Wisconsin Civil Trial Journal

Spring 2021 • Volume 19 • Number 1

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Journal Policy

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

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

President's Message: A Bright Future Ahead

by: Andrew B. Hebl, President, Wisconsin Defense Counsel

It's been an interesting year to say the least, but it looks like we are finally starting to turn a corner, as more and more vaccination doses get administered. As you know, the WDC Board of Directors had to make the very difficult decision to convert our Spring 2021 conference to an all virtual format, but a survey of the membership reflected that we would not have sufficient in-person attendance to justify the significant financial commitment. We want to make sure that WDC emerges from the pandemic in strong financial condition, and holding the spring conference virtually ensures that we will be able to do so, while we are also confident that we can still provide you with significant value through that format. That said, we fully expect that, by the time of our annual conference in August, we will be seeing each other in person, and I know I speak for all of you when I say how much I am looking forward to that.

In the midst of the pandemic, our Board of Directors decided that we still need to keep working on getting better as an organization, and so we decided to go forward with our strategic planning retreat, which was conducted virtually at the end of February. I am very pleased to report that we had an incredibly positive and productive session, with a number of excellent initiatives that will put WDC in a position to maximize the value that we provide to you as members, as well as to generate membership growth going forward. I would like to share some of these initiatives with you here.

First, we have formed a law school committee. As the demographics of defense lawyers have changed over the years, it has become clear that we need to make a more directed effort at getting on the radar of young and new attorneys about a potential career in civil litigation defense. The committee will be reaching out to our two in-state law schools in the near future in order to offer seminars on what it means to have a career as a defense lawyer, the creation of a law student membership category, and facilitating attendance by law students at our conferences in the future. Not only do we believe this will help us grow our membership over time, but we also believe that it will help our existing members identify potential future candidates for associates at their firms, giving them assurance about the candidates' genuine interest in pursuing a career as a defense lawyer. To that same end, we are also reaching out to the State Bar's Young Lawyers Division, in order to present to attorneys who may have already graduated law school but still have an open mind about their long-term career path. It has become clear that this type of outreach is essential for us to maintain and grow.

Second, we are going to make a greater effort to offer CLE programming that focuses on litigation skills training. I personally believe that WDC's members are among the very best litigators and trial lawyers in Wisconsin. Taking advantage of that skill to allow all of us to continue to grow and improve our abilities as attorneys is a value that I have always looked to WDC for, and we want to leverage that value even more now than ever before. Our intention is for our conference seminars to make litigation skills an even greater focus, and to also offer targeted litigation skills training to

young lawyers and law students in separate, stand-alone seminars. We believe that these types of opportunities not only generate value for our existing membership, but will demonstrate to potential new and young lawyers why a membership in WDC is a worthwhile investment for them in a lifelong career as a civil defense lawyer.

Third, we are forming a Diversity, Equity, and Inclusion Task Force. It has become apparent to our Board that, in order to attract the most talented attorneys into our organization and career path, we need to make clear that WDC is open and welcoming to lawyers (and law students) of all backgrounds. We know that we have work to do in this regard, but we are ready to do it. We know that becoming a more diverse, equitable, and inclusive organization means that we will be better able to attract law students and lawyers who might not have considered a career in civil litigation defense in the past, or considered membership in WDC. We want to change that. It is our goal for WDC to be seen as the organization where all lawyers go, regardless of background, to pursue the highest quality legal education and camaraderie, so that we will continue to be seen as representing the very best litigators in the state.

These are our principal short term goals coming out of the strategic planning session. We also developed several long-term goals, including reconsidering our conference format to offer more virtual programming in light of the benefits that it clearly offers, making our future conferences more of a destination-type event with opportunities for networking and socializing outside of the seminars, and increasing the involvement of our membership in our various committees and on the Board of Directors. We would also like to leverage our connections to other legal organizations within Wisconsin whenever we have aligned interests. We will be providing periodic updates to you regarding these initiatives. I want to be clear that input from our membership is essential, so please do not hesitate to reach out to me or any other members of the Board of Directors if you would like to discuss any of these ideas further.

I look forward to working with all of you to implement these initiatives. I am as proud as ever of what WDC has done in the past, and even more so of what we have to look forward to this year and in the years to come. Thanks to all of you for your continued support!

Author Biography:

Andrew Hebl is a partner in Boardman & Clark's Litigation Practice Group. He also chairs the firm's Technology Committee. 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 listed in the Best Lawyers in America. He is rated AV-Preeminent by Martindale-Hubbell.

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WDC Leaders Attorney Spotlight: Matthew J. Richer

***Editor's Note:** In this feature, the Wisconsin Defense Counsel recognizes a member for his or her exceptional accomplishments, both inside and outside of the courtroom. This issue recognizes the philanthropic efforts of Attorney Matthew J. Richer who has generously donated his time to a local charitable organization in Kenosha following the 2020 riots. To nominate a member for the next issue, please contact the Journal Editor, Vincent J. Scipior, at vscipior@cnsbb.com.*

Matthew J. Richer is an associate at Alia, DuMez & McTernan, S.C. in Kenosha, Wisconsin. His practice focuses primarily on civil litigation, specifically insurance defense and municipal law. In addition to the Wisconsin Defense Counsel, Matthew is a member of the Kenosha County Bar and the State Bar of Wisconsin. Matthew is a lifelong Kenosha County resident and currently resides in Pleasant Prairie, Wisconsin with his wife and dog. Along with his civil litigation practice, Matthew is a member of the United States Army Reserves Judge Advocate General's Corps.

Last year, Matthew began volunteering with 1HOPE, a non-profit organization in Kenosha that brings professional and civic leaders together to foster, mentor, and transform neighborhoods into safe and prosperous communities. Through the Foster Family Support Network, 1HOPE encourages and assists individuals and families to care for foster children by giving them a place to live temporarily while they cannot live at home. 1HOPE also works with the Crossroads Kids Club through after-school mentorship efforts to provide a fun, welcoming, and safe environment for young people. Finally, 1HOPE offers a variety of volunteer opportunities to discover, connect and mobilize local resources to unify and transform lives in the community.

How did you get involved with 1HOPE?

Following the riots that took place in Kenosha on August 23, 2020, 1HOPE established an Uptown Recovery Fund to raise money for residents, business owners and property owners that experienced damage from the destructive events. 1HOPE raised over $70,000 and formed the Uptown Fund Recovery Committee to decide how to allocate funds. 1HOPE asked me to join the Uptown Fund Recovery Committee to oversee the administration of the funds.

What is 1HOPE's mission?

1HOPE provides funds and mentorship to the Kenosha community. 1HOPE believes that mentorship spans across a lifetime and that a positive mentorship experience cultivates independence and confidence for the mentee to be able to thrive amid everyday challenges and setbacks through the mentor's influence, guidance, and shared insight. Throughout all that 1HOPE does, mentorship is at the core. We identify, develop, and equip our volunteer leaders to be able to advance our work in foster care and neighborhood transformation through providing the tools, infrastructure, and resources to ensure that they are developing into effective leaders that can profoundly reach and impact those we serve.

Through building authentic, grassroots relationships with these leaders, we learn about their desires and dreams in order to connect their strengths to meet the expressed desires and dreams of those we serve. We believe that everyone – those served and those serving – has value, talents, and experiences that bring mutuality to our mentorship approach. We all have something to learn from one another.

What has been the highlight of your experience with 1HOPE?

All of my experiences with 1HOPE have been extremely positive. It is amazing to see such a variety of professionals and civic leaders come together and support strangers in our community with their donations and time. One of my favorite moments was getting to read impact statements from individuals who received funds from the Uptown Recovery Fund. The gratitude and thankfulness expressed made all the extra effort the Committee put in extremely worth it.

How can other members get involved with 1HOPE?

To get more information about 1HOPE, visit www.1HOPE.community or contact 1HOPE at https://1HOPE.community/contact.

Is there anything else you would like to share about your experience with 1HOPE?

1HOPE has given me the opportunity to give back to my community is an extremely rewarding way that I intend on continuing into the future. As an attorney, we have valuable skill sets and leadership skills that can impact not only individuals, but the structure of organizations. The extra time and effort I put into 1HOPE has been paid back to me with interest by the enriching and rewarding feelings I had from helping others in their time of need.

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Exempting Private Campgrounds from Civil Liability

by: Storm B. Larson, Bell, Moore & Richter, S.C.

Camping is a long-standing Wisconsin tradition and a relatively new statute now immunizes private campground owners for certain injuries which occur on their premises. To take full advantage of its provisions, counsel must be aware of its scope and function.

I. Enactment and Provisions of Wis. Stat. § 895.519

In March of 2016, the Wisconsin Legislature enacted Wis. Stat. § 895.519. This is a civil statute which immunizes private campground owners, operators, employees, and officers from all civil liability arising from an "inherent risk of camping" subject to certain limited exceptions.

The immunity section of the statute provides, in relevant part, as follows:

> An owner or operator of a private campground, and any employees and officers of a private campground or private campground owner or operator are immune from civil liability for acts or omissions related to camping at a private campground if a person is injured or killed, or property is damaged, as a result of an inherent risk of camping.[1]

The statute defines "private campground" as "a facility that is issued a campground license under s. 97.67 and that is owned and operated by a private property owner, as defined in s. 895.52 (1)(e)."[2] Most private campgrounds will probably fall under this definition. Public campgrounds may avail themselves of other immunity statutes which are not the subject of this article.

So, this begs the question of what qualifies as an "inherent risk of camping?" The statute provides some examples, but the list is not exhaustive:

1. Features of the natural world, such as trees, tree stumps, roots, brush, rocks, mud, sand, and soil.
2. Uneven or unpredictable terrain.
3. Natural bodies of water.
4. Another camper or visitor at the private campground acting in a negligent manner, where the campground owner or employees are not involved.
5. A lack of lighting, including lighting at campsites.
6. Campfires in a fire pit or enclosure provided by the campground.
7. Weather.
8. Insects, birds, and other wildlife.[3]

As one can see, the statute mostly lists natural features, but does list certain risks that are unique to private campgrounds such as a lack of lighting as well as campfire pits or enclosures. Thus, an "inherent risk of camping" is a broad definition, but not necessarily something that must be found in the wild. Because no reported Wisconsin decision has ever addressed this statute, we could expect that additional examples of "inherent risk[s] of camping" will fall under this definition.

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II. Civil Immunity Is Not Absolute

Although the statute does provide broad immunity, it is not absolute. For example, immunity is specifically unavailable if the "person seeking immunity does any of the following":

> (a) Intentionally causes the injury, death, or property damage.
> (b) Acts with a willful or wanton disregard for the safety of the party or the property damaged. In this paragraph, "willful or wanton disregard" means conduct committed with an intentional or reckless disregard for the safety of others.
> (c) Fails to conspicuously post warning signs of a dangerous inconspicuous condition known to him or her on the property that he or she owns, leases, rents, or is otherwise in lawful control or possession of.[4]

In some respects, these are commonsense exceptions. The Legislature specifically chose not to exempt injuries, death or property damage which are the result of intentional conduct or willful or wanton conduct. Additionally, as subsection (c) makes clear, there is an affirmative duty for campgrounds to place conspicuous signage around dangerous, inconspicuous hazards. Failure to do so may result in liability attaching. Thus, immunity is broad, but not absolute.

III. Liability for Negligent Conduct

Under the statute, there are also at least two situations where liability for negligence may attach. In other words, immunity would not apply. The first situation falls under subsection (3)(c) which states that a person seeking immunity may be liable if he or she fails to "conspicuously post warning signs of a dangerous inconspicuous condition known to him or her on the property that he or she owns, leases, rents, or is otherwise in lawful control of or possession." Thus, campground owners have a duty to post conspicuous signs around dangerous, inconspicuous, and known hazards.

The second situation falls under subsection (1)(am)4 which is an example of an "inherent risk of camping." That section makes clear that immunity will not apply if a campground owner or employee is involved in a situation which results in negligent injuries to a camper or visitor. It is unclear how "involved" a campground employee must be for liability to attach. However, the statute does make clear that the immunity will apply if a campground owner or employee is wholly uninvolved in the situation giving rise to the injuries.

To maximize their benefit from this statute, it is important for campground owners and employees to continue to ensure that they conduct themselves in a professional manner, and that all known risks are marked conspicuously with adequate signage.

IV. Please, Please Plead Me

Wis. Stat. § 895.519 is an immunity statute. Therefore, it must be specifically pleaded as an affirmative defense. Wis. Stat. § 802.02(3) makes clear that immunity must be pleaded as an affirmative defense. It will likely be insufficient to claim that other catch-all affirmative defenses such as "failure to state a claim" would cover this scenario. If an immunity argument exists it must be specifically pleaded as an affirmative defense.

V. Why Do We Have This Statute?

For reference, no reported Wisconsin case to date has ever cited this statute or explained how it intersects with other statutes. If it seems strange that the Wisconsin Legislature has carved out this sort of exception, think again. A review of Wisconsin's limitations on liability reveals that this is a rather common type of statute. Several other activities enjoy similar protections including equine activities,[5] alpine sports,[6] and sport shooting.[7] One Wisconsin legal scholar has theorized that the Legislature was motivated by the Wisconsin Supreme Court's disfavored view of exculpatory contracts.[8] As Professor Anzivino observed:

> Wisconsin's alpine sports statute and equine activity statutes were passed after the Wisconsin Supreme Court addressed whether particular exculpatory contracts were enforceable in skiing and horseback riding cases. In both cases, the court determined that the exculpatory contracts were unenforceable as contrary to public policy. Subsequently, however, the legislature passed statutes, which provide immunity from civil liability in alpine sports and equine activities.[9]

Legislatively exempting certain activities from liability circumvents the supreme court's precedent which has invalidated exculpatory contracts on public policy grounds. By specifically exempting these activities, the Legislature made it public policy for liability not to attach.

VI. Practical Takeaways

It is important for campground owners to understand that their immunity is not absolute, and that they should continue to exercise best practices to keep patrons safe.

- Campground owners should continue to place conspicuous signs around known dangerous, inconspicuous hazards on the property.
- They should also ensure that their employees understand that they must continue to act in a professional and safe manner at all times. Their negligent conduct is not protected if they are "involved" with a patron's injury.
- The statute also does not foreclose punitive damages as the immunity does not apply to intentional or willful conduct.[10]
- Counsel should specifically plead immunity as an affirmative defense in the answer.

VII. Conclusion

In sum, campgrounds owners (and others) enjoy more protections today than they have in the past. However, they should continue to exercise best practices to ensure the health and safety of their patrons. This will keep Wisconsin a premier destination for camping and the enjoyment of our natural world.

Author Biography:

Storm B. Larson is an associate attorney at Bell, Moore & Richter, S.C. in Madison where he practices labor and employment, insurance defense, and general liability defense. He currently serves on the Board of the Labor & Employment Section of the State Bar of Wisconsin. He received his Bachelor of Arts, highest honors, from the University of Wisconsin-La Crosse. He obtained his law degree from the University of Wisconsin in 2018.

References

1 Wis. Stat. § 895.519(2).
2 Wis. Stat. § 895.519(1)(bm).
3 Wis. Stat. § 895.519(1)(am)1-8.
4 Wis. Stat. § 895.519(1)(a)-(c).
5 Wis. Stat. § 895.481.
6 Wis. Stat. § 895.526.
7 Wis. Stat. § 895.527.
8 Ralph C. Anzivino, *The Exculpatory Contract and Public Policy*, 102 Marquette. L. Rev. 747, 756 (2019).
9 *Id.*
10 *See* Wis. Stat. § 895.043.

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My Experience Conducting a Civil Jury Trial During the COVID-19 Pandemic: Three Separate and Unique Accounts

Editor's Note: *Three of our members recently tried jury cases to verdict in St. Croix, Waukesha, and Rusk Counties during the COVID-19 pandemic. A summary of each case and description of their individual experiences are detailed below.*

Nuahlay McEachran, et al. v. Bremer Financial Corporation, et al.
St. Croix County Case No. 19-CV-209
October 20-22, 2020

by: Chelsea J. Wilfong, Corneille Law Group, LLC, and Christina Davis-Sommers, Corneille Law Group, LLC

On October 20, 2020, we arrived at the St. Croix County courthouse to commence a civil jury trial for a slip-and-fall case in which we represented a defendant bank where one of the plaintiffs alleged she fell due to dangerous ice conditions. We carried, along with the standard trial equipment, masks and a list of novel courtroom procedures provided to us by the Court. 2020 was an unprecedented year for most of the global population, with COVID-19 bringing most facets of life to a standstill, and Wisconsin courts were not impervious to the impacts of COVID. In writing this article, we hope to share our experience of trying a case to a jury in the midst of the pandemic and to provide insight into what trials might look like moving forward, as courts attempt to balance their inevitably busy calendars and the need to implement COVID safety precautions.

On March 22, 2020, the Wisconsin Supreme Court issued orders postponing jury trials, temporarily suspending in-person proceedings statewide (with limited exceptions) and requiring the rescheduling of countless trials. Courts were required to utilize technology platforms in lieu of in-person appearances. On May 22, 2020, the Supreme Court extended the March order, including the suspension of all civil and criminal jury trials, until the chief judge of the judicial district approved an "operational plan" submitted by the circuit court. The St. Croix County Circuit Court was proactive, submitting an operational plan in June of 2020, which was approved the same month, allowing jury trials to resume on July 1, 2020.

Although the St. Croix County Circuit Court had briefed the parties on a number of the measures it had implemented as part of its operational plan at the telephonic pre-trial conference, it was unclear exactly what a trial would look like under the COVID protocols. While some changes were to be expected, others were more surprising. The first thing we noticed while setting up the courtroom was that the room was quite cold. This was apparently due to a revamped air ventilation system in the courthouse, that allowed for completely new air to be circulated every 30 minutes.

The courtroom was arranged to maintain appropriate social distancing between all individuals as much

as practicable. The jury box had been reconfigured and was able to accommodate a 12-person jury with six feet of space between all jurors. Although we were asked to conduct as much of our trial activities at counsel table as possible, the need to lay foundation for exhibits, hold sidebars with the judge, and perform other trial activities resulted in the attorneys leaving counsel table frequently.

Although there has been some curiosity as to the physical layout of the courtroom, the most frequent questions we are asked about the trial have to do with the impact the mask-wearing requirements had on jury selection, in-court examinations, and the ability to gauge jurors' reactions to testimony and opening and closing statements. Jurors, courthouse personnel, and counsel were required to wear a mask at all times in the courtroom, and jurors were also required to wear masks during breaks and deliberations. This was true even while counsel was conducting opening and closing arguments and witness examinations. Given the importance of the jury being able to judge the credibility of all witnesses, including the parties, and for the attorneys to adapt trial strategy as necessary based on juror reactions to the testimony being elicited, we had concerns that the mask-wearing requirement might impede our ability to present our case most effectively. The most challenging aspect of the mask requirement for jurors was the impediment it created to our ability to read reactions of the jurors to *voir dire* questions, witness testimony, opening statement and closing arguments.

During *voir dire*, it was difficult to assess a juror's demeanor as he or she answered a question, and we made our jury strikes without the benefit of being able to see facial expressions. Until you are deprived of the ability to watch the reactions of jurors, you do not realize how important that can be as a trial progresses. Similarly, during witness examinations, non-examining counsel had to keep a close eye on the jurors. We had to assess how each juror reacted to testimony by watching their eyes and to rely heavily on body language, taking special note when jurors nodded, shook their heads, or crossed their arms.

Despite the challenges discussed above, *voir dire* proceeded much the same as it did before COVID with one exception: Judge Scott Needham gave the jury an in-depth explanation of the changes made to the courthouse and measures that would be implemented during trial to ensure that everyone involved in the trial, including the jurors, were as safe as possible.

Prior to trial, a comprehensive COVID-related questionnaire had been sent to all potential jurors to ascertain if certain members of the potential jury pool should be excused from service because of COVID-related issues. After the Judge walked through the protective measures for the benefit of the potential jurors, he asked all members of the jury pool if they were uncomfortable with the accommodations and wanted to be excused due to COVID-related concerns. Not a single member of the pool asked to be excused which was no doubt due to the comprehensive COVID-related questionnaire that had already been sent out. There is some question as to whether this questionnaire impacted the jury pool and whether a jury without an expressed concern over COVID is a representative sample of the community. This is particularly notable given the polarization of ideologies and opinions as it relates to COVID and COVID precautions. What we did find surprising was that all age ranges were represented in our jury.

During the remainder of his explanation regarding COVID safety measures, Judge Needham explained the updated ventilation system and pointed out the plexiglass around the witness stand. He stated, consistent with the Wisconsin Supreme Court Order, that witnesses would not wear masks during their testimony so that the jury could gauge credibility, but that otherwise, everyone would wear a mask at all times. He explained to the jury that judging credibility was an important part of their fact-finding task and that only through seeing a witness's facial expressions was this possible.

That jurors were able to observe the full facial expressions of the trial witnesses was a benefit to the presentation of our case, which included emotional

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witness testimony. Had the faces of the witnesses been obstructed by masks, we felt that some of the impact of the testimony would have been lost on the jurors and, as a result, we may not have observed some of the more obvious juror reactions indicative of the jury's sentiment. For example, one plaintiff cried during her testimony, and another became visibly angry. We were able to observe a number of the jurors tilting their faces to the ceiling and others crossing their arms throughout these portions of the witnesses' testimony, indicating to us that reiterating the testimony during closing would be beneficial to our case.

During deliberations, the jury was escorted to a large room in the jail. This was so that the jurors could deliberate together in a single room while maintaining appropriate social distancing, but it also allowed the courtroom to be utilized for other cases during deliberation, as it was the only operational courtroom in the building. During breaks in trial, the jurors were not removed to the jail but, rather, were split into four or five groups, with each group placed in a separate room adjacent to the courtroom. From the outside looking in, the jury appeared to be functioning as usual during deliberation. The jury deliberated for about three hours and sent questions to Judge Needham as it would under normal circumstances.

Ultimately, no attorney can predict the outcome of a jury trial with complete certainty. Verdicts are dependent on the jury's ability to fully observe as well as listen to witnesses and counsel. How a jury is reacting during the course of trial provides information useful for the trial lawyer in determining points of emphasis, and whether there is a need to adjust strategies during trial. Even though some of the more subtle juror reactions were lost due to the masks, we were still able to read the jurors' body language and use it to build an effective and impactful closing argument, ultimately enabling us to secure a favorable verdict. Trying cases under COVID restrictions presents some unique challenges, but effectively trying cases under these conditions is certainly achievable, especially if judges exercise their discretion to permit witnesses to testify without wearing masks and counsel takes special care to observe the jury.

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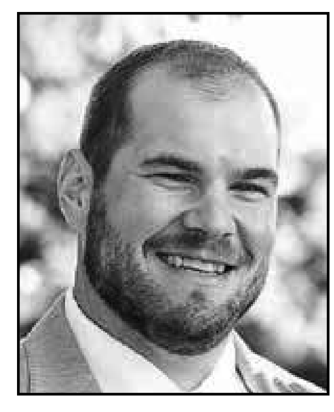
Philip M. McKenney, et al. v. John Howley, et al.
Waukesha County Case No. 19-CV-1364
January 5-6, 2021

by: Andrew J. Versnik, American Family Mutual Insurance Company, S.I.



When *McKenney v. Howley* was assigned to me on August 19, 2019 I had a strong feeling it would end up being tried. The facts of the case were unique, the insured was cooperative and invested, we had a strong liability defense, and (perhaps most importantly) there was plenty of insurance coverage available. Little did I know how different the world would be when the case did go to trial in the beginning of January 2021.

By way of background, the *McKenney* case arose out of an incident in which the plaintiff fell down the American Family insured's basement steps. The plaintiff and American Family's insured had been friends for over 40 years. They grew up in the same Illinois town and went to high school together. They maintained their friendship throughout the years after high school and into adulthood. A couple of days prior to the incident in question, American Family's insured called the plaintiff and asked him if he would be willing to help move a water heater into the insured's basement. The plaintiff agreed to help and drove from his home in Illinois to the insured's home on the day of the incident. Once the plaintiff arrived, he and the insured went to a local Menards' where the insured purchased the new water heater. After making the purchase, they drove back to the insured's home.

There are some discrepancies about what happened once the plaintiff and the insured returned to the insured's home. The plaintiff claimed he and the insured unloaded the water heater from the insured's vehicle and carried it inside the insured's home. The insured testified that he unloaded the water heater from his vehicle by himself with the use of a dolly and transported it inside his home without the plaintiff's assistance. Regardless, the water heater was moved into the insured's home and placed at the threshold of the insured's basement steps.

According to the plaintiff, the insured came up with the plan for how they were going to move the water heater into the basement. The plaintiff said that he went to the bottom of the insured's basement steps and the insured then started to "walk" the water heater down the steps by himself. The plaintiff claimed that the insured then asked the plaintiff to come part way up the steps. As the plaintiff was walking up the steps, he claimed the insured "let go" of the water heater. The water heater struck the plaintiff and knocked him down the basement steps to the concrete floor. The plaintiff alleged that the insured letting go of the water heater constituted negligence.

According to the insured, he and the plaintiff jointly came up with the plan for how to move the water heater into the insured's basement. The insured said that he agreed to take the top position and the plaintiff would take the bottom position. The plaintiff and insured would then move the water heater down the stairs step-by-step. The insured claimed that he had his hands on the water heater the entire time. He insisted that he never let go of the water heater and held onto it the entire time. The insured said the bottom of the box "slumped" forward, knocking the plaintiff down the steps to the concrete floor below.

As a result of the incident, plaintiff was claiming permanent injuries to his lower back. He sustained transverse process fractures at L1-4. Prior to trial, American Family offered $15,000. Plaintiff's only demand was $300,000. Ultimately, the parties stipulated to damages in the amount of $200,000. The only issue remaining for trial was liability.

The *McKenney* case began like most other cases I defend. I filed a notice of appearance and an

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answer. I propounded written discovery on the plaintiff's attorney. I collected the plaintiff's medical records. American Family's insured was deposed on December 17, 2019. An inspection of American Family's insured's home was conducted on February 21, 2020. Finally, the plaintiff was deposed on March 12, 2020. Coincidentally, that was the last in-person deposition I have conducted. Mediation was conducted virtually. The case was assigned to Judge Bohren in Waukesha County. After mediation failed, a final pretrial conference was held via Zoom.

Judge Bohren held the final pretrial conference on August 24, 2020. Given the circumstances and my experience with how other counties in the area were scheduling, I assumed the *McKenney* trial would not take place until mid-to-late 2021 at the earliest. Frankly, I was shocked when Judge Bohren offered a January 5-6, 2021 trial date. Perhaps due to my shock, I foolishly agreed to the date not realizing the trial would take place after the New Year's weekend.

As the January 2021 trial date approached, I assumed this trial would be different than any of my prior jury trials. COVID-19 was still prevalent in the community, and most counties in the greater Milwaukee area were not holding jury trials. On top of that, I had not been to my office since March 2020. American Family was being very cautious with its employees' health and had transitioned most of us to remote work.

As I started to prepare for trial, I realized I would need access to my office. The Court would still require paper exhibits at trial and I would need to print those exhibits (I did not have a printer at home). Further, I discovered the original transcript of the plaintiff's deposition was located in our American Family building. This would obviously have to be retrieved before trial. Finally, I concluded that the best way to prepare for trial would be outside of my makeshift home office. While I had grown used to working from home, the amount of physical space available to me is limited. The setup works most days, but trial preparation would be different.

In order to gain access to my office, I had to submit an online request to American Family. As I mentioned, American Family was being very cautious with its employees' health and had restricted access to our office building for all but 1-2 designated persons. Additionally, before trial, I had to provide an update to my manager and let him know why I needed to appear in person and what precautions would be taken by the Court. This summary was then provided to my manager's superiors. Had they taken issue with the insured or me appearing in person I would have had to file a motion to adjourn the trial.

To find out what COVID-19 precautions would be taken, as well as to test the technology in the courtroom, I went into the courtroom where the trial would be held a couple days before the trial was set to begin. I learned that Waukesha County had one courtroom setup for its civil jury trials. When I walked into the courtroom it was easy to see the precautions that were being taken. The first thing I noticed was plexiglass seemingly everywhere. There was plexiglass on the bench, on the witness stand, at counsel's table, in the jury box, and in the gallery. Additionally, as was expected, everyone in the courthouse was wearing a mask. I learned this would be true for the jurors and everyone else in the courtroom during the trial. Luckily, the powers that be at American Family gave their blessings to proceed with the jury trial.

Though the plexiglass may have been unusual, it did not affect the trial. The attorneys were still able to physically hand exhibits to the clerk, the jurors still sat in the jury box, and the attorneys and their clients still sat at counsel's table. However, I will note, there was noticeably less room at counsel's table given the plexiglass separating me from my client.

On the morning of trial, before the jury pool was brought in, the attorneys and the Judge had a brief conversation about COVID-19 and whether or not it would be addressed. To the best of my recollection, the conversation went as follows:

Plaintiff's Attorney: Judge, before we start, do you plan on addressing COVID-19 at all with the jurors?

Judge: No, I wasn't going to.

Plaintiff's Attorney: Okay. Then neither will I.

Attorney Versnik: Me neither.

As bizarre as it may seem given the presence of COVID-19 in our everyday lives, that was the extent of it being mentioned at any point during trial.

Following this brief conversation, the jury panel was brought into the courtroom. Fourteen jurors were seated in the jury box and the rest were spread out, six feet apart from each other, in the gallery. All of the potential jurors were wearing masks of course. *Voir dire* began with the Judge asking the typical questions. COVID-19 was never mentioned. The plaintiff's attorney was then given his opportunity to ask questions. COVID-19 was never mentioned. Finally, I had my chance to ask questions. COVID-19 was never mentioned.

The biggest impact COVID-19 had on the jury trial was the inability to read the jurors' facial expressions during *voir dire*, opening, closing, witness testimony, etc. Sure there were occasions where witnesses were asked to speak up due to their masks contorting their speech, or attorneys adjusted their masks during opening and closing. However, the utter lack of facial expressions of the jurors made it difficult to determine how the trial was going. As attorneys we are used to reading and analyzing nonverbal cues from the jury. The presence of masks completely eliminated this from trial. There were some head nods and head shakes during the trial, but that was it.

The highest compliment I can give to the Waukesha County Courts and the Judge in this case is how normal the jury trial felt once it began. Frankly, it felt good to be back in a courtroom. The fact that COVID-19 did not dominate the trial is a testament to Judge Bohren and his handling of this case. I assumed trying a case during COVID-19 would be different. In fact, it really wasn't. A jury was picked, opening statements were given, witnesses were questioned, exhibits were introduced, and closing arguments were given. After all that, the jury deliberated for an hour and a half, and a verdict was reached. I'm proud to say the jury found no negligence on behalf of American Family's insured.

I could see how COVID-19 precautions could affect longer trials. There would likely be a need for a number of alternates. However, this trial was like most other trials I've had and that was a good thing.

Author Biography:

Andrew J. Versnik is a Trial Senior Staff Attorney for American Family Mutual Insurance Company, S.I. in Waukesha. He is a 2008 graduate of the University of Wisconsin-Oshkosh where he majored in Political Science and minored in History. In 2011, he received his J.D. from the University of Wisconsin Law School. While attending law school, Andrew served as a Judicial Intern for the Honorable Peter Anderson of the Dane County Circuit Court. He also served as an intern at the office of the Milwaukee County District Attorney. Andrew is currently a member of the Wisconsin State Bar Association and Wisconsin Defense Counsel. He is admitted to practice in Wisconsin and before the United States District Court for the Western District of Wisconsin.

Roger L. Shimko v. Jeffrey A. Potter, et al.
Rusk County Case No. 19-CV-44
January 25-26, 2021

by: Patrick G. Heaney, Thrasher, Pelish & Heaney, Ltd.

This case involved a T-bone collision. The insured, Jeff Potter, was exiting his driveway in his pickup truck. He intended to cross Highway 40 to a different part of his farm. He did not see his neighbor, Plaintiff Roger Shimko, approaching from the north. Following the collision, Shimko was airlifted to Eau Claire. He received several orthopedic injuries, including a broken leg, broken ribs, broken elbow, broken ankle, as well as alleged aggravation of pre-existing pain in his hips, knees, and left shoulder. He also alleged a traumatic brain injury. He was in a nursing home for approximately four months following the accident.

Prior to trial, the parties stipulated to liability. The parties also stipulated to $190,623.30 in past medical expenses. The only issues for trial were future medical expenses and past and future pain, suffering, and disability.

Judge Steven Gibbs from Chippewa County was assigned to the case because plaintiff substituted the usual Rusk County Judge early in the litigation. The case was initially set to go to trial in July of 2020. I had to file a motion for continuance—not because of Covid—but because our expert neurologist was not available to testify.

When Covid started ramping up, opposing counsel suggested a 6-person jury. After discussions with my client, we would not agree. Opposing counsel then indicated he was fine going forward with a 12-person jury. The Court never suggested a 6-person jury or a Court trial and was always willing to conduct a full 12-person trial as long as the parties felt comfortable. A few weeks before the January 2021 trial, we received an e-mail from the Court simply stating it expected the trial to go forward.

We did not have much discussion about logistics with the court. However, when I got into chambers the first day of trial it was apparent Rusk County was prepared to go forward safely. But the first question Judge Gibbs asked on *voir dire* was "Is there anyone that thinks we are crazy doing this?" No juror raised a hand. (Interestingly, Judge Gibbs said he asked the same question in an Eau Claire County trial and several jurors raised their hands).

The most striking thing I will remember about this trial is I felt like we were trying the case in a hockey arena. There was Plexiglas everywhere—Plexiglas on the bench, Plexiglas at counsel table, and Plexiglas in the jury box. Everyone was required to wear a mask, of course. I did notice some of the jurors slipping their mask below their noses. But they were not reprimanded. The Judge also wore a face shield. I did not hear any grumbling about the mask requirement. Everybody tried to keep distance, but we did sometimes get pretty close to witnesses with exhibits and deposition transcripts. The jurors were spread out, and some of the jurors were seated outside the jury box once the jury was impaneled. One thing I found confusing was the seating chart for the jury pool. It was not configured the normal way because jurors were seated everywhere.

The court reporter did mention she was having problems hearing a couple times because of masks. I tried to speak as loudly as possible and I think witnesses and opposing counsel did as well. Another major change is I did not drink nearly as much water because I would have had to remove my mask. Speaking of water, there was no water pitcher. Only water bottles. And they were outnumbered by all the hand sanitizer bottles.

All in all, I thought it was a fairly normal trial considering the circumstances, and I was happy we were able to go forward. My personal opinion

is there is no reason jury trials can't go forward in person as long as they are conducted safely. Of course, I could not shake opposing counsel's hand after closing argument. We had to do the elbow bump. But such is the life of a trial lawyer in 2021.

Author Biography:

Patrick G. Heaney is a shareholder at Thrasher, Pelish & Heaney, Ltd. in Rice Lake. His undergraduate education was at the University of Wisconsin-Eau Claire where he graduated summa cum laude with a Bachelor of Business Administration degree. He obtained his Juris Doctorate degree from the University of St. Thomas School of Law where he was Article Editor for the University of St. Thomas Law Journal. Pat has tried many successful cases—both jury trials and bench trials—in personal injury, breach of contract, and real estate disputes. Additionally, he has handled several successful appeals and argued cases in front of the Wisconsin Supreme Court. He is a member of the State Bar of Wisconsin and the Barron County Bar and admitted to practice in all Wisconsin State Courts and Federal District Court for the Western District of Wisconsin. When not in the office or in court, Pat volunteers as a Commissioner for the Sand Lake Management District. He also enjoys hunting, fishing, boating, skiing, and traveling with his family.

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The Impact of Heuristics and Bias in Litigation

by: Michael D. Aiken, McCoy Leavitt Laskey, LLC

"[P]eople are not accustomed to thinking hard, and are often content to trust a plausible judgment that comes to mind."[1] As risk managers, we must accurately assess the strength of a case in front of the jury, which requires insight into how they will assess the case. Yet, we know that jurors are not completely rational decision makers, particularly when facing complex issues.

Instead of parsing through complexity, behavioral psychologists like Daniel Kahneman have shown that people will largely rely on heuristics to make their decisions. A heuristic is a mental shortcut that allows people to make decisions quickly and efficiently, as opposed to expending significant intellectual resources. We all use these subconscious coping skills to avoid having to spend endless amounts of time analyzing complex decisions that we face every day. We are most likely to rely upon heuristics when: (1) the problem is ill structured and complex; (2) information is incomplete, ambiguous, and changing; and (3) when the goals are ill defined, shifting or competing.[2]

It should come as no surprise that jurors (and trial judges) often use heuristics when deciding complicated issues presented in trials and motion practice. Although these decision makers are largely unaware of this influence, lawyers can use them to their advantage. And despite the usefulness of heuristics, many lawyers may not be familiar with them because they are not generally part of the legal lexicon. This article identifies some common heuristics involved in litigation, and provides a framework for how they can improve the evaluation, preparation, and outcome of a case.

I. Identifying Common Heuristics Involved in Litigation

The following is a short list of the most well documented heuristics with some basic descriptive information.

a. Affect Heuristic

With affect heuristic, people rely on the way they feel (your affect) toward the case to make their decisions rather than varying cognitive activity. All perception has an affective component, and our first response upon perceiving a new stimulus is often an emotional one. For example, we do not just see "a house," we see a "*charming* house," an "*ugly* house," or a "*pretentious* house." The constant flow of emotions eventually forms a stock of more lasting common feelings such as anger, disgust, fear, or sadness.

In terms of analyzing the impact of the affect heuristic, consider:

- What feelings arise from your case narrative?
- What emotions are attached to each witness and item of key evidence?
- How can you adjust the emotional impact of the evidence?
- How can you use the jury's emotions to further your case theme?

b. Authority Heuristic

With authority heuristic, people rely on an expert's specialized knowledge to influence the decision you make. The implicit assumption is that those in positions of authority wield greater wisdom and power, and therefore complying with them will lead to a favorable result. While we do grow more skeptical of authority as adults, we still tend to consider the judgment of certain authority figures, like scientists, doctors, law enforcement officials, and other experts to be more reliable than perhaps they deserve, even on matters that are outside their domain of expertise. The markers of authority are titles, certain clothes, and the use of certain symbols. Of course, perhaps the most authentic important marker are those things combined with the presence and confidence of a true expert.

In terms of analyzing the impact of the authority heuristic, consider:

- Is the core dispute about the facts or expert conclusions derived from those facts?
- Do you have the right expert for the case?
- How can you damage the other parties' expert authority?
- How can you prepare your expert to appear the most authoritative person involved in the case?

c. Liking Heuristic

With liking heuristic, people rely on their positive or negative disposition towards a person or thing to influence a decision. Factors that increase liking are physical attractiveness, similarity (in dress, interests, background, and demographics), compliments, familiarity under pleasant circumstances, and associations.

In terms of analyzing the impact of the liking heuristic, consider:

- How likeable are the key parties and witnesses to the jury pool?
- How can you increase the likeability of your client?
- How can you decrease the likeability of the opposing party?

d. Ideology Heuristic

With ideology heuristic, people make a decision to choose to follow the person perceived as closest to you in ideology on a particular issue or position.

In terms of analyzing the impact of the ideology heuristic, consider:

- What is the predominant ideology of the jury compared to you and your client?
- How can you match your theme to the jury's ideology to resonate?
- Finding a theme that captures the jury's "why" and wrapping your case narrative around it. The theme must focus around letting the jurors feel good about deciding an issue in your favor.

e. Single Factor Heuristic

With single factor heuristic, people make a decision based on—you guessed it—which side is more compelling on a single factor. Put another way, faced with a wide variety of options, a person will decide to base their decision on a single factor and ignore other variables.

In terms of analyzing the impact of the single factor heuristic, consider:

- If you boil down the case to a single factor, what could it be?
- How can you focus the case on a single favorable decision point or action?

f. Availability Heuristic

With availability heuristic, people make a decision

based upon how easy it is to bring something to mind. When trying to make a decision, you might quickly remember a number of relevant examples. Since these are more readily available in your memory, you will likely judge these outcomes as being more common or frequently-occurring. Rather than estimating probability, using base rates, people substitute the more accessible attribute of similarity.

In terms of analyzing the impact of the availability heuristic, consider:

- Which jurors are likely to have relevant experience to the issues presented?
- Can you analogize your facts to something familiar to the jury?
- Can you create a metaphor to compare things that are different yet the same in some respect?

g. Representative Heuristic

With representative heuristic, people make a decision by comparing the present situation to the most representative mental prototype. For example, when trying to decide if someone is trustworthy, a person might compare aspects of the individual to other mental examples you hold. A sweet older woman might remind you of your grandmother, so you might immediately assume that she is kind, gentle, and trustworthy. In short, a representative heuristic is like judging a book by its cover.

In terms of analyzing the impact of the representative heuristic, consider:

- What stereotypes, prejudices, and other snap characterizations of witnesses are at play?
- What is the first impression of interacting with your client and key witnesses compared with the other parties?
- How can you adapt your theme to play off the jury's snap judgment of what happened?

h. Anchoring and Adjustment Heuristic

Anchoring and adjustment heuristic is the foundational decision making heuristic in situations where some estimate of value is needed. Individuals first use an anchor, or some ball park estimate that surfaces initially, and adjusts their estimates until a satisfactory answer is reached. The initial figure may be suggested by the formulation of the problem, or it may be the result of a partial computation. The anchoring heuristic suggests that we favor the first bit of information we learn, and don't make enough adjustments.

In terms of analyzing the impact of the anchoring and adjustment heuristic, consider:

- What are the potential anchor points in your damage case?
- How can you "drop anchor" for your damage number first?
- How can you frame your initial damage suggestion as being a valid initial reference point?

II. Using Heuristics at Trial

Heuristics are not a perfect science, as their use is dependent on the situational aspect of decision making. The same juror will use different ones at different times. Another bullet point under every general heuristic would be to consider what other heuristics might be triggered along similar lines. There are many more heuristics than presented here, and you could fairly apply the term to any number of mental models, including common worldviews such as the golden rule, but also stereotypes, and prejudices. Each represents a dimension of the decision making apparatus of each juror.

Of course, it is easy to see that the explicit and direct use of heuristic tactics could get you in trouble and result in a mistrial. Heuristics appeal to the jurors' emotions, passions, prejudices, or sympathies; or ask the jurors to put themselves in the position of any person involved in the case. The court has

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all types of safeguards to prevent heuristics from carrying the day. Nevertheless, we know that jurors use heuristics to a large degree, so it is worth trying to harmonize your case presentation with these underlying decisional motivators.

Psychological research on confirmation bias further underscores the critical role of heuristics on a juror's decision-making. One might assume that the strength of evidence is the most critical factor in the persuasiveness of a case. But even if the jury pays attention to your evidence, confirmation bias will cause jurors to search for, interpret, favor, and recall information in a way that confirms or strengthens one's prior personal beliefs or hypotheses.[3] Anything less than the proverbial "smoking gun" will be explained away or seen as actually supporting the juror's pre-existing position. The jurors' personal beliefs, grounded in the use of heuristics, is their guiding light to interpreting the case.

III. Conclusion

In summary, much of the material presented above probably rings true as "common sense" for experienced trial lawyers. As trials become more infrequent, however, that pool of experience is evaporating. By borrowing from psychological research into heuristics, lawyers without hundreds of trials can have a repeatable framework to better evaluate their cases and persuade a jury to adopt their viewpoint at trial.

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Michael D. Aiken is a partner at McCoy Leavitt Laskey, LLC. He obtained a B.A. in psychology from Miami University in 2002, and graduated from Marquette Law in 2006. He works in the areas of insurance defense, complex product and system failures, and contractor negligence. Outside of work, Michael enjoys learning about computer programming, playing racquet sports, and skiing. He lives in Whitefish Bay, WI with his wife Jennifer and three children.

References

1 Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 Am. Econ. Rev. 5, at 1450 (December 2003).

2 Gary Klein, *Sources of Power: How People Make Decisions* (Cambridge, MA, MIT Press, 1999).

3 For a discussion of bias in the context of mediation statements, *see* James J. Mathie, *Mediation Statements: Give Them the Attention They Deserve and Then Give Them to the Right Person*, 16 Wis. Civil Trial J. 3, at 41 (Winter 2018), available at https://www.wdc-online.org/wdc-journal/archived-editions/mediation-statements-give-them-attention-they-deserve-and-th.

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Bringing Unpublished Opinions Into the 21st Century

by: Erik M. Gustafson, Borgelt, Powell, Peterson & Frauen, S.C.

As a 2017 graduate of Marquette University Law School, I have never conducted legal research without the benefit of online legal research tools such as Lexis, Westlaw, and Fastcase. Though Marquette, in taking its diploma privilege responsibilities seriously, made me aware of the regulation on citation to unpublished Wisconsin Court of Appeals opinions[1] in Wis. Stat. § 809.23(3),[2] I did not fully comprehend the enormous body of legal analysis that falls within § 809.23(3)'s provisions until I interned for a local circuit court judge. My experience drafting memoranda that analyzed pending motions for the judge revealed how frequently the most on-point legal analysis from Wisconsin appellate courts for a given case is concealed in an opinion to which citation is prohibited under § 809.23(3).

The notion that certain appellate court decisions may not be cited to courts in that state is not intuitive, at least not in an age when Westlaw, Lexis, and Fastcase make finding unpublished opinions just as easy as finding published opinions; after all, both types of opinions appear in the same set of search results. Not surprisingly, whether through ignorance of the rule or inattention to the details of an opinion, attorneys sometimes cite an opinion in contravention of § 809.23(3). An attorney who does so risks the reviewing court ignoring the argument for lack of support and even sanctions.[3]

A rule that is not intuitive but features high stakes for violation should enjoy the support of those who are most affected by it and strong public policy rationales. As Part I below explains, while § 809.23(3) made some sense when enacted, technological advances and other developments have consistently eroded those rationales, resulting in multiple petitions to amend § 809.23(3). After decades of delay, the Wisconsin Supreme Court relented and granted the most recent petition in 2009. As Part II discusses, the 2009 amendment was a welcome and beneficial start but is still inadequate to remedy all problems with § 809.23(3). Finally, in Part III below, I propose a simple solution: take the lid off unpublished opinions and allow citation to any Wisconsin Court of Appeals opinion ever written.

I. Historical Background

Wisconsin Stat. § 809.23(3) governs the citation of unpublished opinions in Wisconsin courts. For its first three decades of existence—from enactment in 1978 through amendment in 2009—it prohibited citation of unpublished opinions in almost all circumstances:

> An unpublished decision is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.[4]

Section 809.23 had noble origins. The Judicial Council Committee's note on the rule as adopted in 1978 identified four policy rationales for the rule:[5]

1. The type of opinion written for the benefit of the parties is different from an opinion written for publication and often should not

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be published without substantial revision;

2. If unpublished opinions could be cited, services that publish only unpublished opinions would soon develop forcing the treatment of unpublished opinions in the same manner as published opinions thereby defeating the purpose of nonpublication;
3. Permitting the citation of unpublished opinions gives an advantage to a person who knows about the case over one who does not;
4. An unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority.

In the days before online legal research, these rationales made perfect sense. Finding—let alone analyzing—unpublished opinions on a given subject would have been a monumental task.[6] Thus, freeing attorneys from the need to find unpublished opinions made for solid public policy to reduce the costs of legal services.[7] Furthermore, the criteria for publishing court of appeals opinions contained in Wis. Stat. § 809.23(1) rendered citation to unpublished opinions unnecessary, or at least they should have.

Practitioners, and some judges, grew weary of the limitation on citing to unpublished opinions. As technology advanced, finding unpublished opinions was no longer the monumental challenge it was in 1978. Prohibiting citation to unpublished court of appeals opinions while inviting other persuasive authority meant that opinions from courts in other jurisdictions, legal treatises, law review articles, and even periodical publications such as this one enjoyed higher status in Wisconsin courts than unpublished court of appeals opinions. In addition, the federal system and other states began backing off strict "no citation" rules concerning unpublished opinions.

Concerns with the original version of § 809.23(3) resulted in three rules petitions seeking to amend § 809.23(3). The Court denied petitions to amend the substance[8] of § 809.23(3) in 1990 and 2003. The *per curiam* opinion accompanying the 1990 denial[9] acknowledges increasing access to unpublished opinions through "services printing … unpublished appellate opinions," "automated legal research tools," and "availability at law libraries."[10] The Court nonetheless rejected this reasoning because researching unpublished decisions—even if readily available—still takes time and will increase fees to clients.[11] As an additional basis to deny the petition, the Court expressed fears that trial and appellate courts "might unwittingly give unpublished opinions more weight than that to which they are entitled."[12] This could result in courts improperly relying on unpublished opinions for their holdings rather than precedential published opinions.[13] Justice Abrahamson dissented, disagreeing with all four of the Judicial Council Committee's policy rationales from 1978.[14]

Justice Abrahamson first questioned whether courts truly save any time through use of unpublished opinions based on research finding that published and unpublished opinions from federal circuit courts are of the same general quality.[15] Second, Justice Abrahamson acknowledged the reality that services providing access to unpublished opinions already existed.[16] Third, Justice Abrahamson questioned whether prohibiting citation to unpublished opinions actually provided any benefit to economically disadvantaged areas or clients; after all, an attorney who is aware of an unpublished decision can adopt its reasoning without the opposing attorney knowing its source whereas citation puts everything into the open.[17] Finally, Justice Abrahamson acknowledged research showing that the court of appeals frequently declines to publish opinions that fulfill the criteria for publication by, for example, presenting "significant variations or meaningful explanations that go beyond mere application of settled law."[18] Allowing parties to instead cite unpublished opinions both protects constitutional rights and helps the court of appeals maintain consistency among decisions, whether precedential or otherwise.[19]

The *per curiam* opinion accompanying the 2003 denial[20] included no reasons for the Court's decision.

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Two concurring opinions, however, elucidate the majority's rationale. Justice Sykes, joined by Justice Bablitch and Justice Wilcox, essentially emphasized the first original rationale for the rule: opinions intended for future use—as opposed to resolving only the case at hand—require additional attention and time that the court of appeals does not have given its ever-increasing caseload.[21] Justice Ann Walsh Bradley took a more nuanced approach, recognizing technological advancements that undercut many of the original rationales for the rule but finding the advancements insufficient to warrant change.[22] Chief Justice Abrahamson again dissented, as she did in 1990, but this time joined by a colleague, Justice Crooks.[23]

Though her 2003 dissent largely reiterates the points made in her 1990 dissent, Chief Justice Abrahamson raised two new major points. First, she pointed out that Wisconsin courts allow citation to any non-binding authority *other* than unpublished court of appeals opinions.[24] Thus, for example, opinions of courts in other jurisdictions, law review articles, treatises, newspapers, and even poetry held higher status in Wisconsin courts than unpublished court of appeals opinions.[25] As the advisory committee to Federal Rule of Appellate Procedure 32.1 (eliminating federal prohibitions on citing unpublished circuit court decisions) noted, "[it] is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except those* contained in the court's own 'unpublished' opinions."[26] Second, and perhaps relatedly, Chief Justice Abrahamson noted that multiple states, in addition to numerous federal circuits and potentially (at that time) the federal system as a whole,[27] had amended their citation rules to allow citation to unpublished opinions as persuasive authority.[28]

Only five and a half years later, the court granted a similar petition to amend subsection (3). This amendment allows parties to cite certain unpublished opinions issued after July 1, 2009 for their persuasive value,[29] bringing § 809.23(3) to its current form:

(a) An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).

(b) In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31 (2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Per curiam opinions issued at any time and unpublished authored opinions issued before July 1, 2009 remain off limits.[30] The 2009 order adopting this change came with little reasoning, and Justice Ann Walsh Bradley filed the lone separate writing, a dissent simply stating that nothing had changed since 2003 to change her mind on the need to amend the rule.[31]

II. Problems Still Remain

While the 2009 amendment was a nice and welcome start, the time has come for further change to allow citation of every court of appeals opinion ever written. Certain changes in circumstances since 2009, and the *lack* of change in certain circumstances since 2009 (or even 1990, for that matter) support this change.

First, technology has continued to progress such that the ubiquity of online legal research systems has made unpublished opinions just as easy to find

as published opinions. Every Wisconsin-licensed attorney has access to unpublished court of appeals opinions through Fastcase, the online legal search tool provided as a benefit to State Bar membership. Those attorneys who use Lexis or Westlaw enjoy even more user-friendly access to unpublished court of appeals opinions. Consequently, finding unpublished opinions is not a challenge for 21st-century attorneys; legal research platforms already present both published and unpublished opinions. Rather, the challenge comes when attorneys must take the additional step of identifying a relevant opinion as unpublished and then determining whether the opinion may be cited under the current version of § 809.23(3)(b). An "all-or-nothing" approach to unpublished court of appeals opinions streamlines research for every Wisconsin-licensed attorney.

Second, because the court of appeals does not always apply the publication criteria properly, relevant case law can be concealed in uncitable opinions. Frustrations with the current version of § 809.23(3) largely arise out of the court of appeals' under-publication of opinions. This is an issue Justice Abrahamson identified as early as 1990 and scholars identified even earlier.[32] Only recently, however, has the Wisconsin Supreme Court (as an institution) taken note of this issue in any official capacity, noting in a 2018 opinion that "[t]he court of appeals … has been issuing unpublished opinions, per curiam opinions, or summary disposition decisions even when the issue satisfies the criteria for publication."[33] Though proper application of the publication criteria would prospectively alleviate many concerns with § 809.23(3), nothing short of permission to cite all previously-issued court of appeals opinions fully corrects past decisions erroneously declining to publish certain opinions.

For example, I recently found myself defending a workers' compensation insurer against allegations that it violated Wis. Stat. ch. 146 when it procured mental health records without a valid release for purposes of contesting an application to reopen a settlement before the Wisconsin Department of Workforce Development ("DWD"). The plaintiff sought to reopen the workers' compensation settlement on the basis that she was not competent to enter the settlement at mediation or sign the settlement agreement thereafter.

Wisconsin law holds that a worker's compensation claimant waives her physician-patient privilege upon filing a worker's compensation claim: "An employee who … files an application for hearing waives any physician-patient … privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation."[34] The plaintiff took the position that the mental health records were *un*related to the "condition for which [she] claims compensation," which was a shoulder injury.[35] The insurer took the position that mental health records became part of the worker's compensation case when the plaintiff moved the DWD to set aside the previous settlement because she lacked capacity to make the agreement. The case therefore turns on the scope of the term "condition for which the employee claims compensation."

Naturally, all parties and the circuit court turned to case law to inform our reading of the statutory language. Unfortunately, an attorney searching for "102.13(2)(a)" in Westlaw (my employer's online legal research provider) finds a single appellate decision: *Wistrom v. Employers Insurance of Wausau*, 2002 WI App 1, 249 Wis. 2d 489, 639 N.W.2d 224 (Nov. 20, 2001) (unpublished *per curiam* decision).[36] Though not directly on point, the *Wistrom* decision would have proven beneficial to the parties' analysis. Consistent with § 809.23(3), both parties refrained from citing it to the circuit court because the opinion was *per curiam* and released before July 1, 2009 (both of which, of course, independently prohibit citation).

Current law allows any person to request that an unpublished opinion authored by a member of a three-judge panel be published with no time restrictions.[37] However, a person who wishes to see an unpublished *per curiam* opinion be published must file the request within 20 days after the court of appeals releases the opinion, and the relief is not

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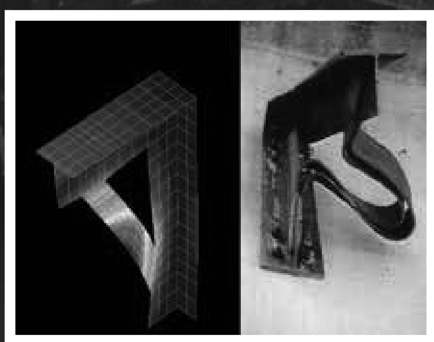

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publication, but rather withdrawal of the *per curiam* opinion and issuance of an authored opinion.[38] This procedure is useful only if an attorney (1) becomes aware of and (2) recognizes the usefulness of a *per curiam* opinion within 20 days of its release—an unlikely proposition. Furthermore, the rules make no allowance for an opinion in an appeal decided by one judge pursuant to Wis. Stat. § 752.31(2) and (3) to become published after the fact.[39] Even where relief is available, the court of appeals rarely grants such relief under § 809.23(4), so this procedure is of limited help in resolving the problem of under-publication of opinions.[40]

Because *Wistrom* is unpublished, *per curiam*, and far more than twenty days old, Wis. Stat. § 809.23(4)(c) provided no relief to the parties in my aforementioned case. Thus, the attorneys' only option was to adopt the reasoning of the unpublished decision without citation and hope that the circuit court will find the reasoning persuasive and/or find the decision itself. The circuit court in my case did find and reference *Wistrom* in its oral decision on the insurer's motion for judgment on the pleadings. This raises another ambiguity in § 809.23(3) and a third problem with the rule in its current form: to what extent does the prohibition against citing uncitable opinions "in any court of this state as precedent" prohibit citations by courts themselves? The supreme court has emphasized the modifier "as precedent."[41]

The court of appeals recently analyzed an assertion that a circuit court improperly relied on an uncitable opinion.[42] The court of appeals easily concluded that the citing party violated § 809.23 by citing an uncitable opinion to the circuit court.[43] The court of appeals then concluded that the circuit court did not rely on the opinion.[44] The court of appeals did not, however, analyze or specifically state whether the circuit court would have been wrong if it had relied on the uncitable opinion.[45] In light of this uncertainty, circuit courts face the same temptation as attorneys to borrow the analysis of an uncitable opinion without expressly acknowledging it.[46] The public would be far better off knowing exactly on what authority circuit courts rely.

Finally, the current version of § 809.23(3) leaves landmines for federal courts attempting to apply Wisconsin law. On the one hand, the Seventh Circuit Court of Appeals has said that "[a] non-case for Wisconsin's own purposes is a non-case in federal courts."[47] Other federal courts (including an opinion, albeit unpublished, from the Seventh Circuit itself) have not taken such a stringent approach.[48] The effect of § 809.23(3) on federal courts, at least in the Eastern District, is somewhat complicated by local rule 7(j)(1), which allows citation to "unreported or non-precedential opinions, decisions, orders, judgments, or other written dispositions" except as prohibited by Seventh Circuit Rule 32.1.[49] Therefore, allowing unpublished opinions to be cited would alleviate confusion in state and federal courts alike.

III. The Solution

My proposed solution substantially simplifies the citation of unpublished opinions, amending Wis. Stat. § 809.23(3) to say:

> (a) Any decision of the court of appeals, no matter its form, may be cited to support a claim of claim preclusion, issue preclusion, or the law of the case.
>
> (b) Any opinion of the court of appeals may be cited for its persuasive value. Orders, including summary disposition orders, are not "opinions" for purposes of this paragraph and may not be cited for their persuasive value to or by any court of this state. Any person citing to an unpublished opinion shall structure the citation in a way that makes clear the opinion's publication and authorship status.

This language allows attorneys and courts to cite any unpublished opinion, no matter when issued, while keeping summary disposition orders uncitable.

This proposed rule resolves the problems analyzed above. First—and most importantly—courts and

attorneys benefit from the full history of the court of appeals' legal analysis. No longer will an attorney be dumbfounded to find that he cannot cite the only appellate opinion construing a particular statute. No longer will a circuit court be left in the unenviable position of citing to an uncitable opinion or nothing when interpreting a statute. No longer must a federal court wrestle with the effects of Wisconsin's citation rule.

Second, the opportunity and stakes for attorney errors are lessened. An attorney who unwittingly cites an unpublished court of appeals opinion risks only a less persuasive argument, not sanctions. The only potential pitfall for attorneys is in citations: attorneys must be careful to properly cite unpublished opinions to make the opinion's publication and authorship status plain to the reviewing court so that the court can afford the proper level of persuasive weight. This issue, however, is just as present under the current rule.

Finally, this rule mitigates the consequences in those situations when the court of appeals issues an opinion as unpublished—and particularly *per curiam*—that could have been published.[50] Given the research indicating that unpublished opinions are generally of no lower quality than published opinions, this change would allow every court of appeals opinion to receive the respect it deserves.

IV. Conclusion

In the 21st century, unpublished opinions are harder to avoid than they are to find. To put courts and attorneys in the best position to reach the proper result, the Wisconsin Supreme Court should update Wis. Stat. § 809.23(3) to catch up to this new reality.

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References

1 For the sake of clarity, I use the term "case" to mean the dispute before the court, "decision" to mean the court's resolution of the dispute, and "opinion" to mean a court's written explanation of its decision. Orders, including summary disposition orders, are not "opinions" for purposes of this article.

2 All references to the Wisconsin Statutes are to the 2019–20 version unless otherwise indicated.

3 *See, e.g.*, *Munger v. Seehafer*, 2016 WI App 89, ¶ 49 n.15, 372 Wis. 2d 749, 890 N.W.2d 22.

4 Wis. Stat. § 809.23(3) (1977-78).

5 *In re Amendment of Section (Rule) 809.23(3), Stats.*, 155 Wis. 2d 832, 833, 456 N.W.2d 783 (1990) (quoting Wis. Stat. § (Rule) 809.23, Judicial Council Committee Note, 1978).

6 *Id.* at 834.

7 *Id.*

8 In 2001, the Court amended § 809.23(3) to replace references to "res judicata" and "collateral estoppel" with "claim preclusion" and "issue preclusion," respectively, to reflect the Court's preferred nomenclature. *In re Amendment of Wis. Stat. § 809.23*, 2001 WI 135, 248 Wis. 2d xvii. The rule petition also included a proposal to allow partial publication of court of appeals opinions, but the Court denied this portion of the petition. *Id.*

9 The petition at issue in the 1990 order would have added the following to the original Wis. Stat. § 809.23(3):

> Unpublished opinions may also be cited for persuasive and informational purposes if the person making reference to the unpublished opinion contemporaneously provides the court and all opposing parties with a copy of the opinion and copies of all other unpublished opinions of the Court of Appeals of which the attorney had knowledge, the holdings of which are directly adverse to the cited opinion upon the issue for which it is cited.

In re Amendment, 155 Wis. 2d at 836 n.2 (Abrahamson, J., dissenting).

10 *Id.* at 834.

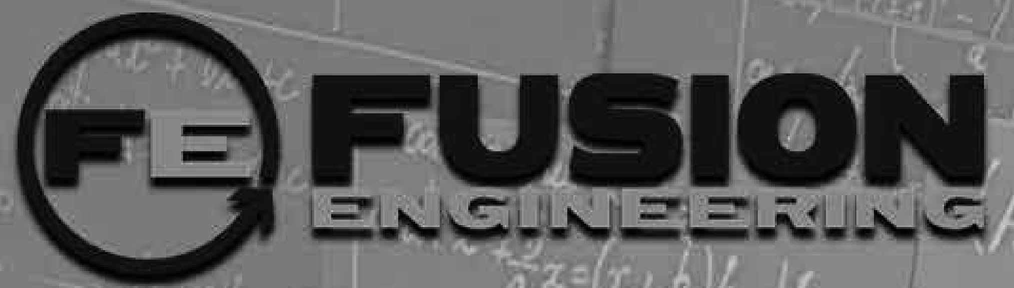
11 *Id.*

12 *Id.* at 835.

13 *Id.*

14 *Id.* at 835-45 (Abrahamson, J., dissenting).

15 *Id.* at 839 (Abrahamson, J., dissenting) (citing Lauren K.



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Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeal*, 87 Mich. L. Rev. 940 (1989)).

16 *Id.* at 839-41 (Abrahamson, J., dissenting).

17 *Id.* at 841-43 (Abrahamson, J., dissenting).

18 *Id.* at 843-44 & n.8 (Abrahamson, J., dissenting) (quoting David L. Walther, Patricia L. Grove and Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* 17-4 (1986)).

19 *Id.* at 844.

20 The petition at issue in the 2003 order would have amended § 809.23(3) to state:

> An unpublished opinion is of no precedential value except that it may be cited in support of claim preclusion, issue preclusion, or the law of the case. An unpublished opinion issued on or after [insert effective date], that is not a per curiam opinion or a summary disposition order, may also be cited for its persuasive value, provided that the party citing the opinion files a copy of it with the court, serves a copy of it upon all parties together with the brief or other paper in which the opinion is cited and clearly disclosed in all written materials and in all oral presentations that it is an unpublished opinion. Because an unpublished opinion is not precedent, it need not be distinguished or otherwise discussed by any court.

In re Amendment of Wis. Stat. § (Rule) 809.23(3), 2003 WI 84, ¶ 53, 261 Wis. 2d xiii (Abrahamson, J., dissenting).

21 *Id.* ¶¶ 15-39 (Sykes, J., concurring).

22 *Id.* ¶¶ 8-11 (Bradley, J., concurring).

23 *Id.* ¶¶ 42-82 (Abrahamson, C.J., dissenting).

24 *Id.* ¶ 43 (Abrahamson, C.J., dissenting).

25 *Id.*

26 *Id.* (quoting U.S. Advisory Committee Comment to New Rule 32.1 (May 15, 2003)).

27 As of the date of the 2003 order, July 1, 2003, a proposal to create Federal Rule of Appellate Procedure 32.1 to allow citation to unpublished opinions was pending for public comment. *Id.* ¶ 44 n.10. The rule was ultimately adopted effective December 1, 2006. *See* Fed. R. App. P. 32.1.

28 *In re Amendment*, 2003 WI 84, ¶ 53 (Abrahamson, C.J., dissenting).

29 *In re Amendment of Wis. Stat. § (Rule) 809.23(3)*, 2009 WI 2, 311 Wis. 2d xxv.

30 *Id.* For clarity and brevity, I refer to unpublished authored decisions issued before July 1, 2009, and unpublished *per curiam* decisions as "uncitable opinions."

31 *Id.* ¶ 1 (Bradley, J., dissenting).

32 *In re Amendment*, 155 Wis. 2d at 843–44 & n.8 (Abrahamson, J., dissenting) (citing Walther, Grove and Heffernan, *Appellate Practice and Procedure in Wisconsin* 17-4 (1986)).

33 *Deutsche Bank Nat'l Tr. Co. v. Wuensch*, 2018 WI 35, ¶ 26 n.13, 380 Wis. 2d 727, 911 N.W.2d 1.

34 Wis. Stat. § 102.13(2)(a).

35 *See id.*

36 2001 WL 1465314, 2001 Wis. App. LEXIS 1188.

37 Wis. Stat. § 809.23(4)(a).

38 Wis. Stat. § 809.23(4)(c).

39 *See* Wis. Stat. § 809.23(4)(b).

40 Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* 17-4 (8th Ed. Jan. 2020).

41 *State v. Higginbotham*, 162 Wis. 2d 978, 996-99, 471 N.W.2d 24 (1991) (allowing parties to cite uncitable opinions in petitions for review to demonstrate a decisional conflict for purposes of Wis. Stat. § 809.62(1)(d)); *accord Deutsche Bank*, 380 Wis. 2d 727, ¶ 26 n.13 (citing uncitable opinions to show conflicting court of appeals opinions); *see also Showers Appraisals, LLC v. Musson Bros.*, 2013 WI 79, ¶ 33 n.14, 350 Wis. 2d 509, 835 N.W.2d 226 (citing uncitable opinions "solely to demonstrate that courts have used particular language from other cases").

42 *Avonelle M. Kissack Living Tr. v. Am. Transmission Co., LLC*, 2020 Wis. App. LEXIS 387, ¶¶ 86-91, 2020 WL 4873255, 394 Wis. 2d 187, 949 N.W.2d 883 (Aug. 20, 2020) (unpublished opinion authored by a single judge).

43 *Id.* ¶ 89.

44 *Id.* ¶ 90.

45 *See id.*

46 *Cf. In re Amendment*, 155 Wis. 2d at 842 (Abrahamson, J., dissenting) ("Under the present rule a lawyer who knows about an unpublished decision may use the reasoning of the case without advising opposing counsel of the decision. The no-citation rule does not prohibit use of unpublished opinions; it only prohibits acknowledging use of unpublished opinions.").

47 *Harnischfeger Corp. v. Harbor Ins. Co.*, 927 F.2d 974, 976 (7th Cir. 1991) (citing *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938)).

48 *Shea v. Smith*, No. 00-1229, 2000 U.S. App. LEXIS 34002, 2000 WL 1875733 at *2 (7th Cir. 2000) (unpublished opinion) ("Although these unpublished opinions do not bind Wisconsin courts, we consider them persuasive indicators of how Wisconsin's court might decide this issue." (citations omitted)); *Doty v. Doyle*, 182 F. Supp. 2d 750, 752 n.3 (E.D. Wis. 2002) ("Nonetheless, § 809.23(3) does not preclude such unpublished opinions from being cited to or by other courts, such as this federal district court or the state courts of other states, for whatever persuasive value they may have."); *see also Wickman v. State Farm Fire & Cas. Co.*, 616 F. Supp. 909, 920 (E.D. Wis. 2009) (citing unpublished opinion from 2007 without reference to § 809.23(3)).

49 Wis. L. Civ. R. 7(j)(1) (May 2020); *see also RMS of Wis., Inc. v. Shea-Kiewit Joint Venture*, No. 13-CV-1071, 2016 U.S. Dist. LEXIS 43915, 2016 WL 1267168 at *2 (E.D. Wis. Mar. 31, 2016) (separating concepts of permission to cite unpublished opinions to federal courts with proper weight afforded by federal courts under *Erie*, 304 U.S. 64).

50 *See Deutsche Bank*, 380 Wis. 2d 727, ¶ 26 n.13 ("The Wisconsin appellate court system functions fairly and efficiently only if the court of appeals fulfills its responsibility to publish opinions according to Wis. Stat. § 809.23(1).").

Re-Introducing the Amicus Curiae Committee

by: Brian D. Anderson, The Everson Law Firm

The Amicus Curiae Committee is here to serve you—the members of the Wisconsin Defense Counsel—and to advance the interests of our organization as an Amicus Curiae in cases before Wisconsin's appellate courts. The Committee is charged with evaluating requests to participate in appeals by filing an Amicus brief on behalf of the WDC. If the Committee agrees to participate, it works to develop arguments which complement the main briefing in a case, and writes a brief on behalf of the WDC.

In 2019, the Amicus Curiae Committee filed a brief with the Supreme Court of Wisconsin on behalf of the WDC in *Antionette Lang v. Lions Club of Cudahy Wisconsin Inc.*,[1] supporting an interpretation of Wisconsin's Recreational Immunity Statute that favors civil defendants. The Supreme Court of Wisconsin ultimately ruled (in a plurality decision) in favor of WDC member Neal Schellinger and his client.

Since 2018, the Wisconsin Association of Justice (WAJ) has filed three Amicus briefs in the Wisconsin Supreme Court (including in *Lang v. Lion's Club*) and six in the Court of Appeals. While the WDC does not necessarily have to sit opposite WAJ in all cases, there are opportunities for the Amicus Curiae Committee to use its members' time and talents to further WDCs goals in supporting caselaw favorable to civil defendants.

The Amicus process is *ad hoc*, meeting whenever called on by request from a member, or identification of a case of interest to the WDC. Once a request to review a case is made, the Committee decides if participation would further the interests of the WDC and its members (and if the committee volunteers have the capacity to take on the case). If so, the Committee next brainstorms, in collaboration with lead counsel in the appeal, which legal arguments would be best made by WDC as amicus. One or more members write the brief, and it is circulated for comment and review by those willing to participate in the editing process. Sometimes upwards of nine to ten attorneys can participate; other times as few as two to three are involved. Committee members help out when they can, with what they can.

To be successful, we need you, WDC members. How can you help?

- Inform the Amicus Curiae Committee about *your* cases on appeal for which the WDC can act as amicus to protect the rights of individuals and businesses who are defendants in civil lawsuits.
- Join the Amicus Curiae Committee and volunteer
- Recruit colleagues to join – whether young lawyers or experienced practitioners

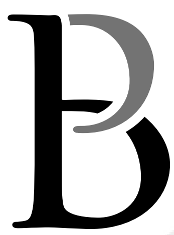
I am honored to serve as Chair of the WDC Amicus Curiae Committee, and to build upon the excellent stewardship of our Committee's previous Chairperson, Monte Weiss. With your help, we can continue to support each other and advance the mission of the Wisconsin Defense Counsel in Wisconsin's Appellate Courts.

Author Biography:

Brian D. Anderson is an attorney at The Everson Law Firm in Green Bay. He practices in the areas of insurance defense, insurance coverage, and medical negligence defense, and handles appeals in state and federal courts.

Reference

1 Milwaukee County Case No. 14-CV-3866; Court of Appeals Appeal No. 15-AP-2354; Supreme Court Appeal No. 17-AP-2510.



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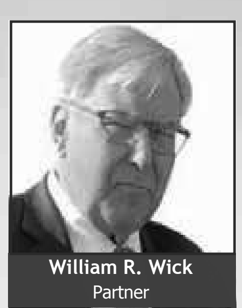
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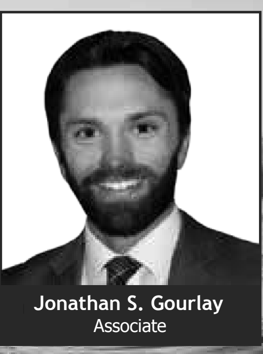
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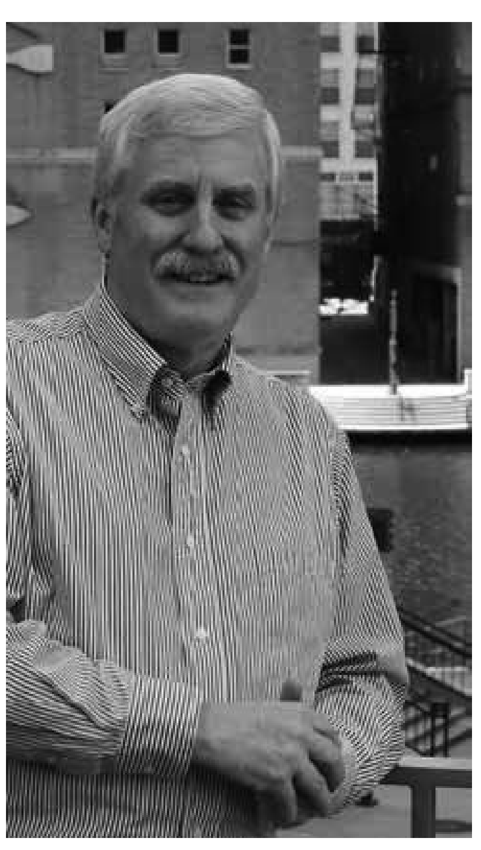

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Before mediating fulltime Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a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

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Calendar of Events

April 15-16, 2021
2021 WDC Spring Conference
A Virtual Event

August 12-13, 2021
2021 WDC Annual Conference
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