Wisconsin Civil Trial Journal

Summer 2024 • Volume 22 • Number 2

Also In This Issue

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

Journal Policy

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

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

PERSONALIZED SUPPORT

FOR YOUR **NEXT PROCEEDING**

DEDICATED IN-HOUSE IT SUPPORT TEAM FOR ALL TECHNOLOGIES

As the national leader in court reporting services, we understand the **intricacies of complex multi-party litigation**. Upon scheduling, your case is entrusted to an **experienced Case Concierge,** streamlining all your unique litigation logistics. Reach out to your local Veritext team today!

VERITEXT VIRTUAL

Depose witnesses remotely and share exhibits in realtime with many participants. Easily connect with any webcam-equipped device, speakerphone and the internet.

VIDEO TECHNOLOGIES

Employ broadcast-quality legal videography, videostreaming, video synchronization and videoconferencing to enhance testimony.

MYVERITEXT.COM

Schedule depositions and access transcripts and exhibits online from anywhere, anytime for free.

EXHIBIT CAPTURE

See your testimony in action. Capture compelling content by displaying electronic documents to a witness and recording computer interaction in realtime.

EXHIBIT SHARE

Introduce and share electronic exhibits with all local and remote participants through the use of your laptop or iPad. No need to print and ship multiple copies of documents.

ADVANCED CASE EXHIBITS

Ongoing hyperlinked and searchable PDF exhibit list updated after each deposition. No Wi-Fi necessary.

VERITEXT LEGAL SOLUTIONS

CONTACT US TO SCHEDULE A PROCEEDING!

www.veritext.com | calendar-midwest@veritext.com | (312) 508-6051

Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

WDC: The Voice of the Wisconsin Defense Bar

Wisconsin Defense Counsel ("WDC") is a premier statewide organization consisting of more than 375 defense attorneys. Founded in 1962, WDC (formerly known as the Civil Trial Counsel of Wisconsin) is dedicated to defending Wisconsin citizens and businesses in a professional manner, maintaining an equitable civil justice system, educating its members, creating referral sources for its members, providing networking opportunities for its members, and influencing public policy. To be eligible for full membership, WDC bylaws require that an individual be a member of the State Bar of Wisconsin and "devote 50 percent or more of his or her professional time to the defense of civil litigation." Any person or entity who devotes less than 50% of his or her professional time to defense of civil litigation is eligible for an associate membership.

WDC Mission, Vision, and Values

Our Mission: Wisconsin Defense Counsel exists to promote and protect the interests of civil litigation defense attorneys and their clients by providing professional education and development, fostering collegiality, promoting principles of diversity and inclusion and striving to ensure equal access to justice for all defendants.

Our Vision: Delivering superior legal services with integrity and professionalism.

Our Values: Educate; Diversity & Inclusion; Collegiality; Integrity; Development; and Service.

WDC Benefits of Membership

Education: WDC holds three education programs during the year, all of which provide continuing legal education (CLE) credits.

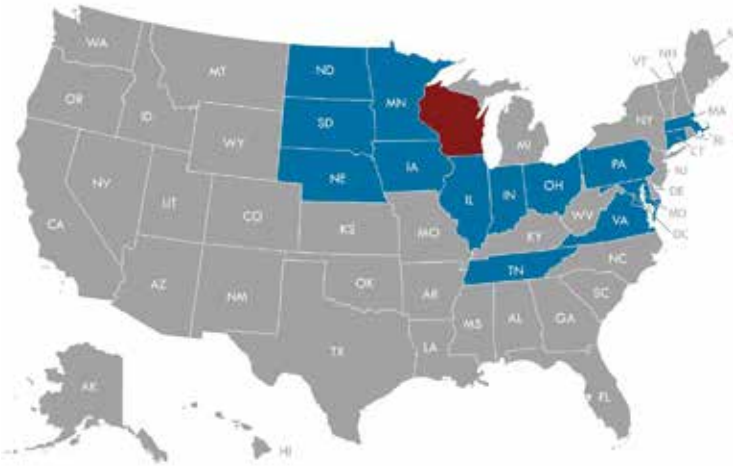
Expert Witness & Deposition Requests: Members can find expert witnesses or copies of depositions in various subject fields by using the knowledge and experience of other members. Requests are sent by broadcast email to all WDC members.

Web Resources: Members are included in a searchable database on the WDC website. Members can also obtain all the seminar outlines that are presented at WDC educational events online. These outlines are a quick and easy way to get access to the latest information on various topics.

... and so much more!

MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

MLM Insures Law Firms in 15 States, Including Wisconsin.



Proud Corporate Sponsor of the WDC
Visit our table in the Expo Hall.

Put your trust in the carrier created by lawyers, run by lawyers, exclusively serving lawyers.

- First Dollar Defense
- Defense Program discounts for qualifying defense firms/attorneys
- Returned over **$80 million** in profits to policyholders since 1988
- 3 Free MLM CLEs per year for each insured, $165 value per insured

Insuring Wisconsin Law Firms Since 2001

Get a fast quote today!
www.mlmins.com
Chris Siebenaler, Esq.
612-373-9641
chris@mlmins.com

Protecting Your Practice is Our Policy.®

President's Message: The Importance of Effective Motion Practice Skills

by: Monte E. Weiss, President, Wisconsin Defense Counsel

Recently, I attended a pretrial conference. The lawyers involved were older, seasoned attorneys. I had a minor role in the case, so I had the "pleasure" of sitting back, largely listening and observing. Ignoring my frustration at being sidelined, as I listened to the way counsel presented their arguments, I was struck by the unique benefits of our legal system.

As I listened to the attorneys argue and watched the interactions between counsel and the court, I was reminded of the efficacy of our advocacy system. Counsel argued their points, responded to points as needed, and fielded inquiries from the court. Just as I was swayed by one side's argument, I quickly saw the merits of the countervailing position.

Our advocacy system requires argument. Arguments are necessary as after all, a "fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making." [1]

The arguments at the recent pretrial conference highlighted points that needed to be made, addressed counterpoints to be asserted, and thoroughly handled replies to arguments. As I listened to the arguments, I also paid attention to the way the arguments were presented. Sometimes, the way a particular argument was presented impaired the effectiveness of the point being argued. At other times, the presentation of a particular argument was very effective and very persuasive.

It just so happened that I had the opportunity to "observe" another round of oral arguments in a different case. Like the previous hearing, my client's interests (at least those interests that I represented) were not directly implicated in the motion hearing. Unlike the prior hearing, I appeared by telephone while other counsel appeared in person.

Given that I could not "see" what was going on, I was limited to listening to the arguments. As I listened to the oral arguments, I was again struck by the choices made by counsel to present their points and counter those made by others.

SEMKE

EXCELLENCE IN ENGINEERING

FORENSIC

Discover the Truth with Semke Forensic

What does it take to provide scientifically sound and defensible opinions when you're faced with complex failures and highly technical disputes? At Semke Forensic, we believe it requires exceptional engineers, investigators, and consultants with an intense focus on quality.

The Expanding Semke Services

- **Accident Reconstruction**
- **Property Damage**
- **Computer Forensics**
- **Product Liability**
- **Vehicles/Machinery**
- **HVAC/Appliance Failures**
- **Workplace Accidents**
- **Fire/Explosion Causation**
- **Plumbing/Fire Suppression**
- **Mold/Water Damage**

SEMKE FORENSIC

St. Louis
154 Hughes Lane
St. Charles, MO 63301
636.896.9995

Kansas City
100 N. Clayview Dr., Suite B
Liberty, MO 64068
816.415.2020

Chicago
3345 Commercial Avenue
Northbrook, IL 60062
708.478.4000

Visit **www.semke.com** or contact us at **888.804.5020**

One attorney started his argument by identifying a list of salient points that he wanted the court to focus upon. Once he identified the points, he then added substantive arguments for each. I suspect that he curtailed the extent of this supplementation as the court previously advised counsel that it had read all the briefing and was therefore familiar with the issues presented, which I thought was a smart move by counsel. Once counsel completed his argument, opposing attorney jumped in. He presented his argument with an example of a common, everyday occurrence as the mechanism to illustrate his point. Truthfully, I found myself swaying back and forth between the arguments, agreeing with one position and then agreeing with the points made in opposition.

I suppose to some extent, my meandering adherence to a particular point was due to the fact that I had not read the briefing in any detail, nor studied the cases cited therein (at least not recently) as I did not represent the client on the issues being presented to the court. This willful blindness, however, allowed me to focus on the style and, to a lesser extent, the substance of the arguments presented – relying solely on counsel's ability to effectively convey this information. This willful blindness also allowed me to assess the effectiveness of the oral presentation without having pre-decided the legal issue. In short, I allowed myself the opportunity to be convinced by the arguments and the manner in which those arguments were presented. I made judgment calls on what I thought worked and what did not.

Every time I have the opportunity to watch arguments, participate in motion practice or appear before a court, I am continually reinvigorated to invest in our Wisconsin Defense Counsel's defense skills workshop. The most recent skills clinic was focused on motion practice. Younger attorneys were given briefs on three different motions and set up in pairs. Each participating attorney argued each motion, sometimes on the plaintiff's side and sometimes on the defendant's side. The goal of the skills clinic was to teach younger attorneys effective motion practice skills. These skills included developing arguments, assessing the opposing arguments, outlining the points to be presented and then, of course, arguing the motions before the "court." Once each oral argument was completed, the "court" provided some feedback regarding what worked and what did not work for the participants and how to be more effective with oral argument.

The "gap" of effectiveness between experienced counsel and new attorneys that I had the opportunity to observe recently at the skills clinic was obvious, but also expected. The old adage that "we all have to start somewhere" is certainly true. That said, I do believe that the skills clinic was helpful to those that participated. The participants had the opportunity to practice arguing motions, assessing and responding to opposing arguments "on the fly" and then perhaps most critically, each participant received important feedback from the "court" on how to improve their argument skills. I believe that this training session will make these attorneys better advocates for their clients in their upcoming motion practice.

This skills clinic, as well as the two skills clinics that preceded this one, are an important part of the Wisconsin Defense Counsel's responsibility to help engage the younger generation. Our more experienced membership can provide knowledge and guidance to newer members so that the grade of their learning curve is reduced. While my time as President of this organization is rapidly coming to an end, I believe that this skills clinic program should continue as this is a benefit to our members.

WOODLAKE
MEDICAL MANAGEMENT

TAKING THE STRESS OUT OF THE IME PROCESS SINCE 1994

- PERSONALIZED, EFFICIENT SERVICE
- HIGH QUALITY, OBJECTIVE REPORTS
- FRIENDLY STAFF AND HAPPY CLIENTS
- FAMILY OWNED AND OPERATED

LIST OF SERVICES:

INDEPENDENT MEDICAL EXAMINATIONS
INDEPENDENT MEDICAL RECORD REVIEWS
VIDEO/NON-VIDEO DEPOSITIONS
TELECONFERENCE WITH PHYSICIAN
IMPAIRMENT RATINGS

OPTIONAL SERVICES:

COMPLIMENTARY COVER LETTER WRITING
DIAGNOSTIC IMAGING RETRIEVAL
NOTIFICATIONS/REMINDERS
TRANSPORTATION/INTERPRETER

Contact your Account Manager
today to schedule a service:
Jennifer Imig
jen.imig@woodlakemedical.com
952-253-6605

We have very experienced attorneys that have knowledge and skills which have been acquired over decades. This knowledge and these skills will be lost as retirements necessarily occur. So, we must take advantage of the opportunity we have now and continue involving our more veteran members before their wisdom and experience "rides off into the sunset."

Likewise, as an organization, we must continue to engage the younger generation by continuing to provide value to their membership in this organization. Providing defense skills clinics is but one means to provide this value. Our committees are another excellent way to create and maintain interest in the Wisconsin Defense Counsel and enrich the lives of our members. However, this goal cannot be achieved through the effort of committee chairs alone. When the opportunity arises for involvement, I encourage our more seasoned members to continue to volunteer their time. An hour or an afternoon can make a significant difference in the success of a program or an event. I would also encourage our member law firms to continue to support their younger associates by making them aware of, encouraging them to attend and, of course, paying for them to participate in these events and programs. And, to our younger members, I encourage you to take advantage of what the Wisconsin Defense Counsel can do for you. The networking, educational, and practical skills training opportunities available to you through the Wisconsin Defense Counsel can help you with your career.

Author Biography:

Monte E. Weiss, Case Western Reserve Univ., 1991, of Weiss Law Office, S.C., Mequon, practices primarily in the defense of bodily injury, property damage, and professional negligence claims for insurance companies and self-insured companies. In conjunction with this area of practice, he has drafted several personal lines insurance policies, including homeowner and automobile policies. He routinely represents insurance companies on insurance contract interpretation issues and is a frequent lecturer and author on insurance topics. He also represents policyholders dealing with coverage denials from their carriers. He the current President of the Wisconsin Defense Counsel. Attorney Weiss can be reached at via his firm's website at www.mweisslaw.net.

References:

1. *Neonatology Assocs., P.A. v. Commissioner, 293 F.3d 128, 131 (3d Cir. 2002).*

Cross Jenks Mercer & Maffei LLP

ATTORNEYS SINCE 1889

LET US SHOW YOU THE BENEFIT THAT A CENTURY OF INSURANCE DEFENSE EXPERIENCE AFFORDS.

For nearly a century, insurance defense has been the core of our business.

WAYNE MAFFEI	NICOLE MARKLEIN	WILLIAM BROOKLEY	CHARLES POLK III

221 3RD AVENUE, BARABOO, WISCONSIN
PHONE: 608-356-3981
VISIT OUR WEBSITE WWW.CJMMLAW.COM

2024 WDC Annual Awards

The WDC Annual Awards recognize the talent, effort, and accomplishments of our incredible members. Congratulations to the following award recipients who will be recognized during the WDC 2024 Annual Conference on August 8-9, 2024!

2024 Advocate of the Year Award Recipient: John R. Shull Jr.

Congratulations to John Shull for being selected by the WDC Board of Directors as the 2024 Advocate of the Year! The Advocate of the Year Award recognizes the member with the most defense work success of the prior calendar year.

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

John had multiple trials in 2023. One case involved a carbon monoxide poisoning that was complex and high exposure. John did a great job mitigating the damages and obtaining a great result for his client. John often has very difficult cases and clients for a variety of reasons. He carries a heavy caseload at all times. Yet he zealously represents his clients in each and every case.

Nominated By: Megan McKenzie, American Family Insurance

2024 Distinguished Professional Service Award Recipient: Vincent J. Scipior

Congratulations to Vince Scipior for being selected by the WDC Board of Directors as the recipient of the 2024 Distinguished Professional Service Award! The Distinguished Professional Service Award recognizes a longtime member who has given consistent effort to grow and improve WDC.

Vincent is a shareholder at Coyne, Schultz, Becker & Bauer, S.C. in Madison where he practices insurance defense (merits and coverage), personal injury, professional liability, long-term care defense, and general litigation. He received his bachelor's degree in 2007 from the University of Wisconsin-Madison and his J.D. in 2011 from the University of Wisconsin Law School. He is admitted to practice in all Wisconsin state and federal courts, as well as the Seventh Circuit Court of Appeals. In addition to WDC, Vince is a member of the American Inns of Court James E. Doyle Chapter, the Dane

THE Everson Law Firm

EVERSON | WHITNEY | EVERSON | BREHM S.C.

CIVIL LITIGATION DEFENSE

At The Everson Law Firm, we treat insurance litigation like a profession, not a business. Our attorneys provide continual legal analysis and strategic recommendations to our clients regarding liability and damages issues and take multiple insurance defense litigation cases to trial each year. We have the experience and tenacity to give your case the personalized attention it deserves, whether litigation ends with a victorious dispositive motion, through negotiation/mediation or in the courtroom.

Visit eversonlaw.com to connect with an experienced lawyer. We're open and ready to serve clients in Greater Green Bay, Northeast Wisconsin and beyond.

Peter J. Hickey | Gabriel G. Siehr | Heather L. Nelson | Todd C. Dickey | Ryan M. Johnson | Brian D. Anderson

County Bar Association, and the State Bar of Wisconsin. He was recognized as a 2017 Up and Coming Lawyer by the Wisconsin Law Journal and has been included in the Wisconsin Rising Stars List by Super Lawyers Magazine since 2016.

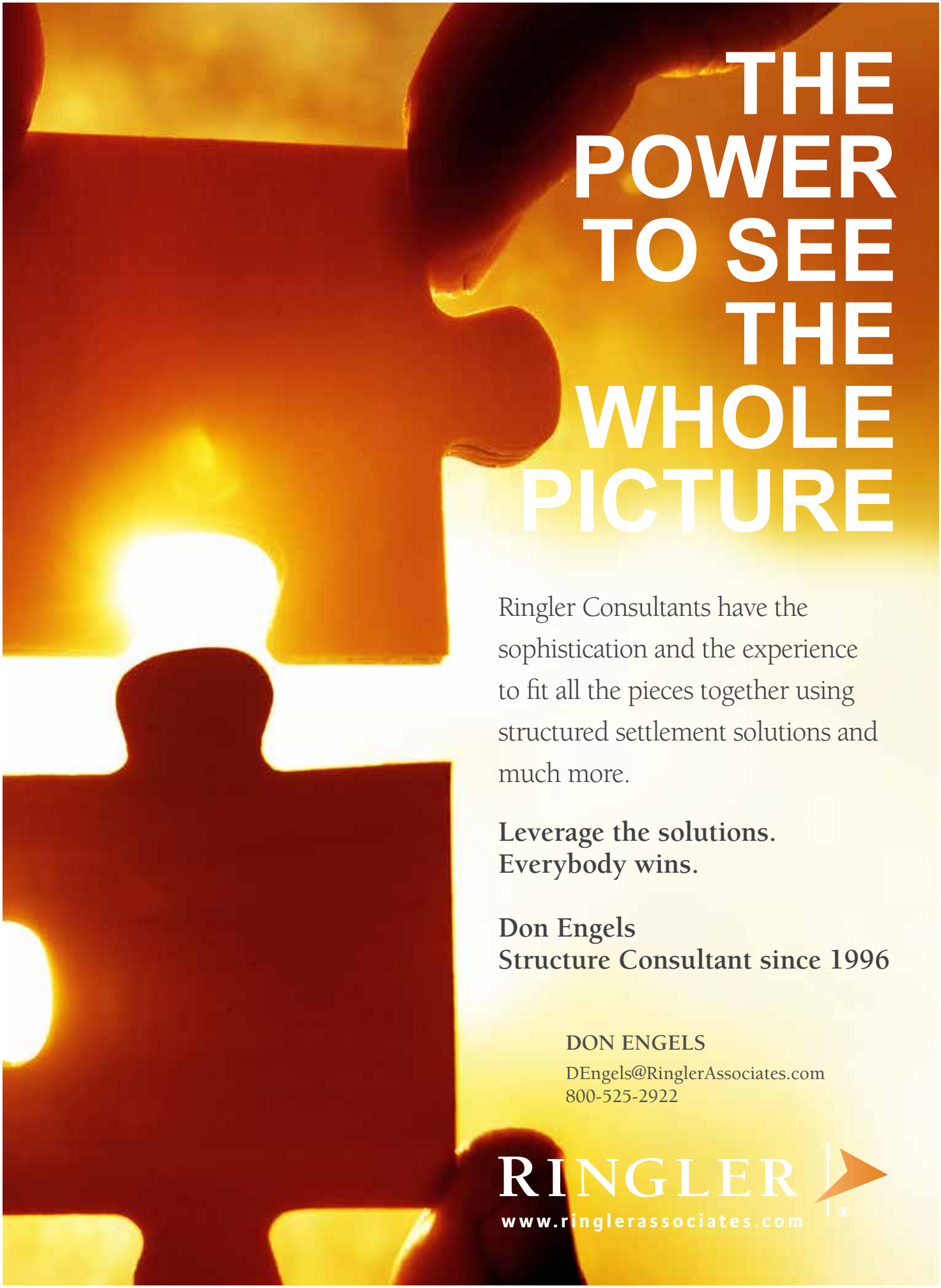
Vince has been a member of WDC since 2011. He has written several articles for the WDC Journal, has been the Editor of the Journal since 2018, is a current member of the WDC Board of Directors, and is an active member of the WDC amicus committee. Vince also recently volunteered as a "judge" at the WDC defense skills motion practice workshop on June 27, 2024. As Editor of the Journal, Vince does a superb job and has been able to solicit and put together excellent, helpful articles in each issue that comes out!

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

2024 Publication Award Recipient: Patricia Epstein Putney

Congratulations to Patricia (Patti) Epstein Putney for being selected by the WDC Journal Editor and Board of Directors as the recipient of the 2024 Publication Award! The Publication Award recognizes a well-written cutting-edge article written for the Wisconsin Civil Trial Journal. Patti is receiving the award for her article, "How to Approach Cases Involving Plaintiffs Whose Ongoing Pain Complaints Are Being Caused by Unrelated Conditions," which appeared in the 2023 Winter Issue of the Journal.

Patti 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.



THE POWER TO SEE THE WHOLE PICTURE

Ringler Consultants have the sophistication and the experience to fit all the pieces together using structured settlement solutions and much more.

Leverage the solutions.
Everybody wins.

Don Engels
Structure Consultant since 1996

DON ENGELS
DEngels@RinglerAssociates.com
800-525-2922

RINGLER®
www.ringlerassociates.com

Punitive Damages Primer

by: Kristen S. Scheuerman, Weiss Law Office, S.C.

If you find yourself defending a claim for punitive damages, you will likely discover that there is simply not much case law in Wisconsin on the issue (specific to personal injury actions). However, understanding the current statute, the legislative history behind the "new statute," and the body of case law that does exist is as good a place as any to start.

The statutory scheme for punitive damages is found in Wis. Stat. § 895.04(3). "The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."[1] "The legislature enacted Wis. Stat. § 895.043(3) in 1995, thereby altering Wisconsin's common law standard for punitive damages.[2] In doing so, it heightened the state of mind required of a defendant from a "wanton, willful and reckless" disregard for rights of another to an "intentional disregard" for rights of another.[3] "Prior to the enactment of Wis. Stat. § 895.85(3), the common law established the standard of conduct governing the imposition of punitive damages. Under it, punitive damages could be awarded for 'outrageous' conduct. A person's conduct was 'outrageous' if the person acted 'either maliciously or in wanton, willful and in reckless disregard of the plaintiff's rights.'"[4]

With the passage of the new statute, the standard was no longer outrageous or malicious conduct. But what does acting with an intentional disregard of someone's rights mean under the new statute? "A defendant acts with intentional disregard if he or she: (1) 'acts with a purpose to cause the result or consequence,' or (2) 'is aware that the result or consequence is substantially certain to occur from the person's conduct.' Accordingly, in order to fall within Wis. Stat. § 895.043(3), a defendant's conduct must be (1) deliberate, (2) in actual disregard of the rights of another, and (3) 'sufficiently aggravated to warrant punishment by punitive damages.' […U]nder this heightened threshold for punitive damages, […] circuit courts [are expected] to serve as gatekeepers before sending a question on punitive damages to the jury.'"[5]

Within the language of the statute itself, there are two mandatory elements as it relates to "intentional disregard": acting with purpose to cause the result or consequence and awareness that the result or consequence is substantially certain to occur.[6] Case law has developed three elements that must exist for a punitive damage claim to survive: 1) deliberate conduct, 2) the rights of another must be actually disregarded, and 3) the conduct must be sufficiently aggravated to warrant punishment.[7]

Most practitioners are aware of the seminal punitive damages case in Wisconsin: *Strenke*. But be mindful of the fact there are two *Strenke* decisions (the OG *Strenke* case and a second decision that mostly focused on whether the amount of punitive damages awarded violated Strenke's due process rights). This article does not focus on the proportionality considerations relative to a punitive damage award, but *Stenke* 2.0 (2005 WI App 194) is a must-read case if that is an issue you need to consider.

Strenke 1.0 (2005 WI 25) is significant for many reasons, including that it overruled, in part, a portion

EXPERT WITNESSES

SKOGEN
ENGINEERING GROUP, INC.

5972 Executive Drive – Suite 200
Madison, WI 53719

Areas of Expertise

- **Motor Vehicle Accident Reconstruction**
- **Truck Accidents Reconstruction**
- **Heavy Truck ECM Imaging**
- **Vehicle Airbag Sensing Systems**
- **CDR - Crash Data Retrieval**
- **Vehicle Defect Analysis**
- **Mechanical Defect Analysis**
- **Low Speed Impact Analysis**
- **Seat Belt Restraint Analysis**
- **Product Liability**
- **Slip/Trip and Fall Analysis**
- **Farm and Industry Accidents**
- **Computer Simulations**
- **Environmental Analysis**
- **Electrical Systems**
- **Structural Failure Analysis**
- **Construction Analysis**
- **Highway/Street Design Analysis**
- **Drone Mapping**
- **FARO 3D Scanning**

608-442-7321 – Telephone
office@skogen.com
www.skogen.com

Over 100 Years of Combined Experience

Dennis D. Skogen, MSME, PE – Jeffery J. Peterson, MSME, PE
Robert J. Wozniak, MSME, PE – Christopher J. Damm, PhD
Paul T. Erdtmann, MSME, BSEE, PE
Jeffrey J. Koch, PE - Andrew C. Knutson, PE, SE, MS
Zachery R. Bingen, BSME, EIT
Mary E. Stoflet, AS - James W. Torpy, BS

of the "Big Blue" case (*Wischer v. Mitsubishi Heavy Indus. Am. Inc.*[8]). The *Wischer* court held that the phrase "intentional disregard of the rights of the plaintiff" included an intent element, specifically an intent to cause harm.[9] In *Strenke* 1.0, the Wisconsin Supreme Court wrote, "we are not persuaded by the interpretation of the *Wischer* court, which inserted words into the statute. Accordingly, we overrule that decision here."[10] "[W]e disagree with the *Wischer* court's interpretation of Wis. Stat. § 895.85(3). The legislature did not intend an 'intentional disregard of the rights of the plaintiff' to require 'intent to cause injury to the plaintiff.' Rather, it reaffirmed the common-law principle that punitive damages can be premised on conduct that is a 'disregard of rights.' However, the legislature chose the word 'intentional' to describe the heightened state of mind required of the defendant who disregards rights, instead of the common law's description of 'wanton, willful and reckless.' Our interpretation of Wis. Stat. § 895.85(3) is supported by the language of the statute, the legislative history, and the common law meaning of the phrase in question."[11]

The *Strenke* court provides additional support for its reading of the statutory language as it relates to an intent to cause harm. "If the legislature had intended to specify an 'intent to injure' requirement, it could have easily done so. Indeed, there was another statute enacted in the same legislative session in which Wis. Stat. § 895.85(3) was enacted that demonstrates this point. Wisconsin Stat. § 895.525(4m) was created by 1995 Wis. Act 447 and allows liability of contact sports participants only 'if the participant who caused the injury acted recklessly or *with intent to cause injury*.' There is no comparable language in Wis. Stat. § 895.85(3)."[12]

There are several key takeaways from *Strenke* 1.0 that I would summarize as follows: The courts must act as gatekeepers, under the new statute there should be *fewer* cases giving rise to punitive damages, and conduct must be aggravated for it to be the basis for punitive damages.

As to gatekeeping, the *Strenke* court wrote, "we expect circuit courts to serve as gatekeepers before sending a question on punitive damages to the jury. We stated this gatekeeper function in *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 735, 456 N.W.2d 585 (1990) (citing *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 70, 126 N.W. 554 (1910)) as follows: The circuit court should not submit the issue of punitive damages to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite . . . conduct. The court of appeals in *Lievrouw*, 157 Wis. 2d at 344, restated this articulation of the gatekeeper's function as follows: Stated another way, a question on punitive damages may not be given to the jury unless the trial court concludes that a reasonable jury could find from the evidence that entitlement to punitive damages has been proven by the middle burden of proof, 'clear and convincing evidence.'"[13]

If you are defending a claim for punitive damages based on conduct that is negligent, carefully read *Strenke* 1.0. In reminding the courts of their gatekeeping duties, the *Strenke* court held that "punitive damages are not recoverable if the wrongdoer's conduct is merely negligent. Furthermore, not every drunk driving case will give rise to punitive damages. Only when the conduct is so aggravated that it meets the elevated standard of an 'intentional disregard of rights' should a circuit court send the issue to a jury."[14]

Practitioners also need to be aware of the *Strenke* court's holding as to the impact the new statute should have on punitive damage cases. "Under the prior common law standard, it was accepted that 'the vast majority of negligence cases do not give rise to the remedy of punitive damages.' The legislature intended with the heightened standard that now there would be even fewer negligence cases giving rise to punitive damages."[15]

Finally, *Strenke* 1.0 is really the first place the concept of aggravated conduct is developed as it relates to the elements necessary for punitive damages to be appropriate. "[W]e conclude that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the

plaintiff's rights, or is aware that his or her acts are substantially certain to result in the plaintiff's rights being disregarded. This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, a property right, or some other right. Finally, the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages."[16]

Since the *Strenke* decision, there have been just two other significant decisions issued by the Wisconsin appellate courts relating to punitive damages specific to personal injury actions: *Henrikson v. Strapon*[17] and *Wosinski v. Advance Cast Stone, Co.*[18] Neither case altered the current standard for punitive damages in Wisconsin, but practitioners should be aware of the *Henrikson* court's discussion about the level of awareness required by a defendant to establish a basis for punitive damages. "The conviction for reckless driving also does not provide a reasonable basis for inferring the requisite awareness by Strapon. Wis Stat. § 346.62(2) prohibits 'endanger[ing] the safety of any person or property by the negligent operation of a vehicle.' A conviction of this charge requires proof beyond a reasonable doubt that a defendant's operation of a vehicle in a manner amounting to criminal negligence endangered the safety of a person or property. Criminal negligence means the 'defendant should have realized that the conduct created a substantial and unreasonable risk of death or great bodily harm to another.' 'Should have realized' that conduct created the prescribed risk requires a lesser degree of awareness than that required for punitive damages under the 'aware that [one's conduct was] substantially certain' standard."[19]

Author Biography:

Kristen S. Scheuerman joined Weiss Law Office, S.C., in October 2022 after spending more than a decade at a large Fox Valley law firm, where she practiced as a Shareholder. Kristen's practice has always been focused on personal injury and civil litigation, and before joining Weiss Law Office, she also served as a municipal prosecutor. Throughout her career, Kristen's practice has also included appellate work in a variety of practice areas. Kristen earned her bachelor's degree from Lawrence University and her law degree from Marquette University Law School. She is admitted to practice in all Wisconsin state courts and both district courts.

References:

1 Wis. Stat. § 895.04(3).
2 *Strenke v. Hogner*, 2005 WI 25, ¶ 19, 279 Wis. 2d 52, 694 N.W.2d 296.
3 *Id*.; *Berner Cheese Corp. v. Krug,* 2008 WI 95, ¶ 63, 312 Wis. 2d 251, 752 N.W.2d 800.
4 *Strenke*, 279 Wis. 2d 52, ¶ 15 (citing *Sharp v. Case Corp*., 227 Wis. 2d 1, 21, 595 N.W.2d 380 (1999)).
5 *Berner Cheese*, 312 Wis. 2d 251, ¶ 64 (citations omitted).
6 *Id.*
7 *Id.*
8 *Wischer v. Mitsubishi Heavy Indus. Am. Inc.*, 2003 WI App 202, 267 Wis. 2d 638, 673 N.W.2d 303.
9 *Id.* at ¶ 44.
10 *Strenke*, 279 Wis. 2d 52, ¶ 34.
11 *Id*. at ¶ 19.
12 *Id*. at ¶ 21 (emphasis added).
13 *Id*. at ¶¶ 40-41.
14 *Id*. at ¶ 42 (citing *Wangen v. Ford Motor Co.,* 97 Wis. 2d 260, 275, 294 N.W.2d 437).
15 *Id*. at ¶ 39 (citing *Brown v. Maxey*, 124 Wis. 2d 426, 432, 369 N.W.2d 677).
16 *Id*. at ¶ 38.
17 *Henrikson v. Strapon*, 2008 WI App 145, 314 Wis. 2d 225, 758 N.W.2d 205.
18 *Wosinski v. Advance Cast Stone, Co.*, 2017 WI App 51, 377 Wis. 2d 596, 901 N.W.2d 797.
19 *Henrikson*, 314 Wis. 2d 225, ¶ 32 (citing Wis. JI-Criminal 2650).

ONE Law Group SC

The willingness and ability to try a case is paramount to a successful defense strategy. One Law Group, S.C.'s team of defense attorneys and paralegals are not afraid to try cases. We successfully defend insurers and insureds in a wide variety of claims ranging from auto, property and casualty, professional malpractice, bad faith, product liability and insurance coverage matters. Our defense team works with a wide variety of insurers and understands the importance of timely reporting and communication with both the file handler and insured. No claim is too large or too small, whether in litigation, appeal, arbitration, mediation or still in the claims phase. Our defense team has decades of experience in all matters for all sizes of insurers, from national carriers to small town mutuals.

THE POWER OF ONE

Tim Hawley

Insurance Law
Mediation
Arbitration
Litigation & Trials

Erik J Pless

Insurance Defense
- Auto & Premises
- Legal Malpractice
- Bad Faith Defense
- Coverage Litigation

866.525.5200 www.onelawgroupsc.com 920.336.5766

BMR BELL MOORE & RICHTER SC


William A. Abbott


William D. Bolte


Ann C. Emmerich


David E. McFarlane


John M. Moore


Melita M. Mullen


Kelsey A. Pelegrin


Patricia J. Putney


David G. Ress


Morgan K. Stippel


Sheila M. Sullivan


William C. Williams

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.

BMR PRACTICE AREAS:

- Alternative Dispute Resolution
- Appellate Practice
- Business/Corporate Planning/Litigation
- Civil Rights/Municipal Litigation
- Commercial/Contract Disputes
- Commercial Collection
- Construction Law/Litigation
- Contracts
- Employment Law
- Environmental Law/Litigation
- Estate Planning/Elder Law/Probate
- Finance/Financial Institutions
- General Liability Defense
- Health Care
- Insurance Agent Litigation
- Insurance Coverage/Bad Faith Litigation
- Insurance Defense
- Intellectual Property
- Landlord-Tenant
- Legal/Accounting Liability Defense
- Medical Malpractice Defense
- Municipal Law
- Personal Injury
- Products Liability
- Public Utilities/Telecommunications
- Real Estate
- Real Estate Agent/Broker Litigation
- Regulation/Licensing
- Securities Law
- Subrogation Claims
- Tax Advice/Planning/Litigation
- Workers' Compensation Defense

FOR YOUR LEGAL NEEDS CONTACT US AT:
345 W. Washington Ave. | Suite 302 | Madison, WI | 53703-3007
(608) 257-3764 | www.bmrlawyers.com

Bell, Moore & Richter, S.C., is a majority women-owned law firm. Providing legal services since 1851.

Sure, I Can Help You with That: Seeking Asylum – How Two Insurance Defense Lawyers Also Became Immigration Lawyers

Megan L. McKenzie and Chester A. Isaacson, American Family Insurance Co.

Editor's Note: We all get asked from time to time if we can help a friend or family member with a legal matter outside of insurance defense work. Usually, we refer the person to an expert in that field, whether it be criminal law, family law, bankruptcy law, etc. Occasionally, however, we get asked to help with something that is out of our comfort zone, but still within our skill set. This article is one such example. If you would like to submit an article about a time when you comfortably ventured into an unfamiliar area of law, please send an email to the Editor at vscipior@cnsbb.com.

I. A Brothers' Story

Usman[1] and his younger brother, Ahmad, were born and raised on a small farm in rural Afghanistan where their family grew wheat and sugar. As is customary in Afghanistan, their family was large. Usman and Ahmad were two of ten siblings.

As young men, the two brothers joined the Afghan National Army ("ANA") and, after their training, joined the coalition forces in the war against the Taliban.

Contrary to what many in the US believe, most Afghan citizens despise terrorist organizations such as the Taliban in a much more passionate and personal way than we could ever understand. For the vast majority of us in America, our experience with terrorism amounts to passive attention paid to a nightly news broadcast or the occasional glimpse of a headline as we casually swipe through the online articles in search of more "important" news.

The lives of nearly every Afghan citizen, however, have been touched in some meaningful way by terrorism. Afghans know the Taliban as a once laudable byproduct of the mujahideen mission to combat Soviet occupation that, over time, mutated into an extremist organization that has partnered with a myriad of international terrorist groups to impose extremist ideologies through violence. Over the years, the Taliban has fought to assert its authority through intimidation, discrimination, extortion, abuse, and murder. Most Afghan citizens have been either personally victimized by the Taliban or have friends and family members who have been subjected to the Taliban's cruel tactics of violence and oppression.

When viewed through this lens, it becomes easy to understand why Usman and Ahmad eagerly chose to fight alongside the coalition forces in the hopes that doing so would finally drive the Taliban from their beloved country. A typical tour of duty for a US soldier lasts six to twelve months. Usman and Ahmad fought with the US-led coalition forces, without interruption, for nearly two decades. Ahmad served primarily as a driver, while Usman rose quickly through the ranks and ultimately became a Captain.

During their many years of service, Usman and Ahmad worked closely with and fought alongside the US forces. They accompanied the US coalition forces on hundreds of combat missions and provided critical cultural advice on the diverse groups that

inhabited the various areas where coalition forces were operating. Needless to say, this did not go unnoticed by the Taliban, and the brothers began to receive chilling letters from the Taliban threatening them and their family with death if they did not leave the ANA.

When the brothers ignored these letters, the Taliban made good on its threats, attempting unsuccessfully to assassinate them on multiple occasions through the use of remote-detonated explosives. Neither the letters nor the assassination attempts deterred Usman and Ahmad. The brothers had devoted their lives to the war against terror and wholeheartedly believed in America's promise to eliminate the Taliban.

One can therefore only imagine the absolute horror, confusion and disbelief the brothers experienced when they were told by their superiors to report to the division headquarters, only to find, upon arrival, that the base had been completely abandoned and the US forces had begun a complete withdrawal from the country. At that moment, the brothers knew that they had to either leave Afghanistan or lose their lives.

Usman and Ahmad quickly collected their families and rushed to the Kabul Airport hoping to be evacuated from the country before the Taliban regained control. Unfortunately, however, thousands of others had also descended upon the airport with similar intentions.

As the brothers and their families slowly made their way toward the airfield, they were forced to cross a deep drainage canal and contend with a mob of people who were fighting to make their way to the planes. The brothers were afraid that their wives and young children would be injured or killed. They therefore made the impossibly difficult decision to leave their families behind in the hopes that they would be able to make it out of Afghanistan on a later flight when conditions were less dangerous.

Unfortunately, however, conditions deteriorated faster than anyone could have predicted after the US withdrawal. In a matter of days, the Taliban regained control of much of the country, including the Kabul Airport and flights out of the country effectively stopped. Usman and Ahmad's families now live in hiding in Afghanistan, prisoners in their own homes, surviving only with the assistance of other family members and friends who remained in Afghanistan.

After their evacuation from Afghanistan, the brothers were initially flown to a base in Kuwait and ultimately made their way to Wisconsin, where they stayed with an incredibly kind member of the US military they had befriended through their close work with the coalition forces. Shortly thereafter, they were connected with a local non-profit, and the asylum process began.

II. Qualifications for a Grant of Asylum

In brief, asylum protects people within the United States or at a point of entry who have a well-founded fear of being prosecuted in their country of nationality. Further, to qualify for asylum, the individual must be outside of their country of nationality and unable or unwilling to return.

Much of today's asylum law is based on the aftermath of World War II. The war left as many as eight million people displaced; two million of whom could never return to their home countries. Many of these displaced people found themselves in countries that did not want them. Consequently, the refugees received little protection, assistance, and no legal status. This prompted the United Nations to seek a solution to the refugee problem in cooperation with various other countries from around the world. The concept of asylum and the laws surrounding it were born from these efforts.

Immigration law is always changing. It is generally the case that anyone who wishes to apply for asylum must do so within one year of arriving in the United States. However, if the individual arrived on a visa and has some other lawful status (such as a student or tourist), then the rule is that you must apply within a reasonable amount of time after that status expires. Generally, six months is considered to be a reasonable timeframe.

Tired of talking to robots?

At Wisconsin Mutual, you talk to a real person. Every time.

Your trusted insurance partner since 1903.

Wisconsin Mutual
Insurance Company

(608) 836-HOME

www.wiins.com

MON - FRI: 8:00 AM - 4:30 PM

10% WDC DISCOUNT
ON HOME AND AUTO

HOME | AUTO | DWELLING | FARM | BUSINESS | UMBRELLA

Asylum is a discretionary form of relief. Although an asylum applicant has the burden of establishing that a favorable exercise of discretion is warranted, absent any adverse factors, asylum should be granted in the exercise of discretion.

To demonstrate eligibility for asylum, an applicant must show they are a "refugee".[2] A refugee is a person who is outside their country of nationality who is unable or unwilling to return to their home country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[3] We argued that Usman and Ahmad had well-founded fears of persecution based upon their membership in a particular social group, political opinion, and religion.

An applicant who seeks a grant of asylum based on membership in a particular social group must establish that "the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."[4] A characteristic is immutable if it is either beyond the power of the individual to change, or so fundamental to their identity that they should not be required to change it.[5] The particularity requirement is met if the group is sufficiently distinct that it constitutes a discrete class of persons; and a group is socially distinct if society perceives it as a group, regardless whether members of the group are identifiable by sight.[6] Because Usman and Ahmad were ANA servicemembers, they are members of a group with a common, immutable characteristic, which cannot now be changed. The Taliban recognizes current and former ANA and other Afghan military forces members and targets them based on that membership.

Usman and Ahmad's fears of persecution based on their military service were well-founded. An asylum applicant may demonstrate a well-founded fear of persecution by establishing that they subjectively fear persecution, and their fear is objectively reasonable.[7] To demonstrate that their fear is objectively reasonable, the applicant must show that (1) they possess one or more protected characteristics; (2) the persecutor is aware or could become aware that the applicant possesses this characteristic; (3) the persecutor is capable of persecuting the applicant; and (4) the persecutor is inclined to persecute the applicant.[8] The Taliban's propensity for persecuting ANA servicemembers is well-documented. The Taliban was aware of our clients' military service and threatened to take action against Usman and Ahmad if they did not abandon their posts. Usman and Ahmad received explicit threats from the Taliban, including those contained in the threat letters, attempted assassinations, and torture of family members who refused to share the brothers' whereabouts. The Taliban are indisputably capable of acting on their threats, as they have taken control of Afghanistan's national government and military operations.

Usman and Ahmad also have well-founded fears of persecution based on their political and religious beliefs. The Taliban believe that anyone who fights against them are anti-Taliban and anti-Islam. Because the ANA fought for years alongside U.S. coalition forces against the Taliban, ANA servicemembers are considered traitors and enemies by the Taliban. The threat letters to Usman and Ahmad from the Taliban specifically state that they believe the brothers have left the religion of Islam and are considered enemies because they were fighting alongside the U.S. Armed Forces. The Taliban are of course known for torturing or killing individuals who do not share their political or religious beliefs. There is no reason to believe Usman and Ahmad would have been any exception.

If Usman and Ahmad were to return to Afghanistan, the Taliban has the power, will, and resources necessary to track our clients down and execute on their threats. Their fears are well-founded.

III. Statutory Grounds for Denial of Asylum

Asylum applicants must show they are not subject to any statutory grounds for denial. First, they must apply for asylum within one year of entry into the United States. We met the filing deadline for Usman and Ahmad.

Second, the applicant must show they were not "firmly resettled" in another country prior to settling in the United States.[9] A person is considered firmly


AMERICAN FAMILY
INSURANCE
Insure carefully, dream fearlessly.

resettled if they obtain permanent legal status or are eligible for such status in that country. Pursuant to 8 CFR § 208.15(a), an alien may be considered firmly resettled based on residence in a third country "after the events giving rise to the alien's asylum claim." In our case, Usman and Ahmad left Afghanistan after the Taliban's takeover of the country. They flew to another country before being evacuated to the United States. They were not offered, and were not eligible for, permanent resident status in the other country, so this was not a bar to asylum for our clients.

No statutory grounds for denial existed as to Usman and Ahmad.

IV. The Long Road to Asylum

There is no standard set of documents that constitute an asylum application; though in nearly every instance the application will include a completed Form I-589.[10] Without going into an unnecessary amount of detail, the I-589 form is a document that must be completed by the applicant (and often his/her attorney) and includes information pertaining to the applicant's background and family members, as well as the basis for the applicant's asylum request. In other words, the applicant must explain *why* he or she is seeking asylum (*i.e.*, persecution based upon race, religion, nationality, political opinions, membership in a particular social group or torture convention).

In addition to the I-589 Form, the typical asylum application will also include a legal memorandum in support of the applicant's application, evidence supporting the request for asylum, a sworn declaration of the applicant and any identifying documents the applicant may have (e.g. driver's license, passport, National Identity Card, employment authorization card, etc.).

To prepare these documents on behalf of the brothers, we had many meetings with them, using hard-to-come-by (and often very expensive) interpreters. All the documents had to be read to the brothers in their native language, Pashto, and the interpreters had to sign certificates that they accurately translated everything. The language barrier presented one of the largest challenges during the process, but the Afghan community in the US supports one another and pulled through for Usman and Ahmad when we needed help.

After the application is completed, it must be submitted to the appropriate regional division of the United States Citizenship and Immigration Services ("USCIS"). At that point, the applicant must wait (often several months) before either a request for additional information is received or the applicant is provided with a notice for an interview with an asylum officer.

In our case, the interview took place in the USCIS Chicago Office. During the interview, the applicant swears, under oath, to tell the truth, and the interview begins with the officer asking the applicant a variety of questions to confirm the information contained in the application is correct. At that point, the officer will typically go through the applicant's story and ask the applicant questions about his or her asylum claim.

The interviews are conducted in English and the applicant is required to bring his or her own interpreter if one is necessary. An attorney may also be present at the interview, though the bulk of the questioning is directed at the applicant. That said, the attorney is permitted to clarify responses when appropriate and is often permitted to give a short "closing argument." Witnesses are generally not permitted to testify at the USCIS interview.

We attended our clients' interviews, which were scheduled about a month apart from one another. The process took place in a small office. It felt akin to defending a client's deposition in one of our insurance defense cases, with much larger stakes of course. The scariest part of Ahmad's interview was the fact that the interpreter did not arrive until an hour after our scheduled start time. Thankfully, the immigration officer was running late, and we did not lose our hearing slot. It was amazing how Ahmad made friends with all the other Afghans waiting for their hearings in the lobby, and through that network,

Tavrn

AI-Powered medical chronologies and summaries for leading attorneys.

Tavrn delivers **state-of-the-art** medical record chronologies in hours, empowering attorneys to build **stronger cases faster.**

- **Speed.** From upload to chronology in as little as 1 hour.
- **Accuracy.** Our chronologies are delivered with unmatched accuracy.
- **Universal compatibility.** Process files of any medical specialty with our AI.
- **Cost-efficiency.** Reduce chronology costs by up to 90%.

90%

Up to 90% reduction in litigation costs with medical chronologies.

12h

All our chronologies, no matter the size, are delivered within 12 hours.

Schedule a demo with our team

contact@tavrn.ai

https://tavrn.ai

someone knew our interpreter, was able to call him, and let us know he was on his way. I am so impressed with how perfect strangers went out of their way to help us that day when they could have been preparing further for their own interviews.

After the interview has been completed (and if no additional information is requested by USCIS), the applicant must wait to receive notice of whether their asylum application is approved. There is no set timeframe for USCIS to make its decision. It not uncommon for the decision to take several months and, in some instances, over a year to arrive. In Ahmad's case, it took about sixteen months from the time of his hearing until he received confirmation of his approval notice. It took about thirteen months for Usman.

V. Conclusion

Ultimately, after our hearings, USCIS agreed with us that Usman and Ahmad warranted asylum protection in the United States, and granted our clients' applications. Now, we can apply for derivative asylum on behalf of Usman and Ahmad's family members who have remained in Afghanistan. We are in the process of completing those applications, so the families can be reunited in the United States.

Before this opportunity, neither of us ever imagined working in the world of immigration or asylum law. This project has taken us far outside our practice area comfort zones. However, the advocacy skills we have developed as litigators certainly helped achieve a positive outcome for the clients. The work itself was not easy, particularly due to the language barrier and horror stories the brothers shared. Convincing them to open up to us, as strangers via interpreters, about their fears was necessary and difficult. Interpersonal skills gained from years of representing clients from all walks of life were put to the test with this work. Ultimately, we succeeded and gained their trust. Knowing we made a difference in their lives and that they truly appreciate the work has been incredibly rewarding. We look forward to celebrating with them when they can hug their wives and children on American soil.

In our profession, we do not have the luxury of free time. That being said, we highly encourage everyone to seek out these pro bono opportunities. In our case, it was literally the difference between life and a death sentence if Usman and Ahmad were deported back to Afghanistan. Your work may genuinely make an impact, and you may realize personal and professional goals you never knew existed.

Author Biographies:

Megan L. McKenzie is in-house counsel at American Family Insurance. She obtained her JD in 2008 from the Thomas Jefferson School of Law. She is the Vice Chair of the Women in the Law Committee, received the 2023 WDC Women in the Law Committee Award, is a member of the WDC Board of Directors, and is the current WDC Program Chair.

Chester (Chet) A. Isaacson is in-house counsel at American Family Insurance. He received his law degree from the University of Wisconsin Law School in 2006. Chet is a member of the WDC Board of Directors.

References:

1 Names have been changed in this article to protect the individuals' privacy.
2 INA § 208(a).
3 INA § 101(a)(42)(A).
4 *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).
5 *Matter of Acosta*, 19 I&N Dec. 211, 233-4 (BIA 1985).
6 *Matter of W-G-R-*, 26 I&N Dec. 208, 210 (BIA 2014) (citing *Matter of S-E-G-*, 24 I&N Dec. 579, 584).
7 *See generally INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
8 *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).
9 INA § 208(b)(2)(A)(vi); *see also* 8 CFR § 208.15(a).
10 The form is available from USCIS on their website, https//www.uscis.gov/i-589.

BEST OF WISCONSIN LAW JOURNAL
Law Journal
2022 WINNER

Cream City Reporting LLC

WHO WE ARE

Cream City Reporting, LLC, located in the heart of Downtown Milwaukee is locally owned and operated by three certified realtime reporters: Melissa Stark, Sarah Hart, and Tricia Trexell. Our team offers over 70 years of combined experience in an array of civil and criminal matters at both circuit court and federal court levels, as well as arbitrations, hearings, and daily copy trials.

WHAT WE DO

We offer efficient and reliable court reporting and videography services to attorneys throughout all of Wisconsin. Our priority is top-notch one-on-one client service. From scheduling your job to receiving your transcripts, we pride ourselves on making the process quick and easy for you and your team.

OUR SERVICES INCLUDE...

- Local reporters you know and trust
- Zoom depositions
- Legal videographers
- Multi-format transcripts with word indexes
- Realtime capability for instant translation
- Rough drafts
- Expedited transcripts
- Linked exhibits
- 24/7 online client repository
- Video synching capability
- Online scheduling
- Statewide coverage
- Referrals for out-of-town deposition coverage through DepoSpan
- Friendly, knowledgeable on-site support staff at our convenient downtown location

CONTACT US TODAY!

creamcityreporting.com

414.585.8128

schedule@creamcityreporting.com

PFAS and Insurance Coverage: Considerations and Updates on Recent Coverage Rulings

by: Alexander C. Lemke, Meissner, Tierney, Fisher & Nichols S.C.

The abundance of per- and polyfluoroalkyl substances (PFAS) litigation has brought significant challenges to both insureds and insurers, regarding the scope and applicability of insurance policies. As these "forever chemicals" continue to be the focus of environmental and health concerns, insurers and insureds need to understand the legal landscape and insurance implications. This article examines the current state of PFAS litigation, Wisconsin insurance considerations, and recent court decisions that provide guidance for insureds and insurers as they navigate this legal terrain.

PFAS litigation poses a two-part problem for insureds and insurers. First, there is a need to handle underlying PFAS litigation and, second, there is a need to resolve the insurer's duty to defend and indemnify its insured.

I. The Underlying PFAS Litigation for Insureds

With over 6,400 PFAS-related lawsuits filed in federal courts from July 2005 to March 2022,[1] PFAS have exposed insureds to an immense amount of liability. Some even predict that it will eclipse the tobacco and asbestos lawsuits from previous time periods. For instance, below are some recent examples of liability exposure based on PFAS exposure:[2]

- **June 2023:** 3M and DuPont, Chemours Co. and Corteva Inc. agreed to pay up to $12.5 billion and $1.18 billion, respectively, to settle lawsuits for PFAS contamination in U.S. water systems.
- **October 2023:** North Carolina judge allowed more than 100,000 plaintiffs to file lawsuits against Dupont and Chemours based on toxic water pollution.

In essence, there are two primary "liability threats" to insureds based on PFAS: (1) regulatory "threats" and (2) a tort 'threats.' Each will be discussed in turn.

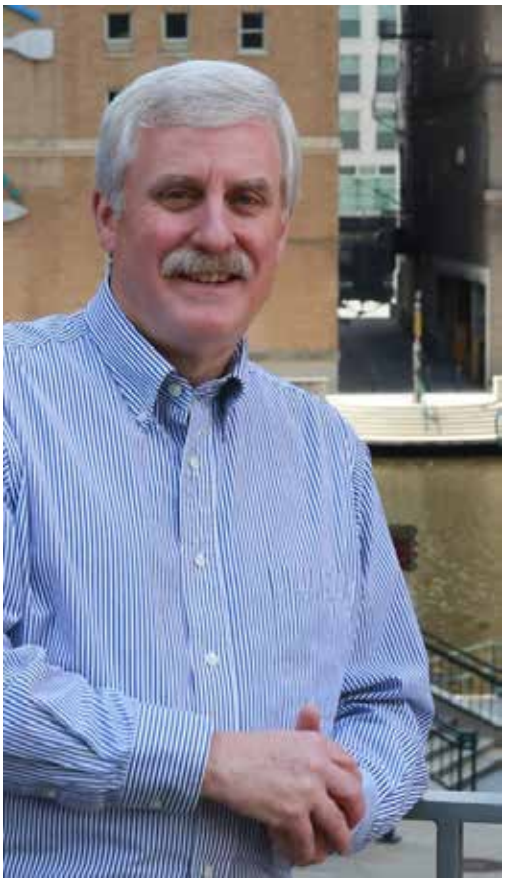
First, in recent years, regulatory actions have intensified around PFAS. The Environmental Protection Agency issued a "PFAS Strategic Roadmap" in 2021,[3] setting the stage for a series of measures to control these substances. By 2023, the Environmental Protection Agency (EPA) finalized PFAS reporting requirements under the Toxic Substances Control Act (TSCA) and finalized the designation of PFAS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 2024. State-level regulations have also gained significant momentum. Ten states[4] have imposed restrictions on PFAS in food packaging. Additionally, California, Maine, and New York have enacted "intentionally added" laws that effectively ban the addition of PFAS to products.

Second, there is the underlying "tort" liability. These types of claims are filed against the insured for various bodily injury and property damage caused by PFAS contaminants.[5]

Based on regulatory liability and tort liability theories, there have generally been four "buckets"

Mathie Mediation Services LLC

Call: (414) 585-0650
Email: jmathie@mathiemediation.com



Jim Mathie established Mathie Mediation Services in 2016. Since devoting his entire practice to mediation, hundreds of attorneys have retained his services to mediate their disputes. Jim's four-office downtown Milwaukee suite provides ample space for any mediation. Jim also travels throughout Wisconsin – at no travel expense – to mediate cases. So, if it works best to have a mediation where you are, Jim will accommodate.

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

Mathie Mediation Services LLC
757 North Water Street, Suite 350
Milwaukee, WI 53202

of claims against PFAS manufacturers/producers. They are:

1. claims by **public and private water suppliers** who allege that PFAS contamination has affected their water sources. As a result of this contamination, the water suppliers have incurred significant costs for obtaining alternate water sources, investigating and remediating PFAS, and conducting expensive ongoing monitoring and testing;

2. claims by **firefighters** who are generally filing product liability claims attributing their health issues to exposure to Aqueous Film Forming Foam (AFFF), which contains various PFAS. These plaintiffs report health problems such as thyroid disease, kidney issues, cancer, and other autoimmune disorders;

3. traditionally **environmental claims** based on the fact that PFAS are pollutants. It is expected that this will substantially increase due to the fact that certain PFAS are now considered hazardous substances under CERCLA; and

4. **states attorneys general lawsuits** have been filed in 30 states.[6] These lawsuits typically allege only common law theories of liability (e.g., trespass, negligence, nuisance, product liability, etc.). The states are not (for the most part) relying on any state-level environmental regulations.

However, courts have not blindly cut a "blank check" for lawsuits that only allege common law theories of liability and have dismissed claims against the PFAS producers, if warranted. For instance, in *SUEZ Water New York Inc. v. E.I. du Pont de Nemours & Co.*,[7] the plaintiff alleged that the defendants contaminated its water sources with PFAS chemicals over decades, leading to demands for financial compensation for upgrades to its New York water treatment facilities.[8] The lawsuit, filed in December 2020, included claims for public nuisance, private nuisance, negligence, trespass, and strict liability for defective design. However, a federal judge dismissed all claims against Chemours and most claims against du Pont on March 22, 2023, holding that the complaint failed to provide a notice of a claim under Federal Rule of Civil Procedure 12(b)(6). Specifically, lacking was any *intent* by the plaintiffs: "Plaintiff has failed to allege that Defendants substantially participated in the creation or maintenance of the nuisance and that they did so intentionally."[9]

In sum, the plaintiff's bar is focused on PFAS and views these so-called forever chemicals as a fertile source of lawsuits and large recoveries—it has largely been accurate in its assessment.

II. Wisconsin Insurance Considerations and Defenses

While a lot is unknown about PFAS, there is a bit of comfort in knowing that the fundamental principles governing the insurer and insured relationship as it relates to who is ultimately going to pick up the tab for the underlying liability are typically in-line with the well-known principles of Wisconsin insurance coverage. Here some things that need to be considered in every instance where the insured is seeking coverage for PFAS-related liability:

Known-Loss Doctrine and PFAS

Wisconsin adopts an objective standard in applying this doctrine,[10] examining whether the insured knew or reasonably should have known about PFAS-related bodily injury or property damage before seeking insurance coverage. There can be nuances applying this doctrine which depend on the specific details of the insurance policy. However, for many PFAS defendants, the operative factual question will be whether they knew of the PFAS-

related losses (alleged bodily injury or property damage) before the inception of the insurance policy.

Trigger of Coverage

Wisconsin courts typically adopt and apply the continuous theory of coverage.[11] Under this trigger theory, all policies from the date of initial exposure through the manifestation of the injury are triggered. This theory assumes that damage occurs for that entire period.

In the PFAS context, there is at least one prominent case dealing with the trigger of coverage issue: *Crum & Forster Specialty Insurance Co. v. Chemicals, Inc*.[12]

There, the court held that the duty to defend was triggered, even though the complaints in the underlying cases did not allege either dates when the firefighters were first exposed to the products or when they first manifested symptoms of injury from the products. The court applied the Texas default rule which stated that "the duty to defend is triggered when the dates of loss are not alleged but could be determined in future proceedings and could fall within the policy period."[13]

While this case may not be determinative in Wisconsin, it provides one with an insight as to how at least some courts are handling issues related to trigger of coverage in the PFAS realm.

Property Damage and Bodily Injury

In Wisconsin, soil and groundwater contamination constitute property damage.[14] Additionally, the burden is on the insured to establish that the property damage occurred during the policy period.[15] As for bodily injury, mere exposure without a resulting injury generally does not constitute bodily injury during the policy period. This will be a significant source of litigation regarding whether a tangible "bodily injury" even occurred.

Pollution Exclusions

The actual wording of the pollution exclusion in the policy is quite important and not all language is treated the same.

For policies involving the "sudden and accidental" pollution exclusion, which was popular from 1972 to 1985, Wisconsin courts have treated the word "sudden" as ambiguous.[16] The word "sudden" just means unexpected and unintended and the word "accidental" means not intentional. Thus, for insurers seeking to exclude coverage based on this exclusion much of the case will be about whether the insured expected or intended the resulting bodily injury or property damage from manufacturing, selling and/or otherwise disposing of PFAS. In essence, what did the insured know, expect or intend at different points in time?

For policies involving the absolute pollution exclusion, which generally excludes coverage for any claim, action, judgment, liability, settlement or any obligation to defend a suit arising out of discharge, dispersal, release or escape of pollutants, Wisconsin courts have tended to recognize this type of language as binding on the insured—"This pollution exclusion is just what

Hills Legal Group, LTD

Squires III, Suite 333
N19W24075 Riverwood Drive
Waukesha, WI 53188

Insurance Defense Lawyers, Personal Injury, Property Damage, Business Liability

it purports to be—absolute."[17] However, having this language does not automatically get an insurer out of the woods. For instance, some courts only apply this to "traditional environmental pollution" context or may be more hesitant to apply it if the pollution stems directly from a product containing PFAS.

Compliance with Policy Terms and Conditions and Notice Requirements
Non-compliance with notice, cooperation, and other policy terms, definitions, and conditions may bar or limit coverage in some instances; both the insurer and the insured should carefully evaluate their respective duties and obligations.

For instance, insureds must adhere to notice requirements in their policies and provide timely notice as mandated by those policies. Some states strictly enforce these requirements, while others expect reasonable diligence from policyholders or require insurers to prove that delays caused them prejudice. Understanding these state-specific obligations can be critical in any coverage action.

Forum Selection
Which forum a coverage action is in could be determinative (at least partially) in whether a finding of coverage is made or not. In *Admiral Insurance Co. v. Fire-Dex, LLC*,[18] the dispute turned on a novel issue of Ohio insurance law: are illnesses arising from exposure to PFAS in a manufacturer's finished products an "occupational disease" under Ohio law? The court declined jurisdiction and the Sixth Circuit affirmed noting that novel issues of state law are best decided by state courts.[19]

III. Touchstone PFAS Coverage Cases

Given the enormous financial stakes, potentially reaching hundreds of millions or even billions of dollars, both insurers and policyholders face significant risks. The issues surrounding PFAS exposures are relatively new, and the application of pollution exclusions to these cases is still in its early stages. However, this area of law is expected to evolve rapidly in the coming years. However, perhaps given that uncertainly, coverage actions that go through to completion are relatively few and far between at this point. Here is a summary of the four most "prominent" cases to date:

Grange Insurance Co. v. Cycle-Tex, Inc.[20]
This is a helpful case for insurers and its principles could apply beyond Georgia where it was decided. The court held that there was "no doubt that the alleged contaminants in the underlying lawsuit — PFAS *chemicals* — are 'pollutants' within the plain meaning of [the insured's] insurance policy."[21] Based on that, the court applied the pollution exclusion in the policy and held that the insurer had "no duty to defend or indemnify [the insured] in the underlying pollution lawsuit . . . because the policy's Total Pollution Exclusion *unambiguously* bars coverage." (Emphasis added).[22]

Tonoga, Inc. v. New Hampshire Insurance Co.[23]
This case is also helpful for insurers in that court also determined that the insured's policy excluded coverage under the "sudden and accidental" pollution exclusion. Looking at the allegations the court concluded that "a solution [that] was dumped over a period of many years suggests 'the opposite of suddenness' . . . and, as a matter of law, volitional, long-term discharge of a substance

BORGELT POWELL
PETERSON & FRAUEN S.C.

ATTORNEYS & COUNSELORS
ESTABLISHED 1881

Our mission is to provide the very best legal services to insurance companies, businesses, and individuals by providing innovative, effective and efficient advice, consultation, and representation during the investigation, evaluation, and litigation of civil and administrative claims.

Our expertise has resulted in Borgelt Powell's selection as Panel Counsel by some of the largest companies and insurance companies in the country.

Licensed in Wisconsin and Illinois

1243 N. 10th Street, Milwaukee, WI 53205 **(414) 276-3600**

Virtual Offices, Madison, WI **(608) 258-1711**

dri™ The Voice of the Defense Bar

Martindale-Hubbell® AV PREEMINENT® Peer Rated for Highest Level of Professional Excellence 2021

Super Lawyers® 2023

CLM

cannot be viewed as unintended or unexpected."[24]

The decisions in both *Grange* and *Tonoga* arguably represent the application of pollution exclusions in a more "traditional" environmental context in light of the fact that the alleged injuries were caused by environmental exposure to PFAS chemicals that made their way into water supplies, air and soil. In both cases, the pollution exclusion served as an adequate basis to exclude coverage. However, that is not always the case.

Wolverine World Wide, Inc. v. The American Insurance Co.[25]
This case serves as an example of courts taking a stricter view of the exclusions. The court held that the insurers had a duty to defend "until it is determined that every claim in the lawsuit involving pollution is conclusively determined to be intentionally discharged" in view of a policy that had the sudden and accidental exclusion.

Colony Ins. Co. v. Buckeye Fire Equipment Co.[26]
Buckeye has been sued in hundreds of underlying cases relating to its manufacture of fire equipment containing AFFF. The court held that there was no duty to defend the majority of toxic tort claims relating to AFFF under an absolute pollution exclusion which barred the majority of cases that alleged injury or damage solely from environmental exposure to PFAS. However, the insurer had a duty to defend those claims that alleged injury related to direct exposure of the PFAS containing AFFF.

IV. Conclusion

The evolving legal and regulatory landscape surrounding PFAS contamination presents significant challenges for various stakeholders, including manufacturers, regulatory agencies, affected communities, and the insurance industry. As regulatory actions intensify and litigation proliferates, the financial and legal ramifications of PFAS contamination will continue to unfold. Insurers and insureds must navigate the complex terrain of coverage disputes.

Author Biography:

Alexander C. Lemke is an attorney in Meissner Tierney's litigation practice group. He focuses on assisting clients in complex commercial, intellectual property, regulatory, insurance, and employment litigation. Before joining Meissner, Tierney, Fisher & Nichols S.C., Alex handled complex intellectual property matters at a nationally ranked law firm. He also served as a Judicial Law Clerk for the Wisconsin Supreme Court under former Justice Daniel Kelly. While attending law school at the Tulsa College of Law, he received highest honors, graduating in the top 10% of his law class, and worked as the managing editor for the Tulsa Law Review.

References:

1 Andrew Wallender, *Companies Face Billions in Damages as PFAS Lawsuits Flood Courts*, Bloomberg Law (May 23, 2022), available at https://news.bloomberglaw.com/pfas-project/companies-face-billions-in-damages-as-pfas-lawsuits-flood-courts.

2 PFAS Lawsuit, Consumer Notice, https://www.consumernotice.org/legal/pfas-lawsuit/ (last visited June 13, 2024).

3 U.S. Environmental Protection Agency, *PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024* (2021), available at https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024.

4 California, Colorado, Connecticut, Hawaii, Maine, Maryland, Minnesota, New York, Rhode Island, Vermont, and Washington.

5 An emerging new source of claims likely to be prevalent in the future are food products and packaging for food

We trim away
the speculation.

We drill past the conjecture.

We pick apart the maybes.

We cut away the what-ifs.

Using every tool at our
disposal to reveal the facts.

S-E-A™

Know.

Precisely revealing the facts. Then explaining them in the simplest of terms. Doing both at the highest level is what sets us apart. From our superior forensics talent, technology and experience to the visualization expertise of our Imaging Sciences team, we dig past the speculation to find and convey the truth about what happened like no one else.

Forensic Engineering, Investigation and Analysis

(847) 354-4720 | SEAlimited.com | Since 1970

SUBMIT AN ASSIGNMENT

products that contain PFAS. *See* Chrissy Callahan, McDonald's and Burger King are being sued for use of 'forever chemicals' in packaging (April 19, 2022) https://www.today.com/food/restaurants/mcdonalds-burger-king-sued-forever-chemicals-pfas-packaging-rcna24991.

6 Hiroko Tabuchi, *Lawyers to Plastics Makers: Prepare for 'Astronomical' PFAS Lawsuits* (May 28, 2024), available at https://www.nytimes.com/2024/05/28/climate/pfas-forever-chemicals-industry-lawsuits.html.

7 *See* No. 20-CV-10731, 2023 WL 2601161 (S.D.N.Y. Mar. 22, 2023).

8 *Id.*

9 *Id.* at *11.

10 *City of Edgerton v. General Casualty Co.*, 172 Wis. 2d 518, 560-61, 493 N.W.2d 518, *rev'd on other grounds,* 184 Wis.2d 750, 517 N.W.2d 463 (1994), *overruled on other grounds*, *Johnson Controls*, 2003 WI 108.

11 *See WEPCO v. California Union Ins. Co.*, 142 Wis. 2d 673, 419 N.W.2d 255 (Ct. App. 1987).

12 *See* No. CV H-20-3493, 2021 WL 3423111, at *3 (S.D. Tex. Aug. 5, 2021).

13 *Id.* at *2.

14 *Just v. Land Reclamation Ltd.*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

15 *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 522 N.W.2d 261 (Ct. App. 1994).

16 *See Just*, 155 Wis. 2d 737.

17 *See Am. States Ins. Co. v. Skrobis Painting & Decorating, Inc.*, 182 Wis. 2d 445, 456, 513 N.W.2d 695, 699 (Ct. App. 1994).

18 No. 22-3992, 2023 WL 3963623 (6th Cir. June 13, 2023).

19 *Id.*

20 No. 4:21-CV-147-AT, 2022 WL 18781187, at *1 (N.D. Ga. Dec. 5, 2022).

21 *Id.* at *6.

22 *Id.* at *7.

23 201 A.D.3d 1091 (N.Y. App 3rd Dept. 2022).

24 *Id.* at 1097 (internal citations omitted).

25 No. 1:19-cv-10, 2021 U.S. Dist. LEXIS 199675 (W.D. Mich. Oct. 18, 2021).

26 *See* No. 319CV00534FDWDSC, 2020 WL 6152381, at *1 (W.D.N.C. Oct. 20, 2020), aff'd, No. 20-2208, 2021 WL 5397595 (4th Cir. Nov. 18, 2021).

Skilled litigators, exceptional results.

Our litigation attorneys balance unparalleled skill and winning strategies to achieve exceptional results in the courtroom. We have successfully tried hundreds of cases on behalf of individuals, businesses, and insurance companies in federal and state courts throughout Wisconsin and nationwide. Together, we can chart the best path forward.

BoardmanClark

BOARDMANCLARK.COM

The Journey to Wellness: A Professional Responsibility

by: Ryan M. Johnson, Everson, Whitney, Everson & Brehm, S.C.

Ryan Johnson is the Chair of the newly created WDC Wellness Committee. The purpose of the Wellness Committee is to promote a culture within the Wisconsin Defense Council of physical, psychological, emotional, spiritual, and mental well-being for our members by providing activities, information, and support that will result in healthier lifestyles. The legal field is wrought with sleepless nights, high stakes, stress, and burnout and can be a generally sedentary profession. To join the Wellness Committee, contact Ryan at rjohnson@eversonlaw.com.

I. Introduction

After the gracious and surprisingly overwhelming approval to start a Wellness Committee, I received an email from an attorney who wanted to join but was concerned that because they did not have it all figured out and were still working on making the commitment to wellness, they did not know if they would belong in the group. Thus, I would like to begin, briefly, by dispelling any notion that a commitment to wellness means that one must be perfect. Far from it. I would be the biggest hypocrite if that were the case.

Wellness is not an exclusive club where only the paragons of fitness are allowed to join. No weights are required. Wellness is not about avoiding indulgence. Treat yourself. Wellness is not about shaming others for not being as far along on their journey. It is quite the opposite. Wellness is about the journey, and all journeys must start somewhere. My journey for wellness has been a long and winding road. This journey allowed for the loss of over one hundred pounds, which has also been partially re-gained, lost, partially re-gained, and working to be lost once again. I have been sidetracked and fallen victim to pitfalls, but I know that I am not the only one. So, I would like to start a conversation with the hope that others will feel comfortable joining because the journey is always easier when accompanied by friends. Just ask Frodo.

II. Conflicts of Interest

It is widely well-known that lawyers must avoid conflicts of interest. Under SCR 20:1.7: *Conflicts of interest current clients*, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[1] This mandatory language is clarified in the ABA Comments: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."[2] These personal conflicts of interest are largely based on our interests and predilections outside of the office and the courtroom.

Personal conflict of interest violations have been illustrated in several cases, which indicate a unifying theme: befriending an elderly woman and "using her position of trust to cause" the woman to make financial decisions that benefitted the attorney[3]; acquiring a financial interest adverse to a client[4]; "a self-admitted procrastinator who tends to put off necessary tasks, including the proper maintenance of his trust account"[5]; "having engaged in unprofessional conduct but attributed that conduct to alcoholism,"[6]; or "engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-

Celebrating 25 years

Digital Intelligence®

mastering the science of digital forensics

Digital Forensics & eDiscovery Services

Preservation
Hosted Review
Expert Testimony
Professional Training

Visit us:
1841 N Prospect Ave
Milwaukee, WI

Call us:
(414)404-8800

Write us:
info@di4n6.com

lawyer relationship."[7] The unifying theme in these cases for which an attorney was subject to discipline was the attorney put personal predilections above the interest of the client: a predilection for money, to procrastinate, to indulge in alcohol, or to indulge in carnal desires. While these few examples may be a bit more on the nose as obvious examples of personal interests that have clouded the judgment of the practitioner, there is another more subtle way in which we allow our predilections to cloud our judgment: Failing to adequately care for ourselves.

I had the privilege of judging a mock trial competition for high school students. One of the other judges, an actual sitting judge, allowed the students to ask questions after the competition. One of the competitors asked earnestly about how many hours of sleep we all got. The judge, a proud parent and busy behind the bench, provided an unsurprising answer to the student by answering that four hours of sleep was a product of luck. I was struck by this, but I was also struck by the notion that this belief is not unusual. One is expected to sacrifice themselves in the interest of justice. However, if that sacrifice means that one is consistently not clear-headed does justice not become cloudy? The judge referred the student to the practicing attorneys as well for response. I informed the student that I prioritized sleep and try for seven to eight hours a night. As luck would have it, the other attorney/mock trial judge agreed.

A casual stroke of the keys on the Google machine allows anyone to learn that a recent study resulted in a consensus of medical practitioners that:[8]

- Adults should sleep seven or more hours per night on a regular basis to promote optimal health.
- Sleeping less than seven hours per night on a regular basis is associated with adverse health outcomes, including weight gain and obesity, diabetes, hypertension, heart disease and stroke, depression, and increased risk of death. Sleeping less than seven hours per night is also associated with impaired immune function, increased pain, impaired performance, increased errors, and greater risk of accidents.

While the listed adverse outcomes are startling in and of themselves, sleep is a basic human need that we all do (hopefully) every day. Since wellness is a journey, and every journey must start at the beginning: we begin every day and end every day with sleep. Developing mindfulness and practicing wellness is a process that one should commit to for life. If you sleep four hours a night, try to sleep five. Then six. The path will be winding and full of pitfalls, it is a journey that should be embraced because of these consequences.

The consequences are not always to easy see. They can be, as mentioned above much more subtle: "[I]mpaired performance, increased errors, and greater risk of accidents." A lack of sleep may impair performance in arguing a motion or at a mediation. It might cause scrivener error, a misread, accidental misrepresentation, or misunderstanding of the law. And all the other things that keep us up at night.

I know, I am asking you to prioritize wellness and sleep by worrying you into dwelling on the things that keep you awake at night. Sleep is only a part of the wellness equation.

Not only are "Diet, exercise, and sleep [the] three pillars of a healthy life[,] diet, exercise, and sleep influence one another in complex and innumerable ways[.]"[9] Supposing one cannot sleep because of the aforementioned worry,

> Eating a healthy, balanced diet has been shown to reduce the risk of a myriad of health conditions, including heart disease, stroke, diabetes, and obesity. Diet can also affect mental health, with several studies suggesting that certain diets may reduce the risk of developing depression and anxiety.[10]

Not only will healthy eating reduce the anxiety and depression that may keep you up at night, but

WE'VE GOT YOU COVERED

A dedicated team of experienced trial attorneys handling personal injury, insurance coverage, insurance defense, and subrogation matters.

Attorney Monte Weiss and **Attorney Kristen Scheuerman** also provide ADR services, including mediation and special master/referee involvement.

WEISS LAW OFFICE

INJURY & INSURANCE ATTORNEYS

MEQUON

1025 W. Glen Oaks Lane
Suite 212
Mequon, WI 53092

APPLETON

620 E. Longview Drive
Suite B
Appleton, WI 54911

weissinjurylaw.com

(262) 240-9663

this will also reduce the other possible negative effects of inadequate sleep. The interconnectivity of these is clear: "What a person eats also impacts sleep quality and duration. Caffeine is notorious for making it more difficult to fall asleep and eating too close to bedtime can lead to sleep disruptions."[11] But the connections do not end there: "A substantial amount of research has shown that getting regular exercise can improve sleep … Multiple studies have shown that exercise can reduce pre-sleep anxiety and improve sleep quality in people with insomnia."[12] To complete the circle: "Food can either help or hinder a workout[.]"[13]

A commitment to wellness can interrupt the cycle. You are up late or awake early because you are stressed and have anxiety about what you did not get done, so you drink some caffeine and get back to it and do not have time to make real food and settle for something quick. Because you are foggy from lack of sleep and interruptions are constant, after an entire day of working, you cannot wait to go home and relax. You skip the walk or workout and did not get up and do it early. You make something quick and easy for dinner because you are tired and cannot think of cooking. The glass of wine, beer, or cocktail alleviates some stress and helps you fall asleep. This repeats.

"While some people find that drinking alcohol helps them fall asleep more easily, alcohol ultimately has a negative impact on sleep. Even in moderate amounts, alcohol consumed in the hours before bedtime can cost you sleep and leave you feeling tired the next day."[14]

You wake up early and eat a healthy breakfast to energize your day. Do something physical to reduce your anxiety: exercise at home, the gym, or a class, ride a bike, walk, stretch, or meditate. Eat a healthy dinner. Avoid caffeine and alcohol hours before bed. Hydrate. You sleep better because the exertion tired your body, and the healthy food nurtured it. You wake up refreshed and repeating is just a little bit easier.

III. Candor

Under SCR 20:3.3, a lawyer is required to honestly represent the facts as they know them to the tribunal and must "take reasonable remedial measures" when a witness or client fails to do so.[15] Our duty to be candid is required when dealing with our opposition. SCR 20:3.4 forbids attorneys from concealing evidence and allowing witnesses to falsify evidence or testimony.[16] Under SCR 20:4.1, a lawyer is further forbidden from misrepresenting, making false statements, and failing to disclose material facts.[17] Attorneys have faced reprimand for failing to be honest,[18] for falsifying bankruptcy documents,[19] for "knowingly omit[ing] material facts in his testimony at the small claims trial[,]" among other similar acts; and most seriously, where the attorney involved had:

> […] common themes to his misbehavior: lack of candor, both by omission and by direct misrepresentation; money mishandling; failure to diligently pursue cases; and a persistent failure to cooperate with the OLR. Attorney [] appears uninterested in honest, responsible advocacy, and tends to dodge or disappear altogether when called to account for his actions.[20]

The unifying theme in these cases for which an attorney was subject to discipline was the attorney failed to be honest. Once again, these few examples may be a bit more on the nose as obvious examples of attorneys who intentionally failed to be honest in their practice, but there are other more subtle ways in which we allow dishonesty to become a habit: Failing to be honest with ourselves.

We are expected to be honest to the court and counsel, should we not be honest with ourselves as members of the bar? We are owed a duty of honesty from our opposition. If we are our own opposition and our predilections are our own conflicts of interest, then we need to be honest about it.

Otjen Law Firm, S.C.

Attorneys at Law • Founded 1881

20935 Swenson Drive, Suite 310
Waukesha, WI 53186

Contact
Phone: (262) 777-2200
https://otjen.com/

I'll start.

IV. Full Candor: I Can be My Own Conflict of Interest

During my first year of college, I developed poor habits, namely binge eating and drinking. I did poorly in school because I skipped classes and went out four nights of the week, slept all the time, hated myself and my body, and contemplated suicide. The summer after my first year of college, my life would change because my wellness journey began, and I have been on that path for the last twenty years.

One morning after a typical night of partying with old friends, I decided to go for a run. The first day of my wellness journey was new for me; I had never been an *I-need-to-workout-today* person. I started a slow jog and was out of breath before rounding the third block. Less than half a mile in, my legs felt on fire as if walking on hot coals. I panted so hard that I thought I was having a heart attack and stopped. I walked and cursed myself for the stupid idea, but after a few minutes the impetus to run kicked in again. This cycle continued for the rest of the two-mile route.

When I got home, I collapsed into a recliner and passed out for over two hours. My mom worried that I had heat stroke. But sure enough, the next morning I went running again. The next day … again. By the end of that summer, I could almost run the whole thing without stopping. I was ready to pass out and die, sure, but I did it.

When I went back to college, my friends had noticed a change in me and, "Have you lost weight?" became a normal question. I had a few friends who regularly joined me and running became my thing. The journey was easier with company, so I joined a fitness group at the university. With the support of this group, I competed in a few triathlons, half-marathons, and eventually completed a marathon. I started martial arts training and eventually became an instructor. But, life happens, and I fell down hard.

My wellness journey went on hold, and I went into survival mode. Stress and anxiety dominated my existence, and years of dedication to wellness went right down the drain. I gained most of the weight I had lost back. I was not sleeping. I was eating out and going for drinks with friends to fill a void and was stuck in a rut. When you struggle with something for long enough, it starts to feel normal—almost like home. There was comfort in my failure because it meant I could give up trying.

My wellness journey did not end there, however. I started working at a military school and ran a high school program for at-risk youth. Physical training was a big part of their day, and I got back on the path. While trying to, my body felt like it was rebelling. Eight months of severe stomach, back, and joint pain, pain so bad that I could not stand up for too long. Countless doctor's appointments, several blood tests, and a CT scan of my abdomen revealed that I have a general stomach disorder. Research revealed that gluten, lactose, processed food, and alcohol should be avoided or consumed sparingly.

I learned the importance of eating healthy and found another group committed to wellness. I became a certified nutrition trainer and martial arts instructor at a gym and lived a life of wellness. My journey, however, then led me to the pursuit of the law.

While in law school, my dedication to wellness was challenged. I cheated on my diet and did not make time to exercise. Stress led to overindulgence. I entered the practice of law in my late thirties, which by no means makes me old, but I am not a spring chicken either. Old injuries snuck up on me and required surgery. Recovery took time, and the time took its toll.

Immediate feelings of defeat and depression were knocking on the door begging to be let in and to take over. I could have let them in. I wanted to. But I did not. I recognize where I can get in my own way and try to take ownership over the things that I can change.

I wake up early and build time into my day to be active: a morning walk, twenty-minute workout, or yoga session; walking the dogs after work; utilizing a standing desk. Think about ways you can incorporate small sessions of activity and start small: take the stairs, park farther away, chair yoga, or break up the day with laps around the office.

I meal prep on the weekends, so that I make better choices during the week. Think about how you can incorporate more home-cooked meals or if you go out to eat often, try to make healthier choices at least some of the time.

While I am typically falling asleep on the couch at about 9:30 p.m., I am almost always in bed around 10:00 p.m. and try not to stay up much later on weekends to stay in my sleep schedule. Think about your own sleep schedule and routine, and the ways you can be more consistent in not having caffeine, alcohol, or technology to close to bedtime.

Wellness is not about total abstinence. Life is better in moderation. I eat out and indulge. I do not do it daily. I skip workouts when my body needs it. I do not do that weekly. I enjoy an Old Fashioned or two. I take breaks during the week or for a month or two at a time. I stay up too late. But this is usually confined to the weekends. So, I would never tell someone what to do, far from it. I just know and simply enjoy the feeling of jumping out of bed in the morning, refreshed and ready for the day. I know this makes me ready to practice law as well.

You might be much further along on your journey, or you may feel like you have not begun. That is okay. Every journey starts with the first step, and we can take ours together.

Author Biography:

Ryan M. Johnson is a litigator who defends insurance companies and their insureds, primarily involving personal injury actions. Ryan graduated Magna Cum Laude from Ohio Northern University Pettit College of Law. He was born and raised in Wisconsin and is proud to be back home with The Everson Law Firm after completing law school and beginning his insurance defense career in Ohio. He was an active participant in Moot Court, led award-winning teams, and was individually recognized for his trial advocacy skills. Ryan has been a board member for several organizations, including Law Review. He had two case notes and a legal article published, was a teaching and research assistant, and was an ambassador for the Pettit College of Law. Ryan gained experience in environmental law after interning with the USDA and Fair Shake Environmental Legal Services. He also interned with Legal Aid of Western Ohio where he primarily provided advocacy for survivors of domestic violence.

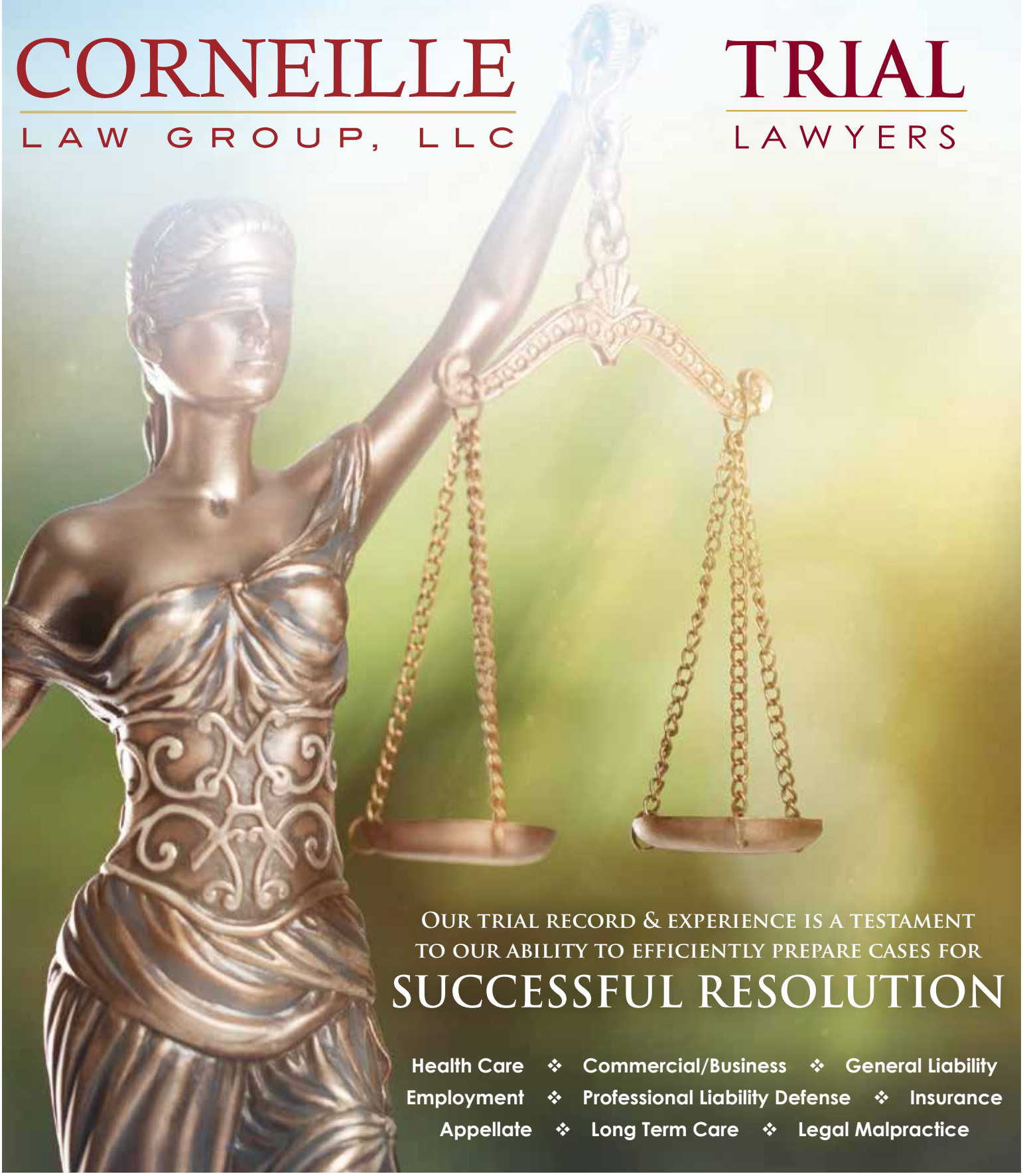
Prior to his legal career, Ryan earned a Master of Fine Arts degree in creative writing and advocated for at-risk youth as the high school program director for a paramilitary school in Milwaukee, Wisconsin. He was a self-defense instructor and is hoping to continue developing those skills and providing classes in the Green Bay area in the near future. He is an avid reader and writes fiction. Ryan loves to cook and enjoys the outdoors and spending time with his dogs, family, and friends.

References:

1 SCR 20:1.7(b).
2 SCR 20:1.7, ABA Cmt. 10.
3 *Matter of Disciplinary Proceedings Against Schwefel*, 2022 WI 35, ¶ 33, 974 N.W.2d 456.
4 *Matter of Disciplinary Proceedings Against Fenger*, 2023 WI 4, 405 Wis. 2d 556, 984 N.W.2d 403.
5 *Matter of Disciplinary Proceedings Against Stevens*, 2023 WI 56, 408 Wis. 2d 232, 992 N.W.2d 147.
6 *Matter of Disciplinary Proceedings Against Wood*, 122 Wis.2d 610, 363 N.W.2d 220 (1985).
7 SCR 20:1.7, ABA Cmt 12.
8 Watson NF, Badr MS, Belenky G, Bliwise DL, Buxton OM, Buysse D, Dinges DF, Gangwisch J, Grandner MA, Kushida C, Malhotra RK, Martin JL, Patel SR, Quan SF, Tasali E., *Recommended amount of sleep for a healthy adult: a joint consensus statement of the American Academy of Sleep Medicine and Sleep Research Society*, SLEEP 2015;38(6):843–844.
9 Newsom, R. & Rehman, Dr. A, *The connection between diet, exercise, and sleep*, Sleep Foundation (April 1, 2024), available at https://www.sleepfoundation.org/physical-health/diet-exercise-sleep.

CORNEILLE LAW GROUP, LLC

TRIAL LAWYERS



Our trial record & experience is a testament to our ability to efficiently prepare cases for

SUCCESSFUL RESOLUTION

Health Care ❖ Commercial/Business ❖ General Liability
Employment ❖ Professional Liability Defense ❖ Insurance
Appellate ❖ Long Term Care ❖ Legal Malpractice

GREEN BAY | 615 S. Monroe Avenue | Green Bay, WI 54301 | P 920.884.2312 | F 920.884.2381

MADISON | 7618 Westward Way | Suite 100 | Madison, WI 53717 | P 608.662.1180 | F 608.662.1181

www.corneillelaw.com

10 *Id*.
11 *Id*.
12 *Id*.
13 *Id*.
14 Bryan, L., & Singh, Dr. A., *Alcohol and sleep*, SLEEP FOUNDATION (May 7, 2024), available at https://www.sleepfoundation.org/nutrition/alcohol-and-sleep.
15 SCR 20:3.3(a)(1)-(3).
16 SCR 20:3.4(a)-(c).
17 SCR 20:4.1(a)(1)-(2).
18 *Matter of Disciplinary Proceedings Against Strouse*, 2024 WI 10, 2024 WL 790449.
19 *Matter of Disciplinary Proceedings Against Johnson*, 2023 WI 73, ¶ 17, 996 N.W.2d 517.
20 *Matter of Disciplinary Proceedings Against Petros*, 2021 WI 55, ¶ 29, 397 Wis. 2d 447, 960 N.W.2d 426.

Unequalled Creativity, Absolute Partnership: Game-Changing Advantages.

At von Briesen, we've transformed the traditional law firm into a modern platform for legal innovation.

Combining our industry leading expertise with innovative technology, we take a collaborative and creative approach to problem-solving the most complex matters.

The result? Game-changing advantages for our clients.

To learn more about our law firm, please visit vonbriesen.com or contact Susan E. Lovern, President & CEO, at susan.lovern@vonbriesen.com.

.

von Briesen
von Briesen & Roper, s.c.

120 Celebrating 120 Years

vonbriesen.com

Milwaukee • Madison • Neenah • Waukesha • Green Bay • Eau Claire

The Facts are Calling Out: A Primer on Obtaining Data from Mobile Phones

by:Sean Lanterman, Esq., CCEP, Computer Forensics Services

It is no secret that phones carry (and remember) vast amounts of information about the most intimate details of life. For many of us, phones are a constant in our lives. Even the U.S. Supreme Court has acknowledged, in the criminal context, that phones are drastically different from other kinds of personal effects for this reason.[1] Lawyers, too, are well aware of the value that data from phones may have for their case. But, while lawyers and their clients alike are usually familiar with the basics of how phones are used and the kinds of things they store, this consumer perspective does not always translate perfectly in litigation. Consumer familiarity can make the use of phone data in litigation seem deceivingly simple. The reason for this is that "phone data" is designed to exist on a phone; it is designed for that consumer perspective. It is not consistently adaptable for presentation or production in civil discovery. In this article, I will pull back the curtain on the technical processes involved in extracting and producing data from phones and explain some of the technical realities that await litigants either seeking data from phones or are on the receiving end of a request for phone data.

I. The Legal Context of Requests for Phone Data

Because of the qualities and categories of information on phones, there is almost invariably advocacy and motion practice before obtaining phones is an option. Prior to reaching the point of calling an expert to obtain phone data, there are procedural considerations for lawyers (on both ends of a request). These considerations are at the risk of stating the obvious, case specific. Justification for, and objections to, a request for phone data are arguable and reliant on the underlying facts. In general, though, advocates may seek or obtain phone data in at least three ways:

- A lawyer may seek to obtain information from the client's phone, as a "proactive" or investigatory measure (even before a complaint is served/filed), or to the extent that the phone is likely to contain useful information.
- A lawyer may subpoena a non-party.[2] As just one example, in some personal injury cases, lawyers may seek phone data that has previously been collected by a law enforcement agency, who would have likely collected relevant phone data in close temporal proximity to an incident, as opposed to months or years after the fact.
- The most common scenario though is that a party has specifically requested data from the opposing party's phone (or other electronic devices for that matter).[3]

In cases where phone data is collected for the purposes of responding to a discovery request, lawyers for both parties will often come to an agreement about the specifics how to handle phone data and set up a protocol that balances the production of relevant information with privacy and privilege concerns. You guessed it! The terms of such a protocol are usually fact specific, but

When it comes to litigation or insurance matters, CTLGroup has the technical support you need for cases that range from functional failures to catastrophic structural collapses.

Our company is comprised of highly skilled engineers, architects and scientists who are experts in their fields including matters related to faulty design, professional standards of care, construction delays and defects, structural and materials failures, water leakage,and natural disasters.

To learn more, please call **847-965-7500** or visit **CTLGroup.com**.

CTLGROUP

usually provide the specifics of where the phone is going, how it will be preserved, what parameters will be applied to the data (based on the area(s) of inquiry), and how such materials are reviewed and communicated.

Fortunately, the steps that are outlined in such a stipulation are usually linear—they outline a step-by-step, repeatable process. This is because these kinds of stipulations rely (sometimes tacitly) on the technical/expert procedures that are necessary to obtain phone data. The order of operations is generally: 1) unlock the phone; 2) collect (or "extract") its data; 3) "unpack" the data; and 4) produce it (where appropriate).

II. Passcodes, Passwords, and Pins

In order to obtain the data from a phone, it must be accessible.[4] This means that the familiar passcodes, "swipe patterns" or passwords are often necessary to proceed to the subsequent steps (preservation, etc.). In many cases, the producing party will agree to provide the passcode necessary to the expert performing the work. But passcodes are not necessarily always available to the parties or their lawyers. With respect to the unavailability of a passcode, the most common situation is that the owner/custodian of the phone data sought has passed away, and family members do not know the passcode.

It is important to recognize that the unavailability of a passcode is not necessarily the end of the line. Security features like passcodes are not impenetrable. However, whether the option exists to access a locked phone depends on a number of factors, including 1) the capabilities of the expert, 2) the condition of the phone, 3) the make and model of the phone, and 4) its operating system. Generally, these techniques work by either bypassing the requirement of entering the passcode altogether, or by trying all possible passcode combinations until the correct passcode is found (e.g., brute force).

In addition to technological means, there are also other ways of obtaining information necessary to unlock a phone. It comes down to good old fashioned detective work. When phone data has been written off as a fool's errand, it has proven possible to obtain the passcode by inventorying the custodian's other data. For example, passcodes have been obtained by finding a person's (*e.g.,* a decedent's) passwords on the Dark Web, to the extent that they were disclosed in a data breach or leveraging data from a person's other electronic devices. Hypothetically, assume that a case presents a scenario where a decedent's passcode is unknown. The decedent, though, also regularly used a laptop. While the decedent's family cannot access the laptop, a forensic analyst can. An analysis of that laptop shows that the decedent kept a list of passwords in a note-taking application, including the passcode to his phone. In other words, just because a phone is locked, does not mean that obtaining its data is impossible. The lawyer (or opposing lawyer) has options and different potential avenues to explore.

When it comes to locked phones, one word of caution to practitioners is to be mindful that some phones (by default) have a self-destruct feature. Essentially, this feature factory resets or wipes a phone when a passcode is entered incorrectly too many times. This is especially important when a client provides a phone to an attorney for safekeeping but does not remember the correct passcode. The attorney may have an impulse to try and unlock the phone immediately to see what is there (akin to how my kids are on Christmas morning) and try multiple combinations that the client provides. In this (real life) scenario, the lawyer may enter the passcode incorrectly over a preset limit and inadvertently destroy evidence. My advice is that if a lawyer receives a phone for safekeeping, do not enter any passcodes. If a phone is provided and it is powered off, leave it off. If it's powered on: turn on airplane mode (to disconnect it from the network), and if the passcode is unknown, leave it charged and powered on until you provide it to an expert. The reason for leaving it charged is that, depending on the phone model, the unlocking process may only be possible if the device's passcode has been typed

KEEPING WISCONSIN STRONG SINCE 1934

Wisconsin's #1 Farm Insurer and 3rd Largest Commercial Insurer

Recognized as One of the Nation's Top Insurance Companies

WARD'S 50 SAFETY • CONSISTENCY • PERFORMANCE

Financial Strength Rating
A M BEST
A+ Superior

Rural Mutual Insurance Company

Learn more at www.RuralMutual.com

in at least once since the last time it was powered off. Additionally, it may allow for an examiner to extract data immediately from the device without the need for a potentially lengthy brute force attack on the passcode.

III. This Copy of the Phone is Everything, Right? Wrong.

After my office receives a phone and its passcode, the first step is to create a forensic copy of its content. For phones, the term of art used to describe the resultant copy is an "extraction." While in principle, it may seem that there is nothing complicated about copying a phone's data, it actually is more nuanced than meets the eye. These details can and have had material impacts on the trajectory of cases.

There is a prevalent misconception that a copy is a copy, and that it is always complete. However, not all phone extraction (copying) methods are equal in terms of their completeness and qualities. It is critical for attorneys on both sides of the "v" to understand that some extractions are (sometimes drastically) less complete than others. If a lawyer mistakes a less complete extraction for a complete extraction, or vice versa, there can be significant facts missed and overlooked.

For the purposes of this article, there are two kinds of mobile device extractions that lawyers should be generally familiar with: logical extractions and full file system extractions. While there are others on the spectrum of completeness, these two categories capture the general types of extractions that attorneys will encounter in practice. A logical extraction relies on the phone's operating system to generate the extraction. It provides data that would be included in a standard consumer-generated backup of the phone (standard text messages, call history, contacts, photos). On the other hand, a full file system extraction is more complete. A full file system extraction is capable of providing all the same information as a logical extraction, but also has the added benefit of capturing system logs and databases[5], email, and data from third-party applications, including messaging applications (like Signal, Snapchat, Messenger, etc.).

The difference between the two kinds of extractions is further contrasted depending on what type of phone is subject to collection. Collecting data from iPhones is more uniform than their Android counterparts. This is because their software and hardware are developed and manufactured by the same company, in contrast to Android phones. For example, an Android phone may have hardware that is developed by numerous vendors and run software that is developed by yet another (*e.g.,* Google). In other words, iPhones are more predictable with what categories of data will be included in a logical or full file system extraction. With an Android phone, a logical image is not predictable, and the quality and completeness of a logical extraction of an Android phone is inconsistent.

Despite the differences between extraction qualities, it is important for all practitioners to understand the limits of what a phone extraction may disclose, and what may be evading the eyes of litigants. For this reason, it is important for lawyers to establish what kinds of extraction a vendor plans to obtain (and whether a more complete, full file system extraction is feasible). Moreover, if phone data has already been provided for review, pay attention to the kinds of data in the extraction to determine whether it is complete or not.

It is generally preferable to obtain the most complete forensic extraction possible. But it may not be absolutely necessary or even possible in all situations. For example, if you receive a discovery request for text messages, a logical extraction will provide the same basis for you to identify them as a full file system would. But if a question is whether the phone was actively being used a particular time, a full file system extraction is necessary. It is important to note further that depending on the circumstance, a full file system (more complete) extraction may not be possible due to various factors (make/model of the phone, its operating system, etc.)

One regular question that I am asked is how long the process to collect data from a phone takes. This is because (as noted above) litigants rely on their phones as much as anybody else and are not

WITH SO MUCH AT STAKE,
YOU NEED TO KNOW

WHAT HAPPENED?

YOU HAVE QUESTIONS. WE PROVIDE ANSWERS.

As a worldwide provider of engineering and technical consulting services, we specialize in resolving a wide range of accidents, claims, and legal disputes.

Our experts offer years of experience spanning multiple industries, including transportation, construction, toxicology and food safety, injury biomechanics, and more. If you're facing a complex forensic challenge, count on Rimkus to uncover the facts.

RIMKUS World-class. Global reach. 800.580.3228 **rimkus.com**

always thrilled about the idea of being without their phone for an extended period. In order to obtain a full file system extraction, an expert needs *physical* access to a phone. That is, the expert either needs to travel to where the phone is, or the phone has to be shipped to the expert's office. It is hard to predict how long the process takes, because it depends on how much data is stored on a phone, and thus experts are at the mercy of physics and how fast data can transfer. In most cases, a phone's data can be collected anywhere from three to eight hours. It is possible to "remotely" collect phone data, where the expert neither travels nor the subject mails their phone to the expert. The resulting copy will be a less complete logical extraction, but the circumstances and objectives of the parties will dictate whether a remote collection is feasible.

IV. How to Make Sense of the Collected Data and Phone Data Productions

Once the data is collected, the parties' objectives (and/or their stipulation) will dictate what is done with it. Sometimes, the data must be analyzed by the expert to make factual determinations about the phone's usage, and whether there are factors that affect the availability of the data (*e.g.,* deletions). In those cases, the expert may perform a technical analysis, to determine whether there is contextual, system-type data that shows whether a particular fact or allegation is supported by the phone evidence. For example, a technical analysis may disclose whether a phone was actively used at a particular time (like the time of a vehicle collision). These kinds of data do not usually speak for themselves and more often require expert testimony to explain.

In other cases, the inquiry may be solely substantive. That is, the phone collection was performed as a basis to produce certain text messages, or other data. In those cases, the expert can limit the data in the collection by defined parameters. For example, the parameters may define that only texts between two parties between two times are to be produced.

When it comes to phone data productions, this is where the familiar consumer experience makes its exit for lawyers tasked with reviewing the data. When phone data is produced in discovery, it is no longer being accessed directly from the phone where it was originally recorded. It looks different, and there are many options for how it can be presented (as a spreadsheet, PDF files, etc.). My advice is to take advantage of a very handy review tool that is designed for organizing, reviewing, and searching phone data- Cellebrite Reader Reports. Cellebrite Reader Reports have become a preferred option by many lawyers and their staff. Cellebrite is a commercially available tool that may be used for many steps in the technical processes of extracting and reviewing phone data. It also provides "Reader Reports" that combine the phone's data with the benefits of a review tool. Reader Reports are shareable files that present phone data within a program (a user interface). This interface makes it easier for reviewers to find, read, and mark the phone data for review. It also has built-in functionality that allows a reviewer to search the data and organize it by categories and time.

V. Conclusion

Phone data in litigation is not new, but it is also not about to depart from the courtroom either. Lawyers must be familiar with the technological basics and limitations of the phone data in order to advocate effectively for their clients. Lawyers need to know, with respect to phone data, what is (and what is not) possible, and the nature of what they are asking for or have been provided. Without an understanding of the technology that underlies phone data in litigation, lawyers are prone to not ask the right questions.

Author Biography:

Drawing on more than a decade of experience, Sean Lanterman, Esq., focuses on complex matters involving electronic evidence, including civil and criminal litigation, as well as information security events. Sean is considered a trusted advisor by his clients, and has successfully, and efficiently,

Our logo tells our story. Gass Turek lawyers walk the tightrope of risk with our clients firmly on our shoulders, directing the way. We venture boldly and deliberately, delivering success.

GASS TUREK LLC
TRIAL ATTORNEYS

241 N Broadway, Suite 300 | Milwaukee, WI 53202 | (414) 223-3300

www.gassturek.com

identified actionable facts from digital sources in a variety of situations. Sean's clients appreciate his ability to concisely, and understandably, communicate often technical, complex findings. As it relates to his practice, Sean provides continuity throughout the course of a project, from initial investigation through reporting and testimony.

Sean has been invited by organizations to speak about numerous topics, including smartphone evidence, working with experts, and cyber incidents. Sean has also provided his expertise to national and local news outlets.

Sean earned his bachelor's degree, with honors, from the University of St. Thomas in Minnesota, and then continued his studies at the University of St. Thomas School of Law. Sean is licensed to practice law in Minnesota state courts. Sean receives ongoing training in digital forensics and incident response from the SANS Institute and is a member of the GIAC (Global Information Assurance Certification) Advisory Board. Sean is also a member of the International Association of Computer Investigative Specialists (IACIS), and InfraGard (an intelligence partnership between the FBI and the private sector).

References:

1 *Riley v. California*, 573 U.S. 373 (2014).
2 *See* Wis. Stat. § 805.07.
3 *See, inter alia,* Wis. Stat. § 804.08 and § 804.09.
4 Phones that are physically damages may also pose problems for obtaining their data. In many cases, though, a damaged phone may be repaired to permit its data to be extracted.
5 These kinds of logs may provide insight into whether a phone was used at a particular time, including but not limited to records about when 1) the phone was unlocked (passcode was entered), 2) whether the phone's screen was turned on, and 3) what application was open and on the screen.

MDD
A Davies Company

Litigation Support

We are a global forensic accounting firm that regularly provides litigation support services and expert witness testimony in courts and arbitrations. We also frequently provide assistance during the discovery process, mediations and during settlement discussions.

Time and again, our assessments have stood up to the scrutiny of cross-examination, making us the choice of both plaintiff and defense counsel around the world.

Our professionals' expertise spans 500 industries and the below practice areas:

Damages Quantification

- Anti-trust
- Business & Shareholder Disputes
- Class Action – both Certification & Defense
- Construction Defect/Delay
- Environmental Damages/ Toxic Tort
- Intellectual Property/Patent Infringement
- Lost Profits/Loss of Hire
- Personal Injury/Wrongful Death
- Product Liability & Recall
- Employment Litigation
- Subrogation

Valuation Matters

- Acquisition/Disposition of Business
- Business Disputes
- Divorce Matters
- Shareholder Disputes
- Succession Planning

Construction Litigation

- Surety Bonds
- Funds Control
- Delay in Start-Up
- Insolvency

Fraud Investigations

- Asset Tracing, Kickbacks, and Misappropriation
- Financial Condition Analysis
- Financial Institutional Bonds
- Piercing the Corporate Veil & Alter Ego
- Ponzi Schemes
- Whistleblower Investigations
- Bankruptcy
- Fidelity & Embezzlements

Corruption

- Regulatory Investigations including Foreign Corrupt Practices and UK Bribery Acts
- Anti-Corruption Program Review
- Internal Investigations/Risk Assessment

We have a global workforce of accountants ready to assist, many of whom are Certified Public Accountants (US), Chartered Professional Accountants (Canada), Chartered Business Valuators and Certified Fraud Examiners.

With more than 40 offices on 5 continents, and extensive language capabilities, our exceptional dedication and uniquely qualified professionals are the hallmarks of our firm. For litigation support or expert witness testimony, hire MDD.

News from Around the State: Trials and Verdicts

News from Around the State: Trials and Verdicts
Summer 2024

The WDC regularly publishes notable trial verdict results in the Wisconsin Civil Trial Journal and on its website. If you or someone you know has had a civil trial recently, we would like to include information about the results in our next issue. We are looking for all results, good or bad. Submissions can be published anonymously upon request. Please submit your trial results directly to the WDC Journal Editor, Attorney Vincent Scipior, at vscipior@cnsbb.com. Please include the following information:

- Case caption (case name and number);
- Trial dates (month and year);
- Brief summary of the background facts;
- Issues for trial (was liability contested, did the parties stipulate to damages, etc.);
- At trial (what happened, who testified, what did the parties ask for, what did the jury award, etc.);
- Plaintiff's final pre-trial demand;
- Defendant's final pre-trial offer;
- Verdict amount; and
- Any other interesting information, issues, rulings, etc.

Dawn M. Utphall, et al. v. Logan G. Miller, et al.
Eau Claire County Case No. 22-CV-10
Trial Dates: April 16-17, 2024

Facts: Plaintiff claimed to have suffered injuries to her head, neck, back, and left shoulder because of a rear-end motor vehicle accident in Eau Claire on July 30, 2020. Plaintiff originally sought approximately $70,000 in past and future medical expenses, as well as $40,000 in lost wages. Plaintiff's permanency claim was supported by her orthopedic surgeon.

At Trial: Plaintiff made the strategic decision at trial to not seek any award for her medical specials and instead asked the jury to award her for her lost wages and $300,000 in past and future pain and suffering. After deliberation, the jury awarded Plaintiff $1,200 in past pain and suffering, $0 in future pain and suffering, and $562 in lost wages, resulting in a total award of $1,762.

Verdict: $1,762

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

2024 Members

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

WISCONSIN CHAPTER

www.WisconsinMediators.org

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution


Emile Banks
Milwaukee


Danielle Carne
Madison


John Claypool
Appleton


Hon. Jeffrey Conen
Milwaukee


Michael Crooks
Madison


Hon. Mark Frankel
Madison


Timothy Hawley
Green Bay


Michael Jassak
Oak Creek


Hon. David Jones
Milwaukee


Hon. Charles Kahn
Milwaukee


Hon. James Kieffer
Brookfield


Terry Lyons
Janesville


Robert McCracken
Manitowoc


Hon. Richard Sankovitz
Milwaukee


Jim Smith
Brookfield


Jill Sopha
Pewaukee

Check preferred available dates or schedule your appointments online directly with Academy Members!

WisconsinMediators.org is free, funded by our members

Visit our national roster of 1000+ top neutrals at www.NADN.org

NADN is administrator for the DRI Neutrals Database

www.DRI.org/neutrals

dri Lawyers Representing Business.™

* The National Academy of Distinguished Neutrals is an invitation-only professional association of over 1000 litigator-rated mediators & arbitrators throughout the US and a proud partner to both the DRI and AAJ. For more info, please visit www.NADN.org/about

Lilly M. Cousineau, et al. v. Rural Mut. Ins. Co., et al.
Dodge County Case No. 21-CV-355
February 19-21, 2024

Facts: Thirteen-year-old plaintiff was bitten and scratched by her neighbor's dog, a Siberian husky, when she was nine years old. At the time of the incident, the dog was leashed in the insured's backyard. Plaintiff regularly visited the insured's residence to play with her daughters. Plaintiff's grandmother was responsible for supervising plaintiff at the time of the incident. As a result of the incident, plaintiff sustained a laceration to her face which left permanent scarring. Upon arriving to the emergency room, plaintiff also suffered a paradoxical reaction to the medication she initially received and required emergent sedation to calm her sufficiently for purposes of treatment.

Issues for Trial: Liability and damages were contested. In addition to plaintiff's negligence claim, defendants brought third-party claims against the plaintiff's grandmother for negligent supervision and contribution.

At Trial: Plaintiff's treating provider, Dr. Kim, testified at trial that the incident may have been "provoked." He noted in the records that plaintiff suffered a "questionable provoked dog bite." Although he could not recall treating the plaintiff, he testified that such wording indicates the bite may have been provoked, such as when someone goes up and kicks a dog.

At trial, plaintiff testified that she was self-conscious about her scar and suffered bullying at school because of it. It was hard to see plaintiff's scar from counsel's table in the courtroom. Plaintiff's retained plastic surgeon, Dr. Korkos, testified that plaintiff needed a scar revision procedure followed by microneedling and/or laser treatments at a cost of approximately $7,500.

At closing, plaintiff's counsel asked the jury for $5,598.21 in past medical expenses, $300,000 for past pain and suffering, $7,500 for future medical expenses, and did not specify an award for future pain and suffering. Defense counsel asked the jury to award $5,598.21 in past medical expenses, $7,500 for future medical expenses, $15,000 for past pain and suffering, but did not specify a figure for future pain and suffering. Instead, defense counsel implored the jury not to tell the minor plaintiff that she was disfigured through their verdict.

After deliberations, the jury found the defendant 80% causally negligent, the plaintiff 20% causally negligent, and assigned no blame to plaintiff's grandmother. For damages, the jury awarded $5,598.21 for past medical expenses, $30,000 for past pain, suffering, and disability, and $40,000 for future pain, suffering, and disability, for total damages of $75,598.21, and a net recovery of $60,478.57.

Plaintiff's Final Pre-Trial Demand: $100,000
Defendant's Final Pre-Trial Offer: $50,000
Verdict: $60,478.57

For more information, contact William A. Brookley at wbrookley@cjmmlaw.com.

YOUR LAWYERS ON THE LAKESHORE

SPECIALIZING IN: TRIAL • CIVIL LITIGATION • INSURANCE DEFENSE & COVERAGE • LIABILITY

William R. Wick
PARTNER

Christopher R. Bandt
PARTNER

Jeremy T. Gill
PARTNER

NASH NASHLAW.COM

Super Lawyers

PREEMINENT™ AV

LexisNexis Martindale-Hubbell PeerReview Rated
FOR ETHICAL STANDARDS AND LEGAL ABILITY™

CONTACT US TODAY!

With our main office in Manitowoc, WI and satellite offices throughout, our coverage area can assist clients in all legal matters.

Jacqueline A. Robers, et al. v. Ultra Mart Foods, LLC d/b/a Pick 'N Save, et al.
Racine County Case No.: 22-CV-791
Trial Dates: May 7-8, 2024

Facts: This was a slip-and-fall accident at a Pick 'N Save store. In August 2020, plaintiff was in the checkout line while an employee was stocking bags of ice in the cooler. The employee had a pallet of ice bags and pounded each bag on the mat in front of the cooler before placing it in the cooler. Surveillance video showed some ice cubes falling out of the bags and onto the concrete floor. The employee picked up most of the ice cubes but did not wipe the concrete floor or put up a wet floor sign. As the plaintiff was walking out of the store, she slipped and fell. Plaintiff claimed a broken ankle and CRPS. Her past medical specials were $25,194.66. She asserted claims against the store for negligence and a violation of the Safe Place Statute. In addition, her husband brought a loss of consortium claim.

Issues for Trial: Liability and damages were contested.

At Trial: During trial, the plaintiff testified that she did not observe the condition of the floor prior to her slipping and did not see the employee stocking the ice cooler. She further testified that she sustained a left ankle fracture/sprain and had ongoing pain complaints because of CRPS. She testified that every step she takes she feels pain and that her condition has not improved. During cross-examination, the plaintiff's medical records were shown where she reported low levels of pain and was pleased with her progress during her recovery period. Cross-examination also revealed that the plaintiff recently lost weight from walking and was walking a significant amount nearly every day.

The plaintiff's husband testified and generally described how the injury impacted the plaintiff's day-to-day living. He specifically mentioned her difficulties with attending to normal tasks she was able to perform before the accident.

The plaintiff's physician, Dr. Jensen, opined on causation and damages and testified about the anticipated impact the injury and pain complaints the plaintiff will experience for the remainder of her life.

Two Pick 'N Save employees testified. The assistant store manager who completed the Incident Report and Customer Statement but did not witness the accident testified about store policies and procedures regarding floor maintenance. She conceded that she would have preferred that the ice stocker wipe the floor. The other employee had her back to the accident; therefore, she did not witness what happened. Her testimony centered on responding to the scene and using numerous paper towels to clean up water on the ground around the area where the plaintiff slipped.

Notably, the actual employee who stocked the ice cooler could not be located. He was a college student who worked at the store temporarily.

The defense argued that the slip and fall was an accident. Further, the defense was based upon what the store did do such as having a mat in front of the cooler to soak up excess liquid, having a cardboard base on the ice bag pallet to soak up condensation, the use of pallet wrap to contain any condensation or liquid, and finally the employee's efforts at picking up ice cubes that did fall on the floor in a timely manner.

During closing arguments, plaintiffs' counsel asked the jury to find the defendant 100% at fault and award $25,185.66 for past medical treatment, $150,000 to $200,000 for past pain and suffering, and $230,000

for future pain and suffering. Plaintiff's counsel did not recommend an amount for the loss of consortium claim.

The defense argued that neither party was negligent and alternatively, if the jury believed someone was at fault, then both parties were 50% at fault. For damages, defendants suggested that the jury award all of plaintiff's past medical expenses ($25,185.66), $30,000 for past pain and suffering, and $15,000 for future pain and suffering. The defense told the jury not to award anything for the loss of consortium claim.

After about two hours of deliberating, the jury returned a no negligence verdict. For the damages questions, the jury awarded $25,185.66 for past medical treatment, $40,000 for past pain and suffering, and $23,000 for future pain and suffering. The jury did not award anything for the plaintiff's husband's loss of consortium claim.

Verdict: $0

For more information, contact Matthew L. Granitz at mgranitz@borgelt.com or Madeline K. Weston at mweston@borgelt.com.

Bertha Estrada, et al. v. Artisan and Truckers Cas. Co., et al.
Milwaukee County Case No. 21-CV-2741
Trial Dates: May 6-8, 2024

Facts: This case arose from a 2018 automobile accident. The accident occurred when the defendant pulled out from a stop sign and struck the plaintiff's vehicle. The plaintiff had the right-of-way. The layout of the intersection made it difficult for either driver to see the other. The defendant testified he stopped at the stop sign and looked but could not see traffic coming from his right because of parked vehicles on the roadway. The plaintiff testified that as she approached the intersection, she was only looking straight ahead and did not reduce her speed even though she could not see down the intersecting road. As a result of the accident, the plaintiff alleged an aggravation to her pre-existing knee arthritis, a torn right rotator cuff, and an undefined injury to her wrists. The plaintiff had approximately $57,000 in past medical bills that she related to the accident. Artisan and Truckers Casualty Company offered its $25,000 policy limit over two years before the trial occurred, but plaintiff would not release the insured.

Issues for Trial: Liability and damages were at issue.

At Trial: Plaintiff's medical expert was Dr. Ryan Kehoe. Dr. Kehoe testified that the plaintiff had a permanent aggravation to her pre-existing knee arthritis (even though plaintiff testified that her knee pain resolved following an injection) and that the plaintiff sustained a rotator cuff tear in the accident. The plaintiff did not provide any prior medical records or her deposition transcript for Dr. Kehoe to review prior to his trial testimony. Plaintiff's past medical records noted some history of knee and shoulder issues.

Defendant's medical expert was Dr. Thomas Grossman. Dr. Grossman testified that the plaintiff sustained contusions and lacerations to her wrists, knees, and shoulders in the accident and related twelve weeks of care.

ESi

Engineering Consulting and Forensic Investigation

ESi's expertise spans dozens of industries and specializations organized across several practice groups, each staffed by in-house experts with the technical knowledge, hands-on expertise, and courtroom experience required to execute projects for and with our clients from start to finish.

- **Multidisciplinary Approach**
- **Industry Expertise**
- **Powerful Insights**

www.engsys.com

During closing arguments, the plaintiff argued for 100% negligence against the defendant and asked the jury to award her claimed past medical bills of $57,000, $100,000 for past pain and suffering, and $75,000 for future pain and suffering. The defense argued that the accident was just that, an accident since both drivers faced substantially similar circumstances in that neither could see each other. In the alternative, defendants argued that each driver had equal responsibility for the accident since both violated a rule of the road (the defendant failed to yield the right of away and the plaintiff failed to reduce her speed even though she had an obstructed view of the intersection). For damages, the defense asked the jury to award $15,590.37 in past medical bills and a reasonable amount for past pain and suffering in the range of $4,500 to $7,500. The defendants further argued that the jury should not award any amount for future pain and suffering as it was not supported by the evidence at trial.

The jury assessed 70% negligence against the defendant and 30% against the plaintiff. It awarded $20,500 in past medical bills, $7,500 for past pain and suffering, and $0 for future pain and suffering.

Verdict: $19,600

For more information, contact Amy Freiman at afreiman@hillslegal.com.

Jacek Salachna v. Marten Transport, Ltd., et al.
Barron County Case No. 21-CV-316
Trial Dates: January 24-26, 2024

Facts: The plaintiff, a 53-year-old truck driver from Glendale Heights, Illinois, was sleeping in the elevated bunk of his semi tractor-trailer in the parking lot of McCains Foods in Rice Lake when his trailer was struck by another semi tractor-trailer driving through the parking lot. Plaintiff alleged that he was knocked out of his elevated bunk and onto the floor of his cab causing injuries to his right shoulder, right elbow, neck, low back, and right knee. Following the accident, plaintiff underwent three surgeries on his left knee, facet and caudal blocks at L4-5 and L5-S1, and disc compression and biacuplasty of the L4-5 and L5-S1 vertebrae.

Issues for Trial: Prior to trial, the defense stipulated to negligence. The only issues for trial were causation and damages.

At Trial: Defense expert Robert Wozniak of Skogen Engineering calculated the direction and forces of the impact on the cab of plaintiff's semi and presented his conclusions with multiple animations depicting movement of the two trucks before, during, and after impact.

Plaintiff's medical experts were Dr. Ronald Michael MD, Chicago, Illinois and Hammond, Indiana (back) and Dr. Thomas Poepping, MD, Elmhurst, Illinois (knee). Defendant's medical experts were Dr. Anthony Bottini MD, Woodlake Medical Management, Minneapolis, Minnesota (back), Dr. Steven Moen MD, Woodlake Medical Management, Minneapolis, Minnesota (knee), and Barbara King, Nursevalue, Inc., Mount Carroll, Illinois (reasonable value of claimed medical expenses)

During closing arguments, plaintiff asked the jury to award $751,359 in past medical expenses, $700,000 for future medical treatment, $79,602 for lost wages, and $600,000 for future loss of earning capacity.

The jury found that the defendant's negligence was not a cause of injury to the plaintiff and awarded no damages.

Plaintiff's Final Pre-Trial Demand: $890,000
Defendant's Final Pre-Trial Offer: $125,000
Verdict: $0

For more information, contact Eric D Carlson at eric@carlsoncarlsonlaw.com or Donald H. Carlson at don@carlsoncarlsonlaw.com.

Julie Defrance, et al. v. Jessica B. Sealock, et al.
Outagamie County Case No. 22-CV-1126
Trial Dates: May 20-23, 2024

Facts: This case involved a T-bone accident that occurred as the defendant driver pulled out of a parking lot in front of the plaintiff. As a result of the accident, plaintiff was claiming a concussion, left shoulder injury resulting in arthroscopic surgery and then total shoulder replacement, traumatic brachial plexus stretch, and neck and back muscle sprains/strains. Her past medical bills were $144,000.

Issues for Trial: Liability was admitted prior to trial.

At Trial: The experts who testified for plaintiff at trial were Dr. Amy Romandine-Kratz, MD (primary care provider), Resa Malloy, MPT (physical therapy), Dr. Benjamin Zellner, MD (orthopedist who performed the shoulder scope), and Dr. Shawn Hennigan (orthopedist who performed the arthroplasty). Plaintiff also called the deputy sheriff and damage estimator to testify. All of the witnesses testified live. The defense had Dr. Thomas Viehe, MD (orthopedist), Dr. Marc Novom, MD (neurologist), and Andrew Rentschler, PhD (biomechanical engineer) testify.

During closing arguments, the plaintiff did not suggest any specific numbers. The defense suggested $5,500 in past medical expenses, $3,000 to $5,000 for past pain and suffering, and $0 for future pain and suffering.

The jury awarded $5,000 for past medical treatment, $1,000 for past pain and suffering, and $0 for future pain and suffering.

Verdict: $6,000

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

Manuel de Jesus Reyes Avila, et al. v. Hastings Mut. Ins. Co., et al.
Lafayette County Case No. 22-CV-96
Trial Dates: January 23-24, 2024

Facts: Plaintiff passed the defendant farmer's combine in a no-passing zone. The farmer made a left turn

HOW MUCH IS A TREE WORTH?

Aftermath of a forest fire in central Wisconsin. Drone imagery by Steigerwaldt.

STEIGERWALDT

Your confidence lands here.

From vast tracts of forestland to small commercial lots, and even individual trees, our appraisers are experts in all aspects of property valuation.

Steigerwaldt provides supportable valuations and expert witness services necessary to see the appraisal through litigation.

STEIGERWALDT LAND SERVICES, INC. | WWW.STEIGERWALDT.COM

715.453.3274| info@steigerwaldt.com

as the plaintiff was passing, resulting in a bad accident.

Issues for Trial: Liability and damages were contested.

Issues at Trial: The jury found plaintiff causally negligent for the accident, the defendant not negligent, and awarded $0 in past pain, suffering and disability. There were no dissenting jurors.

Verdict: $0

For more information, contact Paul D. Curtis at pcurtis@axley.com.

Marcus J. Moths v. Am. Fam. Mut. Ins. Co., et al
Milwaukee County Case No. 21-CV-1747
Trial Dates: April 8-15, 2024

Facts: This case involved three motor vehicle accidents that occurred over the course of three years. The plaintiff pursued a theory of indivisible injuries against the defendants in all three car accidents. Plaintiff was seeking $224,706.40 in past medical expenses and $228,000 for future medical expenses for an alleged permanent aggravation of pre-existing neck and low back injuries.

Issues for Trial: The parties stipulated to liability for all three car accidents. Prior to trial, the plaintiff demanded a total of $3 million from all defendants. One defendant settled out for its $250,000 policy limit, and the remaining two defendants offered a total of $370,000.

At Trial: The jury awarded a total of $524,000, apportioned among the three car accidents. The damages apportioned to the two non-settling defendants were significantly less than their respective last settlement offers.

For more information, contact Joseph M. Mirabella at mirabella@simpsondeardorff.com.

Agnes Duening, et al. v. Wilco Cabinet Makers, Inc., et al.
Brown County Case No. 22-CV-1516
Trial Dates: May 6-9, 2024

Facts: On January 9, 2020, 55-year-old Agnes Duening walked from the parking lot, across the sidewalk and into the defendant's showroom to pick out cabinets for a bathroom remodel project. Earlier that day it had rained and/or misted off and on and the sidewalk was wet with no observable ice upon entry. When she came out less than an hour later to get her phone out of her car, she slipped and fell, fracturing her left distal femur (open/comminuted). She had already had a total knee replacement surgery on the left knee seven months prior but had returned to work without restrictions (infusion/cancer nurse) approximately five months before her fall. Ultimately there was no testimony suggesting the prior total knee replacement had a role in her fall nor was there testimony that it was adversely affected by the femur fracture.

Plaintiff underwent an ORIF the day of the fall but ultimately—after much physical therapy in Wisconsin

and in Arizona—developed a nonunion requiring two more surgeries approximately two years and two months later—one to remove the old hardware and check for infection (none) and one to insert a titanium rod and screws into the femur.

Plaintiff was an infusion nurse whose husband, a consortium plaintiff, had just the day before her fall announced his intention to retire. They already had a winter/vacation home in Arizona. She testified she had intended to increase her 27 hours a week schedule to 40 after her husband retired and to stay in nursing another 10 years as it was her passion. The Duenings moved full-time to their Arizona home in September 2020 to avoid future ice encounters, especially given her long recovery and ongoing claim that she tires easily, cannot walk/shop more than an hour without fatiguing, and has to take stairs one by one.

Plaintiff's treating surgeon did not place any restrictions on her. Plaintiff underwent a functional capacity evaluation (FCE) with a physical therapist in Arizona who deemed her totally disabled from all work. The defense had an independent medical examination performed by Dr. Thomas Viehe, MD due to suggestions during discovery that her treating surgeon told her she needed a new knee replacement as a result of this fall (ultimately her surgeon did not offer this opinion). Dr. Viehe offered some restrictions which took her out of her prior job but left her employable in the health care field, including many remote options (plaintiff claimed she could not sit more than 15 minutes at a time and got up often during trial to stand).

Plaintiff's vocational expert Bruce Schuyler calculated her past wage loss as $326,820 and her future loss of earning capacity as $364,530. Defense vocational expert Dr. Leanne Panizich calculated past wage loss of $190,965.60 and future loss of earning capacity in the range of $60,596.64 to $69,722.64 (differential between her prior job as an infusion nurse and the remote positions available to her for 9.5 years of work life expectancy). There was an argument that any ongoing or future physical complaints were unrelated to the subject fall.

Issues for Trial: Defendant denied liability under the Safe Place Act and argued no actual or constructive notice of the apparent slippery patch on which plaintiff fell. Defendant had an employee who checked all entrances at specific intervals and who did not slip during pre-fall walkarounds that day but threw salt on his three prior walkarounds of the area in case freezing occurred. Plaintiff's interior designer (who accompanied her to the store that day) and defendant's salesman, both of whom assisted her after her fall, did not see ice nor did they slip while assisting her. Plaintiff testified that one of them was slipping and the responding emergency personnel were slipping (interior designer and salesman both denied all of this).

Prior to trial, the parties stipulated to $281,240.63 in past medical expenses.

At Trial: During closing arguments, plaintiff asked the jury to award the $281,240.63 in past medical expenses that were stipulated to, $326,820 for lost wages, $364,530 for future loss of earning capacity, $1.5 million for past pain, suffering, and disability, and $500,000 for future pain, suffering, and disability. In contrast, the defense suggested $190,965.60 for lost wages, $0 to $69,722.64 for future loss of earning capacity, $0 for future medical expenses, $100,000 to $200,000 for past pain, suffering, and disability, and a "lesser amount" for future pain, suffering, and disability.

The jury found neither side negligent and awarded $281,240.63 for past medical expenses, $220,000 for lost wages, $29,000 for future loss of earning capacity, $7,000.00 for future medical expenses, $180,000 for past pain, suffering, and disability, and $50,000 for future pain, suffering, and disability (for total damages of $767,240.63).

In addition, the jury awarded $10,000 to plaintiff's husband on his loss of consortium claim (during closing arguments, plaintiff requested $50,000 and the defense suggested $0 to $5,000).

Plaintiff's Final Pre-Trial Demand: Plaintiff: $650,000; Plaintiff's husband: $24,999
Defendant's Final Pre-Trial Offer: $300,000
Verdict: $0

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

Joy Popke, et al. v. Tri County Chiropractic, S.C., et al.
Waupaca County Case No. 20-CV-206
Trial Dates: January 22-25, 2024

Facts: This was a chiropractic malpractice case. The 55-year-old patient claimed that a chiropractor caused two compression fractures during a spinal adjustment. The plaintiff argued that the chiropractor was negligent in both his treatment and in providing informed consent. The patient had an x-ray and CT scan in June due to a low back injury that did not show compression fractures at L4 or L5. The chiropractor provided treatment in September, and radiology in October showed compression fractures at L4-L5. The defense argued that the plaintiff had undiagnosed severe osteoporosis and a history of compression fractures, including one in June at T12. Once a person with osteoporosis has one compression fracture, they are five times more likely to have more without any trauma. The defense further argued that because plaintiff had not had an MRI in June it was possible she had compression fractures at L4 and L5, which were not seen on the CT scan. Moreover, the defense contended that plaintiff had multiple compression fractures long after the treatment with the chiropractor stopped.

At Trial: The jury returned a unanimous verdict for the defense, finding no negligence. The jury also answered the damage questions and assigned $0 for damages.

Verdict: $0

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

Estate of Jennifer Jawson's Unborn Child, et al. v. Armor Correctional, et al.
WIED Case No. 19-CV-1008
Trial Dates: February 26-28, 2024

Facts: This was a medical malpractice and civil rights case. Jennifer Jawson was eight months pregnant and incarcerated in the Milwaukee County Jail for violating her probation for using cocaine. One week into the incarceration, jail staff were unable to find a heartbeat for the baby. The baby was stillborn. Jawson contended that she was using methadone before she entered the jail and that the jail doctor failed to make sure she got to the methadone clinic. There was a five-day delay. The defense argued that the doctor put in an order for transfer to the methadone clinic. Also, many correctional institutions in the United States abruptly stop methadone when a person is incarcerated and that does not cause stillbirth. Furthermore, the defense contended that the studies show that stopping methadone does not cause harm to the fetus. Finally,

the defense contended that placental pathology revealed that the placenta was too small for the size of the baby, which was very large due to plaintiff's uncontrolled diabetes. The plaintiff had only had one prenatal visit during her pregnancy and was not testing her blood sugar or taking her medication on a regular basis.

At Trial: The jury returned a unanimous verdict for the defense, finding that the jail doctor was neither deliberately indifferent nor negligent.

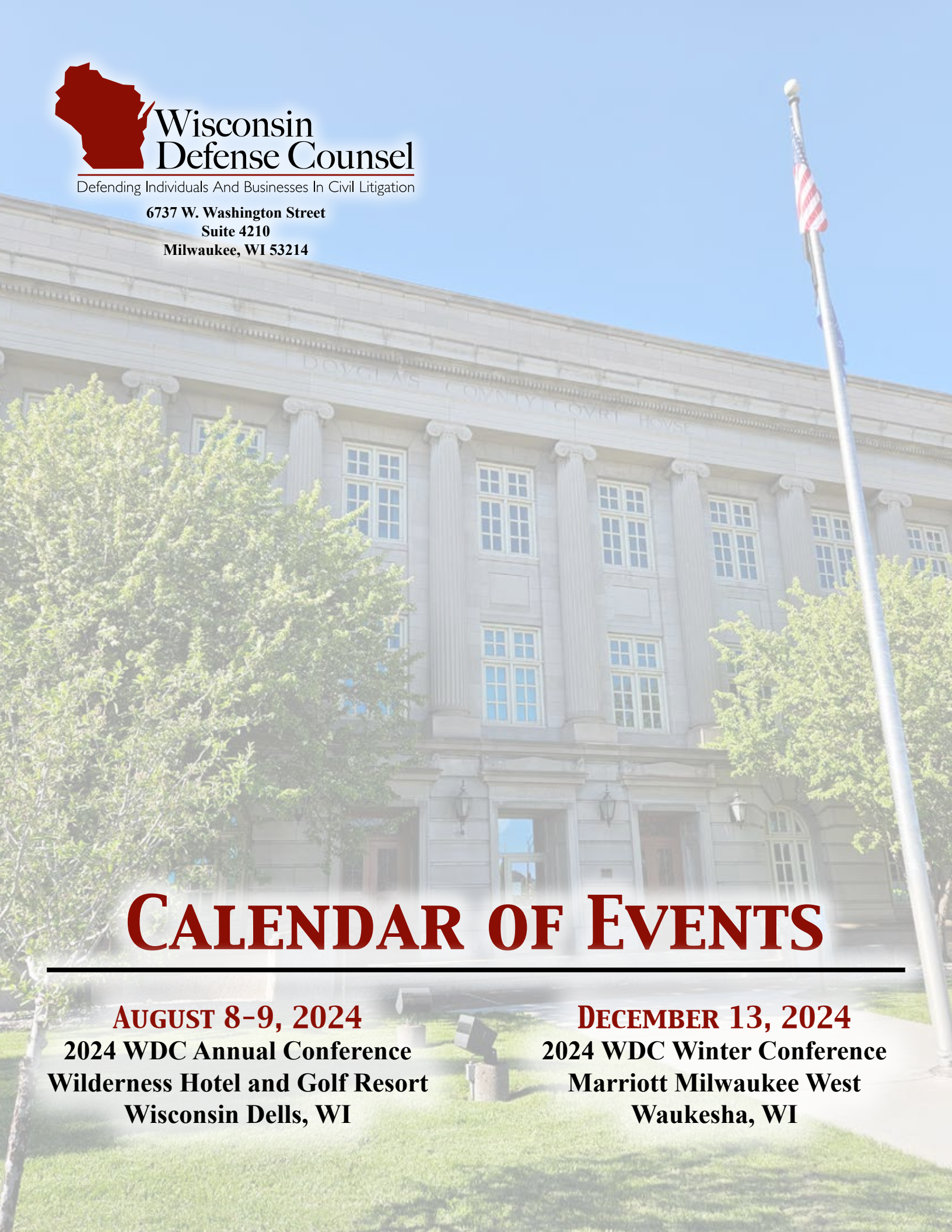
Verdict: $0

For more information, contact Randall Guse at rguse@otjen.com or Linda Vogt Meagher at meagher@gassturek.com.

NOTES

NOTES

NOTES



Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

6737 W. Washington Street
Suite 4210
Milwaukee, WI 53214

Calendar of Events

August 8-9, 2024
2024 WDC Annual Conference
Wilderness Hotel and Golf Resort
Wisconsin Dells, WI

December 13, 2024
2024 WDC Winter Conference
Marriott Milwaukee West
Waukesha, WI