

SHAMBERG, JOHNSON & BERGMAN

— TRIAL ATTORNEYS —

Winter 2005

Welcome

In the *Winter 2005* issue of our newsletter, we report on strategies used to achieve settlements in a Kansas medical malpractice case, an industrial explosion case that settled for the policy limits, and two trucking accident cases. Since 1949, our firm has committed itself to the representation of individuals suffering with serious personal injury and families suffering from the wrongful death of a loved one. As we continue our mission, we take a moment to wish you and your family a joyous holiday season and a new year filled with happiness, good health, and prosperity.

Defense Strategy Backfires in Kansas Medical Malpractice – Brain Injury Action

In Kansas medical malpractice cases, the usual multiple-defendant tactic is to refrain from making any affirmative allegations of fault against other defendants “at this time.” This strategy backfired in this tragic case of medical negligence against three physicians and a hospital, filed in the District Court of Johnson County, Kansas.

Vic Bergman and Matt Birch collected policy limits of \$1,000,000 each against physician-defendants AnaLuina Estrada, M.D., Bruce B. Snider, M.D. and Bryan S. Taylor, M.D., and then proceeded to trial against defendant Olathe Medical Center, Inc., eventually settling with the hospital

on the second day of trial for \$3,500,000, for a total settlement of \$6,500,000.

The plaintiff, Sara Hotchkiss, was 23 years old, married, and 35 weeks, 6 days along in her pregnancy when she was admitted to Olathe Medical Center on September 19, 2002, under the care of Bruce Snider, M.D., an obstetrician, Bryan Taylor, M.D., an anesthesiologist, and the nursing staff and respiratory therapy staff of Olathe Medical Center.

Sara had been the patient of AnaLuina Estrada, M.D. for her prenatal care. Signs

Continued On Page 2

In This Issue

Kansas Medical Malpractice – Brain Injury Settlement	1
Explosion Case Settled for Policy Limits	3
Trucking Accident Settlements	4
John Parisi Elected Chair of ATLA Sole Practitioner and Firm Section	5
David Morantz Joins Firm	6

Brain Injury Settlement
Continued From Page 1

and symptoms of cardiomyopathy had been evident for several weeks, during which she was getting progressively sicker under Dr. Estrada's care. At barely 36 weeks of pregnancy, she had gained 76 pounds gaining nearly a pound a day for the previous month during which she was also developing progressive problems with severe swelling and shortness of breath. Dr. Estrada failed to work Sara up for these symptoms, despite several expressions of concern from Sara and her mother.

On September 19, 2002, Sara's bag of water ruptured, and she was admitted to the obstetrical unit under the care of Dr. Snider with many abnormal vital signs and laboratory values. At the time of admission, Sara was struggling to breathe, could not lie down, and needed supplemental oxygen. These acute breathing problems were attributed to her history of mild asthma, even though the evidence was not consistent

with asthma. Sara had no wheezing and had not been improving on asthma medication.

Ten hours and 45 minutes after admission, just after midnight on September 20, 2002, Sara stopped breathing, lapsed into respiratory arrest, lost pulse and blood pressure, and a Code Blue was called. By the time she was resuscitated, Sara had sustained a brain injury which has left her permanently disabled. Eventually, it was determined Sara had stopped breathing because she developed an enlarged heart, congestive heart failure, and pulmonary edema from an uncommon condition known as peripartum cardiomyopathy.

The most significant aspect of the case was the strategic decision made by the four defendants not to make any affirmative allegations of comparative fault against each other, pursuant to K.S.A. 60-258a, at the time of the Pretrial Conference. Instead, the defendants requested the court to include language in the Final Pretrial Order that, "In the event plaintiff settles or otherwise dismisses any defendant herein, then [defendant] incorporates by reference plaintiff's previous allegations of and evidence concerning fault of same." In advocating their right to make this allegation, defendants relied upon K.S.A. 60-208(e)(2), which allows for inconsistent, alternative, and hypothetical pleadings.

The trial court rejected the defendants' proposed language and required the defendants to be specific in their affirmative claims of comparative fault. The court reasoned that K.S.A. 60-208 does not apply at the Final Pretrial Conference phase of the case, that K.S.A. 60-216 and Supreme Court Rule 140 require clarity regarding the claims and defenses in the Pretrial Order, and therefore at that stage of the litigation such alternative and hypothetical pleading is not appropriate.

As the case proceeded, plaintiff settled with each of the defendant-physicians for their policy limits and dismissed her claims against them, and then sought to proceed to trial against Olathe Medical Center with no allegations of fault in the case against the dismissed physicians, or anybody besides Olathe Medical Center. The defendant-hospital then filed a Motion to Amend the Pretrial Conference Order to allow it to adopt plaintiff's prior allegations of fault against the physicians, and also filed a separate Motion for Leave for the defendant to name the plaintiff's experts to establish those claims. This strategy would have allowed the defendant-hospital to reduce its percentage of liability by casting blame to the now empty-chair-undefended doctors. The court overruled both motions on the ground that all defendants had been "invited" at the Pretrial Conference to make such comparative fault claims but chose not to do so. While somewhat sympathetic to defendant's position, the trial court held that the defendant's procedural position was the result of defendant's tactical choices, and there was no "manifest injustice" to defendant to justify amending the Pretrial Order.

The posture of the case at that point was that Olathe Medical Center would be the only defendant on the verdict form at trial, and although its fault was less than 100%, it was potentially liable for 100% of the damages. While Olathe Medical Center took the position the trial court had committed error, the case settled at a significant premium at the end of the second day of trial.

The lesson of this case for plaintiffs' counsel is to press multiple defendants at every point to commit to their theories of defense, specifically the affirmative defense of comparative fault. We have been advocating this for many years. See Vic Bergman's column from our *Summer 1993* Newsletter. All of our newsletter issues are available at our website, www.sjblaw.com.

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Coffeyville Explosion Case Settled for Policy Limits

On July 28, 2001, the primary reactor at the Coffeyville, Kansas Farmland plant catastrophically failed, releasing a large cloud of ammonia gas into the atmosphere. Rick Hunt, a 46-year-old employee of Farmland who was working on a scaffold in the vicinity, was immediately engulfed in a large, highly toxic ammonia cloud. The ammonia seared Rick's throat and lungs causing permanent, disabling injuries to his respiratory tract. Rick is now on the recipient list for a double lung transplant.

Perhaps the most tragic aspect of Rick's injury is that it could have been prevented. The primary reactor at the Coffeyville Farmland plant was used in the manufacture of urea, or nitrogen fertilizer. A process problem resulted in sulfur contamination within the primary reactor, causing corrosion of the tubes within the tube sheet. Shortly before the explosion, in June of 2001, the damaged tube sheet was removed and sent for repairs to Cust-O-Fab, Inc. in Sands Springs, Oklahoma. To repair the tubes, the channel cover of the reactor had to be removed. The channel cover is a large disk of steel approximately four feet in diameter and six inches thick which is secured to the reactor by

16 large, metal studs measuring approximately four inches in diameter and bolted in place by 16 large hexagonal nuts. The unit is then sealed by a gasket consisting of an inner and outer carbon steel ring and spiral wound Teflon that is placed between the outer edge of the channel cover and the reactor surface.

Cust-O-Fab encountered difficulties in its attempts to repair the tube sheet bundle. The primary reactor failed to hold pressure during the initial hydrotest when welds within the tube sheet bundle leaked. The channel cover had to be removed several times as Cust-O-Fab continued its efforts to repair the leaking tubes. As a result, the threads on a couple of the studs

were damaged. One stud was damaged to the point that the nut could not be properly tightened. Cust-O-Fab employees testified that this particular nut would not tighten even when they tried to use a wrench with twice the normal hydraulic capability. As its "fix," Cust-O-Fab's employees decided to split a washer in half to use as a spacer to fill the gap that existed between the nut and the surface of the channel cover. A further complication was that the gasket used to seal the reactor was crushed following the initial hydrotest, and a new gasket had to be obtained. Cust-O-Fab called Farmland and requested that it send a second gasket. Unfortunately,

Continued On Page 7



Channel cover plate on primary reactor unit.

New Technology Leads to Favorable Settlements of Trucking Cases

We recently settled a Jackson County, Missouri trucking accident case. A UPS tractor/trailer collided with our clients' minivan on Interstate 35 north of Cameron, Missouri. Thick, black smoke from a grass fire had covered the southbound lanes of I-35 and reduced visibility to zero, resulting in a 14-vehicle pile-up. The UPS truck driver claimed the accident was unavoidable, and the investigating highway patrolmen agreed.

Technical information from the UPS truck was crucial to a favorable settlement. The truck was equipped with an on-board device known as a tachograph that recorded the truck's movements and speed. Data from the tachograph showed the 65,000 lb. rig entered the smoke at 35 mph and continued at that speed in conditions of zero visibility without brake application for approximately five (5) seconds, until it hit our clients.

Discovery of internal UPS documents was also key. UPS had conducted an internal investigation of the accident. On motions to compel, the court ordered production of all documents from the UPS investigation, which revealed that UPS had concluded the accident was "preventable," meaning its driver was at fault. UPS's Regional Safety Director then admitted its driver should have pulled over and "ceased operations" in conditions of adverse visibility as required by FMCSR 392.14.

Our clients' injuries were serious but not disabling, and each made a good recovery. After offering \$75,000 at mediation and claiming it would never pay more than \$200,000, our clients received a \$435,000 settlement shortly before trial. Scott Nutter and John Parisi handled the case.

John Parisi recently settled another trucking accident case in Kansas. On the

evening of October 11, 2002, our client Robert Kincaid, Jr. was traveling north-bound in the right-hand lane of Interstate 35 in Johnson County, Kansas when his vehicle was crushed from behind by a tractor-trailer rig traveling 65 miles per hour. Mr. Kincaid suffered severe injuries and fought to survive for three (3) months, but tragically died on January 28, 2003, at the age of 92. He was a widower survived by his son.

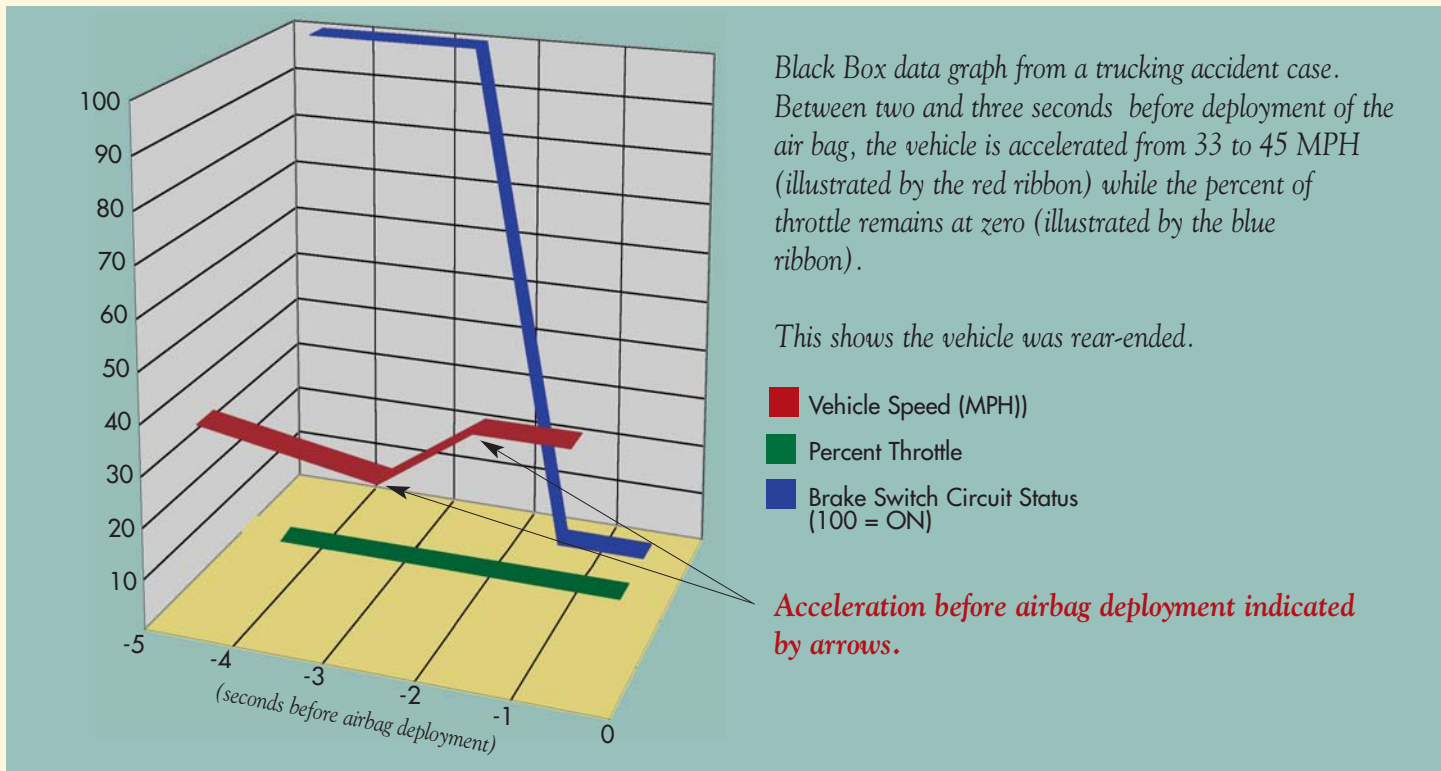
Liability was hotly disputed. The defendants blamed Mr. Kincaid, relying on reports that he was seen driving erratically before the collision, that he was driving too slowly on the interstate, and that he was driving at night in violation of his daytime restricted driver's license.

At mediation we were able to show defense counsel a videotape from the Kansas Highway Patrol which recorded the truck driver making devastating admissions. While the driver was at the KHP car to provide his driver's and insurance information, his statements were recorded by video cameras that also record sound inside the car. On the videotape the trooper asked, "What happened?" The driver responded he did not know and that he wanted to call his employer. He can clearly be heard on the videotape telling his employer while on the telephone that he "fell asleep" and ran into Mr. Kincaid's car. The truck driver continued to dodge the trooper's questions about what happened, but finally admitted that he "may have fell asleep." These admissions were critical in overcoming the defendants' comparative fault arguments.

Continued On Page 5



Multi-vehicle collision site.



*New Technology
Continued From Page 4*

After an initial offer by the defendants of less than \$50,000, confronted with the admission of the driver that he fell asleep at the wheel, the trucking company and truck driver settled for the mid-six figures.

These cases reveal the importance of “new technology” in trucking and automobile accident cases. Cars and pickups have “black boxes.” Police cruisers are equipped with video cameras and audio recorders. Big trucks have on-board recording devices such as a Detroit Diesel Electronic Control (DDEC) module and satellite

location and communications systems like Qualcomm. This technology provides invaluable accident-related data as well as a wealth of information pertaining to compliance with federal hours of service rules and other pertinent safety regulations designed to protect the public from over-worked, dangerous truck drivers.



John M. Parisi Elected Chair of Sole Practitioner and Small Firm Section of ATLA

John Parisi was recently elected Chair of the Sole Practitioner and Small Firm Section of the Association of Trial Lawyers of America (ATLA) for 2005-06. The section currently has 875 ATLA members throughout the country

consisting of solo practitioners or members of firms with fewer than 10 attorneys. The focus of the section is to assist these solo and small firm practitioners with providing improved service to their clients and the legal profession.

Warning – 15-Passenger Vans Have Increased Rollover Risk

The public needs to be aware of the increased risks and dangers of traveling in 15-passenger vans. Fifteen-passenger vans are commonly used for transporting college students to sporting events, for church outings and mission trips, and for airport shuttle services. The most common 15-passenger van models include the Ford Econoline E-Series, GMC Savannah 3500, GMC Rally/Vandura G3500, Dodge Ram Van/Wagon B3500, and the Chevrolet Express 3500.

Fifteen-passenger vans are more likely to be involved in a single-vehicle rollover crash than any other vehicle on the road. According to the National Highway Traffic Safety Administration (NHTSA), between 1990 and 2001 there were nearly 1,500 crashes involving 15-passenger vans resulting in 1,003 fatalities. In 2001 alone, 130 people died in 15-passenger

van crashes. A high number were single-vehicle rollovers.

Fifteen-passenger vans are defective and unreasonably dangerous in rollover resistance

design and performance. These vehicles have a high center of gravity, making them difficult to control during emergency driving maneuvers or following a tire failure. Significantly, NHTSA research shows that the risk of a rollover crash increases as the number of passengers increase. When a 15-passenger van is loaded with ten or more passengers, for instance, its rollover ratio is three



Fifteen-passenger van following rollover.

times higher because passenger weight further elevates the vehicle's center of gravity. NHTSA research also shows a dramatically increased rollover risk at speeds over 50 mph. The bottom line is the public is at an increased risk of serious personal injury or death from using these vehicles exactly as they are designed and marketed (i.e. fully loaded at highway speeds).

Although NHTSA has issued consumer advisories alerting users to the increased rollover propensity of the 15-passenger van, the newly established rollover resistance rating system and dynamic testing procedures do not extend to these vehicles. Not surprisingly, the automotive industry has thus far failed to take sufficient action to improve the rollover resistance and safety of 15-passenger vans.

Our firm and co-counsel David R. Smith represent two passengers who were seriously injured and the families of two other passengers who were killed while on a church mission trip when the 15-passenger van in which they were traveling rolled over several times following a tire failure.

David Morantz Joins Firm

We welcome David R. Morantz, who joined the firm this summer after graduating from the University of Kansas School of Law. David was an articles editor on the *Kansas Law Review* and was honored as the top student in the area of intellectual property his final year of law school.

Prior to law school, David worked as a newspaper reporter for *The Associated Press* and for the *Omaha World-Herald*. He covered many issues, including city and state governments, courts and police, and won several awards in

recognition of outstanding reporting and writing. David earned his undergraduate degree in journalism

from the University of Kansas in 1998. He helped teach reporting and editing at KU's William Allen White School of Journalism while in law school. We are pleased to have David as a member of our litigation team.



*Coffeyville Explosion Case
Continued From Page 3*

Farmland sent Cust-O-Fab the wrong gasket, which Cust-O-Fab ultimately used when it finished re-bolting the channel cover.

Before it was returned to Farmland, the unit was pressure tested by Cust-O-Fab to 6600 psi. Although there was initially a leak at the location of the stud where the split washer was used to tighten the nut, the other nuts were tightened and the vessel did eventually pass the pressure test.

After passing the pressure test, the vessel was Code Stamped by Cust-O-Fab on July 20, 2001, and shipped to Farmland to be placed back into service at the Coffeyville plant. On the evening of Saturday, July 28, 2001, the gasket failed at the location where Cust-O-Fab's employees had galled the nut onto the

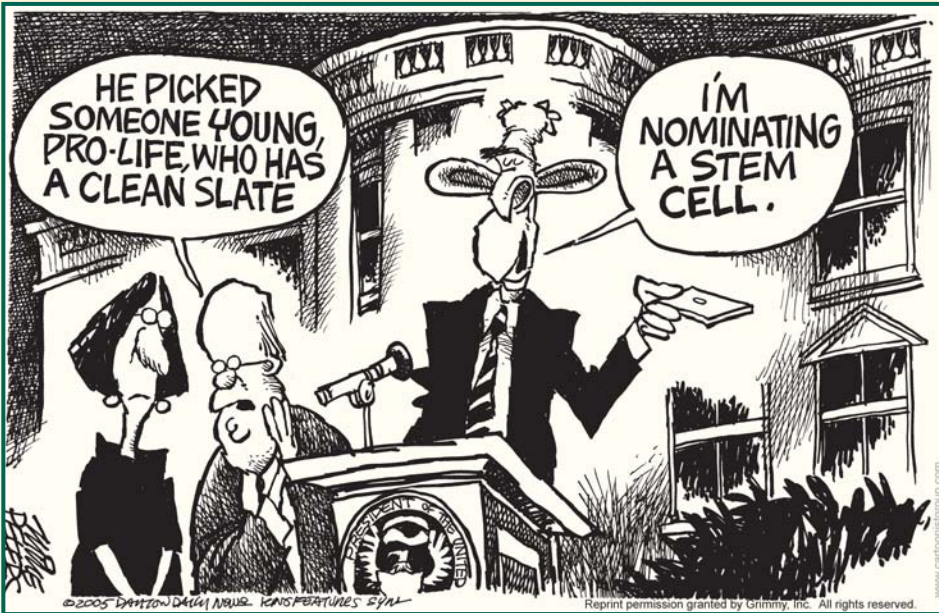
stud and used the split washer as a spacer during the bolt-up of the unit only eight days earlier.

A lawsuit was brought on behalf of Rick and Teresa Hunt against Cust-O-Fab, Inc. and others in state court in Tulsa, Oklahoma. The case presented several challenges. First, Cust-O-Fab performed a litigation test where it removed a bolt from an exemplar vessel and pressurized it to 6600 psi. The unit held with no leaks. Cust-O-Fab used the test to argue that one "bad bolt" could not fail the massive vessel. Second, Farmland supplied the wrong gasket, and our engineering and ASME code expert agreed this gasket contributed to the failure. Third, discovery revealed that Farmland's mechanics had performed additional bolt-up work on the unit after it was returned from Cust-O-Fab and had, therefore, altered the unit from its

repaired condition. Fourth, Cust-O-Fab's engineers and independent inspectors testified the vessel failed due to the same Farmland process problems that contaminated the vessel in the first place. Although we argued for the application of Oklahoma law, if Kansas law applied it would have permitted Cust-O-Fab to compare Farmland's fault at trial. Finally, the worker's compensation carrier claimed a substantial lien and also claimed a credit against future benefits for the amount of any settlement or judgment. Rick and Theresa's recovery would have been virtually eliminated if they were made to repay the lien and lose future benefits.

After a lengthy pre-suit investigation and a year of litigation, the case was settled for Cust-O-Fab's policy limits of \$1,000,000. Unfortunately, this amount is far less than our clients' actual damages, which were found to exceed \$5,000,000 at an apportionment hearing. Importantly, after hearing our clients' testimony and the expert evidence we presented, the Court apportioned the settlement to Rick's lost future wages and Teresa's consortium claims, which were non-duplicative of worker's compensation benefits under Kansas law. As a result, Rick Hunt will continue to receive his future worker's compensation benefits and does not have to repay the worker's compensation lien.

Rick and Teresa's case was handled by John Parisi and Scott Nutter of our firm along with local counsel, James Frasier of Tulsa, Oklahoma.



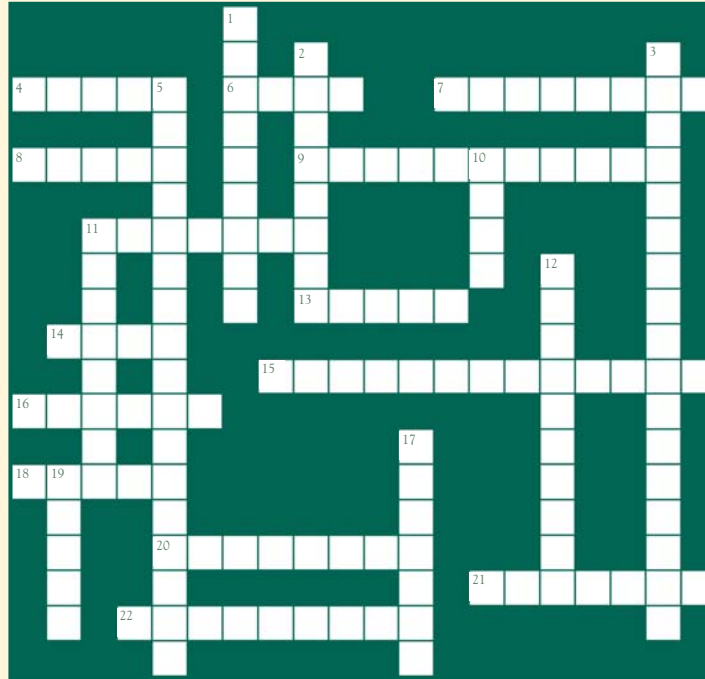
Answers to Presidents Puzler

- ACROSS: 4) Eight [William Harrison, Zachary Taylor, Abraham Lincoln, James Garfield, William McKinley, Warren Harding, Franklin D. Roosevelt, John F. Kennedy] 6) Four [William McKinley, Abraham Lincoln, James Garfield, John F. Kennedy] 7) Ten Years 8) State 9) Harry Truman 11) Madison 13) Nixon 14) Five [John Tyler, Millard Fillmore, Andrew Johnson, Chester Arthur, Gerald Ford] 15) Andrew Johnson 16) Wilson 18) Hayes 20) Van Buren 21) Lincoln 22) Cleveland
DOWN: 1) Jefferson 2) Buchanan 3) Franklin Roosevelt 5) Theodore Roosevelt 10) Taft 11) McKinley 12) Washington 17) Kennedy 19) Adams

Presidents Puzzler

Across

4. How many U.S. Presidents died while in office?
6. How many U.S. Presidents have been assassinated?
7. Under Amendment XXII of the U.S. Constitution, what is the maximum number of years a U.S. President can serve?
8. The Secretary of what department is 4th in line of Presidential succession, as specified by Amendment XXV of the United States Constitution?
9. This former haberdasher knew where the buck stops.
11. U.S. President during War of 1812, traditionally regarded as "Father of the United States Constitution."
13. Who was the first U.S. President to resign office?
14. How many U.S. Presidents were never elected to office?
15. Reconstructionist President, one of two U.S. Presidents to be impeached.
16. This U.S. President signed both the Federal Reserve Act and the Treaty of Versailles, the treaty which ended World War I.



18. Who was the first U.S. President to win an election by electoral votes but lost the popular vote?
20. Nicknamed "Old Kinterhook", this U.S. President was the first non-Anglo to be elected.
21. Who was the first U.S. President elected from the Republican Party?
22. The only U.S. President to serve two non-consecutive terms; also, name of city on Lake Erie.

Down

1. John Quincy Adams and what other U.S. President were elected without a majority of electoral votes and were chosen by the House of Representatives?
2. Who is the only U.S. President to never marry?
3. Who was the only U.S. President to serve more than eight years in office?
5. What U.S. President was the 1912 Bull Moose Party Candidate?
10. This U.S. President was also appointed Chief Justice of the United States Supreme Court.
11. This U.S. President is the namesake for the highest mountain peak in North America (a.k.a. "Denali").
12. Which U.S. President was tasked with appointing all nine U.S. Supreme Court justices?
17. The youngest man to serve as U.S. President.
19. What family (besides the Bush family) has had a father and son both serve as President of the United States?

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