

# DLG News

JAN/FEB 2007

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## ***Health Plan Sues Accident Victim to Get Entire Settlement Recovery*** ***The injured victim will likely get nothing***

**C**an you imagine recovering a settlement after being permanently injured in a car accident that wasn't your fault, and then being sued by your own health insurance plan to recover all of your settlement funds?

That's exactly what happened to a 52-year-old Missouri resident named Deborah Shank. A collision with a semi-trailer truck seven years ago left Shank permanently brain-damaged and in a wheelchair. Her husband, Jim, and three sons found a small source of solace: a \$700,000 accident settlement from the trucking company involved. After legal fees and other expenses, the remaining \$417,000 was put in a special trust. It was to be used for Mrs. Shank's ongoing and future medical care.

But instead of using that money for her medical treatment, it will likely all go to repay Shank's health insurance plan. The health plan was administered through Shank's employer at the time – Wal-Mart Stores, Inc. Wal-Mart's health plan was created under ERISA (Employee Retirement Income Security Act of 1974). ERISA is a federal law that sets minimum standards for most voluntarily established health plans in private industry to provide protection for individuals in these plans.

But recent federal court decisions have given enormous power to ERISA plans, especially in situations where the insured received health benefits due to injuries caused by another party. In those cases, many ERISA plans argue that it

is entitled to repayment from any settlement recovery for accident-related benefits received by the person insured under the plan.

Like most company health plans, Wal-Mart's ERISA plan reserved the right to recoup the medical expenses it paid for someone's treatment if the person also collects damages in an injury suit. But until recently, many employers didn't vigilantly enforce the provision, and some states and federal courts didn't think the claim held water. But as the cost of covering workers continues to escalate, employers and health plans are getting more aggressive about going after the money. A Supreme Court ruling last year also has given them a stronger legal position to sue employees. And the employers have been winning.

In insurance language, the recovery practice is called "subrogation." Employers and insurers say it's necessary to ensure that medical expenses aren't paid twice. By recovering those

*Continued on Page 3*



***Did you know?***

*The Washington State Patrol has reported that "wrong-way" crashes are on the rise in Washington. More than 23 such crashes have occurred since Dec. 1, 2007—almost double the amount that occurred during all last year.*

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## Another Pedestrian Hit and Killed In Seattle Crosswalk

**A**nother pedestrian has been hit and killed while crossing the street in Seattle. Here's another story about a pedestrian who was hit and killed while crossing 23rd Avenue in Seattle's Central District. The pedestrian, a woman in her 20's, died Friday night (Jan. 4, 2008) while crossing the street. The accident occurred around 10 p.m. at the intersection of 23rd Avenue South and South Dearborn Street.

The woman was crossing 23rd Avenue South from east to west when a northbound vehicle on the same street struck her. Seattle fire medics rushed her to Harborview Medical Center, where she was pronounced dead. The driver remained at the scene and cooperated with police

officers investigating the accident.

According to a profile of pedestrian fatalities, written by the King County Health Department, pedestrians make up 20 percent of the motor-vehicle fatalities in the county. The national average is 11 percent, and the state average is 12 percent.

A 2005 study looked at the 103 pedestrian fatalities in King County between 2000 and 2003 — an average of 26 a year — to try to find trends or problem areas. Among the key findings:

- ▶ One in four pedestrians killed was over 60.
- ▶ Highway 99 accounted for 10 percent of all pedestrian deaths.
- ▶ About half of drivers in fatal pedestrian accidents were not charged.
- ▶ About 60 percent of pe-

destrian fatalities were on roads with posted speed limits of 35 mph or slower.

The report made 10 recommendations, including calling for a county pedestrian-safety conference. It urged police to write more tickets to pedestrians and drivers alike for violating pedestrian-safety laws. Seattle Mayor Greg Nickels introduced a plan to improve pedestrian safety through public-service announcements, signs and route improvements.

Just in my office alone, I've seen an unprecedented number of cases involving pedestrian-auto accidents. Most involve very serious injuries. Some also involve the death of the pedestrian. My own experience tells me that there has been an increase in pedestrian-car accidents.

Please, if you will be walking or crossing the streets while it's dark out, try to wear light clothing or reflective clothing so drivers can easily see you. Never let a child cross the street without an adult. And drivers, please slow down, especially in school zones and in areas with high pedestrian traffic. ♦



### Huge Demand for Accident Book

**D**ue to overwhelming demand, for "*The Ten Biggest Mistakes That Can Wreck Your Washington Accident Case*" we are temporarily out of books! Our supply was exhausted in just 3 months. If you've ordered the book but haven't received your copy, please be patient! We'll send one soon. More books are arriving this week!

Since last fall we have been giving free copies of the book to accident victims in Washington State. Every week we get messages from people who have received the book. Recent comments include: "well written and very informative," and "people who involved in a car accident should read the book before contacting insurance company." ♦

### The Littlest Davis Hits The Slopes

**O**ver the holidays attorney Chris Davis introduced his son Jackson (age 2 1/2) to skiing by carrying him down a few bunny runs at the Whitefish Mountain Resort in Whitefish, MT. Little Jackson loved skiing with his daddy and was heard to say, "go fast, Daddy, go fast". Jackson may be ready for his own skis next year.

The whole Davis family enjoyed the trip and loved taking the train (Amtrak Empire Builder) from Seattle to Whitefish. The kids loved sleeping on the bunk beds in the sleeper car. Chris and his wife Michelle enjoyed the beautiful snow-covered mountain scenery. Mostly they were thrilled to avoid the crowded airport and a long car ride! ♦

*Jackson and Chris Davis at Whitefish, MT*



## Davis Asked to Co-Chair Auto Accident Legal Ed Seminar

**A**ttorney **Chris Davis** has been asked to co-chair the annual **Auto Case Seminar** held every year in April for trial attorneys who represent auto accident victims. The all-day conference is a Con-

tinuing Legal Education seminar sponsored by the Washington State Trial Lawyers Association (WSTLA). The Auto Case CLE offers



“cutting-edge” presentations by prominent attorneys in Washington State on various topics related to auto accident cases, including accident reconstruction, catastrophic injuries, dram shop, highway design, insurance, and jury trial techniques. As co-chair, Mr. Davis is re-

sponsible for setting the agenda and finding speakers. Mr. Davis has been recognized for his expertise in handling auto accident cases over the last 15 years of his career. “I’m honored to be asked and I look forward to putting on a good seminar,” says Davis. ♦

## Health Plan Sues Accident Victim *continued from page 1*

costs from someone who’s been compensated elsewhere, they argue they’re saving money for everyone on the plan.

That’s exactly what happened in Shank’s case. Her Wal-Mart ERISA health plan sued Shank to recover the \$470,000 it spent on Shank’s health-care. It did not matter that Shank only had \$417,000 left over after payment of lawyer fees and litigation costs. In fact, Shank’s lawyer anticipated Wal-Mart’s lawsuit and tried to protect these funds by depositing them into a “special needs” trust. But the federal district court ruled that this special trust offered no protection, and it could not defeat the claim

asserted by Shank’s ERISA plan.

A spokeswoman for Wal-Mart said the company was obliged to act in the interest of the health benefits of its employees as a whole. “While the case involves a tragic situation, our responsibility is to follow the provisions of the [company health] plan which governs the health benefits of our associates,” said Wal-Mart spokesperson Sharon Weber.

What does this mean for other accident victims? If you receive health insurance benefits under an ERISA health plan, you may be forced to repay 100% of these benefits back out of the settlement recovery. It’s as if

your health plan benefits are really just a “loan” instead of insurance. It does not matter that the employee has paid for these benefits through payroll deductions and other payments.

Clearly, Congress needs to act. The ERISA laws should be amended to permit the innocent accident victim to keep the benefits in certain cases, or at least force the health plan to share in the legal expenses incurred by the victim by having to hire an attorney and incur costs to recover a settlement. If this problem is not fixed, accident victims like Shank will continue to suffer unjust results. ♦



### Cases Of Interest

*Some Cases We Are Handling Now or Have Recently Resolved*

A 25 year-old father is injured when hit head-on **by a driver who is working on his computer** while driving.

A **41 year-old oral surgeon** receives **permanent nerve injuries to his arm and hand** in a roll-over car accident. He is claiming lost earnings of more than **\$2 Million**.

A 25 year-old male has surgery for a herniated disc after being **t-boned by a drunk driver**. The case settled for \$350,000.

Woman receives nerve damage and permanent scarring after being **attacked and**

**bitten by a pit-bull mix.**

A **7 week-old baby** receives **3rd degree burns** while in the hospital when a nurse applies a warm pack to her arm. The case settled for more than \$600,000 (including annuity)

A **pedestrian** requires **emergency surgery** to fix a broken leg after being struck in a downtown Seattle cross-walk. He stays in the hospital for 9 days.

A **mother of four** is **killed** when T-boned by another driver going 50 mph. The youngest 3 children were split up to live with different relatives.



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**DLG's Mission:**

***"To Level the Playing Field Between Accident Victims and Insurance Companies."***

**I've been in an accident and the insurance adjustor is calling.  
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**Ask The Attorney**



**Christopher M. Davis**  
*Attorney At Law*  
Seattle, WA

**Question: Do I really need a lawyer for my car accident case?**

**Answer:** Not every case needs a lawyer. In fact, in a small injury case you can probably receive greater benefit by settling the case on your own. What is a small case? There are no hard and fast rules, but in a small case the injuries are usually not permanent and the treatment may only last a few weeks to a few months. The past medical bills may also be just a few thousand dollars or less.

However, in most larger cases you will likely benefit by retaining the services of an attorney. Some insurance companies are advertising how quickly they respond to claims. They would like you to believe that they are motivated by their goal of prompt customer ser-

vice. But settling a larger case quickly usually only benefits the insurance company and not the accident victim.

Most accident victims have virtually no experience negotiating an injury case, and have no idea what the claim is worth. If settlement is not reached, the unrepresented person is not in a position to go to court. On the other hand, an experienced injury attorney likely knows the value of your claim. In addition, the attorney can exert some influence or pressure on the insurance company because if the case is not settled, a lawsuit can be filed. One insurance-backed study showed that parties represented by an attorney generally receive on average 3½ times more money than someone who does not use an attorney.

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