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What Real Estate Agents Must Disclose When Representing a Seller of Property

Patricia Epstein Putney and William D. Bolte

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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

Journal Policy

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President's Message: New Horizons

by: Nicole Marklein, President, Wisconsin Defense Counsel

As I write this final column as WDC President, I am both grateful for the opportunity to serve this wonderful organization in this capacity over the last year and optimistic about the direction in which it is headed. Like many of you, I have served in leadership capacities of a number of local and statewide nonprofit organizations. My time as WDC President has exceeded my experience with other organizations. I am heartened by the energy and commitment of our Board, our committees, our staff, and all of you, to the organization and to our profession. Each of you continues to educate and drive me to be a better trial attorney and person. If you choose to get more involved in our organization in any capacity, I am confident you will wish you had done so sooner.

So, what is on the horizon for WDC, and how can you be a part of it?

I. Training in the Forefront of Litigation Tactics

Striving to ensure equal access to justice for all defendants is at the heart of WDC's mission. We are best positioned to prepare civil defense counsel throughout the state in dealing with potentially unjust tactics that deprive our clients of fair adjudication of the claims made against them. WDC must remain committed to being on the forefront of recognizing these tactics and preparing our members to anticipate and defuse them. If you encounter or learn of novel tactics by plaintiffs' counsel, let us know. Let's guarantee that our members are uniquely equipped to ensure that any claims brought against our clients are about the facts and the law, not gamesmanship.

II. New Attorney Recruitment, Training, and Mentorship

New and engaged members are the key to the success and longevity of our organization. In talking to so many law firm and insurer leaders over the last year, I know we are all also struggling with recruiting and retaining new legal talent in our organizations. The WDC Board is taking a renewed interest in formal mentoring programs and ways to attract more and diverse talent to our organization and our firms. The Litigation Skills and Young Lawyers Committees will continue to provide hands-on workshops and seminars for our newer attorneys to give them the skills and confidence that both they and our clients demand. But it takes all of us. No matter how long you have practiced, you can help lead this effort. Whether it is by attending a seminar or workshop, volunteering as a presenter or mock witness, or taking a more hands-on mentorship role, we have a need for you. Please answer the call.

III. Exclusive Networking and Relationship Building

WDC is solely responsible for some of the best business relationships and friendships I have gained in my career. Among all of the other reasons I have to thank him, I would be remiss if I did not semi-publicly thank my law partner and mentor Wayne Maffei for not only introducing me to WDC, but integrating and involving me with his friends and

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colleagues in this organization. It has made such an impact on me and a difference in my career and I can only hope to provide the same to someone else in our organization. Through our strategic plan and beyond, our Board is focusing on increasing inclusivity and involvement so that each member can be as active as desired and reap the same benefits for which I am so grateful. You can expect increased opportunities to network and build these connections that, I hope, will positively define your career.

IV. Legislative Involvement

Our team at Hamilton Consulting keeps us updated on any legislative activity that may impact our members or our practice. We do not have the financial resources to compete with our plaintiff counterparts when it comes to lobbying, but we are able to get involved when it counts most. Your WDC Board remains engaged in drafting legislation to help codify civil law as it should be and to provide a counterpoint to efforts to tip the scales of justice unfavorably against our clients. If you have any interest in legislative activity, or ideas for commonsense legislation, we would love to hear from you.

V. Continued Progress Toward Diversity and Inclusivity

Our organization has accomplished a lot in the last 12 months. By far the closest to my heart is our efforts toward diversity and inclusion. I am most proud of WDC's sincere commitment to this effort, not just in formal committees and vision statements, but in the day to day management of our organization. We understand that diversity, equity, and inclusion is so much more than race, sex and gender identity. We are working hard to uphold our commitment to being an inclusive environment for all members. A couple executive committee members and I had the opportunity to participate in a workshop focusing on intergenerational communication at last year's DRI Annual Conference. It opened our eyes to new ways of doing things here at WDC. If you have a suggestion or idea about how we can make our organization and its events more modern and inclusive, please let us know. We don't know what we don't know, and we want to hear from you!

As I transition to the role of Immediate Past President, I hope to serve as a resource for any WDC member who is interested in getting more involved in, and reaping more rewards from, our organization. I invite you to contact me at nmarklein@cjmmlaw.com or (608) 402-8009 if I can assist in any way. Thank you for a fantastic year!

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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What Real Estate Agents Must Disclose When Representing a Seller of Property

by: Patricia Epstein Putney and William D. Bolte, Bell, Moore & Richter, S.C.

Real estate agents often work with clients who are making one of the most financially and emotionally significant decisions of their lives. Wisconsin has promulgated statutes and regulations imposing certain specific requirements on real estate agents to disclose information during the transaction. This protects both the parties and the agent. The parties receive the necessary information to make an informed decision and the agent is protected if a party later regrets the transaction. It is important for real estate agents to know these requirements in order to protect themselves and for attorneys representing real estate agents to be familiar with their duties and the law.

I. When a Real Estate Agent is Required to Disclose Information to Their Clients or the Other Parties to the Transaction

In Wisconsin, real estate agents[1] are required to disclose certain information to the parties. The required information includes material adverse facts, accurate information about market conditions, and material information to the transaction.[2] These requirements are found in a variety of Wisconsin statutes and regulations including chapters 100 and 452 of the Wisconsin Statutes and chapter REEB 24 of the Wisconsin Administrative Code. Real estate agents and their attorneys should be aware of these requirements so that they ensure that they are meeting their legal obligations.

Generally, when representing a seller involved in a real estate transaction, real estate agents must timely disclose in writing all material adverse facts.[3] A "material adverse fact" is a compound concept, defined as an adverse fact that is of such significance, or that is generally recognized by a competent real estate agent as being of such significance to a reasonable party, that it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or affects or would affect the party's decision about the terms of such a contract or agreement.[4] An adverse fact is defined, in relevant part, as a condition or occurrence that is generally recognized by a competent licensee as doing any of the following:

> (1) significantly and adversely affecting the value of the property;
> (2) significantly reducing the structural integrity of improvements to real estate; or
> (3) presenting a significant health risk to occupants of the property.[5]

It is critical to the definition of a "material adverse fact" that the "condition" or "occurrence" must first be "an *adverse* fact."[6]

In addition to disclosing *material adverse facts*, if a real estate agent chooses to discuss the condition of a property with a potential buyer, he/she assumes a duty to provide truthful and complete information to a potential buyer of the property. The agent cannot omit material facts relevant to the condition of the

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property if the omissions would foreseeably affect a potential buyer's decision about whether or not to purchase the property.

This rule was established in *Ramsden v. Farm Credit Services of North Central Wisconsin*. *Ramsden* involved the sale of polluted land by Agribank and its agent, Hass, to dairy farmers at an auction.[7] The property had previously contained an underground gasoline storage tank on the property which had leaked, contaminated the soil, and killed the cattle of a previous dairy farm located on the property.[8] Agribank and Hass notified the Department of Natural Resources that the groundwater had been contaminated, and the Department ordered Agribank to remove the underground storage tank and clean up the contamination.[9] Agribank removed the tank but did not clean up the contamination.[10] Hass knew that the ground was contaminated and that it had killed the previous owner's cattle.[11] The day of the auction, Hass told the Ramsdens that the property was useful as a dairy farm.[12] Hass did not mention the contamination or death of the previous farm's cattle.[13] The Ramsdens then purchased the property at the auction.[14] After purchasing the property, the Ramsdens lost 186 cattle and one of the owners suffered injuries due to the contamination.[15] The Ramsdens sued Hass for intentional and negligent misrepresentation.[16] Hass moved for summary judgment and the trial court found in his favor. The Ramsdens filed an appeal.[17]

The court of appeals reversed the trial court's decision.[18] It found that Hass may not have had an initial duty to disclose his knowledge of the property to the Ramsdens. However, once he made factual statements about the leaky underground storage tank, he then had a duty to make truthful statements and could not omit material facts about the condition of the property.[19]

Real estate agents also have a duty to provide accurate information about market conditions that affect the transaction, within a reasonable time after a request for such information by a party.[20]

Finally, real estate agents are required to provide *truthful* information to the parties. Agents cannot provide *untrue*, *deceptive*, or *misleading information* when making an advertisement, announcement, statement or representation relating to the purchase of real estate to the public.[21] If they do, and a party suffers a pecuniary loss because of it, the injured party can sue and recover the pecuniary loss together with costs.[22] However, this requirement does not mean that a real estate agent faces legal liability for providing incorrect information about which they are unaware. To be liable, the real estate agent must know that his or her statement was "untrue, deceptive, or misleading."[23] If the real estate agent believes that he or she is providing correct information, the agent will not be liable under this section. This, of course, can lead to a factual dispute.

Another factual dispute can arise when the seller completes a real estate condition report. These reports are required under Wisconsin law and are completed by the seller.[24] A real estate agent is not liable for the misrepresentations of the seller, unless the agent had actual knowledge of the information or was negligent in making the misrepresentation.[25]

In addition to his or her requirements to the parties, a real estate agent has two other duties to disclose certain information: (1) a duty to provide information and advice to the client on matters that are material to the client's transaction and that are within the licensee's knowledge, skills, and training, when requested by the client; and (2) a duty to disclose to the client all information known by the firm that is material to the transaction and that is not known by the client or discoverable by the client through reasonably vigilant observation, unless the information is confidential or the disclosure is prohibited by law.[26] Neither the client nor the agent can waive these duties.[27]

II. When a Real Estate Agent is Not Required to Disclose Information to Their Clients or the Other Parties to the Transaction

There are exceptions to the general rule that real estate agents must disclose *material adverse facts* to the parties. Real estate agents are generally not certified home inspectors and do not need to inspect

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a home they are listing in the way an inspector might do, as they lack such expertise. Real estate agents also do not need to disclose material adverse facts if a qualified third party has already prepared a written report that discloses the information, and that report has been provided to the party.[28] "Qualified third party" is defined in the statute and means a federal, state, or government agency, or any person whom the real estate agent or a party to the transaction reasonably believes has the expertise necessary to adequately prepare the report.[29] However, if an agent knows about information which contradicts the information in the report, the agent has a duty to disclose that information.[30]

This exception is clearly illustrated in *Conell v. Coldwell Banker Premier Real Estate, Inc*. Gene and Lauri Conell were interested in purchasing Judith and William Mauer's residence.[31] The Mauers were represented by Shirley Hanson, a real estate agent for Caldwell Banker.[32] Hanson prepared the offer to purchase and the Conells signed the offer to purchase.[33] The offer stated that there were no exceptions to the standard warranties "except as shown on the seller's property condition report."[34] A separate provision of the offer stated that the offer was contingent on the Conells obtaining a satisfactory condition report regarding the condition of the property.[35]

The Conells contacted a home inspector, and the inspector issued a report several days later.[36] In the report, the home inspector noticed that there were two cracks in the basement wall, the south wall bowed, and that these issues would require repairs.[37] The report also noted that there was "past and present dampness" in a corner of the basement.[38] The Conells received the report and did not object to it.[39] The Conells also received the condition report from the Mauers which mentioned "dampness" and "leaks/seepage" in the basement.[40] The Conells and Mauers closed on the property.[41]

After moving into the home, the Conells learned that the basement had "chronic water problems."[42] The Conells sued Hanson, alleging that Hanson had a duty as the real estate agent to disclose the water problems to the Connels.[43] Hanson moved for summary judgment, arguing that she was not required to disclose the water problems under § 452.23(2)(b) of the Wisconsin Statutes.[44] The court granted summary judgment to Hanson on those grounds.[45] The Conells appealed, arguing that they relied on the language in their offer to purchase that they were relying upon the Maurers' representations stated in the offer.[46]

The court of appeals affirmed the district court's ruling.[47] The court found that Hanson was shielded from liability because the Conells received a report from a qualified third-party home inspector.[48] The court further found any actions by the Conells against Hanson according to the language of the contract must be based on Hanson's actions as the seller's agent.[49] The obligations imposed by the statutes and regulations regarding the disclosure of information to the parties is not based on any kind of principal/agent relation but rather is its own separate duty.[50] As a result, regardless of whether Hanson violated the contract, she did not violate her duties to the Conells to disclose material adverse facts because they had received a report from a qualified third party disclosing the issues.

Real estate agents also do not need to disclose material adverse facts if a party knows or can discover the material adverse fact through reasonably vigilant observation.[51] Real estate agents are also not required to disclose a material adverse fact if the disclosure is prohibited by law.[52]

Determining whether a fact is *adverse* will require analyzing the individual circumstances in each case. *Z Fish Shanty, LLC v. Koch*, an unpublished court of appeals case from 2019, illustrates how to apply that slightly nebulous definition. In *Z Fish*, a property owner ("Koch") listed a duplex property for sale.[53] Koch signed a real estate condition report that he was not aware of any defects in the heating system.[54] Koch also signed an amendment that the furnaces at the property were 14 years old.[55] An LLC ("Z Fish") submitted an offer to purchase the property which included language that the value of the furnaces was "$0.00."[56] Prior to closing, Z Fish

learned that there had been two "no heat" service calls made about the furnaces and Koch had been told that he "may want to consider replacing [the heat exchanger in one of the furnaces] before it becomes a potential carbon monoxide concern."[57] However, the technicians who serviced the furnaces stated that while the furnaces should be replaced to avoid any carbon monoxide issues in the future, the furnaces could be operated safely.[58] Z Fish refused to close on the property and sought specific performance with price abatement, breach of contract, and deceptive advertising.[59]

The court analyzed whether the furnaces' condition was an adverse fact.[60] The court first found that the furnaces did not have an adverse effect on the property because they were operational and did not pose a known safety risk.[61] The court also noted that a 14-year-old furnace would not have much value regardless of the age of the furnace.[62] The court next looked at whether the age of the furnaces would shorten the normal life of the property. The court found that it would not since the furnaces had continued to operate for at least 14 months after the service call.[63] Finally, the court found that the furnaces would not significantly impair the health and safety of the future occupants of the property because they could be operated safely.[64]

There are other occasions when real estate agents do not need to disclose certain information to the parties. Real estate agents are not required to disclose if the property was the site of a specific act or occurrence *unless* it had an effect on the physical condition of the property or a structure located on the property.[65] This means that a real estate agent would not need to disclose that a crime was committed in the home or that a death had occurred in the home. Real estate agents are also not required to disclose the location of adult family homes, community-based residential facilities, or nursing homes in relation to the property.[66] Finally, with limited exceptions, real estate agents are not required to disclose any information related to the fact that a particular person is required to register as a sex offender on the sex offender registry.[67]

Real estate agents are required to provide certain information to parties in a real estate transaction. Providing as much information as possible will help the parties have the most information when deciding whether to enter into an agreement. In addition, providing this information will protect a real estate agent in case a party ever regrets the deal and looks for someone to blame or to rescind the contract. Providing all of the necessary information to the client will act as a shield and help protect the real estate agent from an unhappy former client or purchaser.

III. Conclusion

When defense counsel assumes the defense of a real estate agent in a real estate transaction, he or she must of course familiarize him or herself with the regulatory statutes and requirements and also carefully read the transaction documents, especially looking into whether there was a waiver of any contingencies in the offer that might provide a solid defense to the claims raised. For example, when a purchaser waives a home inspection contingency and later complains about matters that would have been readily addressed therein, this may lay the basis for a summary judgment motion. In addition, emails and texts between the parties can be extraordinarily helpful in determining what was discussed between them. Every such detail can support summary judgment or a defense verdict.

Author Biographies:

Patricia (Patti) Epstein Putney is a Shareholder at Bell, Moore & Richter, S.C. in Madison. She obtained her Bachelor of Arts degree in Art History from Bryn Mawr College in 1984 and her Juris Doctor degree from Brooklyn Law School in 1989. She moved from New York City to Madison in 1995. Patti's practice area relates to the defense of all types of civil litigation. This includes defense of physicians, nurses, and other health care professionals in medical malpractice cases, as well as in licensing, disciplinary and credentialing disputes. She regularly defends personal injury

and wrongful death actions, including automobile accidents, premises liability, products liability, insurance agent negligence as well as insurance coverage disputes. Patti has had numerous jury trials throughout the state, has litigated in federal courts and appellate courts and has argued before the Wisconsin Supreme Court and the 7th Circuit Court of Appeals. Patti is a member of the State Bar of Wisconsin, Wisconsin Defense Counsel, and the Dane County Bar Association. She also started a group called "Lawyer Moms" for working women lawyers with children.

William D. Bolte is a transactional attorney specializing in estate planning, probate, and general business and property matters. William graduated with a B.A. from the College of Wooster and a J.D. from the University of Wisconsin – Madison. Outside of his practice, William is a member of the Real Property, Probate & Trust Law Section. He also volunteers as a judge for high school mock trial and is a volunteer attorney with the Dane County Basic Estate Planning Clinic.

References

1 Referred to as "licensees" in the statutes and regulations.
2 *See* Wis. Stat. § 452.133 (2021-22); Wis. Admin. Code § REEB 24.07
3 Wis. Stat. § 452.133(1)(c) (2021-22).
4 Wis. Admin. Code § REEB 24.02(12) (2022).
5 Wis. Admin. Code § REEB 24.02(1) (2022).
6 Wis. Admin. Code §§ REEB 24.02(1), (12) (2022).
7 Extended to real estate agents in *Shister v. Patel*, 2009 WI App 163, 322 Wis. 2d 222, 776 N.W.2d 632; *Ramsden v. Farm Credit Services*, 223 Wis. 2d 704, 709, 590 N.W.2d 1 (Ct. App. 1998).
8 *Id*.
9 *Id*.
10 *Id*.
11 *Id*. at 709-10.
12 *Id*. at 710.
13 *Id*.
14 *Id*.
15 *Id*.
16 *Id*. at 718.
17 *Id*. at 711.
18 *Id*. at 709.
19 *Id*. at 721.
20 Wis. Stat. § 452.133(1)(e) (2021-22).
21 Wis. Stat. § 100.18(1) (2021-22).
22 Wis. Stat. § 100.18(11)(b) (2021-22).
23 Wis. Stat. § 100.18(12)(b) (2021-22).
24 Wis. Stat. § 709.02 (2021-22).
25 *See* Wis. Stat. § 100.18(12)(b) (2021-22); *Malzewski v. Rapkin*, 2006 WI App 183, ¶ 20, 296 Wis. 2d 98, 723 N.W.2d 156.
26 Wis. Stat. § 452.133(2) (2021-22).
27 Wis. Stat. § 452.133(6) (2021-22).
28 Wis. Stat. § 452.23(b) (2021-22).
29 *Id*.
30 Wis. Stat. § 452.23(c) (2021-22).
31 *Conell v. Coldwell Banker Premier Real Estate, Inc.*, 181 Wis. 2d 894, 896, 512 N.W.2d 239 (Ct. App. 1994).
32 *Id*.
33 *Id*.
34 *Id*.
35 *Id*.
36 *Id*. at 897.
37 *Id*.
38 *Id*.
39 *Id*.
40 *Id*.
41 *Id*.
42 *Id*.
43 *Id*. at 897-98.
44 *Id*. at 898.
45 *Id*. at 898-99.
46 *Id*. at 900.
47 *Id*. at 902.
48 *Id*. at 901-02.
49 *Id*. at 901.
50 *Id*.
51 Wis. Stat. § 452.133(1)(c) (2021-22).
52 *Id*.
53 *Z Fish Shanty, LLC v. Koch*, 2019 WI App 15, ¶ 2, 386 Wis. 2d 351, 927 N.W.2d 156.
54 *Id*.
55 *Id*.
56 *Id*.
57 *Id*. at ¶ 3.
58 *Id*. at ¶¶ 3, 21.
59 *Id*. at ¶ 4.
60 The real question before the court was whether the furnace was a defect and should have been disclosed on the real estate condition report. However, the definition of "defect" in a real estate condition report is the same as the definition of adverse fact. Therefore, the court's reasoning can be applied to this situation.
61 *Id*. at ¶ 21.
62 *Id*.
63 *Id*.
64 *Id*.
65 Wis. Stat. § 452.23(2)(a) (2021-22).
66 Wis. Stat. § 452.23(2)(c) (2021-22).
67 Wis. Stat. § 452.23(2)(d) (2021-22).

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2023 Advocate of the Year Award: Wayne L. Maffei, *Cross Jenks Mercer & Maffei, LLP*

Congratulations to Wayne Maffei for being selected by the WDC Board of Directors as the 2023 Advocate of the Year! The Advocate of the Year Award recognizes the member with the most defense work success of the prior calendar year.

Wayne is a partner at Cross Jenks Mercer & Maffei, LLP. His practice focuses on personal injury law, civil litigation, insurance defense, and business litigation. Wayne obtained his undergraduate degree from Loyola University in Chicago and his law degree from the University of Wisconsin Law School. Wayne has served as President of the Sauk County Bar Association, President of the Wisconsin Defense Counsel (formerly Civil Trial Counsel of Wisconsin), and Chair of the Wisconsin Lawyers Fund for Client Protection. Additionally, Wayne has been elected as a member of the American Board of Trial Advocates (ABOTA), the Trial Law Institute, and the Diversity Law Institute. Wayne has an AV rating from Martindale-Hubbell.

Wayne is certified as a Civil Trial Specialist by the National Board of Trial Advocacy and is a Diplomate of the Court Practice Institute. He has also achieved Senior Fellow status in the Litigation Counsel of America, the Trial Lawyer Honorary Society.

In 2022, Wayne tried a three-day jury trial in Sauk County for Rural Mutual Insurance Company. The primary issue in the case was whether the plaintiff's lumbar laminectomy was related to an auto accident. The jury awarded total damages in an amount that was less than half the amount suggested by Wayne during closing arguments and less than 20% of the amount offered by the defense to settle the case pre-suit. A detailed summary of the case is set forth below.

Donna L. Morris, et al. v. Rural Mutual Insurance Company, et al.
Sauk County Case No. 17-CV-400
Trial Dates: March 8-10, 2022

Facts: The case arose out of a September 2015 motor vehicle accident. The defendant, 19-year-old Paul Zech, made a left turn in front of the plaintiff from a side street onto Highway 12 in Sauk City. After the accident, the plaintiff reported no injuries and declined an ambulance. There was minimal damage to her vehicle. She later went to the emergency room with complaints of neck pain and stiffness, but x-rays of her neck and back were normal. Approximately ten days after the accident, she returned to the doctor complaining of sacrum and coccyx pain. Again, x-rays of these areas were normal. Her doctors advised her to take off work for one week, and then to work half days for another ten days, which she did.

Plaintiff was 50 years old at the time of the accident. In March of 2016 (six months after the accident), she returned to the doctor with complaints of low back pain and pain shooting into her leg. She attended physical therapy and the pain resolved within a month. Although she experienced occasional flareups, the plaintiff had very little treatment until March of 2018. At that time, she complained of muscle tightness throughout the back and shooting pain down her left leg. An MRI revealed mild compression bilaterally at the L5 nerve root. She

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was referred to a neurosurgeon who did not think she was a "good fit" for surgery. The plaintiff got a second opinion and underwent an a L4-5 laminectomy and facetectomy in October of 2018 (three years after the accident), which significantly improved her left hip and leg pain.

Issues for Trial: Liability was not disputed. The only issues for trial were causation and damages.

Pretrial Motions: The case involved significant motion practice, including motions to compel and numerous contested motions *in limine*. Plaintiff's counsel filed motions *in limine* attempting to prevent the defense from reading portions of plaintiff's expert's deposition into the record, restrict defendants' expert's testimony to only the opinions he offered at his deposition, and argued that the court should exclude photos of the vehicle damage because they were allegedly prejudicial and irrelevant. The court denied all three motions. Plaintiff's attorney reasserted the motion to exclude the vehicle photos at least three times during trial, all to no avail.

Pretrial Settlement Discussions: At mediation, plaintiff's lowest demand was $250,000 and defendant's highest offer was $35,000. Plaintiff later submitted a statutory settlement offer of $160,000, which was not accepted. Prior to trial, defendants made a final offer of $90,000 to settle the case, which plaintiff declined.

At Trial: The primary issue at trial was whether the accident—which appeared relatively minor—caused the need for an L4-5 laminectomy/facetectomy three years post-accident. Other than brief testimony from the insured driver, the defendants' only witness was their retained medical expert, neurosurgeon Dr. Morris Marc Soriano, MD. Dr. Soriano related ten weeks of treatment to the accident and opined that the cause of the plaintiff's ongoing low back pain was her pre-existing degenerative facet disease in the L4-5 region. By contrast, plaintiff's treating experts testified that the 2015 accident accelerated plaintiff's degenerative condition beyond its normal progression and necessitated the 2018 surgery.

During closing arguments, plaintiff's counsel asked for $62,796.56 in past medical expenses, $6,157.67 in past wage loss, and $100,000 in past pain, suffering, and disability. Wayne argued that only $5,522.01 in past medical expenses was related to the accident. Additionally, Wayne argued that plaintiff only sustained $1,183.76 in wage loss and suggested $25,000 as an appropriate award for the plaintiff's past pain, suffering, and disability.

Verdict: The jury awarded only $14,205 in total damages, which included $5,522 in past medical expenses, $1,183 in past wage loss, and $7,500 in past pain and suffering. Notably, the jury awarded less damages than the defense suggested in closing.

A jury poll after the trial revealed that Wayne was easily able to connect with the jurors. For example, the plaintiff argued that she was not able to do all the physical activities she once enjoyed and that she often felt aches and pains in the morning after engaging in physical activity. In response, Wayne said, "Welcome to the club." This really resonated with the jurors because they all acknowledged that life brings aches and pains. The jurors also agreed that they liked Wayne's approach and unanimously agreed that he was professional, concise, and easy to follow from *voir dire* through closing argument.

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

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2023 Distinguished Professional Service Award: Nicole R. Radler, *Simpson & Deardorff, S.C.*

Congratulations to Nicole Radler for being selected by the WDC Board of Directors as the recipient of the 2023 Distinguished Professional Service Award! The Distinguished Professional Service Award recognizes a longtime member who has given consistent effort to grow and improve WDC.

Nicole is a shareholder at Simpson & Deardorff, S.C. in Milwaukee. She earned her bachelor's degree from the University of Wisconsin-Milwaukee in 2012, and her law degree from the Marquette University Law School in 2015. She has been recognized as a "Rising Star" by Wisconsin Super Lawyers since 2019. She is a member of the Wisconsin Defense Counsel, Defense Research Institute, and the Milwaukee Young Lawyers Association.

Nicole is a very active member and regular volunteer of the WDC! She is a current member of the Board of Directors and former Chair of the Young Lawyer Committee and Website and Social Media Committee. For several years, she put together and sent out the weekly Advance eSheets. Nicole also assisted in the creation of WDC's new website. Last year, she presented at the WDC Annual Conference during the "What We Want to Know from Seasoned Attorneys" presentation.

Thank you, Nicole, for your contributions to WDC!

Nominated By: Megan L. McKenzie, *American Family Mutual Insurance Company*

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2023 Young Lawyer Award: Morgan K. Stippel, *Bell, Moore & Richter, S.C.*

Congratulations to Morgan Stippel for being selected by the WDC Board of Directors as the recipient of the 2023 Young Lawyer Award! The Young Lawyer Award recognizes a young lawyer (up to 10 years past their first bar admission date) who has shown not only excellence in their work and achievements in their career to date, but also a commitment to professional and ethical standards, as well as a commitment to the larger community.

Morgan is an associate at Bell, Moore & Richter, S.C. specializing in civil defense litigation. Morgan graduated *summa cum laude* from the University of Wisconsin-River Falls in 2015, where she earned her Bachelor of Science in Political Science. She went on to earn her Juris Doctor from the University of Wisconsin Law School in 2018, where she graduated *cum laude*. Morgan is licensed to practice in all Wisconsin state courts, the U.S. District Courts for the Eastern and Western Districts of Wisconsin, and the U.S. Court of Appeals for the Seventh Circuit.

Morgan is a passionate problem-solver committed to providing the highest level of advocacy and helping her clients achieve their goals. Her practice focuses on personal injury matters, business disputes, and civil rights actions. She has experience helping clients navigate all aspects of litigation, including motion practice, discovery, mediation, trial, and appeals. In 2022, Morgan was recognized as a Super Lawyers Rising Star. She was selected based on peer recognition and professional achievement. Only 2.5% of attorneys in Wisconsin receive this distinction.

Morgan takes pride in her active involvement in the legal community. She is the current Chair of the WDC's Diversity, Equity, & Inclusion Committee and has been incredible in this role. She has chaired the meetings by doing significant research and presentations with open discussion encouraged among the group on topics surrounding native/indigenous people, antisemitism, and racism in our country. Morgan has gone above and beyond and put a lot of time into her role as Chair.

Morgan is not only devoted to furthering WDC's commitment to diversity and inclusion, but she volunteers her time with other organizations as well. She served on the Wisconsin State Bar's Leadership Development Committee during the 2022-2023 term, graduated from the G. Lane Ware Leadership Academy in 2022—a significant commitment—and organized the High School State Mock Trial Tournament for the Madison Region in 2023. Morgan is also an adjunct professor at the University of Wisconsin Law School where she teaches trial advocacy to mock trial students and coaches its mock trial competition teams. She has served as a board member for the Madison Legal Association for Women (LAW) since November 2021 and organizes its annual "I Resolve" Fundraiser to benefit the Domestic Abuse Intervention Services (DAIS) Legal Advocacy Program. The past two years, this event has raised a total of $14,474. Finally, Morgan regularly volunteers with Legal Action of Wisconsin at its expungement clinics and takes on pardon application cases pro bono.

Nominated By: Patricia Epstein Putney, *Bell, Moore & Richter, S.C.*

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2023 Publication Award: Daniel Finerty, *Lindner & Marsack, S.C.*, and Adam M. Fitzpatrick, *Corneille Law Group, LLC*

Congratulations to Daniel Finerty and Adam Fitzpatrick for being selected by the WDC Journal Editor and Board of Directors as the recipients of the 2023 Publication Award! The Publication Award recognizes a well-written cutting-edge article written for the Wisconsin Civil Trial Journal. Daniel and Adam receive the award for their article, "*Defending Native American Clients and Their Carrier Partners – The Impact of Wisconsin's Tribal Gaming Compacts*," which appeared in the 2022 Summer Issue of the Journal.

Daniel practices employment law with Lindner & Marsack, SC, in Milwaukee, Wisconsin, where he defends EPLI claims for national and regional, public-sector carriers and their third-party administrators (TPA). He regularly counsels and trains claim professionals on best practices in handling EPLI claims. For over 23 years, Daniel has partnered with EPLI carriers, TPAs, and their respective claims professionals to defend EPLI claims in litigation, arbitration, mediation and during pre-filing, post-tender stage. Daniel is admitted to the State Bar of Wisconsin, the State Bar of Illinois (pending), and he is admitted to practice in several federal district courts as well as numerous Native American tribal courts in Wisconsin and Michigan. Daniel is an active member of the Wisconsin Defense Counsel, an active member of The Gavel, Your Claims Defense Network© (www.thegavel.net) and its Workplace Matters Group, and is a member of the Defense Research Institute's Native Nations Law Task Force.

Adam is a Partner with Corneille Law Group, LLC in Madison, Wisconsin where he defends medical malpractice claims, nursing home and long-term care litigation matters, alleged abuse and neglect and related claims against providers, and a wide range of general liability defense cases, including personal injury, large construction losses including construction defect and delay matters, product liability claims, premises liability and insurance coverage matters. 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.

Thank you, Daniel and Adam, for your contribution to the WDC's Wisconsin Civil Trial Journal! To see more from Daniel, check out his article in this issue, "*Employment Law for Defense Attorneys and Insurance Professionals: A Process-Oriented Approach*." This is Daniel's sixth article published in the Wisconsin Civil Trial Journal!

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Concrete Construction: Understanding the Risks, Remedies, and Ramifications

by: David J. Corr, Ph.D., P.E., CTLGroup

Ever since the Romans put concrete to use on a large scale circa 200 B.C.E., it has been at the heart of civilization—critical to the development of communities, metropolises and countries, and a mainstay of progress across generations of societal evolutions. To make the argument that concrete stands the test of time, you only need to look at the existence of the Pantheon. Built two millennia ago, the monument still stands strong and safe enough for more than 6 million visitors to admire each year.

So why, when we drive through developed areas, are we likely to observe a concrete wall with a few cracks, spalled and broken sidewalks or a crumbling concrete structure of some type—or even worse, a site where a building was either demolished or experienced some type of concrete failure? Why is everyone—from facility owners to designers, builders, and contractors—at risk of being involved in litigation connected to concrete construction?

The simple answer is that in addition to its durability, strength and ubiquity, concrete is an extremely complex substance. As such, any number of factors—from temperature to moisture level and exposure to the elements—can compromise its aesthetic appeal and performance. Consider temperature, for example. For most of us, 50 degrees Fahrenheit is hardly extreme cold, but for concrete, it is the threshold for when the set rate goes from slow to very slow. Drop another 10 degrees, and the hydration reaction of concrete basically comes to a halt, as does its strength gain. Not accounting for the impact of this temperature change can lead to the hardened concrete not achieving its specified design strength, durability characteristics, and other critical performance properties for serviceability.

Engineers have been studying concrete for quite some time, and we continue to do so. Consequently, we understand a great deal about how it acts and reacts to harsh environmental conditions. This knowledge supports better management of risk in concrete construction. For anyone involved in concrete construction, the insights of these specialists—who are often structural engineers or material scientists—are imperative to optimizing the integrity of the structure and the safety of everyone who interacts with it, from the earliest phase of building through decades after project completion.

I. Risk and Remedies

Below, we will look at some of the main risks of concrete construction—with the disclaimer that this list does not represent all the risks or places where things can go wrong. Still, having a basic understanding can go a long way in helping to mitigate risk and in achieving a high-quality, long-lasting final project.

a. Time

When most building materials, such as steel and lumber, arrive at a job site, they are as strong as they are going to be. Not so for cast-in-place concrete, which enters a jobsite in the fresh slurry state, before hardening. Concrete's strength evolves

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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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over time. In the process, heat is produced, which needs to dissipate. If the process occurs too quickly or slowly, it can cause cracking and long-term durability issues that can lead to litigation. The

Figure 1: Concrete is a complex material that gains strength over time.

standard is to evaluate concrete 28 days after the placement to ensure it has reached the compressive strength specified by the designer for the project. Of course, good luck finding a project manager willing to halt work for 28 days. After about a day, the concrete is solid but only has about one-third of the strength it will achieve at 28 days. Knowing that strength will continue to increase, work often continues on faith that quality assurance measures for the concrete mix will remain true. Today, the industry has gotten proficient at managing much of this time-setting risk. We cast the same concrete for a project in cylinders and test the evolution of strength at various intervals. More recently, we have also started to employ sensors that test the concrete in situ after the placement.

Another time-related risk is that causes of concrete degradation—such as water ingress or excessive heat or cold—could also alter the hardened material. A more long-term time-related concept of concrete is service life, which is becoming an increasingly important part of project contracts. For example, a designer may specify a service life of fifty years. The contractor takes on a significant risk if that concrete shows problems before the service-life term is complete. If service life is specified, it is advisable to invest in upfront costs to have a qualified laboratory, such as CTLGroup, measure and model the predicted service life. Doing this can prevent greater costs in the long run associated with repair, reconstruction, or litigation.

b. Cracking

In concrete construction, cracking is inevitable and impractical to avoid completely. It is imperative for an owner to be aware of this from the start and for the designer and contractor to manage expectations. The remedy to cracking is to control it as much as possible. For example, by strategically implementing joints, you can maintain the aesthetics of the concrete and keep cracking to acceptable widths, which are determined by the function of the structure and are more easily patched if necessary. Through proper reinforcement details, the size and frequency of cracks can also be kept to an acceptable level.

c. Environmental Exposure

When you hear the phrase environmental exposure, you may think of concrete's interaction with weather elements, which is part of the definition. Cold and heat, for instance, play major roles in concrete integrity and strength, requiring awareness and adaptation at the job site. The recommended concrete temperature at the time of placement for most applications is around 50 degrees Fahrenheit and should not exceed 70 degrees Fahrenheit. Variations above or below this range can impact set time and strength building, water demand, and cracking, so adjustments must be made. Moreover, concrete contains water, which expands during freezing, creating the perfect formula for cracking. One of the most common ways to prevent this is to add entrained air (microscopic air pockets) to the concrete mix, allowing room for water to expand during freezing.

Other elements of environmental exposure happen within the concrete itself. Alkali-silica reaction (ASR) is frequently referred to as "concrete

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Figure 2: Alkali-silica reaction (ASR) causes certain siliceous aggregates to react with alkalis in concrete to form a gel that swells as it absorbs water from the surrounding cement paste or the environment. These gels can induce enough expansive pressure to damage concrete and leave contractors with no choice but demolition.

cancer" because of its potential to spread and inflict serious cracking and structural damage. ASR has to do with the reaction between silica found in some aggregates and the alkaline cement. When ample moisture is introduced, expansion occurs, exerting pressure and cracking the concrete from within. Incidents of ASR arose decades ago, when the industry transitioned from superior aggregates to more marginal ones. However, while better aggregates could offer a solution to ASR, supply and cost may be prohibitive for certain projects.

Figure 3: Rebar within concrete corrodes over time, a process that can be accelerated by the ingress of chlorides from deicing salts or ocean spray.

Meeting the American Society for Testing and Materials' (ASTM) quality standards for fine and coarse aggregates use in concrete can also help mitigate ASR issues.

Lastly, reinforcement corrosion presents another risk. Steel rebar is introduced to reinforce concrete and make it more structurally useful. The downside is that rebar within concrete corrodes over time, a process that can be accelerated by the ingress of chlorides from deicing salts or ocean spray. Corrosion can be slowed by using higher quality, less permeable concrete, burying the rebar deeper in the concrete, or both.

d. Materials Innovation

As architects and designers push the boundaries of concrete design, and the world continues to drive toward sustainability and zero carbon emissions, materials evolution is essential. While new materials are necessary and valuable, they come with challenges. A recent example that is making its way into the marketplace is ultra-high-performance concrete (UHPC). On the simplest level, UHPC contains additives such as fibers and plasticizers that yield a material that is highly flowable when fresh, but exhibits much lower permeability and higher strength, particularly in tension, than traditional concrete. UHPC offers

Figure 4: Newer products, such as Ultra-High-Performance Concrete (UHPC) can offer new benefits, but pose risks as codes, specifications, and testing procedures that are appropriate for traditional concrete may not work for UHPC.

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high durability, crack resistance, flowability, high abrasion resistance, and more. It can also help accelerate construction schedules. The risk lies in treating UHPC like traditional concrete, which can lead to significant issues, because codes, specifications, and testing procedures that are appropriate for traditional concrete may not work for UHPC. It is important for all parties to be aware of these issues, and to not blindly use UHPC without understanding its requirements.

Another example is Type IL (phrased "one-L") Portland limestone cement, a lower-carbon product introduced to help lower the building sector's carbon footprint. Type IL cement's changes in formulation—replacing 10% to 15% of the ordinary Portland cement in the mixture with lower CO_2-intensive limestone powder—drive changes in concrete properties, such as a slower rate of strength gain and changes in water demand of mixtures. The potential positive environmental impact of Type IL cement use is desirable, but there is risk in treating it like traditional Type I/II cement and using it as a drop-in replacement. While newer products like Type IL cement lower concrete's carbon footprint, we must ensure that the qualifying rigor is applied to these new mixtures.

e. Codes and Standards

Lastly, there is risk in considering codes and standards infallible. At CTLGroup we have investigated multiple failures where a building code did not capture a particular vulnerability. In one recent case I was involved in—a design-bid-build project—a major update to a code was enacted while the design was in progress. The designer was not technically at fault for specifying the design to meet the prior code, nor was the contractor at fault for accurately building the design. However, the result was a structural performance failure caused by well-known issues that were directly addressed in the new code to prevent these types of failures. The best designers are aware of industry trends and anticipate that codes and standards continually evolve. They stay ahead of pending changes to help ensure the highest-quality results of a project.

II. Learning from Structural Failures

It is estimated that an average of eight building-collapse disasters happen globally every year, resulting in 343 deaths. While structural failures are rare, when they do happen, they can be extremely costly. In addition to the threat to public safety, failures incur costs of insurance, litigation, demolition, rebuilding and more. It is the job of structural engineers to do everything possible to ensure failures do not occur. Today, we have many great tools and a large bank of knowledge to support this. The challenge lies in the fact that we design and build one structure at a time, and we cannot do a full-scale "crash test" of a structure. When structural failure does happen, it opens a forensic goldmine for us to investigate unknown vulnerabilities. They also often provide opportunities to change the state of practice and ensure higher levels of safety for future structures. This is why litigation can often help lower societal risk of future structure failures. However, if litigation settles quickly, or involves a sealing of records, it is important for society to continue these investigations through public agencies so the critical lessons can still be learned.

III. Conclusion

When people look at a towering concrete edifice or an elegant modern monument, it is hard to conceptualize that so much risk lies beneath. Concrete is much more complicated than people may think. Resources like CTLGroup—offering specialized testing, consulting, and structural health monitoring—exist to unravel the complexities and formulate solutions to manage concrete risk in construction, help ensure customer satisfaction, and maximize safety.

Author Biography:

David Corr serves as Principal Engineer & Materials Consulting Group Director at CTLGroup and is one of the nation's leading

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experts related to structural performance, material characterization, and material development. Dr. Corr's knowledge focuses on both traditional and emerging building materials. Specifically, he has studied the durability of concrete, the rheology and fresh-state behavior of concrete, and fracture and cracking in cement-based materials. He can be reached at dcorr@ctlgroup.com.

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Employment Law for Defense Attorneys and Insurance Professionals: A Process-Oriented Approach

by: Daniel Finerty, Lindner & Marsack, S.C.

For those defense attorneys and insurance professionals who are new to Employment Practice Liability Insurance (EPLI) claims, new to commercial claims, or new to claims in general, employment law can present a maze of seemingly conflicting obligations upon an insured employer under federal statutory and regulatory authorities, state and local law and other mandates. However, for those that employ a process-oriented approach, a better understanding of those obligations can be easily understood, harmonized, and applied when assessing EPLI claims.

One way that defense attorneys and insurance professionals can best understand employment law to better assess EPLI claims is that, in many ways, it is oriented around processes designed to bring an employer and employee *together* to solve a problem. That process is designed to keep them *together* instead of pushing them apart and, thus, toward a judicial or administrative remedy. Likewise, the quality of the employer's efforts, as well as those of an employee, to solve a problem is often a key factor in determining the strength or weakness of the employer's defenses in litigation that follows a breakdown in the process and the strength of those defenses. In addition, defense attorneys and insurance professionals better oriented with this process-based approach and an understanding of employment law can more thoughtfully engage with employment defense counsel, consider whether to settle a claim and how much effort and capital should be put toward that effort and the strengths and weaknesses of various defenses to the claim.

I. The Process-Oriented Approach

To explain this process-oriented approach, federal statutory obligations are used as examples. Their state law and local law cousins are often similarly formatted so this approach may have a broader appeal. However, defense counsel should be generally consulted before concluding how to proceed on state or local issues, as those laws may vary.

a. Title VII of the Civil Rights Act of 1964

Title VII[1] prohibits discrimination based upon sex, race, national origin, and other protected categories. Interpretations of Title VII's prohibitions on sex, race and other categories yielded a more detailed interpretation that prohibited an employer from creating or permitting a hostile work environment based upon any protected category. However, in 1998, the United States Supreme Court recognized that an employer had an affirmative defense to a hostile work environment claim where the conduct of a supervisor was at issue in the *Faragher* and *Ellerth* cases.[2]

Assuming no tangible adverse employment action was taken against an employee, such as a discharge, demotion, pay cut or other adverse action,[3] an employer may assert the *Faragher*/*Ellerth* affirmative defense where two elements can be shown. *First*, if the employer can show it exercised reasonable care[4] to prevent and promptly correct any harassing behavior through a harassment policy, annual training, and prompt action to investigate and remediate any potential harm to a complainant,

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it can establish the first element of the defense. *Second*, if the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer or to otherwise avoid harm by failing to report alleged harassment as outlined in an anti-harassment policy, by not accepting an employer's remedial offer to return to work, or other opportunity to continue the work relationship, the employer may establish the second element.

In this way, the *Faragher*/*Ellerth* defense is dependent upon the fact that an employer had an anti-harassment policy in place, that it performed regular annual harassment training (showing the employee attended regularly is also helpful), and that the employer promptly acted to correct any untoward behavior and prevent any further harassment after it learned of the alleged harassment. This evidence is key to establishing a firm *Faragher*/*Ellerth* defense. Like above, the quality of the harassment policy, the training, the investigation, and attempts to remedy issues that may have been discovered during an investigation all go a long way to establishing a firm defense. By contrast, where one or more of these processes are lacking or missing entirely, the employer's defense may not be strong, especially if that missing element played a role in the employee's decision not to return to work.

b. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990[5] and its amendments prohibit discrimination based on disability. In order to adhere to the prohibition, the ADA requires an employer to provide reasonable accommodation to qualified applicants for work and employees. Reasonable accommodation may include an employee's request that an employer adjust the job application process so a qualified applicant with a disability can be considered for a position, that an employer modify the physical work environment, or change the way a job is usually performed or the work schedule, so an individual with a disability can perform the essential functions of that position. In that way, one or more changes made by the employer can enable a disabled employee to enjoy equal benefits and privileges of employment like non-disabled employees.[6]

While the process typically starts with an employee's request for accommodation, an employer may be obligated to proactively offer accommodation where the need for reasonable accommodation is obvious. As an example, consider an employee in a wheelchair who is assigned to work in a tight space, has a comparatively lower desk than others or is assigned to a thinner desk under which the wheelchair cannot fit.

Regardless, the quality of the interactive process between the employer and employee may not only determine whether the process will succeed (and the employee remains employed) but also will determine if litigation may follow and the possible outcome of that litigation. Where an employer has not meaningfully participated in the interactive process, is at fault for allowing the interactive process to break down, or is otherwise at fault for the failure to mutually agree to a reasonable accommodation, the employer's position in subsequent litigation is comparatively weak, especially where the employer bears responsibility for the breakdown in the interactive process. Where an employer meaningfully participates, offers reasonable suggestions, does not disregard reasonable suggestions from the employee or the employee's doctor, and is persistent and reasonable in its discussions to find a reasonable accommodation, that employer is more likely to have solved the reasonable accommodation question and prevented any dispute. In addition, it will be in a comparably better strategic position should the process break down. Where the employer fully documents the process and is the last one to genuinely communicate a "we are open to reasonable options" message, so much the better.

One legal limitation on an employer's obligation to provide reasonable accommodation is that the job-related modifications may not cause the employer "undue hardship," which can include significant difficulty, expense or disruption which interfere with the employer's ability to conduct its

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business. This defense can be difficult to assert. However, after having conducted the interactive process, the employer should be able to quantify why it concluded that a specific accommodation caused an "undue hardship" in terms of money, lost work time, disrupted workflow or other production hiccups that the accommodation would cause. Better documentation and articulation of the reasons the employer concluded there was an undue hardship, the better the defense. The same applies to a "direct threat" defense. If the employer concluded the plaintiff or the requirements of the job posed a direct threat to the health and safety of himself, herself or others, a direct threat defense may be asserted. To assert the defense, many courts will require that a health or safety risk must be a significant risk of substantial harm based on valid and objective evidence and not speculation.

II. The Family and Medical Leave Act

If an employee or someone in that employee's immediately family experiences a serious health condition, or the employee's performance or attendance dramatically dip, the employer may be obligated to proactively offer job-protected leave under the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq*. The quality of the process will often determine the outcome of any subsequent dispute. Any subsequent solicitation, review and/or approval of medical certification or refusal to approve medial leave or family leave to care for another member of the family, will play a large role in determining the ultimate outcome of the process and how to assess the risks going forward.

In sum, the better the quality of the process, the better the potential litigation outcome will be, as the employer can obtain strategic high ground to negotiate from a position of strength or, if necessary, assert solid defenses to liability if the matter cannot be resolved.

III. Best Practices

For defense attorneys and industry processionals, the critical questions to ask in a process-oriented case are both open-ended and closed-ended:

- Response. How did the employer initially respond to the employee's complaint, request for accommodation, or request for medical leave? With empathy or with disdain? By documenting the complaint or by directing the employee to put it in writing or speak to other members of the management team?
- Investigation. What steps, if any, were undertaken to investigate the alleged harassment, discrimination or retaliation, the request for accommodation or the communication of the need for leave? How quickly did the next steps take place?
- Questions. If the employer or its investigator had questions regarding the alleged harassment, was a reasonable follow up performed? What questions were asked regarding possible accommodation that would work in the situation? What questions were asked about the likely timing and/or duration of the accommodation and/or the need for leave? Did the employer ask whether the employee requested continuous or intermittent leave? Were all logical questions asked of the employee, witnesses, the employee's doctor, and any other source cited by the employee?
- Responses. Did the employee's responses to the employer's inquiries make sense? If not, was clarity sought through an additional request? If not, why not? If logical questions were asked, what next steps were taken based upon the responses by the employee and/or his or her doctor to attempt to determine what reasonable accommodation was possible and/or the nature, extent, and duration of the employee's need for leave?
- Clarifications. If the story did not make sense at any other point, were clarifying questions asked to achieve an understanding of the situation? If not, why not? Were assumptions made? If questions were asked, were genuine answers received that made sense? Did the answers help the employer to resolve the dispute, decide on a reasonable accommodation and/or certify the leave requested


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by the employee? If not, what questions should have been asked to do so? Or did the questions not matter to the conclusion?

- Return-To-Work. If the employee did not come back to work, why? Was a return-to-work option offered? Did the employee have reasonable objections to that offer? Were the employee's objections disregarded or addressed? Did the employee refuse to return under any circumstances, regardless of what the employer did or may have done? Or did the employee raise a legitimate dispute, such as not wanting to work in the same area as the alleged harasser, not being able to work with the accommodation provided by the employer or needing additional time off due to, for example, an infection post-surgery?

Defense attorneys and industry professionals who can spot trouble in a new claim may be better empowered to rectify any errors through quick action to improve the ultimate result for the carrier and the insured. For example, a sex harassment complaint by a current employee has not been addressed or investigated by the employer is a good example.[7] In such a case, a knowledgeable attorney or industry professional can quickly realize the need for a proactive investigation into harassment allegations, assign employment defense counsel to begin the investigation process by engaging a third-party investigator under the protection of the work product privilege or guide an internal investigation so facts can be gathered for a decision on how to proceed. In this example, the employer may assert a *Faragher*/*Ellerth* defense that, despite a later investigation than should have taken place, will go a long way to either heading off a dispute or achieving a successful or better result than would have occurred without the proactive measures. Again, all should bear in mind that the ultimate goal of all such measures is dispute resolution and continuing the employer-employee relationship such that all measures taken toward achieving those goals will provide a more defensible case, should it come to that.

IV. Conclusion

Defense attorneys and industry professionals armed with the ability to spot employment issues such as these when handling EPLI claims will quickly become indispensable and essential to their respective operations by thoughtfully managing the risk presented by EPLI claims and, when necessary, effectively litigating them to a successful conclusion.

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Daniel Finerty (dfinerty@lindner-marsack.com) (Marquette University Law School, 1998) practices employment law with Lindner & Marsack, SC, in Milwaukee, Wisconsin, where he defends EPLI claims for national and regional, public-sector carriers and their third-party administrators (TPA). He regularly counsels and trains claim professionals on best practices in handling EPLI claims. For over 23 years, Daniel has partnered with EPLI carriers, TPAs, and their respective claims professionals to defend EPLI claims in litigation, arbitration, mediation and during pre-filing, post-tender stage. Daniel is admitted to the State Bar of Wisconsin, the State Bar of Illinois (pending), and he is admitted to practice in several federal district courts as well as numerous Native American tribal courts in Wisconsin and Michigan. Daniel is an active member of the Wisconsin Defense Counsel, an active member of The Gavel, Your Claims Defense Network© (www.thegavel.net) and its Workplace Matters Group, and is a member of the Defense Research Institute's Native Nations Law Task Force.

References

1 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., provided remedies upon proof of a successful claim including back pay, reinstatement, and injunctions against future acts of discrimination in a trial to the court, has been amended several times since passage. Two examples include the Pregnancy Discrimination Act of 1978, which amended Title VII to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions, and the Civil Rights Act of 1991, which amended Title VII to provide a right to trial by jury, authorized recovery of emotional distress and punitive damages, authorized an award of attorney's fees and expert fees to a prevailing party and limited the emotional distress and punitive damages to a capped number based upon the number of employees. As to the number of employees, Title VII only applies to "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year…" 42 U.S.C. § 2000e(b).

2 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). This affirmative defense generally applies only where the conduct of a "supervisor" is at issue, when the conduct of fellow employees or a third party is at issue, the employer may be liable if it knew or should have known of the harassment and failed to respond. *See* 29 U.S.C. §§ 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."), 1604.11(e) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.").

3 Alleged harassment claims against a supervisor initially turn on the question of whether or not the supervisor's behavior culminated in a tangible employment action against the employee, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Ellerth*, 524 U.S. at 765. If the harassment resulted in an adverse employment action, the employer will be vicariously liable. *Id*. In such a case, this affirmative defense is not available.

4 Upon receipt, any attorney or insurance professional should immediately determine two things. First, is there any harassment that may be ongoing? If so, immediate action should be taken to ensure that any potential harm is reduced, mitigated, or eliminated based upon the circumstances, as doing so supports the *Faragher*/*Ellerth* defense. Second, has any investigation been conducted into the allegations to assess whether an employer rule has been violated and whether any preventative or corrective actions need to be taken regarding, for example, a victim and an aggressor. Undertaking both these steps not only supports the employer's defense but also goes a long way toward addressing any existing issues in the workplace that may lead toward potential liability.

5 The Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*., was passed in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" by requiring employers to provide reasonable accommodation to allow qualified employees to work. The ADA applies to all employers that are "engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5)(a).

6 *See* https://www.dol.gov/general/topic/disability/jobaccommodations (last visited Mar. 13, 2023).

7 *See* n. 3, *supra*.

Applying Reducing Clauses to Underinsured Motorist Coverage

by: Blayne Nicole Christy and Mollie T. Kugler, von Briesen & Roper, S.C.

When defending personal injury cases arising out of motor vehicle collisions, the situation commonly arises in which the injured party presents a claim under his or her underinsured motorist (UIM) coverage that the injured party carries through his or her personal automobile insurance policy. In those situations, it is imperative for defense counsel to consider the implications that payments issued by third parties, such as worker's compensation carriers and liability insurers, have on the amount of UIM coverage available to the injured party. This is because pursuant to Wis. Stats. § 632.32(5)(i), insurers are permitted to include "reducing clauses" in their UIM policies, which provisions, if enforceable, limits the amount of UIM coverage available to the insured. When determining whether a UIM policy's reducing clause is enforceable under Wis. Stats. § 632.32(5)(i), courts consider the purpose of UIM coverage, the legislative history of Wis. Stats. § 632.32(5)(i), principles of contract interpretation applied to insurance policies, and the policy language itself. We discuss these issues below.

I. The Statutory Basis for UIM Reducing Clauses

Wisconsin Statutes § 632.32(5)(i) expressly permits insurers to write UIM policies with reducing clauses that "provide that the limits under the policy" shall be reduced by amounts recovered from other sources. Wisconsin Statutes § 632.32(5)(i) states:

> Permissible Provisions.
>
> … A policy may provide that the limits under the policy for uninsured motorist coverage or underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.
> 2. Amounts paid or payable under any worker's compensation law.
> 3. Amounts paid or payable under any disability benefits laws.

This statute permits a motor vehicle insurance contract to state that the maximum amount that the insurer will pay under the policy will be offset by amounts paid by a tortfeasor's liability insurer and to provide for reduction in UIM coverage for amounts the insured receives from worker's compensation payments.[1] However, to constitute a valid and enforceable reducing clause, it must comply with the provisions of Wis. Stats. § 632.32(5)(i) and the provision limiting UIM coverage must be unambiguous in the context of the entire policy.[2] The language of a reducing clause need not mirror the language of Wis. Stats. § 632.32(5)(i), though.[3] "There is no 'magic language' required by Wis. Stats.

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§ 632.32(5)(i) and a reducing clause does not have to mirror the language of the statute."[4] For example, in *Commercial Union Midwest Insurance Company v. Vorbeck*, a UIM reducing clause which stated that the limit of liability shown in the declarations page for each person "shall be reduced by all sums: 1. Paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible" was deemed enforceable even though its language was not identical to the language of Wis. Stats. § 632.32(5)(i).[5]

a. The Purpose of UIM Coverage

As a general matter, the purpose of UIM coverage is to protect "persons insured under that coverage who are legally entitled to recover damages for bodily injury, death, sickness, or disease from owners or operators of underinsured motor vehicles."[6] With this purpose in mind, there are two different approaches for writing UIM policies, both of which are permitted in Wisconsin.[7]

Under the "separate fund" approach, a set amount of coverage is provided for the insured's damages that exceed the amount the insured recovers from a responsible party.[8] The insured purchases coverage for his or her damages in a set dollar amount "above and beyond the liability limits of the at-fault driver."[9] When a policy follows this approach and contains an enforceable UIM reducing clause, the reducing clause decreases the insured's covered damages.

Under the "limits-to-limits" approach, the UIM coverage provides "a predetermined, fixed level of UIM recovery that is arrived at by combining payments from all sources" legally responsible for the insured's damages.[10] Wisconsin Statutes § 632.32(5)(i) explicitly allows insurers to write UIM policies using the limits-to-limits approach, and which contain reducing clauses that reduces the amount of the insurer's liability by the amount recovered from a responsible party.

b. Legislative History

Before 1995, court decisions interpreting UIM reducing clauses were varied and, overall, reducing clauses were determined to be void, illusory, and contrary to public policy.[11] Significant changes to Wisconsin's statutory scheme regulating motor vehicle insurance policies were introduced by the Legislature in 1995 with the enactment of Wis. Stats. § 632.32(5)(i). The statute expressly permitted reducing clauses that decrease UM or UIM payments by the amounts recovered from other sources. The purpose of this statute was explicitly stated by the drafters as follows:

> The bill overturns a series of Wisconsin appellate court decisions which have held that a motor vehicle insurance policy may not prohibit stacking of uninsured or underinsured motorist coverage or any other coverage provided by the policy.... The bill also permits motor vehicle insurance policies to reduce the limits payable under the policy for uninsured or underinsured motorist coverage by payments received from other sources.[12]

The Supreme Court of Wisconsin soon recognized that "[t]he language of Section 632.32(5)(i) is unambiguous…. The statute plainly allows a motor vehicle contract to state that the maximum amount that the insurer will pay under the policy will be set off by amounts paid by a tortfeasor."[13]

In 2009 and 2011, there were further rounds of automobile insurance legislation. The 2009 law disallowed reducing clauses.[14] In 2011, however, the legislature reversed course, again expressly allowing insurers to include reducing clauses in their policies pursuant to Wis. Stats. § 632.32(5)(i).[15] UIM reducing clauses remain permissible under the current version of Section 632.32. As demonstrated in this article, courts continue to grapple with the interpretation and enforcement of reducing clauses.

c. Principles of Interpretation

The same rules of construction that govern general contracts are applied to the language in insurance policies, including the interpretation of

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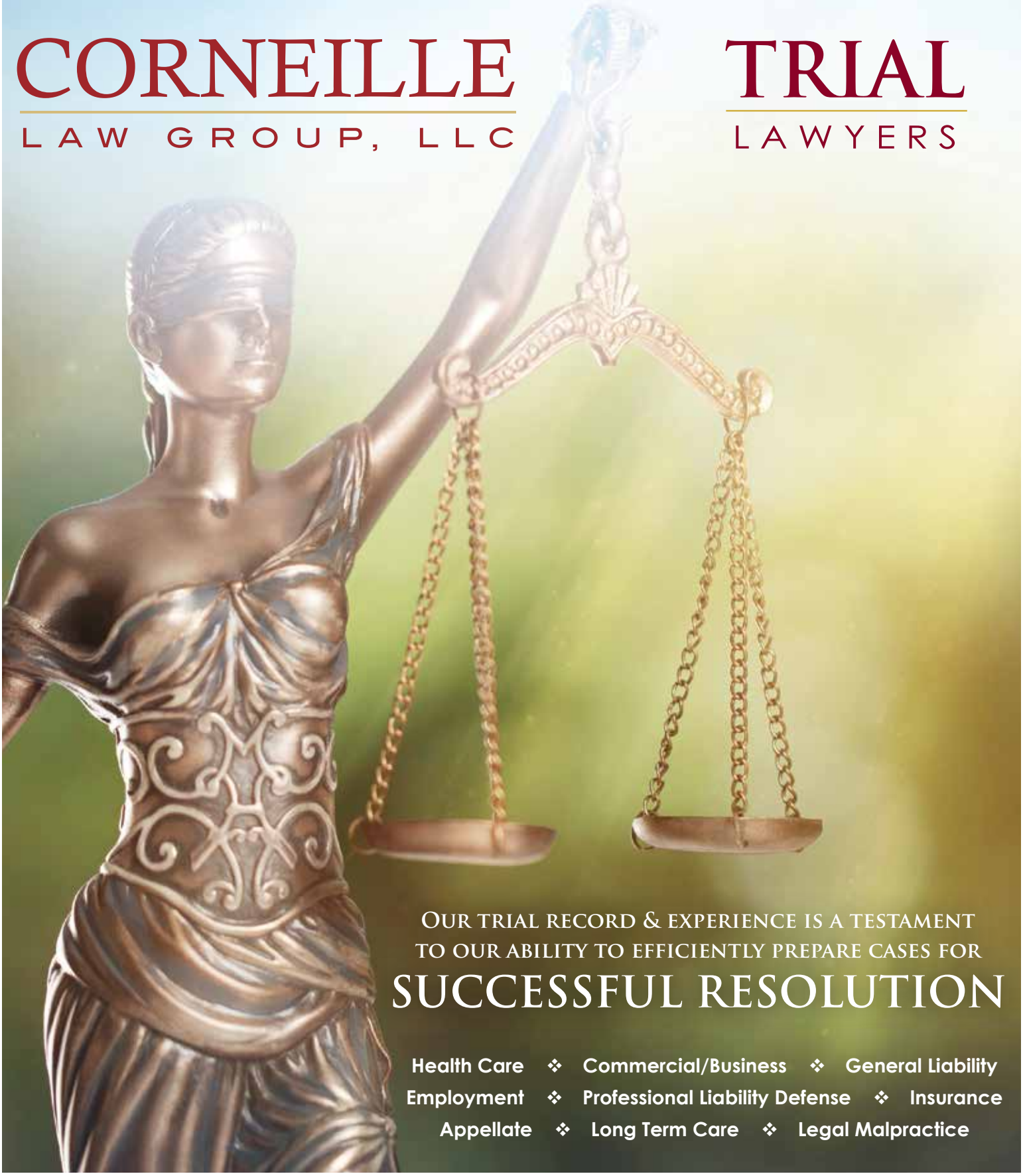

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UIM reducing clauses.[16] An insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy.[17] This concept was recently reiterated by the Supreme Court of Wisconsin:

> While our UIM cases provide a helpful framework for interpreting policy language, we pause to note that a UIM policy is a contract, and "[w]here the language of the policy is plain and unambiguous, we enforce it as written… This is to avoid rewriting the contract by construction and imposing contract obligations that the parties did not undertake."[18]

As a general rule, the language in an insurance contract "is given its common, ordinary meaning," that is, "'what the reasonable person in the position of the insured would have understood the words to mean.'"[19] However, insurance policy language, including a reducing clause, is deemed ambiguous "if it is susceptible to more than one reasonable interpretation."[20] If the UIM reducing clause is ambiguous, it is unenforceable and cannot be used to reduce the UIM coverage.

In response to the enactment of Wis. Stats. § 632.32(5)(i), the Supreme Court of Wisconsin has held that a reducing clause is enforceable if it complies with the provisions of Wis. Stats. § 632.32(5)(i) *and* its limitation on UIM coverage is not ambiguous in the context of the entire policy.[21] This requires not only an analysis of the language employed in the UIM reducing clause, but also an examination of the entire insurance policy, including provisions such as the policy's index, "Insuring Agreement," "Definitions," and "Limit of Liability" subsections, endorsements attached to the underlying coverage form, and notices issued to the insured. As noted in *Myers*, contextual ambiguity can render a UIM reducing clause unenforceable if the clause is not easily located in the policy and fails to clearly notify the insured that UIM coverage will be reduced by certain amounts paid or payable.[22] The standard for addressing alleged contextual ambiguity is whether the "organization, labeling, explanation, inconsistency, omission, and text of other provisions in the policy" create "an objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language."[23] This analysis is imperative because Wisconsin courts want to ensure that UIM policies with reducing clauses "inform a reasonable insured that he or she is purchasing a fixed level of UIM recovery that would be arrived at by combing payments made from all sources."[24]

With the enactment of Wis. Stats. § 632.32(5)(i), there is no longer a viable argument that a reducing clause is *ipso facto* unenforceable when the reducing clause contains the phrase "amounts payable" or "amounts otherwise payable for damages" rather than the word "limits."[25] In *Myers*, the appellate court held that a reducing clause containing the phrase "amounts otherwise payable for damages" was enforceable under Wis. Stats. § 632.32(5)(i) and unambiguous.[26] "[T]he language of a policy should not be made ambiguous by isolating a small part from the text of the whole."[27]

II. Pursuing Enforcement of the UIM Reducing Clause

In addition to arguing that their UIM policies follow the "separate fund" approach, injured parties who carry UIM coverage will frequently attempt to create an "ambiguity" concerning the UIM reducing clause (where no such ambiguity exists) in order to increase the amount of UIM benefits they might recover under the policy. This legal strategy relies on the precedential Wisconsin case law that holds ambiguities must be construed against the insurer.[28] If the UIM coverage provided is misleading and unclear, the policy will be deemed ambiguous and the UIM reducing clause unenforceable.[29]

Because the above-referenced strategies employed by injured parties will commonly make insurers hesitant to deny coverage based on a policy's UIM reducing clause, it is important to recognize the existence of a UIM reducing clause and to evaluate

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its enforceability early on. It is also important to know whether the UIM insured receives payment(s) at any point throughout the course of litigation that could reduce the amount of UIM coverage available pursuant to a reducing clause compliant with the requirements of Wis. Stats. § 632.32(5)(i). For example, third-party distribution agreements, pursuant to which a worker's compensation carrier is reimbursed a percentage of the amount it paid out to the injured party, must be considered when computing the amount of UIM coverage available to the injured party. This early recognition will protect against the UIM carrier paying out on a case in which there are no UIM benefits available because of the insured's receipt of payments issued by third parties such as worker's compensation carriers and liability insurers.

III. The Enforceability of UIM Reducing Clauses Remains a Prevalent Legal Issue

As demonstrated by two recent decisions of the Wisconsin Supreme Court, *Secura Supreme Insurance Company v. Estate of Huck* and *Acuity v. Estate of Shimeta*, UIM reducing clauses can markedly impact the amount of UIM coverage available to an injured party.[30]

a. Estate of Huck

In *Estate of Huck*, the Supreme Court held UIM insurers are not statutorily permitted to reduce UIM limits by the amount an injured party must reimburse the worker's compensation carrier.[31] In *Estate of Huck*, the decedent Daniel Keith Huck was killed by a motorist while performing his job duties for the Village of Mount Pleasant. After receiving the tortfeasor's liability limits of $25,000 and $35,798.04 in worker's compensation benefits from the Village's insurer, the Estate submitted a claim for UIM coverage under Huck's automobile insurance policy with Secura that had a UIM limit of $250,000 and contained a reducing clause compliant with Wis. Stats. § 632.32(5)(i). Following the Estate's receipt of worker's compensation benefits in the amount of $35,798.04, the Estate was obligated by Wis. Stats. § 102.29 to refund the Village's insurer $9,718.73 from its settlement with the tortfeasor, netting $26,079.31. Therefore, the Supreme Court evaluated whether Secura was permitted to reduce its $250,000 UIM limit by the $35,798.04 initially received by the Village's insurer, or just by the net amount of $26,079.31 retained by the Estate. The Supreme Court concluded that a UIM insurer is permitted to reduce its limits, pursuant to Wis. Stats. § 632.32(5)(i) and a policy's reducing clause, "by the total amount of worker's compensation actually received." Thus, Secura was permitted to reduce its $250,000 UIM limit by the $26,079.31 in worker's compensation benefits that the Estate retained after reimbursing the Village's insurer.

b. Estate of Shimeta

In *Estate of Shimeta*, the Supreme Court addressed whether a UIM reducing clause applied on an individual basis versus a combined basis when two claimants presented claims for UIM benefits under the same automobile policy. In *Estate of Shimeta*, Michael Shimeta's Estate (driver) and Terry Scherr (Shimeta's passenger) each received $250,000 from a tortfeasor's automobile liability insurer, Farmers Insurance Company, pursuant to Farmer's policy which provided a $250,000 "per person" limit of liability and a $500,000 "per accident" limit of liability. Subsequently, both the Estate and Scherr sought an additional recovery of $250,000 each under a policy that Acuity issued to Shimeta prior to the accident. Acuity's policy included underinsured motorist (UIM) coverage with a $500,000 limit for "each person" and a $500,000 limit for "each accident." Acuity contended it was not obligated to pay the Estate or Scherr any UIM benefits under its policy because of the language of the policy's UIM reducing clause, which states: "[t]he limit of liability shall be reduced by all sums... [p]aid because of the bodily injury by or on behalf of persons... who may be legally responsible." According to Acuity, based on the reducing clause, the $500,000 in combined payments that the Estate and Scherr received from Farmers reduces Acuity's UIM policy limits to $0. The Supreme Court rejected this argument, however, and affirmed the court of appeals' decision that Acuity's UIM reducing clause operates on an

individual basis to reduce the limit of liability for "each person" by the payment that "each person" insured under the policy received. In other words, the Supreme Court concluded that Acuity owed the Estate and Scherr $250,000 each, because the "limit of liability" in the reducing clause unambiguously refers to only the "each person" limit.

IV. Conclusion

Even though the enforceability of a UIM reducing clause is not always absolute, when an injured party presents a claim for UIM benefits, early recognition of a UIM reducing clause in the claimant's applicable policy and analysis of its enforceability is essential. This analysis is two-fold: (1) ensuring the language of the reducing clause complies with the requirements of Wis. Stats. § 632.32(5)(i); and (2) confirming the UIM reducing clause is not contextually ambiguous. The amount of UIM coverage available to the injured party, which may be significantly impacted by an enforceable UIM reducing clause, can be outcome-determinative in UIM cases.

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12 *Id*. at ¶ 32 (*citing* Legislative Reference Bureau Drafting File for 1995 Wis. Act 21, Analysis by the Legislative Reference Bureau of 1995 S.B. 6).

13 *Downhower ex rel. Rosenberg v. West Bend Mut. Ins. Co.*, 2000 WI 73, ¶ 17, 236 Wis. 2d 113, 613 N.W.2d 557. The Supreme Court later stated: "In other words, the legislature made clear that the second theory of UIM coverage, in which the insured is purchasing a fixed amount of coverage, is not invalid per se." *Badger Mut. Ins. Co.*, 255 Wis. 2d

61, ¶ 33.

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26 *Myers*, 279 Wis. 2d 432.

27 *Vorbeck*, 269 Wis. 2d 204, ¶ 38 (citing *Folkman*, 264 Wis. 2d 617, ¶ 21).

28 *See*, *e.g*., *Brunson v. Ward*, 2001 WI 89, ¶ 12, 245 Wis. 2d 163, 629 N.W.2d 140.

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30 *Secura Supreme Ins. Co. v. Estate of Huck*, 2023 WI 21, 406 Wis. 2d 297, 986 N.W.2d 810; Acuity v. Estate of Shimeta, 2023 WI 28, 406 Wis. 2d 730, 987 N.W.2d 689.

31 For an in-depth discussion about how the *Huck* decision was reached, *see* Erik M. Gustafson, *Avoiding the Question Presented: Thoughts on Wisconsin Supreme Court Practice Through the Lens of Secura Supreme Insurance Company v. The Estate of Huck" Wis. C. Trial J., Infra.*

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Avoiding the Question Presented: Thoughts on Wisconsin Supreme Court Practice Through the Lens of *Secura Supreme Insurance Company v. The Estate of Huck*

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

Since 1977, the Wisconsin Supreme Court's role has been one of law development, rather than error correction.[1] The supreme court therefore enjoys the right to control its own docket through exercising discretion on which cases to accept.[2] Controlling its own docket allows the court to focus its resources on drafting well-reasoned opinions on issues of great importance.[3]

Typically, cases reach the supreme court through a petition for review of the court of appeals' decision.[4] The court has shared five factors it uses to decide whether a case merits its review.[5] While the parties are limited to arguing the issues raised in the petition for review, the court is not so limited.[6] Thus, the court sometimes resolves cases based on arguments or issues other than those raised in the petition for review, or any party.[7]

In *Secura Supreme Insurance Company v. Estate of Huck* ("*Huck II*")[8], the supreme court did just that by resolving a case through two separate opinions, each receiving a majority of votes in part, without ever addressing the reasoning used by the court of appeals, addressed in the petition for review, or argued by the parties.[9] This result left lingering questions about whether the supreme court actually furthered its law-developing purpose through its decision in *Huck II*. In the interests of transparency, the author of this article was one of the attorneys representing Secura in *Huck II*. To be clear, though, this article is not sour grapes about the result of the case; rather, the focus is on the supreme court's scattered opinions in this case, the reasons relied upon in them, and how the court could reconsider its internal operating procedures to better focus its resources on developing the law.

I. The Case

Mr. Huck tragically died in an accident with a motor vehicle.[10] Mr. Huck was in the course and scope of employment at the time of the accident, so he and his estate received worker's compensation benefits totaling $35,798.04.[11] The driver who struck Mr. Huck purchased auto liability insurance with $25,000 limits; the insurer quickly tendered these limits.[12]

Mr. Huck purchased personal auto insurance from Secura that included underinsured motorists (UIM) coverage with $250,000 limits.[13] Secura conceded that Mr. Huck's damages exceeded $250,000.[14] However, Mr. Huck's UIM coverage included a reducing clause:

> The limit of liability shall be reduced by all sums:
>
> (1) Paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible …
>
> (2) Paid or payable because of the bodily injury under any of the following or similar law:
>
> a. Worker['s] compensation law …[15]

The reducing clause is substantially based upon Wis. Stat. § 632.32(5)(i), which permits such provisions:


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> (i) A policy may provide that the limits under the policy for … underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced by any of the following that apply:
>
> 1. Amounts paid by or on behalf of any person or organization that may be legally responsible for the bodily injury or death for which the payment is made.
>
> 2. Amounts paid or payable under any worker's compensation law.

Secura applied each paragraph of the reducing clause separately; that is, Secura deducted from the $250,000 limits the $25,000 paid by the tortfeasor's insurer, and then deducted from the remaining $225,000 the $35,798.04 received in workers compensation benefits, resulting in a payment of $189,201.96.[16]

The Estate asserted, however, that Secura's calculation improperly double-counted $9,718.73 from the tortfeasor's payment that went to compensate Mr. Huck's employer[17] pursuant to Wis. Stat. § 102.29.[18] No Wisconsin case law directly addressed this question. Consequently, Secura filed a declaratory judgment action to resolve this dispute.[19]

a. Lower Court Decisions

The parties filed cross motions for judgment on the pleadings, and the circuit court granted the Estate's motion and entered judgment on its counterclaim for the disputed amount.[20] The circuit court found the policy language ambiguous and construed it in favor of the Estate. The circuit court further found persuasive a court of appeals decision and federal district court decision that tangentially touched on the issue without substantial analysis.

Secura appealed.[21] The court of appeals unanimously agreed with the circuit court's conclusion and affirmed its decision (*"Huck I"*). Unlike the circuit court, however, the court of appeals focused on the language of § 632.32(5)(i) rather than the language of the policy.[22] Further, the court of appeals concluded that the supreme court's analysis in *Teschendorf v. State Farm Insurance Companies* resolved the issue.[23]

The court of appeals was careful to note that the "statutory analysis … set forth in *Teschendorf* guides" its decision, rather than finding *Teschendorf* directly controlling.[24] This careful language is appropriate because *Teschendorf* resolved a different, albeit adjacent, issue without a majority of the supreme court agreeing on any rationale.

At issue in *Teschendorf* was application of a substantively identical reducing clause in an uninsured motorist (UM) policy to worker's compensation payments made to the Work Injury Supplemental Benefits Fund (the "Fund") pursuant to Wis. Stat. § 102.49(5)(b).[25] In that case, if payments made to the Fund were subject to the reducing clause, then the UM recovery would have been zero.[26]

The supreme court unanimously agreed that Wis. Stat. § 632.32(5)(i) contains an implicit requirement that amounts be paid to the insured (or estate) under worker's compensation law in order to be subject to reducing.[27] However, no majority of justices agreed on a rationale.[28] Three justices held § 632.32(5)(i) ambiguous and therefore construed it to require the payment under worker's compensation law be to the insured or estate (the "Ambiguity Faction"); three justices held that § 632.32(5)(i) plainly permits reducing clauses to apply to payments to the Fund, but that the result is absurd such that the legislature could not have intended it (the "Absurd Results Faction"); and the final justice sought to eschew labels and simply determine what the statute means.[29]

In *Huck I*, the court of appeals concluded that *Teschendorf* foreclosed Secura's reading of § 632.32(5)(i) even though *Teschendorf* did not have a majority rationale as to why.[30] Thus, the

court of appeals affirmed.[31] Judge Grogan wrote a brief concurrence acknowledging that the text of § 632.32(5)(i) does not clearly address this issue, so "[o]n a clean slate, Secura's textual argument may not have been so swiftly dismissed, but our supreme court foreclosed it in *Teschendorf*."[32]

b. Petition for Review

Secura petitioned the supreme court for review, emphasizing the court of appeals' reliance on *Teschendorf* and the disjointed analysis in *Teschendorf*. Secura presented *Huck* as a case in which the supreme court could clarify the analysis in *Teschendorf* to provide greater guidance to the bench and bar regarding the proper analytical framework for § 632.32(5)(i). The supreme court accepted review.

II. Supreme Court Opinions

In a twist of irony, the supreme court's decision in *Huck II* not only failed to clarify how insurers, attorneys, and judges should interpret § 632.32(5)(i) in light of *Teschendorf* but was itself subject to disjointed opinions. Justice Roggensack wrote an opinion that only Chief Justice Ziegler joined in full, but Justices Ann Walsh Bradley, Dallet, Hagedorn, and Karofsky joined in part.[33] Justice Dallet wrote a concurrence that Justices A.W. Bradley, Hagedorn, and Karofsky joined in full.[34] Justice Rebecca Grassl Bradley dissented.[35]

Justice Roggensack's opinion garnered six votes in part and two votes in whole. Justice Dallet's opinion garnered four votes in whole. Thus, Justice Roggensack's opinion is binding only as to those portions garnering six votes, and Justice Dallet's opinion is binding in full.[36] This lends itself to as much confusion as *Teschendorf*, the opinion *Huck II* was supposed to clarify.

a. Majority/Lead

The Majority/Lead opinion—*i.e.*, Justice Roggensack's opinion[37]—first focuses on the policy's reducing clause, and in particular on the word "paid."[38] The opinion analyzes chapter 102 to determine that § 102.29 is a worker's compensation law that modifies how much an employer pays.[39] Thus, the reducing clause cannot apply to amounts the employer recovers under § 102.29 because that amount was never actually paid under a worker's compensation law.[40] In so doing, the opinion rejects Secura's argument that the employer "paid" the full $35,798.04 under worker's compensation law because the employer had an obligation for the full amount at the start, even though the employer ultimately recovered nearly $10,000.[41]

As a further alternative under the terms of the policy, the opinion recognizes that UIM coverage does not apply until the tortfeasor's insurer exhausts limits that do not suffice to compensate the insured for all of his or her damages.[42] Thus, the opinion reasons, the amount "paid" under worker's compensation law at the time the UIM claim becomes ripe is the net amount because, by definition, the insured will have already been subject to the § 102.29 distribution.[43]

The Majority/Lead opinion then analyzes § 632.32(5)(i).[44] Secura argued that the court need interpret only § 632.32(5)(i), not the policy, because the policy simply adopts the statutory language in the policy.[45] The opinion, though, appears to reject this proposition by analyzing the policy language first.[46]

The opinion engaged in a grammatical exercise, noting that "paid" is a past participle that is sometimes used as an adjective "to describe the present state of a thing."[47] Accordingly, the "amount paid" under worker's compensation law describes the employer's total financial outlay as of UIM payment, and the employer's total outlay at that time accounts for the § 102.29 reimbursement.[48] Similarly, the word "payable" denotes future payments, which has no effect on this case where all relevant transfers of money between the Estate and employer occurred in the past.[49]

Finally, the Majority/Lead opinion reasons that "any worker's compensation law" in § 632.32(5)(i)

necessarily includes § 102.29, so § 632.32(5)(i) should be interpreted to contemplate the reimbursement required under § 102.29.[50]

b. Second Majority?

Justice Dallet opens her opinion with a hypothetical raised in oral arguments: "If I buy an $8 sandwich, hand the cashier a $10 bill, and she hands me my sandwich and $2 in change, how much was she 'paid' for the sandwich? Eight dollars, of course."[51] The concurrence concludes that, regardless of whether one is applying the policy or § 632.32(5)(i), the only reasonable definition of "paid" is the amount of money the Estate actually kept.[52]

Though she agrees with the mandate to affirm, and the Majority/Lead opinion's analysis of the reducing clause in the policy, Justice Dallet concurred because she views the Majority/Lead opinion's analysis of when UIM coverage applies and § 632.32(5)(i) unnecessary.[53]

Neither the Majority/Lead opinion nor Justice Dallet's concurrence at all discuss the effect of the concurrence garnering four votes in full. Both appear to be binding to the extent each received at least four votes.[54] Consequently, lawyers and judges attempting to use *Huck II* in the future must be careful to note which paragraphs constitute a majority opinion and which do not.

c. Dissent

Justice Rebecca Grassl Bradley's dissent spans almost thirty full pages in the supreme court's slip opinion format—more than the other two opinions combined. The dissent takes issue with both the majority's result and analysis.[55]

On the issue of analysis, the dissent raises multiple concerns with the court's resolution of the case that is wholly divorced from the parties' arguments and petition for review.[56] First, the published court of appeals decision and its analysis of *Teschendorf* remains binding law because the supreme court affirmed the decision without criticizing or otherwise addressing its reasoning.[57] Second, the court leaves unresolved the ostensible reason it accepted the case: to resolve how lower courts should read and apply *Teschendorf*.[58]

Justice R.G. Bradley acknowledged that the court, as part of its law developing function, is not bound to the parties arguments and may consider any arguments or issues, even if not raised by a party.[59] In this case, however, neither majority opinion explained why the court ignored the issues raised in the petition for review and arguments made in the briefing to instead decide the case on a wholly other ground.[60]

On the merits, the dissent's focus is a meticulous deconstruction of the supreme court's decision in *Teschendorf*.[61] Starting with the ambiguity faction, Justice R.G. Bradley attacks those three justices for searching for ambiguity in order to reach a result more palatable than what the statutory language dictates.[62] In order to reach its desired result, this faction had to read the words "to the insured" into the statutory language,[63] which the *Teschendorf* opinion readily acknowledges.[64] Further, the ambiguity faction acknowledged that the "literal" reading of § 632.32(5)(i) supported the insurer's position, but concluded that the statute was nonetheless ambiguous.[65] The dissent criticized this as semantic sleight-of-hand: "a plain meaning cannot be ignored by merely labelling it literal, as the ambiguity faction did in discarding it."[66]

The absurd results faction started on the right path by acknowledging that nothing in § 632.32(5)(i) limits reducing clauses to payments made to the insured.[67] That faction erred, however, by watering down the meaning of "absurd" in statutory interpretation.[68] Historically, absurdity meant that applying the plain meaning "would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[69] The classic examples of an absurd reading of a plain statute include a surgeon who performs emergency surgery on the street to stabilize an injured stranger in contravention of a law prohibiting the drawing of blood in the street; a prisoner escaping in order to avoid a fire despite a

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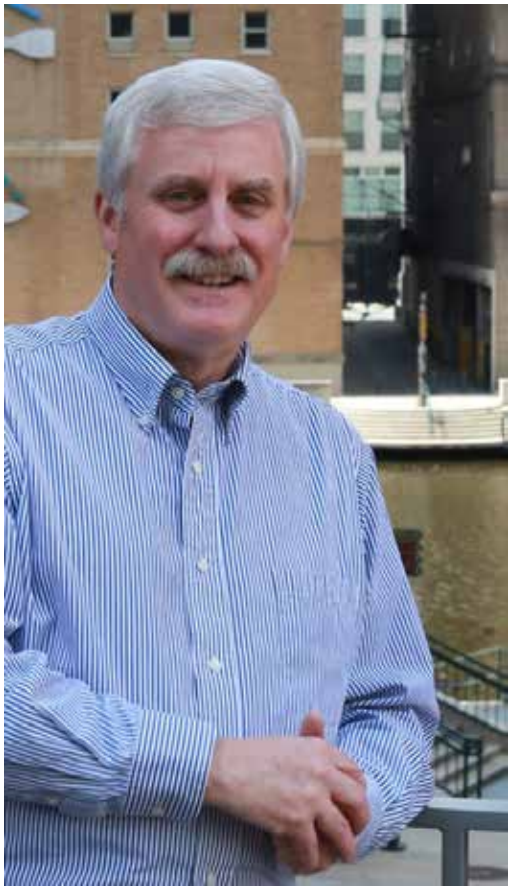

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law prohibiting prisoner escapes; and a mail carrier failing to deliver the mail while indicted for murder despite a federal statute prohibiting anyone from obstructing or slowing the passage of the mail.[70]

While an insured receiving a lower amount of UIM benefits based on worker's compensation payments made to entities other than the insured is perhaps unpalatable and inferior public policy, the dissent does not see this as rising to the level of absurdity.[71] Indeed, the plain language of § 632.32(5)(i) has a purpose: controlling UIM premiums.[72] The legislature could, and in fact has,[73] decided that public policy is better served by firm UIM limits not subject to reducing, with the attendant increase in UIM premiums; however, the legislature most recently decided that greater access to UIM coverage is permitted by lower premiums and reducing clauses.[74] Which option is better is ultimately a decision for the legislature.[75]

Most concerningly to the dissent, six justices in *Teschendorf* agreed that a "literal" meaning of § 632.32(5)(i) favored the insurer, yet all six agreed that the meaning should be set aside.[76] The only dispute among the justices was *why* to ignore that meaning.[77]

The dissent also discusses, albeit briefly, the actual analysis used by the majority. Justice R.G. Bradley criticizes the Majority/Lead opinion for unnecessarily analyzing § 632.32(5)(i)2 after rejecting Secura's position based on the policy language, and further inserting a word—"current"—into the statutory text that does not exist.[78]

The dissent also considers the concurrence's example at the sandwich shop.[79] The problem with Justice Dallet's hypothetical is that the purchaser owed an $8 obligation and overpaid.[80] This would be more akin to Mr. Huck's employer overpaying worker's compensation benefits, successfully recovering the overpayment, and Secura then trying to reduce UIM limits by the original payment.[81] However, consistent with Secura's arguments, Mr. Huck's employer satisfied a $35,798.04 obligation through a payment of $35,798.04; that it later received a little over $9,000 back does not change that it incurred and discharged (*i.e.*, paid) the $35,798.04 obligation.[82]

A better hypothetical (of this author's creation, not Justice R.G. Bradley's), would be Justice Dallet's credit card giving her $2.25 in cash back on her $8 sandwich,[83] which she purchased as part of a tax-deductible charitable event. If the relevant tax statute permitted Justice Dallet to deduct "any amount paid in furtherance of a charitable mission," would she be entitled to deduct the $8 she spent on the sandwich, or the $5.75 "net" payment for the sandwich? In that situation, the result is not so clear.

III. Who Benefits from *Huck II*?

The ultimate resolution of *Huck II* came as a disappointment. To emphasize, the disappointment was not so much in the result—Secura's losses in the circuit court and court of appeals allowed for appropriate emotional preparation to lose again before the supreme court—but that the court's decision did not even address *Teschendorf*, let alone resolve which faction was correct. While Secura, and the industry as a whole, would have benefitted from a victory on the merits applying § 632.32(5)(i) as written, the industry also would have benefitted from knowing that § 632.32(5)(i) is ambiguous, or that § 632.32(5)(i) has a plain meaning that is absurd without an implied "to the insured" in the statute.

Instead, the court resolved little more than the case before it and may have exacerbated questions about how to analyze § 632.32(5)(i). The only discernable rule from *Teschendorf* and *Huck II* is that § 632.32(5)(i) means whatever will result in the highest payment to the insured. Even making *this* clear would allow the industry to appropriately adjust rates, but we are left with more questions than answers.

Though not explicitly explained as such, the majority's analysis (as stated in both Justice Roggensack's and Justice Dallet's opinions) may be the result of applying the doctrine that "[a]n

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appellate court should decide cases on the narrowest possible grounds. Issues that are not dispositive need not be addressed."[84] Drafting a judicial opinion designed for future use—as every supreme court opinion is—requires extensive time and effort.[85] Resolving the case as it did may have simply been easier and less time consuming than wrestling with the *Teschendorf* quagmire.[86]

In this situation, however, the court may have benefitted itself, the public, and even the parties by dismissing review as improvidently granted rather than issuing the opinions it did. Dismissal would have benefitted the court because it would have been freed of the task of drafting any opinions without any change in result or deprivation of law development.

Dismissal of review as improvidently granted is rarely used and often controversial because it gives the impression that the parties' efforts before the court were wasted.[87] However, where the supreme court would affirm the court of appeals and no clear majority reasoning exists, dismissal may be preferrable to disjointed opinions.[88]

Such appears to have been the situation in *Huck II*. The parties would have been no worse off if the court had dismissed review as improvidently granted; the Estate would have been happy with its win, and Secura would have avoided another disjointed decision creating confusion over the meaning of § 632.32(5)(i). Similarly, future litigants, their attorneys, and the lower-court judges deciding those cases would also have benefitted from (or at least been no worse off by) letting the court of appeals remain the last word in *Huck I*, which at least provides a serviceable reading of *Teschendorf*.

The court may be able to further its law-developing role while maintaining the quality of opinions by accepting more cases with the understanding that a certain percentage will be dismissed once the court has had the opportunity to review the briefs. Litigants in the cases dismissed may be disappointed, but the court and public will benefit from the court focusing on the cases that actually present issues meriting supreme court review. If the alternative is a decision that fails to address the issues raised in the petition for review, many litigants may prefer dismissal rather than being blindsided by unforeseen analysis.

Dismissal as improvidently granted works particularly well where the supreme court would affirm a published court of appeals decision.[89] Sometimes, the benefit of a supreme court decision is not groundbreaking analysis, but making binding correct analysis in an unpublished court of appeals opinion. One way to reduce the court's workload in these situations is a procedure for summary affirmance that requires publication of the court of appeals' opinion, either with or without revisions. This would save judicial resources while still allowing for appropriate law development.

IV. Conclusion

Particularly for attorneys who practice in and for a specific industry, taking a case to the supreme court is often about more than just the case at hand. Such was the case in *Huck II*, where resolving which analytical framework from *Teschendorf* controls analysis of § 632.32(5)(i) was just as important as the result of the case. The frustrating experience of coming away with a loss for the client and no meaningful development of applicable law revealed some insights on how the court may be able to better execute its law developing role for the benefit of the public.

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2 Wis. Stat. § 808.10(1); *see also* Wis. Stat. § 808.05 (setting forth procedures for a case to bypass the court of appeals). All citations to the Wisconsin statutes are to the 2021-22 versions, as updated through 2023 Wis. Act 10 and published pursuant to Wis. Stat. § 35.18.

3 *See* Patience Drake Roggensack, *Elected to Decide: Is The Decision-Avoidance Doctrine Of Great Weight Deference Appropriate In This Court Of Last Resort?*, 89 Marq. L. Rev. 541, 543 (2006).

4 Wis. Stat. § 808.10(1). Alternative means include petitions to bypass, certifications, original actions, and supervisory writs. Wis. Stat. §§ 808.05, 809.70, 809.71.

5 Wis. Stat. § 809.62(1r).

6 *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 32, 435 N.W.2d 234 (1989) ("Once the case is before us, it is within our discretion to review any substantial and compelling issue which the case presents.").

7 *See State v. Weber*, 164 Wis. 2d 788, 790, 476 N.W.2d 867 (1991) (denying reconsideration).

8 *Secura Supreme Ins. Co. v. Estate of Huck*, 2023 WI 21, 406 Wis. 2d 297, 986 N.W.2d 810 (*"Huck II"*).

9 *Id*.

10 *Id.* ¶ 4.

11 *Id.*

12 *Id.* ¶ 5.

13 *Id.* ¶ 6.

14 *Id.*

15 *Id.* ¶ 11.

16 *Id.* ¶ 6.

17 The record does not reveal whether Mr. Huck's employer, a municipality, was self-insured or carried worker's compensation insurance because this distinction is irrelevant for purposes of the issues in the case.

18 *Huck*, 406 Wis. 2d 297, ¶ 5.

19 *Id.* ¶ 7.

20 *Id.*

21 *Id.*

22 *Secura Supreme Ins. v. Estate of Huck*, 2021 WI App 69, ¶ 7, 399 Wis. 2d 542, 966 N.W.2d 124 ("*Huck I*").

23 *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 9, 293 Wis. 2d 123, 717 N.W.2d 258.

24 *Id.*

25 *Id.* ¶ 34. The Work Injury Supplemental Benefits Fund provides additional proceeds to certain claimants funded by payments by or on behalf of insurers in certain circumstances. *Id.* ¶¶ 34–36.

26 *Id.* ¶ 5.

27 *Id.* ¶ 18.

28 *Id.*

29 *Id.*

30 *Huck I*, 399 Wis. 2d 542, ¶ 16.

31 *Id.* ¶ 20.

32 *Id.* ¶ 21 (Grogan, J., concurring).

33 *See Huck II*, 406 Wis. 2d 297, ¶ 37 & n.1 (Dallet, J., concurring).

34 *Id.*

35 *Id.* ¶ 84 (R.G. Bradley, J., dissenting).

36 *State v. Dowe*, 120 Wis. 2d 192, 194, 352 N.W.2d 660 (1984) ("It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court. … Numerous cases have expressly held that a concurring opinion becomes the opinion of the court when joined in by a majority." (citations omitted)).

37 The supreme court's internal operating procedures hold that "[i]f…the opinion originally circulated as the majority opinion does not garner the vote of a majority of the court, it shall be referred to in separate writings as the 'lead opinion.'" Wis. Sup. Ct. IOP III.G.4 (June 1, 2023).

38 *Huck II*, 406 Wis. 2d 297, ¶¶ 11–18.

39 *Id.* ¶¶ 15-16.

40 *Id.* ¶ 16.

41 *Id.* ¶ 13.

42 *Id.* ¶ 18.

43 *Id.*

44 *Id.* ¶¶ 19-28.

45 *Id.* ¶ 19.

46 *See id.*

47 *Id.* ¶ 23 (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017)).

48 *Id.* ¶ 24.

49 *Id.* ¶ 25.

50 *Id.* ¶ 26.

51 *Id.* ¶ 31 (Dallet, J., concurring).

52 *Id.* ¶ 35 (Dallet, J., concurring).

53 *Id.* ¶ 37 (Dallet, J., concurring).

54 *Dowe*, 120 Wis. 2d at 194.

55 *Huck II*, 406 Wis. 2d 297, ¶¶ 42-45 (R.G. Bradley, J., dissenting).

56 *See id.*

57 *Id.* ¶ 59 (R.G. Bradley, J., dissenting).

58 *See Id.* ¶ 66 (R.G. Bradley, J., dissenting).

59 *Id.* ¶¶ 42-43 (R.G. Bradley, J., dissenting).

60 *Id.*

61 *Id.* ¶ 60 (R.G. Bradley, J., dissenting).

62 *Id.* ¶¶ 67-68 (R.G. Bradley, J., dissenting).

63 *Id.* ¶ 67 (R.G. Bradley, J., dissenting).

64 *See Teschendorf*, 293 Wis. 2d 123, ¶ 8.

65 *Id.* ¶ 24.

66 *Huck II*, 406 Wis. 2d 297, ¶ 69 (R.G. Bradley, J., dissenting).

67 *Id.* ¶¶ 69, 73-74 (R.G. Bradley, J., dissenting).

68 *Id.* ¶ 74 (R.G. Bradley, J., dissenting).

69 *Id.* ¶ 77 (R.G. Bradley, J., dissenting) (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427 (1833)).

70 *Id.* ¶ 76 (R.G. Bradley, J., dissenting) (quoting *United States v. Kirby*, 74 U.S. 482, 487 (1868)).

71 *Id.* ¶ 75 (R.G. Bradley, J., dissenting) ("To equate the Estate receiving $189,000 instead of $199,000 with the two archetypal examples of absurdity would be, well,

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absurd.").

72 *Id.* ¶ 78 (R.G. Bradley, J., dissenting).

73 *See Teschendorf*, 293 Wis. 2d 123, ¶¶ 45–53 (collecting legislative history on § 632.32(5)(i), including periods when reducing clauses were unenforceable).

74 *See Huck II*, 406 Wis. 2d 297, ¶¶ 77–79 (R.G. Bradley, J., dissenting).

75 *See Id.* ¶ 71 (R.G. Bradley, J., dissenting). A court of appeals decision acknowledged that premiums did, in fact, go down after the legislature first permitted reducing clauses. *Knowles v. State Farm Mut. Auto. Ins. Co.*, No. 01-2015, 2002 Wisc. App. LEXIS 588, ¶ 20 n.6 (Wis. Ct. App. May 16, 2002) (unpublished). *Knowles* is an unpublished decision not citable under Wis. Stat. § 809.23(3), so Secura did not cite it, and none of the *Huck II* opinions address whether § 632.32(5)(i) in fact reduces premiums.

76 *Huck II*, 406 Wis. 2d 297, ¶ 69 (R.G. Bradley, J., dissenting).

77 *Id.*

78 *Id.* ¶¶ 82-83 (R.G. Bradley., J., dissenting).

79 *Id.* ¶ 56 (R.G. Bradley, J., dissenting).

80 *Id.*

81 *Id.*

82 *Id.*

83 This is roughly the same proportion that the disputed amount has to the $35,798.04 payment.

84 *Nationstar Mortg. LLC v. Stafsholt*, 2018 WI 21, ¶ 2 n.2, 380 Wis. 2d 284, 908 N.W.2d 784 (quoting *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15).

85 *In re Amendment of Wis. Stat. § (Rule) 809.23(3)*, 2003 WI 84, ¶¶ 32-34, 261 Wis. 2d. xiii (Sykes, J., concurring); Roggensack, *supra*, 89 Marq. L. Rev. at 543 ("A well-written appellate opinion of the type that the public expects from the Wisconsin Supreme Court is a carefully forged tool.").

86 *Cf. Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 160, 382 Wis. 2d 496, 914 N.W.2d 21 (Gableman, J., concurring) (discussing general preference for resolving cases on simplest grounds without invoking constitutional or other complicated issues) (citing *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997)).

87 *Halbman v. Barrock*, 2017 WI 91, ¶ 5, 378 Wis. 2d 17, 902 N.W.2d 248 (Abrahamson, J., concurring) ("The parties have, at this court's request, expended significant time, effort, and money in submitting briefs and participating in oral argument in this court on the assumption that the case would be heard and decided on the merits. The parties and the public, in my opinion, are owed an explanation of the court's dismissal at this stage of the appellate proceedings without a decision on the merits.").

88 *See State v. Jackson*, 2023 WI 37, ¶ 8, ___ Wis. 2d ___, ___ N.W.2d ___ (R.G. Bradley, J., concurring) ("For example, if this court determines the lower court reached the correct outcome, further review can be a waste of time.").

89 *See id.*

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Legislative Update: Health Care Records Fees, Litigation Advances, and More

by: Adam Jordahl, The Hamilton Consulting Group, LLC

On behalf of WDC, the Hamilton Consulting Group monitors developments affecting civil litigation, insurance law, and worker's compensation policy in Wisconsin, including Legislative opportunities and threats impacting Wisconsin's civil litigation environment; Rule petitions to the Wisconsin Supreme Court affecting civil trial and appellate practice; and Case law from precedential opinions issued by the state's supreme and appellate courts.[1] The Hamilton Consulting team is available to serve WDC and its members and can be contacted at jordahl@hamilton-consulting.com.

I. Introduction

The Wisconsin Legislature inaugurated its 2023-24 session in January. As usual, the first six months of the session have been dominated by deliberations over the biennial state budget, a process typically completed by the end of June or July. Key issues on the horizon for WDC this session include statutory fee limits for copies of patient health records and the regulation of nonrecourse civil litigation advances. Several other civil justice-related proposals have been introduced, most of which do not appear likely to become law at this time.

II. Health Care Records Fees

a. The *Banuelos* Decision

The cost of obtaining copies of health care records is an important issue for attorneys and insurers in Wisconsin. This April, in *Banuelos v. University of Wisconsin Hospitals and Clinics Authority*, the Wisconsin Supreme Court held that state law does not permit health care providers to charge any fees for electronic copies of patient records.[2]

Banuelos was pursuing a personal injury suit when her attorneys requested copies of her health care records from UW Hospitals. UW Hospitals fulfilled the request through its records vendor, Ciox, which provided Banuelos' attorneys with electronic copies of her records and an invoice for $109.96. This bill was based on the maximum allowable per-page fee for paper copies of patient health care records under Wisconsin law.[3]

Banuelos sued UW Hospitals, arguing that Wisconsin law does not permit providers to charge anything for electronic records because those records do not fall into any of the categories listed in Wis. Stat. § 146.83(3f). UW Hospitals filed a motion to dismiss, reasoning that it could not have violated the law because the statute simply does not address electronic records. The motion to dismiss was granted by the circuit court and the appellate court reversed.[4]

The court held that, "although Wis. Stat. § 146.83(3f) provides for the imposition of fees for copies of medical records in certain formats, it does not permit health care providers to charge fees for patient records in an electronic format."[5] The court agreed with Banuelos' argument that "because fees for electronic copies are not enumerated in the statutory list of permissible fees that a health care provider may charge, the fees charged here are unlawful under state law."[6]

b. Policy Implications of *Banuelos*

Notably, the court's decision in *Banuelos* aligned with a third-party brief submitted jointly by the Wisconsin Defense Counsel and the Wisconsin Association for Justice (WAJ). However, this ruling may put pressure on the Wisconsin Legislature to resolve the issue more definitively by establishing some kind of statutory fee limit for electronic records.

Last year, a proposal was brought to the Assembly by Ciox, a health care information management company used by some Wisconsin providers, including the defendant in *Banuelos*. The proposal would have established a per-page fee schedule for electronic copies of medical records at about 75% of the fee schedule for paper copies.

Of course, charging a per-page fee for electronic copies makes little sense, and the 75% cost ratio is difficult to justify. In response, WDC joined with WAJ and the Wisconsin Insurance Alliance to propose a flat fee of $6.50 per request for electronic copies. The coalition also proposed requiring providers to furnish records in an electronic format on request if those records were created or are already stored in an electronic format. This would prevent vendors from printing and mailing paper copies of natively electronic records in order to legally charge a higher fee, an issue reported by some attorneys. In the wake of *Banuelos*, this practice may become more common given the court's holding that no fees can be collected for electronic copies.

In response to this proposal, Ciox argued that a flat fee fails to account for the cost of copying older paper records that must be scanned into an electronic format, or mixed paper/electronic record sets. However, virtually all health care records today are created and stored electronically. As a compromise, the coalition proposed a per-page fee of 20% of the rate for paper copies, applicable to "electronic copies of patient health care records that were not created electronically."

Ultimately, neither side's proposal was introduced or passed before the Wisconsin Legislature adjourned for the remainder of 2022. WDC stands ready to engage on this issue if or when it arises during the 2023-24 session. More information about the proposals from last session, as well as the legislative history and case law behind the statutory fee schedule in Wisconsin, can be found in this author's article published in the Summer 2022 edition of the Wisconsin Civil Trial Journal.[7]

III. Regulation of Nonrecourse Civil Litigation Advances

The Wisconsin Civil Justice Council, a broad coalition of organizations interested in civil liability issues, is pursuing legislation to regulate nonrecourse civil litigation advances. This practice is colloquially referred to as "lawsuit lending," despite such advances not being a loan in the traditional sense. In essence, the plaintiff in a civil lawsuit receives an advance on a portion of the claim from a financing firm, with repayment of the advance contingent on the outcome of the case.

The advances often have confusing terms and high effective interest rates, meaning that successful plaintiffs may see nothing at the end of the case after repayment. For this reason, plaintiffs who have received an advance commonly delay or prolong settlement negotiations, increasing the costs of litigation and legal services for all actors in the civil justice system.

The goal of this reform is to protect consumers and control litigation costs by creating reasonable consumer protections around nonrecourse civil litigation advances, which are mostly unregulated in Wisconsin. The bill includes the following provisions:

- Requires a written contract between the finance company and consumer including clear disclosures of the advance amount, interest rate, one-time fees, and the amounts of the potential proceeds assigned to the consumer and to the finance company.

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- Requires such contracts to include a provision allowing the consumer to cancel the contract within five days, a statement that the company has no right to participate in the dispute or make decisions on the consumer's behalf, and a statement that, except for prepayments, the company is not entitled to repayment if there are no proceeds at the conclusion of the dispute.

- Limits the total finance charge (the sum of all charges, including interest, fees, and assigned proceeds) to the prime interest rate plus 10 percent and the contract length to 36 months.

- Allows a consumer to prepay the advance at any time and entitles the consumer to a pro rata reduction in the finance charge.

- Prohibits the finance company from paying commissions or referral fees to attorneys or health care providers.

Last session, WDC supported similar legislation,[8] submitting a written memo to legislators and testifying before the relevant committee in each house. The bill was authored by a bipartisan group of legislators including several attorneys. The bill ran into headwinds as the session ended, and the Wisconsin Civil Justice Council worked to improve the bill by addressing concerns raised by some legislators and representatives of the legal finance industry.

The primary change was to simplify the finance charge calculation and link it to the prime interest rate, rather than setting specific interest rate or fee limits. The original bill capped the interest rate at 18 percent and limited fees to $360 annually. This change prevents a need for the interest rate or fee numbers to be updated in the future in response to changing financial conditions.

Also, the definitions of terms used in the bill were clarified to ensure consistent interpretation and application. Notably, the bill now refers to "nonrecourse civil litigation advances" rather than "lawsuit lending," a more accurate term that is in line with the statutory language used in other states that regulate such transactions.

IV. Other Legislative Issues

a. State Budget Bill: New Causes of Action Removed

The 2023-25 state budget, as originally proposed by Governor Evers, included new causes of action for employment discrimination, unfair honesty or genetic testing, and broadband service denial. It also would have restored the ability of private parties to bring a *qui tam* action against a person for making a false or fraudulent claim to the state's Medical Assistance program, as well as expanding those actions to include all claims to moneys from a state agency.[9]

At its first executive session on the budget, the Joint Committee on Finance voted to remove hundreds of spending proposals and non-fiscal policy items from the budget, including the above items, which will not be considered further as part of the budget process.[10]

b. Other Legislation: Farm Implements, Unsworn Declarations, Deicer Liability, RVs

The following bills are moving through the legislative process:

- Implements of Animal Husbandry (AB 14/SB 42): Creates "lemon law" requirements for a defective implement of animal husbandry that is covered by an express warranty and is repaired at least four times or is out of service for at least 30 days. Also creates a new civil cause of action allowing a consumer to recover damages, costs, and attorney fees. The Assembly passed the bill by voice vote on June 7, amending it to remove the latter provision. The bill has not yet seen committee action in the Senate.[11]

- Uniform Unsworn Declarations Act (AB 27/SB 29): Allows the use of unsworn declarations,

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under penalty of perjury, in state court proceedings under certain circumstances. This is currently allowed for unsworn declarations made in foreign jurisdictions, and the bill would expand it to include other U.S. jurisdictions. Passed the Senate by voice vote in March and has not yet seen committee action in the Assembly.[12]

- Deicer Applicators Certification Program (AB 61/SB 52): Creates a voluntary certification program for commercial deicer applicators that have completed approved training and passed an exam. Limits the liability of a certified applicator for damages arising from snow and ice accumulation. An amendment was introduced to make various updates to the bill, including improving the liability language. The relevant committee in each house has recommended the bill for passage, as amended.[13]

- Recreational Vehicle Regulations (AB 230/SB 225): Creates various new regulations affecting the recreational vehicle (RV) industry. The bill is supported by RV manufacturers, parts suppliers, and dealers. Includes a "dispute resolution" provision that allows RV dealers, manufacturers, distributors, and warrantors to bring a civil action against one another to recover actual damages, attorney fees, and costs. Requires parties to attempt mediation before filing a lawsuit. Received a public hearing in the Assembly and has not yet seen committee action in the Senate.[14]

Several other bills of interest have been introduced but have not yet received a public hearing or further committee action and do not appear likely to become law at this time. This includes legislation to create new civil causes of action for failure to properly care for a child born alive following an abortion (AB 63/SB 61),[15] financial exploitation of a vulnerable person (AB 116/SB 116),[16] and discrimination based on traits historically associated with race, including hair texture and protective hairstyles (AB 240/SB 246).[17]

Additionally, WDC has registered in support of a bill (SB 77/AB 81) that, according to the official summary, "eliminates the cap on the amount that recovery for injuries or damages may be reduced for failure to wear a safety belt." Current law limits the potential reduction of damages to 15 percent. The bill has yet to receive a public hearing or further committee action.[18]

c. Worker's Compensation Disability Ratings

The Department of Workforce Development (DWD) is proposing updates to the minimum permanent partial disability (PPD) ratings used for worker's compensation claims. DWD is required by law to review and revise minimum PPD ratings at least once every eight years to reflect advances in medical science. The department introduced this proposal at the April 11 meeting of the Worker's Compensation Advisory Council.[19] The proposal includes various ratings changes and the creation of new ratings for damage to various nerves and changes to ratings for knee, elbow, shoulder, and organ damage.

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Adam Jordahl is the Communications & Government Relations Manager at the Hamilton Consulting Group, a full-service government affairs firm located in Madison. On behalf of the firm's clients, including Wisconsin Defense Counsel, he monitors legislation, rules, and public meetings, communicates with legislators, researches policy issues, and develops reports and publications. Adam earned a B.A. from Rice University, graduating cum laude with distinction for his senior thesis on internet memes and political messaging.

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2 *Banuelos v. University of Wisconsin Hospitals and Clinics Authority*, 2023 WI 25, 406 Wis. 2d 439, 988 N.W.2d 627.

3 Wis. Stat. § 146.83(3f).

[4] *Banuelos*, 406 Wis. 2d 439, ¶¶ 7-11.

[5] *Id*. ¶ 4.

[6] *Id*. ¶ 3.

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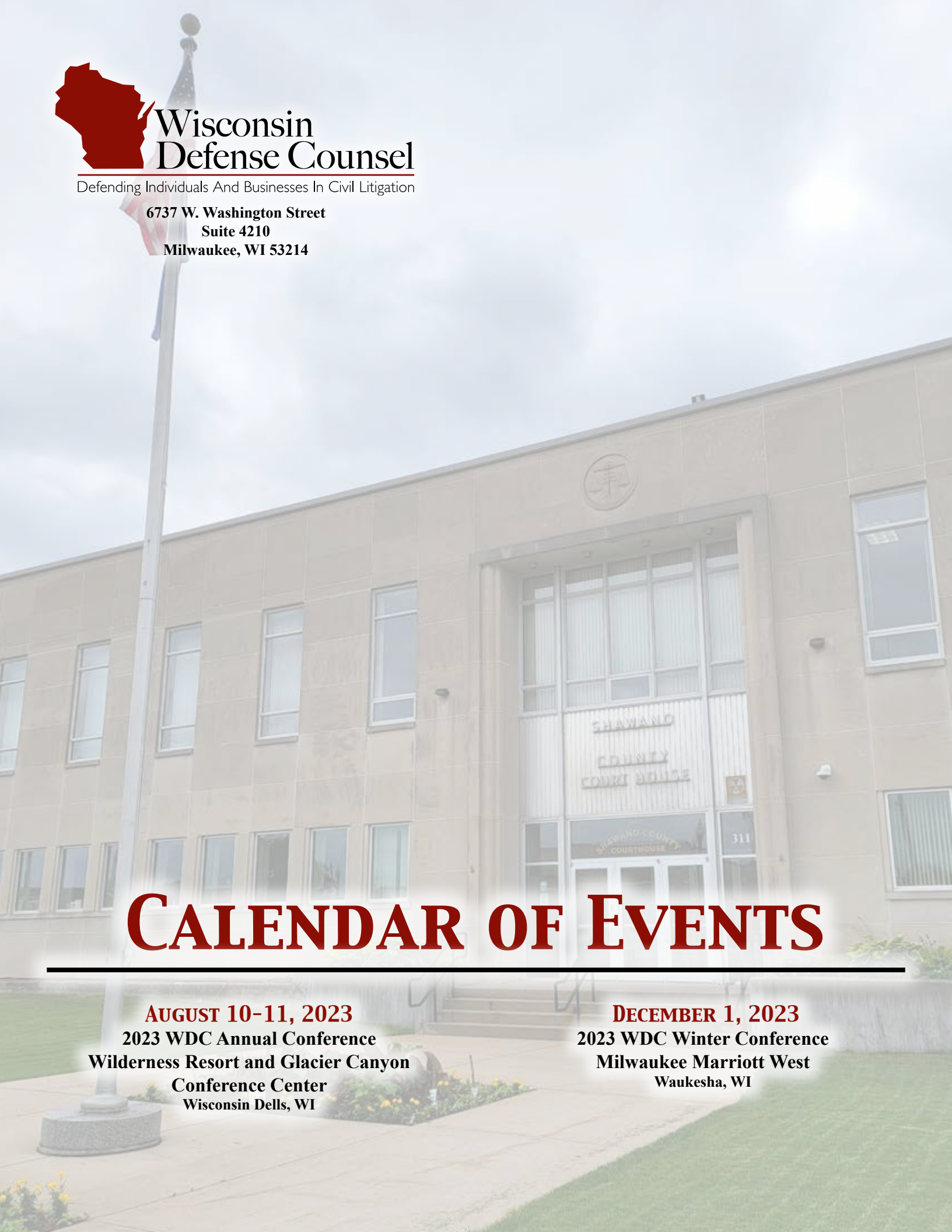

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