The VERDICT

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Florida Supreme Court Strikes Down Medical Malpractice Wrongful Death Cap – Implications for Wisconsin

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The VERDICT

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From the Cover

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The Association strives to achieve and maintain the highest standards of professional ethics and competency while educating and training in the art of advocacy. The Association and its members are dedicated to benefiting communities across Wisconsin through local events and charitable giving.

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Wisconsin Association for Justice

Ann S. Jacobs

From the President

In discussing our organization recently with a non-member, the person remarked, a little skeptically, "you are all in competition with each other every day for cases, how do you manage to get along?"

I thought this was a fascinating question. Here is an organization where its members compete for literally every tort case around the state. And yet, we voluntarily come together not only for an occasional CLE, not only for an annual dinner. We come together daily through list serves, weekly through voluntary committee work, monthly with our officers and executive committee, quarterly with our CLE's and meetings, and, during the political season, with what feels like endless exhortations to action and giving.

How do we do this? How do we manage to create such a cohesive organization from what an outsider would see as directly competing interests?

Many reasons drive our strength as an organization. First is our uniform desire to help our clients. We need the lawyers who represent the injured to do a good job – indeed a great job. The help we give each other – a brief, a motion, advice – isn't helping a competitor. It's helping that injured person achieve justice. It is the desire to do right by the citizens of Wisconsin that allows us to put aside our business competition, and focus on doing what is right.

Second, it is our recognition that united we are strong advocates for our clients and the law. We are able to propose (or oppose) legislation that affects our clients and the law with the authority that comes from representing the best tort lawyers across the state. The intellectual prowess represented by this organization – whether in trial or appellate work, legislation or advocacy – is astonishing.

Finally, it is our history. For 57 years we have been the organization advocating for the injured. Even when people disagree with us, we have a reputation of honesty, intellectual rigor, and advocacy on behalf of the unheard public.

I am humbled and honored to have been asked to join the remarkable list of presidents of this organization. Although I confess that when Paul Gagliardi asked me to do so, I think I might have been a little unaware of the full job description. I am thankful to have the support of my husband, Brad, and children, Lily, Julia and Jacob, in this very time and energy-consuming endeavor. I am also following the example of my parents, Helen and Ronald Jacobs, who have always given in volunteer work and public service. I watched my mother rise to be the first woman chair of the Wisconsin DNR, and am hopeful to live up to the example she set.

WAJ has incredible strength as a voluntary, state-wide organization – incredible strength in our unity and shared goals. And yet, despite this, we find ourselves in a time of great changes.

We have a new political reality. Wisconsin politics have changed direction and are unlikely to swing back any time soon. We have had surprising changes in how we can give money politically. If we have learned anything from the recent decisions coming out of the federal courts on election law issues and giving, it is that our previous models may have changed forever.

We have had a sea change in judicial elections. Even local judicial elections – formerly the bastion of local giving and bad cheese plates – are now drawing large-scale money. As trial lawyers, we spend a great deal of time with our judges. It is essential to the well-being of our clients that we continue to be aware of the importance of a smart, impartial judiciary.

And we have seen great changes in our organization. Jane has departed after over 30 years as our executive director. We have moved our membership directory into new software on the cloud. We will have a new Executive Director who will help us move forward with these new realities.

With these changes come tremendous opportunities. Over the past several years that I have been an officer, I have watched Mike, Ed, Jeff and Chris open the lines of communication to people who previously we might have dismissed as unreachable or not worth the effort. The ability to speak with those who may oppose us on many issues is essential and must continue. This means continuing to open up lines of communication with groups and people that perhaps in the past we didn't see as receptive to our message. We know now that we cannot assume who will and will not hear our advocacy on different issues. Different issues resonate with different politicians and the more we get to know them, the better we can work to educate them and hopefully obtain their support (or perhaps simply not their opposition) on various issues.

This year, there is a surprisingly large group of new legislators. We need to introduce ourselves, and offer the opportunity to educate them on issues they may never have thought or learned about. What is important to them? How can we help them recognize the importance of our efforts? We must maintain our credibility as a reliable source of information on laws and their effects.

We must continue our relationship building with other stakeholders on aligned topics. We cannot advocate alone. Many laws affect not only us and our clients, but others within the judicial system and beyond. Sometimes those affected do not even realize how proposals will affect them. We need to continue to recognize when we can work with allies.

Our efforts at outreach to the public must continue and indeed grow to combat the continuing beat of "tort reform" activities that do nothing to reform, and only serve to further harm the people who were victimized. Our efforts for the Family Justice Network, Erin's law – efforts that seek to right the wrongs that parents like

Eric Rice has suffered – must continue and strengthen this coming year.

We must continue to be strong supporters of candidates that believe in our values. Our Justice Fund is one of the largest political conduits in the state. We have the upcoming Supreme Court election where Justice Bradley – a firm believer in the rights citizens, the right to a trial, and access to the justice system – is facing a well-funded challenger. We will all be called upon to help her in this very important race.

However, in addition to that important race, we need to evaluate our political giving. How do we give? To whom? Past models may not be the best models as we move forward in this new reality. We need to think about the influence of money on local judicial elections – an area that we have not traditionally been involved. When Club for Growth drops $167,000 into a local circuit court race, we need to start thinking about how we look at those races.

Finally, we must continue to modernize our organization. This is more than our technological innovations, although this surely is a large part of it. We must grow our membership. The issues that we recognize as important are not limited to personal injury lawyers. We need to show Workers Compensation lawyers, labor lawyers, criminal defense lawyers, DA's, consumer lawyers, that our organization can provide support, CLE's, and advocacy for issues they believe in. We need to reach out to lawyers who may not traditionally see themselves as trial lawyers. We need to work more closely with other voluntary associations – create relationships and perhaps find opportunities to share the burdens and expenses of our activities with groups who have similar aims.

I am tremendously fortunate to have the opportunity to be a part of this great time of change for WAJ. This will be a busy time – we need to review every aspect of our organization to maximize our strengths. We may have to make difficult decisions, change long-standing traditions, alter ingrained procedures. However, I am confident that in the end WAJ will emerge a stronger, more vibrant organization whose advocacy on behalf of the injured will continue as our guiding principles.

Legislative Report

Joe Strohl

The 2015-2016 Session of the State Legislature began with the swearing in of members on Monday, January 5, 2015. A near record of 25 new state representatives took office as did 7 new state senators. Of the seven state senators all but one (Sen. Devon LaMahieu- R-Oostburg) have served in the Wisconsin Legislature previously.

Of the 25 new state representatives all but 3 were elected from open seats. The other three defeated incumbent Democrats. The new State Assembly is now made up of 63 Republicans and 36 Democrats. The State Senate has 19 Republicans and 14 Democrats. Half of the 14 Democratic State Senators are women.

The new State Legislature is likely to be more conservative than the previous one. A number of moderate Republican members have been replaced by much more conservative members. The impact of the larger conservative majority is already being felt with the Right to Work issue moving to the head of the table despite some Republican leaders and the Governor saying this is not a priority.

It is hard to predict what this might mean for the Civil Justice System. There is mixed news about the number of attorneys in the State Legislature. There are no longer any Republican state senators that are attorneys. Newly elected State Senator Van Wanggaard (R-Racine) is chairman of the Senate Judiciary Committee. Senator Wanggaard is a Racine police officer by profession. He is replacing newly elected Congressman Glenn Grothman (R-West Bend).

Sen. Wanggaard had previously served in the State Senate and WAJ had a good working relationship with him. Former Senator Grothman did not always agree with us but was willing to work with us to improve on legislation. We think that will again be the same with Sen. Wanggaard. The Democrats on the Judiciary are both attorneys; Sen. Lena Taylor (Milwaukee) and Sen. Fred Risser (Madison). It is good to see Senator Taylor return to the Judiciary Committee.

The State Assembly has had the addition of three experienced attorneys to the Republican caucus. They are Adam Jarchow (R-St. Croix Falls), Cody Horlacher (R-Mukwanago) and Dave Heaton (R-Wausau). We welcome that addition since there will now be more attorneys to serve on the Assembly Judiciary Committee. Rep. Jim Ott (R-Mequon), an attorney, will return as chair but he will now have several experienced Republican attorneys to serve with him. In past it was difficult to work with his committee since no other Republican attorney was there for Chairman Ott to consult with. All three Democrats on the Judiciary committee were highly experienced so it was difficult for a good debate to develop. The same was true on the floor of the Assembly.

At this point we do not expect the three new Republican attorneys to agree with WAJ on all our issues but we think there will now be an opportunity for a healthy debate.

It is safe to say that WAJ will probably play defense most of the upcoming session. So far we have not heard a lot of what legislation might be introduced that would be of major concern to us. Fortunately civil justice issues were not the focus at all in the Governor's race nor in most state legislative races.

We know the property and casualty insurance industry will again be pushing Collateral Source legislation and it is one of WMC's top issues. However with the broad coalition of health care providers, health insurers, and WAJ opposing it is not likely the bill will move but we are ready to act if necessary.

There are several issues that we think we can work with the insurance industry on to find some middle ground. If so we will approach legislators jointly to resolve some long standing issues. These include several auto insurance issues like reducing clauses and required minimal amounts of insurance coverage. Modest changes might get worked out on dog bite legislation. We are on the same side as they are on the need to make sure ride-share services (Uber/Lyft) are adequately covered with auto insurance.

This past summer the *Milwaukee Journal Sentinel* did a series of stories on medical malpractice that were sympathetic toward victims and problems with the current law. Some of our members provided valuable information for the series or have won significant malpractice victories in court. These would suggest that there might be momentum for getting changes in state statutes.

However with the current makeup of the State Legislature this may not be the time to raise these issues further. WAJ will be supportive of efforts being made by others. For example, the Family Justice Network has worked to change the law and give parents of adult children and the adult children of widowed or divorced parents the right to bring a wrongful death claim when death is caused by medical malpractice.

Another issue that is likely to return is Parental Sponsorship. Legislation failed last session but we believe it will be back. Last session's bill was poorly written and proponents suggested the bill did something that we don't think it did. WAJ is willing to work with the proponents like the Wisconsin Civil Justice Council if they are willing to do so with us.

It is obviously early in the session so it is hard to know what all might be coming our way. Whatever it is, WAJ will be ready to challenge it if we think it will further erode the rights of injured Wisconsin citizens.

Florida Supreme Court Strikes Down Medical Malpractice Wrongful Death Cap – Implications for Wisconsin

J. Michael End

On March 13, 2014, the Florida Supreme Court struck down, on a 5 to 2 vote, Florida's $500,000 per claimant and $1 million aggregate cap for noneconomic losses in medical malpractice wrongful death cases. In *Estate of McCall v. U.S.*,[1] the court determined that the cap violated Florida's constitutional guarantee of equal protection of the law.

This paper will discuss the implications of the Florida decision in light of a potential challenge to Wisconsin's $750,000 cap on noneconomic damages in medical malpractice cases, which was enacted in 2006.[2]

The *McCall* case involved the death of Michelle McCall, who died from excessive blood loss following the birth of her son. The attending doctors and hospital staff failed to monitor and timely act upon Ms. McCall's blood loss and resulting low blood pressures until she eventually suffered a cardiac arrest shortly after her son's birth.

The case was filed by Ms. McCall's parents and by the father of Ms. McCall's son on behalf of his son. Because Ms. McCall was at a military hospital for the labor and delivery, the case was filed pursuant to the Federal Tort Claims Act (FTCA).[3] The federal district court determined that Ms. McCall had died as a result of medical negligence and that the noneconomic damages totaled $2 million, including $500,000 for Ms. McCall's son and $750,000 for each of her parents. However, because the FTCA provides that damages are determined by the law of the state where the tortious act was committed, the trial judge reduced the damages to $1 million upon application of section 766.118(2) Florida Statutes (2005), Florida's statutory cap on wrongful death noneconomic damages based on medical malpractice claims.[4] As a result, each of the three plaintiffs received one-half of his or her court-determined noneconomic damages.

The plaintiffs appealed the reduction of the damages to the 11th Circuit Court of Appeals, which decided the federal questions, but certified four state constitutional questions to the Florida Supreme Court.[5] The Florida Supreme Court rephrased the first certified question and determined that the only question that needed to be answered to resolve the issue of the constitutionality of the cap was:

> DOES THE STATUTORY CAP ON WRONGFUL DEATH NONECONOMIC DAMAGES, FLA. STAT. §766.118, VIOLATE THE RIGHT TO EQUAL PROTECTION UNDER ARTICLE 1, SECTION 2 OF THE FLORIDA CONSTITUTION?[6]

Article I, § 2 of the Florida Constitution provides: "All natural persons, female and male alike, are equal before the law."[7] The court's rationale in *McCall* was reminiscent of the Wisconsin Supreme Court's rationale in *Ferdon v. Wisconsin Patients Compensation Fund*,[8] holding that Wisconsin's 1995 medical malpractice noneconomic damage cap of $350,000, adjusted annually for inflation, was unconstitutional because it violated the equal protection guarantees of the Wisconsin Constitution.

The *McCall* court held that the Florida cap imposed "unfair and illogical" burdens on injured parties when an act of medical negligence gives rise to multiple claimants. In such circumstances, medical malpractice claimants did not receive the same rights to full compensation because of arbitrarily diminished compensation for legally cognizable claims. Further, the cap did not bear a rational relationship to the purpose the cap was to address, the alleged medical malpractice insurance crisis in Florida.[9]

The court held that the statute "irrationally" impacted circumstances which have multiple claimants/survivors differently and far less favorably than circumstances in which there is a single claimant/survivor, and also exacted an "irrational and unreasonable" cost and impact when the victim of medical negligence has a large family, all of whom have been adversely impacted and affected by the death. Thus, if only Ms. McCall's son had had a claim for the loss of his mother, he would have received the entire $500,000 the trial court determined to be his reasonable compensation. However, because Ms. McCall's parents also had claims, each claimant suffered a fifty percent loss of the compensation determined by the court. Each survivor received limited damages because others also suffered losses. Under the statute, the greater the number of survivors and the more devastating their losses are, the less likely they are to be fully compensated for those losses.[10]

The *McCall* court cited a 1997 Illinois Supreme Court case[11] holding that the Illinois damage cap operated to discriminate against claimants who suffered the most grievous injuries, while benefitting the tortfeasor and/or the insurance company, and a New Hampshire case[12] that condemned on equal protection grounds a $250,000 cap on noneconomic damages in medical malpractice cases, concluding that it was "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."[13]

The *McCall* court held that the Florida cap had the effect of saving a modest amount for many by imposing devastating costs on a few – "those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based upon the existence of the cap. . . We hold that to

reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it 'offends the fundamental notion of equal justice under the law.'" (Internal citation omitted).[14]

The *McCall* court considered "the alleged medical malpractice crisis" and held that the damage cap failed the rational basis test because it bore "no rational relationship to a legitimate state objective."[15] Although the Florida legislature in 2005 had determined that Florida was "in the midst of a medical malpractice insurance crisis of unprecedented magnitude," the *McCall* court determined that the findings of the legislature were subject to judicial inquiry.[16] The court found that the conclusions reached by the Florida Legislature as to the existence of a medical malpractice crisis were not fully supported by available data. The Task Force whose report had been relied upon by the Florida Legislature when the law was enacted included in its report a statement by Joanne Doroshow, Executive Director of the Center for Justice and Democracy: "This so-called 'crisis' is nothing more than the underwriting cycle of the insurance industry, and driven by the same factors that caused the 'crises' in the 1970s and 1980s."[17] After reviewing the evidence, the *McCall* court determined that the finding by the Legislature and the Task Force that Florida was in the midst of a bona fide medical malpractice crisis, threatening the access of Floridians to health care, was "dubious and questionable at the very best."[18]

The *McCall* court also studied the impact of damage caps on the "alleged crisis" and found that the available evidence failed to establish a rational relationship between a cap on noneconomic damages and alleviation of the "purported" crisis.[19] "Reports have failed to establish a direct correlation between damage caps and reduced malpractice premiums."[20] The court found that from 1991 until 2002 median medical malpractice premiums increased at a slower rate in states without caps than in states with caps.[21]

In deciding the constitutionality of the cap issue, the *McCall* court noted that even if a "crisis" had existed when the noneconomic damage cap was enacted, "a crisis is not a permanent condition." The court held: "Conditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation."[22] The court cited Wisconsin's *Ferdon* case in support of that proposition.[23]

The *McCall* court then held: "Having studied current data, we conclude that no rational basis exists to justify continued application of the noneconomic damages cap of section 766.118."[24] The court noted that there were significantly fewer medical malpractice cases filed in Florida in 2012 than in 2004, and the aggregate payments made for noneconomic damages in 2012 were significantly less than in 2004.[25]

The *McCall* court cited information from the annual reports of the Florida medical professional liability insurers to show that the insurers were profiting handsomely and were "financially strong" in 2012. "Indeed, between the years of 2003 and 2010, four insurance companies that offered medical malpractice insurance in Florida cumulatively reported an increase in their net income of more than 4300 percent."[26] Importantly, the court held: "With such impressive net income estimates, the insurance industry should pass savings onto Florida physicians in the form of reduced malpractice insurance premiums, ***and it should no longer be necessary to continue punishing those most seriously injured by medical negligence by limiting their noneconomic recovery to a fixed, arbitrary amount.***" (Emphasis added).[27]

Wisconsin Facts

Let us employ the rationale and methodology of the *McCall* case to a potential challenge to Wisconsin's medical malpractice noneconomic damage cap of $750,000, which became effective on April 6, 2006.[28]

Just as the *McCall* court considered current facts in determining the validity of the Florida cap on damages, the *Ferdon* court also endorsed doing so.[29] A review of the pertinent factors in determining whether Wisconsin's noneconomic cap is constitutional supports a conclusion that Wisconsin is the antithesis of a state needing so-called tort "reform."

Few Payments

The authors of a medical journal article published in 2011 determined that 1,503,323 Americans died or were injured in 2008 as a result of medical errors.[30] In 2013, The National Practitioner Data Bank (NPDB), a federal repository of all payments made to patients by professional liability insurers for doctors, reported that 9,205 people received compensation for injuries or death caused by doctor negligence.[31] That represents just six-tenths of one percent of the people who actually died or were injured in 2008.

If we extrapolate the medical journal number to Wisconsin, on a population basis, there are 26,952 people who die or are injured each year because of medical errors. The NPDB shows that there were only forty-one people in Wisconsin who received compensation because of doctor negligence in 2013. Thus, in Wisconsin, less than one-sixth of one percent of the people who were injured or died because of medical errors received compensation.

On a population basis, Wisconsin in 2013 had the fewest number of payments to people who died or were injured by doctor negligence of the fifty states and Washington, D.C., one payment for every 140,066 people in the state. Minnesota, which has no cap on damages, had the second fewest payments on a population basis, one payment for every 129,057 people. The national ratio was one payment for every 34,798 people.[32]

Fewer Cases Filed; Fewer Payments; Less Money Paid

In 2005, there were 240 medical malpractice lawsuits filed in Wisconsin. In 2013, there were 140 cases filed, a reduction of 42%.[33] Similarly, according to the NPDB, there were eighty-six payments to people harmed by doctor negligence in 2005. In 2013, there were forty-one such payments, a 52% reduction.

In 2005, the Wisconsin medical professional liability insurers paid $42,758,529 to injured people. In 2013, the insurers paid $4,077,592, a reduction of more than 90%.[34]

To put the claim of a medical malpractice "crisis" in perspective, data from the NPDB show that Wisconsin is not alone in having fewer payments to people injured by doctor negligence and less money being paid in compensation. The nationwide number of payments made on behalf of doctors has gone down twelve

years in a row, from 15,898 in 2001 to 9,205 in 2013, a reduction of 42%. Data compiled by the National Association of Insurance Commissioners (NAIC) show a remarkable drop in aggregate nationwide direct losses paid by the insurers. In 2005, the nationwide payments were $6,177,562,888. In 2013, they were $3,965,980,623, a 36% reduction.[35]

Wisconsin Doctors Pay Low Premiums

One of the stated goals of the 2006 bill establishing the $750,000 cap on noneconomic damages in Wisconsin was to help contain health care costs, allowing insurers to set insurance premiums that better reflect such insurers' financial risk.[36]

In 2005, the year before the cap legislation, Wisconsin doctors in the specialties of internal medicine, general surgery, and obstetrics and gynecology were paying the 5th lowest premiums in the country, as documented in the October 2005 Annual Rate Survey of *Medical Liability Monitor.* Internists paid $5,147; general surgeons paid $18,015, and obstetricians paid $23,677. By comparison, Minnesota, which does not have any caps on medical malpractice damages, had the lowest premiums in the country for internists and general surgeons, while obstetricians there paid the third lowest premiums in the country.[37] In 2014, Wisconsin internists paid the second lowest premiums in the country ($3,623), general surgeons paid the lowest premiums ($10,868), and obstetricians paid the third lowest premiums ($16,605). In Minnesota, still without any caps on damages, internists paid the lowest premiums in the country, while general surgeons and obstetricians paid the second lowest premiums.

With such low premiums in Wisconsin, can the medical malpractice liability insurers still make money? The NAIC has tracked each state's medical malpractice combined loss ratio from 1991 through 2013. The combined loss ratio is the percentage of earned premiums used to pay claims and defend claims. For the 23 years tracked by NAIC, Wisconsin has the lowest combined loss ratio of the 50 states and the District of Columbia, 44.7%. In other words, for each dollar of premium received by the Wisconsin medical malpractice insurance companies, less than 45 cents has been used to pay injured people and defense attorneys, expert witnesses, etc. The national average for those 23 years was 77%. According to the Wisconsin Commissioner of Insurance Report, the direct loss ratios, the portion of the premiums used to pay injured people, for the Wisconsin medical malpractice insurers for 2011 through 2013 have been remarkably low, 14% in 2011, -29% in 2012, and 6% in 2013.

The 2012 Wisconsin Insurance Report shows that the Wisconsin medical malpractice insurers had direct premiums earned of $75,226,437 and direct losses incurred of -$21,801,125, for a loss ratio of -29%. The 2012 Wisconsin Insurance Report states that negative losses incurred result from a company, in this case, all of the medical malpractice insurers, overestimating the cost to settle open claims as of the end of the prior year.

Premiums Nationwide Have Been Reduced

Reduction in insurance premiums has actually occurred nationwide, with and without state caps on damages. Data from NAIC show that the nationwide aggregate insurance premiums for medical professional liability insurers have declined every year for the past seven years. In 2006, the aggregate premiums were $12,333,436,958. In 2013, the premiums were $9,792,290,581, a reduction of 21%.[38]

The Legislature was concerned about the viability of the medical malpractice insurers when it passed the 2006 law. As discussed above, the current situation is far different from what it was in 2006.

The Fund Assets Are More Than $1 Billion

The legislature was also concerned about the viability of Injured Patients and Families Compensation Fund (the Fund) when the $750,000 cap was established in 2006. See Wis. Stat. §893.55 (1d) (a)4 (2011-12). According to the 2005 Wisconsin Insurance Report, the Fund at that time had assets of $758,681,054 and a net equity of $31,706,181. The most recent Fund actuarial report shows Fund assets as of June 30, 2014, of $1,181,378,310. The Fund surplus on that date was $580,913,451. Thus, by June 30, 2014, the Fund assets had increased by $422,697,256 and the Fund surplus had grown by $549,207,270 since the cap legislation was enacted in 2006. The actuaries have estimated the Fund surplus as of June 30, 2015, will be $755.4 million, an increase of $174.5 million in one year.[39]

On June 30, 2014, the Fund had $349,993,633 more in assets than it had paid to people injured by medical negligence during its 39 years of existence.[40]

During the past four fiscal years, the Fund has paid only 17 claims, just over four per year, with annual total payments averaging $17,356,574.[41] In the three fiscal years prior to the enactment of the $750,000 cap, there had been an average of ten payments per year, with an annual average of $20,629,345.[42] In the Fund Actuarial Analysis reports of December 3, 2014, and November 25, 2013, the actuaries stated the obvious, namely, that the Fund has been experiencing "fewer losses."[43]

Caps Do Not Bring More Doctors

Since the Wisconsin legislature enacted the $750,000 cap on noneconomic damages, there have been a number of scientific papers that provide useful information about whether caps accomplish their stated goals. These recent studies should help the Wisconsin Supreme Court determine whether the 2006 cap is constitutional.

One of the stated reasons for enacting the $750,000 cap in 2006 was to provide incentives for doctors to practice in Wisconsin.[44] The authors of a study published in July 2014[45] found that there was no evidence that cap adoption predicts an increase in total patient care physicians, physicians in high-risk specialties, or rural physicians. "The states that adopt damage caps were not losing physicians before reform, and do not gain physicians after reform, relative to the baseline of steady national growth in the number of physicians per capita."[46] The authors also found no association between physician supply and the premiums for medical malpractice insurance.[47]

Another study, published in June 2012, looking at the same issue, but related only to the state of Texas, which enacted a $250,000 cap on noneconomic damages in 2003, found that the Texas legislation substantially reduced total

payouts on medical malpractice claims. Despite that fact, "there is no evidence that the number of active Texas physicians per capita is larger than it would have been without tort reform."[48]

The best evidence that damage caps do not increase the supply of doctors in a state is shown by the numbers themselves. According to the 2014 edition of the AMA publication *Physician Characteristics and Distribution in the US*, 11 of the top 14 states in the ranking of the number of patient-care doctors per 100,000 residents were states that do not have caps on damages.[49] There are only 19 states without caps.[50]

Caps Do Not Affect Defensive Medicine

Another stated goal of the 2006 Wisconsin cap was to limit the incentive to practice "defensive medicine."[51] In fact, the 1975 legislative findings at the time of the legislative enactment of Chapter 655 included a finding that "the rising number of suits and claims is forcing both individual and institutional health care providers to practice defensively, to the detriment of the health care provider and the patient."[52] Defensive medicine has been defined as "tests and other procedures ordered by providers that do not benefit patients."[53]

Two studies, both published in October 2014, studied the effect of tort "reform" on defensive medicine. The conclusions were remarkably similar. The authors of the first paper found "no evidence that adoption of damage caps or other changes in med mal risk will reduce healthcare spending."[54] The authors of the second paper studied the impact of three states' legislation that changed the malpractice standard for emergency care to gross negligence. The authors' conclusion: "Legislation that substantially changed the malpractice standard for emergency physicians in three states had little effect on the intensity of practice, as measured by imaging rates, average charges, or hospital admission rates."[55]

Conclusion

In summary, the rationale of the *McCall* court is similar to that of the *Ferdon* court, and suggests that the Wisconsin legislation of 2006 has resulted in injustice to the most severely-injured people without providing a significant benefit to anyone other than medical professional liability insurers.

***J. Michael End** is a partner in the Milwaukee law firm of End, Hierseman & Crain, LLC. He is an attorney with 41 years of experience representing plaintiffs in tort actions, with an emphasis in medical malpractice and personal injury law. Mr. End received his B.A. degree from Marquette University and his J.D. degree from Marquette University Law School, where he was a Thomas More Scholar. He is a past president of the Wisconsin Association for Justice and of the Wisconsin chapter of the American Board of Trial Advocates. He is a fellow of the American College of Trial Lawyers. Mr. End was selected as the 2000 Robert L. Habush Trial Lawyer of the Year by the Wisconsin Academy of Trial Lawyers. He is included in Best Lawyers in America in the fields of medical malpractice law and personal injury litigation, and was named by that organization as the 2014-15 Plaintiffs Personal Injury Milwaukee Trial Lawyer of the Year. He was selected as one of Wisconsin's Top Ten Super Lawyers in 2012 through 2014, and also selected as a Leader in the Law by The Wisconsin Law Journal in 2012.*

(Endnotes)

[1] *Estate of McCall v. U.S.* (Fl. 2014) 134 So. 3d 894. The decision relates only to Florida's noneconomic cap for medical malpractice wrongful death cases, not the cap relating to personal injury cases. *Id.* at 900.

[2] Wis. Stat. §§ 655.017 and 893.55(4)(d)1(2011-12). Injured Patients and Families Compensation Fund has appealed an order by Milwaukee Circuit Court judge Jeffrey A. Conen affirming a jury verdict of $15 million to Ascaris Mayo and $1.5 million to her husband, Antonio Mayo, for noneconomic damages for Mrs. Mayo's losing all four limbs. Milwaukee Circuit Court case number 2012CV006272; Appeal number 2014AP002812.

[3] 28 U.S.C. §§ 1346(B), 2681-80.

[4] *Id.* at 900.

[5] *Estate of McCall v. U.S.*, 642 F.3d 944 (11th Cir. 2011).

[6] *Id.* at 897.

[7] *Id.* at 900.

[8] *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440.

[9] *Id.* at 901.

[10] *Id.* at 901, 902.

[11] *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1078 (Ill. 1997).

[12] *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980), overruled on other grounds, *Cmty. Res.for Justice, Inc. v. City of Manchester*, 917 A.2d 707, 721 (N.H. 2007).

[13] *McCall*, at 902, 903.

[14] *Id.* at 903.

[15] *Id.* at 905.

[16] *Id.* at 906.

[17] *Id.* at 907.

[18] *Id.* at 909.

[19] *Id.* at 909.

[20] *Id.* at 910.

[21] *Id.* at 910.

[22] *Id.* at 913.

[23] *Id.* at 913.

[24] *Id.* at 913.

[25] *Id.* at 913.

[26] *Id.* at 914.

[27] *Id.* at 914.

[28] 2005 Wisconsin Act 183.

[29] *Ferdon*, at § 114.

[30] Jill Van Den Bos et al., The $17.1 Billion Problem: The Annual Cost of Measurable Medical Errors, *Health Affairs*, April 2011, 30:4, p. 599.

[31] National Practitioner Data Bank, available at www.npdb.hrsa.gov/resources/npdbstats/npdbStatistics.jsp. Select Physicians – United States – Wisconsin.

[32] *Id.*

[33] Wisconsin Director of State Courts, Annual Reports for 2005 and 2013.

[34] *Id.*

[35] National Association of Insurance Commissioners, *Nationwide Summary of Medical Professional Liability Insurance, 2000-2013 (2014)*, available at www.naic.org/documents/research_stats_medical_malpractice.pdf.

[36] See Wis. Stat. § 893.55(1d)(a)3 (2011-12).

[37] The Annual Rate Survey compares premiums paid by internists, general surgeons, and obstetricians for medical professional liability insurance policies with limits of $1 million/$3 million in each state. The few states that do not sell policies in those amounts, because of different liability systems, are not included in the survey.

[38] National Association of Insurance Commissioners, supra, note xxxiii.

[39] Pinnacle Actuarial Resources, Inc., *Wisconsin Injured Patients and Families Compensation Fund, Actuarial Analysis as of September 30, 2014*, p.2.

[40] *Id.* p. 19 and Exhibit C1.

[41] *Id.*

[42] IPFCF, *2006 Functional and Progress Report*, Table 1, p. 6.

[43] *Id.* at p. 8; *Wisconsin Injured Patients and Families Compensation Fund, Actuarial Analysis as of September 30, 2013*, p. 8.

[44] See Wis. Stat. § 893.55(1d)(a)1 (2011-12).

[45] Myungho Paik, et al., *Does Medical Malpractice Reform Increase Physician Supply? Evidence from the Third Reform Wave,* available at http://ssrn.com/abstract=246065.

[46] *Id.* p.1

[47] *Id.* p. 1.

[48] David A. Hyman, et al., *Does Tort Reform Affect Physician Supply? Evidence from Texas,* June 2012, available at http://ssrn.com/abstract=2047433.

[49] *Id.* p. 258: District of Columbia (1); New York (3); Rhode Island (5); Connecticut (6); Vermont (7); New Jersey (8); Minnesota (9); New Hampshire (10); Pennsylvania (11); Oregon (13); Illinois (14).

[50] AMA: *Medical Liability Reform NOW!* 2014 ed., pp. 14,15.

[51] Wis. Stat. §893.55(1d)(a)2 (2011-12)

[52] Chapter 37, Laws of 1975, Section 1(e).

[53] Myungho Paik, et al., ., *Do Doctors Practice Defensive Medicine, Revisited,* available at http://ssrn.com/abstract=2110656, p. 1.

[54] *Id.* p. 26.

[55] Daniel A. Waxman,, et al., *The Effect of Malpractice Reform on Emergency Department Care,* N Engl J Med 2014; 371:1518-25.

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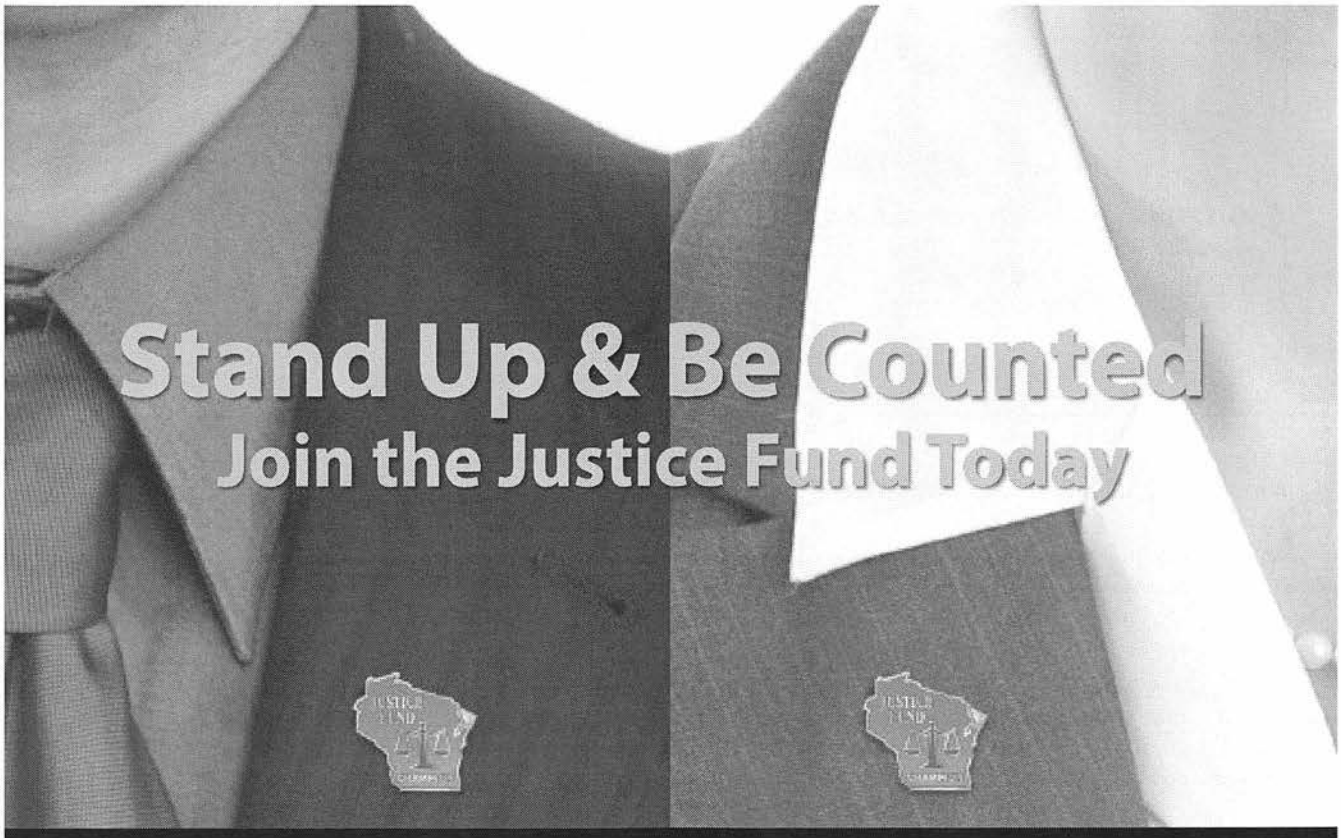

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Fighting the good fight

Courtroom Avenger: The Challenges and Triumphs of Robert Habush

Kurt Chandler
ABA Book Publishing
www.americaanbar.org
276 pp., $39.95
Reviewed by *Stacy E. Burke*

The title is an appropriate moniker for master litigator Robert Habush: In *Courtroom Avenger*, Kurt Chandler highlights Habush's many successes and the roadblocks he overcame along the way. He explains how Habush channeled his frustration with his personal experiences—from anti-Semitism, to his daughter's devastating vaccination injury, to a lack of affection from his lawyer father—into a heated vengeance directed at those who negligently harm others. Habush largely focused on products liability cases before such claims were mainstream, laying the groundwork for our current ability to hold accountable companies that disregard worker and consumer safety. He was among the first trial lawyers to engage in political activism as president of the American Association for Justice—then the Association of Trial Lawyers of America—from 1986 to 1987.

Habush has mastered the art of storytelling—presenting his clients' stories to the jury and proving the facts to support the necessary elements of their claims. In this biography, Chandler, the editor of *Milwaukee Magazine* and a newspaper reporter, gives readers a birds-eye view of the formulaic method Habush would use to decide whether to accept a case—and then how he would prepare it for trial and win.

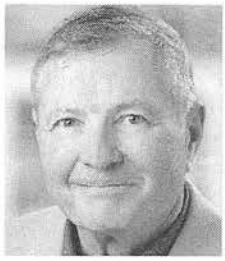
Chandler doesn't spell out trial tactics in a simple list; instead, he uses Habush's success stories to illustrate best practices, including working on whatever cases come your way so that you can learn, getting a workers' compensation insurance carrier to work with you (because your objectives are often harmonious), finding the best experts on a case-by-case basis, and giving a passionate closing argument. The book also emphasizes the concept of being inwardly self-critical and a perfectionist while outwardly portraying stalwart confidence in court—something all lawyers can relate to.

The average nonlawyer reader might consider it a small drawback that the proportion of trial stories and trial transcript excerpts to other information is somewhat unbalanced. While each of Habush's clients, cases, and trials is noteworthy, a nonlawyer can only read so many war stories in a row. Still, his landmark cases are many: HIV-tainted blood being transfused into healthy patients; products liability claims against automakers for seat collapse, lack of shoulder straps in back-seat seat belts, and inadequate child restraints; and acting as special counsel on Wisconsin's behalf against tobacco companies.

As a mother, reading Habush's story about how his daughter suffered irreparable brain damage from a vaccination as an infant was heart-wrenching. At the beginning of his legal career, he was a client in a products liability case against Parke-Davis regarding the Quadrigen vaccine, and it was a turning point. This horrible personal experience led him to become one of the most successful trial lawyers in U.S. legal history.

Such personal flourishes and details of Habush's personal life, lifelong political activism, and philanthropic endeavors make *Courtroom Avenger* a quick and enjoyable read for almost any lawyer in the mood for renewed inspiration to keep fighting the good fight. The book also showcases the best of why trial lawyers do what we do and will serve as a solid counterargument to tort "reform" for years to come.

***Stacey E. Burke** is a trial lawyer consulting for law firms through her own business headquartered in Houston.*



J. Michael Riley

Practice Pointer

Curbing Defense Medical Evaluations

David S. Blinka

The Problem

There was a time when defense medical evaluations were reasonably objective, albeit conservative. They were also a relative rarity because the defense ran the risk of an adverse opinion. Those days are gone.

Over the years insurers have developed a reliable stable of hired gun "experts". These doctors churn out predictable opinions that support the company line. They are most prominent in soft tissue and chronic pain cases, where they consistently opine that everyone recovers within a relatively brief period of an injury.

The statute concerning medical evaluations, Section 804.10(1), is part of the Wisconsin Statutes governing discovery. The purpose of those statutes is to serve the ends of justice and increase the chances for settlement. *Dudek v. Circuit Court for Milwaukee County.*[1] What we have at present is a group of well-paid advocates posing as "independent experts." They provide cookie cutter opinions which do far more to obstruct than promote settlement and further the interests of their masters, not the ends of justice.

This article is focused on the hired gun medical expert. While some of the arguments advanced may have broader application, they are most likely to be effective in that context.

Insurers seem to assume that a defense medical evaluation is a matter of right. That assumption has gone largely unchallenged, although some efforts have been made to place conditions on examinations. We believe a more fundamental challenge is justified.

Suggested Solution

A. Section 804.10(1)

Far from providing a carte blanche right to defendants, Section 804.10(1) grants the court discretion to order an examination on "good cause shown". Absent a stipulation, the burden to justify a medical evaluation rests with the defense.

Section 804.10(1) also rests with the courts. It also affords the court control over the time, place, manner, and scope of any examination. Significantly, the section also permits the court to determine the person or persons by whom an evaluation is to be conducted.

The case law interpreting Section 804.10(1) is limited. Significantly what constitutes "for cause shown" was addressed in *Ranft v. Lyons.*[2] In denying the request for an evaluation, the court held that the requesting party would need to demonstrate cause beyond the threshold requirement that the party's physical condition be at issue. Citing to *Schlagenhauf v. Holder*[3] the court noted that under a similar federal rule the U.S. Supreme Court had concluded that an examination might not be appropriate if the opposing party could obtain the desired information by other means.

The fundamental purpose of the discovery statutes, coupled with the requirement of Section 804.10(1) provide a sound basis for challenging or limiting the defense right to a medical evaluation. The argument is particularly compelling when it can be demonstrated that the defense is proposing that the evaluation be conducted by one of the relative handful of well-paid advocates who conduct a majority of the defense evaluations. They routinely issue opinions which are both scientifically categorical and essentially identical in case after case.

Presenting the court with evidence that the proposed expert is little more than a hired gun is critical. Evidence can be obtained through discovery. That will almost certainly show that the expert has completed a large number of evaluations on behalf of the defense and has consistently produced opinions that do not vary materially from case to case. That is so despite significant differences among a variety of plaintiffs. Prior opinions will also disclose that the proposed defense medical expert consistently disagrees with the opinions of a broad range of treating physicians.

It may also be worth pointing out that in opinion after opinion these doctors rely heavily upon medical records. Their opinions are also predicated upon what is essentially an article of faith, that everyone who is injured in an accident recovers rapidly. At the same time, they essentially ignore the history offered to them by the plaintiff in the course of these examinations.

Under all of those circumstances it is difficult to see that permitting an evaluation by someone who is more advocate than expert can promote the ends of justice or meet the for cause standard set forth in Section 804.10(1).

B. Docs and *Daubert*

We believe there is also a compelling case to be made that the opinions consistently offered by many of the best known defense medical advocates does not pass muster under the *Daubert* standards. In *Daubert* v. *Merrell Dow Pharm., Inc.*[4] and its progeny, the U.S. Supreme Court sought to eliminate junk science from the courtroom. The court was concerned that advocacy masquerading as science could be used to confuse jurors in cases involving technical issues. As anyone knows who has handled medical malpractice cases, jurors are all too readily confused by conflicting medical opinions, regardless of their merit.

Daubert and the subsequent cases interpreting it set forth a number of criteria for determining whether proposed expert testimony passes muster. Several of those criteria apply with particular force to the standard hired gun medical opinion.

First and foremost, courts should concern themselves with whether the theory underlying the expert's opinion enjoys broad acceptance within the relevant scientific community. The often repeated

opinion that everyone heals within 12 to 18 weeks, does not enjoy such acceptance. In fact, that categorical opinion is contradicted in case after case by a variety of treating physicians. Defense experts almost uniformly disregard those opinions and the well accepted reality that long term chronic pain is a common sequelae of neck and back injuries.

Daubert also asks whether the theory or technique underlying an opinion has been subjected to peer review and publication. There is no peer reviewed literature we are aware of which supports the categorical opinion that everyone recovers from soft tissue injuries within a given timeframe regardless of the severity of the injury, the nature of the plaintiff, or the manner in which the injury occurred.

Testimony which is based on testing that was conducted for purposes of litigation is also highly suspect under *Daubert*. Some defense experts rely on tests conducted by the insurance industry specifically for the purposes of litigation.

Ultimately, *Daubert* requires that an expert opinion be grounded in the scientific method. It rejects the use of *ipse dixit* (it is so because I say it is so) testimony. In the case of many medical experts, the opinions offered are not based on a scientific analysis of the evidence presented, but rather on a categorical and scientifically unsupported belief.

Case law applying *Daubert* to medical testimony is sparse. Wisconsin's appellate courts have not addressed the issue directly, although there is at least one Wisconsin decision that discussed the suspect nature of *ipse dixit* testimony in evaluating the admissibility of nonmedical testimony.

The federal courts have held that *Daubert* can be applied to medical testimony. In *Bowers v. Norfolk*[5] the court rejected testimony by a physician hired by a third party because it felt there was insufficient indicia of reliability. The proposed testimony concerned an unusually complex causation issue. The court based its rejection on the fact that the opinions had not been peer reviewed, were not supported by medical literature and were not demonstrated to have general acceptance in the medical community.

The precise concerns articulated in *Bowers* apply to the standard hired gun medical opinions. What *Daubert* and *Bowers* condemn is the effort to convert science into a partisan smokescreen. Defense medical opinions which consistently contradict treating physicians and ignore real world medical experience have precisely that affect.

Wisconsin has not specifically applied *Daubert* to medical testimony. The Wisconsin Court of Appeals has expressly rejected *ipse dixit* testimony in *State v. Giese*.[6] The court noted *ipse dixit* testimony is barred because it contains none of the indicia of reliability that *Daubert* requires. The U.S. Supreme Court had previously stated in *Kumho, supra*, that "nothing in either *Daubert* or the Federal Rules of Evidence requires a District Court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." The opinions most commonly offered by defense medical experts are classic *ipse dixit* testimony. They rest on nothing more than the expert's assertion that the categorical opinion he offers is true because he says it is true.

One obviously related question is whether testimony by treating physicians may also run afoul of *Daubert*. In general, we believe not.

In *Cooper v. Carl A. Nelson & Co.*[7] the 7th Circuit Court of Appeals rejected a challenge to testimony by a treating physician. The defense challenged proposed testimony by the plaintiff's pain specialist linking the plaintiff's chronic pain syndrome to trauma sustained in the accident. The physician had testified based on his examination of the plaintiff as well as plaintiff's reported medical history. The trial court initially rejected the testimony because it was based on history which the defense asserted was inaccurate.

The Court of Appeals rejected the defense argument, concluding it would establish an overly demanding gatekeeper role. The court observed that it was not seriously disputed that in clinical medicine the methodology of physical examination and self-reported medical history employed by the plaintiff's expert was generally acceptable. The defense argued that the approach was not acceptable where the etiology of a condition was well established. The court rejected that argument noting the defense suggested no alternative that could be employed by a conscientious clinical physician.

The court cited *United States v. Lunde*[8] as recognizing a wide choice of methodologies that may be used in developing an expert opinion. In conclusion, the court held that the physician had employed the accepted diagnostic tool of examination accompanied by physical history as related by the patient. The case was returned to the trial court with instructions to follow the court's direction in determining admissibility.

Ultimately, the court concluded that arguments concerning alternative possibilities were susceptible to exploration on cross-examination. The court took the same approach to disputes relating to the patient's medical history.

Cooper is quite consistent with the approach taken by Wisconsin courts prior to *Daubert*. We anticipate the Wisconsin courts following a similar course post *Daubert* with respect to clinical opinions by treating physicians.

So why would our courts be less receptive to defense medical experts? There are fundamental differences between the testimony offered by treating physicians and that offered by hired gun defense medical experts. Treating physicians give opinions specific to a particular case based on a patient's history, their clinical examination of the patient, and their experience with similar patients and similar conditions. The opinions vary from patient to patient. At least treating physicians can attest that a patient's recovery or lack of recovery can be impacted by a variety of factors relating both to the patient and to how they were injured.

Defense medical experts, by contrast, offer opinions predicated on categorical belief that everyone who has sustained certain types of injuries recovers within a defined and relatively brief period. That categorical approach is at direct odds to opinions held by the majority of the medical community. It is also unsupported by literature, or indeed by logic.

Hired gun medical experts are not offering testimony rooted in the reality that human beings are not machines, but rather are infinitely variable. They offer categorical opinions that are rooted neither in sound medical theory or science. Those are precisely the sort of one size fits all partisan opinions that *Daubert* condemned. If such testimony cannot withstand scrutiny under *Daubert*, there is no reason for the court to permit an evaluation intended merely to bolster tes-

timony which would violate the strictures of *Daubert.*

It would be much neater if there were clear cut answers as to how challenges to defense medical experts will play out. That said, we believe there are strong arguments under Section 804.10(1) and *Daubert* to object to the use of hired gun defense doctors. While such challenges are not appropriate in every case, we believe it is time that an effort was made to rein in what has become a destructive phenomenon. To paraphrase, we can't know what we'll get, but we know what we've got. Hired gun doctors present a real impediment to obtaining fair compensation for our clients. Allowing them to continue unchecked seems a poor option.

J. Michael Riley *is an attorney at Axley Brynelson in Madison. His practice includes personal injury, insurance coverage, appellate matters, mediation and arbitration. Attorney Riley has lectured and written extensively on matters relating to the settlement and trial of personal injury claims. He taught trial advocacy and negotiation at the University of Wisconsin Law School. He has been regularly cited as a top personal injury lawyer in Best Lawyers in America; He has also been designated as Super Lawyer in the area of personal injury by Milwaukee Magazine for multiple years and one of Madison's top personal injury attorneys by Madison Magazine.*

David Blinka *is an associate attorney at Habush Habush & Rottier, S.C. in Madison where he focuses on personal injury in addition to working on a mass tort gasoline spill case. Mr. Blinka graduated from the University of Wisconsin Law School in 2012 and is a member of WAJ's New Lawyers Section.*

(Endnotes)

[1] 34 Wis. 2d 559, 150 N.W.2d 387 (1967).
[2] 163 Wis. 2d 282, 471 N.W.2d 274, *review denied* 475 N.W.2d 584 (1991).
[3] 379 U.S. 104, 117-122 (1964).
[4] 509 U.S. 579 (1993).
[5] 537 F. Supp. 2d 1343 (M.D. GA 2007).
[6] 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687.
[7] 211 F.3d 1008 (2000).
[8] 809 F.2d 392, 395-6 (7th Cir. 1987).

Megan M. Zabkowicz

Permanency Reports: The Path of Least Resistance

Introduction

As we all have discovered one way or another, medical records can be full of hidden gems, whether delightful quotes from our clients or damaging notations about our clients' prior medical conditions. To loosely paraphrase Homer Simpson, our clients' medical records are the cause of and solution to all of our problems. Because of the significance of medical records to personal injury claims, it is critical to control, as much as possible, what a treating doctor dictates in the permanency report.

In counties such as Milwaukee, the Scheduling Order mandates permanency reports. As a result, reports are essential to a client's significant injury claim. If a client had surgery or treated for a considerable amount of time, a permanency report helps substantiate the severity of the injury and provides the foundation for the future damages question on the verdict. Regardless of whether you request a report prior to sending the demand or filing suit, there are some basic tips to help ease the process of attaining a permanency report.

Preparing the Doctor for the Report

In general, you should assume your client's treating doctor dislikes attorneys and dislikes interactions with attorneys even more. Discussing the treatment of a patient is generally easy for doctors; however, asking a treating doctor about causation and permanent injuries can be a seemingly arduous task.

Therefore, there is a considerable risk asking the treating doctor for a report that may not give the necessary causation or permanency. If a doctor cannot opine a motor vehicle accident caused the tear in a client's rotator cuff or that a client has suffered a permanent back injury and writes that in the report, you and the client are stuck with that opinion.

Because of this uncertainty, scheduling a quick phone call with the treating doctor can easily assuage concerns of what could end up in a written report. A phone call with the doctor can also help determine whether it is even in your client's best interest to request the report. If a doctor does not indicate that he or she is going to provide a causation opinion, then there is no sense in requesting the report. Figuring this out early is always best practices. Knowing early may determine whether the case merits filing a lawsuit and prevent finding out thirty days before a disclosure deadline that the treating doctor will not "play ball."

Before speaking with the doctor, it is important your office has already provided the doctor all the appropriate information and medical records, whether prior medical records or records from other current treating doctors. Make it easy for the doctor to understand the entire picture of your client's medical history. If a client has had treatment in the past for his or her low back, the doctor may be uncomfortable opining an accident *caused* the injury. However, if the doctor has a better understanding of a client's prior health history, the doctor may be willing to opine the accident caused an aggravation of a pre-existing condition.

Furthermore, during a deposition, the doctor will be questioned as to whether he or she had a full, clear picture of your client's medical history. The doctor's opinions may change if the doctor finds out about prior records for the first time at his or her deposition.

Additionally, if the doctor has the prior records, understands the prior medical history, and cannot say to a reasonable degree of medical certainty the injuries were caused by the accident, you likely will reconsider a request for a permanency report and negotiate the case accordingly. Although unhelpful with regards to a permanency claim, it is better to have this information provided to you over the phone, as opposed to in a damaging permanency report you are unable to abstract from the medical records.

When providing the doctor with appropriate medical records, it is best practice to make things as easy as possible for the doctor. Providing a short stack of pertinent records rather than a four-inch stack of every single certified record makes the doctor's job easier and increases the odds the doctor will actually read the records. If the prior treatment and medical records are substantial, it may be beneficial to provide the doctor with a brief medical review. These types of reviews help clarify treatment history, highlight pertinent aspects, and provide the doctor with a time saving opportunity. Providing the doctors with a brief medical summary also allows you to paint a narrative of your client's history to the doctor. A word of caution, though: medical record reviews are appropriate tools but make sure they are completely accurate. Not only is the doctor relying on you for this information for the foundation of his or her medical opinion, but the review now becomes part of the doctor's file and is discoverable.

Phone Call with the Doctor

Schedule a short telephone conference in advance of requesting the permanency report to educate the doctor on your client's injuries and assess whether you should request a report. Contact the doctor's scheduler or assistant to schedule the phone call with the doctor. Typically, the noon hour is the most convenient time for doctors to speak directly with attorneys. Be sure to determine whether you are calling the doctor or the doctor is calling you. Also, make sure to have the correct office telephone number if you are facilitating the phone call with the doctor. Nothing would be more irritating for both you and the doctor than to lose your window of opportunity to speak because you are calling the wrong office.

Once on the phone with the doctor, feel free to get right to the point. You both are very busy and respecting everyone's time is important. There are basic questions that should be asked and answered during every phone call, but each call

should be tailored to your client's specific case needs. The following are easy tips to help you both get right to the point:

1. Make sure the doctor remembers the client/patient
2. Explain who you are and whom their claim is against. (This can help ease concerns that you are somehow out to get the doctor with these questions)
3. Confirm the injuries
4. Confirm the doctor agrees the accident caused the injuries, or alternatively aggravated/exacerbated a pre-existing injury.

Be clear about what you are looking for from the doctor. If causation is an issue, be sure to highlight that. If the issue is whether there is permanent injury, make sure to focus on those specific types of questions. Once you have determined the treating doctor will be able to provide a favorable report, be sure to end the phone call by telling the doctor you would like to now send over a brief list of questions for him or her to answer in a written report.

If during the phone call it is evident the doctor is not going to give the necessary causation or permanency opinions, do not despair. The entire purpose of this phone call is to ensure a permanency report that will be only helpful to your client and not harmful. It is better to hear the doctor tell you over the phone he or she does not opine there is causation or a permanent injury than to have him or her dictate it in a report in the medical records. Think of this phone call as a way to help formulate strategies for the claim going forward.

Requesting the Report

Send the report request out immediately after the phone call. Doctors tend to place a low priority on assisting attorneys, so getting the request out as soon as possible can help expedite matters.

It is critical to phrase questions to the doctor using the correct legal standards. For example, all answers should be "*to a reasonable degree of medical certainty.*" If causation is an issue be sure to ask whether the accident, if not *the* cause, was a *substantial factor* in the cause of the client's current medical condition. If the client has significant priors, make sure the doctor understands the aggravated/accelerated/exacerbated opinion. The goal of the request should be to tailor the questions to your specific needs. The more concise your request, the greater likelihood the doctor will be willing to answer it expeditiously. Here are some general examples:

1. What is the patient's current medical condition?
2. Was the current condition caused by the accident on (date)?
3. If not directly caused by the accident, was the patient's current medical condition aggravated/exacerbated by the accident?
4. Are the injuries permanent in nature?
5. Does the patient have permanent restrictions as a result of the injuries from the accident?
6. What are the permanent restrictions?
7. Will the patient require future medical treatment as a result of the injury?
8. If yes, what type of future treatment will the patient likely require?

Because doctors are extremely busy, requested permanency reports are generally not at the top of their to-do lists and attorneys often have to wait weeks or months for reports. Follow up phone calls to the doctor's office are often necessary, but really should not be more than a gentle reminder for the report. Highlighting the court's Scheduling Order deadline should be a last resort.

Unfortunately, even if you have done all you can to prepare for a permanency report, there is no guarantee it will be favorable or include everything you had asked about. If the report is unfavorable, you could request a supplemental report; however, there is still no certainty the second report will clarify the first, or particularly benefit your client's case. Additionally, the first report is not going to be eradicated and is likely still part of the certified medical records. Even if the doctor provides supplemental reports, your communications with the doctor to attain it are discoverable and will undoubtedly provide fodder for cross-examination.

Quick Recap

1. Do I need a permanency report for my client's claim?
   a. Do the medical records indicate permanent injury?
   b. Could this claim end up in Litigation?

2. Before requesting a report:
   a. phone call
      i. Make sure doctor has prior medical records, if relevant
      ii. Know the cost of the phone call and whether pre-pay is required
      iii. Schedule telephone call
         1. Who is calling whom? What number? What date/time?
      iv. Prepare questions
         1. Causation
         2. Permanent injury
         3. Future treatment
         4. Permanent restrictions

3. Report
   a. Know the costs for the report
   b. Ask specific question; be concise
   c. Expectations of how long it will take for the doctor to complete is calling whom? What number? What date/time?
   d. include with demand or file with the court

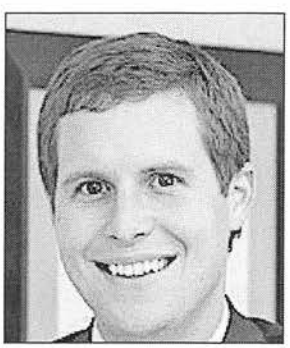
Conclusion

Requesting a permanency report is not always an easy process, but with a solid plan of action you will be able to develop the right strategies for your client's claim going forward and reduced headaches as the disclosure deadline approaches.

***Megan M. Zabkowicz** is an attorney at Gruber Law Offices, where she practices personal injury law. Megan is a graduate of Marquette University Law School and earned her undergraduate degree at the University of Wisconsin-Madison. While at Marquette, Megan was president of the Association for Women Lawyers and competed in the finals of the Jenkins Honors Moot Court Competition, arguing in front of U.S. Supreme Court Justice Elena Kagan.*

NLS Chairs

Chair
Kristen E. Lonergan is an associate attorney with Bremer & Trollop Law Offices in Wausau where she practices personal injury litigation. She received her law degree from the University of Wisconsin Law School in 2010. She received her undergraduate degree from the University of Wisconsin-Madison in 2007. Kristen is admitted to practice in the State of Wisconsin and the Western District of Wisconsin. She is a member of WAJ where she serves on the Board of Directors, the Membership Services Committee, as Chair of the New Lawyers Section and as Chair of the Women's Caucus Mentoring Committee. Kristen is also a member of the State Bar of Wisconsin, serving on the Mock Trial Casewriting and Mock Trial Advisory Committees.



Chair Elect:
Christopher J. MacGillis is a founder and partner at MacGillis Wiemer, LLC in Milwaukee. Chris focuses his practice on personal injury and employment/labor law, and has represented employees, labor unions, and those injured by the acts of others throughout the State of Wisconsin. He graduated from Marquette Law School and received his undergraduate degree from Lawrence University. Reach Chris at (414) 727-5150 or chris@macgilliswiemer.com.

It's Time to Raise America's "Other Minimum Wage"

Breanne L. Snapp

Introduction

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, provides exemptions from both minimum wage and overtime requirements for bona fide executive, administrative, professional, and computer employees.[1] These exemptions are commonly known as the "white collar" exemptions.[2] A broad interpretation of these exemptions, as well as an incredibly low salary threshold of $455.00 per week, pose significant obstacles to overtime claims and deny millions of low paid salaried workers overtime pay. Current decisions examining the executive exemption illustrate these issues well. However, the changes proposed by President Obama could restore the intent of the FLSA and strengthen wage and hour protections for millions of Americans.

This article will provide an overview of the white collar exemptions, examine recent trends in the interpretation of the executive exemption, and discuss President Obama's call for changes to the white collar exemptions.

The White Collar Exemptions

To qualify as an exempt executive, administrative, professional, or computer employee, an individual must be compensated on a salary basis at a rate of not less than $455.00 per week.[3] This compensation amounts to an annual salary of $23,660.00 and constitutes America's "other minimum wage," the minimum an employer can pay workers and avoid overtime requirements.[4]

All exempt white collar employees must also meet a "duties test." The duties tests for each white collar exemption are outlined here:

EXECUTIVE EXEMPTION: To qualify for the executive exemption, an employee's primary duty must be managing the business, and the employee must regularly direct the work of at least two full-time employees.[5]

"Management" includes the following activities:

- Interviewing, selecting, and training employees;
- Directing the work of employees;
- Setting and adjusting employees' rates of pay and hours of work;
- Determining the type of materials, supplies, machinery, and equipment to be used;
- Determining the type of merchandise to be bought, stocked, and sold;
- Planning and controlling the budget; and
- Monitoring or implementing legal compliance measures.

An exempt executive must also have the authority to hire and fire employees from the company, or make recommendations as to hiring and firing that are given particular weight.[7]

ADMINISTRATIVE EXEMPTION: To qualify for the administrative exemption, an employee's primary duty must be the performance of office work directly related to the management or general business operations of the employer or the employer's customers, and the employee must assist with the running or servicing of the business.[8] The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance to the company.[9]

PROFESSIONAL EXEMPTION: To qualify for the professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning, typically acquired through a college or similar program of instruction.[10] The employee's work must also require the consistent exercise of discretion and judgment.[11] Common examples of exempt professionals include doctors, lawyers, pharmacists, and engineers.

COMPUTER EMPLOYEE EXEMPTION: Exempt computer employees include computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field.[12] The computer employee exemption applies only to computer employees whose primary duty consists of:

> (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
>
> (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
>
> (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems.[13]

Courts have struggled to reconcile the language of the computer employee exemption with ever-evolving technology. While it is clear that Information Technology ("IT") support specialists are nonexempt,[14] the exempt status of certain employees in the software industry has not been resolved. For example, end user testers of software and employees who simply configure software generally have little to no education or training in the computer sciences or a technical field. However, many employers classify these individuals exempt simply because this work may seem complex to an outsider.

Recent Interpretations of the Executive Exemption

As a remedial statute, the FLSA's exemptions are to be narrowly construed against employers and are "limited to those establishments plainly and unmistakably within their terms and spirit."[15] In practice, however, courts have broadly construed the exemptions to include employees who are clearly outside the terms and spirit of the statute. These decisions leave us with exempt "executives" potentially working at hourly rates less than those of their subordinates, depending on their hours logged. Because these executives are also exempt from the FLSA's minimum wage requirement, their hourly rate can even fall below the minimum wage.

To avoid paying overtime, employers commonly classify managers, manager assistants, and other employees with supervisory roles as exempt executives. However, many "managers" spend most of their time performing the same nonexempt duties as their hourly employees. Therefore, claims regarding the executive exemption often hinge on whether the employee's ***primary duty*** is the performance of exempt management work, or whether nonexempt concurrent duties disqualify the employee from exempt status.

Concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from the executive exemption.[16] Whether an employee qualifies for the exemption depends instead on whether his or her primary duty is the performance of exempt work.[17] The term, "primary duty" means the principal, main, major, or most important duty that the employee performs.[18]

Factors to consider when determining the primary duty include:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee's relative freedom from direct supervision; and
- The relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

From the early 1980s through the mid-2000s, federal circuit courts unanimously found retail store managers exempt from overtime pay.[20] In 1999, the Government Accountability Office commented on the difficultly of challenging exempt classifications for employees who supervise at least two employees, even if they spend only minimal time on management tasks.[21]

However, there have been successful challenges to managers' exempt status in the past 10 years. In 2008, for example, the Eleventh Circuit upheld a $36 million dollar jury verdict against Family Dollar for misclassifying its store managers as exempt executives.[22] In addition, ***assistant*** managers have prevailed in claiming that their primary duty is nonexempt work. For example, McDonald's paid $2.4 million dollars in 2010 to settle a claim that it willfully misclassified its assistant managers as exempt executives.[23] Similarly, Taco Bell paid $2.5 million dollars in 2013 to settle a claim that it also misclassified its assistant managers as exempt executives.[24]

Nevertheless, the current legal landscape confirms a trend broadening the executive exemption's duties test. In 2011, for example, the Fourth Circuit ignored the *Morgan* Decision and held that Family Dollar's managers were in fact exempt executive employees.[25] The Lead Plaintiff spent 99% of her time performing nonexempt duties, such as stocking freight, running a cash register, and doing janitorial work.[26] Still, the court latched onto the regulation's language that "... time alone is not the sole test, and nothing in this section requires that exempt employees spend more than 50% of their time performing exempt work."[27] Because the plaintiff's work apparently satisfied the other factors outline in § 541.700, the court held that her primary was management.[28] Federal courts have typically followed *Family Dollar*'s lead, disregarding the significant time plaintiffs spend performing nonexempt work.

Proposed Changes

President Obama released a Presidential Memorandum this spring authorizing the Secretary of Labor to update and modernize the country's overtime regulations.[29] In it he acknowledged that the white collar exemptions have not kept up with our modern economy, resulting in millions of Americans lacking overtime and minimum wage protections.[30] The President encouraged the Secretary of Labor to address the changing nature of the workplace and simplify the regulations for employers and workers.[31]

Many observers have speculated regarding the content of the proposed changes, but most predict that the salary threshold will be increased significantly, as high as $984.00 per week.[32] This would amount to an annual salary of $51,168.00 (the FLSA's 1975 salary threshold adjusted for inflation.)[33] In addition, new regulations will likely implement a 50% limitation on work deemed non-exempt.[34] This change in the duties test would lend clarity to both employers and employees, and would eliminate exempt status for low-paid supervisory workers.

In terms of timing, the proposed rule was originally expected to be issued in November 2014.[35] The latest Department of Labor Regulatory Agenda indicates that the agency now plans to publish a Notice of Proposed Rulemaking in February 2015.[36] If the Department sticks to this timeline, it is possible that the new regulations could go into effect before the end of President Obama's second term.

Conclusion

The FLSA's white collar exemptions have failed to serve their purpose of exempting bona fide, highly compensated, professionals from overtime requirements. Instead, these exemptions have resulted in millions of low-paid salaried workers who are virtually barred from bringing overtime claims. The Department of Labor should prioritize the regulatory changes suggested by President Obama to restore the intent of the FLSA.

***Breanne L. Snapp** is an associate at Habush Habush & Rottier, S.C., where her practice includes wage and hour class actions. In 2013 Ms. Snapp graduated cum laude, Order of the Coif, from the University of Wisconsin Law School, where she also earned a Consumer Health Advocacy Certificate. Ms. Snapp is a member of the Women's Caucus and the New Lawyers Section.*

Women's Caucus Chairs

Amy F. Scarr has taken over the helm of the WAJ Women's Caucus. Amy is a solo practitioner and practices in the areas of employment discrimination, civil rights, and personal injury. Amy is on the Board of Directors of the WAJ. She is a member of the State Bar of Wisconsin's Labor and Employment Law Section (Chair of the Board, 2012-13) and Civil Rights and Liberties Section (Chair of the Board, 2005-06). She is also a member of the Dane County Bar Association, the Western District of Wisconsin Bar Association, the Legal Association for Women, the National Employment Lawyers Association, the Wisconsin Employment Lawyers Association, and the AAJ. Amy received her law degree from the University of Wisconsin Law School. She lives and practices law in Madison.

Christine D. Esser was elected the Vice Chair of the Women's Caucus. Christine is a shareholder at Habush Habush & Rottier S.C. and has been a member of the firm since 2000. She began her legal career as a law clerk for the Honorable Marsha Ternus of the Iowa Supreme Court. Since that time she has successfully tried numerous cases in counties throughout Wisconsin. Christine has been certified as a Civil Trial Advocate by the National Board of Trial Advocacy since 2005. She is a member of the State Bar of Wisconsin, the Wisconsin Association for Justice, the Sheboygan County Bar Association where she serves on the Community Outreach and Education Committee and the Judicial Advisory Council. Christine has been included in the list of the Top 25 Women by Wisconsin SuperLawyers since 2011 and was also included in the list of the top 50 Lawyers in the State this year. She is a frequent presenter on topics related to personal injury litigation at various seminars throughout the state.

WISCONSIN ASSOCIATION *for* JUSTICE

Spring Seminar

Slip/Trip & Fall Symposium:
All Your Questions Answered

Radisson Hotel & Conference Center
Green Bay
Friday, March 20, 2015
8:30 a.m. – 3:30 p.m.

Attorney Session Chairs

Amy M. Risseeuw
Peterson, Berk & Cross SC, Appleton

Kristin M. Cafferty
Habush Habush & Rottier SC, Racine

Paralegal Session Chairs

Michelle Dontje
Habush Habush & Rottier SC, Sheboygan

Choua Lee
Ramon & Medrano, SC, Milwaukee

Andrea R. Thunhorst
Laufenberg, Jassak & Laufenberg SC, Milwaukee

Attorney Morning Session

WAJ Update
Ann S. Jacobs, WAJ President

A Practical Review of Premises Liability:
A Panel Discussion of Case Studies
Panelists:
Timothy J. Algiers, O'Meara Law Firm, LLP, Hartford
John D. Claypool, Herrling Clark Law Firm, Appleton
Hon. Marc A. Hammer, Brown County Circuit Court
John C. Peterson, Peterson Berk & Cross SC, Appleton

The Secrets of Winning a Million Dollar Fall Case
Michael K. Bush, Bush, Motto, Creen, Koury & Halligan, Davenport, IA

Safe Place Statute & Non-Profits
Rebecca Domnitz, Pitman Kalkhoff Sicula & Dentice SC, Milwaukee

The Role of the Liability Expert in Slip and Fall Accident Cases
John J. DeRosia, Ph. D., P.E., Consulting Engineer, Dousman

How to Use the Mode of Operations Exception to Mop the Floor with Your Big Box Opponent
Rachel Grischke, Laufenberg Jassak & Laufenberg SC, Milwaukee

Recreational Immunity: It's Not All Fun and Games
Scott M. Butler, Fitzpatrick Skemp & Associates LLC, La Crosse

Wisconsin's Safe Place Statute: The Often Ignored Requirement Placed on Employers
Jacob R. Reis, Habush Habush & Rottier SC, Appleton

Paralegal Morning Session

Mandatory eFiling - Are you ready?
Jean Bousquet, Chief Information Officer
Andrea Olson, CCAP Customer Services Manager
Wisconsin Court System – CCAP

Work Smarter, Not Harder with eDiscovery Tools
Shawn R. Olley, Midwest Legal & eData Services, Inc., Oak Creek

Wisconsin Wrongful Death Actions: Things to Think About
Jessica E. Slavin, Averbeck & Hammer, S.C., Fond du Lac

Presentation of Exhibits at Trial With and Without Technology
Jesse B. Blocher, Habush Habush & Rottier SC, Waukesha

Medicare Compliance Today and In the Future
Todd J. Belisle, Vice President of The Centers, Clearwater, FL

Combined Afternoon Session

Using 911 Calls to Strengthen Your Case
Christine D. Esser, Habush Habush & Rottier SC, Sheboygan

Intake: A Time for Discovery
Ricardo Perez, Ricardo Law Offices LLC, Kenosha

An Overview of Municipal and Private Liability Under the Highway Immunity Act
Katherine C. Polich, Clifford & Raihala SC, Madison

Breaking Bad: Forays off the Ethical Path
Hon. Michael J. Aprahamian
Waukesha County Circuit Court

CLE pending with the Wisconsin Board of Bar Examiners, the Minnesota State Board of Continuing Legal Education and the Paralegal Association of Wisconsin.

Confirmation of credit will appear on our website, www.wisjustice.org/CLE

Seminar Registration

Registration and distribution of course materials begins Friday, March 20, at 7:45 a.m. at the Seminar Registration desk. We ask that you pre-register for this program at your earliest convenience. Registration on the day of the program will include a $20 surcharge.

Registration includes electronic access to the seminar materials, continental breakfast and refreshments at breaks. To register, complete the registration form below and mail to WAJ with your registration fee. Make checks payable to Wisconsin Association for Justice or register online at wisjustice.org.

Cancellations must be made at least 24 hours prior to the date of the program. Refunds are subject to a $15 service charge. Cancellations made after March 19th will not be refunded. You may request that your registration fee be transferred to another WAJ seminar held within one year of the original seminar date.

Hotel Accommodations

WAJ has reserved a block of rooms at The Radisson Hotel & Conference Center at 2040 Airport Drive in Green Bay, Wisconsin 54313. Please make your reservations directly with the hotel at: (920) 494-7300. **In order to receive the special room rate of $95 to $109, you will need to make your reservation no later than March 1, 2015.**

CLE Credit

WAJ will apply for CLE Credit approval with the Wisconsin Board of Bar Examiners, Paralegal Association of Wisconsin and Minnesota Board of Continuing Legal Education. Confirmation of credit approval will be included in the seminar materials.

Special Offer to New Members

Attorneys and Paralegals may enjoy member discounts on seminars and materials by joining WAJ and paying the appropriate dues. Current membership fees are as follows:

More than 15 Years in Legal Practice	$360
10-15 Years in Legal Practice	$342
5-9 Years in Legal Practice	$276
3-4 Years in Legal Practice	$192
1-2 Years in Legal Practice	$96
Inactive Status*	$132
Paralegal/Legal Assistant	$90
Sustaining Seminar Membership	$1320

*Based on membership standing with State Bar of Wisconsin or licensing authority of respective state.

WAJ estimates that 35% of dues are not deductible as ordinary and necessary business expense for 2015.

Contact the WAJ office at (608) 257-5741 for additional information or visit us on the web at www.wisjustice.org.

2015 Spring Seminar Registration Form

Name: _____ Phone: _____

Firm: _____ Email: _____

Address: _____

City: _____ State: _____ Zip: _____

Seminar Registration Fees

	Tuition & Weblink to Book	Tuition & Hard Copy of Book
WAJ Member	☐$210	☐$245
Non-Member	☐$330	☐$365
Sustaining Member	☐FREE	☐$35
Gov't Employed Member	☐$180	☐$215
Gov't Employed Non-Member	☐$260	☐$295
Law Student	☐$30	☐$65
Paralegal Member	☐$110	☐$145
Paralegal Non-Member	☐$185	☐$220
Paralegal Student	☐$30	☐$65

*Hard copy materials must be ordered by March 2nd, 2015

Total Amount Enclosed $_____

Note: At-the-door registration will include a $20 surcharge. Cancellations must be made at least 24 hours prior to the start of the program.

Payment Options

☐ Check Enclosed

☐ Please bill my

☐ Visa ☐ Mastercard

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Account Number:

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Expiration Date: _____

Signature: _____

You may also register on our website, www.wisjustice.org

Mail registration form to:
Wisconsin Association for Justice
44 E. Mifflin St., Suite 402, Madison, WI 53703

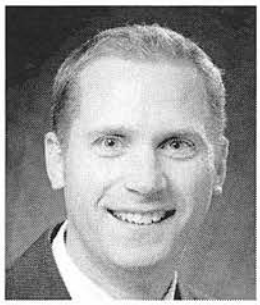
Wisconsin Association for Justice

Ann S. Jacobs, President
Ann S. Jacobs is the founder of Jacobs Injury Law, S.C. She received her B.A. with distinction in 1989 from UW-Madison, and graduated from U.W. Law School in 1992 (*cum laude*). She began her legal career as a public defender before changing her emphasis to personal injury litigation. Her practice focuses on personal injuries and medical malpractice, as well as nursing home abuse/neglect on behalf of injured persons and their families. In 2011, 2012, 2013 & 2014 she was named one of the top 50 lawyers in the State of Wisconsin and one of Milwaukee's top 25 lawyers by SuperLawyers.™ Milwaukee's M Magazine named her a "Leading Lawyer" in both personal injury and medical malpractice in 2011, 2012, 2013 & 2014. She is an officer and a member of the Board of Directors of the Wisconsin Association for Justice and a founding member of their Women's Caucus. She was elected in 2013 to the Board of Directors for the Milwaukee Bar Association, and continues to serve as chair of their Lawyer Referral Committee. She serves as a board member for the Wisconsin Equal Justice Fund and has served on the American Bar Association's national committee on Lawyer Referral Services. She is a frequent lecturer to other attorneys on various topics, including complex lien resolution, mild traumatic brain injuries, and nursing home neglect and abuse.

Russell T. Golla, President-Elect
Russell Golla is a partner with Anderson, O'Brien, Bertz, Skrenes & Golla in Stevens Point where he has been practicing since 1981. His practice is focused on personal injury, product liability, complex commercial, construction and environmental litigation, and insurance and employment law. He received his Bachelors Degree in 1976 from the University of Wisconsin - Stevens Point, where he graduated with high honors and a double major, Mathematics and Political Science. In 1980 he graduated from Marquette University Law School (*cum laude*). Following graduation, he clerked for Wisconsin Supreme Court Justice John L. Coffey for one year before joining his present firm. Golla is a member of the Wisconsin Association for Justice and has been on the Board of Directors since 2000. He is a member of the State Bar of Wisconsin, the American Association for Justice and other specialty bar organizations. He has been certified as a Civil Trial Specialist by the National Board of Trial Advocacy since 1999, has received an "AV Preeminent" rating by his peers in Martindale-Hubbell and has been named a Wisconsin SuperLawyer™ each year since 2006. Golla has been a frequent presenter on topics related to personal injury litigation at various seminars throughout the State including on subrogation and ERISA, default judgment, UM and UIM, governmental immunity, and the use of "Black Box" and cell phone evidence at trial.

Benjamin S. Wagner, Vice-President
Benjamin S. Wagner is a shareholder at the firm and has been a member of the firm since 2003. He graduated magna cum laude from the University of Wisconsin Law School in 2003 and also received the Phillips Owens Memorial Scholarship for outstanding academic achievement and community service. Mr. Wagner has successfully tried numerous cases throughout southeastern Wisconsin. Due to his significant trial experience and success, he has been certified as a Civil Trial Specialist by the National Board of Trial Advocacy and as an advocate by the National Board of Civil Pretrial Practice Advocacy, and listed in the 2012, 2013, and 2014 editions of the Best Lawyers in America. Mr. Wagner is the Vice President of the Wisconsin Association for Justice. He is also a member of the State Bar of Wisconsin, the Milwaukee Bar Association, the American Association for Justice, and the American Bar Association. He is a member of the Board of the Legal Aid Society of Wisconsin, and a former president and board member of the Milwaukee Young Lawyers. He is the past Chair of the Young Lawyers Division of the Wisconsin Association for Justice, and currently serves as its Treasurer. Mr. Wagner is a former board member of Milwaukee World Festival, Inc., and currently serves on the Board of Jewish Family Services and also the Board of Directors of Safe & Sound, Inc., a non-profit organization committed to reducing violent crime in communities; he has joined the Board of Directors of Discovery World in Milwaukee, and also the Neuroscience Center Advisory Board of the Medical College of Wisconsin.

Officers for 2015



Heath P. Straka, Secretary

Heath Straka is a partner at Gingras, Cates & Luebke. His practice focuses on personal injury, medical malpractice, bad faith insurance claims and also complex litigation and class actions involving wage and hour violations.

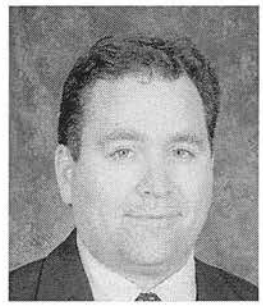
Heath received his law degree from the UW Law School in 2000. He has litigation experience in the State and Federal Courts of Wisconsin and has practiced in the successful resolution of numerous Civil Rights and Personal Injury cases. Heath has successfully argued two cases in front of the Wisconsin Supreme Court, both involving medical malpractice; *Otto v. PIC* and *Bubb v. Brusky, et. al.*

As a member of the Wisconsin Association for Justice, Heath serves as a member of the Board of Directors and the Program Committee and is a past chair of the New Lawyers Section. Heath is also a member of the State Bar of Wisconsin, Dane County Bar Association and American Association for Justice.

Heath is fluent in Spanish and volunteers with the Dane County bar for non-English speaking legal services. He also volunteers in the community. He is the President of the Patriots Youth Hockey Association; is a Board Member with Madison Festivals, Inc. (which runs Taste of Madison, The Madison Marathon and Rhythm & Booms); and coaches for a traveling soccer club. Heath is married with three children.

Edward E. Robinson, Treasurer

Edward E. Robinson is a Partner at Cannon & Dunphy, S.C. in Brookfield. He graduated, magna cum laude, from Marquette University in 1991, with a double major in History and English. Unable to find gainful employment reading poetry and historical biographies all day in coffee shops, he decided to attend law school. Ed received his J.D., cum laude, from the University of Wisconsin Law School in 1995, where he was a member of the *Law Review*, and a Malt & Barley editor (yes, there was such a position). Since graduating from law school, Ed has been very active in The Wisconsin Association for Justice. He previously served on the Amicus Curiae Committee, where he authored and co-authored numerous briefs to the Wisconsin Court of Appeals and Wisconsin Supreme Court advocating on behalf of WAJ. He has authored and coauthored numerous articles published in *The Verdict*, and continues to serve on its editorial board. He has been a frequent speaker at WAJ seminars, and since 2008, he has presented the annual Torts Update at the WAJ Summer Seminar, much to his family's dismay. He has been a member of the Association's Board of Directors since 2009. Since 2009, he has also been recognized annually as a Wisconsin Super Lawyer™, and has also been chosen annually since 2011 for inclusion in Best Lawyers®. In 2014, he was privileged to be selected for membership in the Wisconsin chapter of the American Board of Trial Advocates (ABOTA). Ed is a long-time resident of Oconomowoc, where he resides with his wife Lee Ann (who he is proud to point out is a public school teacher), and his two children, Connor and Keeley.



Christopher D. Stombaugh, Past-President

Christopher Stombaugh concentrates his practice in the areas of personal injury, wrongful death, product liability, and stray voltage damage to dairy cattle. He received his B.A. from the University of Wisconsin- Platteville and his J.D., with honors, from Drake University Law School. He is a member of the Wisconsin, Iowa, and Minnesota bar associations. Chris began his practice in Milwaukee with Kasdorf, Lewis & Swietlik, S.C. and represented insurance companies and the firm's large institutional clients. He returned home to Southwest Wisconsin and practiced at Kopp, McKichan, Geyer, Skemp & Stombaugh, LLP in Platteville, Wisconsin in 1995, and became a partner in the firm in 1998. In those 15 years, his practice became devoted to his true passions in the law – the service of injured tri-state families and of farm families afflicted by stray voltage. He joined the Platteville office of Laufenberg, Stombaugh & Jassak, S.C. in 2010 and in 2013 became a partner in the national practice of The Keenan Law Firm in Atlanta, Georgia. He and his family still live in their home town of Platteville. He has been a member of the Board of Directors of the Wisconsin Association for Justice since 1997, and he is also a member of the Iowa Association for Justice and the American Association for Justice. He graduated from Gerry Spence's Trial Lawyers College (TLC) in 2007 and became a member of TLC's teaching faculty in 2013. In addition to maintaining his active trial practice, he regularly teaches trial advocacy across the country with his law partner Don Keenan and with trial consultant David Ball.

Drafting Discovery and Responses: The Paralegal's Role

Tea B. Norfolk

I. Introduction

Whether you have been drafting discovery requests and responses for thirty years or whether you are about to embark upon your first discovery effort, this brief overview may serve as a handy resource or refresher. This article describes Wisconsin law and notes the analogous Federal Rule of Civil Procedure. Note, however, that the Wisconsin statutes are not precisely the same as the Federal Rules, so if your case is venued in federal court, look at the specific language of the Federal Rule.

Additionally, each attorney and law firm may have practices that differ from what is printed in this article. When in doubt, follow the practices at your law firm.

II. Drafting Discovery Requests

When drafting discovery requests, it is important to familiarize yourself with the pertinent statutes to the pertinent jurisdiction. In Wisconsin, look to Wis. Stat. § 804.01, which governs discovery in general. The analogous federal rule is Rule 26 of the Federal Rules of Civil Procedure.

After reviewing at the statutes, look at the local rules pertinent to your case. For example, in Milwaukee County, Local Rule 3.20 limits the number of interrogatories: no party may serve more than a total of 35 interrogatories in any one case; each subpart is counted as one interrogatory; and certain categories of information do not count toward that number. Make sure when you are drafting interrogatories that they conform to the local rules, if any, where your case is venued. In addition, check whether the court has set forth any additional requirements pertaining to discovery.

There are, generally, four forms of discovery:

- Interrogatories
- Requests for Production of Documents
- Requests for Admissions
- Depositions

Each of these forms may be sent at any time after the commencement of the action. Some attorneys send interrogatories, requests for production of documents, and/or notices for deposition along with service of the summons and complaint. Others prefer to send discovery requests after receiving the answer.

The rules governing interrogatories, Wis. Stat. § 804.08 or Fed. R. Civ. P. Rule 33, and requests for production of documents, Wis. Stat. § 804.09 or Fed R. Civ. P. Rule 34, have some similarities. For example, in Wisconsin, any party may serve them on any other party; each item must be answered separately and fully in writing under oath; the reasons for objections must be stated; the answers must be signed by the person making them; and objections must be signed by the attorney. When receiving discovery responses from the other party(ies), make sure the responses conform to these rules.

Additionally, answers and objections must be served within 30 days after service or 45 days after service of the summons and complaint. When sending discovery requests, tickle on your calendar when responses are due from opposing counsel. Attorneys may agree to extend discovery deadlines for one another; having these deadlines on your calendar helps keep your case on track. Any deadline extensions should be entered on the calendar as well.

Requests for production of documents must describe with reasonable particularity each item or category of items requested. For example, it is not sufficient to state, "Please produce all brochures produced by your company." Instead, narrow the request to the types of brochures you are seeking that are pertinent to your case and fall within a particular timeframe. For example, if your client was injured in 2014 by a shovel with a defective handle that was manufactured in 2012 by a company that also makes lunch boxes, the request should state that the plaintiff seeks sales and marketing materials for the model number shovel that were produced in 2011 to the present, or some other time frame specified by the attorney handling the case. The risk of making a request that does not describe the documents with reasonable particularity is that you may end up with either nothing or with hundreds of thousands of documents that are irrelevant.

Wisconsin Statute § 804.09 also governs entry upon land for inspection and other purposes. When making a request for entry upon land, the request must specify a reasonable time, place, and manner of making the inspection. For example, if your client was injured by a machine that cannot be moved off the premises and sent to your office, an appointment must be made notifying all attorneys in the case when your attorney will arrive, who will accompany the attorney, and what they will be looking at. This method can also be used for discovering electronically stored information. For example, if the other party has extensive electronic files that are stored in a unique database that was created specifically for that company, you may request to enter the premises to inspect that database.

Requests for admission are governed by Wis. Stat. § 894.11 or Fed. R. Civ. P. Rule 36. These are a somewhat underutilized tool. While parties may often deliver vague responses with boilerplate objections in response to interrogatories and requests for production of documents, requests for admission require a specific answer usually of the "yes" or "no" variety. In Wisconsin, the party must specifically admit or deny the request or set forth in detail the reasons it cannot admit or deny the request. The party may not give lack of information as a reason unless a reasonable inquiry has been conducted. For example, if the building's maintenance technician should have been on the premises at the time of the accident and the person answering the request does not know whether the maintenance technician was actually there at the time, the party must find out this information before answering. If the maintenance technician has left the country and is nowhere to be found, the party must make a reasonable inquiry into the maintenance technician's whereabouts and, if unable to find the maintenance technician, then respond not only that the party does not know the answer, but also what was done in an attempt to find out the answer. If a request is not answered, it is considered admitted; accordingly, pay particularly close attention to deadlines for requests for admissions.

Depositions are governed by Wis. Stats. §§ 804.03, 804.05, 804.06, and 804.07 or by Fed. R. Civ. P. Rule 30. Importantly, Fed. R. Civ. P. 30 requires the attorney to store the sealed deposition under "conditions that will protect it against loss, destruction, tampering, or deterioration." Best practice is to not open the sealed deposition and instead to acquire

an additional copy that may be used in the office.

In Wisconsin, Wis. Stat. § 804.03 governs persons before whom depositions may be taken. In the United States, that person must be an officer authorized to administer oaths or a person appointed by the court. The court reporter usually is authorized to serve this role.

Wis. Stat. § 804.05 governs noticing depositions. Any party may take the deposition of any person, and the attendance of witnesses may be compelled. A deposition notice must state the time and place for taking the deposition and the name and address of each person being examined, or a reasonable description, such as the corporate officer most knowledgeable about a particular aspect of the case. Additionally, if the attorney wants the deponent to bring any materials to the deposition, attach a designation of the materials to be produced at deposition.

Wis. Stat. § 804.06 governs depositions upon written questions. These are rarely used. If, however, this type of deposition is needed in your case, read this statute.

Wis. Stat. § 804.07 governs the use of depositions in court proceedings. Any deposition may be used by any party for any purpose. The substitution of a party does not affect the right to use depositions previously taken. For example, if a party was dismissed, that party's deposition may still be used at trial. If only part of the deposition is being used, the adverse party may require the introduction of another part. When assembling the trial book for your attorney, make sure to include the entire deposition and then flag and highlight the portions to be used. The attorney should be aware of the other parts of the deposition that opposing counsel may seek to introduce. Finally, any errors or irregularities are waived unless a motion to suppress is made with reasonable promptness. When depositions come in, check them for any irregularities, such as missing pages, so those can be dealt with immediately.

III. Drafting Discovery Responses

The first thing you want to find out when drafting discovery responses is: When is it due? Other important considerations: keep your objections handy; look for unreasonable requests; some information requires you not to produce it; and remember confidentiality.

In determining when discovery responses are due, the document itself may state a deadline. If none is given, look at the state or federal statute, the local rules, and the scheduling order to determine the date your responses are due. Your client will need to review the responses and sign them, so you want to get the discovery responses drafted as soon as possible to allow time for mailing. Typically, my office prepares most of the responses from the information we have in the client's file, then we send the interrogatories and / or requests for production of documents to the client, specifying which numbers we need the client to answer and asking the client to review the other answers. Upon receipt of the client's responses, we put their answers in the proper format and send them back to the client to review and sign. All of this takes time. Allow sufficient time accordingly.

When drafting responses, keep standard objections handy. Some attorneys prefer to object to each question so as to preserve those objections; others prefer to let the easy ones go and to only object to those deemed important enough to register an objection. In either case, use objections that are pertinent to the request. Some more commonly used objections include: "not reasonably calculated to lead to the discovery of admissible evidence," "vague and overbroad," "relevance,"[1] and "seeks information that is better suited to deposition."

Most questions require a response after the objection. However, some objections, such as attorney work product or privileged communications, require you not to answer the question; answering will waive the objection.[2] If privileged or protected information is inadvertently disclosed, the privilege may not be waived if all of the following apply: (1) the disclosure was inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent the disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including promptly notifying the opposing party of the inadvertent disclosure.[3]

Look out for unreasonable requests. For example, if your client fractured an ankle in an auto collision, it is likely unreasonable for the defendant to request 20 years of medical records. If, however, your client has low back pain, the defense may be entitled to look at medical records that predate the incident. Consider having the request limited to five or ten years, however, rather than the full 20. Flag these types of unreasonable requests, and bring them to the attention of the attorney.

When producing documents, identify everyone in the chain of custody. For example, if your client brings in the bumper from their car, lock it up in the evidence room and keep a log of every person who has access to the key and who has entered the evidence room with the date and time of entry and exit. Additionally, when producing documents, make sure multiple-page documents contain all pages of that document. If the accident report skips from page 2 to page 4, make sure to account for page 3, i.e. "our office never received page 3." Finally, if the documents sought do not exist, object and state that the documents do not exist. For example, if the defendant seeks employment records from the shoe store, but your client has never worked at a shoe store.

Finally, confidentiality is key to your role when responding to discovery requests. Your client's file will contain some fascinating information, especially medical records. Maybe you will learn that your client is in alcohol treatment or has been previously gored by a bull. Do not talk about it. You cannot talk about it at home, to your friends, or post it on Facebook or other social media. You may, however, discuss it with your attorney. Always keep information about your clients inside the office. When in doubt, err on the side of caution.

***Tea Norfolk** is a personal injury attorney advocating on the behalf of plaintiffs. She earned her Juris Doctorate from Marquette University Law School, graduating cum laude with a certificate in litigation.*

(Endnotes)

1. See Wis. Stat. §§ 904.01. 904.02, and 904.03 or Fed R. Evid. 401, 402, and 403.
2. See Wis. Stat. §§ 905.01 and 905.03 or Fed. R. Evid. 501 and 502.
3. See Fed. R. Proc. 26(b)(5)(B).

2015 Paralegal Section Chair

Sara Sweda, a native of Freedom, WI, received her bachelor's degree from the University of Wisconsin – Oshkosh in May, 2005. Upon graduating, she moved to Milwaukee, and immediately began work at Mishlove & Stuckert, LLC as an office administrator and client services specialist. Over the past 9 ½ years, she has managed the overall operations of the office and currently serves as a litigation specialist and senior paralegal.

Kevin Lonergan Awarded the Robert L. Habush Trial Lawyer of the Year

Kevin Lonergan had an outstanding professional year in 2014. But in what may have been a professional and personal benchmark, it was being nominated and presented the Robert L. Habush Trial Lawyer of the Year Award by his daughters, and fellow attorneys, Kristen and Emily Lonergan, that made it so memorable.

"As proud as I was to be named Trial Lawyer of the Year," said Lonergan, "when Chris (Stombaugh) introduced my daughters I was taken aback because I wasn't expecting it. What was already an emotional moment became even more so as they made the introduction. It's a night I will never forget."

The nominating letter the daughters wrote spoke volumes about a special level of respect for their father Kevin, as a fellow trial lawyer.

"...one good verdict in a year, one successful argument before the Wisconsin Supreme Court, or one act of service to our profession... would make us feel like a champion of justice...but to achieve all three in one year... that is something great."

Indeed.

One of Lonergan's proudest accomplishments of the year came this past March. Lonergan's client was horribly injured in a car accident while he was out of prison on parole. However, his client had technically violated parole by being in the accident-vehicle and, as a result, was sent back to prison. "The accident wasn't his fault, he was an invited passenger, he wouldn't get the medical care he needed behind bars, and still the system insisted on locking him up," said Lonergan.

Even before an overwhelmingly favorable jury verdict came back, the client hugged Lonergan and told him, "anytime, anywhere, for any reason, if you need me, I'll be there." In that moment, Lonergan was reminded why he chose to practice law and why trial lawyers are so vital to our legal system. Lonergan also won another significant jury trial in a case where insurance companies tried to deny coverage to parents of their 18-year old son who was killed in an accident.

"Even as a boy I loved to debate issues," said the Appleton lawyer. "But I always argued from a positive perspective and that has carried over into my career. We are here to fight for our clients when they need us most." Lonergan says trial work has been especially rewarding because he's had the chance to represent people who have, "felt the effects of prejudice, been beaten down in life, and then had the chance to overcome those obstacles."

As Kristen and Emily explained, *"...what mattered most to Kevin was a person who was rough around the edges and in a difficult spot...came for help. He was able to help him achieve justice through the twelve people who believed in him and recognized his pain and struggles. {He} always taught us... "This is why we do what we do!" What a great example for us as young lawyers, and for our entire community of trial lawyers."*

Lonergan was also part of a legal team that worked tirelessly for years to ultimately receive a favorable, unanimous decision from the Wisconsin Supreme Court. The issue before the high court involved whether the short-lived Truth-in-Automobile insurance law intended for injured people to be able to access the uninsured and underinsured motorists benefits paid for by the injured party. Lonergan helped to build and develop a dynamic theory in favor of recovery and he successfully argued on behalf of WAJ before the Supreme Court.

Away from the courtroom, Lonergan served for 13 years as the Mock Trial Attorney Coach at Xavier High School in Appleton. Under his leadership, the Xavier team finished in the top five statewide 11 years in a row and was state champion three times in his last five years as coach. "Giving young people the skills they need to speak effectively in public is empowering," said Lonergan. A father of four, Lonergan says the mock trial competitions played a role in the decision of Kristen and Emily to pursue their own legal careers as well as more than a dozen other future lawyers.

"Kevin is the epitome of why legal advocacy matters," said, Chris Stombaugh, the Immediate Past-President of WAJ. "He fights for fairness in the courtroom and then volunteers even more hours helping young people find their career path. As an organization, we could not have a better role model than Kevin Lonergan."

The award is inscribed with following listing of Kevin's achievements: *"For his compassionate commitment to advocating for injured consumers, earning justice for clients at trial and before the Wisconsin Supreme Court; and for his years of dedication to inspiring future generations of trial lawyers, coaching high school mock trial and serving as Chair of the 2014 National High School Mock Trial Tournament."*

A graduate of the US Air Force Academy, Lonergan attended the UW Law School. He started practicing law as an Assistant District Attorney in Eau Claire County, and was briefly in private practice in LaCrosse before joining Herling Clark. Lonergan has been named a "Super Lawyer" every year the award has been given. He is a past president of the Wisconsin Association for Justice and for the last two years served as the Chair for the State Bar's Public Education Committee. Lonergan was also the 2014 Chair for the Mock Trial National Competition.

The Robert L. Habush Trial Lawyer Of The Year award was created in 2000 to recognize a Wisconsin trial lawyer who has made significant contributions to the trail bar by handling a case involving significant change in the law, a precedent setting suit, or donating time to a project involving injured consumers.

Nominations for the 2015 Robert L. Habush Trial Lawyer of the Year Award will be accepted at the WAJ office until beginning next Spring. Look for nomination information in the Spring issue of *The Verdict.*

2015 WAJ Winter Seminar Photos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Wisconsin Civil Justice Education Foundation

Thanks to those whose investment makes a difference ...
*designates new funder or additional funding contributed in 2013

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J. Michael End
Steven Thomas Botzau
In memory of James J. Murphy
Edward E. Robinson
David E. Sunby
In memory of Curtis M. Kirkhuff
Christine Bremer Muggli
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James Grant
Paul Gagliardi
Anne MacArthur
William C. Gleisner, III
Douglas E. Swanson
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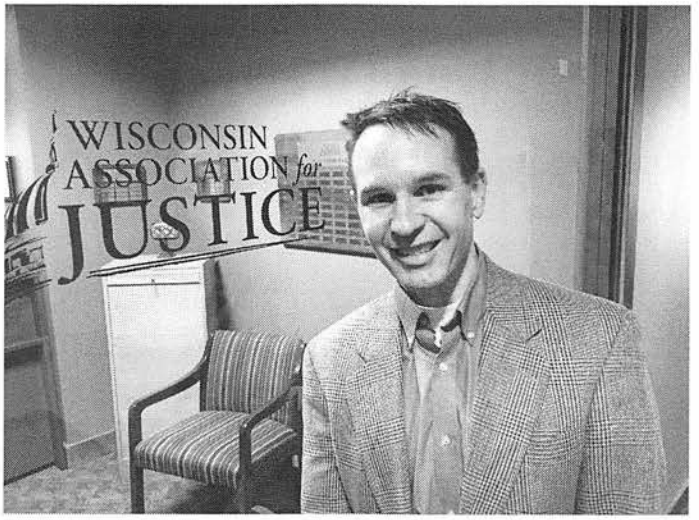
Welcome Our New Executive Director, Bryan Roessler



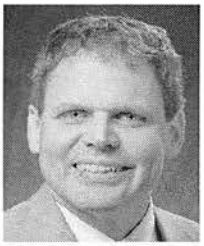
Bryan Roessler, a veteran non-profit association manager has been named as the new Executive Director of the Wisconsin Association for Justice (WAJ).

Roessler, from Sun Prairie, has more than 20 years of association management experience including lengthy service with The Wisconsin Safety Council and MRA – Association Management Solutions in Waukesha.

"For nearly sixty years the members of the Wisconsin Association for Justice have been fighting for the rights of all Wisconsinites," said Roessler, "and I'm proud to be both part of that effort and this team."

Roessler's expertise is in helping organizations maximize resources, promoting innovative solutions in 21st century business environments, and integrating an association's purpose with the community it serves.

"Bryan brings impressive skills to our organization," said Ann Jacobs, the President of WAJ, "and we look forward to continuing to expand our mission even more under his leadership."



Paul A. Kinne

Key Differences Between Federal and State Law
Personal Injury Litigation Against Public Employees

INTRODUCTION

Public employees at the state and local level may be held responsible for tort claims. However, plaintiffs often must work through an obstacle of time limitations, caps on damages and in some cases, immunity. In the right circumstances, public officials can be found liable for violations of both state and federal law. Below, the reader will find a discussion of some of the key differences in public official liability under state and federal law, with a focus on public employee liability under 42 U.S.C. § 1983.

I. DIFFERENCES IN THE IMMUNITY GRANTED TO PUBLIC EMPLOYEES

Under Wisconsin law, both state and local government employees may be protected from liability if their conduct was an exercise of a "legislative," "quasi-legislative," "judicial" or "quasi-judicial" function. If the act fails within this category, the employee may be granted immunity by Wis. Stats. §§ 893.80 and 893.82. There is no immunity, however, for liability associated with the performance of an act imposed by law.[1] The immunity afforded by Wis. Stats. §§ 893.80 and 893.82 can be altered or eliminated by other statutes setting forth different standards.[2]

With respect to liability under sec. 1983, a different immunity standard (qualified immunity) is applied. Governmental actors performing discretionary functions are entitled to qualified immunity from suits for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[3]

In order to overcome qualified immunity, the plaintiff must allege a violation of the plaintiff's constitutional rights and the plaintiff must prove that the contours of the right were clearly established on the date of the violation. To determine whether a right is clearly established, a court will first look to controlling precedent, and if no such precedent can be found, courts will then examine all relevant case law to discover whether there was a clear trend in the law establishing a violation[4]. It is not necessary for a plaintiff to point to a case directly on point; however, prior case law must put the defendant on notice that his or her conduct was a violation of the right in a particularized (as opposed to general or abstract) sense. If no constitutional issue is at stake, and if the contours of the right were not clearly established, then the public official enjoys immunity.[5]

The State of Wisconsin is absolutely immune from suit, unless that immunity is abridged by state law or the U.S. Constitution itself. Local governmental units, as opposed to their employees, do not enjoy qualified immunity.

The Federal Torts Claim Act[6] applies to federal employee tort liability; however, this article will focus upon tort liability for state and local public actors.

Although not immunity, Wis. Stats. § 893.80 and 893.82, Stats., offer public employees another form of protection: a very short statute of limitations. For torts against local government officials other than medical negligence claims, the plaintiff must provide the governmental entity with notice of the circumstances of the claim within 120 days of the event giving rise to the claim.[7] Likewise, for claims against state employees, the plaintiff must give the Attorney General's office notice within 120 days of the act, with medical negligence claims again being the exception.[8]

Section 1983 allows much more time to bring a claim. The statute of limitations for sec. 1983 claims is six years.[9] Moreover, the mandates and limits of Wis. Stat. §§ 893.80 and 893.82 do not apply to sec. 1983 claims.[10]

II. DIFFERENCES WITH RESPECT TO GENERAL ELEMENTS OF PROOF

Under state law, any personal injury claim that can be brought against a non-public person or entity can also be brought against a public official. If not immune, a state or local government actor can be sued for his or her negligent, reckless or intentional conduct committed in the course of the public official discharging his or her official duties.[11]

It is a different story for liability under sec. 1983. In *Payne v. Churchich*,[12] the Seventh Circuit Court of Appeals succinctly spelled out the necessary state-of-mind elements in any sec. 1983 claim:

> The Supreme court distinguished among three levels of fault – negligence, deliberate indifference and conduct that shocks the conscience. It stated that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process," . . . that deliberate indifference is the standard to employ "when actual deliberation is practical" . . . and that "a much higher standard of fault than deliberate indifference has to be shown for officer liability in a prison riot" or in a high-speed chase. That higher standard is "shocks the conscience."[13]

Additionally, the sec. 1983 plaintiff must prove that the individual defendant personally caused or acted in the constitutional deprivation: principles of *respondeat superior* do not apply in sec. 1983 cases. Furthermore, the plaintiff must prove that the defendant was acting under color of state law at the time of the violation.[14]

III. DIFFERENCES WITH RESPECT TO RELIEF AVAILABLE

For claims against local governments and their employees, under state law, the recovery is generally limited to $50,000.[15] For claims against state employees, the general limit is $250,000.[16] Furthermore, neither statute authorizes awards of punitive damages, nor does either statute allow for the prevailing party to recover attorney fees and costs.

A broad recovery is allowed in sec. 1983 claims. A plaintiff can recover emotional distress damages, special damages and loss of earning capacity damages.[17] For claims against individuals (as opposed to public entities), the plaintiff can also recover punitive damages.[18] A prevail-

ing plaintiff can furthermore recover his or her attorney fees and costs; however, imprisoned plaintiffs face more obstacles because of the Prison Litigation Reform Act.[19] There are no statutory limits on the amount of the recovery in a sec. 1983 case.

Although only indirectly related to damages, Wis. Stat. § 895.46 bears mentioning. Broadly speaking, sec. 895.46 requires the government to indemnify an individual public employee defendant for the damages arising out of his or her unlawful conduct as long as the public employee was acting within the scope of employment.

IV, CONCLUSION

Public employees enjoy strong protections from liability under both state and federal law. Public employees can be shielded from liability by claims of immunity, which is not absolute under either state or federal law. While state law generally requires the filing of a notice of claim against public officials within 120 days, for claims under sec. 1983 a notice of claim is not necessary. Plaintiffs litigating a sec. 1983 claim operate under a six year statute of limitations. A sec. 1983 plaintiff cannot sue a public official for a negligent violation of a constitutional right, whereas negligence claims can be litigated under state law. State law claims, however, are subject to severe limitations on recovery. Section 1983 claims are not limited by statute and allows for the recovery of punitive damages and attorney fees in most cases. In sum, sec. 1983 claims provide greater remedies and fewer procedure obstacles, but only state law allows for the recovery of damages flowing from a public official's negligence.

***Paul A. Kinne** is a partner at Gingras, Cates & Luebke. He received his B.A. and J.D. from UW-Madison, graduating from law school in 1993. His practice includes employment law, civil rights, professional malpractice, personal injury, products liability, and lender liability. His peers have recognized him as a "Super Lawyer" in 2009, 2010, 2011, 2012 and 2013.*

(Endnotes)

1 *Legue v. City of Racine,* 2014 WI 92.
2 *Id.*
3 *Abbot v. Sangamon County,* 705 F.3d 706 (7th Cir. 2013).
4 *Id.*
5 *Id.*
6 28 U.S.C. § 1346.
7 Wis. Stat. § 893.80.
8 Wis. Stat. § 893.82.
9 *Hemburger v. Bitzer,* 216 Wis.2d 509 (1998).
10 *Felder v. Casey,* 487 U.S. 131 (1988).
11 Wis. Stats. §§ 893.80, 893.82.
12 161 F.3d 1030 (7th Cir. 2014).
13 *Payne,* 161 F.3d at 1040 (citations omitted).
14 *Id.,* at 1039.
15 Wis. Stat. § 893.80(4).
16 Wis. Stat. § 893.82(4).
17 *Fleming v. County of Kane,* 898 F.2d 553 (7th Cir. 1990), *Carey v. Piphus,* 98 S.Ct. 1042 (1978).
18 *Daniels v. Pipefitters Assoc.,* 945 F.2d 906 (7th Cir. 1991)
19 1942 U.S.C. § 1997e. *See, Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1984).

Farming Cases Can Help At Risk Children

The National Farm Medicine Center and the National Children's Center for Rural and Agricultural Health and Safe are our asking for our help.

The two groups are compiling a national data base on injuries to children in rural farm communities. The focus will be on the children hurt in non-working farm environments. Surprisingly, it's children under 10 years of age who account for more than half of non-fatal farm injuries. It's not uncommon for children to be hurt in farm accidents because parents often think they "can keep an eye on" their children even while the adults are hard at work.

"This is our chance to make a difference in a national research project," said Christine Bremer Muggli. The former WAJ president has been asked by the group to gather case histories as well as anecdotal information on farm accidents.

The National Farm Medicine Center, which is located in Marshfield, will use the information to create the first-ever data base of detailed accounts of children's injuries or deaths on farms. The goal is to create best practice standards which will protect farm children from any injuries.

Researchers would like to interview lawyers who have been involved in the cases as well as engineers or other experts who may have been part of a legal team. Within limited circumstances, the researchers would like to see work product concerning the original accident investigation to document what happened and to better understand context.

"It's important to understand a client's confidentiality will never be compromised by cooperating with this study," said Muggli. "We're being asked to step up for our kids and create the kind of program that will benefit countless families here in Wisconsin and around the nation."

You can help by stepping forward with any information you may have about a farm accident involving a child. It can be a current or past case, or even if you didn't take the case the information can still be useful.

For more information, call Christine Bremer Muggli at (877) 949-3200.

AMERICAN ASSOCIATION for JUSTICE

FEDERAL LEGISLATIVE UPDATE

Public Affairs Department
777 6th Street, NW, Ste 200 Washington, D.C. 20001
800-424-2725 or 202-965-3500

Federal Legislative Report
Winter 2015

In November, Congress returned to address various outstanding legislative agenda items prior to concluding the 113th Congress. After several weeks of intense negotiations, Congress passed legislation to fund the government until September 2015. This funding will ensure that critical government programs continue and another devastating government shutdown will be avoided. Additionally, the House passed a bipartisan $41.6 billion tax extenders package that is now being considered by the Senate. AAJ team worked diligently with congressional leadership to help ensure that neither of these pieces of legislation contained certain dangerous provisions that would have interfered with rulemakings to enhance remedies and impeded the ability to hold wrongdoers accountable for negligence.

As the 113th Congress wraps up all unfinished legislative business, we now turn our focus to the 114th Congress. We expect the next Congress to present new challenges and a renewed focus on attempts to dismantle the civil justice system and deny Americans access to the courts. AAJ will continue to monitor and defend against any efforts to use legislative vehicles or others to infringe upon victims' rights and deny access to civil justice.

Stability for Service Members Act

On December 4th, Rep. Heck (D-WA) and Rep. Fincher (R-TN) introduced H.R.5798, "Stability for Service Members Act." This bill seeks to protect members of the uniformed services from mortgage foreclosures and evictions by extending certain protections relating to these issues afforded to them under the Servicemembers Civil Relief Act for one year.

Forced Arbitration: Franken Amendment Extended Through 2015, Limiting the Use of Forced Arbitration in Defense Contracts

As part of the recent Congressional spending bill to fund the majority of the government through September 2015, Congress reapproved the Franken amendment to limit the use of forced arbitration in defense contracts. This amendment, originally introduced by Sen. Al Franken (D-MN) and first passed in 2010, significantly limits the ability of defense contractors to require their employees to submit to forced arbitration for employment or civil rights related issues. As a result, defense contractors will remain unable to force their employees into arbitration in many circumstances for at least another year. More broadly, the Franken amendment has also served to buttress our many other avenues of arbitration advocacy, in particular because it has had bipartisan support. AAJ will continue to build on the amendment's passage and work toward the monumental task of ending forced arbitration.

FMCSA Releases Advanced Notice of Rulemaking on Insurance Requirements for Motor Carriers

In November, the Federal Motor Carrier Safety Administration (FMCSA) initiated an Advanced Notice of Proposed Rulemaking (ANPRM) to gather information from concerned stakeholders as the Agency considers formal rulemaking to increase minimum insurance requirements for interstate trucks and motor coaches. The current $750,000 per incident minimum for motor carriers has not changed since 1980 when the Motor Carrier Act was passed, deregulating the industry.

AAJ will file comments in response to FMCSA's request for input detailing the inadequacy of current insurance minimums to appropriately compensate crash victims as well as the positive impacts of raising financial responsibilities, such as safer roads for all motorists. In addition, AAJ encourages trial lawyers to voice their concerns and submit client stories that illustrate the need to increase insurance requirements. The comment period is open until February 26, 2014.

NTSB Investigation Procedures for Aviation Accidents

The National Transportation Safety Board (NTSB) began rulemaking in October to review its regulations addressing investigation procedures following aviation accidents. Currently, while the Board regularly invites aircraft manufacturers to participate in examinations of wreckage and other evidence, crash victims and their representative may only participate at the discretion of the investigator-in-charge. Moreover, the NTSB is often slow to release information related to the crash which has a detrimental effect on victims' ability to access the civil justice system before the statute of limitations on their claim has run.

In responding to NTSB's review, AAJ urged the Board to consider allowing a victim representative to participate in the investigation as an observer, and employing confidentiality agreements to protect against dissemination of information before an investigation is complete. AAJ will continue tracking the Board's review as it moves through the rulemaking process.

FTC Telemarketing Sales Rule

AAJ filed comments with the Federal Trade Commission (FTC) in November in response to the Commission's request for input regarding the Telemarketing Sales Rule (TSR). While the clarification of the TSR and rules governing the Do Not Call Registry will be helpful to prevent evasions of important consumer protections, AAJ urged the FTC to also consider expanding the scope of the regulation to include specific language banning the use of forced arbitration clauses between consumers and telemarketers.

Companies that use telemarketing to reach targeted audiences are known to require consumers to sign away their legal rights. While AAJ supports arbitration that is agreed upon by both parties after a dispute arises, we highlighted the many pitfalls of forced arbitration including upfront costs, inconvenient venues, and arbitrators

that are "repeat players" with the companies that contract for their services. By eliminating forced arbitration as an avenue for companies to funnel consumer complaints, AAJ argued that the likelihood that consumers prevail in fighting fraudulent activities by telemarketers would be significantly enhanced.

Conclusion:

The 114th Congress begins on January 6, 2015. During the 113th Congress AAJ witnessed attempts at legislative reforms that threatened the nation's vital health, safety, environmental and financial protections. Ultimately, the AAJ team was able to fend off and defeat many of these attempts that would have not only set dangerous precedent but also would have essentially closed the courthouse doors to many citizens with valid legal claims.

AAJ anticipates that during the 114th Congress the U.S. Chamber of Commerce will continue its assault on the civil justice system through legislation that seeks to shield corporations from liability, overturn critical environmental protections, and derail regulations that would help preserve the safety of all Americans. As always, AAJ will continue to monitor any legislation and new regulatory developments as they move forward to ensure that your clients' rights are protected and no harmful measures are enacted.

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(Located under the "members" tab)

Amicus Curiae

by Lynn R. Laufenberg & D. James Weis

Summary of Activity
July 1, 2014 to January 1, 2015

Cases Reviewed: 2
Cases Accepted: 2

Supreme Court Decided

Force, et al. v. American Family Mutual Ins. Co., et al., 2012AP2402, 2014 WI 82
Plaintiff's attorneys: Joseph J. Welcenbach and Jason R. Oldenburg of Milwaukee
Issues: 1) Can the minor children of a man killed in a car accident recover for wrongful death under Wis. Stat. § 895.04 when there is a surviving spouse, but that surviving spouse has been estranged from the decedent for over ten years, thus precluding any recovery by the spouse from which to set aside the children's share?
2) If the statute does not allow the children to recover absent a recovery by the surviving spouse, does the statute violate the Equal Protection Clause of the United States Constitution by impermissibly differentiating between minor dependent children by conditioning their recovery on the viability of the surviving spouse's claim?
3) Is there a rational basis for providing recovery to minor children whose deceased parent's surviving spouse has a viable claim and denying recovery to those whose deceased parent's surviving spouse does not?
Date Issued: 7/22/14
Opinion Written by: C.J. Abrahamson
Holding: A 4-3 decision by the Supreme Court held that the estranged spouse was not a "surviving spouse" under the wrongful death statute to "avoid an absurd, unreasonable result contrary to the legislative purposes of the wrongful death statute. Therefore, under the unique facts of the instant case, the minor children were allowed to recover..."
Amicus Brief written by: D. James Weis, Susan R. Tyndall and Peter M. Young

Legue v. City of Racine et al.
2012AP2499, 2014 WI 92
Plaintiff's attorney: Timothy S. Knurr of Milwaukee
Issues: Does governmental immunity apply when someone is injured because an officer proceeds against a traffic signal as authorized by Wis. Stat. § 346.03(2)(b), if the officer slowed the vehicle and activated lights and sirens as required by § 346.03(3) but nonetheless arguably violated the duty to operate the vehicle "with due regard under the circumstances" as required by § 346.03(5)?
Date Issued: 7/26/14
Opinion Written by: C.J. Abrahamson
Holding: In a 4-3 decision the Supreme Court held that the immunity statute does not apply in the present case to the police officer's violation of the duty to operate the vehicle "with due regard under the circumstances." "A contrary outcome would contravene Wis. Stat. § 893.80(4) and 346.03(5), public policy, the rules of statutory interpretation, and case law." The trial court was decision was reversed and the jury verdict restored.
Amicus Brief written by: J. Michael Riley of Madison

Augsburger v. Homestead Mutual Insurance Company, et al., 2012AP641, 2014 WI 133
Plaintiff's attorneys: Joseph M. Troy of Appleton and Susan R. Tyndall of Waukesha
Issue: Under *Pawlowski*, is a father who provided free refuge, shelter and protection for six dogs in a home he owned, occupied by his daughter and her family with no formal or informal landlord-tenant agreement, where both agreed he had the authority to make rules concerning the dogs, a statutory owner of the dogs under Wis. Stat.§§ 174.001(5) and 174.02 because he "harbored" the dogs?
Date Issued: 12/26/2014
Opinion Written by: Justice Bradley
Holding: In a 6-1 decision, the Supreme Court held that the father (Kontos) who provided shelter was not an "owner" under the statute. The Court said, "A statutory owner includes one who 'owns, harbors or keeps a dog.' Wis. Stat. § 174.001(5). It is undisputed that Kontos did not legally own the dogs and did not 'keep' them. Additionally, we conclude that he was not a harborer as evidenced by the totality of the circumstances. He neither lived in the same household as the dogs nor exercised control over the property on which the dogs were kept." The Court of Appeals decision was reversed.
Amicus Brief written by: William C. Gleisner, III of Hartland

Holman et al. v. Harvey, et al,
2012AP2552
Plaintiff's Attorneys: Dean Rohde and Martha Heidt, New Richmond
Issues: Did a municipal employee exercise "legislative, quasi-legislative, judicial or quasi-judicial functions" for purposes of Wis. Stat. § 893.80(4) when he violated Wis. Stat. § 346.87, mandating safe backing, and Wis. Stat. § 346.46(1), the Stop Sign Statute, requiring stopping and yielding the right-of-way to vehicles approaching on a through highway? Does the known danger exception to governmental immunity apply to a hazard created by backing a motor grader into an intersection in front of an approaching vehicle?
Status: Motion to participate granted on 12/5/14. Motion to dismiss the case was filed on 12/23/14 so no amicus brief was filed in the case.

Court of Appeals Decided Cases

Dakter v. Cavillino, et al., 2013AP1750 (District IV Court of Appeals) 2014 WI App 112
Plaintiff's attorney: John R. Orton of Mauston
Issues: What is the proper standard of

care for professional truck drivers – is it ordinary negligence or can it include ordinary negligence where a professional truck driver must use the knowledge and skill requirements of operators in similar situations?
Date Issued: 10/9/14
Opinion Written by: Judge Blanchard
Holding: The Court of Appeals held that the trial court's use of the truck driver instruction was not prejudicial given it was done within the realm of other jury instructions that call for the "reasonable person standard."
Status: Petition for Review filed 11-7-14.
Amicus Brief written by: William C. Gleisner, III of Hartland and Lynn R. Laufenberg of Milwaukee

State Farm Mutual Automobile Ins. Co. v. Hunt, 2013AP2518, 2014 WI App 115 (District IV Court of Appeals)
Plaintiff's attorneys: Christopher E. Rogers of Madison, Susan R. Tyndall and Jesse B. Blocher of Waukesha
Issue: Whether underinsured motorist coverage in a Wisconsin automobile insurance policy provides protection for damages sustained as a result of the negligence of a government employee in excess of the $250,000 liability cap?
Date Issued: 10/2/14
Opinion Written by: Judge Blanchard
Holding: The Court of Appeals concluded that the Hunts are "legally entitled to recover" damages within the meaning of Wis. Stat. § 632.32(2)(d) and that, assuming that the definition of underinsured motor vehicle in the Hunts' policy included an exclusion for government-owned vehicles, this exclusion is void under Wis. Stat. § 632.32.
Status: Petition for Review filed on 10/31/14
Amicus Brief written by: William C. Gleisner, III of Hartland

Fiez, et al. v. Keevil, 2013AP2711 (District IV Court of Appeals) Decision Unpublished
Plaintiff's attorney: Eric A. Farnsworth of Madison
Issue: A constitutional challenge to the state governmental cap of $250,000 based on the fact it has not been increased in 34 years.
Date Issued: 10/29/14
Opinion Written by: Per Curium
Holding: In light of existing precedent, the Fiezes have not shown a basis to conclude that the $250,000 statutory cap on damages from state employees violates the state constitution's equal protection, jury trial, or certain remedy clauses.
Amicus Brief written by: William C. Gleisner, III of Hartland

Court of Appeals Pending Cases

Dufour v. Dairyland et al, 2014AP157 (District IV Court of Appeals)
Plaintiff's attorney: Joseph M. Mirabella of Milwaukee
Issue: Whether an insurer is obligated to pay a seriously injured plaintiff the property damage funds it received in subrogation from the tortfeasor's insurer when the plaintiff has not been made whole?
Status: Motion to participate granted. Amicus brief filed on 7/29/14.
Amicus Brief to be written by: Jesse B. Blocher of Waukesha

Johnson v. Cintas Corporation No. 2, 2013AP2323 (District II Court of Appeals)
Plaintiff's attorneys: John V. O'Connor of Kenosha and Kent A. Tess-Mattner of Brookfield
Issue: A constitutional challenge of the retroactive application of the interest rate on offers of judgment after the interest rate was reduced on verdicts and offers of judgment in 2011 Wisconsin Act 69 on December 2, 2011.
Status: Motion to participate granted on 7/16/14. Amicus brief filed 8/15/14.
Amicus Brief to be written by: Mark L. Thomsen & Brett A. Eckstein of Brookfield

Hoxha v. American Family Insurance Mutual Company, 2014AP1375
Plaintiff's attorney: Thomas C. Lenz, Milwaukee
Issue: Whether the trial court can force the injured party to file a workers compensation claim prior to adjudicating an UIM claim.
Status: Motion to participate filed 12/18/14.
Amicus Brief to be written by: Jesse B. Blocher of Waukesha

Please contact the Amicus Curiae Brief Committee if you are bringing an appeal, or know of someone else bringing an appeal, involving an issue of concern to the membership. The earlier we become aware of pending issues, the more likely we are to exert a positive influence on the development of case law that may affect all of our practices. Please contact any of the co-chairs of the committee or Ruth Simpson at the WAJ office.

Lynn R. Laufenberg *is the senior member of the Milwaukee law firm of Laufenberg, Jassak & Laufenberg, S.C. He is a past president of WAJ and has been a member of the Board of Directors since 1988. He is the 2006 recipient of the Robert L. Habush Trial Lawyer of the Year award.*

D. James Weis *is a shareholder at the Habush, Habush & Rottier law firm and the manager of the Rhinelander, Stevens Point, and Wausau offices. Mr. Weis has held numerous leadership roles with WAJ, including President in 1993. In 2003, WAJ bestowed upon him the Robert L. Habush Trial Lawyer of the Year award.*

Tort Preservation Membership

The following members/firms have contributed from January 2014 to December 2014 to the Tort Preservation Membership. As with other WAJ dues, 35% of the Tort Preservation Fund Membership dues are not deductible as ordinary and necessary business expense for the 2014 tax year. None of the contributions to the Tort Preservation Fund are deductible as *charitable contributions* for federal income tax purposes.

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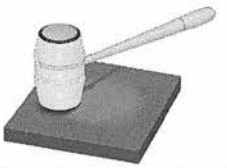

WAJ's Verdict and Settlements Database contains verdict and settlement reports submitted by our members. Each issue of *The Verdict,* the editorial board will feature highlights of the cases submitted. To view the entire submission, go to www.wisjustice.org and click on the "members" section for Verdicts and Settlement. Additional information, including the amount received is listed in the database.

The information reported here is for informational value only irrespective of post-trial activity. **This is a self-reporting service.** WAJ has no means to independently investigate all of the information provided and cannot accept responsibility for its accuracy. Individuals needing verified information should check with appropriate court or counsel involved in the particular case.

Semi-truck – Car Crash – Mediation Settlement

On March 2, 2012, Mr. Steven Reimer was driving on a country highway during wintry conditions. When rounding a turn, Mr. Reimer's car collided with a semi-tractor trailer driven by Mr. Anthony McKnight. As a result of the crash Mr. Reimer suffered a closed head injury and fractures to his arm, wrist, ribs, and spine.

Due to his serious injuries Mr. Reimer did not have any recollection of the actual collision. Mr. McKnight reported that Mr. Reimer crossed the center line and caused the crash. The police investigated and relied on Mr. McKnight's statement. However, the police investigation did not include any witness statements. Great West denied liability and suit was filed.

Mr. Reimer's past medicals totaled approximately $253,000, with an anticipated $18,000 in future medicals.

The plaintiff's expert witnesses were:
Liability: Gary W. Cooper, Accident Reconstruction, Lake Zurich, IL.
Medical: Matthew R. Bong, M.D., Orthopaedic Surgery, Waukesha, WI;
Matthew R. Herald, M.D., Behavioral Medicine Summit, WI
After depositions were conducted and an accident reconstruction was completed, the case settled at mediation.

Steven Reimer et al vs. Great West Casualty Company et al, Waukesha County Case No. 13CV1785. The plaintiff was represented by WAJ member Benjamin S. Wagner of Habush Habush & Rottier SC, Milwaukee, WI. Defendants were represented by attorney Michael P. Crooks of Peterson, Johnson & Murray SC, Milwaukee, WI.

Motorcycle – Truck Crash – Settlement

Mr. Evan Bashirian, 41 years old, was operating his motorcycle westbound on Highway 18 near Helenville, Wisconsin. Shortly before the intersection with County Highway D, he drove around a vehicle that was turning right into a driveway. Witnesses had differing versions of the motorcycle's speed and movement as it accelerated after passing the turning vehicle. At the same time, defendant Brian Kozak was driving a Schwan's Home Service delivery vehicle and was attempting to cross Highway 18 from the stop sign on Highway D. Mr. Kozak did not see the Bashirian motorcycle until his vehicle was blocking the westbound lane. As a result of the collision that occurred, Evan Bashirian suffered multiple injuries including a head injury and a spinal cord injury. The head injury resolved after weeks of hospitalization, but the spinal cord injury left him paralyzed.

As a result of the crash Mr. Bashirian has some use of his arms and is actively engaged in therapy to improve his mobility. He also has some surgical scarring. It is anticipated that Mr. Bashirian will return to the workforce after obtaining some additional training in the information technology field.

While his future medical expenses were disputed, he did suffer the following damages:
Past medicals: $1,274,312
Past wage loss: $88,400
Future LOEC: $88,000
The plaintiff's experts were:
Liability: Paul Erdtmann, Skogen Engineering
Medical: Dr. Merle Orr, Physical Medicine and Rehabilitation, Froedtert
Voc/Econ: Michelle Albers, Vocational Diagnostics, Phoenix, AZ
The defense retained the following experts:
Liability: James Whelan, engineering, Chicago, IL
Voc/Econ: Jan Klosterman, St. Louis, MO
The matter was settled.

Evan Bashirian et al vs. Hartford Fire Insurance Company et al, Jefferson County Case No. 12CV873. The plaintiff was represented by WAJ member James R. Jansen of Habush Habush & Rottier SC, Madison, WI. Defendants were represented by attorney Patrick Lubenow of Smith Amundsen LLC, Milwaukee, WI.

WAJ Sustaining Seminar Members

The following members of the Wisconsin Association for Justice have contributed over and above the regular dues structure for the Association by becoming Sustaining Seminar Members. This extra revenue is a great aid in allowing the Association to carry out its educational and membership services. We highly commend those who have given so generously.

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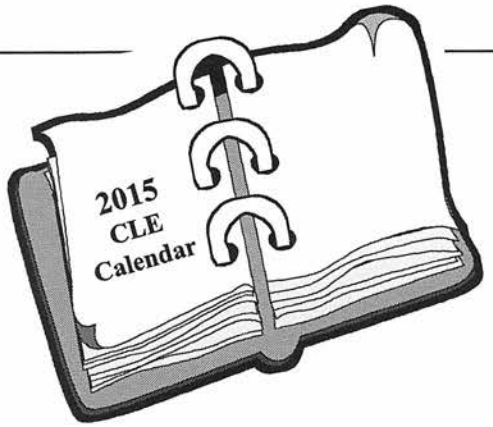

Wisconsin Association for Justice
2015 Seminar Calendar

March 20, 2015
Spring Seminar
The Radisson Hotel
Green Bay

July 10 & 11, 2015
Summer Seminar
The Landmark Resort
Egg Harbor

September 17 & 18, 2015
Women's Caucus Retreat
Glacier Canyon Lodge
Sundara Inn & Spa
Wisconsin Dells

October 16, 2015
Tort and Technique Update Seminar
Inn on the Park
Madison

December 4 & 5
Winter Seminar & Annual Meeting
The Pfister Hotel & Tower
Milwaukee

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Classifieds

Welcome New Members

The following people joined WAJ
from October, 2014 to December, 2014

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Jennifer Kovacovich*
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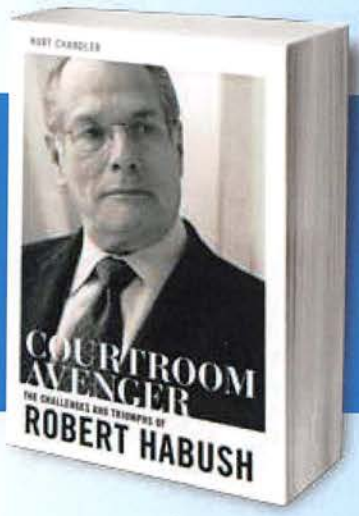
Courtroom Avenger: The Challenges and Triumphs of Robert Habush

By Kurt Chandler



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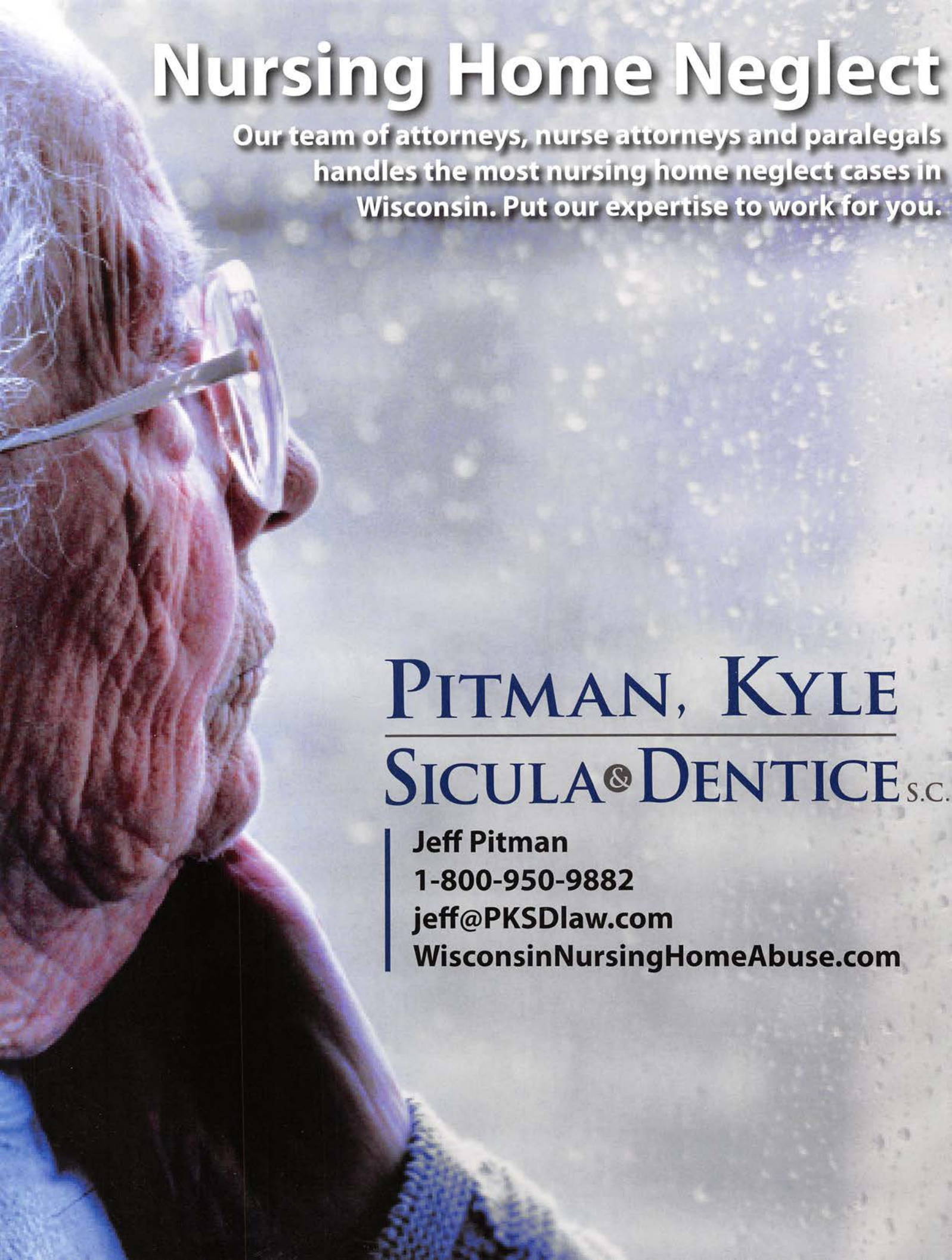
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