Wisconsin Civil Trial Journal

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Also In This Issue

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Columnists

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In This Issue…

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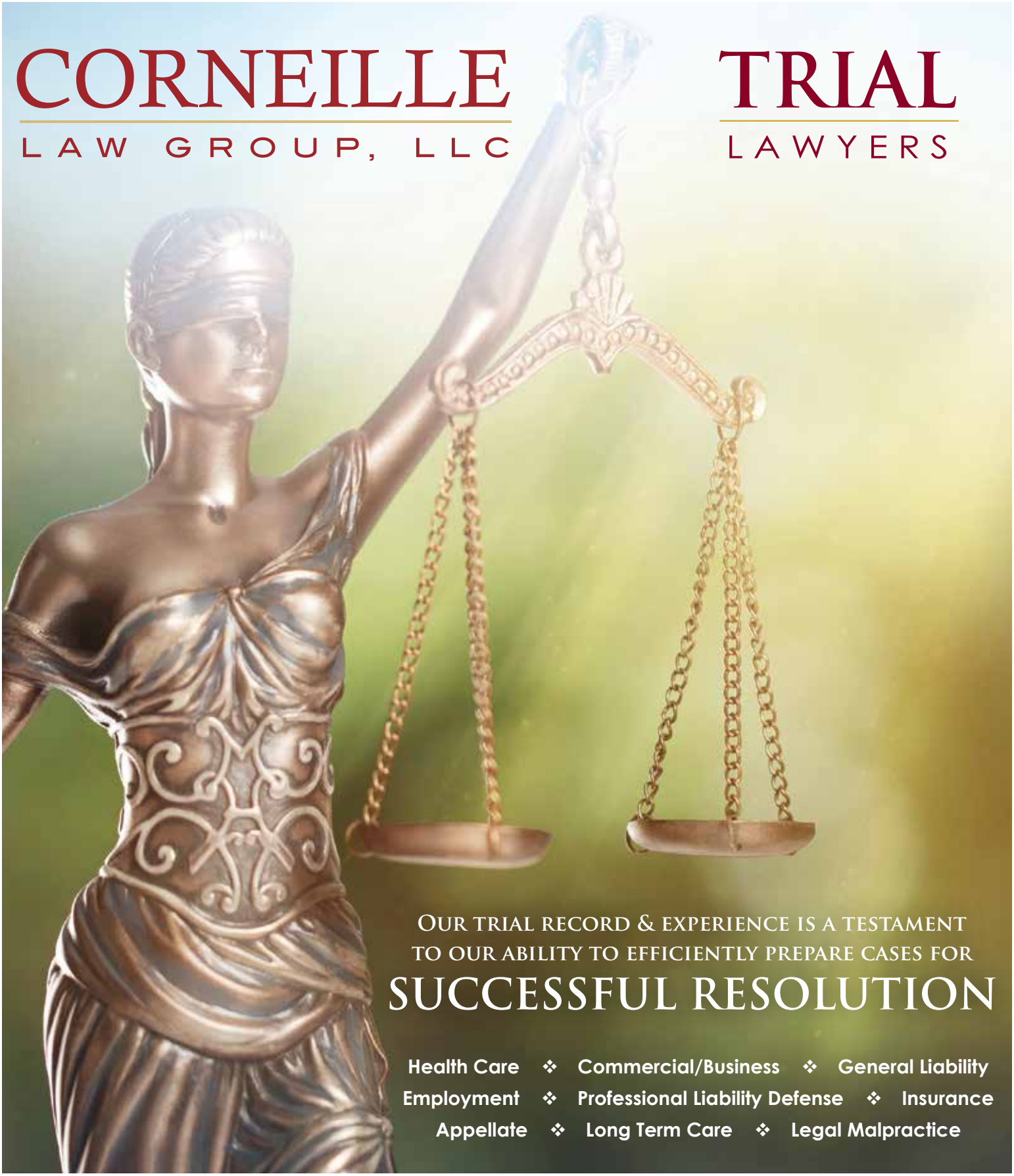
WDC Members and other readers are encouraged to submit articles for possible publication in the *Wisconsin Civil Trial Journal*, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

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



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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.

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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.

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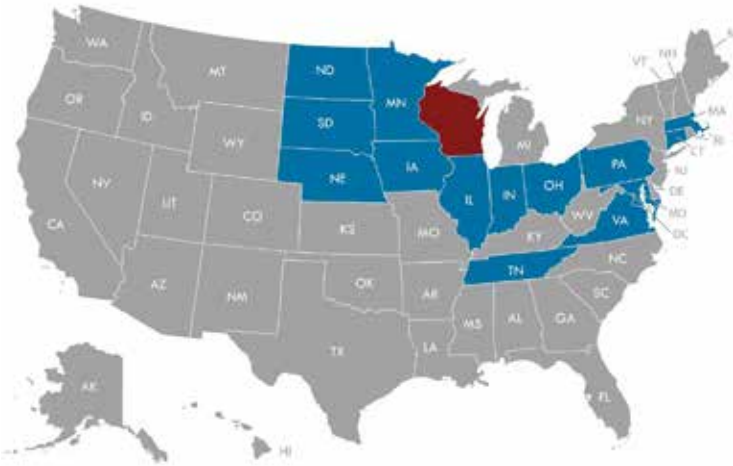

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President's Message: Using the Value and Virtue of Our Profession to Inspire the Next Generation of Defense Litigators

by: Heather Nelson, President, Wisconsin Defense Counsel

For those of you who were able to attend our annual conference in the Wisconsin Dells in August, I discussed during my remarks as incoming president a challenge many of us are facing: The recruitment and retention of our next generation of insurance defense trial attorneys. It seems recruitment has become more difficult, but retention even more so. The makeup of our workforce is changing, and it is becoming necessary to reassess and, in some cases, to pivot. Handling recruitment and retention "the same way it was when we were coming up" is short-sighted. We are not unique. No generation or industry has thrived and grown by simply "doing things the way things have always been done."

When I came out of law school, the job market was difficult. If you were one of the many applicants chosen and hired by a firm, you did not care that your salary was a small fraction of what your billable requirements would bring in. You got into the office before your boss, left the office after your boss, "paid your dues," and you were promised it would (and often it did) pay off some day. Today's law school graduate, in general, wants an immediate seat at the table, immediate financial rewards, and work life balance. In a world where we keep the lights on by the almighty billable hour, this presents a challenge.

In my opinion and experience, a very important key to finding our next generation of defense litigators is to identify new lawyers who want to be in the courtroom, who want to advocate, and who will find this work rewarding. The best way to attract them is to truly be and believe all of these things ourselves. Sometimes I lose sight of that when getting bogged down in the details. But when I mentor a younger attorney, it re-lights my fire.

As a member of the State Bar Litigation Section Board of Directors, I recently attended an event at Marquette Law School during which the State Bar set up a table for all of its practice sections and had one or two practitioners present to answer questions and to provide a glimpse into a career in that field. Law students could go table-to-table to learn what it is like to be in litigation, family law, immigration, public interest, etc., and to ask questions about necessary coursework and experience, pros and cons, work life balance, etc. When I arrived at the event, I was already a bit weary. I was tired from the drive and a long day at the office. But talking to these young students about my life and career as a civil defense litigator absolutely energized me. There were a few law students who were just making the rounds because they felt they had to, but when I locked eyes with the handful of law students who were clearly meant to be an engaging courtroom advocate, it was magical. They fed off my energy and I fed off theirs. It reminded me how much I love the bread and butter of what I do – from client education and counsel, to strategy, to discovery, and to, of course (but not often enough, unfortunately), a jury trial.

Lawyers who primarily practice in insurance defense just do not get enough love. Television and radio ads relentlessly pander for sympathy to injured persons, attempt to program viewers that all injured persons should recover "big dollars," and shamelessly demean and attack insurance companies. Nobody is spending ad dollars talking

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about the fear our clients experience when served with a lawsuit. Nobody is spending ad dollars to educate the public that not all people who are sued for personal injuries are actually liable (and that not all claims of injury are valid). Nobody is spending ad dollars extolling the virtuous practice of defending people and businesses in what are often defensible claims. It is up to those of us who do this work to remind ourselves why we do it and how valuable a service we provide.

I tried a slip-and-fall case before a Brown County jury in May. My client was a corporate client, but a small local business owner. During the trial, the plaintiff attorney's tactic was to aggressively argue that employees were not trained to take care of the safety of the store's patrons, that the store did not take the time to create pages and pages of written procedures to ensure nobody would ever encounter ice in Wisconsin in January, and that the company and its employees were casual and careless. Surely, the store cared more about profits than safety. This, of course, was not true and the jury fortunately saw through it, rendering a defense verdict.

The night before my closing argument, my client gave me a handwritten letter defending herself and her company in a way her trial testimony did not permit. She was so personally hurt and offended by the plaintiff's trial tactics. I knew those tactics were nothing more than "the playbook" to try to maximize recovery but I had forgotten to consider what it might feel like in her chair. She took the case to heart and took her business and societal obligations seriously, including the safety of her patrons and employees. She needed to put in writing for me, and probably for herself, an attestation of "our character, morals and dedication to our clients and our craft." She reiterated how sad and upset they were that this woman fell and sustained a serious injury. Their salesperson checked in on her, all the employees signed a get-well card, and all of them truly felt badly for her. She told me in her letter that "the attack on (her company's) morals, character and dedication to our client" was personal and hurtful. Yet she finished her letter to me (not for plaintiff and not for show, but because it is who she truly is as a person and they are as a business) reiterating how sorry she and her employees were that this woman sustained such a significant injury and that the plaintiff would continue to be in their thoughts and prayers. Clients and cases like this one are the reason I bristle at the incessant onslaught of commercials which I view as an unwarranted attack on what we do and those we represent. The client has graciously agreed to present with me and share her experiences at WDC's Winter Conference ("View from the Other Chair: A Lawsuit from the Insured's Perspective").

Our clients deserve every bit of respect, support, and top-notch representation as any plaintiff. It can be easy to forget that in a world where plaintiffs' flashy verdicts are touted in advertisements and through social media.

I have always found tremendous value in helping defendants - even those whose negligence actually caused somebody else's injury. They deserve respectful, caring, and competent representation to get them through the process. It is easy to get bogged down in our personal and professional lives and to think of our work in terms of monthly billing requirements so we can make a living and take care of ourselves and our families. We will always be at a disadvantage against a well-funded plaintiff public relations machine. Yet I implore our members to never forget that what we do is important, and our clients deserve our best. I encourage everybody to take a moment to remember why we do what we do and to use that passion to lead by example and to invigorate our next generation of trial lawyers: ours is also a just and respectable cause.

Author Biography:

Heather Nelson is President and Shareholder of Everson, Whitney, Everson & Brehm, S.C., in Green Bay. She currently serves as WDC President, having served on the Board of Directors and Executive Committee as well. Heather is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained


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her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back home to her Green Bay roots. Her practice areas include motor vehicle accident, premises liability, wrongful death, and insurance coverage. Heather has been active in presenting CLE topics at WDC conferences, for the State Bar of Wisconsin, and at the North Central Region Trial Academy.

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2024 WDC Winter Committee Awards

The WDC Winter Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders. Congratulations to the following award recipients who will be recognized during the WDC 2024 Winter Conference on December 13, 2024!

2024 Litigation Skills Committee Award: Nicole R. Radler, Simpson & Deardorff, S.C.

Congratulations to Nicole Radler for being selected by the Litigation Skills Committee and the Awards Committee for the 2024 Litigation Skills Committee Award! Nicole is a very active member and regular volunteer of the WDC! Earlier this year, Nicole volunteered as a "judge" at the WDC Litigation Skills Committee defense skills motion practice workshop on June 27, 2024. She is a current member of the Board of Directors and former Chair of the Young Lawyer Committee and Website and Social Media Committee. For several years, Nicole put together and sent out the weekly Advance eSheets. Nicole also assisted in the creation of WDC's new website. In 2022, she presented at the WDC Annual Conference during the "What We Want to Know from Seasoned Attorneys" presentation.

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

2024 Insurance Law Committee Award: Alexander C. Lemke, Meissner, Tierney, Fisher & Nichols S.C.

Congratulations to Alex Lemke for being selected by the Insurance Law Committee and the Awards Committee for the 2024 Insurance Law Committee Award! Alex authored an article that was published in the Summer 2024 issue of the Wisconsin Civil Trial Journal titled, *"PFAS and Insurance Coverage: Considerations and Updates on Recent Coverage Rulings."* He also presented at the *We've Got You Covered: Insurance Coverage in Wisconsin 2024* seminar hosted by the State Bar of Wisconsin on October 24, 2024. These are two of the Insurance Law Committee's most significant initiatives, namely contributing to the journal and putting on the seminar.

Alex is an attorney in Meissner Tierney's litigation practice group in Milwaukee. 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.

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"The Jury Is the Lie Detector in the Courtroom": The Rule Against Witness Vouching

by: Taylor R. Anderson, Boardman & Clark, LLP

In Wisconsin personal injury cases, as in other civil cases, the credibility of witnesses often plays a pivotal role in determining liability and damages. Plaintiffs may seek to bolster their case by having doctors, friends, or family members testify about the plaintiff's character or, worse, suggest through their testimony that the plaintiff is inherently trustworthy. The rule against witness vouching is a critical safeguard in ensuring that such testimony does not unfairly influence the jury. For a civil defense attorney, the ability to effectively prevent improper vouching is essential in maintaining a fair trial and preventing plaintiffs from swaying the jury with subjective, non-evidentiary opinions about the truthfulness of their testimony.

The *Haseltine* rule, as it is called in Wisconsin, precludes witnesses from commenting on the credibility of other witnesses and whether they are telling the truth. This article will discuss the *Haseltine* rule against witness vouching, analyze key case law, and offer strategies for civil defense attorneys to combat improper vouching in personal injury cases, specifically when it involves testimony from doctors, family members, and friends.

I. Legal Basis for the Rule Against Vouching

Wisconsin courts have long upheld the principle that witness credibility is solely the jury's determination. Witnesses and attorneys may not offer personal opinions about the truthfulness of others because this would improperly influence the jury and usurp their role as factfinders.

This issue was first addressed in Wisconsin in the case of *State v. Haseltine*,[1] which establishes that a witness, such as an expert, cannot directly opine on another witness' credibility. Relying on an Oregon Supreme Court case, the *Haseltine* court held that, "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."[2] That case involved criminal charges related to sexual abuse and incest where the State offered the testimony of the victim's psychologist to corroborate that the victim was telling the truth. The court found such testimony by the expert inadmissible and noted that "the jury is the lie detector in the courtroom."[3]

The *Haseltine* rule is "rooted in the rules of evidence that say, 'expert testimony must assist the trier of fact to understand the evidence or to determine a fact in issue.' Expert testimony does not assist the factfinder if it conveys to the jury the expert's own beliefs as to the veracity of another witness.'"[4]

In *State v. Romero*,[5] the Wisconsin Supreme Court confirmed the holding from *Haseltine* and held that neither party may personally vouch for a witness' credibility. The court explained that expressions of personal belief regarding a witness' truthfulness encroach on the jury's role, which is to independently assess whether a witness is credible based on the evidence. Although the *Romero* case involved a prosecutor's conduct in a criminal trial, its reasoning applies equally to civil litigation, particularly personal injury trials, where doctors or experts may be called to testify about a plaintiff's condition or credibility.

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II. Application of Vouching Rules in Personal Injury Cases

In personal injury cases, plaintiffs often attempt to build their credibility by relying on the testimony of individuals who know them well, such as doctors, family members, or close friends. These witnesses, while sympathetic to the plaintiff, must stay within the bounds of permissible testimony. The rule against witness vouching prohibits these witnesses from offering opinions about whether the plaintiff is being truthful about claims of pain, suffering, or the circumstances surrounding the injury.

a. Testimony From Doctors

Doctors play a significant role in personal injury cases, particularly in establishing the extent of the plaintiff's injuries and the prognosis for recovery. However, defense attorneys must remain vigilant when plaintiffs' treating physicians are called to testify, as there is often a risk that the doctor will offer testimony that indirectly bolsters the plaintiff's credibility.

For example, a doctor might testify that the plaintiff "has always been truthful" in reporting symptoms or that the doctor "believed" the patient about reported pain complaints. Such statements can come dangerously close to vouching for the plaintiff's credibility. In *State v. Snider*,[6] the court addressed a situation in which a detective testified that he found the victim's story "credible." The court found this improper because it amounted to a personal opinion about the truthfulness of another witness, a violation of the vouching rule. Defense attorneys should be prepared to challenge similar testimony from doctors, who may indirectly endorse plaintiffs' truthfulness in discussing their symptoms.

Defense counsel should object to such testimony and, if necessary, file a motion *in limine* before trial to limit the scope of the doctor's testimony. The doctor can and should testify about medical facts, diagnoses, and objective findings but should be precluded from expressing any opinion about whether the plaintiff's subjective complaints of pain or suffering are truthful. There is often a fine line between the doctor testifying that a patient's complaints were consistent with the objective findings the doctor observed and the doctor vouching for the patient. By raising the issue before trial with a motion *in limine*, the court can clarify that line before any testimony is given. The court's decision in *Haseltine* provides clear authority for such objections, as it reaffirms that medical experts should not give opinions on credibility.

b. Testimony From Friends and Family Members

It is common in personal injury cases for plaintiffs to call friends and family members to testify about their character, daily life, or how their injuries have impacted them. These witnesses, while offering important context about the plaintiff's condition, must also be restricted from offering improper opinions about the plaintiff's truthfulness. Statements like "She's always been honest" or "He would never lie about this" are examples of impermissible vouching to which defense counsel should object.

In *State v. Kuehl*,[7] the court addressed the impropriety of allowing a witness to testify about the credibility of another. The court ruled that such testimony encroaches on the jury's role and could unfairly influence their assessment of the facts. Although *Kuehl* was a criminal case, its reasoning applies equally in personal injury cases where a plaintiff's family or friends might try to indirectly vouch for the plaintiff's truthfulness regarding the extent of claimed pain or limitations.

Defense counsel should remain watchful during such witnesses' testimony, ready to object when a witness crosses the line into impermissible vouching. During depositions, defense attorneys should ask questions aimed at identifying any opinions or character assessments the plaintiff's family or friends might offer at trial. This provides an opportunity to preemptively file a motion *in limine* to exclude any improper vouching testimony, ensuring that the jury's focus remains on the objective facts of the case rather than subjective,

biased character evaluations. In cases where the plaintiff has credibility issues of his or her own or is simply not a very good witness, counsel may use the plaintiff's friends and family to bolster that credibility and provide corroboration of subjective complaints. In such circumstances, it can be easy for the witnesses to cross the line into vouching for their friend or family member, rather than providing testimony about what they actually observed.

III. Strategic Use of Pretrial Motions and Objections

One of the most effective tools a defense attorney can use to prevent improper vouching is the motion *in limine*. A well-crafted motion can help limit witness testimony before trial begins, preventing plaintiffs from improperly bolstering their credibility through vouching.

a. Motions *in Limine* to Exclude Vouching Testimony

Before trial, defense counsel should file a motion *in limine* specifically targeting the types of improper vouching that are common in personal injury cases. The motion should cite relevant Wisconsin case law, such as *Haseltine*, *Romero*, and *Kuehl*, to argue that no witness should be permitted to offer an opinion about the truthfulness of the plaintiff's statements regarding the claimed injuries or the accident itself.

For example, in a personal injury case where the plaintiff claims significant pain from an accident, the motion might request that the court prohibit the plaintiff's treating physician from testifying about the plaintiff's credibility concerning subjective complaints of pain beyond the doctor's actual observations. The court should limit the doctor's testimony to objective medical findings, diagnoses, and treatment plans. Similarly, the motion could seek to limit the testimony of friends and family members to observable facts rather than personal assurances of the plaintiff's honesty.

b. Objecting to Improper Vouching During Trial

In addition to pretrial motions, defense attorneys must be prepared to object to improper vouching during trial. Timing is critical when dealing with improper testimony, as failing to object immediately may result in the jury giving undue weight to impermissible statements. For example, if a family member testifies that the plaintiff "would never exaggerate about their injuries," defense counsel should immediately object on the grounds that this is improper vouching and request a curative instruction from the judge. The judge may instruct the jury that credibility determinations are their responsibility and that they should disregard any testimony suggesting that the witness personally believes the plaintiff's story. This swift action can neutralize the improper testimony before it taints the jury's perception.

Raising an objection during trial is also important to preserve the issue for appeal because determinations by the circuit court regarding whether a witness is testifying to the credibility of another witness is a question of law that is reviewed *de novo* by the appellate courts and can be grounds for reversal.[8]

IV. Ethical Considerations for Civil Defense Attorneys

In navigating the rule against vouching, civil defense attorneys must also remain cognizant of their ethical obligations. Wisconsin's Rules of Professional Conduct prohibit attorneys from offering personal opinions on witness credibility.[9] Defense attorneys must ensure that they do not cross this line when challenging witnesses on cross-examination or in closing arguments.

For instance, in closing arguments, a defense attorney should avoid statements such as "I know the plaintiff is exaggerating," which would constitute improper vouching or impeachment. Instead, the argument should focus on the evidence, inconsistencies in the plaintiff's testimony, and any

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objective medical records that cast doubt on the plaintiff's claims.

V. Conclusion

The rule against witness vouching is a crucial aspect of Wisconsin's legal system, ensuring that juries make credibility determinations based on objective evidence rather than subjective opinions. For civil defense attorneys in personal injury cases, the rule provides both a shield against improper testimony from the plaintiff's witnesses and a sword for challenging the credibility of those witnesses through permissible means.

By utilizing pretrial motions, timely objections, and strategic cross-examinations, defense attorneys can effectively limit improper vouching and ensure that the jury's decision is based on facts rather than personal opinions about the plaintiff's truthfulness. Wisconsin case law, including the decisions in *Haseltine*, *Romero*, and *Kuehl*, provides a strong foundation for defending against vouching and maintaining the fairness of civil trials.

Author Biography:

Taylor R. Anderson joined Boardman & Clark LLP in August 2023 and is an attorney in its litigation practice group after previously living in Las Vegas, Nevada. Taylor's practice focuses on insurance defense, including personal injury, product liability, product damage, and insurance coverage. Prior to going into private practice, he clerked with a trial court judge in Eugene, Oregon. Taylor earned his bachelor's degree from the University of Nevada, Reno, and his law degree from Willamette College of Law. He is admitted to practice in all Wisconsin state courts and both federal district courts as well as the 7th and 9th Circuit Courts of Appeal.

References:

1 *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (1984).
2 *Id.* at 96 (citing *State v. Middleton*, 294 Or. 427, 657 P.2d 1215, 1221 (1983)).
3 *Id.* (quoting *U.S. v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)).
4 *State v. Molde*, 2024 WI App 37, ¶ 22, 2024 Wis. App. LEXIS 426, 412 Wis. 2d 834, 9 N.W.2d 296 (unpublished single judge opinion) (quoting *State v. Maday*, 2017 WI 28, ¶ 34, 374 Wis. 2d 164, 892 N.W.2d 611).
5 *State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988).
6 *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 668 N.W.2d 784.
7 *State v. Kuehl*, 199 Wis. 2d 143, 545 N.W.2d 840 (Ct. App. 1995).
8 *State v. Tobar*, 2021 WI App 1, ¶ 22, 395 Wis. 2d 294, 953 N.W.2d 116 (citing *State v. Maloney*, 2004 WI App 141, ¶ 19, 275 Wis. 2d 557, 685 N.W.2d 620, aff'd, 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436).
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My Spouse Intentionally Burned Down Our Home! Will Insurance Cover This?

by: Vincent J. Scipior, Coyne, Schultz, Becker & Bauer, S.C.

I. Introduction

Wisconsin courts have gone back and forth over the years regarding whether an "innocent spouse" can collect insurance proceeds after their husband or wife intentionally sets fire to their home. While it usually comes down to the policy language, there are several factors that can affect the outcome, including whether the guilty spouse was mentally ill or intoxicated at the time of the fire, whether the innocent or guilty spouse has concealed information from the insurer, and whether the guilty spouse has been charged with and/or convicted of a crime as a result of the fire. This article discusses the case history, relevant insurance provisions, defenses to consider, and an insurer's rights and obligations when presented with such a claim.

II. Wisconsin Case Law

Before 1982, it was the rule in Wisconsin that an insured who is innocent of any wrongdoing cannot reap the benefits of an insurance policy when the intentional acts of another insured caused the property damage.[1] This rule—known as the "*Bellman* rule"—imputed the incendiary actions of an insured to the innocent insured and served as an absolute bar to recovery by the innocent insured based on public policy concerns to deter crime and prevent a wrongdoer from profiting from his or her own wrongful act.[2]

a. *Hedtcke v. Sentry Ins. Co.* (1982)

The *Bellman* rule was overturned by the Wisconsin Supreme Court in *Hedtcke v. Sentry Ins. Co*.[3] In *Hedtcke*, a husband intentionally set fire to the family's home several days before a divorce order would have compelled him to leave the home.[4] The wife was not occupying the family's home at that time but was a joint owner and a named insured on an insurance policy issued by Sentry.[5] Sentry denied the wife's claim for damages because her husband intentionally started the fire based on the *Bellman* rule.[6] After the wife filed suit, the circuit court dismissed the case, and the court of appeals affirmed.[7] On appeal to the Wisconsin Supreme Court, the wife argued that the *Bellman* rule was unfair and nothing in the contract of insurance barred her from recovering merely by virtue of the fact that another insured (her husband) intentionally caused the damage to the insured property.[8] The *Hedtcke* court agreed and abandoned the *Bellman* rule, holding that the wife's rights must be determined in the particular factual context of the case as applied to the language of the insurance policy.[9] On remand, however, the *Hedtcke* court instructed the trial court to "tailor[ ] the recovery permitted the innocent insured to guard against the possibility that the arsonist might receive financial benefit as a result of the arson."[10] "For example, the arsonist may be denied all recovery while the innocent insured may recover a *pro rata* share of the insurance proceeds, according to his or her interest in the property."[11]

b. *Northwestern National Insurance Co. v. Nemetz* (1986)

Northwestern National Insurance Co. v. Nemetz[12] involved similar facts to that in *Hedtcke*. In *Nemetz*, a husband deliberately burned down a building jointly owned with his wife, except that the fire

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spread to the building next door, leading to a lawsuit and the question of liability coverage for the wife.[13] Although the wife was eventually absolved of liability for starting the fire, the policy at issue contained an intentional acts exclusion that barred coverage for liability "expected or intended by *an* insured."[14] The policy also contained a "severability of interest" clause stating that the policy "applies separately to each insured person against whom a claim or suit is brought."[15] While the court acknowledged that the use of the term "an" insured was an "attempt[ ] to join the insureds' obligations," it nevertheless concluded that the "severability of interest" clause created an ambiguity, which had to be construed against the insurer.[16]

c. *State Farm Fire & Cas. Inc. Co. v. Walker* (1990)

In *State Farm Fire & Cas. Inc. Co. v. Walker*,[17] the Wisconsin Court of Appeals made clear that the *Hedtcke* decision does not bar an insurer from writing its policy to deny coverage to an innocent insured. In *Walker*, the plaintiffs submitted a claim to their homeowners' insurer, State Farm, after their home was destroyed by a fire.[18] During its investigation, State Farm learned that the husband had an active warrant for his arrest on homicide charges in another state.[19] During an examination under oath, the husband refused to answer questions pursuant to his Fifth Amendment right against self-incrimination.[20] State Farm thereafter sought a declaratory judgment that there was no coverage for the fire based on evidence that the husband committed arson (the husband was alone in the home when the fire started and fire investigators concluded that the fire had been set with accelerants).[21] The circuit court granted judgment to State Farm and the plaintiffs appealed, arguing that *Hedtke* compelled a different result.[22]

The court of appeals rejected the plaintiff's interpretation of *Hedtcke*, holding that the *Hedtcke* court based its decision on narrow grounds, declining to address whether it would violate public policy for an insurance company to deny recovery to an innocent insured when the terms of the policy unambiguously supported the denial.[23] The court explained:

> For a court to declare as a matter of public policy that an insurer may not make the obligations of the insureds joint would be to upset long-established rules of insurance contract interpretation. …
>
> No matter what this court's opinion is on the public policy issue of this case, it is not within the province of the appeals court to announce a public policy that has the effect of overturning long-established rules of insurance contract jurisprudence. Such a step can be taken only by the state supreme court….[24]

d. *Smith v. Am. Family Mut. Ins. Co.* (2007)

Following *Walker*, the court of appeals held in *Smith v. Am. Family Mut. Ins. Co.*,[25] that an intentional acts exclusion barred recovery by an innocent insured for a fire started by his spouse, but also ruled that a fact issue existed as to whether the spouse acted with "intent" based on her cognitive status at the time of the fire. In *Walker*, a wife burned down her home while intoxicated by setting fire to the curtains.[26] Prior to the fire, the wife had been struggling with alcoholism, depression, anxiety, and suicidal ideation for which she was prescribed medication, and had been acting erratically and threatening to burn down the home.[27] On the night of the fire, the wife called her husband (who was playing cards with friends) to tell him that she had been drinking and threatened to burn the house down, to which the husband responded, "knock it off" and "go to sleep."[28] As a result of the fire, the wife was charged with arson and ultimately convicted after entering a no contest plea.[29] After the fire, the husband and wife sought to recover under their homeowners' policy with American Family.[30] Because the wife admitted to intentionally starting the fire, American Family denied the claim.[31] After the husband and

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wife filed suit, the circuit court granted summary judgment to American Family, and the husband and wife appealed.[32]

On review, the court appeals reversed the circuit court's decision on the ground that a factual question existed as to whether the wife had the mental capacity to "intentionally" set the fire.[33] In reaching this conclusion, the court agreed that American Family's policy only covered "accidental" losses, not "intentional" losses.[34] First, the policy provided an initial grant of coverage only for "accidental direct physical loss to property."[35] While not defined by the policy, the *Smith* court ruled that "accidental" means "an event that is characterized by a lack of intent."[36] Second, an intentional acts exclusion precluded coverage for "any loss or damage arising out of any act committed … by or at the direction of any insured … and … with the intent to cause a loss."[37] The court interpreted the exclusion to apply "if [the wife] intended the act that caused the loss, *i.e.*, setting fire to the curtains, regardless of whether [the wife] intended to cause the total loss of the home."[38] Due to the wife's intoxication and mental health problems, the court ruled that a disputed issue of material fact existed as to whether the wife intended to set fire to the curtains.[39]

Next, the court addressed the husband's claim that he should be entitled to recover under the homeowners' policy as an "innocent spouse," regardless of whether his wife intended to set fire to the curtains.[40] After discussing *Hedtcke* and *Walker*, the court ruled that the husband was not entitled to recover if his wife intentionally set the fire because the intentional acts exclusion precluded recovery for intentional acts committed "by or at the direction of *any* insured."[41] This language, the court ruled, "creates a joint obligation of the insureds for the intentional acts of one insured, barring recovery for innocent insureds such as [the husband]."[42] Accordingly, the appeals court remanded the case back to the circuit court with instructions that the "policy unambiguously bars recovery to [the husband] as an innocent insured in the event that a jury finds that [the wife] intended to start the fire, precluding her recovery under the intentional loss exclusion."[43]

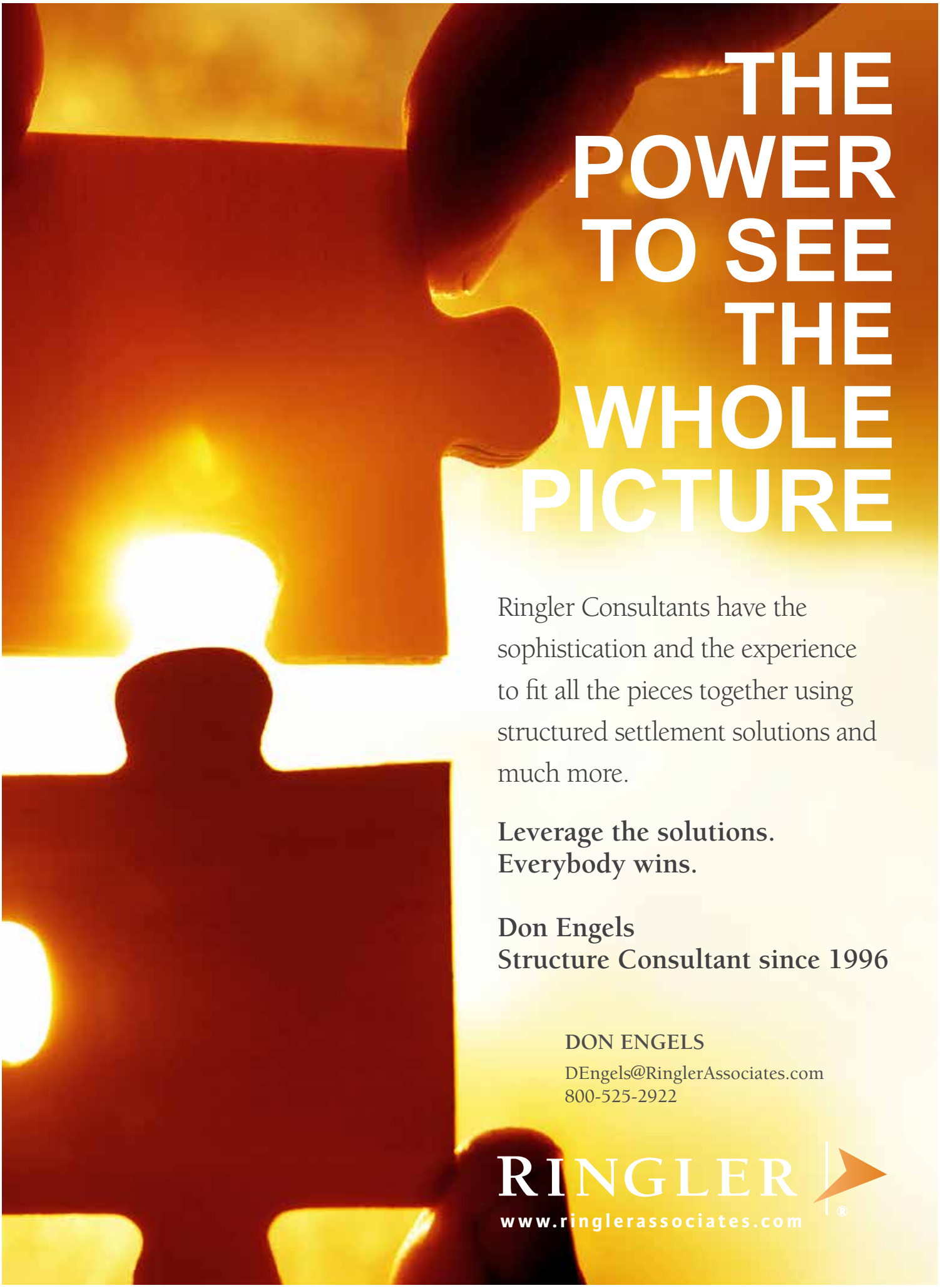
It is important to note that *Smith* is an unpublished opinion issued before July 1, 2009, and therefore cannot be cited in any court in Wisconsin as precedent or authority pursuant to Wis. Stat. § 809.23(3).

e. *Kemper Indep. Ins. Co. v. Islami* (2021)

Like in *Smith*, the court of appeals applied the *Walker* decision in *Kemper Indep. Ins. Co. v. Islami*[44] to hold that an innocent spouse was barred from recovering under a fire loss policy by the intentional act of their spouse. In *Islami*, a wife was denied coverage for a fire started by her estranged husband from whom she was legally separated.[45] As part of the separation, the couple agreed that the wife would have sole title to the home.[46] When the wife was away on vacation, the husband started the fire to spite the wife.[47] Following the fire, the husband was criminally prosecuted for arson.[48] Everyone agreed that the husband intentionally set the fire and that the wife did not conspire with the husband and knew nothing about his plan or actions.[49] After the trial court ruled in favor of no coverage, the wife appealed.[50]

On appeal, the wife argued that her husband's intentional acts could not be imputed to her under *Hedtcke*.[51] The court disagreed, holding that *Walker*—not *Hedtcke*—controlled the case, because the language of the policy unambiguously provided coverage to "no insureds" when "an insured" engages in concealment or fraud.[52] Under the terms of the policy, the husband's actions "voided coverage to all insureds."[53] The court concluded by stating, "Although our decision results in a loss of coverage to one who the parties agree—and we have no reason to doubt—is an innocent insured, this court is not authorized to rewrite the terms of the agreed-upon policy."[54]

On review, the Wisconsin Supreme Court affirmed the lower court's decision.[55] Like the court of



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appeals, the supreme court was not persuaded by the wife's reliance on *Hedtcke*.[56] Applying standard principles of contract interpretation, the supreme court ruled that the plain and unambiguous terms of the policy excluded coverage for innocent spouses like the plaintiff.[57]

f. *Am. Strategic Ins. Corp. v. Curry* (2024)

In a recent decision, the Wisconsin Court of Appeals ruled in *Am. Strategic Ins. Corp. v. Curry*[58] that an "illegal or criminal acts" exclusion did not preclude coverage for a house fire intentionally started by the insured's son while suffering from an episode of schizophrenia. The son testified that he started the fire "because he believed there were cameras and 'imposters' in the house."[59] He was criminally charged with arson but was found "not guilty by reason of mental disease or defect" after entering a guilty plea and was committed to the custody of the Wisconsin Department of Health Services ("DHS") for a period of seven years.[60]

Following the fire, the insureds submitted a claim to their homeowners' insurer, American Strategic Insurance Corporation ("ASI").[61] ASI denied the claim and commenced an action for declaratory judgment.[62] ASI took the position that its policy did not provide coverage for the loss under an exclusion for "illegal or criminal acts," which stated that the policy did "not insure for a loss caused directly or indirectly by … any illegal or criminal act performed by, at the direction of, or in conspiracy with any 'insured."[63]

At summary judgment, the insureds argued that the exclusion did not apply because their son was found not guilty by reason of mental disease or defect, which meant he "did not commit a 'criminal' act because he lacked the necessary intent to be convicted of arson."[64] The trial court agreed and entered summary judgment in favor of the insureds.[65] ASI appealed.[66]

On appeal, ASI argued that the insured's son performed a criminal act despite being found not guilty due to mental disease or defect.[67] By entering a guilty plea, the son admitted that he committed all the elements of the crime of arson.[68] Under Wisconsin law, when a criminal defendant enters a guilty plea and asserts an affirmative defense of not guilty by reason of mental disease or defect, the defendant "admits that but for the lack of mental capacity, the defendant committed all the essential elements of the offense charged."[69]

The court of appeals ruled that the "illegal or criminal acts" exclusion was ambiguous as to the meaning of the word "criminal," which was not defined by the policy.[70] On the one hand, the insured's son committed a crime because he violated the law.[71] On the other hand, the insured's son did not commit a crime because he was found not guilty and was not subject to criminal punishment or responsibility (DHS commitments are regarded as non-punitive in nature).[72] Because the word "criminal" in the exclusion was susceptible to more than one reasonable meaning, it was ambiguous.[73]

Finally, the court of appeals distinguished the facts of the case from its prior decision in *Wright v. Allstate Cas. Co.*,[74] in which the court held that an intentional acts exclusion applied to the insured's actions even though he was mentally ill at the time. In *Wright*, a widow whose husband was shot and killed by their neighbor sought benefits from the neighbor's homeowners' insurer, Allstate.[75] Allstate argued that coverage was barred by an intentional acts exclusion contained in its policy.[76] The widow argued that the intentional acts exclusion should not apply because the neighbor was mentally ill at the time of the shooting, and therefore he was incapable of intending to cause injury or commit a criminal act.[77] Following the shooting, the insured was adjudicated not guilty by reason of mental disease or defect.[78] The court of appeals rejected the widow's arguments, holding that the nature of the neighbor's act does not change because of his mental illness, and that his mental illness "did not prevent him from intending his actions."[79] "Therefore, there can be no coverage."[80]

Unlike the policy in *Wright*, the policy issued by ASI in *Curry* did not contain an intentional acts

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exclusion.[81] Thus, the court was presented with a different question (whether the son's acts were "criminal," not "intentional").[82] Accordingly, the conclusion in *Wright* had no bearing on the court's conclusion.[83]

Like *Smith*, however, *Curry* is an unpublished decision that cannot be cited in any court in Wisconsin as precedent or authority. While *Curry* was published after July 1, 2009, it is a *per curiam* decision (and only opinions issued on or after July 1, 2009 that are authored by a single judge or by a member of a three-judge panel may be cited for persuasive value under Wis. Stat. § 809.23(3)(b)).

III. Relevant Policy Provisions

When presented with a fire loss claim by an innocent spouse for the intentional acts of their husband or wife, there are several important policy provisions to look for in the policy.

To begin with, most homeowners' policies provide an initial grant of coverage only for "sudden and accidental" losses. The term "accident" is not usually defined by the policy. Wisconsin courts have defined "accident"—as used in an insurance contract—to mean an event "occurring by chance or arising from unknown or remote causes" and/or "an event which takes place without one's foresight or expectation."[84] Whether a claimed loss was caused by an "accident" is typically analyzed from the viewpoint of the insured.[85] In determining whether a loss was "accidental" from the viewpoint of the insured, a circuit court will focus on "the injury-causing event," *i.e.*, "the incident or injury that gives rise to the claim, not the plaintiff's theory of liability."[86] "Only if the facts alleged show that the injury-causing event is an accident is the policy's initial grant of coverage triggered."[87] In general, intentional acts are not considered an "accident." To be intentional, the actor must (1) intentionally act, and (2) intend some injury or harm to follow from that act.[88]

Most homeowners' policies contain an **Intentional Acts Exclusion**, which states that the policy 'does not cover any loss caused directly or indirectly by the intentional acts of or at the direction of any insured, if the loss that occurs may be reasonably expected to result from such acts or is the intended result of such acts.' If the policy permits payment to an innocent insured for the intentional acts of another insured, it may nonetheless include a provision that 'payment to the innocent insured may be limited in accordance with his or her ownership interest in the property and/or reduced by payments to a mortgagee.'

Included in the Intentional Acts Exclusion or as a separate standalone exclusion, most policies will also contain an **Illegal or Criminal Acts Exclusion**, which states that the policy 'does not cover any loss caused directly or indirectly by the illegal or criminal acts of any insured.' The exclusion may state that it applies 'regardless of whether or not the insured person is actually charged with or convicted of a crime.' Additionally, the exclusion may state that it applies 'even if the insured lacked the mental capacity to govern his or her conduct.'

The policy may also include a **Misrepresentation, Fraud or Concealment** clause which states that the policy 'does not cover any loss in which any insured has concealed or misrepresented any material fact, the concealment or misrepresentation was made with intent to deceive, and the insurer relied on the concealment or misrepresentation.'

Most policies contain a provision concerning **What You Must Do After a Loss** which states that the insureds 'will cooperate with the insurer and assist the insurer in any matter concerning a claim or suit.' As part of its duty to cooperate, the policy usually requires the insureds to 'submit to examinations under oath, separately and apart from any other insured.' The policy will further state that the insurer has 'no duty to provide coverage under the policy if any insured person fails to comply with these terms and the failure to comply is prejudicial to the insurer.'

As discussed in *Nemetz*, the policy may contain a **Severability of Interest** clause stating that

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the policy applies "applies separately to each insured person against whom a claim or suit is brought." Conversely, the policy may contain a **Joint Obligations** provision which 'imposes joint obligations on all insureds,' which 'means that the responsibilities, acts and failures of any insured is binding upon all insureds.' This provision may appear at the very beginning of the insuring agreement.

The policy may also contain a **Mortgagee** clause which states that 'a covered loss will be payable to the mortgagee named on the policy declarations, to the extent of their interest,' and that the insurer 'will protect the mortgagee's interest in the event of an intentional or criminal act by an insured.'

IV. Available Defenses

Based on the foregoing cases and policy provisions, the following defenses may be available to an insurer who is presented with a claim by an "innocent spouse" for fire losses intentionally caused by their husband or wife.

First, the *Hedtcke* rule, which held that an innocent insured can still recover for losses intentionally caused by his or her spouse, has mostly been rendered obsolete by updated policy language. Most newer policies, like the policies issued in *Smith* and *Islami*, provide an initial grant of coverage only for "sudden and *accidental*" losses and exclude coverage for losses caused by the "intentional or criminal acts of or at the direction of *any* insured person…" The courts in *Smith* and *Islami* ruled that the use of the term "any insured" imposed a joint obligation upon all insureds for the intentional acts of one insured, barring recovery by the innocent insured. Assuming the insurer's policy contains similar language, the starting position will be that the policy does not provide coverage to the innocent spouse.

Next, intoxication and insanity are not always a defense to policy exclusions. Courts in other states are split on the issue of whether arson committed by an insane person constitutes an "intentional" act under an insurance policy. Some jurisdictions have held that coverage is not precluded under an intentional acts exclusion clause when an injury results from an insane act.[89] Courts in other jurisdictions have held that an injury inflicted by an insane person is precluded under an intentional acts exclusion if the actor understands the physical nature and consequences of the act, even if the actor is unable to distinguish right from wrong.[90] In *Wright*, the Wisconsin Court of Appeals ruled that an intentional acts exclusion applied to the insured's actions even though he was mentally ill at the time. Thus, if the policy was issued and delivered in Wisconsin, insanity cannot be raised as a defense to an intentional acts exclusion.

There are two unpublished cases in Wisconsin, however, that carve out exceptions to the *Wright* rule: *Curry* and *Smith*. *Curry* involved a policy that contained a Criminal Acts Exclusion, but not an Intentional Acts Exclusion. Because of the ambiguous nature of the word "criminal," the *Curry* court was unwilling to deny coverage to an insured who was found not guilty of arson by reason of mental disease or defect. Similarly, in *Smith*, the court ruled that a fact issue existed as to whether the insured actually "intended" to cause a fire because he was intoxicated and experiencing a mental health breakdown at the time of the fire. While *Smith* (2007) was issued before *Wright* (2011), there is nothing in *Wright* that specifically overrules *Smith* or precludes a trial court from ruling that a fact issue exists as to intent due to the insured's mental health condition. Unlike in *Smith*, the insured in *Wright* had already been convicted of first-degree intentional homicide. For this reason, the *Wright* court concluded that no fact question existed for trial in the coverage action. If the insured has not been charged or convicted of a crime of which intent is an element, a trial court may be more willing to follow the example set in *Smith*. Although *Smith* is an unpublished case that cannot be cited, it is reasonable to assume that a trial court will find it and read it.

Even if the insurer is obligated to pay the innocent spouse (either because the policy language permits it or a factfinder determines that the guilty spouse

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did not act intentionally due to intoxication or a mental disease or defect), the circuit court must still tailor the recovery permitted to the innocent spouse so that it does not benefit the guilty spouse.[91] In *Hedtke*, that meant the innocent spouse receiving half of the insurance proceeds pursuant to her *pro rata* interest in the property.[92] In *Felder v. North River Inc. Co.*,[93] however, the trial court awarded 100% of the insurance proceeds to the innocent spouse because the guilty spouse was dead. In that case, the husband burned the insured's house with gasoline and then proceeded to commit suicide with a gun during the fire.[94] The insurer sought a declaration that the wife's recovery should be limited to her fifty percent interest in the property under *Hedtcke*.[95] Because the husband did not survive the fire, the court ruled that the wife was entitled to full recovery.[96] First, when the husband died, his interest was extinguished, and the wife became the sole owner of the property.[97] Second, because the husband was dead, there was no possibility the trial court's award would benefit the wrongdoer.[98]

Ultimately, determining whether there can be a recovery without benefiting the wrongdoer is a question of law that the trial court must decide.[99] "Once it has been determined that a recovery without benefiting the wrongdoer can occur, it is for the trial court in the exercise of its discretion to fashion the actual recovery."[100] The fact that the innocent spouse and guilty spouse are both alive and intend to continue their marriage does not foreclose the possibility that a fair recovery can be fashioned.[101]

V. Rights and Obligations

Regardless of the policy exclusions, an insurer has certain rights and obligations when presented with a fire loss claim resulting from the intentional acts of an insured.

a. Right to an Examination Under Oath

Under most policies, the insurer has the right to conduct examinations under oath (EUO) of the insureds after a loss. If an insured refuses to attend an EUO or refuses to answer questions at the EUO (including if the insured invokes his or her Fifth Amendment right against self-incrimination), the insurer may be able to deny coverage on that basis alone. In *Link v. Link*, the court of appeals ruled that an insurer was not required to provide coverage for a claimed loss under its policy because the insured failed to comply with the policy's cooperation clause.[102] Specifically, the insured refused to provide responses to the insurer's discovery requests in the coverage action, instead asserting his Fifth Amendment privilege.[103]

b. Obligation to Provide Coverage for Losses Resulting from Domestic Abuse

The policy may contain an exception to the Intentional or Criminal Acts Exclusion for 'property loss or damage resulting from an act, or pattern, of abuse or domestic abuse.' This exception is based on Wis. Stat. § 631.95(2)(f), which prevents denial of coverage to a domestic abuse victim based on acts of the abuser that cause, or instill fear of causing, physical harm to the victim. It states as follows:

> **Restrictions on insurance practices; domestic abuse.**
>
> **(2)** General prohibitions. Except as provided in sub. (3), an insurer may not do any of the following:
>
> … (f) Under property insurance coverage that excludes coverage for loss or damage to property resulting from intentional acts, deny payment to an insured for a claim based on property loss or damage resulting from an act, or pattern, of abuse or domestic abuse if that insured did not cooperate in or contribute to the creation of the loss or damage and if the person who committed the act or acts that caused the loss or damage is criminally prosecuted for the act or acts. Payment to the innocent insured may be limited in accordance

> with his or her ownership interest in the property or reduced by payments to a mortgagee or other holder of a secured interest.[104]

A similar exception was analyzed in *Islami* (discussed above), in which the supreme court ruled the exception did not apply because the record lacked any evidence showing that the arson constituted "abuse" or "domestic abuse" against the wife, as statutorily defined.[105] Under Wis. Stat. § 813.122(1)(a), "abuse" is defined to mean, among other things, "[p]hysical injury inflicted on a child by other than accidental means."[106] Under Wis. Stat. § 968.075(1)(a), "domestic abuse" is defined to mean:

> [A]ny of the following engaged in by an adult person against his or her spouse or former spouse …:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of s. 940.225 (1), (2) or (3) [sexual assault].
>
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

In *Islami*, the supreme court commented that an act of arson could qualify as a "physical act" under the fourth definition of "domestic abuse," but rejected a claim that the exception applied to the facts of the case because there was no evidence in the record that the wife reasonably feared imminent engagement in the sort of bodily harm described in the statute.[107]

c. Obligation to Mortgagee

Even if the policy contains an intentional and/or criminal acts exclusion, the insurer may still have an obligation to satisfy any mortgages listed on the policy declarations if the policy contains such language.[108]

d. Right to Subrogation

Ordinarily, an insurer does not have a right of subrogation or indemnification against its own insured.[109] In *Madsen v. Threshermen's Mut. Ins. Co.*, however, the court of appeals ruled that an insurer has a right to subrogate against an insured who intentionally sets a fire, reasoning that "the wrongdoer and the insured are the same person."[110]

In *Madsen*, Threshermen's issued a fire insurance policy to Robert and Nancy Madsen who owned a bar and grill.[111] The policy contained a standard mortgage clause naming a mortgagee and authorizing payments directly to the mortgagee for any loss that may occur.[112] After a fire destroyed the bar and grill, Threshermen's paid the balance of the Madsens' mortgage directly to the mortgagee listed on its policy but denied a claim submitted by the Madsens for their interest in the property on the basis that Robert Madsen intentionally set the fire.[113] After the Madsens sued, a jury agreed with Threshermen's and returned a verdict in favor of the insurer.[114] On post-verdict motions, the trial court ruled that Nancy Madsen was not entitled to benefits as an "innocent insured" and denied Threshermen's subrogation claim against Robert Madsen for the amount paid to the mortgagee ($33,050).[115] Cross-appeals followed.[116]

On review, the court of appeals reversed both decisions.[117] First, the court ruled that the language of Threshermen's policy permitted an innocent insured such as Nancy to recover for losses intentionally caused by Robert, and that it was possible to tailor the recovery so that it did not benefit Robert.[118] In short, the court ruled that Nancy was entitled to her one-half interest in the property.[119] "[T]o deny her any recovery because of Robert's misconduct would be tantamount to punishing her for his misconduct."[120]

Next, the court ruled that Threshermen's was

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entitled to subrogation from Robert for the amount it paid under the terms of the fire insurance policy to the mortgagee for the damages resulting from Robert's arson.[121] Additionally, the court held that Threshermen's was entitled to consequential damages including the amount it must pay to Nancy, reasonable adjusting expenses, and reasonable litigation expenses it incurred as the natural and proximate result of Robert's intentional conduct.[122] Because the amount of consequential damages was an issue of fact to be resolved by the trial court, the court of appeals remanded the action for further proceedings.[123]

VI. Conclusion

When an innocent spouse submits a claim for a fire loss intentionally caused by his or her spouse, the policy language and particular facts of the loss will dictate whether the innocent spouse can recover. If the policy excludes coverage for intentional acts committed by "any" insured and imposes joint obligations on "all" insureds, the innocent spouse likely cannot recover (unless the loss was caused by an act of domestic abuse per statute). If the policy permits recovery by the innocent spouse, a full investigation should be performed to determine whether the fire was started at the direction of the "innocent" spouse. If the insureds refuse to cooperate or conceal or misrepresent any facts during the investigation, the insurer may be able to deny the claim on that basis alone. An investigation should also be performed into whether a recovery can be tailored to the innocent spouse that does not benefit the guilty spouse. Regardless of whether the innocent spouse can recover, however, the insurer may still be obligated to satisfy any mortgages listed on the policy declarations page. Finally, to the extent the insurer must make payments, it may have a right of subrogation against the guilty spouse for the payments made, including the amount paid to the mortgagee, the amount paid to the innocent spouse, reasonable adjusting expenses, and reasonable litigation expenses incurred as the natural and proximate result of the guilty spouse's intentional act.

Author Biography:

Vincent (Vince) J. Scipior is a shareholder at Coyne, Schultz, Becker & Bauer, S.C. in Madison with over thirteen years of experience in personal injury, insurance coverage, professional liability, products liability, and wrongful death cases in state and federal courts. Vince received a bachelor's degree in legal studies in 2007 from the University of Wisconsin-Madison and his law degree in 2011 from the University of Wisconsin Law School. He is admitted to practice in all Wisconsin state and federal courts. He has tried cases in Adams, Columbia, Grant, Green, and Dane Counties. Vince is the current Editor of the Wisconsin Civil Trial Journal and a member of the WDC Board of Directors. Vince was recognized as a 2017 Up and Coming Lawyer by the Wisconsin Law Journal and has been included in the Wisconsin Rising Stars List by Super Lawyers Magazine since 2016.

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Legal Landmines in Vacant Land and Lot Sales

by: Erik H. Monson, Coyne, Schultz, Becker & Bauer, S.C.

I. Introduction

Attorneys face many challenges when representing buyers or sellers in vacant land and lot sales. One challenge is avoiding legal "landmines" that can result in claims and/or lawsuits. This article identifies and explores three types of vacant land that can have legal landmines buried beneath them: (1) forested land; (2) petroleum brownfields; and (3) adversely possessed land.

II. Are You Seeing the Forest for the Trees?

Forested land presents unique challenges and corresponding liability risks. Wisconsin has a Managed Forest Law which regulates most aspects of forest resources, and the products derived from those resources.[1] Many of these regulations apply to *privately-owned* forest land.[2]

When involved in the sale of forested land, be aware that a previous or current owner may have registered or entered portions of the subject property into a forest land management plan.[3] Forest land management regulations can limit building or expansion options, expose an unwitting buyer to substantial monetary penalties, and result in the loss of preferential property tax rates if prior management plans are not continued or if construction is undertaken in registered or protected land.[4]

When representing a client involved in a transaction for forested land, counsel should find out whether land is, has been, or may be enrolled in any forest land management program. While title insurance may alert the parties, this is often received too late in the transaction to make any difference. A real estate tax summary or tax history may also show a tax-preferred managed forest land ("MFL") status as well. Counsel should not, however, expect a land survey to reveal a property's MFL status.

On the seller's side, there is most likely an MFL disclosure obligation - the specificity of which is beyond the scope of this article. The disclosure, however, may be difficult to discern, especially for an attorney with limited experience in forested land transactions.

On the buyer's side, counsel should appreciate the nuances attendant to purchasing even partially forested land. Wis. Stat. § 77.88(2)(ac)-(c) provides that when purchasing managed land, the buyer must either file a form to continue under the previous management plan or be subject to an order withdrawing the property from the management plan and assessing a withdrawal tax and fee.[5] As a result, failing to advise a client whether the property is registered as MFL and the costs associated with allowing the protected status to lapse versus the restrictions that will be on the property for continuing under the plan presents a liability risk.

Attorneys are well-advised to inquire about potential forest land management regulations and programs, investigate and report any potential issues to the client, and inform the client as to the possible risks. The client's first notice of MFL status should not be when they receive a five-figure tax bill or penalty for inadvertently removing their land from a managed forest program.

III. Get the History: Brownfields and Other Contaminants

A petroleum brownfield is a property upon which expansion, redevelopment or reuse may be complicated by the presence or perceived presence of petroleum contamination.[6] A significant portion of brownfields are former gas stations that occupied very small parcels throughout communities, along major roadways, or at intersections in neighborhoods.[7] Converting these sites can be challenging, as they are frequently contaminated by petroleum that has leaked from Underground Storage Tanks (USTs).

The attorney exercising reasonable skill and care should obtain (or advise the client to obtain) a history and/or receive disclosures sufficient to determine what a vacant parcel (and any contiguous parcels) used to be before it was offered for sale. There are currently over 450,000 (known) USTs in the United States that store petroleum or hazardous substances.[8] Wisconsin alone has nearly 3,000 known "open" and active brownfield redevelopment plans.[9] Forty years ago there were no federal UST regulations, and most USTs were made of bare steel, which tended to corrode, allowing contents to contaminate the soil, adjacent property, and groundwater.[10] These can present significant issues for buyers. There are also potential brownfields grants and tax benefits which are outside the scope of this article but are important to know to advise a buyer.

In representing a buyer of a parcel of vacant land, an attorney should obtain information sufficient to ascertain what the vacant or recently developed property *used to be*. A brownfield may not be readily apparent to a prospective buyer and the first time they discover that the property is potentially contaminated should not be after they purchase it. Many states and local governments have lists or inventories on their web pages of brownfield properties within their jurisdictions to aid in obtaining a parcel's history.[11]

If the subject parcel had a business that may have stored petroleum products, there is a risk of contamination and needed cleanup costs. While a gas or service station may have only occupied a small parcel, all bets (*i.e.,* cleanup estimates) should be considered "off" if the subject property was part of a larger tract of land upon which a factory, mill, shipyard, transit station or junkyard was located. The EPA estimates that the average cost to simply develop a brownfield remediation *plan* for a larger project range from $50,000.00 to $175,000.00.[12] Given the costs associated with purchasing a brownfield, counsel would be well advised to make sure that his or her buyers are aware of such risks.

IV. Getting Less than Your Client Bargained for: Adverse Possession

When representing a buyer of vacant land, the attorney should advise his or her client to take note of anything that indicates long-term activity of adjacent owners on the subject property. An adjacent property owner's actual, continuous, open, hostile, and exclusive use of any part of the subject property for the requisite statutory period—20 years[13]—can result in the adjacent property owner being the true "owner" of part of the subject property.

Adverse possession is a principle of real estate law whereby a person gains legal title to real property by the adverse use of it. The elements of an adverse possession claim are: (1) actual use; (2) hostile use; (3) open and notorious use; (4) exclusive use; and (5) continuous use for the statutory period.[14]

Actual use requires physical acts.[15] The acts must demonstrate dominion and control over the area claimed. These acts must be the ordinary use of which the land is capable and such as an owner would make it.[16] Such acts may include enclosing, cultivating, and/or improving the land.[17]

Hostile use does not require hatred or ill will. Hostility means that one person in possession claims exclusive right thereto and their actual possession prevents the assumption of possession in the true owner.[18] If the elements of open, notorious, continuous, and exclusive possession are satisfied,

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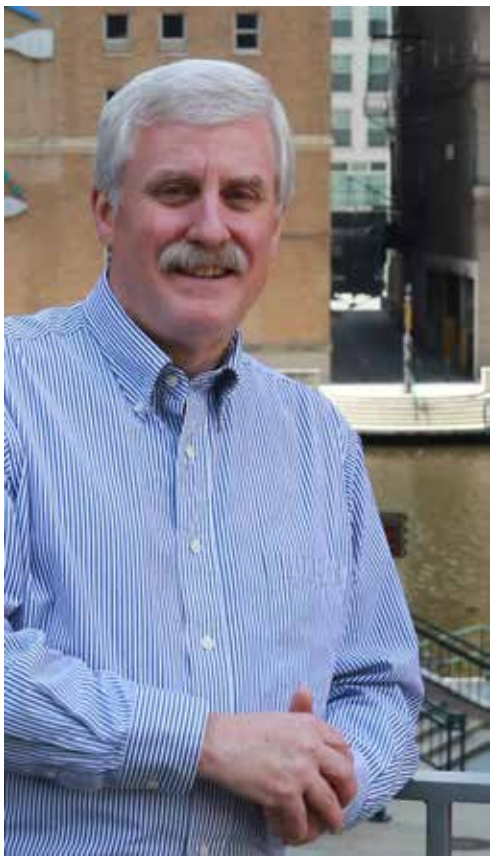

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Before mediating fulltime Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a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

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Wisconsin law presumes the element of hostile intent.[19] However, the adverse possessor must intend to claim title to the property for its use to be considered "hostile."[20]

Open and notorious use requires use which is sufficiently open and obvious to apprise the true owner if, in a change of property and in the exercise of reasonable diligence, of the fact and intention to usurp the possession of the owner's property.[21] "Open and notorious use" does not require that the true owner knows about the use; however, if the true owner has actual knowledge of the adverse possessor's use, this element is satisfied.[22]

Exclusive use requires use of the area to be excluded from the true owner. The adverse possessor cannot claim to share the disputed property with the true owner – they must be the only in possession of the land.[23] If the true owner is in actual possession of a part of the land claimed in adverse possession, they have constructive possession of all the land not in actual possession of the intruder.[24] A claimant need not exclude *all* individuals and may allow others to occasionally use the property without abandoning their claim of adverse possession.[25]

Continuous use requires continuous, uninterrupted use, without lapse, for the entire statutory period.[26] Intermittent or sporadic use will not satisfy this element.[27] Use of a parcel is continuous and uninterrupted when an adverse possessor comes into possession of the parcel from their predecessor in interest and continues to actually use it (*i.e.*, if a parent's interest in a property passes to their child without interruption, use is continuous).[28]

In general, the party claiming title by adverse possession bears the burden of proving all elements by clear and positive evidence.[29] The evidence will be strictly construed against the adverse possessor and all reasonable inferences will be drawn in favor of the true owner.[30] However, despite this high bar to overcome, the risks of an adverse possession claim cannot be overlooked, especially in light of the significant consequences of doing so, *i.e.*, loss of the property and a potential claim/lawsuit.

If the attorney is faced with the prospect of an adverse possession claim, he or she should advise the client not to make an offer – assuming the disputed portion is at all material to the client. The buyer needs to be aware of the risks presented by placing an offer upon a property which is subject to a claim of adverse possession, and the potential they could lose some of the property they are attempting to purchase. While the burden of proof is on the adverse possessor, an attorney representing a buyer should advise their client to have the seller resolve the dispute prior to the sale being made (and advise them of the risks of not doing so).

If representing the seller, and a claim or threat of adverse possession is made, it should be disclosed to the potential buyer.[31] Even without a direct claim or threat, if the adverse possessor's use gives the titleholder "reasonable notice" that they are asserting ownership and the titleholder does nothing, that failure to respond may result in losing title.[32]

V. Conclusion

Vacant land sales hold legal landmines for the parties and for counsel representing them. With the above in mind, performing the necessary due diligence, conveying the relevant information, and providing informed advice as to the risks and benefits of action (or inaction), it is hoped that the reader will be less likely to be the subject of claims arising from vacant land sales.

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Author Biography:

Erik H. Monson is a shareholder in the firm of Coyne, Schultz, Becker and Bauer, S.C. in Madison, Wisconsin. His practice is civil litigation with a focus on professional liability defense and the defense of professionals before licensing boards. Erik received his law degree from The Ohio State University in 1998 and his undergraduate degree, magna cum

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laude, from the University of Wisconsin - Milwaukee in 1995. Erik has tried cases throughout Wisconsin, including Columbia, Dane, Dodge, Grant, Iowa, Juneau, Kenosha, Portage and Waupaca Counties. He has been named to Wisconsin's "Super Lawyers Rising Stars" list several times. Erik is a member of the Wisconsin Bar Association, Dane County Bar Association, Wisconsin Defense Counsel, and the James E. Doyle American Inns of Court.

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9 Wisconsin Department of Natural Resources, *Environmental Cleanup & Brownfields Redevelopment BRRTS on the Web*, available online at https://apps.dnr.wi.gov/botw/SetUpSearchAction.do.

10 Office of Underground Storage Tanks, U.S. Environmental Protection Agency, *Learn About Underground Storage Tanks* (November 2023), available online at https://www.epa.gov/ust/learn-about-underground-storage-tanks.

11 *See*, *e.g.*, Wisconsin Department of Natural Resources, Environmental Cleanup & Brownfields Redevelopment BRRTS on the Web, available online at https://apps.dnr.wi.gov/botw/SetUpSearchAction.do.

12 Office of Brownfields and Land Revitalization, U.S. Environmental Protection Agency, *Brownfields Revitalization Plan* (March 2022), available online at https://www.epa.gov/system/files/documents/2024-04/revitalization-plan-fact-sheet-3-8-22.pdf.

13 Wis. Stat. § 893.25; *Northrop v. Opperman*, 2010 WI App 80, ¶ 9, 325 Wis. 2d 445, 784 N.W.2d 736 ("The doctrine of adverse possession permits a person to acquire title to real property if he or she, in connection with predecessors in interest, adversely occupies the land for an uninterrupted period of twenty years.").

14 *Allie v. Russo*, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979).

15 *Id.*

16 *Id*. at 347.

17 *Id*. at 343; b*ut see Madsen v. Holmes*, 57 Wis. 2d 148, 203 N.W.2d 865 (1973) (finding that putting a road, cabin and water channel on a wooded lake lot used for recreational purposes did not show "cultivation or improvement" sufficient to establish adverse possession).

18 *Wilcox v. Estate of Hines*, 2014 WI 60, ¶ 22, 355 Wis. 2d 1, 849 N.W.2d 280 (quoting *Burkhardt v. Smith*, 17 Wis. 2d 132, 139-40, 115 N.W.2d 540 (1962)).

19 *Kruckenberg v. Krukar,* 2017 WI App 70, ¶ 4, 378 Wis. 2d 318, 903 N.W.2d 164.

20 *Wilcox*, 355 Wis. 2d 1, ¶ 35 (holding that a party's subjective intent to claim title to property is relevant to rebut the presumption of hostility that arises when all other elements of adverse possession are established).

21 *Allie*, 88 Wis. 2d at 343-44.

22 *See id*. at 345.

23 *Id*. at 347; *but see Kruckenberg*, 378 Wis 2d 318, ¶ 8 (holding that a true owner's "casual and sporadic" entry upon the disputed land creates a material question of fact as to whether the element for exclusivity is defeated).

24 *Allie*, 88 Wis. 2d at 349.

25 *Kruckenberg*, 378 Wis 2d 318, ¶ 8.

26 *See Burkhardt*, 17 Wis. 2d. at 138-39.

27 *See id*. at 137.

28 Wis. Stat. § 893.25(2)(a); s*ee also Wilcox*, 355 Wis. 2d 1, ¶ 26.

29 *Allie*, 88 Wis. 2d at 343.

30 *Id*.

31 As mentioned, required real estate disclosures are beyond the scope of this article.

32 *Peter H. & Barbara J. Steuck Living Trust v. Easley*, 2010 WI App 74, ¶ 17, 325 Wis. 2d 455, 785 N.W.2d 631.

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2024 DRI International Day of Service

by: Heather L. Nelson, The Everson Law Firm; Megan L. McKenzie, American Family Mutual Insurance Company, S.I.; and Mollie T. Kugler, von Briesen & Roper, S.C.

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

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

WDC's Women in the Law Committee held the following service projects in the Green Bay/Fox Valley, Madison, and Milwaukee areas as part of WDC's involvement in DRI's third annual International Day of Service.

Green Bay/Fox Valley Area Service Project

WDC members in Green Bay served 167 meals at the NEW Community Shelter as part of the 2024 DRI Day of Service initiative. The shelter's Community Meal Program is available to any child or adult in need of a meal whether homeless or just in need. Volunteers and staff serve dinner 365 days a year and lunch on weekends and holidays.

Pictured Above: The Everson Law Firm Attorney Heather Nelson, Everson paralegal Lesley Bitters, Everson Attorney Todd Dickey, Todd's son Miles, and Everson Attorney Nicole Morley.

Madison Area Service Project

As a part of the 2024 DRI Day of Service, Madison-based WDC members volunteered at WayForward Resources and tended to the garden so they will have a fresh start for next year! WayForward Resources provides access to nutritious food for people and support that helps people stay in their homes throughout Dane County.

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Pictured Above From Left-to-Right: Delisa Claude (American Family), Megan McKenzie (American Family), Heather Mitchell (American Family), Mignon Coyne-Uselman (American Family), Grace Kulkoski (Wisconsin Mutual Insurance), Olga Zagadasnikova (American Family), Ashleigh Johnson (American Family), Vanja Pemac (Corneille Law), and Jimmy Cimermancic (Corneille Law).

Milwaukee Area Service Project

A group of Milwaukee-area attorneys volunteered at Kinship Food Center for the DRI Day of Service. The women assisted customers to shop during the Tuesday "food center hours," where a hot meal is also served, and organized a food drive of Kinship's "highly-sought" food items. The group consisted of Melissa Weinstein, Hanna Kolberg, Mollie Kugler, and Christy Brooks of von Briesen & Roper, S.C.,

Sarah Kidd, Racine Assistant Corporation Counsel, Margaret Krei of the Scopelitis Law Firm, and Taylor Van Zeeland of Simpson & Deardorff.

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

Author Biographies:

Heather Nelson is President and Shareholder of Everson, Whitney, Everson & Brehm, S.C., in Green Bay. She currently serves as WDC President, having served on the Board of Directors and Executive Committee as well. Heather is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back home to her Green Bay roots. Her practice areas include motor vehicle accident, premises liability, wrongful death, and insurance coverage. Heather has been active in presenting CLE topics at WDC conferences, for the State Bar of Wisconsin, and at the North Central Region Trial Academy.

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 Secretary-Treasurer.

Mollie T. Kugler is a shareholder in the Litigation and Risk Management Practice Group at von Briesen & Roper, S.C. in Milwaukee. She focuses her practice on representing and counseling insurance companies in litigation and disputes. Mollie graduated from Georgetown University, cum laude, in 2008. She earned her JD from Fordham University in 2022. She is admitted to practice in Wisconsin and Illinois state courts, the eastern and western federal district courts in Wisconsin, the central and northern federal district courts in Illinois, the eastern federal district court in Michigan, and the U.S. Court of Appeals for the 7th Circuit. In addition to WDC, Mollie is a member of the Defense Research Institute, the National Association of Women Lawyers, the Association for Women Lawyers, the State Bar of Wisconsin, and the Milwaukee Bar Association. She also serves as Georgetown's Milwaukee-area Chair and Alumni Interviewer for the Georgetown University Alumni Admissions Program. Mollie was selected by The Best Lawyers in America© in Insurance Law in 2022.

News from Around the State: Trials and Verdicts

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.

Darrick C. Magee, et al. v. Rural Mut. Ins. Co., et al.
Sheboygan County Case No. 22-CV-22
Trial Date: May 28, 2024

Facts: Plaintiff was a passenger in a Dodge Ram pickup truck that was being operated by a fellow employee when it struck another vehicle head-on, allegedly causing him various injuries. At the time, both gentlemen worked for a local fish farm and were hauling fish and other items from one farm location to another. As such, defendant argued that plaintiff's exclusive remedy was that provided under Wisconsin's Worker's Compensation Statutes. Plaintiff argued that, since the Dodge Ram was titled to the individual owner of the company, rather than the company itself, the co-employee negligence exception applied, meaning that plaintiff was able to bring an action against his co-employee for his negligent operation of the vehicle.

Issues for Trial: Given that there would be no liability coverage for plaintiff's claims if the company was deemed to be the true "owner" of the Dodge Ram, vehicle ownership was the only issue the jury was asked to decide.

At Trial: Plaintiff and the owner of the company testified as to the circumstances surrounding the purchase of the Dodge Ram, its maintenance, use, etc. Ultimately, the jury agreed with the defense and returned a verdict that the company was the actual "owner" of the Dodge Ram, thereby limiting plaintiff's compensation only to that available under worker's compensation laws.

For more information, contact Brittany Mirabella at bmirabella@simpsondeardorff.com.

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Maureen Gibbons, et al. v. TL Manor, LLC, et al.
Kenosha County Case No. 22-CV-98
Trial Dates: August 26-28, 2024

Facts: This was a slip-and-fall case at an apartment complex owned by TL Manor, LLC ("Twin Lakes"). The plaintiff, a 70-year-old retired woman living alone, was a tenant at Twin Lakes at the time of the injury. She fell on February 26, 2019, while taking out trash during active snowfall around 2:00 p.m. Plaintiff testified that she took a small bag and a small box to the dumpster in the back of her apartment building. While throwing away the garbage, plaintiff claims she slipped on ice next to the dumpster that had not been salted or otherwise removed by Twin Lakes' snow and ice removal contractor, Dayco Maintenance, LLC ("Dayco").

Dayco was a one-man operation. Twin Lakes had a handshake agreement with Dayco that one inch of snowfall and icy conditions would trigger Dayco's maintenance duties as it saw fit. Dayco's owner, Mike Pembroke, testified he had salted and plowed the morning of the incident. Plaintiff corroborated that Dayco was out there in the morning. Plaintiff testified that Mr. Pembroke had salted the asphalt parking lot and sidewalks, but not the concrete slab where the dumpster sat. Dayco would plow the lot with a salt truck that had a salter on the back which had a spread range of up to thirty feet. Dayco argued that given the typical snow plowing route to complete the lot, it would be nearly impossible for salt to have not been spread on the concrete slab.

Plaintiff claimed she sustained injuries to her right shoulder, including a right humeral fracture that developed adhesive capsulitis, and a rotator cuff tear. Plaintiff produced a permanency report from Dr. Bradley Fiedler, MD, the treating orthopedic surgeon who performed a procedure on her shoulder.

Issues for Trial: Liability, causation, and damages were contested. Plaintiff claimed past medical expenses of $76,684.63 for two surgeries and $2,000 to $4,000 per year for future cortisone injections for the rest of her life.

On motions *in limine* prior to trial, Judge David Wilk allowed photographs taken by plaintiff's counsel over two years after the fall to be admitted into evidence, including the following photograph:

Judge Wilk also ruled that testimony about complaints made by other residents regarding the snow and ice removal services a year before the accident would not be allowed into evidence as being duplicative and prejudicial.

At Trial: Plaintiff's counsel called the plaintiff, plaintiff's cousin, and Dayco's owner (adversely) to testify live at trial. Dr. Fiedler's testimony was presented by video. The defense did not call any witnesses. The property owner, Twin Lakes, never testified.

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During deliberations, the jury asked to see copies of plaintiff's medical bills, which plaintiff's counsel agreed to send back. The jury returned a defense verdict finding no negligence against Twin Lakes or Dayco, and awarded only $535.00 in past medical expenses (the amount paid by Medicare) and $48,000 for past and future pain, suffering, and disability.

Plaintiff's Final Pre-Trial Demand: $240,000
Defendant's Final Pre-Trial Offer: $125,000 ($100,000 from Dayco and $25,000 from Twin Lakes)
Verdict: $0 (no recovery due to finding of no negligence)

For more information, contact Austin Borton at austin@jeffreyleavell.com.

Tony Solis, et al. v. Rural Mut. Ins. Co., et al.
Portage County Case No. 23-CV-126
Trial Dates: October 16-17, 2024

Facts: This case concerned a motor vehicle accident that occurred on County Highway A near Amherst in Portage County. The defendant, Michael Helbach, was operating a 24-foot-wide potato harvester northbound. The plaintiff, Tony Solis, was operating a 2015 Dodge Dart southbound. The insured's potato harvester was wide and extended well over the centerline into the oncome lane. The plaintiff's vehicle collided with the potato harvester. As a result of the accident, the plaintiff was diagnosed with a fractured right index finger with permanent residuals, a concussion, and post-concussive syndrome.

Issues for Trial: Liability and total damages were contested. Prior to trial, the parties stipulated to $5,087.87 in past medical expenses.

At Trial: Plaintiff asked the jury to award him his past medical expenses, $189 for past wage loss, $15,000 for past pain and suffering, and $15,000 for future pain and suffering. In addition, the plaintiff's wife made a claim for loss of consortium.

The jury found that the plaintiff 100% causally negligent and awarded $0 for past pain and suffering, $0 for future pain and suffering, and $0 for loss of consortium.

Verdict: $0 (no recovery due to finding of no negligence)

For more information, contact John R. Shull, Jr. at jshull@ksrllp.com.

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