



Matthew L. Bretz
Melinda G. Young

Of Counsel
Ethan S. Kaplan
Larry A. Bolton

3 Compound Drive
P.O. Box 1782
Hutchinson, KS 67504-1782

Phone (620) 662-3435
Fax (620) 662-3445

www.byinjurylaw.com

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To: Special Committee on Judiciary
Senator Eric Rucker, Chairman
Representative Fred Patton, Vice Chairman

From: Matthew Bretz on behalf of Zachary Short and Jonathan Romain

Date: October 1 and 2, 2019

RE: Supreme Court Decision and Possible Legislative Response: *Hilburn v. Enerpipe Ltd.*, No. 112,765

Chairman Rucker, Vice Chairman Patton, and Members of the Special Committee on Judiciary:

I am submitting testimony on behalf of my client in support of the Supreme Court's decision in *Hilburn v. Enerpipe Ltd.* *Hilburn* removed an important barrier for Kansans like Zachary Short and Jonathan Romain to exercise fully their constitutional right to trial by jury. We respectfully request that the Committee make no recommendations for policies or legislation that would undermine the right to trial by jury and the important protections for all Kansans re-established in the *Hilburn* decision.

Zachary Short



On October 25, 2014, Zachary Short was in the middle of grain harvest near Salina, Kansas. As he was working, a call for help came over the radio. The call for help was from another worker who was in a tractor parked next to the roadway. Zachary immediately ran over to render assistance. As Zachary jumped over the power take off (PTO) shaft between the tractor and the attached grain cart, Zachary received an extremely powerful electric shock.

What Zachary did not realize was that as the grain cart was being pulled over to the side of the road, the uninsulated overhead power lines were lower than the minimum clearance required by the National Electric Safety Code. The uninsulated power lines caught on the auger of the grain cart.

The electric shock caused Mr. Short to collapse down against the PTO and grain cart where he continued to receive the electric shock. Mr. Short continued to receive the electric shock for a number of minutes before other workers were able to find a plastic shovel and use it to pull him away from the PTO and grain cart.

As a result of the power company violating the National Electric Safety Code, Zachary Short suffered catastrophic injuries including loss of his right leg below the knee, loss of his left leg above the knee, significant burns over approximately 54% of his total body surface area, deep vein thrombosis, loss of function in his left hand, vision loss, and other disabling permanent injuries. Zachary has endured so many surgeries and surgical procedures that he has lost count, and will have countless additional surgeries throughout his lifetime.

Zachary was only 24 when these devastating injuries occurred. If the injuries do not eventually kill him and he lives a normal life expectancy, Zachary will live with these injuries for the next 52.3 years.

A one-size fits all cap on non-economic damages deprives injured and disabled Kansans of the right to have a jury determine what is fair and reasonable for 52.3 years of extreme disability and disfigurement.



Jonathan Romain

Jonathan Romain enjoyed teaching social studies and science to high school students, and perhaps he enjoyed being retired even more. He worked part time delivering flowers, took care of his granddaughter, volunteered at his church and in the community, and was active with his wife in numerous hobbies.



On May 19, 2017, that changed. That morning a woman ran a stop light which had been red for 22 seconds and broadsided Jon's car. The woman was driving a 5,500 pound SUV at about 50 miles per hour while likely talking on her cell phone.

Depending on how you define it, Jon "survived" the collision though his life would never be the same. Jon suffered severe intraventricular and subarachnoid brain hemorrhaging, multiple fractures of his skull, multiple fractures in his neck, multiple fractures in his low back, and fractures in both legs. Jon was in a coma for three weeks.

When Jon woke from the coma he was not verbal and could not follow commands. Jon had suffered severe, permanent, profoundly disabling brain damage. Jon spent months in the hospital, rehabilitation hospital, and brain injury specialty hospital but Jon's condition did not significantly improve. Upon being released from the specialty hospital Jon was moved home, with his wife providing round-the-clock care, with volunteers from church coming in each day to help, and with therapists coming in for treatments.

While Jon's condition did not significantly improve after discharge from the specialty hospital, Jon had to continue with treatment. Every day a physical therapist, Jon's wife or a church friend would put Jon through range of motion exercises. This was torture for Jon, and he would cry out in pain as the therapy was being performed. But torturing Jon in this way was necessary in order to prevent contracture of his joints.

At the time that Jon was discharged from the brain injury specialty hospital Jon had a life expectancy of 17.9 years. Of course, people with profound brain injuries sometimes die early as a result of complication such as unregulated body temperature, cardiac arrhythmias, hyper or hypotension, infection from pressure sores, etc. Jon made it just over two years before having a heart attack secondary to the brain injury. Jon died on July 1, 2019.



The last two years of Jon's life - time which he and his wife of 38 years planned to enjoy - were hell. Instead of spending time together volunteering, Jon and Julia spent time with Julia toileting Jon and wiping feces from his body, clothing and bedding. Instead of taking his dog for a walk, Jon had to be transferred with a lift from a bed to a wheelchair since he could not stand on his own. Instead of taking care of his granddaughter, his granddaughter learned to help take care of him.

We the People

When considering a cap on what can be awarded for non-economic damages for pain, suffering and disability, consider that pain, suffering and disability cannot be capped.

The impact of 52.3 years of extreme disability and disfigurement for Zachary Short is hard to grasp. Imagine waking up in the night needing to go to the bathroom, and having to put on your prosthetic legs before you can stand up. Or instead having to crawl on the floor into the bathroom. But Zachary will live with these problems which affect him every hour of every day, every hour of every night, for the next 19,089 days.

Imagine what Jon experienced, and the agony his family experienced each day for more than two years. Having to torture your spouse with range of motion exercises, knowing that it was necessary, but knowing that it caused extreme pain and that Jon could not understand why his wife was hurting him. Feeding your grandfather, or cleaning up his feces.

In criminal cases, juries who hear and see the evidence make decisions every day regarding life and death. In civil cases, juries who hear and see the evidence are the only people who can make the decision about what is fair to compensate a person for a lifetime of disability. The legislature is not equipped to hear and see the evidence from every new case, and a one-size-fits-all cap on what can be recovered for damages ignores the fact that when it comes to damages, every injury is different.

Our system of justice in the United States is considered the best in the world because it relies on the people to make decisions. We don't have a dictator who decides who lives and who dies. We use juries - the people - to resolve disputes. This is such a fundamental part of our society that the right to a trial by jury in civil cases was guaranteed by the Seventh Amendment to the United States Constitution in 1791. In Kansas, the right to trial by jury is even more broad than the federal right to trial by jury. In 1859 the right to trial by jury was ratified as being "inviolable". This inviolable right was established before Kansas even became a state.

It has been said by the United States Supreme Court that jurors are the conscience of the community; that jurors speak for the community about what is allowed and what is not, about what is fair and what is not, about what is right and what is wrong.

On behalf of Zachary Short and on behalf of Jonathan Romain and his family, we ask that you not take any action to deprive injured Kansans of the right to have the people act as the conscience of the community and decide what is fair, just and reasonable.

Sincerely,

A handwritten signature in blue ink that reads "Matthew L. Bretz". The signature is fluid and cursive, with a long horizontal stroke at the end.

Matthew L. Bretz
Matt@byinjurylaw.com