Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

#WDCAnnual2023

2023 Annual Conference

August 10 - 11, 2023

The Wilderness Resort and
Glacier Canyon Conference Center
45 Hillman Rd.
Wisconsin Dells, WI 53965

Program Chair:
Grace Kulkoski
Wisconsin Mutual Insurance Company

Schedule of Events & More Information inside!

Approved for 8.0 CLE Credits.

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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Schedule of Events

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8:00 - 8:55 AM
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Sponsored by Corneille Law Group, LLC

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Opening Remarks

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Safe Place: Case Update and Practice Tips
John Becker, Becker French

9:50 – 10:00 AM
Break
Sponsored by Bell, Moore & Richter, S.C.

10:00 - 10:50 AM
Arrest & Developments in Liability for Negligent Hiring Claims
Storm Larson, Boardman & Clark, LLP, and Jenna Rousseau, Renning, Lewis & Lacy, S.C.

10:50 – 11:00 AM
Break
Sponsored by S-E-A, Ltd.

11:00 - 11:50 AM
Medical Payments Subrogation, The Made Whole Doctrine and the Mythical Rimes Hearing
Phil Theesfeld, Weiss Law Office, S.C.

11:50 AM - 1:00 PM
Lunch & Annual Business Meeting

1:00 PM - 1:50 PM
"My Whole Body Still Hurts… and it must be from that rear-ender 4 years ago!" – Or is it? A Candid Discussion with a Primary Care Doctor About Potential Physical and Mental Contributors to Ongoing Pain Complaints
Patti Putney, Bell, Moore & Richter, S.C., and Dr. Anne Eglash, UW Health

1:50 – 2:00 PM
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2:00 PM - 2:50 PM
In-House/Outside Counsel Relations
Moderator: *Ariella Schreiber, Rural Mutual Insurance*
Panelists: *Adam Fitzpatrick, Corneille Law Group, LLC, and Nicole Weir, Great American Insurance Co.*

Thursday, August 10, 2023 continued

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Friday, August 11, 2023

8:00 - 8:55 AM
Registration & Continental Breakfast

9:00 - 9:50 AM
Motor Vehicle Inspections – The Importance of Early Investigations and Legal Considerations Regarding Notice and Preservation of Evidence
Chris Bandt, Nash, Spindler, Grimstad & McCracken, LLP, and Paul Erdtmann, Skogen Engineering

9:50 – 10:00 AM
Break
Sponsored by Weiss Law Office, S.C.

10:00 - 10:50 AM
How to Avoid a Bad Faith Claim: Best Practices for Insurance Companies
Sean Bukowski, Meissner Tierny Fisher & Nichols, S.C.

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Sponsored by Weiss Law Office, S.C.

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Unconscious Bias – Knowing What You Don't Know
Judge Derek Mosley, Marquette Law School

11:50 AM
Adjourn

Speaker Biographies

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

John Becker graduated magna cum laude from the University of Wisconsin-Parkside in 1979, and the University of Wisconsin-Law School in 1982. He was certified by the National Board of Trial Advocacy in 1988 and practices in Racine. Although now semi-retired, he has handled personal injury and workers compensation matters for over 40 years. He has argued numerous cases in the Wisconsin Supreme Court and Court of Appeals. He has recently updated the Boyle safe place book, "Wisconsin Safe-Place Law, third edition" and has also published "Recreational and Governmental Immunity in Wisconsin."

Sean A. Bukowski is an attorney with Meissner Tierney Fisher & Nichols' litigation group where he primarily represents insurers and their insureds in civil matters involving liability and coverage issues. Additionally, he advises insurers on extra-contractual claims, including bad faith and duty to defend issues. He is a frequent presenter on insurance litigation matters. Sean earned his Juris Doctorate from Marquette University Law School in 2016 and is currently admitted to practice law in Wisconsin and Michigan state courts in addition to the U.S. District Court for the Western and Eastern District in Wisconsin.

Anne Eglash MD, IBCLC, FABM, is a clinical professor with the University of Wisconsin School of Medicine and Public Health, in the Department of Family and Community Medicine.

Dr. Eglash received her MD in 1986 from the University of Wisconsin School of Medicine and Public Health and completed her family medicine residency in 1989 at Temple University Lancaster General Hospital in Lancaster Pennsylvania. She worked for 5 years in Los Angeles California in private practice and as volunteer faculty for University of California Los Angeles Family Medicine Residency in Santa Monica CA, before returning to Madison Wisconsin in 1994.

She has practiced both inpatient and outpatient family medicine until 2016, after which she has continued to practice outpatient family medicine. Her patient population encompasses all ages, from birth to elderly. She teaches a variety of health professional students and residents.

In addition to family medicine, she has been practicing breastfeeding medicine since 1994, and is the medical director of the University of Wisconsin Breastfeeding and Lactation Medicine Clinic.

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- Financial Condition Analysis
- Piercing the Corporate Veil & Alter Ego Matters
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  - Whistleblower Investigations
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Speaker Biographies *continued*

Dr. Eglash is currently the Medical Director of the Mothers' Milk Bank of the Western Great Lakes and is the president of The Institute for the Advancement of Breastfeeding and Lactation Education (IABLE), as well as a cofounder and the inaugural president of the North American Board of Breastfeeding and Lactation Medicine.

Paul Erdtmann is a consulting engineer with Skogen Engineering Group in Madison, Wisconsin. Mr. Erdtmann received his Bachelor of Science Degree in Electrical Engineering from Northwestern University in 1993, and his Master of Science Degree in Mechanical Engineering from the University of Wisconsin – Madison in 2012. Prior to working at Skogen Engineering Group for the past 18 years, Mr. Erdtmann worked in the automotive industry for 13 years with positions at Ford Motor Company, Visteon, and Autoliv. Mr. Erdtmann has also been a Registered Professional Engineer in the state of Wisconsin since 2006.

Having started his career with 15 years in the healthcare industry, **Adam Fitzpatrick** brings a unique and comprehensive perspective to his work as an attorney. Adam's experience in both hospital and pre-hospital settings, as well as work as a fire fighter and paramedic, shaped his understanding of healthcare and medicine and particularly inform his work as a litigator defending providers from medical malpractice claims. His work also encompasses a range of general liability defense cases, from personal injury to large construction losses.

Prior to joining Corneille Law Group, Adam served as a judicial law clerk for the Honorable Juan Colás, Julie Genovese, and Rhonda Lanford at the Dane County Circuit Court. He is a member of the Corneille Law Group Madison medical negligence team, which garnered a first tier ranking by *U.S. News and World Report: Best Law Firms*® for medical malpractice defense in 2022.

Most recently, Adam successfully completed a rigorous application and testing process to achieve Board Certification as a civil practice advocate from the National Board of Trial Advocacy (NBTA), a distinction only achieved by approximately three percent of attorneys.

Storm Larson practices primarily in the area of labor and employment law. Prior to joining Boardman Clark, Storm was an attorney with a local Madison law firm where he advised and represented clients in a variety of civil issues including general liability defense and labor and employment law.

Prior to graduating law school and starting his practice, Storm served as a judicial intern for the Honorable William Conley as well as the Honorable Ann Walsh Bradley.

Derek Mosley graduated from Marquette University Law School in 1995. After graduation he served as an Assistant District Attorney for Milwaukee County from 1995-2002. As an Assistant District Attorney, he represented the State of Wisconsin in over 1,000 criminal prosecutions. In 2002, Mr. Mosley was appointed Municipal Court Judge in Milwaukee. At the time of his appointment, he was the youngest African-American to be appointed judge in the State of Wisconsin. For ten years Mr. Mosley served as the Chief Judge of the Milwaukee Municipal Court. In 2023, Mr. Mosley became the Director of the Lubar Center for Public Policy Research and Civic Education at Marquette University Law School.

Judge Mosley sits on the Board of Directors of several organizations including Froedtert Hospital, the Urban Ecology Center, the YMCA of Metropolitan Milwaukee, Safe & Sound, Divine Savior Holy Angels High School, the United Way Diversity Leadership Committee, and Transcenter for Youth. He has been a lecturer at both Marquette University Law School as well as the University of Wisconsin-Milwaukee. He sits on the Supreme Court of Wisconsin's Judicial Education Committee. He received the Leaders in

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Speaker Biographies *continued*

the Law Award from the Wisconsin Law Journal. He was inducted into the Milwaukee Community Journal's Academy of Legends, named one of the Philanthropic 5 by the United Way, recipient of the Dean Howard B. Eisenberg Public Service Award from Marquette University Law School, voted "Jurist of the Year" by the Justinian Society of Lawyers, Professional of the Year by ONEMKE & The United Way, named Law Enforcement Official of the Year by Safe & Sound, received the William C. Frye Civic Engagement Award from the Greater Milwaukee Foundation, was named "Milwaukeean of the Year" and "Milwaukee's Most Trusted Public Official" by the Shepherd Express, was inducted into the Milwaukee Business Journal's 40 Under 40 Hall of Fame, and received the Robert H. Friebert Social Justice Award from the Milwaukee Jewish Federation. Judge Mosley routinely speaks both nationally and internationally about Unconscious Bias and Black History. Also, as a kidney transplant recipient, he is an ardent supporter of Donate Life Wisconsin, the National Kidney Foundation, and Versiti (formerly the Blood Center of Wisconsin). He currently serves as a Donate Life Hollywood advisor to the television and movie industries to promote accurate depictions of organ donation and transplant on television and in movies. In his spare time, Judge Mosley is a local Milwaukee foodie, and served as a 2022 James Beard Judge for the James Beard Foundation.

Patricia (Patti) Putney is a Shareholder at Bell, Moore & Richter, S.C. and has been with the firm since 2002. Patti is a graduate of Bryn Mawr College (1984) and Brooklyn Law School (1989). She moved to Wisconsin from New York in 1995 and is a proud Packer fan at this point – she even has a cheese hat. The majority of Patti's practice involves the defense of civil litigation, including general liability defense, medical and professional malpractice defense, insurance coverage, and other related matters. She has tried numerous cases in courts throughout the state. She is also now mediating cases so give her a call! Patti was previously an associate at Peterson, Johnson & Murray, SC (Madison), Bower & Gardner (NYC) and Wilson, Elser, Moskowitz, Edelman & Dicker (NYC). Patti has served two 2-year terms on the Board of Governors for the State Bar, as well as held leadership positions on the Litigation Section, including Chair. She is currently the Chair of the Anti-Sexual Harassment Oversight Committee for the State Bar. Patti has been voted as a "Superlawyer" every year since 2012 and has been on the "Top 25" list for Madison Lawyers and the "Top 50" for Women Lawyers in the past. She was honored to be selected as a "Woman in the Law" in 2012 by the Wisconsin Law Journal. Patti also started a group called "Lawyer Moms" in the Madison area many years ago, which she is happy to report is still going strong as a networking and support group for women juggling motherhood and the law (now led by Grace Kulkosi). She currently sits on the Board of Wisconsin Defense Counsel and is a frequent contributor to the WDC Journal. Patti mentors younger attorneys regularly and is in charge of BMR's law clerk program. Finally, Patti plays the flute and piccolo in two community orchestras and two woodwind quintets.

Jenna E. Rousseau is a Shareholder Attorney with Renning, Lewis & Lacy, s.c. Her practice areas include Labor & Employment Law and Civil Litigation. She represents public and private employers in connection with discrimination/ retaliation complaints, wrongful termination claims, wage and hour complaints, investigations, discipline and discharge, and employment contract disputes. She also assists employers with employee handbooks, personnel file matters, and general questions related to the application of state and federal employment and labor laws.

Ariella Schreiber joined Rural Mutual Insurance Company in August of 2011 as a Senior Claims Attorney and later served as Director of Casualty Claims and Director of Claims. She became Vice President of Claims and General Counsel in January 2018.

Speaker Biographies *continued*

In her current role, she oversees the Rural Mutual Claims Department and advises the company on legal matters. She also works directly with the agents on E&O education and consults on E&O claims asserted against the agents, along with the E&O carrier.

Prior to joining Rural, Ariella was an attorney in private practice. She specialized in insurance coverage, bad faith, agent E&O, and some personal injury defense. Ariella practiced in both state and federal court and had the opportunity to try over 10 cases. She also handled numerous motions and appeals.

Ariella earned her BS in Engineering at Rutgers University in 2002, her JD from Seton Hall University School of Law in 2005, and her MBA from the University of Wisconsin – Madison in 2017. She is a former President of the Wisconsin Defense Counsel and is on the Board of Directors for Wisconsin Lawyers Mutual Insurance Company.

Phil Theesfeld has been representing insurance companies in property, workers compensation, and medical payments subrogation matters for over 25 years. Over his career, Phil has recovered millions of dollars on behalf of his clients. Phil is also an active member in the National Association of Subrogation Professionals (NASP), and is a frequent speaker at the NASP Annual Conference.

Since graduating from the University of Wisconsin Law School in 2007, Nicole has worked on both sides of the fence in civil litigation. Immediately after graduation, she worked as an associate with a Madison, Wisconsin based firm handling a variety of insurance defense cases, with a focus on medical malpractice. In 2010, she opened a satellite office for a large personal injury firm in Appleton, Wisconsin, allowing her to gain experience as a trial attorney and in office management.

In 2014, **Nicole Weir** transitioned from private practice to in-house counsel with SECURA Insurance Company. Nicole's role at SECURA focused on managing litigated files, reviewing insurance coverage issues, and assisting with a variety of projects within the company. Nicole also oversaw Medicare compliance within SECURA's casualty department and was active on teams to implement Lean/Six Sigma strategies.

In 2022, Nicole joined Great American Insurance Group as Senior Claims Counsel in the Corporate Claims division. Her current role focuses on providing coverage analysis and training to GAIG's various business units.

In her spare time Nicole enjoys spending time with her family, distance running, and competing in triathlons. She is aiming to become a member of the 50 States Club by running a half or full marathon in all 50 states.

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WHAT IS SAFE PLACE LAW?

Employer's duty to furnish safe employment and place.

101.11 (1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

(2)(a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.

(b) No employee shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, nor interfere in any way with the use thereof by any other person, nor shall any such employee interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or frequenter of such place of employment, nor fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees or frequenters.

(3) This section applies to community-based residential facilities as defined in s. 50.01(g).

Safe or safety defined

> **101.01 (13)** "Safe" or "safety", as applied to an employment or a place of employment or a public building, means such freedom from danger to the life, health, safety or welfare of employees or frequenters, or the public, … as the nature of the employment, place of employment, or public building, will reasonably permit.

"Under the common law, premises were merely required to be reasonably safe; but under the safe place statute, liability is imposed if the premises are not kept as free from danger as the nature of the place will reasonably permit."[1]

THE DUTY IS NON-DELEGABLE

The duty is non-delegable and several people may have the same safe place duty. With respect to the plaintiff, an owner cannot escape liability be saying the employer has the duty.

> "[A] building owner's duty under the safe-place statute 'is non-delegable, and therefore [the building owner] must answer to [a plaintiff] for any violation of that duty regardless of whether another party contributed to the violation.'"[2] "
> The duties imposed on employers and property owners under the safe place statute are non-delegable"[3]

> [T]he person who has that duty [under the safe place statute] cannot assert that another to whom he has allegedly delegated the duty is to be substituted as the primary defendant in his stead for a violation of safe place provisions. *Under any circumstance, it is the owner or the employer who must answer to the injured party*.[4]

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[1] *Szalacinski v. Campbell*, 2008 WI App 150, ¶ 27, 314 Wis.2d 286, 760 N.W.2d 420, quoting *Gould v. Allstar,* 59 Wis.2d 355, 361, 208 N.W.2d 388 (1973).

[2] *Wagner v. Cincinnati Cas. Co*., 2011 WI App 85 ¶37, 334 Wis.2d 516, 800 N.W.2d 27, quoting *Barry v. Employers Mut. Cas. Co*., 2001 WI 101, ¶43, 245 Wis.2d 560, 630 N.W.2d 517; *Bain v. Tielens Const., Inc*., 2006 WI App 127, 294 Wis.2d 318, 718 N.W.2d 240. "A duty under the safe place statute, when that statute applies, is non-delegable." At ¶17.

[3] *Dhein v. Frankenmuth Mut. Ins*. Co., 2020 WI App 62, ¶24, ftn. 7, 394 Wis.2d 470, 950 N.W.2d 861, quoting *Barry v. Employers Mut. Cas. Co*., 2001 WI 101, at ¶42.

[4] *Barry v. Employers Mut. Cas. Co*., 2001 WI 101, ¶42, 245 Wis.2d 560, 630 N.W.2d 517, quoting *Dykstra v. Arthur G. McKee & Co.,* 100 Wis. 2d 120, 132, 301 N.W.2d 201 (1981).

> "These duties thus assumed by [defendant] as general contractor cannot be delegated or assigned by subcontracting the work."[5]

INDEMNIFICATION

The parties can have indemnification agreements between themselves.[6]

> "While [defendant] might protect itself financially by indemnity agreements with its subcontractors, it could not divest or rid itself of its primary obligation or immunize itself from liability. The assumption of similar duties by the subcontractors does not relieve [defendant]."[7]

> "The fact that a lease allocates safe place duties between an owner and an employer/tenant does not nullify the mutually shared duties of the owner and the employer under the statute."[8]

(Indemnification provisions are often found in contracts involving subcontractors, where several subcontractors may be on the premises.)

CAUSE OF ACTION

The safe place statute is a cause of action for negligence; it does not create an independent cause of action,

> "It is well established that the safe-place statute does not create a cause of action. It merely lays down a standard of care and if those to whom it applies violate the provisions thereof, they are negligent."[9] Allegations charging safe-place violations allege an act of negligence on the part of the defendant.[10]

> It is not necessary to plead a separate cause of action based on a claimed safe place violation. "[T]he alleged violation of the safe-place

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[5] *Presser v. Siesel Const. Co*., 19 Wis.2d 54, 59, 119 N.W.2d 405 (1963).

[6] *Rural Mut. Ins. Co. v. Lester Buildings, LLC*, 2019 WI 70, 387 Wis.2d 414, 929 N.W.2d 180, citing *Dykstra v. Arthur G. McKee & Co*., 100 Wis. 2d 120, 301 N.W.2d 201 (1981) and *Gerdmann v. United States Fire Ins. Co*., 119 Wis. 2d 367, 350 N.W.2d 730 (Ct. App. 1984). See also *Umnus v. Wis. Public Service Corp*., 260 Wis. 433, 442, 51 N.W.2d 42 (1952).

[7] *Presser v. Siesel Const. Co*., 19 Wis.2d 54, 59, 119 N.W.2d 405 (1963).

[8] *Hannenbaum v. Direnzo and Bomier*, 162 Wis.2d 488, 498, 469 N.W.2d 900 (Ct. App. 1991).

[9] *Hofflander v. St. Catherine's Hosp., Inc*., 2003 WI 77, ¶96, 262 Wis. 2d 539, 664 N.W.2d 545, quoting *Krause v. Veterans of Foreign Wars, Post No. 6498*, 9 Wis.2d 547, 101 N.W.2d 645 (1960); see also *Barry v. Employers Mut. Cas. Co.,* 2001 WI 101, ¶18, 245 Wis.2d 560, 630 N.W.2d 517.

[10] *Thiel v. Bahr Const. Co*., 13 Wis.2d 196, 198, 108 N.W.2d 573 (1961).

statute merely alleged another act of negligence on the part of the defendant. It was not the proper basis for a separate cause of action."[11]

However, often the two claims are alleged separately in the complaint. "This is permissible and desirable practice as the issues are more sharply pointed out."[12]

ESTABLISHES AN ENHANCED DUTY OF CARE

The safe place statute established a higher standard of care for:

Employers
Owners of a place of employment
Owners of public buildings.

EXTENT OF DUTY

Some very early cases established several rules that still hold true today:

1. The owner has an absolute duty to maintain the premises as safe as reasonably possible.[13]
2. It is a heightened duty; anything short of that, and exercising ordinary or even extraordinary care, is not sufficient.[14]
3. The statute is to be liberally interpreted "in favor of life, health, and limb."[15]

However, those same cases also establish

LIMITATIONS TO THE SAFE PLACE DUTY

A. The statute does not require absolute safety.[16]

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[11] *Id.*, at 198.
[12] *Lealiou v. Quatsoe*, 15 Wis.2d 128, 136, 112 N.W.2d 193 (1961).
[13] *Olson v. Whitney Bros. Co.,* 160 Wis. 606, 150 N.W. 959 (1915). see also; *Mullen v. Larson-Morgan Co*., 212 Wis. 52, 60, 249 N.W. 67 (1933), *Gross v. Denow*, 61 Wis.2d 40, 46-47, 212 N.W.2d 2 (1973);
[14] *Olson*, 160 Wis. at 606, *Mullen*, 212 Wis. at 59.
[15] *Tallman v. Chippewa Sugar Co.,* 155 Wis. 36, 39, 143 N.W. 1054 (1913. See also *Du Rocher v. Teutonia Motor Car Co*., 188 Wis. 208, 211, 205 N.W. 921, ftn. 11 (1925).
[16] *Tallman*, 155 Wis. at 39, See also *Viola v. Wis. Elec. Power Co*., 2014 WI App 5, ¶17, 352 Wis.2d 541, 842 N.W.2d 515.

B. An employer or owner might make his place as safe as the nature of the employment will reasonably permit, but still have an "unsafe" place in the common sense of the term.[17]

C. The statute does not impose upon an employer an impossible or an unreasonable burden.[18]

The statute does not make an owner/employer an insurer of someone's safety.[19]

PRESUMPTIONS

The statute creates a presumption that an injury was caused by a violation of the statute.[20] If the presumption is applicable, "some evidence is required to show the failure to perform the duty or defect was not causal."[21] "The presumption may be rebutted, but if not rebutted by evidence, the plaintiff has met his burden of proof."[22]

"The presumption is not conclusive in the face of rebutting testimony."[23] If the presumption of causation applies, it does not establish as a matter of law that the defendant's negligence was greater than the plaintiff's.[24]

PLACES COVERED

PLACES OF EMPLOYMENT

> **Wis. Stats. 101.11(11)** "Place of employment" includes every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade, or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade, or business, is carried on, and where any person is,

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[17] *Olson*, 160 Wis. at 610. See also *Mair v. Trollhaugen Ski Resort,* 2006 WI 61, "Just because a place could be made more safe, it does not necessarily follow that an employer or owner has breached the duty of care…." At ¶19, quoting *Megal*, 2004 WI 98, ¶ 10.

[18] *Olson*, 160 Wis. at 612.

[19] *Zernia v. Capitol Court Corp*., 21 Wis.2d 164, 170A, 125 N.W.2d 705 (1964); *Gross*, 61 Wis.2d at 46-47, "The statute does not make the employer an insurer." More recently, see *Megal v. Visitor & Convention Bureau*, 2004 WI 98, ¶20, 274 Wis.2d 162, 682 N.W.2d 857.

[20] *Erdmann v. Frazin,* 39 Wis.2d 1, 4, 158 N.W.2d 281 (1968).

[21] *Baker v. Bracker*, 39 Wis.2d 142, 146, 158 N.W.2d 285 (1968).

[22] *Erdmann*, 39 Wis.2d at 4.

[23] *Fondell v. Lucky Stores, Inc*., 85 Wis.2d 220, 231, 270 N.W.2d 205 (1978).

[24] *Brons v. Bischoff*, 89 Wis.2d 80, 88, 277 N.W.2d 854 (1979).

> directly or indirectly, employed by another for direct or indirect gain or profit, ….

The court has said that "a place of employment can be almost any place."[25]

Industry, Trade or Business

Under the statute, to be a "place of employment," industry, trade or business must be carried on, either on a permanent or even temporary basis.[26] "[F]or a location to qualify as a 'place of employment' within the meaning of the safe place statute, a business must be carried on there, and someone must be employed on the premises."[27]

Whether or not a particular location constitutes a place of employment does not depend on the type of defect present but rather turns on the use made of the area.[28]

Direct Or Indirect Gain or Profit

For a premises to be a place of employment, the statute requires that trade or industry must be carried on for gain or profit. The element of "direct or indirect gain or profit" is construed to mean gain or profit to the employer not to the employee.[29] Charitable and municipal organizations/corporations generally are not places of employment because there is no profit motive.

Premises Appurtenant Thereto

The statute defines a place of employment to include "every place, whether indoors or out or underground and the premises appurtenant thereto."

When an area is public property, it is generally not a place of employment. However, when a hotel and cab companies maintained an area of the sidewalk for loading and unloading guests, it was held to be a place of employment with respect to the cab companies and the hotel.

The safe-place statute does not, by its terms, require an employer to own the premises in order to maintain a place of employment. Nor do cases on the subject

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[25] *Gilson v. Drees Bros*., 19 Wis.2d 252, 120 N.W.2d 63 (1963), citing *Ball v. Madison*, 1 Wis.2d 62, 65, 82 N.W.2d 894, (1957).

[26] Wis. Stats. 101.01(11). See *Antwaun A. v. Heritage Mut. Ins. Co*., 228 Wis. 2d 44, 596 N.W.2d 456 (1999), citing the statute at ¶32.

[27] *Brueggeman v. Continental Cas. Co*., 415 N.W.2d 531, 141 Wis.2d 406, 410-11 (Ct. App. 1987).

[28] *Peppas v. City of Milwaukee*, 29 Wis.2d 609, 615, 139 N.W.2d 579 (1966).

[29] *Voeltzke v. Kenosha Memorial Hospital, Inc*., 45 Wis.2d 271, 172 N.W.2d 673 (1969), citing *Rogers v. Oconomowoc,* 24 Wis.2d 308, 128 N.W.2d 640 (1964).

require ownership as a requisite of liability. Thus, control and custody of the premises need not be exclusive, nor is it necessary to have control for all purposes.[30]

PUBLIC BUILDINGS

> **Wis. Stats. 101.11(12)** "Public building" means any structure, including exterior parts of such building, such as a porch, exterior platform, or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants….

Structure as a Public Building

"The words of the statute are very broad. A building is any structure used for the purposes enumerated in the statute."[31] "The safe-place statute defines 'place of employment' very broadly; a place of employment can be almost any place. But the definition of 'public building' is much more limited."[32]

"As we have pointed out, the duty under the statute with respect to the place of employment is very broad and is not merely concerned with the question of whether or not the place of employment is a structure, while the duty placed by statute on the owner of a public building is much narrower."[33]

> By using the word 'structure' in defining the term 'public building', the legislature did not broaden that term to include anything that is built. The fact that something is constructed and intended for public use does not alone constitute the structure a public building unless it has some aspects of similarity to a building as that term is commonly understood. Since the word is used in the limited sense of defining 'public building', it cannot be regarded as embracing a structure which does not have any of the characteristics of a building.[34]

> A sidewalk appurtenant to a church was not part of a public building.[35]

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[30] *Schwenn v. Loraine Hotel Co*., 14 Wis.2d 601, 111 N.W.2d 495 (1961), citing *Werner v. Gimbel Brothers*, 8 Wis.2d 491, 99 N.W.2d 708, 100 N.W.2d 920 (1959) and *Criswell v. Seaman Body Corp*., 233 Wis. 606, 290 N.W. 177 (1940). See also *Callan v. Peters Const. Co*., 94 Wis.2d 225, 288 N.W.2d 146 (Ct App. 1979).

[31] *Bent v. Jonet*, 213 Wis. 635, 639, 252 N.W. 290 (1934).

[32] *Ball v. City of Madison*, 1 Wis.2d 62, 65, 82 N.W.2d 894 (1957).

[33] *Meyers v. St. Bernard's Congregation*, 268 Wis. 285, 288, 67 N.W.2d 302 (1954).

[34] *Ball,* 1 Wis.2d at 66.

[35] *Bauhs v. St. James Congregation*, 255 Wis. 108, 37 N.W.2d 842 (1949).

"It is clear that a sidewalk is not a structure."[36]

Although a sidewalk can be part of a place of employment, it generally is not considered part of a public building.

Accordingly, the following "things constructed" were held not to be structures within the safe-place law:

a toboggan slide,[37]
a children's slide,[38]
a retaining wall,[39]
a baseball diamond,[40]
steps on the side of an embankment leading to a public beach,[41]
a diving board to swimming pool,[42]
school grounds,[43]
steps which were not an integral part of the building,[44]
a sidewalk.[45]

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[36] *Baldwin v. St. Peter's Congregation*, 264 Wis. 626, 629, 60 N.W.2d 349 (1953), quoting *Bauh*s, 255 Wis. at 110; see also *Mistele v. Board of Education*, 267 Wis. 28, 64 N.W.2d 428, (1954) and *Meyers v. St. Bernard's Congregation*, 268 Wis. 285, 67 N.W.2d 302 (1954).

[37] *Cegelski v. Green Bay*, 231 Wis. 89, 285 NW 343 (1939), involving a slide which followed the natural slope of a hill where the only constructed part was a railing erected to guide the direction of travel; *Ball v. Madison*, 1 Wis. 2d 62, 82 N.W.2d 894 (1957), involving the wooden platform from which slide was commenced. For another toboggan case see *Meyer v. Val-Lo-Will Farms*, 14 Wis. 2d 616, 111 NW2d 495 (1961).

[38] *Grinde v. Watertown,* 232 Wis. 551, 288 N.W. 196 (1939).

[39] *Hanlon v. St. Francis Seminary*, 264 Wis. 603, 60 N.W. 381 (1953).

[40] *Hoepner v. Eau Claire*, 264 Wis. 608, 60 N.W. 392 (1953); *Paykel v. Rose*, 265 Wis. 471, 61 N.W. 909 (1953).

[41] *Weiss v. Milwaukee*, 268 Wis. 377, 68 N.W.2d 13 (1955).

[42] *Waldman v. Young Men's Christian Assn of Janesville*, 227 Wis. 43, 47, 277 N.W. 632 (1938). The case was disposed of on the ground that the faulty diving board was a temporary condition unassociated with the building. See *Kuhlman v. Vandercook,* 241 Wis. 418, 6 N.W. 235 (1942), to same effect as to "shuffleboard" court.

[43] *Lawver v. Joint District No, 1*, 232 Wis. 608, 288 N.W. 192 (1939), "Clearly the school grounds and the sidewalk area cannot be considered a public building by any stretch of the imagination." At page 612. See also *Mlynarski v. St. Rita's Cong*., 31 Wis. 2d 54, 142 N.W.2d 207 (1966).

[44] *Harnett v. St. Mary's Congregation,* 1956, 271 Wis. 603, 74 N.W.2d 382.

[45] "It is clear that a sidewalk is not a structure. The duty of the owner of a public building under the provisions of that chapter to maintain it in safe condition extends only to such portions as are used or held out to be used by the public and does not extend to the highway." *Bauhs v. St. James Congregation*, 255 Wis. at 110 (1949); *Baldwin v. St. Peter's Congregation*, 264 Wis. 626, 629, 60 N.W.2d 349 (1953); *Mistele v. Board of Education*, 267 Wis. 28, 29, 64 N.W.2d 428 (1954); *Moore v. Milwaukee*, 267 Wis. 166, 168, 65 N.W.2d 3 (1954); *Meyers v. St. Bernard's*

and a utility pole used for instruction at a technical school.[46]

However, a temporary bleacher was held to be a public building under the statute.[47]

3 or More Tenants

The "public building" statute by its terms covers not only buildings where the public gathers, but also buildings used by 3 or more tenants.

The term "tenants" in the statute is based on the number of rental units, not the number of people occupying the units.[48]

An owner in possession is regarded as a tenant, thus when one of three units was occupied by the owner, the building was a "public building."[49] A building is a public building if it was intended to accommodate three or more families, and a temporary vacancy would not change its status.[50]

Congregation, 268 Wis. 285, 67 N.W.2d 302 (1954); *Davis v. Lindau*, 270 Wis. 218, 220, 70 N.W.2d 686 (1955).

[46] *Powell v. Milwaukee Area Technical College*, 225 Wis. 2d 794, 594 N.W. 2d 403 (Ct. App. 1999).

[47] *Bent v. Jonet*, 213 Wis. 635, 252 N.W. 290 (1934).

[48] *Antwaun A. v. Heritage Mut. Ins. Co*., 228 Wis.2d 44, ¶36, 596 N.W.2d 456 (1999).

[49] *Skrzypczak v. Konieczka*, 224 Wis. 455, 272 N.W. 659 (1937).

[50] "If a building is intended to accommodate more than four families, the mere fact that one part of it may be temporarily vacant does not make the rule of the Industrial Commission inapplicable." *Kelenic v. Berndt*, 185 Wis. 240, 242, 201 N.W. 250 (1924).

The following have qualified as "public building" under the statute: a hotel,[51] a baseball stadium,[52] a warehouse,[53] a theater,[54] a tavern,[55] a jail,[56] a public school,[57] a church,[58] and a hospital.[59]

WHO DOES THE STATUTE PROTECT?

EMPLOYEES AND FREQUENTERS

1901 SAFE-PLACE STATUTE: DEFINITION OF FREQUENTER

> The term "frequenter" means and includes every person except a trespasser who may go in or be in (a place of employment or a public building).
>
> One who goes upon premises owned, occupied, or possessed by another without an invitation, express or implied, extended by the owner, occupant, or possessor, and solely for his or her pleasure, advantage, or purpose is a trespasser and not a frequenter.

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[51] *Burling v. Schroeder Hotel Co*., 235 Wis. 403, 291 N.W. 810, 813 (1940), "the defendant's hotel is a "public building" under the definition of that term in subsec. (12) of sec. 101.01, Stats."

[52] *Powless v. Milwaukee County*, 6 Wis.2d 78, 94 N.W.2d 187 (1959).

[53] *Tomlin v. Chicago, M., St. P. & P. Ry. Co*., 220 Wis. 325, 265 N.W. 72 (1936). "It is conceded that the defendant's warehouse is a public building within the meaning of the 'safe place' statute." At page 331.

[54] *Boutin v. Cardinal Theatre Co*., 267 Wis. 199, 64 N.W.2d 848 (1954), "Sec. 101.06, Stats. requires the owner of a public building or place of employment to construct, repair and maintain it so as to render it safe for frequenters. There is no question but that appellant is one of those charged with this duty and that respondent is a frequenter." At page 202.

[55] *Monsivais v. Winzenried*, 179 Wis.2d 758, 508 N.W.2d 620 (Ct. App. 1993); *Carr v. Amusement, Inc*., 47 Wis.2d 368, 177 N.W.2d 388 (1970), a tavern/bowling alley.

[56] *Henderson v. Milwaukee County*, 198 Wis.2d 747, 543 N.W.2d 544 (Ct. App. 1995). Referring to an earlier case, the court stated, "The court said the jail was not a public building. This language is misleading." At page 753, citing *Lealiou v. Quatsoe*, 15 Wis.2d 128, 131-132, 112 N.W.2d 193, 195 (1961).

[57] *Heiden v. Milwaukee*, 226 Wis. 92, 98, 275 N.W. 922 (1937); *Lawver v. Joint District*, 232 Wis. 608, 612, 288 N.W. 192 (1939); *Mistele v. Board of Education*, 267 Wis. 28, 64 N.W.2d 428 (1954); *Powell v. Milwaukee Area Technical College,* 225 Wis. 2d 794, 594 N.W. 2d 403, 410 (Ct. App. 1999).

[58] *Harnett v. St. Mary's Congregation*, 271 Wis. 603, 74 N.W.2d 382 (1956); see also *Hintz v. Zion Evang. U. B. Church*, 13 Wis. 2d 439, 109 N.W.2d 61 (1961); *Meyers v. St. Bernard's Congregation*, 268 Wis. 285, 67 N.W.2d 302 (1954).

[59] *Wright v. St. Mary's Hospital of Franciscan Sisters, Racine*, 265 Wis. 502 61 N.W.2d 900 (1953); *Grabinski v. St. Francis Hospital,* 266 Wis. 339, 342, 63 N.W.2d 693, 694 (1954); *Watry v. Carmelite Sisters of the Divine Heart of Jesus,* 274 Wis. 415, 80 N.W.2d 397 (1957*). Voeltzke v. Kenosha Memorial Hospital, Inc.,* 45 Wis.2d 271, 172 N.W.2d 673 (1969);

> The term "express invitation" means a specific invitation to come upon premises. An "implied invitation" is one which may be reasonably assumed from the circumstances which have caused a person to be on the premises of another.
>
> [1. When the (owner) or (possessor) of premises has ordered a contractor to do work upon the premises, it is implied that the employees of the contractor have the invitation and consent of the (owner) or (possessor) to come upon the premises and do the work which has been ordered.]
>
> [2. When a retail merchant, theater proprietor, etc., solicits the patronage of the public in the conduct of business, the invitation could be both express and implied.]
>
> [3. Under some circumstances, an invitee, either express or implied, may be a frequenter of one part of the (owner)'s or (possessor)'s premises and a trespasser in another part to which (he) (she) has not been invited (behind the meat counter, in the boiler room, etc.).]

The statute does not protect trespassers.

Frequenters lose their status as such, and become trespassers, when they go into an area to which they were neither expressly nor impliedly invited.[60] This is so even if such unauthorized entry was a result of mistake or confusion.[61]

WHO CAN BE LIABLE FOR A SAFE PLACE DUTY VIOLATION?

EMPLOYERS

> **101.01(4)** "Employer" means any person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district, long-term care district and other public or quasi-public corporations as well as any agent, manager, representative or other person having control or custody of any employment, place of employment or of any employee.

Public Entities

Although the statute specifically includes a county, town, city, village, school district, sewer district, drainage district, long-term care district, the state and other public or quasi-public corporations as employers, the premises of a municipal entity

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[60] *Lang v. Findorff*, 185 Wis. 545, 201 N.W. 727 (1925); *Grossenbach v. Devonshire Realty Co.*, 218 Wis. 633, 261 N.W. 742 (1935); *Newell v. Schultz Brothers Co.*, 239 Wis. 415, 1 N.W.2d 769 (1942); *Ryan v. O'Hara*, 241 Wis. 389, 6 N.W.2d 209 (1942); *Wannmacher v. Baldauf Corp.*, 262 Wis. 523, 55 N.W.2d 895 (1952); *McNally v. Goodenough*, 5 Wis. 2d 293, 92 N.W.2d 890 (1958); *Mustas v. Inland Construction, Inc.*, 19 Wis. 2d 194, 200, 120 N.W.2d 95, 121 N.W.2d 274 (1963).

[61] *Monsivais v. Winzenried*, 179 Wis.2d 758, 508 N.W.2d 620 (Ct. App. 1993); *Grossenbach v. Devonshire Realty Co.*, 218 Wis. 633, 261 N.W. 742 (1935); *McNally v. Goodenough*, 5 Wis. 2d 293, 92 N.W.2d 890 (1958).

generally are not considered a "place of employment." This is because the entity is not engaged in trade or business for "gain or profit."

Extent Of Employer Duty

The duty of an employer is to provide "safe employment." This includes a safe place of employment, as is required of an owner of a place of employment, but encompasses more. Although an employer has a broader duty than an owner of a place of employment in that the employer must provide safe employment, all of the duties imposed on an owner of a place of employment are also imposed on an employer.

> There is a plain distinction between the obligation of an employer and the obligation of the owner of a building. The employer's duty to furnish safe employment includes the furnishing of a safe place of employment, and the employer has a broad duty not only with respect to the structure, which constitutes the place of employment, but with reference to the devices and other property installed or placed in such place.[62]

Does an Employer's Duty to Provide "Safe Employment" Run to Frequenters?[63]

There are discrepancies in the decisions regarding an employer's duty to frequenters. The cases are all over the map on this issue. Numerous cases have said an employer's duty to frequenters is the same as the duty to employees. Other cases have said that the employer's duty to provide safe employment only applies to employees, and not frequenters.[64]

Types Of Defects To Which Safe Place Applies

> The types of defects for which an owner or an employer may be liable are (1) structural defects,

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[62] *Jaeger v. Evangelical Lutheran Holy Ghost Congregation*, 219 Wis. 209, 211-12, 262 N.W. 585 (1935).

[63] See Chapter 4, Wisconsin Safe-Place Law, 3d, Nevin Publishing 2022.

[64] *Waskow v. Robert L. Reisinger Co*., 180 Wis. 537, 193 N.W. 357 (1923) (emphasis added); *Washburn v. Skogg*, 204 Wis. 29, 235 N.W. 437 (1931); *Sweitzer v. Fox*, 226 Wis. 26, 275 N.W. 546 (1937); *Niedfelt v. Joint School Dist. No. 1*, 23 Wis.2d 641, 648, 127 N.W.2d 800 (1964); *Rogers v. City of Oconomowoc*, 24 Wis.2d 308, 315, 128 N.W.2d 640 (1964); *Kaiser v. Cook*, 67 Wis.2d 460, 462, 227 N.W.2d 50 (1975); *Leitner v. Milwaukee County*, 94 Wis.2d 186, 194, 287 N.W.2d 803, (1980) *Viola v. Wis. Elec. Power Co*., 2014 WI App 5, ¶17, 352 Wis.2d 541, 842 N.W.2d 515; *Gennrich v. Zurich American Ins. Co*., 2010 WI App 117, ¶16, 329 Wis.2d 91, 789 N.W.2d 106.

(2) unsafe conditions associated with the structure, and,
(3) unsafe conditions unassociated with the structure.[65]

Notice or Knowledge of Defect

An owner or employer sustains safe-place liability where a structural defect causes injury regardless of whether he knew or should have known that such defect existed.[66]

If a condition is deemed an unsafe condition associated with the structure, an owner must have actual or constructive notice of the defect.[67] The burden of proving notice is on the plaintiff.[68]

"[I]f an alleged defect is attributable to a defect in the original structural design or construction, an owner or employer is liable regardless of whether he or she knew or should have known of the defect.[69]

There is no liability for a structural defect if the statute of repose has run.[70] (7 years).

Statute of Repose

The statute of repose is a bar to claims for structural defects. The statute of repose applies to safe place claims as well as to common law negligence.[71]

Wis. Stats. s. 893.89,

(1) In this section, "exposure period" means the 7 years immediately following the date of substantial completion of the improvement to real property.

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[65] *Barry v. Employers Mut. Cas. Co*., 2000 WI App 168, ¶8, 238 Wis.2d 125, 617 N.W.2d 493, citing Howard H. Boyle, Jr., Wisconsin Safe-Place Law Revised, (1980), p. 139.
[66] *Mair*, 2006 WI 61 at ¶21; "A property owner or employer is liable for injuries caused by structural defects regardless of whether he or she knew or should have known that the defect existed." *Barry*, 2001 WI 101 at ¶22 Citing *Hommel v. Badger State Inv. Co*., 166 Wis. 235, 242, 165 N.W. 20 (1917) and *Hannebaum v. DiRenzo & Bomier*, 162 Wis. 2d 488, 500, 469 N.W.2d 900 (Ct. App. 1991).
[67] *Wagner v. Cincinnati Cas. Co*., 2011 WI App 85, ¶18, 334 Wis.2d 516, 800 N.W.2d 27, citing *Barry,* 2001 WI 101, ¶ 16, citing *Pettric v. Gridley Dairy Co*., 202 Wis. 289, 293, 232 N.W. 595 (1930).
[68] *Rosenthal v. Farmers Store Co*., 10 Wis.2d 224, 227, 102 N.W.2d 222, (1960), "The burden of proving all the elements of liability under the safe place statute is upon the plaintiff in an action seeking recovery of damages for personal injuries." At page 229, "The evidence adduced by the plaintiffs was insufficient to meet the burden of proof necessary to establish a prima facie cause of action."
[69] *Szalacinski v. Campbell*, 2008 WI App 150, ¶26, 314 Wis.2d 286, 760 N.W.2d 420, citing *Barry*, 2001 WI 101, ¶¶22-23.
[70] Wis. Stats. s. 893.89(2).
[71] *Mair v. Trollhaugen Ski Resort*, 2006 WI 61, ¶18, 291 Wis.2d 132, 715 N.W.2d 598.

> (2) …[N]o cause of action may accrue … against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages ... arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. [72]

See *Mair v. Trollhaugen Ski Resort,* 2006 WI 61, 291 Wis.2d 132, 715 N.W.2d 598. *Rosario v. Acuity & Oliver Adjustment*, 2007 WI App 194, 304 Wis.2d 713, 738 N.W.2d 608; *Crisanto v. Heritage Relocation Servs., Inc*., 2014 Wis. App. 75, 355 Wis.2d 403, 851 N.W.2d 771.

Conditions Associated with Structure

To prevail on a safe place claim for a condition associated with the structure, the plaintiff must prove 1) that there was an unsafe condition associated with the structure, 2) that it was a cause of the plaintiff's injury, and 3) the owner had either actual or constructive notice of the condition.[73] "Conditions 'associated with the structure' are those which involve the structure (or the materials with which it is composed) becoming out of repair or not being maintained in a safe manner. Such conditions are those referred to in the statutory injunction to 'repair or maintain such place of employment or public building.'"[74]

Conditions Unassociated with the Structure

An employer may also be liable for "unsafe conditions unassociated with structure," a category that has been extrapolated from the employer's duty to furnish "employment which shall be safe" under Wis. Stat. § 101.11(1).[75] This does not apply to an owner of a place of employment or public building. Conditions unassociated with structure range from all varieties of unsafe physical conditions not related to the structure and include unsafe methods and processes of doing work. Actual or constructive notice is required to prove liability for an injury caused by a condition unassociated with the structure.

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[72] Wis. Stats. s. 893.89(2). 1993 Wis. Act 309 provided a ten-year statute of repose, which has now been shortened to 7 years.
[73] *Gulbrandsen v. H & D, Inc.*, 2009 WI App 138, ¶ 7, 321 Wis.2d 410, 773 N.W.2d 506.
[74] *Barry v. Employers Mut. Cas. Co.*, 2001 WI 101, ¶25, 245 Wis.2d 560, 630 N.W.2d 517, quoting Howard H. Boyle, Jr., Wisconsin Safe-Place Law Revised 143-44, (1980). Wis. Stats. 101.11.
[75] *Barry v. Employers Mut. Cas. Co.*, 2001 WI 101, ftn. 4, 245 Wis.2d 560, 630 N.W.2d 517.

> The permitting of temporary conditions wholly dissociated from the structure does not constitute a violation of the safe-place statute by the owner of a [public] building, although it may, and undoubtedly does, constitute a violation if permitted by an employer.
>
> Either actual or constructive notice, within a reasonable time before the accident, is required under the statute.[76]

UNRESOLVED ISSUES

Does governmental immunity relieve a municipality from complying with the safe place statute? (Spencer v. Brown County)

Statute of Limitation/Statute of Repose; Can there still be a claim for a structural defect?

Does an employer's duty to provide safe employment extend to frequenters?

Can a plaintiff prove the owner violated the common law duty of ordinary care if it cannot be shown that the defendant violated the safe-place duty, as safe as reasonably possible? (Megal).

Can you combine the negligence of two defendants when at least one has a safe place duty?

1. Does governmental immunity relieve a municipality from complying with the safe place statute?

Spencer v County of Brown

Spencer was the first case to say that a governmental entity did not have to comply with the safe place statute if the negligence was the result of performing a discretionary function.

Governmental Immunity

The general rule is that governmental employees and the entities they work for have immunity from liability if the employee was negligent when performing a discretionary duty, but are liable if the employee is negligent when performing a ministerial duty.

> [A] duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a

[76] *Schwenn v. Loraine Hotel Co.*, 14 Wis.2d 601, 607, 609, 111 N.W.2d 495 (1961); *Cross v. Leuenberger*, 267 Wis. 232, 234-35, 65 N.W.2d 35 (1954).

> manner, or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.[77]

Anderson I and *Anderson II*

In the *Anderson* cases, the plaintiff fell on a raised brick at a farmers market on property owned by the City of Milwaukee. The jury returned a verdict in excess of $400,000. In addition to the safe place issue, there were various issues regarding waiver of the statutory damage limit and the waiver of any immunity claims. In *Anderson I*, the court of appeals affirmed the verdict and said,

> the supreme court long ago determined that cities, as owners of public buildings, "should be subject to the safe place statute regardless of whether at a given time they are acting in a proprietary or governmental capacity," including unsafe construction… Once the City exercised its overall discretion and decided to design and construct the farmer's market, it had to comply with the safe-place statute mandates.[78]

The Wisconsin Supreme Court reversed the Court of Appeals on other grounds (*Anderson II*).[79] *Anderson II* said that a municipality cannot impliedly waive the statutory damage limit merely by failing to raise it as an affirmative defense, but the city did waive its right to raise the issue of discretionary immunity by failing to assert it as an affirmative defense. The Supreme Court held that the $50,000 municipal limit applied and remanded the case for judgment to be entered for the plaintiff in that amount.

Anderson II did not decide the safe place issue and, as a result, left some confusion on the issue. The court said, "[b]ecause we conclude that the City waived the discretionary immunity defense, we do not reach the issue of whether the City has a ministerial duty to comply with the safe-place statute."[80] Then in a footnote to that sentence, the court said, "Since this determination is dispositive, and since, therefore, we do not reach the ministerial duty--safe place issue, we emphasize that our decision should not be taken as approval of the reasoning of the Court of Appeals on that issue."[81]

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[77] *Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514 (1955).
[78] *Anderson v. City of Milwaukee* (*Anderson I*), 199 Wis.2d 479, 493, 544 N.W.2d 630 (Ct. App. 1996), citing *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922 (1937).
[79] *Anderson v. City of Milwaukee*, (*Anderson II*), 208 Wis.2d 18, 559 N.W.2d 563 (1997).
[80] *Anderson II*, 208 Wis.2d at ¶29.
[81] *Anderson II*, 208 Wis.2d at ftn. 17.

Spencer seemed to read the footnote as suggesting that discretionary immunity would apply to a governmental entity even for a safe place violation. "Based on the status of the Anderson decisions, we decline to follow Spencer's invitation to apply the reasoning that has not been approved by our state supreme court, though not specifically overruled…."[82] The court in *Spencer* stated,

> "while the safe-place statute imposes a duty on owners of public buildings to maintain safe premises for employees and frequenters, the duty set forth in § 101.11, STATS., does not rise to the level of imposing a ministerial duty for purposes of analysis under § 893.80(4), STATS."[83]
>
> "We conclude the duty imposed by the safe-place statute, § 101.11, STATS., is discretionary." *Spencer*, at 651.

The Problem

The *Spencer* court was incorrect when it said that the reasoning suggested by Spencer (that discretionary immunity does not apply) had not been approved by the Supreme Court. The Supreme Court, on numerous occasions, stated that the safe place standards applies to governmental entities. In *Heiden v. City of Milwaukee*,[84] the plaintiff recovered from the City of Milwaukee for a safe place violation. The plaintiff had been injured on a poorly lit stairway in a city owned school building.

> The words of the statute are clear, plain, and unambiguous, and when construed according to their common and approved usage as required by law, section 370.01 (1), are clearly applicable to a school building, owned by a city, and to a frequenter who may go in or be in such a public building under circumstances which do not render him a trespasser.
>
> The several Legislatures of Wisconsin, since the year 1911, have written into the "safe place" statute, language which is clear and amply comprehensive to bring within the provisions of the "safe place" law, cities and school districts, and the public buildings owned by them. Had the Legislature intended that the "safe place" statute should not apply to cities and school districts while performing governmental functions or to school buildings, it would have been a simple matter so to provide….

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[82] From this language *Spencer* seems to suggest that the Supreme Court in *Anderson II* impliedly overruled the safe place holding in *Anderson I*. It does no such thing. It does not impliedly confirm nor overrule the safe place discussion from *Anderson I*. It merely did not address the issue.

[83] *Spencer v. County of Brown*, 215 Wis.2d at 652.

[84] *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922 (1937).

> We think it clear, therefore, that the Legislature fully intended that the "safe place" law should apply to cities and school districts.[85]
>
> It is our conclusion that the Legislature intended that cities and school districts, as owners of public buildings, should be subject to the "safe place" statute regardless of whether at a given time they are acting in a proprietary or governmental capacity and that a city or school district may be liable to a frequenter who is injured in one of their public buildings, when such injury is proximately caused by a lack of safety, as defined by law, i. e., unsafe construction or unsafe maintenance. [86]

The Supreme Court has consistently held that governmental bodies were subject to the safe place statute. In the following cases, the court was very specific:

> It is clear enough therefore that under the statute as construed in the Heiden case, a county is liable under the safe place statute.[87]
>
> To apply the [immunity] rule as contended by the city would be to abrogate the exception provided for in this section. Such an argument was rejected in … Heiden v. City of Milwaukee, 1937, 226 Wis. 92, 275 N.W. 922, 114 A.L.R. 420 (safe-place statute).[88]
>
> The defense of governmental function is not available under the safe place statute.[89]
>
> The safe-place statute applies to cities, regardless of whether at a given time they are acting in a proprietary or governmental capacity. This is an illustration of a statutory limitation upon the immunity of a city from liability for a tort committed in the exercise of a governmental function.[90]
>
> The school district, in the exercise of a governmental function, would not be legally chargeable with negligence. Of course, the "safe place" statute applies to schools and school districts.[91]

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[85] *Heiden*, 226 Wis. at 100.
[86] *Heiden*, 226 Wis. at 101.
[87] *Flynn v. Chippewa County.*, 244 Wis. 455, 457, 12 N.W.2d 683 (1944).
[88] *Laffey v. City of Milwaukee*, 8 Wis.2d 467, 470-71, 99 N.W.2d 743 (1959).
[89] *Potter v. City of Kenosha*, 268 Wis. at 371, citing *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922, (1937), 114 A.L.R. 420.
[90] *Flesch v. City of Lancaster*, 264 Wis. 234, 237, 58 N.W.2d 710 (1953), citing *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922, (1937) and 114 A.L.R. 420.
[91] *Lawver v. Joint School District No. 1,* 232 Wis. 608, 288 N.W. 192 (1939) (Citation omitted).

> The immunization of municipalities from tort liability has been chipped away by a number of statutes in this state. Some examples are secs. 101.01 and 101.06, Wis. Stats. (safe place statute).[92]

To say that the duty imposed is discretionary is inconsistent with the Court's rule that the duty imposed by the statute is absolute.

2. Statute of Limitation/Statute of Repose; Can there still be a claim for a structural defect?

In *Mair v. Trollhaugen*,[93] the plaintiff was injured in 2001 when she stepped into a floor drain that was constructed in 1976. In *Rosario v. Acuity & Oliver Adjustment*,[94] the plaintiff fell on a stair that did not comply with the building code, but was constructed about 40 years prior to her injury. In both cases the court held that the defect was a structural defect and the claim was barred by the statute of repose.

In *Crisanto v. Heritage Relocation Services,* a building was constructed in 1909, and an elevator was installed in the 1940's. In 2010, the plaintiff sustained an injury due to the lack of a safety gate on the elevator. The defect was determined to be structural, and the claim was barred by the statute of repose.[95] The holdings in *Crisanto* were:

> I. Case law dictates that the ten-year statute of repose set forth in Wis. Stat. § 893.89 applies to a claim against a subsequent owner even if the subsequent owner was not involved in the actual improvement to the property.[96]
>
> II. Wisconsin Stat. § 893.89(4)(c) does not exempt from the statute of repose Garrido–Crisanto's claims based on a structural defect, that is, the elevator's lack of a safety gate, even if Heritage knew that the elevator was unsafe.[97]
>
> III. Wisconsin Stat. §§ 893.89(6) and 102.29 do not work together to bar application of the statute of repose to this case by virtue of Wausau's subrogation claim.[98]

<u>Does Failure to Warn Constitute a Violation of the Safe-Place Statute?</u>

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92 *Holytz v. City of Milwaukee*, 17 Wis.2d at 36.
93 *Mair v. Trollhaugen Ski Resort*, 2006 WI 61, 291 Wis.2d 132, 715 N.W.2d 598.
94 *Rosario v. Acuity & Oliver Adjustment*, 2007 WI App 194, 304 Wis.2d 713, 738 N.W.2d 608.
95 *Crisanto v. Heritage Relocation Servs., Inc.*, 2014 Wis. App. 75, 355 Wis.2d 403, 851 N.W.2d 771.
96 *Crisanto*, 2014 Wis. App. 75, ¶13.
97 *Crisanto*, 2014 Wis. App. 75, ¶18.
98 *Crisanto*, 2014 Wis. App. 75, ¶25.

What is not clear is what duty an owner/occupier has with respect to *known* defects. *Crisanto* said that the statute does not exempt claims based on a structural defect, even if [the defendant] knew that the elevator was unsafe. What was not discussed in the case was whether a defendant would have a duty to warn of the danger if the defendant knows the condition is unsafe.

In both *Mair* and *Rosario*, the court noted that the defendants were not aware that the condition was unsafe. In the *Mair* decision from the Court of Appeals, the court stated, "Here, there is no evidence of actual or constructive notice that the recessed drain was unsafe."[99] In *Rosario*, the court stated, "Because there has not been a scintilla of evidence presented that [defendant] improperly repaired or maintained its structure, there has not been a sufficient showing to constitute constructive notice of an unsafe condition."[100]

The question would be whether there is a valid claim against a current owner if the owner is aware that a defect creates an unsafe condition and the owner does not warn about the danger. It seems to be so.

The language from *Mair* and *Rosario* suggests a duty to warn if the owner is aware that the condition creates an unsafe situation. Such injury would not just be arising out of any deficiency or defect in the design or construction, but also from the failure to warn of a known danger. *Mair* said this might be considered a defect associated with the structure, and thus not subject to the statute of repose.

Thus, no claim would exist for failing to correct the defect itself (*Crisanto*). However, failing to warn of a known danger would be negligence. Thus, an owner who knew about a danger would not be required under the statute to repair the defect, but would be required to warn about it.

When Would a Duty to Warn Arise?

A duty to warn would likely arise if an owner had actual knowledge that a condition is unsafe. *Rosario* suggests that receiving notice of a building code violation would constitute actual notice that a condition is unsafe.[101] Actual notice could come from a prior injury due to the defect, or if an owner knew there had been a prior warning sign.[102]

Based on the language in *Mair* and *Rosario*, an owner would have a duty to warn of the unsafe condition, but it is not clear when that duty would arise.

---

[99] *Mair v. Trollhaugen Ski Resort*, 2005 WI App 116, ¶14, 283 Wis.2d 722, 699 N.W.2d 624. See the Supreme Court decision 2006 WI 61, at ¶13.

[100] *Rosario*, 2007 WI App 194 at ¶30.

[101] "There is no evidence that any building code violations were ever filed relating to the step that would have placed Oliver on notice of the existence of an unsafe condition." *Rosario*, 2007 WI App 194 at ¶25.

[102] *Gould v. Allstar,* 59 Wis.2d 355, 362, 208 N.W.2d 388 (1973). The defendant had a warning sign that had been taken down, but not yet replaced.

Can an owner defeat liability merely by saying he or she did not think the condition was unsafe? Can an owner turn a blind eye to an obvious defect and claim he was not aware the condition was dangerous? As with the general rule of constructive notice, maybe a duty arises when a reasonably vigilant owner would understand the condition creates an unsafe situation. Again, this would not impose a duty to correct the condition, but only to warn of the danger. This is something the courts will have to sort out in the future.

3. Does an employer's duty to provide safe employment extend to frequenters?

Employers' Duty to Frequenters

There are discrepancies in the decisions regarding an employer's duty to frequenters. Numerous cases have said an employer's duty to frequenters is the same as the duty to employees.

Waskow v. Robert L. Reisinger Co.: As between the several contractors it was undoubtedly the duty of each … to render *the employment and places of employment safe not only for his employees, but also for frequenters*.[103]

Washburn v. Skogg: The language of the statute is just as mandatory as to frequenters as to employees. Its purpose was to give the same protection to frequenters as to employees.[104]

Sweitzer v. Fox: [T]here is no distinction made between an employee and a frequenter. Their language is just as mandatory in relation to frequenters as it is to employees, and their purpose is to provide the same protection to frequenters as to employees.[105] The court stated that a frequenter could make a claim against an employer if the frequenter was injured because the employer failed to use *safeguards or methods* that were as safe as reasonably possible.

In 1964, the court decided *Niedfelt v. Joint School Dist. No. 1* and *Rogers v. City of Oconomowoc.* In both cases, the court stated that the duty to furnish safe employment does not extend to frequenters.

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[103] *Waskow v. Robert L. Reisinger Co.*, 180 Wis. 537, 543, 193 N.W. 357 (1923) (emphasis added).

[104] *Washburn v. Skogg*, 204 Wis. 29, 40-41, 235 N.W. 437 (1931).

[105] *Sweitzer v. Fox*, 226 Wis. 26, 34, 275 N.W. 546 (1937) (emphasis added), citing *Washburn v. Skogg*, 204 Wis. 29, 35, 40, 233 N.W. 764, 235 N.W. 437 (1931); *Sandeen v. Willow River Power Co.*, 214 Wis. 166, 177, 252 N.W. 706 (1934).

> The duty to furnish safe employment does not extend to frequenters. This is *implicit* in the language of sec. 101.06, Stats., which provides: "Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof...."[106]
>
> In any event we have held that the statutory duty to furnish safe employment (unlike the duty to furnish a safe place of employment) runs to employees but not to frequenters such as plaintiff.[107]

The *Rogers* and *Niedfelt* cases were the first cases to say that the duty to provide "safe employment" does not extend to frequenters.

In *Leitner v. Milwaukee County*,[108] a per curium Supreme Court decision, in what would be dicta, the Court, citing to *Rogers,* stated, "[t]he statutory duty to furnish safe employment (unlike the duty to furnish a safe place of employment) runs only to employees but not to frequenters such as Leitner."[109]

Leitner then quoted from *Stefanovich v. Iowa National Mutual Ins. Co.*, "[t]he Wisconsin safe-place statute provides that it is an employer's duty to provide safe employment, premises and equipment for the protection of his employees and frequenters."[110]

In *Gennrich v. Zurich*, the court stated, "[t]he safe place statute places a duty on employers to their employees *and their frequenters*."[111]

THE CONFLICT

1. The statute reads, "Every employer shall … use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters."

---

[106] *Niedfelt v. Joint School Dist. No. 1*, 23 Wis.2d 641, 648, 127 N.W.2d 800 (1964) (emphasis added).

[107] *Rogers v. City of Oconomowoc*, 24 Wis.2d 308, 315, 128 N.W.2d 640 (1964) citing *Niedfelt*, 23 Wis.2d 641, 127 N.W.2d 800 (1964).

[108] *Leitner v. Milwaukee County*, 94 Wis.2d 186, 194, 287 N.W.2d 803, (1980).

[109] *Leitner*, 94 Wis.2d at 194; citing *Rogers v. City of Oconomowoc*, 24 Wis.2d 308, 315, 128 N.W.2d 640 (1964).

[110] *Leitner*, 94 Wis.2d at 195 (emphasis added), quoting *Stefanovich v. Iowa National Mutual Ins. Co.*, 86 Wis.2d 161, 166, 271 N.W.2d 867 (1978).

[111] *Gennrich v. Zurich American Ins. Co.*, 2010 WI App 117, ¶16, 329 Wis.2d 91, 789 N.W.2d 106. (Emphasis in original).

2. The *Washburn/Sweitzer* line of cases says the employer's duty to provide safe employment (including safeguards, methods and processes) runs to frequenters;
3. *Niedfeldt* and *Rogers* say that the employer's duty of safe employment does not run to frequenters;
4. The *Leitner* court, citing *Niedfeldt* and *Rogers*, said that the duty to furnish safe employment does not extend to frequenters; however, the *Leitner* court also said "that it *is* an employer's duty to provide *safe employment*, premises and equipment *for the protection of* his employees and *frequenters*";
5. *Gennrich* says that an employer's duties run to both employees and frequenters.

ANALYSIS

Based upon *Washburn, Sweitzer*, some of the language in *Leitner*, and the statute itself, an *employer* (not an owner) would have liability for injuries sustained by a frequenter if an employer did not provide "safe employment," and the unsafe employment was a cause of a frequenter's injury.

4. Burder of proof; Can a plaintiff prove the owner violated the common law duty of ordinary care if it cannot be shown that the defendant violated the safe-place duty, as safe as reasonably possible? (Megal).

Megal v. Visitor and Convention Bureau[112]

Plaintiff fell on a french fry after attending a performance at an arena. In the past, the court had said,

> [I]f the defendant is found to have breached his duty under the safe-place statute, recovery is had for the breach of the higher degree of care, and if it is found the defendant has not breached the higher degree of care, he cannot be held to have breached the standard of care under common-law.[113]
>
> A fortiori no violation of a common-law duty is shown if violation of the safe-place statute cannot be established.[114]

[112] *Megal v. Visitor & Convention Bureau*, 2004 WI 98, 274 Wis.2d 162, 682 N.W.2d 857.
[113] *Lealiou v. Quatsoe,* 15 Wis.2d 128, 136, 112 N.W.2d 193 (1961), quoted in *Megal v. VISITOR CONVENTION BUREAU,* 274 Wis.2d 162, 2004 WI 98, 682 N.W.2d 857 (Wis. 2004).
[114] *Balas v. St. Sebastians*, 66 Wis.2d 421 at 426-27, 225 N.W.2d 428 (1975), quoted in *Megal v. Visitor and Convention Bureau,* 2004 WI 98, 274 Wis.2d 162, 682 N.W.2d 857.

The language from *Lealiou* and *Balas* that said no violation of a common-law duty is shown if violation of the safe-place statute cannot be established was withdrawn in *Megal v. Visitor & Convention Bureau*.

> These analyses are unsubstantiated and incorrect insofar as they preclude a common-law negligence claim if no violation of the safe-place standard of care is established, and we withdraw them. In our view, there is no reason why, if an employee or frequenter has not proved that the employer or owner violated the higher standard of care in Wis. Stat. § 101.11(1) that it necessarily follows that the employee or frequenter cannot prove that the employer or owner violated the lower standard of common-law negligence by committing a negligent act.[115]

If defendant has complied

5. Can you combine the negligence of two defendants when at least one has a safe place duty?

Reber v. Hanson;
Reiter v Dyken;
Hannenbaum v. Direnzo and Bomier;

> ¶43 Ameritech's duty under the safe place statute is non-delegable, and therefore Ameritech must answer to Barry for any violation of that duty regardless of whether another party contributed to the violation.
>
> ¶ 44. The jury was properly instructed to determine the percentage of negligence attributable to Burgmeier in this case, despite the fact that Ameritech's duty arose under the safe place statute and Burgmeier's under the common law. … Because Ameritech's duties under the safe place statute were non-delegable, upon retrial, Burgmeier's negligence, if any, should be imputed to Ameritech.

Barry v. Employers Mut. Cas. Co., 2001 WI 101, 245 Wis.2d 560, 630 N.W.2d 517 (Wis. 2001)

[115] *Megal*, 2004 WI 98, ¶23.

Employer's Duty To Furnish Safe Employment And Place.

Wis. Stats. 101.11 (1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

Safe Or Safety Defined

Wis. Stats. 101.01 (13) "Safe" or "safety", as applied to an employment or a place of employment or a public building, means such freedom from danger to the life, health, safety or welfare of employees or frequenters, or the public, … as the nature of the employment, place of employment, or public building, will reasonably permit.

Common Law

> "Under the common law, premises were merely required to be reasonably safe; but under the safe place statute, liability is imposed if the premises are not kept as free from danger as the nature of the place will reasonably permit."[1]

Non-Delegable

> [T]he person who has that duty [under the safe place statute] cannot assert that another to whom he has allegedly delegated the duty is to be substituted as the primary defendant in his stead for a violation of safe place provisions. *Under any circumstance, it is the owner or the employer who must answer to the injured party*.[2]

---

1 *Szalacinski v. Campbell*, 2008 WI App 150, ¶ 27, 314 Wis.2d 286, 760 N.W.2d 420, quoting *Gould v. Allstar,* 59 Wis.2d 355, 361, 208 N.W.2d 388 (1973).

2 *Barry v. Employers Mut. Cas. Co*., 2001 WI 101, ¶42, 245 Wis.2d 560, 630 N.W.2d 517, quoting *Dykstra v. Arthur G. McKee & Co.,* 100 Wis. 2d 120, 132, 301 N.W.2d 201 (1981).

PLACES OF EMPLOYMENT

Wis. Stats. 101.11(11) "Place of employment" includes every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade, or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade, or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit, ….

PUBLIC BUILDINGS

Wis. Stats. 101.11(12) "Public building" means any structure, including exterior parts of such building, such as a porch, exterior platform, or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants….

FREQUENTER

Wis. Stats. 101.01(6) The term "frequenter" means and includes every person except a trespasser who may go in or be in (a place of employment or a public building).

EMPLOYERS

Wis. Stats. 101.01(4) "Employer" means any person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district, long-term care district and other public or quasi-public corporations as well as any agent, manager, representative or other person having control or custody of any employment, place of employment or of any employee.

Structural Defect

A structural defect is a hazardous condition inherent in the structure by reason of its design or construction.

Unsafe Conditions Associated with Structure

Conditions 'associated with the structure' are those which involve the structural elements becoming out of repair or not being maintained in a safe manner.

To prevail on a safe place claim for a condition associated with the structure, the plaintiff must prove:

1) that there was an unsafe condition associated with the structure,
2) that it was a cause of the plaintiff's injury, and
3) the owner had either actual or constructive notice of the condition.

Unsafe Conditions Unassociated With the Structure

An employer may also be liable for "unsafe conditions unassociated with the structure," a category that has been extrapolated from the employer's duty to furnish safe employment.

Conditions unassociated with structure range from all varieties of unsafe physical conditions not related to the structure. This includes temporary things such as accumulation of ice, along with unsafe methods and processes of doing work.

This does not apply to an owner of a place of employment or public building.

Ministerial duty

> [A] duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner . . . specifically designated; the duty to perform . . . not being dependent upon the officer's judgment or discretion.[1]

Anderson I (Court of Appeals)

> the supreme court long ago determined that cities, as owners of public buildings, "should be subject to the safe place statute regardless of whether at a given time they are acting in a proprietary or governmental capacity," … Once the City exercised its overall discretion and decided to design and construct the farmer's market, it had to comply with the safe-place statute mandates.

Anderson II (Supreme Court)

> "[b]ecause we conclude that the City waived the discretionary immunity defense, we do not reach the issue of whether the City has a ministerial duty to comply with the safe-place statute."
>
> "Since this determination is dispositive . . . we do not reach the ministerial duty--safe place issue, we emphasize that our decision should not be taken as approval of the reasoning of the Court of Appeals on that issue."

Spencer

> "Based on the status of the Anderson decisions, we decline to follow Spencer's invitation to apply the reasoning that has not been approved by our state supreme court, though not specifically overruled.…"[11]

"the duty set forth in § 101.11, STATS., does not rise to the level of imposing a ministerial duty for purposes of analysis under § 893.80(4), STATS."[2]

"We conclude the duty imposed by the safe-place statute, § 101.11, STATS., is discretionary."

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1 *Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514 (1955).

2 *Spencer v. County of Brown*, 215 Wis.2d at 652.

Supreme Court

> The words of the statute are clear, plain, and unambiguous, and . . . are clearly applicable to a school building, owned by a city, and to a frequenter who may go in or be in such a public building.
>
> We think it clear, therefore, that the Legislature fully intended that the "safe place" law should apply to cities and school districts.[1]
>
> _____
>
> It is clear enough therefore that under the statute as construed in the *Heiden* case, a county is liable under the safe place statute.[2]
>
> _____
>
> To apply the [immunity] rule as contended by the city would be to abrogate the exception provided for in this section. Such an argument was rejected in … Heiden v. City of Milwaukee, 1937, 226 Wis. 92, 275 N.W. 922, 114 A.L.R. 420 (safe-place statute).[3]
>
> _____
>
> The defense of governmental function is not available under the safe place statute.[4]
>
> _____
>
> The safe-place statute applies to cities, regardless of whether at a given time they are acting in a proprietary or governmental capacity. This is an illustration of a statutory limitation upon the immunity of a city from liability for a tort committed in the exercise of a governmental function.[5]
>
> _____

1 *Heiden*, 226 Wis. at 100.
2 *Flynn v. Chippewa County*., 244 Wis. 455, 457, 12 N.W.2d 683 (1944).
3 *Laffey v. City of Milwaukee*, 8 Wis.2d 467, 470-71, 99 N.W.2d 743 (1959).
4 *Potter v. City of Kenosha*, 268 Wis. at 371, citing *Heiden v. City of Milwaukee*.
5 *Flesch v. City of Lancaster*, 264 Wis. 234, 237, 58 N.W.2d 710 (1953), citing *Heiden v. City of Milwaukee*, 226 Wis. 92, 275 N.W. 922, (1937) .

The school district, in the exercise of a governmental function, would not be legally chargeable with negligence. Of course, the "safe place" statute applies to schools and school districts.[1]

_____

The governmental immunity from tort liability has been chipped away by a number of statutes in this state. Some examples are secs. 101.01 and 101.06, Wis. Stats. (safe place statute).[2]

_____

If it can be said that the appellant school district is an 'owner' upon the facts of this case, then it is impressed with a nondelegable duty to make the bleachers safe under sec. 101.06, Stats.3

1 *Lawver v. Joint School District No. 1,* 232 Wis. 608, 288 N.W. 192 (1939) (Citation omitted).
2 *Holytz v. City of Milwaukee*, 17 Wis.2d at 36.
3 *Novak v. City of Delavan*, 31 Wis.2d 200, 207, 143 N.W.2d 6 (Wis. 1966).

Joint and Several Liability

> The jury was properly instructed to determine the percentage of negligence attributable to Burgmeier in this case, despite the fact that Ameritech's duty arose under the safe place statute and Burgmeier's under the common law. … Because Ameritech's duties under the safe place statute were non-delegable, upon retrial, Burgmeier's negligence, if any, should be imputed to Ameritech.

Statute of Repose - Duty to Warn

Mair

> "Although defects in the lighting or paint color or a lack of warning signs could be considered unsafe conditions associated with the structure, Mair did not present sufficient evidence necessary to survive summary judgment that these were potential causes of her fall."

Rosario

> "There is no evidence that any building code violations were ever filed relating to the step that would have placed Oliver on notice of the existence of an unsafe condition."


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2023 WISCONSIN DEFENSE COUNSEL ANNUAL CONFERENCE

August 10, 2023 – August 11, 2023

EMPLOYMENT LAW UPDATE

This presentation will focus on arrest and conviction record discrimination, and the risks associated with employing individuals with arrest or conviction histories from a negligent hiring/supervision claim perspective.

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- Real Estate
- Civil Litigation

Education

- B.A., Marquette University, Cum Laude (2007)
- J.D., Marquette University, Magna Cum Laude (2010)

Jenna regularly advises clients on a variety of legal matters, including in such areas as Labor and Employment Law, School/Municipal Law, Real Estate, Contracts, and Civil Litigation.

In the area of Labor and Employment law, Jenna represents public and private employers in connection with discrimination/retaliation complaints, wrongful termination claims, wage and hour complaints, investigations, discipline and discharge, and employment contract disputes. She also assists employers with employee handbooks, personnel file matters, and general questions related to the application of state and federal employment and labor laws.

Jenna regularly advises school districts on the sale or purchase of real estate, leases, easements, facility use agreements, and other property-related matters. In addition, Jenna advises school districts and other local government clients on a wide range of matters, including public records and open meetings, police and fire matters (including police and fire commissions), drafting and negotiation of contracts, application of state and federal laws, student matters, board governance, policy review, and other matters.

Jenna also has significant experience in the area of Civil Litigation, including representing public and private sector clients with employment-related matters, contract disputes, real estate/property disputes, construction disputes, and other matters. She has represented public and private sector entities at the administrative level, trial court level and appellate court level, in both state and federal court. Jenna also regularly advises clients on the litigation process, and assists clients with resolving disputed issues without the need for litigation.

Professional Activities

- Member, State Bar of Wisconsin
- Member, Brown County Bar Association
- Board of Directors, Wisconsin School Attorneys Association
- Member, Employment Law Committee, Wisconsin Defense Counsel
- Admitted to the U.S. District Court, Eastern District of Wisconsin
- Admitted to the U.S. District Court, Western District of Wisconsin
- Admitted to the U.S. Court of Appeals, Seventh Circuit
- Admitted to the U.S. Court of Appeals, District of Columbia Circuit

Community Involvement

- Leadership Green Bay, Green Bay Area Chamber of Commerce (Class of 2013)
- Board of Directors, Brown County Home Builders Association

Recent Publications and Presentations

- *Key Considerations in School District Real Estate Transactions*, 2023 WASBO Spring Conference (May 2023)
- *School Districts Obtaining Harassment Restraining Orders and Injunctions*, Legal Update (May 2023)
- *Wage and Hour Laws/Issues in the Construction Industry*, Brown County Home Builders Association Program (May 2023)
- *Buy, Sell, Build: Referendums and Real Estate Transactions*, WSAA/WASB Conference (February 2023)
- *Pupil Discrimination Complaints under Wis. Stat. § 118.13*, Legal Update (January 2023)
- *How All Employers Are Affected by Labor Laws and Minimizing Exposure*, Green Bay Area SHRM 2022 Legal Update Program (September 2022)
- *Methods for Selling School District Real Property*, Legal Update (September 2022)
- *Real Estate Condition Reports in Commercial Real Estate Transactions*, Legal Update (June 2022)
- *Employees vs. Independent Contractors: What Employers Need to Know*, Brown County Home Builders Association Program (April 2022)

- *Effectively Managing Student Nondiscrimination Complaints*, 2022 WSAA/WASB School Law Convention (February 2022)
- *Equal Pay Act Claims*, Legal Update (February 2022)
- *School District Real Estate Transactions*, Firm Program (January 2022)
- *Court of Appeals Issues Ruling in Theft by Contractor Case, Legal Update* (October 2021)
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- *Court of Appeals Issues Decision Upholding Paid Administrative Leave of School Business Manager*, Legal Update (March 2019)
- *Critical Protocols for Holding Lawful Closed Meetings*, Firm Program (January 2019)
- *A Primer on Employment Discrimination Claims*, Legal Update (November 2018)
- *Ripped from the Headlines: Sexual Harassment in the Workplace*, Firm Program (January 2018)

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Practice Areas

- Labor and Employment Law
- Municipal Law
- Commercial Litigation

Education

- B.A., University of Wisconsin – La Crosse, 2015, Highest Honors
- J.D., University of Wisconsin Law School, 2018

Storm practices primarily in the area of labor and employment law. Prior to joining Boardman Clark, Storm was an attorney with a local Madison law firm where he advised and represented clients in a variety of civil issues including general liability defense and labor and employment law.
Prior to graduating law school and starting his practice, Storm served as a judicial intern for the Honorable William Conley as well as the Honorable Ann Walsh Bradley.

Admitted to Practice

- Wisconsin State Courts
- United States District Court for the Western District of Wisconsin
- U.S. Court of Appeals for the Seventh Circuit

Professional Memberships

- Wisconsin Defense Counsel
  - Chair of the Employment Law Committee
- Western District Bar Association
- Dane County Bar Association
- American Bar Association
- State Bar of Wisconsin, Labor and Employment Section, board member

Presentations, Publications, & Contribution

- *Author*, "Performance Improvement Plans: Past Performance and Future Success", forwardHR Fall 2022
- *Author*, "Arrest and Conviction Record Discrimination Law in Wisconsin", Wisconsin Lawyer, September 2022
- *Author*, "Disparate Impact Claims Remain a Significant Concern for Employers", Wisconsin Civil Trial Journal, Spring 2022
- *Author*, "Disability Accommodations at Work: No Nationwide Consensus", Wisconsin Lawyer, March 2021
- *Author*, "Staying on the right side of the law", forwardHR, Fall 2021
- *Author*, "Exempting Private Campgrounds from Civil Liability", Wisconsin Civil Trial Journal, March 2021
- *Author*, Seventh Circuit Acknowledges Unresolved Causation Standard Under ADA", Labor and Employment Law Blog, March 2021
- *Author*, The Equal Rights Amendment: Then and Now", Wisconsin Lawyer, March 2021
- *Author*, Seventh Circuit Expands Associational Disability Discrimination During Pandemic", Labor and Employment Law Blog, December 2020
- *Co-Author*, "Sex Discrimination: Old Problem, New Scrutiny Wisconsin Lawyer", April 2020
- *Author*, "Due Process and the Involuntary Intoxication Defense", Wisconsin Lawyer, February 2019

I. APPLICABLE LAW.

A. State Law.

1. Under the Wisconsin Fair Employment Act (WFEA), "it is an act of employment discrimination to…refuse to hire, employ, admit or license any individual, to bar or terminate from employment or labor organization membership any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment or labor organization membership because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322.

2. The prohibited bases of discrimination under the WFEA includes arrest record and conviction record. Wis. Stat. § 111.321.

    a. The term "arrest record" includes, but is not limited to, "information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(1).

    b. The term "conviction record" includes, but is not limited to, "information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(3).

3. Requesting Information.

    a. Requesting information from an applicant, such as on an application form, or from an employee, regarding an arrest record (except a record of a pending charge), can constitute arrest record discrimination. There is an exception if the individual's employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record. Wis. Stat. § 111.335(2)(a).

4. There are a number of exceptions regarding arrest and conviction record discrimination under the WFEA.

    a. Substantial Relationship Test.

i. It is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, an individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity. With regard to licensing, Wis. Stat. § 111.335(4)(a) also applies.

ii. It is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, an individual who has been convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity. With regard to licensing, Wis. Stat. §§ 111.335(4)(b) - 111.335(4)(d) also apply.

iii. Under the plain language of the statute, "the substantial relationship test requires that the employer show that the facts, events, and conditions surrounding the convicted offense materially relate to the facts, events, and conditions surrounding the job." *Cree, Inc. v. Lab. & Indus. Rev. Comm'n*, 2022 WI 15, ¶ 17, 400 Wis. 2d 827, 970 N.W.2d 837 (discussed in depth below).

b. Other Exceptions.

i. It is not employment discrimination because of conviction record to refuse to employ or to terminate from employment an individual who is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation, or established business practice of the employer.

ii. It is not employment discrimination because of conviction record to refuse to employ a person in a business licensed under Wis. Stat. § 440.26 (private detectives, investigators, and security personnel) or as an employee specified in Wis. Stat. § 440.26 (5)(b)[1] if the person has been convicted of a felony and has not been pardoned for that felony.

[1] Wis. Stat. § 440.26(5)(b) provides that "[t]he license requirements of this section do not apply to any person employed directly or indirectly by the state or by a municipality, as defined in s. 345.05 (1)(c), or to any employee of a railroad company under s. 192.47, or to any employee of a commercial establishment, while the person is acting within the scope of his or her employment and whether or not he or she is on the employer's premises."

iii. It is not employment discrimination because of conviction record to refuse to employ as an installer of burglar alarms a person who has been convicted of a felony and has not been pardoned for that felony.

iv. It is not employment discrimination because of conviction record to refuse to employ in a position in the classified service a person who has been convicted under 50 U.S.C. § 3811 for refusing to register with the selective service system and who has not been pardoned.

v. It is not employment discrimination because of conviction record for an educational agency to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony.

A. The term "educational agency" is defined as "a school district, a cooperative educational service agency, a county children with disabilities education board, a state prison under s. 302.01, a juvenile correctional facility, as defined in s. 938.02(10p), a secured residential care center for children and youth, as defined in s. 938.02(15g), the Wisconsin Center for the Blind and Visually Impaired, the Wisconsin Educational Services Program for the Deaf and Hard of Hearing, the Mendota Mental Health Institute, the Winnebago Mental Health Institute, a state center for the developmentally disabled, a private school, a charter school, a private, nonprofit, nonsectarian agency under contract with a school board under s. 118.153(3)(c), or a nonsectarian private school or agency under contract with the board of school directors in a 1st class city under s. 119.235(1)."

vi. It is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensure, any individual who has been convicted of any offense under Wis. Stat. § 440.52(13)(c).[2]

[2] Wis. Stat. § 440.52(13)(c) provides that "Any person who knowingly uses a false academic credential, or who falsely claims to have a legitimate academic credential, as follows may be required to forfeit not more than $1,000: 1. In any communication to a client or to the general public, in connection with any business, trade, profession, or occupation. 2. For the purpose of obtaining a license or other approval required to practice a trade, profession, or occupation. 3. For the purpose of obtaining admission to an authorized institution of higher education. 4. For the purpose of obtaining an employment position with a state agency or with a political subdivision of the state, including an elective or

c. Licensing.

i. "It is employment discrimination because of arrest record for a licensing agency to refuse to license any individual under sub. (2)(b) or to suspend an individual from licensing under sub. (2)(b) solely because the individual is subject to a pending criminal charge, unless the circumstances of the charge substantially relate to the circumstances of the particular licensed activity and the charge is for any of the following: 1. An exempt offense or 2. A violent crime against a child." Wis. Stat. § 111.335(4).

ii. "It is employment discrimination because of conviction record for a licensing agency to refuse to license any individual under sub. (3)(a)1. or to bar or terminate an individual from licensing under sub. (3)(a)1. because the individual was adjudicated delinquent under ch. 938 for an offense other than an exempt offense." Wis. Stat. § 111.335(4)(b).

iii. "If a licensing agency refuses to license an individual under sub. (3)(a)1. or bars or terminates an individual from licensing under sub. (3)(a)1., the licensing agency shall, subject to subd. 2., do all of the following: a. State in writing its reasons for doing so, including a statement of how the circumstances of the offense relate to the particular licensed activity. b. Allow the individual to show evidence of rehabilitation and fitness to engage in the licensed activity under par. (d). If the individual shows competent evidence of sufficient rehabilitation and fitness to perform the licensed activity under par. (d), the licensing agency may not refuse to license the individual or bar or terminate the individual from licensing based on that conviction." Wis. Stat. § 111.335(4)(c). This provision does not apply if a conviction is for an exempt offense.[3] Wis Stat. § 111.335(4)(c).

iv. State licensing agencies must publish on their websites a document indicating the offenses or kinds of offenses that may result in such a refusal, bar, or termination. Wis. Stat. § 111.335(4)(e).

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appointive position, whether compensated or not; of obtaining a promotion, transfer, or reassignment from such a position; or of obtaining an increase in compensation or benefits for such a position."

[3] An "exempt offense" is defined as "1. A violation specified in ch. 940 or s. 948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095. [or] 2. A violation of the law of another jurisdiction that would be a violation described in subd. 1. if committed in this state." Wis. Stat. § 111.335(1m)(b).

v. An individual may apply to a state licensing agency for a determination of whether the individual would be disqualified from obtaining a license due to his or her conviction record. Wis. Stat. § 111.335(4)(f).

vi. It is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under Chapter 125, Wisconsin Statutes (alcohol beverages) if the person holding or applying for the license or permit has been convicted of one or more specified drug-related offenses. Wis. Stat. § 111.335(4)(h).

vii. It is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under Wis. Stat. § 440.26 (private detectives, investigators, and security personnel) to a person who has been convicted of a felony and has not been pardoned for that felony. Wis. Stat. § 111.335(4)(i)1. Additionally, "it is not employment discrimination because of conviction record to revoke a license or permit under s. 440.26(6)(b) if the person holding the license or permit has been convicted of a felony and has not been pardoned for that felony." Wis. Stat. § 111.335(4)(i)2.

viii. It is not employment discrimination because of conviction record for the board of nursing to refuse to license an individual in accordance with Wis. Stat. § 441.51(3)(c)7. and 8. Wis. Stat. § 111.335(4)(j).

B. Federal Law.

1. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based upon one's race, color, religion, sex, and national origin. It does not *expressly* include arrest record or conviction record as protected bases.

2. Title VII prohibits disparate treatment of job applicants and employees, such as an employer disqualifying a person of one protected category based upon their conviction or arrest record while not disqualifying a person who is not in that protected category with a similar record.

3. Title VII also covers disparate impact claims, such as when an employer's neutral policy or practice results in a significant negative impact on one or more protected groups, and either the policy or practice is not job-related and consistent with business necessity or there is a less discriminatory alternative that the employer has chosen not to adopt.

C. Local Ordinances.

1. Some municipalities have ordinances that address arrest and conviction record discrimination. For instance, see Madison General Ordinance 39.03, the Equal Opportunities Ordinance; see also Madison General Ordinance 39.08, "Ban the Box" in City Contracting.

II. RECENT CASES AND DECISIONS

A. In *Cree, Inc. v. Lab. & Indus. Rev. Comm'n*, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837, the Wisconsin Supreme Court considered the substantial relationship test and held that the employer did not unlawfully discriminate against a job applicant.

In this case, Derrick Palmer applied for a position as an Applications Specialist. The prospective employer, Cree, Inc., rescinded its job offer to Palmer based upon his prior convictions for domestic violence. Palmer was convicted in 2013 for eight (8) crimes that involved domestic violence against a former girlfriend. While in prison, Palmer earned a certification in mechanical design. In 2015, he applied for a position at Cree that included designing and recommending lighting systems to customers, sometimes at customers' facilities. It also included attendance at trade shows.

Cree made a conditional offer to Palmer subject to a standard background check. Cree then rescinded the offer based upon the 2013 convictions.

Palmer filed a discrimination complaint with the Wisconsin Department of Workforce Development Equal Rights Division (ERD). The investigator initially found probable cause to believe that discrimination occurred. After a hearing on the merits, the Administrative Law Judge (ALJ) concluded that Palmer's convictions were substantially related to the position, such that the employer did not unlawfully discriminate against Palmer. Palmer appealed to the Labor and Industry Review Commission (LIRC), which reversed the ALJ's decision. LIRC rejected the expert testimony proffered by Cree and instead reached an opposite conclusion. The circuit court reversed LIRC's decision. The Court of Appeals then reversed the circuit court's decision. The Wisconsin Supreme Court then reversed the Court of Appeals and sided with Cree.

In rejecting LIRC's analysis related to domestic violence cases, the Court stated, "we apply the substantial relationship test to a domestic violence conviction the same way we would to any other conviction…we must look beyond any immaterial identity between circumstances—such as the domestic context of the offense or an intimate relationship with the victim—and instead examine the circumstances material to fostering criminal activity. The material circumstances are those that exist in the workplace that present opportunities for recidivism given the character traits revealed by the circumstances of a domestic violence conviction."

Under this framework, Courts must first analyze whether there would be opportunities in the workplace for recidivism. Next, Courts analyze the character traits revealed by the elements of a crime of domestic violence.

In applying the framework to Palmer, the Court reviewed the elements of the offenses and the character traits tied to them. It also considered "other relevant and readily ascertainable circumstances of the offense such as the seriousness and number of offenses, how recent the conviction is, and whether there is a pattern of behavior." The Court stated, "[w]e consider the seriousness of the convicted offense because the more serious the offense, the less we can expect an employer to carry the risk of recidivism."

Next, the Court considered the circumstances of the job, including the facility size and layout, access to the facility, and security camera coverage. It also considered the independent nature of the job and work with customers.

The Court held that Cree satisfied the substantial relationship test. It reasoned that "Palmer's willingness to use violence to exert power and control over others substantially relates to the independent and interpersonal nature of a pre and post sales job like the Applications Specialist position." It further reasoned that "the absence of regular supervision creates opportunities for violent encounters." The Court explained that "the seriousness of Palmer's convictions would force Cree to assume the risk of Palmer repeating his conduct and threatening the safety of employees, customers, and the public. Additionally, the recentness of Palmer's convictions—a scant two years—eliminates any favorable inference of a long-dormant conviction record. Finally, Palmer's emerging pattern of domestic violence convictions further highlight his recidivism risk."

B. In *Geiger v. Milwaukee Area Technical College*, ERD Case No. CR201602707 (LIRC April 28, 2023), LIRC found that the prospective employer, Milwaukee Area Technical College (MATC), did not violate the WFEA when it suspended the complainant, Geiger, while a charge of embezzlement was pending. Geiger alleged that MATC discriminated against him on the basis of an arrest record. Geiger further alleged that there was not a substantial relationship between the crime of embezzlement (which he was charged with) and his job as a plumbing instructor.

LIRC considered the elements of the crime of embezzlement. It then considered the character traits revealed by the offense. LIRC reasoned that "[o]ne character trait revealed by having engaged in embezzlement includes, generally, a tendency to take things that belong to others without the owner's consent. Embezzlement requires a theft arising out of one's position with an organization. One convicted of embezzlement exhibits the character traits of disregard for the property rights of others; dishonesty and lack of trustworthiness; and a willingness to abuse one's position for personal gain."

Next, LIRC considered the circumstances of the job, which included placing orders for tools and supplies. In addition, Geiger was permitted to take tools and supplies to an offsite location for teaching students. LIRC reasoned that, "[h]e had great autonomy in his position and had the opportunity to personally select which tools

and supplies to order and how much to order. Although the complainant did not work completely free of oversight, the job provided great freedom to exercise his judgment in procurement and with that, great opportunity to abuse his position for personal gain and to disregard the property rights of his employer." LIRC concluded that the circumstances of the charge substantially related to the circumstances of the particular job.

C. In *Lane v. Bellin Memorial Hospital*, ERD Case No. CR201801229 (LIRC March 16, 2023), LIRC concluded that the complainant's arrest record was not substantially related to her job. Thus, the employer's decision to suspend her violated the WFEA.

The complainant, Karen Lane, had been charged with obstructing an officer, battery, criminal damage to property, domestic abuse, and disorderly conduct related to a single incident involving her husband. LIRC considered the character traits associated with those offenses. Next, it considered the circumstances of the job; the complainant was employed as a physician specializing in pediatric care.

LIRC noted that the charges related to a single incident, and there was no pattern of violence or other criminal conduct. LIRC reasoned that, "[t]he record contains no evidence to indicate that there are specific opportunities in the workplace that would allow the complainant to recidivate, and the commission can see no reason to believe that the complainant, who worked for the respondent for 17 years without incident, is likely to become aggressive with a patient, a patient's family member, or a co-worker, that she might destroy property, or that she might obstruct an investigation in the context of her work."

In addition, based upon its prior decisions, LIRC reasoned that adverse personality traits alone cannot form the basis for a finding of a substantial relationship. However, it also stated "even assuming that adverse character traits could form the basis for a finding of substantial relationship in the absence of a concern about criminal recidivism, the commission would nonetheless be disinclined to find a substantial relationship in this case." LIRC reasoned that "honesty, trustworthiness, and a willingness to follow rules are important components of most any job, and there is nothing about the job of a pediatric physician that is unique in this regard." Thus, LIRC sided with the complainant.

D. In *Rucker v. Milwaukee Center for Independence*, ERD Case No. CR201702654 (LIRC May 31, 2022), LIRC concluded that the complainant's convictions for retail theft substantially related to the duties of the job of an Inbound Customer Resolution Specialist. LIRC reasoned that the character traits associated with such a conviction includes "untrustworthiness and a tendency to steal." The position of Inbound Customer Resolution Specialist would have provided the complainant with access to clients' sensitive personal information, and the clients included a vulnerable population. LIRC rejected the complainant's attempt to differentiate between retail theft convictions versus the crime of identity theft, for which he had no past history.

III. RELEVANT CONSIDERATIONS.

A. An employer may ask a job applicant if they have any pending charges or convictions; the employer should make it clear that these will only be given consideration if the offenses are substantially related to the particular job.

B. If an employee or job applicant fails to disclose all requested criminal background information or is otherwise dishonest, that can serve as a legitimate, non-discriminatory reason for not hiring the individual or for imposing discipline.

C. The preferences of customers and other employees are not relevant to the analysis. Rather, the circumstances of the offense must be substantially related to the circumstances of the job.

D. An employer should obtain information from the job applicant or employee regarding the circumstances of the conviction and document its analysis under the substantial relationship test.

IV. Liability Avoidance

A. Negligent Hiring & Supervision

Miller v. Wal-Mart Stores, Inc., 219 Wis. 2d 250, 580 N.W.2d 233 (1998).

- The plaintiff, Stanley Miller, was leaving a Wal-Mart in Superior, Wisconsin when three Wal-Mart employees approached him in the parking lot. A Wal-Mart loss prevention employee, Richard Maness, tipped them off that Miller had stolen a swimsuit. Maness was one of the three employees who approached Miller in the parking lot. Miller and the employees had a verbal exchange, the content of which they disputed at trial. Critically, no swimsuit was found with Miller.

- Miller was distraught after the interaction and sued Wal-Mart, alleging that the employees had unlawfully stopped, detained, searched, and interrogated him. He sought damages for false imprisonment, battery, negligent infliction of emotional distress, and loss of consortium.

- After a four-day jury trial, the jury awarded Miller $20,000 in compensatory damages for past mental pain and suffering and $30,000 in punitive damages. The jury determined that Wal-Mart was negligent in hiring, training, or supervising its employees and that the Wal-Mart employees lacked reasonable cause to believe that Miller had shoplifted. The circuit court denied Wal-Mart's post-verdict motions and judgment was entered.

- Wal-Mart appealed, and came before the Wisconsin Supreme Court. In a case of first impression, the supreme court held that negligent training, supervision, and hiring is a valid claim in Wisconsin and it clarified the claim's elements.

- According to the court, "[t]o state a claim for such negligence, the plaintiff must show that the employer has a duty of care, that the employer breached that duty, that the act or

omission of the employee was a cause-in-fact of the plaintiff's injury, and that the act or omission of the employer was a cause-in-fact of the wrongful act of the employee." *Miller*, 219 Wis. 2d at 267–68.

- The supreme court held that Wal-Mart owed Miller a duty of care because everyone owes everyone else a duty to refrain from conduct which will result in foreseeable harm. It was foreseeable that failure to train Maness could cause harm to a patron.

- The supreme court next left undisturbed the jury's conclusion that Wal-Mart had breached its duty to Miller by failing to properly train Maness on proper loss prevention protocol.

- The supreme court next turned to the causation element and explained that for a negligent hiring/training/supervision claim, it is a two-part inquiry. "The first [question] is whether the wrongful act of the employee was a cause-in-fact of the plaintiff's injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee." *Id.* at 262.

- Importantly, the court held that "[t]he act of the employee, whether intentional or unintentional, must be causal to the injury sustained. But equally important, the negligence of the employer must be connected to the act of the employee." *Id.*

- The jury determined that Wal-Mart had negligently hired, trained, or supervised the three employees and that the employees' actions caused damages to Miller. However, the Special Verdict form failed to ask the jury whether Wal-Mart's failure to properly train, hire, and supervise the employees was a cause-in-fact of Miller's damages. For this reason, the case was ultimately remanded for a factual finding.

- Although the supreme court ultimately remanded, it went further in its explanation of this tort. According to the court, the fact that the employees had not committed a specific tort against Miller was of no consequence because the employees' conduct was contrary to well-defined public policy in Wisconsin. This public policy being that employees should only approach shoplifters when they possess reasonable cause to do so.

- Having expounded on cause-in-fact, the supreme court turned to proximate cause and the public policy factors. According to the court, none of them would negate liability in this matter:

    - The first policy consideration asks whether the injury is too remote from the negligence. Miller argued that the hiring, training, and supervision of employees was exclusively within Wal-Mart's control. Trial testimony showed that the loss prevention employee was not trained regarding his duties and responsibilities. Accordingly, the supreme court held that the injury was not too remote from Wal-Mart's negligence in failing to properly train.

- The second policy consideration asks whether the injury was disproportionate to the tortfeasor's negligence. In this case, the evidence showed that Wal–Mart was solely responsible for hiring, training and supervising its retail security employee. Accordingly, holding Wal-Mart liable for the damages caused by Maness was not disproportionate to Wal-Mart's culpability because of its role in the training.

- Under the third consideration, the supreme court found that it was not highly extraordinary that Wal-Mart's negligence caused Miller's harm. The court observed that security personnel enjoy significant authority and therefore if they are not properly trained, this could cause significant harm.

- Under the fourth consideration, the court held that allowing recovery for Miller would not place an unreasonable burden on Wal-Mart. The court was persuaded that because the employee stopped and detained Miller without reasonable cause, it was not unreasonable to impose civil liability on Wal-Mart. The court assumed that had the employee been properly trained, the employee would not have stopped Miller without reasonable cause.

- Under the fifth factor, the court was not persuaded that allowing recovery for Miller would open the door to fraudulent claims. It rejected Wal-Mart's argument that a specific tort had to be committed to establish liability and held that if a plaintiff can prove that an employee's conduct caused specific harm and that the employer's failure to train/supervise properly contributed to the employee's conduct, that is sufficient to prove a claim.

- Under the sixth factor, the court considered whether such claims would have a sensible or just stopping point. It rejected Wal-Mart's argument that this would open the floodgates of claims because "[t]he employee's conduct must be a cause-in-fact of the plaintiff's injury. Only then can a jury move to the second causation question of whether the employer's negligence was a cause-in-fact of the employee's wrongful and injurious act. [And so] [r]equiring that the employee's act be a cause-in-fact of the plaintiff's injury provides a just and sensible stopping point."

- The case was ultimately remanded to the circuit court because the Special Verdict form did not properly ask the jury to make a finding on whether Wal-Mart's negligence in training/hiring/supervising was a cause-in-fact of Miller's harm.

B. *Hansen v. Texas Roadhouse, Inc.*, 2013 WI App 2, 345 Wis. 2d 669, 827 N.W.2d 99

- A Texas Roadhouse employee, Ryan Kropp, intentionally placed one of his beard hairs in Kevin Hansen's steak after Hansen sent his first steak back for being overcooked. Kropp told his coworker, Michael Perkins, what he had done. Perkins did not intervene, and the steak was served to Hansen.

- After it was served, Perkins told the kitchen manager what Kropp had done. The kitchen manager reported the incident to the service manager, Nicole Livermore. Livermore thought the steak had been served hours ago and made no effort to try and locate it.

- However, Hansen did not immediately eat the steak. It was placed in a to-go box and he ate it the next day when he located the hair. He took the steak to the police department and filed an incident report.

- Hansen brough civil claims against Texas Roadhouse on the following grounds: "(1) Texas Roadhouse was negligent in its training, hiring and supervision of Kropp and its managers, which caused injury to Hansen; (2) Texas Roadhouse was vicariously liable for Kropp's and its managers' actions under the doctrine of *respondeat superior*; (3) Texas Roadhouse breached the implied warranty that its food was fit for human consumption; and (4) Texas Roadhouse acted with intentional disregard for Hansen's rights in failing to respond to complaints about Kropp."

- The circuit court granted summary judgment on the negligent hiring claim, which the court of appeals affirmed. Hansen had argued that Texas Roadhouse was negligent in hiring Kropp who had a criminal record for disorderly conduct, bail jumping, misdemeanor possession of marijuana. Hansen also introduced evidence that Kropp had been fired from an Applebee's for drinking on the job. However, he failed to introduce evidence that these considerations were related to the act of contaminating food.

- The court of appeals affirmed the trial court's dismissal of the claim because Hansen failed to introduce sufficient evidence that Kropp's prior convictions were causally connected to his conduct of contaminating a steak.

V. Practical Considerations

1. Consult a labor and employment attorney
    a. Arrest/conviction issues are tricky even for experienced employment attorneys. If you have questions about whether an individual with an arrest/conviction record poses a risk to the workplace, contact someone who can provide sound advice.

2. Ensure that clients follow training policies/practices
    a. Clients who have training policies but do not enforce them do so at their own risk. Not following through with employment policies or enforcing them meaningfully feeds a claim of negligent supervision/training.

3. Ensure that employees of clients are completing this training and signing acknowledgments
    a. Electronic signatures are generally okay if there is a way to trace the signature back, but ensuring that employees sign with a wet ink signature that they have reviewed and understand workplace policies is a way to combat a claim that the employer did not properly train employees.

VI. Background Checks

A. Background Checks are in some instances legally required. For example:

1. Care givers

a. Wisconsin's Caregiver Law requires background and criminal history checks of certain personnel who are responsible for the care, safety and security of children and adults. Wis. Stat. §§ 50.065(2) and 146.40.

b. The programs subject to the Caregiver Law include:

i. Emergency Mental Health Services Programs - DHS 34
ii. Mental Health Day Treatment Services for Children - DHS 40
iii. Outpatient Community Mental Health/Developmental Disabilities - DHS 61
iv. Community Substance Abuse Services (CSAS) - DHS 75
v. Community Support Programs (CSPs) - DHS 63
vi. Community Based Residential Facilities (CBRFs) - DHS 83
vii. Adult Family Homes (3 and 4 bed AFHs) - DHS 88
viii. Residential Care Apartment Complexes (RCACs) - DHS 89
ix. Hospitals, including Clinics that are part of the hospital-DHS 124
x. Rural Medical Centers - DHS 127
xi. Hospices - DHS 131
xii. Nursing Homes - DHS 132
xiii. Intermediate Care Facilities for Persons with Mental Retardation (ICFs/MR) - DHS 134
xiv. Home Health Agencies (including personal care and supportive home care services provided by a licensed HHA) - DHS 133

2. Bank/Credit Unions

a. Employees

i. 12 U.S.C. § 1829 (banks and insured depository institutions).
ii. 12 U.S.C. § 1785 (credit unions)

b. Mortgage Loan Originators

i. SAFE Act
ii. Consumer Financial Protection Bureau (CFPB) Rules

B. Distinguish Qualified Applicants

1. A background check is another tool to obtain information that will assist in determining which qualified applicant is better suited for the position.

2. The information sought in a background check should be relevant to specific job-related considerations and priorities.

V. Overview of the Fair Credit Reporting Act ("FCRA")

A. If an employer conducts its own background check, there is no legal requirement that the employer notify individuals of the fact that it may review and take action based upon an individual's background profile.

B. However, if an employer hires a third-party company to perform a background investigation and that company regularly conducts background checks, the employer must then comply with a federal law known as the Fair Credit Reporting Act ("FCRA"). The FCRA imposes specific notice and authorization obligations on employers that order background checks from third-party vendors (known as consumer reporting agencies).

1. FCRA regulations apply to all "consumer reports," a broad term that includes a wide variety of reports such as driving records, criminal records, credit reports, and many other reports procured from a third-party company.

2. Employers who hire third parties to conduct background checks or obtain credit reports from job applicants or employees must be aware of the FCRA's requirements and make sure that if you hire a company to conduct background checks, the third-party vendor is complying with the FCRA. **It is your responsibility, not your third-party vendor, to make sure that the FCRA requirements are followed.**

3. FCRA Requirements Before the Background Check:

   a. Provide job applicants with a clear and conspicuous disclosure to the applicant *before* requesting the credit report, in a document consisting *solely* of that disclosure. The document must be clear, easy to understand, and a stand-alone document. The documents must include that:

      i. A consumer report may be obtained for employment purposes;

      ii. That the consumer has authorized in writing the procurement of the report by the employer; and,

iii. That before an adverse action is taken, the applicant or employee will be provided with a copy of the report, the address and phone of the credit bureau, and a copy of "A Summary of Consumers Rights" under the FCRA.

b. Before obtaining a credit report from a credit reporting agency, the employer must certify to the credit reporting agency that:

i. The consumer has been informed that a credit report may be obtained for employment purposes;

ii. The consumer has authorized the procurement of a credit report;

iii. The consumer has been informed about the procedures to be taken in case an adverse action is to be taken based in whole or in part on the credit report; and,

iv. The information being obtained will not be used in violation of any federal or state equal opportunity law or regulation.

c. A summary of employer's obligations before obtaining a background check may be found on the Federal Trade Commission's website: https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know.

4. FCRA Requirements Before You Take an Adverse Action:

a. Before you reject a job applicant or take an adverse action against an employee based on information contained in a background check, you must give the employee notice.

b. The employer must provide:

i. A notice that includes a copy of the consumer report you relied on to make your decision; and

ii. A copy of A Summary of Your Rights Under the Fair Credit Reporting Act.

a) This is a standard document issued by the Federal Trade Commission and Consumer Financial Protection Bureau. The agencies update this form periodically and it is your responsibility to ensure

you are providing the most updated version of the form. This form can be found on the FTC's website. The last update to this form occurred on September 21, 2018. Use of the model form is not required, but the information in the form must be provided to applicants and employees.

b) The change in the form is a result of the recent enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act. The new law requires nationwide consumer reporting agencies to provide a "national security freeze" free of charge to consumers. The national security freeze restricts prospective lenders from obtaining access to an individual's background report, which in turn makes it more difficult for identity thieves to misappropriate the individual's personal information.

c) The law also states that, whenever the FCRA requires a "consumer" to receive a Summary of Consumer Rights, a notice regarding the availability of a security freeze must be included. The new Summary of Consumer Rights form includes language related to security freezes, consistent with the new law.

5. FCRA Requirements After Your Take Adverse Action

a. When the adverse action is taken, the employer must issue a notice which must include:

i. The name, address, and telephone number of the agency/individual that supplied the report;

ii. A statement that the agency/individual was not responsible for taking the adverse action and therefore, cannot explain it; and,

iii. A notice that the applicant or employee may dispute the accuracy or completeness of any information furnished by the agency/individual, and that the applicant or employee has the right to an additional free credit report if requested within 60 days of receipt of the Adverse Action Notice.

b. While third party vendors typically provide copies of required

FCRA notices to employers for their use, **it is the employer's responsibility to give these to applicants and employees at the appropriate times and make sure the notices are accurate and up to date.** Failure to abide by the obligations under the FCRA can result in legal claims by those adversely affected.

6. City of Madison General Ordinance (§ 39.03(8)) also contain requirements for employers to follow regarding the results of background checks.

2023 WISCONSIN DEFENSE COUNSEL ANNUAL CONFERENCE

Employment Law Update

August 10, 2023

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Program Topics

- Arrest and Conviction Record Discrimination
  - State Law
  - Federal Law – Disparate Treatment and Disparate Impact Claims
  - Local Ordinances
  - Recent Cases and Decisions
- Negligent/Hiring Supervision Claims
  - Relevant Considerations
  - Liability Avoidance
  - Practical Considerations
  - Background Checks
  - FCRA

2

State Law

- Wisconsin Fair Employment Act
  - Arrest Record Discrimination
  - Conviction Record Discrimination
  - Requesting Information from Applicants
  - Substantial Relationship Exception
  - Other Exceptions
  - Licensing

3

Federal Law and Local Ordinances

- Title VII
  - Does not expressly include arrest record or conviction record as protected bases.
  - Prohibits disparate treatment of job applicants and employees.
  - Covers disparate impact claims, such as when an employer's neutral policy or practice results in a significant negative impact on one or more protected groups, and either the policy or practice is not job-related and consistent with business necessity or there is a less discriminatory alternative that the employer has chosen not to adopt.
- Some municipalities have local ordinances that address arrest and conviction record discrimination.

4

Recent Cases and Decisions

- *Cree, Inc. v. Lab. & Indus. Rev. Comm'n*, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837
  - The Court applied the substantial relationship test and held that the employer did not unlawfully discriminate against a job applicant.
- Geiger v. Milwaukee Area Technical College, ERD Case No. CR201602707 (LIRC April 28, 2023)
  - LIRC applied the substantial relationship test and held that the employer did not violate the WFEA when it suspended an employee while a charge was pending.
- Lane v. Bellin Memorial Hospital, ERD Case No. CR201801229 (LIRC March 16, 2023)
  - LIRC applied the substantial relationship test and held that the employer violated the WFEA in suspending an employee.
- *Rucker v. Milwaukee Center for Independence*, ERD Case No. CR201702654 (LIRC May 31, 2022)
  - LIRC applied the substantial relationship test and held that the employer did not violate the WFEA.

5

The Tort of Negligent Hiring/Training/Supervision

- This is a separate cause of action from arrest/conviction record discrimination.
- This cause of action was first recognized by the Wisconsin Supreme Court in the decision of *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 580 N.W.2d 233 (1998).
- "To state a claim for such negligence, the plaintiff must show that the employer has a duty of care, that the employer breached that duty, that the act or omission of the employee was a cause-in-fact of the plaintiff's injury, and that the act or omission of the employer was a cause-in-fact of the wrongful act of the employee." *Miller*, 219 Wis. 2d at 267–68.

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The Intersection of Claims

- *Hansen v. Texas Roadhouse, Inc.*, 2013 WI App 2, 345 Wis. 2d 669, 827 N.W.2d 99.
- Demonstrates how arrest/conviction record discrimination intersects with the tort of negligent hiring/training/supervision
- Provides a good illustration of the policy considerations at work

7

Practical Considerations

- Consult a labor and employment attorney
- Arrest/conviction issues are tricky even for experienced employment attorneys. If you have questions about whether an individual with an arrest/conviction record poses a risk to the workplace, contact someone who can provide sound advice.
- Ensure that clients follow training policies/practices.
- Clients who have training policies but do not enforce them do so at their own risk. Not following through with employment policies or enforcing them meaningfully feeds a claim of negligent supervision/training.
- Ensure that employees of clients are completing this training and signing acknowledgments.
- Electronic signatures are generally okay if there is a way to trace the signature back, but ensuring that employees sign with a wet ink signature that they have reviewed and understand workplace policies is a way to combat a claim that the employer did not properly train employees.

8

Thank You

Questions?

9

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MEDICAL PAYMENTS SUBROGATION, THE MADE WHOLE DOCTRINE AND THE MYTHICAL RIMES HEARING

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I. SUBROGATION BASICS

A. The doctrine of subrogation enables an insurer that has paid an insured's loss pursuant to a policy of insurance to recoup that payment from the party responsible for the loss. Muller v. Society Insurance, 309 Wis. 2d 410, 750 N.W.2d 1 (Wis. 2008)

B. Subrogation rests upon equitable principles. Petta v. ABC Ins. Co., 278 Wis. 2d 251, 692 N.W.2d 639 (Wis. 2005).

C. Subrogation effectuates an equitable adjustment among parties to prevent unjust enrichment in at least two ways. First, subrogation compels payment of a debt by one who in equity ought to pay, namely, the tortfeasor. Second, subrogation precludes an insured from recovering twice for the same loss. Petta v. ABC Ins. Co., 278 Wis. 2d 251, 692 N.W.2d 639 (Wis. 2005).

II. THE MADE WHOLE DOCTRINE

A. Subrogation rests upon equitable principles, including a rule that the insured has priority over his insurer when there is an inadequate pool of funds." Garrity v. Rural Mut. Inc. Co., 77 Wis. 2d 537, 541, 253 N.W.2d 512 (Wis. 1977).

B. The general rule is that there is no subrogation until the insured has been made whole. Garrity v. Rural Mut. Inc. Co., 77 Wis. 2d 537, 542, 253 N.W.2d 512 (Wis. 1977).

C. The test of wholeness depends upon whether the insured has been completely compensated for all the elements of damages, not merely those damages for which the insurer has indemnified the insured. Rimes v. State Farm Mut. Auto Ins. Co., 106 Wis. 2d 263, 275, 316 N.W.2d 348 (Wis. 1982).

D. Elements of Damages in Typical Automobile Accident

1. Past Medical Expenses
2. Future Medical Expenses
3. Past Loss of Earnings
4. Future Loss of Earning Capacity
5. Pain and Suffering
6. Permanent Injury or Disability
7. Property Damage

E. Evaluating Damages

1. The value of a personal injury case is often founded on the "specials" (past medical expenses + past loss of earnings).

2. Factors such a permanent injury, chronic pain, functional limitations and disfigurement increase the damages in a personal injury case.

3. Compare the total damages to the amount of the settlement. If settlement > total damages, insured is made whole. If settlement < total damages, insured has not been made whole.

4. The "made whole" analysis **should** be a simple matter of mathematics. In practice, it is treated as highly subjective, with plaintiffs' attorneys routinely insisting that any settlement has not made their client whole.

III. "RIMES" HEARINGS

1. When the subrogated insurer and the plaintiff's personal injury attorney cannot agree on whether a settlement has made the insured whole, the dispute gets resolved at a "Rimes" hearing.

2. Actually, it is a "trial", not a hearing. Rimes v. State Farm Mut. Auto Ins. Co., 106 Wis. 2d 263, 277, 316 N.W.2d 348 (Wis. 1982).

3. The purpose is to conduct a trial "in which the various items of damages would be ascertained to determine what sum would have made the plaintiff whole". Rimes v. State Farm Mut. Auto Ins. Co., 106 Wis. 2d 263, 277, 316 N.W.2d 348 (Wis. 1982).

4. At the "Rimes" trial, the subrogated insurer will have the burden of proving:

    a. That it paid medical expenses on behalf of the plaintiff;

    b. That those medical expenses are causally related to the accident;

    c. That it has a basis (either contractual or equitable) for pursuing subrogation.

5. At the "Rimes" trial, the plaintiff's attorney will have the burden of proving all of the other damages – past medical expenses (the ones the med pay coverage did not pay for), future medical expenses, wage loss, loss of earning capacity, pain and suffering permanent injury.

    a. Note – because it is a "trial", it is subject the rules of evidence. This means that proof of damages must come in the form of *admissible* evidence. Things like future medical expenses, loss of earning capacity, and permanency require testimony from a doctor.

6. The Good News for MedPay Carriers

    a. It is neither difficult nor expensive for the medpay carrier to prove the things it has to prove at the *Rimes* trail. Medpay coverage only applies to medical expenses that are incurred in a covered accident. Once paid, the plaintiff cannot deny that the medical expenses are causally related.

    b. It is both difficult and expensive for the plaintiff to prove the things that he or she has to prove at a *Rimes* trial. Other past medical expenses, future medical expenses, permanency all require expert testimony and medical experts are expenses.

7. The Bad News for MedPay Carriers

    a. The medpay carrier will lose a "Rimes" trial MOST of the time.

    b. Why? – because at the end of the day, the judge must decide who should get a limited amount of money – the unquestionably injured plaintiff sitting before them v. the

multi-million dollar insurance company who charged a premium to take on the risk.

8. Responding to the Threat of a "Rimes" Hearing

b. Make them do the math. What amount is necessary to make the plaintiff whole? What are the elements of damages included in that number? What dollar value is assigned to each of those elements?

c. Make the plaintiff's personal injury attorney show you the evidence. How will they prove up the damages? What expert witnesses will be providing the opinions necessary to prove these damages?

d. Here's a typical email that I will send to a plaintiff's attorney who is claiming that their client has not been made whole by their settlement:

At present, what my client knows about Mr. Smith's injuries is what it learned during the claims process – a process that concluded several years ago when (Mr. Smith was released from care)(when the last medical expense claim submitted)(when the policy limit was paid). As you know, the "made whole" analysis is primarily a mathematics equation – what amount is necessary to fully compensate Mr. Smith for all of the elements of damages that he has sustained as a result of the accident? We add up those amounts and compare it to the third-party settlement. To that end, my client needs to know more about the variables in the equation. How much is Mr. Smith claiming in past medical expenses? (with whom was the treatment and what were the dates of service?) Is Mr. Smith claiming future medical expenses? (if so, who is the expert providing the medical opinion necessary to support those claims?) Is Mr. Smith claiming lost wages? (if so, what documentation exists to support these claims?) Is Mr. Smith claiming permanent injury? (if so, who is the expert providing the medical opinion necessary to support those claims?) How much is Mr. Smith claiming in past pain and suffering (and how was that number arrived at?) Is Mr. Smith claiming future pain and suffering (if so, who is the expert providing the medical opinion that supports these claims?) Without this information, my client can't draw any conclusions about whether the settlement has made Mr. Smith "whole". Upon receipt of this information, however, we would be happy to reassess our position.

IV. NEGOTIATING WITH THE INSURED'S PERSONAL INJURY ATTORNEY

A. What if they are now claiming that the medical expenses paid by the medpay carrier are unrelated?

1. Unlike traditional health insurance companies, automobile insurers with medical payments coverage are only obligated to pay medical expenses related to a covered automobile accident.

2. When an insured submits medical bills for payment under the medical payments coverage of an automobile policy, they are taking the position that these particular medical expenses are related to the accident.

3. Once the insured has taken the position that medical expenses are related to the accident for the purposes of first party coverage, they can't later claim that those same medical expenses are unrelated for the purposes of subrogation.

B. Some medical expenses are better than others

1. First Meds > Later Meds

2. Medical Care > Chiropractic Care

3. A subrogated insurer "owns" a portion of the plaintiff's personal injury claim.

4. Since medical payments coverage is usually primary (at least in comparison to traditional health insurance), it usually pays for the first (and potentially "best") medical expenses incurred as a result of the accident.

5. While the plaintiff's personal injury claim may have certain weaknesses (especially with regard to permanency), the med pay carrier may "own" the best part of the case.

V. ETHICAL CONSIDERATIONS

A. Notice and Delivery of Funds

1. Upon receiving funds which a lawyer has received notice that a 3rd party has an interest in by virtue of a lien (such as a medical payments lien), the lawyer shall promptly **notify** the 3rd party in writing. The

lawyer shall then promptly **deliver** to the 3rd party any funds that the 3rd party is entitled to receive. Supreme Court Rule (SCR) 20:1.15(e)(1).

2. Did the medpay carrier receive **prompt** notice of the settlement?

3. Did the insured's attorney **promptly** deliver the medpay carrier's funds?

B. Accounting of Funds

1. Upon request by a 3rd party having an interest in the funds, a lawyer shall promptly render a full written accounting regarding the funds. Supreme Court Rule (SCR) 20:1.15(e)(2).

2. Is the insured's attorney being evasive about the settlement, or about the status of the medpay carrier's funds? Request an accounting.

3. Here's a sample letter requesting an accounting from the insured's attorney:

   a. As you know from the prior notices that we have sent you, my client paid medical expenses on behalf of Mr. Smith for injuries that he sustained in the above-referenced accident. My client has a subrogation lien on any third-party settlement proceeds associated with his injuries. Pursuant to SCR 20:1.15(e)(2), please render a full written accounting of the funds subject to my client's lien in the above-referenced matter.

C. Disputes Over Funds

1. When a lawyer and another party (such as an insurance company) claim an ownership interest in trust property identified by a lien, court order, judgment, or contract, the lawyer shall hold that property in trust until there is an accounting and severance of the interests. If a dispute arises regarding the division of the property, the lawyer shall hold the disputed portion in trust until the dispute is resolved. Supreme Court Rule (SCR) 20:1.15(e)(3).

2. The insured's attorney has an ethical obligation to hold the full amount of the medpay carrier's lien in trust pending resolution of the lien (either through negotiation or at a *Rimes* trial).

3. Did the insured's attorney **promptly** seek a severance of the interest by seeking declaratory judgment (a *Rimes* trial)?

VI. DID YOUR CLIENT WIN IN MEDPAY ARBITRATION? - MAKE MEDPAY SUBROGATION WORK FOR YOU

A. Under the collateral source rule, an injured plaintiff is not entitled to recover the value of his/her insurer's medpay subrogation claim after his/her insurer paid the policy limits for medical expenses and then pursued and lost its subrogation claim in arbitration. *Fischer v. Steffen,* 2011 WI 34, 333 Wis.2d 502, 797 N.W.2d 501.

B. Facts

1. Roger Fischer was injured in an automobile accident with Pamela Steffen, who was insured by Wilson Mutual Insurance Company.

2. Roger Fischer's medpay carrier, American Family, paid its policy limits of $10,000.00 for medical expenses.

3. Prior to the filing of Fischers' personal injury lawsuit, American Family pursued recovery of its $10,000 medpay claim through arbitration and lost (the arbitration panel found that Pamela Steffen was not negligent and therefore, Wilson Mutual did not have to pay American Family).

4. In the Fischers' personal injury lawsuit, the jury found the defendant 100% at fault for the plaintiffs' injuries. The jury awarded the plaintiffs $21,000 for pain and suffering and loss of consortium. The parties stipulated that $12,157.14 was the reasonable value of past medical expenses; the trial court entered this amount in the jury verdict.

5. After the trial, the defendants filed a motion for partial judgment, asking the court to reduce the award for medical expenses from $12,157.14 to $2,157.14 because the plaintiffs had already recovered $10,000.00 of the medical expenses from their insurer, American Family, and because American Family had no basis to recover because it had lost in medpay arbitration. The trial court granted the motion and reduced the award for medical expenses by $10,000.00.

6. The Wisconsin Supreme Court affirmed the trial court. In the opinion for the majority, Justice Abrahamson concluded that the plaintiff was not entitled, under the collateral source rule, to recover the value of his/her insurer's medical payments subrogation claim where the insurer had lost its subrogation claim in arbitration.

OUTLINE

"My Whole Body Still Hurts… and it *must* be from that rear-ender 4 years ago!" – Or is it? A Candid Discussion with a Primary Care Doctor About Potential Physical and Mental Contributors to Ongoing Pain Complaints"

Presenters: Patricia Epstein Putney, Esq., Bell, Moore & Richter, S.C. and Anne Eglash, M.D., UW Health, Wisconsin Defense Counsel Summer Conference, August 10, 2023 **(with special thanks to Alex Gordon, BMR law clerk, for his assistance).**

We will have a participatory conversation with an experienced Family Practice physician to discuss the various physiological and emotional processes that may explain why some patients continue to complain of ongoing pain months or years after a seemingly minor car accident. We will discuss issues specific to females, such as the role menopause or other hormonal processes may play. On a broader level, we will discuss depression, malingering, somatization, arthritis and degenerative disc disease, among other topics which may play a role in ongoing pain complaints and discuss the quandary primary care physicians often face in these situations. Questions are encouraged!

I. Topics to consider for possible alternative or contributory causes of ongoing pain complaints:

- Depression and/or Anxiety
    - Treated or untreated
    - Past history of abuse or trauma
    - Family history of mental health issues
    - Other mental health issues including somatization
- Anger issues
    - Playing the victim
    - Looking for someone to blame for life's problems
    - If A follows B, did B necessarily cause A?
        - Convincing oneself that A caused B
- Insomnia
    - Chicken and egg problem
        - Can't sleep because of pain; in pain because can't sleep
    - The importance of sleep hygiene

- Obesity/Overweight Status
    - Sensitive topic -- but must be addressed
    - What physical and emotional problems does it cause
- Deconditioning/Lack of Exercise
    - The “dwindles” -- the less one does, the less one will be able to do
    - A/K/A use it or lose it
    - How this contributes to complaints of pain
- Stress
    - Cortisol levels and their relationship to pain
    - Financial stress
    - Family stress
    - Marital stress
- Substance Abuse
    - Self-treatment and relationship to pain
    - Alcohol
    - Cannabis
    - Opioids
    - Doctor shopping
- Hormonal issues, including Menopause
    - Cognitive changes
    - Brain fog
    - Aches
    - Depression
    - Mood issues
    - Insomnia
    - Headaches
    - Other issues
- Arthritis and Degenerative Disc Disease
    - “Bulging” discs
        - Who gets them and at what age
    - Disc herniation
        - Degenerative vs. Acute disc injuries

        - Occupational considerations

- Cultural Factors

    - Men vs women
    - Attitudes about medical care
    - Different cultures

- Prior Trauma

    - Emotional abuse
    - Sexual abuse
    - Adverse Childhood Experiences
        - "ACE scores"

- Malingering

    - How to test for it
    - How treating doctors can figure that out
    - What treating doctors can do when they suspect malingering
    - Principles of "secondary gain"

- Fibromyalgia

    - What is it?
    - Who gets it?
    - Is it caused by trauma?

- Treatment for Chronic Pain

    - Opioids or other medications
    - Injections
    - Spinal stimulators
    - Surgery

II. Diagnosis and Discussion of Post Traumatic Stress Disorder

- Elements
- Diagnosis
- Treatment
- Over-diagnosis
- Google diagnoses

III. Prior Complaints of Exact Same Issues (of which Treating Doctor may be totally unaware…)

- How should defense counsel best handle
- How does the doctor handle

IV. The Treating Doctor as Patient Advocate

- How to break that dynamic
- Why they dig in
- Treater vs. IME perspective
- Tips for deposing the longstanding treating doctor
- Best approaches in setting of pre-existing issues

V. Relevant Jury Instructions to Issues Explored Above

1. Causation

   1500 WIS JI-CIVIL 1500

   1500 CAUSE

   In answering question(s) , you must decide whether someone's negligence caused the (accident) (injury). (This) (These) question(s) (does) (do) not ask about "the cause" but rather "a cause" because an (accident) (injury) may have more than one cause. Someone's negligence caused the (accident) (injury) if it was a substantial factor in producing the (accident) (injury). An (accident) (injury) may be caused by one person's negligence or by the combined negligence of two or more people.

2. Aggravation of Pre-Existing Injury

   1715 WIS JI-CIVIL 1715

   1715 AGGRAVATION OF PRE-EXISTING INJURY
   The evidence shows that the plaintiff was previously injured when (briefly describe event). If the injuries of the plaintiff received in the accident on (date) aggravated any physical condition resulting from the earlier injury, you should allow fair and reasonable compensation for such aggravation but only to the extent that you find the aggravation to be a natural result of the injuries received in the accident.

3. Aggravation or Activation of Latent Disease or Condition

   1720 WIS JI-CIVIL 1720

   1720 AGGRAVATION OR ACTIVATION OF LATENT DISEASE OR CONDITION

In answering subdivision of question [ ] , you cannot award any damages for any (pre-existing disease, condition, or ailment) (predisposition to disease) except insofar as you are satisfied that the (disease, condition, or ailment) (predisposition to disease) has been(aggravated) (activated) by the injuries received in the accident on (date). If you find that the plaintiff had a (pre-existing disease or condition which was dormant) (predisposition to disease) before the accident but that such (disease or condition) (predisposition to disease) was (aggravated) (brought into activity) because of the injuries received in the accident, then you should include an amount which will fairly and reasonably compensate (plaintiff) for such damages (plaintiff) suffered as a result of such (aggravation) (activation) of the condition.

Any ailment or disability that the plaintiff may have had, or has, or may later have, which is not the natural result of the injuries received in this accident, is not to be considered by you in assessing damages. You cannot award damages for any condition which has resulted, or will result, from the natural progress of the pre-existing disease or ailment or from consequences which are attributable to causes other than the accident. If the plaintiff was more susceptible to serious results from the injuries received in this accident by reason of a (pre-existing disease or condition) (predisposition to disease) and that the resulting damages have been increased because of this condition, this should not prevent you from awarding damages to the extent of any increase and to the extent such damages were actually sustained as a natural result of the accident.

VI. Synopsis of Select Medical Literature

A. Depression as Cause of Chronic Pain

1. Sheng J, Liu S, Wang Y, Cui R, Zhang X. *The Link between Depression and Chronic Pain: Neural Mechanisms in the Brain.* Neural Plast. 2017;2017:9724371. doi: 10.1155/2017/9724371. Epub 2017 Jun 19. PMID: 28706741; PMCID: PMC5494581.
   - Studies have found **considerable overlaps between pain and depression-induced neuroplasticity changes and neurobiological mechanism changes**. Such overlaps are vital to facilitating the occurrence and development of chronic pain and chronic pain-induced depression.
   - Pain and depression are closely correlated from the perspectives of both brain regions and the neurological function system, whereby chronic pain may lead to depression.
   - Current efforts in this field fail to sufficiently and explicitly explain their connection. Further investigations into the common neuroplasticity changes shared by pain and depression are warranted to promote the identification of new drug targets and to free patients from chronic pain-induced depression.

2. Depression and Pain –https://www.health.harvard.edu/mind-and-mood/depression-and-pain, March 21, 2017, Harvard Health Publishing.

- This article reaches the conclusion that while there are significant links to chronic pain and depression, studies need to be further conducted to identify if there is more of a causation, rather than just a correlation.
- Brain pathways that handle **the reception of pain signals**, including the seat of emotions in the limbic region**, use some of the same neurotransmitters involved in the regulation of mood**, especially serotonin and norepinephrine. When regulation fails, pain is intensified along with sadness, hopelessness, and anxiety. And **chronic pain, like chronic depression, can alter the functioning of the nervous system and perpetuate itself**.
- Fibromyalgia may illustrate these biological links between pain and depression. Its symptoms include widespread muscle pain and tenderness at certain pressure points, with no evidence of tissue damage. Brain scans of people with fibromyalgia show highly active pain centers, and the disorder is more closely associated with depression than most other medical conditions. **Fibromyalgia could be caused by a brain malfunction that heightens sensitivity to both physical discomfort and mood changes**.
- According to some estimates, more than 50% of depressed patients who visit general practitioners complain only of physical symptoms, and in most cases the symptoms include pain. Some studies suggest that if physicians tested all pain patients for depression, they might discover 60% of currently undetected depression.
- Pain slows recovery from depression, and depression makes pain more difficult to treat; for example, it may cause patients to drop out of pain rehabilitation programs. Worse, both pain and depression feed on themselves, by changing both brain function and behavior.

B. Hormonal Issues as Cause of Depression and Pain

1. Soares CN, Zitek B. *Reproductive hormone sensitivity and risk for depression across the female life cycle: a continuum of vulnerability?* J Psychiatry Neurosci. 2008 Jul;33(4):331-43. PMID: 18592034; PMCID: PMC2440795. Findings include:

    - Women are at greater risk for depression than men. Hormones and neurotransmitters share common pathways and receptor sites in areas of the brain linked to mood, particularly through the hypothalamic-pituitary-gonadal axis. It has been hypothesized that women presenting with episodes of depression associated with reproductive events (i.e., premenstrual, postpartum, menopausal transition) may be particularly prone to experiencing depression, in part because of a heightened sensitivity to intense hormonal fluctuations.

- Despite the mounting evidence of an association between reproductive life events and the development of depressive episodes, further research is needed to more clearly identify the driving factors of this association.
- Future research should also assess the efficacy and safety of hormonal and nonhormonal strategies to modulate the occurrence of these disturbances or to alleviate their symptoms.

2. Can hormonal imbalances cause depression?
   https://www.medicalnewstoday.com/articles/hormonal-depression#risk-factors

   - This article makes no definitive claims that there is a causal link between hormonal issues and depression and pain, but it does make a similar conclusion to the above article that there is at least a correlation. For example:
     - Premenstrual dysphoric disorder (PMDD), postpartum depression, and thyroid problems are all possible connections.

3. Statistics of Pain in Post-Menopausal Women

   - Shweta Kulkarni1, Shashank Adhikari2, Sunil Kumar K. S.3, Prashant Mukkannavar4. (2020). *Prevalence of Musculoskeletal Disorder among Postmenopausal Women: A Cross Sectional Study.* Indian Journal of Physiotherapy & Occupational Therapy Print- (ISSN 0973-5666) and Electronic – (ISSN 0973-5674), 14(2), 278–282. *https://doi.org/10.37506/ijpot.v14i2.9710*
     - The prevalence of musculoskeletal pain among postmenopausal women was found to be 56% with mean age of onset of menopause as 46 yrs. Region wise analysis of musculoskeletal pain among postmenopausal women showed back (57%) and knee (72%) pain to be most prevalent.

   - Marini M, Bendinelli B, Assedi M, Occhini D, Castaldo M, Fabiano J, Petranelli M, Migliolo M, Monaci M, Masala G. *Low back pain in healthy postmenopausal women and the effect of physical activity: A secondary analysis in a randomized trial*. PLoS One. 2017 May 10;12(5):e0177370. doi: 10.1371/journal.pone.0177370. PMID: 28489877; PMCID: PMC5425229.
     - Two hundred and ten women (102 randomized to PA intervention, 108 not receiving the PA intervention) filled out the questionnaires. At baseline lower back pain (LBP) was present in 32.9% of the participants. Among women randomized to the PA intervention, LBP prevalence at follow up (21.6%) was lower than at baseline (33.3%), while in women who did not receive the PA intervention the LBP prevalence at baseline and follow up were 32.4% and 25.9%
     - Medical News Today Article – What can cause cramps after menopause? https://www.medicalnewstoday.com/articles/322748

- Cramping after menopause can indicate an underlying condition, such as uterine fibroids, endometriosis, constipation, or ovarian or uterine cancers.
- Many people experience pelvic cramps as part of their menstrual period. However, cramping after menopause can signify an underlying health condition.

4. Comparisons Between Male and Female Pain Complaints

   - Bartley EJ, Fillingim RB. *Sex differences in pain: a brief review of clinical and experimental findings.* Br J Anaesth. 2013 Jul;111(1):52-8. doi: 10.1093/bja/aet127. PMID: 23794645; PMCID: PMC3690315.
   - The expansive body of literature in this area clearly suggests that men and women differ in their responses to pain, with increased pain sensitivity and risk for clinical pain commonly being observed among women.
   - Psychosocial processes such as pain coping and early-life exposure to stress may also explain sex differences in pain, in addition to stereotypical gender roles that may contribute to differences in pain expression.
   - For each of 10 different anatomical regions, a greater proportion of women than men reported pain in the past week, and women were significantly more likely to report chronic widespread pain.
   - Moreover, the population prevalence of several common chronic pain conditions is greater for women than men, including fibromyalgia, migraine and chronic tension-type headache, irritable bowel syndrome, temporomandibular disorders, and interstitial cystitis.
   - The influence of sex hormones represents a significant source of pain-related variability that likely impacts men and women differently.
   - Multiple biopsychosocial mechanisms contribute to these sex differences in pain, including sex hormones, endogenous opioid function, genetic factors, pain coping and catastrophizing, and gender roles.

5. Women and pain: Disparities in experience and treatment – Harvard Health Blog - *https://www.health.harvard.edu/blog/women-and-pain-disparities-in-experience-and-treatment-2017100912562#:~:text=One%20of%20the%20few%20studies,suspected%20to%20play%20a%20role*.

   - 70% of the people chronic pain impacts are women. And yet, 80% of pain studies are conducted on male mice or human men. One of the few studies to research gender differences in the experience of pain found that women tend to feel it more of the time and more intensely than men.
   - While the exact reasons for this discrepancy haven't been pinpointed yet, biology and hormones are suspected to play a role.

6. Brain Fog

- What is Brain Fog and How Can I Treat It? – Article from NYTimes *https://www.nytimes.com/2022/09/13/well/mind/brain-fog-treatment.html*
  - Sluggish and forgetful, easily distracted or completely overwhelmed by mundane tasks, are all signs one could be experiencing brain fog.
  - Brain fog has become closely associated with the cognitive impairment many people experience during or after a bout with Covid-19.
  - Roughly 20 to 30 percent of Covid patients have some brain fog that persists or develops during the three months after their initial infection, and more than 65 percent of those with long Covid report neurological symptoms too.
  - Brain fog tends to affect executive function — a set of skills that are essential for planning, organizing information, following directions and multitasking, among other things. "When executive function is impaired, it will often impact several domains of cognitive ability," Dr. Becker said.

- McWhirter L, Smyth H, Hoeritzauer I, et al, *What is brain fog?* Journal of Neurology, Neurosurgery & Psychiatry 2023;94:321-325.
  - A total of 141 first person descriptions of brain fog included overlapping descriptions of: forgetfulness (51; 36%)); difficulty concentrating (43; 30%)); dissociative phenomena (34; 24%); perceived cognitive 'slowness' and excessive effort (26; 18%); communication difficulties (22; 16%); a feeling of 'fuzziness', 'grogginess' or pressure in the head (10; 7%) and fatigue (9; 6%).
  - Examination of subjective descriptions of 'brain fog' on a non-clinical social media platform reveal rich descriptions of distinct and overlapping phenomena.

7. Malingering After MVAs

- Monaro M, Bertomeu CB, Zecchinato F, Fietta V, Sartori G, De Rosario Martínez H. *The detection of malingering in whiplash-related injuries: a targeted literature review of the available strategies.* Int J Legal Med. 2021 Sep;135(5):2017-2032. doi: 10.1007/s00414-021-02589-w. Epub 2021 Apr 8. PMID: 33829284; PMCID: PMC8354940.

  - Malingering (i.e., the intentional fabrication or gross exaggeration of psychological or physical conditions designed to achieve secondary benefits, such as financial compensation) is fairly frequent, especially in forensic contexts and litigation evaluations, where external incentives are evident.

  - Although it is difficult to estimate the prevalence of malingering in medicolegal settings precisely, the literature indicates that it comprises 15 to 40% of cases.
  - The literature indicates a prevalence of malingering of up to 60%, while underperformance in cognitive tests was found to be twice as frequent as in clinical contexts. Importantly, these percentages are likely to be an underestimate, given that successful malingerers, by definition, are not included. In light of these data, it is clear that malingered WAD (whiplash-associated disorders) represents a serious economic, legal, and health issue that needs to be addressed.
  - Insurance claims related to injuries following whiplash-related accidents are substantial, associated with high costs, and have a significant impact on healthcare, legal, and economic systems worldwide.

- Ali S, Jabeen S, Alam F. *Multimodal approach to identifying malingered posttraumatic stress disorder: a review*. Innov Clin Neurosci. 2015 Jan-Feb;12(1-2):12-20. PMID: 25852974; PMCID: PMC4382135.

  - This article mainly focuses on malingering related to PTSD, however it provides helpful definitions and insight on malingerers.
  - Malingering of PTSD is the intentional production of false or grossly exaggerated physical and/or psychological symptoms associated with the diagnosis of PTSD in order to obtain external incentives (e.g., financial and/or personal gains).
  - Malingerers often have histories of previous lawsuits; run-ins with the law; acting- out behavior in school, workplace, or the military; sporadic employment and attendance at work; substance use; turning down jobs that accommodate or accept their professed “partial” disability; and few, if any, longstanding financial responsibilities.
  - Additionally, malingerers have difficulty elaborating on their symptoms; may have decreased capacity to work but increased ability to enjoy recreational activities; often have histories of lack of improvement in their condition over time; and lack objective evidence of concentration deficits, hyper-vigilance, irritability, and avoidance.
  - No exact prevalence rates for malingering exist. According to Rogers, practitioners do not typically scrutinize the accuracy of client reports, and, consequently, formal assessments for malingering are not often carried out.
  - Estimates of malingering psychological symptoms after personal injury range from one percent to over 50 percent. In one study, it was reported that as many as 20 to 30 percent of personal injury claimants feign posttraumatic disturbances in an attempt to receive financial compensation.

- Main motivations of malingering
    - Financial gain
    - Personal gains
    - Attention seeking

VII. Select Bibliography

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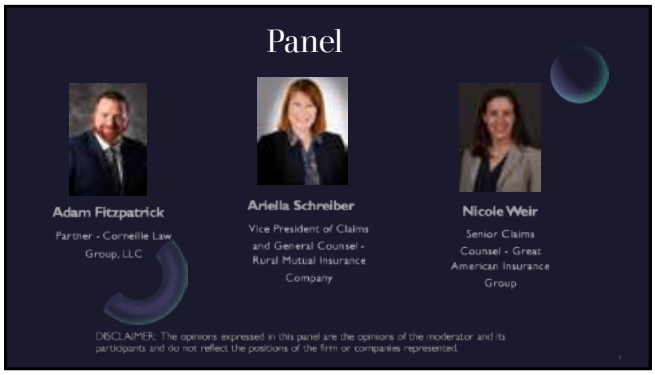
Building Effective In-house/Outside Counsel Relations
WDC Annual Conference
August 10, 2023

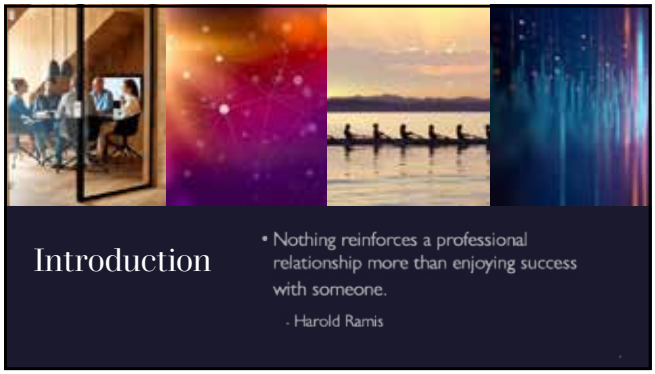
1


Panel
Adam Fitzpatrick
Partner - Corneille Law Group, LLC
Ariella Schreiber
Vice President of Claims and General Counsel - Rural Mutual Insurance Company
Nicole Weir
Senior Claims Counsel - Great American Insurance Group
DISCLAIMER: The opinions expressed in this panel are the opinions of the moderator and its participants and do not reflect the positions of the firm or companies represented.

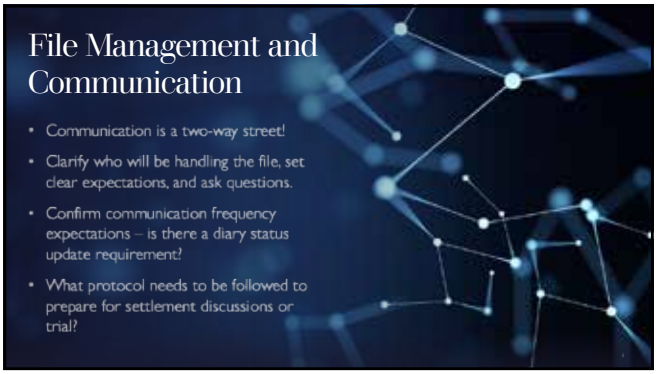
2


Agenda
1. Communication and File Management
2. Tripartite Relationship Considerations
3. Succession Planning
4. Teamwork on Unified Defense Industry Goals

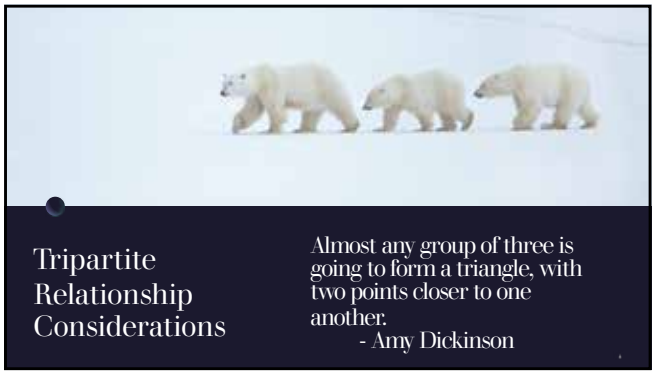
3


Introduction
• Nothing reinforces a professional relationship more than enjoying success with someone.
- Harold Ramis

4


File Management and Communication
• Communication is a two-way street!
• Clarify who will be handling the file, set clear expectations, and ask questions.
• Confirm communication frequency expectations – is there a diary status update requirement?
• What protocol needs to be followed to prepare for settlement discussions or trial?

5


Tripartite Relationship Considerations
Almost any group of three is going to form a triangle, with two points closer to one another.
- Amy Dickinson

6

Texas Supreme Court Justices Raul Gonzalez and Gregg Abbott aptly noted:

- The duty to defend in a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking for the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in the middle. There is a lot of wisdom in the old proverb: He who pays the piper calls the tune. The lawyer wants to provide a competent defense, yet knows who pays the bills and who is most likely to send new business. This so-called tripartite relationship has been well documented as a source of unending, ethical, legal and economic tension. *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 633 (Tex. 1998).

7

Wisconsin follows a Two-Client Theory

STATUTORY LAW

WI SCR 20:1.8 Conflict of Interest: prohibited transactions ("A lawyer shall not accept compensation for representing client from one other than client unless: (1) client gives informed consent . . . or consent pursuant to terms of agreement or policy requiring . . . insurer to retain counsel on client's behalf. (2) there is no interference with lawyer's independence of professional judgment or with the client-lawyer relationship, and (3) information relating to representation of client is protected by SCR 20:1 & ").

SCR 20:1.6 – Confidentiality Requirements

COMMON LAW PRECEDENT

- Juneau County Star Times v. Juneau County, 345 Wis. 122, ¶ 48, 824 N.W.2d 457, 467 (2013) ("insurance defense counsel are generally recognized as having two clients in any given case: the insurer and the insured." (citation omitted)).

ETHICS RULES/ REGULATORY OPINIONS

- State Bar of WI Ethics Opinions, Formal Opinion E99-1 (2011) ("Wisconsin lawyers retained by insurers under a policy of insurance typically represent both the insurer and the insured in the defense. . . . Counsel who regularly represent insureds usually have ongoing attorney-client relationships and economic ties to those insurers.")

8

If you don't know where you are going, you'll end up someplace else.

- Yogi Berra

9

Succession Planning

- What development steps are being taken to continue the firm/insurer relationship?
- How are associates being supported and is there open communication about file handling to align expectations?
- How are we as a defense bar passing on leadership roles and developing talent?

10

Teamwork divides the task and multiplies the success

- Author Unknown

11

Teamwork on Unified Defense Industry Goals

- What areas can the defense bar focus on to better collaborate and organize?
- How can the WDC continue to support the issues discussed here today?
- How can the defense bar continue to support public outreach?

12

13

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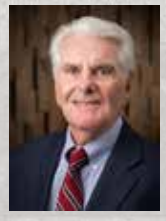
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Bell, Moore & Richter, S.C. has been involved in insurance defense litigation for most of its existence. Due to the firm's extensive experience with all aspects of insurance litigation, we are often called on to defend insurance companies and their insureds in the courtroom and in appeals, both in state and federal court. Our attorneys pride themselves on keeping up to date on the latest changes in insurance law and can help clients untangle the constant legislative and case law changes in insurance. For decades, our attorneys have also successfully defended medical professionals practicing in a broad range of specialties and a wide variety of claims. We know how to build a strong defense to workers' compensation claims and disputes and help employers on all issues which may arise. Our experience has led to successful results in defending claims both in State and Federal courts as well as before the State Medical Examining Board and Medical Mediation Panel. In the defense of business litigation, we bring the experience and judgment of seasoned practitioners from both business and transactional attorneys, on the one hand, and proven civil litigation practitioners on the other. We also have considerable experience helping to defend insurance agents as well as real estate agents and brokers in litigation. Let us help you.

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- Contracts
- Employment Law
- Environmental Law/Litigation
- Estate Planning/Elder Law/Probate
- Family Law
- Finance/Financial Institutions
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- Insurance Agent Litigation
- Insurance Coverage/Bad Faith Litigation
- Insurance Defense
- Intellectual Property
- Landlord-Tenant
- Legal/Accounting Liability Defense
- Medical Malpractice Defense
- Municipal Law
- Personal Injury
- Products Liability
- Public Utilities/Telecommunications
- Real Estate
- Real Estate Agent/Broker Litigation
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MOTOR VEHICLE ACCIDENT INVESTIGATIONS:

THE IMPORTANCE OF EARLY INVESTIGATIONS AND LEGAL CONSIDERATIONS REGARDING NOTICE AND PRESERVATION OF EVIDENCE

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I. Considerations for Early Accident Investigations

A. Type of accident – Low Speed to Catastrophic

B. Likelihood for severe injuries

C. Contested versions of what happened – speed, traffic signals, right of way

D. Did law enforcement conduct a reconstruction

1. Was a full reconstruction performed
2. Was the vehicle data collected
3. Were photographs taken

E. Cost-benefit analysis

1. Not necessarily cost effective to perform early accident investigation in all cases.
2. Worth considering if:

i. Early communications raise questions regarding what happened or who was at fault;
ii. Multiple vehicles involved and serious injuries
iii. LVI cases

3. Depending on where the vehicle is located, a general inspection/download can cost between at least $1,000 to $5,000.
4. Once the data is gone, it is gone (vehicle operational or destroyed)

F. Attorney-Client/Attorney Work Product Privilege – statements, investigations, photographs, etc… However:

> Wis. Stat. Ann. § 804.01(c) Trial preparation: materials. 1. Subject to par. (d) a **party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative** (including an **attorney**, **consultant**, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Wis. Stat. Ann. § 804.01 (West)

G. Litigation Hold Requests – see attachment

II. Consultants/Experts

A. Retain a qualified expert who will not only assist early on but also be able to do a complete reconstruction and testify if needed.

B. Wisconsin Statute § 907.02 was adopted to conform with the Federal Rules of Evidence 702 and Daubert v. Merrell Down Pharm., 509 U.S. 579 (1993).

C. Wisconsin Statute § 907.02(1) provides "[i]f 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."

D. Section 907.02(1) requires the court to consider:

1. whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
2. whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
3. whether the testimony is based upon sufficient facts or data;
4. whether the testimony is the product of reliable principles and methods; and
5. whether the witness has applied the principles and methods reliably to the facts of the case. State v. Jones, 2018 WI 44, ¶ 29, 381 Wis. 2d 284, 911 N.W.2d 97.

E. Make sure your expert will hold up to any potential Daubert motion:

1. Daubert factors:
   i. whether the technique or theory in question can be and has been tested;
   ii. whether it has been subjected to peer review and publication;
   iii. the known or potential error rate of the technique or theory;
   iv. the existence and maintenance of standards controlling its operation; and
   v. whether it has attracted widespread acceptance within a relevant scientific community. Daubert, 509 U.S. at 593-94.

2. Wisconsin's Adaptation of Daubert:

   i. As set forth in Wis. Stat. § 907.02, Wisconsin's adaptation of the Daubert standard provides the following requirements:

      a. the expert's testimony must be based on sufficient facts and data;
      b. the expert's testimony must be the product of reliable principles and methods; and
      c. the expert must apply the principles and methods reliably to the facts of the case. Seifert v. Balink, 2017 WI 2, ¶ 7, 372 Wis. 2d 525, 888 N.W.2d 816.

III. Notice of Inspection

A. The trial court may use its discretion, guided by the totality of the circumstances, to judge the sufficiency of the content of the notice. American Family Mut. Ins. Co. v. Golke, 2009 WI 81, ¶ 29, 319 Wis. 2d 397, 768 N.W.2d 729.

B. Some factors courts consider include:

1. length of time evidence can be preserved;

2. ownership of the evidence;
3. prejudice posed to possible adversaries by destruction of the evidence;
4. form of the notice;
5. sophistication of the parties;
6. ability of the party in possession to bear the burden and expense of preserving the evidence. Golke, 319 Wis. 2d 397, ¶ 29.

C. First-class mail may be used to deliver the notice. Golke, 319 Wis. 2d 397, ¶ 33.

D. Notice of mail is usually considered complete upon mailing, not proof of receipt. Golke, 319 Wis. 2d 397, ¶ 35.

E. Habit evidence is admissible to show a letter was mailed. See Golke, 319 Wis. 2d 397, ¶ 47-48 (finding unrebutted evidence American Family sent letter based on adjuster's testimony and American Family's "routine, habit, and practice" regarding outgoing mail.)

F. Evidence of mailing a letter raises a rebuttable presumption that the addressee received the letter. Golke, 319 Wis. 2d 397, ¶ 36.

G. This presumption cannot be overcome without a denial of receipt; the "mere non-remembering of receipt is not enough." Golke, 319 Wis. 2d 397, ¶ 36.

H. Notice of Inspection – See attachment

IV. Who Do You Put on Notice

A. Owner or Lessee of Vehicle

1. Typically determined based on title.
2. In some cases, it can be difficult to determine ownership of the vehicle.
3. Following an accident, the owner could be the individual, corporation, insurance company, or salvage company (i.e., CoPart of junk yard).

V. Investigation/Inspections

A. What is needed to complete the reconstruction?

1. Full accident reconstruction or view/preserve evidence

i. What is the difference
ii. Can a full reconstruction be done at a later date

2. Timely preservation of the evidence

    i. Evidence can be lost over time
    ii. Skid marks/tire marks fade
    iii. Road construction
    iv. Vehicle salvage yards and the crusher
    v. Stored electronic data can be lost or overwritten

3. We can't always rely on others to preserve the evidence

4. What to preserve?
    i. The vehicles
    ii. Damage locations
    iii. Damage depth or penetration
    iv. Seat belt condition/usage
    v. Lighting
    vi. Preliminary mechanical defect
    vii. Electronic Data
        a. Crash Data Retrieval (CDR)
        b. Heavy Truck (ECM)
        c. Heavy Truck (ABS)
        d. Video/Images
        e. GPS
        f. Infotainment Systems

VI. Preservation of Evidence

A. A party or potential litigant has a duty to preserve evidence essential to a claim that is being or likely will be litigated. American Family Mut. Ins. Co. v. Golke, 2009 WI 81, ¶ 21, 319 Wis. 2d 397, 768 N.W.2d 729.

B. Duty to preserve evidence is discharged once the party in possession has given reasonable notice of:

    1. a possible claim;
    2. the basis for that claim;
    3. the existence of evidence relevant to the claim; and
    4. a reasonable opportunity for inspection of the evidence.

C. Failure to preserve such evidence can lead to a spoliation claim.

VII. Authorizations to Download Vehicle Data

A. Driver Privacy Act of 2015

    1. (Sec. 2) Declares that any data in an event data recorder required to be installed in a passenger motor vehicle (as provided for under

Department of Transportation (DOT) regulations concerning the collection, storage, and retrievability of onboard motor vehicle crash event data) is the property of the owner or lessee of the vehicle in which the recorder is installed, regardless of when the vehicle was manufactured.

Prohibits a person, other than the owner or lessee of the motor vehicle, from accessing data recorded or transmitted by such a recorder unless:

i. a court or other judicial or administrative authority authorizes the retrieval of such data subject to admissibility of evidence standards;
ii. an owner or lessee consents to such retrieval for any purpose, including vehicle diagnosis, service, or repair;
iii. the data is retrieved pursuant to certain authorized investigations or inspections of the National Transportation Safety Board or DOT;
iv. the data is retrieved to determine the appropriate emergency medical response to a motor vehicle crash; or
v. the data is retrieved for traffic safety research, and the owner's or lessee's personally identifiable information and the vehicle identification numbers are not disclosed.

2. (Sec. 3) Directs the National Highway Traffic Safety Administration, after completing a study and submitting a report to Congress, to promulgate regulations concerning the amount of time event data recorders installed in passenger motor vehicles may capture and record vehicle-related data to provide accident investigators with pertinent crash-related information.

VIII. Vehicle Downloads - 49 CFR Part 563 – Event Data Recorders (EDR)

A. Applies to:
    1. Vehicles manufactured on or after September 1, 2013
    2. Vehicles with a gross vehicle weight rating (GVWR) or 5,500 pounds or less (most passenger vehicles)

B. Requirement states if the auto manufacturer decides to record data, they must:
    1. Record a minimum set of data
    2. Make the retrieval of the data "commercially available"

C. For most vehicles, the event data recorder function is done within the airbag control module.

D. Some manufacturers (Ford, GM, Chrysler) have EDR data for vehicles built before September 1, 2023

E. Some manufacturers choose to record data beyond the required elements

F. Part 563 excludes heavy trucks/semis given their higher GVWR, but many of these vehicles can still have some sort of EDR capability.

IX. Bosch CDR System

A. Bosch Crash Data Retrieval (CDR) System
    1. In a damaged vehicle (DLC attempt unsuccessful), download directly from the module
    2. Vehicle disassembly required to access the ACM in the vehicle
    3. ACM can also be removed for a benchtop download

X. Available Data

A. What data is stored in the ACM
    1. Impacts to front, side, or rear of vehicle
    2. Vehicle roll events
    3. Non-deployment events:
        i. Impacts that are severe enough to meet recording criteria:
            a. Crash algorithm wakeup
            b. Non-deployment recording threshold (typically 5 mph delta-V)
        ii. Not locked: May be overwritten by subsequent events
        iii. Older GMs: erased after 250 ignition cycles
    4. Deployment events:
        i. When the airbags or other devices are commanded to deploy
        ii. Data is locked: Cannot be erased

B. Pre-Crash Data – Time Series
    1. Typically 5 seconds of data before algorithm enable
    2. May include:
        i. Vehicle speed
        ii. Engine RPM
        iii. Accelerator pedal position
        iv. Brake status
        v. Steering wheel angle
        vi. Cruise control status
        vii. ABS activity
        viii. Stability control system activity

C. Other Pre-Crash Data
    1. Driver belt status

2. Passenger belt status
3. Passenger seat occupancy status
4. Airbag warning lamp status
5. Seat track position status
6. Some manufacturers include:
    i. Odometer
    ii. Date/Time of event

D. Crash Data
    1. Crash severity:
        i. Longitudinal delta-V and acceleration
        ii. Lateral delta-V and acceleration
        iii. Roll angle or roll rate
    2. If airbags and other devices were commanded to deploy
        i. Commanded deploy times of devices

XI. Manufacturers

A. GM
    1. Airbag Control Module (ACM)
        i. Bosch CDR coverage starting MY1994
    2. Active Safety Control Module (ASCM) – if equipped
        i. Bosch CDR starting MY2013
        ii. Automatic Emergency Braking (AEB) events
        iii. Deployment events and some non-deployment events
    3. Front Camera Module (FCM) – if equipped
        i. Bosch CDR starting MY2019
        ii. “Events of Interest”
            a. Deployment events
            b. Non-deployment events
            c. Front collision alert
            d. Lane departure warning
    4. 3 images
        i. 4 seconds before event
        ii. At event
        iii. 4 seconds after event

B. Stellantis (Fiat Chrylser Automobiles)
    1. Includes Chrysler, Jeep, Dodge, RAM, Fiat
    2. Airbag Control Module (ACM)
        i. Bosch CDR coverage starting MY2005

C. Ford
    1. Airbag Control Module (ACM)
        i. Bosch coverage starts MY2001

ii. Ford and its suppliers can download some older unsupported ACMs

2. Powertrain Control Module (PCM)
   i. Vehicles from MY2003 to MY2011 equipped with Electronic Throttle Control (ETC)
   ii. Typical record time is 25 seconds
   iii. Pre-crash time series data is stored
   iv. Data is continuously written into a circular buffer
   v. Data is locked if the PCM receives a “deploy” signal from the ACM
   vi. If PCM remains powered after an event, data can be overwritten over time if no deployment occurs, or if the PCM does not receive the “deploy” signal from the ACM (ie, impact wiring damage)

D. Toyota
   1. Airbag Control Module (ACM)
      i. Bosch coverage starts MY2001
   2. Vehicle Control History (VCH) – Data sourced from various modules
      i. Coverage starts MY2013
      ii. Data obtained using Toyota Techstream (separate from Bosch CDR system)
      iii. Triggered during various driving events or driver input (even when Delta-V is < 5mph)
      iv. Time series data depends on type of event that occurred
   3. Toyota Safety Sense (TSS) – Data sourced from various modules
      i. Coverage starts MY2016
      ii. Data obtained using Toyota Techstream (separate from Bosch CDR system)
      iii. Pre-collision System (PCS) data
         a. Combination of time series data and front camera images

E. Other Vehicle Manufacturers
   1. The Bosch CDR system supports other manufacturers (ACM data):
      i. Honda Starts MY2012
      ii. Nissan Starts MY2013 (Nissan North American can download older ACMs)
      iii. Mazda Starts MY2011
      iv. Volvo Starts MY2011
      v. BMW Starts MY2013
      vi. Mercedes-Benz Starts MY2014
      vii. VW/Audi Starts MY2014/MY2015
      viii. Subaru Starts MY2012
      ix. Mitsubishi Starts MY2006

x. Tesla
    a. Uses their own system for downloads
    b. ACM coverages starts MY2012
    c. Other vehicle data and video can be stored (request through Tesla)

xi. Hyundai/Kia
    a. Both use their own system for downloads
    b. ACM coverage starts MY2013 (research shows data can be available back to MY2010)

XII. What's Next for EDRs?

A. Infotainment
    1. SOME infotainment modules record data
        i. IF recording is enabled, often lots of data, recorded continuously with time and location
        ii. Track logs (can include GPS locations and speeds)
        iii. Vehicle events (key on, door open/close)
        iv. Phone connections
        v. Phone use
    2. Data imaging tools NOT provided or supported by manufacturers
    3. Berla iVe tool used for data acquisition
        i. Can be in vehicle
        ii. Often requires removal/disassembly of infotainment module

XIII. Spoliation

A. Wisconsin law defines spoliation as the "destruction or withholding of critically probative evidence resulting in prejudice to the opposing party. Estate of Neumann v. Neumann, 2001 WI App 61, ¶ 79, 242 Wis. 2d 205, 626 N.W.2d 821.

B. If a party or potential litigant destroys, alters, or loses evidence in a manner that constitutes spoliation, the court may impose sanctions for the spoliation of that evidence. See Golke, 319 Wis. 2d 397, ¶ 21.

C. Not all destruction, alteration, or loss of evidence qualifies as spoliation. Insurance Co. of N. Am. v. Cease Elec. Inc., 2004 WI App 15, ¶ 15, 369 Wis. 2d 286, 674 N.W.2d 866.

D. Courts follow a multi-step analytical process to determine whether spoliation has occurred. Mueller v. Bull's Eye Sport Shop, LLC, 2021 WI App 34, ¶ 19, 398 Wis. 2d 329, 961 N.W.2d 112.

    1. "First, the court identifies, with as much specificity as possible, the evidence that is alleged to have been destroyed, altered, or lost."

2. Then the court makes a factual inquiry into the following three factors:
    i. the relationship of the destroyed, altered, or lost evidence to the issues in the present action;
    ii. the extent to which the destroyed, altered, or lost evidence can now be obtained from other sources; and
    iii. whether the party responsible for the evidence destruction, alteration, or loss knew or should have known at the time he or she caused the destruction, alteration, or loss of evidence that litigation against the opposing parties was a distinct possibility.
3. Lastly, the court determines whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed and, if so, what the sanctions should be.

E. Sanctions for spoliation serve two main purposes:

    1. to uphold the judicial system's truth-seeking function; and
    2. to deter parties from destroying evidence.

F. Wisconsin courts have recognized the following potential remedies for evidence spoliation:
    1. discovery sanctions;
    2. monetary sanctions;
    3. exclusion of evidence;
    4. reading the spoliation inference instruction to the jury; and
    5. dismissal of one or more claims.

G. The spoliation inference instruction is not appropriate when evidence is negligently destroyed, but it may be appropriate when the destruction of evidence is intentional.

William R. Wick Christopher R. Bandt Jeremy T. Gill
Beau W. Krueger Patrick M. McDonald Janna L. Sorgatz

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Janna L. Sorgatz (920) 684-3321 | jsorgatz@nashlaw.com | Kim M. Kaufmann (920) 645-6226 | kkaufmann@nashlaw.com

August 1, 2023

NOTICE OF INSPECTION

VIA CERTIFIED MAIL: Receipt No. 7021-2720-0000-3864-5153

Mr. James Smith
1234 American Avenue
Anywhere, USA

RE: DOL: 1/1/23
Type of Loss: Motor Vehicle Accident
Loss Location:

Dear Mr. Smith:

Please be advised that this law firm has been retained by ABC Insurance Company to represent it and its insureds, with regard to a motor vehicle accident that occurred on January 1, 2023, at (insert location). We are investigating the facts and circumstances surrounding the accident.

As part of the investigation, we intend to inspect the vehicles involved, (identity vehicles, operators and owners). We have scheduled a joint inspection of the vehicles to take place on (insert date and time). The inspection will take place at (identify the inspection location(s)). The inspection and investigation will include vehicle downloads of any data storage units in the vehicle, may be destructive in nature and may involve removal and/or examination of the contents or components from one or both vehicles. You are invited to attend and participate. If you have retained legal counsel or representation, we ask that you immediately provide this notice to your counsel or representative. If you or your representatives are not present at the investigation, we will operate under the assumption that you have waived your presence at this investigation.

If you wish to have anyone participate in the investigation, we ask that this notice be immediately sent to any persons that you wish to have present to participate in the investigation. Only persons authorized to perform the vehicle inspections will be allowed to conduct the inspection. If you believe a party who has not been put on notice by this attached service list should be present at this inspection, I request that you immediately forward this notice to those persons or organizations. You have the responsibility as a party who has been put on notice to either contact or put on notice and invite any new party to this inspection and

investigation or notify me immediately of the existence of any additional parties to the appropriate contact and notice can be made.

Thank you for your prompt attention to this matter. Should you have any questions or concerns prior to this joint inspection, please do not hesitate to contact me.

Very truly yours,

NASH, SPINDLER, GRIMSTAD & McCRACKEN, LLP

Electronically signed by Janna L. Sorgatz

By: Janna L. Sorgatz

JLS/kmk
Enclosure

August 1, 2023

James Smith

1234 American Avenue

Anywhere, USA

RE: Insured:

Occurrence/Location:

Date of Loss:

LITIGATION HOLD/PRESERVATION OF EVIDENCE REQUEST

Please be advised that ABC Insurance Company is the insurer for (insert insured name) who was involved in a motor vehicle accident on (insert date and location). It is our understanding that you were the owner/operator of one of the vehicles involved in the accident. At this time, we are requesting your preserve all evidence related to the motor vehicle you were operating at the time of the accident referred to above. This is a Litigation Hold request and steps should immediately be taken to preserve all evidence associated with the vehicle you were operating.

An inspection of the vehicle and all components of the vehicle may be necessary. This Litigation Hold request includes, but is not limited to the vehicle body, vehicle parts, seats, blackbox, electronic control modules (ECM), dash cameras, internal vehicle monitoring devices, computer controlled data systems, tires, and any electronic device that was used as part of the operation of the vehicle.

Any changes, modifications or alteration to the vehicle and items listed herein may affect the ability for ABC Insurance Company to properly investigate this matter. **Any such action would be viewed upon as a potential Spoliation of Evidence, and may result in sanctions or presumptions relative to the evidence.**

Sincerely

MOTOR VEHICLE ACCIDENT INVESTIGATIONS:

THE IMPORTANCE OF EARLY INVESTIGATIONS AND LEGAL CONSIDERATIONS REGARDING NOTICE AND PRESERVATION OF EVIDENCE

Presented by

Paul T. Erdtmann
MSME, BSEE, PE

Christopher R. Bandt
Nash, Spindler, Grimstad & McCracken, LLP

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Considerations for Early Accident Investigations

A. Type of Accident - Low Speed to Catastrophic

B. Likelihood for severe injuries

C. Contested versions of what happened – speed, traffic signals, right of way

D. Did law enforcement conduct a reconstruction?

1. Was a full reconstruction performed?
2. Was the vehicle data collected?
3. Were photographs taken?

2

Considerations for Early Accident Investigations

E. Cost-benefit Analysis

1. Not necessarily cost effective to perform early accident investigation in all cases.
2. Worth considering if:
   i. Early communications raise questions regarding what happened or who was at fault;
   ii. Multiple vehicles involved and serious injuries;
   iii. LVI cases
3. Depending on where the vehicle is located, a general inspection/download can cost between at least $1,000-$5,000.
4. Once the data is gone, it is gone (vehicle operational or destroyed).

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Considerations for Early Accident Investigations

F. Attorney-Client/Attorney Work Product Privilege – statements, investigations, photographs, etc. . . . However:

a. Wis. Stat. Ann.§ 804.01(c) Trial preparation: materials. 1. Subject to par. (d) a **party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative** (including an **attorney**, **consultant**, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Wis. Stat. Ann. § 804.01 (West).

4

Considerations for Early Accident Investigations

Litigation Hold Requests

5

Consultants/Experts

A. Retain a qualified expert who will not only assist early on but also be able to do a complete reconstruction and testify if needed.

B. Wisconsin Statute § 907.02 was adopted to conform with the Federal Rules of Evidence 702 and Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

C. Wisconsin Statute § 907.02(1) provides: "[i]f 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."

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Consultants/Experts

D. Section 907.02(1) requires the court to consider:

1. whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
2. whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
3. whether the testimony is based upon sufficient facts or data;
4. whether the testimony is the product of reliable principles and methods; and
5. whether the witness has applied the principles and methods relliably to teh facts of the case. State v. Jones, 2018 WI 44, ¶ 29, 381 Wis. 2d 284, 911 N.W.2d 97.

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Consultants/Experts

E. Make sure your expert will hold up to any potential Daubert motion:

1. Daubert factors:
   i. whether the technique or theory in question can be and has been tested;
   ii. whether it has been subjected to peer review and publication;
   iii. the known or potential error rate of the technique or theory;
   iv. the existence and maintenance of standards controlling its operation; and
   v. whether it has attracted widespread acceptance within a relevant scientific community. Daubert, 509 U.S. at 593-94.
2. Wisconsin's Adaptation of Daubert:
   i. As set forth in Wis. Stat. § 907.02, Wisconsin's adaptation of the Daubert standard provides the following requirements:
      a. the expert's testimony must be based on sufficient facts and data;
      b. the expert's testimony must be the product of reliable principles and methods; and
      c. the expert must apply the principles and methods reliably to the facts of the case. Seifert v. Balink, 2017 WI 2, ¶ 7, 372 Wis. 2d 525, 888 N.W.2d 816.

8

Notice of Inspection

A. The trial court may use its discretion, guided by the totality of the circumstances, to judge the sufficiency of the content of the notice. American Family Mut. Ins. Co. v. Golke, 2009 WI 81, ¶ 29, 319 Wis. 2d 397, 768 N.W.2d 729.

B. Some factors courts consider include:

1. length of time evidence can be preserved;
2. ownership of the evidence;
3. prejudice posed to possible adversaries by destruction of the evidence;
4. form of the notice;
5. sophistication oof the parties;
6. ability of the party in possession to bear the burden and expense of preserving the evidence. Golke, 319 Wis. 2d 397, ¶ 29.

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Notice of Inspection

C. First-class mail may be used to deliver the notice. Golke, 319 Wis. 2d 397, ¶ 33.

D. Notice of mail is usually considered complete upon mailing, not proof of receipt. Golke, 319 Wis. 2d 397, ¶ 35.

E. Habit evidence is admissible to show a letter was mailed. See Golke, 319 Wis. 2d 397, ¶ 47-48 (finding unrebutted evidence American Family sent letter based on adjuster's testimony and American Family's "routine, habit, and practice" regarding outgoing mail.)

F. Evidence of mailing a letter raises a rebuttable presumption that the addressee received the letter. Golke, 319 Wis. 2d 397, ¶ 36.

G. This presumption cannot be overcome without a denial of receipt, the "mere non-remembering of receipt is not enough." Golke, 319 Wis. 2d 397, ¶ 36.

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Notice of Inspection

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Who Do You Put on Notice

A. Owner or Lessee of Vehicle

1. Typically determined based on title.
2. In some cases, it can be difficult to determine ownership of the vehicle.
3. Following an accident, the owner could be the individual, corporation, insurance company, or salvage company (i.e., CoPart or junk yard).

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Preserving the Evidence

What is needed to complete the reconstruction?

A. Timely preservation of the evidence

1. Why?
   a. The analysis may be limited without proper preservation
   b. Evidence can be lost over time
      i. Skid marks/tire marks fade
      ii. Road construction
      iii. Vehicle salvage yards and the crusher
      iv. Stored electronic data can be lost or overwritten
   c. We can't always rely on others to preserve the evidence

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Preserving the Evidence

2. What to preserve?
   a. The accident site
      i. Tire marks/skid marks
      ii. Gouge/scrape marks
      iii. Fluid stains
      iv. Debris
      v. Final rest positions
      vi. General roadway characteristics

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Preserving the Evidence

2. What to preserve?
   b. The vehicles
      i. Damage locations
      ii. Damage depth or penetration
      iii. Seat belt condition/usage
      iv. Lighting
      v. Preliminary mechanical defect
      vi. Electronic Data
         1. Crash Data Retrieval (CDR)
         2. Heavy Truck (ECM)
         3. Heavy Truck (ABS)
         4. Video/Images
         5. GPS
         6. Infotainment Systems

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Preservation of Evidence

A. A party or potential litigant has a duty to preserve evidence essential to a claim that is being or likely will be litigated. Golke, 319 Wis. 2d 397, ¶ 21.

B. Duty to preserve evidence is discharged once the party in possession has given reasonable notice of:
   1. a possible claim;
   2. the basis for that claim;
   3. the existence of evidence relevant to the claim; and
   4. a reasonable opportunity for inspection of the evidence.

C. Failure to preserve such evidence can lead to a spoliation claim.

16

Authorizations to Download Vehicle Data

Driver Privacy Act of 2015

- (Sec. 2) Declares that any data in an event data recorder required to be installed in a passenger motor vehicle (as provided for under Department of Transportation (DOT) regulations concerning the collection, storage, and retrievability of onboard motor vehicle crash event data) is the property of the owner or lessee of the vehicle in which the recorder is installed, regardless of when the vehicle was manufactured.
- Prohibits a person, other than the owner or lessee of the motor vehicle from accessing data recorded or transmitted by such a recorder unless:
  - a court or other judicial or administrative authority authorizes the retrieval of such data subject to admissibility of evidence standards;
  - an owner or lessee consents to such retrieval for any purpose, including vehicle diagnosis, service, or repair;
  - the data is retrieved pursuant to certain authorized investigations or inspections of the National Transportation Safety Board or DOT;
  - the data is retrieved to determine the appropriate emergency medical response to a motor vehicle crash; or
  - the data is retrieved for traffic safety research, and the owner's or lessee's personally identifiable information and the vehicle identification numbers are not disclosed.

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Authorizations to Download Vehicle Data

Driver Privacy Act of 2015

- (Sec. 3) Directs the National Highway Traffic Safety Administration, after completing a study and submitting a report to Congress, to promulgate regulations concerning the amount of time event data recorders installed in passenger motor vehicles may capture and record vehicle-related data to provide accident investigators with pertinent crash-related information.

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49 CFR Part 563 – Event Data Recorders (EDR)

- Applies to:
  - Vehicles manufactured on or after September 1, 2013
  - Vehicles with a gross vehicle weight rating (GVWR) or 5,500 pounds or less (most passenger vehicles)
- Requirement states if the auto manufacturer decides to record data, they must:
  - Record a minimum set of data
  - Make the retrieval of the data "commercially available"
- For most vehicles, the event data recorder function is done within the airbag control module.
- Some manufacturers (Ford, GM, Chrysler) have EDR data for vehicles built before September 1, 2023
- Some manufacturers choose to record data beyond the required elements
- Part 563 excludes heavy trucks/semis given their higher GVWR, but many of these vehicles can still have some sort of EDR capability.

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Bosch Crash Data Retrieval (CDR) System

- Coverage for most vehicle manufacturers
- Separate from dealership diagnostic tools
- In-vehicle: Data retrieved via the Diagnostic Link Connector (DLC) without disassembly
  - Most vehicles require a key to turn on the ignition to power the Airbag Control Module (ACM)
  - Many newer GMs can be downloaded without a key

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Bosch Crash Data Retrieval (CDR) System

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Bosch Crash Data Retrieval (CDR) Sytem

- In a damaged vehicle (DLC attempt unsuccessful), download directly from the module
  - Vehicle disassembly required to access the ACM in the vehicle
  - ACM can also be removed for a benchtop download

22

When is data stored in the ACM?

- Impacts to front, side, or rear of vehicle
- Vehicle roll events
- Non-deployment events:
  - Impacts that are severe enough to meet recording criteria:
    - Crash algorithm wakeup
    - Non-deployment recording threshold (typically 5 mph delta-V)
  - Not locked: May be overwritten by subsequent events
  - Older GMs: erased after 250 ignition cycles
- Deployment events:
  - When the airbags or other devices are commanded to deploy
  - Data is locked: Cannot be erased

23

Pre-crash Data – Time Series

- Pre-crash time series data
  - Typically 5 seconds of data before algorithm enable
  - May include:
    - Vehicle speed
    - Engine RPM
    - Accelerator pedal position
    - Brake status
    - Steering wheel angle
    - Cruise control status
    - ABS activity
    - Stability control system activity

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Other Pre-crash Data

- Other Pre-crash data elements may include:
  - Driver belt status
  - Passenger belt status
  - Passenger seat occupancy status
  - Airbag warning lamp status
  - Seat track position status
  - Some manufacturers include:
    - Odometer
    - Date/Time of event

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Crash Data

- Crash data elements typically include:
  - Crash severity:
    - Longitudinal delta-V and acceleration
    - Lateral delta-V and acceleration
    - Roll angle or roll rate
  - If airbags and other devices were commanded to deploy
    - Commanded deploy times of devices

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GM

- Modules that can have data:
  - Airbag Control Module (ACM)
    - Bosch CDR coverage starting MY1994
  - Active Safety Control Module (ASCM) – if equipped
    - Bosch CDR starting MY2013
    - Automatic Emergency Braking (AEB) events
    - Deployment events and some non-deployment events
  - Front Camera Module (FCM) – if equipped
    - Bosch CDR starting MY2019
    - "Events of Interest"
      - Deployment events
      - Non-deployment events
      - Front collision alert
      - Lane departure warning
    - 3 images
      - 4 seconds before event
      - At event
      - 4 seconds after event

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GMC Terrain – FCM Images

FCM Trigger: Airbag Deployment Event

FCM : t-4 sec

FCM : At Event

FCM : t+4 sec

(Google Street View)

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Stellantis

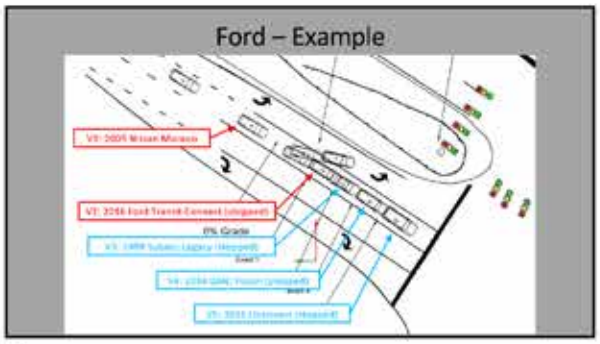
- Formerly FCA (Fiat Chrysler Automobiles)
  - Includes Chrysler, Jeep, Dodge, RAM, Fiat
- Modules that can have data:
  - Airbag Control Module (ACM)
    - Bosch CDR coverage starting MY2005

29

Ford

- Modules that can have data:
  - Airbag Control Module (ACM)
    - Bosch coverage starts MY2001
    - Ford and its suppliers can download some older unsupported ACMs
  - Powertrain Control Module (PCM)
    - Vehicles from MY2003 to MY2011 equipped with Electronic Throttle Control (ETC)
    - Typical record time is 25 seconds
    - Pre-crash time series data is stored
    - Data is continuously written into a circular buffer
    - Data is locked if the PCM receives a "deploy" signal from the ACM
    - If PCM remains powered after an event, data can be overwritten over time if no deployment occurs, or if the PCM does not receive the "deploy" signal from the ACM (ie, impact wiring damage)

30



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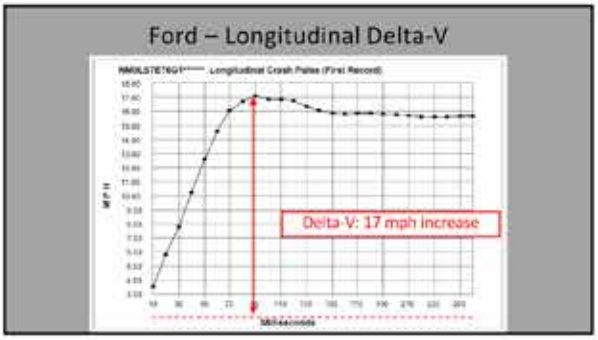
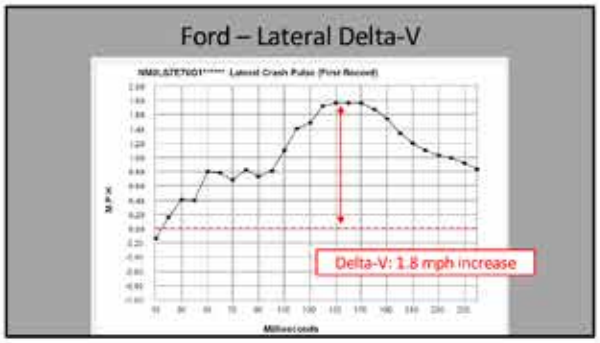
32

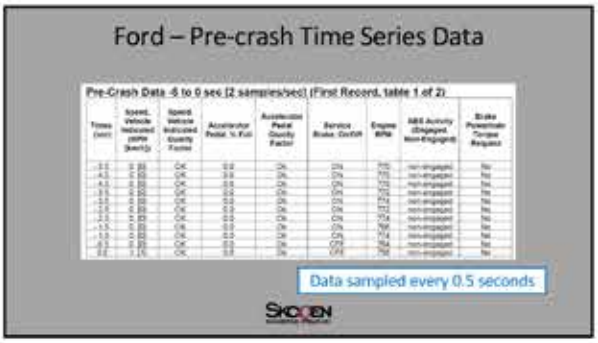
33



34

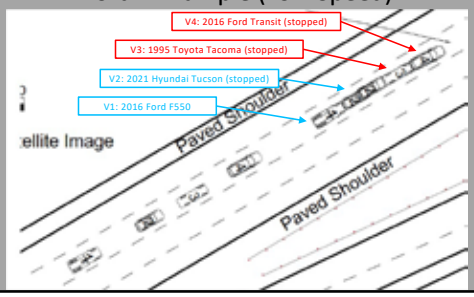


35



36

Ford – Example (Low Speed)



37

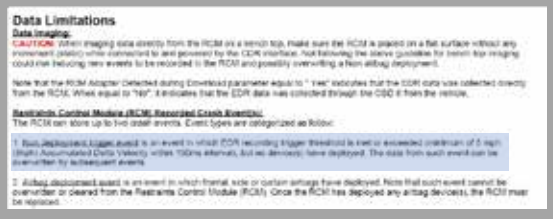
Ford – Example (Low Speed)

38

Ford – Example (Low Speed)

39

Ford – Example (Low Speed)



40

Toyota

- Airbag Control Module (ACM)
  - Bosch coverage starts MY2001
- Vehicle Control History (VCH) – Data sourced from various modules
  - Coverage starts MY2013
  - Data obtained using Toyota Techstream (separate from Bosch CDR system)
  - Triggered during various driving events or driver input (even when Delta-V is < 5mph)
  - Time series data depends on type of event that occurred
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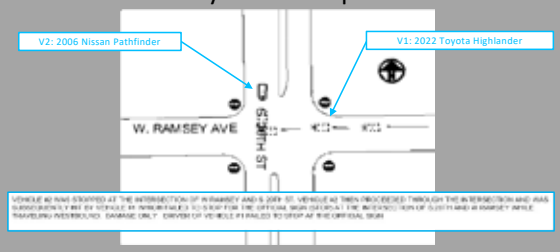
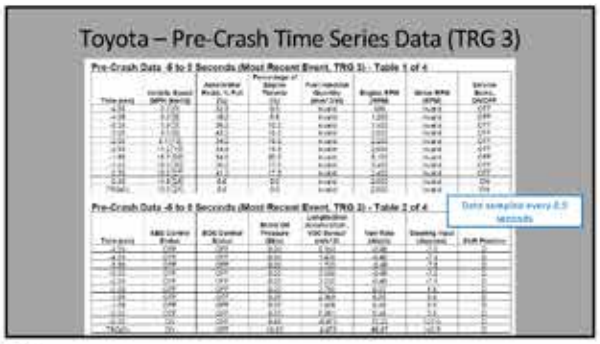
  - Coverage starts MY2016
  - Data obtained using Toyota Techstream (separate from Bosch CDR system)
  - Pre-collision System (PCS) data
    - Combination of time series data and front camera images

41

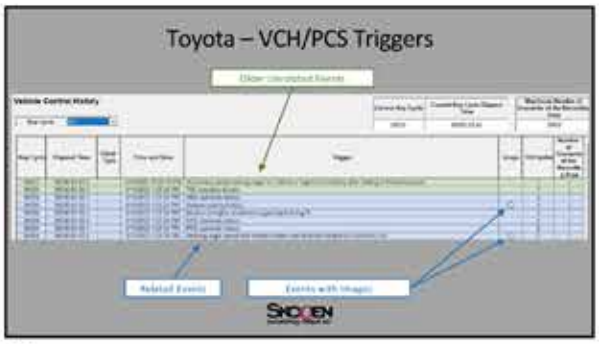
Toyota – Example



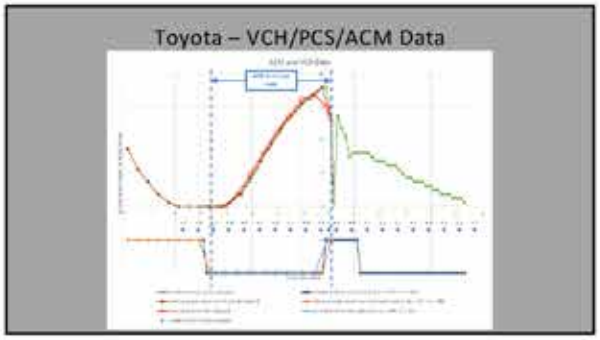
42



43



44



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49

Other Vehicle Manufacturers

- The Bosch CDR system supports other manufacturers (ACM data):
  - Honda — Starts MY2012
  - Nissan — Starts MY2013 (Nissan North American can download older ACMs)
  - Mazda — Starts MY2011
  - Volvo — Starts MY2011
  - BMW — Starts MY2013
  - Mercedes-Benz — Starts MY2014
  - VW/Audi — Starts MY2014/MY2015
  - Subaru — Starts MY2012
  - Mitsubishi — Starts MY2006
- Tesla
  - Uses their own system for downloads
  - ACM coverages starts MY2012
  - Other vehicle data and video can be stored (request through Tesla)
- Hyundai/Kia
  - Both use their own system for downloads
  - ACM coverage starts MY2013 (research shows data can be available back to MY2010)

50

What's Next for EDRs?

- More recording of driving aids (emergency braking, lane keep, etc)
  - Were they enabled/disabled? Engaged? Faulty?
  - Overruled by the driver?
- New GM module family (SDM50)
  - Stores 8 seconds of pre-crash data
  - Time and date of event
  - Left and right turn signal status
- Proposed NHTSA Rule
  - 20 seconds of data at 10 Hz

51

Infotainment

- SOME infotainment modules record data
  - IF recording is enabled, often lots of data, recorded continuously with time and location
  - Track logs (can include GPS locations and speeds)
  - Vehicle events (key on, door open/close)
  - Phone connections
  - Phone use
- Data imaging tools NOT provided or supported by manufacturers
- Berla iVe tool used for data acquisition
  - Can be in vehicle
  - Often requires removal/disassembly of infotainment module

52

Spoliation

A. Wisconsin law defines spoliation as the "destruction or withholding of critically probative evidence resulting in prejudice to the opposing party. Estate of Neumann v. Neumann, 2001 WI App 61, ¶ 79, 242 Wis. 2d 205, 626 N.W.2d 821.

B. If a party or potential litigant destroys, alters, or loses evidence in a manner that constitutes spoliation, the court may impose sanctions for the spoliation of that evidence. See Golke, 319 Wis. 2d 397, ¶ 21.

C. Not all destruction, alteration, or loss of evidence qualifies as spoliation. Insurance Co. of N. Am. v. Cease Elec. Inc., 2004 WI App 15, ¶ 15, 369 Wis. 2d 286, 674 N.W.2d 866.

53

Spoliation

D. Courts follow a multi-step analytical process to determine whether spoliation has occurred. Mueller v. Bull's Eye Sport Shop, LLC, 2021 WI App 34, ¶ 19, 398 Wis. 2d 329, 961 N.W.2d 112.

1. "First, the court identifies, with as much specificity as possible, the evidence that is alleged to have been destroyed, altered, or lost."
2. Then the court makes a factual inquiry into the following three factors:
   - i. the relationship of the destroyed, altered, or lost evidence to the issues in the present action;
   - ii. the extent to which the destroyed, altered, or lost evidence can now be obtained from other sources; and
   - iii. whether the party responsible for the evidence destruction, alteration, or loss knew or should have known at the time he or she caused the destruction, alteration, or loss of evidence that litigation against the opposing parties was a distinct possibility.
3. Lastly, the court determines whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed and, if so, what the sanctions should be.

54

Spoliation

E. Sanctions for spoliation serve two main purposes:
   1. to uphold the judicial system's truth-seeking function; and
   2. to deter parties from destroying evidence.

F. Wisconsin courts have recognized the following potential remedies for evidence spoliation:
   1. discovery sanctions;
   2. monetary sanctions;
   3. exclusion of evidence;
   4. reading the spoliation inference instruction to the jury; and
   5. dismissal of one or more claims.

G. The spoliation inference instruction is not appropriate when evidence is negligently destroyed, but it may be appropriate when the destruction of evidence is intentional.

55

Summary

- Engage a knowledgeable expert:
  - Identify if the year/model/make of the vehicle may have data
  - When data is stored, what type(s) of data may be available
  - Data interpretation
- Preserve data sources sooner than later:
  - Data can be overwritten:
    - Vehicle repaired and/or back on the road, potential to overwrite events of interest
  - Data can disappear:
    - Modules replaced during vehicle repairs, old modules with data of interest are scrapped
    - Vehicle scrapped/crushed
- Specialized tools and training needed to obtain data:
  - Dealer tools and dealer techs may not obtain all available data
  - Avoid losses to data or changes to data due to imaging

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HOW TO AVOID A BAD FAITH CLAIM: BEST PRACTICES FOR INSURANCE COMPANIES

Sean A. Bukowski

Meissner Tierney Fisher & Nichols S.C.

1

WHY?

- Bad faith claims are increasingly being made against insurance companies.
- Firm specialization.
- Increasingly negative public view of insurers.
- Not just in Wisconsin; other jurisdictions are seeing courts take an increasingly critical view of insurer conduct.

https://www.reuters.com/legal/legalindustry/bad-faith-claims-against-insurers-rise-how-they-can-remain-good-graces-2022-08-18/.

2

WHAT IS BAD FAITH?

- To prove bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits under the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. "Bad faith" by definition cannot be unintentional. "Bad faith" is defined as "Deceit; duplicity; insincerity." American Heritage Dictionary of the English Language (1969), p. 471. The same dictionary defines "deceit" as a "strategem; trick; wile" (p. 342), and duplicity as "Deliberate deceptiveness in behavior or speech." *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 691-92, 271 N.W.2d 368, 376-77 (Wis. 1978). Bad faith is the absence of honest, intelligent action or consideration based upon a knowledge of the facts and circumstances upon which a decision in respect to liability is predicated. *Id.* at 692, 271 N.W.2d at 377. The tort of bad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim, i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances. *Id.*

3

WHAT IS NOT BAD FAITH?

- Bad faith however will not result when an insurance company in the exercise of ordinary care makes an investigation of the facts and law and concludes on a reasonable basis that the claim is at least debatable. *Id.* at 693, 271 N.W.2d at 377. Bad faith is not a weapon to be used by an insured to coerce or intimidate an insurer into acceding to the insured's demands. A mere disagreement with one's insurer is clearly not enough to show bad faith. *Gosha v. Erie Insurance Company*, 2020 WL 7698356 (E.D. Wis. 2020). Simply because the insurer may be wrong does not mean there is bad faith. *American Cas. Co. of Reading, Pa. v. B. Ciancolo, Inc.*, 987 F.2d 1302, 1306 (7th Cir. 1993).

4

WHAT CLAIMS?

- First-party claims.
- Fire losses.
- Perils such as hail or wind.
- UIM/UM.

5

REMIND INSUREDS OF THEIR DUTY UNDER THE POLICY

- An insurance policy is a contract. Not only do insurers have duties under the policy, insureds do as well. Typically, insurance policies have provisions that outline duties in the event of a loss. Provisions include: (1) providing documentation to support the loss; and (2) a duty to cooperate during the investigation.
- This should be done at the beginning of the claim and continue throughout the claim. Doing this informs the insured of his or her duties under the policy and has the added benefit of placing the burden – as required under most policies – on the insured to prove the loss. *See Dutz v. John Alden Life Insurance Co.*, 573 F.Supp. 1002 (W.D. Wis. 1983), *aff'd*, 754 F.2d 245 (7th Cir. 1985).

6

INVESTIGATE

- Insurers have a duty to investigate. *Fehring v. Republic Insurance Co.*, 118 Wis.2d 299, 347 N.W.2d 595 (Wis. 1984). That does not mean however that your investigation must supplant the insured's investigation. Investigation may include inspections, asking questions, and requesting documentation from the insureds to support payment. Keep in mind that an investigation does not need to be perfect. *Mills v. Regent Insurance Co.*, 152 Wis.2d 566, 449 N.W.2d 294 (Wis. Ct. App. 1989).
- A good practice is to continue to follow-up and put the onus on the insured (as required under most policies) to prove the loss. Be mindful however that requests from the insured for information, documentation, or evidence should be reasonable.

7

CONSIDER ALL INFORMATION

- Consistent with an insurer's duty to investigate, you have a duty to consider all the available information and documentation in assessing the claim. Do not disregard unfavorable information.

8

DO NOT HIDE INFORMATION FROM INSUREDS

- If you receive unfavorable information from either an expert or some outside source, be honest and transparent with your insureds. *Benke v. Mukwonago-Vernon Mutual Insurance Co.*, 110 Wis.2d 356, 329 N.W.2d 243 (Wis. Ct. App. 1982); *Upthegrove Hardware, Inc. v. Pennsylvania Lumbermans Mutual Insurance Co.*, 146 Wis.2d 470, 431 N.W.2d 689 (Wis. Ct. App. 1988); *Weiss v. United Fire & Casualty Co.*, 197 Wis.2d 365, 541 N.W.2d 753 (Wis. 1995).

9

BE CONSISTENT

- If you have a claim where you are assessing multiple items being claimed as a loss, be consistent in what documents you request and whether you issue payment. Inconsistency may evidence bad faith.

10

MAKE SURE THAT YOU HAVE A REASONABLE BASIS TO DENY THE CLAIM

- If you have any questions about the claim, do not leave anything to chance. It never hurts to ask another question or hire an outside expert to assist with the claim. While that may increase the cost of the claim, it is better to incur that cost rather than the extracontractual costs at a later date.
- If there is a question about whether the documentation or information supports the insured, you should retain an expert to consider the evidence. Do not exceed your level of knowledge. For an insurance company's decision to be made in good faith, it must be based upon a knowledge of the facts and circumstances upon which liability is predicated. The lack of reasonable diligence and the insurer's refusal to determine the nature and extent of liability is bad faith. *Anderson* at 688, 271 N.W.2d at 375.

11

ABIDE BY WISCONSIN'S INSURANCE CLAIM SETTLEMENT PRACTICES ACT

- (3) Unfair claim settlement practices. (a) Any of the following acts, if committed by any person without just cause and performed with such frequency as to indicate general business practice, shall constitute unfair methods and practices in the business of insurance:
- 1. Failure to promptly acknowledge pertinent communications with respect to claims arising under insurance policies.
- 2. Failure to initiate and conclude a claims investigation with all reasonable dispatch.
- 3. Failure to promptly provide necessary claims forms, instructions and reasonable assistance to insureds and claimants under its insurance policies.

12

CONTINUED

- 4. Failure to attempt in good faith to effectuate fair and equitable settlement of claims submitted in which liability has become reasonably clear.
- 5. Failure upon request of a claimant, to promptly provide a reasonable explanation of the basis in the policy contract or applicable law for denial of a claim or for the offer of a compromise settlement.
- 6. Knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverages involved.
- 7. Failure to affirm or deny coverage of claims within a reasonable time after proof of loss has been completed.
- 8. Failure to settle a claim under one portion of the policy coverage in order to influence a settlement under another portion of the policy coverage.

13

CONTINUED

- 9. Except as may be otherwise provided in the policy contract, the failure to offer settlement under applicable first party coverage on the basis that responsibility for payment should be assumed by other persons or insurers.
- 10. Compelling insureds and claimants to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them.
- 11. Refusing payment of claims solely on the basis of the insured's request to do so without making an independent evaluation of the insured's liability based upon all available information.
- 12. Failure, where appropriate, to make use of arbitration procedures authorized or permitted under any insurance policy.
- 13. Adopting or making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

- Wis. Admin. Code § 6.11. While there is no private right of action, violation of one or more of the above, can form the basis for a bad faith claim. *Heyden v. Safeco Title Ins. Co.*, 175 Wis.2d 508, 521-26, 498 N.W.2d 905, 909-11 (Wis. Ct. App. 1993) (overruled on other grounds).

14

TRUST YOUR FIELD AND CLAIMS ADJUSTERS

- If you have a field adjuster investigate, inspect the loss, and recommend payment, trust your field adjuster. Having a manager or desk adjuster overrule someone who has actually investigated and inspected the loss does not bode well for the insurance company and does not present well in front of a jury. Whether a desk adjuster can justify his or her decision, a jury will be left wondering why they should believe a desk adjuster who has never inspected or investigated the loss over a field adjuster who has actually inspected the loss.

15

DO NOT LOWBALL YOUR INSURED

- If you recommend a payment in the claim file and then proceed to offer something lower, that may be bad faith. *Davis v. Allstate Insurance Co.*, 101 Wis.2d 1, 9, 303 N.W.2d 596 (Wis. 1981).

16

QUESTIONS?

17


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Judge Derek Mosley

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In this session you will:

1. Learn to assess and measure your unconscious bias
2. Be able to define unconscious bias
3. Learn the history of unconscious bias in America
4. Learn how subconsciously, decisions are being made in your mind
5. Learn how unconscious bias affects everyday life
6. Finally, learn ways to mitigate your bias

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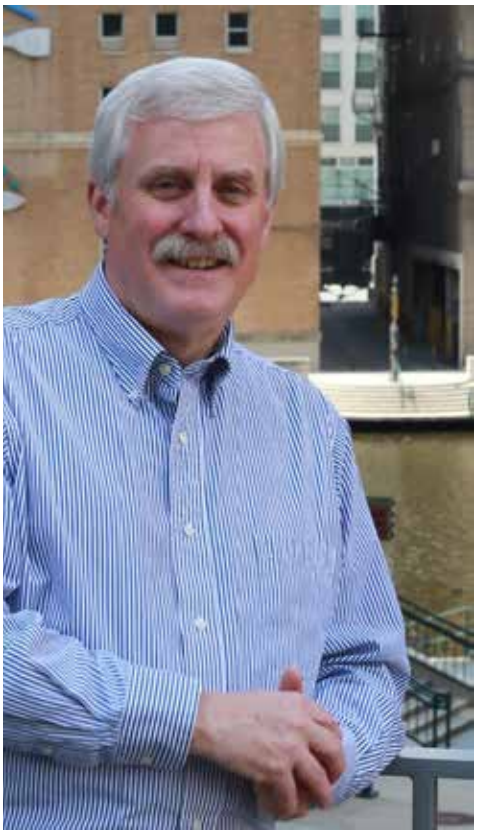

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