, 2019 from 9 - 4. At the MAC downtown.

AGENDA

Tyson Mutrux & Jim Hacking: *Top 10* ***Marketing Mistakes*** *Missouri Lawyers Make*. What are current or new marketing areas/techniques? How should you compete in our current internet/social media world? Tyson & Jim have **a popular and award-winning national podcast called Maximum Lawyer.** Come learn from the Masters about how to triple your business.

Peter Dunne: *Advance Trial Practice*. Peter is one of the most respected trial lawyers around. it's never easy preparing for a trial or even attending one. Come hear him share his best tricks for trial, opening, cross examination, and close. Hone your craft. In true Lawyer v lawyer style, Gary may jump in and provide a counterpoint. Ethics credit too!!

Judges Panel: *Top 10 do's and dont's of litigation practice*. Hear from Court of Appeals Judge **Angela Turner Quigless** and Trial Judges **David Vincent and David Roither** about what to do and not do when appearing before them. Get candid advice about how to advance your case well. It's not ex parte to ask questions at a CLE.

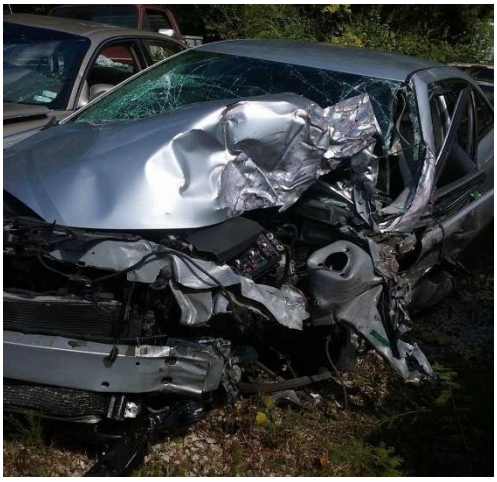
Zane Cagle: ***Turn your $25k case into $1M: How to make and win a bad faith case.*** Get the latest Bad faith law and how to make and win a bad faith case. Zane pushes the envelope in these cases and will share his techniques to destroy policy limits

and get full recovery for clients. Debbie may jump in to provide perspective from the defense bar to lawyer v lawyer it a bit.

Gary Burger: *Immunity! Immunity! Immunity!* **Get all your immunity questions answered from someone who has litigated it in the trenches - victories and losses.** Law and strategy on all immunity issues we can think of: co employee, work comp, sovereign, municipal, police, firefighter, paramedic, contract claims, tort claims, garnishment, school, and volunteer.

Debbie Champion and Gary Burger: Ethics: Debbie and Gary present the most encountered ethics challenges in practice from both a defense and plaintiff lawyer perspective. Conflicts, communication, Rule 4.2, terminating representation, fees, liens, advertising, solicitation.

Head On Collision Settlement

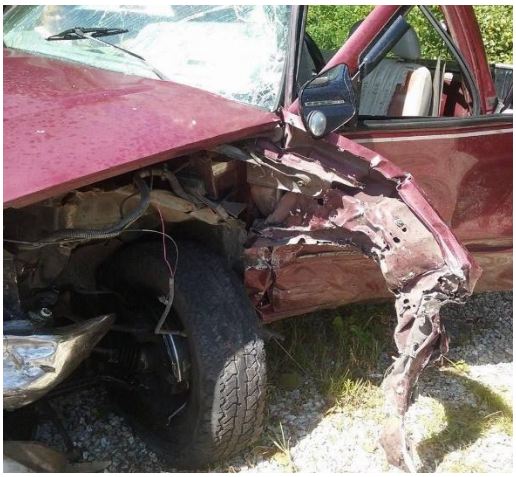


I represented Brad in his car accident claim. Brad was hit by a truck that swerved and crossed over the center-line into oncoming traffic and hit Brad head on. Brad had a passenger in his car and both were hurt pretty bad.

Brad hurt his knee, ankle, and chest in the accident. He went to the ER and did physical therapy. His lingering issue was a left Achilles tendon strain and left ankle instability. His surgeon recommended Brad undergo a left ankle arthroscopy with debridement and left ankle Bostrom procedure.

Brad also had significant back pain that was not subsiding with conservative treatment. His pain was constant and it would wake him up in the middle of the night. Brad eventually underwent injections to eliminate the pain.

We fought for Brad against the insurance company. We first demanded the full policy limits. Brad had significant medical damage and would need future care from his injuries.



The insurance company wouldn't pay the limits so we filed suit and litigated it. We keep going till we persuade them of the wisdom of our position.

We eventually recovered $100,000 for Brad to cover his medical treatment and bills. But that was not where we stopped. We helped Brad, as we help all our client**s, reduce his liens**. I have done other blogs about how we are so successful in reducing liens -- check it out here.

When clients have significant injuries and bills but the liable party doesn't have enough insurance to cover it, our office helps reduce liens under the Missouri Statute for our clients.

Negotiation Raises Settlement 30k

We settled a workers compensation case and an automobile accident for our client Daniel.

Daniel was rear-ended on the highway at a high rate of speed when the other driver wasn't paying attention to traffic ahead of her. Like Brad above, Daniel had significant medical from his accident. Daniel treated consistently with a physical therapist and also received steroid injections.

The insurance company didn't want to pay for all of the treatment and had given Daniel a low offer in the beginning. We fought hard and negotiated a lot.

Sometimes, insurance companies try to give a low offer if there are prior injuries, if they think the impact is low, or if there are gaps in treatment, like here. However, we know sometimes life happens and you can't make appointments, and that the back pain you had two years ago isn't what caused your back pain after a significant accident.

That's why we always negotiate with insurance companies to mitigate these factors. We did that for our client Daniel who had seen a chiropractor for ten years prior to this accident.

The insurance company tried to say that not all of Daniel's back pain came from this accident. But after some back and forth, **we were able to raise the defendants offer over $30,000 to $61,000.**

Check out the blogs and podcasts I have done on using different techniques to get a good result for your client and how to negotiate with insurance companies.

Happy Earth Day!!

Every year we put in a garden to feed the squirrels - JK. We usually have good results and are hopeful for another good harvest. Our okra, broccoli, peppers, cauliflower and sunflowers do best.

But we are always trying new stuff. This year our strawberries are coming up strong and we are hopeful our asparagus will finally do well. Both of these take a few years to get going.

Here are some pics of me and the girls working.

And I made everyone go on another hike yesterday.

-Gary Burger

Happy Monday, Friend:

Come to our **AMAZING CLE on May 29 at the MAC downtown**. Full day CLE with all your ethics needs for the year - including How to Surrender your Law License.

Below, I also discuss the ethics rules about law license surrender (like our former County Executive) and two settlements from last week.

Lawyer v. Lawyer CLE

We are doing another CLE with an all-star lineup people presented in connection with Debbie Champion and I's Lawyer v. Lawyer podcast. As usual, this will be a great nuts and bolts CLE and have presentations with robust written material. Sign up NOW.

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Settlement at 6 times paid and owed medical

I was recently able to get a great resolution for our client, Bob Schneider. Bob was driving on Highway 367 when he was rear ended by a driver who was going too fast attempting a lane change. Bob's car was totaled, with the rear bumper completely knocked off the car.

Bob went to the hospital, where he was evaluated and kept overnight for observation. Bob had CT scans of his neck, back head, shoulder, and chest. He was diagnosed with a reversal of the normal curve of the cervical spine and a hiatal hernia.

Bob received treatment for a year, with maintenance care continuing afterwards. The driver who hit Bob only had a legal minimum policy with coverage up to $25,000. We were able to secure this for Bob while he was still treating. As he continued to recover, we tried to negotiate and then filed suit against Bob's own insurance company.

They initially offered $1,000.00, and did not increase their offer. We continued to press them, and even held depositions. A judge recommended both sides go to mediation. At mediation, we were able to secure $35,000.00 for Bob.

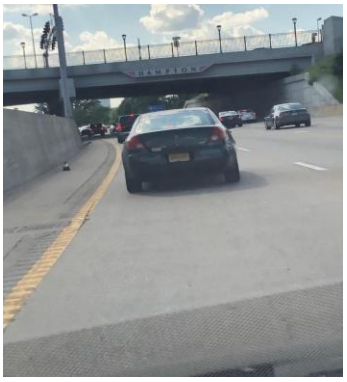
The final total for Bob's accident was more than SIX times his paid and owed medical after adjustments and lien negotiations.

Dear Friend:

Well, I got rear ended the other day driving home from work. Surprised me.

Even more surprising was that the driver who rear ended me did a hit and run. Took off in her car. I chased them, tried to get them to stop.

After I tell this story, I have a little bit from our CLE below. But first, I took pictures as I pursued:



They kept moving over to the right to get off the highway. I followed them. They exited but got stuck at a light. I got out and tried to get their information. They just yelled at me.

So, I took a picture of their license plate. A witness had called 911 and followed us off the highway. Nice guy. I chased a bit more then let them go. What's the point?

My wife and the police later told me not to do that again.

The reporting St. Louis City Police officer was great. Made a police report.

The next day I called my investigator:

Me: "You get the picture I sent? Can you run that plate?"

Investigator: "Temp tags are hard. Why don't you just call the place where she got the car?"

Me; "What?"

Him: "**Look at the picture you took - there's the dealership sticker on it**."

Me: "Oh."

So, I called A & E Auto Sales, Inc. Nice people. I highly recommend them. 618-332-2007.

They gave me the hit and run drivers name, address, phone number and the day she bought the car. I called her. She hung up. I texted - no response.

The police (and I assume the defendant) were surprised I got the info so quick. Hope she has insurance. My neck and low back hurt.

I went to urgent care that day. Then to see my new chiropractor last week.

I think I'll file suit against her this week. Need to find a good lawyer. Don't want to have a fool for a client....

Thanks to the 120 lawyers who came to our CLE: What Impresses Judges, and What Turns Them Off?

At the CLE, a panel of judges imparted wisdom about what attorneys should and should not do in the court room.

The presenters included Angela Turner-Quigless from the Missouri Court of Appeals, Judge David Vincent from St. Louis County Circuit Court, and David Roither, City of St. Louis Associate Circuit Court.

To start, Judge Vincent referenced a statewide survey of the trial judges and commissioners addressing, “What Impresses Judges About Attorneys and What Turns Them Off?” The Ethics of Practice Management: Playing by the Rules (Missouri Bar Survey Edition – 2016 Update)

As indicated in the graphic below, the top five responses from all responding circuits about what impresses them include: 1) Being prepared; 2) Courteous/Polite; 3) Punctual/Prompt; 4) Professionalism; and 5) Knowledge of Laws. The top five responses about what turns them off include 1) Unprofessional Behavior; 2) Unprepared; 3) Late; 4) Lack of Knowledge of Laws.

Impressed by attorneys who naturally disagree but not disparage opponent, candid on status of law, are punctual, dress appropriately (clients also), have respect for court and others, pre-mark exhibits, prepare instructions early, admit weaknesses of case, have knowledge of facts and applicable law, present case succinctly, provide case law, and properly filling out paper work.

Also, brevity, promptness, and communicating with opponent and resolving issues.

The Circuit Courts Of The State of Missouri

2016 Survey

Top Five Responses from Responding Circuits
(Missouri Bar Survey Edition – 2016)

Impresses		Turn Offs	
1. Prepared	100%	1. Unprofessional Behavior	83%
2. Courteous/Polite	53%	2. Unprepared	76%
3. Punctual/Prompt	47%	3. Late	69%
4. Professionalism	39%	4. Lack of Knowledge Laws	17%
5. Knowledge of Laws	32%	5. Miscellaneous	17%

Impresses: 29% of the Judges responding to the survey were impressed with Honesty.
Turn Offs: Miscellaneous Dislikes include unnecessary objections and repeated requests for continuances.

Turned off with increased "personalizing," gamesmanship, redundancy, addressing clients by first name only, misrepresenting facts and law, providing unconfirmed information, arguing in front of judge or jury, "petty bickering", lack of civility and professionalism, not accepting court rulings, coaching clients to lie, unprepared, not properly dressed, not informing themselves about the client, details of case, and division procedures, and ex parte communications.

Although there are common themes regarding "dos and don'ts" in the courtroom, Judge Vincent emphasized that every judge and every courtroom is different. He recommended calling judges' clerks to ascertain judge-specific quirks.

Personally, Judge Vincent does not like it when attorneys or witnesses interrupt him. Interestingly, he divulged that the judges all talk to each other about attorneys and their reputations, so civility is important!

From a Court of Appeals perspective, Judge Quigless said that she cannot emphasize Missouri Supreme Court Rule 84 (procedures in the Court of Appeals) enough. In appellate briefs, attorneys should not have argumentative statements of fact, and their "points relied on" alone dictate what issues the Court can consider.

She reiterated the importance of preserving issues on appeal during a trial and establishing a proper record. Objections should be specific, an offer of proof must be made, and the precise error must be stated in the offer of proof, because the judges cannot act as advocates. As a practice tip, she strongly recommended that attorneys attach important exhibits to the appendix in their brief.

Judge Roither agreed with the survey that attorneys need to be prepared and not waste his time. He also emphasized civility in the courtroom, among attorneys, with the clerk, and with the judges He explained that the judge has *ultimate discretion*. If an attorney does not respect him, his courtroom staff, or opposing counsel, he will be less inclined to use his discretion to favor that attorney.

Your reputation and way you conduct yourself in the courtroom matters! As summarized in the judicial survey:

“It is the duty of each lawyer to engage in conduct that brings dignity to and promotes civility in the profession. Toward that end, each lawyer shall be: respectful, trustworthy, courageous, cooperative in all dealings with judges, lawyers, clients and other members of the public that they serve.”

-Gary Burger

Happy Tuesday, Friend:

Went down to the Blues parade with the family on Saturday. What a great time. Couldn't see much of the parade - but loved the sea of humanity

Amazing to celebrate this with the whole City. Was there really 1.5 million people there?

Below are comments from our CLE and I dive in on 6 ethics questions.

CLE Comments

From our CLE, Debbie champion and I did a fantastic ethics presentation. Here are the top 6 answers to ethics questions I find lawyers and lay people have.

Here are our top 7 comments to our CLE (there were no bad ones).

Great seminar

Will be back next year if offered again

Thank you-Awesome as always

It was a great program

Great CLE with great practice tips

It was a nice variety of tips

Loved hearing from a variety of practice areas

I really enjoyed this CLE, it's one of the best I have been to in 15 years

Really enjoyed the format of the ethics presentation with Gary and Debbie. Kept things interesting.

Loved receiving handouts and pens. Great location.

Answers to the top 6 ethics questions

From our CLE, Debbie champion and I did a fantastic ethics presentation. Here are the top 6 answers to ethics questions I find lawyers and lay people have.

1.What are the two most often reported rule violations?

RULE 4-1.3: DILIGENCE A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 4-1.4: COMMUNICATION (a) A lawyer shall: (1) keep the client reasonably informed about the status of the matter; (2) promptly comply with reasonable requests for information; and

(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

2. Does a lawyer have to turn another lawyer in?

Rule 4-8.3:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule 4-8.3 does not require disclosure of information otherwise protected by Rule 4-1.6 or information gained by a lawyer or judge while participating in an approved lawyer's assistance program.

3. Does substance abuse affect our profession?

Rule 16.01. *(b) Substance abuse* ***causes or contributes to incompetence and malpractice of the law by lawyers and judges****, which damages the public and*

the legal profession. ***Substance abusers neglect clients, violate rules of professional and judicial conduct and commit crimes.***

In order to maintain public confidence in the legal profession and the disciplinary process, the committee shall strive to address substance abuse or addiction problems among lawyers or judges before said abuse or addiction results in complaints or grievances against those lawyers or judges and, when complaints or grievances have been filed, to assist in promptly resolving those complaints or grievances, thereby serving the public and the profession.

The Missouri Lawyers' Assistance Program is a professional, confidential counseling program for members of The Missouri Bar, immediate family members who reside with them, and law students. Through a variety of free services, MOLAP helps individuals overcome personal problems such as depression, substance abuse, stress, and burnout.

Services include:

•Counseling. All Bar members have unlimited, 24/7 access by phone to a licensed clinical social worker (call (800) 688-7859). MOLAP also makes referrals to professional resources as indicated.

•Crisis intervention. MOLAP coordinates crisis intervention services for individuals and law firms.

•Education and Prevention. MOLAP offers educational programs and articles on topics such as stress, substance abuse, depression, and quality of life. In addition, a series of questionnaires helps members screen themselves for a variety of problems.

All MOLAP services are free of charge and strictly confidential.

Or call me on my cell at 314-799-4848. I am a member of the MOLAP and the Missouri Intervention Committee.

4. What to do if you get an ethics charge?

Well, you can hire an ethics lawyer for more serious violations or handle it on your own.

Draft non-conformational response to Alan Pratzel's letter citing rules, formal and informal advisory opinions and/or case law.

Say why you did not violate any ethics rule.

Your response, along with the complaint and any reply will go to the Regional Disciplinary Commission with jurisdiction for their review. They can dismiss, recommend admission, or if really bad, send it straight to the Supreme Court/OCDC.

The purpose of discipline is not to punish the attorney, but protect the public and maintain the integrity of the legal profession." *In re Kanzanas*, 96 S.W.3d 803, 807-08 (Mo. banc 2003).

5. Can you ask for Facebook, Avvo, SuperLawers and Google likes or reviews – give something of value?

Rule 7.2(c) prohibits providing a thing of value in return for a recommendation for services, i.e., a lawyer cannot pay someone to send him or her a case or to recommend a client to him or her for money.

Distinction between seeking an honest review and seeking an endorsement for a lawyer? A review can be positive or negative, and the attorney requesting the review does not know what he or she is going to get.

The Comment to the MO rule states: "A lawyer is allowed to pay for advertising permitted by this rule but otherwise is not permitted to pay another person for channeling professional work."

The comments to the ABA rule says "lawyers are not permitted to pay others for recommending a lawyer or services over channeling professional work to them." The comment also makes it clear that there are a lot of ways that lawyers can pay for being recommended: a lawyer can pay for advertising and communications; a lawyer can pay for employees, agents, and vendors to market for them; a lawyer can pay for business development and staff and web designers and social media consultants; a lawyer may pay others for generating client leads such as internet based client leads; a lawyer may pay the usual charges for a legal service plan or loyal referral service; a lawyer may refer cases to another professional or lawyer with the promise that the other professional will in return refer clients to the lawyer.

Online Legal Marketplaces

Online legal platforms such as Avvo, Legal Zoom, and Rocket Lawyer bring with them the potential for ethical complaints.

Avvo ended its Avvo Legal Services product in 2018, due to concerns it was in violation of legal ethics rules. The platform offered online clients limited legal services provided by a participating lawyer for a flat-fee, determined by Avvo. Client satisfaction was "guaranteed." Avvo defined the lawyer's flat-fee, the scope of representation, and the type of services offered. Avvo paid the lawyer after the service was complete, but the lawyer was required to pay a "marketing" fee back to Avvo.

State bar ethics committees in eight states – New Jersey, Virginia, Indiana, Pennsylvania, Ohio, Utah, New York and South Carolina - issued opinions that a lawyer's participation in the program, and similar programs, violated multiple state ethical rules. Four aspects of the program were found to be the most problematic:

Avvo determining the scope and price of the representation interfered with the lawyer's independent professional judgment (Model Rule 5.4);

Avvo collecting and retaining the full legal fee until the legal work was completed prevented the lawyer from fulfilling her duties to safeguard a client's funds and to refund unearned fees at the end of the representation (Model Rules 1.15 and 1.16)

Avvo's "satisfaction guarantee" prevented a lawyer from being professionally independent. (Model Rule 5.4) and

The "marketing" fee charged to the lawyers was not a reasonably permitted advertisement cost (ABA Model Rules 1.5 and 7.2), but instead found to be an improper fee splitting/sharing with a for-profit, non-lawyer (Model Rule 5.4), and/or an improper payment for a recommendation/referral (Model Rule 7.2)

6. Do you or should you file a Motion for Sanctions?

MRCP 56.01- Motion for Protective Order

MRCP 61.01- **We rarely, if ever, do this.**

(a) Failure to Make Discovery: Sanctions - For the purpose of this Rule 61, an evasive or incomplete answer is to be treated as a failure to answer.

(b) Failure to Answer Discovery Answers - Courts may enter an order striking pleadings/dismissing the action/render a judgment by default against the disobedient party – it can grant additional time to serve answers, but shall provide that if the party fails to answer the interrogatories within the additional time allowed, the pleadings of such party shall be stricken/ action shall be dismissed or default judgment shall be rendered.

(c) Failure to Answer Request for Admissions - Non-answer shall be taken as admitted. If a party denies document genuineness and then the other party proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order for expenses and attorney fees.

(d) Failure to Produce Documents, and Things or to Permit Inspection – Trial court can refuse to allow the disobedient party to support or oppose claims, strike pleadings or parts thereof, stay further proceedings until the order is obeyed, dismiss the action, Order treating failure to obey as a contempt of court; or pay the reasonable expenses, including attorney fees

(e) Failure to Appear for Physical Examination - Court may make any order

(f) Failure to Attend Own Deposition – Court may take any action. (g) Failure to Answer Questions on Deposition - Questioner may move for an order compelling an answer; may complete or adjourn the deposition examination before applying for an order. If the motion is granted, shall require the party/deponent to pay movant's expenses and attorney's fees, unless action was substantially justified.

Thanks for having me MC the Maximum Lawyer conference last week to over 150 Lawyers.

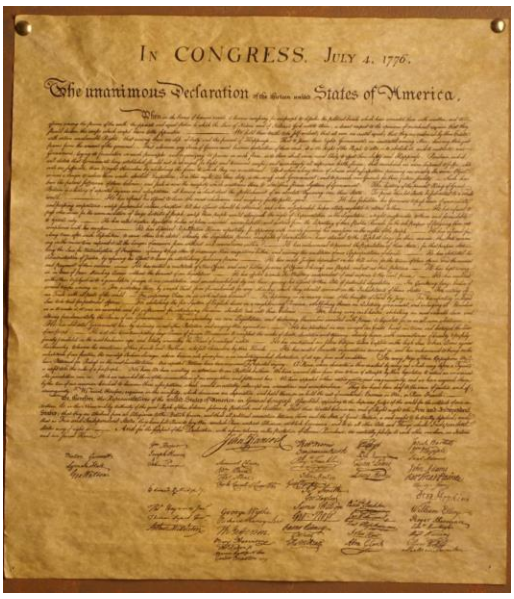
Hope all my readers had as great a Father's Day as I.

-Gary Burger

Happy Independence Day, Friend,

Happy Independence Day (tomorrow). We are closing our office Friday to let our attorneys and staff enjoy the holiday and a long weekend, Below I celebrate Casey Fluegel's 10 years working with me and helping our clients and discuss a jury trial last week and one of our lawyers, Genavieve Fikes.

But first, I thought I would give you 10 surprising facts about the Declaration of Independence.



1. The Declaration was not signed on July 4th, 1776.

While the declaration was adopted by the Continental Congress on the 4th, most of the men did not sign it until August 2nd of that year and New York delegates did not even give their support until July 9th.

2. July 4th was not the day the Founders intended to be remembered as Independence Day.

July 2nd was when the Continental Congress voted on Independence and the day they thought would be remembered and celebrated as Independence Day.

3. Signers held a wide array of occupations - 24 lawyers, 11 merchants, 9 farmers.

4. There is more than one copy.

Most people see the original Declaration on display at the National Archives in Washington, D.C. While it is the original, it is not the only one -- there were hundreds of copies made. These copies are known as the “Dunlop broadsides”. They were used to spread the news of the Declaration throughout the colonies. The rebels had a great system of copying and disseminating information quickly.

5. Two of those copies have been found in the last 25 years.

In 1989, a Philadelphia man got very lucky when he found an original Dunlap Broadside copy in the back of a picture frame he bought at a flea market for $4. It sold for $8.1 million in 2000. What a find! A 26th known Dunlap broadside emerged at the British National Archives in 2009, hidden for centuries in a box of papers captured from American colonists during the Revolutionary War.

6. Three US Presidents have died on 7/4.

Thomas Jefferson, John Adams and James Monroe all died on the Fourth of July. Adams and Jefferson both died on the 50th anniversary of the Declaration’s passage. James Monroe died 5 years later on July 4, 1831.

7. There was a 44-year difference between youngest and oldest signers.

Benjamin Franklin was the oldest signer at 70 years old. But 44 years his junior was Edward Rutledge, a lawyer from South Carolina who was only 26 at the time.

8. The movie National Treasure May Not be Way Off.

In the movie “National Treasure,” Nicholas Cage’s character claims that the back of the Declaration contains a treasure map written in invisible ink. That is not sure, but there is writing on the back. It reads: “Original Declaration of Independence dated 4th July 1776.” It’s thought this was added as a label, but no one is sure when.

9. The Declaration has only left Washington D.C. twice.

The first time was when the British attacked Washington during the War of 1812, and the second time was during World War II from 1941 to 1944 when it was stored at Fort Knox.10. Every 4th of July the Liberty Bell in Philadelphia is tapped (not rung) 13 times in honor of the original thirteen colonies.

The family and I visited the Midway Aircraft carrier yesterday in San Diego - It’s a must see. I have so much gratitude for the amazing job our service men and women do. Special Happy Independence Day to members of our Armed Forces and Veterans.

Victory in St. Clair County

This year we welcomed attorney Genavieve Fikes to the firm. She has nearly a decade of litigation experience, and is not afraid to go to trial on any case, large or small. Although the majority of our cases settle, sometimes they do not. Then, we are forced to go to trial to prove to the insurance companies that we are willing to fight to obtain verdicts above their insufficient, low-ball offers.

She recently battled Allstate at trial in St. Clair County, Illinois, and obtained a jury verdict in favor of our client, Dwight Keener. The defendant rear-ended Mr. Keener, but after two years, still had not accepted responsibility for the accident. As a result of the crash,

Mr. Keener went to the emergency room, attended 15 chiropractic visits, and incurred $7,431.51 in medical charges. By the end of his two-month chiropractic treatment, Mr. Keener had fully recovered.

This was a smaller, soft-tissue injury case, with very little property damage:

Nevertheless, the **Friday before trial, Allstate was still only offering $10,000.** With an offer like that, Genavieve and Mr. Keener did not think there was much to lose by going to trial. Judge Kolker presided over the case, which only took one day to try.

The week before trial, defense counsel expressed that he wanted to "admit liability" and just have a trial on damages. This is a common defense tactic used to take the heat off the defendant and make the plaintiff look greedy.

Other times, it is used when they have a defendant who makes a very poor witness. Typically, when a defendant admits liability, they seek to keep the plaintiff from presenting evidence on how the accident happened or testimony of the defendant altogether.

Genavieve had already taken the defendant's deposition, and knew she made a poor witness. In her deposition, the defendant did not admit fault, but rather, pointed the blame at Mr. Keener. Genavieve thought that the defendant's demeanor and testimony would help the plaintiff's case, so she filed a Rule 237 Notice, compelling the defendant to appear.

Since defense counsel was not going to have her testify, Genavieve put her on the stand in her case-in-chief as a hostile witness. As expected, she continued to blame Mr. Keener and made a very poor witness at trial.

The **jury found in favor of Mr. Keener against defendant, and awarded $15,431.51 ($7,431.51 in medical bills, and $8,000 in pain and suffering). We also were awarded $1,000 in taxable costs.**

Judge Kolker told Mr. Keener that that was the highest verdict he had gotten on a soft-tissue injury case in the past year, explaining that jurors rarely award 2x medical. We were satisfied with the result, and hope that Allstate will take notice that we aren't afraid to go to trial, even in small cases, in the face of low-ball offers.

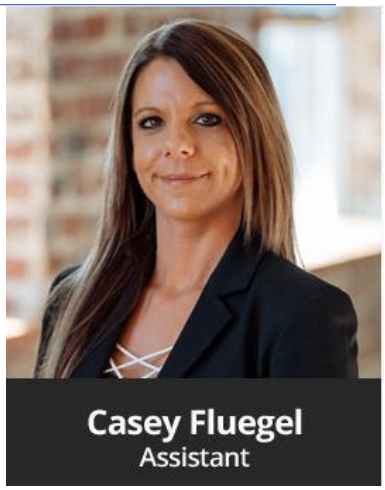
Prior to trial, Genavieve successfully argued a Motion in Limine to exclude certain evidence. The judge ruled in her favor, and held that the defendant could not present evidence of Mr. Keener's prior injuries to the same body parts at issue, prior lawsuits, unrelated health conditions and the fact that Mr. Keener was on social security disability, among other things.

These rulings really undermined the defendant's strategy to blame plaintiff's pain on pre-existing conditions. Genavieve argued that in Illinois, a defendant must have expert medical testimony if he wants to claim prior injuries are relevant, even if they are to the same body parts.

The judge agreed, which is consistent with the Illinois Supreme Court's ruling in *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 733 N.E.2d 1275 (2000) (holding, "**if a defendant wishes to introduce evidence that the plaintiff has suffered a prior injury, whether to the 'same parts of the body' or not, the defendant must introduce expert evidence demonstrating why the prior injury is relevant to causation, damages, or some other issue of consequence.**")

Here at Burger Law, I am happy to be working with another lawyer who has the experience to take cases to trial and obtain great results for our clients.

Happy 10th Anniversary, Casey!!



This past week was the tenth anniversary of my paralegal Casey and I working together and a simple bio in my newsletter is not long enough to tell everyone what she does on a daily basis for my firm.

Ever have someone you love working with, who seems like she can read your mind, and who you're grateful is in your life (other than your awesome wife)? That's Casey.

She goes above and beyond. Oftentimes she knows what I need for a trial, a hearing or a case before I even think about it. She keeps the office standing while I am gone, and is a huge go to person for everyone in my office – paralegals, receptionists, and my attorneys too.

Honestly, she is why the office remains standing even when I am there.

She has a cape on the back of her chair with a pink superman logo that fits her role in the office perfectly. She solves problems before they happen and I am so impressed by her on a daily basis and when I look back to when she first started with me, I am even more impressed.

She can write petitions better than most lawyers and knows how to help clients with their needs. Hate to admit it, but she gets more compliments in our firm's 404 Google reviews than I do.

I continue to beg her to go to law school and one day I think it could happen. Until then, I will continue to be grateful for all she does.

Thank you, Casey.

Have a fun and safe July 4.

-Gary Burger

Good morning, Friend,

As it's the middle of summer and my kids are loath to learn anything, I thought it the perfect time to visit with you about Jury Selection. It's what I do and truly important to our system of justice.

So below, I discuss the basics of jury selection, challenges for cause, a video of the classic "can we go now" question from my 9-year-old, and great voir dire questions with law to back them up.

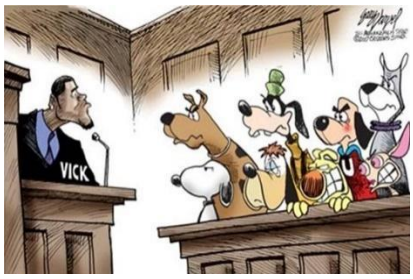
Voir Dire

The cornerstone of our judicial system lies upon the constitutional right to a fair and impartial jury, composed of twelve qualified jurors. *Williams v. Barnes Hosp.,* 736 S.W.2d 33, 36 (Mo. Banc 1987). It is fundamental that jurors should be thoroughly impartial. *Kendall v. Prudential Inc. Co.,* 327 S. W. 2d 174, 177 (Mo. 1959).

700 years ago, the Magna Carta guaranteed a person could not be punished without "the lawful judgment of his peers."

Voir dire literally means "to speak the truth".

It's when lawyers ask questions of prospective jurors to get “A fair cross section of the citizens of the county for which the jury may be impaneled." Many think that it’s really to get only good jurors for a lawyer's client - which has some truth but the process does achieve a balanced jury.



The purpose of voir dire is to ferret out any bias or prejudice of potential jurors. *State v. Ball*, 622 S.W.2d 285, 287 (Mo. App. 1981).

Jurors have to be:

- At least 21 years of age
- A citizen of the US and of the county issuing the jury summons
- Not been convicted of a felony, unless restored
- Able to read, speak and understand the English language, unless adequately accommodated
- On active military duty, or a judge of a court of record
- Not incapable of performing the duties of a juror due to mental or physical illness or infirmity, in the judgment of the trial court

“The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution. A state of mind in a juror evincing bias to either party is a ground for challenge.” *Kendall,* 327 S.W.2d at 177.

To be meaningful, the constitution “contemplates twelve [fair and] impartial qualified jurors."

People can be excused from jury service under R.S.Mo. 494.430 because they:

- Have served within the last two years;
- Are a nursing mother;
- Absence from regular place of employment would adversely affect the public safety, health, welfare or interest;
- Impose an undue or extreme physical or financial hardship (not sufficient that the juror will be absent from place of employment or will suffer some financial hardship);
- Licensed health care provider;
- Employee of a religious institution whose constraints prohibit jury service.

Challenging a juror for cause

A party "is entitled to a full panel of qualified jurors before being required to make peremptory challenges and that there is prejudicial error in failing to sustain a meritorious challenge for cause." *State v. Wacaser*, 794 S.W.2d 190, 193 (Mo. banc 1990).

So, after voir dire, lawyers ask the court to strike jurors for cause who should not serve.

Failure to grant a legitimate challenge for cause is reversible error. *State v. Stewart,* 692 S.W.2d 295, 298 (Mo. 1985).

RSMo 494.470 establishes a juror must be stricken if he/she:

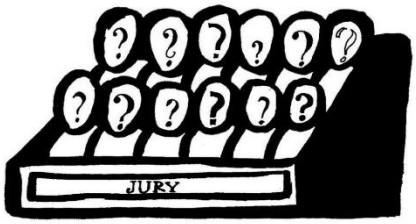
- "Has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person"
- has "opinions or beliefs preclude them from following the law as declared by the court in its instructions"
- ¨No person summoned as a witness¨
- No person kin to a party, or the accused, or the prosecuting attorney in a criminal case

The court should exclude prospective jurors for any potential bias, even though the circumstances may not come specifically within the reason for exclusion set out above. *See, e.g., Johnson v. Missouri-Kansas-Texas R.R. Co.,* 374 S.W.2d 1, 3 (Mo. 1963) (the 494.470 factors are not exclusive grounds for a cause challenge).

A prospective juror is not the judge of her own qualifications. *State v. Coleman,* 725 S.W.2d 113, 114 (Mo. App. 1987). The court must carefully consider the responses of the venireperson and make an independent evaluation of the juror's qualifications. *Id.*

> In making its determination, the trial court must analyze the facts detailed by the person and must not accept their own assessment that she could be unbiased. *State v. Kaiser* 637 S.W.2d 836, 837 (Mo. App. 1982).

The trial court must sustain a challenge for cause if there is any doubt about a person's impartiality. "If the answers of prospective jurors to questions posed by counsel or the court raise a doubt as to their ability to be fair, such doubt is to be resolved by removing them from the jury panel." *State v. Hamlett,* 756 S.W.2d 197, 199 (Mo. App. 1988).



Moreover, when someone gives equivocal responses to questions about whether he can follow the Court's instructions, such equivocation requires that the venireperson be stricken when challenged for cause. *State v. Long,* 795 S.W.2d 598, 602 (Mo. App. 1990).

When someone has expressed doubts about her ability to set aside her bias and decide that case on the laws and the evidence without a predisposition against one the parties, she is subject to removal for cause. *State v. Houston,*803 S.W.2d 195, 197 (Mo. App. 1991).

When a prospective juror has made unequivocal statements of bias or prejudice, that person must be stricken for cause and cannot be rehabilitated by the other side. *State v. Edwards*, 740 S.W. 2d 237, 243 (Mo. App. 1987) (emphasis added).

> It does not save a venireperson that she affirmatively answered a coercive leading question about whether she believed she could follow the law and the court's instructions. *State v. Wacaser*, 794 S.W.2d 190, 192-94 (Mo. 1990).

Questions to ask potential Jurors

You need to ask venirepersons about any prejudices or personal feelings which could prevent a panelist from following the court's instructions. *State v. Henderson,* 750 S.W.2d 555 (Mo. App. 1988). In particular:

- A plaintiff seeking money for personal injuries has a right to inquire whether anyone has any prejudices or beliefs about the amount or monetary nature of the damages the plaintiff seeks to recover. *Wright v. Chicago, Burlington & Quincy R.R. Co.,* 392 S.W.2d 401 (Mo. 1965).
- How the size of the verdict requested might affect them. In *Holtgrave v. Hoffman,* 716 S.W .2d 332 (Mo. App. E.D. 1986), a juror was asked by the trial judge if she could set aside her reservation about awarding a million dollars in damages, she replied, "If I made every effort, but I could not be sure." The trial court first denied a challenge for cause, but, after the verdict, granted a new trial.
- Explain legal concepts to the veniremen during voir dire to determine whether any of them have any personal qualms about following the law. *State v. Henderson,* 750 S.W.2d 555 (Mo. App. 1988).
- Whether a person who is prejudiced in favor of corporations and against an individual litigant (or these awesome shorts) - those folks should be excused for cause. *Vessels v. Kansas City Light and Power Co.*, 219 S.W. 80 (Mo. Banc 1920); *Johnson v. Kansas City Electric Light Co.,* 232 S.W. 1094 (Mo. App. 1921).
- Attitudes about a particular category of testimony is appropriate to address. Like whether the person is more likely to believe a policeman, *State v. West*, 809 S.W.2d 464 (Mo. App. 1991), or a chiropractor. *Brown v. Collins,* 46 S.W.3d 650 (Mo. App. W.D. 2001).
- Whether there is any moral, religious, philosophical, or other reason they cannot sit in judgment of another person - or these shorts. *State v. Luster*, 750 S.W.2d 474 (Mo. App. 1988).
- The insurance question: Whether they, or any members of their family, work for, or have a financial interest in, the defendant's liability insurance carrier. *Ivy v. Hawk,* 878 S.W. 2d 442 (Mo.1994).

- How a verdict for the plaintiff might affect Hollygrove them, in increased prices, reputation in the community, etc. *Rodgers v. Jackson County Orthopedics, Inc.,* 904 S. W. 2d 385 (Mo. App.W.D. 1995) (where a juror had a concern about health care costs in a medical malpractice case).
- Whether jurors have had a similar incident or medical condition similar to the plaintiffs. *Lange v. Woodworth,* 22 S. W.3d 758 (Mo. App. E.D. 2000).
- Whether the jurors have had prior litigation. *Ewing v. Singleton,* 83 S.W.3d 617, 621 (Mo. App, W.D. 2002) ("Prior litigation experience is vitally important, not only in exploring bias and disqualifying for cause, but for preemptory challenges as well.")
- Whether the jurors can follow specific law. The correct procedure is for counsel to ask the members of the panel whether, if the court later instructs them in a specific way, they have any opinion or conscientious scruples such as would prevent them from returning a verdict accordingly. *Duensing v. Huscher,* 431 S.W.2d 169, 172 (Mo. 1968).

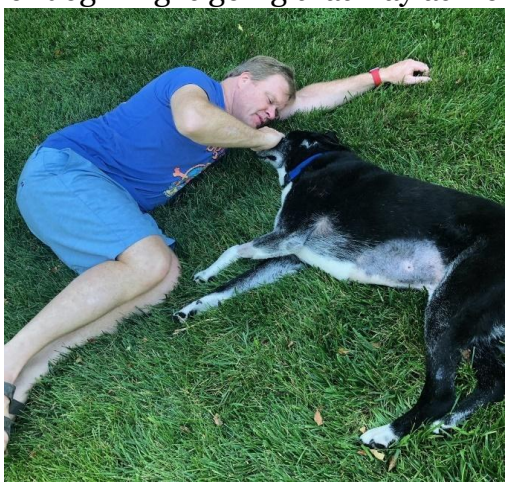
As baby William was looking at the parade behind us - here's a cute one of him.

-Gary Burger

Good morning!

Well, our family got new dogs. After some pics, I talk about running for the Missouri Board of Governors, how insurance companies try to get out of coverage for lack of cooperation of their insured, a video of my recent ethics CLE and a case success.

Why we did it is pretty sad. Our great dog, Jackson passed away from cancer and our other dog King is going that way as well. Here's me with my last talk with Jackson.



But the happy news is we have these two new 1- and 2-year-old dogs from a rescue in Pacific, Missouri - Kingdom Canine.

They do board, training and have a good facility. They also rescue and rehome a lot of dogs. Give them a try if you're thinking of adding a dog to your family.

I'm running for the Missouri Bar Board of Governors

If elected I will work to improve services the Bar provides to lawyers and the public. We need to ensure issues that concerns are heard and promptly addressed.

The election is currently underway and ends on Thursday, August 15. Votes will be tabulated on August 15, 2019 once the electronic voting is closed.

Here are my qualifications:

- I have been a trial lawyer for 27 years and founder of Burger Law in downtown St. Louis. More information about my firm can be found at BurgerLaw.com.
- For 20 years I have run a small- to medium-sized firm dedicated to zealous representation of injury victims and their families.
- I am a Board and Executive Committee Member of Legal Services of Eastern Missouri, a member of the Board of Governors of the Missouri Association of Trial Attorneys, and a member of the Missouri Supreme Court Intervention Committee under Rule 16.
- I have been chosen as a Superlawyer for seven consecutive years, am a member of the Multi-Million Dollar Advocates Forum and recipient of other professional recognition. I am AV rated by LexisNexis and Martindale-Hubbell, Board Certified in Civil Trial Advocacy and Civil Pretrial Practice Advocacy by the National Board of Trial Advocacy, and admitted to practice in Missouri and Illinois, the Missouri Supreme Court, the U.S. Court of Appeals for the 7th and 8th Circuits and various Federal District Courts.
- I am a member of Illinois and Missouri Bar Associations, the Bar Association of Metropolitan St. Louis, Missouri Association of Trial Attorneys and the American Association for Justice, and winner of 2018 second highest jury verdict in Missouri.

- I grew up in the St. Louis area and graduated from the University of Missouri-Columbia and Washington University School of Law. I live in St. Louis with my wife, kids and dogs. I am an avid scuba diver and bee keeper, and have a variety of other interests.
- I am a former Chairman of the Missouri Lawyers Assistance Committee and member of the Missouri Lawyers Regional Disciplinary Committee.

- I created and co-host a podcast called Lawyer v Lawyer, which provides advice, trial tips, and discussions on real-life litigation situations by and for practicing lawyers with Debbie Champion.
- I speak at and host Continuing Legal Education courses for fellow lawyers. I volunteer in the community as well.

So, what happens if a defendant ignores its insurance company when you sue them?

It can happen. Defendants get resentful that someone is pursuing them or may try to dodge their responsibility. Unfortunately for the claimant, there is an exclusion in every insurance policy - auto or homeowners - that if an insured does not cooperate with the insurance company, the insurance company either: (1) declines coverage all together and there is absolutely no insurance coverage or (2) the auto insurance coverage is reduced from the normal coverage limits to the minimum limits of $25,000.

I settled a case two weeks ago where the defendant did not cooperate with his attorney to answer interrogatories or show up at his deposition. He absolutely refused to cooperate. The defense attorney threatened to reduce the amount of coverage from $100,000 to $25,000.

So, we told the defense lawyer that we did not need answers to interrogatories and did not need his deposition. We were happy to proceed to trial without any participation from the defendant. I made the decision, from a tactical point of view, that if we went to trial, we would not even mention that the defendant was not there (that much) at trial.

That way, we take the wind out of the sails of the insurance company and eliminate the grounds for them to deny or reduce coverage. Who really cares anyway? It was a great liability case and the defendant was questionable.

The defendant had good reason not to show – he had a long criminal history. However, we were still able to ensure that our client had the defendant's full insurance coverage available to him for recovery. We mediated the case and settled the case for $90,000.

Here are some cases that discuss this issue:

Missouri courts have consistently held that to deny coverage pursuant to a cooperation clause, the insurance company must prove three things: (1) there was a material breach of the cooperation clause; (2) the insurer suffered substantial prejudice by the breach; and (3) the insurer exercised reasonable diligence to get the insured's cooperation. *Roller v. American Home Insurance Co.*, 484 S.W.3d 110 (Mo. App. W.D. 2015); *American Access Cas. Co. v. Alassouli*, 31 (N.E.3d 803 Ill. App. 2015). This usually comes down to whether or not there is "substantial prejudice."

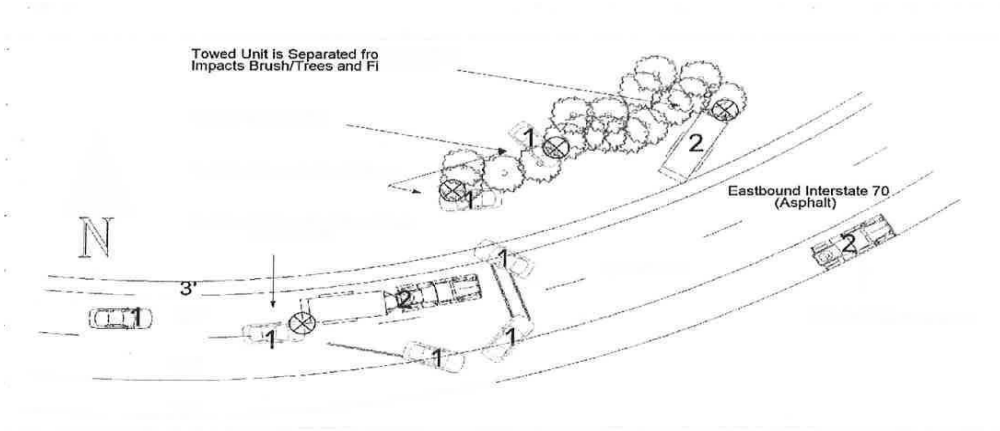
In *Hendrix v. Jones*, 580 S.W.2d 740 (Mo. banc 1979), the Missouri Supreme Court analyzed the applicability of a non-cooperation clause when a Defendant failed to show up for trial. Noting the defendant's questionable character, the Supreme Court held that

the insurance company could not prove "substantial prejudice" from not having the defendant at trial. *Id.* at 744-45.

On the other hand, in *Medical Protective Co. v. Bubenik*, 594 F.3d 1047, the Eighth Circuit Court of Appeals applied Missouri law to analyze a non-cooperation clause. In this case, an insured physician refused to answer interrogatories, participate in discussions, share documents, submit to a deposition, or testify at trial. *Id.* at 1051. Noting that the defendant withheld useful information from his insurance company and attorneys, the Eighth Circuit held that the non-cooperation clause was applicable in this matter. *Id.* at 1053.

Jason and I discuss his $90,000 settlement

Our client, Jason, was a front seat passenger in his friend's vehicle while traveling eastbound on Highway 70 in Lafayette County, Missouri. They were towing a vehicle behind them when another vehicle, also traveling eastbound on Highway 70, struck the towed vehicle. This violent collision caused the towed vehicle to separate from the vehicle in which Jason was a passenger.



Jason suffered severe injuries as a result of this collision, including injuries to his neck, back, head, and both shoulders. Jason underwent conservative medical treatment, incurring $6,492.50 in bills. He also needs a future surgery which is estimated around $42,000. Due to his injuries, Jason has been unable to return to work since this accident in June 2016. Therefore, he has extensive wage loss damages.

The insurance company initially refused to give Jason a fair settlement, so we filed suit. As the suit progressed, we completed discovery and Jason gave his deposition. The defendant did not do either of those. Eventually, the matter was set for mediation.

During mediation, we presented the evidence and legal reasons why our client was entitled to a substantial settlement. At the end of it all, we obtained a $90,000 settlement for our client.

We are proud of the work we did for Jason and the great result we achieved.

Dogs and babies - Nothing cuter (sorry for the Dodgers' hat).

-Gary Burger

Happy Tuesday, Friend,

I decided to expand my bee keeping by splitting a hive and creating a new one. It went well so far. I took some frames from an existing hive and put them in a box. Those bees will create a new queen by feeding regular larvae Royal Jelly - and they will **turn into a queen rather than a regular bee**.

But you have to put the hive at least two miles away or they will just go back to the old hive. I let my parents know I would be dropping a hive off in their back yard. The great thing about parents is they have to let their kids do this kind of stuff (or at least mine do).

Here's the hive I dropped at my parents (and I discuss a truck crash settlement below too).

I'm still running for the Missouri Bar Board of Governors

The election is currently underway and ends on Thursday, August 15. Votes will be tabulated on August 15, 2019 once the electronic voting is closed.

If elected I will work to improve services the Bar provides to lawyers and the public. We need to ensure issues that concerns are heard and promptly addressed.

I could tell you my qualifications (again) but instead - here's some pics of my putting the new hive in its new home after it was at my parents for a few weeks

The new queen eliminates any other queens the hive is rearing. Then she goes on her one and only mating flight. She returns to the hive and governs it for a few years - laying thousands of eggs and directing the whole hive through physical and chemical signals.

$200,000 Truck Accident Settlement

Recently, Genavieve Fikes and I obtained a great $200,000 settlement for our client in a contested liability truck accident case. Despite strong evidence in our favor, the trucking company failed to make any settlement offer whatsoever until the day of mediation, when the case ultimately settled.

The defendant truck driver crossed into our client's lane on Interstate 70, and crashed into her with his tractor-trailer.

The impact caused our **client's car to careen into the median, flip over repeatedly, and come to rest on the driver's side**, causing her serious injuries necessitating surgery.

The truck driver fled the scene of the accident while our client was suspended upside down and had to be extracted by emergency personnel forty-five minutes later.

We investigated and filed suit quickly in the case. I was removed to federal court in the Southern District of Illinois. Defendant's often remove cases if they can - they force us to win a unanimous jury at trial instead of 9 of 12 in state court.

As a result of the accident, our client incurred over significant medical charges. **She injured her head, neck, left side and left shoulder.** She tried to treat conservatively with months of physical therapy, injections, and chiropractic treatment.

However, when that failed, she ultimately underwent successful **shoulder surgery.**

The police investigated the scene of the accident and interviewed two witnesses who both stated they saw the truck driver cross into our client's lane. In his report, the officer corroborated these statements based upon tire tracks and markings on the road.

The officer wrote that the truck driver initially blamed our client, but then "once faced with the evidence, stopped denying responsibility." The officer issued the defendant driver a traffic citation for "improper lane usage."

Subsequently, the truck driver's employer terminated him. We obtained the Separation Report through discovery, and the reason for termination stated, "Driver was terminated for having an at-fault accident and then falsifying the details of events."

At first glance, this **seemed** like a clear liability accident. Based on the police report, witness statements, and the Separation Report, you would think that the defendant would make a settlement offer.

However, during depositions, **both the truck driver and his employer's corporate representative changed their stories and surprisingly blamed our client for the accident, saying *she* swerved into *his* lane.** The corporate representative was a young safety manager who had never been deposed before.

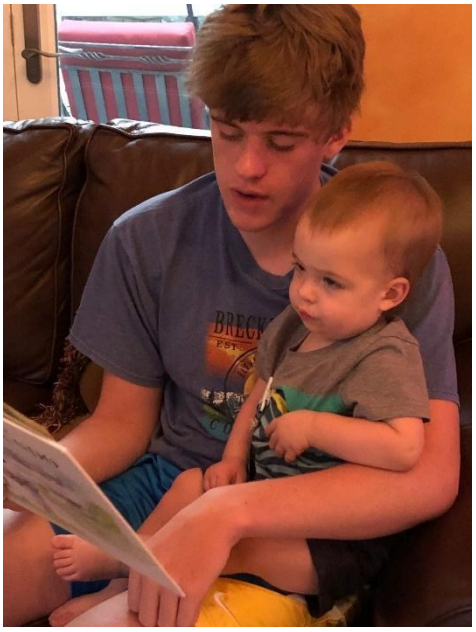
The owner of the national truck company flew in to observe the deposition, and stared down the representative as he futilely tried to explain away the incriminating Separation Report, which he claimed was just an internal document.

In their depositions, the **defendant's witnesses lacked credibility or remorse**, which we did not think would bode well for them in front of a jury. They refused to take any responsibility whatsoever, and did not offer our client a dime until mediation.

At the mediation, we reiterated that the defendant was an unlikeable corporate truck driver who slammed into our client with a tractor-trailer, lied to police, and was fired for "having an at-fault accident and then falsifying the details of events."

After a few hours of negotiating, the **defendants finally made the $200,000 offer that our client and I were pleased with**. Sometimes, even when all the evidence is in your favor, you still have to fight to get a reasonable offer.

Great job Genavieve!!



Our 14-month-old brought a book to our 17-year-old and asked him to read it to him. So cute.

Looking at colleges for the older one (who's really driven and gets great grades and test scores) and teaching the younger one how to say "purple." Both young men are impressive.

-Gary Burger

Happy last week of summer, Friend,

Sad that summer is going, going, gone. Let's get down to business.

VAPING CLAIMS - DANGEROUS DIACETYL

Diacetyl is dangerous and banned in many countries. It should not be in e-cigarettes. Our firm is pursuing these claims. If you or someone you know needs help, or you want to refer someone to us, contact us please.

Diacetyl is a compound that can be found in e-cigarettes. It imparts a buttery or butterscotch flavor that can enhance the experience of using an e-cigarette or vape-pen. Guess what? It's also banned in over 28 countries in Europe.

Why? Because the inhalation of this chemical can cause serious and detrimental health effects to your lungs. In some cases, it can even lead to death. But if this chemical is extremely deadly, then why is it allowed in vape-pens?

According to the Centers for Disease Control and Prevention, a whopping 21 percent of high schoolers use e-cigarettes, up from just 1% in 2011.

And recently, the Food and Drug Administration announced it has received 127 reports of seizures and other serious neurological symptoms linked to vaping since 2009.

Tobacco and e-cigarette companies want to make money. They need you to be hooked on their products, and nicotine goes a long way to ensuring that you're chemically bound to their products. But if that isn't enough, they also want to fool you into thinking that what you are inhaling tastes interesting or good. Diacetyl helps with that.

It gives a buttery or even candy-like butterscotch flavor that will keep you hooked and keep you using it. Diacetyl is dangerous, and even deadly. There is no confusion regarding that. You may be more familiar with microwave popcorn workers dying from exposure to diacetyl. This was way back in 2007.

If Diacetyl was known to be dangerous in 2007, why was it allowed to be used in vape pens and vaping flavors? Greed, plain and simple. Vaping Companies and E-cigarette companies want you to be hooked and to stay hooked to their product.

Other Dangers of Vaping: heavy metals and formaldehyde

Many harmful trace metals have also been discovered in e-cigarettes. Most e-cigarettes produce an aerosol by heating an e-liquid with a metal coil. The heating element in e-cigarettes emits tiny particles, sometimes including metals, which can lodge themselves deep into the lungs and get absorbed into the body's circulatory system.

Nickel, chromium, cadmium, tin, aluminum, silica and lead have all been observed and are potential carcinogens.

A 2018 study found that the metals associated with these heating coils were leaching into the liquid solution and into the bodies of people inhaling them. Chronic exposure to such metals has been linked to lung, liver, heart and brain damage, and may also depress immune function and increase cancer risk.

Additionally, while flavoring liquids can vary from e-liquid to e-liquid, propylene glycol (PG) and vegetable glycerin (VG) are essentially universal.

These are considered non-toxic when ingested, but may be toxic when inhaled. When PG/VG is heated, it can become oxidized to produce carbonyl compounds, such as glyoxal, acrolein, acetaldehyde, and formaldehyde, a cancer-causing substance.

Vaping seems to be capable of causing a variety of injury patterns in the lung. This reflects the large number of different chemicals involved, which may have variable pathological effects.

Facts alone don't help you get better, and now you're suffering from a serious lung illness or disease because of the greed of these companies. What can you do? What should you do?

Contact us and we can help.

Honey Harvest

Well, we got a bunch of honey from our hives this year. Here's a pic with us bottling some.

Two Policy Limit Settlements

This week we settled two accidents for two clients for policy limits. In both cases, we knew our clients deserved the full amount of the policy. In both cases, they got really low offers at first. But we didn't give in and come off of the policy limit demands.

Instead, we regrouped, and re-presented the insurance company with better documentation on their injuries and damages. In each case, the insurance company came back with a policy limit offer.

Our first client, Cori, was injured when a driver ran a red light.

The driver gave false insurance information to the officer at first, so our clients' uninsured insurance wouldn't accept liability. After some investigation, they discovered the driver did not have insurance.

The officer at the scene had gotten a video of the accident from the building on the corner that shows the unknown uninsured driver running the red light.

Cori had significant injuries. Her medical bills alone were more than the amount of insurance available. We demanded policy limits. The insurance company came back

with a very low offer – a third of the limits. We refused to come off our policy limit demand.

Instead, we made another demand for policy limits under the new bad faith statute supplementing all medical bills and wage loss, clearly outlining our client's injuries in the records for the adjuster, and sent the video along again. This time, the insurance company came back offering policy limits.

Our second client, Mike, was injured when a car rear-ended him while he sat at a red light. He had braced for the impact with his hands on the steering wheel, severely injuring his hands and shoulders.

Mike started with conservative treatment, but when the pain did not go away, he consulted a surgeon. After injections into his shoulder joint and an MRI, Mike was diagnosed with a labral tear that would need surgery.

At the same time, Mike was seeing a chiropractor and pain management specialist for his back and neck symptoms. In all, Mike had significant medical bills from the accident. His doctors indicated he would need an additional surgery on his hands to relieve his pain.

Our office made a policy limit demand for Mike. Again, the insurance company came back with a very low offer claiming prior injuries were the real cause.

Mike had prior shoulder surgery. However, the doctor's notes were clear – his prior surgery had nothing to do with the labral tear surgery.

Sticking with our policy limit demand, we pulled the specific records where doctors had stated his injuries were a direct result from the accident – highlighting it for the adjuster. We were able to get them to come back with policy limits.

Happy Thursday, Friend,

Although fall is coming, the bugs in my yard are still terrible. I decided that I would put up some bat boxes to see if bats will help.

A single bat can eat up to 1,200 mosquito-sized insects every hour, and each bat usually eats 6,000 to 8,000 insects each night.

On the lawyer front, let me talk about my argument in the Western District Court of Appeals on Tuesday, more Lawyer v Lawyer podcasts and a $200,000 med mal settlement we recently completed.

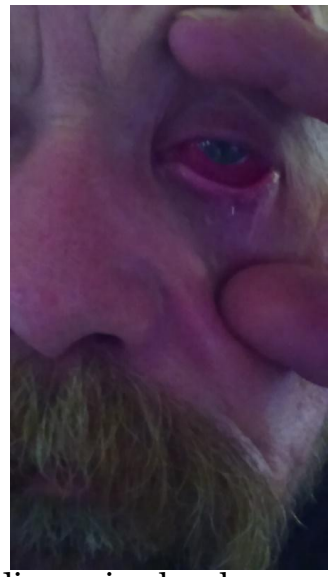
$200,000 Med Mal Settlement

Here's a scary story with Halloween coming up. Our client Roy goes to Wal-Mart on May 20, 2016, for new eyeglasses, He sees Dr. Kenton McWilliams and complains his left eye is painful and tearing,

McWilliams treats Plaintiff with steroid eye drops without doing a diagnostic culture. Roy's condition gets worse - blurry vision, watering, severe pain and pressure, and light sensitivity.

A few weeks later, Roy sought treatment from another doctor who performed appropriate diagnostic testing and determined that Plaintiff had a staphylococcus infection for which antibiotics were necessary and steroid drops were harmful.

His eye had become really red:



After his treatment, Roy was left with greatly diminished vision in his left eye and sensitivity to light.

We filed suit and did depositions in the case.

We tried to show that Dr. McWilliams breached the standard of care by failing to properly diagnose Mr. Payne, by prescribing Neo Poly Dex, and failing to rule out contraindicated diagnoses (including, but not limited to, fungal infections). If you put steroids in a fungal infection, it's like putting gas on a fire.

What started out as a likely corneal abrasion and eye infection spiraled into a large corneal ulcer with permanent scarring and vision loss.

My Deposition of McWilliams went well - he did not even have a diagnosis when he prescribed the medication. Here are some excerpts:

Q: And then what did you diagnose him with?

A: Well, I wasn't sure what it was. So, it looked like recurrent corneal erosion. And I have a question mark.

Q: So, then what did you decide to do?

A: I don't – I think I explained to him there's something going on, but I'm not sure what it is. I don't know if I explained the term recurrent corneal erosions because typically, I don't explain that under those terms.

It does not take an expert to understand that in order to properly treat a condition, you have to know what the condition is. McWilliams didn't.

And the standard of care when prescribing Neo Poly Dex drops requires that an optometrist rule out contraindicated diagnoses, otherwise further damage to the eye, such as corneal ulcers and scarring, can occur.

Q: So, it is the standard of care to rule those corneal, fungal and viral out before you prescribe it; is that correct?

A: Generally speaking, yes.

Q: And you did not rule those out prior to making the prescription that you did, fair?

A: I would say that's fair in any case, but yes.

Q: Isn't a – aren't you supposed to check for a fungus infection before you prescribe that medication?

A: Or at least rule it out.

Q: Did you rule it out?

A: I couldn't really rule out anything at that point.

Dr. McWilliams had to admit that:

A. **Typically if you suspect fungal you wouldn't prescribe it. If you suspect corneal viral, especially herpes, you wouldn't want to prescribe it.**

Dr. McWilliams also breached the standard of care by failing to schedule a follow up appointment with Mr. Payne to monitor his condition.

Q: Is it important to, if you're giving someone an antibiotic with a steroid, to do close monitoring of his condition thereafter?

A: I would agree.

Later I asked:

Q: So, you did not tell him to come back in seven days. You told him to take the medication for seven days, correct?

A: Yes.

McWilliams had to admit:

Q: What would you have done differently, knowing the history?

A: Knowing all the history and his visits to the second, third, and fourth doctors I probably would have referred his case right away.

Q: Meaning when he first came to you?

A: Had I known how bad it potentially could have been I would have referred him to a corneal specialist.

Q: So, are you saying you would have referred him to a specialist, May 20, the day you saw him, had you known everything in hindsight, or are you saying that had he called you back you would have referred him?

A: Both.

Not surprisingly:

Q: Did you have complaints about patients – from patients about the care they received?

A: I would say occasionally.

We settled the case for $200,000. There were notes in the medical records that Roy's vision was not significantly diminished and he did take some time before he went and got additional medical care.

Bat Boxes

Here's some pics of me putting up the Bat boxes - hope they move in soon.

Western District Court of Appeals Argument

Had a blast arguing before the Western District Court of Appeals in our Department of Corrections Class action case. The Judges asked impressive questions of my opponent and I, were extremely well prepared, and got to the heart of the issues quickly.

We are hopeful for a good result. Decisions take months to craft and we will update you with any new information.

My awesome wife made this sign and sent me this pic for support.

Lawyer v Lawyer and the Rams

My friend Debbie Champion asked me to join her at the Isaac Bruce Foundation Gala Friday night. Had a great time.

You can find the Lawyer v Lawyer podcast on your favorite podcast platform.

Here is a picture of the 1999 Rams Super Bowl Champions taken:

-Gary Burger

Hi, Friend,

It's exciting sports week with the Cardinals entering the playoffs and the Blues opening their season next Wednesday.

In this email, I discuss how to get approval of wrongful death and minor settlements, whether a lawyer can promise to pay a lien in a settlement, the Illinois Lien reduction statute used to reduce liens in settlements, and 10 great things about my recently departed dog, King (and a plug for more Lawyer v Lawyer podcasts featuring interview of CD Longo).

Court Approval in Settlements

Sometimes when we settle cases, Court approval is required. In Missouri this occurs in two situations: Wrongful Death and a Minor Settlement. In Illinois it occurs if a settlement is made with only one defendant (in my next newsletter/email). We have had a lot of these Court hearings lately.

Under R.S.Mo. 537.080 and .095, the Court must approve a wrongful death settlement. Typically, a Motion or Application for Approval of Wrongful Death settlement is filed with the Court. The lawyer and client appear in Court and the lead plaintiff takes the stand to testify to approve the settlement.

To approve a wrongful death settlement, both the Motion should say, and the lawyer should have their client testify to, the following:

- That Plaintiff is ____ relation to the deceased;
- That Plaintiff maintain a claim or lawsuit for wrongful death because ____;
- That Plaintiff participated in and litigated the case;
- That they negotiated a settlement;
- That they believe the Court approval of the settlement would be in the best interest of the case and parties;
- Identity of all the parties that are entitled to distribution from the settlement under 537.080.1(1);
- That notice of the hearing went to everyone with an interest in the settlement;
- That Plaintiff employed Burger law to represent them who pursued the case and had a contingency fee contract;
- That they understand that if they settle the case and if the Court approves the settlement, that the case will be completely closed and no further relief may be had from the released parties;
- That if the Court approves the settlement, plaintiff will not be able to have jury trial in the case and that a jury could have awarded more or less than the settlement amount;
- They are requesting the Court approve the settlement; and That the court enter an order approving the settlement, payment of attorneys' fees and expenses and the distribution of the settlement to beneficiaries.

Then, typically the Court will approve the settlement if the terms are fair and just. Sometimes, cases are confidential - in that case you provide the Court with a copy of a document showing settlement, attorneys fees, expense, and distribution plan directly, but do not put it in the Motion. If a case is not confidential, you put those numbers in your Motion for Approval.

The second situation for Court approval that is necessary is in a minor settlement.

Typically, by Court order (and I require with my clients) that the money be put in a restricted account, a conservatorship, or structured settlement. This way all the money goes to the benefit, health, education or welfare of the minor. We have many situations like this.

To approve a minor settlement, there needs to be a Motion for Approval and an Order stating the following:

- The age and the date of birth of the minor;
- Identify who is the “next friend” of the minor;
- There should already be a Motion for Appointment of Next Friend filed with the Court and if not, that needs to be done with the Motion for Approval;
- Sometimes, it is necessary to not use the minor's full name and ask the Court to only use the minor initials or “Jane Doe.” This is done by a simple Motion moving the Court to use only the initials for reason that the lawsuit includes personal information, settlement funds and other identifying information of a minor;
- That Plaintiff participated in and litigated the case;
- That they negotiated a settlement;
- That they believe the Court approval of the settlement would be in the best interest of the case and minor;
- Shortly describe the incident and why the Motion is being prepared;
- State that the settlement of the money and specific sums would be in the best interest of the minor;
- Note that the defendant has offered to settlement a that amount and that Plaintiff wishes to accept the settlement;
- That the next friend acknowledgement receipt of settlement money they will use the settlement money for the sole benefit for the minor;
- That Plaintiff employed Burger law to represent them who pursued the case and had a contingency fee contract;
- That they understand that if they settle the case and if the Court approves the settlement, that the case will be completely closed and no further relief may be had from the released parties;
- That if the Court approves the settlement, plaintiff will not be able to have jury trial in the case and that a jury could have awarded more or less than the settlement amount;
- They are requesting the Court approve the settlement; and
- That a court order be issued approving the settlement and directing where the funds go.

Then the question becomes where do you put the money from the settlement for the minor. You can put the money into a restricted account with a bank pursuant to the statute.

You can also open a conservatorship in probate court. These forms for conservatorship in St. Louis City or County can be found here and here.

With both conservatorship and restricted accounts, you will have to do yearly reports and accounting to the Court to show what is happening with the accounts for the minor.

You can also place the money in a structured settlement. This is an annuity where an insurance company or other investment company holds the money and pays the money out over time. The advantage of this is that you get tax benefits and this is a good way to safeguard the money.

Wait until the Minor is over the age of 18 to pay them. I usually require additional time to get the money out - I do not know many 18-year-olds that handle money smartly. Plan for money to pay for college and then wait for a period of time before the rest of the settlement funds are provided to the recipient.

The tax advantage is that personal injury settlements are not taxable and if you put them in a structure the interest earned on the money is not taxable either. So, the interest on the money for a certain amount of time gets paid eventually in the structure and no tax is paid on that.

If you have any other questions about how to get a wrongful death or minor settlement approved, please give our office a call or email for more information.

Can a Lawyer promise to pay a lien in a settlement?

In Missouri, a lawyer cannot guarantee payment of liens in a settlement. The client can, but not the lawyer. Informal Opinion 125 from the Missouri Supreme Court advisory committee states this is a violation of ethics rule 4-1.8(e).

The client has the right to instruct the lawyer not to honor the lien. *But see* Comment 8 to Rule 4-1.15 ("[a] lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client.

In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved").

Illinois is similar but a bit different. ISBA Advisory Opinion No. 06-01 says that an attorney personally guaranteeing payment of liens is in violation of Rule 1.8(d). It goes on to say, however, that:

"Under Rule 1.15(b), a lawyer representing a plaintiff has an obligation to segregate the settlement funds over which a third party has a claim, to notify persons who have an in interest in those funds (including lien/subrogation claimants) and then distribute the funds owed to said persons. Based on language of Rule 1.15 and the court's opinion in Western States Insurance Co. v. Olivero, it is clear that a lawyer representing a plaintiff is ethically obligated to identify the portion of funds which are due and owing to a lien/subrogation claimant and to ensure that those funds are properly paid to those entities."

Illinois Lien Statute - It's Complicated

Liens are a huge part of any personal injury case, whether you are on the defense or plaintiff's side of the "v." Cases where liens are not at issue are rare.

As a service to clients, I try to reduce liens as much as possible. This obviously puts more money in the client's pocket. **It's important not only to maximize the settlement amount on the front end, but also to minimize any liens on the back end.**

Lien resolution also gives finality to the outstanding medical bills for the injured party. And it's worth noting that both the defendant and the plaintiff want the liens completely resolved.

Managing and resolving liens is an important part of our legal service to clients. Yet, it can be overlooked, an afterthought or dreaded. **I have as article on lien reduction which can be found on our Lawyer-to-lawyer page of our website.**

Missouri and Illinois have lien statutes, which are typically used when the liens are large and it would be too hard to get the lienholders to take large deductions.

I will do an article about the Missouri Lien Statute in my next email. In Illinois, liens are governed by 770 ILCS 23/1. It is not as strong as Missouri's law – mostly because in Illinois the lienholder can still pursue the client for the balance after the liens are reduced under that statute.

So, the smart lawyer will try to negotiate the liens down – but the statute guides us as to what a court would do and what is a fair reduction - but it is complicated.

Under the Illinois Lien Statute:

- Total liens cannot be more than 40% of the total settlement
- No single provider/professional can get more than 33% of the settlement
- If the total liens meet or exceed 40% of settlement, then: All liens of the professionals cannot exceed 20%; and all liens of the providers cannot exceed 20%
- But you have to reallocate the unused 40%, but it still holds true that no single provider can get more than 1/3
- If the liens exceed 40%, the attorney fee cannot exceed 30% of the total settlement

Let me do an Illustration with a $50,000 offer in a case with $29,051.60 in liens. Under this example:

- Total liens cannot be more than ($50k x 40%) = $20,000
- No single provider can get more than ($50k x 33.33%) = $16,666
- If the total liens are more than $20,000, then: All liens of the professionals cannot exceed more than ($50,000 x 20%) = $10,000; All liens of the providers cannot exceed more than ($50,000 x 20%) = $10,000

- Attorney fee AND costs cannot exceed ($50k x 30%) = $15,000

Now, applying these rules to the liens:

1. Total liens before reduction = $29,051.60 (more than $20k and 40%)
2. Total Professional Liens = $8,569.58 (this is under $10k, so ok)
3. Total Provider Liens = $20,482.02 (this must be reduced to $10k) $10,000
4. Total liens after reduction: $18,569.58 ($8,569.58 + 10,000)
5. Now, reallocate the unused 40% -(20,000 -18,569.58 = $1,430.42
6. The $1,430.42 goes to satisfy the health *providers*
7. End Result:

- Professionals get $8,569.58
- Providers get $11,430.42
- Total Liens: $20,000

Now applying this to the net settlement for the client:

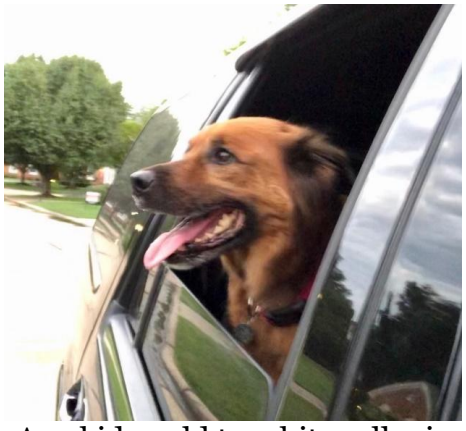
50,000 - $15,000 (Atty fee + costs of 406.29) - $20,000 (liens) = $15,000

The client could still be on the hook for $9,051.60 in unsatisfied charges

Call or email me if you have any questions about the Illinois Lien statute.

RIP KING

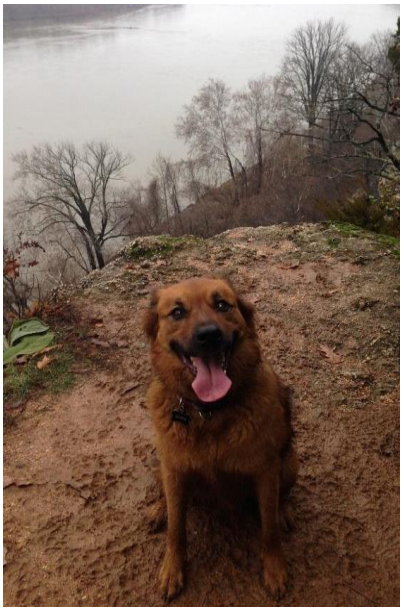
RIP King. So sad to lose this partner of mine for 10 years. Here's 10 extraordinary things about him:



1. Any kid could tug, hit, pull, pinch or squeeze him with no bad response.
2. Run with me off leash and chase squirrels and smells. Great trail dog - not canoeing cause he'd rather swim.

3. King guarded us always - he would lick and want to be petted if he thought we knew you but would try to bite if he didn't.
4. Had the u city mailman warn the Clayton mailman about King when we moved - that's a rep.
5. Had to get a po box in Clayton cause wouldn't deliver mail any more.

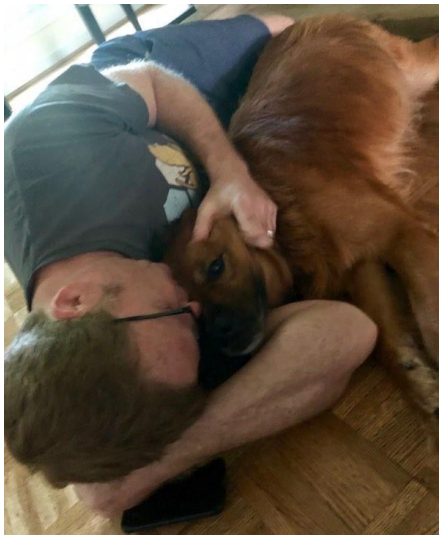
6. Ate everything - chocolate candy and brownies and we'd find foil wrappers in his poop.
7. Once ate a bottle of Jackson's medicine that should have killed him 10 times over - went to the vet and pumped his stomach to save him, finding he'd also eaten a bag of almonds.
8. Sat underneath me literally every night I've worked late in the last 10 years.
9. Hung out on the dining room table because he was scared of the puppies we fostered.
10. **Loved me and our family tirelessly.**



Great new Lawyer v Lawyer Episodes

We have three great new lawyer v lawyer episodes up. You can find them wherever you listen to podcasts.

In one, we interview my friend and great lawyer CD Longo about his career and firm Longo Biggs. Congrats to Doug Biggs getting married in a couple weeks.



My last pic with King. :-(

-Gary Burger

Happy Tuesday, Friend,

Our 14,000 correction officer class members and I are grateful to advise that the Court of Appeals for the Western District of Missouri today affirmed the Trial Court Judgment in our $113.7 Million verdict last year.

I said at the oral argument, and repeat here that today, Oct 8, thousands of corrections officers are **still** required to do pre- and post-shift work and are not paid for it. This is despite our work, the Trial Court Judgment and now the Court of Appeals decisions. You will not find a harder working and deserving group than these officers. I am so grateful to be able to fight for them.

In this email, I discuss parts of the Court of Appeals opinion, what is pre and post shift activity, an article on three new cases we recently filed, and working on my bee hives to guard against hive beetles (cause Jamarin asked about my bees this morning).

Affirmed

The Court of Appeals affirmed the Trial Court's judgment and denied all six points raised by the Missouri Department of Corrections. Here are my 16 favorite quotes from the opinion:

1. Here, viewing the facts in the light most favorable to DOC, it is undisputed that the officers are "on duty and expected to respond" if incidents of "offenders confronting staff and becoming physical" occur at any time after they go into the facility.
2. When they are on the premises, officers are "expected to act as a prison guard" during their pre-shift and post-shift required activities. Officers must "pay attention to the offenders absolutely at all times[.]" Inside the premises, it is imperative that the officers are "going to be mindful of [offenders'] behavior."
3. Officers "have to monitor and pay attention to offenders walking to their post and walking back[.]" Officers are trained to be careful during pre- and post-shift activity and shift change time because they know those are the times that prisoners often take action, such as escape attempts and staging fights to divert officers' attention.
4. Given DOC's undisputed knowledge of, and expectation for, the officers' requirement to utilize their training to guard against prisoner fights and escape attempts during shift changes, we conclude that the preliminary and postliminary activities of the officers are not "pre" or "post" at all; instead, these shift change activities are "integral and indispensable" to the officers' "principal activities" for which they are hired by DOC, that is, guarding against and protecting the public from prison riots and escape attempts.
5. According to Supreme Court precedent, these activities are, indeed, part of the officers' "principal activities" of employment by DOC and must be compensated pursuant to FLSA. *Integrity Staffing Sols., Inc.*, 135 S. Ct. at 519. Further, at minimum, the officers are "required by [their] employer to report at a particular hour at [the] place where [they] perform [] [their] principal activity," and the officers are "there at that hour ready and willing to work." 29 C.F.R. § 790.7(h).
6. The officers are "on duty and expected to respond [,]" "act[ing] as a prison guard [,]" whether or not offenders take action requiring officers' intervention. In other words, the officers are "waiting for work [,]" at *all* times from the moment they arrive at the premises, which is, as such, "integral and indispensable to [their] principal activities." *Integrity Staffing Sols., Inc.*, 135 S. Ct. at 519.
7. Here, the most dangerous, relevant, and integral part of the officers' "extra work" is the transition from entering the correctional facility and arriving at their shift post—where the threat of prison riots and attempted escapes are real, formidable, and of such nature as to require diligent attention and readiness to intervene.
8. This "extra work" is *daily*. It is *not* a ten minute or less daily activity; instead, combined with the entire pre/post shift "extra work" *in the aggregate*, the officers are spending thirty minutes per day on this "extra work." Hence, both substantively and quantitatively, the "extra work" demanded of the officers simply cannot be categorized as *de minimis*.

9. DOC conveniently ignores the circuit court's authority to administer the rules of discovery and its broad discretion to strike experts and their corresponding opinions not timely disclosed—which is the authority that we conclude was properly exercised by the circuit court below.
10. Here, approximately six years after the present lawsuit had been pending, seven months after the officers had disclosed their expert witness on damages and made such expert available for deposition, a month after the circuit court had closed discovery (with an order stating "no further discovery") after extensive pre-trial discovery and numerous DOC motions for trial continuance (all of which were granted), and weeks before trial was scheduled to commence, DOC produced a twenty-page affidavit and over 1000 pages of supporting documentation from its rebuttal expert witness, Dr. Hanvey.
11. At a hearing in which one of the issues related to a motion to strike expert witness testimony was the issue of DOC's late expert witness disclosure, the circuit court noted its frustration with DOC's late disclosure, expressed disbelief that DOC would not have thought it important to have their expert witness "on line and ready to go" years earlier, and noted disdain for DOC's admission that the 1000 pages of expert witness supporting documentation should have been produced months earlier and prior to the close of discovery.
12. The DOC contends that the declaratory judgment was duplicative of the breach of contract award. This is patently not so, given that the breach of contract judgment was for damages incurred due to DOC's breach of the contract up to the point of the judgment, whereas the declaratory judgment clarified the parties' rights under the contract and obligations moving forward under that contract following the date of the judgment.
13. The declaratory judgment clarified the parties' rights and obligations under the contract, including DOC's obligation to pay the officers for work, including pre- and post-shift activities. DOC's refusal to pay and refusal to record time in a manner to properly calculate such pay made the declaratory judgment's order for adequate timekeeping and future obligation to pay pursuant to the contract "necessary to effectuate" the judgment.
14. Finally, DOC argues in conclusory fashion and without citation to legal authority nor any argument demonstrating how principles of law interact with the facts of the case, that enacting a timekeeping system within the timeline set by the circuit court's judgment was "unachievable" and that any funds ordered to be paid were not presently appropriated by the legislature.
15. "If a party does not support contentions with relevant authority or argument beyond conclusory statements, the point is deemed abandoned." *Frazier v. City of Kansas City*, 467 S.W.3d 327, 346 (Mo. App. W.D. 2015) (internal quotation marks omitted).
16. The judgment is affirmed.

What is pre and post shift activity?

The pre and post shift activity discussed includes:

1) Electronically logging their arrival or departure from the facility by either scanning a Bar Coded or Radio Frequency Identification (RFID), and/or manually signing in or initialing a paper entry/exit record, and/or submitting to biometric identification such as a fingerprint or palm scanning instrument, or a combination of these things;

2) Utility officers may be required to report to the Central Observation Post to receive assignments;

3) Passing through security gates/entry-egress points, including passing through a metal detector on arrival and through an airlock when entering and exiting the security envelope;

4) Presenting themselves before a custody supervisor who communicated to the officers their daily post/duty assignment;

5) Picking up or returning equipment such as keys or radios from electronic key boxes or key/radio issue rooms;

6) Walking to and from the entry/egress points to duty post and possibly waiting in line if one has formed for any of the above activities;

7) In the case of vehicle patrol officers, inventorying the vehicle patrol's issued weapons, ammunition, and equipment prior to and at the end of each shift; and

8) Passing of pertinent information from one shift to another.

New Lawsuits

We have been filing a lot of lawsuits lately. Often, I talk about settlements in these newsletters, but thought I would mention some new suits that cover a wide variety of legal issues. We pride ourselves in representing clients for a lot more than only car and truck crashes.

Wrongful Death against Pam Hupp

We recently filed a wrongful death action against Pam Hupp. Pam was indicted for first degree murder for the death of Louis Gumpenberger. Pam had fraudulently concealed her actions as was reported by many news agencies.

In the criminal case, Pam entered into an *Alford* plea. An *Alford* plea is where the individual enters into a guilty plea for the case, but does not admit guilt for the crime itself and asserts their innocence with respect to the crime.

This crime took place in August of 2016, but any assertion that the statute of limitations has run is not a defense she is entitled to under *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015).

To assert the wrongful death claim, we alleged that Louis Gumpenberger was killed as a direct and proximate result of her actions and pursuant to §537.080 and 537.090 the next kin of Louis Gumpenberger.

Terrence J. Dee v. Synergy Chiropractic Center, et al.

This case was referred to us by a lawyer in Kansas City. Our client went to Synergy Chiropractic Center for a routine adjustment.

While there, the chiropractor negligently adjusted our client's neck, causing an acute dissection and occlusion of his left vertebral artery and eventually leading to an acute ischemic stroke. We initially filed suit against Synergy Chiropractic Center and Dr. Rodney Bampton.

However, as we learned more about the case, we learned that it may have been another chiropractor that adjusted our client, and amended our petition before the statute of limitations in order to make sure we obtain justice against the proper party. The records say Brampton did the adjustment but it was really another chiropractor.

Because no answer had been in the case, we were able to amend as a matter of course. This case is pending in St. Charles County and is assigned the case number 1911-CC00920.

Michael Asher v. James Mowry and Drain Medics

We filed a petition against one of our clients' employers for failure to maintain an OSHA compliant work environment. Our client was working as a drain technician and while up on a ladder, the ladder slipped out from under him and he seriously injured himself breaking both wrists.

The ladder did not have footings to keep it from slipping and was provided by the employer. Under OSHA, an employer must provide compliant equipment to its employees. There is a general negligence component but also a negligent supply of dangerous instrumentality.

We alleged both for our client. To allege negligent supply of dangerous instrumentality, we stated it was supplied by the employer, it had a defect, the employer knew or should have known, and they failed to exercise care to correct it and it caused our client damages.

There was also a discrimination component to the petition. This is a work-related injury, and thus a workers compensation claim was filed. After it was filed, our client began to lose pay – his employer was progressively lowering his rate of pay by the week and that it was because he couldn't afford to pay him and he had a workers compensation attorney.

An employer cannot retaliate against an employee pursuing work comp benefit. This violates R.S.Mo. § 287.780.

Hive Beetles

I visited with my client Jamarin before his depo this morning. He asked about my bees. So, I am adding this to the newsletter. (Great job in your depo by the way).

I did some work on the hives over the weekend to get them ready for summer and to guard against hive beetles. I drilled holes in the sides of the hive and will block the bottom entrance to make it harder for hive beetles to get in the hive.

It's a challenge to drill holes and drive screws around thousands of irritated bees. But it went off without a hitch on only one sting. And yes, I do not use gloves.

The small hive beetle (*Aethina tumida*) is a beekeeping pest. It is endemic to sub-Saharan Africa, but has spread to many other locations, including my backyard.

The small hive beetle can be a destructive pest of honey bee colonies, causing damage to comb, stored honey, and pollen. If a beetle infestation is sufficiently heavy, they may cause bees to abandon their hive.

Its presence can also be a marker in the diagnosis of colony collapse disorder for honey bees. The beetles can also be a pest of stored combs, and honey (in the comb) awaiting extraction. Beetle larvae may tunnel through combs of honey, feeding and defecating, causing discoloration and fermentation of the honey.

Here are some pics. The first is of hive beetles (not from my hive) and the rest is my project:

Ladies tried to use the hole as soon as I drilled it.

Below - two full frames removed while working.

Happy Monday, Friend,

Well, I cannot top my last email about the Court of Appeals affirming our class action verdict.

But we have been busy. In this email, I share two stories about our firm's work that were in the news lately - time clocks being installed (wrongly) by the DOC and a new class action we filed for correction nurses.

Then an article on the Illinois Contribution Statute for settling claims among multiple defendants and three other interesting new cases we filed. Blues Stanley Cup pics at the end.

In the News

We were in the news twice last week: one for a new case we filed and one for a development in our class action case.

'The state is doubling down on their bad decision' in not paying corrections officers, attorney says.

The State is installing time clocks at its prisons - but not at the front door of prisons. Here's from the article:

"What they're doing instead is putting these time clocks back in the bowels of the institution," Burger said.

Instead of one timeclock at each prison, the Missouri Corrections Officer Association said it could take as many as 25 to equip each post.

"It's going to be another failed system," said Gary Gross, an MCOA spokesman. "It's going to have to be challenged. It does not comply with the court order, in our opinion."

Meanwhile, the Department of Corrections has stopped talking about it ever since Fox 2 started keeping track of the interest that climbs by the second. Spokesperson Karen Pojman has ignored questions about the time clocks in July, again in September, and now this month, all while an appeals court just last week affirmed the court order and judgment.

Corrections Nurse Case

We also filed a case for corrections nurses. They have to do the same pre and post shift work that corrections officers have to and do not get paid.

The case is not against the State, but against a private employer - Corizon. It is an FLSA claim and we will seek class certification as Corrections Nurses are treated similarly.

Here's a quote from the article:

Nurses who work in Missouri's prison system say they too are owed potentially millions of dollars in back pay, according to a lawsuit filed Friday.

In a 20-page suit filed in federal court, a trio of nurses who work for a contractor at the state's lockup in Licking alleged they have not been paid for work they do once they arrive at the prison.

The lawsuit seeks class-action status covering all current and former nurses in the sprawling Missouri Department of Corrections facilities.

The case mirrors one in which a Cole County jury found that 13,000 current and former correctional officers were owed $113.7 million because the state wasn't paying them when they entered a prison's security envelope, even though they were expected to respond to incidents once inside.

The bill for that case has grown by at least $12 million while the state appeals.

Unlike the case brought by the guards, the nurses are suing a private company that has been contracted out by the state to provide healthcare for inmates.

Corizon, which has similar contracts across the country, has been paid more than $1.1 billion by the state since 2012.

JTCA

In 1979 the Illinois Legislature enacted the Joint Tortfeasor Contribution Act ("JTCA"). 740 ILCS 100/2. The goal was to promote 2 policies: encouraging tortfeasors to settle disputes and equitable apportionment of damages among tortfeasors.

It's a complicated law - mostly because its brief and does not give a lot of direction. It also affects other joint liability statutes in Illinois. Below I give some highlights of the JTCA.

The Act itself really only has one requirement: that the settlement be made in "good faith." 740 ILCS 100/2 (c). The act does not define good faith, does not state what should be considered when making a good faith determination, and does not give

guidelines to a court on whether a full evidentiary hearing is necessary to make this determination.

The Illinois Supreme Court has given the only guidance stating "a trial court should consider the totality of the circumstances surrounding the settlement to make this determination. *In re Guardianship of Babb,* 642 N.E.2d 1195 (1994).

This standard enables the trial court to strike a balance between the public policy favoring the peaceful settlement of claims and the policy favoring the equitable apportionment of damages among tortfeasors. *Associated Aviation Underwriters, Inc. v. Aon Corp*., 800 N.E.2d 424 (Ill. 2003).

On the flip side, a settlement will not be found to have been made in good faith where there has been collusion, unfair dealing, or wrongful conduct by the settling parties. *Babb,* 642 N.E.2d 1195.

In addition, a settlement agreement that conflicts with the terms of the Contribution Act or is inconsistent with its underlying policies cannot satisfy the good-faith requirement. *Dubina v. Mesirow Realty Development, Inc*., 756 N.E.2d 836 (Ill. 2001).

A finding of good faith though is extremely beneficial to the settling tortfeasor. A settlement and the apportionment made in good faith relieves a settling party of any liability for contribution to the non-settling defendants. *Babb,* at 1198.

Other than the "good faith" requirement, the Act gives restrictions for when it applies, such as only when there exists a right of contribution among tortfeasors where one has paid more than their fair share of the liability. 740 ILCS 100/2(a), (b).

The JTCA also affects apportionment of fault at trial. Until 2008, Illinois courts could apportion liability among plaintiffs, settling parties, non-settling parties, and even non-parties. That changed in *Ready v. United/Goedecke Services, Inc.,* 905 N.E.2d 725 (Ill. 2008).

Courts cannot apportion damages to settling parties anymore. To have a settling party be considered in apportionment of fault, the defendant must implead them as liable to the defendant for contribution. However, if the court made a finding the party settled in good faith, then they cannot be liable for contribution. That is the JTCA at work to promote settlement.

New Lawsuits II

Still filing a lot of lawsuits. We pride ourselves in representing clients for a lot more than only car and truck crashes.

I. Bad Faith Claim – Missouri

We have two bad faith vexatious refusal petitions we filed in Missouri. The first is only over property damage. Our client gave her daughter permission to drive her vehicle. Unfortunately, her daughter was involved in an accident.

The insurance company refuses to pay for anything despite there being an automobile policy that covers the vehicle's damage and the third-party damage.

Under Mo. Rev. Stat Section 375.296, to show a vexatious refusal to pay claim we must show: (1) the claimant made a demand; (2) the insurer failed or refused to pay for a period of thirty days after the demand; and (3) the refusal to pay was vexatious and without reasonable cause.

"A plaintiff who successfully shows vexatious refusal may be awarded, in addition to the amount due under the contract of insurance and interest thereon, damages and attorney fees. *Tauvar v. Am. Family Mut. Ins. Co.*, 269 S.W.3d 436, 439 (Mo. Ct. App. 2008). This claim is a first party claim to pay for the insured's property damage.

In order to show bad faith, we have to show: (1) The insurance company assumes control of the negotiation, settlement and defense of the action; (2) the insured has demanded that the insurer settle the claim; (3) the insurance company refuses to settle within the liability limits of the policy; and, (4) the insurance company acted in bad faith, rather than negligence, in refusing to settle. See *Dyer v. Gen Am. Life Ins.* Co., 541 S.W.2d 702, 704 (Mo. App. 1976).

This is a third-party claim. In *Zumwalt* the court defined bad faith as when the insurance company has intentionally ignored the financial interest of the plaintiff in the hope that the insurance company can escape its responsibility under the policy. *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 374, 228 S.W.2d 750, 756 (1950).

Since there is an automobile policy, no exclusions for drivers, and the driver had permission, we believe we have a strong case for vexatious refusal and bad faith. If we show both, we can get additional damages, emotional distress, attorneys fees, and possibly punitive damages. *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 589 (Mo. Ct. App. 2008).

The second Missouri bad faith claim stems from an auto accident that happened in 2016. Our clients were hit by two vehicles. They were on highway 270 westbound and the traffic was stopped.

They stopped for traffic and were rear ended by a car that had been rear ended by another car. They had underinsured insurance through their insurance carrier and we demanded payment under them on behalf of our clients.

We settled with the main liable party and obtained permission to do so from our underinsured carrier. However, the other driver did not offer much and came this close to winning summary judgment.

We advised the Underinsured Carrier it was in bad faith for them to require full recovery from the middle driver when we did so from the driver in the back that started the whole thing. We have been trying to talk with the underinsured company for months without significant response.

So, we made a demand and filed suit against the insurer.

One of the underlying claims is going to trial soon so updates to come.

We also filed a lawsuit against a physical therapy company and physical therapist on behalf of two separate patients who were both sexually assaulted during their treatment.

The physical therapist at issue had already been disciplined by the Missouri licensing board for sexual abuse of a patient *prior* to the assaults against our clients.

Furthermore, several other patients reported his inappropriate conduct to the facility, yet the facility continued to employ him. In our lawsuit, we are alleging counts for assault and battery, medical negligence, general negligence, negligent supervision, negligent failure to warn, negligent hiring and retention, negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages.

We are also asserting that the facility is vicariously liable for the physical therapist's conduct. Even though it is blatantly obvious that sexually assaulting patients does not constitute the practice of physical therapy, we nevertheless have to assert medical malpractice claims due to the strict interpretation of Missouri's statutes since tort reform.

This is very significant because medical malpractice claims only have a two-year statute of limitations, rather than the five years for other personal injury claims.

Even though we have several different negligence theories, courts often require that all are asserted within the two-year statute of limitations since they are levied against medical providers arising out of the doctor-patient relationship.

#LGB

-Gary Burger

Hey, Friend,

It’s the middle of the week and I know you're busy.

In this email I share: details of how to make a demand to help clients show an insurance company is acting in "bad faith;" our awesome volunteer experience with Gateway Pet Guardians last weekend; and a partial med-mal settlement and legal ethics rules about pretrial publicity.

Let's get to it.

Bad Faith Demand under 'New" Statute

The Missouri Legislature issued new rules last year with more requirements for a written demand to be put into evidence in a bad faith case.

A bad faith case is when an insurance company should settle a case, but does not and leaves its insured subject to personal liability. It happens often. An insurance company acts in bad faith when it violates duties to an insured (who has paid premiums for years) and does not protect them when they are sued.

Spoiler alert - it worked and we settled Letitia's case for $100,000.

How to do a demand under R.S.Mo. § 537.058 you ask?

First, put all the statutory requirements in the beginning:

- Caption: *Letitia Stout v. Craig A. Nichoals, et. al.*
- Case No.: 18SL-CC04507
- Claim No.: 034076358 0101 030
- Demand Amount: $100,000 (Policy Limits)
- Time Limit for Response: 90 Days
- Date of Loss: August 18, 2017
- Location of Loss: St. Louis County, Missouri
- Party to be Released: Geico Casualty Company
- Known Injuries: Shoulder, neck, chest, back, ribs
- Claims to be Released: Bodily injury and related claims
- Re: Demand Pursuant to R.S.Mo. § 537.058

Second, describe the incident and damages, like this:
We represent Letitia for injuries she sustained in an automobile accident on August 18, 2017. This accident was caused when an uninsured motorist negligently changed lanes without signaling, crashing into Ms. Letitia Stout's vehicle.

We previously provided medical bills and records to your client, Geico Casualty Company. For your reference, below is a summary of Ms. Stouts medical costs:

Provider Amount

Total Access Urgent Care $304.64

Accelerated Care Center $3,275.43

Athletico $7,484.17

Greater MO Imaging $6,000.00

Total $17,064.24

After the accident Ms. Stout suffered immediate pain in her left shoulder. She also had pain in her neck, chest, and back. Ms. Stout went to Total Access Urgent Care on August 20, 2018 and reported pain in her shoulder, neck, chest, and back, along with numbness in her extremities. She was diagnosed with a fractured shoulder and rib contusion.

Due to continuing pain, Ms. Stout went to Accelerated Care Center for further treatment. At ACC she reported continuing neck and shoulder pain. She also suffered from numbness, radiating pain, and limited mobility. She was diagnosed with a cervical strain and a CT scan was ordered for her neck and shoulder.

After a CT scan, Ms. Stout was diagnosed with a lumbar strain, cervicalgia, and a torn labrum. She started treatment at Athletico Physical Therapy on September 14, 2017. She attended 16 visits over the course of two months. Ms. Stout received four pain injections for her shoulder, but still continues to suffer from ongoing pain.

Letitia complained of shoulder pain immediately. She indicated this in the police report. She then indicated this to the urgent care center where she went for medical treatment. At the urgent care center, an x-ray revealed that her shoulder was fractured.

Dr. Solman at ACC entered a note on January 16, 2018 indicating that an MRI showed there was a rotator cuff tear and he recommended surgery. He says in his notes and we would expect him to testify at trial, that the tear was caused by this accident.

Letitia's medical bills and treatment history indicate that this was a serious accident. She continues to suffer from ongoing pain and is expected to incur additional medical costs, including a rotator cuff surgery which would cost $95,000. Plaintiff hereby demands $100,000.00 to fully settle and resolve this claim.

Third, tell them how you complied with the statute:

This is a demand for settlement pursuant to R.S.Mo. § 537.058. This is an offer of unconditional release of liability for Geico from all present and future liability for this case, as described by R.S.Mo. § 537.060.

This demand is:

- made with the understanding that Ms. Stout has $100,000 in uninsured motorist coverage. If this is incorrect and there is additional coverage available, please advise immediately.
- accompanied by a list of the names and addresses of the health care providers that have treated our client's injuries from the date of injury to the date of this demand. HIPAA compliant written authorizations sufficient to allow you to obtain records from the health care providers listed are also provided.
- accompanied by the name and address of our client's employers at the time she was injured to the time of this demand. Written authorizations sufficient to allow you to obtain records from the employer are enclosed.

We believe, because of the clear liability and our client's extensive injuries, it would be faith for your client to not settle this case for the policy limits. If you need any further information or documents to evaluate this claim, or have any questions, please let me know.

Fourth, accept the policy limits like we did for Letitia or go to trial and pursue the bad faith case.

Volunteer at Gateway Pet Guardians

We had a great time volunteering at Gateway Pet Guardians in East St. Louis on Saturday. Gateway provided straw to area pet owners to line dog houses for warmth this winter. We had tons of folks come by for straw and to visit.

Gateway Pet Guardians truly earns its slogan "Beyond Rescue." It is a nonprofit animal welfare organization in the East St. Louis metro area by providing resources to the community in order to eliminate homelessness for dogs and cats. I am really proud of my wife Kristen, for her work on the board.

Gateway works hard to rescue strays in East St. Louis.

But they also exert a huge effort to make sure that good pet owners in ESL can take care and keep their pets - and go Beyond Rescue. We all know how much pets can enrich our lives - but they can be expensive. Gateway assists with vaccinations, spay and neutering and food for dogs and cats.

They teach pet owners best practices for animal care too. They reduce strays by keeping them home'd in the first place. They do weekly outreach, knocking on doors to support dog owners and teach responsible ownership.

For their latest project, Gateway Pet Guardians will turn the former Miles D. Davis elementary school into a community resource center to bring much needed animal services to the area.

They bought an entire school to transform it into a center for pets in East St. Louis.

They are cementing their presence in the community to make life better for pets and the people who love them.

Their volunteers also feed the strays in East St. Louis on a daily basis. When a foster family comes forward, they can then rescue one of the many dogs in the area.

All of Gateway Pet Guardians' adoptable animals are in the care of loving foster families within their network while they patiently await their turn to be adopted to a forever home.

They also have an Emergency Shelter located at 5321 Manchester Avenue in Saint Louis. Due to the emergency nature of the animals in our care, our shelter is not open to the public.

Please contact them if you would like to set up an appointment.

Partial Settlement in Med Mal case

Super proud to settle part of a medical malpractice case for the Irving Family.

We settled part of the case as some defendants accepted responsibility. We will continue to pursue the ones who have not.

See the video below for Shaneka and I talking about wrongful death settlement law.

But I will not talk about it too much here for two reasons: First, confidentiality is often part of med-mal settlements.

Also, did you know there is an ethics rule about pre-trial publicity?

Rule 4-3.6 provides:

TRIAL PUBLICITY(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

But a lawyer may state:

(1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step-in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to Rule 4-3.6(b)(1) to (b)(6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

But what happens when the other side talks? Well then:

(c) Notwithstanding Rule 4-3.6(a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this Rule 4-3.6(c) shall be limited to such information as is necessary to mitigate the recent adverse publicity.

-Gary Burger

Good morning, Friend,

With Thanksgiving next week, our focus is on Thanks.

A recent settlement we completed underscores how fragile life is and a reminder to have gratitude for our families and loved ones.

I discuss this case below and dive in on sovereign and official immunity in cases. I do not have any family pics or descriptions in this one - didn't feel right. I do have a video I did of the path of the defendant driver and Paul's widow and I discussing the case.

$765,000 Settlement

We represent Paul's family. He tragically died last year. He was traveling with his wife near Potosi Missouri on highway 185 when they encountered a car crash.

Being the kind of guy Paul was, he stopped his car and got out to help. He was walking to the top of a ridge to flag oncoming vehicles when he was hit and killed. He was walking in the center of the highway.

Devon DE Clue was responding to the first accident on behalf of the Potosi Fire Protection District. As the police report states, DeClue:

- *was traveling south on Missouri 185. Paul was walking north in the Center of Missouri Highway 185. After cresting a hill, DeClue inattentive to the roadway ahead and observed Vehicle 1 stopped. DeClue applied his brakes and steered left, in an attempt to avoid a collision with Vehicle 1. But, was unsuccessful.*
- *DeClue's Vehicle began to skid, crossed the centerline, and the front right of DeClue's Vehicle collided with the rear left of Vehicle 1. Paul began running to the east road edge of Missouri 185. DeClue's Vehicle traveled across the center of Missouri 185 and its front right collided with Paul.*
- *DeClue's Vehicle travels off the roadway and collided with a fence and trees and came to a rest in a field off the east road edge facing southeast.*

It was a tough case in that Paul was in the middle of the highway and DeClue was responding to an emergency as a volunteer EMT.

But the reconstruction stated DeClue was going 60 mph at a minimum. This was not that fast on a highway. But I went to the scene and took these pictures:

DeClue should only have been going 45 mph.

The reconstruction report also correctly noted that DeClue was "responding with the fire department to assist with the first crash and should have been aware a crash was in the area."

We noted that multiple other cars were able to successfully stop without hitting Paul or other cars. All of the witnesses listed on the police report state they saw Paul, knew he was flagging down cars, and were all able to stop safely.

We filed suit and engaged in discovery. We negotiated with the other side and were able to agree to a settlement. The money will go into a structured settlement for Paul's sons and his wife. Such a sad case to handle.

So lucky to be able to help the family – we also had to open a probate case to get Paul's life insurance proceeds. And lucky to help provide financial security for them in the face of this tragedy.

Legally in a case like this we navigate sovereign and official immunity, as discussed in the next article.

Immunity of Governmental Entities and Public Employees

Sovereign immunity has been recognized in Missouri since 1821 and official immunity has been recognized since 1854. *Soothers v. City of Farmington*, 263 S.W.3d 603, 611 (Mo. 2008).

Both types of immunity derive from the British common law. Sovereign immunity reflects the British common law idea that the "King can do no wrong."

In Missouri, official immunity was adopted in *Reed v. Conway*, 20 Mo. 22 (1854), also from British common law, based on the idea that public officers are immune from liability for discretionary decisions, so long as their motives were "not tainted by fraud or malice."

The law surrounding each has application to many different types of political subdivisions and public employees. It is helpful to provide an overview of the laws, and then specify their application to different defendants under current Missouri law.

State Sovereign Immunity

The State of Missouri and its governmental divisions are generally immune from suit for torts, as they are sovereigns. R.S.Mo. § 537.600. However, § 537.600 provides that immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is expressly waived in two instances and a third instance is covered in R.S.Mo. § 537.610.

Those 3 instances where sovereign immunity is waived are:

1. injuries "directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment" and
2. resulting from the dangerous condition of public property,
3. The third way sovereign immunity is waived is if there is applicable insurance. Under Missouri statute, a public entity can purchase tort liability insurance and statutorily waive sovereign immunity. R.S.Mo. §71.185 and § 537.610.

Four notes on these waivers (and a note on Illinois handling of sovereign immunity):

First, for negligent design claims against the Missouri Highway and Transportation Commission (don't sue MODOT), they have a special defense. If the highway department can prove that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards, they get a complete bar to recovery. § 537.610(2).

Second, R.S.Mo. § 537.600.2 clarifies that the waivers of immunity are *absolute* waivers of sovereign immunity.

Third, longstanding case law interpreting the statutes holds that municipalities waive sovereign immunity for governmental functions to the extent they are covered by liability insurance. *Southers*, at 609.

Where a party can show the existence of insurance and that it specifically covers the negligence at issue, immunity for public entities has been waived under Missouri statute. *Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432, 434 (Mo. Ct. App. 1997).

Fourth, under R.S.Mo. § 537.610, **the maximum amount of coverage shall not exceed $2 million for each occurrence and shall not exceed $300,000 for**

any one person. Further, if coverage of the insurance is less than these amounts, immunity is only waived up to the coverage of the amount of insurance.

No award for damages against a public entity within R.S.Mo. § 537.600 and RSMo. § 537.650 can include punitive or exemplary damages. R.S.Mo. § 537.610(3).

Lastly, Illinois has a slightly different model. In Illinois, the Illinois Court of Claims has exclusive jurisdiction to hear all claims against the state founded upon any law of the State of Illinois, founded upon any contract entered into with the state, and all claims against the state for damages in cases sounding in tort. 705 ILCS 505/8.

Further, pursuant to Court of Claims Act § 22-1, any person who brings a claim for personal injuries in the Court of Claims must file specific notice of the claim within one year from the date of the injury or when such cause of action accrued in the office of the Illinois Attorney General and the Clerk of the Court of Claims. 705 ILCS 505/22-1.

Municipality Sovereign Immunity

Junger man v. City of Raytown, 925 S.W.2d 202, 204 (Mo. banc 1996) -- found common law sovereign immunity belonged only to state entities and *sometimes* municipalities. Municipalities are not provided immunity for *proprietary functions* but are immune under sovereign immunity for *governmental functions*. *Id*.

Proprietary functions are performed for the benefit or profit of the municipality as a corporate entity. *Id.* On the flip side, governmental functions are those performed for the common good. *Id.*

The operation and maintenance of a police force is a governmental function. *Fantasma v. Kansas City, Mo., Bd. of Police Comm'rs,* 913 S.W.2d 388, 391 (Mo. Ct. App. 1996).

Further, employees are not entitled to the sovereign immunity of their state or municipality employers. Per *Southers,* even though municipalities act through employees, the waivers of immunity applicable to municipalities and political subdivisions do not abrogate official immunity protections afforded to public employees. *Southers,* at 609.

If municipalities have tort immunity, they still waive immunity with auto and premises claims, and applicable insurance. RSMo. §§ 71.185 and 537.610; *Jungerman v. City of Raytown,* 925 S.W.2d 202, 204 (Mo. Banc 1996).

Official Immunity

Employees of governments sometimes get Official Immunity, which is a judicially created doctrine. Official Immunity protects public employees for the alleged acts of negligence committed during the scope of their official duties for the performance of discretionary acts. *Davis v. Lambert-St. Louis International Airport,* 193 S.W.3d 760, 763 (Mo. banc 2006).

This means the doctrine does not provide protections for torts committed when acting in a ministerial capacity. *Kanagawa v. State,* 685 S.W.2d 831, 835 (Mo. banc 1985).

Classifying an act as discretionary or ministerial depends on the degree of reason and judgment required. *Kanagawa,* 685 S.W.2d at 836.

- Discretionary acts -- require the exercise of reason in determining how or whether an act should be done or course pursued.
- A ministerial function is one "of a clerical nature which a pubic officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to a mandate."

Courts use a three-pronged test to determine how to classify an act. You consider: 1) the nature of the public employee's duties; 2) the extent to which the act involves policymaking or exercise of professional judgment; and 3) the consequence of not applying official immunity.

Because the defense of official immunity is personal to a public employee, it cannot be extended to protect his employing government entity sued under the doctrine of *respondeat superior*. *Southers v. City of Farmington,* 263 S.W.3d 603, 611 (Mo. 2008).

A government employer may still be liable for the actions of its employee even if the employee is entitled to official immunity because the doctrine protects the employee from liability, but it does not erase the existence of the underlying tortious conduct for which the government employer can be vicariously liable.

Application of official immunity law regarding paramedics includes an additional step in the analysis. Courts must still determine if the action was discretionary or ministerial, however, first courts now ask if the defendant was operating in a "true emergency situation" with limited information available.

If so, then their decisions are judged based on the information they had available at the time. *Thomas v. Brandt,* 325 S.W.3d 481 (Mo. Ct. App. 2010).

However, simply because an action is taking place during an emergency does not mean it is automatically discretionary. This was the court's finding in *Richardson v. Burrow,* 366 S.w.3d 552 (Mo. Ct. App. 2012) ("Richardson II").

Richardson II, decided after *Thomas*, involved the failure of EMT personnel to intubate a patient properly during transport when the patient's stats fell below 80. The court found the paramedic did not engage in discretionary conduct because his conduct was mandated by the criteria requiring intubation under the circumstances presented – even if the circumstances were emergent in nature. *Id.*

There, the court pointed out that even in a true emergency, an act can still be ministerial. Even in the emergency situation, the paramedic had all the information necessary, but just did not act according to the policy correctly.

Police Officers and Firefighters

Normal traffic accidents and high-speed chases where a fleeing vehicle injures someone, constitute some of the vast situations where the defendant is a police officer. The main case applicable to these situations is *Southers v. City of Farmington,* 263 S.W.3d 603, 611 (Mo. 2008).

Debra Southers sued the City of Farmington and individual police officers for negligence. The police officers were responding to an emergency and were engaged in a car chase with the suspect. While in chase, the officers crashed into a vehicle, killing two people and injuring Debra Southers as well. The plaintiffs sued the city and the officers involved in the chase and collision.

The issue before the Missouri Supreme Court was who had what immunity. The court ultimately found that the officers who were involved in the accident were immune from suit. The Court in *Southers* stated that the official immunity doctrine applies to officers responding to emergencies.

If the conduct is in the course and scope of employment – and for officers an emergency is just that – they are immune from suit. However, if the officer is not responding to an emergency, then they might not be entitled to official immunity. Subsequent cases have attempted to draw a line where acts are discretionary.

In *Rhea v. Sapp*, 463 S.W.3d 370, 372–73 (Mo. Ct. App. 2015), as modified (Apr. 28, 2015), Margaret Rhea filed a wrongful death suit against multiple defendants after her car was struck by a fireman responding to a fire. The question on appeal was whether the individual firefighter was entitled to official immunity.

The firefighter alleged he was performing a discretionary act and the court agreed. *Id.* at 376. The court found the individual firefighter acted in the course of his duties as chief of the fire department when he responded to the fire. *Id.* at 378. Based on the circumstances known to him at the time, the firefighter exercised his discretion when he elected to speed while traveling to the fire. *Id.*

This required judgment on behalf of the firefighter in determining the speed he could travel in response to a call from dispatch of a fire on a cattle trailer in the middle of the highway. *Id.*

What if the firefighter violates internal policies on speeding: "[p]ublic employees' conduct that is contrary to applicable statutes or policies can constitute evidence that their conduct was negligent, but that conduct does not remove their negligence from the protections of the official immunity or public duty doctrines where the provisions at issue indicate no intent to modify or supersede these common law immunity protections." *Southers,* at 617.

In *McCormack v. Douglas*, 328 S.W.3d 446 (Mo. Ct. App. 2010), the court considered whether the official immunity doctrine applied to a volunteer firefighter. The court found the volunteer was entitled to official immunity and there was no bad faith because the volunteer violated the district's policy and without more, the facts amounted to

negligence during the course and scope of employment and performing discretionary acts. *Id*. at 451.

-Gary Burger

Good morning, Friend,

January 2020

Well, I hope it's been a great year for you and your family. I wish you the absolute best for 2020. For those of you who read these email newsletters (even intermittently), thanks. I truly appreciate being able to share with all the friends of our firm.

I started these newsletters a little over four years ago. I send them every two weeks. I have done 106 of them.

In this one, I do my usual recap of the year, by the numbers, share a great Christmas gift my office got me, a video testimonial and a good settlement.

The great news is you will not hear from me again till the next decade.

2019 by the numbers

Cases tried to a jury and won: 3

Cases that were set for trial and settled within a month of trial: 13

Employees: 9 (and me)

Cases argued to Court of Appeals: 2

Decisions: 1 (click here for the opinion rendered; the other one has been stayed pending the Supreme court weighing in on co-employee claims in on-the-job injuries)

Appellate Briefs written: 2

Appellate cases lost: 0

Burger Law YouTube videos: 329 Click here for our YouTube channel.

Google reviews: 412. Click this link to review us if you have not yet.

Lawyer v. Lawyer podcast episodes with Debbie Champion: 58 - click here for the pods.

Bi-weekly emails sent: 24

Average Number of people who open our bi weekly emails: 2514

Cases/clients with current open files: 392

New dive cards: 0 :-(

Dives: 47 (way too low- lets change this for 2020)

Cases closed - most settled, a few terminated: 255

Books published on website: 4

Hosted CLE's: 1

Presented CLE's: 3

CLEs MC'd: 1 (Come to Max law Con 2020 in St. Louis for best CLE in STL next year - email me for details)

Additional bee hives: 1 (for a total of 3 - going to 5 next year)

Here's our snow man from last Tuesday:

Great holiday gift from my coworkers

I received the greatest gift from my coworkers at our holiday gift exchange. They always get me great stuff and do a secret Santa among themselves. I got a shark tie, a biking t-shirt, and a book on how to lower my blood pressure (true and funny).

But best of all, they bought a bunch of food and supplies for gateway pet guardians. I have written about them before - they are amazing. Here are pics of the gift and us delivering it to the dogs.

Best type of regifting there is.

Here's my 2018 by the numbers article to compare

Good to have accountability, so here is last years:

But first, the end of the year is a good time to assess. Here's a great quote by actor Douglas Fairbanks: "In taking stock of ourselves, we should not forget that fear plays a large part in the drama of failure. That is the first thing to be dropped."

To that end, here is Burger Law's 2018 by the numbers:

Amount awarded in jury verdicts and judgments: $113,714,362

Cases tried to a jury and won: 1

Cases tried to a jury and lost: 1 (very proud of this fight)

Jury verdict average $56,857,181

Cases that were set for trial and settled within a month of trial: 11

Google 5 Star reviews: 373.

Employees: 8

Burger Law YouTube videos: 244

Lawyer v. Lawyer podcast episodes with Debbie Champion: 30

Bi-weekly emails sent: 24

Average Number of people who open our bi weekly emails: 2,012

Cases/clients with current open files: 314

New dive cards: 2 dive control specialist and assist and instructor

Dives:78 (way too low- lets change this for 2019)

Cases closed - most settled, a few lost or dismissed: 307

Books published on website: 4

Hosted CLE's: 1

Presented CLE's: 4

Scholarships awarded: 1

Appellate Briefs written: 2

Appellate cases lost: 1

Additional kids: 1

Additional bees: 12,000

Another client testimonial

We have a ton of these on our YouTube channel and website. Here's client Eric King talking about what a **great job Genavieve Fikes did in his case.**

Eric was injured on July 21, 2018, when he was rear ended at a high rate of speed. Mr. Bailey then fled the scene, and did not turn himself into the police until July 25, 2018, at which time he was given traffic citations for failing to reduce his speed and leaving the scene of an accident that caused damage.

Eric had 1 ER visit and less than $2,000 in chiropractic bills - we settled his claim for **over $23,000.** The pictures really helped:

$100k and $75k Settlements

We ended the end of the year with some good resolutions in a couple auto cases.

We represented Julie in an auto crash rear ender. Although liability seemed clear we couldn't get the insurance company to pay policy limits. She had back and neck treatment after the crash.

Her doctor recommended surgery but she has not had it. she has a history of prior neck and back problems as well and used a chiropractor to maintain her back in her medium labor job. We filed suit, did a policy limit demand and pushed the case. Defendant relented after we showed how the treating doctor was going to testify.

We settled Rich's case for $75,000. The case was referred by a lawyer friend who did a great job and wanted us to push this civil case. We did. We filed suit and limited the claim to $75,000 to prevent removal to federal court.

After litigation and producing Rich for deposition the defendant's insurer paid the top amount we could get. So happy to help this quality person. Great to get to know him.

If you have not made it yet - go see the Christmas lights at the zoo.

-Gary Burger

Happy Monday, Friend,

February 2020

I trust 2020 has started well for you. It has for me - been busy the last couple weeks.

We decided to take kind of a last-minute New Year's Trip to Cuba - fascinating country!

I'll share some pics from that trip below, but first I'm announcing the first CLE of 2020 - March 6 at my office building downtown. Defense lawyer Tim McCurdy of Lashly Baer and I are teaming up to teach How to NOT have your experts struck. He and I had a conversation about some recent successes he and I have had in the expert area under the (not so new) Missouri Expert Rules.

We thought they would make a good CLE. If you're a Missouri litigator - come and learn.

Also below is a story from a court appearance last week that got me thinking about consumer debt, the last Lawyervlawyer podcast of 2019. I divided the consumer debt story into two parts - with the second coming in the next email.

CLE - How NOT to have your expert struck

Taking a treater's depo and worried about foundation? Naming a bunch of defense experts and wondering if plaintiff's counsel is going to try to strike some of them? Not really sure what you're going to see in a Motion to Strike or in Limine about your expert right before trial?

Join us on March 6 at 11:00 am to have all your questions answered and your mind put to rest. ;-)

Tim McCurdy and I will take you through Advanced Expert Law applied to varied facts, with cases to back us up about disclosure, foundation, reliability, deposition and trial. We will have sample Motions and good written material.

March 6, 2020 at 11:00 am with lunch provided after. 1 Hour approved CLE credit. $25. @ 500 N. Broadway, First Floor. Tim and I will troubleshoot your expert and case issues during lunch - so come with questions.

Consumer Collection Lawsuits - Part I

So, I was sitting in Lincoln County court on Tuesday to set an auto crash case for trial.

We represent a client who was hit and needs surgery. We are hopeful to settle the case, but the insurance company will not pay enough so we are setting this case for trial and hope to get a large verdict for him.

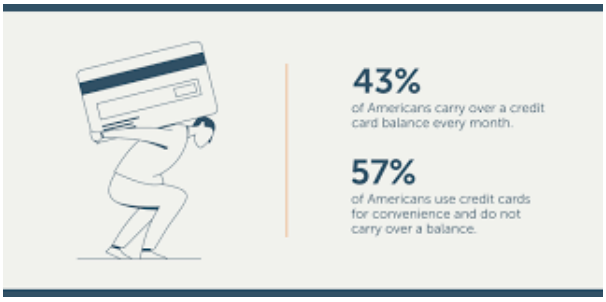
But that is not what this story is about. As I was sitting there, an older gentleman and his wife were called up in front of the Court because Bank of America was suing them.

The bank was about to take a default judgment against him and his wife. He had been to Court a number of times on this debt. He could not afford an attorney and could not figure out the paperwork to hire Legal Service of Eastern Missouri.

The Judge advised that he would go ahead and enter a default judgment against him - even though he was right there, which I thought was weird.

So, I asked to approach the bench, mentioned I was a board member of Legal Services and asked if I could help. I met with the man and his wife.

I got the lay of the land from this man and his wife and told them a bunch of things to do to help them with their debt problem. This was the nicest couple - they had not done anything wrong or run up debt improperly. The wife had open heart surgery and medical costs and the husband just did his best to pay the bills. Both were disabled.



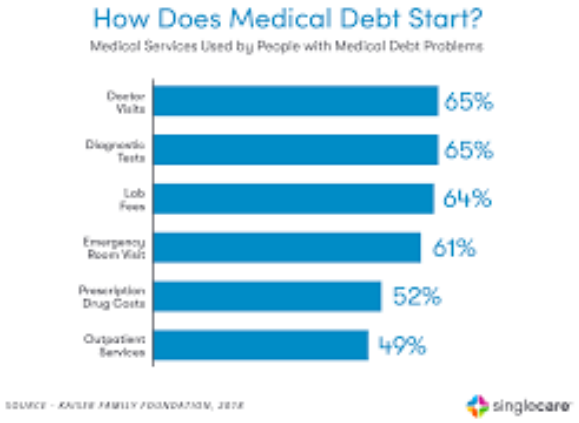
I learned that they hired a debt consolidation protection service out of Nevada and paid them every month. But, every time he gets sued by a bank, the company he hired does not do anything and he has to come to Court and represent himself.

He had fought his Sam's Club credit card company and now he was fighting Bank of America.

The fact that credit card companies, banks, and large finance institutions use our Courts to harass Americans on their debt really disturbs me. I go to court a lot all over this half of the state. I often see Courts bring up many Americans to chastise them about the fact that they cannot pay all their debts and are being sued.

People who get sued by credit card companies or other loan companies have to take time off work, go to Court, get called out in public, sheepishly walk up and get lectured in front of the Court, and feel inadequate and irresponsible.

Credit card companies advertise and solicit these people, they strategically alter the interest rates, try to get you to get a credit card on every college campus and airport, and do aggressive marketing to get customers in the first instance. They don't care if you can afford the card or know how to spend responsibly.



Our judges and lawyers sit in many courts for many hours every day across the State of Missouri and across the nation having these credit card companies use our court systems to harass Americans and make us feel like crap.

It is a disgrace and a national embarrassment.

I have sat through dockets where at least 50 people were called in front of the Court to get judgments against them with another 50 not there and defaulted. They have the threat of a Court Judgment and garnished wages or losing their houses if they do not jump through these hoops. It is demeaning.

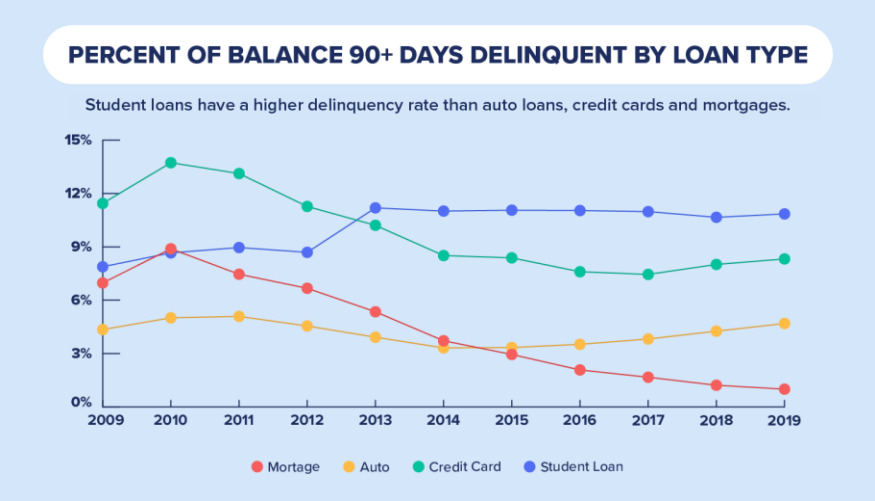
Why is it brilliant for a corporation to run up a bunch of debt, or pay money to investors or other entities, and then declare bankruptcy?

Why is our president a smart business man for having 6 bankruptcies and filing over 3,500 lawsuits?

Why do we let corporations set up a different LLC for every investment they do allowing them to hide behind the corporate veil?

But it's extremely embarrassing and a scarlet letter of shame, for an individual American to have debt, be unable to pay their bills, or to declare bankruptcy?

The drums of tort reform are being beaten again in the Missouri legislature and other states across the country as legislators open up for business again for the new year. They say personal injury cases are clogging up the Courts and taking our valuable judicial resources.



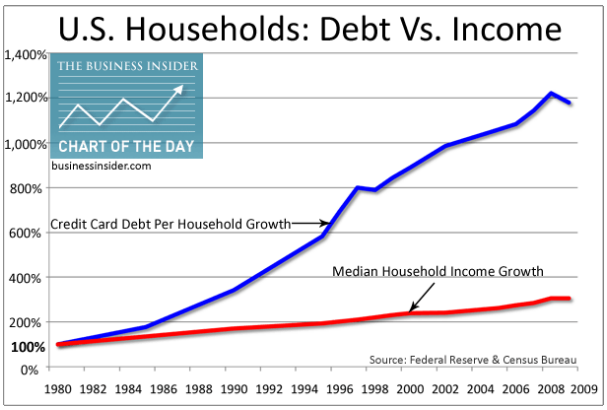
It is a lie. Credit card companies and debt holders clog up our Courts. In the State of Missouri, approximately 50% of the cases filed are debt collection actions. In Saint Louis, over 100,000 judgments were issued in debt collection lawsuits from 2008 to 2012.

Collectively, the individuals who were victims of these lawsuits lost over $50 million in wages through garnishments.

This is not just a St. Louis problem, rather Missouri residents all across the state are harassed by large debt collection agencies. For example, in 2008, a combined 15,321 debt collection actions were filed in Jackson County, St. Charles County, and the City of Saint Louis.

In 2009, 5,621 debt collection actions were filed in the Jackson County Circuit Court, cases in which 95 percent of the defendants did not have an attorney to protect their rights. The reality is, for most courts across the country, debt buyers filed more suits than any other type of plaintiff.

Why do the tort reform advocates try to restrict our access to Courts without restricting the debt collectors' access to Courts anyway?



In some states you have no fault insurance and you can't even file a lawsuit for car crashes. States have arbitrary caps and limits on damages without regard to the quantum of damages someone has actually suffered. States also have mandatory arbitration where you do not even have the right to a jury trial for cases.

In Illinois, a fairly democratic/progressive state, there is mandatory arbitration for any injury case under $50,000 and all claims against your own insurance company. I have written about this before.

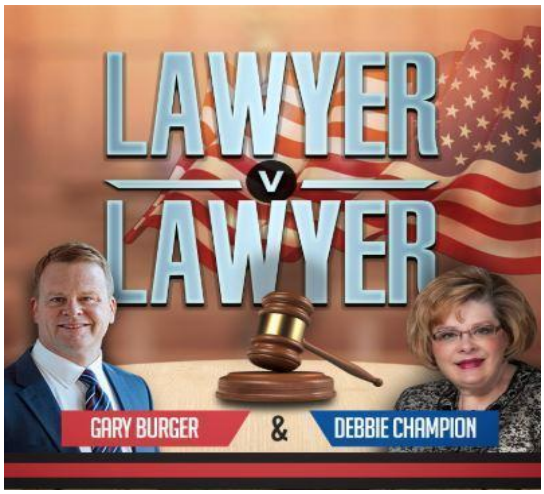
This gives the insurance companies the power to string people along, deny valid claims, delay payment of claims and make people hire lawyers to go through many hoops to get a recovery (after they paid premiums for 20 years to the same insurance company).

Next Newsletter - My solution

Lessons from 2019 PODCAST

Debbie Champion and I did another 29 episodes of our Lawyer v Lawyer Podcast in 2019.

In our last one, we discussed lessons we learned (and mostly relearned) in 2019.



Here are some pics from our Cuba trip:

-Gary Burger

Dear, Friend,

Today's email discusses two great settlements on the eve of trial, Part II of my thoughts on consumer debt and some volunteer work our family did at Gateway Pet Guardians.

But first let me plug a great Continuing Legal Education class we are presenting. Register now - limited seats left.

CLE - How NOT to have your expert struck

Taking a treater's depo and worried about foundation? Naming a bunch of defense experts and wondering if plaintiff's counsel is going to try to strike some of them? Not really sure what you're going to see in a Motion to Strike or in Limine about your expert right before trial?

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Two great settlements on the eve of trial

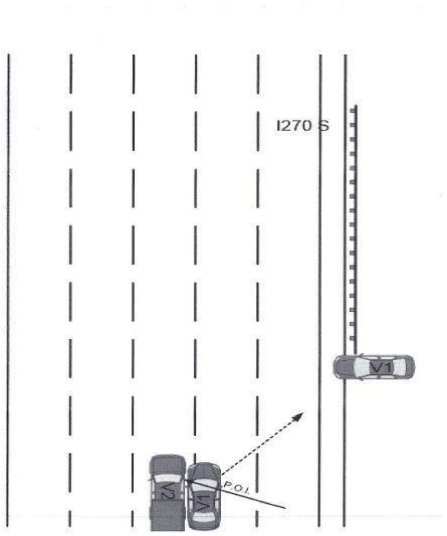
On Saturday, I settled Mary's car crash case against Allstate. We were scheduled to go to trial yesterday. Mary was injured in a 2017 car crash. The offer was $21,000 until about 4:30 on Friday afternoon when Allstate capitulated and paid the $100,000 policy limits.

And yes, I work on Saturdays.

This often happens in my practice. The client and I decide the value of the case and then we keep going until the other side realizes the wisdom of our position. Often, the only power an injured person has is a trial against the wrongdoer's insurance company.

We took the medical doctor's depositions by video tape and filed our full pretrial with the court. We argued the motions on Friday and were ready to go. The courthouse closed because of a winter storm and the judge kept the Motion hearing on schedule by doing them from his home on a conference call.

After winning the key motions and insisting on the accurate value of the case we got what Mary deserved.



In the second case, my great coworker Genavieve obtained a $90,000 settlement in a car accident case for her client Jamal where there was only $4,500.00 in medical billing charges. Sometimes, the low cost of medical bills does not reflect the severity of our client's injuries. Here, Jamal suffered a small labral tear in his right shoulder in a crash that happened like this:

He was treated conservatively with physical therapy and injections. An orthopedic surgeon opined that an arthroscopic surgery would not be unreasonable for him to consider if he continued to have persistent pain and weakness.

However, the surgeon informed Jamal that the recovery process after such a surgery could take up to a year. Jamal works in a job that requires him to use his arm and shoulder. He already missed five weeks of work. Jamal ultimately decided to forego having the surgery, but he might go forward with it in the future.

In a situation like this, where a client has a serious injury but low medical bills, it is extremely important to add value to the case by highlighting other factors.

Here, Genavieve emphasized that this was a high-speed collision on the highway, Jamal's car was totaled, and objective evidence showed a labral tear.

In addition to the $4,500 in medical charges and $4,800 in lost wages already incurred by Jamal, Genavieve estimated the cost of a future arthroscopic labral repair ($27,171.00), anesthesia ($5,424.00), post-surgical physical therapy ($15,572.43), and future lost wages ($4,000 - $20,000). Suddenly, Jamal's economic damages increased from $9k to ~$60k-$80k.

The policy limits in the case were $100,000. Genavieve sent a bad faith letter pursuant to RSMo. § 573.058, demanding the $100,000 limits.

Insurance companies are often hesitant to consider future medical or future lost wages, claiming they are speculative. But if they don't consider them, and a jury *does*, they run the risk of getting an excess judgment at trial.

Likewise, Jamal ran the risk of going to trial with only $9,000.00 in actual damages, being cross-examined about why he had not had the surgery, and a jury disregarding the future medical and future lost wages.

As we approached trial, the insurance company offered $90,000 which we happily accepted.

Consumer Collection Lawsuits - Part II

Last email newsletter I wrote about consumer debt and how our courts are clogged with collection suits by large credit card and debt companies against Americans.

The numbers don't lie: from January 1, 2008 through December 31, 2012, there were 116,289 judgments handed down in debt collection cases in St. Louis City and County alone.

My proposed solution: implement a debt Court in Missouri.

Rather than having everyone take off work and having to walk hat in hand in the Court to explain why they can't pay the debt they incurred trying to save their wife's life, why don't we have an arbitration Court where they do not have to come to Court or waste a Judge or attorneys time?

Why can't they just have a telephone conference with a court administrator and the debt collector and resolve these matters with payment plans? Or give them counsel and information so they can figure it out. People do not know what to do about debt problems.

The people I met in Lincoln County had no idea what to do. They were trying to figure out how to handle their debt and had many questions about how and what they should do.

As lawyers and as a Court system we owe a duty to Missouri citizens and Americans to make this debt navigation easier for them.

Bank and credit card companies are some of the most profitable organizations around. In the first half of 2019 alone, Bank of America hauled in $14.7 billion, setting a record for the largest profit ever in just six months.

These profit numbers have steadily grown over the years, and will continue to grow. For example, in 2019, the nation's 5,303 FDIC-insured institutions earned net income of $62.6 billion, an increase of 4.1% from the same time in 2018 and an all-time high.

Additionally, American consumers collectively had $1.08 trillion in credit card debt as of mid-2019, while there were 41 billion U.S. general purpose credit card transactions in 2018.

After meeting with this couple in Court, I got the other side to agree to a 60-day continuance of the hearing on their debt, talked them into getting a hold of Legal Services or me if they are unable to, and gave them advice on how to get into a debt management program.

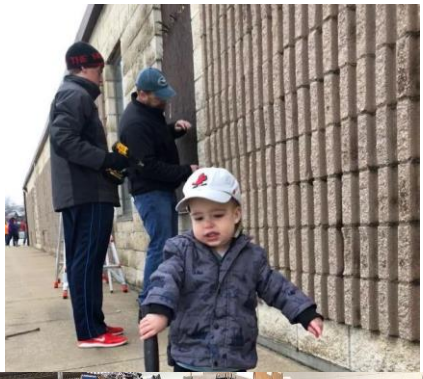
I also advised them on how to get out of their contract with the Nevada debt consolidation company, long term debt and finance solutions, a way to save their house, and as much advice as I could give them at that time.

Most are not successful in fighting Bank of America. It shouldn't depend on whether or not a lawyer is going to stand up in Court and help them or not. Thousands or millions of Americans are going to get judgments against them this year and get unfairly taken by these vultures feeding on the poorest Americans.

A debt collection system would more efficiently accommodate debt holders' rights to collect on their contracts while better protecting debt holders. Consumers could be educated and manage their debt crisis.

This would lower the caseload of bankruptcy courts and other institutions designed to address unmanageable debt.

Here are some pics from our latest work at Gateway



Dear Friend,

Happy Valentine's Week. Today's email discusses four great opportunities and a big success for my mom, Joan Burger.

First, the Missouri Supreme Court granted transfer to our big verdict on behalf of correction officers, so we get to argue before that august body.

Second, we have an opening at my firm for a good lawyer to join our team.

Third, our Expert CLE March 6 is filling up, so register now - limited seats left. Below I have an article on striking experts based on an argument we had in a case last Friday.

Fourth, the deadline to apply for our firm's scholarship is coming soon so apply now. See below for details on all this, but first -

Congrats to my mom, Joan Burger, on being given **the Fleur De Lis Award by St. Louis University Law School** Friday night. She is enshrined in the **SLU law school hall of fame**. So Proud of her and her amazing and accomplished career.

She is a great mediator working out of USA&M.

Here's our family at the event:

Multiple Experts at Trial

Sometimes a defendant wants to have multiple experts at trial. I oppose this practice. Repetitive and cumulative expert testimony is not helpful to a jury - it is unduly prejudicial to call redundant experts at trial to get a numbers advantage. But what's Missouri law say?

A circuit court may allow an expert to testify if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue…" RSMo. § 490.065.

In *Shallow v. Follwell,* 554 S.W.3d 878 (Mo. banc 2018), the Missouri Supreme Court **approved a defendant calling four experts** at a medical malpractice trial:1) a doctor in general surgery and critical care medicine to testify about the standard of care; 2) a cardiologist to testify solely in response to plaintiff's expert; 3) a vascular surgeon, and 4) a colorectal surgeon. *Id*. at 884.

The Court held the circuit court did not abuse its discretion by **admitting the testimony**, reasoning, "each one of the experts [has] a different specialty and they all added their own parts." *Id*. at 884.

One might argue it was only allowed because all were different specialties. But the Court said:

[The] experts testified about the very root of the matter in controversy; the evidence therefore, was not cumulative. While the expert testimony overlapped at times, the experts testified about their own specialties and offered their own parts….

*[T]**he overlapping testimony went to the issue of the standard of care and causation—the "very root" of a wrongful death action arising from medical negligence. For this reason, the expert testimony was not cumulative under Missouri law. Further, "Even if evidence is cumulative, that alone is not sufficient to exclude its admission."***

Well then is nothing cumulative? Maybe not, because the court then said:

This does not mean the number of experts who may testify about the very root of the controversy on behalf of a party is limitless** and always legally relevant. The **probative value** of logically relevant collective evidence going to the very root of the controversy **must also 'be weighed against the risks it poses of unfair prejudice.'

If the prejudicial effect substantially outweighs the probative value, the evidence is unfairly prejudicial, not legally relevant, and must be excluded.

Excessive expert witnesses can create the risk the trier of fact will resolve differences in expert witness opinions by the number of experts called instead of giving due consideration to the quality and credibility of each expert opinion.

While expert witnesses testifying about the very root of the controversy have purpose and are not needlessly repetitive, such evidence remains subject to exclusion if the prejudicial effect of the testimony substantially outweighs the probative value. Shallow v. Follwell, 554 S.W.3d at 885.

So, what's the answer? (Drum roll please)

Come to our CLE to find out (Ha).

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Practice law with me

Great opportunity at our firm. We are growing and need more good lawyers.

We are excited for lawyers to join our team who:

- want to have an exciting future personal injury and other types of litigation;
- are highly motivated to join our incredible team;
- have three to ten years of experience in litigation;
- want to work in a fast-paced practice getting great results for our clients;
- have strong research, writing and courtroom skills; and
- who want to grow with our firm?

Salary commensurate with experience. Health insurance and benefits provided.

Please forward your resume, writing sample and references.

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Kate Kouplen from Jenks Oklahoma had a great essay and idea on how to stop texting and driving and won the $1500 scholarship.

This year our top entry will be awarded $2000! The essay question for this year is – How to STOP Bullying.

There's no easy answer to this problem, but it's a question deserving of the inquiry. Bullying can have serious and traumatic effects on children and even adults, and it's never ok nor acceptable. But why does it start? How can an age-old problem be stopped? We're excited to see what solutions our scholarship candidates can put forth, and what new ideas they have to stop bullying.

Hey, Friend,

Our Expert CLE next week on March 6 is almost full - so Register now - limited seats left.

Speaking of deadlines, our firm's scholarship application time period is ending soon - so apply now. See below for details on all this, but first -

Below, I discuss the CLE and scholarship a bit more, show a client success video, discuss my friend Randy's $250,000 policy limit settlement, lament about how cheap workers' compensation is and highlight an article about a client success in last week's Lawyer's Weekly newspaper.

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Randy's $250,000 Policy limits settlement

We were recently able to secure a policy limits settlement for our client and friend Randy.

Randy and I became friends many years ago when he painted my house. He is a nice and hardworking man. He later had a crash on his motorcycle in Jefferson County when a motorist pulled out in front of him. The insurance company would not settle and we tried his case in 2012.

Missouri Lawyers WEEKLY

www.molawyersmedia.com

Motorcycle crash case leads to plaintiff win

Man returned to work as painter six months later

By Alan Scher Zagier
Special to Missouri Lawyers Weekly

A Jefferson County jury awarded $142,000 to a 55-year-old Imperial man who alleged his motorcycle was struck by a vehicle in March 2011.

Randy Overy filed suit against Kristina Borovic in Jefferson County Circuit Court on June 6, 2011, less than three months after the accident on Lemay Ferry Road.

Overy alleged that Borovic pulled in front of him without yielding at a stop sign while turning onto Lemay Ferry from a side street. Overy was thrown from his motorcycle, causing injuries to both knees, his left foot, ribs and more. He also suffered a torn rotator cuff that required surgery to repair.

The case went to trial in late March, with a Jefferson County jury siding with the plaintiff after a trial that lasted less than two days.

Gary Burger, Overy's attorney, said his client was able to return to work as a painter six months after the wreck and is a "salt of the earth guy" who primarily sought reimbursement of his medical costs rather than pursue a continuing wage loss claim.

Overy is "honest in the extreme," Burger said, and "insisted on the stand that he could paint as good as before and as fast post-injury."

Defense attorney Gerald Sims did not respond to a request seeking comment on the case by press time. Online court records indicate the defense filed a motion seeking a new trial, which was pending.

Gary K. Burger Jr.

$142,000 verdict

MOTOR VEHICLE COLLISION

- Venue: Jefferson County Circuit Court
- Case Number/Date: 11E-CC00512/March 27, 2012
- Judge: Circuit Judge Gary P. Kramer
- Plaintiff's Expert: Dr. Robert Medlet, St. Louis (orthopedic surgery)
- Special Damages: Medical expenses; $54,000 charged, $4,568 paid; $19,000 owed
- Last Pretrial Demand: $140,000
- Last Pretrial Offer: $103,000
- Insurer: Safeco Insurance
- Captions: Randy Overy v. Kristina Borovic
- Plaintiff's Attorney: Gary K. Burger Jr., Cantor & Burger, St Louis
- Defendant's Attorney: Gerald A. Sims Jr., Rouse & Cary, Sunset Hills

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He worked so hard to get better that I called his physical therapist to the stand who testified he attended 52 of 52 PT visits and was the hardest working patient she ever had. I demanded $140,000 to settle and the jury awarded Randy $142,000.

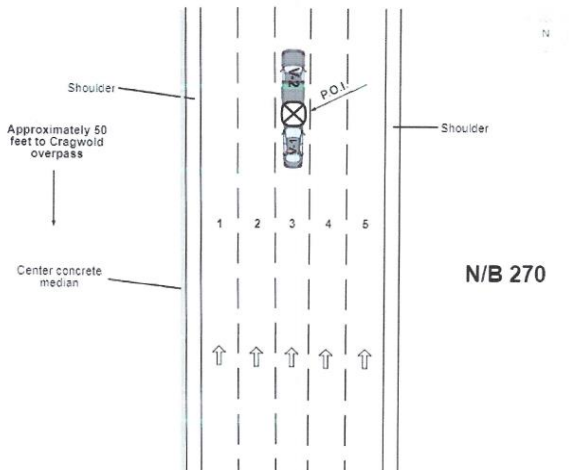
I still have the article framed in my office. Here's a pic of it:

I am lucky still have Randy as a friend. And more recently, Randy got hurt again.

Randy was rear-ended on I 270, injuring his back and neck.

He saw his primary care doctor, and treated conservatively for four months, but the pain did not go away, it got worse, with shooting pain into his right shoulder. Randy saw an orthopedist and received an MRI that showed multiple disc protrusions in his neck.

A really good surgeon did a microdiscectomy and fusion on his neck, and a follow up surgery was required for further neck and throat issue.



Through all this time, the Burger Law team worked with Randy and aggressively pursued the liable party. **After the initial claim adjuster refused to offer the policy limits, we filed suit, and pressed the defendant further, revealing more insurance than was initially disclosed during the discovery process.**

I told them I would never take less than policy limits for Randy and they recently relented.

We will put a lot in Randy's pocket with this and will now pursue his underinsured claim. Stay tuned.

How much is your thumb worth in Work Comp? A: Not much

Missouri Workers' Compensation can feel really unfair sometimes - particularly when you cut off your thumb.

Unlike a civil claim, with Missouri Workers' compensation claims, you cannot get money for pain and suffering, the value of your claim depends on how much money you make at work, your lost wages may be capped, and a lump sum payment for your injury is limited by an arbitrary "schedule of loss" assigned to each body part by statute.

For example, we recently represented a client whose thumb was sliced off at work:

Pursuant to RSMo. § 287.190, the "schedule of loss" number assigned to a thumb that is completely amputated at the distal joint is 45.

Based on our client's hourly wage, which is part of the statutory formula, the most he could ever get, even if he lost 100% loss of his thumb is $10,642.50, plus a small amount for disfigurement. This includes the 10% increase in compensation you get for amputations. Doesn't seem very fair, does it?

We were able to make the argument that the loss of his thumb affected overall use of his hand. The hand is assigned the number 175. We settled the case for 35% disability of the hand, plus disfigurement, which increased his settlement to $13,500.00. Still not much.

Unfortunately, that is just the reality of Missouri Workers' Compensation. Sometimes an employee who lost his thumb might have a civil claim too, such as a product liability claim involving a dangerous machine, retaliation against the employer if they are fired because of their injury, or negligence against someone other than his or her employer.

We always investigate whether we can bring these claims to get our clients the most money possible. We are doing this for the poor young man at issue. Stay tuned.

We were in the Missouri Lawyers Weekly again last week for a successful settlement. Here it is:

Verdicts&Settlements

■ $765,000 SETTLEMENT

Volunteer fire department settles after fatal collision

WRONGFUL DEATH, MOTOR-VEHICLE COLLISION

- **Venue:** Washington County Circuit Court
- **Case Number/Date:** 18WA-CC00395/ Nov. 14, 2019
- **Judge:** Jerel Poor II
- **Caption:** Amy Van Doren, as spouse of decedent, Paul Van Doren v. Devon DeClue and Potosi Fire Protection District
- **Plaintiffs' Attorney:** Gary Burger, Burger Law, St. Louis
- **Defendants' Attorney:** John Mazzei, Brown & James, St. Louis

By Alan Scher Zagier
Special to Missouri Lawyers Media

The widow of a 40-year-old Potosi man killed while trying to redirect traffic at an accident scene settled a wrongful-death suit for a total of $765,000 against the local volunteer fire department and the 18-year-old EMT who struck the man while responding to the crash.

According to the complaint and a Missouri State Highway Patrol accident report, Paul Van Doren and his wife, Amy, were driving home from visiting their nephew on the afternoon of April 8, 2018, when they encountered a wreck on Missouri Highway 185 in Washington County.

St. Louis plaintiff's attorney Gary Burger said his client was walking in the center of the highway to flag oncoming vehicles when he was struck by a 2009 Chevy Silverado 1500 pickup truck operated by Devon DeClue. The teen driver was responding to the crash while traveling in the opposite direction on the rural highway.

"Being the kind of guy Paul was, he stopped his car and got out to help," Burger said of the victim, who worked in St. Louis for the state Division of Probation and Parole and was the father of three sons, ages 2, 12 and 14.

DeClue told Highway Patrol troopers that he was unable to stop in time to avoid first hitting another stopped vehicle, then skidding across the center line and striking Van Doren as he tried to run away.

In its report, the Highway Patrol described DeClue as "inattentive to the roadway ahead." Several witnesses reported that he was traveling at an excessive speed. An accident reconstruction estimated that DeClue was driving at least 60 mph in a 45-mph zone, Burger said.

No criminal or traffic charges were filed against DeClue. A defense attorney representing the volunteer fire department and DeClue did not respond to a request for comment.

A wrongful-death settlement approved in mid-November provides slightly more than $250,000 to Amy Van Doren, with each of the couple's three sons receiving $84,177 through structured settlements. The balance of the settlement is reserved for court costs, attorneys' fees and two unpaid medical liens. MLW

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Happy March, Friend,

It's a strange time with the Corona Virus. I have been reading a lot about it and monitoring what's been going on in the world, the U.S. and our Community. Scary, and it hasn't fully hit us yet. I hope our leaders step up to lead us in this time and pray our community can take care of our sick.

It's a bit of a mad whirlwind of event and sports cancellations, changing information about how to protect ourselves and our families, and how to go on with a normal life amid this pandemic. As you don't need my views on this, I'll try to keep it a bit normal with my regular bi-weekly email.

Our firm has established plans to work remotely and stay in business if super restricted travel becomes necessary. So, we will keep working hard for our clients and are here for questions and help from lawyers and new clients.

Stay healthy.

Blocking a late and tactical liability admission by Defense counsel

Deposed a defendant last week who refused to admit she did anything wrong. She was driving her commercial vehicle, went too fast, slid on ice and snow, spun out perpendicular to the road, went across the road and crashed head on into my client's truck.

He had seen her coming and pulled to the side of the road and stopped by then. Pictures show the road completely icy. She flat out refused to admit she did a single thing wrong.

The problem is, her lawyer is likely to admit liability in opening statement to defuse the situation at trial.

What to do? Here it is in three steps:

1. Nail her down in deposition with the following.

- You didn't do anything wrong.
- You take absolutely no responsibility.
- Wouldn't change a thing if had to do it over.
- Didn't learn any lessons from this.
- If didn't do anything wrong, you still drive like that today and are gonna drive to the courthouse for trial like that.
- Unless there's a jury verdict in this case you won't change a thing.

2. Go to trial.

3. At trial, when they try to late admit liability to keep evidence out and take the wind out of your sails remind them of a little Missouri law: An admission of fault by defendant should not prevent plaintiff from putting her evidence relating to liability before the jury.

All my evidence of negligence will come in. And it's some old, good law - back to 1934.

Most recently in *Ingram v. Rinehart*, 108 S.W.3d 783 (Mo. App. W.D. 2003), defendant admitted liability but the trial judge allowed counsel for plaintiff to present evidence of fault including direct and demonstrative evidence that the defendant was drunk at the time of the incident, testimony about what led up to the incident itself and its aftermath, and photographs of the incident scene.

The Court said:

"The party bearing the burden of proof is not bound to a party's admission. Franklin v. Byers, 706 S.W.2d 230, 231 (Mo. App. 1986); Ruppel v. Clayes, 72 S.W.2d 833 (Mo. App. 1934). Instead, that party may elect to present evidence to prove the issue at a jury trial. Ruppel, 72 S.W.2d at 835. Furthermore, that testimony and evidence was also admissible because it was directly relevant to the disputed issues regarding plaintiff's special damages and their claim for punitive damages. There was no error admitting the challenged testimony and evidence."

The rationale underlying this longstanding rule in Missouri is that "[a] colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate moral force of his evidence . . . " Wigmore on Evidence, 3d Ed. § 2591.

Back in 1934, the Ruppel v. Clayes, 72S.W.2d 833, 835, 836 (St. L. 1934), court held that even when a defendant makes an unqualified or limited admission of liability, a plaintiff has the right to introduce evidence relevant to the issue of liability. The court said:

"[p]arties, as a general rule, are entitled to prove the essential facts, to present to the jury a picture of the events relied upon. To substitute for such picture a naked

admission might have the effect of robbing evidence of much of its fair and legitimate weight. No exception lies to the admission of relevant evidence under such circumstances."

4. Tell the jury the late admission is just to play a game with the jury - to try to manipulate them.

5. Ask the jury for a bunch of money to fully, not partially, compensate your client.

6. Tell this story so defendants and their lawyers stop playing this game.

CLE Materials from How to NOT have your expert struck

Thanks to my friend Tim McCurdy for his great presentation last Friday. I enjoyed mine as well.

Here are some reviews:

- *Gary put together another great CLE as usual - Thanks!*
- *Stepped up my expert game with what I learned today. Thanks for the lessons.*
- *Can you help me in my case to strike the other side's experts?*

If you would like the materials from the CLE, go to our lawyer to lawyer page and click the tab for March 2020 CLE. They are all there for free.

Bummed the Blues and NHL have suspended play - Hopefully can have playoffs when its safe

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Hello Friend,

Our corona virus pandemic continues. With the mandatory stay at home order in place in St. Louis, I and my family are staying home and working from home.

We closed the physical office of Burger law last Tuesday and move everyone to working from home. My kids are started virtual school this week.

So much to worry about and so many things changing. Remember you only can control what you can control and this too shall pass.

Here's an update about Burger Law and corona, a video a great client texted me, some pics of us having fun at home, and a helpful list of court orders in light of Covid-19.

Burger Law and Covid-19

With the corona virus, it seems like things are changing rapidly, but Burger Law will not only keep up, but be ahead of the curve.

We remain open 24/7 to our clients and future clients who need our help.

We offer phone and video counseling for all our clients and prospective clients.

We work on our clients' cases continually and virtually and are able to sign new clients, file lawsuits, answer discovery, take depositions, mediate cases and take any legal action necessary.

Our modern firm has long been set up virtually. Cloud based case management, intake and email programs, internet phone system, off hours call service, a team of intake specialists, 100s of YouTube help videos, DocuSign practice of signing contracts, zoom meetings, large server with remote access has, as it turned out, helped us be a virtual firm long ago.

To keep our lawyer friends, clients and prospective clients updated, here's some important points about Burger Law's business operations during the Covid-19 mandatory social distancing/staying at home orders:

We are still open – we are operating as we always have for our clients. We have unmanned our physical office in downtown St. Louis and have all of our staff working from home. We have access to all our client documents, and have scanners, computers and everything we need in our home offices.

We are still working hard to get for compensation for our clients' injuries. We have settled a large number of cases in the last two weeks and cases are moving. We have filed probably ten lawsuits in the last two weeks and sent out three times that many demand letters, and sets of discovery to try to settle cases.

We can handle your case or answer your questions without personally meeting. If you're injured because of the bad conduct of another please contact us. We do video consults, phone consultation, electronic case sign up. We file your claim or lawsuit electronically.

We remain committed to our core mission: Obtaining justice and full compensation for the injured. When bad actors, large corporations and insurance companies needlessly break safety rules and injure people, we are there to help.

We honor Stay at Home Orders and social distancing requirements. We follow all guidelines and precautions. We're doing our part to reduce the spread of corona virus and have cleaned and sanitized our office. We now work mostly out of our homes but have been literally busier than ever. We have fully implemented a policy to have all of our clients avoid social interactions.

We are currently setting video depositions and video mediations. We are busy answering client and lawyer questions about a case, potential case, referrals from the lawyers, our operations during the Covid-19 pandemic for any other concerns about our clients' cases.

For lawyers who are challenged in litigating cases during this time, we can help. Call us for litigation support and to co-counsel in cases.

Please email me personally, call me on our office line or on my cell phone or reach out to me on Facebook messenger our Facebook page or any other way.

Covid - 19 Court Announcements

Courts have closed all over the area. Here's an article on the Missouri Supreme Court's response to the pandemic.

How do you know what each one is doing? The Missouri Supreme Court has created a page to collect court specific responses, which you can find by clicking here. The Illinois Supreme Court's page can be found by clicking here.

The Missouri Supreme Court has offered for April oral arguments to continue them, submit cases of the briefs or argue over video conferencing. What would you do?

To help clients and lawyers with a list of Courts and their corona virus Orders, web pages and updates, I thought I would list some more here so you can easily keep up with information about closures, procedures and changes thereto.

Missouri Courts

https://www.courts.mo.gov/page.jsp?id=7100.

Illinois Courts

http://www.illinoiscourts.gov/Administrative/covid-19.asp

St. Louis County

https://wp.stlcountycourts.com/st-louis-county-circuit-court-coronavirus-update/

St. Louis County Municipal Courts

https://www.stlouisco.com/Law-and-Public-Safety/Municipal-Courts

St. Louis City

http://www.stlcitycircuitcourt.com/

https://www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/documents/upload/COVID-19-Order-10-Summons-Writs-Evictions-and-Service-of-Process.pdf

St. Louis City Municipal Courts

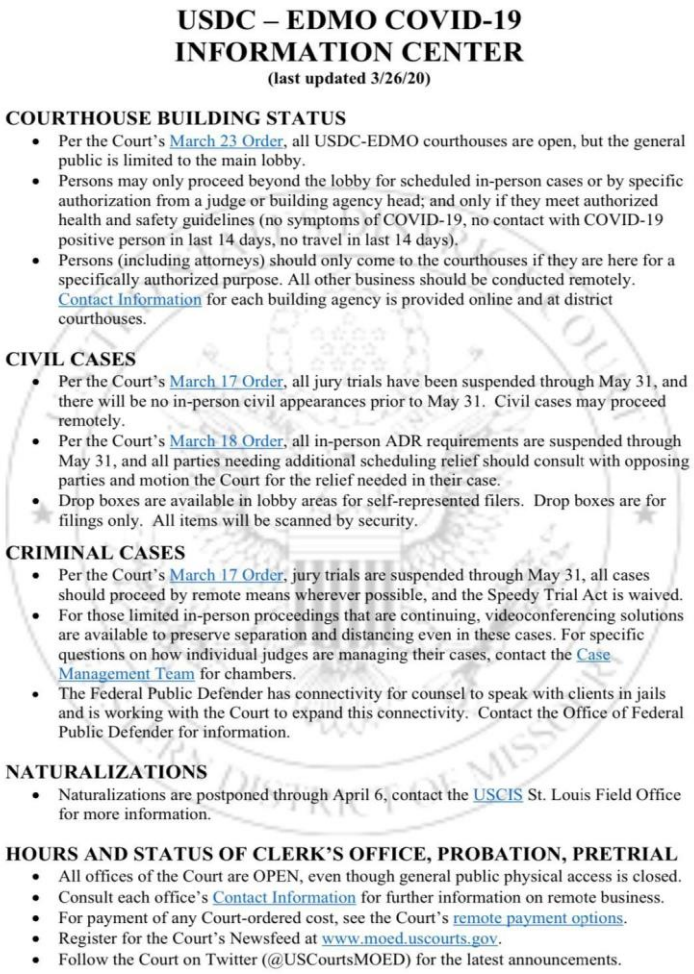
https://www.stlouis-mo.gov/government/departments/municipal-courts/news/for-defendants.cfm

https://www.stlouis-mo.gov/government/departments/municipal-courts/news/continuances-by-phone-due-to-covid-19.cfm

Federal Court: Eastern District of Missouri

https://www.moed.uscourts.gov/sites/moed/files/documents/news/Order-03-23-2020.pdf

https://www.moed.uscourts.gov/



USDC – EDMO COVID-19 INFORMATION CENTER

(last updated 3/26/20)

COURTHOUSE BUILDING STATUS

- Per the Court's March 23 Order, all USDC-EDMO courthouses are open, but the general public is limited to the main lobby.
- Persons may only proceed beyond the lobby for scheduled in-person cases or by specific authorization from a judge or building agency head; and only if they meet authorized health and safety guidelines (no symptoms of COVID-19, no contact with COVID-19 positive person in last 14 days, no travel in last 14 days).
- Persons (including attorneys) should only come to the courthouses if they are here for a specifically authorized purpose. All other business should be conducted remotely. Contact Information for each building agency is provided online and at district courthouses.

CIVIL CASES

- Per the Court's March 17 Order, all jury trials have been suspended through May 31, and there will be no in-person civil appearances prior to May 31. Civil cases may proceed remotely.
- Per the Court's March 18 Order, all in-person ADR requirements are suspended through May 31, and all parties needing additional scheduling relief should consult with opposing parties and motion the Court for the relief needed in their case.
- Drop boxes are available in lobby areas for self-represented filers. Drop boxes are for filings only. All items will be scanned by security.

CRIMINAL CASES

- Per the Court's March 17 Order, jury trials are suspended through May 31, all cases should proceed by remote means wherever possible, and the Speedy Trial Act is waived.
- For those limited in-person proceedings that are continuing, videoconferencing solutions are available to preserve separation and distancing even in these cases. For specific questions on how individual judges are managing their cases, contact the Case Management Team for chambers.
- The Federal Public Defender has connectivity for counsel to speak with clients in jails and is working with the Court to expand this connectivity. Contact the Office of Federal Public Defender for information.

NATURALIZATIONS

- Naturalizations are postponed through April 6, contact the USCIS St. Louis Field Office for more information.

HOURS AND STATUS OF CLERK'S OFFICE, PROBATION, PRETRIAL

- All offices of the Court are OPEN, even though general public physical access is closed.
- Consult each office's Contact Information for further information on remote business.
- For payment of any Court-ordered cost, see the Court's remote payment options.
- Register for the Court's Newsfeed at www.moed.uscourts.gov.
- Follow the Court on Twitter (@USCourtsMOED) for the latest announcements.

Federal Court: Western District of Missouri

https://www.mow.uscourts.gov/sites/mow/files/DC-SupersedingOrderCovid19.pdf

St. Clair Court, Illinois

http://www.co.st-clair.il.us/publicNotices/Pages/default.aspx

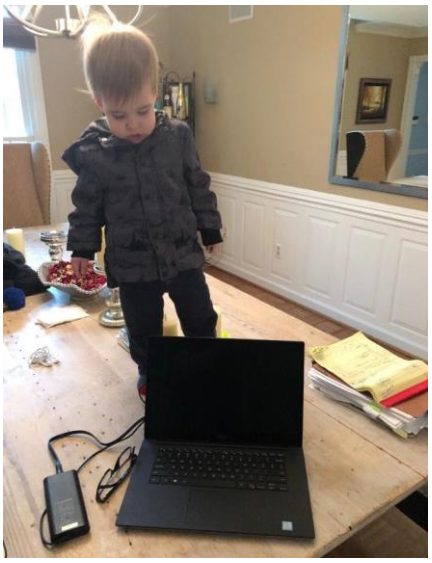
Madison County, Illinois

https://www.co.madison.il.us/departments/circuit_clerk/index.php

5th District Court of Appeals, Illinois

http://www.illinoiscourts.gov/Administrative/covid-19.asp

Working from home has its advantages



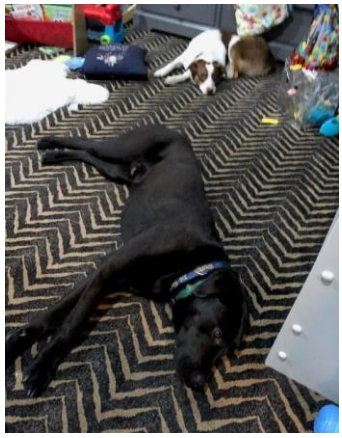
Stop Bullying Scholarship

We extended our scholarship application time because of Corona.

The essay question for this year is – How to STOP Bullying. The scholarship is for $2,000.

There's no easy answer to this problem, but it's a question deserving of the inquiry. Bullying can have serious and traumatic effects on children and even adults, and it's never ok nor acceptable. But why does it start? How can an age-old problem be stopped?

We're excited to see what solutions our scholarship candidates can put forth, and what new ideas they have to stop bullying.



Coworkers are not pulling their load.

-Gary Burger

Hello, Friend,

It's been 6 weeks since I closed my office and had our staff work from home. That's 60,480 minutes since March 17, but who's counting?

I and the firm have been incredibly busy.

We unmanned our physical office in downtown St. Louis and have all of our staff working from home. We have access to all our client documents, and have scanners, computers and everything we need in our home offices.

I filed a brief and argued to the Missouri Supreme Court, started a Ask a lawyer Facebook show, and have been working to manage my firm virtually. Best of all, I get to hang with the family more.

I think this quarantine is going to change how lawyers do business in the future - less of a need for court appearances and face to face meetings. It's going to change how we do a lot of things.

Below I list my top 10 video conference moments, discuss the pandemic and nursing home rules and have some pics. But first:

Ask a lawyer and Insta-cart Giveaway

Because of the strange time we are in, I and the firm decided to start an ask a lawyer Facebook show once a week to field any legal questions people may have.

We also decided to **give a $150 Insta-Cart gift certificate away every week** to help families buy food who might need the extra help.

Tune in Friday at 4 pm for this show - ask me some good questions.

Top video conference moments in the last month

The rapid advent of videoconferencing (for me) over the last month has been a game changer. Here's my top 10 moments:

1. Arguing to the Missouri Supreme Court last week over Webex. It was a challenge to argue to a camera instead of at a podium and looking at judges.
2. Starting my Supreme Court argument with the mic off. Whoops. Thankfully they started my time when I started talking.
3. Having a judge ask me a question with the mic off too.
4. Not being able to find my timer on the video to see how much time I had left.
5. At dinner with my family: right after I lament about the declining stock market, my brilliant son Jordan (graduating high school this year) casually mentions he bought zoom stock 4 weeks before the pandemic hit. Why didn't he tell me then?
6. Seeing all my coworkers in zoom calls - and appreciating and missing them.
7. Doing Zoom training of my employees. I have done two sessions where I am able to share my screen about how to work our case management system (Filevine) and intake system. I record the sessions on zoom for employees in the future.
8. Having an employee who can never get Zoom to work and I only see his ceiling fan going round and round - even after mentioning it numerous times. I think he just sets his phone on his desk.
9. Doing marathon zoom meetings to write and edit a 130-page Supreme Court brief and prepare for oral argument.
10. Zooming with family members to catch up on their quarantine.

Preventing COVID-19 in Nursing Homes

Strictly following state and federal COVID-19 prevention regulations is the legal obligation of long-term care facilities to keep residents safe in the midst of infectious outbreaks.

Prevention measures for COVID-19 are the same strategies used to detect and prevent common viruses such as the flu. This includes hand washing, avoiding social contact, and not touching shared surfaces.

With elderly people being most at risk of contracting the virus, additional prevention measures must be enforced in nursing homes.

Note that while nursing homes are a hotspot for infection, everyday contact for people both healthy and immunocompromised is dangerous.

If you or someone you know has questions about a nursing home Corona, claim please contact me. You can also visit our website here.

Below are some of the coronavirus prevention regulations to which long-term care facilities are required to adhere:

Surfaces and Objects Should Be Continually Disinfected

Elderly people are considered high-risk for many illnesses and conditions. With nursing home residents regularly getting sick, undergoing surgeries, receiving physical therapy, and getting treatments, it's crucial for nursing homes to sanitize frequently.

According to the CDC, one of the most effective ways to prevent the spread of COVID-19 is to continually disinfect tables, chairs, and other surfaces. If a long-term care facility fails to take proper sanitary precautions, and a resident gets sick, this could result in a nursing home claim for loss of life.

Nursing Home Staff Should Wear Masks and Gloves

Coronavirus spreads easiest via respiratory droplets and touch. As such, the CDC recommends that all people (especially nursing home caregivers, nurses, and doctors) wear face masks and gloves to prevent its spread.

If a long-term care facility fails to provide gloves, face masks, face shields, and other supplies to nurses, doctors, and other caregivers, and a resident contracts COVID-19.

COVID-19 Positive Residents Should Be Isolated

Isolation is one of the most effective ways of preventing a nursing home resident from infecting others. Isolation must be achieved as soon as an individual is suspected of having coronavirus – this is done through persistent surveillance by nursing home caregivers, nurses, and doctors.

If a patient is showing coronavirus-related symptoms such as dry coughing, running a fever, or having shortness of breath, staff should spot these signs immediately and follow COVID-19 prevention measures and isolate sick residents.

Failure to isolate a nursing home resident that has been diagnosed with coronavirus, or is displaying symptoms, is nursing home negligence.

Outside Guests and Caretakers are Federally Prohibited

Federal COVID-19 nursing home regulations were updated on 4/13/2020. Per the update, nursing homes and long-term care facilities must prohibit all non-essential visitors and outside caregivers and physicians, such as hospice and EMS workers, dialysis specialists, etc.

Any staff or visitors that have a cough, fever, or other coronavirus symptoms are restricted from entering facilities. Lastly, group gatherings such as dining hall meals, religious services, and social activities, are strictly prohibited.

These events are shown to be conducive to the spread of the virus. Nursing home residents must be isolated from all possible sources of infection whether they display symptoms or not.

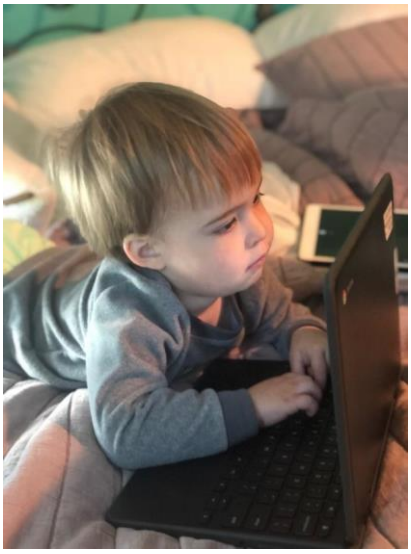
Complying with Federal Nursing Home COVID-19 Regulations

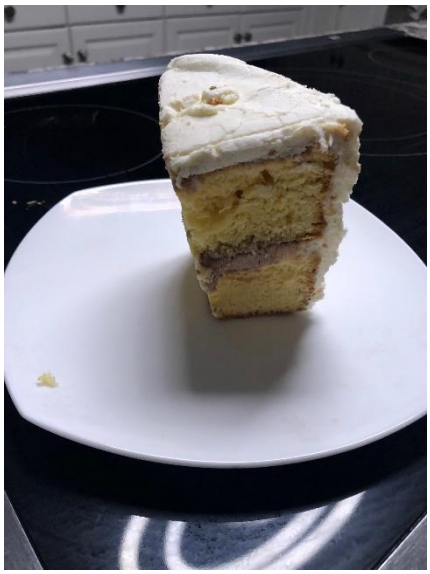
Federal nursing home regulations mandate that long-term care facilities must utilize an Infection Control Program, which is designed to help each resident attain or maintain their highest level of well-being. Under these regulations, facilities must:

- Investigate, actively control, and prevent COVID-19 infections in the facility
- Isolate patients diagnosed with coronavirus, or who are suspected to be potential carriers
- Prevent sick employees from coming in contact with residents, their food, facility surfaces and objects
- Document infection control incidents, including who was infected, when it happened, and what prevention measures were taken to avoid the spread of COVID-19

When investigating a potential coronavirus lawsuit against a nursing home or long-term care facility, we obtain a copy of the facility's infection control record. This record should include potential coronavirus cases, as well as the steps that the facility took to prevent the spread of COVID-19.

Sign made by my wife for a big case, my amazing son graduating from high school and too much home working affects the little guy.





Happy 4th anniversary to my amazing wife.

We had a piece of cake from our wedding - it was really good.

High recommends to the Cakery.

-Gary Burger

Happy Friday, Friend,

Yes, it's Friday. The days seem to run together with working from home and the TGIF phenomenon is not there anymore.

Our country's navigation through this pandemic continues, with twists and turns. Even after three and a half years of this Administration, I am frankly surprised at the divisiveness over the Corona Virus. People calling it a conspiracy and rebellion over health and safety recommendations.

Here's a Facebook post I put up for my law firm:

If you or your loved one has been refused entry to a business for failure to wear a mask or if you would like to protect your constitutional rights with the pandemic restrictions, my law firm would be happy to explain how selfish and misguided you are.

We continue to be incredibly busy working from home. Cases settled, depositions, filed lawsuits, etc. We recently filed a national class action case against a private prison company, Management Training Corp, for not paying guards for pre and post shift activity.

And we will be reopening our physical location in a few weeks. Below I share our office policy for when we reopen - I would love to hear what everyone thinks about it. Feel free to use it as a model for your own business.

All lawyers please **save the date of June 19, 2020 for our virtual CLE.** Our annual event will be virtual this year with amazing presentations about how to negotiate and

reduce liens, how to successfully fight ERISA liens, Mental health during the pandemic and other great topics.

I also discuss a $350,000 settlement below with a video of my client Randy and I.

But first, I have been busy with my bees this spring, with adding two new hives, having a hive swarm and catching it.

Requeening

Requeening a bee hive refers to the hive making a new queen or a beekeeper changing queens. I did the former with two hives this year.

The first was by accident. I had bought and put together two new hives and was going to "split" my hives again. This means you split part of a bee hive off and the bees make a new queen.

But before I could, one of my hives swarmed. This is how bees reproduce - they naturally make one hive into two. Here's a pic.

The existing queen gathers about half the bees (a few thousand) and they leave the old hive and settle on a tree branch, log or where ever. They then look for a new home.

Meanwhile the hive where they left create new queens. They start feeding the larvae "Royal Jelly" to change them from a regular bee to a queen. They make a bunch of queens.

It takes 15 days to make a new queen.

The first queen to hatch kills the other queens in their cocoon. Like in the movie Highlander - there can be only one.

New queens sing to the hive.

So, I opened the hive from where the swarm came, and sure enough, they were making a bunch of new queens. Here's a pic.

But first I had to catch the swarm in the tree. So, I did. You do this by shaking the swarm into a hive box. Or so I've read - never did it before.

It went well. They kept going back to the tree, so I kept shaking them in the box. I was able to get the queen in there, so the rest of the bees followed within an hour or so.

These bees are thriving as are the hive they left. But I felt bad that all those new queens were being raise but only one would live.

So, I collected a couple. Look for my next newsletter about what I did with them.

Randy's great $350,000 settlement

We filed and litigated an auto rear end crash for Randy. He was rear ended on highway 270 going to work.

I've known Randy for 20 years. Truly a great guy. He was hit pretty hard.

Randy went through conservative therapy and eventually had surgery. In the video below, Randy and I talk about his case, why you should take pictures after a car crash and how we navigated his case.

We held out for the full policy limits of $250,000 from the person who rear ended him. They jerked us around for a while and I told the other lawyer and adjuster we would not take a dime under the policy limits.

We also pursued and obtained $100,000 from his underinsured motorist policy. We put a lot of money in his pocket - tax free.

I also had the pleasure of representing Randy a seven years ago in a trial in Jefferson County where we got a jury verdict of $142,000. He was riding a motorcycle when another driver pulled out in front of him. He had an open rotator cuff surgery and fully recovered.

At trial he testified he could paint (he is a great professional painter) as well as before and had worked hard to make a full recovery. His physical therapist loved him - he went to 52 of 52 physical therapy visits, and never missed one.

So proud to represent Randy. As I joke in the video, I cannot wait for his next crash - three's a charm.

BURGER LAW POLICIES FOR REOPENING AND OPERATING DURING COVID 19 PANDEMIC

As we return to the office after the Stay-At-Home order, it is critical that precautionary measures are followed to continue mitigating the spread of COVID-19.

This provides guidelines for our staff to return to the workplace. The most effective tool for preventing the spread of the COVID-19 virus is physical distancing, but there are other measures we can take to stop the spread and provide a safe work space.

Remember that responses to the pandemic, best practices, and how we run our firm is rapidly changing, so the policies in here may change as well.

1. **Do not come to work if you are sick.** Employees must quarantine or isolate if they have or are believed to have COVID-19 or have come into contact with individuals who have COVID-19. Remain at home if you are unwell or have been in close contact with someone who is sick. You are required to quarantine or isolate if you have or are believed to have COVID-19, or if they have come into contact with individual(s) with COVID-19.

Please adjust your personal behavior to control the likelihood of exposure. Remember your responsibility to protect yourself and others by following protocols for minimizing risk of infection. Please see Gary if you cannot and special arrangements will be made for you to work from home.

- Symptoms of COVID-19 include fever, cough, shortness of breath or trouble breathing, muscle aches, chills, sore throat and new loss of taste or smell.
- Employees with a temperature of 100.4°F (38°C) or above, or who answer yes to any of the screening questions are not be allowed to enter the workplace.
- Employees who develop any symptoms of respiratory illness while at work must immediately be sent home.
- Employees with symptoms should contact their healthcare provider for additional guidance.
- Employees who are sent home with symptoms should not return to work until they have met CDC's criteria to discontinue home isolation or they have been cleared to return by their healthcare provider.

2. **Staggered Shifts:** We have had people work or access our business from home since March 15, 2020. We will reopen. Beginning the week of _____, each team should spend at least one day working in the office to get acclimated. We will schedule to spread out that day.

Beginning the week of _____we will return to the office for staggered shifts or schedules. We will also move work stations around to socially distance. We may use some of our new space on the 14th floor to do this as well.

Reduce contact between people:

- use technology to facilitate communication;
- stay further apart.
- We have or will reconfiguring space to comply with Social Distancing Requirements by ensuring people are able to maintain 6 ft. of distance from each other.
- We already have physical barriers between people to reduce transmission. Let's respect those.
- Stay in your cubicle or office when working at the office.
- Work with your door closed.
- To talk to someone, call them on intercom, use google etc.

Finish change to Paperless office: We need to become a virtual/paperless office so we are not exchanging paper and carting around files. To that end:

- All documents get scanned and saved on x drive.
- All notes and matters about a file are kept in Filevine.
- All updates, notes and communications are documented in Filevine and not on paper.
- Link emails to Filevine and text and email clients through Filevine.
- All photos, discovery, attachments to emails etc. are to be saved on the X drive.
- Subfiles in X drive have to be organized.
- No printing med records or documents.
- Send pdfs of letters to everyone you can. Don't mail stuff.
- Ask for all med records via HI-TECH request
- No printouts or paper copies of depos. Just put them on x drive.
- Arrange for contactless payment, pick-up, and delivery options whenever feasible
- Use DocuSign for everything

5. **Zoom everything:** All depositions that can be done by Zoom or video conference will be. Same with client conferences, large firm meetings, court appearances, etc.

6. **Do not meet with clients or have them come into the office.** Have a zoom meeting with them. Open a free zoom account with your own Burger Law email address.

7. **Socially Distance:** ensure six feet of distance between employees. We have to limit the number of employees, clients or visitors in our office at any one time so that each of them can follow social distancing practices. Do not gather in the kitchen, conference room or at copiers. If you see someone in the hall, keep six feet of distance between them.

8. **Personal Protective Equipment:** Each employee is required to have a face mask(s) and wear a face mask coming into and leaving the office building, and if you are walking around downtown. Do not touch surface in the building. Wash your hands if you do. Use of protective equipment is an effective risk mitigation strategy. Bring your own hand sanitizer. Latex or protective gloves are permitted.

The firm can also supply PPE. But with shortages, all employees are encouraged to acquire their own. Any employee able to supply Clorox or other disinfectant or sanitizing wipes or hand sanitizer to the firm will be reimbursed their expense.

9. **Frequent Sanitation:** You are required to conduct frequent sanitation of all high touch surfaces, such as restrooms, shared computers, check-out areas, carts, baskets, and any other areas that may be frequently touched by clients, employees, or any other individuals.

- take breaks for hand washing or sanitizing opportunities throughout the day;
- Neither you nor visitors can bring outside containers, including reusable bags or boxes, into the facility;
- Your work space and any area you work must be sanitized and disinfected (wiped down) at the beginning and end of your shift at minimum.
- Plan how will you implement sanitizing and disinfection of workspaces?
- clean between uses of conference room
- Do not share equipment such as phones and keyboards.
- If this is not followed, we will have a staff member responsible for monitoring this.

10. **Visitor Protocol:** Let's keep guests to a minimum. No non-essential visitors during initial re-entry to maintain social distancing guidelines. Advise visitors of screening, social distancing, and face covering policies for the building and our office through posted signage.

11. **Conference Room:** Limited to 5 people - ensure social distancing.

- stocked with disinfectant wipes with adequate time allotted for appropriate cleaning between uses;
- Reconfigure conference room tables and chairs to accommodate 6 feet of space between participants.
- Limit conference room capacity to accommodate configuration with 6-foot distancing.
- Place signage on conference tables encouraging the practice of safe distancing.

12. **Signage at the Firm:** Strategically post signs promoting social distancing per CDC guidelines at office entrances/ exits, kitchen and conference room; Label the floor at your reception desks to indicate 6-foot distancing.

Yard work

-Gary Burger

Hey, Friend,

Here's an update on me and the firm.

Time seems to be going slow and fast at the same time lately. While working from home, things slow down, I get to hang more with my wife and kids and be present with my family.

I have been working out (biking and running) and doing stuff around the house - e.g., bee hive expansion discussed below.

Simultaneously, national news is a whirlwind - George Floyd death, Black Lives Matter protests, up and down corona and economic news, election cycle, and POTUS' hundreds of tweets. Below is a little article on my family marching (William and I made the news).

And law firm activities are super busy - depositions and hearings by zoom, new lawsuits filed, trials continued to 2021 - I spend many evenings keeping up.

For all the lawyers, please attend our Zoom CLE in a couple weeks on **Liens, ERISA and (de)Stressing.** Register now. - 3 hours and the best title for the ethics hour - Love and Lawyering in the time of Corona.

New Hives

In my last email, I talked about increasing the number of my hives. I had one hive swarm and captured the swarm into a new hive.

The old have made new queens. I took a couple of those queens in their cocoon and created yet another new hive - and it worked.

I put the old queen cells into a new small box with some frames and let them sit for a couple weeks. This lets the new queen hatch and start running the hive. The bees accepted the new queen from a different hive.

I could tell they accepted her and were building out new honey comb and she was laying new eggs. So, they were ready to move into a new box to expand.

So, I take the frames from the starter box and move them into a regular 10 frame hive box.

It’s a great year for honey. The bees seem to be getting a lot of nectar and pollen. The " honey flow" should be beginning now. Honey flow is a time when one or more major nectar sources are in bloom and the weather is favorable for bees to fly and collect the nectar in abundance. Honeybees are fast - they visit up to about 40 flowers per minute depending on floral type, nectar availability and weather conditions.

A bee will visit 100–1000 flowers per trip from the hive. A single bee will do an average of 10 trips per day. A hive may have thousands of forager bees. A hive can gain 8 to 20 pounds in a single day. In two days, a strong hive with more than 20,000 foragers may fill a honey super. This is for nectar; ripe honey has its water fraction reduced significantly.

Fingers crossed.

CLE - LOVE, LIENS (ERISA) and LAWYERING IN THE TIME OF CORONA

This **AMAZING ZOOM CLE** will teach you all this and more.

My **Lien CLE is the top result when you google resolving liens in cases** - go ahead and google it - then register for this CLE, as I only do it twice a decade.

Phil Tatlow is the recognized **ERISA expert** in the area with hundreds of ERISA victories.

The more is an hour of ethics credit on dealing with your and your client's stress and mental health - **Love and Lawyering in the time of Corona**. Brought to you by Dave Crawford and I.

As usual, this will be a great nuts and bolts CLE and with robust written material.

Where: on your computer via ZOOM

When: June 19th 2020 from 11am-2pm

Price: $25

All Proceeds donated to Legal Services of Eastern Missouri.

Approved for 3 hours of Missouri and Illinois CLE Credit, including one hour of ethics.

P.S. - *Love in the Time of Cholera* has one of the best first lines of any novel: "It was inevitable: the scent of bitter almonds always reminded him of the fate of unrequited love."

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Legal Questions Answered

I am trying to answer people's legal questions on a Facebook show we have been doing.

Here's some new questions we answer on our website.

What do I need to collect from the scene of my personal injury for my lawyer?

What are the 10 most common personal injury claims?

What are Missouri's Trucking Regulations?

Why file a lawsuit? -

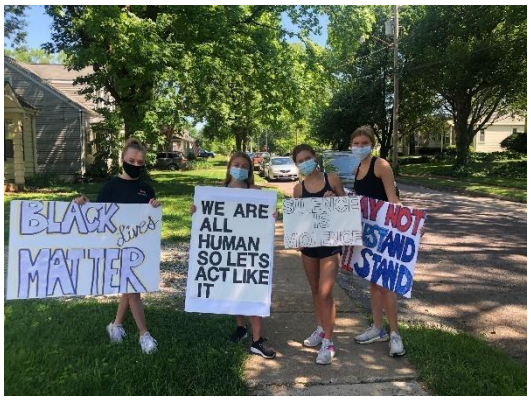
What should you do if your loved one has bedsores after a nursing home stay or hospital visit?

What are business interruption claims?

Black Lives Matter

It’s important to teach your children well. We have taken the opportunity to stand up for what we believe and participate in peaceful protesting.

William and I were interviewed and made it on the news!



Here's some of the results of an at home tie die project.

I highly recommend it if you're looking to fill a few hours.

-Gary Burger

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Happy Independence Day Friend,

Happy Independence Day (Saturday). We are closing our office Friday to let our attorneys and staff enjoy the holiday and a long weekend,

Below I discuss a few settlements, our really successful Zoom CLE, an interview with the winner of our scholarship, and more Lawyer v. Lawyer Podcasts and a FB show.

But first, I thought I would give you 10 surprising facts about the Declaration of Independence.

1. The Declaration was not signed on July 4th, 1776.

While the declaration was adopted by the Continental Congress on the 4th, most of the men did not sign it until August 2nd of that year and New York delegates did not even give their support until July 9th.

2. July 4th was not the day the Founders intended to be remembered as Independence Day.

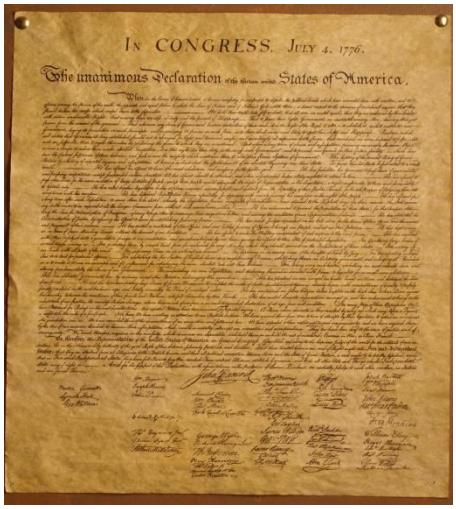
July 2nd was when the Continental Congress voted on Independence and the day they thought would be remembered and celebrated as Independence Day.

3. Signers held a wide array of occupations - 24 lawyers, 11 merchants, 9 farmers.

4. There is more than one copy.

Most people see the original Declaration on display at the National Archives in Washington, D.C. While it is the original, it is not the only one -- there were hundreds of copies made. These copies are known as the "Dunlop broadsides". They were used to spread the news of the Declaration throughout the colonies. The rebels had a great system of copying and disseminating information quickly.

5. Two of those copies have been found in the last 25 years.



In 1989, a Philadelphia man got very lucky when he found an original Dunlap Broadside copy in the back of a picture frame, he bought at a flea market for $4. It sold for $8.1 million in 2000. What a find! A 26th known Dunlap broadside emerged at the British National Archives in 2009, hidden for centuries in a box of papers captured from American colonists during the Revolutionary War.

6. Three US Presidents have died on 7/4.

Thomas Jefferson, John Adams and James Monroe all died on the Fourth of July. Adams and Jefferson both died on the 50th anniversary of the Declaration's passage. James Monroe died 5 years later on July 4, 1831.

7. There was a 44-year difference between youngest and oldest signers.

Benjamin Franklin was the oldest signer at 70 years old. But 44 years his junior was Edward Rutledge, a lawyer from South Carolina who was only 26 at the time.

8. The movie National Treasure May Not be Way Off.

In the movie “National Treasure,” Nicholas Cage’s character claims that the back of the Declaration contains a treasure map written in invisible ink. That is not sure, but there is writing on the back. It reads: “Original Declaration of Independence dated 4th July 1776.” It’s thought this was added as a label, but no one is sure when.

9. The Declaration has only left Washington D.C. twice.

The first time was when the British attacked Washington during the War of 1812, and the second time was during World War II from 1941 to 1944 when it was stored at Fort Knox.

10. Every 4th of July the Liberty Bell in Philadelphia is tapped (not rung) 13 times in honor of the original thirteen colonies.

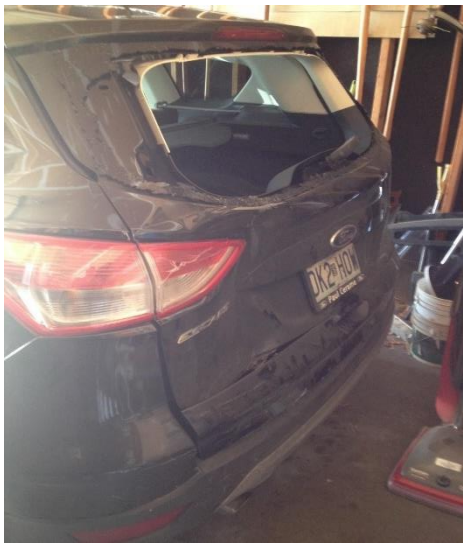
Settlements in Three Cases

Our client Cindy was involved in a three-car accident and we were able to recover multiple times for her. She and her husband Nick were on the way to work in Nick's work vehicle when they were rear ended on Highway 270. Cindy had to be taken to the hospital with back and neck pain.

Follow up imaging showed that the accident caused the hardware from a previous back surgery to move, and created new painful disc bulges. Cindy would need corrective surgery again to repair her back, but the incident was 4 and a half years ago and her medical damages at the time of settlement were only $11,000.

Even though Cindy was pain and symptom free for years, the Defendants argued that this was not related to the accident. We sued both other vehicles involved in the accident. We took the deposition of her surgeon, who confirmed the cost of surgery, the change to Cindy's back, and the likely lost time at work.

The week before trial, we recovered the policy limits from the rearmost driver, as well as additional settlement from the middle driver who was partially at fault, for a total of $57,000. Then we pursued the underinsured case.



When the insurance company refused to pay, we sued them for vexatious refusal to settle. The case went to court ordered mediation, and we settled it for $300,000. Here's a picture of her car:

The hood of Marqual’s vehicle flew open as he was driving down the highway. In this moment, Mr. Patton’s life flashed before his eyes. His vision was completely obstructed due to the raised hood of the vehicle.

He lost control of the vehicle and his car was sent barreling into the median. This accident arose from the carelessness on the part of the company that had serviced Marqual's vehicle. Specifically, employees of this car service failed to properly secure the hood after they completed work on the vehicle.

As a result, our client suffered severe injuries to his knees and back which required a ligament repair surgery and months of physical therapy and rehabilitation. Fortunately, this story has a happy ending.

Marqual has fully recovered from the injuries that he sustained in the accident and the diligence and determination exhibited by those at Burger Law Firm helped to achieve compensation for him to the tune of $82,500!

Our third case we settled for $125,000 with Marqual's only $6,259 in medical damages.

In April 2018, our client was using her pressure cooker that she received as a gift from a large department store in the Illinois area. Our client had used her pressure cooker numerous times and was using it according to like she always had.

All of a sudden, the pressure valve malfunctioned, and our client opened the cooker without pressure being release and shooting hot water onto her stomach, side and legs. OWWWW.

Unfortunately, it burned these parts of her body. Our client opted out of a class action litigation involving the pressure cooker and made this individual claim against the manufacture.

The manufacture was liable under the theory of product liability set forth in §§ 402A and 402B of the Restatement (Second) of Torts as the manufacture engage in the business of designing, manufactured, selling, marketing and/or supplying these pressure cookers.

The cooker was defective in that the pressure release – an essential safety feature – unlocked while the contents of the cooker were still pressurized causing injuries to our client.

The cooker was not reasonably safe for its intended use because it did not conform to its intended design and failed by allowing the lid to be opened when the Cooker contained pressurized steam and hot water. Without limitation, the cooker was defective because it did not perform as intended and designed.

Our client went directly to the emergency room. It was determined that she had 1st degree burns on approximately 7% of her total body surface.

The center of the scars were treated with vascular laser on short pulse duration and others were treated with CO2. She underwent this treatment 4 times. This was a painful injury that took a long time to heal. Even with the plastic surgery procedures, she still has permanent scaring from these burns.

Love in the Time of Corona

We presented a great CLE two Fridays ago - attended by over 100 lawyers. Phil Tatlow presented on ERISA, I did a talk on resolving Liens, and Dave Crawford and I did an ethics session on dealing with stress during this strange pandemic time.

To access all the CLE written material and power point slides, go to our Referral or Lawyer to lawyer page: https://burgerlaw.com/lawyer-to-lawyer/

Good morning, Friend,

I was able to obtain a $3 Million Judgment against murderer Pamela Hupp on Friday.

I represent the family of Louis Gumpenberger. Hupp killed Louis on August 16, 2016, by shooting him.

Margaret Burch, Louis' mom and grandma and guardian of Louis' minor child testified in support of the Judgment.

Margaret wanted to be sure that Pamela Hupp could not profit off of her crimes and her murder. If she tries, the first $3 million goes to Margaret and Louis' son.

The details of Hupp's murder of Louis are grisly. Hupp called 9-1-1 shortly before shooting Gumpenberger. Hupp claimed that Louis, armed with a knife, had jumped out of a car (driven by another person) into her driveway, accosted her while she sat in her vehicle in her garage, and demanded she drive them to a bank to retrieve Russ Faria's money.

She also stated this prompted her to flee into her house and then shoot Louis in self-defense with a gun she kept on her nightstand after he pursued her. Hupp planted a knife and a note on Louis' body.

The note contained instructions to "kidnap Hupp, get Russ's money from Hupp at her bank, and kill Hupp" and to "Take Hupp back to house and get rid of her. Make it look like Russ' wife. Make sure knife sticking out of neck." in return for a reward of $10,000.

Russ Faria spent three years in prison, wrongly accused of his wife's Betsy's murder.

She even put $900 in Louis' pocket. Then she stabbed herself in the neck and waited for the police to arrive.

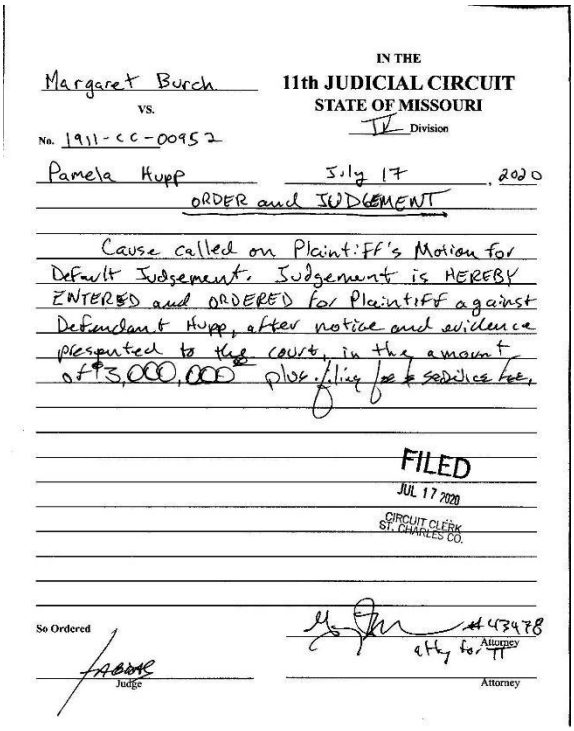
On June 19, 2019, Defendant Hupp entered an Alford guilty plea of the charges and was sentenced to life imprisonment without the possibility of parole for Louis' murder.

In her Alford plea, Hupp still did not admit to any criminal act relating to Louis. Hupp is incarcerated with the Missouri Department of Corrections.

We were hired more than three years after Louis death by his mom. We filed a Petition and served her in prison. For reasons set out in the below article on the wrongful death three-year statute of limitation, we alleged fraud and concealment.

We had some delays because of service, a judge recusing himself because of involvement in past cases with Hupp and corona. Hupp never got a lawyer or filed an answer.

Margaret and I went to Court on Friday and obtained a judgment against Hupp for $3 Million. Unlike a typical hearing like this, Margaret testified about her son, the murder, her sorrow and anger and the impact on her grandson.



IN THE

Margaret Burch

11th JUDICIAL CIRCUIT
STATE OF MISSOURI

VS.

IV Division

No. 1911-CC-00952

Pamela Hupp

July 17, 2020

ORDER and JUDGEMENT

Cause called on Plaintiff's Motion for Default Judgement. Judgement is HEREBY ENTERED and ORDERED for Plaintiff against Defendant Hupp, after notice and evidence presented to the court, in the amount of $3,000,000 plus filing fee & service fee.

FILED
JUL 17 2020
CIRCUIT CLERK
ST. CHARLES CO.

So Ordered

Judge

#47478
Attorney for Pl
Attorney

I was not sure how much the court wanted to hear but the Judge said "Let her talk."

It was incredibly moving. Not a dry eye in the courtroom.

She told St. Charles County Judge, Michael Fagras, that her 15-year-old grandson still has nightmares about his father's death.

Burch shook with emotion as she testified – and the podium shook with her.

She talked about her son and the impact the murder had on her and her grandson.

Louis had suffered a traumatic brain injury during a car accident, which left him with the developmental capacity of a child. He worked in recent years caring for others with developmental disabilities.

He didn't make a lot of money, but every Friday when he got his paycheck, he would take his son to Walmart to get a toy.

When he was first murdered, that was the memory his then 11-year-old son clung to and told his grandmother he missed. The three of them lived together and now it's just the two of them.

Her testimony was powerful. She spoke from the heart. She's lived this, the love for her lost son, and what she's done through the circus that Pam Hupp has put her through.

She told the court that she did not want Hupp to profit from her son's murder.

The Judge was gracious and kind - noting that she had never gotten to tell her story till that day and expressing sincere condolences.

What a privilege to represent her and stand next to her through this.

How to Address Statute of Limitations Concerns in a Wrongful Death Case.

Because Margaret came to me after the three-year statute of limitations had ran, we had to address it head on in our case. After research and analysis, we did it in two ways (and a third materialized later).

First, in our petition we alleged that Hupp was equitably estopped and was foreclosed, as a wrongdoer, from asserting a wrongful death statute of limitations defense in this case. *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015). In this case, the Missouri Supreme Court held:

This Court holds the application of common law maxims precluding one from benefiting from his or her own fraud and application of the doctrine of equitable

estoppel bars Relator from asserting the statute of limitations as a defense to Irwin's cause of action.

In so doing, this Court follows the dictates of O'Grady by interweaving legislative policies with the inherited body of common law principles so as to reach a remedial purpose ensuring that tortfeasors be held liable for the consequences of their actions and cannot benefit from their own fraud.

This Court cannot fathom that the legislature's intent when enacting the wrongful death statute of limitations was to permit tortfeasors to evade liability for causing wrongful deaths so long as the tortfeasor could conceal their wrongdoing until the statute of limitations expired, while other torfeasors, guilty of the same conduct, except for the fortuity that it merely caused injury instead of death, would be held liable for damages. Such a reading of section 537.100 would lead to an absurd and illogical result.

The circuit court did not abuse its discretion in overruling Relator's motion to dismiss Irwin's wrongful death suit because the doctrine of equitable estoppel forecloses Relator from relying on the statute of limitations as an affirmative defense due to his fraudulent concealment of his wrongdoing.

The court made specific findings regarding this case and the Statute of Limitations issues.

Second, we alleged Assault and Battery - an intentional tort with a longer statute of limitations. This is also much harder to discharge in bankruptcy.

We also alleged Fraud and Misrepresentation - for lying about Louis murder to escape statute of limitations claim preclusion and also to prevent bankruptcy discharge.

Third, Hupp never answered the lawsuit. Statute of limitations is an affirmative defense and not an element of an initial claim. For a defendant to assert it, they must file a Motion to Dismiss or Answer asserting that the statute of limitations has passed to bar the suit.

A party must plead all affirmative defenses, including a statute-of-limitations defense, and more specifically, the defending party must plead the very provision on which he depends in order to take advantage of a statute of limitations. Mo. Sup. Ct. R. 55.08. *Scott v. King*, 510 S.W.3d 887 (Mo.App. ED 2017).

Hey, Friend,

Hope you continue to weather the Corona Pandemic well. Rather than talk about that I thought I would discuss two important auto insurance issues and mix in some pictures of a driving trip my family took to Colorado a couple weeks ago.

My friend, Tyson Mutrux, asked me to present with him for a couple of Continuing Legal Education classes at the Missouri Solo and Small Firm Conference. It will of course be virtual this year - August 19 - 21, 2020.

We are teaching other lawyers about: Maximize Your Client's Un/Underinsured Motorist Claim During a Pandemic and Bad Faith claims.

So, I thought I would take a little bit of the content and share some aspects of underinsured and underinsured motorist claims. We recorded our presentations and will be moderating them. Should be good watching. I am psyched to see some of the other presentations too.

Uninsured and underinsured claims are against the client's own insurance company. Clients sometimes thinks that means they are easy or simple. NO - they are as easy and simple as 2020.

I try to answer insurance questions for free - so email me if you have one.

Uninsured Motorist Coverage

All auto insurance policies carry a minimum uninsured motorist coverage in Missouri in the amount of $25,000.

If you, a family member or friend are injured in an automobile accident and the driver who was at fault did not have insurance, and is uninsured, your insurance pays. This includes compensation for medical expenses, wage loss, pain and suffering and emotional distress.

Every policy holder has this coverage and it is the same as if the other driver actually did have insurance - but your insurance policy provides coverage for the other driver's negligence.

Uninsured coverage applies:

- If there is a hit and run or phantom driver
- if you're walking and you are struck as a pedestrian by another driver who leaves,
- circumstance where you do not know or cannot track down the identity of the phantom driver,

- Defendant could have failed to pay their premium and their insurance was cancelled even though they had an insurance card at the scene.

The answer to a question I often am asked is make an uninsured claim even if you are worried your premiums may go up.

Some tips in making these claims:

- Always get a certified copy of the policy.
- Read the Definitions section first.
- "Follow the path" of insurance language in the policy to get to coverage for the insured in the vehicle.
- Don't wait for the 3P case to settle to open the UIM claim.
- Be careful of multiple claimants and multiple defendants.

Underinsured Coverage

Underinsured coverage is not mandatory in Missouri. It provides coverage if the first party (tortfeasor) defendant has less insurance than the damages suffered by the plaintiff.

To make an underinsured claim, first settle the claim with the tortfeasor and exhaust their coverage.

Claimant has to get all money available from the negligent driver. If the negligent driver has $25,000 in insurance, and settle that claim for $20,000 - underinsured claim is gone.

Put underinsured carrier on notice, and let them know of the claim, let them know when the case against the tortfeasor driver settles, and make sure they do not object. Then, claim is ripe against the underinsured carrier.

Notice should be done in writing, and will assign a claim number.

It's kind of crazy, but sometimes, insurance companies will not admit to underinsured coverage or tell a client how to make that claim.

They will have separate claims adjusters and separate departments for underinsured coverage.

The adjuster for a property damage or medical payment coverage will not tell a claimant they have a possible uninsured claim or a possible underinsured claim.

Adjusters can call asking if you are really trying to settle a property damage claim, or get medical payment coverage or what exactly I was writing about. They try to trick and create obstacles - even a lawyer like me.

So, always make underinsured claim clearly, in writing and ensure an underinsured claims adjustor is assigned -separate from any property or med pay adjustor.

Remember you cannot stack underinsured coverage.

Also remember there is usually a set off amount recovered from underlying insurance - which raises issues that can make it difficult to determine the exact amount of coverage - see below.

Colorado Trip

A couple weeks ago we took a trip to Colorado to visit my brother

Traveling during the pandemic is weird. Drove there and back. One day each way and brought my parents. We had a great time bonding with each other. Making memories.

All meals were cooked in or carry out except one - ate outside away from folks for one meal. Masks and hand sanitizers all the way. It was a bit weird, but becoming the new normal.

Crested Butte Colorado is a magical place: beautiful mountains and amazing hiking and mountain biking. The kids only complained some about the daily hikes. Takes a few days to get used to the altitude.

Really cold in the winter - January is the coldest month with an average temperature of 11.8 °F. The average temperature for the whole year is 34.7 °F.

My son and I summit-ted Mount Crested Butte at 12,168. Not a 14er but a good climb. Here's a few pics - horseback riding in the mountains, walking the Royal Gorge Bridge and whitewater rafting the Taylor River.

Stacking Uninsured Motorist Policies

In Missouri the claimant can stack the minimum $25,000 uninsured from every vehicle owned under that same policy in that household.

This is because uninsured coverage is mandatory and the State of Missouri, both through statutes and court decisions, require that coverage.

For example, if you are injured and your vehicle has $25,000 of uninsured coverage, but also two other vehicle that are insured on that policy, you will have $75,000 in uninsured coverage.

Insurance companies will never tell you this and very often try to settle uninsured claims directly with their claimants without so advising them.

Stacking is defined as an insured's ability to obtain benefits either from more than one insurance policy, as when the insured has two or more separate vehicles under separate policies, or from multiple coverages within a single policy, as when an insured has one policy that covers more than one vehicle. *Martin v. Auto Owners Insurance Company*, 486 S.W.3d 390, 393 (Mo. App. W.D. 2016).

In Floyd-Tunnell v. Shelter Mut. Ins. Co., 439 S.W.3D 215 (Mo. banc 2014), Plaintiff's husband was killed in an accident involving an uninsured motorist. Each of three auto policies in household provided $100,000 UM coverage, but contained an "owned vehicle" exclusion which limited coverage to the mandatory minimum if the insured was injured while occupying a vehicle.

Defendant paid $100,000 on the vehicle involved in the accident, but only $25,000 under each of the other 2 policies based on the "owned vehicle" exclusion. The Supreme Court held that the term "insured" referred to the decedent, and not to the wife (who was not in the vehicle at the time of the accident).

The court believed the policy had to be viewed with the decedent as the "insured". The court held that the declarations page had to be read in conjunction with the policy

language indicating that the declarations were subject to the conditions and exclusions contained in the policy.

Missouri law mandates that all policies of automobile insurance in this state must include uninsured motorist coverage. Section 379.203 RSMo.

Missouri public policy flowing from this statute requires that multiple uninsured motorist coverages must be allowed to be stacked, and prevents insurers from including policy language denying stacking.

Underinsured Motorist offsets

Missouri Supreme Court has ruled underinsured motorist policies can setoff amounts based on prior payments if the policy language allows such an offset – *Owners Ins. Co. v. Craig*, 514 S.W.3d 614 (Mo. banc 2017)

In *Owners*, the policyholder had an underinsured motorist policy with a $250,000 limit. She had already received a $50,000 policy-limit settlement from the at-fault motorist.

The parties stipulated that her damages exceeded $300,000, but the Supreme Court ruled Owners could offset the $50,000 received against the $250,000 policy limit, so it owed the policyholder $200,000, rather than the $250,000 underinsured motorist policy limit

But remember Missouri Underinsured Motorist Statute – Mo. Rev. Stat. § 379.204:

"Any underinsured motor vehicle coverage with limits of liability less than two times the limits for bodily injury or death pursuant to section 303.020 shall be construed to provide coverage in excess of the liability coverage of any underinsured motor vehicle involved in the accident."

The intent of Section 379.204 is to prevent insurance companies from offsetting entire amount of purported underinsured motorist coverage of $25,000.

Under Section 379.204, any underinsured policies less than $50,000 (for example, a $25,000 UIM policy) will become excess over a $25,000 liability policy – therefore the injured party and underinsured policyholder will be able to recover $25,000 from the tortfeasor and then $25,000 in excess from their underinsured motorist policy, assuming their damages exceed $50,000

And note that an insurance company can never promise on the declaration page to provide the consumer with a certain amount of underinsured motorist coverage and then take it away in the fine print of the multi-page insurance policy.

The kid on the left is leaving for college today - boy will we miss him.

Thanks for reading.

-Gary Burger

Good morning, Friend,

So, this week we again see my fellow Missouri lawyers Mark and Patricia McCloskey in the news at the Republican National Convention. Since they brandished their weapons on a BLM march in June, they have more than doubled down on their notoriety.

Below, I discuss in detail a lot more about insurance claims. My email from 8/4 discussed un and underinsured coverage. I also discussed stacking of uninsured and set offs of underinsured.

Today I turn to Bad faith and vexatious refusal to settle claims. This arises from the talk I did at the Solo and Small Firm conference last week with my friend Tyson Mutrux.

I try to answer all insurance questions for free - so email me if you have one.

And speaking of bad faith - "what about the McCloskeys?" I am asked that as a lawyer a bunch. I am sure all lawyers in the area are.

So, I discuss some stuff about what they have done - regardless of anyone's view of the propriety of their actions in the first place - everyone agrees you can protect your own home.

But first, we are fostering puppies again - so **if you are looking for a dog email me** and my wife and I can put you in touch with great dogs. We are big advocates for rescuing strays - we just fostered these puppies.

What is Bad Faith Failure to Settle?

It's when and insurance company will not reasonably settle a claim and damages its insured, or customer, in Missouri.

Bad Faith is "the intentional disregard of the financial interest of Insured in the hope of Carrier escaping the responsibility imposed upon by its policy." *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 828 (Mo. 2014)

It is well established that an insurer owes to its insured a duty to act in good faith in settling a claim against the insured and that the insurer may be liable to the insured when it breaches this duty.

An insurance company cannot gamble with the insured's assets:

"[Carrier] is not permitted to take a gamble on getting a favorable verdict rather than to make a settlement within the limits of the policy."

"[W]here [Carrier]'s and [I]nsured's interests' conflict, [Carrier] cannot protect its own interests to the detriment of Insured's interests, but instead, the [Carrier] must sacrifice its interests in favor of [Insured]'s." *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 95 (Mo. Ct. App. 2005)

Here are the legal elements:

1. the liability insurer has assumed control over negotiation, settlement, and legal proceedings brought against the insured;
2. the insured has demanded that the insurer settle the claim brought against the insured;
3. the insurer refuses to settle the claim within the liability limits of the policy; and
4. in so refusing, the insurer acts in bad faith, rather than negligently.

The existence of bad faith is a question of fact to be determined on a case-by-case basis.

In situations where an insurer fails to inform the insured of settlement offers and the status of negotiations, the second requirement that the insured demand that the insurer settle the claim is not necessary to show bad faith.

"Bad faith is [a state of mind] indicated by the Carrier's acts and circumstances and can be proven by circumstantial and direct evidence." *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655, 662 (Mo. Ct. App. 2008)

My friend, Debbie Champion, and I did three great podcasts a bit ago on insurance coverage and bad faith. You can find them wherever you listen to podcasts.

Typical conduct showing bad faith:

- Not fully investigating and evaluating a third-party claimant's injuries;
- Not recognizing the severity of a third-party claimant's injuries and the probability that a verdict would exceed policy limits;
- Refusing to consider a settlement offer;
- Not advising an insured of the potential excess judgment or settlement offers; or
- Failing to properly communicate with Insured.

The tort of bad faith failure to settle creates liability to compensate [I]nsured when [I]nsured has been wrongly subjected to an excess judgment and to deter [Carriers] from failing to fulfill fiduciary duties to their Insureds. *Shobe v. Kelly*, 279 S.W.3d 203, 279 (Mo. Ct. App. 2009)

Remember that “an insurer's ultimate settlement for its policy limits does not negate the insurer's earlier bad faith refusal to settle and that an excess judgment is not essential to a bad faith refusal to settle action” *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 821 (2014).

Remember that you have to try and get a verdict over the policy limit int he underlying case in order to for the insured to have a bad faith claim against the insurance company which they can then assign to you.

So how do you successfully ensure that you can prove bad faith? Well - hire me and I will do my best to make that happen. I cannot give away all my secrets in these emails. ;-).

There are many other issues such as 537.058 letters which enable you to get written demands into evidence in Bad faith trials.

But there are other issues too, like 537.065 agreements, reservations of rights, Hammer letters, documenting bad faith, duty to defend, interpretation of insurance policies. Etc.

Rather than further getting in the weeds on this, give me a call or email me to discuss.

Are the McCloskeys in Bad Faith when they claim?

- Democrats want to "abolish the suburbs" when they live in the heart of the city.
- They are victims and thrust in the spotlight when they seek this attention, do "scores" of interviews and speak at the RNC convention.

- They are fighting for the Second Amendment when the gun Patricia used was an exhibit from one of their cases against a gun manufacturer.
- They are victims and do not want attention while being needlessly aggressive in multiple interviews and the national political stage. Their lawyer, Albert Watkins, says they "will not shake like small dogs passing razor blades." Is that a phrase I have not heard of?
- The marchers were "an out-of-control mob" when videos disprove that, and other neighbors signed a petition supporting BLM and gave water to marchers.
- They were threatened on their property when the marchers included kids, grandparents and our new congress woman, and no one looked like they were on their property or threatened them. This march did not seem to turn violent at all.
- The marchers were led by a "Marxist liberal activist" referring to our new congresswoman, who is just not an angry radical or a danger.
- Say the above but also say they supported BLM causes.
- “No matter where you live, your family will not be safe in the radical Democrats’ America.”

Is their portrayal honest or trying to get their 15 minutes of fame, stir up racial animus or feed into a portrayal of all protests as violent and threatening?

To borrow the bad faith definition above, are they showing **intentional disregard of fair facts in the hope of escaping the responsibility imposed in them by their oath as lawyers or fundamental fairness?**

You can probably tell what I think. A lot of lawyers get asked about the McCloskeys. Can we bill them our time for answering? Class action? What about their neighbors?

I am all for protecting property, but this seems silly, contrived and conflated well beyond what occurred with political agendas. They live in the central west end near the mayor (where the marchers were going) - not in some compound in Idaho.

Will they sue me for asking this? They have sued a lot of folks and seem like aggressive people - even to bees.

Does anyone want to keep seeing them or talk about this?

Not me - back to insurance companies

Vexatious Refusal

Vexatious refusal in Missouri are penalties against the injured person's insurance company and is thus different than bad faith.

"Vexatious" means "without reasonable or probable cause or excuse."

Elements of a claim for vexatious refusal to pay:

1. Issuance of an insurance policy within the scope of §§ 375.296 and 375.420 to a plaintiff who is a Missouri resident or Missouri corporation;
2. The plaintiff sustains a loss and makes a first-party claim under the plaintiff's insurance policy against the defendant insurance carrier;
3. The claim is wrongly denied;
4. The defendant's refusal to pay the loss was willful and without reasonable cause or excuse;
5. The plaintiff is entitled to damages for breach of the insurance contract, and penalties and fees are warranted due to the insurer's vexatious and recalcitrant claim handling, as established in V.A.M.S. § 375.420.

See V.A.M.S. §§ 375.296, 375.420; *Progressive Preferred Ins. Co. v. Reece,* 498 S.W.3d 498 (Mo. Ct. App. W.D. 2016); *Vantage Credit Union v. Chisholm,* 447 S.W.3d 740 (Mo.Ct. App. E.D. 2014).

Common Grounds for an Action for Vexatious Refusal to Pay

- Refusal to pay the claim without a valid reason. *Russell v. Farmers & Merchants. Ins. Co.,* 834 S.W.2d 209 (Mo. Ct. App. S.D. 1992).
- Inadequate investigation and refusal to explain its denial of coverage. *Allen v. State Farm Mut. Auto. Ins. Co.,* 753 S.W.2d 616 (Mo. Ct. App. E.D. 1988);
- Claim denied without explanation. *Hensley v. Shelter Mut. Ins. Co.,* 210 S.W.3d 455, 467 (Mo. Ct. App. S.D. 2007); *Hounihan v. Farm Bureau Mut. Ins. Co. of Missouri,* 523 S.W.2d 173 (Mo. Ct. App. 1975)
- 18-month delay in paying life insurance policy proceeds when the company knew of the beneficiaries and their residences. *Victor v. Manhattan Life Ins. Co.,* 772 S.W.2d 826 (Mo. Ct. App. E.D. 1989).
- Inadequate investigation of the claim; *Watters v. Travel Guard Intern.,* 136 S.W.3d 100, 110 (Mo. Ct. App. E.D. 2004);
- Bad or BS explanation of the insurance company's denial of a claim and improper delay in payment. *DeWitt v. American Family Mut. Ins. Co.,* 667 S.W.2d 700 (Mo. 1984).

So, what damages do you get for Vexatious?

Under § 375.420 20% of the first $1,500 of the loss and 10% of the loss in excess of $1,500 together with reasonable attorney's fees, in addition to the amount of recovery owing under the policy.

Attorney fees can be assessed in a vexatious refusal to pay case even if the jury does not assess any penalty damages under the statute. *DeWitt.*

It is kind of funny that courts say the trial court is an expert on the value of legal services - however, a jury is not. See *Howard Const. Co. v. Teddy Woods Const. Co.,* 817 S.W.2d 556 (Mo. Ct. App. W.D. 1991).

What if they pay the day before trial?

Answer: The fact that the insurance company pays, paid, or eventually pays all or part of the amount owing under the policy does not eliminate a claim under § 375.420.

The Supreme Court in *Dhyne*, in response to such an argument, stated:

Adopting State Farm's argument would permit an insurance company to refuse payment and avoid liability under section 375.420 by simply paying prior to trial. Such an interpretation would, from a practical standpoint, eliminate section 375.420.

Call me if you have vexatious questions.

Here's me dropping Jordan off at Tulane University in New Orleans to begin college. He will crush it.

We both have CORONA hair.

Thanks for reading.

-Gary Burger

Happy Wednesday, Friend:

I thought I would talk a little today about Good Faith, as opposed to my theme last email. I can describe how to fight insurance companies acting badly, but sometimes, they act in good faith.

In law, the premise of good faith is that each party to contract will make effort which is honest in fact to meet terms and spirit of performance and enforcement obligations. A covenant of good faith and fair dealing is implied in all contractual relationships, including insurance agreements.

Below I talk about three settlements we obtained through zealous representation of our clients and in which the insurance companies acted in good faith. And when I say 'we' I should, in good faith, say Genavieve Fikes and Tyler Thompson - two attorneys with whom I am lucky to work.

In the spirit of good faith, I also share some feedback from my comments about Mark and Patricia McCloskey at the Republican National Convention and share a new ad with them in it by the Lincoln Project.

Let me share a great dog rescue we are involved in - Home 2 Home. The cute puppy below is no longer available - but there is faith, other super cute puppies available now and more on the way.

You can check out the “adoptables” album on the H2H Facebook page or the “adoptables” highlight on their Instagram page for more.

$50,000 Car Accident Settlement – Adding Good Faith Value to Claims Involving Concussions

Injury claims involving concussions can be real wildcards, because oftentimes there is no objective evidence of injury, the treatment is sparse, the bills are low, and insurance adjusters disregard your client’s subjective complaints of memory loss and headaches.

However, at Burger Law, we know how to add value to these claims and persuade insurance companies to compensate concussions in good faith.

For example, Genavieve recently obtained a $50,000 policy limits settlement for her client Amanda who suffered a concussion in a car accident, and we are currently pursuing an underinsured claim as well.

It is crucially important for a concussion patient to be evaluated by a neurologist. Unlike a herniated disk or broken bone, concussions cannot be diagnosed through X-rays or MRIs. Insurance adjusters tend to discredit symptoms that are only based on what a patient says, such as memory loss or headaches.

However, a neurologist will utilize specialized cognitive testing that leads to the best care for your client AND that will show the real legitimacy and harm from a concussion to an adjuster (or jury!).

Burger Law helped coordinate Amanda’s appointment with a neurologist, who diagnosed her with post-concussion syndrome caused by the car accident and then referred her to cognitive rehabilitation where she treated for three months.

Concussion patients often assume that there is nothing that can be done to treat these injuries and don’t have any treatment or bills apart from the initial ER visit.

However, Amanda’s cognitive rehabilitation, which involved speech pathology, eye muscle coordination, visual tracking, and other exercises, helped her recovery and added value to her case due to the documented treatment and medical bills.

The demand letter in these cases is also uniquely important. A concussion is a type of mild "traumatic brain injury." The phrase "traumatic brain injury" tends to evoke more of a response from adjusters than just "concussion," so this terminology was used in the letter.

Since the bills were not very high, Genavieve emphasized the severity of the injury in a way that is not captured in the records.

She described the difficulties Amanda experienced in detail, such as memory lapses, difficulties with word retrieval, critical thinking, and attention deficits, and illustrated how they interfered with her daily life as a school psychologist, graduate student, wife and mother.

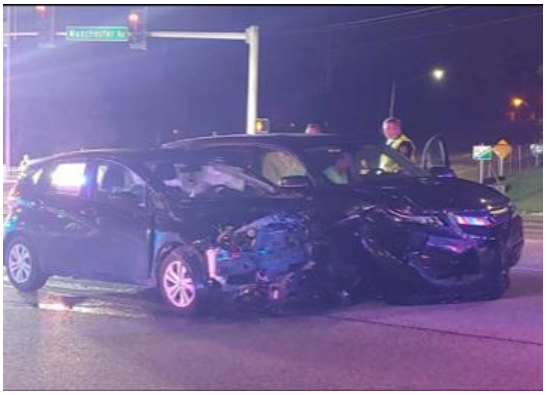
The tragedies involving players with head injuries in the NFL have shed light on the severity of concussions that was previously ignored. Thus far, the NFL has already paid out **nearly *one billion dollars* to eligible players and their families.** With challenges to that settlement rejected.

If there is one thing insurance companies care about, it is their pocketbooks, so it doesn't hurt to remind the adjuster of these figures.

Burger Law knows how to maximize settlements in these tricky head injury cases.

$250,000 Settlement

On September 1, 2019, Daniel Dotson was driving south on Baxter Road at its intersection with Manchester Road in St. Louis County when Mr. Shanmugam ran a red light, crashing into Daniel's vehicle.



Daniel suffered serious injuries to his head, neck, back, shoulders, arm, knee, and foot. He suffered a concussion and a number of ligament tears, and had to undergo surgery to repair his shoulder.

We obtained Daniel's medical records and bills and demanded $250,000 in settlement, which was the insurance policy coverage available. Mr. Shanmugam's insurance company elected to act in good faith and paid the full $250,000 limit.

Daniel is very happy with the settlement and the services and aid our firm provided to him.

Our recovery for Daniel will allow him to move forward with his recovery and he will have the financial resources to do so.

Response to my McCloskey article

Much of the response to the McCloskey article I wrote two weeks ago was positive and thought I had good points. But, to act in good faith, I should report one comment from a friend who emailed me saying:

Gary, you forgot to mention the fact that a publicity hound of a prosecuting attorney filed bogus felony charges against them blowing the whole event out of proportion and back into the national news. (A prosecutor who fails to charge or drop charges in major felony cases). However, to mention this fact would not fit the scenario you want to paint.

Good point - I did have a scenario.

But I think that scenario is founded in fact and echoed in my newest favorite podcast: The Lincoln Project.

The Lincoln Project is now doing a commercial featuring the McCloskeys. Here's a description:

In the new minute-long commercial shared exclusively with Morning Consult, **the group links Kyle Rittenhouse's alleged Aug. 26 killing of two people at a Black Lives Matter demonstration in Kenosha, Wis., to Trump's rhetoric and his elevation of Mark and Patricia McCloskey,** who were awarded an Aug. 25 speaking slot at the Republican National Convention after brandishing firearms at demonstrators outside of their home in St. Louis on June 28.

Another $250,000 settlement

Zachary Murray suffered injuries on October 9, 2019, when another driver abruptly changed lanes and swerved into his motorcycle's lane of travel.

Zach was thrown from the vehicle and had abrasions running the length of his right side. He had serious injuries to his right shoulder, head, right knee, left wrist, left hand, and left arm.

We demanded the $250,000 insurance policy limit for Zach and the company paid the full $250,000 available in coverage - good faith abounds this week.

Zachary is very happy to have the financial resources necessary to aid him in his recovery.

Good morning, Friend:

Its fall and that means harvest time.

I harvested my honey last week. Really happy to have a bigger yield than last year. And I learned a lot as well.

Observing the bees to learn about their behavior and the lessons they teach has been a great experience. It can be humbling to have a hobby with so much to learn and appreciate how nature will always throw us curve balls. Life lessons perhaps.

This was a good year for bees in terms of honey flow. This is the second good year in a row in our area. This comes from good nectar flow from flowers and water in the early part of the year.

But bees are still facing many challenges in America and around the world. They suffer habitat loss and fragmentation, disease from the Varroa destructor mite, pesticides and climate change.

Below I discuss a couple settlements and my weekly Ask a Lawyer FB live show on Wednesdays.

And although this email comes on the heels of the terrible loss of Justice Ruth Bader Ginsberg, I frankly cannot bring myself to write about that.

It's a profound loss with such enormous consequences for the Supreme Court and rights I and millions of Americans hold dear, that I cannot do it justice now. Others have done so very well.

Although, to shortly paraphrase Shakespeare in Romeo and Juliet: Death, that hath suck'd the honey of thy breath, hath had no power upon thy words, strength or notoriety.

So back to bee keeping - when we take honey from bees, we take only extra honey they make and not what they need for winter. Yes - bees make honey in abundant spring and summer months to have food for winter. And we make sure they are good for the winter months.

To get the honey, I remove boxes that were on top of the hives, but leave the bottom boxes - which contain honey, and the egg laying, or brood development, area.

They get a little mad when their honey is taken.

The next day we went to the bee store and brought my little one with us. We got him a little bee keepers' outfit. When we got home, he put it on and wanted to go to the hives.

He had no fear and enjoyed getting really up close.

$45,000 settlement for child injury at birthday party

We were able to get a solid result for Michelle's daughter recently.

They experienced a parent's nightmare - broken bone at a birthday party.

The claim was against a local gymnastics place that promotes parties. They had a lot of kids and only one person supervising a balance beam activity. No one spotted her daughter, who fell a relatively small distance but broke her leg.

She had surgery and thankfully had a really great recovery. You'd think the defendant and its insurance company would take care of this little girl. But no - they fought us really hard.

First, they tried to get Michelle to sign the waiver the day after the incident to avoid any responsibility. She would not. Remember, waivers can be enforced to obviate liability but only when the insured can come up with a signed waiver. Don't sign one after an incident.

Then they said they had a witness statement saying they had adequate staff and it was the girl's fault. We came up with witnesses proving that position a lie.

Lastly, they low balled us and would not pay. So, as usual, we filed suit and pushed the case. We were able to settle shortly after filing. We filed a motion for approval of the settlement and put the entire amount in a structured settlement to help in the future.

I get asked all the time whether a prospective client needs a lawyer in such a cut and dry case. I often explain how a year or two later after a fight that same client really appreciates that they hired me.

Burger Law FB Live show

I continue to do a Facebook live show each Wednesday at 3 pm. We have had some really great guests the last weeks - all friends who graciously answered questions in their areas.

Last week I discussed a wide array of topics with criminal defense lawyer Eric Abramson.

And the week before Nedim Ramic discussed his personal injury practice and the St. Louis Bosnian community.

$100,000 Settlement

Our client Peyton suffered serious injury on February 22, 2020, when riding in a vehicle driven by Hailey Cook. Ms. Cook veered off the road and crashed into a dirt pile head-on.

Peyton had to be air-evacuated from the accident site and required significant treatment.

Unfortunately, only $100,000 in insurance coverage was available but we were able to quickly secure the policy limit for Peyton, allowing him to use the settlement money for his treatment and recovery.

We were able to use the Missouri Lien statute to lower his bills and make sure the bill collectors do not follow him around. In cases where the damages exceed the insurance coverage, we make sure we fight hard to lower the liens as much as possible.

Peyton and his family are happy with the settlement and our firm's ability to provide fast assistance.

Close up of William at a hive.

-Gary Burger, Personal Injury Lawyer

Happy Wednesday Friend,

Its 27 days till the election. One of the strangest in memory.

I love elections. For many years I have worked as a poll watcher or voter protector.

I'll be working in a polling place Nov. 3 to help answer questions and ensure voters get to exercise their franchise.

Make sure you vote - if any friends need information on how or where to vote, call our office or email me.

Below, I discuss a settlement and a Continuing Legal Education class on mediation I will be presenting next month with USAM.

But first, we should remember that we are really choosing the electors who will go choose our president on election day. The popular vote does not choose the president.

It’s a strange system thought up over 4 days by 11 men in 1787. Here's a little article I wrote on the electoral college, what it is and some of its history. Enjoy!

The Electoral College

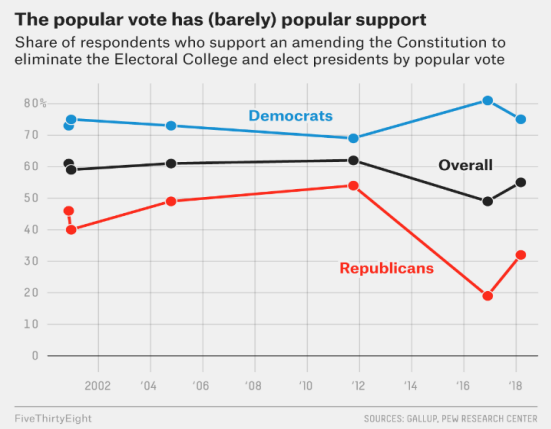
In my Dave Letterman style, here’s the top 10 things most people do not know about the Electoral College.

10. As just stated - created as a compromise in just four days in September 1787. The constitutional convention delegates could not decide how the president was to be elected. So, they sent the issue to the “Committee of Eleven.”

They decided a select group of appointed people would choose the president, called electors (reference to how popes were chosen?). Each state would get electors equal to the number of representatives and senators.

Each state's legislature decides how it appoints electors. The framers thought this the least objectionable choice of President selection.

If no candidate gets a majority of the elector votes the House of Representatives chooses the President.



9. The Framers thought electors would be look to nothing other than what was best for the nation and be above politics. But after Washington's presidency, political parties started and electors as independent decision makers became useless.

Missouri's Thomas hart Benton wrote in 1824 that they "lost power over their own vote" and were picked "for their devotion to a party." Electors quickly became "party lackeys and intellectual nonentities" wrote Supreme Court Justice Robert Jackson in 1952.

Electoral college waivers in popularity - depending if a party thinks they have an advantage using it or not.

8. In 1796 and elector pledged to John Adams instead voted for Jefferson. Adams won that year 71 electoral votes to 68, in part, because Virginia split its electoral votes by districts.

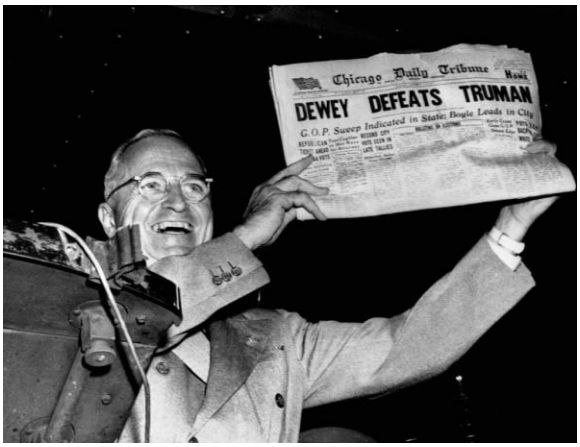
After those states frequently switched between splitting votes and being winner take all in political maneuvering by political parties. (Massachusetts changed systems in every election between 1796 and 1820). Today 48 states are winner take all with Maine and Nebraska having a district system.

In the 1800 election, Jefferson and Aaron Burr tied electorally – and Burr was Jefferson's running mate! It took the house 36 votes before Jefferson won.

7. The 12th Amendment to the constitution in 1804 required electors to distinguish between votes cast for president and vice president, to stop that from happening again.

6. In 1824 Andrew Jackson won both the popular vote and the electoral college but lost to John Quincy Adams. This was because two other candidates took votes that cost Jackson the majority. The contest went to the House – which chose Adams.

Winners of the popular vote lost the electoral vote in 1876 and 1888, in addition to more recent Bush-Gore and Trump-Clinton elections. Perhaps the most famous picture of electoral college troubles is Harry Truman holding the newspaper announcing his opponents win.

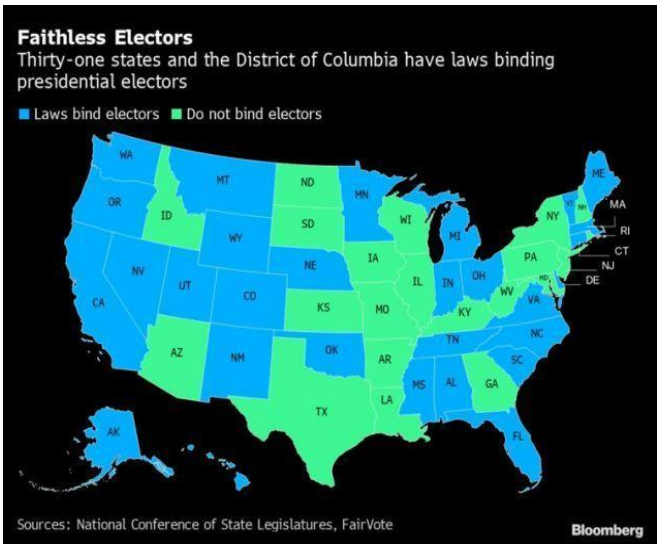


5. In *Ray v. Blair*, 343 U.S. 214 (1952), the Supreme Court held it constitutional for states to allow parties to require a pledge to vote for the party's nominee as elector, and that it was not a breach of otherwise qualified candidates' rights to be denied this position if they refused the pledge. Blair did not want to support a candidate advocating civil rights for African Americans.

4. A faithless elector is a member of the United States Electoral College who does not vote for the presidential or vice-presidential candidate for whom they had pledged to vote. That is, they break faith with the candidate they were pledged to and vote for another candidate, or fail to vote.

A pledged elector is only considered a faithless elector by breaking their pledge; unpledged electors have no pledge to break. There has been a total of 165 instances of faithlessness as of 2016, 63 of which occurred in 1872 when Horace Greeley died after Election Day but before the Electoral College convened.

Nearly all have voted for third party candidates or non-candidates, as opposed to switching their support to a major opposing candidate. Here's a map of states that do and do not bind their electors:



3. As of 2017, 761 bills have been filed to change the electoral system. This included abolishing it and using a straight popular vote starting in 1816.

2. The National Popular Vote Compact is an agreement among states to cast all their electoral votes for the winner of the national popular vote regardless of the vote in their state. This has arisen because it is so hard to amend the U.S. Constitution.

Amending the Constitution requires a two-thirds majority in the House and Senate and ratification by three-fourths of the states. The last time we got close to getting rid of the

electoral college was in 1969 when a bill passed the house with 30 states on board to ratify it.

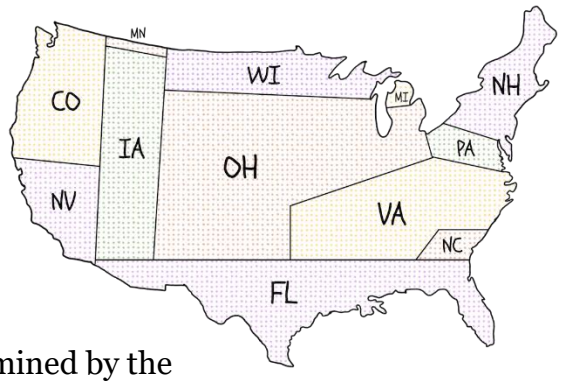
But a filibuster in the Senate killed the bill and it never was passed.

The Compact bypasses Congress – but it has not taken effect yet. 15 states have entered the compact but it does not take effect, by its terms, unless enough states representing a majority of electoral votes enters the compact.

If that happens, and states abide it, the electoral college will be bypassed. They are 74 votes shy of the majority needed.

Will the drama of this election push more states into the compact?

1. 38 states voted for the same party in the last 5 presidential elections 2000-2016. So, candidates fight over votes and electors in relatively few states.



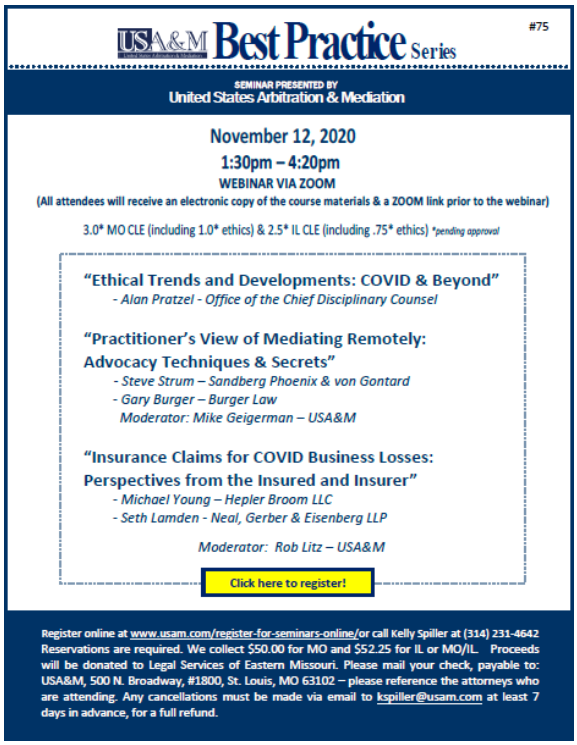
We often hear the election will come down to relatively few voters in few states. Sometimes this makes voters think their vote does not matter.

Here's a map of the US with the states size determined by the number of presidential campaign events in 2012:

Mediation CLE November 12

Very psyched to be presenting at an upcoming CLE by United States Arbitration and Mediation Services on **Advocacy Tips and Secrets** via zoom.

Since the pandemic, I have done a bunch of Zoom mediations. I have developed effective strategies and ways of presenting during the mediations, which I will share.



Here are some teasers (more in the presentation):

- Before the mediation we have a firm system of activities to be prepared, including contacting lienholders, form emails to clients explaining mediation, etc.
- A week or two before a mediation I prepare my case summary to the mediator with pictures or whatever good evidence I have and send it to the other side too. They need to digest it and set reserves accordingly.
- Pre mediation meeting via zoom with client to prepare them for mediation process and to talk case value.
- Prior to and during the mediation I take notes in a word document and prepare arguments and parts of depos or medical reports. Then share screen with that in Zoom to my client and the mediator to present points in the mediation.

Please register now. All proceeds go to Legal Services of Eastern Missouri.

$100,000 settlement

We settled a case for the $100,000 policy limits only 3 months after signing a representation agreement with our client Brandon.

In April 2020, Brandon was in a terrible motorcycle accident. The young driver of the other vehicle was not paying attention while he was reaching for a drink when he crashed his vehicle into Brandon's motorcycle.

Brandon suffered severe injuries, including both wrists fractured, fractured vertebrae, internal injuries, broken shoulder, broken hip and road rash.

Thankfully, Brandon was wearing a helmet at the time of this incident. He was flown from the scene of the accident in St. James, Missouri to Mercy Creve Coeur. With Missouri's helmet law changing – riders will be suffering much worse injuries or death.

Even though the Defendant had an insurance policy limit of $100,000 - Brandon's medical bills were higher.

The benefit Brandon has from hiring Burger Law is that we are able to negotiate with his medical providers to assert liens against the case in the case so we can use the Missouri Lien Statute to reduce his medical bills.

This way we are still able to get Brandon settlement proceeds for what he went through in this incident. The Missouri Lien Statute §430.225.3 through 430.250, provides that medical lien holders can only get up to 50% of the net proceeds of a settlement and cannot collect any more.

This lets us help clients walk away from bad crashes with no medical debt.

We are happy to represent Brandon and work to make sure that Brandon is able to get a recovery in his pocket from this incident and will not have to worry about paying for his medical bills on his own.

Gary's Gold honey is really good this year.

All bottled up for distribution.

-Gary Burger, Personal Injury Lawyer

Hello, Friend,

Voting in the 2020 election ends in two weeks.

I would say it's in two weeks, but 35 million Americans have already voted as of the time of this email.

It is important for us to understand the rules protecting voters against intimidation or supersession.

Voting in America is flooded with examples of voter intimidation and voter suppression in the past. By 1940, voter suppression campaigns were so successful that only 3% of eligible African-Americans in the South were registered to vote.

In the last few weeks, we see news reports of limited polling places and long lines, which affects access. We all know that not all Americans vote, it seems to be declining and we complain about voter apathy.

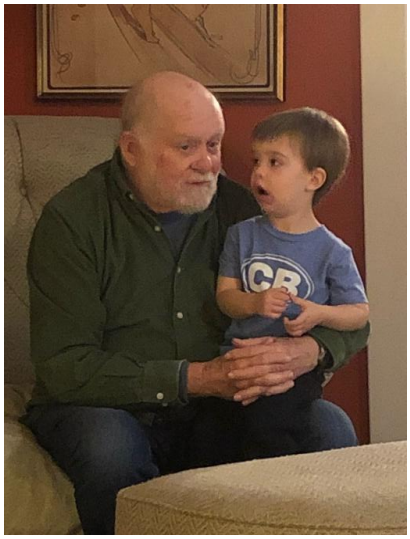
The 5th Circuit Court of Appeals recently ruled Texas could have one mail in drop off location per county, including counties with millions of people.

In 2016, Arizona had long (5 hours) voting lines – resulting in lawsuits and apologies from election officials. Predominantly Latino areas were disproportionately affected.

In Phoenix—which is a majority-minority city and the largest metropolitan area in the state—there was only one polling site per 108,000 residents- with some predominantly non-Latino white communities having a polling site for as few as 8,500 residents.

They had problems with armed people asking for green cards.

In St. Louis, I have worked at polls with hours long lines in higher minority residential areas and my polling place in a whiter area is pretty short.



And just two weeks ago, our president has criticized the voting process and legitimacy, with varying replies about accepting results. In the national debate urge supporters to go into the polls and 'watch very closely' while questioning the integrity of the 2020 election.

Fears of voter intimidation follow this.

Here's a pic of my dad telling my son voter intimidation stories.

But first, can we protect voters from intimidation?

Would voters policing polling places break the law?

What is voter intimidation?

Under the law voter intimidation is defined as the use of *threats*, *coercion*, or *attempts to intimidate* for the purpose of interfering with the right of another person to vote or to vote for the person of their choosing.

Voter intimidation is still a problem in the United States and may be a growing problem especially with the controversial presidential election that is coming up. Below are some examples that Voters have reported as intimidation tactics:

- Physically blocking polling places
- Using threatening language in or near a polling place
- Yelling at people or calling people names while they are in line to vote
- Disrupting or interrogating voters
- Looking over people's shoulders while they are voting
- Questioning voters about their political choices, citizenship status, or criminal record
- Displaying false or misleading signage
- Spreading false information about voting requirements and procedures

Voter intimidation greatly exceeds voter fraud.

Federal laws protecting voters

Over the years Congress has recognized that voter intimidation undermined the principles of democracy and in 1940 passed laws that criminalized voter intimidation.

Voter intimidation is defined under 18 U.S.C. § 594 which states that,

"*whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than one year, or both.*"

Other voter intimidation-related laws include:

- The Ku Klux Klan Act of 1871, which protected newly-freed slaves from harassment at the polls; and
- The Voting Rights Act of 1965, which prohibited intimidation, threats, and coercion.

Voter intimidation is a felony - person found guilty of violating the federal voter intimidation law can be sentenced up to one year in prison and fines up to $1,000 fine.

Missouri laws protecting voters

Voter suppression, intimidation, misleading information and disorderly conduct is illegal under Missouri law too.

For example, baseless challenges, intimidating voters, spreading false information or interfering with a voter or polling place may result in criminal or civil penalties. Any

activity that threatens, harasses or intimidates voters should be reported to the authorities below.

Did you know that a voter's identity or qualifications may be challenged by election personal or duly authorized challengers? (Not by anyone in the polling place).

Missouri laws allows challengers credentialed by political parties to be present in the polling place and challenge a voter's eligibility. Mo. Rev. Stat. § § 115.105.1, 115.429.2

Each party is allowed to designate a watcher only at locations where votes are counted, who are there to observe the counting of votes. Mo. Rev. Stat. § 115.107.1

Further, under Mo. Rev. Stat. § 115.105.1 challengers:

- must be registered voters in the election jurisdiction,
- had their names submitted to the Election Board before Election Day by their political party, and have credentials on them.
- cannot approach voters directly to request information or identification, or invade their privacy while voting.

All a challenger may do is raise a challenge to the voter's eligibility with a poll worker. However, a challenge can only be made when the challenger reason to believe the election laws of the state have been or will be violated.

Voters should be aware of reports that some challengers may not be well-trained and are being encouraged to aggressively challenge and in some instances have challenged voter's eligibility on non-legitimate legal grounds.

Examples of challengers acting in a non-legitimate ground can include mass challenges, challenges targeted to minority precincts or those based on information like foreclosure lists may violate the Constitution and Voting Rights Act.

Under no circumstance should an eligible voter be denied a regular ballot solely on the basis that his eligibility is challenged.

Only a select amount of people is allowed inside the polling place which include:

- watchers
- challengers
- law enforcement there at the request of election official or in the line of duty
- children accompanying an adult in the process of voting
- international observers
- those administering a youth election
- and members of the media with identification

All other people are not allowed in polling places.

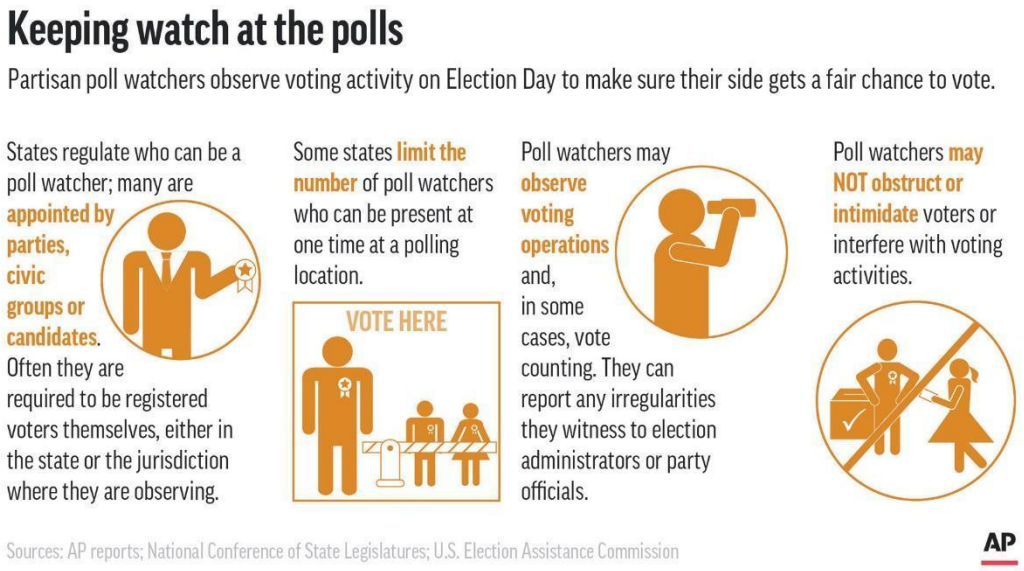
These people are only allowed to be in the polls as long as they are not interfering with the elections process. Mo. Rev. Stat. § 115.409.

All other people (other than election officials and voters) must be at least 25 feet from the entrance to the polling place. Mo. Rev. Stat. § 115.637(18)

In Missouri, exit polling, surveying, electioneering, distributing election literature, posting signs regarding a candidate or an election issue are prohibited in the polling place or within 25 feet of the polling place.

Finally, it is illegal in Missouri for anyone at a polling place (inside or out) to breach the peace, engage in disorderly conduct or impede the election process. Mo. Rev. Stat. § 115.637

If any of these laws are broken the polling cite should be reported immediately.



Missouri Law about intimidation and deceptive voting practices

Missouri Law further prohibits anyone one to induce, threaten, impede or prevent or attempt to impede or prevent someone from voting by abduction, duress or any fraudulent device. Mo. Rev. Stat. § 115.635 (1)(2)(3)

Missouri further prohibits employers to prevent employees from engaging in political activities, for anyone to interfere or attempt to interfere with voting in the polling place, or to engage in any disorderly conduct, breach of peace, violence or threats or violence that will impede or interfere with the election. Mo. Rev. Stat. § 115.637

Voters should also be aware of misleading information that confuses voters and prevents them from voting is illegal under Missouri Law.

Any information that disseminates untrue information about the timing of the election, or erroneously tells voters that they cannot vote if they have back-due child support, owed back taxes, have an outstanding warrant, have unpaid tickets or have had their home foreclosed upon.

In addition, it is illegal for anyone to attempt to coerce, intimidate or bribe any member or employee to vote or refrain from voting in a particular way. Mo. Rev. Stat. § 130.028

Voter intimidation is a huge issue that most voters are not aware of but should be.

Voters who experience voter intimidation should report all illegal challengers or watchers conduct, voter intimidations or deceptive practices to the following Agencies:

U.S. Department of Justice Voting Rights Hotline: 800-253-3931; TTY line 877-267-8971; Advancement Project Voter Protection: 202-728-9557

Election Protection Hotlines: 866-OUR-VOTE (866-687-8683) or 888 VE Y VOTA (888 839-8682).

Happy Wednesday, Friend,

Voting in the 2020 election is over but the counting is not.

Will the Supreme Court decide this election?

I am sending this email out on Wednesday, November 4th while mail-in ballots are being counted in numerous swing states.

I wrote before about the electoral college, its quirks and how it creates the current system where a few states end up being the most important determiners of who wins the Presidential Election.

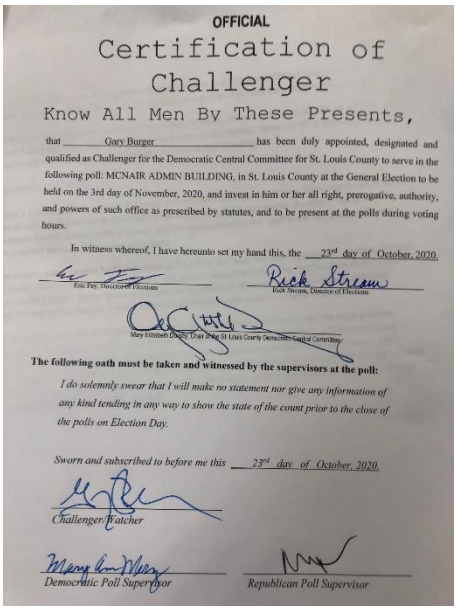
President Trump said this morning that he thought that he had won the election and was going to go to the United States Supreme Court to stop counting of mail in votes.

So, below I thought I would talk a little bit about the law and the Supreme Court's jurisdiction to determine the outcome of presidential elections. Other things in this email I discuss are a settlement, how to pay co-counsel fees, and another video of a happy client.

But first, I was able to work the polls yesterday and really enjoyed it.

I was certified as a vote challenger - or as I prefer to call it voter protection representative by the Democratic party.

To get such credentials, I have to be approved and signed off on by the Republican and Democratic election board officers in St. Louis County.



OFFICIAL

Certification of Challenger

Know All Men By These Presents,

that Gary Burger has been duly appointed, designated and qualified as Challenger for the Democratic Central Committee for St. Louis County to serve in the following poll: MCNAIR ADMIN BUILDING, in St. Louis County at the General Election to be held on the 3rd day of November, 2020, and invest in him or her all right, prerogative, authority, and powers of such office as prescribed by statutes, and to be present at the polls during voting hours.

In witness whereof, I have hereunto set my hand this, the 23rd day of October, 2020.

Eric Fey, Director of Elections

Rick Stream

Rick Stream, Director of Elections

Mary Elizabeth Duggan, Chair of the St. Louis County Democratic Central Committee

The following oath must be taken and witnessed by the supervisors at the poll:

I do solemnly swear that I will make no statement nor give any information of any kind tending in any way to show the state of the count prior to the close of the polls on Election Day.

Sworn and subscribed to before me this 23rd day of October, 2020.

Challenger Watcher

Democratic Poll Supervisor

Republican Poll Supervisor

Then when I go to the polling location, the Republican and Democratic supervisors have to witness my signature and approve my presence.

Here is a copy of my credentials from yesterday:

When I arrived, I introduced myself and basically tried to facilitate voting. I made sure that we had handicap accessibility and curbside voting. I watched to make sure that everyone was moving smoothly through the lines.

I was able to verify voters were registered on the Secretary of State's website, which worked really well. People who had questions were able to call the Board of Election - and were able to get through quickly and have their questions answered.

The election judges and supervisors at my polling location were really good. They were dedicated and worked well as a team. They worked so well, that I got the word out to other poling locations with longer lines to send people over to our location.

In St. Louis County, Kansas City and other big Missouri Counties, the rules about where you can vote were changed this year. Voters can vote at any polling location and do not have to specifically be in their precinct.

This really assisted other voters who had moved or who were not clear about where they were supposed to vote- they could vote anywhere.

Sometimes, for bigger elections, additional polling locations are open so it can be confusing about what location to vote.

One of my favorite stories was a lady in line who literally flew in from Japan to vote. I guess she did not trust the absentee ballot process. She said that coming here was not that big of deal but going home she would have to be quarantined for 14 days. Apparently, Japan is very guarded about Americans coming into the country and have controlled the pandemic well.

Thanks to everyone who voted yesterday and to all the poll workers and everyone who tried to make this an easy experience for voters.

Confidential Settlement for $110,000

Our office was referred a case from another lawyer to file a lawsuit after initial settlement discussions were not successful.

On June 5, 2018, our client was shopping at a store in St. Louis County. While he was shopping, an unsecured PVC pipe fell out of the rack and onto his foot, fracturing his toe.

We alleged this was a dangerous condition of the property – the PVC pipes were stored too high enabling them to fall if anyone was taking them down. Defendant knew that people would take these down.

Our client was taken immediately after the incident to the emergency room via ambulance. During his evaluation, emergency room staff contacted a podiatric surgery specialist, regarding his toes. This doctor recommended that our client be seen as an outpatient in his office the next day.

He was and had a displaced fracture of his left big toe.

On June 15, 2018, our client underwent an open reduction internal fixation surgery. During surgery a plate, four screens and packing were inserted and remain in place. After surgery, he received a bone stimulator due to the delayed fusion of the multiple breaks in his toe.

A few months later, in October, his wound was not healed from the surgery. He had moved out of state to Maine, and therefore had to be seen by a new podiatrist. This doctor ordered a biopsy and a bone scan of his toes.

It was determined that some of the pieces of packing migrated becoming problematic and causing the wound to not heal. This doctor performed an in-office extraction of the packing pieces that had migrated which allowed his wound to heal.

We filed suit, did depositions and had taken the treating doctors' depositions by zoom recorded video.

We asserted that the Defendant failed to properly stack and secure the merchandise on the shelves causing a dangerous condition and failing to protect or warn invitees, including Plaintiff of the dangerous condition which contributed to Plaintiff's injury.

We were successful in settlement during a mediation. Our office will be working to get the medical liens reduced and paid for the client as well as sending a co-counsel referral fee check to the referring attorney.

How Does a Lawyer Pay Co-Counsel Fees?

So, I made a number on comments on a thread on a private Facebook group among lawyers about how co-counsel fees are paid to referring lawyers. I thought I would write about it.

If a lawyer asks another lawyer to work with them on a case, they can share a contingency fee under Ethics Rule 1.5(e). This provides:

(*e) A division of fee between lawyers who are not in the same firm may be made only if:*

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;(2) the client agrees to the association and the agreement is confirmed in writing; and (3) the total fee is reasonable.

Burger Law works with other lawyers and partners with them to get great results for our clients.

When we do, we always make sure that the referring lawyer keeps the client as their contact.

When we pay co-counsel fees, we tell the client about it. We usually work under the referring lawyers' contingency fee agreement - but sometimes work under our agreement as well.

The question on the Facebook thread was “Do I pay the fees myself and then pay the referring lawyer or pay it out of my trust account”. The answer is the later.

We always pay the referral fees out of the lawyer’s trust account for a number of reasons. First, it ensures that the lawyer is paid and that lien is resolved. It is really beneficial to the client.

We also sometimes have a prior lawyer who handled a case for a period of time and then we took it over. If we pay the lawyer directly from the trust account that ensures the clients obligation under Missouri attorneys lien statutes are satisfied.

In addition, paying the lawyer referral fee from the trust account ensures that the money is not taxable income to my firm. We issue 1099’s to other counsel at the end of the year.

If you are one of my clients or a referring attorney, I thought you might be interested in learning how this works.

Can the Supreme Court decide this Presidential Election?

The popular vote in the Presidential election of 2020 is approaching a record-setting 140 million votes. The outcome of this election hangs in the balance as votes are tallied in several key swing states. As we wait eagerly for the announcement of a winner, it is important to remember that this delay can be largely attributed to the state voting laws in these particular states.

For instance, in Georgia, over 250,000 mail ballots remain to be counted. Michigan has reported that 100,000 still need to be counted and Nevada will have until November 12th to finish counting votes. In North Carolina, mail ballots postmarked by November 3rd can be received and added to the total numbers until November 12th.

The state of Pennsylvania requires officials to wait until the morning of Election Day to process mail-in ballots and accepts ballots postmarked by November 3rd as long as they arrive within three days.

Meanwhile, Wisconsin is one of six states that does not allow election officials to start processing absentee ballots before election day and although Wisconsin has been called in Biden's favor, the Trump campaign has already stated publicly that it will pursue a recount in the state of Wisconsin.

As the wait for election results continues, it becomes increasingly important to consider the potential election disputes that may arise as well as the Supreme Court's jurisdiction in resolving such disputes.

The Constitution provides that the settlement of presidential election disputes first happens within the state legal system under authority granted by Article II, § 1. Only in the elections of 1876 and 2000 has a presidential election landed before the United States Supreme Court.

Justice Breyer articulated the Court's reluctance to involve themselves in resolving Presidential election disputes in *Bush v. Gore*: "However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court." *Bush v. Gore* 531 U.S. 98 (2000) (quoting Justice Breyer). In 2020, the Supreme Court has issued a few substantial rulings pertaining to state voting laws.

The first allowed ballots received in Pennsylvania up to three days after election day to be counted. The second is a ruling which blocked ballots received in Wisconsin after election day from being counted. Lastly, the Court ruled in favor of allowing absentee ballots in North Carolina to be received and accepted up to November 12th.

Article II requires that presidential electors of every state meet on the same day to cast their votes for president. Congress has specified that date as Monday, December 14th, as Congress is entitled to do. Up until that time, state law may determine the method of appointing a state's electors.

Article II grants state legislatures broad authority in assigning presidential electors, and this is especially important to consider in battleground states such as Pennsylvania, Michigan and North Carolina because all four of these states have Republican-controlled legislatures.

The framers of the Constitution did not intend for the Supreme Court to determine the outcome of a presidential election and it remains that the Supreme Court will refrain from resolving an electoral dispute unless state methods for appointing electors implicate constitutional or other federal legal protections.

The 12th Amendment clearly grants Congress the authority to count votes, but the Court's involvement in the 2000 election demonstrates that Supreme Court intervention is not unprecedented.

A Supreme Court ruling is not designated as a part of the Constitutional process when it comes to selecting a president. The Supreme Court may become involved in resolving an electoral dispute if issues of federal law are raised by the way in which state courts handle their own involvement in these cases or if an electoral dispute is not resolved by the Constitutionally mandated deadline of January 20th. In 2000, the Supreme Court granted certiorari review over federal constitutional questions arising from how the Florida Supreme Court conducted itself on appeal from lawsuits filed initially in state court.

In *Bush v. Gore*, lawyers on the Republican side argued that the Florida State Supreme Court had overstepped the state legislature's authority by ordering a recount. The U.S. Supreme Court ruled to stop the recount, but this ruling was based on a finding that different standards for vote-counting in different counties violated the equal protection clause.

Under *3 U.S.C. § 2*, if a state holds an election for the purpose of choosing electors but fails to make a choice on the day prescribed, then electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct. The most important question to consider is whether state legislatures have uninhibited authority to appoint presidential electors after an election takes place.

The holding in *Bush v. Gore* offers that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental and becomes subject to other constitutional protections, including equal protection and due process."

It is these protections that may limit the ability of Republican-controlled state legislatures to prioritize their own preferences over the preferences of their constituents. Efforts of state legislatures aimed to subvert equal protection or due process may trigger the involvement of the Supreme Court in determining the outcome of this election.

https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=2719&context=luclj

https://www.lawfareblog.com/how-resolve-contested-election-part-1-states-and-their-electors

https://www.reuters.com/article/us-usa-election-contested-scenarios-expl/explainer-what-happens-if-the-u-s-election-is-contested-idUSKBN2781FS

https://www.cbsnews.com/news/supreme-court-orders-2020-election-battles/

https://www.nbcnews.com/politics/2020-election/do-not-open-until-election-day-state-laws-will-delay-n1238806

https://www.npr.org/2020/11/04/931288362/when-will-we-know-the-winner-timeframes-for-6-key-states

Bush v. Gore, 531 U.S. 98 (2000)

Mediation CLE November 12

Very psyched to be presenting at an upcoming CLE by United States Arbitration and Mediation Services on **Advocacy Tips and Secrets** via zoom.

Since the pandemic, I have done a bunch of Zoom mediations. I have developed effective strategies and ways of presenting during the mediations, which I will share.

Here are some teasers (more in the presentation):

- Before the mediation we have a firm system of activities to be prepared, including contacting lienholders, form emails to clients explaining mediation, etc.

- A week or two before a mediation I prepare my case summary to the mediator with pictures or whatever good evidence I have and send it to the other side too. They need to digest it and set reserves accordingly.

- Pre mediation meeting via zoom with client to prepare them for mediation process and to talk case value.

- Prior to and during the mediation I take notes in a word document and prepare arguments and parts of depos or medical reports. Then share screen with that in Zoom to my client and the mediator to present points in the mediation.

Please register now. All proceeds go to Legal Services of Eastern Missouri.

Thanks for reading.

Hello, Gary,

So, as the now stale joke goes, 2020 is a dumpster fire of a year (or insert your own analogy to bad stuff here).

But as we get ready for Thanksgiving and take stock of this year, I always like to focus on what I am grateful for.

In this edition, I have an article about what I am thankful for in 2020, comments from Burger Law employees in a recent email thread we had about being thankful and a case result.

Gratitude is something that I have learned to work on in my life. It is a way to focus on the glass being half full rather than half empty. Thinking about what we are thankful for, rather than the opposite, does wonders for our attitude.

So, without further pontification, here is a list of 10 things I am grateful for in 2020:

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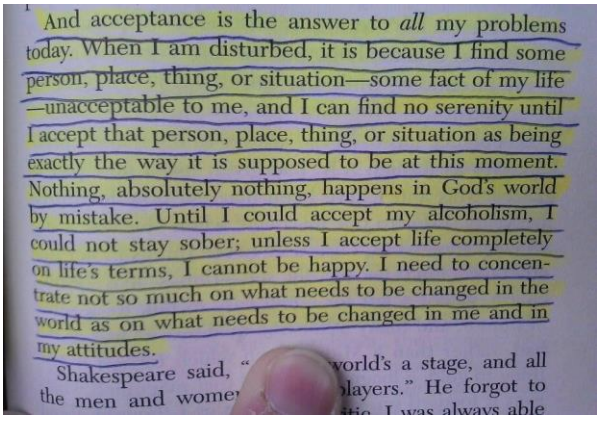
10 Things for Which I am Grateful in 2020

1. <u>The extra time that I have gotten to spend with my family at home</u>. There is something about having a Wednesday or Thursday in the week to stay home and do some work but also take breaks to talk to my kids, hug my wife, have lunch at home, etc. These end up being the most important times in our lives and it is truly a gift.

2. <u>The clarity of what is important in my life</u>. With a global pandemic, everybody wearing masks, the economy slowing down and the crazy election year, it has forced me and many people I know to focus on what is important in their lives. This is often family and friends.

I focus on how to run a business well, what issues are important to us as a firm, what friends we need to stay in contact with, and what extra efforts we need to make to maintain relationships during this pandemic.

3. <u>Acceptance</u> – for it is the answer to all our problems today. I have really tried to focus this year on accepting what life is throwing at me at any time and seeing what shows up for me in that. Rather than blaming others or complaining about how our lives look, it is really important to turn around a bad attitude, to accept our lot, focus on what that means to us, think about what we can control or do about it, and surrender to, and revel in, our life. This needs constant work. Here's the Acceptance quote from the Big Book of Alcoholics Anonymous:


And acceptance is the answer to *all* my problems today. When I am disturbed, it is because I find some person, place, thing, or situation—some fact of my life—unacceptable to me, and I can find no serenity until I accept that person, place, thing, or situation as being exactly the way it is supposed to be at this moment. Nothing, absolutely nothing, happens in God's world by mistake. Until I could accept my alcoholism, I could not stay sober; unless I accept life completely on life's terms, I cannot be happy. I need to concentrate not so much on what needs to be changed in the world as on what needs to be changed in me and in my attitudes.

Shakespeare said, "…world's a stage, and all the men and wome…layers." He forgot to …tic. I was always able

4. <u>How well my business was set up for a pandemic</u>. I did not know it but, the systems I had put in place before the pandemic in my now 5-year-old law firm, was well suited for a pandemic. We have cloud-based case management systems, servers, email systems, this email newsletter for marketing and a robust communication system among our employees and with our clients. Fortunately, I was set up well.

5. <u>The changes and additional things I did in my business to work even better in the pandemic</u>. Even though we were set up well, per above, we still did things to make our business run better in the pandemic.

This included mastering Zoom for court hearings, deposition, mediation (I even taught a class on this last week), having Zoom meetings with staff and focusing on teaching our

great lawyers and paralegals how to keep communicating with the clients, doing a Facebook Live show to answer free legal questions for people in our community and to give gift certificates for Instacart to help people during this hard time.

We reworked our systems on lead intake, communication with clients. We continued with marketing with getting an extra 50+ Google review for the firm, settling and closing 113 cases this year, writing a Truck Crash book (which is very close to being completed) and investing in training and support for staff.

Here's a pic from last year's holiday party. We will not be having one this year.

6. **My physical health**. At the beginning of the pandemic, I really worked hard on getting out to run and ride my bike to keep myself in shape. Truth be told, that has waxed and waned over the pandemic.

Most recently, I took a week off on a little trip and ran or rode my bike every day. I have committed to running or riding every day in November. Even though when there are times that I don't and I stumble, I am always getting back on track and making myself do this.

7. **The large number of clients we have been able to help**. Although business, including ours, has taken a hit during the pandemic we redoubled our efforts to help people and were successful.

We are having a really good year of helping more people, achieving success in legal fights whenever we can and settling cases (113 in 2020 so far). There are not going to be any trials this year, but at least we can still aggressively fight to settle cases and put as much money in our client's pockets as we can.

8. **My kids adapting to the new rules for Corona**. It has been hard to sit and tell my kids that they cannot socialize or interact with their friends. Sometimes all I think I am telling them are lectures about Covid increases and redoubling our efforts to socially distance and wear masks, etc.

But I am so grateful that my kids listen, do not take it personally, are following the rules and have acquiesced to the new paradigm we are in. They are such great kids and I am so blessed to have them.

I am sure they will look back and remember this as the year when dad kept telling them that they cannot see their friends and have to wear masks. But there are positive lessons in this as well about community and responsibility that I hope will carry through their lives.

9. The money I have saved. Since I have not been out to eat or taken vacations, we have saved money.

10. Our home cooked meals. We have cooked many meals at home, almost every night. Most of our family are vegetarians and most of us eat all organic food. So, we really have spent a significant effort to have fresh home cooked organic and vegetarian meals every night. My wife is amazing in organizing the shopping and we all lend a hand in cooking and cleaning up.

We have also had some construction in the house for periods of time and have had to do some carryout and delivery. We had a 30-day window that we had to order food when the kitchen was unusable. So many great local restaurants to support.

I have always talked to my kids and family about where food comes from. It is something I read on a book by Thich Nhat Hanh. Having your family be conscious of where their food comes from is really important so that they can have gratitude and appreciate the world in which we live. Food is not something that just magically appears on our plates.

$225,000 Settlement in Truck Crash case

On April 24, 2017, our client David was traveling southbound in the right lane on U.S. 67 when another driver, Mr. Lint attempted to change lanes. Mr. Lint steered into the right lane and struck our clients vehicle.

David attempted to steer away, but David's car became hooked onto Mr. Lint's vehicle and Mr. Lint lost control. They eventually came to a stop in the median of the highway.

David suffered serious injuries to his neck and upper back, resulting in a disc replacement surgery. He went to countless physical therapy visits, but he may never fully recover.

Instead of admitting fault, the defendant denied the events that took place. Therefore, we had to aggressively fight this case and filed a lawsuit to fight for justice for him.

After three years of litigation and a mediation, the defendant and his insurance company decided to do the right thing and offered to settle this case.

We were able to obtain a $225,000.00 settlement for our client, just shy of the $250,000.00 policy limit.

This case is a classic example of why it is very important to hire an attorney when you're seriously injured in a car accident as David was.

Without the assistance of our office David may not have been able to settle this case or get this great of a settlement, as the other driver tried to deny the events that took place.

We also had to work through and reduce liens for David. We are proud to have represented David and are always willing to file suit and use the law to obtain the best results for our clients.

What the People at Burger Law are Thankful for in 2020

With Thanksgiving quickly approaching, I asked the talented Burger Law attorneys, paralegals and support staff what they are thankful for in 2020. It was a great email thread. I encourage you to do this with your family or in your business.

Below are some of the responses that I received:

· I am thankful for two things: The flexibility that my job has allowed me with the unknowns of the pandemic and the relationships with my immediate family that have grown closer because of the quality time we've been able to spend together. Our lives are usually so hectic and this year has allowed me the time to reflect on how important those relationships are, and how much value that they hold.

· I'm thankful that there are people and businesses (like Burger Law!) who are still trying to do the right thing. So many people put their own needs, selfishness and/or greed before the health and safety of others. We're all in this together!!

· I'm always grateful for what I have in the present. COVID did not inconvenience me too much since I already spend most nights Netflixing, especially when it gets cold but I did start to miss dining out and the option of the social scene. We just need to be thankful for what we do have right now because this is a first world problem and it will pass.

· I am thankful for my job and all the great people at Burger Law.

I am thankful for the relationships I have with my best friends, the bond that has been strengthened with my kiddos these past few months, consistent employment, and that my year has been a blessing compared to what others have experienced. This year has been humbling.

· My family and new job at Burger Law!

· I appreciate everything my parents have sacrificed for my education and all of their support along the way so that I could get where I am today at a successful, impactful law firm with an incredible boss who doesn't make me come in on Saturdays and who values work life balance! I also feel fortunate that the pandemic has not had too negative of an impact on my life because I feel for all the others who are trying to make ends meet or have loved ones who have been really sick.

· I'm thankful for the people around me including family, friends, coworkers (although I hope you all count as friends) and for another year with all my elderly relatives still around.

· I enjoyed reading everyone's messages and glad we all have found things to be grateful for during these crazy times. I am thankful that I get to wake up every day and have the opportunity to learn something new and potentially make a difference. I am also thankful for my health, family, friends, education, and job.

· I am thankful that I have continued to have a job during this craziness. It has been wonderful to be able to work and have a flexible schedule to be home more. There are so many people that have lost their job and/or been laid off for long periods of time with no certainty of how they will pay their bills or feed their family and it has been nice to help others during their time of need this year. I am also thankful for my family and my friends that are my family and getting to spend more time with them this year.

· I'm thankful for the health of my family and friends. I'm also thankful for gainful employment and for graduating law school.

And mine: I am truly thankful for my employees at Burger Law. I am lucky to work with such an amazing group of people. They have all worked hard through this crazy year. I appreciate that they have stuck with me through the ups and the downs. I appreciate that they have listened to my coaching about communication, file reviews and getting work out. Thank you to all of my wonderful co-workers.

Burger Law wishes everyone a Happy and Healthy Thanksgiving!

-Gary Burger, Personal Injury Lawyer

Happy Holidays, Friend,

Merry Christmas, Happy Holidays and Happy New Year to you and your family. It seems we really need these holidays - especially this year.

It's been a strange and tragic year. All our hearts break for the sad deaths of corona victims - including over 300,000 Americans. But in facing tragedy, it is helpful to look at what we have gratitude for and how to start anew.

Thanksgiving helps us think about the many things for which we are grateful - and not taking our health for granted this year. I discussed this in the last newsletter.

I hope that the end of year holidays you celebrate help with new beginnings, moving on and focusing on your future. In that vein, I will turn to business as usual in this newsletter.

In our law firm right now, we are busy resolving cases and getting ready for the holidays.

About two months ago we started an in firm challenge to settle 40 cases by the end of the year. Yesterday, I am pleased to say, we hit our goal - and have 41+ very happy clients. We do this end of year push each year to brighten the holidays for as many clients as we can.

In this email, I discuss three settlements and highlight some new podcasts of Lawyer v Lawyer and a new Ask a Lawyer episode.

Two great new Lawyer v. Lawyer Podcast episodes

Debbie Champion and I recorded two new great Lawyer v Lawyer episodes where we discuss some hot issues right now. I have had some great feedback on these, so take a listen.

-**Evidence in the Time of Election Litigation** and how recent litigation and press coverage have affected us "normal" trial lawyers. Thankful that we have rules of evidence and ethics rules that have long existed to address this.

-**How Zoom Changes our Litigation Practice** where we give great tips on Zoom in depositions and mediations. How to litigate in the time of Corona.

You can find these wherever you listen to podcasts!

$350,000 Settlement in Ladder case

After surviving summary judgment and participating in mediation, we recently settled a case involving a ladder accident for $350,000.

As is common with mediation settlements, there is a confidentially provision that limits what we can say about the case, but here is what we *can* say:

The liability in this case was hotly disputed from the beginning. Our client was injured in 2018 when a ladder provided to him for a commercial repair project slipped out from

under him due to worn down “feet” at the base of the ladder that failed to provide sufficient traction.

There were no witnesses to the accident, the defendant denied giving our client the ladder, said our client could have used his own ladder which was on his truck, and claimed it was our client’s own fault the ladder slipped.

As a result of the accident, our client sustained serious spinal injuries requiring emergency surgery.

Our lawsuit alleged three different theories of recovery: general negligence, premises liability, and negligent supply of a dangerous instrumentality.

Defendant filed a Motion for Summary judgment on all counts, trying to get our case completely dismissed.

They succeeded on dismissing the premises liability count based on the “independent contractor doctrine” which is a defense to premises liability claims. *See Matteuzzi v. Columbus P’ship, L.P.*, 866 S.W.2d 128 (Mo. 1993). This holds that when an independent contractor comes on property and takes control of work, they cannot sue for a dangerous condition.

We did not think it squarely applied here, but had other claims too. We successfully defeated summary judgment on the other two counts and continued on.

Ladder cases are tough, and even with the best facts, there is almost always some comparative fault on the person who fell. Because of this, defendant never made any offer whatsoever until the mediation despite our client’s serious injuries.

We were incredibly pleased with the $350,000 result that we obtained, and defense counsel even said, “I think this is one that we paid more than it was worth” and that no money was left on the table.

$212,000 Truck Crash Settlement

Our office was able to get a great settlement for our client Matthew, and over the road truck driver.

Matt was driving out of state in Texas when this crash occurred. Another tractor trailer did not secure his trailer load which caused a jack that weighted approximately 200 pounds to fall off.

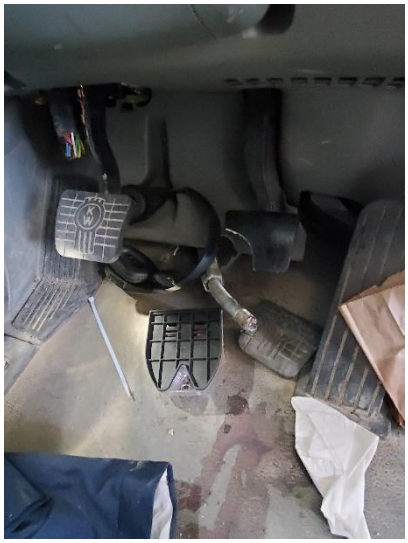
Matt was following in his rig and hit the jack with his tractor. This destroyed his steering axel and he could not control his truck. Matt did the best he could in a truly emergent situation.

His tractor trailer traveled across the highway, into the center median and through the cabal barrier. Although her did strike one other vehicle, he was able to stop his truck in the center median and avoided catastrophic injury to others.

But, during the incident a metal bar from under the truck broke through the floorboard into Matt's foot. Matthew was transported via ambulance to the emergency room where he required substantial medical care.

Due to the severity of his injuries and higher level of care needed, it was determined that Matthew needed to be transferred to a different hospital for surgery. Doctors operated on him and he was discharged after 7 days and was able to return to Missouri.

Matt did a great job documenting the crash scene. Here's a picture of the metal bar that went into his foot.



Since Matthew was working at the time of this accident, he had not only a civil claim but also a worker's compensation claim. but because the accident happened in Texas and Matthew's employer is in Indiana and Matthew lives in Missouri, his workers compensation claim was in Indiana.

Our office obtained worker's compensation lawyers in Indiana to help get Matthew the treatment and benefits he needed during his recovery.

Once Matthew was released from treatment and settled his workers compensation claim, our office was able to proceed with the civil claim against the at fault trucking company and driver. We usually try to resolve the comp claim before the civil claim for lien purposes.

We were able to settle the civil claim for Matthew for $212,500.

However, since Matthew had a worker's compensation claim, there was a lien on the civil claim for the benefits paid for Matthews weekly benefit payment while he was off work and the medical bills paid through the workers compensation claim.

Our office was able to get a 50% reduction on that lien to ensure that our client received the most money possible in his pocket for the injuries and suffering he sustained in this accident.

We are always happy to help truck driver clients as well as clients who are in accidents out of state. It's good to be able to help Matt navigate the different claims and legal hurdles.

Burger Law wishes everyone a Merry Christmas and Happy holidays!

-Gary Burger, Personal Injury Lawyer

Let's not kid ourselves, Friend - all of us are really glad 2020 is over and we are looking forward to 2021.

I cannot recall another year so many wanted to be done with.

No election year, vaccines are coming and the St. Louis Blues start regular season play on January 13 at Colorado.

In this newsletter, I thought I would focus on some really hard-working clients we were able to recently help in their employment.

Below I discuss some workers' compensation settlements, a radio interview with lawyer v lawyer, and a great overtime wage case where we were able to get our hard-working clients paid time and a half for overtime.

FLSA Overtime Pay Settlement

We just settled a federal case representing three long-term Water Distribution Supervisors against the City of St. Louis.

Our hardworking clients worked hundreds or even thousands of hours of overtime every year for years, but they did not get paid time and a half for overtime!!! Ever.

But Water distribution supervisors would continue being paid at their straight hourly rate for time above 40 hours.

Each had worked for the city for more than 20 years at the time of suit. They helped to maintain and repair the water systems that provide water to the city and its residents. They are required to work mandatory overtime, weekend and holiday assignments, and be on 24-hour call to attend to emergencies like water main breaks.

That they had always received only straight-time pay for overtime, rather than time-and-a-half, yielded a strange result. Their subordinates, who were considered non-exempt, made more money than them with the overtime.

We filed suit in the case and each side took depositions. The city argued the Supervisors are exempt employees under the Fair Labor Standards Act (FLSA) and do not have to be paid time-and-a-half.

Although at first blush it's surprising our clients did not get paid time and a half for overtime considering how many hours and how hard they worked.

But it was a really difficult case because a significant amount of Missouri and Eighth Circuit law supported the City's argument. The FLSA is written and interpreted in a way that provides favorable treatment for employers, especially public employers.

The FLSA actually permits a number of exemptions to the usual time-and-half rule, including for employees working in an "executive" capacity, meaning the employee supervises other employees in a management position.

The parties actually both filed motions for summary judgment; each side arguing to the Court that it could resolve the case without involving a jury. We did not think our supervisors digging up water pipes in the middle of the night were "executives." But the law is tough.

While the summary judgment motion was pending, **we were able to reach an amicable settlement to obtain full back pay for our clients,** as well as an agreement with the city to change the Supervisors' employment classifications and guarantee them time-and-a-half pay for overtime going forward, **changing a pay ordinance that had existed for more than 20 years.**

The **city paid $135,000 to settle the case**. But the most important impact for the supervisors is **the increase to time-and-a-half for overtime effective now and into the future** - which will make their pay commensurate with their position.

This case resolution benefits not only our clients but other employees who will be working as Water Distribution Supervisors for the City.

I would also note what good and professional lawyers were on the other side of the case.

Our clients are very happy with the result and we were honored to represent them in their effort to be paid fairly by the city for the important and difficult work they do.

Four Worker's Compensation Settlements in December

We handle many types of cases at Burger Law and I've recently written about successes in various cases involving premises liability, truck-accidents and wrongful death.

However, we also handle a large number of Workers' Compensation cases. These cases involve injuries suffered by our clients while on the job. Below are a few of the cases we successfully resolved for our clients this month:

Our client, Ashli Platt, was injured while working as a nurse in a hospital. She was assisting a patient getting out of bed and when the patient stood up, she fell to the floor, suffering multiple herniated discs in her back. We filed her claim for compensation and litigated her case. We were able to get her a great settlement of $65,269.80.

Martin Moreno is a construction worker and was injured on the job when he stepped on a patch of glue and twisted his right ankle. He suffered an ankle sprain and a bone fracture in his foot. He then injured his back in a separate incident while on the job.

His injuries limited what he could do at work and he ultimately required surgery. Our great attorney, Genavieve Fikes, fought hard on Martin's case and obtained a settlement of $57,500.00.

Caleb Bingham works at a rock quarry and was turning a rock cutting table when he felt a pop and pull in the base of his neck. He was diagnosed with an acute cervical strain and a herniated disc, and required physical therapy and steroid injections. We fought hard for him and obtained a settlement of $42, 939.00.

Finally, our client Ricky Ems worked for a pool service company and was injured on the job when he slipped and tore his meniscus. He reported his injuries to his employer who wrongfully terminated him.

We litigated the case extensively and even took Ricky's deposition. We were ultimately able to get him a settlement of $27,353.56.

We were happy to represent these individuals and help them get the compensation they deserved.

Who is an "Executive under the FLSA?

In order for the exemption to the FLSA requirement that workers be paid time and a half for overtime, the employee must:

(1) Have as his or her "primary duty" the "management of the enterprise in which the employee is employed";

(2) "Customarily and regularly direct [] the work of two or more other employees"; and

(3) "Ha[ve] the authority to hire or fire other employees," or have his or her "suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees [be] given particular weight." 29 C.F.R. § 541.100(a).

The employer has the burden to prove its employee is an executive and therefore exempt. *Madden v. Lumber One Home Center, Inc.*, 745 F.3d 899, 903 (8th Cir. 2014) (citing *Fife v. Harmon*, 171 F.3d 1173, 1174 (8th Cir. 1999)).

"The designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed by the employee." 5 C.F.R. § 551.202(e). Employers must prove the employees meet each prong to be exempt. *See, e.g., Perez v. Radioshack Corp.*, 552 F.Supp.2d 731 (N.D. Ill. 2005).

We argued int the City Water supervisor case that the city could not prove either the first or third requirements are satisfied. Plaintiffs' "primary duty" is not "management of the enterprise." They also do not have authority to hire or fire and their suggestions or recommendations are not given "particular weight."

The "primary duty" stated above in the first requirement is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). The regulations also provide a non-exclusive list of factors to consider:

(1) [T]he relative importance of the exempt duties as compared with other types of duties;

(2) [T]he amount of time spent performing exempt work;

(3) [T]he employee's relative freedom from direct supervision; and

(4) [T]he relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. 29 C.F.R. § 541.700(a).

The regulations also set forth a list of management activities:

interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102.

We argued that Water Distribution Supervisors do *none* of this and do not: have hiring or firing power; set employee pay; maintain production or sales records; have any ability

to promote or demote employees; have any ability to suspend employees; make grievance decisions; enforce employee discipline; perform quality control; control the materials used on job sites; set safety policies or policies of any kind; or enforce legal compliance.

Water Distribution Supervisors only arguably "direct" employee labor, which is also something foremen, a non-exempt position, do.

For the relative importance of exempt duties as compared with other duties, Courts must consider whether the employer's goals can be accomplished if the employee failed to perform either his managerial or non-managerial duties. *Cort v. Kum & Go, L.C.*, 923 F.Supp.2d 1173, 1178 (W.D.Mo. 2013) (internal citations omitted).

The Court also considers the employee's job description, performance review criteria, bonus plan, and training. *Id.* The plaintiffs' testimony made clear their hands-on labor and on-site work keeping the City's water up and running is their most important duty. Following *Cort*, the City's "goals" of keeping the water running are not met if plaintiffs do not perform their on-site and hands-on labor.

"The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee," though time is not the sole test. 29 C.F.R. § 541.700(b).

If a manager is closely supervised and earns little more than nonexempt employees, the manager will generally not meet the primary duty requirement. 29 C.F.R. § 541.700(a); *Cort*, 923 F.Supp.2d at 1181.

The fourth primary duty factor concerns the relationship between an employee's salary and the wages paid to other nonexempt employees for the kind of nonexempt work performed by the employees. 29 C.F.R. § 541.700.

The regulations and cases do not prescribe a specific mathematical formula, rather the Court generally compares a manager's weekly salary with the highest nonexempt weekly wage. *Cort*, 923 F.Supp.2d at 1183.

This comparison also proves the plaintiffs are not executives. The Water Distribution Supervisor base rate earns $1,781 every two weeks. The Water Maintenance Foreman base rate earns $1,601 every two weeks, but they earned more with overtime. So, the pay disparity was absent.

Hello, Friend:

Thought I would talk a little bit about two separate issues that we have been for a while.

Insurance companies sell underinsured motorist coverage as part of their coverage and always charge more for it. Underinsured coverage provides extra coverage if a person is involved in a motor vehicle accident caused by someone who carries less coverage than they do.

And underinsured always sets off from its coverage the level of coverage of the other, negligent driver. What happens when the underinsured coverage is too low so no real coverage is provided? We fight that in cases (and sue on regular underinsured claims often).

Also, we represent a lot of folks in crashes with trucks, and I am intrigued by where truck crashes happen - rural versus urban, what type of road, what speed, etc. So, I did some research on that too. Then I have some videos with a client and explain how bees survive in the winter. Thanks for reading.

Insurance Illusions – Minimum-Coverage Underinsured Motorist Policies in Missouri and Illinois

An illusion is a deception – something that will be misinterpreted. Visually, people are most familiar with optical illusions, perhaps a still object drawn on paper that appears to move, or magicians who appear to make objects disappear and reappear, or perform other tricks.

Contracts can create illusions as well, however, and when they do so Courts call those contracts "illusory." An illusory contract is one where a party appears to agree to perform, but their promise does not actually obligate them to do anything at all.

For example, Joe and Frank agree Joe will pay Frank $100 to maybe paint Joe's house. Frank's promise is illusory – he did not agree to paint Joe's house, he only agreed to "maybe" paint it. Frank is not obligated to do so and his promise is illusory.

Insurance policies are simply contracts, though they are complicated. In short, a policyholder (the insured) buys a policy from an insurance company (the insurer) to pay the policyholder money under certain circumstances, like a car wreck or a house fire.

Occasionally, the insurance company's promises to pay contain terms or definitions that render those promises illusory – they appear to promise to pay but actually do not.

These illusory promises can arise in both Missouri and Illinois in the context of underinsured motor vehicle coverage. Underinsured coverage is designed to protect a policyholder in the event they are involved in a motor vehicle accident caused by someone who carries less coverage than they do.

To use Joe and Frank again as an example, Joe holds a $25,000 insurance policy, meaning the most it will pay in liability coverage is $25,000. Frank holds a $100,000 underinsured motorist policy. If Joe runs a red light, hits Frank's car, and causes $100,000 in damages, Joe only has $25,000 in coverage.

Frank will therefore collect the $25,000 from Joe's insurance and then make an underinsured motorist coverage claim against his own insurance to recover the remaining $75,000, up to $100,000.

Normally underinsured policies allow the insurance company to offset the money already received from the responsible party, here Joe, against the total limit, so the most Frank can recover in total is $100,000.

Policies will also carry uninsured motorist coverage, so if Joe does not have insurance at all and runs the red light, causing Frank $100,000 in damage, Frank will recover up to $100,000 from his own insurance company. Joe here is an "uninsured motorist" – someone who does not have any insurance but causes an accident and damage.

States require drivers to carry a minimum amount of liability coverage, in Missouri and Illinois that minimum is $25,000 per person, $50,000 per accident.

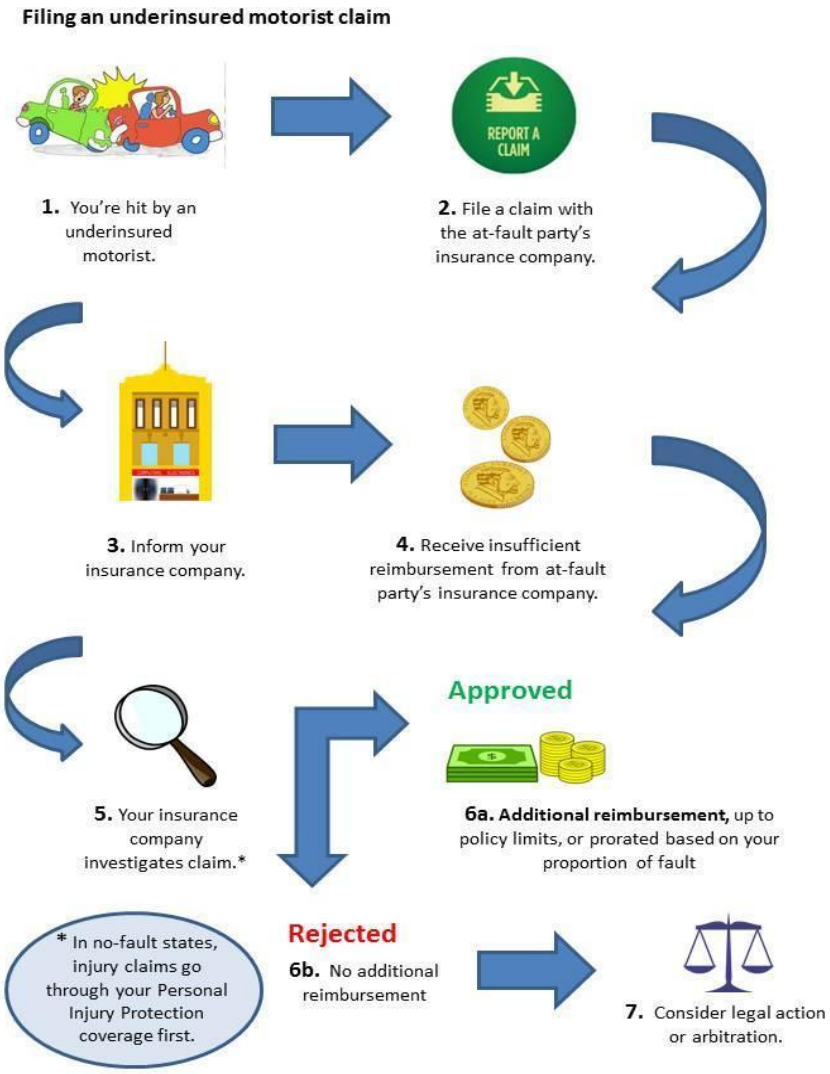
Many policies are written so the uninsured and underinsured motorist coverage matches the liability coverage on the policy, so a policy with $25,000/$50,000 in liability coverage will also carry $25,000/$50,000 in uninsured and underinsured motorist coverage.

These state minimum coverages for uninsured and underinsured motorist coverage can end up creating illusory coverage – what appears to be a promise to pay but does not actually obligate the insurance company to do anything.

If any driver whose policy is paying out less than $25,000 is uninsured, t**hen they are not underinsured and no driver can be underinsured for a $25,000 underinsured policy.** Another possibility is if the policy allows the company to set off the entire $25,000 minimum amount against underinsured motorist coverage of $25,000, because then minimum underinsured coverage won't be paid when it is fully offset.

Under these circumstances, underinsured coverage is illusory. It appears that the insurance company is offering $25,000 in underinsured coverage but nothing will ever be paid under that coverage – the promise to pay is an illusion.

Here's a graph about underinsured claims - only change I would change is get a lawyer sooner.



Missouri and Illinois have each addressed this potential illusory promise in different ways, Missouri by statute and Illinois in a more *ad hoc* fashion. Missouri Revised Statute § 379.204, states underinsured motorist coverage with a limit less than twice the minimum coverage (so less than $50,000) will be excess over liability coverage.

By statute, if a policyholder recovers $25,000 from a minimum limit at-fault driver, that policyholder can recover another $25,000 from his or her underinsured policy as "excess" coverage.

Illinois' manner of addressing this issue is more complicated because the legislature has not directly addressed it via statute. Illinois has an underinsured motorist statute, 215 ILCS 5/143a-2, which requires underinsured motorist coverage to be included with all policies sold except for minimum-coverage policies.

This specific exemption implies the Illinois legislature has recognized the illusory nature of this coverage and permits insurance companies to sell coverage without a $25,000

underinsured provision to avoid selling policyholders coverage that does not actually cover anything.

Illinois case law has taken this a step farther, though the matter has not been much litigated in Illinois and there are not many cases interpreting minimum-level underinsured motorist policies specifically.

One case in particular though, *Glazewski v. Coronet Ins. Co.*, states a plaintiff may pursue fraud and consumer fraud claims against an insurance company selling a $25,000 underinsured motorist policy, based on the theory the coverage is illusory. *Glazewski*, 91 Ill.Dec. 628, 631, 483 N.E.2d 1263, 1266 (Ill. 1985).

We are currently pursuing two underinsured cases against insurance companies asserting claims based on illusory coverage for minimum policies. Insurance companies should not be allowed to sell illusory non-existent coverage to drivers. If you or anyone you know has been wrongfully denied insurance coverage under circumstances like these, please contact us.

Does Location Have Anything to do with Truck Crashes?

For most U.S. Citizens, they believe that the main concept for truck crashes is driver fatigue or substance abuse. However, though these can be involved in semi-truck crashes they are not the sole cause of truck crashes. Instead, the location of where a truck is driving can have an important role in whether there is a higher or lower risk of an accident.

In 2017, alone 4,761 people were killed in a crash involving a large truck. This was a 9.0% increase in fatalities from the previous year in 2016 where 4,369 fatalities occurred to 4,761 in 2017.

From 2008 until 2017 the average increase in truck crashes over these 10 years was a 12 percent increase in the total number of people killed in large-truck crashes, from 4,245 in 2008 to 4,761 fatalities in 2017.

Breakdown of fatalities in 2017:

- 72 percent (3,450) were occupants of other vehicles;
- 18 percent (841) were occupants of large trucks; and
- 10 percent (470) were nonoccupants (pedestrians, pedal cyclists, etc.).

Crash Statistics:

Driving next to a semi-truck can be extremely dangerous because large vehicles are more likely to be involved in fatal multiple-vehicle crashes as opposed to fatal single-vehicle crashes than are passenger vehicles. In 2017, 82% of fatal crashes involving large trucks were multiple-vehicle crashes, compared with 62% for fatal crashes involving passenger vehicles.

Did you Know?

- More than 1 out of 4 fatal large-truck accidents occur on interstates.
- Fifty-eight percent of fatal crashes involving large trucks occur in rural areas.
- Only around 5 percent of fatal crashes involving large trucks occur in work zones.
- Seventy-eight percent of the fatal crashes involving large trucks occur on weekdays.
- Of those weekday truck accidents, 72 percent occur during the daytime hours of 6 a.m. to 5.59 p.m.

Country Statistics:

- Large truck accidents make up to about 8.8 percent of all fatal vehicle crashes.
- In 2017 the range around the country was from none in the District of Columbia to 16.1 percent in North Dakota.
- In 17 states large truck involvement in fatal accidents was 10 percent or higher.
- Texas led the country in the highest number of fatal accidents involving trucks at 621, and the largest number of total vehicles involved in fatal crashes.
- States located in the West North Central, and West South-Central portions of the country had the largest percentages of large truck fatal crashes while the Eastern and Western portions had lower percentages.

Vehicle Traffic Volume and Accident Risks:

The volume of traffic increases truck accidents however, crashes even further increase when the volume of truck traffic increases. According to Science Daily, this increases regardless of the overall traffic volume goes up or down.

They also discovered a direct disproportionate relationship between truck volume increases and accident risk. According to the data when the volume of trucks on the road goes up by one percent, the risk of an accident goes up by even more than that.

Speed vs. Accident Risks:

Science daily further discovered that there was a correlation between higher speeds with higher accident reports. An error in driver manipulation of a vehicle, such as improper lane change, was found to have a lower impact on crashes than did speed. In contrast, the chance of a fatality was found to double when a truck is driven at a speed over 45 miles per hour.

Truck accidents can occur because of all kinds of factors that are not in our control. Due to so many possible reasons for why a fatal truck accident occurred you need to pick an experienced attorney who has dealt with various truck accidents.

Our firm Burger Law has been representing our clients for over 30 years in fatal truck accidents and has plenty of success stories that can be found on our website.

Good morning, Friend:

So happy to have our super cold weather break and a springy light at the end of our winter tunnel.

Everyone at the firm worked really hard towards the end of 2020 to resolve cases for our clients. It was a team effort with everyone pulling hard. And our firms' efforts paid off for our clients. We settled 43 cases in the last quarter.

Here are discussions of three very recent settlements: a medical malpractice case, a multivehicle crash in Illinois and a car crash with a head injury in Missouri.

What lessons can you take from them? Let me know if you want more information or details.

Birth Injury Settlement for $750,000

I settled a birth injury case for $750,000 recently.

Rather than discussing the details of the case, I thought I would discuss confidentiality provisions that surround these types of cases.

The first is, **should you agree to a confidentially provision**? These provisions make the amount of the settlement and sometimes the facts of the underlying claim, confidential.

I will not do confidentially provisions in routine cases. However, in an employment discrimination and medical malpractices cases, and in higher figure cases, confidentially provisions are the norm. Typically, those cases do not settle without them.

Arguments in favor of confidentially is that an insurer or defendant will often require confidentially as a condition of settlement. This protects them from publicity and any negative effect of the allegations of the lawsuit and protect their public image.

Confidentially also has a hidden benefit for the plaintiff as they often do not want to disclose or share the details of their finances with friends, family or the public. So, a client may want confidentiality and/or not object to it if the settlement amount is enough.

However, the public and our community has an interest in knowing the value of these cases. If there is a bad actor or someone routinely committing negligence and hurting or killing people, we need to know. Disclosure of settlement amounts along with the facts and details of the settlements promote safety in the community.

And someone who gets injured a week or year from now wants to know what other cases settled for to try to determine the value of those or what would be a fair settlement in their case rather than just having to try the case.

My general rule is that I do not agree to confidently in most cases. I get in disagreements with the opposing party on confidentially and try to stick to my guns on that. I think it is really in the interest of the public to know when a tortfeasor pays money to settle a claim. Plaintiff have a hard enough burden to prove and win their case without having additional confidentially hampering them.

Further, we have seen, glaringly, what confidentiality in the sexual assault context can foster.

High profile and rich serial sexual harassers and abuser can get away with terrible things for decades without being called to account. Them or their companies pay big money for silence from those who bring claims against them.

Then the assault continues on unknowing victims. Having these things public warns the next victim and dissuades bad conduct. A company is not going to keep manufacturing a defective product or continue to employ a serial sexual assaulter or harasser if that knowledge was public.

If you are going to agree to confidentiality, then what kind? just the amount of the settlement or the underlying facts? mutual non-disparagement provisions? If there's a breach, is it the whole amount of the settlement or a portion?

Some lawyers agree to confidentially on most or all cases and most agree to confidentially on something. If a defendant is going to offer and pay enough money for confidentially, they can get what they pay for. And if the client understands and agrees, lawyers should not get in the way.

Multi vehicle crash settled at $356,500 with more to come

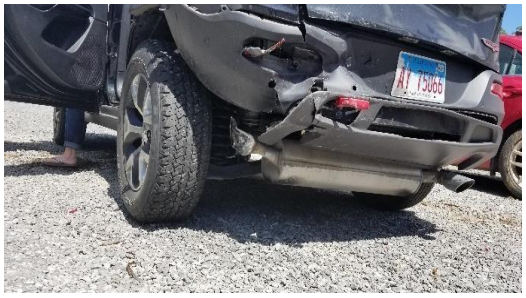
We are proud to represent Eric, as well as his daughter Rylee, who unfortunately were both injured in a motor vehicle accident in Franklin County, Illinois, on September 4, 2019, despite riding in separate vehicles at the time of the accident.

Both vehicles were stopped as the result of road construction on I-57, when a driver rear-ended Rylee's vehicle with such force it pushed it into Eric's vehicle. Rylee aggravated a pre-existing shoulder problem and ended up needing arthroscopic surgery to repair a torn ligament. We settled her claim for $106,500.

Eric's injuries were unfortunately more extensive than Rylee's, and he suffered severe neck and lower back injuries. Eric ended up suffering disc herniations in his cervical spine and tears in his lumbar spine.

Eric received treatment for his injuries at the Orthopedic Center of St. Louis, including epidural injections, and ultimately, a two-level disc replacement in his lower back.

His medical bills total more than $200,000, and he has also lost wages as a result of his injuries. According to his surgeon, Eric will also eventually need a future surgery on his lower back to further treat his injuries.



The at-fault driver had insurance coverage of $250,000 per person, $500,000 per accident, and his insurance company paid the $250,000 policy limit for Eric's claim.

Fortunately for Eric, he also had an underinsured motor vehicle policy on his vehicle, which provides for coverage in circumstances like these, when his damages exceed the policy limit for an at-fault driver. Eric's underinsured coverage provides for $1 million in underinsured coverage.

His underinsured motor vehicle claim is ongoing and we are fighting hard to make sure Eric obtains a recovery that will help him through this difficult time and recovery.

When purchasing insurance for yourself and your family, please keep in mind the importance of purchasing additional coverage to protect yourself and your family in cases of catastrophic injury. This additional protection can make a significant difference in your life if you ever need it.

Some states require underinsured motorist coverage to be automatically included in policies, but Missouri does not have such a requirement. Illinois requires underinsured motorist coverage on policies exceeding the state-minimum $25,000 limit.

If you are unsure as to whether your policy includes underinsured motorist coverage, contact your insurance agent and discuss the matter with them.

$69,000 Car Accident Settlement

Genavieve obtained a $69,000 settlement in a car accident case for her client Brandon where there was less than $14,000 in medical billing and approximately $5,500.00 in lost wages.

Brandon primarily treated on lien basis meaning that his medical expenses were not paid until we obtained a settlement. This is common practice for clients that don't have health insurance. We were also able to negotiate with the medical providers and we were able to reduce his medicals bills by over $5,000.

After our fee and paying his outstanding medical expenses, Brandon received a check for over $36,500 of tax-free money. Brandon netted approximately $31,000!

Brandon suffered a concussion and a neck strain. After the accident Brandon had consistent headaches, trouble with memory, dizziness, trouble sleeping, and loss of feeling in his hands.

At Burger Law, we know how to add value to your claim and persuade insurance companies to compensate concussions fairly. Injury claims involving concussions can be difficult, because oftentimes there is no objective evidence of injury, the treatment is sparse, the bills are low, and insurance adjusters disregard your client's subjective complaints of memory loss and headaches.

It is crucially important for a concussion patient to be evaluated by a neurologist. Concussions cannot be diagnosed through X-rays or MRIs. Insurance adjusters tend to discredit symptoms that are only based on what a patient says, such as memory loss or headaches.

However, a neurologist will utilize specialized cognitive testing that leads to the best care for your client AND that will help convince an insurance adjuster (or jury!) that the concussion is legitimate. Burger Law assisted Brandon in coordinating his appointment with a neurologist, who diagnosed him with post-concussion syndrome.

The demand letter in these cases is also uniquely important. A concussion is a type of mild "traumatic brain injury." The phrase "traumatic brain injury" tends to evoke more of a response from insurance companies than just "concussion," so this terminology was used in the letter.

Since the bills were not very high, Genavieve emphasized the severity of the injury in a way that is not captured in the records. She described the difficulties Brandon experienced in detail, such as memory lapses, headaches, difficulties with word retrieval, critical thinking, and attention deficits, and illustrated how they interfered with his daily life.

Burger Law knows how to maximize settlements in these complex head injury cases.

Good day, Friend:

We are pleased to announce a great CLE about a month from now. We have worked really hard to adapt to the pandemic with zoom depositions and mediations, and great settlements, that we thought we would teach other lawyers all we have learned.

We have been really busy at the firm and at home. Also below is a discussion of how to safeguard a child's money in a settlement, videos of a great client and an update on my bees - which made it well through the winter.

Pandemic Success CLE

Burger Law is hosting a virtual Zoom CLE on Tuesday, April 15, 2021 from 11 a.m. to 12:50 p.m. **As usual, we will have nuts and bolts presentations with robust written materials.**

I will present on how to conduct **advanced Zoom depositions and mediations** from 11 to 11:50 a.m. I'm excited to teach all the tricks I've learned over the last year for conducting successful virtual depositions and mediations.

My presentation will include tactics I use to nail liability and present expert medical testimony. I will also show actual video examples from depositions I've done during the pandemic.

Genavieve and Tyler will follow my presentation with a session on **advanced demand and negotiation tricks** from 12 to 12:50 p.m. They will discuss successful strategies they've used to obtain great settlements for high policy limits and 15 times special damages.

This CLE has been **approved for 2 hours of Missouri CLE credit. Anyone who is interested in Illinois credit can email me for further information.** The price is $25, and I will donate all proceeds to Legal Services of Eastern Missouri.

What to do with Minors' Money - Structured Settlements.

I talked in my last newsletter about a large minor settlement in a medical malpractice case and what to do about confidentiality.

The second issue is that arises in these types of cases is what to do with the settlement money. Missouri has a statute that says that if the net amount to any minor over $10,000, a conservatorship or guardianship, restricted accounts or other safeguard is mandatory.

That statute reads:

507.150. Bond of person acting for infant, when — effect of failure to give. — 1. Before a next friend or guardian ad litem can receive or receipt for any money or property, personal or real, and before he can acknowledge satisfaction or discharge of any judgment, he must execute a bond to such infant; except, that no bond shall be required if the total value of the property or money, exclusive of expenses and fees approved by the court, is not in excess of ten thousand dollars and all of the money or property is to be turned over to the infant or his parent.

All minor settlements have to be approved by Courts in Missouri and Illinois. There are a couple of ways to safeguard the settlement money for the child.

First, you can file a conservatorship where the Court takes jurisdiction over the settlement funds until the minor reached the age of 18. Another option for some judges, for a smaller settlement amount, will put the money in a restricted account so the money can only be withdrawn for the benefit of the minor or by Court approval or Court order.

The third most common way to handle this is to set up a structure settlement. This is the purchase of an annuity from a well rated and well bonded insurance company which agrees to payments in the future after the child reaches the age of 18.

Typically, we set this up for some payments for college and then space out payments much later after the age of 18. I find it very few 18-year-olds make smart decision about money, so I encourage my clients to extent those payments out further in the future.

This structure checks a couple of boxes also. It ensures the money goes solely to the use for the minor and when the minor reached the age of majority.

Second, it makes the interest in the money non-taxable. Personal injury settlements are nontaxable and even if the money is saved in a structure and earns interest on that when it eventually paid to the recipient, that is still not a taxable event. So, no income or any taxes are charged on that amount.

I always use my friend Tom Parmelee for structured settlements. For more information about structures, go to his website: http://www.atlassettlements.com/contact/find-an-atlas-settlement-broker/thomas-c-parmelee/

Or call Tom at 314-768-7632. He and his brother have been doing this for decades and are great people.

We work with the parents to make sure the payment schedule is what they want for their child.

As always, call with questions about these issues if you need help.

My Bees weathered the winter!!!

My hives made it well through the winter. The temperature has been a little up and down, so I think they will start increasing their size next week.

I opened up the hives and got them ready for spring recently.

Good morning, Friend:

I have had a bunch of important depositions in three different cases in the last three weeks. All by zoom - a change I hope stays with us after the pandemic is over.

For a lot of depos I do, I am not that worried about questions or preparation as I have done similar ones many times. But with depos that can really make a case, I still get anxious. These usually are of the main defendant in big exposure cases.

On the one hand, I get a little tired of worrying about not messing up - which can be stressful. But that's part of the job. On the other hand, it's great that after almost 30 years of practice, I still care enough to want to do a great job in every depo.

My long-time paralegal Casey and I have a joke where we say I need to go win the case in these types of depos. That's all, no pressure - just win the entire case in one depo. But again, that's the job. And - I really love it and am lucky to be able to do what I do.

Two Fridays ago, I deposed a construction company "safety" representative. The company's driver went across the center line, crashed into my client's car, and killed him and his passenger. It's a sad case. The deponent was their 'pro' testifier who tried to wiggle away from the company's conduct.

Before I continue my story, consider attending our **CLE on April 15** on zoom depositions and getting great results in the pandemic. Story continues after this CLE plug:

Pandemic Success CLE

Burger Law is hosting a virtual Zoom CLE on **Thursday, April 15, 2021** from 11 a.m. to 12:50 p.m. **As usual, we will have nuts and bolts presentations with robust written materials.**

I will present on how to conduct **advanced Zoom depositions and mediations** from 11 to 11:50 a.m. I'm excited to teach all the tricks I've learned over the last year for conducting successful virtual depositions and mediations.

My presentation will include tactics I use to nail liability and present expert medical testimony. I will also show actual video examples from depositions I've done during the pandemic.

Genavieve and Tyler will follow my presentation with a session on **advanced demand and negotiation tricks** from 12 to 12:50 p.m. They will discuss successful strategies they've used to obtain great settlements for high policy limits and 15 times special damages.

This CLE has been **approved for 2 hours of Missouri CLE credit. Anyone who is interested in Illinois credit can email me for further information.** The price is $25, and I will donate all proceeds to Legal Services of Eastern Missouri.

I hope to see you there.

In the depo, I was able to show that their training was minimal and not documented, they had little oversight of drug use of their driver and had about 1/5 of the drug test results they should have had in his file.

No investigation of what happened or how their driver, who tested positive for marijuana, was a daily pot user, had it all over social media, but they claim they did not know.

That was a depo where the company designates a representative to testify about certain matters on their behalf. And the great thing about zoom is I could be anywhere to do it. I had planned to be there live (first live depo in a year) - but then decided to travel to New Orleans to visit my oldest son in college.

I got to enjoy the weekend with family while doing the depo from a hotel conference room for a few hours. Here's a pic of me and my two sons in the Big Easy:

I had another big one of those three Fridays ago and then the following Tuesday. We are pursuing a claim against the State of Wisconsin similar to the one we had in Missouri for Correctional Officers not paid for pre and post shift activity.

In those depos (for two days) we successfully checked boxes on class certification and liability. They admitted almost all corrections officers and sergeants (our class) (99%+) had to do pre and post shift activity without pay per uniform department wide policy.

They would never pay for it and had prior complaints about it. Didn't treat anyone different. Of course, none of this is written down in policies. Even though they promised their employees they would comply with FLSA. They agreed the pre and post shift activity was pretty important too.

But boy was it a lot of work, my office organized all the documents with the help of anywhere sit paralegals. We identified all the good exhibits we have so far in the case – about 50 documents out of 20,000 produced.

Interestingly, the Wisconsin DOC pays for health screening at the beginning of shifts. But isn't regular pre and post shift activity more connected to their job than corona testing?

They agreed it was for health and safety - as are all the previous shift activities. Once this screening is over, they will go back to not paying for any of it.

The third big depo was last week – it was of the top officer of a local correctional institution where my client was an inmate who was injured. I do not want to go into too much detail, as the case is pending, but the deposition went really well and the witness agreed with almost all of the opinions of our expert.

But that good result was only after I had poured over prior notes and depos to get the best result possible. And, again, I had to synthesize a bunch of documents down to just the key ones.

Stepping back and reflecting, I enjoy seeing myself rise to the challenge of establishing great evidence in these cases – i.e., going a long way towards winning the case. We accomplished that in all three.

And I laugh at myself for getting nervous – cause after they are over, I appreciate how hard I worked to get them to go well. I wonder why I get anxious about them. I should know they will go well and not stress – but that's the way it goes.

I also laugh at myself for, again, learning the lesson to work hard and trust my abilities as a trial lawyer. How lucky am I to be able to help my clients like this? And have fun and assess how I handle these situations all at the same time.

Negligent Entrustment

Negligent entrustment is a variant of the common law tort of negligence. *Hays v. Royer*, 384 S.W.3d 330, 333 (Mo. App. W.D. 2012). It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor if that would create an unreasonable risk of harm to others.

The essential elements of a negligent entrustment claim are:

1. the entrustee is incompetent by reason of age, experience, habitual recklessness, or otherwise;
2. the entrustor knew or had reason to know of the entrustee's incompetence;
3. there was an entrustment of the chattel (motor vehicle, firearm, etc.); and
4. the negligence of the entrustor concurred with the conduct of the entrustee as a proximate cause of the harm to the plaintiff.

To assert a successful claim of negligent entrustment, the defendant must have an ownership interest in the vehicle (or other thing) entrusted or must have authority to control the use it.

“Negligent entrustment occurs when the defendant ‘supplies’ a chattel to another” with actual or constructive knowledge that the entrustment creates an unreasonable risk of injury.

A “supplier” means someone who “gives possession of a chattel for another’s use.”

Missouri court's apply negligent entrustment but have not used it when a parent entrusts a vehicle owned by an adult child. We are trying to do this in a case. Other states have done so with inconsistent results:

- *Broadwater v. Dorsey*, 344 Md. 548, 688 A.2d 436, 437 (1997) (finding that “parents who sell or give an automobile to an adult child are not responsible for damages when they lack the power to control the child or the automobile.”);
- *Zedella v. Gibson*, 165 Ill.2d, 209 Ill.Dec. 27, 650 N.E.2d 1000,1004 (1995) (finding that cosigning a loan “was merely a link in the chain that facilitated [his son’s] acquisition, and subsequent possession and use, of the vehicle, but did not itself constitute an entrustment.”);
- *Vince v. Wilson*, 151 Vt. 425, 561 A.2d 103, 105 (1989) (finding that the someone who provides funding to an incompetent driver can be considered an entrustor because “the issue is clearly one of negligence to be determined by the jury under proper instruction; the relationship of the defendant to the particular instrumentality is but one factor to be considered.”)
- In deciding this issue in *Lockhart v. Carlyle*, 585 S.W.3d 310 (Mo App. Ct, W.D.), the Court notes that the ability to entrust property us fundamentally grounded in the relationship between a purported entrustor and the subject chattel.

In every Missouri decision recognizing a viable negligent entrustment claim, the defendant has exercised control of the chattel, or at a minimum has had the capacity to exercise control over the chattel either before and/or after the purported “entrustment.” See *Hays*, 384 S.W.3d at 337 (stating that the plaintiff must show that the entrustor’s right of control was superior to that of the entrustee’s).

The parent/adult child relationship between parent and adult child simply cannot serve as a substitute for the adult child’s lack of authority or dominion over the vehicle. Wish us luck.

Thanks for reading.

-Gary Burger, Personal Injury Lawyer

Happy Tuesday, Friend:

Well, the year is flying by - I have been so busy, I have not emailed one of these in a month. Seems like I am jumping from depo to depo and mediations.

But our hard work does pay off.

Remember I talked about the story of deposing a construction company "safety" representative? The company's driver went across the center line, crashed into my client's car, and killed him and his passenger. Well, happy to report we settled the case for $2.5 Million last week.

Below, I have some pictures of a bee swarm I collected over the weekend, an article on how to do Zoom depos from our CLE a couple weeks ago, and a save the date for our upcoming CLE.

But first, as a lawyer, **what do you want to hear about or learn in a CLE? Email me back and let me know.** I really am interested in what other lawyers want to learn. Let me know and we will see if we can do it.

Save June 9, 2021 for our CLE. Great speakers and content, as usual.

This weekend, I got a text from a friend that his neighbor had a bee swarm in the front yard. It was fun to go and collect the swarm and see if these bees will make it in a hive in my yard.

I put the bees in a box and hope they will prosper. Bees swarm like that to reproduce and to start a new hive. Here's a couple pictures.

Zoom Depositions

Lawyers who are used to doing depositions in person should not let this new paradigm of Zoom constrain them, instead, they should double down on it.

Covid-19 may have started a new wave for how depositions and mediations will be done in the future and new and old lawyers should get used to them being executed via Zoom.

Lawyers who are new to zoom depositions and mediations should practice a few times and remember perfection is not necessary. You should consider this new concept with an open mind and eventually you may find it fun, a time-saver, and different in a good way.

I have personally conducted around 25 mediations and well over 50 depositions if not more since the pandemic began and my office has done even more.

From personal experience over the last year, I have concluded that Zoom Depositions are better. Why?

- You can conduct them from anywhere (home or hotel).
- Easy to record all you have to do is (1) Click record, (2) record to the cloud, and (3) pin video on deponent.
- Zoom also provides helpful functions such as screen sharing, exhibits, ability to highlight PDFs while talking.
- Zoom allows you easy access to deponent's documents on screen that they cannot escape from which seems to work better.
- Zoom also forces me to be organized and get all exhibits I may need together earlier.
- Exhibits can be accessed and jumping from exhibit to exhibit is also easier.
- Never have had a concern that answers were being suggested to the deponent.
- Clients and Co-counsel can easily attend.

How Zoom can be Helpful for Exhibits

Zoom allows you to share the screen with exhibits and allows you to blow up language effectively.

However, it is important to have your exhibits ready to present. Do not open or try to find where they are saved for the first time during the deposition.

A helpful tip is to name the files to the exhibit number, for example, 1-photo, 2- police report this will help you access the document you are referring to quickly. It is also helpful to share the google file with the opponent of all the exhibits the day before.

A trick I found helpful is you can also create a new exhibit during the deposition and can google relevant information and turn them into exhibits while attending the deposition.

Zoom also allows you to be able to have exhibits to show doctor's medical records during depositions so they do not have to find theirs. Lastly, it is important to be familiar with the documents produced by the defendant so you can be prepared to use them.

Further, doing depositions on Zoom makes you have all exhibits in a Google folder which is easy to provide to the court reporter. This process also makes it more convenient to share the folder with remote staff and other lawyers who make be working on the case with you.

Another helpful tip I have come across through my experience is you can highlight PDFs of documents with stuff you would like to use in the deposition.

The two ways that I use are: (1) having two separate copies of an exhibit – one clean and one with highlights. The advantage is to not signal the other side what you are going to use. (2) One copy of the exhibit pre-highlighted which gives you a signal of key things to focus on.

It can also be useful to pull other documents from the defendant's production and show them to the witness by screen share. Remember – this document is not required to be an exhibit at first you can show photos and documents to see what the witness knows and what the good documents are and then mark them as an exhibit.

Recording Depositions on Zoom

In the past, I have used my Sony Handicam to record depositions however Zoom recording is absolutely great. I find it better because it intensifies to the witness that they are being recorded.

After all, they are looking at their face on a big screen right in front of them ensuring that they know exactly what is being recorded.

From experience, I have found that witnesses tend to give me more information when doing a Zoom deposition. For example, I have had many defendants admit liability in crash cases and policy violations in other cases.

This process also can make witnesses look bad when they are lying or playing games and you can see it in real-time on your screen. Remember to be careful about your facial expressions because you are being recorded as well.

Different Tricks that I find Resourceful

One trick I find helpful is having my deposition notes in a word document in front of me and then minimizing the zoom screen.

You can get even more creative by using a Google doc shared with co-counsel or paralegals for them to suggest questions for you.

This can also work with other useful documents in front of you which allows you to use them for language and not tell the other side or deponent what you are doing and latter share or never share that document.

Issues Conducting Zoom Depositions and Mediations

Zoom depositions and mediations do come with problems. Often someone is on mute and they do not realize this and are talking. Also, the poor wireless connection can arise at any time.

One thing I have learned to avoid issues is prepping my clients on Zoom as a test run at least the day before and not letting the first time they get on zoom and answer questions be at the deposition.

People may have the understanding that they are just on Zoom and do not take it as seriously this is important to be dealt with in preparation.

Zoom requires more deposition preparation. Also, if we are using notes, a Deponent may be using notes. Also, lawyers have the ability to text clients in depositions to take a break.

Thanks. Next email I will share Zoom Mediation tips.

Here's a picture of our youngest at the Tower Grove Farmers Market Last Weekend. So glad to be able to go again after a long covid hiatus.

Thanks for reading.

-Gary Burger, Personal Injury Lawyer

Good afternoon, Friend:

I hope everyone enjoyed their long weekend - I sure did. I spent some time thinking on the ultimate price our American soldiers paid in the battlefield.

Here's one powerful story I read about a navy seal and Medal of Honor recipient: https://en.m.wikipedia.org/wiki/Michael_P._Murphy.

Below I welcome our newest attorney to Burger Law and discuss a recent OSI products liability discovery dispute we had. But first I want to remind you of our upcoming CLE later this month.

Want to:

- Learn How to get a $14 Million verdict in Phelps County during corona?
- Learn about your and everyone's bias and how it impacts your practice and your clients?

- Get an hour's ethics Credit on the ethics issues you will absolutely encounter or already have - practical and interesting examples?
- Get two ethics hours for this year, including explicit/implicit bias, diversity and inclusion?

Bias, Ethics and Large Exposure Cases

Burger Law is hosting a virtual Zoom CLE on **Wednesday June 9, 2021** from 11 a.m. to 2:00 p.m. **As usual, we will have nuts and bolts presentations with robust written materials.**

Debbie Champion and Gary Burger talk with Brent Sumner about High Exposure Litigation. As part of our Lawyervlawyer podcast series, learn what to do and not do when a lot of $$ is on the line. Brent and **Ben Sansone** recently had an amazing and hard-fought success.

Latasha Barnes of LSEM will teach us how to identify personal and institutional biases and address the discomfort that can arise with discussions of race and ethnicity in the law.

This CLE has been **approved for 3 hours of Missouri CLE credit and two hours of ethics credit. Anyone who is interested in Illinois credit can email me for further information.** We ask for a $50 donation to LSEM and all proceeds are donated to Legal Services of Eastern Missouri.

I hope to see you there.

In the News!!

Gary and Burger Law were featured again in the latest edition of Missouri Lawyers Weekly!

We as a firm are so proud that we were able to get our client such an excellent settlement after extensive trauma, treatments, and complications she and her family experienced.

We will be adding this one to our wall so we can be continuously reminded of why we work as hard as we do.

Welcome new lawyer Michael Sheldon

Burger Law would like to welcome our newest Attorney, Michael Franklin Sheldon! Michael was born in New Jersey and raised in Bloomington, Illinois.

He graduated in 2018 with a Bachelor's Degree in Legal Studies from Illinois State University. While attending ISU Michael participated in Mock Trial to gain valuable experience in the Legal field. He also interned at a criminal defense firm and corporate law department of a great insurance company.

Michael's undergrad studies led him to have a passion for the law which continued when he began law school at St. Louis University School of Law, where he graduated a half semester early in December 2020 with Honors in the middle of a pandemic.

While attending SLU Law, Michael gained valuable experience by being a member of SLU Law Journal and taking practical courses in Transactional Drafting and Law Practice Management. He also was a law clerk at Burger Law and another well-known firm during his law school studies.

During his 3L year Michael led his Law School Softball team to the playoffs as a star Center Fielder making multiple acrobatic catches with a beer in one hand.

Michael enjoys spending his free time outdoors playing sports such as golf and baseball. He also enjoys camping, hiking, kayaking and attending sporting events during his spare time. When the Missouri winters kick in, Michael enjoys spending time with his two cats and dog and playing guitar.

We are excited and looking forward to welcoming Michael to the Burger Law family as an attorney and are excited for his future at Burger Law.

OSI Discovery Dispute in Products Liability Case

We had a big discovery dispute last week in a products liability case and the Court granted our Motion to Compel.

Facts

We have a robust products liability practice. We settled a steam cooker explosion case last year that I have written about. We have a current case against an international medical device manufacturer regarding a knee implant which failed far too early.

Total Knee Arthroscopy's should last 15 to 20 years and my clients lasted 4.5 and he had problems for a couple years before it was removed. We alleged the polyethylene insert wore out and failed too quick. It is like buying a 40,000-mile tire to have it wear out in a few thousand miles.

Other Similar Incidents (OSI) are very important discovery in product liabilities cases. Recently we had a discovery dispute regarding the defendant's objections to discovery of OSI.

Discussion

Under the standard used in Missouri, Plaintiffs are entitled to discovery of OSIs involving products substantially similar to the product used on the client.

Evidence regarding other similar incidents "may be relevant to prove the defendant's notice of defects, the defendant's ability to correct known defects, the magnitude of the danger, the product's lack of safety for intended uses, or causation." *Adams v. Toyota Motor Corp.*, 867 F.3d 903, 911 (8th Cir. 2017), as corrected (Aug. 14, 2017).

There is "no black letter rule of law" regarding such discovery disputes in products liability cases, "other than to state that discovery of similar, if not identical, models is generally permitted." *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380–81 (8th Cir. 1992).

"Generally, different models of a product will be relevant if they share with the accident-causing model those characteristics pertinent to the legal issues raised in the litigation." *Fine v. Facet Aerospace Prod. Co.*, 133 F.R.D. 439, 441 (S.D.N.Y. 1990) (cited by Hofer).

"On the other hand, discovery has been denied where the predecessor models did not share pertinent characteristics with the products at issue." *Hofer v. Mack Trucks, Inc.*, 981 F.2d at 381. Thus, "the courts have undertaken a fact specific determination of the extent of the similarities or dissimilarities, and have inquired about the basis for the discovery request." Id.

After applying the relevant case law in our case, the Court held we were entitled to the requested written discovery regarding OSI to the extent the other incident involved a similar artificial knee device, regardless of the defendant's claim that their other knee devices differed greatly from the one implanted in our client.

The court allowed OSI discovery because the defendant conceded that all models of its artificial knee devices contain the same polyethylene that was defective in our client. We got the defendant to make this valuable admission during deposition of its corporate representative.

Further, the defendant in our situation did not assert or explain why any differences in its knee device would affect the defective polyethylene.

In *Mt. Carmel Mut. Ins. Ass'n v. CNH Am., L.L.C.*, No. C12-4112-DEO, 2014 WL 6775593, at *4 (N.D. Iowa Dec. 2, 2014), the court held that granting a motion to compel regarding other similar incidents involving different models of a combine than the one owned by plaintiff where the plaintiff's product liability claim alleged a defect arising from material used to construct the combine's fuel tank and "[w]hile the shape and location of the fuel tanks may have changed, it appear[ed] that the material used to construct those tanks ha[d] been largely unchanged" over the various combine models).

Though evidence of those OSIs may not be admissible at trial if the defendant can provide evidence that the OSIs are in fact not substantially similar to our client's incident. However, such analysis cannot take place until the related discovery is produced. See *McMahon v. Robert Bosch Tool Corp.*, No. 4:18-CV-583 CAS, 2019 WL 4141027, at *3 (E.D. Mo. Aug. 30, 2019) ("There is a significant distinction between whether evidence of similar incidents is admissible and whether it is discoverable.").

The Court granted our Motion to Compel the defendant to provide our client the requested written discovery regarding its other similar knee devices.

We will use the OSIs to counter the defendant's proclaimed defense that its knee devices have a low failure rate. We hope this big discovery victory is a step towards a great outcome for our client.

Go cards.

-Gary Burger, Personal Injury Lawyer

Happy Friday, Friend:

Hope you enjoy your weekend.

Below, I discuss the Missouri Supreme Court decision in *Hootselle v. Mo. Dept. Corrections* and another in the news article. But, as the decision to send the case back to the trial court for another trial is a little bitter, let's start with some honey - 120 pounds of it.




Hootselle v. Missouri Department of Corrections Remanded back to trial

The Missouri Supreme Court affirmed in part and vacated in part the trial court's judgment in this case - and remanded it back to the state court for a new trial. *Hootselle v. Missouri Department of Corrections*, 624 S.W.3d 123 (Mo. banc 2021).

This was a unanimous decision of all six Judges handed down June 1, 2021.

The case was transferred from the Supreme court back to the trial court. **We appeared before our new judge and set the trial of the case June 11, 2022 in Cole County Circuit Court.**

Although we obviously do not agree with the reversal of the money verdict, we and our clients remain unbowed and ready to win the case again in our second trial. The Supreme Court Judges put a lot of work and thought into their decision.

And there are a lot of pretty significant victories affirmed by the Supreme Court in the remand. These are not silver linings – but rather first of their kind wins in Missouri.

The Supreme Court affirmed that:

1. This is an appropriate class action as certified.

The defendant opposed certification by arguing that the Correctional Officers failed to demonstrate that common issues predominated because they worked at a variety of facilities where the time spent on pre- and post-shift activities differed to some extent.

The trial court rejected defendant's argument because Correctional Officers performed virtually identical pre- and post-shift activities which began and ended their workdays at all prisons and their employment was governed by the same contract and department policies.

As a consequence, the question of defendant's liability to all Correctional Officers would be determined based on those documents and the same legal theories. The fact that individuals' damages recoveries might differ did not preclude finding predominance. *Hootselle*, 624 S.W.3d at 132.

2. There is no sovereign immunity from this claim. This was the primary and first issue on appeal. The courts analysis is best summed up:

Unlike the plaintiffs in Nuñez, the corrections officers do not claim the state has waived sovereign immunity for claims arising under the FLSA. Their counts alleging causes of action under the FLSA have been dismissed. The corrections officers and MDOC negotiated labor agreements that expressly incorporated MDOC's FLSA obligations. The corrections officers are suing for breach of those labor agreements. They are alleging state-law breach of contract claims, not freestanding claims for violations of the FLSA as the Nuñez plaintiffs sought to do.

Breach of contract claims may be maintained against the state to enforce an express contract even when that contract incorporates statutory obligations. Dierkes v. Blue Cross & Blue Shield of Mo., 991 S.W.2d 662, 668 (Mo. banc 1999). The state waives sovereign immunity when it enters into an express contract. Kubley v. Brooks, 141 S.W.3d 21, 28 (Mo. banc 2004). Therefore, the corrections officers' breach of contract counts seeking to enforce against the state an express contract with terms that incorporate FLSA obligations do not circumvent the FLSA and do not implicate the state's sovereign immunity. The corrections officers can maintain claims against the

state for breach of an express contract even though the contract incorporates obligations imposed by the FLSA.

3. The contract in this case is established and enforceable,

4. The contract was breached by MDOC; they violated the FLSA contrary to their contractual promises

5. Significant damages resulted front that contract breach.

6." During [pre and post shift activity], corrections **officers are**, as a job requirement: "**on duty and expected to respond"** to incidents involving offenders; required to act as prison guards whenever they are inside the prisons; and required to remain vigilant and respond to incidents as they arise." *Id.* at 141.

7. The time the class spends "on duty" is compensable as a matter of law under counts III and VI: "once they are in the presence of inmates and "on duty and expected to respond" to emergent incidents, they are performing the work they are employed to do.

8. "Corrections officers are required to perform essentially the same duties during preshift and postshift time as they are required to perform when on shift."

9. Time spent" Picking up and returning equipment" is compensable as a matter of law.

10. Time spent after the first compensable activity until the last is compensable under the continuous workday rule, re-affirmed by the Supreme Court.

11. Regarding the other activities, the court "is not finding on the merits that those activities that were not shown to be compensable affirmatively are not compensable" **"If the remaining activities are indispensable and integral to the corrections officers' work *or if they occur after the first and before the last principal activity*, they are compensable."**

We will go forward to trial to again prove our damages. We hope to get a large recovery for the really large loss the corrections officers have and continue to suffer.

Stay tuned.

In the news once again!!

Gary and Burger Law were featured again in the latest edition of Missouri Lawyers Weekly!

We as a firm are so proud that we were able to get our client such an excellent settlement in such a sad wrongful death case.

-Gary Burger, Personal Injury Lawyer

Verdicts&Settlements

■ $2.5 MILLION SETTLEMENT

Family settles after man is killed in mid-Missouri crash

MOTOR VEHICLE COLLISION

- **Venue:** Confidential Missouri court
- **Case Number/Date:** Confidential/June 3, 2021
- **Caption:** Confidential
- **Plaintiffs' Attorney:** Gary K. Burger, Burger Law, St. Louis
- **Defendants' Attorney:** Confidential

BY SCOTT LAUCK
slauck@molawyersmedia.com

The daughters of a man killed in a motor vehicle collision in central Missouri reached a $2.5 million settlement, according to their attorney.

Gary Burger of Burger Law said the March 12, 2020 crash occurred while the decedent was traveling northbound on Missouri Highway 5. The defendant driver was driving southbound and lost control of his vehicle while trying to light a cigarette, crossing into Burger's client's lane.

The front passenger side of the defendant's truck struck the front of the decedent's truck at more than 60 miles per hour. Burger said the impact left gouge marks in the road and caused his client's vehicle to spin clockwise 180 degrees.

The driver reported to police that he put his foot on the brake to disengage his cruise control, but Burger said the vehicle's data download showed he never applied his brakes prior to impact and that there was no indication that he swerved, turned, slowed or took any action to avoid the collision.

According to Burger, the police report indicated that the defendant driver had a significant amount of marijuana in his system several hours after the collision which apparently compromised his ability to take action to avoid this collision.

The man's family alleged that the collision occurred as a direct result of the negligence of the defendant driver and the negligent hiring, training and supervision of his employer. The case was resolved through mediation in May.

Hello, Friend:

Kids are back at school and summer seems over. I do not know if I am ready - it seems to have creeped up on me.

I am driving kids to school, organizing fall activities and looking at the remainder of the year. And navigating COVID (not over or even close) and what is the new normal.

But it's all good - The more things change, the more they stay the same.

This happens to be one of my favorite quotes - its coined by some French dude - but I know if from the Rush song - Circumstances.

Below, I discuss more of the same - How we took a case from **0 offer to a $407,000 verdict and judgement** - which we have now collected,

Then I have a really hilarious article my daughter wrote appropriately called: **Top 10 reasons YOU should make your children work at your office.**

Enjoy (And let us know if you have a legal claim in which you need our help).

From $0 to $407,943.84

Every state is a sovereign. Every state waives its sovereign immunity on its own terms. In Illinois, the only way to sue a sovereign is under the Illinois Tort Claims Act. 705 ILCS 505/

We represented JD Walker, a Nashville, Tennessee musician and truck driver because he was injured in Illinois while driving a route from Tennessee to Kansas City. The case has a lot of twist and turns and is a crazy story.

On February 24, 2016, JD was driving an 18-wheel truck on northbound Interstate 57 near Mt. Vernon, Illinois. As he approached the overpass supporting State Route 15, snow and ice being plowed off the overpass onto I-57 below crashed into his truck causing him to lose control.

The ice destroyed his windshield and mirrors of his truck and came into the cab. His GPS and ice hit his face, he felt rumble strips on the median side – and steered to the right – his back trailer came off the ground and was about to tip – he controlled it all and came to a safe stop and did not hit other cars.

He couldn't see and stopped his truck that way – pretty incredible.

He knew and saw that it was an Illinois Department of Transportation ("IDOT") plow.

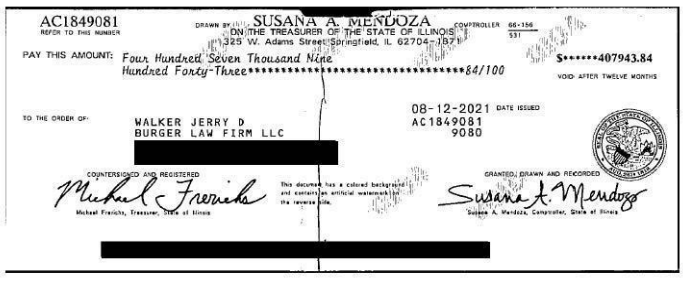
He reported to the state trooper who came to the scene that snow and ice was pushed over the State Route 15 overpass by an IDOT snowplow.

IDOT never admitted it was their truck – to this day. But JD was injured and couldn't catch the plow – he was smart to give a detailed report to the officer.

It was a zero-offer case and there has never been any money offered to settle the case in any way.

So, we filed the Illinois Court of Claims action, tried the lawsuit, and won. We also won it before the Illinois Court of Claims.

We got JD a recovery of $407,000 in an opinion earlier this year and received the settlement check this week.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ON THE TREASURER OF THE STATE OF ILLINOIS
325 W. Adams Street, Springfield, IL 62704-1871
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TO THE ORDER OF:
WALKER JERRY D
BURGER LAW FIRM LLC
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Michael Frerichs
Michael Frerichs, Treasurer, State of Illinois
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GRANTED, DRAWN AND RECORDED
Susana A. Mendoza
Susana A. Mendoza, Comptroller, State of Illinois
[redacted]

JD injured his neck from the whiplash of the ice and snow.

He was diagnosed with a herniated disk in his neck and had neck surgery.

He received his workers compensation benefits in Tennessee. But he needed a Civil Lawyer for this claim in Illinois and turned to us.

The State of Illinois asserted we could not prove it was their truck. But we noted that the law is well established that the State owes a duty to maintain its roads and highways in a

reasonably safe condition. See *Smith v. State,* 42 Ill. Ct. Cl. 19 (1990), and that §6.200.7.1 of the IDOT Snow and Ice Control Manual for Districts 2-9 provides, "Plowing speed shall be reduced to prevent throwing snow over bridge parapets… "

This duty of care was further supported by IDOT District 9 Bureau Chief Miley, who admitted to me that employees are instructed and trained so as to not plow snow and ice over the parapets of bridges. Thus, Respondent owed Claimant a duty to plow the snow on the State Route 15 overpass in a reasonably safe manner. We won this issue – the court said:

Based upon a totality of the evidence presented in this case, the opposite conclusion is reached. The evidence at trial shows that Claimant identified the snowplow as being orange. IDOT District Bureau Chief Miley testified that all IDOT snowplows are orange. While it is acknowledged that non-IDOT snowplows may also be orange, it is undisputed that all IDOT snowplows are orange. Miley also testified that IDOT had jurisdiction over State Route 15, including the responsibility to plow snow. Respondent speculates that it is possible that another unknown entity or private company was plowing State Route 15 on the date in question but there is no evidence to support this conjecture. The only fact that Respondent relies on is that the Claimant testified that he could not see IDOT markings on the side of the truck. Despite this one detail the totality of all direct and circumstantial evidence leads to the finding that the snowplow at issue in this case was an IDOT snowplow. The testimony of Claimant is undisputed that the snowplow threw snow off of the State Route 15 overpass onto northbound I-57. The thrown snow hit Claimant's truck and caused him to lose control and become injured. The Court finds that it the Respondent breached its duty of care and is liable for the accident and resulting injuries to Claimant.

Trooper Moak testified that he was familiar that different municipalities in the area have snowplows of various colors; however, he knew that all IDOT snowplows were orange. Trooper Moak stated that his understanding was that some local roads are plowed by other entities but interstate and state routes are plowed by IDOT.

One of the craziest things about this case is JD's neck surgery. He had a herniated disc in his neck from this crash and had surgery in Tennessee by a Dr. Wiess.

After they did the surgery, a discectomy putting in plates and screws in his neck, JD was in the recovery room. Dr. Wiess was in immediately post-surgery to see how he was doing and examine JD.

Dr. Weiss asked JD to lift his left leg which he did and asked him to lift his right leg, but he couldn't. In that moment, while Dr. Wiess was examining him, JD was suffering a blood clot in his neck that was strongly, quickly and adversely affecting him.

I have taken a lot of doctor's depositions for neck surgeries and they all say that a blood clot can happen and it is bad. But I do not think I ever had a client with a blood clot. JD had it and thankfully Dr. Weiss was there when the effects were happening.

Dr. Weiss recognized what was going on, personally unplugged his bed and rolled the bed to the elevator. The nurse was asking Dr. Weiss if they needed to take him to a CT and Dr. Weiss said there was not time we are going to the OR.

They called the neurosurgeon who assisted Dr. Weiss in the surgery and caught him in the parking lot. That doctor turned his car around, handed his keys to an attendant and ran to back into the OR for surgery.

While in the elevator on the way back to the OR, JD's blood pressure crashed. He was dying. He was unable to use his legs or arms. They got him on medication, supported his blood pressure and got him into surgier.

They opened up his neck again, took out all the hardware they just pit in, found and identified the blood clot and aneurysm. They treated and treated it, closed the clot, supported the blood vessels and then re put in the hardware and refixed his neck again.

Regarding his medical problems, the Court of Claims found:

Claimant testified that the recovery after the second surgery was tougher. Claimant testified that he has permanent limited range of motion in his neck. He stated that the second surgery helped with the headaches, and initially with the tingling, but the tingling in his fingers returned about a week or so before the trial in this matter.

Claimant then testified as to the effect his injuries and surgeries have had on his life. He stated that prior to the accident that he rode horses, dirt bikes, four wheelers, wave runners, jet skis and water skis. He testified that he can no longer do those activities because the bouncing around hurts his neck.

We lost the issue of permanent disability, though. The court noted that in Illinois, recovery of future earnings must be limited to such loss as is reasonably certain to occur. *Branum v. Slezak Construction Co., Inc.,* 289 Ill. App. 3d 948 (1997). Future loss of earnings cannot be speculative or conjectural. *Id.* Testimony as to loss of earnings that is merely speculative, remote, or uncertain is improper. *Id.*

The court said:

The testimony and evidence here is speculative. Claimant was assigned work on an as needed basis. His employers could employ his services one year and not another. Meanwhile, his own doctors did not rule out his return to work and Dr. Reig testified only to a risk of "reinjury" going forward. Furthermore, Claimant testified that he applied for and was denied permanent disability. We find the Claimant here has not met his burden to establish lost future earnings or future medical bills, and thus decline to grant any award on that basis.

But, we did pretty good – here's the end of the opinion:

Based upon the evidence presented at trial, the Claimant is awarded $407,943.84

IT IS HEREBY ORDERED that Claimants' claim is granted. He is awarded $407,943.84 in total damages.

Top 10 Reasons YOU should make your children work at your office

Written by someone working at my dad's office!

1.You can teach them about money management. Children like me spend their money on useless stuff if you show that they have to work for their money they won't waste it because they worked hard for it.

2. You could pay them less. Your actual employees are professional who went through college and deserve to be paid a good amount for needs and wants, your children are doing little jobs and can be paid less than your actual employees.

3.You love your children. It is always fantastic to have quality time teaching your children about work,

4.Your children want to get money. Rather than giving $10 to your child every time they ask for it, you should have them work for their money.

5.It shows your children what working in an office is like. Sometimes children will think about their future job and think, oh it's just super fun working in the office you get to do fun thing every day! So, you need to teach them working in an office or and job isn't going to be fun sometimes.

6. Your children can see other professionals that inspire them and look up to them.

7.It is also fun for your CHILDREN because they learn about what you do for a living. It is important for your children to know what you do every day so maybe that will make a new level of respect and thankfulness.

8. You can order them around to help you with your work. You can't really say to your employees or fellow employees to go get me a coffee or, give this to someone. With your children you can just tell them to do anything you want because you're paying them.

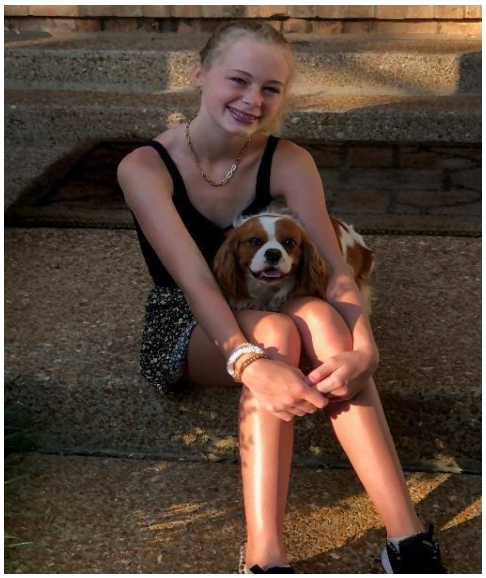
9. Your coworkers will be happy to see your child. Everyone loves a little break from work to be with a child and have fun!

10.It gets your child out of the house in summer and off their phones for a day. Now almost every child is just inside on their phones on a hot summer day instead they will get a break from technology and spend the day with you.

Thank you for reading this piece, I get paid $15 by hour for working at my father's office.

Here's a pic of the last author.

-Gary Burger, Personal Injury Lawyer



Happy Wednesday, Friend:

Monday night I did something I have not done in a long time. I went to an actual live concert!!

My Dad, I and my son Jordan saw the Grateful Dead at the Hollywood Casino amphitheater - aka Riverport. It was a great show - those dudes are old. And so am I - I have seen many shows (first was Hampton VA in '86) and brought my dad to some in Chicago years ago. But never my son.

We had a blast. Dead and Co really play hard and rocked with John Mayer on lead guitar and helping out Bobby Weir on vocals.

In my last email, I discussed a large trial win with a $0 offer - well our other lawyers are doing it too.

It’s no BS - BL lawyers have been taking zero or low offers to amazing settlements with our hard work - below are three stories. The last one involves an insurance company trying to trick our client into a settlement before she came to us.

But first a pic from the Show - three generations at a Dead show.

$3,900 offer to $100,000 Settlement

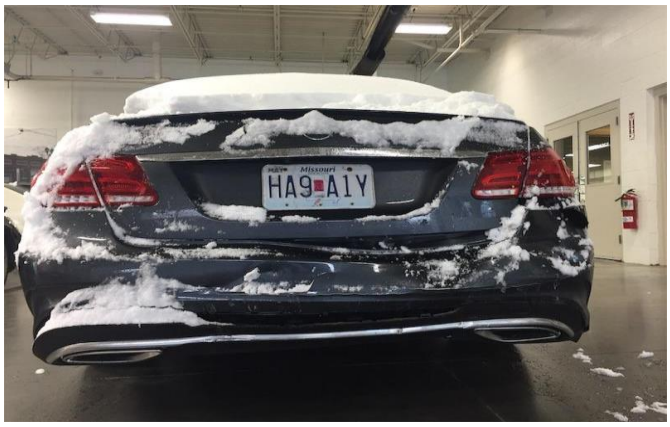
Burger Law's new attorney, Michael Sheldon, assisted in representing our client, Amanda, in an auto crash case.

He was able to **obtain a $100,000 policy limit settlement** after we received the insurance company's highest offer of $3,900 pre-suit.

Amanda was rear-ended at highway speeds by a distracted driver who was looking at their phone instead of the road. The sudden and unexpected impact jolted Amanda causing her to forcefully hit her head. She suffered a concussion and painful injuries to her neck and back.

Amanda sought treatment on her own from a local chiropractor and treated for about a year. We obtained her medical records and bills and we submitted a demand to the insurance company.

But the insurance company would not consider the bills and treatment with the chiropractor, and downplayed the severity of Amanda's head injury. They only offered $3,900 to settle the claim, even though Amanda had about $15,000 in medical bills.



This is a typical tactic of an insurance adjuster – declare some damages are not considered – its BS.

Our office strongly disagreed with the insurance company's value of this claim and opinion to not include the chiropractic treatment.

So, we of course filed suit and strongly litigated the case. We completed written discovery and did not receive a higher offer, and proceeded with depositions. Attorney Genavieve Fikes deposed the other driver and got them to admit complete fault for the accident.

After deposition, we made a bad faith demand and discussed settlement with the defense counsel.

We were able to negotiate a settlement for the policy limits of $100,000. We were glad to get this great recovery for Amanda.

If you need help maximizing your recovery or making bad faith demands to pressure insurance companies, give us a call or email me.

New Logo

Check out the new Burger Law logo - we will be putting this on the website, letter head, etc. What do you think of it?

Workers Compensation Settlement – 35% PPD of the Knee ($28,795.20)

After refusing to cave into the employer's lowball offers, attorney Genavieve and her team recently obtained a fantastic settlement result on their client David's Workers' Compensation claim.

David injured his knee at work while stepping off large machinery equipment and subsequently required surgery.

Missouri Workers' Compensation cases are valued based upon the following statutory formula:

(Percentage of disability) x (2/3 wage rate) x (body part value) = $_____

By statute, a person's knee is given the number 160, and David's wage rate was capped at the statutory maximum of $514.20. Therefore, the only variable to negotiate was David's knee's percentage of disability ("PPD").

The employer hired a doctor to examine David and rated him as having a 6% disability to his knee, which amounts to $4,936.32 under the formula.

After a few rounds of negotiations, the employer's most willing to offer was 15% of the knee, or $12,240.80. So, we decided to mediate David's claim in front of the judge.

At the mediation, Genavieve argued that David's claim was worth 35% ppd. David also got to speak to the judge directly on his behalf. The judge agreed. Even after the judge's recommendation, the employer still only offered 25% ppd.

After conferring with David, Genavieve told opposing counsel that she'd settle his claim for 35% ppd and nothing less. If forced to undergo the expense of retaining her expert and report, we would revoke the offer.

Shortly after that, the 35% settlement offer was made, and David's case was settled. At Burger Law, we will fight to obtain the best result possible.

Amazing $260 to $50,000 Policy Limits Settlement

We recently had great success in a hard-fought battle against an insurance company. What is amazing about this case is we got a round a settlement that the insurance company tried to trick her into.

Aarti was rear-ended and suffered severe injuries to her neck and right arm. She ultimately required surgery, and the total medical was over $40,000.

One week after the accident, the at-fault driver's insurance company tried to settle the claim with Aarti over the phone before she knew the full extent of her injuries. They offered $260 for full settlement and agreed to pay for medical bills up to $2,000.

The insurance company then sent Aarti a letter saying she agreed to settle her injury claim for $260 and asked her to sign a release. Aarti cashed the check because she believed it was partial payment for her medical bills, not the settlement of her claims.

However, she did not sign the release.

After taking the case, the insurance company told us Aarti already settled her claim in full for $260. We disputed this and filed a lawsuit. The defendants raised the affirmative defense of accord and satisfaction, asserting that the dispute had been settled when Aarti cashed the check.

Under Missouri law, when an insurance claim involves a genuinely disputed amount, and the insured accepts in settlement of that claim-a draft designated as payment in full, an accord and satisfaction results. *Clark v. Trader Ins. Co.*, 951 S.W.2d 750, 754 (Mo. App. 1997).

Missouri law agrees that where a claim is unliquidated or in dispute, a check has been tendered on the express condition that acceptance thereof shall be deemed to be satisfied in total, and where the payee cashes the check, an accord and satisfaction results. Id.

We rejected the defense of accord and satisfaction. During discovery, the defendants served requests for admissions attempting to get Aarti to admit that she settled her claim for $260, which we denied.

We asserted that the check was not for full settlement but rather partial payment for Aarti's medical treatment.

After written discovery was completed, the defendants offered Aarti the policy limits of $50,000.

This case was a big win, and we were happy to help Aarti with this misleading claim.

This is why we do what we do – fight unscrupulous insurance companies trying to trick people.

Genavieve tried and won a case this week in St. Clair County, IL. Here's a pic.

More on that in the next newsletter.

-Gary Burger, Personal Injury Lawyer

Happy Tuesday, Friend:

All is right with the world - the Cardinals are peaking at the right time (as usual) with an amazing 16 wins in a row. And we went to the first Blues preseason game on Saturday night.

The longest winning streak in St. Louis Cardinals history is up to 16 games. The last time this has happened was in 1951 with the Giants. Today we have another game, let make it 17 straight wins!

And it's almost October, which means it's time to settle cases in my business. We are working hard to ramp up settlement and push resolution of cases. To that end, we are mediating a lot of cases, and trying them again.

I settled a national labor case for unpaid wages on Friday - helping 364 clients who opted into the case. Below, I talk about Genavieve's recent trial, a $125,000 settlement and some of our techniques for a successful mediation. But first, here are some pics from the blues game.

Burger Law obtains $47,106.50 Plaintiff Verdict in Disputed Liability Soft Tissue Auto Case

Jury trials are back, and we are still winning! **Genavieve Fikes** recently won a two-day jury trial in St. Clair County, Illinois, before Judge Heinz Rudolf. The case involved a disputed-liability intersection collision at Route 159 and Highway 15 in Belleville, Illinois, in August of 2017.

Following the collision, Plaintiff went to the emergency room and was x-rayed and diagnosed with a contusion from the seatbelt and arthritis. Her primary care doctor later diagnosed her with a neck and back strain resulting from the collision and referred her to two months of physical therapy.

Plaintiff incurred $17,106.50 in related medical charges, the bulk of which was hospital and imaging.

Despite Defendant's admission in her deposition that she had a stop sign on Highway 15 and that Plaintiff had the right-of-way *for nearly three years*, Allstate only offered Plaintiff $8,369.00 to settle her case, which was only about half of her medical bills.

As such, Burger Law geared up for the trial and took the depositions of Plaintiff's doctor and the defendant's paid expert, Dr. Richard Lehman. Before trial, in response to Plaintiff's bottom-line demand of $40,000, Allstate finally increased their offer to $20,909. This offer was obviously not enough to compensate Plaintiff for her injuries, medical expenses, loss of everyday life experienced, and pain and suffering.

So, the parties went to trial in St. Clair County, Illinois. Because of Covid, the panel for jury selection only consisted of 21 potential jurors, and only 6 jurors and 1 alternate ultimately heard the case.

Genavieve was able to get **1/3 of the jury panel struck for cause based** on information that she could elicit from the potential jurors showing bias.

At trial, Defendant and Allstate refused to accept responsibility for the collision and asserted that Plaintiff was contributorily negligent for not avoiding the crash or maintaining control of her vehicle. They minimized her cervical and thoracic strains as "whiplash" and tried to invalidate her pain and suffering. They highlighted Plaintiff's arthritis and negative imaging to try to diminish her damages.

Through cross-examination of Defendant on the stand with her deposition testimony, Genavieve was able to catch Defendant in her "prior inconsistent statements." *(Ahem…lies)*. Plaintiff testified about the accident's impact on her life and stood up well to defense counsel's cross-examination.

Ultimately, the jury returned a verdict in favor of Plaintiff and against Defendant for $47,106.50, which comprised $17,106.50 in past medical expenses, $10,000 for loss of everyday life experienced, and $20,000 for pain and suffering.

This is Genavieve's third disputed-liability jury trial victory in cases defended specifically by Allstate.

Genavieve 3 – Allstate 0.

It was a four-year-long fight against Allstate, but Burger Law never gave up.

What's A Mediation? And How do I Prepare for One?

Mediation is the process in which a neutral third party, called a mediator, meets with both sides of a civil claim and facilitates the resolution of their legal dispute.

Mediation can often be very successful in settling cases, but the process is voluntary, and neither party is obligated to accept an offer or demand during the mediation. A mediator will help assess the risks involved and offer strategies for coming up with a mutually agreed-upon number.

Here's our step by step of how tour office prepares for a mediation.

- Schedule Mediation- via Zoom for now or in conference rooms designated by mediator. Scheduling means you clear with client and attorney handling mediation and other side. Most mediators schedule on their websites and have available dates on there. Whether and when to mediate should be a decision by attorney and client.
- At the time of scheduling, send the below pre-mediation email and provide the client with the mediation date, as well as any other upcoming dates of importance, such as trial date, arbitration date, upcoming deposition dates, etc.
- A call with the client explaining mediation is also recommended. Discuss the mediation and what it means. Make sure we are updated with medical providers, medical treatment, wage loss info and any other stuff (like do we have all the pictures or bills from client).
- At the time of scheduling, send an email to the client and provide them with any important deposition transcripts and a copy of the demand letter if one has been sent, as well as any response received/current offer on the case.
- Within a week of scheduling the mediation, total outstanding liens and send reduction requests to all providers, and make sure lien letters are sent to all necessary parties. See lien reduction protocol. Attorney and paralegal have to plan and meet on this. Usually we ask for 50% reduction – but that may not be enough – or there may be providers we should leave alone. Also – for Medicare/Medicaid make sure conditional payment letter will be issued and get on the portal to get figures for the lien and look at the EOB.
- Within a week of scheduling the mediation, make sure any medical records or bills that need to be supplemented have been supplemented. These also need to be produced to the other side.
- Is all medical related, all liens related and have we supplemented everything to the other side, like med records, photos, wage loss, liens, and rog answers?

- Two weeks before the mediation schedule a phone call between the client and the attorney for one week to allow for preparation and to discuss any other issues with the client ahead of the mediation.
- A week to 10 days before mediation, do the mediation letter and/or presentation to the mediator with any attachments – send to mediator, client and opposing counsel.
- A week before the mediation, get Casey to get you expenses and any other financial details you need like % fee.
- A week before the mediation, send a letter or email to the client informing them of the total of the outstanding liens and any reduction acceptances that you have received.

$125,000 Combined Policy-Limit Settlement

We recently achieved an excellent result for our client Jamie Jessop, who was seriously injured due to being rear-ended by Arturo Barragan while stopped at a red light in St. Louis. Jamie, unfortunately, ended up having to have surgery on his back as a result.

Mr. Barragan, who rear-ended Jamie, had a $25,000 policy, and Jamie had $100,000 in underinsured motorist coverage through his own auto insurance company.

Mr. Barragan's insurance company was uncooperative, and we were forced to file suit to recover his policy limit, even though Mr. Jessop's medical bills exceeded the $25,000 limit. We ultimately were able to obtain the policy limit from Mr. Barragan's insurance company.

Fortunately, Jamie also had an underinsured motorist policy totaling $100,000. An "underinsured" policy provides additional coverage if the driver responsible for the accident does not have enough insurance to fully offer coverage for injuries they cause.

These policies require settlement for the policy limit for the driver who caused the accident before the policyholder can make a claim. In Jamie's case, we expected we were going to obtain the policy limit.

So, once we did so, we sent correspondence to Jamie's insurance company informing them of the underinsured motorist claim and demanding the $100,000 policy limit, which we could obtain for Jamie.

In total, **we were able to get $125,000 for Jamie**, the whole of all insurance coverage available.

More on that in the next newsletter!

Happy fall, Friend:

At least I didn't say happy fall, y'all.

We had a blast yesterday going to a new pumpkin patch, Braeutigam Orchards - just west of Belleville and Eckerts in Illinois.

Great stuff in this email (and a bit morbid for Halloween) - dog bite claims and the law, an exploding house case we settled, and why you can't sue for wrongful death in Missouri if your grandparent passes.

Boo.

$305,000 Settlement in Dog Bite Case

We have had quite some success in dog bite cases lately? Earlier this year, Genavieve secured a $305,000 settlement for our client, who was attacked by a Mastiff.

The dog was on a leash and appeared friendly, but when our client went to pet her, she jumped and bit our client's face, causing injury, resulting in approximately $23,000 in paid medical charges.

Genavieve mediated the case while in claims, which is rare, and obtained this settlement without filing a lawsuit. At Burger Law, we LOVE dogs – I am usually fostering three at a time – but we still fight hard for our clients when attacked. There are a few rules of thumb to follow when it comes to preventing dog bites.

- Especially with children, it is better *not* to pet dogs without the owner's permission.
- Running from a dog typically excites it, which can exacerbate the situation.
- Give strange dogs their space. If leash-less or wondering, back up slowly and do not provoke.
- Do not squeeze dogs too hard. This may agitate them and cause aggression or accidental excitement.
- Let a dog come to you. Allow them to sniff your hand, finish their meal, or sleep in peace.

Another important thing is never to underestimate a dog's size, even if you are its owner. The damage a dog bite leaves behind is often much more than physical. In addition to lacerations, broken bones, and bruises, vicious dog attacks can cause permanent damage and leave physical and mental scars that never heal.

The result of these attacks is even more devastating when they happen to young children. When you or a loved one suffers a dog bite's physical and emotional trauma, you will not simply accept a meager settlement offer. Still, you will work hard to demand and obtain the highest possible compensation for your lasting damages.

Maximum Lawyer Conference 2021

I was excited to act as master of ceremonies for the maximum lawyer conference in St. Louis with about 250 attendees from around the country. Had fun working on my business, learning from friends and teaching lawyers. Attorneys Jim Hacking and Tyson Mutrux created Maximum Lawyers. Over the years, this group has grown into a collaboration of attorneys worldwide to share ideas, resources, solutions, challenges, and triumphs of being a legal entrepreneur.

Members experience access to unmatched support for their firm visions, long-term planning, day-to-day practice management, and strategic growth through open-source information sharing and relationships with lawyers from all types of practice areas.

Real Client Testimonials - Exploding House Case Result

Our attorney, Michael, got to sit down with our client Kelvin to discuss his experience working with Burger Law. Kelvin and Joyce were in their home when the house next door suddenly exploded. The force from the explosion forced Joyce against a wall and jolted Kelvin from a couch to the floor, causing bodily injury and damage to the Plaintiffs' home.

The exploded house was owned by a rental property and had been uninhabited for more than a month, as the previous tenants had moved out before the explosion. An arson investigator determined that the explosion was caused by a natural gas leak triggered by someone removing copper pipes connected to a water heater in the home.

The arson investigator also reported that other pipes leading to and from the water heater and the main water supply valve had been removed.

Our theory of liability was that Defendant's rental home company was negligent because they failed to turn the gas off in an uninhabited home and failed to properly secure the house to prevent an intruder from breaking in and stealing the copper pipes.

This was a tough case on liability because rental properties need to keep the heat turned on in the winter, or damage can occur to the property. Also, we had no direct evidence of someone breaking into the home and stealing the copper pipes.

A criminal act such as burglary can be considered a superseding intervening cause that cuts off liability to the rental property. Ultimately, we could get a good settlement for the Plaintiffs after filing suit but before the written discovery was complete.

My Grandmother Died in a Car Accident, Can I Sue?

Often, we lose the elderly people in our lives through no one's fault at all. Sometimes a heart attack, sometimes cancer, sometimes just "old age." Occasionally we are faced with the difficult decision of what to do if someone elderly in our lives dies due to someone else's negligence - meaning our loved one's death was caused by an individual or individuals who are responsible for his or her death.

Whether occurring as the result of a motor vehicle accident, a doctor's mistake, or a nursing home's mistake, such a tragedy can prove a challenge when the family wants to hold the at-fault person responsible. The first question that may come to mind is, what can I do?

A standard answer to such a question is to file suit. Various other options may be available, such as reporting a doctor to an investigatory committee or agency. If the family is seeking compensation for their loved one's loss, the best option is to file suit. The next question that comes to mind is who can file a lawsuit?

Missouri has a statute (Section 537.080) that sets forth three classes of plaintiffs who may bring suit.

The classes offer a descending order of priority: class 1 plaintiffs can sue; if no one exists in class 1, then class 2 plaintiffs can sue, and if no one lives in class 1 or class 2, then class 3 plaintiffs can sue. This discussion explains a further division within the eligible class 1 plaintiffs.

The statute says suit can be brought "by the spouse or children or the surviving lineal descendent of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive."

To answer the question at the top, if your grandma died in a car accident, you might be able to sue, but only if your parent, who was her child, has already passed. If your mother or father has not died already, you cannot be the only plaintiff named in the suit. Your parent will need to be also named. For many families, this will not be an issue.

However, if there is a dispute over whether to file a suit or if the parent and child are estranged, this can cause conflict to keep in mind when deciding about filing a lawsuit and pursuing compensation.

Hey, Friend:

I am so thankful of the great lawyers and legal professionals we have working together at Burger Law. We have really weathered a lot in the last two years.

We have successfully navigated this pandemic. I did not know it at the time, but the systems we put in place to run our firm set us up to work remotely during Covid and continues to be super effective. Then, when the pandemic started, we adapted and learned how to work remotely.

We constantly work on our communication with each other and our clients. We keep pushing our clients' claims and have had a great year of victories and successes. It’s great to be able to help our clients get good recoveries for their injuries.

Even though we have good systems, they need maintenance and change. So many cases are unique and need creative solutions.

Sometimes seems the world is getting colder and harder, so what we accomplish for our clients is a good and bright light for our them.

So, a sincere thanks to Casey, Genavieve, Tyler, Michael, Mom, Jennifer, Rodney, Laura, Tiffany, Caylin and Taylor for your hard work and putting up with me.

Here's a pic of us in front of our building.

$150,000 Phantom Motorist Settlement

Genavieve recently settled a phantom motorist claim for the stacked uninsured policy limits of $150,000. A phantom motorist claim arises when a negligent driver causes an accident, but you don't know who the driver is.

Some examples include hit-and-runs, accidents caused by cargo following off of an unknown truck, or accidents caused by debris in the roadway. In these situations, you can file a phantom motorist claim through your own insurance policy's uninsured motorist coverage.

Here, our client was a pedestrian lawfully crossing the street when she was hit by a car that fled the scene. We requested footage from nearby surveillance cameras but were ultimately unable to identify the at-fault driver.

Genavieve requested our client's own car insurance declaration page to determine the amount of uninsured motorist coverage available if the at-fault driver could not be found. Genavieve noticed that two vehicles in the household were covered on the policy – one with $50,000 uninsured limits and one with $100,000 uninsured limits.

In Missouri, you can "stack" or combine uninsured motorist limits, so it is essential to investigate all potential sources of insurance coverage.

Genavieve confirmed that there were $150,000 in coverage limits available. Our client sustained a fractured shoulder and labral tear. Rather than undergo surgery, she pursued extensive physical therapy and had injections.

Ultimately, she incurred approximately $58,000 in medical charges, with only about $11,000 paid and owed. Although our client had no immediate plans to get surgery, there was a possibility that she might elect to repair her labrum down the road.

Genavieve estimated that future arthroscopic labral repair, surgical anesthesia, and post-surgical physical therapy could cost approximately $48,000. Hence, she included those figures in the settlement demand letter to add value to our client's claim.

She also had $13,816.00 in wage loss damages. Genavieve submitted a settlement demand for the $150,000 stacked policy limits with a 90-day deadline to respond.

On the 88th day, our client's insurance company offered the full $150,000. If you are injured in an accident with a phantom motorist, Burger Law is happy to help navigate the insurance issues and do all we can to maximize the value of your claim.

Max law speech

I gave a talk at the Maximum Lawyer conference a couple weeks ago. If you run a law firm or want to, join Max law and listen to the podcasts. Here's some notes from my talk:

How to run a firm and get a $113,714,632 million verdict

You have to have a system for running a firm and trying cases and maximizing the value of your cases.

Here's what I learned about myself and my firm in trying the Hootselle case:

Build a great team and system in your firm for trying cases and running a business

Take risks in your business – take and try the big cases

I am only going to live once. My why is to fight for the little guy against the bullies. I want to be the CEO who has the amazing systems and has KPI automatic charts showing all this stuff. And coming here makes me focus on those more. But honestly, I like being a trial lawyer.

But run a kick ass business

I have great lawyers and staff that I work with. We push to get good results for our clients and push legal envelopes.

Keep everything else going – but do more. If you want to get something done, ask a busy person.

Be funny

Be gracious and honorable

Have Serenity

Really surrender to the idea that you can only control what you can control – that you could lose the whole thing.

When the jury goes to deliberate, I am done and relaxed, regardless of what the verdict is.

Then when you see the verdict – be open to learn the lessons from it – acceptance is the answer to all your problems today.

Acceptance is the answer to all my problems today. When I am disturbed, it is because I find some person, place, thing or situation - some fact of my life - unacceptable to me. I can find no serenity until I accept that person, place, thing or situation as being exactly the way it is supposed to be at this moment. Nothing, absolutely nothing, happens in God's world by mistake.

How I work with other people and firms

Pretty well, but it can be hard when there are a lot of leaders in the group.

I have to share – I get to share.

Success has a thousand masters – failure has none.

Cases happens and life happens

Live your full and best life.

Humility and gratitude

Case is a constant study for me on my ego and my humility and gratitude.

All glory is fleeting – really true

Think about all those class members who are really counting on that money – college tuition for a kid, retirement, and now dead, new house or car. Justice delayed is justice denied. They all went to work today.

Relax into your power and legal ability – your Ego

Proud of the novelty of the case – breach of contract case to get around sovereign immunity -Became real expert in sovereign immunity.

This case is like a book and life – any imaginable twist and turn – it's happened. Now going to go and retry it - got the amount of the verdict reversed but the court said we were right on sovereign immunity, having a contract, its breach, having a class and that some of the work these officers do is compensable. All of it could be. The court is to determine compensability on the rest and recompute damages accordingly.

This case is a constant lesson in ego and humility and gratitude. It's for me to be open to the lessons. God would not give us traffic unless he wanted us to learn patience.

Failures make us appreciate success and learn.

Flower blooms when ready – but up to me to fertilize my soil, look for sunshine and find water and sustenance so I can continue to bloom when the opportunity arises.

And be a kick ass trial lawyer.

Won't be every time, but that's ok.

Update on MODOC Lawsuit via Facebook Live

On November 3, 2021, I hosted my "Ask A Lawyer" Facebook Live show. This is an event where I answer the audience's questions live. During the show, and officer asked about an update about the Missouri Department of Corrections case.

The Missouri Supreme Court affirmed in part and vacated in part the trial court's judgment - and remanded it back to the state court for a new trial. This was a unanimous decision of all six Judges handed down June 1, 2021.

The case was transferred from the Supreme court back to the trial court. We appeared before our new judge and set the trial of the case on June 11, 2022, in Cole County Circuit Court.

$110,000 Settlement in Dog Bite Case

While we love dogs here at Burger Law, we also represent people injured from dog bites and attacks. I recently obtained an excellent settlement for our client, Ruth, viciously bitten by a dog several times.

Ruth was helping someone she knew move into a new home in Illinois when the dog owner's German Shepherd got loose and unexpectedly bit Ruth on the arm and back. Our client suffered severe physical injuries as well as emotional trauma.

We investigated the incident, obtained animal control and police reports, and demanded the case. However, the insurance adjuster made a low offer because they claimed Ruth was partially at fault for the attack and that some of her medical bills were unrelated to the dog bites.

So, we filed a lawsuit, completed written discovery, and took the defendant's deposition. A vital issue was that the defendant claimed Ruth tried to grab the dog before the attack. Ruth, however, strongly denied this.

Under **Illinois dog bite laws**, a dog owner is strictly liable when their dog, without provocation, attacks a person in a place where the victim had a legal right to be. In this case, the defendant tried to deny liability by alleging that Ruth provoked the dog.

We were able to identify and interview several witnesses who would testify that Ruth did nothing to provoke the dog. This helped us negotiate a great settlement of $110,000 for Ruth.

At Burger Law, we always fight to get the best possible result for our clients.

And I am thankful that the Blues are playing again.

Hey, Friend:

My last email talked about how thankful I am about my coworkers and the great work they do.

I am psyched for thanksgiving next week to travel and have some family time. We are going to Angel Fire New Mexico to hang with my in laws and their great family.

I happen to be a vegetarian and as is my wife and two of our kids. People ask how we do thanksgiving. Well - we do it very well. Rather than turkey, we get to eat all the sides and deserts.

Which is the best part of it anyway. Think about all the food we eat on thanksgiving – and how little of it is meat. Anyone interested in making this a meat free thanksgiving?

Regardless, have a great T Day.

And speaking of animals - to give back a little bit, **our whole firm is taking off work** at noon this Friday to do a **volunteer day at Gateway Pet Guardians**. https://gatewaypets.org/

They are truly Beyond Rescue. They are located in East St. Louis and lead the animal welfare industry by investing in people and the community to end the cycle of animal homelessness.

They take in strays, offer free vaccination and veterinary car, rehome great animals and provide free pet supplies with their partners.

But they also go into the community to provide resources to help pet owners keep their pets and keep them healthy. They work hard to remove barriers to foster and adoption.

Thanks.

Below is the very robust news of the firm over the last couple weeks.

Client Testimonial

Last time I shared the story about a recent settlement regarding a dog bite case. I'll share a brief description of what happened for those who don't recall.

Our client Ruth was helping someone she knew move into a new home in Illinois. The owner's German Shepherd got loose and unexpectedly bit Ruth on the arm and back.

Ruth's suffered severe physical injuries as well as emotional trauma. We did some investigating, interviewed some witnesses, and got an excellent settlement for Ruth. Ruth was able to stop by our office downtown to collect her settlement. We're happy to share that's she's doing well

Back-to-Back Settlements!

Tyler and Jennifer have been working hard! We were able to get back-to-back settlements for several clients this past week.

Joe Rice

We represented Mr. Rice on an accident on Highway 44 in St. Louis County. Another driver lost control of his vehicle, crossed multiple lanes of traffic, and crashed into Mr. Rice's car. Fortunately, Mr. Rice was not seriously injured, and his recovery went well with conservative medical treatment.

After the adjuster did not make a serious offer to compensate Mr. Rice, we filed suit. Fortunately, the assigned counsel viewed the case more realistically, and we were able to quickly reach an amicable settlement for $15,000.

Joe paid us a very high compliment with respect to our representation when he referred his mother to us.

Jonathan Starbuck

We represented Mr. Starbuck in a rear-end motor vehicle accident. Mr. Starbuck, unfortunately, had many pre-existing health conditions that the insurance company wanted to claim were the sole cause of his pain and suffering after his accident. After continued negotiation, we were able to more than double the settlement offer, and we were able to settle Mr. Starbuck's claim for $30,000.

Matthew Pantaleo

Mr. Pantaleo suffered a back injury while working for the State of Missouri. Despite receiving a 15% disability rating from the State's doctor, we were able to increase the settlement offer to 25% and settle Mr. Pantaleo's case for an amount he is pleased with.

Cedric Mason

Mr. Mason was riding as a passenger in his girlfriend's vehicle when an unidentified driver forced her off the road into a light pole. The driver that caused the crash left the scene. We were able to secure Mr. Mason the policy limit of $25,000 for uninsured motorist coverage for his injuries.

Here at Burger Law, we take on any cases, big or small were happy to get the settlements our clients deserve.

Do I Have a Wrongful Death Claim in IL?

The loss of a loved one is immeasurable, and it's more difficult when it's caused by the negligence of another person or company. I did a video the previous week and broke down the process of how to find out if you have a wrongful death claim in Illinois.

Wrongful death claims are difficult in Illinois, people have two years from the day of death to file their claim. However, in Illinois, the big question is who can file this claim, in Illinois the court appoint a personal representative to pursue the claim, it's always a close family member.

In Illinois, you are entitled to damages for grief, pain, and suffering loss of income or the reeducate capacity of income due to your loved ones' untimely death. The law is placed here to help these family members move forward and begin their healing process during these challenging times.

On the topic of wrongful death, I was asked by one of my employees about what would someone's rights be in recovering damages in a wrongful death claim if they are a member of the LGBTQ community.

Regardless of what state you are in, people are entitled to make a claim. The barriers that were once there before are gone. The law is constantly changing or being updated to fit our modern society.

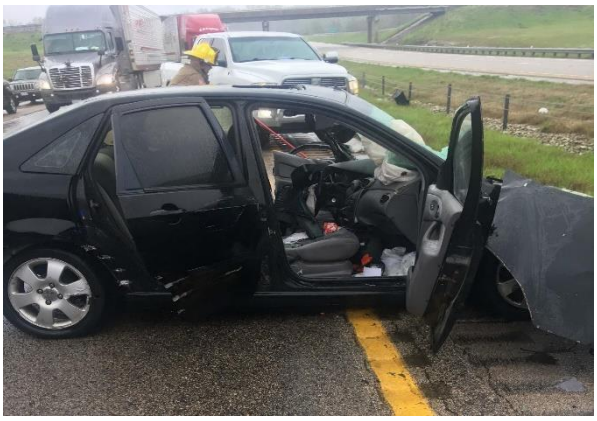
These types of claims are hard to do, but they are necessary. When people come forward to make these claims, they are getting justice for their loved ones and making their community safer. Here at Burger Law, we are ready to help people begin the process or just answer any questions.

$162,500 Truck Accident Settlement

Collisions involving tractor-trailers often cause serious injuries, and because of the commercial insurance coverage available, companies tend to fight these claims hard.

When involved in a truck accident, it is crucial to hire an attorney immediately so that they can send out a spoliation letter to the truck company and ensure that they preserve

valuable evidence, such as dashcam footage, and various forms of electronic data through GPS systems, radar collision warning systems, the electronic control modules, and accelerator recording systems.

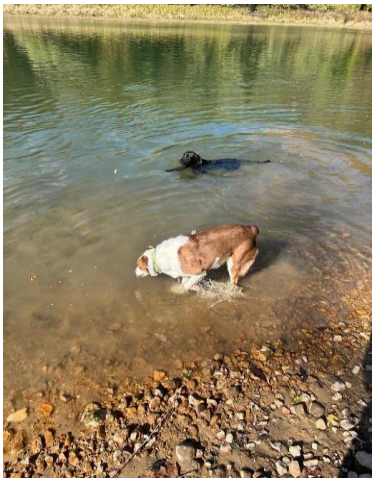


That is what Burger Law did in Lisa's case, and we were able to obtain video of the collision proving that the truck driver was at fault.Lisa was driving in the left lane on Highway 44 on a rainy day when a truck in the right lane ahead of her failed to slow down for traffic and abruptly changed lanes, cutting her off.

This forced Lisa to skid out of control and run into the median. As a result of the crash, she sustained a concussion and partial tear of a ligament in her knee. She had $38,000 in paid and owed medical bills.

Despite the dashcam video, the truck company claimed Lisa was speeding and partially at fault and only offered $50,000 to settle her claim.

After months of negotiation, Genavieve resolved **Lisa's claim for $162,500**. If you know someone involved in a truck accident, be sure to act quickly so that valuable evidence isn't lost or destroyed.



My dogs swimming in a hike I did last week.

Happy December, Friend:

Welcome to the last month of the year. Hard to think its December with the really warm weather we have lately and this week. Two meows in this email - hence the subject line.

We are super busy at the firm - depositions, court hearings and settling cases. Below are articles about a great settlement, funny turkey jokes friends of the firm supplied in a

contest on Facebook we had last week, and our volunteer day we had **at Gateway Pet Guardians - or** https://gatewaypets.org/.

At the volunteer day, I took home a cat to foster - meow. She is really sweet. If anyone is looking to **adopt a cat**, email me - her picture is at the end of this email.

In my thanksgiving trip to New Mexico last week, we had a blast. We also got to go see a really unique place **called Meow Wolf**. It's an artsy, adventure unique attraction - the brain child of Games of Thrones author George R.R. Martin.

If your ever in Santa Fe, Las Vegas, or Denver, check it out. Here's some pictures:

Burger Law Volunteer Day

On November 19, the firm and I took the afternoon off to do a volunteer day at Gateway Pet Guardians. We spent the day cleaning and setting up some dog houses and cat towers. These items were given to the shelter from Chewy.

They have a great deal with them that any returned item Chewy receives goes directly to the shelter; people can visit Gateway Pet Guardian and get new toys, beds, and more at discounted prices. All purchases go immediately back to the shelter as a form of donations.

Gateway Pet Guardians' goal is to **keep pets and people together.** They provide life-saving operations for animals in need and a place for the community to have the resources to keep their pets; this includes a free pet food pantry and a free spay/neuter program.

I've been involved with Gateway Pets Guardians for a while now, so I was happy to bring my team to the shelter for the day. They were all excited to participate and are looking forward to coming again to help them out in the future.

Organizations like this need all the help they can get; they are really changing lives for the better, which is why I've included where you can make a donation. These donations help keep their programs going, and more animals can find their forever homes. To donate, visit their website.

Thanksgiving Give Away!

We do a lot of giveaways here at Burger Law. During the holiday week, we gave Blues Tickets to whoever told the best Thanksgiving joke, our winner was Kelen Deffendall.

Here are some of the best we heard:

Winning Joke: My family told me to stop telling Thanksgiving jokes, but I said I couldn't quit cold turkey!

What's something usually insulting, but not on Thanksgiving? A family member giving you the bird!

What was the turkey suspected of? FOWL PLAY

What happened when a turkey got into a wrestling match with a chicken? He got the stuffing knocked out of him.

A young man who worked at a grocery store had just finished stocking the turkeys in the freezer when a woman approached and asked, “Excuse me, do these turkeys get any bigger?” “No ma’am,” he replied. “These turkeys are dead.”

What did the turkey say to the computer? GOOGLE, GOOGLE, GOOGLE

"What's blue and covered in feathers?" "A turkey holding its breath."

What did the mother turkey say to her disobedient children? If your father could see you now, he’d turn over in his gravy

What do you call a running turkey? Fast food

Give Away is something we do from time to time to show our appreciation to those who follow us on our social media platforms. If you want the chance to win our next giveaway, make sure to follow us on Facebook and Instagram! You could be our next winner!

$117,500 Slip and Fall Settlement

Winter is fast approaching, and with that comes the increased risk of cold weather, icy conditions, and slip and falls. Slip and falls can be tough cases, but Burger Law has a long track record of obtaining great results for our injured clients.

Genavieve recently settled a slip and fall case for $117,500. Our client had slipped and fallen on a trail of ice that formed from a drainage pipe on a commercial property. She fractured her wrist and incurred approximately $30,000 in medical charges (with ~ $6,000 paid and $1,800 owed).

Because of confidentiality terms in the settlement agreement, we cannot release the names of the parties, but we filed a lawsuit against the property owner, and the property owner joined their snow removal company as a third-party co-defendant.Depending on who was responsible for maintaining the property, the property owner, or snow removal company (or both!) may be liable for negligently failing to warn of, or remove, the dangerous slippery condition.

Here, the defendant property owner asserted third-party claims against the snow removal company for breach of contract and contribution/indemnification, alleging they

failed to pre-treat, warn of, and remove the ice, as required by their service contract with them.

Our case settled globally with both entities and our client was very happy with the result.

Happy Holidays, Friend:

... and Merry Christmas. What a year it's been - super busy for everyone from the looks of it.

Hope everyone reading this has a great holiday and new year.

We just accomplished a firm goal I set - to settle 60 cases from October to now and get those clients their money by Christmas. Well, Mission Accomplished.

Below, I discuss another settlement, talk with a friend for whom I tried a case, the Freedom Suits Memorial Project and my Ask a Lawyer Facebook show every other week. But first,

We had a blast at our Burger Law Holiday Party - this year to see the Blues.

It was quite a treat to see left-wing Nathan Walker score a hat-trick in his 2021-22 regular-season debut in the Blue's 6-2 win against the Detroit Red Wings.

He had been recalled from the AHL's Springfield Thunderbirds earlier in the day.

Our work with Gateway Pet Guardians continued up to today. We fostered an 8-year-old cat, who was rescued in East St. Louis. Happily, she was adopted and had moved to a great home.

And I today dropped off two puppy pit bulls who will go to their forever home today. These pit mixes have powerful blue eyes. Here's one of them being introduced to our awesome cat by my son.

If anyone needs help finding a good match for a slightly used pet for their home for the holiday or in 2022 - let me know.

Freedom Suits Memorial Project

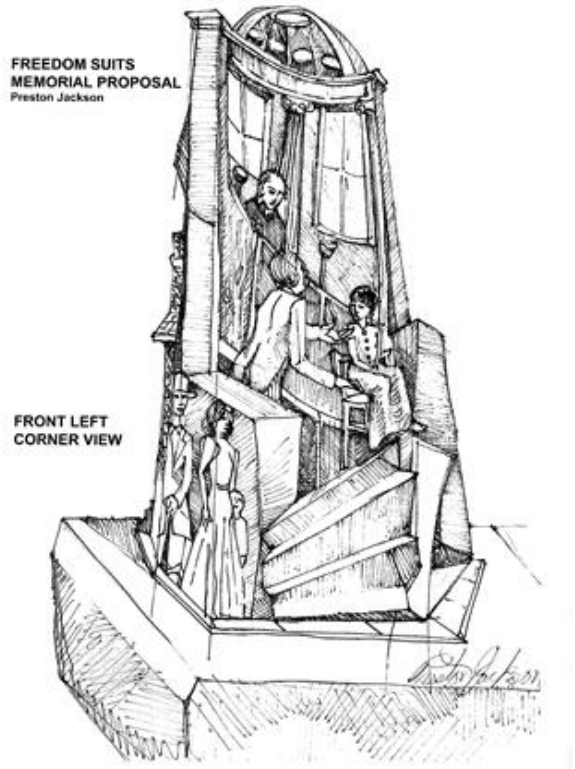
The Freedom Suits Memorial Project is dedicated to 400 courageous slaves who filed suit in Missouri Courts for their freedom and were assisted by lawyers working without pay.

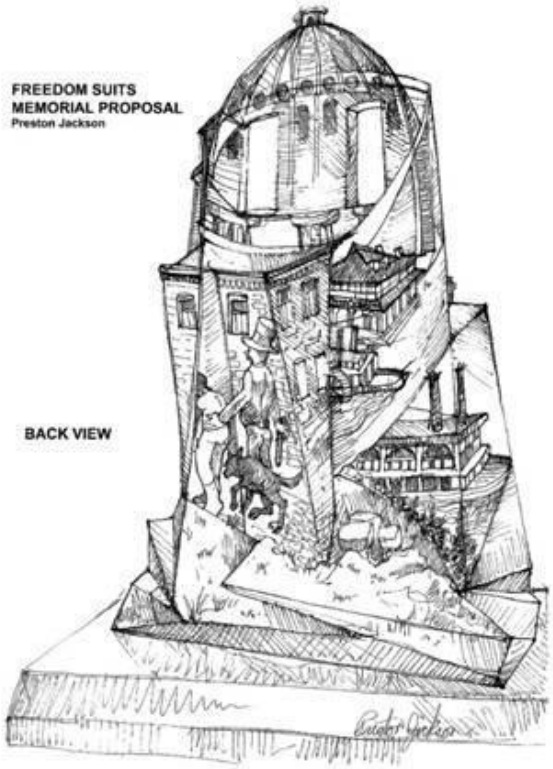
The Freedom Suits Memorial Steering Committee announced that they are partnering with the Bar Association of Metropolitan St. Louis (BAMSL) to unveil a 14-foot-tall bronze sculpture. This unveiling will be held on Law Day next year - **May 2, 2022**.

The sculpture will be placed at the Civil Courts Building downtown, aligning with the Gateway Mall and the Old Courthouse, where most of these suits were tried.

This project was inspired by many who told their account and experiences suing for their freedom, but none are more famous than plaintiffs Harriett and Dredd Scott.

The Scotts filed suit 57 years after the Emancipation Proclamation - and it was of course a challenge for a slave to get to court. Still, once there, these slaves had a legal precedent **"Once Free, Always Free."**





Under this theory, a slave who had been moved to a free state or territory for any length of time then returned to a slave state or territory could sue for his or her freedom. In the St. Louis region, a group of anti-slavery lawyers worked hard to extend this legal theory.

They hoped to abolish slavery without a violent struggle by taking these matters to court. These lawyers freed many slaves, including Harriett and Dredd Scott. However, the Scotts had a more difficult time suing for their freedom.

The Scotts original owner had died while their case was pending, so the owner's widow and her brother appealed the St. Louis verdict, which went all the way up to the Supreme Court.

The decision that was made is considered the worst in the history of the Supreme Court. It held that all people of African ancestry — slaves and those who were free — could never become citizens of the United States and therefore could not sue in federal court.

The court also ruled that the federal government did not have the power to prohibit slavery in its territories.

$90,000 Car Accident Settlement

Genavieve recently obtained a $90,000 car accident settlement for our client arising from a crash in Marion, Illinois. The at-fault driver only had $25,000 in coverage, so we were able to secure that compensation and obtain an additional $65,000 through our client's underinsured policy.

As is typical in Illinois, the UIM policy's $100,000 limits were reduced by the $25,000 paid by the at-fault driver, so there was actually only $75,000 in additional coverage available.

Our client had $12,000 in outstanding medical bills, so she is thrilled with the result.

A trial story

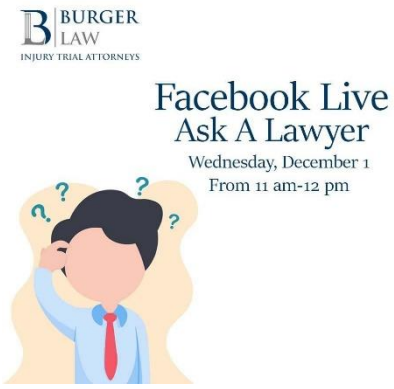
I got the chance to sit down with a past client to talk about her experience with myself and my firm. Amy came to us a while ago and we tried her and her families' case at the end of 2018. She and her family were in a dire situation and didn't know what steps they needed to take in their case.

After searching the internet for attorneys, she found us and called right away. We answered and began our work of assisting her and her family.

Medical errors are the third leading cause of death in America. These medical errors can occur from surgeries that lead to wrong results, improper medication, trips, slips, falls, and a doctor not paying attention to a patient's complaints.

We restarted our Ask A Lawyer show a few weeks ago and have been able to provide a lot of answers to questions.

Tune in every other Wednesday and ask a question. Or go to our You Tube page for answers to hundreds of questions. https://www.youtube.com/burgerlaw



LGB!!!

Gary Burger

-Personal Injury Attorney

Hey, Friend, Happy New Year:

January 2022

Is it me, or is time going by even quicker now with the pandemic? Another new year, goals, renewal, etc.

Especially with the Omicron variant of corona. Almost two years into this thing and we are now setting records. Now. Again.

It's like Groundhog Day.

I have many friends vaccinated and boosted who are getting corona. Some of our employees are out sick with it. We are fearful and exhausted with this.

And Flurona - Influenza and Corona at the same time.

But thankfully, as a firm we are still working away and getting great results. It's always changing though. I had intended to have folks in the office more after the new year - instead, I shut our office down this week at the last minute.

Working from home myself this week.

Below discussed is a class action settlement, some car crash settlements and FAQs we get about needing a lawyer and which lawyer to hire.

One thing new and different this week is that I installed a solar energy system on my house. Shout out to Straight up Solar for their great work. Here's a pic from yesterday. Stay safe out there.

$130,000 Collective Action Settlement

I recently had the pleasure of representing hundreds of correctional officers in a collective action under the Fair Labor Standards Act.

We filed the case in federal court alleging the employer required my clients to perform pre- and post-shift duties off-the-clock without pay.

We represented about 350 officers at four prisons where Management Training Corporation was hired to provide prison staffing.

We litigated this case for over half a year conducting written discovery. We then requested that the Court stay litigation and allow the parties to mediate the case.

Before mediation, we distributed an online survey to the hundreds of correctional officers asking what pre- and post-shift duties they performed and how much time it took. We also hired an expert statistician to calculate the damages of the class.

After all this work, we were able to successfully mediate the case. We were honored to represent the correctional officers and proud to get a **great settlement of $130,000!**

Similar to our case in Missouri, corrections officers entering the correctional facilities where they work, and prior to proceeding to their work assignment posts, my clients were required to pass through security screenings, retrieve equipment including handcuffs and pepper spray, verify their identity, receive job assignments, pass through security gates, walk to their post and receive a pass down briefing from the prior shift.

They were also required to do much of this activity after leaving their posts.

The FLSA requires that employees be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

In addition, under the continuous workday rule, compensation is required from the first work-related activity through the last, even if activities in between might not otherwise be compensable.

We alleged that pre- and post-shift duties are integral and indispensable to correctional officers' primary job duties and therefore compensable.

The damages and recovery in this case was limited because MTC stopped its practice of not paying for pre and post shift work after we filed suit.

And they had a good argument that they should not have their damages doubled as they had a district court ruling approving their conduct. But that decision was reversed in 10th Circuit Federal appellate court ruling.

We redid our website

Let us know what you think. Burgerlaw.com. More changes to come in 2022.

Client Testimonial in Car Accident Settlement

Laura is a super talented and hardworking paralegal at our office. She had the chance to sit down with one of our clients to discuss a settlement in a car crash case.

Yes, this was recorded before Omicron and all were vaccinated and boosted.

Lisa came to us after a horrific car accident involving a truck driver.

As Lisa passed the truck, the truck driver suddenly went into Lisa's lane and collided with her. Lisa was pushed into the median and crashed.

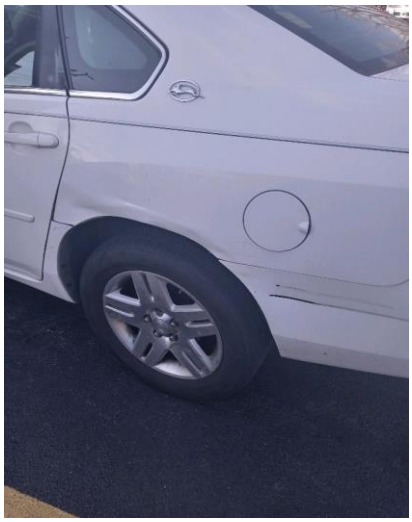
Fire and rescue arrived onto the scene and found Lisa's car on fire and had to use the jaws of life to rescue her from her car.

With amazingly few injuries, we were able to get Lisa a great settlement and are happy to see her doing well now

Denial to Policy Limits Settlement

Genavieve recently obtained a $25,000 policy limits settlement for our client in a minor car accident case after the insurance company initially denied the claim completely.

The accident was a hit-and-run, but our client was able to obtain the driver's license plate and track him down.



However, his insurance company asserted that its insured's vehicle did not make contact with our client's vehicle at all based upon the at-fault driver's own statement and photos of the property damage.

This became a classic "he-said, she-said" scenario.

After doing some digging, Genavieve and her client discovered that the at-fault driver had a looooooong criminal record, with over 34 misdemeanor charges and a suspended license.

We sent a second bad faith letter demanding the policy limits and attached a printout of the driver's public criminal history. We pointed out that their insured was not credible considering his track record.

In response, the insurance company changed its position and offered the full $25,000 policy limits to settle our client's claim. She only had $2,580 in paid medical charges, and is thrilled with the result.

Gary Burger

-Personal Injury Attorney

Good morning, Friend,

Get ready for a big snowfall this week.

The silver lining of working from home (partially) during the pandemic is that our firm operates just as smoothly remotely as in the office.

Below, I talk about our latest Burger Law Stop Bullying scholarship winner and a settlement. But first, Braggin' Rights and differences between Illinois v. Missouri injury law.

Note that although I can say Braggin' Rights - I cannot say Super Bowl. So - silly. Unless I pay the NFL for the privilege.

And here's a pic from the snowman William, Kristen and I made a couple weeks ago.

Illinois beat Missouri 88 to 63 in the last match up this year. It's always a fun game to go to and a great rivalry - of course I root for my alma mater, Mizzou. Illinois has won the Braggin' Rights game 33 times and Mizzou 19.

This prompted me to do an article about my top 10 differences between Illinois and Missouri law in the personal injury cases our firm handles.

I have been an Illinois and Missouri lawyer for 29 years. All our lawyers are licensed in both states.

TOP 10 DIFFERENCES BETWEEN ILLINOIS AND MISSOURI INJURY LAW

Q: Would you rather be in Illinois or Missouri for your injury claim?

A: It depends (such a lawyer answer)

1. Statute of Limitations

Illinois has a **2-year** statute of limitations to file a lawsuit for Injury Claims. (735 ILCS 5/13-202).

Missouri has a **5-year** statute of limitations to file a lawsuit for general negligence (R.S.Mo. § 516.120); a 2-year SOL to file a lawsuit for medical malpractice (R.S.Mo. § 516.105); and a 3-year SOL to file a lawsuit for wrongful death (R.S.Mo. § 516.105).

2. Wrongful Death Damages

The Illinois Pattern Jury Instructions for wrongful death allow a plaintiff to recover damages for grief, sorrow and mental suffering resulting from the loss of the decedent. (IPI 31.01).

The Missouri Approved Jury Instructions do not allow such damages in a wrongful death case. (MAI 5.01)

3. Noneconomic Damages in Medical Malpractice Cases

In Missouri, there is a legislative cap on noneconomic damages recoverable in medical malpractice cases. Noneconomic damages include pain and suffering, disability and disfigurement.

The current cap for non-catastrophic injuries is $450,098 and the current cap for catastrophic injuries is $787,671. (R.S.Mo. § 538.210.8). The statute provides for an annual increase in these caps of 1.7 percent.

Illinois does not have statutory caps on noneconomic damages in medical malpractice claims or any types of cases.

4. Comparative Negligence

Illinois and Missouri have different laws concerning comparative negligence.

Illinois follows the "modified comparative negligence" rule which holds that an injured party may recover damages only if he or she is less than 50 percent at fault for the injury or damages. (735 ILCS 5/2-1116).

Missouri, on the other hand, follows the "pure comparative negligence" law which places no cap on how much an injured party can be found at fault and still recover damages. (R.S.Mo. § 537.067).

In both states the injured party's damages will be reduced by the percentage of fault the jury assigns them.

5. Attorney's Fees in Medical Malpractice Cases

In Illinois, an attorney's contingency fee in medical malpractice actions is capped at 33 1/3 percent of the total recovery (735 ILCS 5/2-1114) whereas in Missouri there is no such cap.

6. Lien Reduction

Under the Missouri lien reduction statute, if the liens of medical providers exceed 50 percent of the injured person's recovery, each medical provider is entitled to share in up to 50 percent of the recovery on a pro rata basis.

Importantly, any medical provider who receives benefits under the statute is forever barred from pursuing the injured party for additional costs. (R.S.Mo. § 430.225).

In Illinois, the Lien Act caps the total amount of all liens at 40 percent of the injured party's recovery. However, there is no bar to the medical provider pursuing the balance of the medical costs from the injured party if they receive benefits under the statute. (770 ILCS 23/1, et. seq.).

7. Evidence of Medical Expenses

Under Illinois law, a plaintiff may present evidence to a jury of the amount of medical bills charged by medical providers who treated the plaintiff, whereas in Missouri a

plaintiff may only submit evidence of the "actual cost" of medical care, or the amount actually paid. (R.S.Mo. § 490.715).

8. Premises Liability

In premises liability cases involving snow and ice, Illinois and Missouri hold property owners to different standards of care.

In Illinois, when a property owner knows or in the exercise of reasonable care *would* discover the condition and *should* realize the condition involves an unreasonable risk of harm, he or she can be liable for the harm caused by the snow or ice.

Missouri has a broader standard—when a property owner knew or by using ordinary care *could* have known of the dangerous condition, he or she can be liable.

9. Submitting Business Records in Evidence

In Missouri, a plaintiff is allowed to enter medical records in evidence with a business records affidavit, provided the plaintiff served all parties with copies of the medical records and business records affidavit at least seven days before trial. (R.S.Mo. § 490.692).

However, Illinois does not have a statute which allows medical records to be entered into evidence with a business records affidavit. Consequently, in Illinois you either have to take subpoenaed records depositions of the medical provider, get the other party to admit to admissibility by serving a request for admissions, or have the other party stipulate to admissibility of the medical records.

10. Disclosure of Experts

Under the Missouri Rules of Civil Procedure, a party must disclose expert witnesses in written discovery by providing the expert's name, address, occupation, place of employment, qualifications to give an opinion, the general nature of the subject matter on which the expert witness is expected to testify and the expert's hourly deposition fee. (Mo. R. Civ. P. 56).

Under Illinois Supreme Court Rule 213(f) independent expert witnesses and controlled expert witnesses are disclosed differently. A party must disclose an independent expert witnesses' identity and address, the subject matter of the expert's testimony, and the opinions to which they are expected to testify.

For controlled experts, a party must disclose the same information required for independent experts plus the qualifications of the controlled expert and any reports prepared by the expert about the case.

$50,000 Policy Limits Settlement

The devastating impact of personal injury accidents often extends beyond the physical injuries and mounting medical bills. They are more than just an inconvenience.

Many of our clients miss time from work and temporarily lose the ability to provide for their families. Recoupment of lost wages is another component of damages that Burger Law will seek when handling your case.

Genavieve recently obtained a $50,000 policy limits settlement for our client who sustained injuries when struck by a car as a pedestrian.

Our client was exiting Ameristar Casino as the at-fault driver was attempting to enter the parking area. The at-fault driver was denied access through the parking lot gate and reversed his vehicle, striking our client.

Our client suffered from neck, back and shoulder strains, and incurred $15,000 in medical charges. In addition to his medical expenses, he also lost wages as a result of the at-fault driver's negligence.

He was working as a photographer who does portrait photography, weddings, and photo shoots of homes for a real estate company. Because of his severe pain, he had to cancel several appointments and shoots.

He lost clients, business relationships, and future business opportunities as well.

We were able to produce voicemails and text messages proving our client's future missed job opportunities, which added significant value to his claim.

If you are ever in an accident and miss work, it is important to keep any evidence you have to corroborate your losses, even if they are casual text messages, calendar entries, email reservations, or voicemails.

Luckily our client is on the mend, and the $50,000 settlement he received will go a long way in making up for the work that he lost.

Thanks for reading.

-Gary Burger, Personal Injury Attorney