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Vincent J. Scipior

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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

JOURNAL POLICY

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

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

President's Message: Why WDC?

by: Christopher R. Bandt, President, Wisconsin Defense Counsel

Why WDC? It is a simple question, but the answer is complex. As I embark on my term as President of WDC, one of my primary tasks will be to provide our membership the answer to why they are a member of WDC and why we need to attract new members to WDC. Before I continue, I would like to thank Andrew Hebl for being a tremendous asset to our organization during his term as President. We have been in these unprecedented times much longer than any of us had hoped and we continue to navigate our way through the many changes and challenges that have taken place. Andrew has been a great leader to this organization and will continue as a viable resource to WDC as not only the Past President but as the new DRI representative for the State of Wisconsin. Thank you Andrew!

It was truly great to see so many colleagues and sponsors attend our Summer WDC Conference and Annual Meeting. We had gone over 18 months without an in-person conference and being able to interact with so many of you was fantastic! We had great presenters and I was so happy to see so many of our loyal sponsors back and interacting with our membership.

Getting back to the "Why WDC?" This concept became important to me during our Board of Directors strategic planning session this past spring. We had Mike Weston (DRI) as our mentor/guide for our strategic planning session and he kept circling back to the "Why?" My conclusion was we need to provide our members with content and opportunities to make them better lawyers. Similarly, make them proud to be a member of WDC and focus on the esteemed nature of our organization—we are the best of the best when it comes to defending our clients in civil matters!

We have taken a number of steps already to provide the answers to "Why WDC?" Our law school committee is actively working with the University of Wisconsin and Marquette University to present at the law schools. We are providing law students with free admission to the Winter Conference and free membership to WDC. Our Young Lawyer Committee is growing and is a great complement to our law school initiative to attract more young members to WDC. The Board of Directors is also continuing to work on fostering a mentoring program for our young members.

We have expanded our committees over the last several years to include Cyber Law and Technology, Employment, Diversity, Equity & Inclusion, as well as an ad hoc In-House Counsel Committee. Those are in addition to the tremendous work being done by our Women in the Law, Litigation Skills, Insurance Law, and Amicus Curiae Committees. Please see the complete list of committees and committee chairs at http://www.wdc-online.org/about-wdc/committees. One of the best ways to be involved in WDC is to join a committee and see for yourself how much WDC has to offer!

To further enhance the value of joining a committee, the Board of Directors has formed an Awards Committee. Starting in 2022, in addition to our annual awards which will now include a Young Lawyer of the Year award, committee awards will be presented at the Spring and Winter Conferences. The focus of our organization will continue to be

creating meaningful content and opportunities for our members to continue to be the best lawyers in the State of Wisconsin. One aspect of the pandemic that has created new opportunities for our membership are the webinars being put on by our sponsors. They have stuck with us during our 18 months of virtual conferences, and we have acknowledged their loyalty by having them provide free webinars at various times throughout the year. Please continue to check the email blasts on new and upcoming sponsor seminars!

Another great asset to our organization is our WDC Journal which is published three times a year to coincide with our conferences. Our Journal Editor, Vince Scipior, does a tremendous job getting meaningful articles collected and published for our membership. Please reach out to Vince with any articles, trials/verdicts, settlements, and significant motion hearing results that will continue to make the Journal a valuable resource for our membership.

Our Winter Conference is shaping up to be another fantastic program, with Heather Nelson as our program chair. Litigation skills training will continue to be at the forefront of programming, as will the ever popular ethics credits to close out the year. I hope to see many of our members for another in-person conference on December 3, 2021!

I look forward to a great year as WDC President and feel free to contact me with ways to further answer, "Why WDC?"

Author Biography:

Christopher R. Bandt is a partner in the Manitowoc office of Nash, Spindler, Grimstad & McCracken, LLP. He has been with the firm since 1996 and his practice focuses on all aspects of civil litigation with a concentration on insurance defense. He also provides mediation/ADR services. He has represented clients and tried cases throughout the State of Wisconsin and has argued before the Wisconsin Supreme Court. He is admitted to practice in the State of Wisconsin and before the U.S. District Courts for the Eastern and Western Districts of Wisconsin. He has served on the faculty for the University of Wisconsin Law School Lawyering Skills course. He is the current President of WDC and also is the chair of the Civil Jury Instruction Committee and co-chair of the Awards Committee. He is also a member of the Defense Research Institute. He has previously presented before WDC, the State Bar, and routinely provides presentations to clients and peer groups.

The Theory of the Case

by: David A. Piehler, Piehler & Strande, S.C.

Pilots talk about the concept of "situational awareness." It involves the loss of the big picture of a flight. Such loss is a frequent contributor to aviation accidents. The same concept can apply to litigation. In the context of litigation case management, situational awareness might be defined as, "the ability to identify, process, and comprehend the critical elements of information about what is happening with regard to the case." Loss of situational awareness in litigation can, at the least, result in unfocused and inefficient case management, and, at the worst, result in a significant adverse verdict. I submit that a major cause of loss of situational awareness in litigation is the failure to develop a Theory of the Case and to refine it as the case progresses.

I. What is the Theory of the Case?

The Theory of the Case is an organizing principle of the entire case, from initial investigation to appeal. Author and law professor James McElhaney defined it as, "the basic idea that not only explains the legal theory and the factual background but also ties as much of the evidence as possible into a coherent, credible whole."[1] My simpler formulation: "What's your story" or "Why shouldn't this claim be paid?" The Theory of the Case may be implicitly considered or explicitly expressed. It may be implicit in the sense that as you work on your case you may have an unarticulated idea of how you want to handle the case. An explicitly stated Theory of the Case is better, since articulating the theory helps you crystallize your thinking about the case and your proof. (Admit it—have you ever sat down to prepare for a deposition and found yourself wondering, "Why did I schedule the deposition of this witness?")

Ideally, the Theory of the Case should be plausible (*i.e.*, it has to pass the "snicker test"), simple, and easy to understand. It should appeal to common sense and the values of the community in which the case is venued. It should also reflect the underlying "morality play" of the case, which commentators tell us influences the jury.

The defense's Theory of the Case is inherently reactive, responding to the plaintiff's theory. Since the process of discovery doesn't remove all mystery about how the plaintiff will present its case, it will evolve during trial (rapidly, in some cases) as the case unfolds. Because each new piece of information obtained (including perceptions about witness credibility and likeability, expert opinions, and factual evidence developed by additional investigation) affects the case, the Theory of the Case will change throughout the life of the case. At its most basic level it considers both liability and damages. Because liability is different for different plaintiffs (think opposing driver versus guest passenger), you may have different theories for each plaintiff.

Your Theory of the Case will depend on your goal for how the case will be resolved, or, if tried, whether it will be a court trial or a jury trial. You may even have different theories for different stages of the case—summary judgment, mediation, pretrial motions, a court trial, a jury trial, or the court of appeals. You may be tempted to have multiple theories in the event one isn't accepted. We all learned in our first

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semester of Civil Procedure that it's permissible to plead inconsistent theories. This may be fine for pleading, motion arguments or appeal, but caution is warranted at trial to avoid either confusing the jury or giving the impression that you lack confidence in any of your arguments. For a jury, the K.I.S.S. principle applies, and one theory is much preferred over potentially inconsistent alternative theories.

II. Why is Having a Theory of the Case Important?

A Theory of the Case guides the entire strategy of the case. It involves an interactive process throughout investigation, discovery, and trial. Each new piece of information merits revisiting and, if necessary, revising the theory. It determines your strategy for investigation and discovery, your pretrial motions, your trial brief, trial exhibits, jury instruction and special verdict request, *voir dire*, opening statement (you get the idea). It orients you to the forest rather than getting you lost in the trees. In short, it gives you situational awareness. It may lead you to present fewer witnesses rather than more, engage in less discovery, or choose to forego experts. Your clients will appreciate the cost savings and efficiency.

III. How Do You Develop a Theory of the Case?

Ideally, you'll collaborate with your client to agree on a Theory of the Case. In a perfect world, you would get the file with a thorough investigation and a thoughtful analysis of the case from the adjuster. For those clients lacking the sophistication (or willingness to respond to your communications) to engage in such dialogue, you'll need to develop the Theory of the Case on your own. Ironically, in all the various reports clients have asked me to use, I don't recall any of them explicitly asking about what my Theory of the Case was.

Professor McElhaney suggests asking these questions to help develop a Theory of the Case:

1. Is this what really happened?
2. Does this statement sound plausible?
3. Does it add up to a claim or defense?
4. Where are the holes in my case?
5. Which of my witnesses are credible?
6. What is the strongest point in my opponent's case? Am I ready to meet it?
7. What is the weakest point in my opponent's case? Do I take advantage of it?
8. Will my client's position seem fair to a neutral observer? How can I present it so it will?
9. Will my opponent's position seem fair to a neutral observer?[2]

Never become overly enamored with your Theory of the Case. It's not engraved in stone. It will necessarily evolve as the case progresses. As one commentator said, "Nothing ruins a good story like an eyewitness." Be prepared to make changes in your theory as the case unfolds. Play devil's advocate and challenge your own theory. Be aware of how it will be viewed by the ultimate fact finder.

Your theory must adapt to the maneuvers of the plaintiff's attorney. We've all seen the master at ad libbing who is constantly morphing his or her case throughout discovery and trial. The defense must react and respond accordingly or be outflanked. Likewise, court rulings may not go your way, admitting damaging evidence for the plaintiff, or excluding helpful evidence for the defense.

IV. Conclusion

This isn't rocket science. We all develop a Theory of the Case from our first review of the file (whether explicit or implicit) as we assimilate information and begin to formulate a response. However, circumstances can conspire to cause you to lose situational awareness. Many cases are "mill run" matters which we've seen often (one rear-ender soft tissue case is much like the next). We may feel implied or express pressure from clients to spend as little time as possible on a file. A large case load may press you for time to think quietly about a case. The point of this article isn't to teach you something you didn't already know or do. Rather, it is to encourage you to overtly address the question of what your Theory of the Case is, and to occasionally revisit

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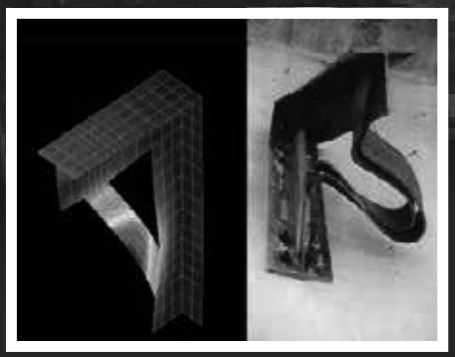

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that theory throughout the progress of the case to either validate or refute it, and adjust your actions accordingly. Doing so will inevitably lead to better outcomes, and more personal and client satisfaction.

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David A. Piehler is of counsel to Piehler and Strande, S.C., Wausau, Wisconsin. He has represented insurers and insureds for over 40 years, handling liability defense and coverage cases and worker's compensation cases.

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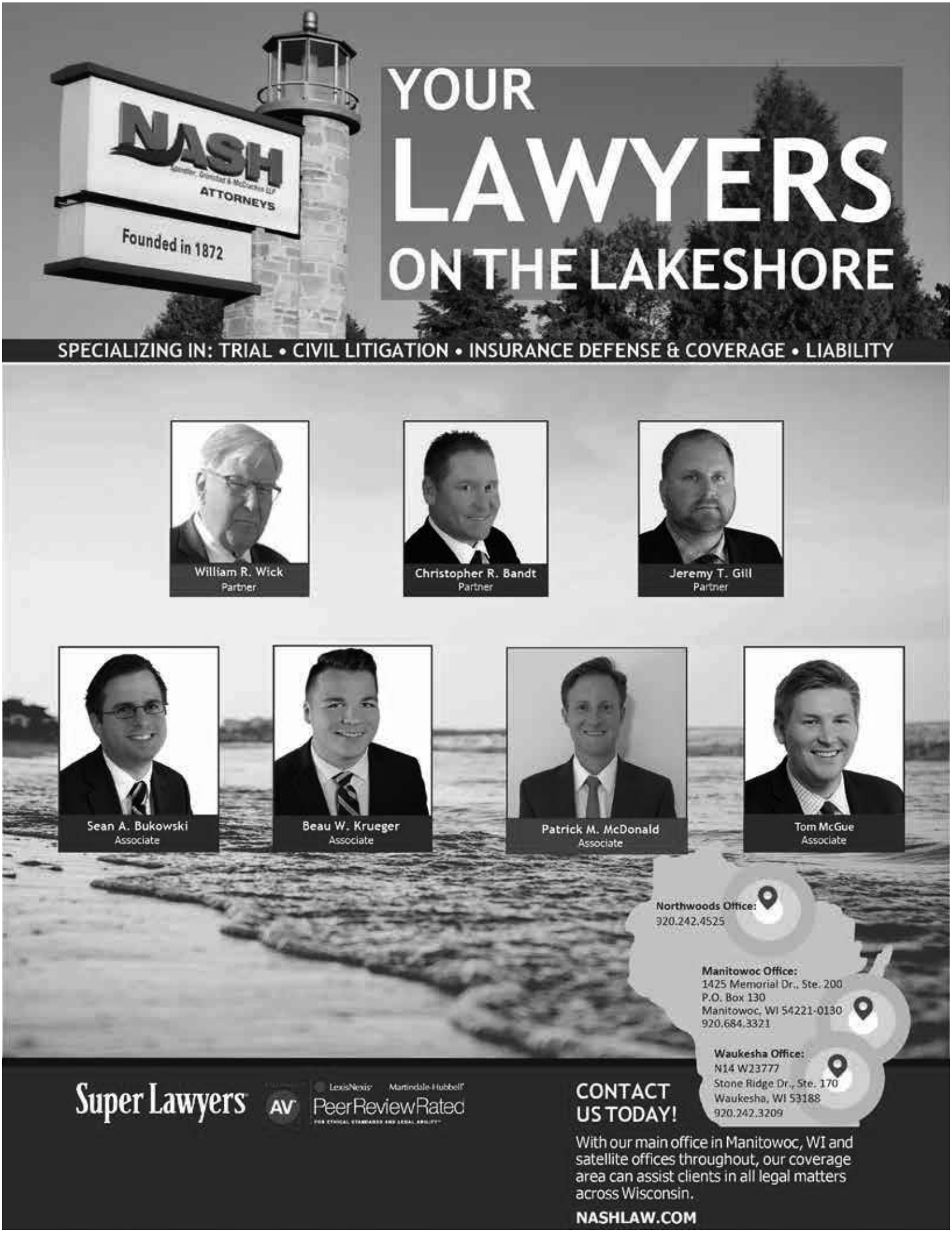
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An Introduction to Long-Term Care Defense

by: Vincent J. Scipior, Coyne, Schultz, Becker & Bauer, S.C.

I. Introduction

Claims against long-term care providers such as nursing homes are on the rise. Representing and defending long-term care providers requires an understanding of the different types of facilities that exist, the types of records they keep, the standard of care applicable to long-term care providers, the various claims that can be brought against them, and the different protections available to long-term care providers under Wisconsin law. This Article provides an introduction to these and other issues common in long-term care defense.

II. Understand the Facility

Wis. Stat. § 893.555 defines "long-term care providers" to include:

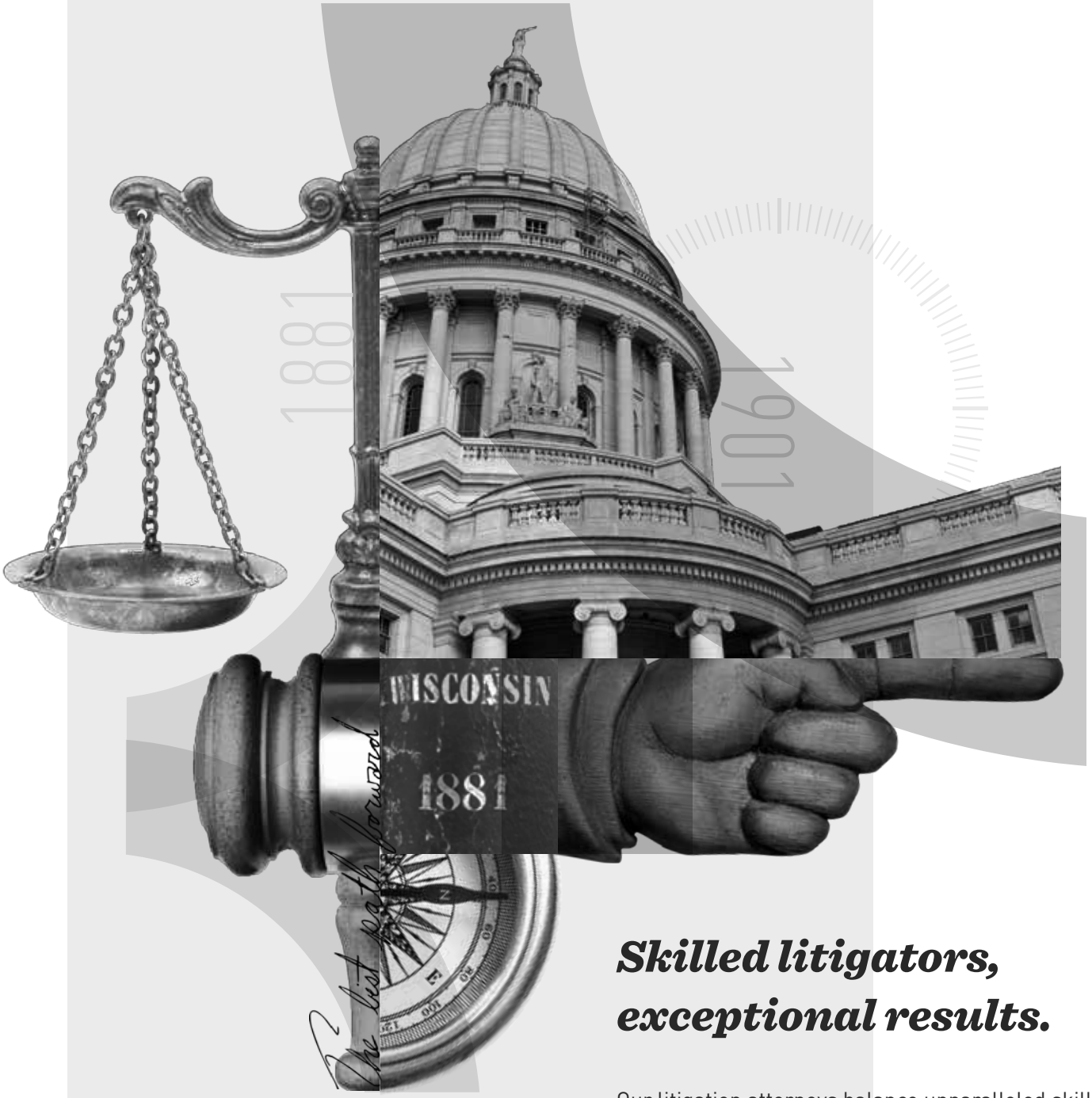
- An adult family home, as defined in s. 50.01 (1);
- A residential care apartment complex, as defined in s. 50.01 (6d);
- A community-based residential facility, as defined in s. 50.01 (1g);
- A home health agency, as defined in s. 50.01 (1r);
- A nursing home, as defined in s. 50.01 (3); and
- A hospice, as defined in s. 50.90 (1).[1]

Not all types of facilities meet the statutory definition of "long-term care provider." For example, adult day centers (day programs which provide a safe environment and activities for seniors and adults with disabilities) are not considered "long-term care providers" under Wis. Stat. § 893.555. Accordingly, adult day programs are not afforded the same protections as long-term care providers.

Understanding the facility is step one. Is it a community-based residential facility ("CBRF") or a nursing home? How many rooms? How many beds? A 5-bed CBRF is much different than a 100-bed nursing home, both in size and level of care. Residents at a CBRF can receive "no more than 3 hours of nursing care per week,"[2] whereas residents at a nursing home "require access to 24-hour nursing services."[3]

Who owns the facility? Who operates the facility? Who holds the license for the facility? Often times, these are not the same person or entity. Early on, you want to identify the following persons who were at the facility during the resident's stay:

- Administrator
- Assistant Administrator
- Admissions Director
- Director of Nursing
- Assistant Director of Nursing
- Director of Operations
- Medical Director
- Nurse Manager
- Nurse Supervisor
- Nurse Educator
- Director of Compliance



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III. Gather the Records

After you identify your client, you should send a litigation hold letter to prevent spoliation. The litigation hold letter informs the facility that it has a continuing legal duty to preserve and protect all documents in its possession or control that are relevant to the subject matter of the lawsuit, including electronically-stored information ("ESI"). It is essential that the facility immediately preserve and retain all potentially relevant evidence. The facility and its staff must not alter, delete, destroy, or otherwise modify potentially relevant documents. Preservation should be interpreted broadly. If the facility has any doubt about whether a document needs to be preserved, it should err on the side of preservation. The duty to preserve evidence supersedes any company document retention or destruction policy. It is important to instruct the facility to stop any automatic document destruction software to preserve relevant ESI.

For litigation purposes, recordkeeping is critical. You can produce 20,000+ pages of documents in discovery, but plaintiff's counsel will focus on the five missing pages of records. The following is a non-exhaustive list of records you should ask the facility to provide at the outset:

- Resident record;
- Emails referencing the resident and/or the resident's room number;
- Facility license;
- Facility floorplan;
- Organizational chart;
- Job descriptions;
- Staff schedules;
- Punch detail reports;
- Resident census reports;
- Operating policies and procedures;
- Employee handbook;
- Employee orientation and training records; and
- Employment files.

The Wisconsin Statutes list the documents that must be maintained in a resident's record.[4] The types of records that must be maintained in a resident's record depends on the type of facility. For nursing homes, what documents are required also depends on whether or not the resident was admitted for short-term care (also known as respite or recuperative care).[5] Depending on the type of facility, the resident record must contain, among other things:

- A facesheet with the resident's name and date of birth;
- Family and emergency contact information;
- Admission agreement;
- Care plan or individual service plan ("ISP");
- Assessments;
- Physician's orders;
- Medical records;
- Medication administration records;
- Progress notes;
- Incident reports;
- Documentation of significant changes in condition or treatment; etc.[6]

The resident record needs to be complete, accurate, legible, and organized.[7] The resident record must be maintained in a secure, dry location at the facility that is accessible to employees.[8] The facility must safeguard all resident records against destruction, loss, or unauthorized access or use.[9] Copies of a resident's record must be made available to the resident or the resident's guardian or designated representative upon request.[10] Depending on the type of facility, a resident's record must be retained for

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at least 5 or 7 years after the resident's discharge or death.[11]

In addition to understanding your facility, it is important to analyze the resident record to understand the resident. How old was the resident? Was the resident on hospice? What brought the resident to your client's facility? What were the resident's diagnoses at admission? Did the resident have difficulty communicating? What level of care and supervision did the resident require? What types of risks did the resident present with (*e.g.*, falls, dehydration, choking, *etc*.)? Who else was involved in the resident's care? You should determine whether the resident had a power of attorney ("POA") for health care, whether and when the POA was activated, and whether the resident was "do not resuscitate" ("DNR") code status.

Depending on the type of case, you might focus on different parts of the resident record. If it is a choking death case, you should review the resident record to determine whether the resident had been diagnosed with dysphagia (difficulty swallowing), whether there had been prior choking incidents, what type of diet the resident was on (mechanical soft diet, puréed diet, etc.), whether the care plan or ISP required supervision while eating, whether the resident received speech therapy for bad eating habits, whether the resident had been assessed as "high choking risk" by a speech language pathologist ("SLP"), etc. If it is a fall injury case, you should review the resident record to determine whether the resident had prior fall incidents, whether the resident used an assistive device to ambulate (cane, walker, crutches, wheelchair, etc.), whether the resident could transfer independently or required a 1-person or 2-person assist, what types of interventions were implemented to address the resident's fall risk, etc. Regardless of the theory of liability, the facility's care plan for the resident is usually a key component to any long-term care defense.

IV. Arbitration and Negotiated Risk Agreements

Admission agreements often contain arbitration provisions which require the parties to arbitrate any and all claims or controversies arising out of the resident's stay at the facility. An arbitration agreement might also be an addendum or attachment to the admission agreement, or a separate contract. When a lawsuit is filed in breach of an arbitration agreement, a defendant can file a motion to stay the civil action and compel arbitration in lieu of an answer pursuant to Wis. Stat. § 788.02, which provides:

> If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[12]

Arbitration in Wisconsin is governed by Wis. Stat. Ch. 788, the Wisconsin Arbitration Act.[13] It provides:

> A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract, or out of the refusal to perform the whole or any part of the contract, or an agreement in writing between 2 or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract. This chapter shall not apply to contracts between employers and employees, or between employers and associations of employees, except as provided in s. 111.10, nor to agreements to arbitrate disputes under s. 292.63 (6s) or 230.44(4)(bm).[14]

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Monte's arguments before the Wisconsin Court of Appeals and Wisconsin Supreme Court have led to the development of **Wisconsin insurance coverage law**, reflecting the depth of his understanding of this area of practice.

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The Wisconsin Arbitration Act reflects the "sensible policy of this state … to promote arbitration as a viable and valuable form of alternative dispute resolution."[15] This principle is specifically reflected in Wis. Stat. § 788.02, which directs the court to stay the trial of the action upon being satisfied that the issue involved in such suit is referable to arbitration under an agreement. *See* Wis. Stat. § 788.02. The goal of arbitration is to resolve the entire controversy out of court without the formality and expense that normally attaches to the judicial process.[16]

Sometimes the signatory to the admission agreement is not always the same entity being sued. It is not uncommon for plaintiffs to sue multiple related companies involved in the ownership and operation of the facility. In general, a plaintiff cannot avoid an arbitration provision by suing a non-signatory affiliated company. First, there is usually some provision in the admission agreement binding all agents, assigns, predecessors, successors, parent companies, subsidiaries, affiliates, etc. Second, Wisconsin recognizes five legal doctrines through which a non-signatory can be bound by an arbitration agreement entered into by others: (1) assumption; (2) agency; (3) estoppel; (4) veil piercing; and (5) incorporation by reference.[17] When charges against two affiliated companies are based on the same facts and inherently inseparable, but only one company is a party to the arbitration agreement, the court can bind both parties to the arbitration agreement.[18] The question of arbitrability is one for judicial determination unless the parties expressly agree otherwise.[19]

Sometimes the signatory to the admission agreement is not always the resident. It is not uncommon for a resident to have an activated power of attorney or legal guardian that executes the admission contract on their behalf. It is important to understand the capacity of the resident at the time of admission and their legal ability to make their own decisions and enter into legally binding contracts. If the admission agreement was executed by anyone other than the resident, a copy of the document authorizing the representative to sign, *e.g.*, letters of guardianship or an activated power of attorney document, should be obtained from the facility.

Like arbitration provisions, negotiated risk agreements are a growing trend. Negotiated risk agreements shift legal responsibility for injuries caused by staff while providing care requested by the resident. The agreement acknowledges potential risks of the care and allows the resident to make informed decisions about his or her care. The following is example language of a negotiated risk agreement:

> Resident understands that the care described in this Negotiated Risk Agreement may have significant negative consequences to the Resident's health and quality of life, including injury or death. These consequences have been fully explained to the Resident. Having considered these consequences, Resident wishes to have his/her care delivered as described in this Negotiated Risk Agreement. Resident agrees that the facility will not be held legally or otherwise responsible for any consequences, including injury or death, arising out of or relating to the care described in this Negotiated Risk Agreement.

Negotiated risk agreements are a form of liability waiver (or exculpatory contracts). To date, no Wisconsin court has addressed the enforceability of negotiated risk agreements. In general, liability waivers "are not favored by the law because they tend to allow conduct below the acceptable standard of care."[20] Wisconsin courts will not enforce liability waivers which are overly broad in scope or when the non-drafting party lacked bargaining power.[21] "A valid exculpatory contract must be clear, unambiguous, and unmistakable to the layperson."[22]

V. Investigation

After an incident, the Wisconsin Department of Health Services ("DHS") will often investigate and conduct a survey. This can result in the creation of several documents, including a misconduct incident report, a statement of deficiencies ("SOD"), a notice of violation, an order to submit a plan of correction, a

plan of correction, etc. Plaintiff often uses the SOD as a roadmap for their lawsuit. It is important to obtain a copy of any documents generated as a result of a DHS investigation. Pursuant to Wis. Stat. § 904.16(2), however, reports submitted to DHS and statements obtained by DHS "may not be used as evidence in a civil or criminal action brought against a health care provider." For this reason, these documents should be kept separate from the resident record.

The facility may also have investigated the incident. In order to encourage free and open discussion among health care providers about the quality of treatment they provide, the Wisconsin Legislature enacted the Health Care Services Review Statute, § 146.38. The Health Care Services Review Statute applies to, *inter alia*, nursing homes, community-based residential facilities, and hospices.[23] It provides that any report or record kept or created by any person or organization for the purpose of reviewing or evaluating the services of a health care provider is "confidential" and cannot be used in any civil or criminal action against the health care provider.[24] In addition, any person who participates in the investigation "may not testify as to information obtained through his or her participation in the review or evaluation, nor as to any conclusion of such review or evaluation."[25] Under former law, the Health Care Services Review Statute applied only to quality review committees. The current language of § 146.38 applies to "[a]ll persons, organizations, or evaluators, whether from one or more entities."[26]

After an incident, it is not unusual for the administrator and staff to meet with the resident's family. Sometimes statements of apology or condolences are offered. Wisconsin's "I'm sorry" law, § 904.14, makes an apology inadmissible to prove negligence. It provides:

> A statement, a gesture, or the conduct of a health care provider, or a health care provider's employee or agent, that satisfies all of the following is not admissible into evidence in any civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration regarding the health care provider as evidence of liability or as an admission against interest:
>
> **(a)** The statement, gesture, or conduct is made or occurs before the commencement of the civil action, administrative hearing, disciplinary proceeding, mediation, or arbitration.
>
> **(b)** The statement, gesture, or conduct expresses apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility, or sympathy to a patient or his or her relative or representative.

Like the Health Care Services Review Statute, Wisconsin's "I'm sorry" law applies to nursing homes, community-based residential facilities, and hospices.[27] It also applies to adult family homes.[28]

VI. Standard of Care

In order to prove negligence, a plaintiff must prove a duty of care, a breach of that duty, an injury, and a causal connection between the breach and the injury.[29] Long-term care providers have a duty to exercise ordinary care. Ordinary care is "the care which a reasonable person would use in similar circumstances."[30] A person fails to exercise ordinary care "if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property."[31] Failure to exercise ordinary care constitutes negligence.[32] In general, a plaintiff must produce expert testimony to establish a deviation from the standard of care in long-term care cases.

The Wisconsin Administrative Code sets the minimum threshold for standard of care. For example, Chapter DHS 83 applies to community-based residential facilities and sets forth basic requirements for licensing, hiring, maintaining employee files, training employees, admitting residents, discharging residents, respecting resident rights, ISP planning, etc.

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A violation of the administrative code is negligence *per se*. At a minimum, long-term care providers must follow the administrative codes.

As a general rule, however, the internal policies and procedures of a long-term care provider do not set the standard of care.[33] It is the law, not any protocol or policy of a company, that establishes a defendant's duty. If, however, an employee testifies that the company's policies and procedures are consistent with what a reasonable person would do in similar circumstances, the judge may allow the plaintiff to use the policies and procedures as evidence of the standard of care.

Long-term care cases are subject to the comparative negligence provisions of Wis. Stat. § 895.045.[34] Pursuant to Wis. Stat. § 895.045(1), contributory negligence does not bar recovery in an action to recover damages for negligence resulting in injury or death, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering. Pursuant to Wis. Stat. § 895.045(1), the liability of each person or entity found to be causally negligent whose percentage of causal negligence is less than 51 percent is limited to the percentage of the total causal negligence attributed to that person or entity. A person or entity found to be causally negligent whose percentage of causal negligence is 51 percent or more, however, shall be jointly and severally liable for the damages allowed.[35] It is important to note, however, that there is a rebuttable presumption in wrongful death cases that a deceased person was not negligent.[36] A jury is instructed to presume that the deceased person was not negligent at and before the time of his or her death, unless the jury finds the presumption is overcome by other evidence."[37]

Contributory negligence is not commonly seen in long-term care cases. That is because the resident is being admitted to the facility precisely because they cannot care for themselves and often have mental and physical disabilities. They are relying on the facility to keep them safe and maintain their health. Practically speaking, it is difficult to argue that a long-term care resident was contributorily negligent. Occasionally, there is evidence that a family member was comparatively negligent.

VII. Vicarious Liability

In Wisconsin, long-term care providers are vicariously liable for the torts of their employees under the doctrine of *respondeat superior* if the acts occurred within the scope of employment.[38] "Our supreme court has stated that the 'conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.'"[39] "Further, the employee's intent must be considered when determining whether his or her conduct was within the scope of employment.[40] "In short, employees act within the scope of their employment as long as they are, at a minimum, 'partially actuated by a purpose to serve the employer.'"[41] "Serving the employer need not be the sole purpose of the employee's conduct, nor need it be even the primary purpose."[42] "An employee's conduct, however, cannot be said to fall within the scope of employment 'if it is too little actuated by a purpose to serve the employer or if it is motivated entirely by the employee's own purpose.'"[43] "Thus, if the employee fully steps aside from conducting the employer's business to procure a predominantly personal benefit, the conduct falls outside the scope of employment."[44] Normally, the scope-of-employment issue is presented to the jury because it entails factual questions on an employee's intent and purpose.[45]

A long-term care provider may even be vicariously liable for the intentional torts of its employees.[46] "[T]he scope-of-employment concept recognizes that an [employee] can exceed or abuse his authority—even intentionally or criminally—and still be acting within the scope of his employment."[47] There is an argument that some intentional conduct, such as resident assault and abuse, falls outside the scope of employment because it is forbidden by the facility's written policies.[48] Many courts have held, however, that assault can fall within an employee's scope of employment if the assault was related to the performance of the employee's job duties. For

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example, in *Rodebush v. Oklahoma Nursing Homes, Ltd.*,[49] an Oklahoma court upheld employer liability for an employee's intentional tort where a nursing home employee slapped a combative Alzheimer's patient he was bathing because the nursing home was in the business of taking care of Alzheimer patients, and the employee had not deviated from his assigned duties, and was carrying out an assigned task when the slapping occurred. Similarly, in *Kevin C. v. Founds. Behavioral Health*,[50] the United States District Court for the Eastern District of Pennsylvania—applying a similar standard as Wisconsin—held that a jury could find that an employee of a psychiatric hospital who yelled at, pushed, shoved, dragged, and struck a patient was acting within the scope of his employment because the alleged misconduct occurred while the employee was performing tasks within the responsibilities of his job (taking care of the patient and performing daily cares), and therefore motivated at least in part to serve his employer. Likewise, in *Elliot v. Ohio Dept. of Rehab. & Corr.*,[51] the court held that the Ohio Department of Rehabilitation and Corrections was vicariously liable for a prison guard's intentional assault of an inmate because the guard's acts, while heedless and unnecessary, were not outside the scope of his employment duties to maintain and discipline an inmate population, which served the prison's interest. In *McCombs v. Ohio Dep't of Developmental Disabilities*,[52] the Court of Claims of Ohio held that a treatment center was vicariously liable under the doctrine of *respondeat superior* for an employee's intentional abuse and neglect of an autistic adult because in each instance of abuse the employee was engaged in client monitoring or attempting to control the client's behaviors, which was in furtherance of the facility's interest. What these cases all teach is that the scope-of-employment question is very complex and must be analyzed in light of the facts presented on a case-by-case basis.[53]

When there are allegations that an employee committed an intentional tort, occasionally the employee will also be facing criminal charges. Because of the parallel criminal case, the employee may need to exercise his or her constitutional right not to testify in the civil case on the ground that the testimony might tend to incriminate them in the criminal case. Wisconsin has long recognized that a person may invoke the Fifth Amendment privilege against self-incrimination in a civil action as protection from the adverse use of such evidence in a parallel or subsequent criminal action.[54] "[The privilege] extends not only to testimony which would support a conviction but also to evidence which would furnish a link in a chain of evidence necessary to prosecution."[55] "The privilege against self-incrimination exists whenever a witness has a real and appreciable apprehension that the information requested could be used against him [or her] in a criminal proceeding."[56] While asserting his or her Fifth Amendment rights cannot be used against a defendant in a criminal case, a civil jury is instructed that it "may find by this refusal to answer that the answer would have been against the interest of the witness."[57] For this reason, you may need to move the court to stay discovery in the civil case until the parallel criminal case is resolved. Upon a showing of good cause, Wis. Stat. § 804.01(3)(a) authorizes a trial court to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense in a discovery proceeding. This includes, without limitation, "[t]hat the discovery not be had, … [t]hat certain matters not be inquired into, or that the scope of the discovery be limited to certain matters."[58] Issuance of a protective order in a discovery proceeding is within the trial court's sound discretion.[59] Whether a particular court should stay the civil proceedings in face of a parallel criminal investigation must be decided in light of the particular circumstances and competing interests involved in the case.[60]

VIII. Causation

Often times, an injury or death has more than one cause. An autopsy report or death certificate may list multiple competing causes of death. For this reason, Wisconsin law asks whether someone's negligence was "a cause" of the plaintiff's injury, not "the cause."[61] Someone's negligence was "a cause" of an injury if it was "a substantial factor in producing the injury."[62] In long-term care cases, it is not unusual for a plaintiff to allege that the defendant's negligence was

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"a cause" of injuries that led to the resident's death, even though the alleged negligence and death are far removed in time. If a physician expert is retained, it is often helpful to have one that is experienced in geriatric care and will understand the significance and impact of the resident's comorbidities on their overall life expectancy and death.

IX. Compensatory Damages

Pursuant to Wis. Stat. § 893.555(4), the total noneconomic damages recoverable for bodily injury arising from care or treatment provided by a long-term care provider is capped at $750,000. This cap applies to "all long-term care providers and all employees of long-term care providers acting within the scope of their employment and providing long-term care services who are found negligent."[63]

When a resident dies, an action for wrongful death may be brought against a long-term care provider pursuant to Wis. Stats. §§ 895.03 and 895.04.[64] Section 895.03 provides:

> Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death in this state.

Under Wis. Stat. § 895.04, the resident's estate can seek damages for his or her pre-death conscious pain and suffering (capped at $750,000).[65] In addition, the resident's surviving relatives have a single claim for loss of society and companionship capped at $350,000.[66]

In addition to noneconomic damages, plaintiffs in a wrongful death action can recover "the reasonable cost of medical expenses, funeral expenses, including the reasonable cost of a cemetery lot and care of the lot, grave marker or other burial monument, coffin, cremation urn, urn vault, outer burial container, or other article intended for the burial of the dead."[67] Unlike a typical personal injury case, however, the collateral source rule does not apply in actions against long-term care providers.[68] "Simply put, the collateral source rule states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person."[69] Pursuant to Wis. Stat. § 893.555(8), "Evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for negligence by a long-term care provider."

X. Punitive Damages

In addition to compensatory damages, an action for punitive damages may be brought pursuant to Wis. Stat. § 895.043. Unlike compensatory damages, the purpose of punitive damages is "to punish the wrongdoer and to deter the wrongdoer and others from similar conduct in the future."[70] Punitive damages are available when "evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."[71] A person's acts are "malicious" when they are "the result of hatred, ill will, desire for revenge, or inflicted under circumstances where insult or injury is intended."[72] A person acts with an "intentional disregard of the rights of the plaintiff" if the person acts with the purpose to disregard the plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded.[73] Punitive damages must be proven by "clear and convincing evidence."[74] An award for punitive damages is capped at "twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater."[75]

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To hold an employer liable for punitive damages arising out of the tortious acts of its employee, a plaintiff must prove that the employer either authorized the acts in advance, or, with knowledge of the acts, ratified them.[76] No matter how willful or outrageous the acts of an employee, an employer, in the absence of a direction on its part to do the act in the manner in which it is done, cannot be held liable for punitive damages unless the employer ratified the employee's acts.[77] While retaining an employee guilty of a tort is one fact tending to show ratification, it is not conclusive.[78] Where the evidence shows that the employer denounced the tortious acts of its employee in the strongest terms, there is no basis for ratification and punitive damages are not appropriate.[79]

When punitive damages are alleged, you may want to file a motion to bifurcate the punitive damage claim from the negligence claim and stay discovery on the punitive damage claim. Circuit courts are statutorily authorized to bifurcate punitive damage claims from negligence claims and hold separate trials on each pursuant to Wis. Stat. § 805.05(2), which provides:

> **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition or economy, or pursuant to s. 803.04(2)(b), may order a separate trial of any claim, cross-claim, counter-claim, or 3rd-party claim, or any number of claims, always preserving inviolate the right of trial in the mode to which the parties are entitled.

Wis. Stat. § 906.11 also supports the court's power to bifurcate and stay punitive damage claims, which grants the court authority to exercise reasonable control over the mode and sequence of trial. Thirty years ago, the Wisconsin Court of Appeals clarified in *Badger Bearing, Inc. v. Drives and Bearings, Inc.* that punitive damage claims and negligence claims are "distinct" and "entirely separable."[80] The claims require different elements and different levels of proof.[81] Additionally, circuit courts are expected to serve as gatekeepers before sending a punitive damage question to the jury.[82] In order to preserve this gatekeeping function, Wisconsin courts may bifurcate punitive damage claims from the negligence claims.[83] Whether to bifurcate claims and hold separate trials lies in the discretion of the court.[84]

In addition to bifurcation and separate trials, circuit courts have the power to stay discovery on punitive damage issues.[85] A motion to stay discovery is addressed to the circuit court's broad discretion.[86]

XI. Statute of Limitations

Pursuant to Wis. Stat. § 893.555(2), "an action to recover damages for injury arising from any treatment … performed by, or from any omission by, a long-term care provider, regardless of the theory on which the action is based, shall be commenced within the later of: (a) Three years from the date of the injury[; or] (b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that an action may not be commenced … more than 5 years from the date of the act or omission." If there is evidence, however, that the long-term care provider concealed a prior act or omission that resulted in injury to the resident, an action may be commenced within one year from the date the concealment is discovered or, in the exercise of reasonable diligence, should have been discovered.[87]

XII. Conclusion

Wisconsin law offers special protections for long-term care providers. It also requires long-term care providers to keep good records and meet a minimum standard of care. In order to effectively represent long-term care providers, you must be familiar with these requirements and protections.

Special thanks to Amy F. Scholl and Myranda Stencil for their feedback and assistance with this Article.

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32 *See id*.
33 *Otto v. Milwaukee Northern Ry. Co.,* 148 Wis. 54, 59, 134 N.W.157 (1912)*; Marolla v. American Family Mut. Ins. Co.,* 38 Wis. 2d 539, 157 N.W.2d 674 (1968)*; Johnson v. Misericordia Comm. Hosp.,* 97 Wis. 2d 521, 294 N.W.2d 501 (Ct. App. 1980)(*aff'd* 99 Wis. 2d 708, 301 N.W.2d 156 (1981)); *Cooper v. Eagle River Memorial Hospital,* 270 F.3d 456 (7th Cir. 2001).
34 Wis. Stat. § 893.555(7).
35 *See* Wis. Stat. § 895.045(1).
36 *See* Wis. JI-Civil 353.
37 *See id*.
38 *See Maniaci v. Marquette Univ.*, 50 Wis. 2d 287, 302-03, 184 N.W.2d 168, 176 (1971).
39 *Block v. Gomez*, 201 Wis. 2d 795, 805-06, 549 N.W.2d 783 (Ct. App. 1996) (quoting *Scott v. Min-Aqua Bats Water Ski Club, Inc.*, 79 Wis. 2d 316, 321, 255 N.W.2d 536 (1977)).
40 *Id*. (citing *Olson v. Connerly*, 156 Wis. 2d 488, 498-99, 457 N.W.2d 479 (1990)).
41 *Id*.
42 *Id*.
43 *Id*. (quoting *Olson*, 156 Wis. 2d at 499-500).
44 *Id*. (citing *Olson*, 156 Wis. 2d at 500 & n.11).
45 *Desotelle v. Continental Cas. Co.*, 136 Wis. 2d 13, 26-28, 400 N.W.2d 524 (Ct. App. 1986).
46 *See Maniaci*, 50 Wis. 2d at 302-03 ("[D]efendants' assertion that [it] is not liable for the intentional torts of its agents finds no support in the Wisconsin law. Under Wisconsin

law, the general rule is, subject to the usual rules of agency, that an employer is vicariously liable for the torts of his employees.").

47 *Javier v. City of Milwaukee*, 670 F.3d 823, 832 (7th Cir. 2012).

48 *See Block*, 201 Wis. 2d at 807 (holding that a therapist's sexual conduct with a patient fell outside the scope of employment in part because the therapist "knew that he was forbidden by the Clinic to enter into a sexual relationship with his patients because the Clinic had a written policy forbidding such conduct between its therapists and patients.").

49 1993 OK 160, 867 P.2d 1241 (Okla. 1993).

50 No. 20-6431, 2021 U.S. Dist. LEXIS 159384, at *18-19 (E.D. Pa. Aug. 24, 2021).

51 Ct. of Cl. 1992 Ohio 285 (1992).

52 2021-Ohio-2404, ¶ 18, 2021 Ohio Misc. LEXIS 84 (Ct. Cl.).

53 *See Desotelle*, 136 Wis. 2d at 26-28.

54 *S.C. Johnson & Son, Inc. v. Morris*, 2010 WI App 6, ¶ 11, 322 Wis. 2d 766, 779 N.W.2d 19 (citing *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969)).

55 *In re: Matter of Sheila Grant*, 83 Wis. 2d 77, 81, 264 N.W.2d 587 (1978).

56 *Id*.

57 *See* Wis. JI-Civil 425.

58 Wis. Stat. §§ 804.01(3)(a).

59 *State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981); *see also Dahmen v. Am. Family Mut. Ins. Co.*, 2001 WI App 198, ¶ 11, 247 Wis. 2d 541, 635 N.W.2d 1 ("Likewise, the decision whether to stay discovery is committed to the trial court's discretion.").

60 *State v. Steenberg Homes*, 204 Wis. 2d 113, 552 N.W.2d 900 (Ct. App. 1996), (*citing Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.)).

61 Wis. JI-Civil 1500.

62 *Id*.

63 Wis. Stat. § 893.555(4).

64 *See* Wis. Stat. § 893.555(6) ("Notwithstanding the limits on noneconomic damages under this section, damages recoverable against a long-term care provider, and an employee of a long-term care provider acting within the scope of his or her employment and providing long-term care services, for wrongful death are subject to the limit under s. 895.04 (4).").

65 *See* Wis. Stat. § 893.555(4).

66 *See* Wis. Stat. § 895.04(4); *Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, ¶ 98, 293 Wis. 2d 38, 717 N.W.2d 216.

67 *See* Wis. Stat. § 895.04(5).

68 *See* Wis. Stat. § 893.555(8).

69 *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 26, 302 Wis. 2d 110, 736 N.W.2d 1.

70 *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 278, 294 N.W.2d 437 (1980).

71 *See* Wis. Stat. § 895.043(3).

72 *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 483, 464 N.W.2d 654 (1991).

73 *Strenke v. Hogner*, 2005 WI 25, ¶ 36, 279 Wis. 2d 52, 694 N.W.2d 296.

74 *Id*. ¶ 31.

75 *See* Wis. Stat. § 895.043(6).

76 *See Garcia v. Samson's, Inc.*, 10 Wis. 2d 515, 518, 103 N.W.2d 565 (1960).

77 *Marlatt v. W. Union Tel. Co.*, 167 Wis. 176, 180-84, 167 N.W. 263 (1918).

78 *Id*.

79 *Id*.

80 111 Wis. 2d 659, 674 (Ct. App. 1983).

81 *Id*.

82 *Henrikson v. Strapon*, 2008 WI App 145, ¶ 15, 315 Wis. 2d 225, 758 N.W.2d 205; *Strenke*, 279 Wis. 2d 52, ¶ 40.

83 *See*, *e.g.*, *Mews v. Beaster*, 2005 WI App 53, ¶ 4, 279 Wis. 2d 507, 694 N.W.2d 476 ("the trial court … did allow bifurcation of the compensatory and punitive damages claims"); *Kottke v. Commercial Truck*, 2009 Wis. App. LEXIS 536, ¶ 5 (July 21, 2009) (unpublished opinion) (Kottke sued and a jury awarded him damages for breach of contract. In a subsequent bifurcated proceeding, a jury … also awarded punitive damages"); *Walter v. Cessna Aircraft*, 121 Wis. 2d 221, 236 (Ct. App. 1984) (remanding for separate retrial on punitive damage claim).

84 *See Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 325, 129 N.W.2d 321 (1964).

85 *See Mucek v. Nationwide Comm., Inc.*, 2002 WI App 60, ¶ 28, 252 Wis. 2d 426, 643 N.W.2d 98 (circuit courts have authority to control the order of discovery).

86 *Dahmen*, 247 Wis. 2d 541, ¶ 11.

87 Wis. Stat. § 893.555(2).

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Nine Tips to Enhance Your Company's Cybersecurity When Employees Work Remotely

by: Justin P. Webb and Rebeca M. López, Godfrey & Kahn, S.C.

The coronavirus (COVID-19) pandemic increased employee teleworking and telecommuting, a trend that seems likely to continue for the foreseeable future, whether through flexible work schedules or companies deciding to formally endorse permanent remote work for some or all of their employees. As a result, an increased amount of business is now conducted over the internet. This change brings significant legal risks to employers' doorsteps.

In 2020, the U.S. Federal Bureau of Investigation (FBI) Internet Crime Complaint Center (IC3) received a record number of complaints—791,790—with reported losses exceeding $4.1 billion. This represents a 69% increase in total complaints from 2019. According to the FBI, most complaints involved phishing, ransomware and cyber scams, as well as extortion carried out through email. Individuals and businesses suffered the greatest losses through compromised business email, as well as scams in which individuals mimicked the account of a person or vendor known to the victim that were used to gather personal or financial information, also known as "social engineering."

The FBI and Cybersecurity and Infrastructure Security Agency (CISA) have issued advisories and warned that the threat of vishing (social engineering through voicemail), smishing (social engineering through SMS or iMessages) and phishing schemes targeting remote employees is even greater today.

Employers must take steps to create and follow policies to limit the risk posed by cybersecurity threats and legal counsel can assist clients in instituting best practices to do so. The following nine high-level considerations and steps may be implemented by businesses to reduce their risk of a cybersecurity breach.

Tip #1: Ensure Access to Dedicated and Skilled Information Technology Resources

Remote work requires dedicated and skilled information technology staff and vendors. For any vendors, employers should have their agreements reviewed by knowledgeable counsel to ensure the arrangement addresses cybersecurity risks and liabilities, including when the vendor will notify the employer of any incident and how the vendor will secure the employer's information.

Tip #2: Manage the Devices Accessing the Employer's Systems

Perhaps the most important decision to be made is whether to allow employees to use personal devices when accessing the employer's network, systems, and information. Personal devices present the

greatest breach risk because they are not centrally managed and controlled with restrictions and security measures.

It is best practice for employers to install mobile device management software on any device that accesses company email, systems, documents, etc. that will, at a minimum, allow the employer to remotely terminate the employee's access to the employer's systems, and to delete or wipe employer information from the device. If the employer will remotely wipe information or use mobile device management to monitor employee activity on devices, employees must be made aware that such software is being installed on their personal or company-provided laptop and of the corresponding consequences for misuse.

If the employer uses employer-owned mobile devices, advise employees that they should not save personal information, documents, and photos on those devices because that information could be lost if their computer, phone, etc. is wiped upon termination, departure, or a cybersecurity incident.

Tip #3: Require Strong Passwords and Implement Multifactor Authentication

Employers should require employees to use complex passwords and change their passwords frequently. More importantly, multifactor authentication is best practice. Typically, this system requires an employee to enter a code generated on a separate device as a secondary step to logging in. Multifactor authentication helps guard against hackers guessing an employee's password or using credentials harvested from a data breach to break into the employee's account.

Tip #4: Update, Test, and Train Employees

Employers should send regular updates to employees regarding the latest cybersecurity risks and point out tips to identify scams. Training employees on good cybersecurity hygiene, how to identify phishing emails, and what to do if they have questions or concerns can go a long way to prevent employees from responding to or clicking on links that threaten the employer's operations. Finally, businesses should test their employees, particularly those working remotely, by sending mock phishing emails to see if employees are able to identify and properly address the scams. Most importantly, employees should be told who to call and what to do if they suspect an incident has occurred.

Tip #5: Monitor Employee Access and Activity

If possible, use software that alerts the business if an employee is downloading large amounts of company data or other sensitive information. Such activity, including sending this information to a personal email account, may signal an employee is preparing to end their employment and compete with the business, or that an attacker has gained access to the employee's account.

Tip #6: Promptly Terminate Access

If an employee is terminated, departs, loses a device, or has been targeted by a cyberattack, it is imperative that the business immediately terminate the employee's access to the business' systems. The employer should have a written procedure or policy to address cybersecurity in employee off-boarding.

Tip #7: Develop and Maintain an Incident Response Plan

Businesses should develop and maintain an incident response plan that is communicated to the business to address how it will respond when faced with a cyberattack. Minimally,

the plan should address preparation, detection, containment, eradication and recovery, and post-incident review. The incident response plan should also include contact information for outside resources that will assist the business in responding to an incident, including forensic providers and outside counsel.

Tip #8: Implement a Telecommuting/ Telework Policy

Implement a telecommuting/telework policy which, minimally, includes the following provisions to help enforce and support best practices that protect the business from cyberattacks directed at remote employees:

- Reference and incorporate the employer's information technology and cybersecurity policies
- Detail password, firewall, antivirus software, router encryption, and other security requirements.
- Make clear that third parties and members of the employee's household cannot use or access employer provided devices for any reason and should not access personal devices that have access to employer resources
- Prohibit employees from using public or unsecured Wi-Fi connections
- Prohibit employees from emailing company information to personal email or cloud-based devices, or saving company information locally
- Provide employees contact information and directions on reporting lost, stolen, or compromised devices and suspected cyber incidents
- Remind employees that they do not have an expectation of privacy when using devices that have access to company resources and any such device may be remotely wiped

Tip #9: Restrictive Covenant Agreements

Now is also the time to review a business's restrictive covenant agreements to ensure they properly address employees who are taking confidential information home and to provide for the prompt return of information and equipment after the employment relationship ends.

Author Biographies:

Justin P. Webb is an associate at Godfrey & Kahn, S.C. He is the Chair of the firm's Data Privacy & Cybersecurity Practice Group. Justin is also the firm's Chief Information Security Officer and a member of the firm's Technology & Digital Business Practice Group. He holds the Certified Information Privacy Professional/US (CIPP/US) certification from the International Association of Privacy Professionals. Justin received his bachelor's degree from the University of California – Los Angeles, and his law degree from Marquette University Law School, summa cum laude. Justin's practice focuses on helping clients with the legal issues that arise from technology and data in an increasingly digital world, with a specific focus on cybersecurity and data privacy matters. Prior to practicing law, Justin was the Information Security Officer at a top-100 private university, where he was in charge of all aspects of the university's information security program, including intrusion detection and prevention, incident response, penetration testing, and forensic analysis.

Rebeca M. López is a senior associate on Godfrey & Kahn, S.C.'s Labor, Employment & Immigration Law Practice Group in Milwaukee. She received her bachelor's degree from Marquette University and her law degree from Marquette University Law School, magna cum laude. She is admitted to

practice in state and federal courts in Wisconsin. Rebecca is a member of the American Bar Association, Defense Research Institute, Eastern District of Wisconsin Bar Association, Hispanic Professionals of Greater Milwaukee, Professional Dimensions, State Bar of Wisconsin, and Wisconsin Hispanic Lawyers Association. Businesses in the service, manufacturing, distribution, retail, and hospitality industries rely on Rebeca to solve the labor and employment issues that arise throughout the course of their operations. Rebeca's understanding of employment law goes beyond legal theory. Whether she is defending an employer before an administrative agency or advising on hiring, discipline, policies, or practices, Rebeca's background enables her to bring pragmatic and cost-effective solutions to the table. With prior work experience managing an office and working directly with human resources professionals, Rebeca understands what it's like to be in her client's shoes and this perspective guides her in each conversation. Rebeca's expertise includes defending employers before administrative agencies and state and federal courts in single-plaintiff and class action matters alleging discrimination, harassment, or wage and hour violations. She has successfully guided clients through government audits and regularly conducts investigations into employee complaints.

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Q&A with Mediator James Naugler

Attorney James Naugler is a partner at Moen Sheehan Meyer, Ltd. in La Crosse. He obtained his bachelor's degree from the University of Wisconsin - Stevens Point, *magna cum laude*, and his law degree from the University of Wisconsin in 1979. Prior to joining Moen Sheehan Meyer, Ltd. in 1981, Attorney Naugler was an Assistant District Attorney in La Crosse. His areas of practice include business law, general litigation, insurance defense, products liability litigation, and personal injury cases.

Attorney Naugler has been mediating cases for roughly ten years. We recently sat down with him to discuss his experiences as a mediator and suggestions for a successful mediation.

Why did you decide to become a mediator?

Two things, but mostly people would call and ask, and I realized that I had a pretty good handle on bad mediators since I had run into a few and know what good mediation looks like, and that is what I aspired to do.

What is a "good mediation?"

Generally, good mediation would be listening, knowing the facts, not being judgmental, and dealing with the parties in a respectful manner.

Is your goal always to settle the case?

No. I want to settle the case, but sometimes these cases will settle after mediation and mediation may fail for a host of reasons. First, lack of discovery. People want to mediate too quickly. Secondly, there are certain facts which have to be established in order to arrive at the true value of the case.

Are certain types of cases more difficult to settle than others?

The most difficult cases to settle are the small ones. They are the most time consuming for some reason, and they frequently can be emotional. If you are trying to settle, say, a real estate matter or some commercial matter, emotions can be quite high. But they are difficult to settle because there is just not enough money there. And those are tougher than the big ones.

How does the plaintiff's room differ from the defense room?

In the defense room, of course, you are dealing with insurance people who negotiate and settle cases all the time. They have a good handle, generally, on what the verdicts are in the local area because they keep track and may use a system.

In the plaintiff's room, this is usually the person's first time. They haven't been exposed to this procedure. It is foreign to them. They are nervous, and they have different goals. As a mediator you have to spend ten to fifteen minutes to gain the trust of the plaintiff and if you can't, your mediation is less likely to be successful. I work very hard immediately to put the parties at ease because you have to get the parties to relax a little bit, be at ease, in order to communicate with them. You spend a little bit of time explaining the procedure and that includes the negotiations, the offers, and

the counter-offers. That's why there's more time in the plaintiff's room because you are explaining to them the process and the negotiation process. You usually explain to the plaintiff that the attorneys are all experienced and we are all trying to figure out what the value of the case is, but the ultimate people that will determine the value of the case is the jury. The other thing to bear in mind is the end goal here. What most plaintiffs want is just to know that they have the insurance company's best offer short of trial. And then they can make their own decision.

Most people are terrified of going to trial, or certainly nervous about it, because it involves public speaking. The three greatest fears of Americans are heights, snakes, and public speaking. With that in mind, it kind of makes it easier to progress to some type of a settlement. Incidentally, most lawyers, unless they've been in court, and very few have these days, because fewer than 1% of all civil cases go to a jury trial, are also nervous or scared of trying the case.

How do Zoom mediations compare to live and telephone mediations?

Zoom came in to being because of COVID-19. The advantage is obviously safety. It is also convenient. You have less travel time, both by attorneys on both sides. And, the other thing that is important—and you can't lose sight of this—is the plaintiffs or parties may well be more comfortable and relaxed if they are Zooming from their home than in some lawyer's office.

A disadvantage of Zoom is technological glitches, and I think anybody that's been mediating has been through those. Zoom is also a cold medium, just like television. It's not personal. It's harder to read the room. It's tougher on the mediator, but right now Zoom mediations are extremely popular.

The big advantage of a live mediation is you can feel the atmosphere in the room. The mediator can read the room, can evaluate the moods, can know what to say and what to avoid, and can see if there's a problem or objections. Also, many large companies pretty much insist that mediations be live because there is a huge advantage in negotiating between people in a live setting than in a Zoom or a phone setting. For me personally, live is preferable because I enjoy people.

The disadvantages of live are safety during COVID-19. Travel is another one. Sometimes people have to travel long distances. Maybe a plaintiff is out-of-state, they can appear by Zoom which is much more financially beneficial to them, and also probably makes settlement easier.

Mediating in a live setting such as a lawyer's office, which is a formal setting, can be intimidating and uncomfortable for a lot of plaintiffs. And then you have the difference between the rural and the city setting because once again most mediations take place in an urban environment and if somebody is coming from rural Wisconsin, they're coming in and they have to find parking, they are in an unfamiliar area, so they are uncomfortable from the start.

Phone mediations are the least popular. Insurance claims people often prefer to appear by phone. They live on the phone. They are comfortable on the phone. But, really, it's terrible if you are asking plaintiffs' attorneys or the plaintiffs to negotiate on the phone because basically, they are negotiating blind. Ninety percent of all information that is translated to the brain is visual.

Do you have more success with live mediations versus Zoom?

Not necessarily. I've settled six, seven, eight figure cases on Zoom. Zoom can certainly be very effective.

Do you prefer half-day or full-day mediations?

The majority of cases should settle within three hours or less. Now, there are some that won't. If there are multiple parties, it's a complicated case, there's a lot of money involved, we're negotiating with subros or whatever, we just book a day and it takes a day. But, for the average case, three hours

or less. If I can settle a case in an hour, I'll settle the case in an hour. If it takes three hours, I'll settle it in three. I made a mistake once, and I'll never repeat it, when I felt the parties were too far apart and ended the mediation too quickly. They eventually settled the case themselves. So, I will generally stay with a mediation until I know that everybody has said no, and they are at their limits, and then they go home. Because, most of the time you can get it resolved.

What is the worst thing a plaintiff can do going into mediation?

I think the worst thing a plaintiff can do is what I call a "specials dump," which is to come to the mediation with an extra $10,000, $20,000, $50,000 in additional medical bills that weren't shared with opposing counsel before the mediation. It immediately induces frustration and anger on the other side. It makes it very difficult sometimes; you may even have to suspend the mediation. And, by the way, these dumps can come from very good law firms as well as just average submissions. But, generally, that's pretty much the worst thing you can do pre-mediation.

What is the worst thing a defendant can do going into mediation?

They can go in with no authority. And, I can count on my hands when that has happened, but that is the worst. Also, if you're coming in, or your position is we're not paying anything, but we're showing up, that's not productive. It's not useful and the assumption in the law is that the parties will negotiate in good faith. It seems to me that if you've got nothing to offer, you have an obligation to pick up the phone and call opposing counsel as a professional courtesy and then the parties can decide if they want to go forward with mediation.

In those situations, what if the judge requires mediation?

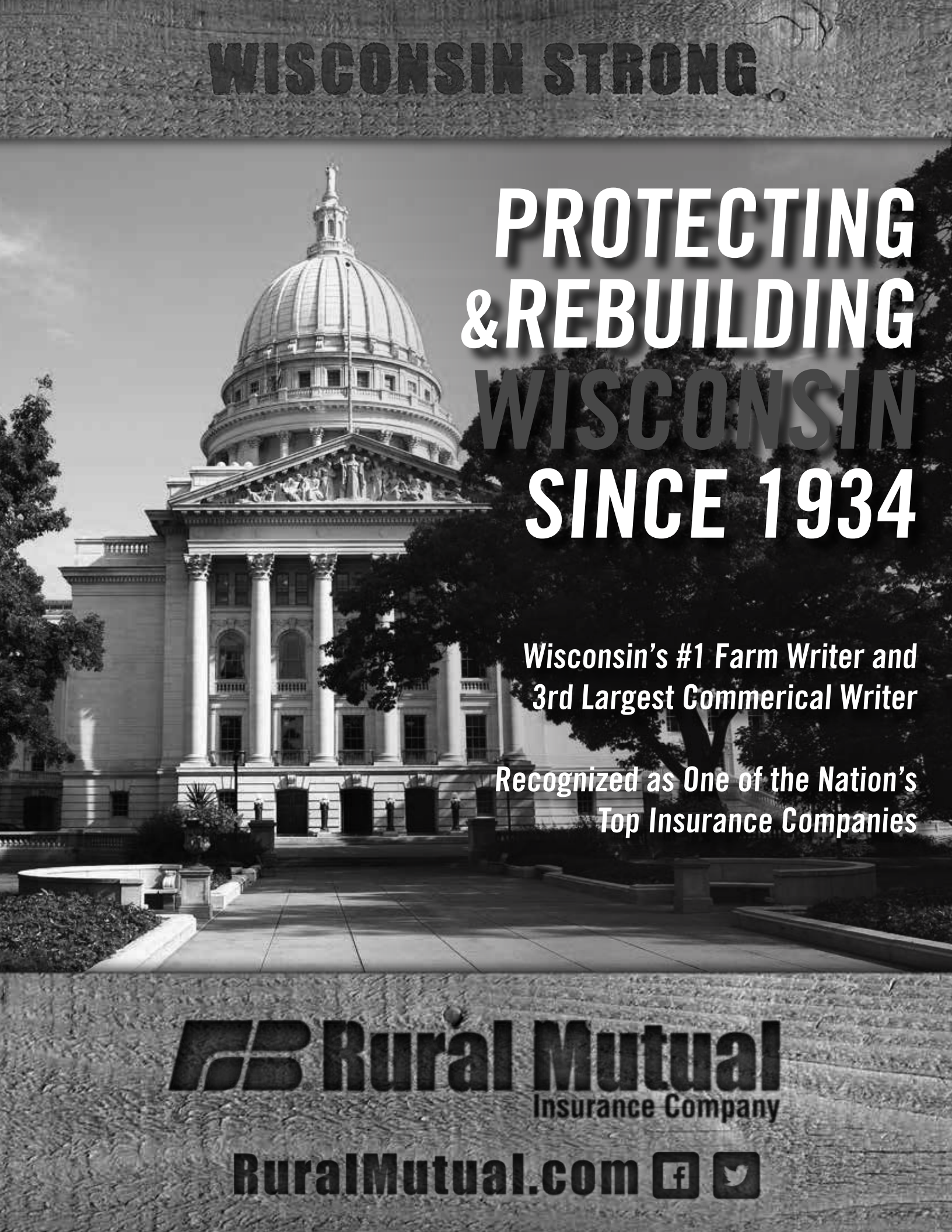
You talk to counsel. If they agree mediation would be a waste of time, it's better if the two of you make the request than just you. Now, if the judge still orders mediation, at least everybody's going in prepared. But, my experience has been that most judges will give you a trial date. The other thing that some judges don't realize is that mediation is voluntary under the statute. They can't really compel it.

What is the best thing a plaintiff can do going into mediation?

Job one is to provide an accurate summary of the specials well in advance of mediation. Share those with opposing counsel. Specials are so basic to any insurance company's evaluation of the claim and to miss that is just really tough. Second thing is to bring the decisionmaker. In other words, if the plaintiff is really not the one making decisions, but someone else, you need that other person in the room. I remember having an exceptionally difficult case and was warned by plaintiff's counsel that the person who was making the decisions was the husband, not the wife, but the wife was the one who was injured. Third thing is pick up the phone and call the mediator if there are issues you don't want to discuss in front of your client. *Ex parte* conversations are not prohibited in mediation. I have had counsel call me and say, look, my client is extremely difficult, I am having trouble with control, here are the issues. That's huge because I can go in and be prepared.

What is the best thing a defendant can do going into mediation?

One of the problems—and this is an industry problem—is that insurance companies are very reluctant to share their authority with their own attorneys. Some do, some don't, depends on the claims adjuster, depends on the carrier. That can make negotiations difficult, especially if you get close. Sometimes they'll say to the attorney, look you've got X, and that's fine. But frequently, they'll leave the defense counsel out in the cold, and that's not particularly helpful in a mediation. Especially if the claims adjuster doesn't even want to talk to the mediator.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Do you prefer to speak directly to the adjuster?

I think plaintiff's counsel has a preference. I think when I can go in plaintiff's room and say, "Just so you know, the claims adjuster is in the other room," that gives everybody a sense that the insurance company is taking their negotiations seriously. As a practical matter, it doesn't make any difference. The claims people have evaluated the case, it's been reviewed, they have a certain amount of authority. I don't think the claims adjuster being present is necessarily important. The defense attorney is absolutely critical. I mean, you've got to have the defense attorney either on the Zoom or live.

How often do adjusters show up in person to mediation?

Oh, not much. Ten percent, maybe? It's really low. The claims adjuster being there is important if it is a substantial case. For the average case, no, you just need defense counsel there.

When do you expect the insured to participate in mediation?

The insured needs to participate if they are at risk for personal liability. If there is personal exposure to the insured, then there needs to be a conversation about whether they need to be there. Also, if there are two defendants and one is insured and one isn't insured, you want the uninsured defendant present because they may have to write a check or do something to get the case resolved. But it's rare that the insured is there.

The other problem you have is when plaintiff insists on making an initial demand greater than the policy limits. It presents a problem because that demand means they are saying the insured is personally liable. Some carriers will say, look, we will not negotiate until you make a demand at or below the limits. You can always go to mediation and find out, but it puts the defense counsel in a very difficult position and it puts the insured in a difficult position.

What do you do if the plaintiff insists on making an opening demand above the limits?

You work on the plaintiff and you explain why. I say, you know, we're not going to have a productive mediation if you continue to demand more than the policy limits. That's just not going to happen because most carriers will not settle a case unless their insured is protected. And if their insured is not protected, then the mediation ends. And, that's usually a motivator to get plaintiff to be reasonable.

What mistakes do attorneys make at mediation?

Confusion over authority. Saying, "I will only accept X," when in fact they are only willing to accept Y. Or, "I have authority to do this," and it turns out they don't have authority to do that. As a lawyer, that undermines your credibility and also undermines the trust of the mediator. It's really important that if you say you have authority to do something, you can deliver on it.

Does that happen a lot?

It doesn't happen a lot. Thank goodness. But it happens more frequently than you think and it's frustrating.

The other thing is negotiating in bad faith. Where you agree on a number, you settle on it, and then suddenly the other side starts adding conditions that weren't originally discussed. It's anything that wasn't discussed or contemplated by the parties in reaching the settlement number. For example, you've got to pay the mediator's fees, or you gotta pay this, or you gotta pay that. A confidentiality agreement is an excellent example. Some large companies insist on release language that I would call quasi-draconian. At that juncture, plaintiffs have a choice to take it or leave it. You don't see it too often, but when it does, it makes it very difficult and leaves a pretty bitter taste in everybody's mouth.

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What causes a mediation to break down?

I think where mediations are most likely to break down is where the plaintiff is not the decisionmaker. Where the woman comes in and she's got to consult with her boyfriend who has already picked out the new car.

How do you deal with subrogated parties at mediation?

I usually prefer that the plaintiff's counsel negotiate with the subro. As a practicing attorney, I would be upset sometimes that plaintiff's counsel had not dealt with the subro before mediation. What I've learned as a mediator is that, frequently, plaintiff's counsel can't settle the case with the subro until they figure out what the final numbers are at the mediation. So, I think it is the rule, not the exception, that plaintiff's counsel will negotiate with the subro after they have reached a final number. And usually, frequently, the good lawyers will call the subro and sort of keep them apprised during the negotiations, which also is very helpful.

I also make sure to ask, "What portion of the medical bills are unpaid?" If the person is obligated to pay a certain amount of money that is significant, say four figures or up, that means they are probably being hounded by credit agencies and that definitely influences the process.

What do you like to see in written mediation statements?

It's pretty simple. Just a little summary of the facts, liability, why there is, why there isn't. Settlement negotiations are always important. You need to know what the last offer is and what the last demand is. For damages, you want to make sure there is not a big difference in what the defense thinks the specials are and what the plaintiffs are claiming. If there is, then you need to make a phone call and put them together. So, those are basically what you are looking for, which are just the key facts, or the key areas you need to know to evaluate the claims.

The only other thing I would add—and I don't see enough of this—but it is probably useful to deal with the weaknesses of your case. You don't have to dwell on them, but at least touch on them, acknowledge them, and how you're going to handle them, because those are going to come up during mediation. Weaknesses will come up during mediation. Now, sometimes issues will come up during mediation that neither side contemplated, which is fine, because that's what makes negotiations constructive and you may or may not get the case settled as a result of that, but at least those issues are on the table.

Do you want the submissions to be confidential or shared with counsel?

I think that judgment has to be left to counsel. I am very, very careful about what I share. So, if there is something you have that you don't want shared, then you say we don't want this disclosed, and the other side will never hear it from me. It is absolutely critical that the mediator keep confidences. And that's another thing I tell both parties. If they want to tell me something that they don't want to share in the other room, it won't be shared. It won't come up.

What do you like to see attached to the submissions?

I think most mediators see depositions and medical record summaries, which some mediators will use extensively and some won't. I've had more than one mediator say to me, "I hate deposition transcripts; I won't read them." Mediators are sensitive to time. Mediation is expensive and you want to give as thorough an analysis as you possibly can, but at the same time you want to do it economically and efficiently. This is why the mediation letters are so critical because they save so much time and they get to the points necessary to settle the case.

In terms of attachments, if liability is at all at issue, then the basics, police report, statements, and photos. If there is a legal issue and briefs have been filed and the briefs are fairly reasonable, and

the legal issue is important, then send the brief. You don't have to send the motions. And then, any expert reports, permanency reports, IMEs, anything like that. In terms of deposition transcripts, if there are admissions that you think are helpful, then Xerox that page, yellow highlight it, send it off, or just take that portion of the transcript and put it in your letter. And then, if you want, when you come to the mediation, you can just bring the deposition transcript with you, or if you want, send it along. Obviously, if you have complex litigation, it's going to require more depth, send it, and as a mediator you have an obligation to go through it.

Will you read everything that is sent to you?

No. Because frequently I get huge volumes. People will send a stack of medical records, or six depositions, and you look at the case and you know the size of the case doesn't merit it. But, even if you have a seven or eight figure case, the facts can be often simple, and the damages are fairly straight-forward. I think most mediators, if you ask them, will tell you that the mediation letters are very, very valuable. It is the first thing the mediator reads.

What happens if you receive a poor mediation letter?

Well, that's not uncommon, and I think it puts the party's case to a disadvantage. If you are given something that is clean and well written, it is human nature to tend to rely on that. But if the submissions are somehow inadequate, you realize it, and then you'll refer to other things. And I find that the better the lawyers are, the better those submissions are. Sometimes, plaintiff's lawyers will just send the demand letter. And, the demand letter is pretty good, but the lawyer should go back and review the demand letter and update it as necessary.

Now, once you're in the mediation, then there's what I call an informal discovery process. So, the mediator is learning from the parties, filling in the blanks that weren't provided by the submissions.

What advice do you have for young lawyers?

Actually the same rules that apply to a young lawyer apply to someone who is experienced and been doing this a long time. Take the time. Do a careful mediation analysis. Make sure your specials are lined up and that you have given them to opposing counsel. If you have client control problems, let the mediator know either by email or picking up the phone.

For young lawyers, they have to remember that with fewer than 1% of all cases going to jury trial, modern cases are trial by mediation. They should prepare for mediation in a way that they are putting their best case forward with all the issues. A young lawyer should think of a mediation submission as their trial outline.

Our thanks to Attorney Naugler for taking the time to sit down with us to discuss his experiences as a mediator. To schedule a mediation with Attorney Naugler, contact him directly at jnaugler@msm-law.com, or his assistant Erica Pedrazoli at epedrazoli@msm-law.com or call 608-784-8310.

This interview has been edited for length and clarity.

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Transcript Errata in the Time of COVID-19

by: Erik H. Monson, Coyne, Schultz, Becker & Bauer, S.C.

I. Introduction

Zoom depositions have presented interesting challenges during the COVID-19 pandemic. When the court reporter is not physically present in the room with the deponent and/or the deponent is masked and socially distanced, the accuracy of the transcript can suffer. Combine this with scientific or technical testimony, along with screen "freeze" and other technical glitches, and—voilà—you have the perfect recipe for a transcript laden with errors.

How does an attorney address the circumstance of, "I didn't say that" when reviewing a deposition transcript? The errata sheet. In Latin, an erratum is an error in printing or writing. The plural of erratum is errata. Black's Law Dictionary (11th ed. 2019) defines an errata sheet as, "[a]n attachment to a deposition transcript containing the deponent's corrections upon reading the transcript and the reasons for those corrections."

While an errata sheet can be used to correct transcription errors, be warned that an errata sheet is not a panacea for a poorly given deposition. As discussed below, outside of transcription errors, courts have consistently held that an errata sheet cannot be used to "rewrite" testimony to manufacture an issue of material fact—especially in connection with a motion for summary judgment.

II. State and Federal Rules

Wis. Stat. § 804.05(6) governs the use of errata sheets, which provides:

> Submission to deponent; changes; signing. If requested by the deponent or any party, when the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by the deponent. **Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them.** The deposition shall then be signed by the deponent, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days after its submission to the deponent, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deponent may then be used as fully as though signed unless on a motion to suppress under s. 804.07 (3) (d) the court holds that the reasons given for the refusal or failure to sign require rejection of the deposition in whole or in part.[1]

Wisconsin's errata statute is modeled after Rule 30(e) of the Federal Rules of Civil Procedure, which provides:

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Review by the Witness; Changes.

> (1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:
>
> > (A) to review the transcript or recording; and
> >
> > (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.
>
> (2) Changes Indicated in the Office's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

Both statutes explicitly allow for changes "in form or substance" so long as the changes are accompanied by a signed statement explaining the reasons for the change.

III. Correcting the Record

A. Treating Errata Sheets as Sham Affidavits

Wisconsin does not have developed case law on errata sheets and the boundaries for making substantive changes to a deposition transcript. The federal courts, including the Court of Appeals for the Seventh Circuit, have adopted the "sham affidavit" rule precluding the creation of genuine issues of fact on summary judgment by the submission of an affidavit that directly contradicts earlier deposition testimony.[2] The rule was created on the presumption that testimony given in depositions, in which witnesses speak for themselves and are subject to cross-examination, is more trustworthy than testimony by affidavit, which is often prepared by attorneys.[3]

When considering errata sheets, the Seventh Circuit uses a similar analysis to the sham affidavit rule, recognizing that errata sheets are allowed by the federal rules. In 2000, the Seventh Circuit in *Thorn v. Sundstrand Aero. Corp*. noted in its review of an errata sheet, "Though this strikes us as a questionable basis for altering a deposition, it is permitted by Fed. R. Civ. P. 30(e), which authorizes 'changes in form or substance.'"[4] *Thorn* involved a claim of age discrimination brought by two employees who were laid off from their jobs.[5] During a deposition, the defendant's employee was asked what criteria his superiors had told him to utilize when making layoffs, and he answered that the decision was based on "which people did we feel have the longest-term potential for those whose product lines we were eliminating."[6] The plaintiffs pointed to this answer as evidence of age discrimination.[7] The defendant responded by having its employee submit an errata sheet to modify his answer.[8] Claiming that his answer was "garbled," the employee changed his answer in the errata sheet to say that he made his decision based on "which people were associated with the products that had the longest-term potential versus those whose product lines we were eliminating."[9] Offering strategic advice, the court noted that it thought the defendant was not doing itself any favors by using an errata sheet to make the correction:

> [The defendant] didn't help itself by the [defendant's employee] altering his deposition. If at trial [plaintiff] tried to use [defendant's employee] garbled phrase to impeach his testimony, or as an admission, [defendant's employee] could explain what he meant, and it would be for the jury to decide whether the explanation was truthful. He could not remove the issue from the jury by altering the transcript of his deposition. The tactic was foolish

> rather than merely otiose because it suggests guilty knowledge and merely riveted the plaintiff's attention upon a passage that would otherwise have been dismissed by the trier of fact as terminally muddled.[10]

Analogizing the case law of sham affidavits used to correct or alter witness deposition testimony,[11] the *Thorn* court held that a change of substance which contradicts the transcript is "impermissible unless it can plausibly be represented as the correction of an error in transcription, such as dropping a 'not.'"[12]

B. *Thorn* Progeny: Let Errata Sheets Speak for Themselves

Federal district courts within the Seventh Circuit have mostly interpreted *Thorn* as a limited ruling that permits striking or disregarding errata sheets within the context of a dispositive motion. These district courts have expressed comfort with letting errata sheets (even dubious ones) stand—thus leaving them open to credibility arguments.

In *United States ex rel. Robinson v. Ind. Univ. Health Inc.*, the court held that:

> [T]he plain text of Rule 30(e)(1)(B) coupled with the language actually used by [the *Thorn* court] compels the conclusion that *Thorn* does not empower the Court to provide the remedy [to strike an errata sheet from the record]. Instead, *Thorn* permits a trial judge to disregard substantive errata changes on summary judgment where the changes *do not reflect errors in transcription*.[13]

The court in *Arce v. Chi. Transit Auth.* held similarly:

> What these analogous sham affidavit cases demonstrate is that courts ordinarily must defer to juries to resolve factual disputes and decide the credibility of witnesses who change their testimony after a deposition. It is only when a court is resolving a summary judgment motion that it is empowered to disregard contradictory testimony […]. As a result, there is no reason for a party to file a motion to strike changes in an errata sheet—or a court to consider such a motion—unless and until a party seeks summary judgment. If no party moves for summary judgment, all changes in testimony—even contradictory ones—should be resolved by the jury, just as they are when a witness gives contradictory testimony at trial.
>
> […]
>
> Subject to the rules of evidence, the jury is permitted to hear the original answer, the change, and the reasons for the change and decide—in the context of all the other evidence—whether to credit either answer and what weight to assign it.[14]

The U.S. District Court for the Western District of Wisconsin, while not expounding on the state statute at all, stated in *Brainstorm Interactive, Inc. v. Sch. Specialty, Inc.*, "With these nuances in the law, the court is not prepared to strike the errata sheets as a whole, but will consider specific challenges where relevant in the discussion of the facts below. […] defendant is free to cross-examine [the plaintiff]."[15]

In the face of substantial alterations to testimony through an errata sheet, the U.S. District Court for the Eastern District of Wisconsin in *Thermal Design, Inc. v. Guardian Bldg. Prods.*, likewise did not strike an errata sheet despite being troubled by the attempted corrections.[16] Rather than strike the errata sheet as requested, the court instead stated that attempts to rehabilitate the plaintiff's testimony

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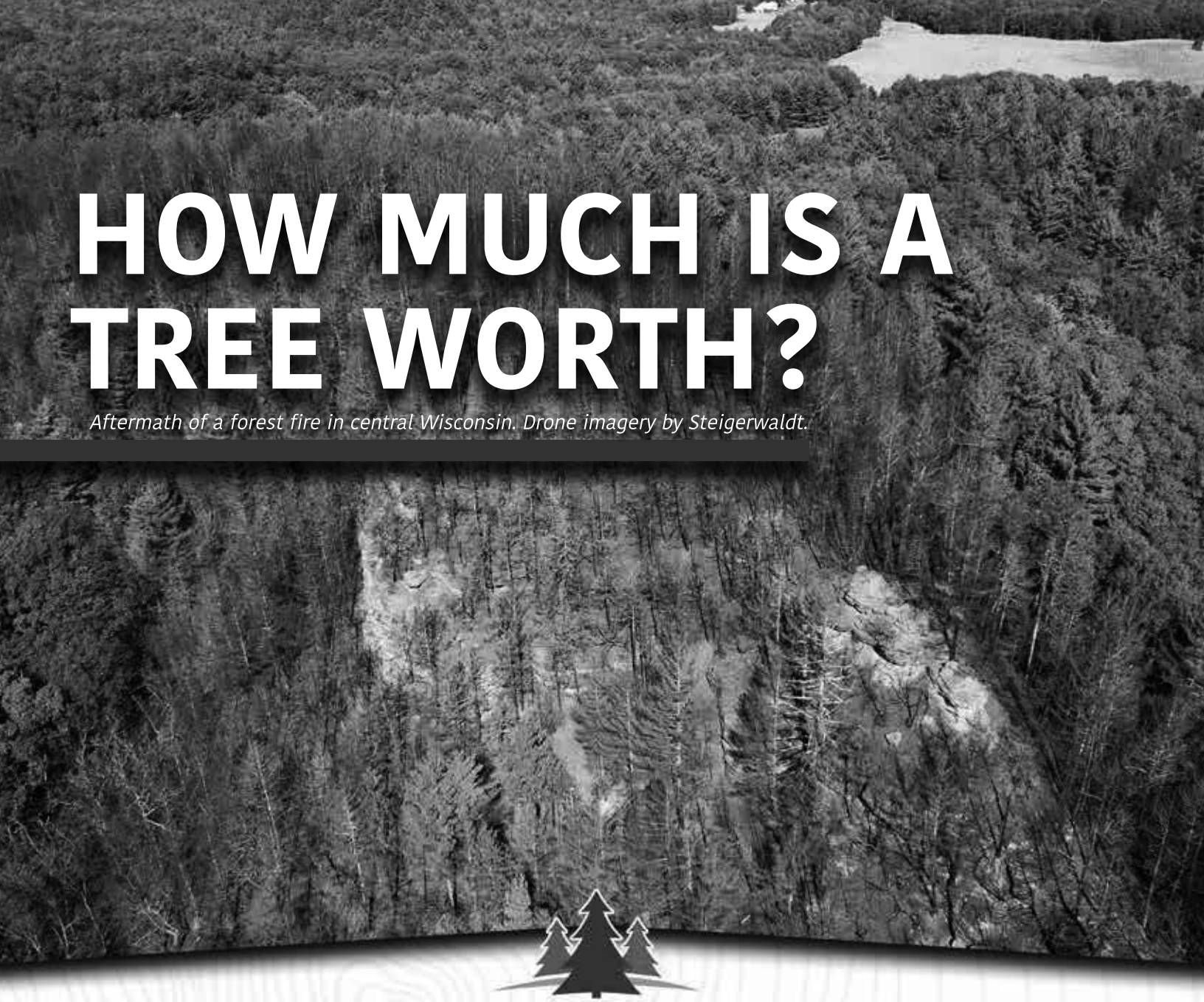

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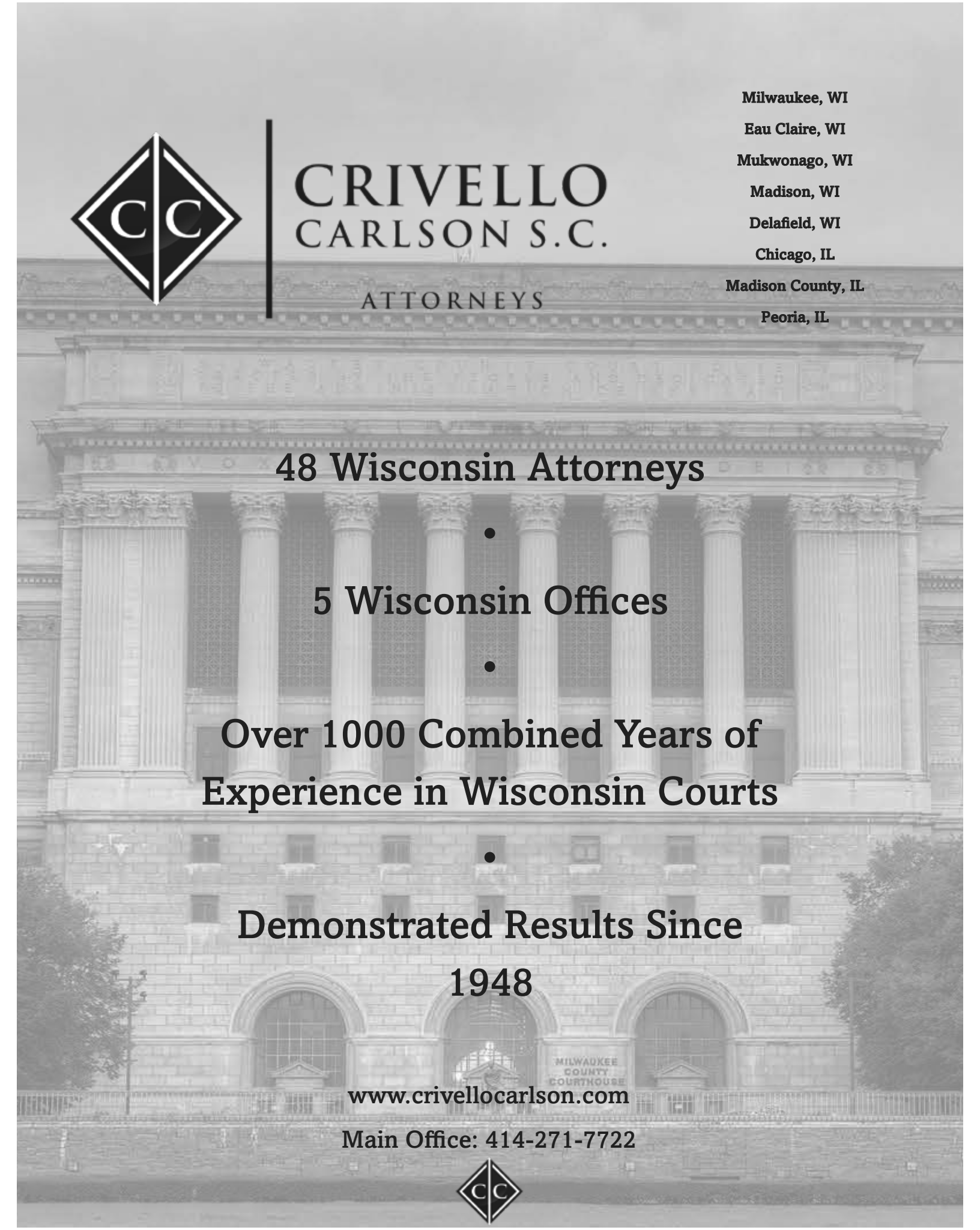

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during summary judgment would be subject to scrutiny under the sham affidavit rule.[17]

The list of cases in which a district court in the Seventh Circuit actually granted a motion to strike an errata sheet for its alteration to testimony is considerably thinner, and mostly comprises of unpublished cases. In *Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, the court, relying on the reasoning in *Thorn* themselves, struck an errata sheet because it felt the changes made were improperly substantive.[18] This case noted several of the unpublished cases which made the same decision to strike an errata sheet from the record,[19] but as noted earlier, this is a minority view within the Seventh Circuit.

IV. A Sample of Other Circuits: A Deposition is Not a Take Home Examination

Amongst the other circuits, there is a mixed view on what is allowed with substantive changes to testimony through an errata sheet. Some circuits strongly disfavor an errata sheet that substantially alters testimony, even favoring striking errata from the record when appropriate. For example, in *Hambleton Bros. Lumber Co. v. Balkin Enters*, the Court of Appeals for the Ninth Circuit affirmed the district court's order striking the plaintiff's deposition errata sheet for violating Rule 30(e).[20] The district court "was troubled by the deposition corrections' seemingly tactical timing—the corrections were submitted only after [defendant's] motion for summary judgment was filed—and by their extensive nature."[21] The district court ruled that the changes "were not corrections at all, but rather purposeful rewrites tailored to manufacture an issue of material fact […] to avoid a summary judgment ruling in his favor."[22] On appeal, the Ninth Circuit ruled that "this type of 'sham' correction is akin to a 'sham' affidavit."[23] Affirming the lower court's decision, the court of appeals wrote: "While the language of FRCP 30(e) permits corrections 'in form or substance,' this permission does not properly include changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment."[24]

In *Combs v. Rockwell Int'l Corp.*, the Court of Appeals for the Ninth Circuit affirmed the district court's order dismissing the case with prejudice and granting Rule 11 sanctions against the plaintiff and his counsel who, to avoid summary judgment, tried to use an errata sheet to make substantive changes to the plaintiff's deposition testimony in violation of FRCP 30(e).[25] Plaintiff made thirty-six changes, many of which materially altered the substance of his testimony.[26] "Among the most striking changes were several reversals of [plaintiff's] answers to key questions."[27] The changes "dealt with issues of central importance in the upcoming summary judgment hearing."[28] As a sanction for "attempt[ing] to deceive the district court on material matters before it," the district court dismissed plaintiff's claims.[29] On appeal, the Ninth Circuit affirmed, stating, "[f]alsifying evidence is grounds for the imposition of the sanction of dismissal."[30] The court found that the plaintiff's conduct was "so egregious that there is no need to reach the merits of the motion for summary judgment" and "[t]he case was properly dismissed."[31]

In *Burns v. Bd. of County Comm'rs*, the Court of Appeals for the Tenth Circuit affirmed the district court's decision to disregard a deposition errata sheet based upon the sham affidavit rule.[32] In *Burns*, the plaintiff sued his employer for race discrimination.[33] At his deposition, the plaintiff conceded he was not terminated because of his race.[34] After the deposition, he submitted an errata sheet to change his answer from "no" to "yes."[35] At summary judgment, the district court treated plaintiff's "attempt to rewrite portions of his deposition" as a sham affidavit.[36] On appeal, the Tenth Circuit affirmed.[37] The court saw "no reason to treat Rule 30(e) corrections differently than affidavits," and held that plaintiff's attempt to amend his deposition testimony must be evaluated under the sham affidavit rule.[38] Because plaintiff was subject to cross-examination at his deposition, the errata sheet was not based on any newly discovered evidence, and plaintiff's corrected answers did not reflect any need to clarify, the errata sheet was properly disregarded as a sham affidavit.[39]

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In *Garcia v. Pueblo Country Club*, the Court of Appeals for the Tenth Circuit expressed dismay and disapproval by defense counsel's attempt to rely upon an errata sheet that "strayed substantively from the original testimony."[40] The court said it would "not condone counsel's allowing for material changes to deposition testimony [and] use of such altered testimony that is controverted by the original testimony," citing several district court decisions in support.[41] Quoting *Greenway v. Int'l Paper Co.*,[42] the Tenth Circuit ascribed the purpose and scope of Rule 30(e) as follows:

> The purpose of Rule 30(e) is obvious. Should the reporter make a substantive error, i.e., he reported "yes" but I said "no," or a formal error, i.e., he reported the name to be "Lawrence Smith" but the proper name is "Laurence Smith," then corrections by the deponent would be in order. The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.

While the views in the cases above represent those closest to the Seventh Circuit's perspective on the issue, the matter is by no means settled in the federal judiciary, and there is variance, particularly between U.S. district courts within every circuit.[43]

V. Final Considerations

Regardless of jurisdiction, and despite a variety of analyses, the general understanding of the effect of Rule 30(e) is to allow substantive changes to deposition testimony—even dramatic ones—with an errata sheet. The use of those corrections, at least within the Seventh Circuit, depends on whether an error in transcription can be attributed to the court reporter. It is also clear that within the Seventh Circuit, that an absence of a traceable error of transcription to a court reporter, errata sheets that materially alter the testimony of a deposed party cannot then be relied on by that party to try and defeat a dispositive motion.

What is less uniform is how any given court might handle errata sheets *outside* the dispositive motion setting. A party might not be able to rely on an errata sheet that dramatically alters testimony absent a transcription error to defeat a summary judgment motion, but under the federal rules, can they still wield those corrections for purposes of trial? Many federal courts suggest that the answer is yes. These decisions also support the proposition that the more brazen the attempt to correct deposition testimony, the better the opportunity for the opposing party to attack the credibility of the witness (and by extension the credibility of his or her attorney who submitted the errata).

VI. Conclusion

For the Wisconsin state court practitioner, there is clear precedential support within the Seventh Circuit to submit errata sheets and make changes to a deposition transcript which aim to correct transcription error. Without a transcription error, the caselaw favors disregarding errata sheets with substantial revisions that contradict prior deposition testimony, specifically in the context of a motion for summary judgment. But without developed state case law or rules beyond plain statutory language, Wisconsin does not seem readily available to establish a dramatic departure from the precedent set by the Seventh Circuit on whether an errata sheet should be allowed or stricken. Given the Wisconsin Supreme Court's clear precedent regarding "sham affidavits," and the ubiquitous analogizing of the sham affidavit rule by the Seventh Circuit to errata sheets made under similarly dubious pretenses, the Wisconsin judiciary would likely embrace the precedent of letting errata sheets speak for themselves.

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References

1 (Emphasis added).

2 *See Yahnke v. Carson*, 2000 WI 74, 236 Wis. 2d 257, 266, 613 N.W.2d 102, 107 (citing *Colantuoni v. Alfred Calcagni & Sons, Inc*., 44 F.3d 1, 5 (1st Cir. 1994); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 706 (3d Cir. 1988); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495-96 (5th Cir. 1996); *Reid v. Sears, Roebuck & Co*., 790 F.2d 453, 460 (6th Cir. 1986); *Babrocky v. Jewel Food Co*., 773 F.2d 857, 861-62 (7th Cir. 1985); *Camfield Tires, Inc. v. Michelin Tire Corp*., 719 F.2d 1361, 1364-65 (8th Cir. 1983); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975); *Franks v. Nimmo*, 796 F.2d 1230, 1237-38 (10th Cir. 1986); *Van T. Junkins & Assoc., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657-59 (11th Cir. 1984); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992)).

3 *Yahnke*, 236 Wis. 2d art 266-67 (citing *Russell v. Acme-Evans Co*., 51 F.3d 64, 67 (7th Cir. 1995)).

4 *Thorn v. Sundstrand Aero. Corp.*, 207 F.3d 383, 389 (7th Cir. 2000) (internal quotations omitted).

5 *Id.* 385.

6 *Id*. at 388.

7 *Id*.

8 *Id*.

9 *Id*. at 389.

10 *Id*.

11 *See Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 532-33 (7th Cir. 1999); *Bank of Illinois v. Allied Signal Safety Restraint Systems*, 75 F.3d 1162, 1168-69 (7th Cir. 1996); *Russell v. Acme-Evans Co*., 51 F.3d 64, 67-68 (7th Cir. 1995); *Schiernbeck v. Davis*, 143 F.3d 434, 437-38 (8th Cir. 1998); *Raskin v. Wyatt Co*., 125 F.3d 55, 63 (2d Cir. 1997); *cf. Sullivan v. Conway*, 157 F.3d 1092, 1096-97 (7th Cir. 1998).

12 *Thorn* 207 F.3d at 389.

13 204 F. Supp. 3d 1040, 1042-43 (S.D. Ind. 2016) (italics emphasis added).

14 311 F.R.D. 504, 511 (N.D. Ill. 2015).

15 No. 14-cv-50-wmc, 2014 U.S. Dist. LEXIS 168607, at 3 (W.D. Wis. Dec. 5, 2014).

16 No. 08-C-828, 2011 U.S. Dist. LEXIS 139794, at 5 (E.D. Wis. Dec. 5, 2011).

17 *Id*.

18 710 F. Supp. 2d 777, 792 (N.D. Ind. 2010).

19 *See Murray v. Conseco, Inc*., 2009 U.S. Dist. LEXIS 53953, 2006 WL 2644935 (S.D. Ind.) (striking deposition testimony after finding that the errata sheets "made material and contradictory changes to [the witnesses'] deposition testimony"); *Paul Harris Stores, Inc. v. Pricewaterhousecoopers, LLP*, 2006 U.S. Dist. LEXIS 65840, 2006 WL 2644935 (S.D. Ind.) (striking deposition testimony because it was "an attempt to impermissibly change the factual testimony offered during Hettlinger's deposition, a tactic which has been rejected by the Federal courts").

20 397 F.3d 1217, 1224-26 (9th Cir. 2005).

21 *Id*. at 1225.

22 *Id*.

23 *Id*.

24 *Id*.

25 927 F.2d 486,488-89 (9th Cir. 1991).

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*.

31 *Id*. at 489.

32 330 F.3d 1275, 1281-82 (10th Cir. 2003).

33 *Id*. at 1278.

34 *Id*. at 1281.

35 *Id*.

36 *Id*.

37 *Id*.

38 *Id*.

39 *Id*.

40 299 F.3d 1233, 1242 n.5 (10th Cir. 2002).

41 *Id*., *citing Coleman v. Southern Pac. Transp. Co.*, 997 F. Supp. 1197, 1205 (D. Ariz. 1998) (discrediting deposition testimony directly contradicted by errata sheet); *S.E.C. v. Parkersburg Wireless, L.L.C.*, 156 F.R.D. 529, 535 (D.D.C. 1994) (noting modern trend in which courts do not allow

a party "to make any substantive change she so desires" in deposition testimony); *Rios v. Bigler*, 847 F. Supp. 1538, 1546 (D. Kan. 1994) (stating that the court will consider only those changes which clarify the deposition, and not those which materially alter it); *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) (suppressing deponent's attempt to rewrite material answers given in deposition); *Barlow v. Esselte Pendaflex Corp.*, 111 F.R.D. 404, 406 (M.D.N.C. 1986) (refusing to consider changes to deposition that were made in bad faith).

42 144 F.R.D. 322, 325 (W.D. La. 1992).

43 *See EEOC v. Skanska USA Building Inc.,* 278 F.R.D. 407 (W.D. Tenn. 2012) for its extensive exploration of the subject of substantive change to deposition testimony through an errata sheet, and voluminous citation to case law on the subject.

44 Erik Monson, *Transcript Errata in the Time of COVID-19*, InsideTrack, Vol. 13, No. 17 (Aug. 27, 2021) (available online at https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=13&Issue=17&ArticleID=28595) (last visited Oct. 30, 2021).

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News from Around the State: Trials and Verdicts

Sydney R. Wierzba, et al. v. State Farm Mutual Automobile Insurance Company, et al.
Brown County Case No. 18-CV-1278
October 26-28, 2021

Facts: On June 15, 2010, then 5-year-old Sydney Wierzba (along with her mom and grandmother), was a passenger in her grandfather's van on a road trip to Montana. Her grandfather fell asleep behind the wheel and the van rolled. Sydney was physically uninjured save for some bumps and bruises but, now at 16 years old, claimed significant mental health issues including PTSD with a lifetime of future treatment and impairment.

Issues for Trial: The parties stipulated to liability. The issue for trial was damages.

At Trial: Sydney first sought counseling two years after the accident. At six months post-accident, she had a totally uneventful well child visit with the record noting the parents had no concerns. They claimed that the mom's injuries from the accident and the dad working so much (and being averse to therapy initially) caused the delay. She saw three total therapists. All initially diagnosed anxiety (with the records showing her mom said she has "always been an anxious child") but once the attorneys got involved and had her sent to a psychologist for an evaluation, PTSD was diagnosed. Before seeing the third therapist, Sydney started to experience issues with peer bullying at school to the extent her mother pulled her out and home schooled her for two years. The psychologists testified that PTSD left her with a lessened ability to handle such peer stresses. In addition to the Bellin psychologist, the Habush firm retained Dr. Brad Grunert to diagnose PTSD. Defendant did not have a retained medical expert and used the records themselves to defend the claim.

A major issue fought by plaintiff's counsel repeatedly was the defense playing Sydney's videotaped deposition (from one year prior) in its case in chief. In her brief time on the witness stand at trial, Sydney's testimony was hushed and brief, with most questions only requiring a "yes" or "no" answer. Plaintiffs mounted repeated objections but the video was allowed. The claim was that her guilt at not waking grandpa up when she saw his eyelids fluttering and the fear her mother was dead continued to haunt her, leading to the PTSD diagnosis. The video showed a very relaxed, comfortable then-15-year-old, who testified when she was helped out of the van at the scene, she went to find her mom who was lying in a ditch. On the witness stand she testified she feared her mom was dead but in her video she testified she and her mom had a conversation as soon as Sydney reached her, about getting the grasshoppers off her face, with Sydney laughing easily about the memory.

Plaintiff's Final Pre-Trial Demand: $150,000 of State Farm's $200,000 available UIM limits (plaintiff had already recovered $100,000 from the grandfather's insurance carrier, Safeco)
Defendant's Final Pre-Trial Offer: $0
Verdict: $27,900 (which after application of the $100,000 already received from Safeco, resulted in a judgment in favor of State Farm)

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

Secura Insurance, A Mutual Company v. Timothy A. Ludvigsen, et al.
Rusk County Case No. 20-CV-17
October 21, 2021

Facts: This was a subrogation property damage claim filed by SECURA against Allmerica's insured, PUSH, Inc., and its driver, Timothy A. Ludvigsen. On September 27, 2019, plaintiff's insured, Gary Baker, was driving a John Deere tractor hauling a manure spreader on County G in Rusk County. Ludvigsen was driving a PUSH pickup truck and came around a bend and behind a slow moving vehicle. Ludvigsen began to pass the slow moving farm equipment in the oncoming lane of a two-lane road and had nearly cleared the tractor when the tractor driver turned left into the pickup truck.

Issues for Trial: The parties stipulated to damages (including PUSH's counterclaim for damages to its truck). The only issue for trial was liability.

At Trial: The damage was to the tractor's front driver wheel and to the PUSH vehicle's rear cab and cargo bed, leading defendants to argue that Baker did not look before he turned as Ludvigsen was already nearly past him. Baker stated he had his four-way flashers on but as he approached his turn he put his left turn signal on. He said he checked his sideview mirror three to four times and never saw the white pickup behind him or alongside of him. He said he checked his window right before turning and made his turn, and only saw the pickup an instant before contact. Ludvigsen testified that as he approached the slow moving spreader he only saw four-way flashers, checked to make sure oncoming traffic was clear, and began to make his passing maneuver. Ludvigsen never saw brake lights, a turn signal, or slowing of the vehicle before it turned into him, as he had almost passed it. The jury found that Ludvigsen was 100% negligent in causing the accident and that Baker was not at fault. The juror foreperson stated after trial that "given the damage to the wheel of the tractor" (it was flattened and knocked off), "the pickup must have been going at a high speed to cause that damage." She advised that this was why she felt the tractor driver would never have seen the pickup despite claiming he checked three to four times and looking out of his window. Speed had not been argued by plaintiff's counsel as a causative factor.

Plaintiff's Final Pre-Trial Demand: $25,000
Defendant's Final Pre-Trial Offer: $0
Verdict: $52,130.88

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

Rachel G. Penewell v. Steven W. Reed, et al.
Dane County Case No. 19-CV-293
July 12-21, 2021

Facts: Plaintiff alleged missed diagnosis of compartment syndrome and failure to obtain informed consent against an urgent care physician.

Issues for Trial: Liability and damages were disputed. Plaintiff was claiming damages of approximately $2.5 million

At Trial: The Court entered a directed verdict on the informed consent claim. The jury found no negligence on the part of the urgent care physician.

Verdict: $0

For more information, please contact Mark T. Budzinski at budzinskim@corneillelaw.com or Adam M. Fitzpatrick at fitzpatricka@corneillelaw.com. You can also contact Erik H. Monson at emonson@cnsbb.com for more information.

Kemp Grutt v. Christopher Sturm MD, et al.
Rock County Case No. 18-CV-1310
June 21-23, 2021

Facts: Plaintiff brought a facial disfigurement claim against an anesthesiologist after a lumbar fusion surgery

Issues for Trial: Liability and damages were contested. Plaintiff's alleged damages were approximately $600,000.

At Trial: The jury unanimously found no negligence on the part of the anesthesiologist and awarded $0 in damages.

Verdict: $0

For more information, please contact Mark Budzinski at budzinskim@corneillelaw.com or John Healy at healyj@corneillelaw.com.

Estate of Thomas H. Pliner, et al. v. Sean Maurice Yetman, et al.
Dane County Case No. 16-CV-2133
June 14-16, 2021

Facts: Plaintiff brought a wrongful death medical malpractice claim against a cardiothoracic surgeon.

Issues for Trial: Liability and damages were contested. Plaintiffs' alleged damages were approximately $1.3 million.

At Trial: The jury found no negligence on the part of the cardiothoracic surgeon and awarded $0 on all categories of damages.

Verdict: $0

For more information, please contact Mark T. Budzinski at budzinskim@corneillelaw.com or Adam M. Fitzpatrick at fitzpatricka@corneillelaw.com.

Jenna J. Erickson, et al. v. American Family Mutual Insurance Company, S.I., et al.
Eau Claire County Case No: 18-CV-498
June 1-3, 2021

Facts: In this uninsured motorist case, plaintiff claimed to have suffered head and neck injuries as a result of a motor vehicle accident that occurred in Eau Claire, Wisconsin on February 26, 2016.

Issues for Trial: In addition to medical expenses, plaintiff claimed to have incurred $169,810 in lost earnings due to injuries she allegedly sustained in the accident.

At Trial: Plaintiff's earnings loss claim was voluntarily dismissed midway through trial. During closing argument, plaintiff's counsel asked the jury to award his client $150,000 in compensation for her medical expenses and pain and suffering. After deliberation, the jury returned a defense verdict of only $8,000.

Defendant's Pre-Trial Statutory Offer of Judgment: $20,000
Verdict: $8,000

For more information, please contact Chester A. Isaacson at cisaacso@amfam.com.

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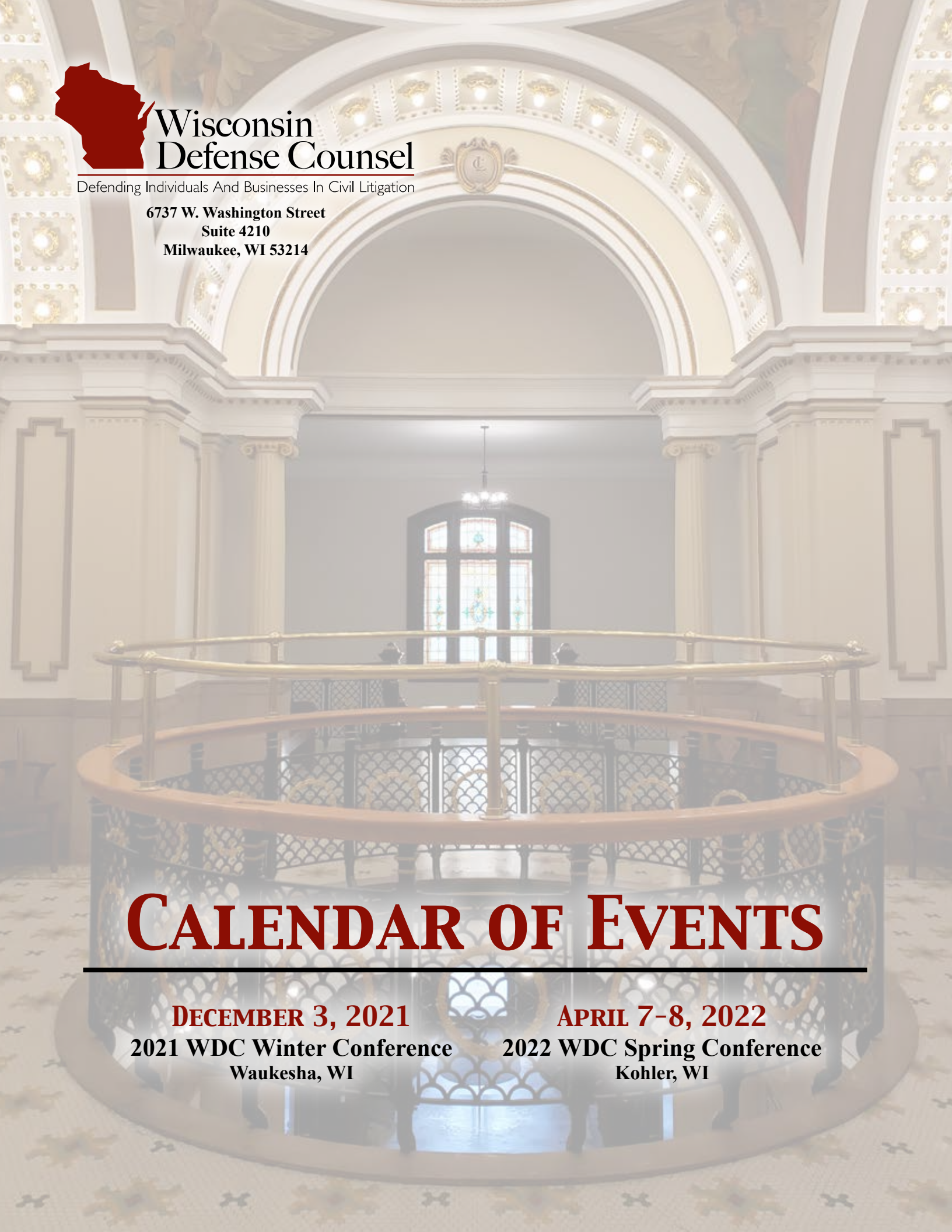

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Calendar of Events

December 3, 2021
2021 WDC Winter Conference
Waukesha, WI

April 7-8, 2022
2022 WDC Spring Conference
Kohler, WI