Wisconsin Civil Trial Journal

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30 Example Defense Motions Covering Liability, Damages, Experts, and More!

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

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JOURNAL POLICY

WDC Members and other readers are encouraged to submit articles for possible publication in the *Wisconsin 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.

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President's Message: New Achievements and Initiatives

by: Nicole Marklein, President, Wisconsin Defense Counsel

My term as WDC President has just begun, but I am pleased to report that we are hitting the ground running! By the time you read this message, the WDC Board of Directors and Committees have already accomplished many of our goals and are making headway toward achieving the vision for our organization as laid out in our current strategic plan. Of course, all of this will only serve as a springboard for even further growth and improvement in the future. Please take the time to thank our Immediate Past President Chris Bandt for his leadership and service over the past year, which has paved the way for such exciting accomplishments.

Those who are actively involved in WDC continue to stay engaged because we know that our involvement makes us better lawyers and provides a deeper level of satisfaction in our legal careers. We have long urged our members to become involved and reap all the benefits WDC has to offer. I will highlight three recent achievements and initiatives that are helping to bring those benefits directly to you.

New Website

Our website contains a wealth of useful tools and information for our members, from directories and contact information, to archived editions of our well-respected Wisconsin Civil Trial Journal, to outlines, presentations, and updates. However, if you have had the frustration of attempting to navigate our site over the past couple of years, you will agree that it was well overdue for an overhaul. Many thanks to Chris Bandt, Nicole Radler, Vince Scipior, and WDC staff members Jenni Kilpatrick and Veronica DeMore for making that happen. Due to their hard work, I am proud to introduce to you the new www.wdc-online.org!

The new website will help streamline continued education, event registration and payment, membership renewal, listserv/community discussion forums and direct access to all Members Only items contained within the WDC website!

Here is how to get started: A username has been provided to you by a personalized email. Please let one of our staff know if you have not received an email. Use the new username and new password to login. To create an individualized password, please click the "Login" button in the top right-side of the website. Enter your Username and click "Reset Password." On the next screen, enter the email address associated with your account, and click "Send Password Reset Email."

Once updated, you can login using your Username and New Password. While you are logged in you can access features on our website and update your information with ease! Remember to keep your username and password private.

New Membership Categories

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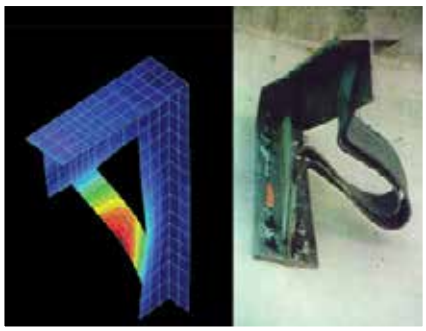

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of legal professionals who work in the defense of businesses and individuals in Wisconsin with providing candid conversations and targeted content for countering emerging plaintiff's tactics and better representing defendants in litigation.

We are exploring a redesigned membership structure designed to maximize the benefits to all our members. We are also continuing our efforts to involve law students and new bar members. Stay tuned!

Intensive New Board Member Orientation

This past September, the newly elected Board Members and Executive Committee participated in an intensive orientation to get up to speed on all things WDC, our goals and initiatives and the issues currently facing our members and organization. This new event helped prepare our newest leaders to hit the ground running and best serve our members. We did a deep dive into WDC's history and structure and discussed issues facing our organization and brainstormed practical steps to make it even better. It also provided yet another opportunity to network and connect with each other outside the strictures of board meetings and casework. I hope we will continue this event with new Board Members and leadership so that they can better understand our organization and better serve our members.

Thank you to our Executive Committee Monte Weiss, Heather Nelson, and Grace Kulkoski and (welcome!) our new Board Members Amy Freiman, Heidi Melzer, Charles Polk, Patti Putney, Nicole Radler, and Vincent Scipior for starting this new WDC year with such great energy and commitment to our organization.

What steps will you take to continue this momentum? Is it volunteering for a committee, authoring an article or contributing a recent verdict for the Wisconsin Civil Trial Journal, or submitting a proposed post, link, or circuit court decision for our Advance eSheet email? Perhaps it is nominating a fellow member for one of our many awards or making a point to speak with at least one new person at each conference this year. Or maybe it is just recommitting to staying in the loop by following WDC on Facebook, LinkedIn and Twitter, or subscribing to the Political Tidbits provided to us by Hamilton Consulting, our governmental relations firm (https://www.hamilton-consulting.com/political-tidbits/).

Wherever you are currently in the state, in your career and in your WDC involvement, we are glad you are here. Over the years, so many of our colleagues have remarked how their involvement in WDC has garnered benefits that far outweigh their efforts. I have no doubt that you will feel the same.

Author Biography:

Nicole Marklein is a partner with the Baraboo firm of Cross Jenks Mercer & Maffei LLP, Sauk County's longest-running law firm. She specializes in the areas of employment law and insurance defense litigation, including coverage issues. She is a frequent presenter on employment law and defense litigation topics.

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2022 Insurance Law Committee Award: Brad A. Markvart

Congratulations to Brad A. Markvart for being selected by the Insurance Law Committee and the Awards Committee for the 2022 Insurance Law Committee Award! The WDC Winter Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders.

Brad is the current Chair of the Insurance Law Committee. In October, the WDC Insurance Law Committee, in partnership with the Wisconsin State Bar, put on the 2022 "We've Got You Covered" Insurance Coverage Seminar. The "We've Got You Covered" seminar is an annual full-day seminar that addresses a wide spectrum of the hottest topics in insurance law. Brad did a tremendous job managing the seminar, which is a lot of work. He recruited presenters and made sure it was an interesting and diverse agenda.

Brad is in-house counsel at the General Insurance. Previously, Brad was a claims attorney at SECURA Insurance. Brad earned his bachelor's degree from Marquette University in 1999 and his law degree from the University of Wisconsin Law School in 2002. He is admitted to practice in all Wisconsin state and federal courts, as well as the Seventh Circuit Court of Appeals. In addition to WDC, Brad is the current Secretary of the Wisconsin Chapter of The CLM.

Brad will be recognized during the WDC 2022 Winter Conference on December 9, 2022, at The Milwaukee Marriott West in Waukesha.

Nominated By: Ariella Schreiber, *Rural Mutual Insurance Company*

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2022 International Day of Service

by: Grace M. Kulkoski, Wisconsin Mutual Insurance Company, and Heather L. Nelson, The Everson Law Firm

This October, the DRI Foundation held its first International Day of Service. DRI is the largest international membership organization of attorneys defending the interests of businesses and individuals in civil litigation. The DRI Foundation's mission is to provide financial, educational, and volunteer aid to those in need.

The DRI Foundation asked state and local defense organizations (SLDOs) to hold a service project of their choice anytime during the month of October. Participation in the DRI International Day of Service gives SLDOs an opportunity to give back to the community and strengthen relationships. The International Day of Service is one of the first steps the Foundation is taking to expand, better coordinate, and streamline the holistic betterment of the civil defense bar.

WDC members in the Madison and Green Bay areas held the following service projects in October as part of WDC's involvement in the DRI International Day of Service.

Madison Area Service Project

On October 14, 2022, WDC members in the Madison area gathered to volunteer at Middleton Outreach Ministry. The volunteers packed over 500 pounds of food for the center's food pantry delivery service. They also sorted warm winter gear, which is made available to local residents in need of warm clothing.

WDC members who participated in the Madison Area Service Project were Andrew Hebl (Boardman & Clark LLP), Kristine Burck (Wisconsin Mutual Insurance Company), Ariella Schreiber (Rural Mutual Insurance Company), Megan McKenzie (American Family Insurance Company), Grace Kulkoski (Wisconsin Mutual Insurance Company), Julie Piper-Kitchin (Crivello Carlson, S.C.), Todd Keller (American Family Insurance Company), and Roger Flores (American Family Insurance Company).

Green Bay Area Service Project

On October 19, 2022, WDC members in the Green Bay area joined together to provide dinner service at NEW Community Shelter.


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WDC members who participated in the Green Bay Area Service Project were Crystal Uebelher (Great American Insurance Group), Peter Carman (Law Office of Peter J. Carman), Erik Pless (The Everson Law Firm), Brian Anderson (The Everson Law Firm), and Heather Nelson (The Everson Law Firm) (as well as two paralegals from The Everson law Firm, Alison Herrmann and Taylor Gilson).

Stay tuned to hear about other volunteer events taking place throughout the state as part of this and other initiatives!

Author Biographies:

Grace M. Kulkoski is Legal Counsel at Wisconsin Mutual Insurance Company in Madison. She obtained her bachelor's degree from the University of Notre Dame du Lac and her law degree from the University of Wisconsin Law School. She is a member of the Wisconsin Defense Counsel and currently serves as the Program Chair of WDC.

Heather L. Nelson is President and Shareholder at The Everson Law Firm in Green Bay. She is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back to her Green Bay roots. Her practice areas include motor vehicle accidents, premises liability, wrongful death, and products liability. Heather is currently the Secretary/Treasurer of WDC.

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Don't Delay - Get Involved with the Diversity Clerkship Program through the State Bar of Wisconsin!

by: Patricia Epstein Putney, Bell, Moore & Richter, S.C.

Are you looking for ways to introduce diverse law students to your practice area? Do you scratch your head and bemoan the fact that diverse law students do not apply to your law firm or insurance company? Everyone talks about the importance of increasing diversity in the defense bar and making sure all feel welcome and included, right? Well, our State Bar has a fantastic program that is actively addressing this very issue. Look no further!

The Diversity Clerkship Program is a 10-week (paid) summer clerkship for first-year law students at both UW Law School and Marquette University Law School. Law students from diverse backgrounds are matched with employers who sign up. You just pay the student whatever you would pay for any other law clerk you might hire (the pay varies depending on the size of the firm or the company, of course).

My law firm has been involved with this program for several years and we have had the pleasure of working with outstanding law students every summer. Several students have stayed on part-time once the summer is over. These students are put through a rigorous application process to be accepted into the program. After a day or two of interviews, akin to speed dating, the employers rank the students, and the students rank the employers. There is then a 'match' made, with great effort made to give the employers one of their top few picks. The program is always looking for interested employers. Students have had to be turned away in the past because there were not enough participating employers. In my opinion, this simply should not happen.

You prefer hiring 2L students over the summer, you say? Think again. I have been in charge of our law clerk program for nearly 20 years. I can honestly say that the quality of the law clerk work is not dependent on whether they are 1L or 2L. Rather, this is entirely student specific.

The deadline for employer commitments is **January 12, 2023**.

For more information, visit https://www.wisbar.org/aboutus/forlawstudents/pages/diversity-program.aspx, or contact Kim Burns at kburns@wisbar.org or Katie Castle-Wisman at kcastlewisman@wisbar.org.

Author Biography:

Patricia (Patti) Epstein Putney is a Shareholder at Bell, Moore & Richter, S.C. in Madison. She obtained her Bachelor of Arts degree in Art History from Bryn Mawr College in 1984 and her Juris Doctor degree from Brooklyn Law School in 1989. She moved from New York City to Madison in 1995. Patti's practice area relates to the defense of all types of civil litigation. This includes defense of physicians, nurses, and other health care professionals in medical malpractice cases, as well as in licensing, disciplinary and credentialing disputes. She regularly defends personal injury and wrongful death actions, including automobile accidents, premises liability, products liability, insurance agent negligence as well as insurance coverage disputes. Patti has had numerous jury trials throughout the state, has litigated in federal courts and appellate courts and has argued before the Wisconsin Supreme Court and the 7th Circuit Court of Appeals. Patti is a member of the State Bar of Wisconsin, Wisconsin Defense Counsel, and the Dane County Bar Association. She also started a group called "Lawyer Moms" for working women lawyers with children. Patti is a member of the WDC Board of Directors and previously served two terms on the Board of Governors for the State Bar of Wisconsin from 2018 to 2022.

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WDC Presents: Motions *in Limine*

30 Example Defense Motions Covering Liability, Damages, Experts, and More!

Note from the Editor: In this special issue of the Wisconsin Civil Trial Journal, members of WDC contributed thirty examples of common motions in limine used in defense cases. The motions are presented with internal Bluebook legal citations and available on the WDC website in text format for member use.

Contributors: Andrea P. Goode, *Borgelt, Powell, Peterson & Frauen, S.C.,* John R. Shull, *Klinner Kramer & Shull,* Monte E. Weiss, *Weiss Law Office, S.C.,* Patricia Epstein Putney, *Bell, Moore & Richter, S.C.,* Heather L. Nelson, *The Everson Law Firm* and Vincent J. Scipior, *Coyne, Schultz, Becker & Bauer, S.C.*

Authority and Standard

Trial courts have authority to issue pretrial rulings on motions *in limine* pursuant to Wis. Stat. § 802.10(5)(d), which provides:

> At a pretrial conference, the court may consider any matter that facilitates the just, speedy and inexpensive disposition of the action, including … Any pretrial rulings on the admissibility of evidence …

In ruling on whether to admit or exclude evidence, trial courts have broad discretion. *Martindale v. Ripp*, 2001 WI 113, ¶ 28, 246 Wis. 2d 67, 629 N.W.2d 698. The trial court is to examine the facts of record, apply a proper legal standard, and using a rational process, come to a reasonable conclusion. *See Glassey v. Continental Ins. Co.*, 176 Wis. 2d 587, 608, 500 N.W.2d 295 (1993).

The Parties

> **Motion *in Limine* #1 (INSURANCE): Plaintiff (and their counsel and their witnesses) should be prohibited from referencing or mentioning insurance after the parties have been identified at the outset of the trial.**

The Court should enter an order precluding all references to insurance after the parties have been identified at the outset of trial. Pursuant to Wis. Stat. § 904.11, evidence of insurance or lack of insurance is not admissible to prove negligence in a civil action:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

In *Stoppleworth v. Refuse Hideaway, Inc.*, 200 Wis. 2d 512, 546 N.W.2d 870 (1996), the Wisconsin Supreme Court ruled that a circuit court in a jury trial, as a procedural rule, should apprise the jury of the

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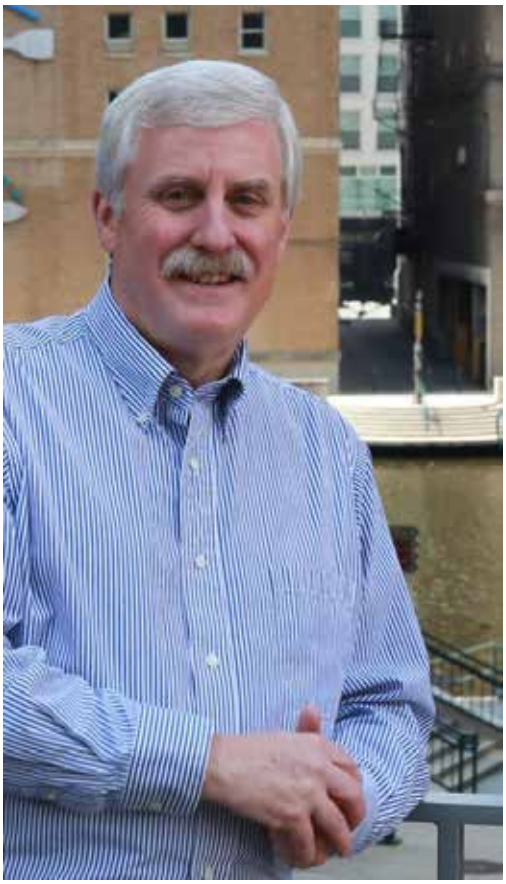

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Before mediating fulltime Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a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

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names of all the parties to the lawsuit and remind the jury that they must be impartial toward all parties, regardless of whether insurance companies are involved. *Id*. at 524-25. Additionally, Wis. JI-Civil 125 instructs the jury to "answer the questions in the verdict the way you would if there was no insurance company in the case":

> References to an insurance company have been made in this case. The title to this case included an insurance company as a defendant. There is no question as to insurance in the special verdict, however. This is because there is no dispute of fact concerning insurance in this case. In addition, whether a (defendant) is liable or not liable for any damages is the same, whether (defendant) is or is not insured. Under your oath as jurors, you are bound to be impartial toward all parties to this case. So, you should answer the questions in the verdict just as you would if there were no insurance company in the case.

Thus, any reference to insurance (directly or indirectly) after the parties have been identified at the outset of the trial is unnecessary and wholly immaterial, and any probative value of such evidence is substantially outweighed by the danger of unfair prejudice. *See* Wis. Stat. § 904.03. The only possible reason for plaintiff to reference insurance during trial is to influence the jury by improper means, *i.e.*, to infer that the jury should find for the plaintiff, or award higher damages, because an insurance company will pay the verdict. *See Caldwell v. Piggly-Wiggly Madison Co.*, 32 Wis. 2d 447, 456-457, 145 N.W.2d 745, 750 (1966) (recognizing that prejudice in the form of excessive damages may result from even an inadvertent reference to an insurance company during the testimony). Indeed, in *Doepke v. Reimer*, 217 Wis. 49 (1935), the Wisconsin Supreme Court emphasized that gratuitous references to insurance during trial are not allowed:

> It is not to be understood, however, that because an insurer is made a party defendant, witnesses testifying on behalf of the insured defendant may be asked questions containing invidious insinuations against the insurer, or that the plaintiff's counsel in such a situation may consider himself licensed to ask questions solely for the purpose of playing up to the jury and unduly emphasizing the fact that the defendant is insured.

Id. at 55. Accordingly, plaintiff (and their counsel and their witnesses) should be prohibited from:

- Referencing or mentioning insurance after the parties are identified at the outset of trial;
- Referring to defense counsel as the "insurance attorney" or "counsel for the insurer" or the like;
- Referring to the insurance company's policy limits;
- Referring to the insurance company's advertising and marketing campaigns; and
- Interrogating the jury panel during *voir dire* about insurance paying the judgment.

> **Motion *in Limine* #2 (LOCATION OF COUNSEL): Plaintiff (and their counsel and their witnesses) should be prohibited from referencing the business or residential location of defense counsel.**

The Court should enter an order precluding plaintiff, their counsel, and their witnesses from referencing the location of defense counsel's business office or residence in the presence of the jury. Defense counsel resides in [location] and has an office in [location]. Such information has no relevance to the issues to be decided by the jury and would only serve to try to prejudice the jury against defense counsel.

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Motion *in Limine* #3 (WEALTH OF DEFENDANT): Plaintiff (and their counsel and their witnesses) should be prohibited from introducing evidence of defendant's wealth.

This Court should bar any reference to the purported wealth of defendants, including the size of defendant's companies, the existence of any of their affiliates, subsidiaries, or parent companies, and/or the relative poverty of plaintiff. The ground for this request is that such evidence would be prejudicial, confusing, and a waste of time. *See Masterson v. Chicago & N.W. Ry. Co.*, 102 Wis. 571, 78 N.W. 757 (1899) (it is prejudicial for an attorney to make unwarranted statements to a jury in an argument regarding the purported size and power of a corporation). Such reference is not an appropriate concern for jury consideration because it is inflammatory, improper, irrelevant, and unfairly prejudicial. For evidence to be relevant it must tend to prove a material fact. *See State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). Evidence which does not tend to prove or disprove a fact that is of consequence to a material issue is irrelevant and is properly excluded. *See* Wis. Stat. § 904.02; *State v. Alsteen*, 108 Wis. 2d 723, 324 N.W.2d 426 (1982).

Remarks within the scope of the foregoing prohibition include, but are not limited to, the ability of plaintiff to afford shouldering their damages. It is improper for an attorney for a party to make statements to a jury "calculated to induce the jury to ignore the evidence presented and render a verdict for plaintiff founded on sympathy." *Fields v. Creek*, 21 Wis. 2d 562, 572, 124 N.W.2d 599 (1963). References to the relative wealth of the parties are improper because they cater to the tendency of jurors to favor the poor over the rich. Such references are likely to elicit the "deep pocket" theory of liability.

Granting this motion *in limine* is soundly supported under Wisconsin law. In *Martens v. Lundquist*, 15 Wis. 2d 540, 113 N.W.2d 149 (1962), plaintiff's counsel argued to the jury that his client "did not have any money with which to pay his bills." This prompted objection by the opposing counsel, which was sustained. *Martens* held that such remarks "constituted improper argument by plaintiff's counsel. Stressing the financial worth of one of the parties in argument to the jury is an appeal to passion and prejudice and is not to be condoned." *See also Neumeister v. Goddard*, 133 Wis. 405, 113 N.W. 733 (1907).

Liability Issues

Motion *in Limine* #4 (ACCIDENT REPORT): Plaintiff (and their counsel and their witnesses) should be prohibited from referencing or mentioning the DOT Crash Report.

The Court should enter an order precluding reference to the accident report. Pursuant to Wis. Stat. §§ 344.21 and 346.73, accident reports and any action taken by the law enforcement officer based upon the accident report are not admissible in evidence in a civil lawsuit. Wis. Stat. § 344.21 provides:

> **Matters not to be evidence in civil suits.** Neither the report required following an accident, the action taken by the department pursuant to this chapter, the findings, if any, upon which such action is based nor the security filed as provided in this chapter shall be referred to in any way or be any evidence of the negligence or due care of either party at the trial of any action at law to recover damages, but this shall not be construed to exclude a notice of insurance filed pursuant to s. 344.14 or 344.15(4), or both, from being admissible in evidence where it would otherwise be material and admissible under the rules of evidence.

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Similarly, § 346.73 provides:

> **Accident reports not to be used in trial.** Notwithstanding s. 346.70(4)(f), accident reports required to be filed with or transmitted to the department or a county or municipal authority shall not be used as evidence in any judicial trial, civil or criminal, arising out of an accident, except that such reports may be used as evidence in any administrative proceeding conducted by the department. The department shall furnish upon demand of any person who has or claims to have made such a report, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the requirement that such a report be made to the department.

"It has been a rule of some standing in this state that a police traffic report of an accident made by a traffic officer in the line of duty is not admissible in evidence as to those factual matters therein stated which are based on hearsay. Likewise, a conclusion in the report of the traffic officer is inadmissible." *Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 292, 294, 177 N.W.2d 109 (1970).

> **Motion *in Limine* #5 (TRAFFIC CITATION): Plaintiff (and their counsel and their witnesses) should be prohibited from referencing or mentioning that defendant received a traffic citation because of the subject accident.**

Following the accident, defendant received a traffic citation, pled no contest to the citation, and paid a fine. The Court should enter an order precluding reference to the citation and disposition. Pursuant to Wis. Stat. § 904.10, the citation and resulting plea are not admissible in the civil action to prove liability. Wis. Stat. § 904.10 provides:

> **Offer to plead guilty; no contest; withdrawn plea of guilty.** Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

Evidence of the citation and resulting plea is inadmissible because it allows the jury to improperly infer guilt. *See Matter of Safran's Estate*, 102 Wis. 2d 79, 94-95, 306 N.W.2d 27 (1981); *Bushmaker v. Green Bay Diocese*, 212 Wis. 2d 242, 568 N.W.2d 785 (Ct. App. 1997) ("[N]o contest pleas have no collateral import or evidentiary place in civil lawsuits.").

> **Motion *in Limine* #6 (OTHER ACCIDENTS): Plaintiff (and their counsel and their witnesses) should be prohibited from referencing or mentioning other accidents.**

The Court should enter an order precluding reference to other accidents. Wisconsin law dictates that only relevant evidence is to be admitted at trial. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Irrelevant evidence is not admissible. Wis. Stat. § 904.02. Simply put, evidence of other accidents is not relevant to the issues in this case. The jury is to decide whether defendant was negligent at the time and place of the subject accident.

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Whether defendant was negligent on a different day at a different place under different circumstances is not probative of these issues.

Evidence of other accidents is also generally prohibited under Wis. Stat. § 904.04(2)(a), which provides:

> OTHER CRIMES, WRONGS, OR ACTS. (a) *General admissibility.* Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Finally, even if evidence of other accidents has some minimal probative value, it should be excluded under Wis. Stat. § 904.03 because it would result in unfair prejudice, confusion, undue delay, and waste of the jury's time. If this Court should deem that other accidents are somehow relevant, it would require a mini trial on how and why the other accidents occurred, including testimony from witnesses to the other accidents.

Motion *in Limine* #7 (SPEED): Plaintiff (and other lay witnesses) should be prohibited from offering lay opinions about speed at trial.

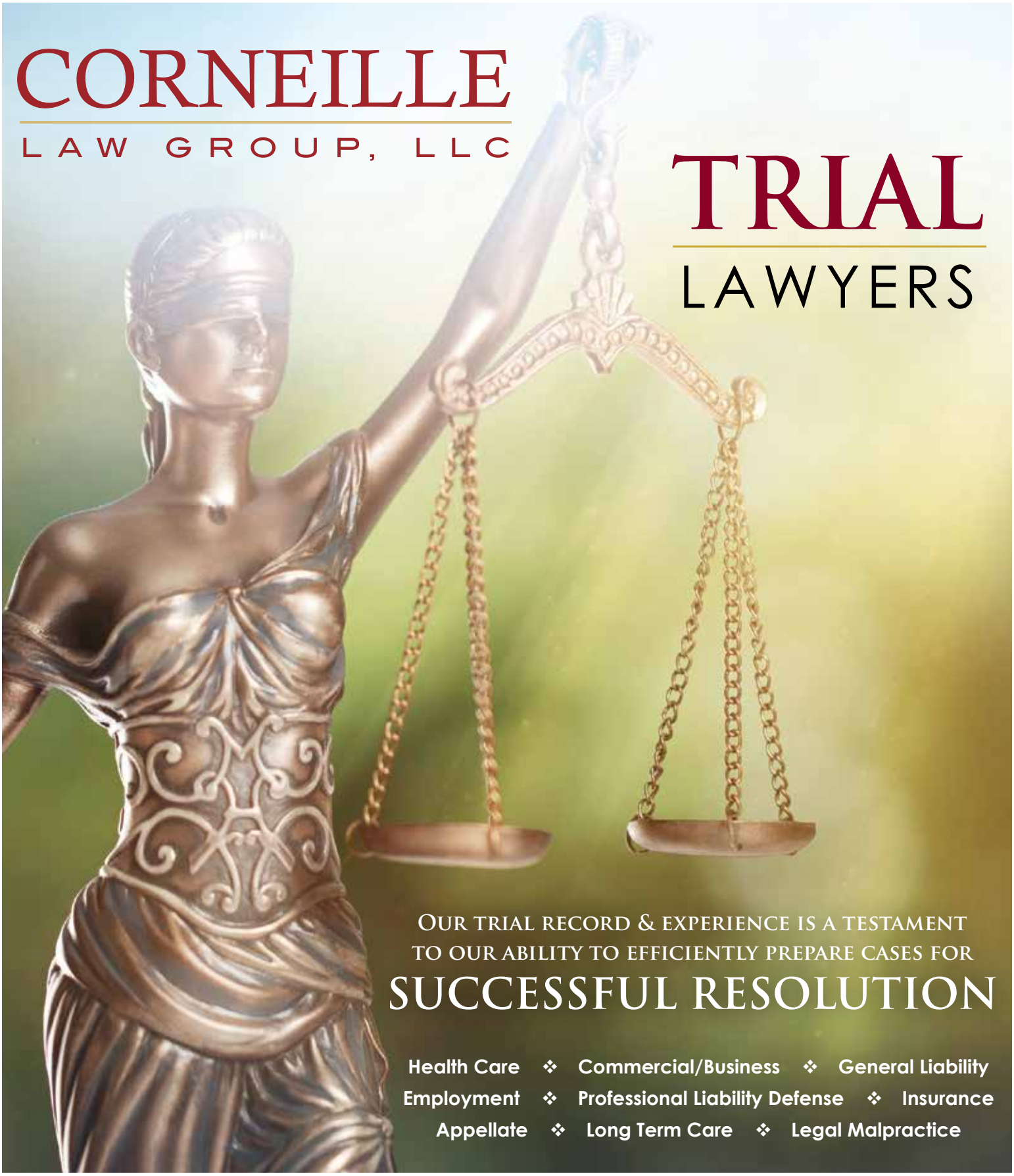
The Court should enter an order precluding plaintiff, their counsel, and their witnesses from making statements or arguments about defendant's speed. To state an opinion as to the speed of a vehicle, a witness must be qualified by experience and have had the opportunity to observe the vehicle for a sufficient distance and time to make a judgment. *See Wisneski v. Heritage Mut. Ins. Co.*, 38 Wis. 2d 702, 707, 158 N.W.2d 357 (1968) (where witness is unable to judge rate of speed because of position, shortness of observation, lack of reference points or other reasons, opinion has no probative value); *see also Fessler v. Northwestern Nat. Casualty Co.*, 265 Wis. 14, 18, 60 N.W.2d 387 (1953) (affirming trial court's ruling precluding lay witness from testifying about speed of vehicle because the witnesses "admitted he was in no position to judge speed and could not estimate it").

Here, none of the witnesses are qualified to offer opinions on defendant's speed based on qualification or observation. Any testimony about speed would be pure speculation. Plaintiff must not be permitted to imply, through testimony or argument, that defendant's vehicle was travelling more than the posted speed limit.

Further, plaintiff may attempt to argue that the vehicle [would not have rolled] [would not have spun] [would not have left the roadway] [would not have been so damaged] had the defendant not been speeding. Accident reconstruction is a subject that requires expert testimony. *See Wester v. Bruggink*, 190 Wis. 2d 308, 318-19, 527 N.W.2d 373 (Ct. App. 1994). Plaintiff has not disclosed an accident reconstructionist to testify at trial. Without an expert, plaintiff should not be permitted to speculate about the physics behind the accident.

Motion *in Limine* #8 (PUNITIVE DAMAGES): Plaintiff (and their counsel and their witnesses) should be prohibited from arguing at trial that defendant acted intentionally or that the jury should punish defendant.

The Court should enter an order precluding plaintiff from suggesting or arguing to the jury that they should "punish" or "send a message" to the defendant in any way. "Trial courts in Wisconsin have a significant



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responsibility in ensuring that a verdict question on punitive damages is not given to the jury unless the evidence 'establishes a proper case' for their allowance." *Lievrouw v. Roth*, 157 Wis. 2d 332, 344, 459 N.W.2d 850 (Ct. App. 1990) (quoting *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 298, 294 N.W.2d 437 (1980)). Under Wisconsin law, the circuit court is expected to serve as a gatekeeper before allowing evidence of punitive damages to be introduced to the jury and before sending a question on punitive damages to the jury. *See Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶ 64, 312 Wis. 2d 251, 752 N.W.2d 800; *Strenke v. Hogner*, 2005 WI 25, ¶ 40, 279 Wis. 2d 52, 694 N.W.2d 296. The trial court "should not submit the issue of punitive damages to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite outrageous conduct." *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 735, 456 N.W.2d 585 (1990). "Stated another way, a question on punitive damages may not be given to the jury unless the trial court concludes that a reasonable jury could find from the evidence that entitlement to punitive damages has been proven by the middle burden of proof, 'clear and convincing evidence.'" *Lievrouw*, 157 Wis. 2d at 344. Whether the plaintiff has established a *prima facie* case for punitive damages is a question of law for the court to decide. *Id*.; *see also Bank of Sun Prairie*, 155 Wis. 2d at 736; *Burg v. Miniature Precision Components, Inc.*, 111 Wis. 2d 1, 12, 330 N.W.2d 192 (1983).

Punitive damages are designed to punish and deter conduct that is "willful or wanton, in a reckless disregard of rights or interests." *See Brown v. Maxey*, 124 Wis. 2d 426, 433, 369 N.W.2d 677 (1985). Punitive damages may not be awarded unless there is "clear and convincing evidence" that the defendant's conduct was "outrageous." *Id*. For conduct to be "outrageous" there must be "aggravating circumstances beyond ordinary negligence." *Id*. at 432. The conduct must be so outrageous as to "require the added sanction of a punitive damage [award] to deter others from committing acts against human dignity." *Fahrenberg v. Tengel*, 96 Wis. 2d 211, 222, 291 N.W.2d 516 (1980) (quoting *Entzminger v. Ford Motor Co.*, 47 Wis. 2d 751, 757-58, 177 N.W.2d 899 (1970)).

This is a simple negligence case. No intentional tort or punitive damage claim has been pled. There is no evidence that the defendant acted "maliciously" or "outrageously." Any suggestion or argument that the defendant should be punished would be unfairly prejudicial to the defense and has the potential to mislead and confuse the jury. Accordingly, the Court should prohibit plaintiff from introducing any evidence or making any arguments about "reckless behavior," "gross negligence," or "punitive damages."

Motion *in Limine* #9 (INTOXICATION): Plaintiff should be prohibited from introducing evidence of alcohol and/or drug test results without an expert.

Following the accident, defendant tested positive for [substance]. The Court should enter an order precluding plaintiff from arguing that defendant's [substance] use was a cause of the accident. Expert testimony is required to prove causation when "the matter is not within the realm of ordinary experience and lay comprehension." *White v. Leeder*, 149 Wis. 2d 948, 960, 440 N.W.2d 557 (1989). This is because in complex and technical situations, the jury, without the assistance of expert testimony, would be speculating. *State v. Doerr*, 229 Wis. 2d 616, 623-24, 599 N.W.2d 897 (Ct. App. 1999). In such a case, the failure of expert testimony is a failure of proof. *Id*. Whether defendant's intoxication affected their ability to drive is a matter outside the common knowledge of the average juror and requires expert testimony. Without expert testimony, the jury would be forced to speculate, and therefore the evidence "should not be presented to the jury at all." *Zilmer v. Biglautsch*, 35 Wis. 2d 691, 707, 151 N.W.2d 741 (1967).


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In *State v. Schutte*, 2006 WI App 135, ¶ 4, 295 Wis. 2d 256, 720 N.W.2d 469, the court upheld a decision admitting evidence of marijuana use to prove negligent operation of a vehicle where plaintiff had an expert to testify about the effects of the drug. Without expert testimony, the State could not establish any connection between the marijuana use and impaired driving. Courts in other jurisdictions have held that (alcohol) (drug) test results are inadmissible without expert testimony. *See*, *e g.*, *Head v. State*, 303 Ga. App. 475, 693 S.E.2d 845 (2010); *Baldor Elec. Co. v. Reasoner*, 66 S.W.3d 130 (Mo. Ct. App. 2001).

Here, plaintiff does not have a toxicologist to offer expert testimony about the effect of defendant's intoxication on their ability to drive. Accordingly, evidence of defendant's intoxication is irrelevant and should be excluded.

Even if there is some minimal probative value to the evidence without an explanation from an expert, the Court should exclude the evidence under Wis. Stat. § 904.03 because its prejudicial value substantially outweighs its probative value. There is good probability that a jury could find defendant at fault for merely consuming [alcohol] [drug]. As the First Circuit noted, "to allow the jury to be told that traces of cocaine were found in [defendant]'s body without any accompanying explanation of the meaning of the test results or of cocaine's capacity to impair driving skills would sow the seeds for a horrific harvest." *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 86 (1st Cir. 1998).

> **Motion *in Limine* #10 (LIABILITY STIPULATION): Plaintiff should be prohibited from introducing liability-related evidence because the parties have stipulated to liability.**

The parties have stipulated to liability. The jury will not be asked to decide whose negligence caused the subject accident. The only issue that needs to be decided by the jury is the value of plaintiff's damages. Therefore, evidence that is only related to liability issues is irrelevant and should be excluded from trial pursuant to Wis. Stat. § 904.02 ("[e]vidence which is not relevant is not admissible."). *See also Weborg v. Jenny*, 2012 WI 67, ¶ 62, 341 Wis. 2d 668, 816 N.W.2d 191 ("evidence which is not relevant is not admissible…with no exception"). This includes, without limitation:

- Photographs of the vehicles;
- Testimony about speed and right-of-way;
- Traffic citation guilty plea;
- Driving record;
- Driver logs; and
- Event data recorder information.

Even if this evidence has some minimal probative value, it should also be excluded under Wis. Stat. § 904.03 due to the dangers of unfair prejudice, confusion of the issues, misleading the jury, and waste of time.

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Expert Issues

Motion *in Limine* #11 (NEW EXPERTS): Plaintiff should be prohibited from calling experts to testify at trial who were not timely disclosed.

The Court should enter an order precluding plaintiff from calling any expert who was not timely disclosed to testify at trial. Wisconsin courts do not allow parties to wait until the eleventh hour to disclose evidence that should have been disclosed earlier. *See*, *e.g.*, *Schneller v. St. Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 316-17, 470 N.W.2d 873 (1991) (precluding expert opinions that were not disclosed before the deadline set in the scheduling order); *Dobbratz Trucking & Excavating, Inc., v. Paccar, Inc.*, 2002 WI App 138, ¶ 23, 256 Wis. 2d 205, 647 N.W.2d 315 (upholding exclusion of expert opinions that were not disclosed per the scheduling order); *Oliver v. Heritage Mut. Ins. Co.*, 179 Wis. 2d 1, 14, 505 N.W.2d 452 (Ct. App. 1993) (holding that, without a showing of excusable neglect, an expert may be prohibited from testifying when the expert's opinions are disclosed after the deadline for doing so).

Allowing new and undisclosed expert opinions at trial would deprive parties of their right to discover expert opinions and the bases for them. This would be contrary to the purpose of scheduling orders and the whole purpose and intent of the discovery process. Indeed, Wisconsin has a system of extensive pre-trial discovery, which is designed to formulate, define, and narrow the issues to be tried, and to give each party the opportunity to be fully informed as to the evidence which may come out at the time of trial. S*tate ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 576, 150 N.W.2d 387 (1967). Therefore, defendants request this Court preclude plaintiff from calling any new or undisclosed experts to testify at trial.

Motion *in Limine* #12 (NEW EXPERT OPINIONS): Plaintiff's experts should not be allowed to offer new opinions at trial that were not contained in their report or offered at their depositions.

The Court should enter an order precluding plaintiff's experts from offering new opinions at trial. New or different opinions are not admissible because they would amount to surprise testimony that would be unfairly prejudicial to the defense. *See* Wis. Stat. § 904.03; *Maygar v. WHCLIP*, 211 Wis. 2d 296, 303, 564 N.W.2d 766 (1997). A trial court may exclude evidence if it finds that the probative value of that evidence is substantially outweighed by "unfair surprise" to an opposing party "who has not had reasonable ground to anticipate that such evidence would be offered." *Fredrickson v. Louisville Ladder Co.*, 52 Wis.2d 776, 783, 191 N.W.2d 193 (1971). It is impossible for defendants to anticipate and respond to new and different opinions at trial not previously disclosed. Therefore, plaintiff's experts should be prohibited from offering new or different opinions at trial not contained in their report and/or deposition testimony.

Motion *in Limine* #13 (EXPERT QUALIFICATIONS): Plaintiff's experts should be prohibited from offering opinions outside their expertise.

The Court should enter an order precluding [expert] from offering opinions outside of their expertise. Under Wisconsin law, an expert must be "qualified as an expert by knowledge, skill, experience, training, or education." Wis. Stat. § 907.02(1). "A witness must be qualified to answer the question put to him [or her]." *See Martindale v. Ripp*, 2001 WI 113, ¶ 52, 246 Wis. 2d 67, 629 N.W.2d 698. "'[A] witness eminently capable on one subject may not be sufficiently qualified to give helpful testimony on another, albeit related, issued in the case. … No expert has carte blanche.'" *Id*. (quoting 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE § 702.4, at 489-490).

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Motion *in Limine* #14 (*DAUBERT*): Plaintiff's expert should be prohibited from testifying under the *Daubert* standard.

Defendant moves the Court to exclude [expert]'s opinion testimony pursuant to Wis. Stat. § 907.02(1) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the U.S. Supreme Court announced a heightened evidentiary standard for experts. Wisconsin adopted the *Daubert* standard in 2011 when it amended § 907.02, which now reads:

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

Under the *Daubert* standard, it is no longer enough for a proponent to simply argue that the expert testimony would assist the trier of fact. The court now serves a gatekeeping function "to ensure that an expert's opinion is based on a reliable foundation and is relevant to the material issues." *State v. Giese*, 2014 WI App 92, ¶ 18, 356 Wis. 2d 796, 854 N.W.2d 687 (citing *Daubert*, 509 U.S. at 589 n.7, 597). "The court is to focus on the principles and methodology the expert relies upon, not on the conclusion generated." *Id*. "The question is whether the scientific principles and methods that the expert relies upon have a reliable foundation in the knowledge and experience of the expert's discipline." *Id*. (internal citations omitted).

"*Daubert's* inquiry applies not just to scientific evidence, but to all expert opinions." *Seifert v. Balink*, 2017 WI 2, ¶ 60, 372 Wis. 2d 525, 888 N.W.2d 816 (emphasis added). While "courts frequently admit experience-based testimony, especially when expert medical evidence is offered," the "[p]roposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known." *Seifert*, 372 Wis. 2d 525, ¶¶ 67, 77 (quoting *Daubert*, 509 U.S. at 590). "A trial court should admit medical expert testimony if physicians would accept it as useful and reliable." *Id*. ¶ 81. "In other words, expert medical opinion testimony is reliable if the knowledge underlying it 'has a reliable basis in the knowledge and experience of the [relevant] discipline.'" *Id*. (quoting *U.S. v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006)); s*ee also* Fed. R. Evid. 702, Advisory Committee Note ("The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.' … The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.") (internal quotation marks and citations omitted).

The goal of the *Daubert* standard is "to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *State v. Giese*, 2014 WI App 92, ¶ 19, 854 N.W.2d 687 (citing *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 671 (6th Cir. 2010) ("No matter how good experts' credentials may be, they are not permitted to speculate.") (internal punctuation omitted)); Daniel D. Blinka, The *Daubert* Standard in Wisconsin: A Primer, Wisconsin Lawyer, March 2011, at 60 ("Coursing through *Daubert* lore is a palpable fear of *ipse dixit* ('because I said so') testimony"); Ralph Adam Fine, Fine's Wisconsin Evidence 34 (Supp. 2012) ("Under *Daubert*, the testimony of the witness [is to be] 'more than subjective belief or unsupported speculation.'")). "An expert cannot establish that a fact is generally accepted merely by saying so." *Seifert*, 372 Wis. 2d 525, ¶ 75. "Trial courts do not have 'to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Id*. If an expert's opinions are not based on "sufficient facts or data," or are not "the product of reliable principles and methods," the expert's

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testimony must be excluded under the *Daubert* standard. *See* Wis. Stat. § 907.02(2); *see also Moore v. Ashland Chemical, Inc*., 151 F.3d 269, 276 (5th Cir. 1998) (the self-serving "assurances that [an expert] has utilized generally accepted scientific methodology is insufficient").

As noted by the Wisconsin Supreme Court, "the degree to which the medical expert is qualified implicates the reliability of the testimony." *Seifert*, 372 Wis. 2d 525, ¶ 83. Simply "[h]aving a medical license does not automatically qualify a person to offer expert testimony on every issue in the field of medicine." *State v. St. George*, 2002 WI 50, ¶ 40, 252 Wis. 2d 499, 643 N.W.2d 777. "If the witness has no scientific, technical, or other specialized knowledge about the particular issues in the case then the witness's opinion is not reliable enough to be probative." *Id*.

Expert opinions based upon unreliable data or tests do not meet the *Daubert* standard. *See Wilder Enterprises Inc. v. Allied Artists Pictures, Corp.*, 632 F.2d 1135, 1143-44 (4th Cir. 1980) (expert's testimony properly excluded under Rule 703 when no facts were presented to support his calculations nor was there any proof that underlying data was of a type reasonably relied upon by experts in the field); *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987) (summary judgment granted on issue of causation because tests upon which expert relied were so unreliable and lacking in probative value that no reasonable expert would base an opinion on them); *U.S. v. Esle*, 743 F.2d 1465, 1474 (11th Cir. 1984) (unreasonable to rely on untrustworthy radio station market surveys); *Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*, 739 F.2d 1028, 1033 (5th Cir. 1984) (court excluded expert testimony based on the results of a voice stress analyzer because there was insufficient foundation establishing its trustworthiness or its acceptance in the relevant scientific community); *Soden v. Freightliner Corp.*, 714 F.2d 498, 503 (5th Cit. 1983) (court excluded statistical data and opinion based on them when not shown to be of a type reasonably relied upon by experts in the field) (superseded on other grounds); *U.S. v. Cox*, 696 F.2d 1294, 1297 (11th Cir.), cert. denied, 464 U.S. 827 (1983) (affirming exclusion of expert testimony based on hearsay not reasonably relied upon by experts in the field); *U.S. v. Tranowski*, 659 F.2d 750, 756-57 (7th Cir. 1981) (trial court erred in admitting "scientific evidence" consisting of astronomer's calculations without general acceptance in the relevant scientific community).

Although Wis. Stat. § 907.03 permits an expert to rely on data or facts collected by another expert and use that information to form an opinion, it does not permit an expert to simply parrot the opinions of others. *State v. Williams*, 2002 WI 58, ¶ 19, 253 Wis. 2d 99, 644 N.W.2d 919 ("one expert cannot act as a mere conduit for the opinion of another"); *Loeffel Steel Prods. v. Delta Brand, Inc.*, 387 F. Supp. 2d 794, 808 (N.D. Ill. 2005) ("The problem then, is that the expert is vouching for the truth of what another expert told him - he is merely that expert's spokesman. But, a scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science.") (internal punctuation and citations omitted).

"The party seeking to have the testimony admitted bears the burden of showing that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology; the expert's bald assurance of validity is not enough." *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 303 (6th Cir. 1997) (quoting *Daubert*, 43 F.3d at 1316) (internal punctuation omitted). An expert "must explain precisely how they went about reaching their conclusions … to show that they have followed the scientific method." *Daubert*, 43 F.3d at 1319. "Admissible opinions relate instant facts to known relationships; an opinion relating instant facts to an unknown relationship (a hypothesis) does not further the trier of fact's ability to determine a fact dependent upon that hypothetical relationship." *Porter v. Whitehall Labs., Inc.*, 791 F. Supp. 1335, 1345 (S.D. Ind. 1992) "Although experts may provide

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opinions in the form of a hypothetical fact *situation,* the scientific foundation or reasoning process may not be based on merely hypothetical causal *relationships* … [u]nsupported subjective opinion is unhelpful speculation and not admissible under Rule 702." *Id*. (emphasis in original).

[Expert]'s opinions should be excluded for failing to meet the reliability standard for expert testimony under Wis. Stat. § 907.02(1) and *Daubert* for the following reasons:

- The opinions are not based upon sufficient facts or data;
- The opinions are based upon unreliable data or tests;
- The opinions are not the product of reliable principles and methods;
- The opinions are contrary to the accepted principles and methods in the witness's field;
- The witness has not applied the principles and methods reliably to the facts of the case;
- The opinions are mere *ipse dixit* ("because I say so") testimony; and/or
- The witness is simply parroting the opinions of others.

Motion *in Limine* #15 (LEARNED TREATISES): Plaintiff should be prohibited from introducing learned treatises into evidence at trial.

The Court should enter an order precluding plaintiff from using learned treatises at trial. Wis. Stat. § 908.03(18) sets forth the requirements that must be met before a learned treatise can be admitted into evidence. It provides in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: … (18) Learned Treatises. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer's profession or calling as an expert in the subject. … (a) **No published treatise, periodical or pamphlet constituting reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days prior to trial.** The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

(Emphasis added.)

Trial is less than 40 days away and plaintiff did not serve any written notice of learned treatises. Accordingly, pursuant to Wis. Stat. § 908.03(18)(a), the Court should enter an order precluding plaintiff from introducing any learned treatises into evidence at trial unless used for impeachment on cross-examination.

While Wis. Stat. § 908.03(18)(a) authorizes the use of learned treatises for cross-examination as an exception to the 40-day notice provision, a party seeking to use a treatise to cross-examine must still

establish the necessary foundation demonstrating the treatise to be reliable. Accordingly, whether the learned treatise is used as direct evidence or for cross-examination, a proper foundation must be made establishing the publication is, in fact, a learned treatise.

A treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the writer's reputation at stake. *See* 6 WIGMORE, EVIDENCE § 1692 (Chadbourn rev. ed. 1976). A learned treatise is admissible if "a witness expert in the subject testifies, that the writer of the statement in the treatise … is recognized in the writer's profession or calling as an expert in the subject." Wis. Stat. § 908.03(18). The language of the statute clearly requires that a witness who is an expert in the subject must testify that the author of the treatise is also a recognized expert in the subject matter addressed by the treatise. *Broadhead v. State Farm Mut. Auto. Ins. Co.*, 217 Wis. 2d 231, 247, 579 N.W.2d 761 (Ct. App. 1998).

It is not sufficient foundation that the periodical or text in which the treatise appears is considered authoritative or reliable. Testimony that the publication itself is reliable authority was considered and rejected in the adoption of Wis. Stat. § 908.03(18). *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis. 2d 69, 76, 146 N.W.2d 505 (1966); Wis. Stat. § 908.03(18) Judicial Council Committee Note. Thus, the expertise of the author is a foundational requirement for admissibility. In the absence of such testimony, admission of any excerpts would be error.

To hold that a foundation is not necessary would allow an opponent to cross-examine a witness using less than authoritative literature. Thus, even if a treatise or other publication is being introduced for impeachment on cross-examination, a trial court must assure that the literature has proper foundation to be used on cross-examination.

Complying with the foundation requirements of the statute, however, only overcomes the hearsay objection that would otherwise exclude the written document. All the requirements of admissibility, such as relevancy, materiality, the requirements of expert testimony, and not being cumulative must also be satisfied before the text can be received into evidence. Accordingly, the defendant seeks an order *in limine* that plaintiff cannot introduce any treatise, periodical or scholarly article unless and until the proper foundational and admissibility requirements are met.

Damages Issues

> **Motion *in Limine* #16 (NEW DAMAGES): Plaintiff should be prohibited from claiming any new or previously undisclosed special damages at trial which were not itemized in discovery.**

The Court should enter an order precluding plaintiff from asking the jury to award any special damages that were not disclosed in discovery. "It is well-settled law in Wisconsin that the person claiming damages has the burden of proof …" *Wingad v. John Deere & Co.*, 187 Wis. 2d 441, 449, 523 N.W.2d 274 (Ct. App. 1994). "[I]nterrogatories are ideal for obtaining … itemizations of medical expenses and other damages …" *Wisconsin Discovery Law and Practice*, State Bar of Wisconsin, 4-3 (Nov. 2017). Here, defendant asked plaintiff to itemize their special damages in discovery, which they did. Plaintiff should not be allowed to claim any new or different special damages at trial that were not disclosed in discovery. Such evidence would amount to surprise evidence that would be unfairly prejudicial to the defense. *See* Wis. Stat. § 904.03; *Maygar v. WHCLIP*, 211 Wis. 2d 296, 303, 564 N.W.2d 766 (1997). The trial court has discretion

to exclude evidence from trial which was not disclosed during discovery. *Jenzake v. City of Brookfield*, 108 Wis. 2d 537, 543, 322 N.W.2d 516 (Ct. App. 1982). To prevent unfair surprise and prejudice, the Court should preclude plaintiff from claiming any special damages not previously disclosed.

Motion *in Limine* #17 (LAY MEDICAL OPINIONS): Plaintiff (and other lay witnesses) should be prohibited from offering lay medical testimony at trial.

The Court should enter an order precluding plaintiff and all other lay witnesses from testifying as to medical opinions and conclusions at trial. Medical opinions and conclusions on the issues of causation, diagnoses, and prognoses are in the realm of expert witness testimony. Wis. Stat. §907.01; *Heiting v. Heiting*, 64 Wis.2d 110, 118, 218 N.W.2d 334 (1974). Inasmuch as none of the lay witnesses have the requisite background and cannot establish an appropriate foundation, they should be barred from testifying about medical causation, diagnoses, and prognoses of injury.

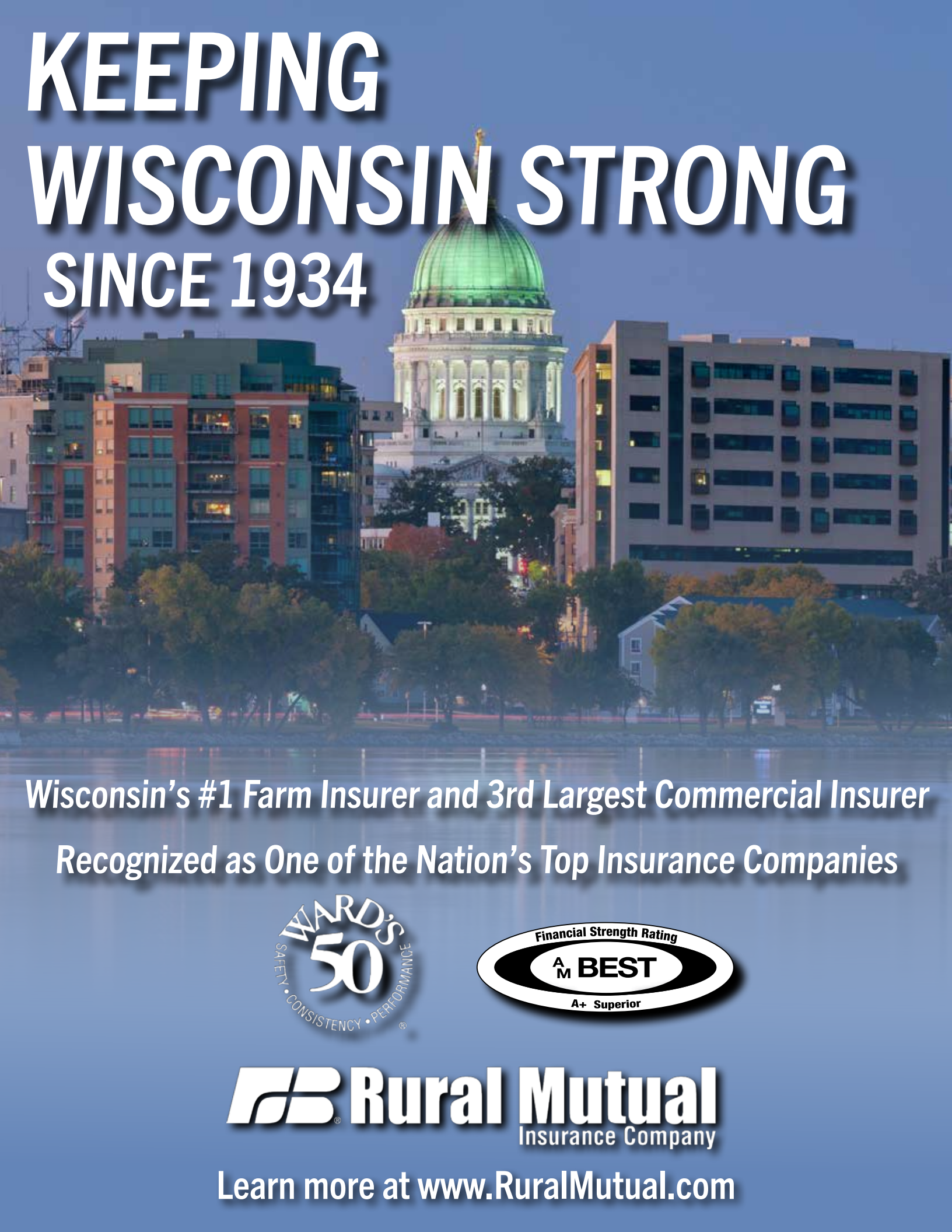
Motion *in Limine* #18 (FUTURE MEDICAL EXPENSES): Plaintiff should be prohibited from claiming future medical expenses without an expert.

The Court should enter an order precluding plaintiff from asking the jury to award future medical expenses without support from an expert. Under Wisconsin law, a litigant seeking to recover compensation for future medical expenses must have an expert opine in this regard. *Reyes v. Greatway Ins. Co.*, 220 Wis. 2d 285, 301, 582 N.W.2d 480 (Ct. App. 1998) ("An award of future medical expenses will not be upheld if it is unsupported in the record by expert medical testimony."). Expert medical testimony must establish two facts: (1) the plaintiff suffered permanent injuries that will require future treatment; and (2) the cost of that future treatment. *Franz v. Brennan*, 146 Wis. 2d 541, 551, 431 N.W.2d 711 (Ct. App. 1988) (citing *Bleyer v. Gross*, 19 Wis. 2d 305, 120 N.W.2d 156 (1963)). "The burden of proving the actual cost of future medical expenses is upon the plaintiff." *Walker v. Baker*, 13 Wis. 2d 637, 650, 109 N.W.2d 499 (1961). "A medical expense award must be supported by competent medical evidence as to the reasonableness and necessity of the expense." *Balz v. Heritage Mut. Ins. Co.*, 2006 WI App 131, ¶ 41, 294 Wis. 2d 700, 720 N.W.2d 704. Thus, "a jury should not be permitted to speculate as to the amount of future expenses of medical treatment in the absence of any evidence as to the possible cost thereof." *Spleas v. Milwaukee & Suburban Transport Corp.*, 21 Wis. 2d 635, 642, 124 N.W.2d 593 (1963).

Here, plaintiff does not have an expert who will testify that the plaintiff suffered permanent injuries that will require future treatment and the cost of that future treatment. Accordingly, plaintiff should be prohibited from claiming future medical expenses at trial.

Motion *in Limine* #19 (LOSS OF FUTURE EARNING): Plaintiff should be prohibited from claiming loss of future earning capacity without an expert.

The Court should enter an order precluding plaintiff from asking the jury to award future loss of earning capacity without support from an expert. Generally, under Wisconsin law, "an award for loss of earning capacity must be supported by expert testimony." *Brain v. Mann*, 129 Wis. 2d 447, 458, 385 N.W.2d 227 (Ct. App. 1986); *Koele v. Radue*, 81 Wis. 2d 583, 590, 260 N.W.2d 766 (1978). Any plaintiff claiming future loss of earning capacity must provide sufficient evidence to prove that the amount they were reasonably capable of earning before the alleged injury is more than what they are reasonably capable of earning in the future. *Ianni v. Grain Dealers Mut. Ins. Co.*, 42 Wis. 2d 354, 364, 166 N.W.2d 148 (1969) ("The extent of the diminution or impairment of earning capacity is generally to be arrived at by comparing what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the injured party was capable of earning at or before the time of the injury with what he was capable of earning after it occurred"). A claim for loss of future earning capacity cannot be based on possibilities or speculation. *Schultz v. St. Mary's Hospital*, 81 Wis. 2d 638, 656, 260 N.W.2d 783 (1978) (stating that an award of future earning capacity should "not be left to conjecture or speculation").

Here, plaintiff does not have an expert who will testify that the plaintiff is not reasonably capable of earning the same amount they were capable of earning prior to the accident. Accordingly, plaintiff should be prohibited from claiming future loss of earning capacity at trial.

> **Motion *in Limine* #20 (UNDOCUMENTED IMMIGRANT): Plaintiff should be prohibited from claiming lost wages because plaintiff is an undocumented immigrant.**

Plaintiff testified at their deposition that they are not a U.S. citizen, they are not a legal permanent resident, and they do not have the legal right to work in the United States. Federal immigration policy does not permit wage-related damages for those who are not legally authorized to work in the United States. *Hoffman Plastic Compounds v NLRB*, 535 U.S. 137, 149 (2002). Accordingly, plaintiff should be barred from claiming lost wages as damages in this lawsuit.

Standard of Proof

> **Motion *in Limine* #21 (POSSIBILITIES): Plaintiff should be prohibited from introducing evidence expressed in terms of "possibilities" to prove their case-in-chief, while defendant should be allowed to introduce evidence of possibilities on direct and cross-examination.**

It has long been held in Wisconsin that "possibility" questions designed to help establish plaintiff's case-in-chief are improper because plaintiff has the burden of proof. It is the plaintiff's burden to produce expert testimony based upon a reasonable degree of professional certainty – not mere possibility – that there was negligence, and that such negligence proximately caused plaintiff's claimed damages. *Treptau v. Behrens Spa, Inc.*, 247 Wis. 438, 444, 20 N.W.2d 108 (1945). An expert's opinion expressed in terms of possibility or conjecture is insufficient to satisfy that burden, and accordingly, it is error to allow such testimony. *McGarrity v. Welch Plumbing Co.*, 104 Wis. 2d 414, 430, 312 N.W.2d 37 (1981); *Pucci v. Rausch*, 51 Wis. 2d 513, 519, 187 N.W.2d 138 (1971).

Since plaintiff has the burden of proof, they must offer testimony and evidence that is based upon a reasonable degree of professional certainty. An expert's testimony cannot be speculative. *Drexler v. All American Life and Casualty Co.*, 72 Wis. 2d 420, 432-35, 241 N.W.2d 401 (1976). Allowing testimony from plaintiff's experts regarding "possibilities" would cloud the issue of whether an opinion is held to a reasonable degree of medical probability, which is the applicable standard. Therefore, this Court should enter an order precluding plaintiff from eliciting, or attempting to elicit, any testimony from their expert witnesses that is based merely on a "possibility." This includes opinions that defendant "could have" done something differently.

Unlike the plaintiff, defendant may introduce evidence of "possibilities" because defendant does not have the burden of proof. *See Hernke v. Northern Ins. Company of New York*, 20 Wis. 2d 352, 360, 122 N.W.2d 395 (1963); *Milbauer v. Transport Emp. Mut. Benefit Society*, 56 Wis. 2d 860, 864, 203 N.W.2d 135 (1973); *Felde v. Kohnke*, 50 Wis. 2d 168, 184 N.W.2d 433 (1971). The Wisconsin Supreme Court explained this rule in *Felde*:

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> Although the party with the burden of proof must produce testimony based upon reasonable … probabilities, the opposing party is not restricted to this requirement and may attempt to weaken the claim for injuries with … proof couched in terms of possibilities. Thus, it is proper to cross-examine a plaintiff's [expert] witness on matters which do not rise to the dignity of "reasonable … probability."

Felde, 50 Wis. 2d at 183 (citing Wisconsin Civil Trial Evidence, Chapter 4, sec. 4.46 at 133 (1967)). Similarly, the Wisconsin Supreme Court held in *Hernke*:

> A defendant may attempt to weaken the claim of injuries with medical proof which is couched in terms of possibilities. Thus, it is proper to cross-examine a plaintiff's medical witness on matters which do not rise to the dignity of "reasonable medical probability."
>
> We see no inconsistency in requiring that one with the burden of proof produce medical testimony which is based upon reasonable medical probabilities and at the same time in permitting the side which does not have the burden of proof to attempt to upset such proof by showing other relevant possibilities.

Hernke, 20 Wis. 2d at 360. Accordingly, the Court should rule that, while plaintiff is barred from proving their case with "possibilities," defense counsel may ask "possibility"-type questions of witnesses because defendant does not bear the burden of proof in this case.

Argument of Counsel

> **Motion *in Limine* #22 (*PER DIEM*): Plaintiff's counsel should be prohibited from making a *per diem* argument to the jury for pain and suffering damages.**

Wisconsin case law strictly forbids an attorney arguing to a jury that the plaintiff should be awarded pain and suffering damages based on a "*per diem*" calculation. In *Affett v. Milwaukee & Suburban Transp.*, 11 Wis. 2d 604, 616, 106 N.W.2d 274 (1960), our supreme court held that counsel may not ask a jury to award a sum of money for pain and suffering based on a mathematical formula or on a per day, per month, or on any other time-segment basis. In *Affett*, the plaintiff's counsel argued to the jury that the plaintiff deserved $1.50 per day for the pain and suffering she endured, and then multiplied $1.50 per day by 365 days and then multiplied that sum by 20 years—which was the life expectancy of the plaintiff—and asked the jury to award a total of $10,950. *Id*. at 607. The trial court allowed the argument over defense counsel's objection. *Id*. On appeal, the supreme court ruled that "[t]he use of the formula was prejudicial error." *Id*. at 614.

"The basic reasoning behind the use of any mathematical formula is not so much to aid, or even to persuade, the jury as it is to ultimately establish a fixed standard to displace the jury's concept of what is a fair and reasonable amount to compensate for the pain and suffering sustained as shown by the evidence in the light of the common knowledge and experience possessed by the jury of the nature of pain and suffering and the value of money." *Id*. "The difficulty in using a mathematical formula to measure damages for pain and suffering is inherent in the nature of pain and suffering." *Id*. at 613. "It cannot be measured by any such mathematical standard." *Id*. "Pain and suffering has no market price." *Id*. Thus, "[t]he use of a mathematical formula is pure speculation by counsel" *Id*. "[It] must always include an arbitrary dollar amount per day or other period of time, which has no foundation in the record." *Id*. at 612. "There is no

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mathematical way of formulating a formula which will represent all the varying factors involved in pain and suffering in a given case without making assumptions of fact which are not in the evidence." *Id*. at 612-13. "The formula, rather than being an aid as claimed, would result in confusing the jury." *Id*. at 613.

Accordingly, the Court should enter an order prohibiting plaintiff (and their counsel and their witnesses) from making a *per diem* argument to the jury for damage determination for pain and suffering based on a mathematical formula or on a per day, per month, or on any other time-segment basis.

Motion *in Limine* #23 (REPTILE THEORY): Plaintiff (and their counsel and their witnesses) should be prohibited from making "reptile theory"-type statements and arguments about "best practices" and "safest choices."

It is anticipated that plaintiff may attempt to introduce and use the popular "reptile theory" during trial. The "reptile theory" comes from a 300+ page book written by two plaintiff attorneys titled "Reptile," which teaches other plaintiff attorneys how to appeal to jurors' so-called primitive instincts by compelling them to think in terms of "best practice" or "safest choices" (not the legal standard), rather than "reasonable care" (the actual legal standard). *See* David Ball & Don C. Keenan, *Reptile*, Balloon Press (2009). The goal is to convince the jury that the defendant did not act in the *safest* or *best* manner and therefore put the entire community at risk. Rather than focus on the plaintiff and their damages, the "reptile theory" encourages the jurors to render a verdict based on emotion and a "reptilian primitive instinct" to protect themselves as members of the community. In reality, the "reptile theory" is nothing more than an attempt to avoid the legal standard of care and a veiled "golden rule" argument.

The reptile theory directly contradicts the legal definition of standard of care. Wisconsin law does not speak in terms of best practice, safest choices, or risk avoidance. To determine whether a defendant acted negligently, the jury is asked to decide whether the defendant failed to exercise "ordinary care," *i.e.,* "the care which a reasonable person would use in similar circumstances." *See* Wis. JI-Civil 1005. Opinions about whether defendants acted in the *safest* or *best* manner are contrary to the standard of care as defined in Wisconsin.

Allowing plaintiff's counsel to ask "reptile theory"-type questions and/or make "reptile theory"-type arguments at trial would be unfairly prejudicial to the defense because it has the potential to influence the outcome by improper means, appeal to the jury's sympathies, and provokes the jury's instinct to punish and/or base its decision on something other than established and admissible facts. *Lease Am. Corp. v. Insurance Co. of N. Am*., 88 Wis. 2d 395, 401, 276 N.W.2d 767 (1979). A fundamental and crucial principle of our legal system is that jurors must decide cases based on a dispassionate analysis of the evidence, untainted by sympathy, anger, or other emotion. Jurors are instructed on this basic principle in virtually every case. *See* Wis. JI-Civil 50 ("Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. … Do not let any personal feelings … affect your consideration of the evidence"); Wis. JI-Civil 100 ("You should not concern yourselves about whether your answers will be favorable to one party or to the other nor with what the final result of this lawsuit may be"); Wis. JI-Civil 1700 ("Your answers to the damage questions should not be affected by sympathy or resentment …"). Notwithstanding these instructions, jurors are human and susceptible to emotional appeals, which is why courts have discretion to bar evidence and argument which pose an unfair risk of influencing the jurors' emotions, even if the evidence has some probative value. *Weborg v. Jenny*, 2012 WI 67, ¶ 86, 341 Wis. 2d 668, 816 N.W.2d 191 ("While courts expect juries to follow instructions, courts also recognize that jurors (like any individual or group of individuals processing information) may misuse

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information and may succumb to emotion or bias, either consciously or unconsciously. It is no secret that evidence can be unfairly prejudicial to a party if it risks arousing jurors' emotions.").

For these reasons, plaintiff (and their attorneys and their witnesses) should be precluded from introducing any "reptile theory"-type evidence, from posing any "reptile theory"-type questions, and/or from making any "reptile theory"-type arguments at trial, including opinions from experts that defendants did not follow the "best practice" or make the "safest" choices.

> **Motion *in Limine* #24 (GOLDEN RULE): Plaintiff (and their counsel and their witnesses) should be prohibited from making improper golden rule arguments.**

The Court should enter an order precluding all golden rule statements and arguments at trial. Wisconsin law prohibits "golden rule" arguments, which are attempts to persuade the jurors to put themselves in the place of the victim or the injured person and deliver the verdict that they would wish to receive if they were in that person's position. *See State v. DeLain*, 2004 WI App 79, ¶ 23, 272 Wis. 2d 356, 679 N.W.2d 562; *Rodriguez v. Slattery*, 54 Wis. 2d 165, 170, 194 N.W.2d 817 (1972). Golden rule arguments divert the jury's attention from the relevant questions in the case and can be grounds for a mistrial. *Id*. An appeal to the golden rule may be explicitly obvious (as it was in *Rodriguez*, an auto accident case involving an injured child, where plaintiff's counsel argued in closing that "if it was your seven-year-old, I don't think you would go for" the defendant's suggestion of a $4,000 damage award), or may be more nuanced (such as by using the "reptile theory"). The jury should not be asked to "put themselves in the shoes of the plaintiff" and decide what they themselves would want, but instead should be called upon to search for the truth from the evidence before them.

Miscellaneous Motions

> **Motion *in Limine* #25 (SOCIAL SECURITY DISABILITY): Plaintiff should be prohibited from introducing evidence that they have been determined disabled by the Social Security Administration and receive SSDI benefits.**

Following the subject accident, plaintiff was determined disabled by the Social Security Administration (SSA) and receives Social Security Disability Insurance (SSDI) benefits. Social Security determinations depend on standards that are specific to the Social Security context. *See, e.g.,* 20 CFR Section 404.1505; *Crawford and Company v. Apfel*, 235 F 3rd 1298 (11th Circuit 2000). Whether plaintiff has been determined disabled by the SSA and/or whether they receive SSDI benefits is irrelevant to the issues to be decided by the jury in this case and would be prejudicial if improperly considered by the jury.

> **Motion *in Limine* #26 (WITNESS CREDIBILITY): Witnesses should be prohibited from commenting on the credibility of other witnesses.**

The Court should enter an order precluding witnesses from commenting on the credibility of other witnesses. It is well established that a witness may not testify that another witness is telling the truth. *See State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Such testimony is inadmissible because it invades the province of the jury. *State v. Tutlewski*, 231 Wis. 2d 379, 381-82, 605 N.W.2d 561 (Ct. App. 1999). Functioning as a virtual "lie detector in the courtroom," it is the jury's role to weigh witness testimony and determine the truthfulness of each witness. *See Haseltine*, 120 Wis. 2d at 96. "Expert testimony does not assist the factfinder if it conveys to the jury the expert's own beliefs as to the veracity of

another witness." *State v. Maday*, 2017 WI 28, ¶ 34, 374 Wis. 2d 164, 892 N.W.2d 611 (citations omitted). "The jury is the sole judge of credibility of the witnesses, and a witness who comments on the veracity of another witness usurps this role instead of assisting the jury in fulfilling it." *Id*.

Motion *in Limine* #27 (PRIOR CONVICTIONS): Defendant should be permitted to introduce evidence of plaintiff's prior conviction(s).

Wisconsin has long held that criminal convictions are probative of a witness's credibility. *State v. Smith*, 203 Wis. 2d 288, 294-99, 553 N.W.2d 824 (Ct. App. 1996). It is within the circuit court's discretion to determine whether to admit evidence of prior convictions for impeachment purposes. *State v. Gary M.B.*, 2004 WI 33, ¶ 19, 270 Wis. 2d 62, 676 N.W. 2d 475 (citing *State v. Kruzycki*, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995)).

Wis. Stat. § 906.09 governs the admission of prior criminal convictions for the purposes of impeaching a witness's character for truthfulness. *Id*. at ¶ 20. It provides, in pertinent part:

> (1) General Rule. For the purpose of attacking character for truthfulness, a witness may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications.

Under Wis. Stat. § 906.09, any prior conviction is relevant to a witness's character for truthfulness. *Gary M.B.*, 270 Wis. 2d 62, ¶ 21. Wisconsin law presumes that criminals are less truthful than persons who have not been convicted of a crime. *Id*. The crimes themselves do not need to be relevant to a person's character for truthfulness and it is unnecessary to directly link the nature of the offense with the character trait for truthfulness. *Id*. ¶ 23. (citing 7 Daniel D. Blinka, Wisconsin Practice: Wisconsin Evidence § 609.1, at 417-18 (2d ed. 2001)). Further, Wisconsin does not follow the federal rule, which bars convictions more than ten years old. *Id*. ¶ 23 (citing Wis. Stat. § 906.09 Judicial Council Committee Note (1974)).

The only limitation is that courts must perform a balancing test to determine whether the probative value of the prior conviction is substantially outweighed by the danger of unfair prejudice. Wis. Stat. § 906.09(2). Here, plaintiff was convicted of [crime]. The nature and gravity of the crime outweighs any danger of unfair prejudice. Pursuant to well-established Wisconsin law, this conviction directly affects plaintiff's credibility. Therefore, pursuant to Wis. Stat. § 906.09, defendant should be permitted to inquire of plaintiff whether they have been convicted of a crime and how many times.

Motion *in Limine* #28 (SETTLEMENT OFFERS): Plaintiff (and their counsel and their witnesses) should be prohibited from mentioning or referencing settlement discussions, offers, and/or payments at trial.

Under Wis. Stat. §§ 904.08 and 904.085, evidence of settlement offers, as well as "statements made in compromise negotiations," are not admissible to prove liability or the amount of a claim. *See also Estate of Hegarty v. Beauchaine*, 2006 WI App 248, ¶ 99, 297 Wis. 2d 70, 727 N.W.2d 857 ("The general rule is that settlement agreements are not admissible to prove liability."). As such, plaintiff (and their counsel and their witnesses) should be prohibited from mentioning or referencing settlement discussions and offers at trial, including any statutory offers made under Wis. Stat. § 807.01.

Additionally, the Court should enter an order precluding plaintiff from introducing evidence that defendant made payments towards plaintiff's medical expenses and/or property damages at trial. Pursuant to Wis. Stat. § 904.09, "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." Similarly, Wis. Stat. § 885.285(1) provides that no admission of liability may be inferred from payments made for bodily injury, death, or property damage:

> **Settlement and advance payment of claim for damages.**
>
> **(1)** No admission of liability shall be inferred from the following:
>
> (a) A settlement with or any payment made to an injured person, or to another on behalf of any injured person, or any person entitled to recover damages on account of injury or death of such person; or
>
> (b) A settlement with or any payment made to a person or on the person's behalf to another for injury to or destruction of property.
>
> **(2)** Any settlement or payment under sub. (1) is not admissible in any legal action unless pleaded as a defense.

Accordingly, the fact that defendant paid some or all of plaintiff's medical expenses and/or property damages is not admissible to prove liability at trial in this matter.

> **Motion *in Limine* #29 (SEQUESTRATION): Defendant requests sequestration of all non-party witnesses.**

Under Wis. Stat. § 906.15, the defendant requests exclusion of non-party witnesses from the trial so that they cannot hear the testimony of other witnesses. The defense further requests an order that all excluded witnesses be kept separate until called, and that counsel be directed to inform all witnesses that they are not to communicate with other witnesses until after each such witness's testimony has been completed.

Sequestration upon a party's motion was formerly discretionary, but is now mandatory under Wis. Stat. § 906.15, except where one of the statutory exceptions is met. *See Bagnowski v. Preway, Inc.*, 138 Wis. 2d 241, 250, 405 N.W.2d 746 (Ct. App. 1986) (citation omitted). In *Bagnowski*, the trial court's refusal to sequester a witness was held to be error where there was no statutory exception being asserted. *Id.* Similarly, in *James v. Heintz*, 165 Wis. 2d 572, 478 N.W.2d 31 (Ct. App. 1991), the appellate court stated:

> Rule 906.15's command is mandatory subject to its terms. A court may not deny the request unless the witness fits into one of three exempted categories.

Id. at 582 (internal citation and quotation omitted). The purpose of sequestration is to assure a fair trial; specifically, to prevent a witness from "shaping his [or her] testimony" based on the testimony of other witnesses. *State v. Evans*, 2000 WI App 178, ¶ 6, 238 Wis. 2d 411, 617 N.W.2d 220 (cited source omitted).

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<u>Motion *in Limine* #30 (COURT RULINGS)</u>: Each witness should be advised of the Court's rulings on motions *in limine* so that inappropriate testimony is not given.

The Court should enter an order requiring counsel to advise each witness of the Court's ruling on motions *in limine*. Whether certain evidence is admissible is a question for the Court. Wis. Stat. § 901.04(1) ("… the admissibility of evidence shall be determined by the judge …"). Evidentiary questions are properly resolved at the circuit court's discretion. *Grube v. Daun*, 213 Wis. 2d 533, 541-42, 570 N.W.2d 851 (1997). A trial court has significant discretion in the admission of testimony and evidence and may serve as a gatekeeper to exclude evidence of questionable reliability. *State v. Peters*, 192 Wis. 2d 674, 689-90, 534 N.W.2d 867 (Ct. App.1995). If this gatekeeping function is to be preserved, counsel should be ordered to inform each witness prior to taking the stand of the Court's rulings on these motions *in limine*, *i.e.*, the topics and subjects of testimony which are not admissible at trial. Such an order will keep the presentation of admissible evidence clean and orderly, will prevent wasting the Court's and the jury's time with sidebars and evidentiary rulings, and will significantly reduce the potential for unfair prejudice, confusion of the issues, and a mistrial.

Contributor Biographies:

Andrea P. Goode is an attorney at Borgelt, Powell, Peterson & Frauen, S.C. in Milwaukee. She earned a bachelor's degree from the University of Illinois in 1999 and a law degree from Washington University School of Law in 2002. Her areas of practice include commercial and personal auto liability, construction defect litigation, first party property insurance issues, homeowner's insurance analysis and litigation, insurance coverage analysis and litigation, premises liability, product liability litigation, and trucking and common carrier litigation. She is admitted in all Wisconsin and Illinois state courts, as well as the Eastern District of Wisconsin, Western District of Wisconsin, and Central District of Illinois. In addition to WDC, Andrea is a member of the State Bar of Wisconsin, Association for Women Lawyers, and the Claims and Litigation Management Alliance.

John R. Shull is a partner at Klinner Kramer & Shull in Wausau. He has a bachelor's degree from Southern Illinois University and a law degree from the Marquette University Law School. He is a certified civil trial attorney by the National Board of Trial Advocacy. John is admitted to practice in all Wisconsin state and federal courts, as well as the Menominee Tribal Court. In addition to WDC, John is a member of the State Bar of Wisconsin, American Bar Association, and the Marathon County Bar Association.

Monte E. Weiss, Case Western Reserve Univ., 1991, of Weiss Law Office, S.C., Mequon, practices primarily in the defense of bodily injury, property damage, and professional negligence claims for insurance companies and self-insured companies. In conjunction with this area of practice, he has drafted several personal lines insurance policies, including homeowner and automobile policies. He routinely represents insurance companies on insurance contract interpretation issues and is a frequent lecturer and author on insurance topics. He also represents policyholders dealing with coverage denials from their carriers. He is currently on the Executive

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Committee the Wisconsin Defense Counsel and serves at the Program Chair and is also the chair of the Insurance Law Committee and Amicus Committee. Attorney Weiss can be reached at via his firm's website at www.mweisslaw.net.

Patricia (Patti) Epstein Putney is a Shareholder at Bell, Moore & Richter, S.C. in Madison. She obtained her Bachelor of Arts degree in Art History from Bryn Mawr College in 1984 and her Juris Doctor degree from Brooklyn Law School in 1989. She moved from New York City to Madison in 1995. Patti's practice area relates to the defense of all types of civil litigation. This includes defense of physicians, nurses, and other health care professionals in medical malpractice cases, as well as in licensing, disciplinary and credentialing disputes. She regularly defends personal injury and wrongful death actions, including automobile accidents, premises liability, products liability, insurance agent negligence as well as insurance coverage disputes. Patti has had numerous jury trials throughout the state, has litigated in federal courts and appellate courts and has argued before the Wisconsin Supreme Court and the 7th Circuit Court of Appeals. Patti is a member of the State Bar of Wisconsin, Wisconsin Defense Counsel and the Dane County Bar Association. She also started a group called "Lawyer Moms" for working women lawyers with children.

Heather L. Nelson is President and Shareholder at The Everson Law Firm in Green Bay. She is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back to her Green Bay roots. Her practice areas include motor vehicle accidents, premises liability, wrongful death, and products liability. Heather is currently the Secretary/Treasurer of WDC.

Vincent (Vince) J. Scipior is a shareholder at Coyne, Schultz, Becker & Bauer, S.C. where he practices insurance defense, personal injury, professional liability, long-term care defense, and general litigation. He received his bachelor's degree in 2007 from the University of Wisconsin-Madison and his J.D. in 2011 from the University of Wisconsin Law School. He is admitted to practice in all Wisconsin state and federal courts. He has tried cases in Adams, Columbia, Grant, Green, and Dane Counties. Vince is the current Journal Editor of the Wisconsin Civil Trial Journal and a frequent content contributor. In addition to WDC, Vince is a member of the American Inns of Court James E. Doyle Chapter, the Dane County Bar Association, and the State Bar of Wisconsin. He was recognized as a 2017 Up and Coming Lawyer by the Wisconsin Law Journal and has been included in the Wisconsin Rising Stars List by Super Lawyers Magazine since 2016.

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News from Around the State: Trials and Verdicts

Kevin S. Callahan v. Organic Ventures, Inc., et al
Buffalo County Case Number 20-CV-08
Trial Dates: September 28-29, 2022

Facts: Plaintiff fell off a loading dock as he was attempting to lift a dock plate that he says was not working properly. As he did, he lost his balance and fell through the opening between the side of the truck and the wall of the loading dock. He sustained a fracture to his wrist which required surgery and the permanent placement of hardware. The surgeon indicated that plaintiff had made a complete recovery, had no permanent injury, and would not require future medical care.

Issues for Trial: The parties stipulated to $58,369.62 in past medical bills and $2,356.56 in past wage loss. Liability and general damages were contested.

At Trial: Plaintiff presented evidence that the bumpers on the outside of the dock were in disrepair. As a result of the damaged bumpers, it was argued that it was difficult to line up the delivery truck and that a gap was created between the side of the truck and the building. Plaintiff also presented evidence of a subsequent remedial measure that the dock owner put up a sign after the accident advising drivers that they should not operate the dock plate.

Defendant contended that there was a rule in place that delivery drivers should not operate the dock plate and that the dock plate functioned properly both before and after the incident. Defendant submitted evidence that the plaintiff attempted to place the dock plate on two occasions and, rather than ask for help, attempted a maneuver to where he bent over to lift the dock plate with his hand. The defendant further suggested that if the jury found that it was negligent to not repair the bumpers on the dock, that such negligence was not a cause of the fall and only affected where the plaintiff landed.

Regarding damages, plaintiff presented evidence of ongoing pain and limitations to the wrist but had to concede that he had not returned to the surgeon or any other doctor since he was released from care three year earlier.

Plaintiff's counsel asked for $60,000 for past pain, suffering and disability and $60,000 for future pain, suffering and disability. Defendant asked for $14,000 to $18,000 for past pain, suffering, and disability and left it to the jury's discretion as to whether the evidence supported an award for future pain, suffering and disability.

The jury awarded $15,000 for past pain, suffering and disability and no future general damages. The jury found that defendant was negligent in its maintenance of the premises but that such negligence was not a cause of the plaintiff's fall. The jury further found that the plaintiff was negligent as to his own safety and such negligence was a cause of his fall, resulting in no recovery.

Plaintiff's Final Pre-Trial Demand: $275,000 (but plaintiff indicated he would accept $75,000)
Defendant's Final Pre-Trial Offer: $15,000
Verdict: $0

For more information, contact Rick E. Hills at rhills@hillslegal.com.

Sydney L. Jepson v. Richard E. Boland, et al.
La Crosse County Case No. 20-CV-163
Trial Dates: September 26-28, 2022

Facts: Plaintiff was claiming vision problems and headaches from an accident.

Issues for Trial: Causation and damages were contested.

At Trial: Plaintiff had an IME doctor testify that she would need future vision therapy (five times at a cost of $6,500 each), headache medication ($1,500 per year with a life expectancy of 57 years), and prism glasses (three times at a cost of $1,000 each).

The defense attacked the plaintiff's IME doctor's credibility on the grounds that the doctor never spoke with plaintiff or treated her, and plaintiff had never been prescribed medication for headaches, additional vision therapy, or prism glasses by her treating doctors. The defense used Dr. Joseph Burgarino, MD as their IME doctor.

During trial, a juror claimed her notepad had been tampered with. It was ripped and someone had written in the back, "Are you positive?" Given that the notepads are recycled and reused by juries, the judge was not concerned but said she would check with her cleaning crew.

At the end of trial, plaintiff asked the jury to award $21,974 in past medical expenses, $120,000 in future medical expenses, $932 in lost wages, $75,000 for past pain, suffering and disability, and $150,000 for future pain, suffering and disability.

The defense asked the jury to award past medical expenses of $11,900, $25,000 to $35,000 for past pain, suffering and disability, and no future damages.

The jury began deliberations on day three. One of the excused alternate jurors indicated to defense counsel that he did not find Dr. Burgarino to be credible and that he would have awarded plaintiff approximately $47,000 in past and future medical expenses.

Within a half an hour of the jury stepping out for deliberations, the parties were called back into court. The court read a note from a juror with four questions:

1. What settlement offer(s) have been made by the insurance company?
2. Were the settlement offers rejected?
3. Can we view evidence: all exhibits and video?
4. When did plaintiff seek legal counsel?

The judge was upset that a rogue juror was introducing concepts to the jury and was discussing them without following her instructions (*i.e.,* the only discussion should be about the evidence presented during the trial). Based on the questions presented the judge did not feel that she could rehabilitate the jury by providing any type of corrective instruction. It was her wish to declare a mistrial and both sides agreed based upon the record.

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Plaintiff's Final Pre-Trial Demand: $120,000
Defendant's Final Pre-Trial Offer: $45,000
Result: Mistrial

For more information, please contact Kara M. Burgos at kburgos@msm-law.com.

Jay Sebok, et al. vs. West Bend Mutual Insurance Company, et al.
Dane County Case No. 20-CV-2312
Trial Dates: August 29, 2022 to September 1, 2022

Facts: Plaintiff was rear-ended by defendant on Mineral Point Road waiting to get onto the beltline eastbound ramp. Defendant approached plaintiff's vehicle stopped in the turn lane, waiting to enter the on-ramp. It had snowed overnight, and the roads were in varying stages of clearing. As defendant approached, she braked but ultimately bumped into plaintiff's rear end. An accident reconstructionist opined that the collision was 4-6 mph with only damage to the plastic bumper and some minor intrusion into the trunk space. Plaintiff got out of his car after the accident, checked on defendant, called the police, and was instructed to drive up the road to a location out of traffic. Once in a parking lot further down Mineral Point, plaintiff and defendant again exited their vehicles and checked on each other, exchanged information, and all appeared in no physical distress. Police arrived, took a report, issued no citation, and all involved drove away to school and work. Later that day, plaintiff complained of neck pain at the urgent care. Two months later, plaintiff made a complaint of lumbar tenderness and went through an initial round of PT. Plaintiff began treating extensively with a physical medicine and rehabilitation specialist who provided numerous injections and eventually recommended a spinal cord stimulator. Plaintiff also went to 165 PT appointments over the ensuing 3 years before trial as well as chiropractic care and massage therapy. Nothing has relieved his pain that developed after the accident.

Issues for Trial: Liability was stipulated, but the facts of the collision and how the parties appeared on scene was allowed into evidence. Relatedness and the value of damages were thoroughly contested.

At Trial: Plaintiff asked for $3,600,000 including $2,000,000 for future pain and suffering. The jury awarded $778,217.46. This number included the defense expert on reasonableness of bills number and defense counsel's numbers for all other damage categories.

Plaintiff's Final Pre-Trial Demand: $950,000
Defendant's Final Pre-Trial Offer: $600,000
Verdict: $778,217.46

For more information, contact Adam M. Fitzpatrick at fitzpatricka@corneillelaw.com or Alyssa Chojnacki at chojnackia@corneillelaw.com.

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Thomas De La Rosa, et al. v. SECURA Insurance, A Mutual Company, et al.
Waukesha County Case Number 18-CV-1460
Trial Dates: August 30-31, 2022

Facts: The plaintiff was involved in a rear-end accident on December 23, 2015. He had left his pain management doctor's office one hour earlier with a diagnosis of failed anterior two-level cervical fusion. The plaintiff moved to California three months after the accident. He had a posterior three-level cervical fusion on April 28, 2017. After that surgery, the plaintiff developed adjacent disc disease and the surgeon believed another surgery was necessary because of the accident.

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

At Trial: Plaintiff asked for $239.380.17 in past medical bills, $199,375.00 in future medical bills, $100,000 to $200,000 for past pain, suffering and disability, and $100,000 to $200,000 for future pain, suffering and disability.

The defense argued that the accident resulted in a temporary aggravation of a pre-existing condition for a period of no more than three months. The defense argued that $4,000 to $6,000 would be an appropriate award for past pain, suffering and disability.

The jury awarded $5,150.50 in past medical expenses, $15,000 for past pain, suffering and disability, and no future damages.

Plaintiff's Final Pre-Trial Demand: $900,000.00
Defendant's Final Pre-Trial Offer: $20,000.00
Verdict: $20,150.50

For more information, contact Rick E. Hills at rhills@hillslegal.com.

Saddle Mound Cranberry Company, Inc. v. Daniel Mullins, et al.
Jackson County Case No. 19-CV-155
Trial Dates: August 23-24, 2022

Facts: Defendant logging company was hired by plaintiff to log plaintiff's land. Plaintiff claimed after the fact that defendant: 1) harvested trees that were outside the scope of the parties' written agreement; 2) failed to pay for all timber harvested; and 3) harvested in an area not authorized by the contract. The claim regarding harvesting in an unauthorized area was dismissed on summary judgment.

Issues for Trial: Liability and damages.

At Trial: The owners of the plaintiff company testified that they saw logging trucks entering and exiting their property hauling severed timber on dates that were not covered by any of the payments and receipts they received from the defendant. They also testified regarding alleged damage to the land caused by the defendant's logging equipment. The plaintiff's expert testified regarding his observations of logging site and that he calculated that the defendant failed to pay for 141.67 cords of wood that were harvested, which

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represented 6.2% of all the timber harvested during the project. Neither the expert nor any other plaintiff witness testified regarding the value of the trees harvested, nor the costs to repair any of the alleged damage.

The Court granted the defense's motion for a directed verdict at the close of the plaintiff's case based on the plaintiff's failure to present any evidence of damages.

Plaintiff's Final Pre-Trial Demand: $474,000
Defendant's Final Pre-Trial Offer: $11,500
Verdict: $0

For more information, contact Nicole Marklein at nmarklein@cjmmlaw.com.

Michael E. Uttke, et al. v. Erie Insurance Exchange, et al.
Fond du Lac County Case No. 20-CV-315
Trial Dates: August 3-5, 2022

Facts: Plaintiff was rear-ended while at a stop waiting for oncoming traffic to clear.

Issues for Trial: Damages and Liability.

At Trial: Plaintiff claimed $184,134.52 in past and future medical costs for Delta 8 marijuana and radiofrequency ablations. Plaintiff asked the jury to return a total verdict of $484,134.52.

The defense argued that plaintiff suffered an aggravation of a pre-existing condition. Further, the defendant driver claimed there was no oncoming traffic and no clear reason plaintiff was stopped in the roadway.

The jury awarded $80,000 in damages and found plaintiff 25% negligent.

Plaintiff's Final Pre-Trial Demand: Over $100,000
Defendant's Final Pre-Trial Offer: $70,000
Verdict: $60,000

For more information, contact Todd C. Dickey at tdickey@eversonlaw.com.

John Bromfield, et al. v. Prairie Rock Landscapes, Inc., et al
Walworth County Case No. 19-CV-753
Trial Dates: August 1-2, 2022

Facts: The 80-year-old plaintiff fell at his own town home on January 10, 2017, when he went outside at 6:45 a.m. to pick up his newspaper. He fell on black ice on his driveway and fractured his femur. Complications kept the plaintiff hospitalized or in rehabilitation facilities for over two months. The plaintiff sued the townhome owners' association and the snowplow contractor. Despite the fact the board

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for the townhome owners' association was not paid and had no employees, the court found the owners' association was subject to the safe place statute. The court also found that the snowplow contractor was subject to the safe place statute because he hired employees who worked on the premises. The townhome owners' association settled under a *Pierringer* Release.

Issues for Trial: Liability and damages were contested.

At Trial: The plaintiffs presented testimony from a snowplow expert from Pennsylvania to show the snowplow contractor could have been using more efficient measures of monitoring the weather conditions. The plaintiffs also presented testimony from a meteorologist to show what advance weather warnings had been issued by local and national weather services. The meteorologist also discussed the lighting conditions based upon a sunrise about 35 minutes after the fall. Defense presented testimony that the plaintiff was wearing inappropriate clothing (bath robe and slippers), that the plaintiff did not turn on the outside light, and that the plaintiff walked on the grass to and from picking up the paper suggesting that he knew there had been freezing rain. The snowplow contractor had also provided plowing and salting services about six to seven hours before the accident. The parties stipulated to past medical expenses of $306,553.45. Plaintiff's counsel asked for $1 million in past pain and suffering and $1 million for future pain and suffering.

The jury found defendant not negligent in their maintenance of the premises and plaintiff negligent with regard to his own safety. The jury also found that the settling party was not negligent.

Plaintiff's Final Pre-Trial Demand: "At least six figures."
Defendant's Final Pre-Trial Offer: $15,000.00
Verdict: $0.00

For more information, contact Rick E. Hills at rhills@hillslegal.com.

Ian M.S. Flaws, et al. v. SECURA Insurance Company
Dane County Case No. 21-CV-135
Trial Dates: April 18-19, 2022

Facts: The plaintiff claimed underinsured motorist benefits arising out of an accident on June 12, 2019. The plaintiff was driving a vehicle for his employer when another vehicle attempted a U-turn from the right lane as the plaintiff was traveling in the left lane. The plaintiff alleged an injury to the spine which required a two-level disc replacement surgery.

Issues for Trial: The parties stipulated to a 90/10 liability split. The only issue for trial was damages.

At Trial: Plaintiff's counsel advised the jury in opening statement that he would be asking for $1 million at the close of the case for pain and suffering. The plaintiff was 35 years old at the time of trial. Defense argued that plaintiff had symptoms which pre-dated the accident and that surgery was already being contemplated. Plaintiff focused on the fact that the accident was "a" cause of the surgery. Defendants argued that even if the surgery was related, plaintiff was functioning better than before the accident and was able to work as a plumber.

The jury awarded $75,358.13 in past medical expenses, $18,240.00 in past wage loss, $160,000.00 in past pain and suffering and $60,000 in future pain and suffering, for a total award of $313,598.13. The net recovery for the plaintiff after applying reducing clauses for worker's compensation payments and settlement with the underlying carrier was $257,000.

Plaintiff's Final Pre-Trial Demand: $650,000
Defendant's Final Pre-Trial Offer: $100,000
Verdict: $257,000

For more information, contact Rick E. Hills at rhills@hillslegal.com.

NOTES

Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

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Calendar of Events

December 9, 2022
2022 WDC Winter Conference
Milwaukee Marriott West
Waukesha, WI

April 13-14, 2023
2023 WDC Spring Conference
The American Club
Kohler, WI