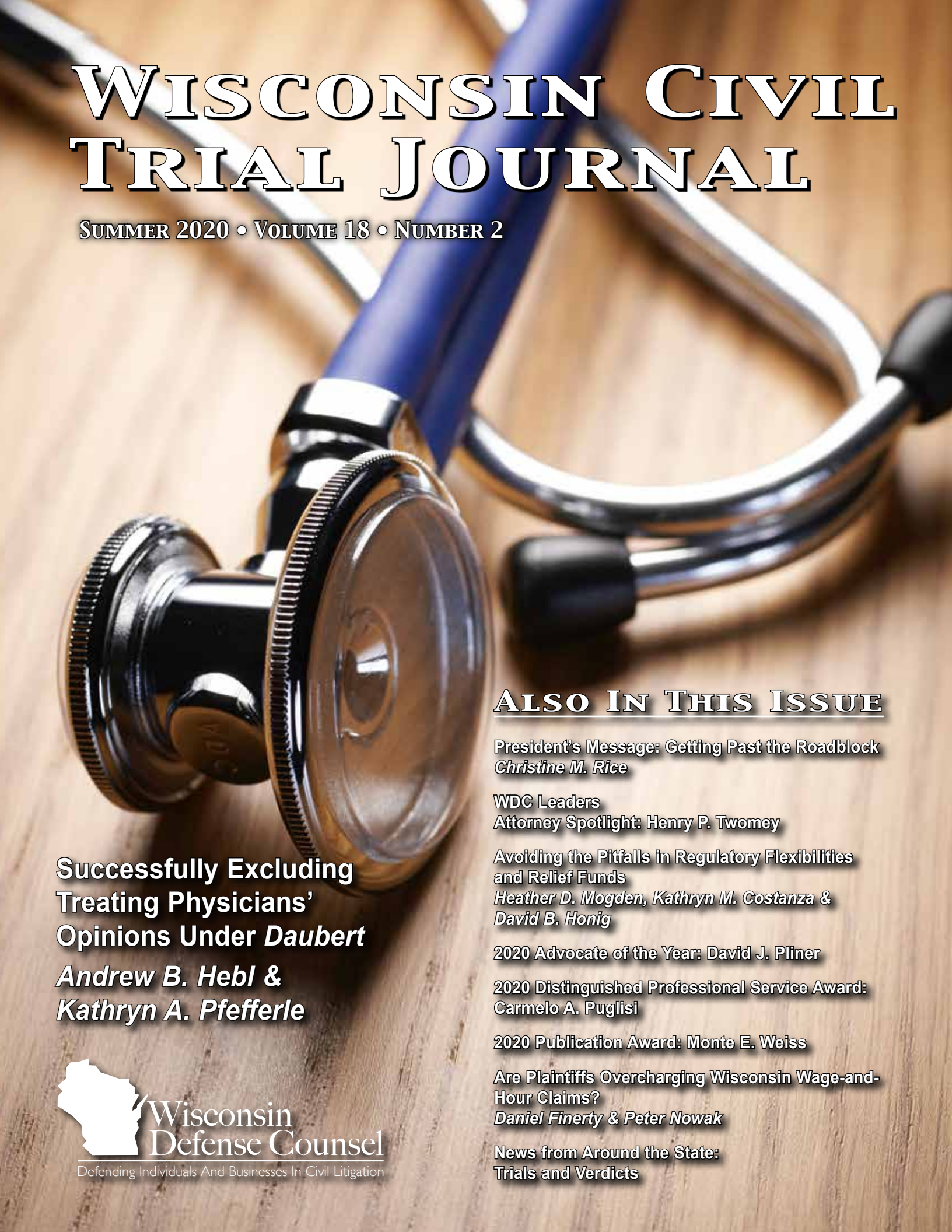

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Successfully Excluding Treating Physicians' Opinions Under *Daubert*

Andrew B. Hebl & Kathryn A. Pfefferle

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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Defending Individuals And Businesses In Civil Litigation

In This Issue…

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President's Message: Getting Past the Roadblock

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

This was certainly not the "Presidential Year" I had anticipated. This was to be the year of strategic planning – setting the stage for a stronger, more vibrant organization. It was to be the year to bring us together with discussion of goals, plans, and future visions. Little did we know that this would be the year that kept us socially distanced, and that changed and challenged us personally, professionally, and as an organization.

Despite the setbacks, your executive committee and board members have kept working. Just before the pandemic hit, three of your leaders and our executive director attended DRI national and state and local defense organizational leadership conferences to gain fresh perspectives and ideas for strategic planning sessions. We have had phone and videoconferences aimed at bringing you virtual CLE, at member retention and recruitment efforts with benefits that matter, at much-needed diversity and inclusion initiatives, and at ways we can encourage our newer professionals to become engaged. All of these discussions are crucial for the long-term stability, growth, and depth of our organization. The excitement of the upcoming leadership and board is contagious. I am really looking forward to seeing WDC flourish and renew for years to come.

I want to thank Jenni Kilpatrick, our executive director and WDC's true treasure. She has been instrumental in minimizing impact to the organization and in keeping us moving forward during these difficult times. I want to thank my fellow board members. I have been honored to lead with you, and I truly appreciate your support and commitment to the organization and our profession. Finally, I want to thank all of you. When we gather for conferences and I look around the room, I see genuinely good people that I respect, admire, and am proud to call colleagues and friends. I am humbled to have had the opportunity to be at your service in the leadership of this organization.

I want to leave you with the reassurance that strategic planning will happen as soon as we are able to safely get together. I do see us getting past the roadblock stronger and with a more defined purpose. I hope that you will be with me in embracing with excitement and support the efforts to rejuvenate our group toward our mission. We are all in this together, WDC!

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.*

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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.

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Successfully Excluding Treating Physicians' Opinions under *Daubert*

by: Andrew B. Hebl and Kathryn A. Pfefferle, Boardman & Clark LLP

It is well settled that in a personal injury case the plaintiff has the burden to prove that the accident caused the plaintiff's claimed injuries and the resulting damages. Although a plaintiff can testify as to the existence of pain, expert medical testimony is generally required as to the cause of such pain.[1]

In all but the most straightforward of cases (such as a broken limb, for example), the cause of an injury involves technical, scientific, or medical matters which are beyond the common knowledge or experience of jurors.[2] Thus, to prove causation, personal injury plaintiffs are nearly always required to utilize the testimony of post-accident treating physicians to render expert opinions that the accident caused their injuries and necessitated the treatment the plaintiffs sought for those injuries. As expert witnesses, plaintiffs' treating doctors who are utilized in support of their claims are subject to the *Daubert* standard for expert testimony under Wis. Stat. § 907.02(1).

The conventional wisdom among personal injury lawyers seems to be, however, that treating doctors are either immune from the *Daubert* standard or are somehow less vulnerable to its requirements than other expert witnesses, such as engineers or vocational experts. The purpose of this article is to advance the notion that this need not be the case. Applying well-established case law from the federal courts interpreting the *Daubert* standard, there are several arguments that can effectively be made, and should more frequently be made, to either limit or outright bar a plaintiff's treating doctor from testifying at trial. The authors of this article have had success in doing so, and describe the tactics that they have found to be most effective. Defense lawyers are encouraged to more frequently consider securing court rulings under *Daubert* regarding the opinions of treating medical experts at the pretrial motion stage using the arguments set forth in this article.

I. *Daubert* in Wisconsin

Under Wisconsin law, expert testimony is admissible only if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[3] The expert testimony must be "based upon sufficient facts or data," and "the product of reliable principles and methods" applied "reliably to the facts of the case."[4] Wis. Stat. § 907.02(1) adopts the federal *Daubert* standard for the admissibility of expert testimony. Under the *Daubert* standard, an expert witness's testimony is not admissible unless "the expert's reasoning or methodology underlying the testimony [is] scientifically reliable."[5] *Daubert* also requires the expert to rely on "facts or data," as opposed to subjective impressions.

Daubert imposes an important "gatekeeping" function for expert testimony, which entails determining whether the proposed expert testimony is reliable and ensuring only helpful, legitimate expert testimony reaches the jury.[6] In deciding

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whether an expert's opinions are based on reliable principles and methods, the Court may consider a wide range of factors, including, but not limited to:

1. Whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
2. Whether the technique or theory has been subject to peer review and publication;
3. The known or potential rate of error of the technique or theory when applied;
4. The existence and maintenance of standards and controls; and
5. Whether the technique or theory has been generally accepted in the scientific community.[7]

Additional reliability factors have been recognized in other federal cases:

1. Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying";
2. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
3. Whether the expert has adequately accounted for obvious alternative explanations;
4. Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting"; and
5. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[8]

Importantly, it is the proponent of the expert's testimony—*i.e.*, the plaintiff in a personal injury case when the expert is a treating medical provider—who has the burden of proof to show that the expert's testimony satisfies the *Daubert* standard. It is not the burden of proof of the party challenging the testimony—*i.e.*, defendants in an injury case—to show that it does not.[9]

In nearly every case, a plaintiff's treating medical provider has focused only on treating the condition as it presents, and rarely takes the time and effort to complete the steps required by *Daubert* to determine the actual cause of the underlying condition. Consequently, the requirements of *Daubert* provide several methods of attacking a treating physician's opinions. However, to set up a successful *Daubert* challenge, defense counsel must first obtain and thoroughly review the plaintiff's medical records and then carefully depose the physician. With that in mind, the next sections discuss tactics for challenging treating doctors under the *Daubert* standard.

II. Challenging a Treating Medical Provider's Opinions Based on a False Factual Premise

One of the most effective ways to attack a treating physician's opinions under *Daubert* is when those opinions are based upon an incomplete, if not outright wrong, understanding of the plaintiff's pre- and post-accident medical history. Pursuant to the plain language of the statute, an expert witness's testimony is not admissible if it is not "based upon sufficient facts or data" and is not "the product of reliable principles and methods" applied "reliably to the facts of the case."[10] Indeed, federal courts interpreting the *Daubert* standard routinely disqualify experts from testifying when their opinions are based upon a false or otherwise incorrect understanding of the facts underlying their opinions.[11] Importantly, defense counsel can

and should rely upon those cases in Wisconsin state courts because the *Daubert* standard is a federal standard that our legislature has adopted, so those federal cases are considered persuasive authority.[12]

That being the case, if a medical provider has rendered a causation opinion that assumes, for example, that a plaintiff had no relevant pre-existing history based solely on representations from the plaintiff taken during a history (*i.e.*, the plaintiff's own description), yet the plaintiff's medical records reflect that the plaintiff did in fact have such a history, then the provider's opinions are arguably not based upon sufficient facts or data and were not reliably applied to the facts of the case. This is a sound basis to seek disqualification of that expert's opinions under *Daubert*.

In addition, a doctor's opinions may be subject to exclusion where his or her understanding of a plaintiff's history, while not necessarily incomplete, is nevertheless based upon per se unreliable information. An example is where a doctor has not reviewed or been provided with the plaintiff's pre-accident records, but has been *told* by the plaintiff's counsel what those records allegedly reflect. Federal courts have routinely held that information purporting to summarize evidence but created primarily or solely by plaintiff's counsel or staff carries a per se inference of bias that prevents opinions relying upon that information from being considered admissible.[13]

In a case where the authors recently successfully excluded a plaintiff's treating doctor from testifying by prevailing on a *Daubert* motion, the doctor's opinions all relied on the assumption that the plaintiff had no prior history or complaints of the conditions she claimed were caused by the accident—tension headaches and neck pain. This assumption was based solely upon the plaintiff's representations to her doctor during her medical appointments. However, from a careful record review, it was clear the plaintiff had a long, relevant, and recent history of sporadic muscular neck complaints and tension headaches. The treating physician had either missed this history, or, as is more likely the case in most personal injury lawsuits, had simply not reviewed or been provided with the plaintiff's pre-accident medical records, and instead relied solely on plaintiff's statements.

Confronted with this scenario, there are at least two approaches available to defense counsel in taking the doctor's deposition. The first is to simply have the doctor confirm that he or she has relied solely upon the plaintiff's statements and assumed no relevant pre-accident history. That is, get the doctor nailed down on the notion that his or her opinions rely on assumptions that are demonstrably false. The second—and this is admittedly a little bit more unpredictable an approach as it runs the risk of allowing the doctor to correct the errors in his or her opinions on the fly—is to confront the doctor with the false assumptions underlying his or her opinions and have the doctor hypothesize how correcting those false assumptions may impact his or her opinions.

In our case, when we deposed the treating physician, we went with the latter, higher risk option, and it paid off. We asked her if her opinions would change if she assumed that there was a prior history that directly contradicted her assumptions (again, there clearly was such a history based upon the records). In response to this, the treating physician acknowledged that her opinions on the cause of the plaintiff's injuries would no longer be valid if the plaintiff had a pre-existing history of any of the complaints that she related to the accident. This testimony was particularly important, because often, plaintiff's counsel will argue that challenging the underlying facts of a doctor's opinions does not warrant excluding the opinions but rather is best left to challenge upon cross-examination. In our case, we were able to argue that the doctor herself admitted that her false factual premise rendered her causation opinions unreliable and therefore inadmissible. Again, an alternative, lower-risk but also lower-reward approach would simply have been to exhaust the doctor's own assumptions in her deposition, without confronting her with the incorrectness of them and giving her an opportunity to correct them, and instead leave that argument for the motion itself by showing the doctor's erroneous assumptions through the certified medical records.

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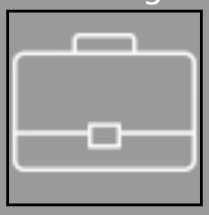
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There is no denying, however, that a judge will find compelling an expert admitting under oath that his or her opinions would be wrong in a hypothetical scenario that you can conclusively demonstrate is true. In our case, the fact that the treating medical provider's opinions relied upon a demonstrably false factual foundation also allowed us to set up a challenge to the doctor's methodology, discussed in the next section.

III. Challenging a Medical Provider's Failure to Use the Correct Method to Determine Causation—Etiology Versus Diagnosis

When an injured person is seen by a doctor, the doctor's focus is generally on diagnosing the patient's condition—*i.e.*, figuring out *what* the problem is. To the extent that the *cause* of that problem is relevant to the determination of *what* the problem is, the doctor may care about the cause. To the extent the cause is irrelevant, the doctor does not care—*i.e.*, once the problem is diagnosed and the appropriate treatment identified, if the cause need not be known to make the diagnosis or determine the treatment, the doctor is generally not going to place a significant emphasis on the cause. For example, if a patient comes in with a broken arm, it is not necessarily of any significant importance to the diagnosis and treatment of that injury that it came as the result of a fall, a sports injury, a bar brawl, etc. Once the injury is diagnosed and the treatment identified, there is little reason for the doctor to focus on what caused the injury. For our purposes, this is the fundamental disconnect between what a doctor's focus is on when they are treating a patient and what they are asked to do by personal injury plaintiffs or their attorneys once a claim is made.

Diagnosis is the process of identifying *what* a medical condition is, and the process of differential diagnosis, the accepted methodology for making a diagnosis, is for the doctor to first rule in all of the potential conditions that could explain the patient's condition, and then to progressively rule out those conditions as additional information about the condition is obtained.

The science of determining the *cause* of a medical condition is not diagnosis; it is etiology.[14] And, like differential diagnosis, there is also a scientific method in the medical field for determining the etiology of a particular condition. It is analogous to differential diagnosis, and perhaps not surprisingly, is called differential etiology.[15] The difference is that, rather than focusing on *what* the condition is and how to treat it, as diagnosis does, etiology focuses on what *caused* it, and differential etiology involves the process of ruling in all of the possible causes that could result in a particular condition (to establish general causation), and then to progressively rule out the causes that could not explain the condition, one by one, as additional information is obtained (to establish specific causation).[16]

This distinction is incredibly important in personal injury cases because, in nearly every case confronted by defense counsel, the plaintiff's treating medical providers who are proffered as experts will have diagnosed the plaintiff's condition, presumably by way of differential diagnosis (though if they have not that is another problem in and of itself), but it is *very rare* that the plaintiff's treating doctor will have conducted a differential etiology, because again, a doctor treating a patient is focused on determining what the condition is and how to treat it, not necessarily what caused it. The cause—*i.e.*, the etiology—of a particular condition is only important in circumstances where that cause is relevant to the diagnosis. In personal injury cases, in the *Daubert* context, it is arguable that a doctor's causation opinion where he or she has not conducted a differential etiology—the medically accepted method for determining the cause of a particular condition—is not "the product of reliable principles and methods" under Wis. Stat. § 907.02(1).

Importantly, many federal courts, including courts in the Seventh Circuit, have made it clear that an expert must perform a "differential etiology"[17] in order to reach a reliable causation opinion.[18] The failure to apply the method of differential etiology in order to rule out obvious potential alternative causes is "fatal" to a doctor's causation opinions.[19] The fact that most doctors in their everyday practice

have no significant need to apply a differential etiology, and therefore do not, yet *Daubert* arguably requires them to do so in order to render admissible medical causation opinions, provides fertile ground for attacking a treating physician's opinions.

In our case, in addition to arguing that plaintiff's doctor's opinions were based on a false factual premise, we also challenged her opinions by arguing that she failed to perform a differential etiology by failing to consider other causes of the plaintiff's alleged neck pain and tension headaches, including obesity, posture, other lifestyle factors, anxiety, and stress. In response to that line of questioning, the plaintiff's treating doctor admitted in her deposition that the plaintiff had many other conditions that were also possible causes of neck pain and tension headaches. However, the doctor failed to account for how these alternative causes factored into her opinions in both her report and her deposition, and also acknowledged that she had never specifically undertaken to rule them out as causes. That is, she essentially acknowledged that she had failed to apply a differential etiology to determine the cause of the plaintiff's symptoms. As a result, in our *Daubert* motion, we argued that the physician's failure to perform a differential etiology and rule in or rule out other alternative causes of plaintiff's complaints was an additional reason that her opinions were unreliable and inadmissible. We identified the following *Daubert* and *Seifert* factors in particular: 1. The physician's method for determining cause was not generally accepted by the medical community; 2. The physician's method unjustifiably extrapolated from an accepted premise to an unfounded conclusion; and 3. The physician had not adequately accounted for obvious alternative explanations.[20] In essence, without performing a differential etiology, we argued the physician impermissibly offered only an *ipse dixit* opinion, asking us to "take her word for it."[21] This argument was an additional basis for the court in granting our *Daubert* motion excluding the doctor's testimony.

IV. Challenging Medical Causation Opinions that Are Based on a Temporal Relationship Alone—the *Post Hoc Ergo Propter Hoc* Fallacy

This last section discusses a scenario that is likely very familiar to all defense counsel: A plaintiff claims that she has no pre-existing history of a particular condition, and the medical records reflect that she never treated for anything similar to it prior to the accident. Then, following the accident, she begins to complain of symptoms that she relates to the accident. Based solely on these facts, and nothing more, her treating doctor provides a causation opinion: "Since the patient claims no prior history of these symptoms and her records reflect no prior treatment for them, and given that her complaints have been consistent since the accident, it is my opinion to a reasonable degree of medical certainty that the accident is the cause of the patient's current complaints."

Cases like this are routine for defense counsel, and where there really is no record of a pre-existing history, the temptation may be to simply accept that causation is clearly established. This does not necessarily have to be the case. First, as discussed in the previous section, even in the scenario described here, plaintiff should still be required to show that the doctor performed a differential etiology before this causation opinion should be considered admissible under *Daubert*.

Second, it is well-established among the federal courts in the *Daubert* context that basing a causation opinion solely upon a temporal relationship is inadmissibly unscientific, as it is based on a logical fallacy known as the *post hoc ergo propter hoc* fallacy.[22] An example of the fallacy is as follows: "The rooster crows immediately before sunrise, therefore the rooster causes the sun to rise."[23] When a doctor renders a causation opinion as follows—she did not have it before the accident and does have it after the accident, therefore the accident caused it—that doctor's opinion is an example of the *post hoc ergo propter hoc* fallacy and, without more, must be considered inadmissible. Indeed, one of the specific purposes of the *Daubert* scientific

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reliability standard is to ensure "that [jurors] will not be misled by the post hoc ergo propter hoc fallacy."[24] In fact, it is precisely because a causation opinion like the one described here has a certain degree of attractiveness—*i.e.*, it seems to make sense, even though it is completely unscientific—that it is a very dangerous opinion to allow the jury to hear without first challenging it by *Daubert* motion.

Importantly, that a temporal relationship alone is insufficient to sustain a finding of medical causation under *Daubert* is well-settled and has been discussed at some length by the federal courts.[25] Reliance upon these cases as persuasive authority is appropriate given that, as noted above, Wisconsin has adopted the federal *Daubert* standard wholesale.[26] Defense counsel are urged to more regularly challenge medical opinions supported solely on a temporal relationship.

The physician's deposition is a crucial tool to establish that a physician's sole basis for causation is a temporal relationship by exhausting all the reasons that the physician relates the injuries to the accident. In the experience of this article's authors, that a doctor's opinion is based solely upon a temporal relationship and nothing more happens with surprising frequency. In addition, it is critical to obtain deposition testimony that the physician does not have sufficient knowledge of the facts of the accident, such as the speed of the cars, direction of the cars, how the accident happened, and how the plaintiff's body moved inside the vehicle. This will confirm that the doctor lacks knowledge concerning the mechanism and physics behind the accident to sufficiently explain the plaintiff's mechanism of injury. Particularly in the context of a low velocity impact, the doctor's lack of knowledge of these facts, combined with reliance solely upon a temporal relationship, can make a *Daubert* motion even more persuasive. In addition, where a biomechanical expert has been retained by defense counsel, illustrating the lack of expertise in injury causation that most medical doctors possess can further help to bolster the motion. Regardless, a medical causation opinion based solely upon a temporal relationship is per se inadmissible pursuant to the extensive federal case law addressing this issue, and defense counsel are encouraged to more regularly advance this argument given how frequently it will be available.

V. Conclusion

Contrary to popular belief, a *Daubert* motion against a plaintiff's treating medical expert is not a lost cause. Indeed, in the appropriate case, a successful motion will even be dispositive, because it will deprive plaintiff of the ability to prove an essential element of his or her claim—causation. Even if unsuccessful, a strong *Daubert* challenge can still be used to narrow the issues for trial, educate the court about the evidence, and, where appropriate, apply valuable pressure to the plaintiff at a critical point in the case to leverage a better settlement position.

Author Biographies:

Andrew B. Hebl *is a partner in Boardman & Clark's Litigation Practice Group. He also chairs the firm's Technology Committee. In addition, Andrew is currently serving as the President-Elect of the Wisconsin Defense Counsel (Wisconsin's defense bar). Andrew's trial and appellate practice focuses on the representation of insurance companies and their insureds. The cases primarily involve personal injury, property damage, and professional malpractice. Andrew also frequently represents insurance companies in insurance coverage disputes and extra-contractual litigation (bad faith). Finally, Andrew regularly defends municipalities in a wide variety of matters, including major civil rights lawsuits. Andrew is admitted to practice before all Wisconsin state and federal trial and appellate courts and is rated AV-Preeminent by Martindale-Hubbell.*

Kathryn A. Pfefferle *is a second-year litigation associate at Boardman Clark where she practices primarily in insurance defense, real estate, and construction law. Having spent five years in nonprofit management at a major domestic*

nonprofit, Kathryn is dedicated to pro bono work, which allows her to gain valuable hands-on trial experience and better serve her clients. Kathryn was recognized for her pro bono efforts in 2019 with the Dane County Bar Association's Individual Attorney Pro Bono Award. Also in 2019, Kathryn was named to the Wisconsin Super Lawyers Rising Stars list. Outside her practice, Kathryn is active in the legal community and is a member of a number of legal associations, including the James E. Doyle American Inns of Court for which she serves on the executive committee as the Social Chair.

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1 *Ollman v. Wis. Health Care Liab. Ins. Plan*, 178 Wis. 2d 648, 667, 505 N.W.2d 399, 405 (Ct. App. 1993).

2 *Id.*

3 Wis. Stat. § 907.02(1) (2017-18) states in full: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case."

4 *Id.*

5 *Ervin v. Johnson & Johnson, Inc*., 492 F.3d 901, 904 (7th Cir. 2007) (citing *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993)).

6 *Daubert*, 509 U.S. at 589.

7 Fed. R. Evid. 702 advisory committee note to 2000 amendments.

8 *See id.* (citations omitted).

9 *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004); *see also State v. Chitwood*, 2016 WI App 36, ¶ 35, 369 Wis. 2d 132, 879 N.W.2d 786 (the proponent of expert testimony has the burden to demonstrate that the proffered opinions are reliable).

10 Wis. Stat. § 907.02(1).

11 *Berk v. St. Vincent's Hosp. and Med. Ctr*., 380 F. Supp. 2d 334, 353 (S.D.N.Y. 2005) ("Because [the expert's] opinion rested on a faulty assumption due to his failure to apply his stated methodology 'reliably to the facts of the case,' [his] expert opinion . . . was not based on 'good grounds.'" (internal citations omitted) (quoting *Amorgianos v. Nat'l R.R. Passenger Corp*., 303 F.3d 256, 269 (2d Cir. 2002)); *Macaluso v. Herman Miller, Inc*., No. 01 Civ. 11496, 2005 WL 563169, at *8 (S.D.N.Y. Mar. 10, 2005) (concluding that an expert's testimony must be excluded under *Daubert* because it is "based on incorrect factual assumptions that render all of his subsequent conclusions purely speculative").

12 *See State v. Evans*, 2000 WI App 178, ¶ 8 n. 2, 238 Wis. 2d 411, 617 N.W.2d 220 ("[W]here a state rule mirrors the federal rule, . . . federal cases interpreting the rule [are] persuasive authority.").

13 *Lyman v. St. Jude Med. S.C*., 580 F. Supp. 2d 719 (E.D. Wis. 2008) (excluding as unreliable expert testimony where the expert did not independently verify the source and accuracy of the data but rather accepted a summary from the defendant's attorney); *In re TMI Litig.*, 193 F.3d 613, 683-84, 698 (3rd Cir. 1999) (excluding expert testimony that was based on summaries of medical histories prepared by employees of the plaintiff's lawyer); *Crowley v. Chait*, 322 F. Supp. 2d 530 (D.N.J. 2004) (excluding expert testimony where the testimony relied upon summaries prepared by plaintiff's counsel of depositions that had been taken in the case); *Sommerfield v. City of Chicago*, 254 F.R.D. 317 (N.D. Ill. 2008) (same).

14 "Differential diagnosis" refers to the process of reasoning they use to identify a patient's condition. "Differential etiology" refers to the science and study of the causes of a condition, and differential etiology is the more precise term for determining which of several possible causes is the most likely cause of the plaintiff's injuries. William P. Lynch, *Doctoring the Testimony: Treating Physicians, Rule 26, and the Challenges of Causation Testimony*, 33 Rev. Litig. 249, 309–10 (2014).

15 *Brown v. Burlington N. Santa Fe Ry. Co.,* 765 F.3d 765, 773 (7th Cir. 2014) (citing *Myers v. Ill. Cent. R.R. Co*., 629 F.3d 639, 644 (7th Cir. 2010)).

16 *Feit v. Great W. Life & Annuity Ins. Co*., 271 Fed. Appx. 246 (3d Cir. 2008); *Hendrix v. Evenflo Co*., 609 F.3d 1183 (11th Cir. 2010); *Cooper v. Marten Transp., LTD*., 539 Fed. Appx. 963 (11th Cir. 2013); *Wilson v. TASER Int'l, Inc*., 303 Fed. Appx. 708 (11th Cir. 2008).

17 *Lynch*, *supra* note 14.

18 *Brown*, 765 F.3d at 773; *Bland v. Verizon Wireless*, L.L.C., 538 F.3d 893 (8th Cir. 2008); *Bowers v. Norfolk S. Corp*., 537 F. Supp. 2d 1343 (M.D. Ga. 2007). Decisions on claims brought under the Federal Employers' Liability Act, which require a plaintiff to prove all elements of a negligence claim against their employer, provide a dearth of opinions analyzing the proper application of differential etiology in a *Daubert* challenge to a medical opinion. *See, e.g., Brown*, 765 F.3d at 773; *Kopplin v. Wis. Cent. Ltd*., 914 F.3d 1099, 1101–05 (7th Cir. 2019); *Myers*, 629 F.3d at 645 (7th Cir. 2010).

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20 *Seifert v. Balink*, 2017 WI 2, ¶¶ 73-74, 372 Wis. 2d 525, 888 N.W.2d 816.

21 *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert" is inadmissible).

22 *See Post hoc ergo propter hoc*, Wikipedia.com, http://en.wikipedia.org/wiki/Post_hoc_ergo_propter_hoc (last visited June 10, 2020).

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24 *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 473 (D.C. Cir. 1989).

25 *Guevara v. Ferrer*, 247 S.W.3d 662, 667-68 (Tex. 2007) ("[T]emporal proximity alone does not meet standards of scientific reliability and does not, by itself, support an inference of medical causation.") (collecting federal case law); *see also, e.g., McClain v. Metabolife Int'l, Inc*., 401 F.3d 1233, 1243 (11th Cir. 2005) (concluding that a temporal relationship does not, by itself, establish causation, and rejecting "the false inference that a temporal relationship proves a causal relationship"); *Rolen v. Hansen Beverage Co*., 193 Fed. App'x 468, 473 (6th Cir. 2006); *Porter v. Whitehall Labs*., 9 F.3d 607, 611 (7th Cir. 1993); *see also Roche v. Lincoln Prop. Co*., 278 F. Supp. 2d 744, 764 (E.D. Va. 2003) ("An opinion based primarily, if not solely, on temporal proximity does not meet Daubert standards."); *In re Breast Implant Litig*., 11 F. Supp. 2d 1217, 1238-39 (D. Colo. 1998) ("[A] temporal relationship by itself, provides no evidence of causation. . . . The fact of a temporal relationship establishes nothing except a relationship in time. Proof of a temporal relationship merely suggests the possibility of a causal connection and does not assist Plaintiffs in proving medical causation."); *Schmaltz v. Norfolk & W. Ry*., 878 F. Supp. 1119, 1122 (N.D. Ill. 1995) ("It is well settled that a causation opinion based solely on a temporal relationship is not derived from the scientific method and is therefore insufficient to satisfy the requirements of [*Daubert*].").

26 *See Evans*, 238 Wis. 2d 411, ¶ 8 n. 2.

WDC Leaders Attorney Spotlight: Henry P. Twomey

Editor's Note: *To recognize the philanthropic efforts of our membership, this recurring feature of the Wisconsin Civil Trial Journal 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.*

Henry P. Twomey is an associate at Kasdorf, Lewis & Swietlik, S.C. in Milwaukee. His practice focuses on all aspects of civil litigation, with an emphasis on insurance defense, municipal law, and construction law. In addition to the Wisconsin Defense Counsel, Henry is a member of the American Bar Association and the State Bar of Wisconsin. A native of Massachusetts, Henry currently resides in Milwaukee with his fiancé and their dog. He regularly serves as a guest speaker at Wauwatosa East High School, mentoring students with an early interest in the law.

In 2018, Henry began volunteering as a youth hockey coach with SHAW Pirates Special Hockey. The SHAW Pirates are supported by the Southeastern Hockey Association of Wisconsin ("SHAW"), the Wisconsin Amateur Hockey Association, and USA Special Needs Hockey. A new and growing program, its mission is to enrich the lives of individuals with intellectual or developmental disabilities through increasing their personal development and self-confidence both on and off the ice. The program provides its players with an opportunity to have fun, learn teamwork, gain friendships, and increase physical activity.

How did you get involved with SHAW Special Hockey?

I have been playing hockey all my life and try to stay involved with the game as much as possible. I heard about the program from another hockey player in the Milwaukee area and contacted the program's directors, Juan Rios and Wade Van Westen, to express interest in getting involved. From there I began attending weekly practices and assisting with on-ice coaching duties.

How does the program work?

This is a new and growing program and we are so excited to spread the word and get more members involved. Practices are scheduled every Saturday morning from November to late March at Wilson Park Ice Rink, 4001 S. 20th Street, Milwaukee, WI. During practice, players have the opportunity to develop on-ice confidence through skating, shooting, puck handling drills, and learning general hockey knowledge. Players of all skill levels are always welcome. Our goal is to recruit players and grow the team so we can seek out games and tournaments in both the Wisconsin and Midwest regions.

What kinds of events are involved?

Outside of weekly practices, our players have had numerous opportunities to experience and watch the game of hockey at all levels. Last season our players were invited to attend a Milwaukee Admirals game and were given the opportunity to skate on the ice during an intermission. Our players were also

recognized by the UW-Milwaukee Panthers hockey team and attended one of their games.

What has been the highlight of your experience?

During my first season with the program, there were several high school age players on the team. Program directors Juan Rios and Wade Van Westen worked with the SHAW high school program to fulfill the necessary requirements for each player to obtain high school letters in hockey. One day after practice, Juan and Wade surprised the players with an impromptu ceremony and awarded each player with their high school letter. The players were overjoyed when they realized that – like many of their high school peers – they were being recognized for their achievements as part of a hockey team. Seeing the excitement that the players displayed along with how proud their parents and family members were of their accomplishment is an experience that I will never forget.

How can other members get involved?

We are looking for any individual with special needs interested in giving hockey a try. All skill levels and experience welcome! We are also always looking for more on-ice volunteers, as well as equipment donations. For more information, please contact Juan Rios at swash.specialneedshockey@gmail.com.

Is there anything else you would like to share about your experience?

I cannot stress enough that SHAW Pirates Special Hockey is for individuals of all hockey skill levels. Whether a beginner or an experienced skater, this program is a great way for athletes with special needs of all ages to keep physically active and have a lot of fun in the process. Even if you think that your player does not have the proper gear, we recently received an equipment donation from the American Special Hockey Association and will work to equip any athlete interested in hitting the ice!

To get more information about SHAW Pirates Special Hockey, visit www.shawhockey.org or email swash.specialneedshockey@gmail.com.

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Avoiding the Pitfalls in Regulatory Flexibilities and Relief Funds[1]

by: Heather D. Mogden, Kathryn M. Costanza, and David B. Honig, Hall, Render, Killian, Heath & Lyman, P.C.

The federal and state responses to COVID-19 have resulted in a dizzying and ever-evolving array of executive orders, waivers, flexibilities, emergency declarations and enforcement discretion (collectively referred to as, "regulatory flexibilities") that significantly change the rules governing health care providers. Although regulatory flexibilities and relief funds are in part intended to shield frontline responders from liability and mitigate financial losses, taking advantage of these accommodations comes with independent risks. While not exhaustive, counsel representing health care providers should be aware of the following six pitfalls and practical takeaways to avoid them.

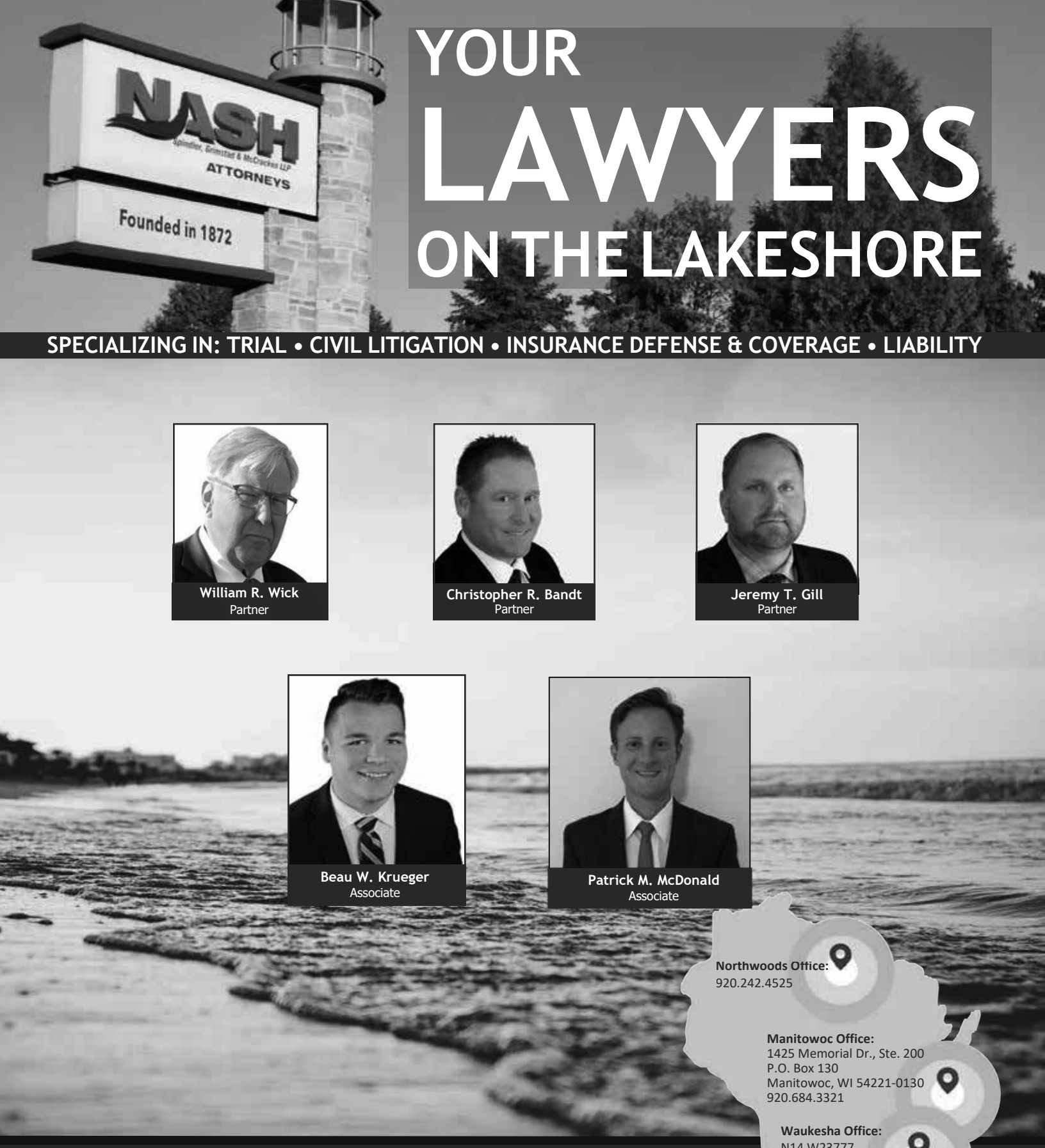
1. Pressures on Health Care Staff Increase Whistleblower Potential Beyond the Norm

The pressure of the COVID-19 public health emergency has prompted organizational providers to rapidly expand capacity in the face of supply and staffng shortages or, conversely, to cut costs drastically in an effort to stay afloat as elective (and typically more profitable) services are limited, delayed or canceled. This creates a unique workload and financial pressures on health care workers. Widespread employee dissatisfaction in the wake of COVID-19 will fuel a range of lawsuits, including the potential for fraud litigation, with overworked, furloughed, or terminated employees blowing the whistle on practices perceived to be noncompliant both during and pre-dating the public health emergency.[2] The sheer increase in the volume of laid-off or financially disadvantaged providers will likely increase the number of whistleblower actions.

Also, the confusion and constant evolution of legal requirements in the COVID-19 environment may independently trigger a deluge of whistleblower activity. Health care workers with legitimate concerns about the lack of appropriate PPE may not realize that their concerns are not the result of noncompliance or negligence on the part of their organization. The ever-changing regulatory flexibilities and associated guidance mean that previously recognized "best practices" or prohibited conduct may frequently change or be temporarily permitted, leading health care workers to question organizational practices. Disagreements will continue to arise between health care organizations and their workers related to tough choices necessary to effectively respond to COVID-19 financial and patient care pressures. In short, even compliant practices may trigger whistleblower activity if there is confusion and miscommunication about changed practices.

2. Regulatory Flexibility and Relief Funding Are Separate: Don't Confuse Them

Providers should not confuse regulatory flexibility with relief funding: the remedy for a strained operational response is regulatory flexibility, and



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the chief remedy for significant financial loss is relief funding. Providers do not necessarily have carte blanche to take advantage of every regulatory flexibility for any and all patient care scenarios, and liberal interpretations of the scope of these flexibilities may create additional liability. It is reasonable to anticipate the health care industry's response will be second-guessed at some point.

The False Claims Act ("FCA") is the federal government's primary vehicle for imposing civil penalties on health care providers who knowingly submit claims to Medicare or state Medicaid programs that do not meet the conditions of payment. During this public health emergency, several of these conditions have been altered or waived through regulatory flexibilities.[3] Generally speaking, a waiver is appropriate only *as needed to respond to the public health emergency*. Depending on the scenario, if a provider uses regulatory flexibility beyond what is necessary to respond to COVID-19, the provider may not meet the applicable conditions of payment and may be exposed to FCA liability.

3. There Is No Immunity from Fraud

Even the broadest, most encompassing immunity available during the public health emergency does not protect against willful misconduct. Additionally, the confusion and fear of a pandemic creates an ideal situation for bad actors to engage in fraud. Fraudulent submission of claims can trigger both criminal and civil penalties, and the government is moving swiftly in this regard. State attorneys general have begun forming joint task forces with U.S. Attorneys with the specific purpose of targeting COVID-19 related health care fraud.[4] Already, the U.S. Attorney's Office for the District of Rhode Island announced it had filed federal criminal charges in response to a fraudulent application for a Paycheck Protection Program ("PPP") loan.[5]

4. Scope, Scope, Scope!

It cannot be stressed enough: every government action limits risk in different ways. The term "blanket" waiver can be misleading.[6] Every regulatory flexibility is limited by:

- The jurisdiction and authority of the government branch or agency that issued it;
- The provider type to which it applies;
- The conduct it protects or permits;[7]
- The geographic area to which it applies;
- The timeframe of its applicability;[8] and
- The specific relief it provides.

For example, some states have issued executive orders protecting health care entities and individual providers from professional liability under state negligence laws for services rendered in response to the public health emergency. Some states recognize that providers operating under an expanded scope of practice or license, and with limited resources available, might not meet the pre-COVID-19 standards of care. But immunity from patients' medical malpractice claims in state court does not preclude the U.S. from imposing penalties when the same conduct violates un-waived conditions of payment for claims related to that treatment. This is particularly true for allegations that services were not medically necessary. Moreover, while negligence may be excused under state immunities, most levels of culpability beyond that (*e.g.*, recklessness or gross negligence) are not waived.

Failure to attend to the scope and time-limited nature of regulatory flexibilities may form the foundation of a whistleblower's argument that the provider knowingly submitted a false claim. Providers that affirmatively modify operational processes in reliance on regulatory flexibilities will be ascribed with knowledge of the applicable limitations and timeframe, and it may be difficult to establish that the submission of noncompliant claims was an unknowing mistake rather than knowing fraud, particularly once the emergency expires.

5. Today's Relief is Tomorrow's FCA Investigation

The relief funds authorized under the CARES Act, such as the Provider Relief Fund and the PPP, are built-in sources of FCA liability. Federal and state fraud investigations and enforcement are certain


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to arise from pervasive audits related to relief funds. The Provider Relief Fund website[9] explicitly states that the terms and conditions for the funds are intended to combat fraud and that "[t]here will be *significant anti- fraud and auditing work done by HHS*, including the work of the Office of the Inspector General." Unfortunately, the terms and conditions attendant to the various relief funds are constantly evolving, making it difficult for providers to evaluate their ability to comply with the terms and the risks of accepting the funds.

Applications to obtain relief funds or enroll in new payment programs likely constitute a "statement" for purposes of the FCA and often include a tick-the-box certification of eligibility for the funds and compliance with the terms and conditions. If any part of the certification of eligibility for funds or compliance with the terms and conditions is knowingly or carelessly[10] false, the entire amount provided under the grant, loan or program may be clawed back, with penalties. The risk of accepting relief funds without monitoring for updates to the terms and conditions can be significant. For example, large publicly-traded companies who received PPP loans were given a deadline to return the funds after the agency updated guidance defining the term "necessary" in the loan applications.[11] Providers who fail to understand the scope and limits of each relief mechanism, whether regulatory or financial, risk civil and criminal penalties.

6. Immunity from Liability does not Mean Freedom from Suit

As discussed above, regulatory flexibilities offer limited protection when providers comply with the specific language, scope and applicability of a waiver or interim rule. Provider relief funds are available if providers meet all of the eligibility requirements for the assistance type and amount awarded. But even when organizations act diligently and in good faith to comply with all the elements required, whistleblowers and the government alike can contest the organization's good faith as it applies to each element. This is further complicated by a lack of available guidance when taking advantage of regulatory flexibilities.

Appropriate documentation will be the provider's best evidence against fraud. However, a favorable decision may not come until the summary judgment stage, after discovery and pre-trial litigation which is extensive, expensive and intrusive. Depending on the nature of the suit, the cost of a successful defense can rival the avoided damage award.

Practical Takeaways

Providers should only use regulatory flexibilities and relief funds that are reasonably needed and should document good faith decision-making when they do use them.

- Perhaps challenging under the circumstances, the best way to avoid litigation is to minimize reliance on regulatory flexibilities and relief funds. When needed, providers should document that their decision to use a regulatory flexibility was appropriate or necessitated by their COVID-19 response effort, as supported by the testing numbers, projections in their community, resource strain or availability, and other relevant considerations.
- Not only will diligent documentation assist with any future audit, but it should also assist the decision-making process itself and aid the organization in determining how to phase out reliance on regulatory flexibility.
- As a practical tip, providers should save copies of guidance documents that influence their decision-making processes. As these documents are updated, older versions are typically removed from the agency's website. Obsolete documents may be evidence that compliance efforts were undertaken in good faith even if they fall short.

Providers should act with an eye towards the optics.

- The perception that a provider is needlessly cutting costs, does not support frontline workers or is trying to silence health care

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workers who are speaking out will only prompt additional scrutiny and increase the likelihood of whistleblower action, regardless of whether the organization's efforts are undertaken in good faith.

- Providers should communicate to health care workers, patients and the community about the organization's commitment to providing high-quality patient care, compliance efforts, the reason for changes in policies or staffng due to regulatory flexibilities and financial concerns, and the organization's support for frontline workers.

Providers should dedicate sufficient resources to compliance with regulatory flexibilities and relief funding programs.

- Know the applicable conditions and adapt to any later issued changes in guidance.
- Make sure key personnel understand the timeline for returning to normal when each regulatory flexibility expires.
- For processes that may be permitted post-public health emergency (for example, telemedicine and in-home health care services), start shifting waived requirements into compliant processes in advance of the expiration of the waiver or temporary flexibility.
- Always ensure that conditions of payment known and applicable at the time of treatment are met before submitting claims to government payors.

Providers should actively monitor updates to regulatory flexibilities and relief funds terms and conditions.

- Senate Majority Leader Mitch McConnell recently stated that legislation may be introduced providing liability protections for organizations acting in accordance with public health guidance.[12] This may provide broader liability protections than may otherwise be available under the regulatory flexibilities, but until details about the scope and applicability of such protections are released, providers should continue to act with an eye towards compliance.
- Regularly monitor agency websites for guidance documents, such as "Frequently Asked Questions" ("FAQ"), on existing flexibilities and programs.
- Monitor legal alerts issued directly from the relevant state and federal agencies.
- Monitor legal alerts from your state hospital association and other state and federal provider associations.

Author Biographies:

Heather D. Mogden *is a litigation associate in the Milwaukee office of Hall, Render, Killian, Heath & Lyman, P.C. She represents health care providers in state and federal courts and administrative proceedings on a wide variety of issues ranging from tax exemption and contract disputes to False Claims Act violations and Medicare reimbursement appeals. Heather earned her B.B.A. in 2007 from the University of Wisconsin-Madison and her J.D., cum laude, in 2012 from Marquette University Law School. Heather is admitted to practice in Wisconsin state and federal courts and in the U.S. District Court for the District of Columbia, and is a member of the American Health Law Association and the Wisconsin Defense Counsel.*

Kathryn M. Costanza *is an associate in the Denver office of Hall, Render, Killian, Heath & Lyman, P.C. Kathryn counsels her health care clients in state and federal regulatory and compliance matters, including licensure, conditions of participation, change of ownership, reimbursement matters and enrollment appeals. Kathryn received her bachelor's degree in 2010 from Colorado State University and her J.D., Order of the Coif, in 2019 from the University of Colorado Law School. She is admitted to practice in Colorado, is a member of the American Health Law Association, and is a Certified Neurologic Music Therapist.*

David B. Honig *is a shareholder in the Indianapolis office of Hall, Render, Killian, Heath & Lyman, P.C.*

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Leading the firm's National Health Care Litigation team, David focuses his practice on complex litigation with particular emphasis on the False Claims Act ("FCA"). He has more than 20 years of FCA and health care experience, including playing an integral role in the creation of the nation's first Medicaid Fraud Major Case Unit for the state of Florida. David is admitted to practice in multiple state and federal courts nationwide, including the U.S. Supreme Court, and is a member of the American Health Law Association and the lead author of Healthcare and the False Claims Act, Second Edition, Healthlaw Publishing (2019). David serves as an adjunct professor at Indiana University Robert H. McKinney School of Law, teaching about the art of negotiations, and has spoken nationally and internationally about negotiations. He also serves as a Registered Civil Mediator in the state of Indiana.

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1 This article is adapted from the authors' original blog post available at *https://www.hallrender.com/2020/05/21/providers-beware-avoiding-the-pitfalls-in-regulatory-flexibilities-and-relief-funds/#_ftnref10* with links to additional information and resources.

2 Furloughed employees are as disgruntled as overworked employees in hot spots. The Department of Labor issued COVID-19 guidance notifying employers that it was not waiving the WARN Act requirement that employers give 60 days' notice of mass layoffs, and at least one employer who failed to comply has already been named in a class action suit. "DOL Issues New WARN Act COVID-19 Frequently Asked Questions," Hall Render (May 8, 2020), available at *https://www.hallrender.com/2020/05/08/dol-issues-new-warn-act-covid-19-frequently-asked-questions/*.

3 *See* CMS, *Medicare and Medicaid Programs, Basic Health Program, and Exchanges; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency and Delay of Certain Reporting Requirements for the Skilled Nursing Facility Quality Reporting Program, Interim Final Rule*, 85 Fed. Reg. 27550 (May 8, 2020); CMS, *Explanatory Guidance, March 30, 2020 Blanket Waivers of Section 1877(g) of the Social Security Act* (April 21, 2020), available at *https://www.cms.gov/files/document/explanatory-guidance-march-30-2020-blanket-waivers-section-1877g-social-security-act.pdf*.

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6 For example, the Stark "blanket waivers" are quite limited. *See* Wallander, Gregg M., et al., *CMS Issues New Blanket Stark Waivers for COVID-19 Purposes*, Hall Render (Mar. 31, 2020), available at *https://www.hallrender.com/2020/03/31/cms-issues-new-blanket-stark-waivers-for-covid-19-purposes/*; Wallander, Gregg M., et al., *CMS Explains Stark Waivers – Consider Any Needed Action Now*, Hall Render (Apr. 24, 2020), available at *https://www.hallrender.com/2020/04/24/cms-explains-stark-waivers-consider-any-needed-action-now/*.

7 For example, the PREP Act protects against civil liability for development, clinical testing, distribution, purchase, use, prescribing, dispensing, and administering "covered countermeasures" like tests and treatment for COVID-19. *Guidance for Licensed Pharmacists, COVID-19 Testing, and Immunity under the PREP Act*, U.S. Dept. Health & Human Services (Apr. 8, 2020), available at *https://www.hhs.gov/sites/default/files/authorizing-licensed-pharmacists-to-order-and-administer-covid-19-tests.pdf*. The PREP Act does not protect providers who are treating positive-tested patients for conditions unrelated to their COVID-19 diagnosis, nor does it protect providers applying the Act's otherwise "covered countermeasures" to patients with a different respiratory disease.

8 Every waiver, executive order, emergency declaration, and enforcement discretion has an expiration date. The effective period of each of these regulatory flexibilities depends on the language itself and the authority under which it was issued, which means that there will not a be a single deadline for all operations to revert to normal. Many states have built cushions into their emergency orders, allowing providers an additional thirty days or so after the declared public emergency ends to wind down their response efforts and return to normal regulatory compliance. This applies only to compliance with state regulations. Most federal regulatory flexibilities lack this cushion, however, and emergency operational processes must return to normal compliance immediately when the emergency ends. This necessitates adequate planning.

9 *CARES Act Provider Relief Fund*, U.S. Dept. Health & Human Services, available at *https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/index.html* (last visited June 9, 2020).

10 The FCA defines "knowing" as "actual knowledge, … deliberate ignorance, … or reckless disregard." 31 U.S.C. § 3729(b)(1).

11 Honig, David B., et al., *PPP Loans and FCA Liability*, Hall Render (April 24, 2020), available at *https://www.hallrender.com/2020/04/24/ppp-loans-and-fca-liability/*.

12 David Morgan, *McConnell says he is spearheading broad*

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2020 Advocate of the Year: David J. Pliner

Congratulations to David J. Pliner for being selected by the WDC Board of Directors as the 2020 Advocate of the Year! The Advocate of the Year Award recognizes the member with the most defense work success of the prior calendar year. In 2019, Dave had an exceptional year. Some of his noteworthy accomplishments are summarized below.

Dave is one of the founding partners at Corneille Law Group, LLC. He received his J.D. from the University of Wisconsin Law School in 1989. He is licensed to practice in all state and federal courts in Wisconsin, in the Seventh Circuit Court of Appeals and in the United States Supreme Court. David focuses his practice on motion and appellate work. Since he began practicing law in 1989, Dave has been recognized by his peers as well as Judges around the State as an eloquent legal writer, who has an uncanny ability to make articulate, thoughtful, and novel legal arguments from the most complex sets of facts. He has filed briefs in dozens of appeals, resulting in over thirty-five published and unpublished decisions at both the state and federal levels. He has presented oral arguments before the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the United States Court of Appeals for the Seventh Circuit.

Dave handles briefing and motion practice for every attorney at his firm as needed. Accordingly, the legal issues and topics on which Dave writes are unbelievably broad in scope. The volume of his briefing is astounding and no doubt exceeds most, if not all, of his peers. Dave routinely produces briefs and/or motions in multiple cases in a given week. Though Dave can complete complex briefs in an incredibly timely and efficient manner, the quality of his work product is consistently excellent. By way of example, Dave was recently asked to assist with a summary judgment motion in a negligence case on a Wednesday. There had been 18 depositions and no less than seven experts involved. The summary judgment deadline was Friday. Despite knowing little-to-nothing about the case, Dave was able to produce an absolutely stellar summary judgment brief by the deadline.

In addition to the above, Dave achieved excellent results in the following cases in 2019:

Sauk County Case No. 17-CV-156

This medical negligence case involved allegations that a locum tenens physician assistant negligently splinted a tibial fracture on a two-year-old, which caused compartment syndrome. Dave achieved two noteworthy victories in this case.

First, plaintiff counsel in this case was Nicholas Rowley, a highly decorated attorney who practices in Iowa and California. He has recovered over $1 billion in more than a dozen states and was the California trial lawyer of the year in 2018. Attorney Rowley sought *pro hac vice* admission months before trial – a request that is rarely opposed and seemingly almost always granted. Dave filed a comprehensive motion opposing Rowley's *pro hac vice* admission, which was granted by the trial judge. This somewhat unprecedented ruling not only knocked out one of the best personal injury attorneys in the country, but gave defense lawyers

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across the nation a roadmap for opposing Attorney Rowley's admission to any state court. Notably, in his brief, Dave cited some unique extraneous sources to definitively refute representations that Rowley had made to the Court in his filings, including but not limited to, excerpts from a book written by Rowley and excerpts from newspaper articles where Rowley had been quoted in the past.

Second, several weeks after knocking out Attorney Rowley from the case, the trial court granted Dave's motion for summary judgment dismissing all claims against the physician assistant. The motion dealt with a unique loophole in the law with respect to the employment of a professional who does not meet the definition of a "heath care provider" under Ch. 655. Though the physician assistant was an independent contractor, Dave posited that, legally, he must be considered either an employee of the hospital at which he was working (a non-party to the action) under "apparent agency" or a "borrowed employee" theory for purposes of a medical negligence claim. The court ruled that the physician assistant was a "borrowed employee" of a health care provider. Since the physician assistant could only be liable in his capacity as a borrowed employee of a non-party health care provider, the court dismissed the entire case, leaving the plaintiffs astonished. The matter is currently on appeal.

Kenosha County Case No. 18-CV-926

In this medical negligence case, Dave represented a hospital who was sued for negligent policies and an alleged fraudulent cover-up of an alleged wrong-site surgery claim along with a claim for punitive damages. Dave successfully argued for dismissal of the punitive damages claim and fraud claim for inapplicability in medical negligence cases and the plaintiff's failure to plead with the requisite particularity, respectively, on a Motion to Dismiss. As the case progressed, the Plaintiff attempted to re-plead the fraud claim, eventually filing a Motion for Leave to File a Second Amended Complaint which included an allegedly-more-particularly-pled fraud claim. Dave successfully argued for denial of the motion on the following grounds: (1) the amendment would prejudice the defendants due to the impending trial date, (2) the facts available to the plaintiff at the time of the plaintiff's initial fraud claim pleading remained unchanged, (3) the fraud claim was still not pled with the required particularity, and (4) informing a patient of wrong-site surgery was not a recognized duty for a negligence cause of action. The ruling was an absolutely crushing blow to plaintiffs' case as a whole. By dismissing the fraud and punitive damages claim, the plaintiffs were left solely with a claim for negligent policies – a development that reduced the value and exposure of the claim exponentially.

What is perhaps more noteworthy about Dave's accomplishments in these cases is the fact that the issues were being briefed *simultaneously* and both rulings came down in the *same week*. Thus, Dave had what can only be described as a "once in a career" type week in December 2019, wherein he effectively defeated two separate medical negligence cases – both of which involved considerable exposure and incredibly complex issues. Dave's success in 2019 did not end there.

Waukesha County Case No. 18-CV-692

This medical negligence case involved alleged negligence arising out of a laser skin treatment at a spa. Dave filed a motion for summary judgment claiming that the plaintiff had insufficient support from a qualified expert along with an argument that the doctrine of *res ipsa loquitor* did not apply. The Court granted the motion and dismissed the case. No appeal followed.

Milwaukee County Case No. 17-CV-2791

This medical negligence case was brought by a patient against two of his former treating optometrists alleging a delayed diagnosis of advanced glaucoma. After a considerable amount of briefing, Dave won a summary judgment motion on all claims against one of the two defendants based on the statute of repose. Subsequently, Dave won a motion for sanctions against the plaintiff, including an award of almost $7,500 in attorney fees. The

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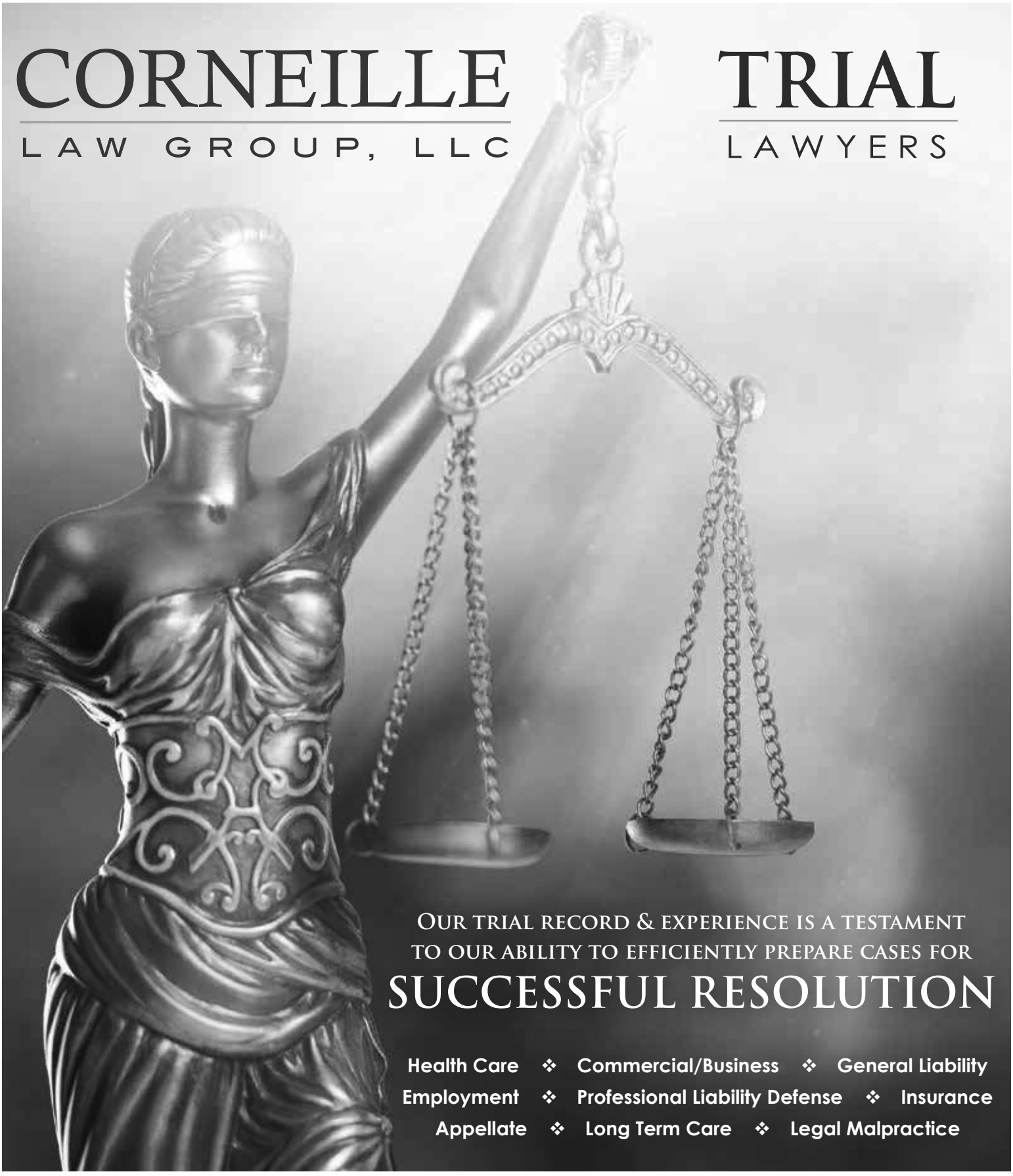
Court indicated that if the plaintiff did not pay the fees by a certain date, it would dismiss the case with prejudice. The matter is currently on appeal.

Waukesha County Case No. 19-CV-78

This case involved a physical altercation between two men at a fitness center. Dave filed a summary judgment brief arguing that there was no duty owed by the fitness center to protect a frequenter from the negligent acts of a third party, which is an area of law that is significantly underdeveloped. The Court agreed with Dave's premise that our client did not violate any duty to protect the plaintiff from the negligent or intentional acts of a third party without the requisite level of notice. This led to a dispositive dismissal of the plaintiff's case. The matter is currently on appeal.

Despite all of his accomplishments, Dave is extremely humble. When he achieves favorable results, he credits others in the firm and never takes the credit himself (though it is no doubt warranted). He is an excellent mentor to young lawyers and makes his peers much better lawyers with his unique ability to break down and analyze complex legal issues that many overlook.

Nominated By: John H. Healy, Adam M. Fitzpatrick, & Brian C. Bultman, Corneille Law Group, LLC



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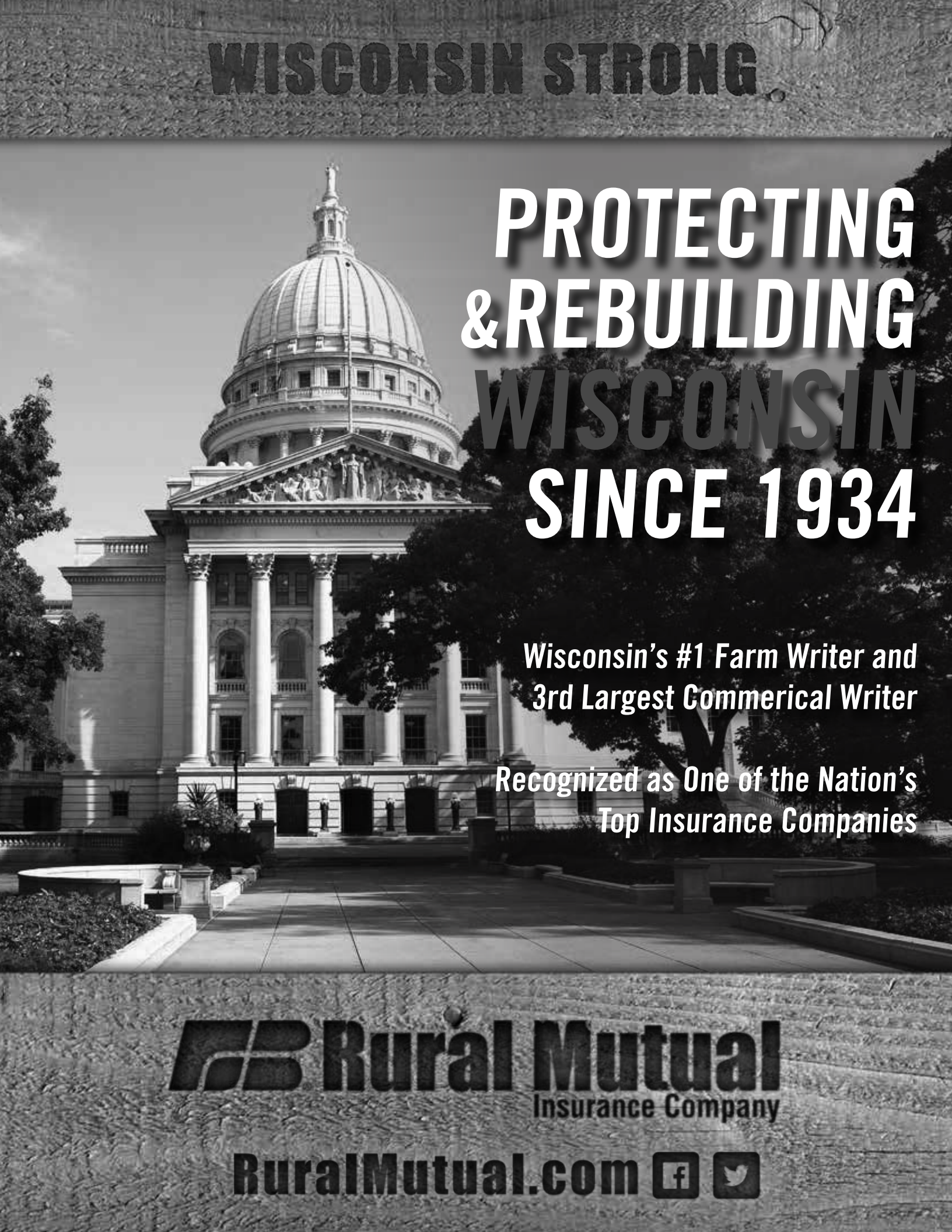
2020 Distinguished Professional Service Award: Carmelo A. Puglisi

Congratulations to Carmelo Puglisi for being selected by the WDC Board of Directors as the recipient of the 2020 Distinguished Professional Service Award! The Distinguished Professional Service Award recognizes a longtime member who has given consistent effort to grow and improve WDC. Carmelo served on WDC's Board of Directors and was President of the WDC from 1996-1997 (at the time, the organization was known as the Civil Trial Counsel of Wisconsin). Prior to that, he was the Treasurer from 1994-1995 and Program Chair from 1993-1994. During his term as President, he helped WDC draft, support, and see a bill enacted which enlarged the time to answer a complaint. Carmelo has been a frequent presenter at WDC seminars.

Carmelo Puglisi graduated from Marquette Law School in 1980. He started his career with American Family Mutual Insurance Company in June 1983 as a trial attorney for their Brookfield legal office that covered southeast Wisconsin. During this time, he tried court and jury trials. In 1986, he became the managing attorney for the Brookfield office. In 2009, he became the Associate General Counsel of Performance and Quality for the American Family Litigation Division. Carmelo taught legal research to paralegals at Concordia University, in Mequon, for 10 to 12 years. During his time at Concordia, he helped the 4-year paralegal program secure ABA accreditation. Carmelo testified before the legislature on the modified joint and several liability bill that was passed into law. He has served as an expert bad faith litigation. Carmelo retired in October 2019 after practicing law in insurance defense for 40 years.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2020 Publication Award: Monte E. Weiss

Congratulations to Monte Weiss for being selected by the WDC Journal Editor and Board of Directors as the recipient of the 2020 Publication Award! The Publication Award recognizes a well-written cutting edge article written for the WDC Journal. Monte receives the award for his article, "A Perilous Decision: *Steadfast* Explains an Insurer's Duty to Defend in the Multi-Insurer Context (and the Damages Available against a Breaching Insurer)." The article appeared in the summer 2019 issue of the WDC Journal – an entire issue dedicated to the duty to defend. All of the articles in the summer 2019 issue were authored by members of the Insurance Law Committee, of which Monte is the Committee Chair. Monte was instrumental in putting together the issue, which was very well received by the membership.

Monte Weiss of Weiss Law Office, S.C., Mequon, graduated from Case Western Reserve University in 1991 S.C. He 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. Monte routinely represents insurance companies on insurance contract interpretation issues and is a frequent lecturer and author on insurance topics. He is currently on the Board of Directors for the WDC.

Are Plaintiffs Overcharging Wisconsin Wage-and-Hour Claims?

by: Daniel Finerty, Lindner & Marsack, S.C. and Peter Nowak, Steinhilber Swanson LLP

Chapter 109 authorizes employees to seek unpaid wages by filing a complaint with the Department of Workforce Development Equal Rights Division (DWD) and through a private right of action in circuit court.[1] In addition to unpaid wages, the statute allows the circuit court to award attorney's fees and costs and order civil and criminal penalties.[2] Chapter 109 is, in essence, the state equivalent of the federal Fair Labor Standards Act (FLSA).

While a circuit court has explicit statutory authority to order a civil penalty under Wis. Stat. § 109.11(2), based on research and statutory analysis, it appears the civil penalty provision is generally misunderstood, and sometimes wrongly pled, to permit a 50% penalty upon unpaid wages, regardless of whether an employee has actually filed a DWD complaint prior to commencing suit in circuit court. As a result, counsel for employers and Employment Practice Liability Insurance (EPLI) carriers that provide wage-and-hour coverage[3] should be aware that this position is not supported by the text of the statute, relevant cases (albeit unpublished), or the legislative history of Wis. Stat. § 109.11(2).

Defense counsel should uniformly raise a statutory defense that this provision does not authorize the circuit court to award a 50% penalty where a plaintiff has not filed a DWD labor standards complaint. Correcting this misconception among practitioners will reduce the impact of wage-and-hour litigation upon businesses and, by extension, insurance carriers. It may also, hopefully, increase the likelihood that wage-and-hour cases will settle earlier, perhaps encouraging employees to bring them to the DWD instead of in court, permitting a less costly settlement without inflated attorney's fees. This would also lessen the burden on federal district courts[4] and Wisconsin circuit courts to address these issues and for businesses to defend these suits.

I. Wisconsin's Wage Payments, Claims and Collections Act

The civil penalty provision, Wis. Stat. § 109.11(2), provides:

> (a) In a wage claim action that is commenced by an employee *before* the department has completed its investigation under s. 109.09 (1) and its attempts to compromise and settle the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50 percent of the amount of wages due and unpaid.
>
> (b) In a wage claim action that is commenced *after* the department

> has completed its investigation under s. 109.09 (1) and its attempts to settle and compromise the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid to an employee and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 100 percent of the amount of those wages due and unpaid.
>
> (Emphasis added.)

This section has been the foundation for discussion in Wisconsin cases, but, unfortunately, no published Wisconsin case has directly addressed whether this section authorizes a court to award damages in the absence of an administrative filing with DWD.

II. Wisconsin Caselaw – Published and Unpublished

In *Hubbard v. Messner*,[5] the court of appeals acknowledged that "the administrative remedy is encouraged through the penalty structured" and that "DWD's involvement is encouraged because the legislature trusts the DWD will be able to resolve most claims or the employer and employee will be able to settle their disputes without further court action or penalties."[6] However, the *Hubbard* court did no go so far as to acknowledge that the DWD filing is required in order to obtain either a 50% or 100% civil penalty because the plaintiff had filed a DWD claim, the investigation of which was completed prior to the commencement of suit.[7]

In *German v. Wisconsin Department of Transportation*, the court of appeals held that "the right of action created by § 109.03(5) permits employees to sue employers for wage claims deriving from hours and overtime regulations without first pursuing the claim with DWD."[8] In doing so, the *German* court rejected the argument that employees "may properly pursue their claim only under [Chapter 103, a different statute], which does not, in the [defendant's] view, provide for employee-initiated suits against employers."[9] The court recognized that "[s]ection 109.03(5), STATS., further provides that '[a]n employe[e] may bring an action against an employer under this subsection without first filing a wage claim with the department under s. 109.09(1).'"[10] Finally, the *German* court reviewed 1993 Wis. Act 86, which created the civil penalty section that is now Wis. Stat. 109.11(2), albeit in *dicta*, holding:

> The 1993 amendment also provided that employees could recover greater penalties by allowing the agency to investigate wage claims before filing their own wage claim actions. *See* [1993 Wis. Act 86,] § 12. But the 1993 amendment also added the following clarifying language to § 109.03(5), STATS.: "An employe may bring an action against an employer under this subsection without first filing a wage claim with the department under s. 109.09(1)." *See* 1993 Wis. Act, § 2. With this language, the legislature plainly stated its intent not to restrict an employee's private right of action for wages due, even though it encouraged agency enforcement of wage claims…[11]

However, there is no indication that the *German* court's statement extends to the civil penalty provision. Clearly, an employee can go straight to circuit court without filing a DWD wage claim; however, failing to do so precludes the employee's ability to recover civil penalties under the Wis. Stat. §109.11(2) provision. The express language of Wis. Stat. § 109.11(2) outlines the necessity to file an administrative claim, the right to relief under that section being dependent upon an employee's prior filing of a DWD administrative claim prior to seeking relief in circuit court. Further, this conclusion makes sense because the legislature has stated a preference for wage claims to be resolved by those with the specialized knowledge at DWD, instead of the over-burdened circuit courts.[12]

One unpublished case provides very useful insight and support for this interpretation of the civil penalty provision; however, as an unpublished decision, it is of limited utility. In *Levin v. Gass & Riegert Auto Complex, Inc.*, the court of appeals concluded that an employee need not exhaust administrative remedies before litigating a wage claim in circuit court.[13] In support of its conclusion, the court of appeals reviewed Wis. Stat. § 109.11(2) and explained:

> Specifically, § 109.11(2)(a) provides an incentive to employees to seek the DWD's assistance in enforcing their wage claims and to complete the process before filing a wage claim action in circuit court. By doing so, a circuit court may award an employee not only wages owed and unpaid, but also an additional 50% of those wages. Subsection (b) of the §109.11(2) permits a circuit court to grant double damages to an employee who waits to file a wage claim in court until after the DWD has completed its investigation and all efforts to settle or compromise the matter have been exhausted.
>
> We recognize that, by providing greater damages for administrative claims, the legislature has signaled a strong preference for the administrative resolution of these disputes. Nonetheless, the fact that the legislature indicated a preference for an administrative solution does not mean it intended to require an employee to exhaust the administrative process before seeking a remedy in court. Indeed, the existence of these incentives suggests that the legislature did not intend for the administrative remedies under that statute to be exclusive. An incentive to complete the administrative process would be unnecessary if the legislature required an employee to exhaust administrative remedies before pursuing court action.[14]

The *Levin* court's reference to the incentive to file a DWD claim provides some support for the conclusion that, if a DWD claim is not filed or, if filed, not concluded, the civil penalty damages are not available or should be limited. As "[s]tatutory language is given its common, ordinary, and accepted meaning,"[15] and "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results,"[16] the *Levin* court's plain reading counsels that the incentive provided to, at least, file a DWD complaint and, at most, to permit DWD to complete its investigation and attempt to settle cannot be realized if circuit courts permit civil damage penalty claims where no DWD claim has been filed by the plaintiff. Additionally, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."[17] Such a holding renders the portion of Wis. Stat. §§ 109.11(2)(a) and (b) regarding DWD claims to be mere surplusage.

III. Statutory Analysis and Legislative History

Because Wisconsin courts have not definitively concluded that an administrative claim is required prior to the circuit court awarding civil penalties under Wis. Stat. § 109.11(2), plaintiffs continue to request civil penalties while bypassing DWD. In fact, of the seventy complaints requesting penalties under § 109.11 available on Westlaw, only six referenced filing a labor standards complaint with DWD.[18]

However, the statutory language and legislative history do not support this understanding. To the contrary, both support the proposition that § 109.11(2) requires plaintiffs to first file a DWD labor standards complaint as a condition precedent to the circuit court obtaining the discretion to consider whether to award civil penalties, the potential amount of which being dependent upon whether or not DWD completed its investigation

and its efforts to settle the case. As a result, the filing of a DWD complaint against an employer is *not* an administrative prerequisite to filing suit in circuit court unlike, for example, the requirement that an employee file an administrative complaint with DWD or its federal cousin, the Equal Employment Opportunity Commission (EEOC), in order to pursue discrimination litigation in state or federal court. However, as already noted, Wisconsin appellate courts have not yet directly applied the statutory language to the question of whether the DWD filing *is* a prerequisite to the award of any civil penalties outlined in Wis. Stat. § 109.11(2). Applying the plain language, an administrative filing *is* a statutory prerequisite to a circuit court's award of a civil penalty. In this regard, *only the amount* of the civil penalty is dependent upon whether or not the DWD has *completed* its investigation *and* its attempts to compromise and settle the wage claim. If the employee files suit seeking unpaid wages before DWD has completed its investigation and its attempts to compromise and settle the wage claim, then a circuit court may only order not more than 50 percent of the amount of wages due and unpaid.[19] However, if the DWD has completed its investigation and its efforts to compromise and settle the wage claim, prior to the employee's suit in circuit court, the court would be authorized to award up to an amount of "increased wages of not more than 100 percent of the amount of those wages due and unpaid."[20]

Additionally, the drafting history of § 109.11(2) indicates that plaintiffs must first file an administrative claim before the circuit court may award a 50% civil penalty. The first draft of § 109.11(2) in 1993 Wisconsin Act 86 provided that "[i]n addition to the amount of wages due and unpaid [illegible] and in addition to or in lieu of the criminal penalties specified in sub. (3), a circuit court may order an employer to pay to the employee increased wages equal to 100% of the amount of those wages due an unpaid."[21] The second draft of the bill significantly revised this language to condition the extent of civil penalty on the status of the administrative proceedings. The revised text provided:

> In a wage claim action that is commenced by an employee before the department has completed its investigation under s. 109.09(1) and its attempts to compromise and settle the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50% of the amount of wages due and unpaid.[22]

The drafters rejected the initial language that would have allowed for civil penalties independent of the administrative process and chose to condition the scope of the civil penalties to the status of the administrate proceeding. This revised language withstood the third and fourth drafts of Act 86 and was passed by the legislature and, once again, demonstrated the legislature's preference for administrative resolution of wage claims.

Further, awarding civil penalties that are not authorized by the statute may actually be a direct violation of the limitation placed by the legislature into the statute itself. Specifically, Wis. Stat. § 109.03(6) provides that "[n]o person other than an employee or the department shall be benefited or otherwise affected by this subsection." Arguably, by awarding unauthorized civil penalties that are not authorized by the statute, in cases where the employee has counsel, could arguably act as a benefit to the counsel whose recovery is increased in proportion to the amount of the civil penalties wrongly awarded.

IV. Best Practices

Upon receipt of a wage claim filed under Wisconsin law in state or federal court with a plaintiff's request for assessment of a civil penalty under Wis. Stat. § 109.11(2), counsel should determine if the plaintiff filed a DWD claim prior to commencing suit.

If the plaintiff did not file a DWD claim, counsel should consider either a motion to dismiss the civil penalty claims or otherwise preserve the defense that the failure to file a DWD claim precludes the court from exercising its discretion to award or from awarding the plaintiff any civil penalty for a later summary judgment motion.

If the plaintiff did file a DWD claim, counsel should determine whether or not DWD concluded its investigation and its attempts to compromise and settle the wage claim prior to suit being filed. This is usually indicated by a closure letter from DWD's Labor Standards Investigator. If DWD did conclude its investigation and attempts to settle the claim,[23] a 100% civil penalty may be sought by the plaintiff, although the circuit court has discretion over the appropriate award of civil penalties.[24] If a closure letter was not sent or evidence of a closure of the investigation or DWD's settlement efforts cannot be found, after request for and review of the DWD file, counsel should consider preserving the defense that the 100% civil penalty is not due, and that any civil penalty, if awarded, must be limited to 50% of the amount the court determines is due.

V. Conclusion

The conventional understanding of Wis. Stat. § 109.11(2) is not supported by the text of the statute or its drafting history. A proper reading mandates that a plaintiff must first, at least, file a DWD wage claim prior to commencing any action in circuit court seeking any civil penalty. Thus, counsel should uniformly raise the defense that Wis. Stat. § 109.11(2) does not authorize any penalty where a plaintiff has not filed a labor standards complaint with DWD first and, when a DWD complaint has been filed but not concluded, the potential civil penalty is limited. Broad consensus on this position among Wisconsin counsel will ensure uniform protections for Wisconsin businesses and, when included, their insurance carriers.

Author Biographies:

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 and wage and hour matters in administrative agencies, federal, state and tribal courts and other venues.*

Peter Nowak *(University of Wisconsin Law School, 2020) is an attorney at Steinhilber Swanson LLP in Oshkosh, Wisconsin, where he practices bankruptcy law.*

References

1 Wis. Stat. § 109.03(5).
2 Wis. Stat. §§ 109.03(6), 109.11.
3 While EPLI typically may not cover claims for unpaid wages, a claim for unpaid wages may still be outlined in a circuit court action alleging wrongful discharge or other claims that may be covered by an insured client's EPLI policy. Further, more and more carriers are wading into limited coverage of claims for unpaid wages.
4 A review of the Eastern District of Wisconsin PACER records between July 1, 2019 and February 27, 2020 to determine the number of cases filed under the headings for 445 Civil Rights: Americans with Disabilities-Employment (discrimination) and 710: Labor: Fair Standards (FLSA), among others. During that period, 32 discrimination cases were filed while 44 FLSA cases were filed during that same time period.
5 *Hubbard v. Messner*, 2003 WI App 15, ¶¶ 9, 13, 259 Wis. 2d 654, 656 N.W.2d 475, *aff'd* 2003 WI 145, 267 Wis. 2d 92, 673 N.W.2d 676.
6 *Id.*
7 *Id.* ¶ 2.
8 *German v. Wis. Dept. of Transp.*, 223 Wis. 2d 525, 528, 589 N.W.2d 651 (Ct. App. 1998), *aff'd* 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50.
9 *Id*. at 536.
10 *Id*. at 537.
11 *Id*. at 541, n. 7.
12 "We recognize that agency enforcement of agency regulations promotes uniformity in the development and application of regulations within agency's specialized expertise." *Id*. at 544 (when both court and agency have jurisdiction over a dispute, the court should exercise discretion to relinquish jurisdiction to the agency in technical matters beyond the expertise of the court) (*citing*

City of Brookfield v. Milwaukee Sewerage Dist., 171 Wis. 2d 400, 416-24, 491 N.W.2d 484 (1992)).

13 *Levin v. Gass & Riegert Auto Complex, Inc.*, 2009 Wisc. App. LEXIS 207, ¶¶ 11-12, 2009 WI App 56, 317 Wis. 2d 730, 768 N.W.2d 62 (unpublished decision).

14 *Id.* (citing *Hubbard*, 267 Wis. 2d 92, ¶ 27).

15 *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

16 *Id.* ¶ 46.

17 *Id.*

18 To make this determination, the author searched Westlaw for all cases that cited Wis. Stat. § 109.11 since 2010. The author then reviewed each complaint to see if the plaintiff referenced filing a labor standards complaint with DWD.

19 Wis. Stat. § 109.11(2)(a).

20 Wis. Stat. § 109.11(2)(b).

21 LRB Analysis, 3595-1, Page 7.

22 LRB Analysis, 3595-2, Insert 7-12.

23 Typically, DWD's Labor Standards Bureau will issue a Final Determination outlining any wages owed to the employee, request that employer forward a check made out to the employee for the wages found due in the determination, less standard deductions, send it directly to the employee, provide a copy of the enclosure letter and check to the DWD . DWD usually requests the employer do so within 15 days of the date of this determination. If it does not, a file closure letter, signaling its efforts have failed and advising the employee of the right to file in circuit court or contact the district attorney, will follow.

24 A circuit court ultimately has discretion under Wis. Stat. § 109.11(2)(b) to award few or no civil penalties. *Johnson v. Roma II - Waterford LLC*, 2013 WI App 38, 346 Wis. 2d 612, 829 N.W.2d 538 (*citing Hubbard*, 267 Wis. 2d 92, ¶ 40).

News from Around the State: Trials and Verdicts

William B. Heffern III, et al. v. GEICO Cas. Co., et al.
Ozaukee County Case No. 18-CV-354
February 2020

Facts: This case involved a multi-vehicle accident on a dark, icy highway in which plaintiff was rear-ended but did not know which of two drivers listed in the accident report hit him. Both defendant drivers denied striking him. Both defendant drivers were insured by American Family.

Plaintiff claimed permanent injuries to his neck and back with radicular symptoms, shoulder blade pain and headaches as a result of the accident. He claimed he needed future chiropractic care and radiofrequency ablations. The defense IME doctor opined that the plaintiff's injuries were related to a pre-existing degenerative condition, not the accident.

Issues for Trial: Both liability and damages were contested.

At Trial: At trial, the court entered a directed verdict in favor of one of the defendants, Kelly Heyden, finding there was no evidence from which a jury could conclude that Ms. Heyden struck the plaintiff. A motion for directed verdict brought by the other defendant, Rebecca Blau, was denied, and claims against Blau were submitted to a jury. The jury found no negligence against Blau. For damages, the jury awarded plaintiff his claimed medical bills of $73,000, $27,000 for past pain and suffering, $50,000 for future medical care, and $0 for future pain and suffering.

Plaintiff's Final Pre-Trial Demand: $100,000
Defendant's Final Pre-Trial Offer: Defense Costs
Verdict: $0

For more information, please contact Brandon J. Robison at brobison@amfam.com.

Marsha Tarney v. Am. Fam. Mut. Ins. Co., et al.
Milwaukee County Case No. 18-CV-6631
January 2020

Facts: This case arose from a two-vehicle accident in a bank parking lot. Plaintiff was stopped waiting in line for the ATM when the defendant backed her vehicle into the rear driver's side corner of plaintiff's car, causing some scratches and dents to the bumper cover but no other visible damage. Plaintiff claimed that she heard a big "boom" but her car was not pushed forward and she did not strike anything in the vehicle. She did not have any pain at the accident scene and did not request an ambulance when she called 911.

Issues for Trial: The parties stipulated to liability. Plaintiff claimed permanent neck and back injuries requiring future chiropractic care based on a report from Bryan Gerondale, DC. Defendants argued that plaintiff had only a temporary aggravation of pre-existing chronic neck pain that resolved within one month of the subject accident, based on an independent record review.

At Trial: At trial, plaintiff asked for $9,340.46 in past medical bills, an unspecified amount for future chiropractic treatment, $45,000 for past pain and suffering, and $160,000 for future pain and suffering. Defendants asked the jury to award $482 for past medical bills (one month of treatment) and a nominal amount for past pain and suffering. The jury awarded $5,000 for past medical bills and no amount for pain and suffering.

Plaintiff's Final Pre-Trial Demand: $25,000
Defendant's Final Pre-Trial Offer: $10,000
Verdict: $5,000

For more information, please contact Brandon J. Robison at brobison@amfam.com.

Alisyn A. Bell v. Jennifer R. Wolf, et al.
Ozaukee County Case No. 18-CV-439
January 2020

Facts: This case arose from a single-vehicle accident on a highway. Plaintiff claimed that the defendant crossed the center line, causing plaintiff to swerve and lose control of her vehicle.

Issues for Trial: Liability and damages were disputed. The defendant did not think she crossed the center line. Plaintiff claimed neck, back, and right shoulder injuries that required a surgery. Her surgeon related the plaintiff's shoulder injury and surgery to the accident, but did not believe she had a permanent injury or needed future care. Defendants argued that plaintiff required a shoulder surgery before the accident and the accident was therefore not the cause of her shoulder injury or treatment.

At Trial: At trial, plaintiff asked for $31,000 in past medical bills, $225 in wage loss, and $75,000 for past pain and suffering. Defendants asked the jury to award past medical bills of $500 for one month of treatment and a nominal amount for past pain and suffering. The jury found the defendant 100% negligent, but awarded plaintiff only $1,100 in past medical bills and $3,300 for past pain and suffering.

Plaintiff's Final Pre-Trial Demand: $60,000
Defendant's Final Pre-Trial Offer: $30,000
Verdict: $4,400

For more information, please contact Brandon J. Robison at brobison@amfam.com.

Georgina V. Brett, et al. v. Am. Fam. Mut. Ins. Co., et al.
Racine County Case No. 17-CV-1540
October 2019

Facts: Plaintiffs alleged that the defendant turned left in front of their vehicle from his driveway and came to a stop in the middle of the road, causing them to swerve off the road to avoid a collision. The defendant said that he never stopped and was able to complete his left turn without incident and watched plaintiff lose control.

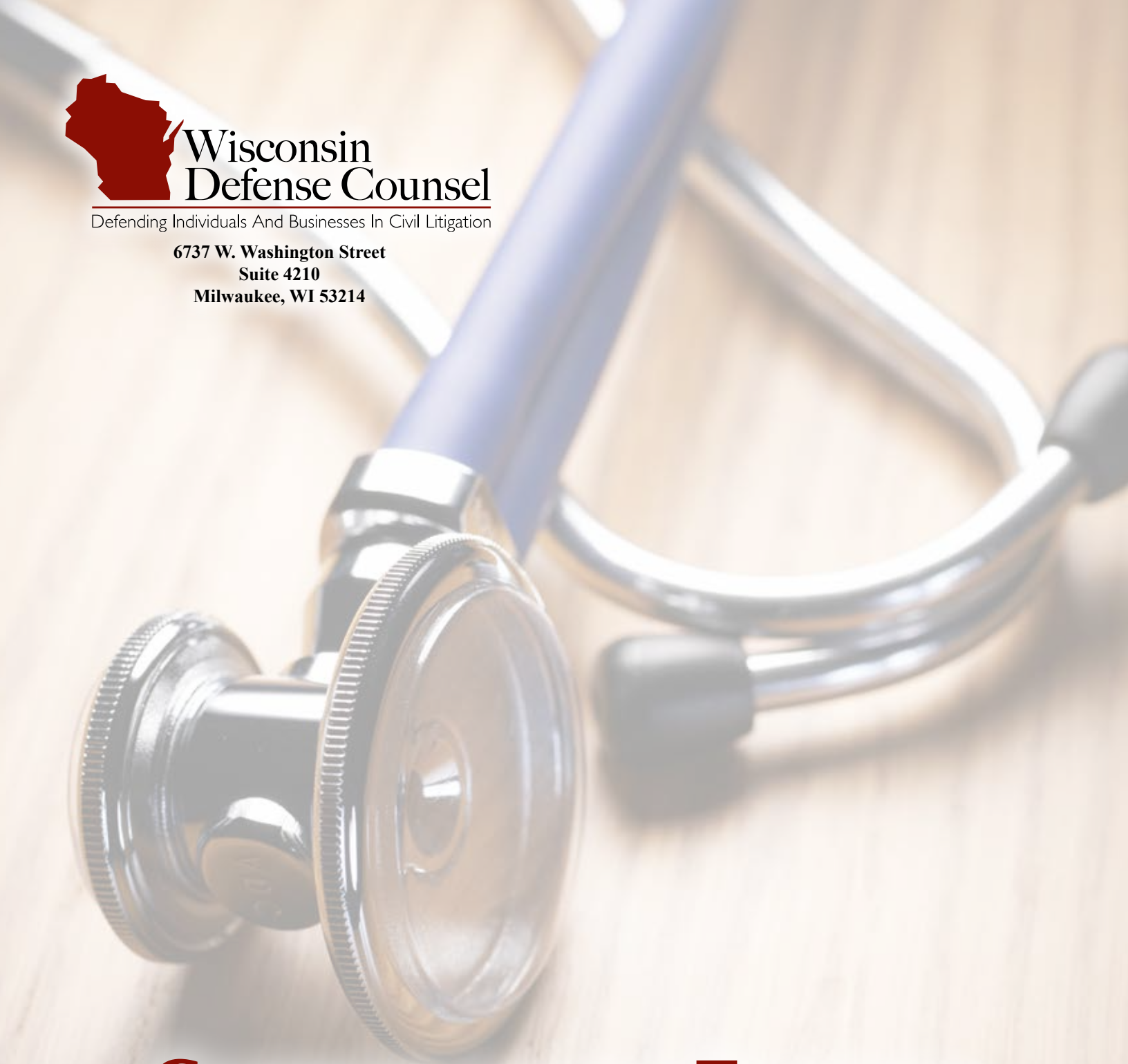
Issues for Trial: The parties stipulated to damages and tried liability.

At Trial: At trial, the jury found the plaintiff driver 80% at fault and the defendant only 20% at fault.

Verdict: $0 for plaintiff driver

For more information, please contact Brandon J. Robison at brobison@amfam.com.

NOTES



Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

6737 W. Washington Street
Suite 4210
Milwaukee, WI 53214

Calendar of Events

August 13, 20 & 27, 2020
2020 Annual Conference
Virtual Meeting Series

December 4, 2020
2020 Winter Conference
Milwaukee Marriott West
Waukesha, WI