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Contrary to Popular Belief, the Consumer-Contemplation Test Still Applies in Wisconsin to Design Defect Claims

Richard T. Orton and Aaron R. Wegrzyn

Also In This Issue

Wisconsin Defense Counsel
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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

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

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President's Message: Our Role in the Civil Justice System

by: Nicole Marklein, President, Wisconsin Defense Counsel

The future of the insurance defense practice in Wisconsin has been increasingly on my mind. Many of my concerns (compensation rates, attorney retention, client relationships and the like) have long been subjects of discussion amongst our members. However, the extent to which the threats to our profession are real or only perceived, we benefit by discussing them directly and being proactive when action is warranted.

My comments come from my perspective of practicing insurance defense litigation for 15 years. I feel right in the middle—no longer a "Young Lawyer" and not yet a "well-seasoned" lawyer with fifty jury trials under my belt. The future of civil defense, and specifically insurance defense, has become increasingly important to me at this point in my career. It has been incredibly rewarding, and I hope to enjoy this practice for many years to come. The strength of the insurance defense bar in Wisconsin depends on all of us—the Young Lawyers, the well-seasoned attorneys, and insurers alike.

I am consistently energized and heartened by the work and involvement of the members of the WDC Young Lawyers Division. To WDC's newer attorneys: We do not emphasize enough the vital role we play in the civil justice system. I worry that this may be partially to blame when we lose one of our younger members to plaintiffs' firms and other types of practices. The plaintiff's bar has done a masterful job of characterizing insurers and their counsel as nothing more than greedy impediments to justice for the most vulnerable and deserving people. If unchallenged, this false narrative may leave an insurance defense attorney feeling personally unfulfilled or that his or her work may be more meaningful in another setting.

Our organization and law firms owe it to you to demonstrate the significance of our work and our roles. And our roles go beyond working to ensure that our insurer clients are not overpaying on claims, though this, in itself, is vital to the system. Just as the criminal justice system cannot sustain without the checks and balances of defense counsel, nor can the civil tort system. The criminal defense attorney helps ensure that individuals are only deprived of their liberty when the government proves their guilt beyond a reasonable doubt. Similarly, we protect the integrity of the civil tort system by helping to ensure that those who are compensated are legally entitled. To this end, we assist legitimate claimants in obtaining fair and swift compensation for their damages, which is the foundation of liability insurance. Without insurance, legally entitled tort victims would rarely have a solvent party from which to seek compensation.

Moreover, we protect policyholders. Equal with the insurers who pay our bills, our clients are the individuals and businesses who are the targets of lawsuits. Often, our case may be the client's only experience with the civil justice system. Even in cases where there is no personal financial exposure, our clients are often nervous and deeply invested in defending the allegations against them. Our insurers trust us to provide service on

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their behalf that puts these individuals at ease and helps them through what can be a very stressful time. If you have not yet had the opportunity to receive sincere appreciation from an insured, you soon will. It is extremely fulfilling.

The WDC leadership wants nothing more than to engage the next generation of civil defense attorneys in the careers that we have all found so rewarding. If you do not have someone from your firm or organization to help you become more connected and involved in WDC, I know all of our board members will be delighted to do so. Please, reach out to any of us.

In addition to the great work and energy of our Young Lawyers Division, I am equally grateful for the continued mentoring, involvement and guidance of the very experienced attorneys who are well known throughout our organization. To the leaders of our member law firms: The long-term quality of insurance defense representation and enjoyability of this practice area for those who pursue it is largely up to you. If I've heard anything from the great conversations our Young Lawyers Division has fostered, it is that newer lawyers want meaningful mentorship. And the good news is that, aside from the cost of pulling us away from otherwise billable time, being a good mentor is free. I would love to see WDC assist our more experienced attorneys in mentoring, as it is not a skill that comes naturally to many.

Moreover, I encourage you to reflect on how you speak to newer attorneys about what we do and why. More often than not, are we tongue-in-cheek about our role in the civil justice system? Do we paint all plaintiffs with a broad brush, giving the impression that we are out of touch? Do we stress enough the important role we play for each of our insureds? Or that we are acting as the face of our insurer clients to them?

I also urge law firms to look at the overall cost of really involving newer attorneys in our profession and our organization. In the grand scheme, allowing a new attorney to shadow you at a deposition or mediation for a day is well worth the cost. The same is true with covering the cost for associates to join WDC and DRI and attend our conferences and events.

Like many of our members, I practice in a small firm in a rural community. I certainly understand the financial pressures of running a high-quality firm in such an environment. Though we cannot compete with our colleagues at very large firms in associate compensation alone, the good news is that our Young Lawyers Division members are telling us that they look for so much more than just compensation when choosing where they want to practice law. They want individualized development and inclusion. They want to know that their skills are improving, and their work is meaningful. These are things we can deliver in spades.

Finally, our insurer members: One of the ways that WDC is unique amongst its state defense bar peers is the engagement of our insurer members. Most state organizations do not allow insurers to be members, instead reserving membership only for private counsel, or in-house counsel from non-insurer corporations. Although we encourage membership of all civil defense practitioners, insurance defense has long been a core focus of our organization. Counsel from other states have expressed envy at the insights we gain and the relationships we build between our private and insurer members.

Not surprisingly, our insurers play a vital role in the strength of this profession. You probably think I am going to make a case for higher rates for outside counsel, and I am. We cannot deny the fact that we are watching many of our talented outside counsel find new employment in house and in plaintiffs' law firms. And while compensation is only part of the equation, it is a crucial one. The caliber of counsel that I assume you want representing your companies and your insureds command much higher hourly rates in their private sector representations. We understand the tradeoff that ideally comes with

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charging these lower rates: steady workflow, prompt payment of bills and personally fulfilling work alongside claims personnel with whom we can strategize and collaborate. But the financial pressures—often from within our own law firms—are increasing. It is not uncommon for an insurance defense attorney to charge $150 per hour less than she charges her private pay clients. At some point, the attorney must ask whether making half as much money or working twice as hard for the same compensation is worth the tradeoff.

While I am happy to give discounted rates to my insurers to do the work I love, there is a tipping point. I worry that we may be approaching the point where the best litigators in Wisconsin will no longer choose insurance defense as a career path, leaving our insurers and their insureds with sub-par representation and an imbalance in the civil justice system.

I do not suggest that insurers pay rates equal to those we can charge of other clients. But the disparity seems to be growing. In addition to approving reasonable rate increases where warranted, insurers can further alleviate some of the revenue disparity for their outside counsel by encouraging associates to bill for their assistance at trials, or in assigning associates files to work under the supervision of a more experienced partner.

I do not write these words lightly. I can only begin to appreciate the financial pressures faced by claims departments and their role in a larger organization that, perhaps, views them as nothing more than an expense or a cost of doing business. But we want to hear about your constraints and how we can better assist and represent you.

Perhaps this is yet another column worrying needlessly about the demise of the insurance defense practice in Wisconsin. But, if nothing else, I hope it encourages ongoing, productive dialogue about how we can continue to work together to sustain and improve this practice for all of us.

Author Biography:

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

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2023 Diversity, Equity & Inclusion Committee Award: Charles Polk

Congratulations to Charles Polk for being selected by the Diversity, Equity & Inclusion Committee and the Awards Committee for the 2023 Diversity, Equity & Inclusion Committee Award! The WDC Spring Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders.

Charles is the Diversity, Equity & Inclusion Committee's founding chair, and the Committee quite literally would not exist without his efforts. Creating a committee from scratch is no easy task. He embraced the committee as a passion project, and it has taken off. During his time as chair, Charles engaged committee members with regularly scheduled meetings and discussions on topics of interest. During these meetings, he created a safe space for an open and honest exchange of questions and thoughts about notoriously difficult topics. Charles went above and beyond to provide thought-provoking educational materials that have led to robust discussion, some of which WDC has used to create excellent social media content. Numerous committee members have commented that they benefitted from every meeting he hosted during his time as chair. In addition to his activities within the committee, Charles created and moderated a Diversity, Equity & Inclusion panel at the WDC Spring Conference in April of 2022, which was well-received and garnered significant positive feedback from those in attendance. Charles' passion genuinely inspires those around him!

Charles Polk, III is an associate at Amundsen Davis, LLC, where he works out of the Milwaukee office and serves as a member of the firm's Business Litigation Service Group. Charles handles civil litigation encompassing personal injury, federal 1983 claims, municipal matters, insurance exposure, and data privacy/security issues. Outside the office, Charles volunteers at the Sojourner Family Peace Center, which serves victims of domestic violence and abuse. He aids survivors of domestic violence by providing pro bono representation, connecting them with legal aid, and by being a part of their support group that listens to their stories and fosters healing.

As for his roles with the WDC, Charles serves on the board as the Chair of the Young Lawyers' Committee and is the past Chair of the Diversity, Equity, and Inclusion Committee.

Charles will be recognized during the WDC 2023 Spring Conference on April 13-14, 2023, at The American Club in Kohler.

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2023 Amicus Committee Award: Crystal Uebelher

Congratulations to Crystal Uebelher for being selected by the Amicus Committee and the Awards Committee for the 2023 Amicus Committee Award! The WDC Spring Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders.

The Amicus Committee is regularly active evaluating and monitoring cases to participate in, considering requests from WDC members, and remaining on the forefront of appellate procedure and caselaw in Wisconsin. There are many active Committee members worthy of an award for their dedication and service. This year, we recognize Crystal M. Uebelher for her continued service and contribution to the Amicus Committee. Crystal has been active over the years as an engaged member of the Amicus Committee, by inviting Committee support for cases in which she was involved, and identifying cases where WDC can serve the interests of the organization by partnering with the law sought to be developed in cases in the Court of Appeals and Supreme Court of Wisconsin.

Crystal has been an expert in the property and casualty insurance industry for over 20 years. Her experiences as a claims representative, insurance defense lawyer and in-house claims attorney have given her a deep knowledge of how the law and insurance are inextricably intertwined. Crystal's current role as a Divisional Assistant Vice President in Claim Practices for Great American Insurance allows her to support claims divisions across the many specialty lines of insurance offered by Great American. Crystal's role includes assisting in the management of complex claims issues and driving technical excellence in claims. Crystal is also a frequent speaker both at Great American and industry events to share her knowledge on bridging the gap between insurance and the law to respond to the ever-changing issues in our industry.

Crystal earned her juris doctorate in 2007 from the University of Wisconsin Law School (magna cum laude, Order of the Coif). She earned her Certified Property Casualty Underwriter designation in 2017. She is a recipient of the Property & Liability Resource Bureau's Outstanding Presentation Award (2022) and the Wisconsin Defense Counsel Publication Award (2019).

Crystal will be recognized during the WDC 2023 Spring Conference on April 13-14, 2023, at The American Club in Kohler.

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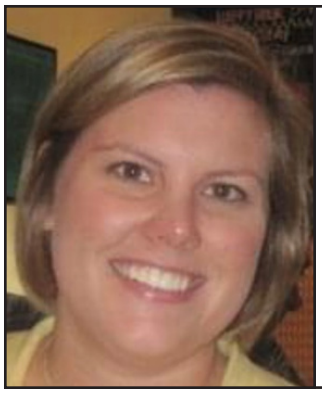

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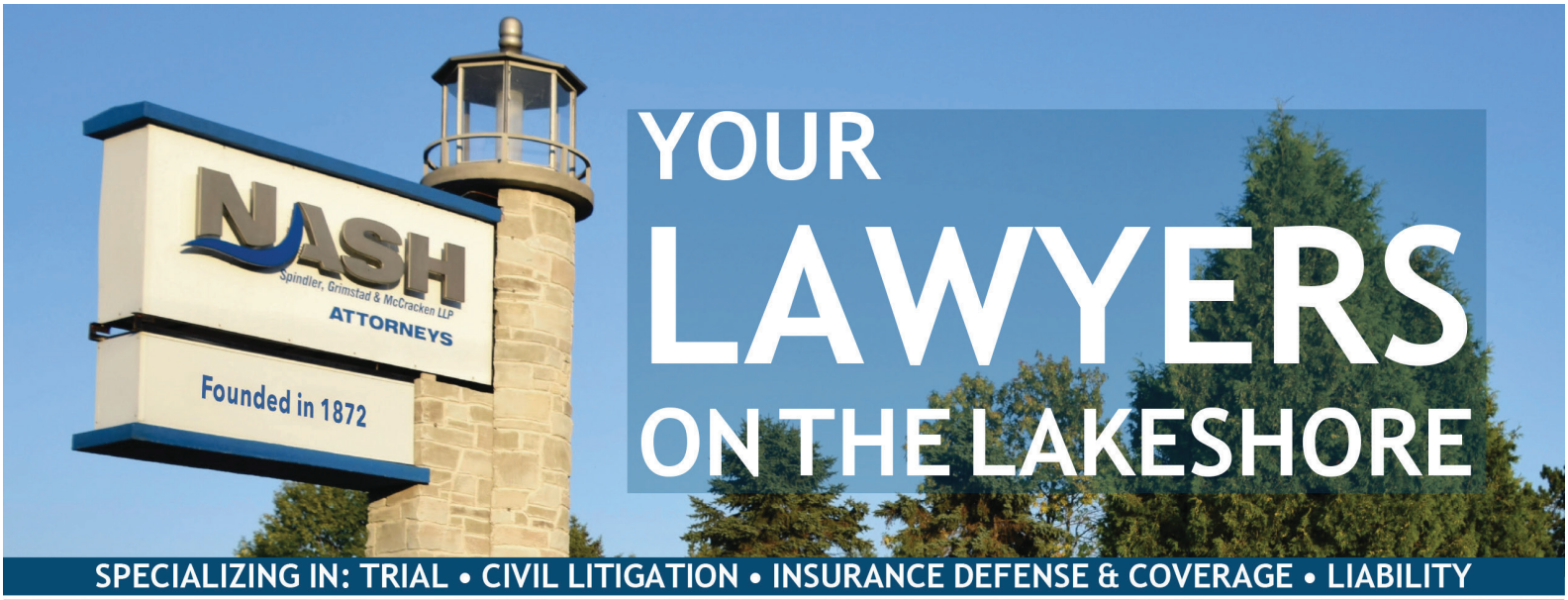
Congratulations to Megan McKenzie for being selected by the Women in the Law Committee and the Awards Committee for the 2023 Women in the Law Committee Award! The WDC Spring Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders.

Over the past few years, Megan has been a reliable and energetic member of the Women in the Law Committee. She regularly helps to promote WITL's projects and events, both by attending events herself, and by encouraging others to attend and participate. This year, Megan assisted with the DRI day of service, helping to make it a success. She also serves as a mentor to younger members of WDC, encouraging them to participate in the committee and attend conferences. She has stepped into the role of vice-chair, and is currently taking the lead on the committee's most well-known project, the spring clothing drive. This is a huge time and energy commitment, and the committee is grateful for her leadership. Megan takes this on without complaint, all while juggling a demanding litigation caseload and making time for her family and friends.

Megan McKenzie is a Senior Trial Staff Attorney with American Family Insurance Company. She has worked in the American Family litigation department for the past 8 years in the Madison office, conducting all stages of litigation defense and trial work. Before that time, she worked for Habush, Habush & Rottier in Madison for a year and a half representing the plaintiffs in a large environmental mass tort case. Megan began her practice in San Diego for a small insurance defense firm, handling complex personal injury, products liability, medical malpractice, and construction defect cases as an associate attorney.

Megan is licensed to practice in state court in California and Wisconsin, as well as the Southern District Court in California and Western District Court in Wisconsin. She is an active member and Director at Large with the Wisconsin Defense Counsel serving as Vice Chair for the Women in the Law and Membership Committees.

Megan will be recognized during the WDC 2023 Spring Conference on April 13-14, 2023, at The American Club in Kohler.



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Contrary to Popular Belief, the Consumer-Contemplation Test Still Applies in Wisconsin to Design Defect Claims

by: Richard T. Orton and Aaron R. Wegrzyn, Gass Turek LLC

The Wisconsin Supreme Court closed out 2022 with a question of first impression—how to interpret Wisconsin's "new" products liability statute (enacted in 2011), Wis. Stat. § 895.047. The most notable (and to many, surprising) ruling in *Murphy v. Columbus McKinnon Corp.*,[1] is that the legislature created a unique, hybrid products liability claim and did not simply adopt § 2 of the Restatement (Third) of Torts: Products Liability wholesale. Instead, the court concluded that Wisconsin's statute incorporates elements from § 2 of the Restatement (Third) as well as from Wisconsin's common law precedents founded in § 402A of the Restatement (Second) of Torts.[2] The decision breathes new life into the consumer-contemplation test in Wisconsin, thought by many to have been discarded by the legislature with its adoption of § 895.047.

I. The History

To understand *Murphy* properly, a brief review of the development of Wisconsin's products liability law is necessary. Historically, strict liability claims arose out of the problems plaintiffs faced in pursuing products liability claims based in negligence and warranty.[3] While several court decisions and law review articles led to the development of strict products liability,[4] none had more impact than the 1963 California case *Greenman v. Yuba Power Products, Inc*.—the first decision to establish a cause of action for strict liability in tort.[5]

Just two years later, in 1965, the American Law Institute embraced the principles in *Greenman* when it published § 402A of the Restatement (Second) of Torts.[6] Between the mid-1960s to the mid-1980s, § 402A "spread like wildfire from state to state," with courts and legislatures around the country adopting the new doctrine of strict products liability in tort for the sale of defective products.[7] Wisconsin was no exception, with our Supreme Court adopting § 402A in 1967 in *Dippel v. Sciano*.[8]

Section 402A requires a plaintiff to show that the subject product was "defective" and "unreasonably dangerous" when sold.[9] Comment g. to § 402A explains that a product is "defective" when it is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[10] Further, Comment i. states that a product is "unreasonably dangerous" only if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[11] This became known as the "consumer-contemplation" test.[12]

While the Wisconsin Supreme Court in *Dippel* did not specifically adopt or reject any of the comments to § 402A, it adopted Comments g. and i. eight years later in *Vincer*.[13] Thus, for several decades after the adoption of § 402A, Wisconsin followed the consumer-contemplation test in determining whether a product was defective and unreasonably dangerous.

By the 1990s, support for the consumer-contemplation test began to erode, particularly in cases claiming defective design and failure to warn.[14] Among its detractors were Professors Twerski and Henderson, the Reporters for the Restatement (Third) of Torts: Products Liability published in 1998,[15] who called the use of the consumer-contemplation test for design defect claims an "abject failure" that is "thoroughly discredited today."[16] Among other things, they argued that the consumer-contemplation test embodied in Comment i. of § 402A was "clearly intended … to apply only to manufacturing defects," and was therefore inappropriate as applied to design defect claims.[17]

Thus, the Restatement (Third) set forth in § 2 separate definitions for each of the three types of defect: manufacturing, design, and inadequate instructions or warnings.[18] As it relates to design defects, § 2 replaced the consumer-contemplation test with the risk-utility test as the standard for determining whether a product was defective.[19]

However, the Wisconsin Supreme Court, which in *Dippel* wasted no time in adopting § 402A of the Restatement (Second) shortly after its publication, twice resisted adopting § 2 of the Restatement (Third) shortly after its publication.[20] In *Green*, Justice Sykes filed a dissent stating that the majority was "seriously out of step with product liability law as it has evolved since" adopting § 402A in *Dippel*, and "blurs the distinctions between design, manufacturing, and failure-to-warn product defects."[21] Justice Sykes advocated for the adoption of § 2, rather than keep "Wisconsin in the much-criticized and rapidly dwindling minority of jurisdictions that rely exclusively on a consumer contemplation test to determine liability in design defect cases."[22]

The disagreement within the court on this issue was highlighted again in two cases decided on the same day in 2009, *Godoy* and *Horst*.[23] Adherents to § 402A's consumer-contemplation test saw abandoning it for § 2 of the Restatement (Third) as a "sea change" that "would discard over forty years of precedent."[24] At the same time, the proponents of § 2 echoed Justice Sykes' dissent in *Green*, explained the need for the change, and argued that the adherents to § 402A "restate[] Wisconsin's peculiar position on alleged design defects without mustering the intellectual firepower to defend it."[25]

It was against this backdrop that, in 2011, the legislature adopted Wis. Stat. § 894.047.[26] The statute set out in subsection (1)(a) different tests for manufacturing, design, and inadequate-instructions defect claims that mirror § 2 of the Restatement (Third).[27] With respect to design defect claims, § 894.047(1) states that a manufacturer is liable if the plaintiff can establish that:

(a) the product is defective because "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe;"

(b) "the defective condition rendered the product unreasonably dangerous to persons or property;"

(c) "the defective condition existed at the time the product left the control of the manufacturer;"

(d) "the product reached the user or consumer without substantial change in the condition in which it was sold;" and

(e) "the defective condition was a cause of the claimant's damages."[28]

Many saw the adoption of § 894.047(1) as the legislature stepping in to resolve the disagreement among the justices of the Wisconsin Supreme Court and establish § 2 of the Restatement (Third) as a wholesale replacement for § 402A of the Restatement (Second) and the consumer-contemplation test developed by Wisconsin common law.[29] Following the statute's enactment, commenters described its impact on design defect claims as follows: "Whether one agrees or not, the new standard means that consumer expectations (as such) no longer

are relevant to findings about whether a product's design is defective or unreasonably dangerous."[30] Indeed, the Wisconsin Jury Instructions were not only amended to reflect the new standards in § 894.047(1), but also to include a comment suggesting that the statute "apparently discard[ed]" the consumer-contemplation test for design defect cases.[31]

II. *Murphy:* The Consumer-Contemplation Test Never Left

This brings us to the Wisconsin Supreme Court's recent decision in *Murphy*, which arose out of an accident involving the transportation of old electrical line poles. The plaintiff, a utility company technician, used a truck-mounted boom equipped with specialty "Dixie" tongs to hoist downed electrical poles onto a truck bed. As the plaintiff moved a pole using the tongs, the tongs lost their grip and the pole fell onto the plaintiff, causing severe injuries. He brought both a strict product liability design defect and common law negligent design claim against the manufacturer of the Dixie tongs. The trial court granted summary judgment to the defendant on both claims, which the court of appeals reversed.

Murphy offered the supreme court its first opportunity to interpret § 895.047. Although the court issued a splintered decision with majority, concurring, and dissenting opinions, there was cohesion on several key points. Most significantly, despite § 895.047(1)'s apparent adoption of § 2 of the Restatement (Third) and the belief by many that the consumer-contemplation test had been discarded, all of the justices agreed that the statute did not entirely abolish the consumer-contemplation test recognized under Wisconsin common law and derived from § 402A of the Restatement (Second).

The majority opinion explained that the consumer-contemplation test under § 402A and Wisconsin common law previously applied to assess whether a product was (a) defective and (b) unreasonably dangerous.[32] The court unanimously held that the language in subsection (1)(a) of the statute concerning defectiveness clearly mirrors the language from the Restatement (Third) § 2.[33] Therefore, to prove a design defect, the statute requires plaintiffs to demonstrate a reasonable alternative design, the omission of which renders the product at issue "not reasonably safe."[34]

However, as to the second element of the statute under subsection (1)(b)—that the defective condition must render the product "unreasonably dangerous"—the court also unanimously held that the term "unreasonably dangerous" is part of the common law consumer-contemplation test.[35] The majority opinion rejected the defendant's argument that § 895.047 constituted a wholesale adoption of the risk-utility test under the Restatement (Third) and a rejection of the consumer-contemplation test under the Restatement (Second). The Court instead adopted the "plain language reading" of § 895.047 advanced by the plaintiff and found that the statute "remains loyal to Wisconsin's roots in the common law consumer-contemplation test."[36] It is here that the court "recognize[s] the legislature's retention of the consumer-contemplation test in the statute."[37]

The majority based its conclusion on the structure of § 895.047(1), recognizing that the legislature copied much of the language in subsection (a) from the Restatement (Third) while interpreting subsections (b) through (e) as codifying elements of the common law test applied by Wisconsin courts for decades.[38] The Court rejected the defendant's argument that the adoption of the Restatement (Third) language in subsection (a) impacted the test for whether a product is "unreasonably dangerous," a requirement separately set forth in paragraph (b) of § 895.047(1) with language the court determined was taken by the legislature from Wisconsin case law precedent rather than the Restatement (Third).[39] The justices largely agreed that the legislature intended to create a "unique hybrid test," incorporating § 2 of the Restatement (Third) for determining whether a product is "defective" while retaining the consumer-contemplation test of § 402A of the Restatement (Second) for determining whether a product is "unreasonably dangerous." Justice Roggensack was the only justice to suggest that Wisconsin's

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pre-statute common law (presumably including that concerning the consumer-contemplation test) would continue to provide persuasive authority concerning the "defectiveness" element under § 895.047(1)(a).[40]

None of the justices chose to adopt any specific comments from the Restatement (Third) in order to interpret subsection (1)(a) concerning defectiveness.[41] However, six justices noted that the comments may prove persuasive and useful in applying the statute in future cases, although the legislature did not expressly incorporate any comments from the Restatement (Third) into the statute and the court did not need to adopt any to resolve the case at bar.[42]

Finally, all the justices agreed that the plaintiff's negligence claim should proceed to trial, noting that § 895.047(6) expressly disclaims altering the common law analysis of negligence claims.

III. Design Defect Post-*Murphy*

The most important takeaway from *Murphy* is the conclusion that the consumer-contemplation test is still alive and well in Wisconsin strict products liability design defect cases. Unlike the common law before § 895.047(1), plaintiffs must now meet ***both*** the risk-utility standard of § 2 of the Restatement (Third) under subsection (1)(a) ***and*** the consumer-contemplation test under subsection (1)(b).

Interestingly, in *Murphy*, plaintiff and an amicus brief submitted by the Wisconsin Association for Justice advocated for this "hybrid " approach requiring both tests be met.[43] One might think that the plaintiffs' bar would prefer not to have to satisfy two tests to prevail in design defect cases. But the justices' split in *Murphy* when applying the consumer-contemplation test to the facts of the case may suggest why they advocated for the hybrid approach. It highlights how different judges will approach the consumer-contemplation test from different perspectives, with varying interpretations of what an "ordinary consumer" looks like or expects in a particular context. Indeed, some say the test "is amorphous and defies precise definition when used in a products liability case."[44] As a result, perhaps plaintiffs' advocates concluded that—seeing as they could not avoid the Restatement (Third) test under subsection (a)—injecting the consumer-contemplation test into the statute will result in more judges finding issues of fact to be left for a jury, and therefore fewer cases lost on summary judgment.

Whether the court accurately interpreted the legislature's intent to create this "hybrid" approach in adopting § 895.047 is debatable. The decision in *Murphy* makes clear, however, that the consumer-contemplation test remains alive and well in Wisconsin. It will likely be up to the legislature to make another change if it feels *Murphy* misinterpreted its intention.

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1 *Murphy v. Columbus McKinnon Corp.*, 2022 WI 109, 405 Wis. 2d 157, 982 N.W.2d 898.

2 *Id.* ¶ 27.

3 Among other things, negligence claims focus on the conduct of the manufacturer or seller, rather than the condition of the product. Warranty claims require privity of contract between the manufacturer and the user of the product. *See Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (discussing the problems posed by strict products liability

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claims in founded in negligence and warranty).

4 *See, e.g., Escola v. Coca Cola Bottling Co*., 150 P.2d 436 (Cal. 1944)*; Henningsen v. Bloomfield Motors, Inc*., 161 A.2d 69 (N.J. 1960); William Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

5 *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963); *see also Godoy v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶ 15, 319 Wis. 2d 91, 768 N.W.2d 674.

6 Restatement (Second) of Torts § 402A (1965). Notably, although § 402A is contained within the Restatement (Second), it hardly embodied a "restatement" of the law in the typical sense. As of its publication in 1965, California was the only state that recognized strict tort liability for defective products. Instead, § 402A represented what the ALI and Professor William Prosser ("the preeminent scholar in American tort law who served as sole Reporter" for the Restatement (Second)) thought the law should be. *Godoy*, 319 Wis. 2d 91, ¶¶ 83-84 (J. Prosser, concurring).

7 David G. Owen, *The Evolution of Products Liability Law*, 26 Rev. Litig. 955, 977 (2007).

8 *Dippel*, 37 Wis. 2d at 459.

9 § 402A(1).

10 § 402A, cmt. g.

11 § 402A, cmt. i.

12 Also frequently referred to as the "consumer expectations" test.

13 *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326 (1975); *see also Green v. Smith & Nephew AHP, Inc.*, 245 Wis. 2d 772, 797 (2001).

14 *See, e.g.,* James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan and Other Countries Can Learn From The New American Restatement of Products Liability*, 34 Tex. Int'l L.J. 1, 4-5 (1999); *Godoy*, 319 Wis. 2d 91, ¶ 17.

15 Restatement (Third) of Torts: Products Liability at XVII.

16 Henderson & Twerski at 4-5, 13.

17 *Id.* at 4.

18 Restatement (Third) of Torts: Products Liability, § 2 (1998).

19 *Id.*; *see also Murphy*, 405 Wis. 2d 157, ¶ 23.

20 *Sharp ex rel. Gordon v. Case Corp.*, 227 Wis. 2d 1, 19, 595 N.W.2d 380 (1999); *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 74, 245 Wis. 2d 772, 629 N.W.2d 727.

21 *Green*, 245 Wis. 2d 772, ¶ 122.

22 *Id.* ¶¶ 122, 127.

23 *Godoy*, 319 Wis. 2d 91; *Horst v. Deere & Co.*, 2009 WI 75, 319 Wis. 2d 147, 769 N.W.2d 536.

24 *Horst*, 319 Wis. 2d 147, ¶ 110 (J. Bradley, dissenting).

25 *Godoy*, 319 Wis. 2d 91, ¶ 109 (J. Prosser, concurring).

26 2011 Wis. Act 2.

27 *Compare* Wis. Stat. § 895.047(1)(a) *with* Restatement (Third) § 2; *Murphy*, 405 Wis. 2d 157, ¶ 31.

28 Wis. Stat. § 895.047(1)(a)-(e).

29 *See, e.g.,* Timothy D. Edwards & Jessica E. Ozlap, *A New Era: Products Liability Law in Wisconsin*, Wis. Lawyer (July 2011) (the replacement of the consumer-contemplation test with the risk-benefit test in design defect cases "represents a move to the approach of the Restatement (Third) of Torts, a move that had been hotly debated in recent years and that split the Wisconsin Supreme Court in two 2009 cases.").

30 *Id.*

31 Wis. JI-Civil 3260.1 (2014); *Murphy*, 405 Wis. 2d 157, ¶ 36 n. 21.

32 *Murphy*, 405 Wis. 2d 157, ¶ 21.

33 *Id.* ¶¶ 33, 59 (J. Karofsky concurring), 76 (J. Hagedorn concurring).

34 *Id.* ¶¶ 33, 59 (J. Karofsky concurring), 76 (J. Hagedorn concurring).

35 *Id.* ¶¶ 31, 37, 61 (J. Karofsky concurring), 77 (J. Hagedorn concurring).

36 *Id.* ¶¶ 27-28.

37 *Id.* ¶ 37.

38 *Id.* ¶ 31. These common law elements include the requirements that the alleged defect render the product "unreasonably dangerous," that it exist at the time the product left the manufacturer's control, that the product reach the consumer without substantial change in condition, and that the defective condition cause the plaintiff's damages. Wis. Stat. § 895.047(1).

39 *Id.* at ¶ 37. The defendant argued that it was impossible to read sub-(a)'s "not reasonably safe" language as distinct from sub-(b)'s "unreasonably dangerous" language, but the Court rejected that position, relying on the statutory interpretation canon of imputed common law meaning. *Id*.

40 *Id.* ¶¶ 38, 41.

41 Restatement (Third) § 2, cmt. f.

42 *Murphy*, 405 Wis. 2d 157, ¶ 64 n. 2 (J. Karofsky concurring), 76 n. 3 (J. Hagedorn concurring).

43 *Id.* ¶ 27.

44 *Godoy*, 319 Wis. 2d 91, ¶ 91 (J. Prosser dissenting).

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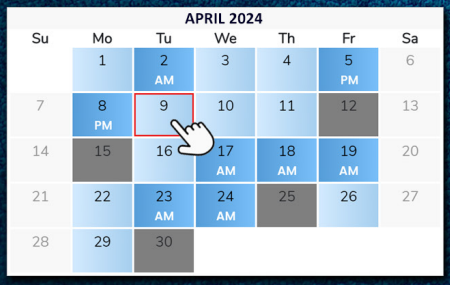

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Admissibility of Deceased Driver's Statement to Insurance Company: Suggestions and Tips

by: Kelsey Pelegrin, Bell, Moore & Richter, S.C.

Defense attorneys may come across the situation in a car accident case where their client's insured, the driver, has passed away at some point after the accident and is not available to testify as a witness. In such cases, the driver may have given either a written or oral recorded statement to the insurance company shortly after the accident, creating a potential hearsay issue. A deceased driver's recorded statement may contain significant and, indeed, crucial information regarding liability and the circumstances surrounding the collision, such as the driver's speed, evasive measures, at what point the driver saw the other vehicle, and the color of the driver's light in an intersection accident, among other important information. In the vast majority of car accident cases, counsel will have the opportunity to talk to the driver and present him or her for deposition, so that the drivers' sworn testimony about the material facts surrounding liability issues will be available to cite in a dispositive motion, for example.[1]

There may be no other witnesses who can testify as to those material facts, so when a driver passes away before being deposed, the insurance company's recorded statement of the dead driver is a critical piece of evidence. However, in these circumstances, the deceased driver's statement is hearsay and inadmissible – unless it meets at least one of the specific hearsay exceptions found in the Wisconsin Statutes.[2]

This article will discuss potential arguments that defense counsel may make in a pretrial motion to admit the statement into evidence and other issues that may arise. While counsel may classify this as a motion *in limine,* it is actually a motion to *include* evidence, rather than exclude evidence. As with every evidentiary issue, a strategy decision must be made as to whether to raise this in a pre-trial motion or simply wait for the time of trial, being amply prepared for the arguments needed to support its admissibility.

I. General Hearsay Rule

Wisconsin defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[3] Generally, if an individual is deceased and no longer able to testify, any statement attributed to him or her and offered for the truth of the matter asserted is hearsay. As a general rule, hearsay is not admissible in a court proceeding; however, there are exceptions, and in order to be admissible, the statement must fall under a specific exception to the general rule.[4] The admissibility of a hearsay statement is within the trial court's discretion,[5] and the court must exercise discretion regarding admissibility of evidence "in accordance with accepted legal standards and in accordance with the facts of the record."[6]

Generally, in personal injury actions, a statement or writing made or signed by an injured party *within 72 hours* of an accident is inadmissible.[7] The rule expressly applies to statements of ***any injured party***—not just plaintiffs—and was created based on the policy that admission of statements made within 72 hours was "unfair because the physical and mental condition of the injured person might prevent him from properly safeguarding his rights."[8]

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Thus, an insurance company's recorded statement of a driver who later dies may be admissible if it is taken after 72 hours and meets at least one hearsay exception. (If the driver was not injured, the other side may well argue that the above statute is inapplicable.)

When a declarant is unavailable to testify due to death, Wisconsin recognizes a handful of hearsay exceptions in Wis Stat. §§ 908.03 and 908.045. Generally, the exceptions in Wis. Stat. § 908.03 apply whether or not the declarant is available to testify, and the exceptions in Wis. Stat. § 908.045 apply only when the declarant is unavailable.[9] Thus, if a deceased person's statement to an insurance company meets an exception under either of those sections, it is not excluded from evidence by the general hearsay rule. Defense counsel may argue that the following hearsay exceptions apply to a deceased driver's statement to an insurance company.

II. Recorded Recollection Hearsay Exception

Wis. Stat. § 908.03 contains hearsay exceptions that may apply *whether or not* the declarant is available to testify as a witness.[10] Under that section, counsel may argue that a deceased driver's statement is admissible under the recorded recollection hearsay exception:

> **(5)** RECORDED RECOLLECTION. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the witness's memory and to reflect that knowledge correctly.[11]

A recorded recollection is defined as a "record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately."[12] To fall under this exception, the statement must have been made when the matter was fresh in the witness's memory and reflect the witness's knowledge on the matter correctly.[13]

On its face, it may seem like this exception applies to a deceased driver's statement, as the declarant is unable to testify fully and accurately, and the statement likely reflects that it was made when the declarant's memory was fresh, and the knowledge was recorded accurately. However, while this hearsay exception is listed in the category where the availability of the declarant is *immaterial*, the exception actually requires that the declarant *is* available to testify about the record but cannot remember fully or accurately.[14] It applies where a witness is testifying on the stand and cannot recall something well enough to testify "fully and accurately."[15] The attorney examining the witness may then have the witness read into evidence the memoranda or record regarding the matter about which the witness had personal knowledge but no longer has sufficient knowledge to testify about the record.[16] The hearsay exception is similar to the practice of refreshing a witness's present memory while testifying, but it essentially substitutes the record for the witness's failed memory.[17] Thus, in the deceased driver scenario, the recorded recollection hearsay exception would probably not apply.

III. Records of Regularly Conducted Activity Hearsay Exception

However, under Wis. Stat. § 908.03, defense counsel may also argue that a deceased driver's recorded statement falls under the "business records" hearsay exception and is a record of the insurance company's "regularly conducted activity." That exception provides:

> **(6)** RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course

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> of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.[18]

According to the statute, to meet this exception, the statement at issue must be a record of events, made at or near the time of the events by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness.[19] It may be "in any form," which would arguably cover a recording.

In order to qualify to testify to the requirements of this exception, the "qualified witness" must have personal knowledge of how the records were made so he or she may testify that they were made "at or near the time [of the event] by, or from information transmitted by, a person with knowledge" and "in the course of a regularly conducted activity."[20] Wisconsin courts have held that the business records hearsay exception applies where affidavits establish the affiants' personal knowledge that certain documents recorded events that occurred at the times recorded, in the course of regularly conducted business activity.[21] Thus, defense counsel may present testimony, or obtain an affidavit, from the insurance representative who took the statement to establish the requirements under the statute. Generally, each declarant involved in making the "business record" must be part of the organization that prepared the record,[22] but ultimately, it is up to the trial court's discretion—courts often admit into evidence records involving non-business declarants, like bank records and police reports.

IV. Comparable Circumstantial Guarantees of Trustworthiness – The Catch-All Hearsay Exception

Defense counsel may also argue that a deceased driver's statement falls under the identically worded hearsay exceptions found in Wis. Stat. §§ 908.03(24) and 908.045(6), Other Exceptions, which are considered the "residual" hearsay exception.[23] These are frequently referred to as "catch-all" provisions. Wis. Stat. § 908.045 is similar to § 908.03 but contains hearsay exceptions that apply only when the declarant is unavailable to testify, like in the scenario with a deceased insured driver. Both Wis. Stat. §§ 908.03(24) and 908.045(6) provide an exception to the general hearsay rule for statements "not specifically covered by any of the foregoing exceptions but having *comparable circumstantial guarantees of trustworthiness*."[24] Under this exception, courts must consider the facts of each particular case to determine trustworthiness, and "no single factor [should] be dispositive of a statement's trustworthiness."[25]

In cases with a deceased driver, the driver is clearly unavailable to testify, so the parties unfortunately do not have the opportunity to depose the driver or call him or her to testify at trial. Yet, the driver's version of events is likely critical, and he or she may even be the only driver involved in the accident who remembers the collision. If the deceased driver's statement is crucial for the defense's argument, and the statement meets the requisite standard of trustworthiness, a judge will likely admit the insurance company's recorded statement under the residual hearsay exception.

Trustworthy statements under this hearsay exception are statements whose authenticity and truthfulness are proven by facts on the record, and trial courts consider factors that may indicate the statement's untrustworthiness[26] Thus, defense counsel may argue that a statement is sufficiently trustworthy especially where it is corroborated by other evidence on the record, like the sworn testimony of a reliable and impartial eyewitness to the accident, for example. To establish authenticity, an attorney may find someone who can testify and confirm the identity of the deceased driver's voice making the statement and to testify as to the chain of custody of the statement, including whether it was transcribed and if so, by whom. It may also be beneficial to play

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the actual recording of the statement for the judge because hearing the declarant's voice and own words may have an impact on the judge's decision about trustworthiness. Essentially, proponents of the statement's admission should cite as many factors that go to the statement's trustworthiness as possible.

V. Statement of Recent Perception Hearsay Exception

Unfortunately, opposing counsel may argue that an individual's recorded statement to an insurance company is inadmissible because it is does not meet the requirements of the hearsay exception found in Wis. Stat. § 908.045(2), which states:

> **(2)** STATEMENT OF RECENT PERCEPTION. A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which the declarant was interested, and while the declarant's recollection was clear.

A recorded statement of a deceased driver, taken by an insurance company, generally would be prohibited by this exception because it would have been taken by the insurance company for the *investigation of a claim* (although in some circumstances, defense counsel can argue that the statement was taken before any legal action was taken or any lawyers were involved).

However, just because an insurance company's recorded statement of the driver may not fall under this specific exception, that does not mean that every recorded statement given to an insurance company is inadmissible. Counsel can (and should) argue that the statement is admissible under the other hearsay exceptions previously discussed.

In fact, a party objecting to the admission of evidence need not specify the rule under which the evidence does *not* fit, but rather, it is the proponent who has the burden to specify the exceptions under which the evidence *does* fit and to show why the evidence is admissible.[27] Any argument that a piece of evidence is inadmissible because it does not fall under one specific hearsay exception fails.[28]

It is worth noting that in a recent case where this issue arose, the trial court noted that the insurance adjuster did not elicit an understanding from the driver that the statement "may be used in a court of law." Insurance personnel should therefore be instructed to include that language in statements that they take of witnesses or participants in an accident. While it does not convert to sworn testimony, it could help in situations like this.

VI. Conclusion

When arguing in favor of the admissibility of a deceased driver's statement to an insurance company, it is best to argue that multiple hearsay exceptions apply—the statement is admissible if even one exception applies. Whether the statement is admissible is, of course, entirely a discretionary decision made by the trial judge. The decision may essentially come down to whether the judge believes that admitting the statement will prejudice the opponent of its admission more than it would prejudice the proponent to not admit the statement into evidence. For the highest chance of success, defense attorneys arguing for the admission of a deceased driver's statement should offer multiple options to the court to prove the statement's authenticity and trustworthiness.

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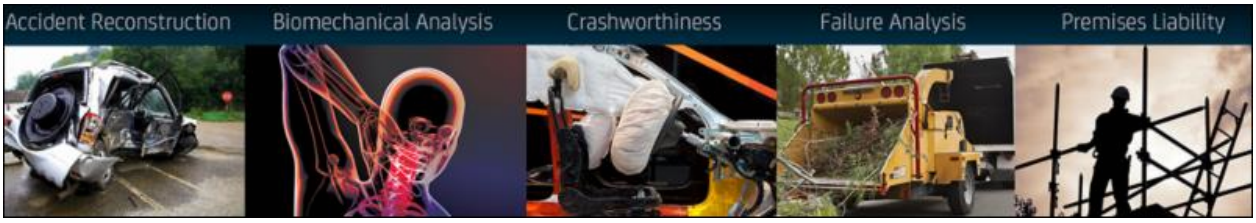

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earned her Juris Doctor degree from Marquette University Law School in 2021. She is admitted to practice in Wisconsin state courts and before the U.S. District Court for the Western District of Wisconsin.

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1 With special thanks to BMR shareholder, Patricia Epstein Putney.
2 *See* Wis. Stat. §§ 908.03, 908.045.
3 Wis. Stat. § 908.01(3).
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14 § 803.5 Recorded recollection, 7 Daniel D. Blinka, *Wisconsin Practice:* Wis. Evidence § 803.5 (4th ed.) ("At the outset one should observe that this rule requires that the declarant testify as a witness. Logically, the recollection recorded exception should have been grouped with prior statements by witnesses under § 908.01(4), but Wisconsin followed the lead of the federal rules, which miscast this exception among those where the declarant's availability is (otherwise) 'immaterial.'").
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Defending Individuals for Conduct Which May Give Rise to Criminal Charges

by: Nicole Marklein, Cross Jenks Mercer & Maffei, LLP, and Jay Englund, Englund & Associates Law Office, LLC

I. Introduction

The Fifth Amendment to the United States Constitution is widely known to provide United States citizens with the right to avoid self-incrimination.[1] This provision is commonly understood to afford individuals the right to "plead the fifth" in response to a question or demand which would otherwise legally compel their response if such response would tend to incriminate the individual in a criminal matter.

It is common for civil defense counsel to represent individuals in defense of alleged conduct that also gives rise to criminal liability. For example, a civil defense attorney may represent an individual who was driving under the influence of an intoxicant in a civil negligence lawsuit while the individual is also charged criminally for driving under the influence. In such circumstances, it is common practice for courts (though they are not required) to stay any litigation of the civil matter pending resolution of the criminal matter.[2]

However, this article will focus on ethical and practical considerations arising from situations where defense counsel represents an individual in a civil matter for conduct that could result in criminal charges, but where no criminal charging decision has been made. This article further assumes that an individual who is a defendant in a civil matter and may be subject to criminal prosecution is cooperating with civil defense counsel.[3]

II. Applicable Law and Guidance

The Fifth Amendments states, in relevant part:

> No person shall be … subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself …

The Fifth Amendment "privilege extends to all court proceedings, civil and criminal."[4] "The privilege against self-incrimination exists whenever a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding."[5] The privilege "extends not only to testimony which would support a conviction but also to evidence which would furnish a link in a chain of evidence necessary to prosecution."[6] "It has long been recognized in Wisconsin that a person may invoke the fifth amendment in a civil case in order to protect himself from the use of such evidence against him in a subsequent criminal action."[7]

Wis. Stat. § 905.13 provides, however, that the privilege is not treated equally in civil and criminal actions:

> **905.13. Comment upon or inference from claim of privilege; instruction.**
>
> **(1) Comment or inference not permitted.** The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a


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> proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> **(2) Claiming privilege without knowledge of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> **(3) Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.
>
> **(4) Application; self-incrimination. Subsections (1) to (3) do not apply in a civil case with respect to the privilege against self-incrimination.**

(Emphasis added.)

While juries are instructed in criminal matters that the invocation of this right should not be held against a defendant, they receive the opposite instruction in civil matters. The applicable criminal jury instruction provides:

> A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.[8]

By contrast, a court may provide a jury with the following instruction in a civil matter:

> A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate (the witness) (him) (her). You may find by this refusal to answer that the answer(s) would have been against the interest of (the witness) (him) (her).[9]

The preamble to the Wisconsin Supreme Court's Rules of Professional Responsibility provides, in part, that "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." Therefore, an attorney—including a civil defense attorney—has the obligation to explain to a client the right to invoke his or her Fifth Amendment privilege.

III. Representing an Individual in a Civil Action When Criminal Charges are Possible But Not Yet Brought

a. The Charging Decision

Charging a crime is generally a two-step process. First, law enforcement conducts an investigation and makes a recommendation regarding what charges law enforcement believes should be filed to the correct prosecutorial unit. Second, a prosecuting attorney within that unit decides what, if any, criminal charges to file. If the prosecutor elects to file charges, he or she will draft a criminal complaint setting forth the criminal charges and the "essential facts" supporting the charges. Although this process seems relatively straight-forward, it is riddled with issues that can cause delay.

Oftentimes there are investigative delays for good reasons, such as trying to locate a critical witness, or bad reasons, such as internal disorganization. It is also common to have prosecutorial delays for a number of other reasons. The prosecuting attorney who reviews the evidence may ask for follow-up investigation by law enforcement or be too busy to promptly file charges.

Although less common, law enforcement or prosecutors may also engage in strategic delays in hopes that the suspect will make an admission

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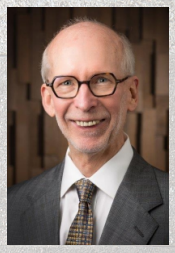
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or some other mistake resulting in a stronger case for the State. If a civil case surrounding potential criminal allegations is ongoing, you should assume law enforcement and/or a prosecutor is watching the case to see what evidence is produced.

Pre-charging delays can, under some circumstances, amount to a Due Process Clause Violation. However, a motion to dismiss based upon pre-charging delay requires the defense to prove the defendant has suffered actual prejudice and the delay arose from improper motives. This high burden typically leaves the defense with only the criminal statutes of limitations to protect against stale prosecutions.

b. The Dilemma

For all of these reasons, civil defense counsel may find themselves in a position of representing an individual in defense of conduct that could result in criminal liability in the future. The civil defense attorney is then faced with the dilemma of successfully defending the civil action while preserving the individual's rights under the Fifth Amendment. This can be especially problematic when no criminal charging decision has been made, and, therefore, counsel cannot address the issue by simply seeking a stay on the civil litigation until the criminal proceeding is complete. It may not be practical to delay litigation without knowing when—or if—criminal charges may ever be brought under criminal statutes with statutes of limitation several years into the future.

IV. Strategies and Recommendations

Below are some strategies and recommendations that civil defense attorneys may wish to employ when representing an individual against whom criminal charges may be brought in the future.

a. Assert of Privilege in Answer

Preserving a client's right to invoke his or her Fifth Amendment privilege starts with the answer to the civil complaint. It is wise to fully assert this privilege from the beginning of the case, while you are still analyzing how the threat of criminal charges may impact the defense. After admitting any basic background facts, potential answer language to the remaining allegations may be:

> Answering all other allegations contained in the Complaint, the answering defendant invokes [his/her] Fifth Amendment privilege, which has the effect of a denial. *See National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1983).

Next, it is wise to include in the scheduling order a generous amount of time to amend pleadings to provide the opportunity to revoke the assertion of privilege and file a more substantive answer. While you can always later agree to waive privilege, it is not guaranteed that a judge will allow the defense to amend its answer if the time to do so pursuant to statute or the scheduling order has passed.[10] This poses the risk of plaintiff's counsel attempting to introduce the assertion of privilege to a jury at trial, which is almost always prejudicial to the defense.

b. Analyze Issues/Impact on Case and File Appropriate Motions

Once you have taken steps to preserve your client's right to invoke his or her Fifth Amendment privilege, it is important to carefully analyze how the assertion of the privilege will impact your civil case.

In some situations, an individual defendant's invocation of his or her Fifth Amendment privilege may have almost no negative impact on a civil case. Take, for example, a death or severe injury caused by a motor vehicle accident in which the defendant driver was intoxicated and no criminal charging decision has been made as to reckless homicide, causing great bodily harm by operating while intoxicated, or a whole host of other potentially applicable criminal charges. If liability is conceded or very likely, defense counsel often chooses to admit liability in order to make the resulting jury

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trial only about damages. In doing so, the defense can obtain an order *in limine* excluding from evidence the defendant's intoxication and other factors which are irrelevant to damages and may inflame the jury.

If criminal charges are possible, it will be important to analyze the impact of an admission of liability on your client's potential future criminal case. Are the elements of the civil matter dissimilar enough from the potential criminal charges that an admission of liability in the civil matter will not operate as any admission in a subsequent criminal matter? For example, an admission of negligence and causation in a civil matter will not operate as an admission of all of the elements of criminal recklessness, which requires the prosecution to prove ordinary negligence to a higher degree.[11]

In such cases, the civil defense attorney could admit only negligence and causation and deny the remaining factual and legal allegations. Since the only issue remaining for trial will be damages, this should be coupled with a motion *in limine* for an order excluding any evidence of the defendant driver's conduct as irrelevant. Nonetheless, plaintiff's counsel may want to depose the defendant driver on other bases, such as testimony regarding his or her perceptions of the plaintiff and things that may have been said or otherwise witnessed at the accident scene.

If the defendant driver is compelled to attend a deposition, you or the criminal defense attorney may counsel the individual to assert his or her Fifth Amendment privilege in response to any questions about the accident. If this occurs, plaintiff's counsel will likely attempt to put the defendant driver on the stand at trial as a fact witness so that the jury will observe him or her refusing to answer questions and asserting the Fifth Amendment privilege. It is wise to file a second motion *in limine* prohibiting plaintiff's counsel from calling the defendant driver as a witness at trial on the grounds that liability is stipulated and any additional testimony that the individual may provide is greatly outweighed by the prejudice to the defense. This argument will be even stronger in cases where the defendant driver did not witness anything relevant to the plaintiff's damages and has no additional evidence than that supplied by other witnesses.

In other cases, however, a defendant's assertion of his or her Fifth Amendment privilege may have serious consequences for the civil litigation. The most obvious is a case in which there is a solid defense to liability, but litigating the defense would require the defendant driver to waive his or her Fifth Amendment privilege. For example, imagine a single-vehicle accident resulting in the death of a passenger. The defendant driver tested positive for the presence of alcohol in his or her system, but the defense believes that not only was the presence of alcohol not causal of the accident, but that the defendant driver was not even negligent. Instead, the defense believes that the driver sustained a medical emergency that caused him or her to lose consciousness and leave the roadway. Under these facts, the defense will be eager to proffer evidence that the defendant driver was not negligent and therefore not liable for the accident. However, doing so would require the driver to testify in deposition and waive his or her Fifth Amendment privilege.

In this situation, counsel should attempt to stay the civil litigation or, alternatively, to protect the individual defendant from discovery, for as long as possible. As noted above, a judge may be reluctant to stay a civil lawsuit if a criminal charging decision has not been made. However, the facts of the specific situation may create a compelling reason to do so. For example, the civil defense attorney may have specific information that criminal charges are forthcoming, or the criminal statute of limitation may be about to expire. Under such circumstances, the defense could argue that the stay would not be indefinite and is required to protect the rights of the individual defendant.

As an alternative to a complete stay on all litigation of the civil matter, defense counsel may seek a protective order on any discovery from the individual defendant. This may make sense in cases where there are many additional witnesses or a lot

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of other discovery to be conducted. This option allows the case to proceed in some fashion while preserving the rights of the individual defendant. Substantively, whether the motion is to stay the entire civil litigation or only certain discovery from the defendant, the basis will be essentially the same:

> [A]ll parties—those who invoke the Fifth Amendment and those who oppose them—should be afforded every reasonable opportunity to litigate a civil case fully … Based on this policy, the general rule is that if the claimant makes a timely request to the court, the court should explore all possible measures to select that means which strikes a fair balance and accommodates both parties. Striking a fair balance between both parties requires a careful assessment of each case's precise facts. The court should give due consideration to the nature of the proceeding and the potential for harm or prejudice to opposing parties.[12]

As this language from the Wisconsin Court of Appeals notes, the strength of the argument will depend heavily on the precise facts and circumstances of each case. If possible without the testimony of the individual defendant, you may be able to impress upon the court the strength of any liability defenses, should you have the opportunity to present them. This may highlight the additional prejudicial effect of the defendant not being able to present his or her side and, even worse, the jury being instructed that the defendant's silence may be used as a presumption against the defense. You may also be able to demonstrate that a decision regarding criminal charges is forthcoming or that the stay or protective order will not unreasonably delay the litigation under the circumstances. Whatever the specific facts of the case, it is important to remember that the court must balance the equally compelling rights of the plaintiff in obtaining swift resolution with that of the defendant to assert and avail him- or herself of the constitutional right against self-incrimination in a meaningful way.

c. Involve Criminal Defense Counsel

It is important to advise a client to seek criminal counsel as soon as possible whenever criminal liability is a reasonable possibility. A criminal law expert can assist both you and your client in protecting the client's Fifth Amendment rights through the civil litigation and can help ensure that you do not advise outside of your expertise. Savvy criminal counsel will be able to advise on all aspects related to potential criminal liability, such as unintended consequences or other potential bases for criminal liability that would not be covered by double jeopardy and the original charging decision.

V. Q&A With Criminal Defense Attorney Jay Englund

1. Practically, is it possible to obtain an agreement with a district attorney that criminal charges will not be brought? How?

Yes. Prosecuting attorneys have the authority to decline prosecution prior to the filing of charges. Such a decision is often referred to as a "no prosecution" or "no pros." However, a "no prosecution" agreement is only binding upon the State if it meets standard contract law principles of offer –acceptance—reliance. While "offer" and "acceptance" need no explanation, "reliance" is a more complicated piece of the equation. In a criminal context, reliance requires some act by the person to his or her detriment. The client must take some affirmative detrimental action that they were not previously obligated to take. When engaging in negotiations with a prosecutor to "no pros" a case, the attorney should always condition the "no pros" on some detrimental action by their client. For example, the attorney may agree that their client will complete an alcohol/drug assessment or 5 hours of community service as a

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condition precedent to the "no pros." If such an agreement is reached, remember to memorialize it with the prosecutor in writing.

2. **Have you had any resistance from opposing counsel to your involvement in a civil deposition where the deponent is also represented by separate counsel in the civil matter? Is there any basis for such resistance? How do you handle this?**

   It is not uncommon for opposing counsel in a civil matter to express frustration with my involvement; however, calmly explaining my role and responsibilities typically puts an end to the resistance. Just like opposing counsel, I have an important job to do that must be done correctly. Often times an informal discussion about our respective objectives leads to beneficial results for both sides. I have negotiated numerous resolutions with civil attorneys in exchange for their client's support to favorable outcomes in the criminal cases. These situations are somewhat delicate, but, if handled correctly, within the rules of ethics. In stand-alone criminal cases, such agreements are commonplace. For example, prosecutors often agree to dismiss cases if the defendant agrees to pay restitution because it satisfies the alleged victim's wishes.

3. **Do you counsel clients regarding how the assertion of their Fifth Amendment rights in a civil action may jeopardize their defense or insurance coverage in that action?**

   No. I explain to my clients that I have been hired to evaluate criminal liability and provide guidance on that subject alone. If they have questions about civil consequences, I refer them to their civil attorney. Once they are equipped with that information, I then discuss what is more important to them –financial consequences or the potential loss of liberty.

4. **What recommendations do you have for civil defense counsel when representing a defendant who may be subject to related criminal charges in the future?**

   Three things. First, contact a criminal defense attorney to discuss your concerns. Second, assist your client in finding a lawyer who specializes in criminal defense. Finally, send your client a letter explaining your lack of expertise in criminal defense and recommendation that he or she contact a criminal defense attorney immediately.

VI. Conclusion

Special problems arise for civil defense counsel representing individuals who may be charged criminally for their conduct that gave rise to the civil litigation. In these circumstances, it is important to protect an individual's right to assert his or her Fifth Amendment privilege. However, protecting that right is not necessarily as easy as moving for a stay of the civil litigation pending resolution of any criminal matter. The fact that the individual is not aware of any potential efforts to bring criminal charges does not relieve civil defense counsel of this responsibility. In some cases, criminal charges may not be contemplated until an incident receives additional attention through the civil lawsuit. It is always a good idea to recommend that the individual retain separate criminal counsel who can assist the both the client and civil attorney in preserving the client's Fifth Amendment privilege.

Author Biographies:

Nicole Marklein is a partner with Cross Jenks Mercer & Maffei, LLP in Baraboo, Wisconsin. She concentrates her practice on civil defense litigation, both defending insureds on the merits of claims

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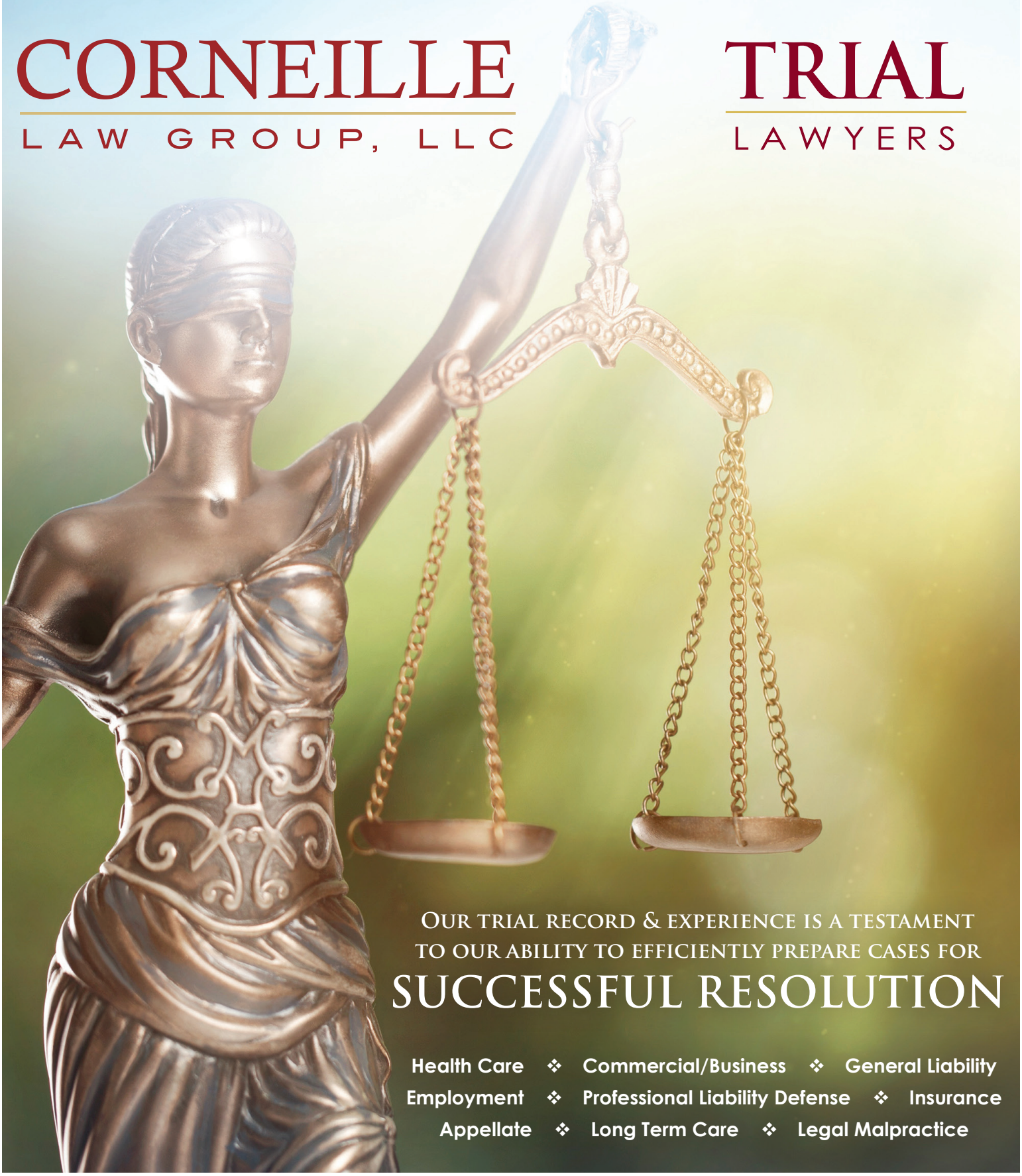

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and representing insurers regarding coverage issues. Attorney Marklein also specializes in as employment law, wherein she provides employers cost-effective advice and defends employment-related claims should they arise. Attorney Marklein currently serves as President of the Wisconsin Defense Counsel and represents the organization on the Wisconsin Civil Justice Council.

Jay Englund owns and manages Englund & Associates Law Firm, LLC . He has devoted his career to criminal defense litigation and currently focuses his practice on the defense of felony, misdemeanor and drunk driving charges. He appears regularly in Adams, Columbia, Juneau, Monroe and Sauk Counties.

The authors thank Attorney Vincent J. Scipior for his contributions to this article.

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1 U.S. Const. amend. V.

2 *See, e.g., Wallace v. Kato*, 549 U.S. 384, 393-94 (2007) ("…[I]t is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.") (citation omitted).

3 For an excellent discussion of coverage issues related to non-cooperation by an insured subject to criminal prosecution, please see "*Link v. Link*: Examining the Essential Duty of Cooperation with Coverage Counsel" in the Summer 2022 Edition of *The Wisconsin Civil Trial Journal*.

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

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News from Around the State: Trials and Verdicts

Jolene Hollinger, et al. v. Affordable Dentures – Madison, S.C., et. al.
Dane County Case No. 19-CV-2222

Results: The defense of this dental malpractice case led to a voluntary dismissal by plaintiffs, without payment, weeks before the trial was set to begin on December 5, 2022.

Facts: On October 25, 2016, the defendant dentist extracted ten lower teeth from the mouth of Jolene Hollinger, then 66 years old, and placed an immediate denture. In March of 2017, Ms. Hollinger was diagnosed with osteonecrosis of the jaw. After several doses of both oral and IV antibiotics, one side of Ms. Hollinger's jaw was removed and reconstructed during two separate surgeries. The surgeries left Ms. Hollinger disfigured, and she was never able to eat solid foods again. She had trouble speaking and it was difficult to understand her. Ms. Hollinger died of unrelated causes in December of 2020.

Claims: Plaintiffs brought claims for both negligent treatment and lack of informed consent. The defendant dentist denied liability. Plaintiffs claimed that because Ms. Hollinger had undergone annual Reclast infusions for many years for osteoporosis, she was not a candidate for invasive dental procedures. Reclast is a bisphosphonate medication, which includes a warning that invasive dental procedures can cause osteonecrosis of the jaw. Ms. Hollinger had her annual Reclast infusion in both January of 2016, before the extractions, and January of 2017, after the extractions but before the diagnosis of the osteonecrosis of the jaw.

Damages: Ms. Hollinger incurred over $500,000 in medical expenses. There was no cap on damages for pain and suffering. The doctor's policy limit was one million dollars.

Litigation: At the deposition of the plaintiffs' dental expert, Phillip Devore, defense counsel's questioning eliminated plaintiffs' causation case. Dr. Devore conceded that use of Reclast alone can cause osteonecrosis of the jaw. He further admitted that an infection in the mouth, with or without use of Reclast, could cause osteonecrosis of the jaw. Dr. Devore then conceded that before his deposition, he had no idea that Ms. Hollinger had an infection in her mouth prior to the extractions, because Ms. Hollinger's medical records were so voluminous. Additionally, Dr. Devore admitted that any invasive dental treatment, including removing a root tip, could cause an infection leading to osteonecrosis of the jaw, and that it could take up to one year for the process to occur. Ms. Hollinger had a root tip removed by a different dentist, who was not a party to the lawsuit, a year before the extractions.

Voluntary Dismissal: The defense moved for summary judgment on causation, citing Dr. Devore's admissions and pinpointing evidence in Ms. Hollinger's records which demonstrated alternate causes for her injuries. The court granted the motion as to the negligence claim. While the court allowed the case to proceed on the informed consent claim, plaintiffs knew they had an uphill battle on causation regardless of the court's decision and voluntarily dismissed their case.

Pretrial Settlement Discussions: There were no settlement offers or demands prior to trial.

For more information, contact Linda Meagher at meagher@gassturek.com.

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Stacey Dierksmeier, et al. v. NCMIC Insurance Company, et. al.
Waukesha County Case No. 19-CV-818
Trial Dates: November 7-15, 2022

Facts: On June 6, 2016, plaintiff, then 38 years old, suffered a stroke immediately after a chiropractic neck adjustment. She was transported via ambulance to Oconomowoc Memorial Hospital, and then transported via flight for life to Froedtert Hospital. She was diagnosed with bilateral vertebral artery dissections. Although she had a good recovery, she had permanent left sided weakness.

Issues for Trial: The parties stipulated to past medical bills of $568,105.60 and future medical bills of $67,428.39. There was no wage loss claim because the plaintiff was a stay-at-home mother. Liability was at issue, but damages were not.

At Trial: Plaintiff alleged that the chiropractor had negligently performed a neck adjustment, causing traumatic bilateral vertebral artery dissections, which resulted in an immediate stroke. Plaintiff argued both dissections occurred at the same time. The defense argued that the plaintiff had a spontaneous right sided vertebral artery dissection, which caused neck pain and headache, and led her to seek out treatment with the chiropractor. The adjustment may have forced a blood clot to release from the dissection, but the chiropractor was not negligent when he performed the adjustment. The defense also argued that plaintiff suffered a second spontaneous dissection a day later while in the hospital, and that the bilateral dissections did not occur at the same time. Expert witnesses in the case included chiropractors, neurosurgeons, neuroradiologists, and interventional and diagnostic neuroradiologists. During closing arguments, plaintiff asked for $300,000 to $500,000 for the first 3-6 months of pain, suffering and disability, which is when the plaintiff had to relearn to walk and needed a lot of care. She was in the hospital for 52 days, which included inpatient rehabilitation. Plaintiff's counsel asked for $100,000 for the next three years up to trial and then $400,000 for future pain, suffering and disability. It was undisputed that plaintiff had a normal life expectancy of 38 additional years. Total damages requested, with medical expenses, were in the range of $1.4 to 1.6 million.

Pretrial Settlement Discussions: There were no settlement offers or demands prior to trial.

Verdict: A unanimous jury found no negligence. The jury was asked to decide damages regardless of its answer as to liability. The jury awarded $400,000 for past pain and suffering and $200,000 for future pain and suffering, which means had the plaintiff won, the damages with medical expenses would have been roughly $1.2 million dollars.

For more information, contact Linda Meagher at meagher@gassturek.com or Stephen Trigg at trigg@gassturek.com.

David J. Rust v. Bradley C. Bode, et al.
Eau Claire County Case No. 19-CV-103
Trial Dates: November 14-17, 2022

Facts: The facts were not in dispute. The defendant was traveling behind plaintiff on Highway 53 in Altoona, when he spun out on ice, spun 180 degrees, and made driver's-side-to-driver's-side contact with

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plaintiff's vehicle. After that collision, a third driver, Holly Brown, stuck defendant, pushing him into plaintiff again. Interestingly, the plaintiff did not sue Brown. Plaintiff claimed a disc protrusion at L3-4 which resulted in a fusion at that level. He also claimed an inability to work for the rest of his life.

At Trial: The plaintiff called four experts: Dr. Louis Saeger (anesthesiologist who did injections), Dr. Stefano Sinicropi (surgeon), Jesse Ogren (vocational expert), and Ferris Pfeiffer, Ph.D. (biomechanical engineer). The defense called three experts: Joseph Cusick, M.D. (neurosurgeon), Andrew Rentschler Ph.D. (biomechanical engineer), and Tim Riley (vocational expert). The plaintiff asked for $1 million in closing

Plaintiff's Settlement Demand(s): $700,000
Defense Settlement Offer(s): $180,000

Verdict: The jury awarded $37,5000 in damages but found no liability, resulting in no recovery.

For more information, contact Joseph Ryan at josephryan@theryanlawoffice.com.

Carrie Makos, et al. v. Russ's Mulch and Topsoil, Inc., et al.
Waukesha County Case No. 20-CV-697
Trial Dates: March 15-17, 2022

Facts: This was a low velocity, rear-end accident that occurred at Capitol and Highway 16 off ramp in Waukesha. The plaintiff incurred $15,000 in medical expenses but chose not to claim them in the suit because she did not want her pain and suffering anchored to that number.

At Trial: The plaintiff asked the jury for $400,000 in closing ($100,000 future general damages and $300,000 in past general damages). The plaintiff used Dr. Darryl Prince, a neurologist, to testify at trial. The defense hired Dr. Charles Klein, an orthopedic surgeon, and Dr. Andrew Rentschler, Ph.D., a biomechanical engineer.

Plaintiff's Settlement Demand(s): $99,000
Defense Settlement Offer(s): $10,000

Verdict: The jury found negligence but awarded only $5,000 in past damages and no future damages.

For more information, contact Joseph Ryan at josephryan@theryanlawoffice.com.

Delaney M. Dretzka v. State Farm Mutual Automobile Ins. Co., et al.
Waukesha County Case No. 20-CV-1142
Trial Dates: February 22-23, 2022

Facts: This was moderate-to-severe rear-end impact that was caught on video.

At Trial: The plaintiff played the video for the jury. Claimed past medical specials were $23,000. Defense asked the jury to award $11,000 in specials and $5,000 for pain and suffering.

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Plaintiff's Settlement Demand(s): Plaintiff's demand at mediation was $75,000. Three weeks before trial, plaintiff lowered her demand to $37,500.
Defense Settlement Offer(s): Defendant's offer was $20,000 throughout the litigation.

Verdict: The jury awarded the medical bills recommended by the defense ($11,000) and $10,000 for pain and suffering.

For more information, contact Joseph Ryan at josephryan@theryanlawoffice.com.

Alfredo Miranda, et al. v. State Farm Mutual Automobile Ins. Co., et al.
Milwaukee County Case No. 18-CV-5918
Trial Dates: November 8-9, 2021

Facts: This is a sideswipe accident that occurred as defendant was pulling out of a parking spot on the side of the road. The plaintiff claimed a knee injury for which he underwent arthroscopic surgery. He claimed $86,412.39 in past medical specials.

At Trial: Plaintiff asked the jury for nearly $500,000, without suggesting a number for future pain and suffering.

Verdict: The jury awarded zeros across the board.

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Calendar of Events

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

August 10-11, 2023
2023 WDC Annual Conference
Wilderness Resort and Glacier Canyon Conference Center
Wisconsin Dells, WI

December 1, 2023
2023 WDC Winter Conference
Milwaukee Marriott West
Waukesha, WI