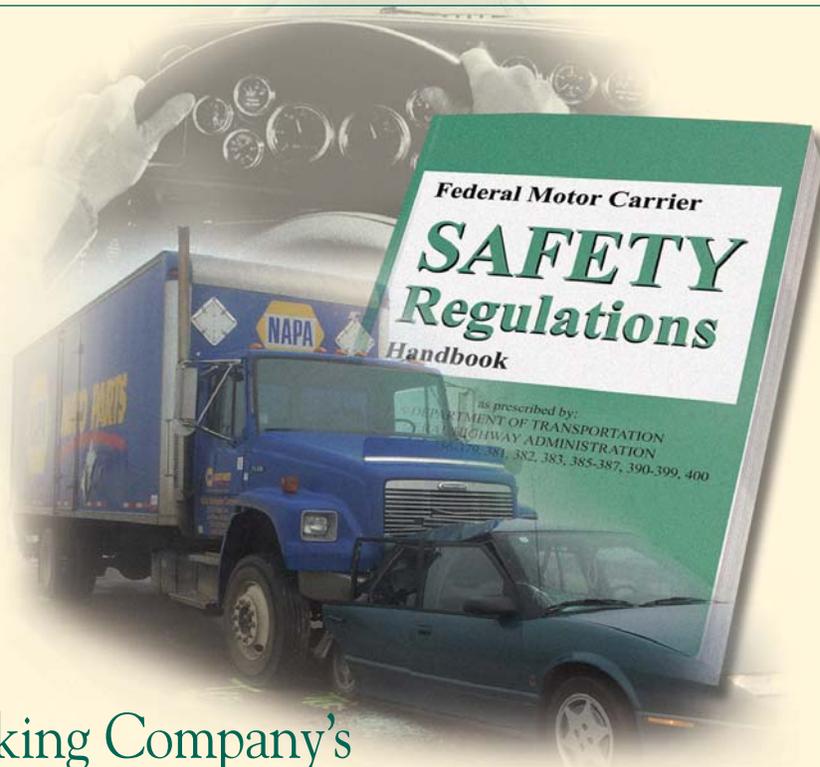


SHAMBERG, JOHNSON & BERGMAN

—TRIAL ATTORNEYS—

SPRING 2004



Trucking Company's Violations of Federal Motor Carrier Safety Regulations Lead to Fatal Iowa Collision

On November 16, 2001, Shannon Bessey was driving south on Highway 13 in Marshall County, Iowa, with her two-year-old daughter in the rear seat position in a child car seat. A dense fog covered northeast Iowa that morning, so Ms. Bessey drove slowly and stopped when she came to a railroad crossing with red flashing signals.

Turning to check on her daughter in the back seat, she

w a s

shocked to see a large NAPA Auto Parts/Genuine Parts Company freight liner truck which instantly smashed into the Bessey vehicle, pushing it up and over the railroad crossing and onto the other side. The collision knocked Ms. Bessey unconscious, injured her front seat passenger, and caused serious and ultimately fatal injuries to her two-year-old daughter. Steve Six represented Ms. Bessey, the estate of the child, and the front seat passenger in a lawsuit filed in Polk County, Iowa against NAPA.

CONTINUED ON PAGE 2

Welcome

When an accident involves a large truck, the consequences are often catastrophic, involving death or serious injury with permanent disability. Driver fatigue is an important and frequently identified risk factor in accidents involving large trucks. Because of the well-understood risks associated with driver fatigue, the trucking industry and the federal government, through the Federal Motor Carrier Safety Regulations, have promulgated mandatory regulations that limit driving time, require mandatory off-duty time, and set other limits to help protect the traveling public. Our firm has had the opportunity to investigate, evaluate, and pursue scores of these tragic trucking accident cases. Representation of families in crisis – whether due to injury from trucking accidents or other catastrophic events – is our primary mission. In this issue, we report on trucking litigation, including an interesting story of a tragic trucking accident caused by driver fatigue.

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TRUCKING ACCIDENTS
Special Edition

Witnesses at the scene removed Ms. Bessey from the car and laid her on the side of the road, where, upon regaining consciousness she immediately attempted to climb back into the wreckage to find her daughter in the crushed back occupant space and the smashed car seat. Ms. Bessey held the child and prayed during the interminable wait for emergency help to arrive at the remote rural location.

Depositions of the NAPA Auto Parts corporate officers and Genuine Parts Company supervisors revealed that the trucking company failed to follow the Federal Motor Carrier Safety Regulations (FMCSR) and Genuine Parts Company's "Truck and Driver Regulations" and "Fleet

Safety Program" rules. Plaintiffs alleged that several failures by the defendant demonstrated a corporate culture of lack of concern about safety, supervision and training in the operation of commercial motor vehicles. In the weeks leading up to the collision, the trucking company had repeatedly dispatched the responsible truck driver: in a dangerously fatigued condition; who was unqualified to operate a commercial motor vehicle; who was untrained to operate in dangerous visibility conditions caused by thick fog; and who felt pressured to complete a route in the dangerous fog conditions so he would be available to drive his next shift.

FMCSR Section 392.14 requires a truck driver to discontinue operations if road conditions become sufficiently dangerous. Despite the dangerous visibility conditions caused by the dense fog, the truck was observed by a witness going sixty-three (63) miles per hour in a fifty-five (55) mile-per-hour zone, in near zero visibility conditions shortly before the accident.

Plaintiff's discovery established that the truck driver commuted one hour each way to his place of employment, adding two hours of driving time onto his fourteen to fifteen hour days of driving for the defendant. In the week leading up to the collision, the truck driver's log book showed that he was incorrectly filling out his log book by recording "off-duty" time for breaks, such as sleeping on the seat of his truck, putting gas in the truck, or stopping for a cup of coffee. The Federal Motor Carrier Safety Regulations set forth the requirements a motor carrier must follow to allow the driver to record "off-duty" time for breaks (FMCSR 395.2). The four specific requirements that must be met before break time can be logged as "off-duty". The truck driver and the trucking

company violated these federal regulations, allowing a dangerously fatigued driver to be on the road.

After driving for more than 14 hours before the collision, through thick, dangerous fog, the truck driver finally decided it was too dangerous to drive any further and stopped at a gas station about fifteen miles from the

FEDERAL MOTOR CARRIER SAFETY REGULATIONS

The regulations violated by NAPA and Genuine Parts Company included:

FMCSR:

- 395.3 – Maximum Driving Time;
- 395.2 – Logging off-duty Time, (395.2 Definitions, Question #2 2000 Edition);
- 390.3(e) – Requiring that a Driver Receive Formalized Training;
- 391.21 – Failing to Obtain the Required Information on the Motor Carrier's Employment Application;
- 391.27 – Failing to Obtain the Required Statement of Violations from the Truck Driver;
- 391.25 – Failing to Perform the Annual Inquiry and Review of the Truck Driver's Driving History;
- 391.1 which provides that if the above steps are not completed, a driver is unqualified "to operate a commercial motor vehicle".
- 395.3 – By dispatching the truck driver on a route which he could not complete under the maximum driving time regulations.
- 392.14 – Operating the truck in dangerous visibility conditions caused by fog.

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collision. He then listened to the weather report, heard the fog was going to be around all morning, decided he did not have the time to wait for conditions to improve or he would be unable to drive his next shift. So he got back in his freightliner truck and, despite full knowledge of the risks and dangers, proceeded down the highway and rammed the back of the Bessey vehicle, causing a young child's death.

The trucking industry has long understood the well-known risks and dangers of accident and death caused by motor carriers who dispatch drivers who are suffering from cumulative fatigue. The literature on fatigue by the National Safety Council, and the United States Department of Transportation, and the trucking industry's own publications, show that a driver suffering from cumulative fatigue is just as impaired as a driver who is legally intoxicated. Studies have shown cumulative fatigue will slow a driver's reaction time by as much as five to twenty-five percent (5-

SOURCES OF STANDARDS FOR DRIVER FATIGUE

Alert Driver: A Trucker's Guide to Sleep, Fatigue, and Rest in Our 24-Hour Society, *Carla J. Reissman, American Trucking Associations, Inc., 1997;*

Issues of Injury – Sleepy Workers May Pose New Liability for Employers, *Susan Marmaduke;*

Optimizing the 24/7 Workforce, *Circadian Technologies, Inc., Driver Fatigue Center, 2001;*

Overview of Sleepiness and Accidents, *David F. Dinges, Ph.D., European Sleep Research Society, J. Sleep Res. 1995 4, Suppl. 2.4-14;*

Performance Effects of Fatigue, *David F. Dinges, Ph.D., NTSB and NASA Ames Research Center, November 1, 1995.*

25%), cause micro-sleep episodes, slow reaction and perception times, and cause drivers to exercise poor judgment. Fatigue is so well recognized as a risk factor in the motor carrier industry that there are specific Federal Motor Carrier Safety Regulations that address the number of hours a driver may operate his truck, such as the "maximum driving time regulation". FMCSR 395.3 limits the number of hours of driving time, regulates driver off-duty time, and calculates driving limits

based on seven or eight day periods.

Plaintiff's allegations were that NAPA Auto Parts and Genuine Parts Company: (1) knowingly dispatched a dangerously fatigued driver who was over hours and in violation of the Federal Motor Carrier Safety Regulations' maximum driving time limits; (2) destroyed the evidence that would show the truck driver was falsifying his log books; (3) violated the Federal Motor Carrier Safety Regulations, Genuine Parts Company's own "Truck and Driver Regulations" and "Fleet Safety Program" in the hiring, retention, and training of the truck driver; (4) truck driver's actions in operating his truck before the accident were wanton and reckless; and (5) the truck driver's violations and accidents, both before and after the collision, demonstrated his lack of training and should have put his company on notice that the driver did not have the proper knowledge to safely operate a NAPA truck. After unsuccessful mediation, plaintiff's claims for compensatory and punitive damages were resolved in a confidential settlement one week prior to trial. ■



NAPA truck collision near Ryan, Iowa.

Defective Front Seat System in Ford Tempo Results in Child's Serious Brain Injury

On March 31, 2000, in Kansas City, Missouri, Beth Canfield was driving a 1990 four-door Ford Tempo with her husband in the passenger seat and their 6-year-old twins, Jacob and Bailey, in the right and left rear seats. As Beth was slowing to stop at an intersection, a 1999 Ford Econoline van driven by James Hupman rear ended the Tempo. Evidence showed Hupman was traveling between 30 and 35 mph. As a result, the Tempo, which was also moving, experienced a change in velocity of about 25 mph. During the collision, the Tempo's right front passenger seat violently collapsed backwards causing Mr. Canfield's head to strike the child's forehead, causing the child's traumatic frontal lobe brain injury.

Lynn Johnson and Scott Nutter, along with our co-counsel Jack Brady and Steve Brown of Shughart, Thomson, et al., represented Jacob Canfield in a product liability lawsuit in Jackson County, Missouri. The suit alleged that the Tempo's front seats were defectively designed and that Ford failed to warn that the front seatbacks would collapse rearward into the rear seat occupant space during rear impact collisions involving a change in velocity of as little as 17 mph. The suit contended it was technically and economically feasible to design stronger seats that would provide appropriate occupant restraint and would prevent intrusion of the front seat back and the front seat occupant into the rear seat occupant space.

Ford's defense was that the Tempo's front seats were designed to "yield" backwards in rear-end collisions in order to protect the front seat occupants from whiplash-type neck injuries. Ford

also contended that virtually every vehicle on the market in 1990 was manufactured with seats that were essentially identical to the Tempo seat in design, strength and collision performance.



Plaintiff's sled testing – pre-impact (above).

Testing showing failure of driver's seatback in 1990 Ford Tempo (below).



To counter Ford's defenses, plaintiffs' engineering expert performed five dynamic sled tests using a 1990 Tempo body and front and rear seats, with adult dummies in the front seats and six-year-old dummies in the rear seats. The testing demonstrated that the Tempo front seat would fracture and fail with a 112-pound female dummy in the front seat during a 15 mph change in velocity rear impact. The testing further revealed a severe risk of injury to children seated in the rear seat during any rear impact with a change in velocity of 15 to 30 mph. The testing showed that a stronger seat would not fail and collapse

rearward during a 30 mph change in velocity rear impact, would not result in a risk of injury to children seated in the rear, and, contrary to Ford's claims, would not result in injury to front seat occupants. (See testing photographs to the left.)

Before trial a §§ 537.060 and 537.065 R.S.Mo. settlement agreement was reached with the driver, Hupman, and his employer, Kansas City Motorcycle Escort. After a three-week trial and just prior to closing arguments, the Canfield family reached a confidential settlement with Ford.

While safety experts and the automobile manufacturers all recommend that young children be placed in the rear seats, most parents do not know that the front seats are purportedly "designed to yield" in a manner that places their children at a high risk of serious injury or death in routine rear impact collisions from front seatback failures. Seatback failure is a serious automobile safety concern that should be addressed by the automobile manufacturers or by NHTSA through significant improvements to the seat strength requirements of Federal Motor Vehicle Safety Standard 301. 🚗

Wichita Kansas Physician's Failure To Provide Hypertension Treatment Results In Stroke

If untreated, hypertension, or high blood pressure, can lead to cerebral vascular accidents, most commonly, stroke. John Parisi represented a 47-year-old man, whose family practice physician failed to provide adequate treatment for his long-term, uncontrolled high blood pressure. Despite

having high blood pressure readings over a number of years during his office visits, the Wichita, Kansas physician failed to prescribe blood pressure medication to lower his blood pressure. As a consequence of untreated high blood pressure, in April of 2001 our client sustained a severe ponteen stroke, ren-

dering him completely disabled, with disabling right sided weakness, difficulty with ambulation and significant impairment to his vision.

The relationship between increased blood pressure and increased risk of

CONTINUED ON PAGE 6

Classification and Management of Blood Pressure*

BP Classification	Systolic	Diastolic	Lifestyle Modification	Drug Therapy
Normal	< 120	And < 80	Encourage	None – absent compelling indications
Pre-Hypertension	120 – 139	Or 80 – 89	Yes	None – absent compelling indications
Hypertension Stage 1	140 – 159	Or 90 – 99	Yes	Thiazide-type diuretics
Hypertension Stage 2	≥160	Or ≥ 100	Yes	Two-drug combination

*From The Joint National Committee on Prevention, Detection, Evaluation, and Treatment of High Blood Pressure (JNC 7) "Seventh Report."

cardiovascular disease is well understood by physicians, is continual, consistent, and independent of other risk factors. The higher the blood pressure, the greater the risk of heart attack, heart failure, stroke, and kidney disease. For individuals between 40 and 70 years of age, each increment of 20mmHg in systolic blood pressure or 10mmHg in diastolic blood pressure, doubles the risk of cardiovascular dis-

ease across the entire blood pressure range from 115/75 mmHg to 185/115 mmHg. Recent clinical trials have demonstrated that effective blood pressure control can be achieved in most patients who are hypertensive, but the majority will require two or more anti-hypertensive drugs. The JNC 7 (see accompanying article below) concluded that, "when clinicians fail to prescribe lifestyle modifications, adequate hypertensive drug doses, or appropriate drug combina-

tions, inadequate blood pressure control may result."

Major lifestyle modifications effective in lowering blood pressure include weight reduction for those who are overweight or obese, a diet rich in potassium and calcium, dietary reduction of salt, increased physical activity, and moderation or elimination of alcohol consumption. The above lifestyle modifications can reduce a patient's blood pressure and enhance the effectiveness of hypertensive drug therapy and decrease the cardiovascular risk to the patient. The bottom line is that due to advances in the treatment of high blood pressure, through changes in lifestyle, diet, and improved medications, hypertension can be controlled and the risk of its sequellae, including heart attack and stroke, greatly diminished.

After suit was filed, the case was resolved against the physician for the policy limits. The case is still pending against the nurses based on allegations that they failed to obtain and record blood pressure readings in the patient's chart on numerous office visits. 

ON MAY 14, 2003 THE JOINT NATIONAL COMMITTEE ON PREVENTION, DETECTION, EVALUATION, AND TREATMENT OF HIGH BLOOD PRESSURE (JNC 7) RELEASED ITS "SEVENTH REPORT."

The key messages in the JNC Report are:

- (1) in persons older than 50 years, a systolic blood pressure more than 140 mmHg is a much more important cardiovascular disease risk factor than diastolic blood pressure;
- (2) the risk of cardiovascular disease, beginning at 115/75 mmHg, doubles with each increment of 20/10 mmHg;
- (3) individuals with a systolic blood pressure of 120-139 mmHg or diastolic blood pressure of 80-89 mmHg should be considered as pre-hypertensive and require health-promoting lifestyle modifications to prevent cardiovascular disease;
- (4) thiazide-type diuretics should be used in drug treatment for most patients with uncomplicated hypertension, either alone or combined with drugs from other classes;
- (5) most patients with hypertension will require two or more anti-hypertensive medications to achieve a blood pressure goal of less than 140/90 mmHg, or less than 130/80 mmHg for diabetics or those with kidney disease;
- (6) if blood pressure is 20/10 mmHg above a goal blood pressure, consideration should be given to initiating therapy with two agents, one of which should be a thiazide-type diuretic; and
- (7) the most effective therapy prescribed by physicians will control hypertension only if patients are motivated.

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STANDARD FOR EXPERT TESTIMONY IN MISSOURI

Since the United States Supreme Court decided Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993), state courts in Missouri have struggled with the standard for admission of expert testimony. Some courts have utilized the standards set forth in Frye v. United States, 293 F. 1013 (1923), while other opinions have applied the standards set forth in **Daubert** and other courts have straddled the fence and applied some of both standards. In State Board of Registration for the Healing Arts v. McDonagh, D.O., 2003 WL 22999293 (Dec. 23, 2003 Mo. Banc), the Missouri Supreme Court emphasized that the standards for admissibility of expert testimony in Missouri are neither those of **Daubert** nor **Frye**, but those set out in Mo.Stat. Ann. §490.065, which provides:

490.064. Expert witness, opinion testimony admissible – hypothetical question not required, when

- 1) In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify there-to in the form of an opinion or otherwise;
- 2) Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to the decided by the trier of fact.

- 3) The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
- 4) If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefore without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understand-

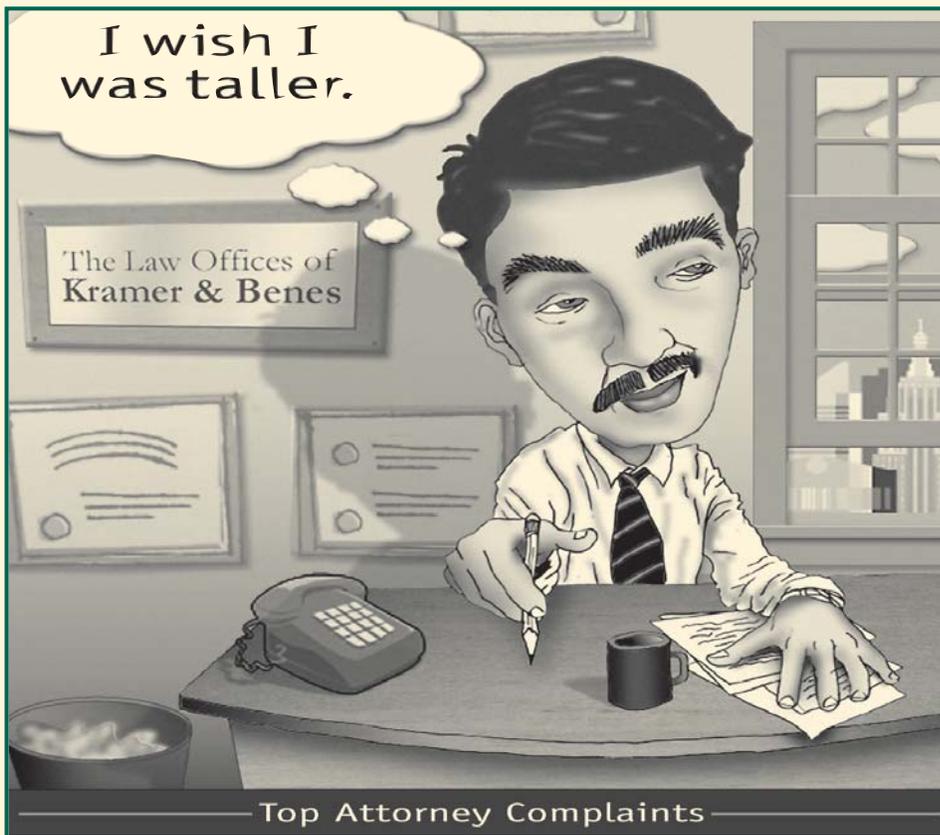
able or of greater assistance to the jury due to the particular facts of the case.

In a refreshingly clear and direct way, Judge Michael A. Wolff, in a concurring opinion, titled, "Advice for Lawyers on Expert Witnesses" stated:

Forget Frye. Forget Daubert. Read the statute. Section 490.065 is written, conveniently, in English. It has 204 words.

These straight-forward statutory words are all we really need to know about the admissibility of expert testimony in civil proceedings.

Appellate opinions are rarely so concise or easily understood. 

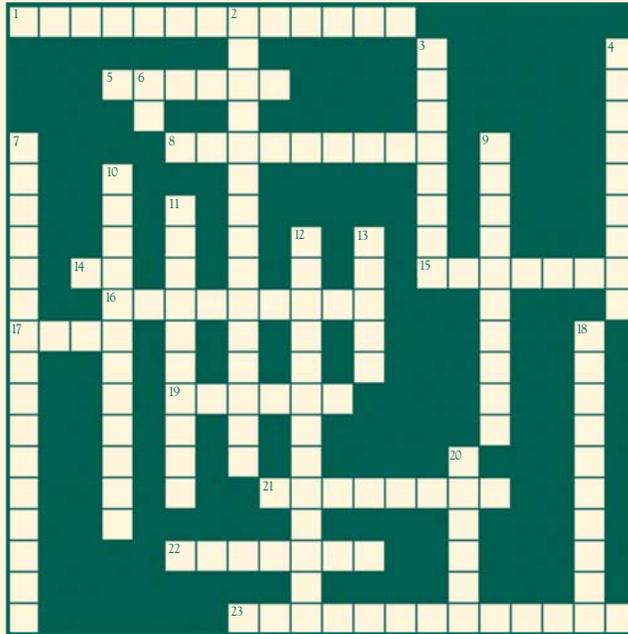


Answers to Eighties Puzzle – Across: 1) alienInferno 5) Hubble 8) Williams 14) ET 15) Spicoli 16) BonnScott 17) Vera 19) Gandhi 21) Hinckley 22) Kristin
 23) PunkyBrewster DOWN: 2) FalklandIslands 3) Jayhawks 4) CarLewis 6) U2 7) MarkDavidChapman 9) BerlinWall 10) Luftballons 11) JohnHughes 12) ScottHamilton
 13) ZZTop 18) GeneralLee 20) George

EIGHTIES PUZZLER

ACROSS

1. ALE
5. It magnified orbit in the eighties.
8. In the eighties this man in black claimed that "parents just don't understand."
14. What movie featured Reece's Pieces as a crucial part of the story, because the director couldn't get the rights to use M&Ms?
15. Great film line: _____ said, "Learning about Cuba and having some food."
16. In 1980, we lost this Scottish snaggle-toothed rocker.
17. Beer-guzzling Cheers star's wife.
19. This great-souled one's biography won best picture in 1983.
21. For the love of Jodi, I shot POTUS.
22. Who shot J.R.?
23. A spunky kid had a dog named Brandon.



DOWN

2. Argentina and Great Britain fought over these.

3. Winners of the 1988 NCAA Championship Game.
4. In 1988, I lost a hundred meters to Ben Johnson.
6. In 1985, these blokes wowed Americans at Live Aid.
7. I shot the legend who hoped the world would live as one.
9. Fell in 1989 to unite a divided city.
10. Nena let go of 99_____.
11. I wrote films for the brat pack.
12. I took home the gold in 1984 for my double loop, triple toe loop combination.
13. "Beer Drinkers and Hell Raisers" rock group that bestowed good luck on fans with a silver keychain in the eighties.
18. What did Uncle Jessie's nephews drive?
20. This boy tumbled.

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