Wisconsin Civil Trial Journal

Spring 2020 • Volume 18 • Number 1

Employment Practice Liability Insurance Provides Essential Risk Management for Businesses of All Sizes
Daniel Finerty

Also In This Issue

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

Columnists

Daniel Finerty
Lindner & Marsack, S.C.

Ian Hackett

Kylie M. Owens
Crivello Carlson S.C.

Travis J. Rhoades
Crivello Carlson S.C.

Christine M. Rice
President, Wisconsin Defense Counsel

Monte E. Weiss
Weiss Law Office, S.C.

Editor

Vincent J. Scipior
Coyne, Schultz, Becker & Bauer, S.C.
vscipior@cnsbb.com

Amicus Curiae Committee
Monte Weiss
Weiss Law Office, S.C.
monte.weiss@mweisslaw.net

Cyber Law and Technology Committee
Chair: Travis Rhoades
Crivello Carlson, S.C.
trhoades@crivellocarlson.com

Vice Chair: Randall Guse
Otjen, Gendelman, Zitzer, Johnson & Weir, S.C.
rguse@otjen.com

Employment Law Committee
Chair: Elizabeth Rowicki
SECURA Insurance
lrowicki@secura.net

Insurance Law Committee
Chair: Monte Weiss
Weiss Law Office, S.C.
monte.weiss@mweisslaw.net

Vice-Chair: Joseph Sarmiento
Karbal, Cohen, Economou, Silk & Dunne
jsarmiento@karballaw.com

Litigation Skills Committee
Frederick Strampe
Borgelt, Powell, Peterson & Frauen, S.C.
fstrampe@borgelt.com

Membership Committee
Sandy Hupfer
SECURA Insurance
shupfer@secura.net

Website and Social Media Committee
Nicole Radler
Simpson & Deardorff, S.C.
radler@simpsondeardorff.com

Wisconsin Civil Jury Instructions Committee
Christopher Bandt
Nash, Spindler, Grimstad & McCracken, LLP
cbandt@nashlaw.com

Women in the Law Committee
Chair: Heather Nelson
Everson, Whitney, Everson & Brehm, S.C.
hnelson@eversonlaw.com

Vice-Chair: Andrea Goode
Borgelt, Powell, Peterson & Frauen, S.C.
agoode@borgelt.com

Young Lawyer Committee
Joshua Greatsinger
Nash, Spindler, Grimstad & McCracken, LLP
jgreatsinger@nashlaw.com

DRI Representative
Sandy Hupfer
SECURA Insurance
shupfer@secura.net

Executive Director
Jenni Kilpatrick, CAE
jenni@wdc-online.org

Legislative Advisors
Andrew Cook
Hamilton Consulting Group
cook@hamilton-consulting.com

Rebecca Hogan
Hamilton Consulting Group
hogan@hamilton-consulting.com

Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

JOURNAL POLICY

WDC Members and other readers are encouraged to submit articles for possible publication in the Civil Trial Journal, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

Statements and expression of opinions in this publication are those of the authors and not necessarily those of the WDC or Editor. Letters to the Editor are encouraged and should be sent to the WDC office at 6737 W. Washington St., Suite 4210, Milwaukee, WI 53214. The Editor reserves the right to publish and edit all such letters received and to reply to them.

President's Message: A Roadmap to the Future

by: Christine M. Rice, President, Wisconsin Defense Counsel

In 2016, the Wisconsin Defense Counsel Board of Directors participated in a strategic planning retreat that would provide the roadmap for a comprehensive set of goals, objectives and critical tasks to lead WDC into the future. The 2016 Strategic Plan was very focused on membership growth and revitalization. It led to development of committees including Employment Law, Insurance Law, Membership, and Women in the Law. These committees have been an incredible addition to the organization and continue to provide an additional sense of community that WDC may have been missing previously.

Non-profit organization best practices indicate that strategic planning should be conducted every three to five years to ensure that the organization's mission and vision represent the current state of the organization - and to evaluate the organization's culture, structure and procedures.[1] The WDC Board of Directors has determined that the next Strategic Planning Retreat will be held in August 2020 (or future date TBD) due to the Coronavirus/COVID-19 situation and cancelation of the Spring Conference to prioritize the health, safety, and well-being of our members, partners, and sponsors.

Attorney J. Michael Weston, a Past President of DRI, The Voice of the Defense Bar, has been selected to facilitate the Retreat. Attorney Weston will be meeting with some of the WDC Executive Committee members and staff in advance of the retreat to discuss the overall plan, which includes a survey of the Board of Directors, committee chairs and a sample of members. The WDC Lobbyist and Government Relations Firm, Hamilton Consulting Group, LLC, will also be providing input for the survey questions, as the Board would like to identify legislative goals and objectives to be included with their new strategic plan. The results from the survey will be useful to determine the direction of WDC going forward.

Attorney Weston's facilitation includes presentations on service and commitment, along with group discussion concerning the organization mission, current structure, member services and survey results. From there, the Board of Directors will work diligently to determine the goals, objectives and critical tasks that shape WDC's roadmap for the future. The Board of Directors will leave the Retreat with an implementation plan that will allow for a clear evaluation of achievements associated with the plan.

I believe that the Wisconsin Defense Counsel is on the path to greater success; however, this strategic roadmap is required to ensure that we are all on the same page – striving to promote, represent and demonstrate the mission of the organization. In order to continue moving WDC forward, we are going to need the passion, energy and dedication from each and every one of you. We are all in this together – dedicated to the defense of Wisconsin citizens and businesses and the maintenance of an equitable civil justice system.

References

1 See Michael Johnson, *Realigning the Board for Successful Strategic Planning*, ASAECenter.org (June 30, 2017); *see also 5 Phases of Strategic Planning*, Boardsource.org (2016).

Author Biography:

Attorney Christine Rice is a Shareholder and the President of Simpson & Deardorff, S.C. She received her bachelor's degree in nursing from Carroll College, and after practicing for several years as a registered nurse, she returned to law school and graduated magna cum laude from Marquette University. Ms. Rice practices in all areas of insurance defense, specializing in insurance coverage. Ms. Rice has been recognized by her peers as a Wisconsin "Super Lawyer," and was one of Wisconsin Law Journal's "Leaders in the Law" in 2019. Ms. Rice also serves on the Board of Directors at her alma mater, Dominican High School in Whitefish Bay, Wisconsin.

Experience every moment, protect every moment.

Your trusted insurance partner since 1903.

Wisconsin Mutual prides itself on providing our policyholders fairly priced products that are crafted to meet the needs of our insured's lifestyles.

Farm

Auto

Home

Dwelling

Umbrella

Commercial

Our experience is in the numbers.

1,000+	50,000+	100,000+
Agents	Insured Properties	Insured Automobiles

www.wiins.com

(800) 831-5959

WDC Leaders Attorney Spotlight: Karen M. Gallagher

Editor's Note: *To recognize the philanthropic efforts of our membership, WDC is introducing a new recurring feature to the Wisconsin Civil Trial Journal which spotlights members who generously donate their personal time and/or resources to a civic or charitable organization on a community, national, or international level. To nominate a member, please contact the Journal Editor, Vincent J. Scipior, at vscipior@cnsbb.com.*

Karen M. Gallagher is an associate at Coyne, Schultz, Becker & Bauer, S.C. in Madison. She has been practicing since 1995. Her practice focuses on personal injury, professional negligence, medical malpractice, and insurance coverage issues. In addition to the Wisconsin Defense Counsel, Karen is a member of the American Inns of Court James E. Doyle Chapter and the Dane County Bar Association. Karen lives in Madison with her husband and two children. She serves on the board of the Notre Dame Club of South Central Wisconsin and has previously served on the Parish Council of her church.

In 1999, Karen and her husband began volunteering as a "Big Couple" with the Big Brothers Big Sisters ("BBBS") of Dane County Program. Big Brothers Big Sisters matches adult volunteers ("Bigs") and children ages 6 through 18 ("Littles") to create and develop one-to-one mentoring relationships that have a direct and lasting effect on the lives of young people.

Why did you decide to become a Big Couple?

A friend of ours was a Big Sister and frequently spoke about the events she took her Little Sister to and how important the relationship was for her. I wish I could say I would have volunteered to be a Big Sister on my own, but the truth was I did not think I had time to commit to BBBS until our friend said we could volunteer as a "Big Couple." We were pre-kids and pre-dog, and we contacted BBBS shortly thereafter and applied to be a Big Couple.

Tell us about your experience as a Big Couple.

In October 1999, we were matched to a 7-year-old Little Brother who lived with his grandmother. His mom struggled to take care of herself, let alone her two kids, and would arrive in town occasionally and stay just long enough to make a lot of promises and disrupt his home life. We stayed matched with him – even with the arrival of our two kids and a dog – through his high school graduation in 2011. There were ups and downs through those years and times when we saw our Little more and less, but overall we are so glad our Little Brother was part of our lives and our family. We are still in touch with him, his grandmother, and his aunt.

After not participating in BBBS for several years and having our older child head off to college, in 2019 my husband and I decided we would like to be matched again, and in May 2019, we were matched to a 9-year-old Little Brother. Our Little's father died of cancer in January 2019, which can still be quite fresh for him and his mom, and we are building our friendship one visit at a time.

What do you like best about being a Big Couple?

I think that volunteering as a Big Couple has been fulfilling for me because of the opportunity to serve a child who is learning to navigate the community and build a friendship with them. I am glad to provide some consistency, encouragement, and cheerleading in our Little's life. Serving as a Big Couple has the added bonus that my husband and I also spend the volunteering time together, but can also be flexible if only one of us is available for an event or to pick up our Little Brother.

What are some of your favorite memories from volunteering with the Big Brothers Big Sisters Program?

Some of the highlights were a BBBS bus trip to a Bucks game where the matches got to sit near courtside. There were many basketball games when our Little Brother played for a traveling team through middle school and early high school. And then there was his high school graduation in 2011; that was a great day. We had a party at our house to celebrate and showed a video montage of photos going back more than 10 years.

Last fall we took our Little Brother to a high school band event and later heard from his mom how much he enjoyed it.

What advice do you have for someone who is considering becoming a Big Brother or Big Sister?

Think about ways you could involve a Little Brother or Sister in your life – you don't have to find "extra time" for the friendship; you can pick up your Little and make and eat dinner together, play some UNO or Go Fish, and take them home. It is about letting an authentic friendship develop, so think of things you like to do – go to a movie, see a Badger game, visit a library, take a walk on Picnic Point – and then add your Little to the picture.

Is there anything else you would like to share about your volunteer experience with Big Brothers Big Sisters?

Having first experienced BBBS 20 years ago in the days before cell phones and apps, the Program now makes it really easy to find out what is going on around town that could be interesting to you and your Little. There is also a comprehensive process to get matched, but it is worth the time and steps in order to get matched and establish a relationship with a young person who is looking for a friend.

BBBS of Dane County has hundreds of boys on a waiting list, and many girls too, but the boys wait longer to get matched. Consider volunteering today.

To learn more information about the Big Brothers Big Sisters Program, visit www.bbbs.org.

Skilled litigators, exceptional results.

Our litigation attorneys balance unparalleled skill and winning strategies to achieve exceptional results in the courtroom. We have successfully tried hundreds of cases on behalf of individuals, businesses, and insurance companies in federal and state courts throughout Wisconsin and nationwide. Together, we can chart the best path forward.

BoardmanClark

BOARDMANCLARK.COM

Employment Practice Liability Insurance Provides Essential Risk Management for Businesses of All Sizes

by: Daniel Finerty, Lindner & Marsack, S.C.

"*With the growth of employers' liability for discrimination, retaliation, harassment, wrongful termination, and other similar torts ... demand has grown for 'employment practices liability' insurance*."[1]

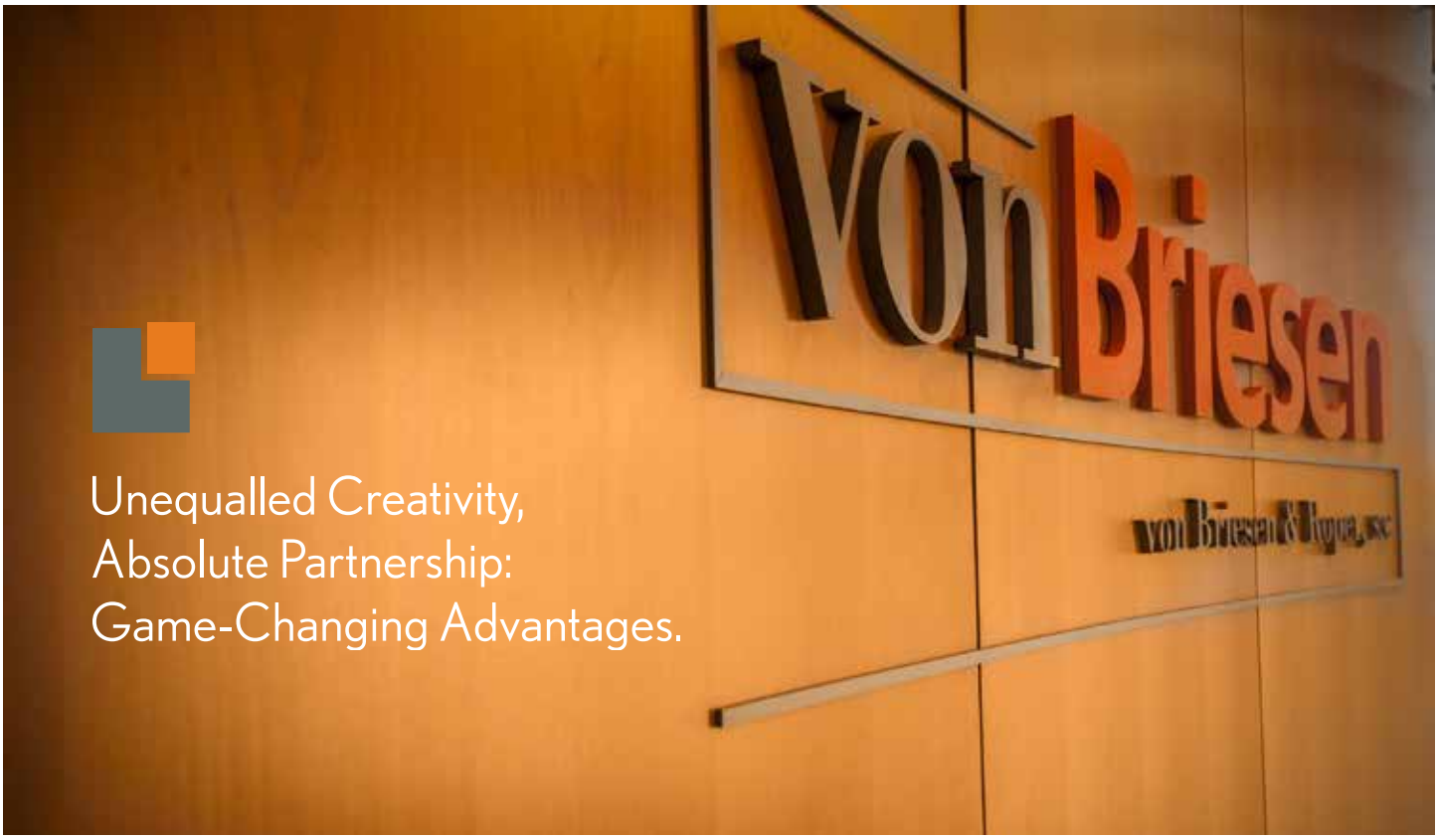
When Judge Richard A. Posner of the Seventh Circuit United States Court of Appeals authored the *Krueger International, Inc. v. Royal Indemnity Company* opinion in 2007, he likely had no idea how Employment Practice Liability Insurance ("EPLI") coverage would continue to grow and expand into other risk areas not then covered. Today, it has become an almost essential element to safely protecting any business[2] from both the garden-variety employment claims and the potential "runaway jury" that could seriously impact a business's continued viability. In the 1990s, EPLI was born from a need for businesses to better manage and limit their financial risk due to the regularity of employment litigation and the potential "runaway jury" claim. More recently, the *#MeToo* movement, the aging workforce, a patchwork of disability and medical leave laws, and societal trends have continued to subject businesses to increasing financial risk and potential liability from their employment-related decisions. Employers of all sizes, including private-sector, public-sector, non-profit and Native American employers, face the economic and business costs imposed by an almost predictable slew of annual employment claims that dictates EPLI coverage is essential. *This trend appears set to continue*. The 2018 Equal Employment Opportunity Commission (EEOC or Commission) statistics shows discrimination, harassment and retaliation based on sex discrimination (including harassment and pregnancy) and Equal Pay Act charges increased.[3] In 2018, the Commission resolved 141 separate lawsuits and recovered over $53 million dollars from businesses.[4]

I. Covered Claims and Losses

It is critical for practitioners to ensure that their business clients are aware of the nature and extent of their EPLI coverage, the limitations upon that coverage, the availability of additional coverages and that these clients tender any covered claims to the EPLI carrier as soon as they are received.[5] A business looking to initially secure an EPLI policy will typically have to disclose the existence of, or put in place, adequate employment law protections designed to mitigate risk, which means a business will likely have taken a step forward in its employment-related risk mitigation efforts just by applying for EPLI.[6]

While each policy is different, EPLI generally covers an insured business for "employment wrongful acts" that may result in a claim for damages by a current, former or prospective employee.[7] Such claims include discrimination, harassment, retaliation, defamation, invasion of privacy and other wrongful employment practices. Numerous courts have examined whether a particular claim is or is not covered within an EPLI policy; however, most of those opinions are intertwined with the definition of "claim" and "notice," among other terms.[8]

By contrast, EPLI policies typically exclude coverage for OSHA workplace safety citations,



Unequalled Creativity, Absolute Partnership: Game-Changing Advantages.

At von Briesen, we've transformed the traditional law firm into a modern platform for legal innovation.

Combining our industry leading expertise with innovative technology, we take a collaborative and creative approach to problem-solving the most complex matters.

The result? Game-changing advantages for our clients.

To learn more about our law firm, contact:
Susan E. Lovern, President & CEO, at slovern@vonbriesen.com or 414.287.1286.
For more information on the services and areas of expertise that we offer, please visit vonbriesen.com.

von Briesen

von Briesen & Roper, s.c. | Attorneys at Law

vonbriesen.com

Milwaukee • Madison • Waukesha • Oshkosh • Green Bay • Appleton • Neenah

NLRB charges, WARN notice claims, wage and hour violations,[9] ERISA or COBRA claims, unemployment insurance or workers compensation claims or an alleged breach of an employment contract.[10] While coverage will likely be denied for OSHA citations or a primary worker's compensation claim, EPLI coverage may lie for a claim alleging retaliation due to workplace safety complaints[11] or an Unreasonable Refusal to Rehire claim under Wis. Stat. § 102.35(3). EPLI policies typically pay any "loss," the amount to which the insured becomes legally obligated, after the insured satisfies its deductible or self-insured retention, which may include defense costs, settlement amounts, back pay, front pay, and compensatory damages including emotional distress. However, the EPLI policy typically excludes from the "loss" definition damage awards for punitive damages, liquidated damage awards, criminal and civil fines, penalties and other amounts which are, by law, not insurable.

If a business receives an EEOC determination finding reasonable cause that it may have violated Title VII, the EEOC will engage in conciliation with the business to attempt resolution prior to further litigation. Setting aside deductible/SIR issues, the carrier will cover a negotiated settlement amount and attorney's fees for the plaintiff's counsel; however, the EPLI policy will not cover any costs the business may incur associated with Commission-required employee training or employee reinstatement. Those costs will have to be shouldered by the business, not the carrier.

II. Defining the Insured and Covered Employees

While the definition of "company" may be easy to assess in the case of a single corporate entity, the "insured" definition becomes more complicated when there are a number of interrelated companies, subsidiaries and affiliates. To ensure that business clients are protected, practitioners must confirm that their client's EPLI policy broadly covers all corporate entities owned or controlled by the main corporate client. If coverage is not sufficiently broad, a broader "employer" definition may be warranted to ensure all sub-entities are covered during re-negotiation of the policy terms and/or the annual premium. Further, a topic of increasing importance is whether an EPLI policy provides coverage for acts or omissions by, or claims by, a business's volunteers, independent contractors, temporary or leased employees and other individuals outside of the traditional employer-employee relationship. One court has held that, if an EPLI policy does not explicitly address this issue, the business's EPLI policy does not cover a third-party claim filed by an employee of a temporary agency against the business at which the employee was placed and subsequently injured.[12]

When dealing with temporary agencies, joint employment arrangements, or more complicated employment situations, the scope of coverages provided to the businesses should be clarified in advance and contractually negotiated before any issue arise.[13] Businesses that use volunteers, such as hospitals and senior living providers, should review the EPLI policy definition of "employee" to determine if it provides coverage, is silent, or explicitly excludes volunteers or anyone not paid by the business.

III. Claims-Made Policies

EPLI policies are written as "claims-made" policies,[14] which allows a fairly easy definition for the date of loss as the date a "claim" was received by the business. Most policies specifically define a "claim" to mean either a written demand for relief or legal proceedings seeking damages, a definition which encompasses demand letters from plaintiff's counsel, administrative charges and a typical civil summons and complaint filed in state, federal or tribal court.[15] This definition usually includes a threatening letter from an employee's counsel that advises of at least one covered claim. Different definitions of "claim" have led to different results. A Massachusetts district court held that an EPLI policy's "claim" definition, which covered an EEOC charge, unambiguously excluded coverage for the related lawsuit by the EEOC.[16] By contrast,

WISCONSIN STRONG

PROTECTING &REBUILDING WISCONSIN SINCE 1934

Wisconsin's #1 Farm Writer and 3rd Largest Commerical Writer

Recognized as One of the Nation's Top Insurance Companies

Rural Mutual Insurance Company

RuralMutual.com

an Illinois district court held that both the EEOC charge and the EEOC's subsequent federal court lawsuit based on the earlier charge against the business were both covered and were separate claims triggering EPLI coverage.[17]

A dispute may arise in the event a business is not aware that coverage may exist.[18] If the business fails to tender the claim in a timely fashion or does so only after coverage or an extended reporting period has expired, the business may not be able to receive the contemplated benefit in exchange for its premiums. In such cases, a carrier may be well within its rights to deny coverage. However, in some cases, a reservation of rights letter may be issued to reserve the carrier's right to later deny coverage while it investigates the underlying circumstances of the tender and/or whether the insurer's right to defend the claim has been prejudiced by the delay.

IV. The Claim Handling Process

Assuming a covered claim has been received, tendered by the business to the carrier within the coverage period, no exclusions apply and no reservations of rights letter has been issued, the carrier will typically assign panel counsel to handle the claim. Typically, the carrier will assign the claim to a particular panel counsel attorney or firm for the jurisdiction in which the claim was filed or provide the business with the panel counsel firms and the option to choose.[19] Panel counsel firms have an existing relationship with the carrier to handle EPLI claims at a pre-approved rate, generally lower than the panel firm's typical hourly rate, provided by the firm in exchange for the volume of work that the relationship entails. While exceptions may be permitted to allow existing counsel to represent or continue to represent a business client in an employment claim, such exceptions are rare and require, in the least, that such firm agree to the carrier's EPLI rate and its litigation guidelines.[20]

V. Best Practices

While a few "best practices" for handling an EPLI claim and working with the insured clients and their carriers follow, a note of guidance first. It is critical for practitioners to ensure the service provided to the business matches up with the carrier's customer service model. To do this, a timely initial assessment of the claim, an assessment of settlement options and a road map for a successful defense, however the insured and the carrier shall define that term, among other things, are critical to providing an exceptional level of client service that is in line with, or exceeds, the carriers' expectations.

a. Conduct a Thorough Initial Review and Client Interview

After an initial conflict check, acknowledging receipt of the EPLI claim, reviewing the available documentation from the business,[21] and conducting an in-depth interview with the business[22] and personnel involved, counsel must discern, among other things, the factual basis for the employment-related decision the business made and whether it constitutes a legitimate non-discriminatory, non-retaliatory reason.[23] Typically, this reason forms the very center of the business's defenses to a claim. To do so, it is critical to identify the decision-makers and acknowledge that businesses do not make decisions, people do. The information provided by these decision-makers will assist in the defense of the claim going forward.

b. Outline and Discuss Assessment

Once the business has provided the necessary information for counsel to flesh out a response to the complaint, counsel should also re-connect with both the business and the carrier's assigned representative in order to provide a more thorough perspective on the claim. There are several goals to this discussion. First, the discussion ensures the carrier's assigned representative can ask counsel questions regarding both liability and potential damages in order to set an appropriate reserve[24] to cover the potential loss. Second, this discussion allows counsel, the business and the representative to discuss and assess initial considerations including whether the claim should be defended, immediately settled or mediation should be explored to see if the case can be resolved

economically before additional costs are incurred. While dictated by the facts and circumstances of each case, settlement consideration should be given to "hot button" cases such as the EEOC's Strategic Priorities or, currently, *#MeToo* allegations.[25] Third, in the event the claim is to be defended to its end or, at least, to another waypoint at which another settlement assessment should be made, counsel can share thoughts about the 10,000-foot perspective with regard to the defense to liability and damages and share how he or she will defend the claim to secure victory or put the insured and the carrier in an advantaged position to discuss settlement down the road.

c. Outline a Multi-Layered Defense

A road map to a viable, cost-effective defense of the claim should be prepared that will answer the most pressing issue from the business and the carrier, whether that is how to defeat the claim or, if the client and carrier choose to resolve, how to obtain a strategic advantage in litigation to obtain a comparably more tolerable resolution. Counsel's mission, among other things, is to define the route, assess the costs, risks and rewards of each option, and assist the business and its carrier in defining, refining when necessary and reaching the identified goals. That roadmap will define multiple layers of defense.[26] Counsel can begin to chart out the most direct, effective and cost-efficient path to prevail utilizing these defenses and ensure that layers of defense are at the ready to defend the claim. The business and the carrier should regularly be consulted and should always be given regular updates on the likely path this claim will take, based upon counsel's experience, and be available to answer any questions, especially where the complainant is still employed.

d. Execute and Revise When Necessary

Counsel should defend the business and represent the carrier's interests by zealously and cost-effectively advocating for the business regarding both liability and, when necessary, damages. While the venue for the claim will define the path, counsel should regularly seek opportunities to discuss resolution with the opposing party, as guided by both the business and the carrier.

During this time, the defense will likely need to be modified to accommodate changes by the business, the carrier and/or the dramatic nature of employment litigation. It is counsel's job during this process to support the business and the carrier to ensure the parties maintain a cooperative tripartite relationship designed to secure the best result for the business. At times, that relationship may break down. It happens, especially with a company that has never been involved in employment litigation. Regardless of the reason, it is counsel's job to ensure that the relationship, if it derails, gets back on track as soon as possible.

e. Identify Settlement Opportunities

Assuming support for a business's desire to resolve the matter is an option to which the carrier does not object, a potential settlement should be outlined for approval by the business and the carrier. This proposal should ensure that the business and the carrier are both released from liability and any damage claims, that the complainant agrees not to sue and agrees to release any and all claims (known and unknown), that any future references can be provided based upon agreed language or an agreed document placed into the complainant's personnel file (to avoid future disputes) and that any other provisions (such as notice of an alleged breach and time to cure) are included to bind the parties' post-settlement behavior in a manner to avoid future conflict. After approval, the settlement proposal can be provided to the complainant and/or his or her counsel.

VI. Conclusion

When representing insured clients and insurance carriers in EPLI matters, several important points need to be kept in mind. First, the insured client has tendered the claim to the carrier to ensure that it is cost-effectively and competently handed, a job for which counsel is responsible. Second, the carrier's

assigned claims representatives are responsible for effective claims-handling, which includes setting a reserve on any claim, tracking the progress of the claim and any necessary internal reporting, a job for which good communication with counsel is essential. Third, all parties have a mutually-shared goal – to ensure the best result for the insured client. That shared goal should form the centerpiece of each and every discussion the parties have when defending an EPLI claim, as it will always bind the parties together and help counsel support the tripartite relationship. In the end, achieving the best result for the business, in addition to doing so professionally, cost-effectively, and diligently with solid, interactive communication throughout the process for the carrier, can ensure that future cases follow.

Author Biography:

Daniel Finerty, Marquette University Law School 1998, is a Shareholder with Lindner & Marsack, S.C. in Milwaukee, Wisconsin, where he regularly counsels and defends private-sector, public-sector, non-profit and Native American tribal clients, also representing the interests of the clients' EPLI carriers, in employment litigation matters in administrative agencies, federal, state and tribal courts and other venues. He would like to personally recognize the insurance companies for which he serves as panel counsel and their current and former claim representatives and attorneys. Even though their names may not appear here, he acknowledges that he could not have drafted this article without the opportunities they have provided and the trust and confidence they have placed in him. He is grateful to each of them beyond words.

References

1 *Krueger Int'l, Inc. v. Royal Indem. Co.*, 481 F.3d 993, 994 (7th Cir. 2007).

2 Insured business clients will be referred to as businesses, clients or insureds. Their EPLI partners will be referred to as insurers or carriers. Defense counsel that represent businesses and carriers are referred to as practitioners, counsel and the like.

3 *See* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Feb. 10, 2020).

4 Office of General Counsel FY 2018 Annual Report, available at: https://www.eeoc.gov/eeoc/litigation/reports/18annrpt.cfm (last visited, Feb. 10, 2020). The National Women's Law Center notes that a gender wage gap exists in over 97 percent of occupations and African-American women make 62 cents, Latina women make 54 cents, Native women make 57 cents, and Native Hawaiian and Pacific Islander women make 61 cents for every dollar paid to white, non-Hispanic men. Elizabeth Skerry, *Your Racial and Gender Wealth Gaps Playlist*, NWLC (Dec. 20, 2019), available at: https://nwlc.org/blog/your-racial-and-gender-wealth-gaps-playlist/ (last visited Feb. 14, 2020). These numbers foreshadow continued litigation over the Equal Pay Act.

5 The Author notes that he does not handle coverage but is familiar with these topics by experience.

6 As an example, to apply for EPLI with Arch Essential EPL with Arch Insurance Group, Inc., a business must disclose information regarding its Human Resources Department, hiring process, employee handbook, performance assessments and evaluations, terminations, training on harassment, discrimination and the like, and other employment-related procedures. The application which lists these items, and provides practitioners a good list of items to review with a client looking to secure EPLI coverage, is on Arch's website. *See* Essential EPL – Application, Arch Insurance Group, Inc., available at: https://www.archcapgroup.com/Portals/0/Forms/Executive%20Assurance/EmploymentPractices/APPLICATION%20FOR%20ARCH%20ESSENTIAL%20EPLsm.doc (last visited Feb. 14, 2020).

7 Britton D. Weimer, J.D., Eric D. Satre, Andrew F. Whitman, Ph.D., J.D., CLU, CPCU, T. Michael Speidel, D.D.S., J.D., Employment Practices Liability – Guide to Risk Exposures and Coverage, The National Underwriter Company (2nd Ed. 2012), at pp. 1, 21-22.

8 *See, e.g.*, *LodgeNet Ent. Corp. v. American Intern. Specialty Lines Ins.*, 299 F. Supp. 2d 987 (D. S.D. 2003) (EPLI policy covered both administrative charges and civil complaints as "claim[s]," but policy was ambiguous as to whether same facts amounted to a single claim); *KB Home v. St. Paul Mercury Ins. Co.*, 621 F. Supp. 2d 1271 (S.D. Fla. 2008), *aff'd*, 339 Fed. Appx. 910, 2009 U.S. App. LEXIS 16883 (11th Cir.) (filing of discrimination charge with Broward County Civil Rights Division was an EPLI-covered "claim," however, coverage denied because claim was filed prior to start of EPLI policy period); *SNL Fin., LC v. Phila. Indem. Ins. Co.*, 2009 U.S. Dist. LEXIS 93319 (W.D. Va. 2009), *aff'd*, 455 Fed. Appx. 363, 2011 U.S. App. LEXIS 23529 (4th Cir.) (insured promptly reported EPLI claim when lawsuit was filed; earlier correspondence and discussions with former employee's attorney did not amount to a "written demand for monetary or non-monetary relief" within the policy); *Nat'l Waste Assocs., LLC v. Travelers Cas. & Sur. Co. of Am.*, 51 Conn. Supp. 369, 988 A.2d 402 (2008), *aff'd*, 294 Conn. 511, 988 A.2d 186 (2010) (former employee's unemployment insurance claim, which amounted to a prior "administrative

Complete representation is the cornerstone of our practice. We focus on providing our clients creative, responsive, thorough legal advocacy and advice at every single stage of our representation. We offer large firm experience, but with small firm responsiveness.

MEQUON

1017 W. Glen Oaks Lane
Suite 207
Mequon, WI 53092

Phone: 262-240-9663
Fax: 262-240-9664
Email: info@mweisslaw.net

proceeding," barred coverage for employment litigation filed after policy's retroactive date).

9 An EPLI policy that excludes coverage for claims arising under the federal Fair Labor Standards Act usually excludes coverage for related state and local claims.

10 Weimer, *et al*., at pp. 22-26. A number of carriers currently offer specialty coverage for defense for alleged wage and hours claims in some fashion. *See Insurance Definitions – Wage and Hour Insurance Coverage Endorsement*, International Risk Management Institute, Inc., available at: https://www.irmi.com/term/insurance-definitions/wage-and-hour-insurance-coverage-endorsement (last visited Feb. 11, 2020); Marsh LLC Wage and Hour Preferred Solution, available at: https://www.marsh.com/us/services/financial-professional-liability/wage-and-hour-preferred-solution.html (last visited Feb. 10, 2020) ("[t]he top 10 wage and hour settlements in 2017 totaled $525 million, the second-highest figure in the last decade, according to law firm Seyfarth Shaw").

11 *See* OSHA's Whistleblower Protection Program, OSHA Fact Sheet, available at: https://www.osha.gov/Publications/OSHA3638.pdf (last visited Feb. 14, 2020).

12 *Home Ins. Co. v. Liberty Mut Fire Ins. Co.*, 830 N.E.2d 186, 188-89 (Mass. 2005). The exclusive remedy provision of worker's compensation would likely protect only the temporary agency, not the business, hence, the reference to a "third-party claim."

13 Further, if an EPLI-insured temporary agency agrees to indemnify its business client from employment and other claims, the carrier will have to be involved with that discussion as certificates of insurance will likely need to be exchanged between the parties.

14 Weimer, *et al*., at p. 6. Weimer notes that the Insurance Services Office policies, and "virtually all other EPL policies, are claims-made rather than occurrence policies." *Id*. (*citing Nat'l Waste Assocs., LLC*, 988 A.2d at 187, n.5). The *National Waste* court noted that claims-made policies limit the liability of the carrier to a fixed period of time, which allows it to charge lower premiums. *Nat'l Waste Assocs., LLC*, 988 A.2d at 187, n.5.

15 Weimer, *et al*., at p. 6. The definition of "claim" will be further explained by defining a "wrongful act" which may include an employment-related decision, as outlined in an EPLI policy one court reviewed. *See Martinsville Corral, Inc. v. Society Ins.*, 2018 U.S. Dist. LEXIS 55144, **4-6 (S.D. Ind. Mar. 31, 2018), *aff'd*, *Martinsville Corral, Inc. v. Society Ins.*, 910 F.3d 996 (7th Cir. 2018).

16 *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 2011 U.S. Dist. LEXIS 156158 (M.D. Tenn. Sept. 16, 2011) *rev'd by Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 499 Fed. Appx. 559, 565, 2012 U.S. App. LEXIS 19161, **16-17 (6th Cir. 2012). The Sixth Circuit reversed and held the "claim" definition was ambiguous and susceptible to more than one reasonable interpretation.

17 *John Marshall Law School v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 223 F. Supp. 3d 733, 738 (N.D. Ill 2016) ("there is no question that the policy reasonably may be read as contemplating that an administrative investigation/charge and a lawsuit arising from the same facts are two different claims. Indeed, in the Court's view, this is the most reasonable reading of the policy.").

18 Practitioners can greatly assist their business clients by offering to review their insurance policies to ensure a basic awareness of what is and is not covered. A business that secures a business owner package policy or pre-packaged trade association policy may not necessarily recall the exact contours of the policy. Businesses that pay annual premiums for EPLI coverage will want to access that coverage when necessary.

19 Some carriers are very forthright about panel counsel membership. *See* Approved EPL Panel Counsel Defense Firms, Chubb Insurance – Employment Practices Liability, available at: https://www.chubb.com/us-en/business-insurance/approved-epl-panel-counsel-defense-firms.aspx (last visited Feb. 14, 2020).

20 Some carriers permit the business to identify and use approved employment counsel as part of their marketing strategy. *See* Management Liability – Employment Practices Liability, Philadelphia Insurance Companies, available at: https://www.phly.com/mplDivision/managementLiability/EPLI.aspx (last visited Feb. 11, 2020). With the number of EPLI carriers serving different markets, every business should be able to match an EPLI policy to its need.

21 This documentation typically includes the employee's personnel file, the business's employee handbook, compensation and payroll records, and any and all other communications and related documentation regarding the employee who filed the claim.

22 During this discussion, counsel should advise the business that, to the extent possible, a litigation hold should be initiated and be in place throughout the claim to prevent destruction of any relevant hard-copy or electronic evidence.

23 Other issues to discuss may include whether the prospective, current or former employee that filed the claim, referred to as the "complainant," suffered an adverse employment action and if similarly-situated comparator employees outside of the alleged protected class were treated more favorably by the business than the complainant. Typically, in the early stages, a complainant's protected status may not be subject to a great deal of attention but counsel should ensure due diligence is performed on this issue to ensure that a basic statutory coverage and other defenses, such as timeliness, are preserved from the start. *See e.g.*, *Masri, v. Labor and Ind. Rev. Comm'n*, 2014 WI 81, ¶ 60 ("Wis. Stat. § 146.997 applies only to employees, a category that does not include interns [like Masri] who do not receive compensation or tangible benefits"); *see also* Wis. Stat. § 111.39(1) ("The department may receive and investigate a complaint charging discrimination, discriminatory practices, unfair honesty testing or unfair genetic testing in a particular case *if the complaint is filed with the department no more than 300 days after the alleged discrimination, unfair honesty*

testing or unfair genetic testing occurred.") (emphasis added).

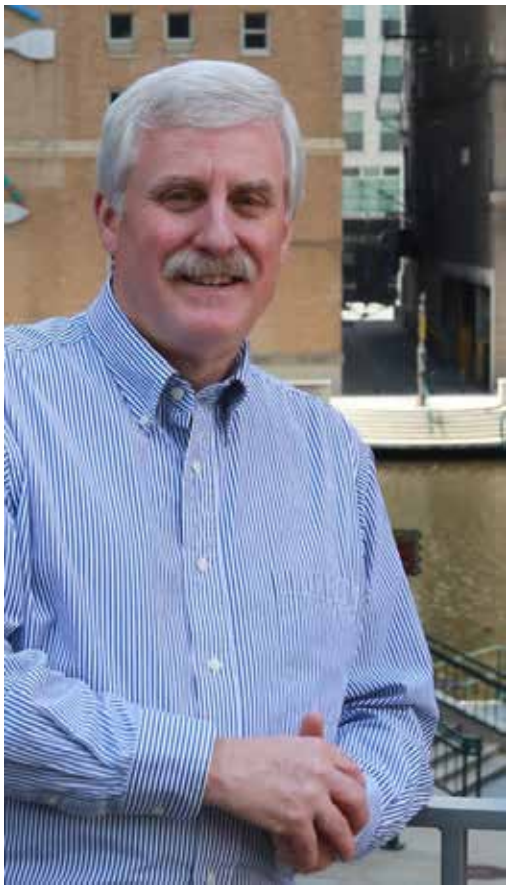
24 "Reserve — an amount of money earmarked for a specific purpose. … Loss reserves are estimates of outstanding losses, loss adjustment expenses (LAEs), and other related items. Self-insured organizations also maintain loss reserves." Insurance Definitions – Reserve, International Risk Management Institute, Inc., available at: https://www.irmi.com/term/insurance-definitions/reserve (last visited Feb. 10, 2020).

25 *See* Executive Summary, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, available at: https://www.eeoc.gov/eeoc/plan/sep-2017.cfm (last visited Feb. 10, 2020).

26 As an example, in a typical disability discrimination claim in which a complainant alleges discrimination due to a back injury from a car accident, the layered list of defenses may include that the business was not aware of the complainant's injury; the complainant was not disabled and/or did not have a permanent disability; the complainant was provided with reasonable accommodation; the complainant did not suffer an adverse employment action; and, regardless of the foregoing, the business had one or more legitimate non-discriminatory, non-retaliatory reasons for its employment-related decisions with regard to the complainant, among other defenses.

Mathie Mediation Services LLC

Call: (414) 585-0650
Email: jmathie@mathiemediation.com



Jim Mathie established Mathie Mediation Services in 2016. Since devoting his entire practice to mediation, hundreds of attorneys have retained his services to mediate their disputes. Jim's four-office downtown Milwaukee suite provides ample space for any mediation. Jim also travels throughout Wisconsin – at no travel expense – to mediate cases. So, if it works best to have a mediation where you are, Jim will accommodate.

Before mediating fulltime Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a plaintiff personal injury attorney and in-house counsel for a major insurer. He is a past president of WDC.

Mathie Mediation Services LLC
757 North Water Street, Suite 350
Milwaukee, WI 53202

A Review of the Superior Knowledge Rule in Wisconsin: How it Works, Who it Applies to, and How to Defend Against It

by: Ian Hackett

I. Introduction

In 2015, the Wisconsin Supreme Court concluded in *Dakter v. Cavallino*[1] that the jury was permitted to consider the defendant's training and knowledge as a "professional truck driver" without holding him to a heightened standard of reasonable care. The Wisconsin Supreme Court, in explaining their decision, held that the jury instruction did not permit the jury to hold the defendant to a heightened standard because, as the defendant was engaged in a profession or trade at the time of the accident, he was to have exercised the knowledge and skill "that a reasonable member of that profession or trade would exercise under the same or similar circumstances" (the "superior knowledge rule").[2] But do these considerations effectively hold a truck driver to a standard of care higher than that of other drivers? While the superior knowledge rule does not expressly create a heightened standard of care, it seems to have that effect.

This article analyzes the origins of the superior knowledge rule in Wisconsin, explains who the rule is applicable to, and examines where the superior knowledge rule fits between ordinary and professional negligence.

II. *Dakter v. Cavallino*

In May 2008, Ronald Dakter ("Dakter") was driving northbound on Highway 80 in Juneau County with his wife Kathleen when he approached the highway's intersection with Tilmar Street. Dakter put his turn signal on to turn left, and stopped.[3] Dale Cavallino ("Cavallino") was driving a semi-trailer truck southbound on Highway 80 and intended to continue straight.[4] Dakter attempted to turn left onto Tilmar Street and collided with Cavallino's semi-trailer truck.[5] Dakter filed suit against Cavallino, claiming that Cavallino's negligence caused the collision.[6] The judge gave the following negligence instruction:

> At the time of the accident, the defendant, Dale Cavallino was a professional truck driver operating a semi tractor-trailer pursuant to a commercial driver's license issued by the State of Wisconsin. As the operator of a semi tractor-trailer, it was [the defendant's] duty to use the degree of care, skill, and judgment which a reasonable semi truck driver would exercise in the same or similar circumstances having due regard for the state of learning, education, experience, and knowledge possessed by semi truck drivers holding commercial driver's licenses. A semi truck driver who fails to conform to the standard is negligent. The burden is on the plaintiff to prove that [the defendant] was negligent.

The jury found that Cavallino was 65% causally negligent and awarded more than $1 million in damages.[7] Cavallino challenged the verdict, claiming the jury instruction created a heightened standard of care that misstated the law and misled the jury. His post-verdict motions were denied.[8]

Cavallino appealed and, on review, the court of appeals also denied his request for a new trial. The appeals court acknowledged that the jury could have misinterpreted the instruction as creating a higher standard of care for semi-truck drivers as opposed to other drivers, but ultimately ruled that any error was not prejudicial to Cavallino's case.[9]

The Wisconsin Supreme Court considered the following when analyzing the truck driver negligence instruction's application in *Cavallino*: (1) the negligence principles of the superior knowledge rule and the profession or trade principle; (2) the applicability of those negligence principles to the defendant; (3) whether the truck driver negligence instruction misstated the law; and (4) whether the truck driver negligence instruction, as part of the jury instructions as a whole, was misleading.[10]

III. The Superior Knowledge Rule

The principles of negligence are important to understanding the superior knowledge rule. "Negligence is the failure to exercise ordinary care under the circumstances, that is, the failure to exercise 'that degree of care which under the same or similar circumstances the great mass of mankind would ordinarily exercise.'"[11] The standard of ordinary care is objective; it is the care that would be exercised by a reasonable actor under the circumstances.[12]

The superior knowledge rule allows for the consideration and addition of any relevant special knowledge or skill a party may have into the ordinary care framework.[13] "If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person."[14]

a. *Osborne*: The Inception of the Superior Knowledge Rule in Wisconsin

Osborne v. Montgomery[15] is attributed with the adoption of the superior knowledge rule in Wisconsin. In *Osborne*, the plaintiff, a 13-year old boy who was employed by the Wisconsin State Journal to run errands, was returning to his place of employment on a bicycle.[16] As he was travelling north on Pinckney Street, the defendant's car stopped, and as he opened the door, it made contact with the bicycle, throwing the plaintiff to the ground.[17] The jury found the defendant negligent and assessed the plaintiff's damages at $2,500. The defendant appealed, contending that the plaintiff was contributorily negligent, the damages assessed by the jury were excessive, and the court erred in its instructions to the jury.[18] The court found that the jury instructions did not "[afford] the jury such a knowledge of the law as will enable it in that case to reach a just result,"[19] and offered the following as a more accurate presentation of the law of negligence:

> Every person is negligent when, without intending to do any wrong, he does such an act or omits to take such a precaution that under the circumstances present he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm. In determining whether his conduct will subject the interests of another to an unreasonable risk of harm, a person is required to take into account such of the surrounding circumstances as would be taken into account by a reasonably prudent person and possess such knowledge as is possessed by an ordinarily reasonable person and to use such judgment and discretion as is exercised by persons of reasonable intelligence and judgment under the same or similar circumstances.[20]

The court went on to state that this proposed instruction would not apply where the actor is a child or an insane person.[21] Further, "[if] the actor in a particular case in fact has superior perception or possesses superior knowledge, he is required to exercise his superior powers in determining whether

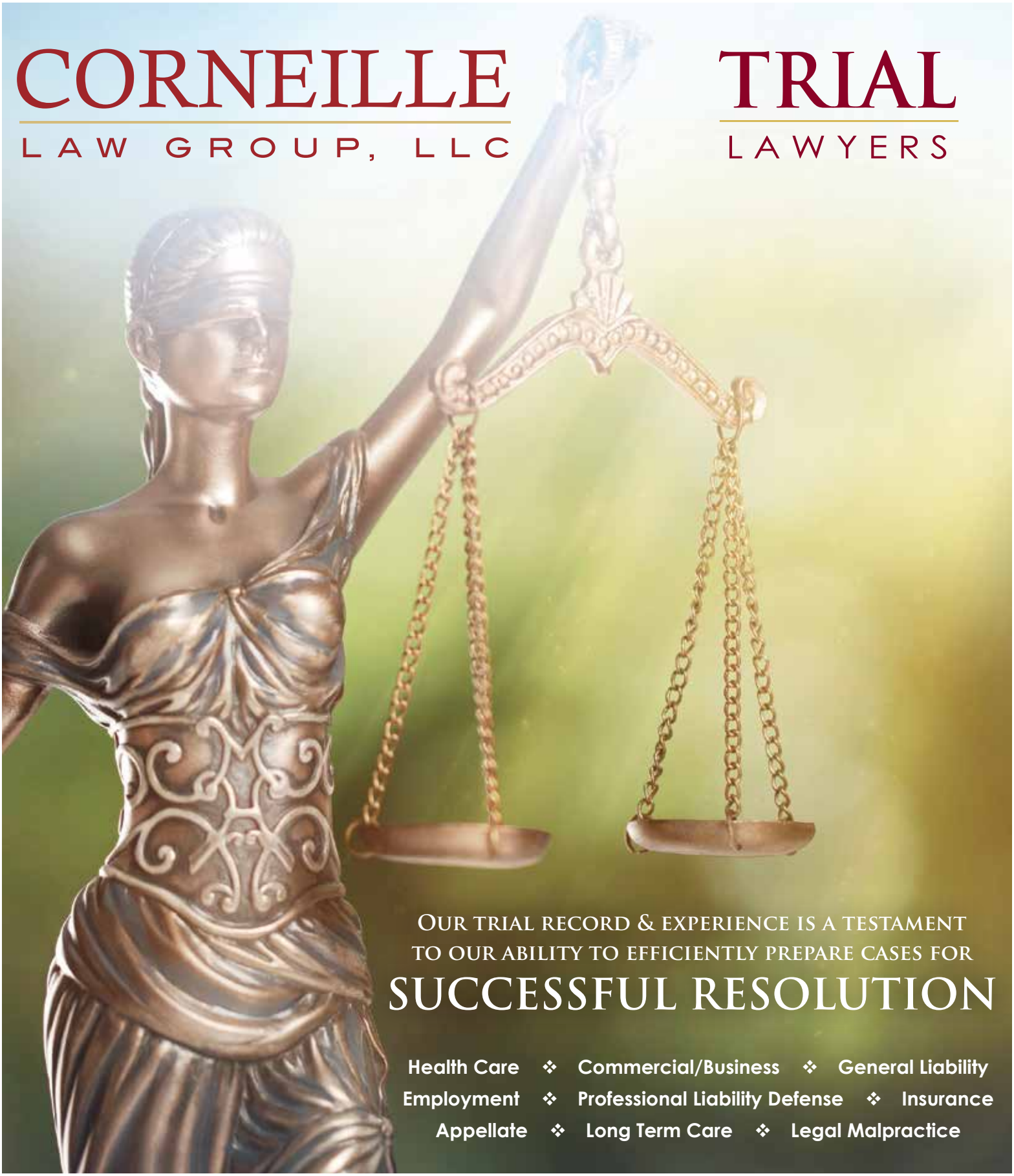
S-E-A™

Know.

Celebrating 50 years of finding the truth. The truth is, being an industry leader is never easy. In our 50 years, S-E-A has pretty much done it all. Forensic engineering and investigation. Vehicle testing and safety. Consumer product testing and health sciences. Just to name a few. And we do it all with the best talent and technology in the business. So, yeah. We'll blow out some candles. And we'll eat some cake. Then we'll get back to working on the next 50 years.

50TH ANNIVERSARY 1970 – 2020

+1.800.597.5084 | SEAlimited.com



GREEN BAY | 615 S. Monroe Avenue | Green Bay, WI 54301 | P 920.884.2312 | F 920.884.2381

MADISON | 7618 Westward Way | Suite 100 | Madison, WI 53717 | P 608.662.1180 | F 608.662.1181

www.corneillelaw.com

or not his conduct involves an unreasonable risk of injury to the interests of another, *so the instruction would not be applicable to such a case*."[22] (Emphasis added.) The *Dakter* court left out the emphasized section of that statement when they cited the *Osborne* decision.[23]

It is important to note this omission by the *Dakter* court because it would appear that the court in *Osborne* never laid out a superior knowledge rule. Rather, the court was seemingly distinguishing those with superior knowledge as not being held to the same ordinary care standard as the general population. Superior knowledge and skill increases the standard of care owed to others. So, one could argue, *Osborne* never adopted the superior knowledge rule as we understand it today because the *Osborne* court saw superior knowledge or skill as characteristics that require a heightened standard of care.

b. *Dakter* and the Application of the Superior Knowledge Rule

The *Dakter* court found *Osborne* to adopt the superior knowledge rule regardless of the actual holding of *Osborne* and concluded that an actor with special knowledge or skill meets the standard of ordinary care by employing that special knowledge or skill.[24] Said differently, the actor's superior knowledge is one of the "circumstances" that a reasonable person would use in dealing with a recognizable risk with ordinary care. The court concluded that it is right to tell a jury that a reasonable person will use the relevant special knowledge he has, but not right to tell the jury that he is held to a higher standard of care because of this relevant special knowledge.[25]

The *Dakter* court was not convinced by Cavallino's arguments that the superior knowledge rule did not apply to him, concluding that "the conduct of a semi-trailer truck driver should be assessed by reference to the conduct of a reasonable person with the special competence required of semi-trailer truck drivers – not by reference to the conduct of a reasonable, ordinary driver."[26] To reach this conclusion, the Wisconsin Supreme Court observed that Cavallino was required to undergo specialized testing and obtain a specialized license, and that these demonstrate his special knowledge and skill "necessary to safely operate a semi-trailer truck."[27] The Wisconsin Supreme Court also cited to numerous Wisconsin statutes and federal regulations to show the qualifications, training, and knowledge required to operate a commercial motor vehicle.

As it stands today in Wisconsin, the superior knowledge rule permits a jury to consider the advanced training or knowledge that a party may have as part of that party's duty to act as a reasonable person under the circumstances. It is important to note that, while the jury can consider the party's advanced training or knowledge, such training and knowledge does not raise the party's standard of care to a professional standard.

IV. Profession or Trade Principle

In coming to the conclusion that a semi-trailer truck driver with a commercial driver's license qualifies as someone with superior knowledge or skill, the *Dakter* court sought to distinguish between the superior knowledge rule and the "profession or trade principle," as they are often conflated with one another.[28]

The profession or trade principle holds that actors engaged in a profession or trade "must exercise the knowledge and skill that a reasonable member of that profession or trade would exercise under the same or similar circumstances."[29] The Wisconsin Supreme Court cited to various Wisconsin pattern jury instructions applicable to different professions and trades to "illustrate the principle that a person engaged in a profession or trade must act commensurate with the knowledge and skill a reasonable member of that profession or trade possesses."[30] The *Dakter* Court used the building contractors pattern jury instruction as an example:

> A building contractor has a duty to exercise ordinary care in the construction or remodeling of a

> building. This duty requires such contractor to perform work with the same degree of care and skill and to provide such suitable materials as are used and provided by contractors of reasonable prudence, skill, and judgment in similar construction.[31]

The *Dakter* court noted that while the superior knowledge rule and the profession or trade principle are distinct doctrines, there are instances, such as the matter before them, where both work in combination.[32] However, the court held that even though both standards apply, neither doctrine sets forth a heightened standard of care.[33]

Cavallino first asserted that neither the superior knowledge rule nor the profession or trade principle apply to him because "all users of the roadway have the same duty of ordinary care regardless of their driving experience or skills."[34] Cavallino further argued that the profession or trade principle applies only in professional malpractice cases or cases of professional negligence. The profession or trade principle should only apply to situations where the actor is "providing a highly specialized professional service to the plaintiff that involves a unique standard of care," and that semi-trailer truck driving cannot be classified as a profession in that vein.[35]

The truck driver negligence instruction required the jury to consider Cavallino's special knowledge or skill as a "*professional* truck driver …"[36] (emphasis added). The Wisconsin Supreme Court saw this language as incorporating both the superior knowledge rule and the profession or trade principle.[37] However, Cavallino argued that labeling him as a "professional truck driver" applied a heightened standard of care – a professional standard of care. The framework for defining "professional" for the application of a professional standard of care in Wisconsin has been laid out in *Racine County v. Oracular Milwaukee, Inc*.[38]

a. The *Oracular* Framework for Determining What Qualifies as a "Profession"

The Court in *Oracular* was tasked with deciding whether computer software developers are professionals for the purposes of a contract dispute between Racine County and Oracular. The need to label a person a professional is "part and parcel of a 'professional malpractice' action."[39] Tagging or describing an actor as a professional adds to the burden of the party seeking to be made whole.[40] The court of appeals concluded that computer consultants were not professionals by using eight total characteristics, six from *Hospital Computer Systems, Inc. v. Staten Island Hospital*, and two from *Chase Scientific Research*, to serve as a template to measure whether an occupation is a "profession"[41]:

> (1) A requirement of extensive formal training and learning; (2) admission to practice by a licensing body; (3) a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace; (4) a system of discipline for violating the code of ethics; (5) a duty to subordinate financial gain to social responsibility; and (6) an obligation of all members to conduct themselves as members of a learned, disciplined and honorable occupation, even in nonprofessional matters; (7) a professional relationship is one of trust and confidence, carrying with it a (8) duty to counsel and advise clients.[42]

The court in *Hospital Computer Systems, Inc.* further explained that professionals may be sued for malpractice "because the higher standards for care imposed on them by their profession and by state licensing requirements engenders trust in them by clients that is not the norm of the marketplace. *When no such higher code of ethics binds a person, such trust is unwarranted. Hence, no duties independent*

of those created by contract or under ordinary tort principles are imposed on them."[43] (Emphasis added.) The court of appeals in *Chase Scientific Research* observed that the term "professional" is "commonly understood to refer to the learned professions, such as medicine and law."[44]

The *Oracular* court thus held that the occupation of computer consultant is not a "profession" under this framework because the State of Wisconsin does not license computer consultants nor are computer consultants governed by any enforceable code of ethics.[45]

b. How *Dakter* Differs from *Oracular*

In observing the framework and holding of *Oracular*, it is noteworthy that the *Dakter* Court concluded both that driving a semi-trailer truck "clearly … constitutes a profession or trade within the context of the profession or trade principle,"[46] and that labeling Cavallino as a "professional truck driver" in the jury instruction was not misleading.

In concluding that semi-trailer truck driving clearly constitutes a profession or trade, the Wisconsin Supreme Court turned again to pattern jury instructions to demonstrate that, in Wisconsin, the profession or trade principle clearly applies not only to highly specialized professionals, but more broadly "to those engaged in occupations that require the exercise of 'acquired learning, and aptitude developed by special training and experience.'"[47] The profession or trade principle governs an actor in the performance of their occupation "so long as reasonably performing that occupation requires acquired learning and aptitude developed by special training and experience."[48]

This definition of a "profession" seems to conflict with the definition previously adopted by the *Oracular* framework. Under the *Oracular* profession framework, a semi-trailer truck driver arguably does not meet the definition of a "professional" despite the extensive training and admissions to a licensing body because there is a lack of a code of ethics that imposes higher standards than other drivers and a lack of a professional relationship of trust and confidence with a duty to counsel and advise clients. While the *Dakter* court said these considerations do not formally raise the standard of care beyond ordinary care, its decision could have that unintended effect.

V. The Truck Driver Negligence Instruction was Not Found to be Misleading Because the Overall Meaning of the Totality of the Negligence Instructions was a Correct Statement of the Law

While a circuit court has broad discretion in crafting jury instructions, the court is required "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence."[49] Jury instructions are reviewed as a whole to determine whether "the overall meaning communicated by the instructions was a correct statement of law…."[50] Erroneous jury instructions warrant reversal and a new trial only when the error is prejudicial.[51]

Cavallino contended that, even if the truck driver negligence instruction did not technically misstate the law, the instruction "had the practical effect of telling the jury that [the defendant] had a higher standard of care because he held a [commercial driver's license]," which likely misled the jury and was therefore prejudicial.[52] The *Dakter* court disagreed. The Court found that the truck driver negligence instruction was not a stand-alone instruction[53] and that portions of the jury instructions, especially portions immediately preceding and immediately following the truck driver negligence instruction, set forth that the standard of ordinary care applies to all drivers.[54] Jury instructions are reviewed as a whole "to determine whether they full and fairly convey the applicable rules of law to the jury,"[55] and according to the Wisconsin Supreme Court, these jury instructions when read as a whole conveyed the clear message that the standard of ordinary care applied to both parties.[56]

The Wisconsin Supreme Court did acknowledge that the truck driver negligence instruction

could perhaps have been worded more clearly.[57] Previously, the court of appeals had acknowledged that, while the truck driver negligence instruction was not incorrect, "a jury could possibly have misinterpreted the instruction as imposing a higher standard of care on semi-trailer truck drivers than that applied to other drivers…."[58] The law does not require perfection, however, only that the instruction's overall meaning communicated a correct statement of law.[59] Neither court found any potential error in the jury instruction to be prejudicial.

VI. Where Does the Law Stand?

Wisconsin defense attorneys are left to try to navigate between the superior knowledge rule and professional negligence. On one side, the *Oracular* ruling lays out an eight-characteristic framework to ascertain whether an occupation is a "profession" worthy of imposing a higher standard of care and affirmatively states that computer consultants "are not professional as that term is used in the tort of professional negligence."[60] On the other side, the *Dakter* majority concluded that operating a semi-trailer truck is a "profession," that the semi-trailer truck driver's "profession" and superior knowledge were to be considered as part of the characteristics of his standard of ordinary care, and that labeling the semi-trailer truck driver as a "professional" was not prejudicial or misleading.

How do we reconcile these competing ideas? Chief Justice Roggensack's concurrence[61] in *Dakter* may provide an answer. Chief Justice Roggensack concluded that the circuit court's special skills instruction "was erroneous because it incorrectly stated the law," but that the error was harmless.[62] Chief Justice Roggensack cited to *Oracular* in her concurrence, and found that the special skills instruction given "implies that there is a semi-truck driver standard of care and that Cavallino was obligated to conform his conduct to that standard of care, which differs from ordinary care."[63] Specifically, Chief Justice Roggensack took issue with the part of the instruction that directed that it was Cavallino's "duty to use the degree of care, skill and judgment which reasonable semi truck drivers would exercise in the same or similar circumstances," which she deems to be an incorrect statement of law that establishes a semi-truck driver standard of care.[64]

Chief Justice Roggensack also concluded that the circuit court "erroneously exercised its discretion in giving the special skills instruction" because the superior knowledge and skills doctrine only applies "to persons taking actions in a venue where special skills are required by that venue."[65] She cites to examples such as physicians, lawyers, pharmacists, and dentists to illustrate this limited use of the superior knowledge and skills doctrine; venues where "the circumstances that underlie the standard of ordinary care take into account the similarity of experience among those who work in the exclusive venue where the particularized superior knowledge and skills are required."[66] Both professional and lay vehicle operators operate in the same venue, *i.e.*, the shared roadway. As such, according to Chief Justice Roggensack, both are subject to the same ordinary care standard and are to act as a reasonable person would under the circumstances without any modification to the circumstances of ordinary care based on the type of vehicle operator.[67] One standard of care applies uniformly to "reflect the nature of the shared venue, a public roadway."[68]

VII. Conclusion

There are inconsistencies in the law concerning what constitutes a profession and the applicable standard of care owed by persons in that profession. After the *Dakter* decision, you can call someone a "professional" and use their superior knowledge as a circumstance to consider without assigning them a higher standard of care. However, the *Oracular* decision states that labeling someone as a professional requires them to be held to a heightened standard of professional care. This inconsistency means that, as defense counsel, you must pay special attention to the proposed jury instructions and how they could reflect against your client. Be cautious about allowing a jury instruction to refer to your client as a "professional" unless they satisfy

the eight-characteristic rubric outlined in *Oracular*. Both the court of appeals and the supreme court noted that the truck driver negligence instruction in *Dakter* at best could have been worded more appropriately, and at worst could have misled the jury to hold Cavallino to a heightened standard of ordinary care.

Author Biography:

Ian Hackett holds bachelor's degrees in Operations & Supply Chain Management and International business from Marquette University and earned his J.D. from Marquette University in 2019. Ian has experience working in the defense of bodily injury and property damage claims for insurance companies.

References

1 *Dakter v. Cavallino*, 2015 WI 67, 363 Wis. 2d 738, 866 N.W.2d 656.
2 *Id.* at ¶ 51.
3 *Id.* at ¶ 15.
4 *Id.* at ¶ 17.
5 *Id.* at ¶ 19.
6 *Id.* at ¶ 20.
7 *Id*. at ¶ 2.
8 *Id.* at ¶¶ 3-7.
9 *Id*. at ¶ 9.
10 *Id.* at ¶¶ 34-37.
11 *Id.* at ¶ 40 (citing *Osborne v. Montgomery*, 203 Wis. 223, 231, 234 N.W. 372 (1931)).
12 *Id.* at ¶ 41.
13 *Id*.
14 Restatement (Third) of Torts, § 12, which derives in part from Restatement (Second) of Torts § 289(b), comment m, which explains: "*Superior qualities of actor.* The standard of the reasonable man requires only a minimum of attention, perception, memory, knowledge, intelligence, and judgment in order to recognize the existence of the risk. If the actor has in fact more than the minimum of these qualities, he is required to exercise the superior qualities that he has in a manner reasonable under the circumstances. The standard becomes, in other words, that of a reasonable man with such superior attributes."
15 *Osborne*, 203 Wis. 223.
16 *Id.*
17 *Id.*
18 *Id.* at 374.
19 *Id.* at 379.
20 *Id.* at 379-80.
21 *Id*. at 380.
22 *Id.* (citing Restatement of the Law of Torts, American Law Institute, § 170).
23 *Dakter*, 2015 WI 67 at ¶47.
24 *Id.*
25 *Id.* at ¶ 60 (citing 1 Dan B. Dobbs et al., *The Law of Torts* § 132, at 416-17).
26 *Id.* at ¶ 78.
27 *Id.* at ¶ 71.
28 *Id.* at ¶ 50.
29 *Id*. at ¶ 51; *see also Kerkman v. Hintz*, 142 Wis. 2d 404, 419-20, 418 N.W.2d 795 (1988) (holding that a chiropractor must exercise the degree of care, diligence, judgment, and skill which is exercised by a reasonable chiropractor under like or similar circumstances).
30 *Id*. at ¶ 52.
31 Wis. JI-Civil 1022.4.
32 *Dakter*, 2015 WI 67 at ¶ 59 ("An actor engaged in a profession or trade who has knowledge or skill superior to that of a reasonable person within that profession or trade must employ such knowledge or skill in order to meet the standard of ordinary care").
33 *Id.* at ¶ 61.
34 *Id.* at ¶¶ 66-68.
35 *Id.* at ¶ 68.
36 *Id.* at ¶ 65.
37 *Id.*
38 *Racine Cty v. Oracular Milwaukee, Inc.*, 2009 WI App 58, 317 Wis. 2d 790, 767 N.W.2d 280.
39 *Id.* at ¶ 24.
40 *Id.*
41 *Id.* at ¶ 32.
42 The first six characteristics are from *Hosp. Computer Sys., Inc. v. Staten Island Hosp.*, 788 F.Supp 1351, 1361 (D.N.J 1992) and the last two characteristics are from *Chase Scientific Research v. NIA Group, Inc.*, 725 N.Y.S.2d 592, 749 N.E.2d 161, 166 (2001).
43 *Hosp. Comp. Sys., Inc.*, 788 F.Supp at 1361.
44 *Chase Scientific Research*, 749 N.E.2d at 166.
45 *Oracular*, 2009 WI App 58 at ¶ 32.
46 *Dakter*, 2015 WI 67 at ¶ 82.
47 *Id.* at ¶ 80.
48 *Id.* at ¶ 81.
49 *Oracular*, 2009 WI App 58 at ¶ 31.
50 *Id.* at ¶ 32.
51 *Id.* at ¶ 33.
52 *Dakter*, 2015 WI 67 at ¶¶ 85-86.
53 *Id.* at ¶ 87
54 *Id.* at ¶ 89-95.
55 *Id.*
56 *Id.* at ¶ 96.
57 *Id.* at ¶ 97.
58 *Id*. at ¶ 89; *see also Dakter v. Cavallino*, 2014 WI App 112, ¶ 44, 358 Wis. 2d 434, 856 N.W.2d 523 ("[W]e see at least some danger that the truck driver instruction could have been interpreted by the jury to suggest that [the defendant] should be held to a different standard of care than other drivers because he is a professional truck driver…. If understood this way, it would state the legal doctrine

incorrectly.”).

59 *Dakter*, 2015 WI 67 at ¶ 97.

60 *Oracular*, 2009 WI App 58 at ¶ 25.

61 *Dakter*, 2015 WI 67 at ¶ 99.

62 *Id.*

63 *Id.* at ¶ 111.

64 *Id.* at ¶ 112.

65 *Id.* at ¶ 113.

66 *Id.*

67 *Id*. at ¶ 114.

68 *Id.*

WRECKED CARE

It might sound cliché, but our claims people really do care and love making a difference every day. It's not surprising we keep the best people on staff—we are consistently named a best workplace in the nation and frequently honored as a top employer in insurance and financial services. Our customers love us too! We have a 95 percent customer claims satisfaction rate* and offer a single point of contact through the entire claim.

Together, we rebuild shattered lives.
Join our team! acuity.com/CLM

acuity®
INSURANCE

* Based on claimant surveys, December 2018

Crum & Forster Specialty Insurance Company v. DVO: The Importance of Critical Reading and Precise Drafting

by: Monte E. Weiss, Weiss Law Office, S.C.

I. Introduction

We have all been there. We receive an insurance policy, either from the client or opposing counsel. The policy looks generally familiar. We glance at the insurance agreement to see if the facts alleged support a claim falling within the initial grant of coverage. We then quickly jump to the exclusions to see if the claim is excluded. Then, we shift our attention to the endorsements to see if one or more of them apply. From here, we reach a preliminary opinion as to coverage.

The fact that we constantly receive, and review policies makes the task of reading them critically even harder. Whenever we are asked to review a matter for coverage, however, it is critically important to guard against any tendency to assume that the policy's provisions are effective – especially when it comes to a consideration of the impact of endorsements on the coverage analysis. The safer course is to view the policy with a critical eye to see if there are potential issues. Whether you represent the carrier, the policyholder, or the claimant, a careful evaluation of the policy will allow you to provide the best advice to your client.

While there are many "standard" endorsements that have been construed by courts around the country, there are other endorsements that were drafted by or for a carrier for application to a specific policy. Sometimes these policy endorsements are well written and sometimes they are not.

The case of *Crum & Forster Specialty Ins. Co., v. DVO*[1] is a good example of the impact of a poorly written endorsement and the need to be a critical reader of insurance policies. At issue in *Crum & Forster* was the impact of a breach of contract exclusion contained in an endorsement that purported to preclude coverage for any liability of an insured for a breach of its contracts.

II. Background

DVO designs and installs anaerobic digesters.[2] DVO entered into a contract to design and build a digester and related equipment with WTE-S&S AG Enterprises, LLC ("WTE"). By way of background, an anaerobic digester "is designed to take manure produced at a dairy farm, and run it through a digester, where it is broken down into biogases, solid wastes and liquid wastes."[3] The produced biogas then flows into the digester through pipes to a generator and engine unit (a gen set) to produce energy.[4] Some of the energy produced is used to power the digester and excess energy is sold to a power company. In addition to these benefits, a digester owner can also receive revenue in the form of carbon credits which are monetized.[5]

DVO entered into a design-build agreement with "WTE"[6] which consisted of essentially two documents: (1) a Standard Form Agreement between Owner and Design/Builder on the Basis of a Stipulated Price ("Standard Form Agreement") and (2) the Standard General Conditions of the Contract Between Owner and Design/Builder.[7]

The Standard Form Agreement required DVO to provide professional services associated with the anaerobic digester, engineering, construction and

installation of the digester heating system, gas mixing system, and building interior plumbing and electrical work, digester startup, along with project management and administration.[8] The digester was designed and built along with the other necessary buildings and components. DVO was not the actual builder of the digester nor did it serve as the general contractor for the project.[9]

After the project's completion, punch lists were submitted to DVO containing claims of alleged construction and design errors associated with the project. At least one of the punch lists contained an estimate of the amount of the damages that the digester owner claimed resulted from DVO's breach of its contract.[10]

In August of 2013, WTE filed suit against DVO in state court for breach of contract.[11] The lawsuit alleged that DVO breached the contract for the construction of the anaerobic digester as it "did not properly design substantial portions of the structural, mechanical and operational systems of the anaerobic digester," which resulted in significant damages to WTE.[12] WTE sought over $2 million in damages and fees.[13] DVO denied the allegations and in the end, after trial, DVO was proven correct.[14]

DVO had purchased a package insurance policy that provided for primary and excess coverage from Crum & Forster.[15] The "package" included a Commercial General Liability Coverage Part, a Contractors Pollution Liability Coverage Part, an Errors and Omissions Liability Coverage Part, a Third Party Pollution Liability Coverage Part, an Onsite Cleanup Coverage Part, and excess liability coverage.[16]

Under the terms of the Errors and Omissions Policy, Crum & Forster had a duty to defend DVO as a result of "an act, error or omission in the rendering or failure to render" "functions performed for others by you … that are related to your practice as a consultant, engineer, architect, surveyor, laboratory or construction manager."[17] WTE's Complaint alleged that DVO was liable for damages caused by DVO's failure to "fulfill its design duties, responsibilities and obligations" in creating the anaerobic digester.[18] Designing and constructing the anaerobic digester are functions that fell within the definition of "professional services."[19] Professional services included engineering and construction management activities.[20] As an environmental engineering firm, DVO performed these activities for WTE. DVO's alleged failure to meet design requirements and alleged insufficient construction management met the definition of a "wrongful act."[21]

DVO tendered its defense to Crum & Forster. Crum & Forster initially defended DVO subject to a reservation of its rights.[22] While the lawsuit was still pending, however, Crum & Forster advised DVO that it would stop providing a defense.[23] On December 31, 2015, Crum & Forster unilaterally stopped paying for DVO's defense.[24]

Shortly thereafter, WTE filed for bankruptcy. [25] The WTE lawsuit was eventually transferred to the United States Bankruptcy Court for the Northern District of Illinois as an adversary proceeding.[26] The bankruptcy court held an eight day trial that resulted in an award in favor of WTE in the amount of $65,961.86.[27] The bankruptcy court later awarded attorneys' fees in favor of WTE in the amount of $198,000.[28]

During the pendency of the bankruptcy court's trial, Crum & Forster commenced a declaratory judgment action in the United States District Court seeking a declaration that it had no duty to defend or indemnify DVO under its Errors and Omissions Policy.[29] In particular, Crum & Forster argued that WTE's only claim against DVO was for a breach of contract and its policy contained an exclusion in an endorsement which excluded coverage for damages based upon or arising out of any breach of contract. Crum & Forster argued that this exclusion precluded any obligation to defend or indemnify DVO.[30] DVO opposed Crum & Forster's position, contending that the exclusion was broader than the grant of coverage thereby depriving DVO of any coverage under the policy.[31]


AMERICAN FAMILY
INSURANCE
Insure carefully, dream fearlessly.

III. The District Court's Decision

The breach of contract exclusion was the issue before the District Court. The exclusion as set forth in the policy provided:

> This Policy does not apply to "damages", "defense expenses", "clean up costs", or any loss, cost or expense, or any "claim" or "suit" […] Based upon or arising out of [a] Breach of contract, whether express or oral, nor any "claim" for breach of an implied in law or an implied in fact contract, regardless of whether "bodily injury", "property damage", "personal and advertising injury" or a "wrongful act" is alleged.[32]

According to its terms, the exclusion excused Crum & Forster from defending and indemnifying DVO for any damages, or defense costs, clean up costs, or any other loss, cost, expense, claim or suit that was based upon or arose of out any type of contract, regardless of the offense or damage alleged.

Shortly after the commencement of the declaratory judgment action, Crum & Forster brought a motion for summary judgment on the efficacy of the breach of contract exclusion. The parties agreed that WTE's Complaint fell within the initial grant of coverage.[33] The parties also agreed that *if* the exclusion was valid, then it would apply to preclude coverage under the policy.[34] Since the claim fell within the initial grant, the next step under Wisconsin's coverage analysis was to examine the language of the exclusion to determine if it precluded coverage.[35]

Crum & Forster contended that the exclusion was valid as the WTE Complaint alleged that DVO breached its contract and WTE sustained damages as a consequence of that breach. DVO contended that the language of the exclusion was so broad as to preclude coverage under the errors and omissions policy, thus making it illusory coverage.

According to DVO, the Errors and Omissions policy obligated Crum & Forster to defend and indemnify DVO for any wrongful acts as that term was defined in the Policy. A wrongful act was defined in the Policy to include a failure to render "professional services." The Policy defined "professional services" as "those functions performed for others by you or by others on your behalf that are related to your practice as a consultant, engineer, [or] architect."

As a professional architectural and engineering firm, DVO argued that it has to enter into contracts with its clients to perform its "professional services".[36] Errors and omissions policies are designed to protect professional service firms like DVO for wrongful acts. "Professional liability coverage for architects and engineers, often referred to as 'errors and omissions' coverage, provides insurance principally for economic injury caused by the professional's failure to perform his contractual duties properly."[37]

The WTE Complaint alleged that DVO breached its contract when it "did not properly design substantial portions of the structural, mechanical and operational systems of the anaerobic digester."[38] While couched in terms of a breach of contract claim, the WTE Complaint alleged facts of professional negligence. Under Wisconsin law, the focus of liability is not the label attached to the pleading, but rather the underlying facts.[39] Given this, DVO argued that regardless of the theory of liability, the facts alleged were of professional malpractice.

Since the exclusion purported to exclude coverage for "damages," "claims" or "suits," which are "based upon or arising out of" and any breach of any type of contract, DVO contended that the exclusion went too far. As written, the exclusion took away whatever coverage was afforded to DVO under the initial grant of coverage. After all, "arising out of" is broadly construed under Wisconsin law, requiring only some causal relationship between the injury and the event not covered.[40] Since all of DVO's work is performed pursuant to a contract, any damages that result because of any alleged failure of its professional services to meet the requisite standard of care would necessarily arise out of a "breach of [its] contract."[41]

Building upon this point, DVO pointed out that every failure to perform a professional contract is a professional act or omission.[42] Thus, there are no acts, errors or omissions that could occur that would not arise out of a breach of contract.[43] As such, there could never be coverage under the Errors and Omissions Policy because the act, error or omission would always arise out of a breach of its contract. Hence, DVO argued that the exclusion created illusory coverage.[44] Simply put, there could never be coverage for its errors and omissions under the policy as promised by Crum & Forster.

The District Court disagreed with DVO. The District Court felt that DVO's reading of the breach of contract exclusion was "too broad."[45] Rather, the District Court concluded that the breach of contract exclusion simply reflected Crum & Forster's intention to insure "DVO against liability it incurred to third parties for its negligent error or omissions" and not DVO's liability to "its own customers for failing to meet its contractual obligations."[46] In support of its decision, the District Court relied upon *General Casualty Company of Wisconsin v. Rainbow Insulators* for the proposition that breach of contract exclusions do not render errors and omissions policies "meaningless."[47]

Thus, the District Court held that to the extent the Crum & Forster Policy was called upon to indemnify DVO for liability claims by third parties, the policy would apply.[48] The District Court held that to the extent that Crum & Forster's Policy was called upon to indemnify DVO for claims by its clients that DVO failed to live up to its contractual obligations, the Policy would not apply.[49]

The District Court also addressed DVO's argument that the Policy should be reformed to provide coverage for the types of claims asserted in the WTE Complaint. The District Court noted that Wisconsin law holds that reformation is an extraordinary remedy – one that should be applied sparingly.[50] As a remedy, reformation would be applied to reform the policy to meet the reasonable expectations of the insured.[51]

Here, in order to meet the reasonable expectation of DVO, the District Court concluded that the exclusion would not be eliminated as requested by DVO, but rather, would remain. The District Court concluded that a reasonable insured, by reading the language of the breach of contract exclusion, would understand that liability for breaches of contracts is not covered under the Crum & Forster Policy. Since the WTE Complaint was for breach of contract, the reasonable insured would not expect the Policy to provide coverage.

IV. The Seventh Circuit Court of Appeals' Opinion

DVO appealed. The United States Court of Appeals for the Seventh Circuit reversed the District Court's grant of summary judgment and remanded the matter for a determination of DVO's reasonable expectations of coverage.[52]

The Seventh Circuit succinctly identified the pivotal issue: "whether the language in that breach of contract exclusion renders the exclusion broader than the grant of coverage, and therefore renders the coverage illusory."[53] To answer this question, the Seventh Circuit first examined the District Court's decision.

According to the Seventh Circuit, the District Court concluded that the exclusion eliminated coverage for contract-based claims against DVO by its clients but did not exclude coverage for claims by third parties against DVO. Central to the District Court's decision was its conclusion that irrespective of any contract, DVO had a duty to third parties to exercise reasonable care in executing its contracts and as such, a third party could sue DVO for injuries or damages in absence of a contract.[54] Under this circumstance, coverage would be afforded to DVO for third party claims.

The Seventh Circuit disagreed with the District Court as the language of the exclusion did not support its conclusion. According to the Seventh Circuit, had the exclusion's language been more precisely drafted, it might have been able to

Statewide Representation for Business & Insurance

MILWAUKEE OFFICE
311 E. Chicago St., Ste. 410
Milwaukee, WI 53202
Phone: 414-273-8550
Fax: 414-273-8551

GREEN BAY OFFICE
P.O. Box 11097
Green Bay, WI 54307
Phone: 920-770-4087
Fax: 920-544-4110

www.simpsondeardorff.com

Proud Sponsor of Wisconsin Defense Counsel

accomplish what the District Court concluded was the scope of the coverage under the Crum & Forster policy as limited by the exclusion. However, the language Crum & Forster did use in its policy was simply too broad to accomplish what the District Court concluded was the impact of the exclusion.

Because the exclusion contained the phrase "based upon *or arising out of,*" the scope of the exclusion necessarily encompassed claims other than those based upon contract. In order to trigger the exclusion's application, all that is necessary is that the "damages," "defense expenses," "clean up costs," loss, cost, expense, "claim" or "suit" be based upon or arise out of a breach of any type of contract, *i.e.*, a written, oral, or implied in fact or implied in law contract. If so, then the exclusion applied to bar coverage.[55]

Since the "arising out of" language was included in the exclusion, there need only be *some* causal relationship between the injury and the event not covered, and thus, the Seventh Circuit noted that claims of third parties would be precluded under the exclusion's application. As any of DVO's professional work would have to be performed pursuant a contract (even one implied by law), injuries or damages sustained by third parties would necessarily arise out of DVO's contractual breach with its client.[56] Thus, the Seventh Circuit concluded that the "breach of contract exclusion in this case rendered the professional liability coverage in the E&O policy illusory."[57]

The Seventh Circuit then addressed the reformation argument. DVO argued that the Policy was rendered illusory by the exclusion's impact, requiring reformation to be consistent with DVO's reasonable expectation of coverage. DVO argued that the exclusion should be stricken from the policy. The court noted that where a policy is to be reformed, the reformation must "meet an insured's reasonable expectation of coverage."[58]

In order to meet an insured's reasonable expectation of coverage, courts are to consider the intended purpose of the coverage purchased. As an errors and omissions policy, the policy's purpose is "to insure members of a particular professional group from liability arising out of the special risk such as negligence, omission, mistakes and errors inherent in the practice of the profession."[59] Accordingly, the Seventh Circuit concluded that the Policy must be reformed to meet DVO's reasonable expectations of coverage, arising out of negligence, omissions, mistakes and errors inherent in the practice of its profession.[60]

The Seventh Circuit remanded the case to the District Court for a determination of DVO's reasonable expectation of coverage under the Crum & Forster policy. In assessing this reasonable expectation, the focus on remand is to be on the reasonable expectation of coverage that was "upended by the breach of contract exclusion that rendered [the coverage] illusory."[61]

V. Takeaways

The takeaways from *Crum & Forster* are the need to carefully read a policy's language and to think about the precise language chosen to draft policy provisions. It would have been easy to simply read the exclusion and conclude that it barred breach of contract claims. Had the analysis stopped at that point, coverage would not have been afforded as DVO would not have contested Crum & Forster's position.

However, by considering the exclusion's exact language, in conjunction with the purpose of the policy and the intent of DVO in acquiring the policy, it became obvious that the exclusion "upended" DVO's reasonable expectation of coverage. As DVO performs its professional services through contracts, the broad scope of the exclusion took away the policy's promised coverage in the initial coverage grant – to defend and indemnify DVO for damages arising out of its wrongful acts – regardless of who asserted the claim.

As Judge Rovner pointed out, "The overlap between claims of professional malpractice and breach of contract is complete, because the professional

CRIVELLO CARLSON S.C.

ATTORNEYS

Milwaukee, WI
Eau Claire, WI
Madison, WI
Mukwonago, WI
Delafield, WI
Chicago, IL
Edwardsville, IL

Crivello Carlson, S.C. is a full-service litigation firm serving Wisconsin for the past 70 years. Its attorneys specialize in trial, appeal, mediation, and arbitration.

Ready to serve your Eau Claire and Northwestern Wisconsin legal needs.

For more information or to view our attorneys' biographies and qualifications, please visit our website.

www.crivellocarlson.com
414-271-7722

Cross Jenks Mercer & Maffei LLP

ATTORNEYS SINCE 1889

LET US SHOW YOU THE BENEFIT THAT A CENTURY OF INSURANCE DEFENSE EXPERIENCE AFFORDS.

For nearly a century, insurance defense has been the core of our business.

ATTORNEYS WAYNE MAFFEI AND NICOLE MARKLEIN
(608) 356-3981

malpractice necessarily involves the contractual relationship."[62] Since the exclusion barred coverage for all damages, defense expenses, clean up costs, loss, cost or expense, claims and suits that are based upon or arise out of the breach of any type of contract, including those imposed by law, the exclusion simply reached too far, rendering the errors and omissions policy illusory.

The Seventh Circuit hinted at the possibility that had the exclusion been more artfully drafted, it might have been able to accomplish its purpose: "If more narrow language was used, the district court's determination that third-party liability would still be covered might have merit."[63] Had the exclusion delineated between covering third party claims but not client-based contract claims, then perhaps the exclusion could have accomplished what the District Court believed was Crum & Forster's intent in drafting the exclusion. With the additional language clarification, the exclusion would not have been "broader than the grant of coverage."[64]

The more precisely drafted exclusion was highlighted in the *Rainbow Insulators* case that Crum & Forster relied upon as support for its argument that breach of contract exclusions are valid and enforceable.[65] In *Rainbow Insulators*, the errors and omissions policy at issue contained a breach of contract exclusion, but that exclusion was not as all-encompassing as the one contained in the Crum & Forster Policy.

The General Casualty policy exclusion provided "damages arising out of any .. [d]elay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms."[66] By its terms, the exclusion did not bar all coverage. Rather, as the *Rainbow Insulators* court noted, the exclusion applied only where the was a delay or failure to perform a contact by the insured AND the damages arose out of that failure.[67] If the damages arose out of a contract, but did not involve a delay or failure to perform a contract, the exclusion would not apply.[68] In the Crum & Forster Policy, however, there was no exception to the exclusion's reach: as long as a contract is involved or related to the event to be excluded, the exclusion barred coverage.

Precise drafting of an exclusion was also highlighted in *Great Lakes Bevs., LLC v. Wochinski*.[69] One of the policies addressed in *Great Lakes* was issued by AMCO Insurance Company. The AMCO policy contained a breach of contract exclusion that barred coverage for personal and advertising injury "[a]rising out of a breach of contract, except an implied contract to use another's advertising idea in your 'advertisement.'"[70]

Significantly, AMCO's exclusion contained an exception. The exclusion would not apply if the breach of contract arose out of "an implied contract to use another's advertising idea in your 'advertisement.'"[71] Thus, the exclusion was not all-encompassing – it did not bar all coverage for breach of contract claims. Rather, it carved out an exception for a certain class of contracts – those that arose out of "an implied contract to use another's advertising idea in your 'advertisement'.

Since the AMCO exclusion did not bar all coverage, AMCO's policy was not illusory – coverage was triggered under some circumstances. This is the distinction between AMCO's exclusion and the Crum & Forster's exclusion. All that was necessary for the Crum & Forster exclusion to apply is for DVO's liability – tort or contract - to be based upon or arise out of any breach of any type of contract. There was no exception. Since DVO's "professional services" would always be performed pursuant to a contract, even "claims" for negligence (read malpractice) will be with the ambit of the exclusion's application as DVO's "professional services" will always "arise out" of or be "based upon" any type of contract. It is this lack of exceptions to the exclusion's application that made the Crum & Forster professional errors and omissions policy illusory.

VI. Conclusion

Critical reading and precise drafting of insurance policies are necessary if the policies are to meet

the reasonable expectation of coverage. After all, courts will not bind a carrier to risks that were not contemplated and for which the carrier was not paid a premium.[72] Likewise, courts "will not rewrite the contract to create a new contract to release the insurer from a risk that it could have avoided through more foresighted drafting of the policy." [73]

Author Biography:

Monte E. Weiss, Case Western Reserve Univ., 1991, of Weiss Law Office, S.C., Mequon, practices primarily in the defense of bodily injury, property damage, and professional negligence claims for insurance companies and self-insured companies. In conjunction with this area of practice, he has drafted several personal lines insurance policies, including homeowner and automobile policies. He routinely represents insurance companies on insurance contract interpretation issues and is a frequent lecturer and author on insurance topics. He also represents policyholders dealing with coverage denials from their carriers. He is currently on the Board of Directors for the Wisconsin Defense Counsel and is the chair of the Insurance Law Committee and Amicus Committee. Attorney Weiss was counsel for DVO in Crum & Forster Spec. Ins. Co. v, DVO, and can be reached at via his firm's website at www.mweisslaw.net.

References

1 *Crum & Forster Specialty Ins. Co. v. DVO,* 939 F. 3d 852 (7th Cir. 2019).
2 *WTE-S&S AG Enters., LLC v. GHD, Inc.* (*In re WTE-S&S AG Enters., LLC*), 575 B.R. 397, 406 (Bank. N.D. Ill. 2017).
3 *Id.* at 406.
4 *Id.*
5 *Id.* at 407.
6 *Id*. at 409.
7 *Id*.
8 *Id.*
9 *Id.* at 417.
10 *Id*. at 411-12.
11 *WTE-S&S AG Enterprises, LLC vs. GHD, INC.* (Brown County Case No. 2013CV000166).
12 *Crum & Forster Specialty Ins. Co. v. GHD, Inc.*, 325 F. Supp. 3d 917, 920; *rev'd*, *sub nom*, *Crum & Forster Specialty Ins. Co. v. DVO,* 939 F. 3d 852 (7th Cir. 2019). DVO, Inc. changed its name from GHD, Inc. to avoid confusion with another company. *In re WTE-S&S AG Enters., LLC*, 575 B.R. at 404, n.1.
13 *Crum & Forster,* 939 F. 3d at 853.
14 *In re WTE-S&S AG Enters., LLC*, 575 B.R. 397.
15 *Id.* at 858.
16 *Id*.
17 *Crum & Forster*, 325 F. Supp. 3d at 922.
18 *Id*.
19 *Id*.
20 *Id*.
21 *Id*.
22 *Id. at 920.*
23 *Id.*
24 *Id*.
25 *Id*.
26 *In re WTE-S&S AG Enters., LLC*, 575 B.R. at 405.
27 *Id.* at 404.
28 *Crum & Forster*, 939 F.3d at 854.
29 *Id.* at 853.
30 *Crum & Forster*, 325 F. Supp. 3d at 923.
31 *Id*.
32 *Crum & Forster*, 939 F.3d at 855.
33 *Crum & Forster*, 325 F. Supp. 3d at 922.
34 *Id*.
35 *Am. Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 24, 268 Wis. 2d 16, 673 N.W.2d 65.
36 *Crum & Forster*, 325 F. Supp. 3d at 923.
37 *Fid. & Cas. Co. v. Nalco Chem. Co.*, 155 Ill. App. 3d 730, 739 (1987) (citing *Mgmt. Support Assoc. v. Union Indem. Ins. Co.,* 129 Ill. App. 3d 1089, 1093 (1984); 7A J. Appleman, Ins. Law and Practice § 4504.01 (Berdal Ed. 1979)).
38 *Crum & Forster*, 325 F. Supp. 3d at 920.
39 *Smith v. Anderson*, 2017 WI 43, ¶ 63 n.33, 374 Wis. 2d 715, 893 N.W.2d 790.
40 *Trumpeter Devs., LLC v. Pierce Cty.*, 2004 WI App 107, ¶ 9, 272 Wis. 2d 829, 681 N.W.2d 269.
41 *Crum & Forster*, 325 F. Supp. 3d at 923.
42 Every contract contains a common-law duty to perform the contract with care, skill, reasonable expedience and faithfulness. *Colton v. Foulkes*, 259 Wis. 142, 146, 47 N.W.2d 901 (1951).
43 *Crum & Forster*, 325 F. Supp. 3d at 923.
44 *Id*.
45 *Id.*
46 *Id*. at 924.
47 *Gen. Cas. Co. of Wis. v. Rainbow Insulators*, 2011 WI App. 58, ¶ 41, 332 Wis. 2d 804, 798 N.W.2d 320 (unpublished).
48 *Crum & Forster*, 325 F. Supp. 3d at 924.
49 *Id*.
50 *Id*. at 925.
51 *Id*. at 923 (*citing Marks v. Houston Cas. Co.*, 2016 WI 53, ¶ 56, 369 Wis. 2d 547, 881 N.W.2d 309).
52 *Crum & Forster*, 939 F. 3d at 852.
53 *Id*. at 855 (7th Cir. 2019).
54 *Id.* at 856.
55 *Id.*
56 *Id.* (*citing 1325 N. Van Buren, LLC v. T-3 Group, Ltd.*, 2006

WI 94, 293 Wis. 2d 410, 716 N.W.2d 822, 838) (noting that a claim based upon a negligent act for failure to adhere to professional standards is one sounding in negligence but arising in the context of a contract) and *Colton v. Foulkes*, 259 Wis. 2d 142, 146, 47 N.W.2d 910 (1951) (the contract creates the state of things which furnishes the occasion of the tort)).

57 *Id.* at 857.

58 *Id.* at 858.

59 *Id*.

60 *Id*.

61 *Id.* at 859.

62 *Id.* at 857.

63 *Id*. at 855.

64 *Id*.

65 *Id.* at 856 (citing *General Casualty Co. of Wisc. v. Rainbow Insulators, Inc.*, 2011 WI App 58, 332 Wis. 2d 804, 798 N.W.2d 320 (Ct. App. 2011)).

66 *Id.*

67 *Id*. ("the 'contract' exclusion would not operate to preclude E&O policy coverage arising from a tort claim that involves conduct that is not a delay or failure to perform under a contract term.").

68 *Id*.

69 *Great Lakes Bevs., LLC v. Wochinski*, 2017 WI App 13, ¶4, 373 Wis. 2d 649, 892 N.W.2d 333.

70 *Id*. at ¶18.

71 *Id*.

72 *Davis v. Allied Processors*, 214 Wis. 2d 294, 301, 571 N.W.2d 692, 695 (Ct. App. 1997).

73 *Kremers-Urban Co. v. American Employers Ins. Co*., 119 Wis. 2d 722, 743-44, 351 N.W.2d 156 (1984).

The Interplay between the Safe Place Statute and the Statute of Repose Following *Nooyen*

by: Travis J. Rhoades, Crivello Carlson S.C., and Kylie M. Owens, Crivello Carlson S.C.

I. Introduction

Wisconsin's construction statute of repose, Wis. Stat. § 893.89, is a valuable defense tool, particularly when dealing with alleged violations of the safe place statute, Wis. Stat. § 101.11. The Wisconsin Court of Appeals recently added a new case to the landscape of appellate cases discussing the interplay between the two statutes: *Nooyen v. Wisconsin Electric Power Company.*[1] The *Nooyen* court held that airborne pollutants generated by the use of building materials during new construction of an improvement to real property are properly classified as structural defects, not conditions associated with the premises.[2] Persons injured by structural defects are barred from suing certain classes of entities involved in the construction of an improvement to real property under the construction statute of repose. In such situations, owners, architects, contractors, suppliers, and builders are relieved from responsibility for claims that are not brought during the exposure period set forth in the construction statute of repose, which has recently been reduced to from ten years to seven years.[3]

II. History of the Safe Place Statute and the Construction Statute of Repose

a. Brief History of the Safe Place Statute

Wisconsin's safe place statute, Wis. Stat. § 101.11, was enacted in 1911 and the original language applied only to employers and the conditions of employment they furnished.[4] However, two years later the statute was amended to include owners of places of employment and public buildings.[5] Today, the original protections of the safe place statute have been greatly expanded and often involve an intense factual analysis.

Under the safe place statute, owners and employers have the duty to construct, repair, and maintain safe places of employment or public buildings.[6] This heightened duty of care focuses "on the property condition that caused the injury rather than on the duty that the property owner or employer breached."[7] Safe place violations involve either "structural defects" or "unsafe conditions."[8] Structural defects arise "by reason of the materials used in construction or from improper layout or construction."[9] In *Barry v. Employers Mutual Casualty Company*, the Wisconsin Supreme Court further defined structural defects as hazardous conditions which are "inherent in the structure by reason of its design or construction."[10]

While structural defects are present at the conclusion of any construction, unsafe conditions arise by the failure to keep a once safe structure properly maintained or in proper repair.[11] Unsafe conditions are further broken down into two types: First, there are unsafe conditions associated with the structure, which occur when a structure is not maintained or repaired properly.[12] Second, there are unsafe conditions that are unassociated with the structure which are conditions that may arise in an unsafe area.[13]

The determination of whether an injury-causing condition is a structural defect or an unsafe condition is a critical classification in the analysis under both the safe place statute and the construction statute of repose, for different reasons. Under the safe place statute, the distinction amounts to either absolute liability (for structural defects) or liability only if the owner has actual or constructive notice of the condition (for conditions associated with the premises). Under the construction statute of repose, the determination is critical because it determines whether an owner or other member of a protected class is exposed to liability (if the injury is caused by a condition associated with the structure), or that entity qualifies for the protections of the construction statute of repose (if the injury is caused by a structural defect).

b. Brief History of the Construction Statute of Repose

Wisconsin's construction statute of repose, Wis. Stat. § 893.89, limits the liability for certain protected classes for their involvement in improvements to real property during the statute's "exposure period." The number of protected classes has changed over time. Under the original 1973 version of the statute, the only protected class was builders, leaving all others involved in construction potentially on the hook for damages.[14] Because the early version of the statute granted immunity to one class and discriminated against other classes, it was found to be unconstitutional in 1975 in *Kallas Millwork Corporation v. Square D Company*.[15]

Following the *Kallas* case in 1975, the legislature did not immediately include owners and occupiers as a protected group. The reasoning at the time was that owners and occupiers were in a better position than any other group to continually improve and maintain structures and thus in a better position to accept liability if they chose not to correct issues.[16] Although the statute needed to be amended post-*Kallas*, this reasoning led the legislature to make only minor changes to the statute, which did not include the addition of owners and occupiers.[17] Ultimately, the failure to include owners and occupiers as a protected class led to another successful equal protection challenge in 1989.[18]

In response, the legislature amended Wis. Stat. § 893.89 to include owners and occupiers of property on the condition that the injuries not be a result of negligent maintenance of the improvement. The Wisconsin Supreme Court held the statute in its current form to be constitutional in *Kohn v. Darlington Community Schools*.[19] In *Kohn*, the court found that "[r]ather than drawing arbitrary profession-based distinctions," like the old statute, the updated version "draws distinctions based on the conduct of certain individuals."[20]

The *Kohn* court noted that, currently, owners and occupiers are protected under the statute as long as a plaintiff is bringing suit stemming from an improvement.[21] Moreover, even material providers are included under the current version of the statute, as long as they are furnishing materials for an improvement, and are excluded "only when liability is based upon a defect in the material provided."[22] Thus, *Kohn* stands for the idea that everyone listed in the statute gets the benefit of protection as long as the conduct does not stem from actions prior to or subsequent to improvements.[23]

Since the changes to the construction statute of repose, only two revisions have been made, both of which deal with the "exposure period" mentioned above. The most recent revision in 2018 changed the "exposure period" from ten years to seven years. This recent change reflects the intent of the legislature to further constrict the amount of time plaintiffs have to bring claims against property owners and others.

III. Interplay between the Safe Place Statute and the Construction Statute of Repose

a. *Mair v. Trollhaugen Ski Resort*

It is well settled that the construction statute of repose "was intended to apply to at least certain safe place claims."[24] Safe place claims are not specifically excepted[25] from the construction

BORGELT POWELL
PETERSON & FRAUEN S.C.

ATTORNEYS & COUNSELORS
ESTABLISHED 1881

Our mission is to provide the very best legal services to insurance companies, businesses, and individuals by providing innovative, effective and efficient advice, consultation, and representation during the investigation, evaluation, and litigation of civil and administrative claims.

Our expertise has resulted in Borgelt Powell's selection as Panel Counsel by some of the largest companies and insurance companies in the country.

Licensed in Wisconsin, Minnesota and Illinois

1243 N. 10th Street, Milwaukee, WI 53205	**(414) 276-3600**
Virtual Offices, Madison, WI	**(608) 258-1711**
7815 3rd Street North, Suite 203, Oakdale, MN 55128	**(651) 256-5000**

dri™ The Voice of the Defense Bar

Martindale-Hubbell® PEER RATED For Ethical Standards and Legal Ability 2020

Super Lawyers® 2020

CLM

statute of repose, which extinguishes liability for "deficiencies or defects in the design or construction of improvements to real property . . . ."[26] However, in *Mair v. Trollhaugen Ski Resort*, the Wisconsin Supreme Court specified that "§ 893.89 bars safe place claims resulting from injuries caused by structural defects, but not unsafe conditions."[27]

Mair involved a fall in a restroom at a ski resort, in which the only admissible evidence relevant to liability involved claims of negligence in the design and construction of the floor and floor drain. The plaintiff argued that other characteristics of the bathroom like lighting and paint color may have contributed to the fall but offered no admissible expert evidence that these conditions fell below the standard of care. The *Mair* court began its analysis by emphasizing that the scope of the statute of repose is limited to deficiencies.[28] The court then notes that the duty to design or construct a safe place is breached when the improvement contains a structural defect, because only the structure may be considered to be an "improvement" to property, as the statute of repose requires.[29]

Reasoning that because Wis. Stat. § 893.89(4)(c) excepts owners who negligently maintain property, the court held that the word "'maintain' correlates to an unsafe condition associated with the structure, and thus allegations of such defects do not fall under the purview of the [construction] statute of repose."[30]

Under *Mair*, in order to be shielded from liability for a safe place violation by the construction statute of repose, the injury-causing condition must have been a result of a structural defect caused by the design or construction of the improvement. Only then does the condition fall under the statute's protections for "improvements to real property."[31] Unsafe conditions associated with the structure, and particularly those which exist due to negligence in maintaining the structure, are explicitly excepted by the construction statute of repose.[32] Thus, it is essential for those seeking the application of the construction statute of repose to establish that the alleged injury stemmed from a structural defect in the construction or design, because structural defects protect owners, employers, and builders from liability after the expiration of the exposure period.[33]

b. *Nooyen v. Wisconsin Electric Power Company*

On January 20, 2020, the Wisconsin Court of Appeals again addressed the interplay between the safe place statute and the construction statute of repose, this time in the context of injuries caused by the exposure to airborne asbestos released during the construction of two new nuclear power plants.[34]

In *Nooyen v. Wisconsin Electric Power Company*, the parties stipulated to facts relating to construction projects in which the plaintiff was alleged to have been exposed to airborne asbestos dust. The parties stipulated that each of the *Kohn* factors for an improvement to real property had been satisfied.[35] Both the trial court and the court of appeals agreed that the exposures occurred during construction projects that were correctly construed as improvements to real property.[36]

The dispute in *Nooyen* concerned whether the owners of the power plants qualified for the protection of the construction statute of repose for exposures that occurred during construction. The resolution of the dispute rested on the classification of airborne asbestos dust during the pendency of a new construction project. The defendants took the position that the dust arose from the use of products during the activities of the construction of the improvement, and therefore were structural defects inherent in the improvement, and that the work done during the improvement and whatever conditions that resulted from that work were covered in the construction statute of repose's definition of "defects" or "deficiencies" in the construction of the improvements. Plaintiff argued that the dust was a condition of the premises, citing several cases analyzing airborne dust in the context of a safe place claim.

The *Nooyen* court found that asbestos dust created during a building's original construction period is properly classified as a structural defect, rather than an unsafe condition.[37] The court reasoned that the dust is the result of a structural defect because it was created by the original construction process.[38] To reach this conclusion, the court relied on the definitions of structural defects provided by the Wisconsin Supreme Court in *Barry v. Employers Mutual Casualty Company.*[39]

In *Barry,* the Wisconsin Supreme Court analyzed the differences between structural defects and conditions associated with the premises in the context of the safe place statute. The court held that structural defects arise when a builder or employer breaches its duty to construct a safe building.[40] A defect is considered "structural" if it is caused by the "materials used in construction or from improper layout or construction."[41] The *Barry* court then reasoned that because unsafe conditions arise over time, structural defects differ in that they are "hazardous condition[s] inherent in the structure by reason of its design or construction."[42]

The *Nooyen* court applied these definitions of "structural defect" and "unsafe condition" and concluded that because the plaintiff alleged his injuries were caused by materials used in the initial construction period, the injuries arose from a structural defect.[43] In other words, "the presence of airborne asbestos during the original construction . . . was a hazardous condition inherent in those structures by reason of their design or construction."[44]

The court examined *Calewarts*[45] and *Viola*[46], cases in which the plaintiffs were exposed to airborne asbestos long after the completion of the improvement projects, during the repair or maintenance of the property.[47] The court found that because the injuries in both of those cases resulted from exposure during repair or maintenance, they were distinguishable from Nooyen's exposure.[48] Because those plaintiffs were exposed to asbestos that was disturbed during repair or maintenance activities, those exposures would be classified as arising out of unsafe conditions associated with the structure, not structural defects.[49]

The *Nooyen* court noted that it was bound by *Mair,* which foreclosed argument that the construction statute of repose may apply to unsafe conditions. For the time being, it appears that the construction statute of repose's protected classes will be shielded from liability for injury-causing conditions that exist or arise during construction projects, as long as those conditions arise from the work done on those projects, during those projects, with the materials used to complete those projects, even when the injury is a latent one that may not manifest itself until years after the work is completed. Further, the Plaintiff in *Nooyen* chose not to appeal the decision to the Wisconsin Supreme Court.

IV. Conclusion

Wisconsin's construction statute of repose extinguishes the liability of an owner, employer, or builder after seven years when a defect stems from an improvement to real property.[50] *Nooyen* is the most recent addition to the body of law addressing the application of the statue of repose, and the interplay between its protections and the duties imposed on owners by Wisconsin's safe place statute. *Nooyen* supplements and further defines the concept of the structural defect set forth in *Barry* and discussed in *Mair*, to include injuries caused by environmental factors inherent to the design or construction of improvements to real property, when those factors are encountered during the construction of the improvement. Latent injuries caused by exposures to dusts or other pollutants created during and by the construction process are now categorized as structural defects, and the protected classes in the construction statute of repose are immune from liability for claims arising from those exposures. The case has been recommended for publication, and the time for appeal has expired.

Author Biographies:

Travis J. Rhoades is a shareholder at Crivello Carlson, S.C. His practice includes product and

premises liability claims, and he has litigated in state and federal courts in 36 states. He recently completed his last term on the Board of Directors of the Wisconsin Defense Counsel.

Kylie M. Owens is in her third year at Marquette University Law School and will graduate in May of 2020. She is currently working as a law clerk at Crivello Carlson, S.C.

References

1 *Nooyen v. Wis. Elec. Power Co.*, 2020 Wis. App. LEXIS 32, 2020 WL 355914 (Wis. App. Jan 22, 2020) (final publication decision pending).
2 *Id*. at ¶ 16.
3 Wis. Stat. § 893.89(1).
4 *Delaney v. Supr. Inv. Co.*, 251 Wis. 374, 378, 29 N.W.2d 754 (1947).
5 *Id*. at 379.
6 Wis. Stat. § 101.11(1); *Barry v. Employers Mut. Cas. Co.*, 2001 WI 101, ¶ 20, 245 Wis. 2d 560, 630 N.W.2d 517.
7 *Barry*, 245 Wis. 2d 560 at ¶ 21.
8 *Mair v. Trollhaugen Ski Resort*, 2006 WI 61, ¶ 21, 291 Wis. 2d 132, 715 N.W.2d 598.
9 *Barry*, 245 Wis. 2d 560 at ¶ 28 (quoting Howard H. Boyle, Jr., *Wisconsin Safe-Place Law Revised* 139 (1980)).
10 *Id*.
11 *Barry*, 245 Wis. 2d 560 at ¶ 27.
12 *Id*. at ¶ 25 (citations omitted).
13 *See Id*. at n. 4 (stating that "[a]n employer, but not an owner of a public building … may also be liable for 'unsafe conditions unassociated with structure,' a category that has been extrapolated from the employer's duty to furnish 'employment which shall be safe' under Wis. Stat. § 101.11(1)").
14 *Id*. at 388.
15 *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975).
16 *Funk v. Wollin Silo & Equip., Inc.*, 148 Wis. 2d 59, 65, 435 N.W.2d 244 (1989).
17 *See id*. at 64-67 (discussing all of the changes between the old statute of repose under Wis. Stat. § 893.155 (1979) and the renumbered one under Wis. Stat. § 893.89).
18 *Id*. at 63.
19 *Kohn v. Darlington Comm'y Sch.*, 2005 WI 99, ¶ 43, 283 Wis. 2d 1, 698 N.W.2d 794.
20 *Id*. at ¶ 65.
21 *Id*. at ¶ 66.
22 *Id*. at ¶ 67.
23 *Id*. at ¶ 68.
24 *Mair*, 291 Wis. 2d 132 at ¶ 28.
25 *See* Wis. Stat. § 893.89(4) for the enumerated exceptions.
26 *Mair*, 291 Wis. 2d 132 at ¶ 28.
27 *Id*. at ¶ 29.
28 *Mair*, 291 Wis. 2d 132 at ¶ 27.
29 *Id*. at ¶ 28.
30 *Id*. at ¶ 29.
31 Wis. Stat. § 893.89(2); *see also Kallas Millwork Corp.*, 66 Wis. 2d 382 at ¶ 17 (stating that an improvement to real property is "[a] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.").
32 *Mair*, 291 Wis. 2d 132 at ¶ 28.
33 *Id*.
34 *Nooyen*, 2020 Wis. App. LEXIS 32, 2020 WL 355914, ¶ 12.
35 *See Kohn*, 2005 WI at ¶ 22, 28 (stating that in order to be considered an "improvement" under the statute of repose, there must be a permanent addition that enhances its capital value).
36 *Id*.
37 *Id*.
38 *Id*. at ¶ 16.
39 *Barry*, 245 Wis. 2d 560.
40 *Id*. at ¶ 28.
41 *Id*. (internal citations omitted).
42 *Id*.
43 *Nooyen*, 2020 Wis. App. LEXIS 32, 2020 WL 355914, ¶¶ 15-16.
44 *Id*. at ¶ 16 (internal citations omitted).
45 *Calewarts v. CR Meyer & Sons Co.*, No. 2011AP1414, unpublished slip op. (July 3, 2012).
46 *Viola v. Wis. Elec. Pwr. Co.*, 2014 WI App 5, 352 Wis. 2d 541, 842 N.W.2d 515.
47 *Nooyen*, 2020 Wis. App. LEXIS 32, 2020 WL 355914, ¶ 17.
48 *Id*.
49 *Id*.
50 Wis. Stat. § 893.89.

MINNESOTA LAWYERS MUTUAL'S

Defense Program

INSURANCE SPECIFICALLY DESIGNED AND RATED FOR DEFENSE FIRMS

Proud Corporate Sponsor of the WDC

Members of the WDC have access to MLM's Defense Program offering a lawyers' professional liability policy with preferred pricing and enhanced coverage.

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

Two Ways to Save

- **Preferred pricing** for firms with substantial insurance defense practice
- **A 5% membership credit -** Credit applied to premium on a per attorney basis

Enhanced Coverage*

- **Additional Claim Expense -** Benefit equal to one-half of the policy single limit, up to a maximum of $250k per policy period
- **Increased Supplementary Payment Limit -** From $10k to $25k - this includes loss of earnings if you attend a trial at our request and coverage for costs and fees incurred defending disciplinary claims
- **Aggregate Deductible -** Caps the total amount the insured will have to pay in total deductibles regardless of the number of claims in a single policy period

*Visit www.mlmins.com for qualification details

"We are proud to offer coverage to WDC membership. MLM has long been recognized as a financially stable and consistent carrier for Wisconsin lawyers, and we're thrilled to benefit members of the association."

Paul Ablan, President and CEO
Minnesota Lawyers Mutual

Protect your firm with the ***premium savings*** and ***enhanced coverage*** offered to you as a member of the WDC.

Apply for a quote online!

www.mlmins.com

MINNESOTA LAWYERS® MUTUAL INSURANCE COMPANY

Contact
Chris Siebenaler, Esq.
Regional Sales Director
(612) 373-9641
csiebena@mlmins.com

027122020

News from Around the State: Trials and Verdicts

Nadine Reyes, et al. v. Innovative Exteriors, L.L.C., et al.
Milwaukee County Case No. 17-CV-13213
January 2020

Facts: Plaintiff and her employer, Menard Inc. (self-insured for workers compensation), brought suit against Innovative Exteriors and its insurer, Acuity, for a slip-and-fall on ice that occurred in December of 2014. Reyes sustained a severe elbow injury requiring two surgeries.

Innovative was the snowplowing contractor hired by Menards to plow and salt the parking lot at its West Milwaukee store. Plaintiffs alleged Innovative failed to properly salt the parking lot, resulting in Reyes slipping and falling on her way into work.

Issues for Trial: Innovative and Acuity contested liability, arguing that the contract called for two inches of snow to trigger the duty to salt, which the weather records demonstrated had not occurred. Furthermore, the accident was due to Menard's failure to properly inspect its parking lot and Reyes' own negligence. The parties stipulated to medical bills of $59,112.53 and wage loss of $17,818.31.

At Trial: At trial, plaintiffs sought an additional $175,000 for pain and suffering. The jury found no negligence on Innovative, 90% on Menards and 10% on Reyes.

Plaintiff's Final Demand: $100,000
Defendant's Final Offer: $50,000
Verdict: $0

For more information, please contact Thomas J. Binder at binder@simpsondeardorff.com.

Thomas G. Pierick, et al. v. Rural Mut. Ins. Co., et al.
Dane County Case No. 18-CV-1644
November 2019

Facts: On October 4, 2016, before daybreak, Tom Pierick collided with several black beef cattle on Highway 80 near Cobb, Wisconsin. Mr. Pierick sustained an L1 burst fracture and several broken ribs in the accident. The evening or early morning hours before the accident, approximately 30 beef cattle escaped from the CR Bishop farm in Cobb, Wisconsin. A post-accident investigation indicated that the cattle were able to work open a chained gate and two sliding doors to escape from the feed lot.

Issues for Trial: The parties stipulated to the plaintiff's injuries and corresponding damages. Liability was challenged.

At Trial: Plaintiff asked the jury to find C.R. Bishop negligent and asked for approximately $350,000 at trial. C.R. Bishop argued that its employees exercised ordinary care in confining its cattle. The jury agreed with C.R. Bishop and found that C.R. Bishop was not negligent. For damages, the jury awarded $230,000.

Plaintiff's Final Pre-Trial Demand: $200,000
Defendant's Final Pre-Trial Offer: $40,000
Verdict: $0

For more information, please contact Paul D. Curtis at pcurtis@axley.com.

Rebecca L. Gruenewald, et al. v. Ali Amoco Inc., et al.
Milwaukee County Case No. 17-CV-2393
October 2019

Facts: Plaintiff sustained a broken ankle after a slip-and-fall accident on slush at a gas station on January 14, 2016. Plaintiff alleged general negligence and safe place claims for failure to maintain premises and inadequate safety policies. The gas station argued that the condition of the premises and its wintertime maintenance policies were reasonable.

Issues for Trial: Liability was contested. Plaintiff sought damages for past and future pain, suffering and disability only. Plaintiff waived her claim for past medical expenses and did not assert a claim for future medical expenses.

At Trial: Plaintiff asked the jury for $375,000. The defense suggested $11,000-$22,000. The jury found no negligence on any party.

Plaintiff's Final Pre-Trial Demand: $200,000 (statutory offer of settlement)
Defendant's Final Pre-Trial Offer: $30,000 (statutory offer of judgment)
Verdict: $0

For more information, please contact Joseph M. Mirabella at mirabella@simpsondeardorff.com.

Thomas Jones, et al. v. Am. Fam. Ins.
Walworth County Case No. 17-CV-3
October 2019

Facts: This was an uninsured motorist (UM) case. The lawsuit involved a motor vehicle accident that occurred when the plaintiff rear-ended an excavator driven by Walworth County employee, Dennis Jacobs. The County, its insurer, and Mr. Jacobs were dismissed on immunity grounds following a successful motion for summary judgment before trial. The pleadings were amended to assert a UM claim against American Family. Plaintiff claimed that Mr. Jacobs was negligent because he was operating a 40,000 pound, slow moving vehicle (15 mph top speed) on a highway with a posted speed limit of 70 mph. They argued that he was negligent for driving the excavator half on the shoulder and half into the right lane of traffic on eastbound Highway 12 in Geneva. Plaintiff claims he never saw the excavator before the crash because the glare of the sun camouflaged it. The evidence showed that plaintiff never reduced his speed from the posted speed limit of 70 mph when the sun got in his eyes and therefore, the defense argued that he was negligent. Plaintiff sustained significant injuries in the accident, as well as lost wages.

Issues for Trial: The parties stipulated to damages at the UM limit of $150,000 and tried liability.

YOUR LAWYERS ON THE LAKESHORE

SPECIALIZING IN: TRIAL • CIVIL LITIGATION • INSURANCE DEFENSE & COVERAGE • LIABILITY

William R. Wick
Partner

John F. Mayer
Partner

Christopher R. Bandt
Partner

Jeremy T. Gill
Partner

Ryan R. Graff
Partner

Justin F. Wallace
Partner

Katelyn P. Sandfort
Partner

Thomas A. Van Horn
Of Counsel

Joshua M. Greatsinger
Associate

Sean A. Bukowski
Associate

Katherine T. Mayer
Associate

Beau W. Krueger
Associate

Travis L. Yang
Associate

Super Lawyers

AV PreeminentTM | LexisNexis Martindale-Hubbell PeerReviewRated FOR ETHICAL STANDARDS AND LEGAL ABILITY

BEST'S CLIENT RECOMMENDED Insurance Attorneys Listed Over 25 Years

2011-2012 BEST LAW FIRMS U.S.News Best Lawyers

BEST'S CLIENT RECOMMENDED 2019 INSURANCE ATTORNEYS

CONTACT US TODAY!

With our main office in Manitowoc, WI and satellite offices throughout, our coverage area can assist clients in all legal matters across Wisconsin.

NASHLAW.COM

ESi

Engineering Consulting and Forensic Investigation

ESi has recently expanded, with Crane Engineering now being part of ESi. Crane Engineering has a 40-year track record of providing industry leading forensic engineering and investigation services involving accident investigation, industrial applications, insurance subrogation, and product liability litigation.

CRANE ENGINEERING
PART OF ESi

- Multidisciplinary Approach
- Industry Expertise
- Powerful Insights

www.engsys.com

At Trial: The jury returned a verdict finding both plaintiff and Jacobs casually negligent. They allocated 72.5% fault to the plaintiff and 27.5% to Jacobs, resulting in a defense verdict.

Verdict: $0

For more information, please contact Megan L. McKenzie at mmckenzi@amfam.com.

Robert Stewart v. Rural Mut. Ins. Co.
Walworth County Case No. 18-CV-276
October 2019

Facts: This case arose out of a water leak from a plumbing component in the second-floor bathroom of a vacant dwelling owned by the plaintiff. The defendant issued a policy of homeowners' insurance for the subject dwelling, which excluded insurance coverage if the cause of the water leak was wear and tear and/or if the water leak had been occurring for a matter of weeks from within a plumbing system. While investigating the claim, the insurer retained experts who respectively opined that the cause of the water leak was age-related wear and tear, and that the water leak very likely first began three to five weeks prior to discovery. The insurer denied coverage on the basis of the exclusions. Instead of disputing the denial, plaintiff razed the dwelling and filed suit alleging that the insurer breached the insurance contract when it unjustifiably refused to pay. Plaintiff demanded the full value of the dwelling.

Issues for Trial: During motions *in limine*, the court significantly limited the plaintiff's damages by ruling that, in the event this was a covered loss, the policy only obligates the insurer to pay the reasonable cost to repair that part of the dwelling that was damaged by the water infiltration. The court also limited the plaintiff's ability to elicit expert testimony regarding the reasonable cost of repair because of violations of the court's scheduling order. The court ultimately ruled that the plaintiff could elicit expert testimony regarding the cost of repair only in rebuttal to the defense expert retained to opine as to the reasonable cost of repair.

At Trial: Plaintiff introduced evidence regarding his discovery of the water infiltration. The plaintiff attempted to introduce evidence on the full value of the residence, which the court deemed inadmissible. The plaintiff also attempted to introduce evidence of the cost of repair in his case-in-chief, which the court deemed in violation of its order on motions *in limine*. At the end of the first day of trial, the plaintiff rested his case having introduced no evidence as to the cost of repair in the case-in-chief. Because the plaintiff had not met his burden on damages, the defense moved for a directed verdict in favor of the defendant insurer, which was granted.

Verdict: $0

For more information, please contact Christine M. Rice at rice@simpsondeardorff.com.

Marla Slowey, et al. v. The Coffee Pot LLC, et al.
Kenosha County Case No. 17-CV-1152
September – October 2019

Facts: Plaintiff alleged she fractured her pinky finger while attempting to exit the Coffee Pot's front door. She claimed that a gust of wind from inside the restaurant blew open the restaurant's front door, pulled the door away from her, and caused her pinky to fracture. There were no witnesses to the alleged event. Plaintiff had previously entered the Coffee Pot that same day, using the same door, without issue.

Plaintiff alleged that the Coffee Pot was negligent in choosing a door unsuitable for the restaurant and in violation of the safe place statute. Plaintiff retained a local construction company owner to testify that the door was not commercial grade, and was improper for a restaurant serving nearly 400 customers per day. However, the door in question was not in violation of any building codes or regulations.

Defendants retained a mechanical engineer who opined that the door met all building codes. The engineer also provided a biomechanical analysis and testified that the type of fracture plaintiff sustained could not have been caused by a door blowing away from her. Plaintiff's treating physician testified that the fracture could occur in this manner.

Issues for Trial: Liability and causation were contested.

At Trial: Plaintiff asked the jury for $50,000. The jury awarded no damages and found no negligence and no violation of the safe place statute.

Plaintiff's Final Pre-Trial Demand: $40,000
Defendant's Final Pre-Trial Offer: $25,000
Verdict: $0

For more information, please contact Austin Borton at austin@jeffreyleavell.com.

Rural Mut. Ins. Co., et al. v. Mid-State Equip. Group LLC, et al.
Washington County Case No. 17-CV-255
September 2019

Facts: Plaintiff serviced his John Deere Chopper at Mid-State Equipment over the winter of 2014-15. The following June, after completing the first crop of hay with the Chopper and beginning to chop the second crop, plaintiff's Chopper caught fire. Experts determined that the origin was the right-hand blower bearing assembly. Plaintiff alleged that during the winter service, Mid-State technicians manipulated the right hand blower bearing assembly given entries found on the invoice for the work performed. Defendants, however, denied manipulating that bearing assembly and the invoice had erroneous entries.

Issues for Trial: At trial, liability was contested but the parties stipulated to damages. Plaintiff alleged that based on the way in which the bearing assembly failed, Mid-State employees must have manipulated the assembly and that was further evidenced by the invoice for the work performed that previous winter. Mid-State denied the allegations based on their recollection of not performing nearly a day's worth of work,

explaining that the invoicing system had an error, and presented expert testimony confirming the bearing assembly was in factory settings when the failure occurred.

At Trial: Plaintiff asked the jury for $337,697. The jury awarded no damages and found no negligence.

Plaintiff's Final Pre-Trial Demand: $295,000
Defendant's Final Pre-Trial Offer: $65,000
Verdict: $0

For more information, please contact Adam M. Fitzpatrick at fitzpatricka@corneillelaw.com.

Donna J. Ehlert, et al. v. State Farm Mut. Auto. Ins. Co., et al.
Outagamie County Case No. 18-CV-155
August 2019

Facts: On March 31, 2015, Plaintiff Donna Ehlert brought her vehicle to a stop for a bus. Defendant Brice Babcock, then 17, was briefly distracted by telling a friend to put on her seat belt and was not able to stop in time for the stopped Ehlert vehicle. Impact was minor with only a license plate imprint of the defendant's vehicle pressed into the bumper of plaintiff's vehicle.

Plaintiff claimed neck, shoulder, upper back and low back pain, with initial physical therapy, personal massage therapy and ultimately pain management with injections.

Issues for Trial: The parties stipulated to liability.

At Trial: Plaintiff counsel asked the jury to award past medical expenses of $32,311.47, past pain and suffering of $30,000-$50,000, future medical expenses of $12,500, and future pain and suffering "something less than past pain and suffering, you decide."

The defense argued that plaintiff had prior unresolved chronic neck issues from other unrelated motor vehicle accidents, had no pain complaint to the responding officer at the scene with minimal property damage, had four months of post-accident physical therapy with good resolution of symptoms, and then a ten-month gap before restarting physical therapy and seeing a pain management doctor for injections. During the ten month gap, she had seen other practitioners for other items, but never mentioned any neck issues.

The defendants argued that, at most, plaintiff was entitled to four months of physical therapy ($5,799.67), suggested a past pain and suffering award of $500 or less, and nothing for future medical or pain and suffering.

The jury awarded $5,800.00 in past medical expenses and nothing else.

Plaintiff's Final Pre-Trial Demand: $85,000
Defendant's Final Pre-Trial Offer: $1,500 + $10,000 med pay lien waiver
Verdict: $5,800

For more information, please contact Heather L. Nelson at hnelson@eversonlaw.com.

Mark F. Meisner, et al. v. State Farm Mut. Auto. Ins. Co., et al.
Brown County Case No. 17-CV-1409
July 2019

Facts: On October 26, 2014, State Farm's insured (subsequently deceased due to unrelated causes and not named as a party) fell asleep behind the wheel, crossed the centerline and impacted the truck being driven by Plaintiff Mark Meisner, with Denise Meisner as his passenger (both in their 50s). Denise claimed a left shoulder injury with an injection and physical therapy. Mark claimed carpal tunnel syndrome leading to bilateral carpal tunnel release surgeries, permanent aggravation of pre-existing degenerative neck issues (long history of chiropractic care, but no visits within four years before the accident) with headaches and occasional low back pain. He also claimed he had to reduce his work schedule (auto body mechanic) from four days a week to three days due to pain when looking up and when using his hands.

Issues for Trial: The parties stipulated to liability. The parties also stipulated to Denise's economic damages ($9,295.40 in medical expenses and $863.18 in lost wages).

State Farm's exposure was capped at its $100,000 policy limit. Trumbull Insurance had a UIM Policy of $250,000 with a reducing clause, which should have left it with exposure of $150,000. Trumbull elected not to have an attorney attend trial (even though an attorney participated in discovery and attended video trial depositions of medical experts) and agreed to be bound by the judgment.

At Trial: In addition to medical expenses and lost wages, Denise Meisner asked the jury for $30,000-$35,000 for past pain and suffering and $10,000 for future pain and suffering. Mark Meisner asked the jury for $37,122.00 in past medical expenses and mileage, $20,800.00 in past wage loss, $12,482.40 to $14,201.60 in future medical expenses, $30,000.00 in future wage loss, $150,000-$200,000 for past pain and suffering ("If I say $250,000, is that enough? If I say $500,000, is that too much?"), and future pain and suffering with no specific number but "less than the past number." Plaintiff did not suggest a number for Denise's loss of society and companionship.

The defense asked the jury to award Denise $2,000-$3,000 for past pain and suffering and $500-$1,000 for loss of society and companionship, and Mark $3,438.32 for past medical expenses, $2,880.00 for past wage loss, and suggested $10,000-$15,000 for past pain and suffering.

The jury awarded Denise $5,000 for past pain and suffering and $35,000 for loss of society and companionship. It awarded Mark $20,000 for past medical expenses and mileage, $13,350.00 for future medical expenses, $16,224.00 for past wage loss, $39,780.00 for future wage loss, $200,000 for past pain and suffering, and $100,000 for future pain and suffering.

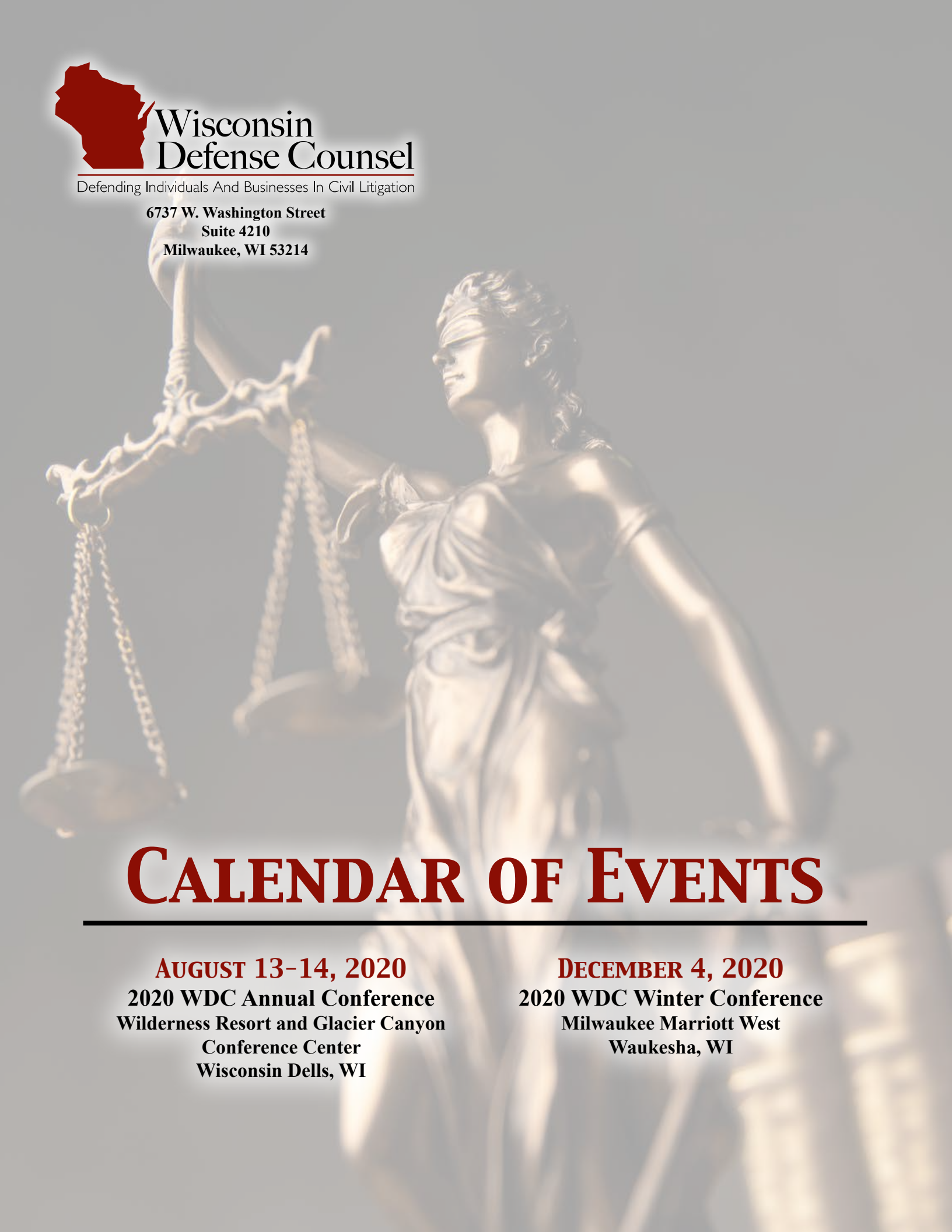
The jury advised counsel after verdict that they did not find the carpal tunnel surgeries related. Despite no clear sign of objective injury, the jury felt that based on the fact that there had been no neck complaints in

the four years before the accident (despite a history of chiropractic treatment), Mark's life had changed in a significant manner as a result of the accident. Several family members and friends testified that he was not the same active, helpful guy he had been, and his hobby of working on cars in his spare time had been significantly reduced.

On Appeal: Plaintiff Mark Meisner requested and ultimately was granted a judgment for the entire $250,000 UIM policy limit against Trumbull (not applying the reducing clause) since Trumbull did not appear at trial and did not prove their policy limits at trial. This issue is currently on appeal.

Plaintiff's Final Pre-Trial Demand: $100,000
Defendant's Final Pre-Trial Offer: $11,000
Verdict: $100,000

For more information, please contact Heather L. Nelson at hnelson@eversonlaw.com.



Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

6737 W. Washington Street
Suite 4210
Milwaukee, WI 53214

Calendar of Events

August 13-14, 2020

2020 WDC Annual Conference
Wilderness Resort and Glacier Canyon Conference Center
Wisconsin Dells, WI

December 4, 2020

2020 WDC Winter Conference
Milwaukee Marriott West
Waukesha, WI