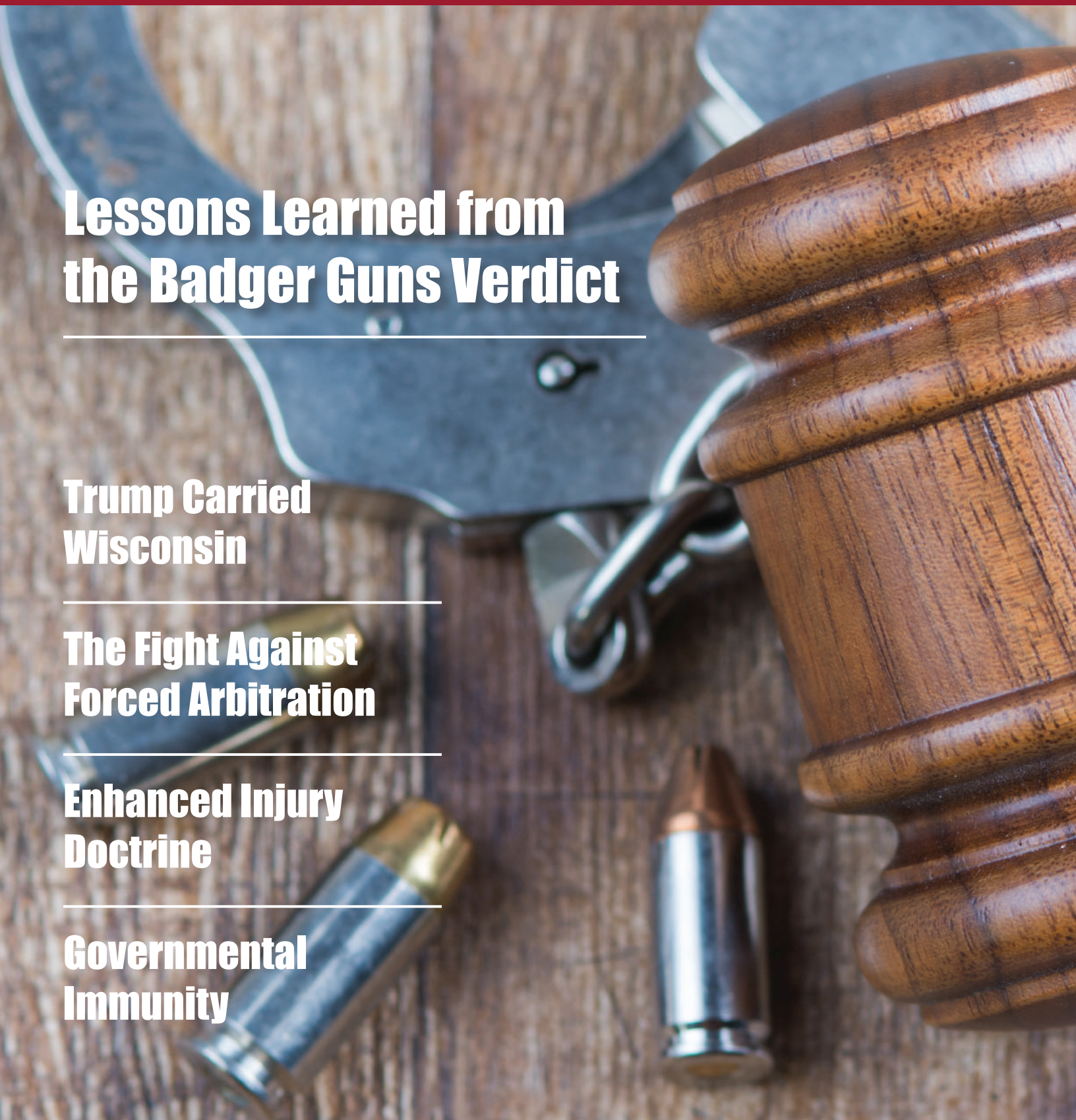
THE VERDICT

Fall 2016

A Quarterly Publication of the Wisconsin Association for Justice



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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.

On the Cover

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Perry Mason Isn't Enough

Finding the Truth in Our Most Complicated Cases

Russell T. Golla is the 60th president of the Wisconsin Association for Justice. A Stevens Point native, Golla attended law school at Marquette University. A partner at Anderson, O'Brien, Bertz, Skrenes & Golla LLP since 1986, he focuses on auto and product liability cases. Golla was named a Wisconsin Super Lawyer every year from 2006 through 2015.

In a trial one of the last things a jury hears is an admonition from the Judge to let their verdict "speak the truth." The phrase is intended to focus the jury on their task at hand: They must determine what the "objective" truth is regardless of whether it means a win or a loss for our clients or the defense.

The phrase also honors the adversarial system our courts embrace. The adversarial system is our preferred method of dispute resolution. The competing claims of the parties are presented by their legal representatives to a presumed impartial third party, usually the jury. The end result of the adversarial courtroom battle is usually a verdict by the neutral jury that "speaks the truth."

Before a jury's verdict can speak the truth, the truth must be disclosed. What happens if one side's case is predicated on untruths or outright lies? Hopefully, the adversary will be able to expose the untruths or lies. Exposing the lies is very seldomly done in a "Perry Mason moment." Rather, it is the result of very thorough preparation and often hundreds of hours of research by the lawyers.

Practically every civil jury trial requires testimony by expert witnesses. This includes medical doctors of every specialty, chiropractors, psychologists, engineers, accountants, economists, toxicologists, physicists, etc. Due to the way civil and criminal jury trials are portrayed on TV and in the movies, many jurors are surprised to find that it is exceedingly difficult, although not unheard of, to get an expert or for that matter, any witness, to admit that they lied or are lying when testifying. Defense experts often rationalize their prevarications by stating them as "opinions" that others may disagree with. Of course, they offer at least one opinion that differs with the injured party's experts, more often than not, the injured party's treating physicians and healthcare providers, for the sole purpose of creating an issue. If they did not disagree with at least one opinion offered by the injured party's experts, their source of income from the insurance industry and product manufacturers would dry up. This phenomenon was well documented in the book "Doubt is Their Product" by David Michaels. In his book, Michaels argues that product defense consultants have increasingly skewed the scientific literature and manufactured and magnified scientific uncertainty for the purpose of influencing decision makers including jurors and lawmakers to side with their clients who are often insurers, polluters and manufacturers of dangerous products.

Recently, I was reminded that even people who appear to be unimpeachable standup witnesses like the doctors in our communities lie on the witness stand when they can rationalize the lie. We must all continue our fight to expose these fabricators and share the fruits of our efforts with others who run up against them in other cases. The failure to expose the liars for what they are can be catastrophic. The following are a few examples of documented "lies" by defense experts.

In the context of a medical malpractice case, a highly qualified physician hired by the defendant and his insurance company gave the insurance company a blunt report which described serious mistakes made by the healthcare providers which, in turn, caused the permanent vegetative state of their patient. The patient was a relatively healthy young woman who went into a hospital to have a baby and ended up in a coma without any higher brain function.

The doctor who was a professor of medicine at an Ivy League school sent the insurer two reports. The first report for publication and for delivery to the victim's lawyer stated unequivocally that he could find no evidence of negligence or malpractice. The second report sent only to the malpractice insurance company's representative for his eyes only stated specifically it was going to be very difficult to defend the doctor and that there was no way he could defend certain conduct by the healthcare providers. That report opened with the following two sentences:

I have made no copies of this letter and I have written it for your eyes only. I would suggest that once you have read it it should be destroyed."[1]

This report concluded with the following sentence:

"Again, let me emphasize that I do not have a copy of this letter and I frankly hope that you will destroy it after you read it."

In this case, the attorney for the young, comatose mother fortuitously discovered the report which contained the expert's "true" opinions and exposed him for the liar he was.

Unfortunately, it often takes years and in many instances, decades of extremely hard work to expose the defense experts' lies for what they are. We see this with litigation involving all types of products. An historical example of this is the asbestos litigation which ultimately disclosed that the industry knew its product was producing an incurable cancer, mesothelioma, back in the 1920s. More recently, the link between the use of Johnson & Johnson's baby powder and Shower to Shower products containing high levels of talcum powder and ovarian cancer has been exposed despite knowledge of that link for decades. Yet, if you "google" "Johnson & Johnson and talcum powder and its link to ovarian cancer," the result at the top of the list is a piece put out by Johnson & Johnson labeled "Facts About Talc." A reading of this material will leave you with the impression that the use of talcum powder on female genitalia does not increase the risk of ovarian cancer at all. Indeed, these materials make the use of talcum powder so inviting, you might want to run to the store and stock up on it in case there is a shortage.

Exposing a lie is very seldomly done in a "Perry Mason moment." Rather, it is the result of very thorough preparation and often hundreds of hours of research by the lawyers.

However, Johnson & Johnson intentionally fails to reference its own internal documents which, back in the 1980s, noted medical studies that implicated talc use in the vaginal area with the incidence of ovarian cancer. In the 1990s, its CEO received correspondence from the Cancer Prevention Coalition referencing scientific studies dating back to the 1960s which stated that the frequent use of talcum powder in the genital area poses a serious risk of ovarian cancer. The same letter also referenced a study performed by a leading ovarian cancer researcher from Harvard which found a threefold increase of ovarian cancer in women who used talc in the genital area daily. These documents were used as exhibits to expose the objective truth at the recent jury trials on the subject and Johnson & Johnson will hopefully have to pay the price for its knowing sale of a dangerous and defective product.

On this web page, Johnson & Johnson is trying to create doubt. It is taking a page out of the tobacco industries' playbook. We all know of the decades of tobacco litigation that it took to finally prove that tobacco is addictive and carcinogenic. The industry had known that it was selling a highly addictive and dangerous product long before Surgeon General Dr. Luther Terry released a report sounding a nationwide alarm in 1964. In fact, the industry worked hard to find ways to more efficiently hook its customers. Despite internal research making this truth plain, the tobacco companies denied both the science and their role in encouraging greater use of even more addictive cigarettes.[2]

But, what if there are no whistle blowers, no documents, or no experts who will admit what happened? Consider medical malpractice claims where the defendant is a doctor who we are all indoctrinated to trust, respect and hold in high esteem. When it comes to medical errors, an increasingly common problem[3], there may not be discoverable documents which prove the victim's case. Determining what happened in a surgery gone wrong is not the same things as identifying a dangerous product. Often, we must rely on individuals to give honest opinions on whether the doctor was negligent.

Pro Publica recently highlighted the confession of a South Dakota doctor who admitted he lied on the witness stand in a medical malpractice case. In an op-ed originally appearing in the *Yankton Community Observer*, Dr. Lars Aanning confessed to lying on the witness stand to protect a former colleague and business partner.

In this case, the victim alleged that the doctor was negligent in performing an operation and that the negligence was a cause of a stroke which left the patient permanently disabled. While testifying at the trial, Dr. Aanning denied any misgivings about his colleague's skill and experience. The problem, however, was that Dr. Aanning questioned his colleague's skill because his patients had suffered injuries during this and other procedures performed by him. The jury found in favor of the doctor.

Dr. Aanning described why he lied: He knew he was expected to support his colleague and he did. This goes well beyond the well-known phenomena which all lawyers who have prosecuted medical malpractice claims have experienced, namely, "the conspiracy of silence" where they cannot find a local doctor willing to criticize another local doctor. Here, Dr. Aanning supported his colleague even though his professional opinion was that he questioned his

colleague's skill. Dr. Aanning stated: "From that very moment, I knew I had lied - lied under oath - and violated all my pledges of professionalism that came with the Doctor of Medicine degree . . . ." In an attempt to make amends, he now is an outspoken patient advocate who assists the medical malpractice attorney who represented the patient in the case in which he lied.

Dr. Aanning stated: "From that very moment, I knew I had lied - lied under oath- and violated all my pledges of professionalism that came with the Doctor of Medicine degree. . ."

Many patients are not informed that they are the victims of medical negligence. According to its research, *Pro Publica* has determined that many physicians do not have a favorable view of informing patients about medical mistakes. Further, healthcare workers are afraid to speak up when they believe that the care provided is subpar. They fear retaliation if they speak out about patient safety issues. Additional research shows that the medical community is often divided about disclosure of medical negligence. A 2010 survey of hospital risk managers and physicians revealed that risk managers are often at odds with physicians about how much to disclose.[4] Slightly less than half of the physicians felt that patients should be told when a medical error occurs.[5] In contrast, a majority of the risk managers felt that the error should be disclosed.[6] This result caught me by surprise: I thought the doctors would want to disclose medical errors to their patients but their desires were trumped by the risk managers. My pro-doctor indoctrination has just been exposed.

Wisconsin's personal injury trial lawyers confront all of the problems discussed above in prosecuting their client's claims to enforce safety rules that have been violated. Unfortunately, when we successfully do so, our opponent's well-funded, well-oiled and well-greased spin machines castigate us as greedy ambulance chasers. That machine rarely targets our clients because our client's causes are just. It is hard to demonize a quadriplegic, paraplegic or young comatose mother for trying to enforce the rules that would have prevented his or her injury. When it comes to uncovering dangerous products or improving patient safety, everyone benefits when the truth is revealed and the jury's verdict speaks it. Only those who cut corners and fail to follow the applicable safety rules complain. Unfortunately, they often have the war chest needed to buy immunity or other protections from our politicians.

Endnotes

1 Dr. Brett Gutsche, M.D., June 19, 1985 Letters to St. Paul Fire and Marine Ins. Co., originally compiled as part of AAJ, then ATLA, Smoking Gun documents collection.
2 Martin, Douglas, Merrell Williams Jr., Paralegal Who Bared Big Tobacco, Dies at 72, *New York Times*, Nov. 26, 2013; B 17.
3 http://www.npr.org/sections/health-shots/2016/05/03/476636183/death-certificates-undercount-toll-of-medical-errors
4 https://www.documentcloud.org/documents/703679-risk-managers-physicians-and-disclosure-of.html#document/p2/a239408
5 *Id.*
6 *See id.*

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Joe Strohl served in the Wisconsin Senate from 1978-1990 representing Racine County. Strohl was Senate Majority leader the last four years of his political career. He has been the head of WAJ's lobbying efforts since 2007.

Trump Carried Wisconsin and Along with it Federal and State Legislative Races

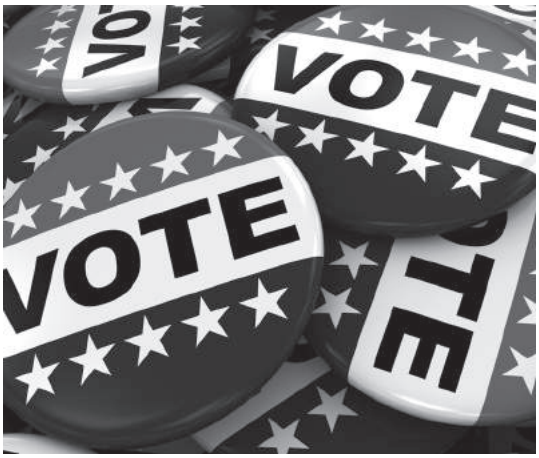
Donald Trump lost the Wisconsin Primary back in April but did exceedingly well in the northern half of the state. Since Trump lost Wisconsin, Democrats though that was a good sign and that would give them a chance to win up and down the ticket in both federal and in state races in November. What seems to have been ignored is that Trump performed well in northern Wisconsin. Once he had the nomination, he appealed to rural voters across the state. Other than in Dane County, Democratic areas of the state saw lower turnout compared to 2012.

US Senate

The result became obvious once the polls closed on November 8th. First, there was a low turnout in Milwaukee and a big turnout in most other parts of the state. That resulted in not only Trump carrying Wisconsin but US Senator Ron Johnson defeating Russ Feingold by a comfortable 100,000 votes.

House of Representatives

The Trump appeal also resulted in the open House seat in the 8th Congressional District (northeastern Wisconsin) remaining in GOP hands. At one time Democrats thought they had a chance of winning this seat but once Trump carried it in the Primary and with newcomer Republican candidate Mike Gallagher easily defeating other Republicans in the Primary there was little chance Democratic candidate Tom Nelsen could win. Gallagher won the seat with 63 percent of the vote.



State Legislature - Assembly

Trump had a big impact here as well. Democrats had done a pretty good job of recruiting candidates and the party was able to raise enough funds to make some races competitive. Republicans hold several seats that in Presidential election years Democrats often win. Democrats had identified at least 6 Assembly seats that they figured they had a pretty good chance of winning. The problem was that all the districts are in rural areas and with Trump winning big, Democrats ended up losing every one of the seats.

Not only did the Democrats lose all of their targeted races they also lost a Democratic seat that was not on anyone's radar: State Rep. Chris Danou (D-Trempealeau) lost to a local official by getting 48 percent of the vote. The new GOP State Representative is Treig Pronschinske, Mayor of Mondovi. Danou served on the Committee on Insurance, an area obviously important to WAJ.

This resulted in the Republican margin in the State Assembly increasing from 63 to 64 out of 99 seats.

State Legislature – State Senate

The Republican majority also increased their margin by one vote and will now hold 20 out of 33 seats. Democrats thought they had a good chance of winning the open 18th seat (Oshkosh, Fond du Lac) but Democratic candidate Mark Harris lost to Dan Feyen, Republican party chair in Fond du Lac County. Vote was 56% to 44%.

Democrats also thought they might be able to defeat Senator Luther Olsen (14th District-Ripon) but lost that race with Olsen getting 57% of the vote.

The biggest surprise was the defeat of Senator Julie Lassa (D-Plover). She got 48% of the vote against Portage County Republican Party Chair Patrick Testin. Testin's only other run for office had been a 3 to 1 defeat by Rep. Katrina Shankland.

Another surprise was the narrow victory for Senator Jennifer Shilling (D-La Crosse). As of this writing, she had a 55 vote lead over former GOP Senator Dan Kapanke. A recount will take place.

So you can see something all these races had something in common: All were in rural areas or parts of these districts were rural. Since none of these legislative districts were in the Milwaukee area, greater turnout there would not have impacted the state legislative races. In contrast, better Milwaukee turnout would have helped in the Presidential and US Senate.

New Legislature

As I reported above, the Republican-controlled Legislature will see an increase by one Republican vote in each house there will be numerous new faces in the Legislature taking office in January. There will be new faces replacing the 12 state legislators that did not seek re-election. None of those districts were flipped to the other party, however.

One of the new legislators to take office due to a retirement will be a Republican personal injury lawyer from Appleton. There was an open Republican seat in the 3rd Assembly District. The new state representative is Ron Tusler. I expect he will play an important role as issues of interest to WAJ come before him in his new position.

BADGER GUNS VERDICT LESSONS LEARNED

On October 13, 2015, a Milwaukee County jury made history by returning the first, and still only verdict in the country finding a licensed gun dealer liable for injuries caused by a firearm sold by the dealer and used in the commission of a crime.

While this verdict is old news, I agreed to write this article because the obstacles to the verdict and the manner in which the case was framed and tried could prove useful to others in the framing and presentation of their clients' cases.

FACTS

Badger Guns was a federally licensed firearms dealer located in West Milwaukee, Wisconsin. Badger Guns was established in 2007 by Adam Allan. Adam purchased the inventory of Badger Outdoors, a gun store co-owned by his father, Walter Allan, and Milton Beatovic. Badger Guns was operated out of the same building as Badger Outdoors with the same employees.

According to newspaper accounts, pretrial discovery and records of the Bureau of Alcohol, Tobacco and Firearms, Badger Outdoors had a long history of selling guns that were recovered by the Milwaukee Police Department during crime investigations. The Milwaukee Journal reported that for the 3 years, 1996-1999, Badger Outdoors sold more firearms recovered in crime investigations than any other licensed gun dealer in the country. Badger Outdoors duplicated that feat for the year 2005.

On May 2, 2009, Jacob Collins went to Badger Guns to buy a semi- automatic handgun for 18 year old Julius Burton. Burton accompanied Collins into the store. Burton could not legally own a handgun because he was a minor. Burton promised to pay Collins $40.00 to buy a handgun. Once, in the store, Burton picked out the gun he wanted Collins to buy. Collins then approached the Badger Guns salesman and began the purchase procedure. First, Collins pointed out the gun to the salesman. The salesman retrieved the gun from the cabinet where not only Collins but Burton was standing. Next, Collins filled out a state firearm transaction form. The form asked the question; "Are you the actual purchaser of the firearm?" Collins wrote "yes". Collins then filled out the federal transaction form which asked: "Are you the actual transferee/buyer of the firearm listed on this form?" Collins wrote "no". One purpose of the questions was to determine if the buyer was an illegal straw buyer (someone who was buying the firearm not for themselves but for someone else). When the salesman reviewed the two forms, he noticed the conflicting answers. Instead of shutting down the sale, or asking Collins why he had answered the questions differently, he simply showed the two forms to Collins, told Collins the answers must be the same and then allowed Collins to change the "no" to a "yes" on the federal form. Collins passed the background check, returned to Badger Guns on May 4th, picked up the gun and gave it to Burton a few days later.

On June 9, 2009, two City of Milwaukee police officers were patrolling an area on the south side of Milwaukee near Bradley Tech High School. There had been some post school day disturbances caused by non- students. The officers were assigned to patrol the area near the school to look for potential trouble makers. When the officers spotted Burton, he was riding his bicycle on the sidewalk. This was illegal and the officers decided they would make an information stop of Burton. Burton knew he was violating the law by having a handgun in his possession. Burton panicked once stopped, pulled out the handgun and shot the two officers. The stop and the shooting were captured on a surveillance video.

Eventually, Burtons and Collins were arrested, charged and sentenced for their crimes.

APPLICABLE LAW

The Protection of Lawful Commerce in Arms Act (PLCAA) was enacted in 2005. The purpose of PLCAA was to provide some limited degree of protection for gun sellers and manufacturers in some cases in which injuries were caused by guns used in crimes. There are a number of exceptions to the immunity. The key exception in our case was for negligent entrustment of a firearm. The legal definition of negligent entrustment in Wisconsin is the dealer's sale of a firearm to someone the dealer knew or reasonable should have known was likely to use the firearm to cause harm to themselves or someone else.

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ISSUES RAISED BY THE CLAIMS

Obviously, the so called "Elephant in the Room" was the involvement of a gun. This raised the possibility that the case would be perceived as an attack on the Second Amendment or a "Gun Control" case. Additionally, the case was tried when police and minority confrontations had led to riots and protests in Milwaukee and other cities. The officers in this case were white and the shooter was black. The case and the jury could easily be hijacked by either of these political issues.

Another issue was the idea that a police officer could bring an action for civil damages for injuries caused by a criminal in the course of a criminal act, a situation that every officer accepts as a risk of the job. An officer seeking damages could be viewed as gaming the system and negatively impact the liability case.

Lastly, there was the problem of causation. The criminal pulled the trigger and shot the officers. Could the gun dealer reasonably foresee that was going to happen when it sold the gun to a straw buyer? Was it reasonable to hold a gun dealer liable for injuries that occurred after the gun left the store?

In short, there were difficult legal, political and "assumption of risk" issues to overcome.

THE CASE FRAME

The frame is the lens through which someone views the picture It is the principle that provides the window through which the case is viewed.

There are universal principles that may provide the case frame. Tested frames that explain certain actions by a defendant. Frames such as "Profits over safety"; "Betrayal of Trust"; "Assembly line Medicine". Case Framing is a construct created by Mark Mandell and detailed in his book "Case Framing", AAJ Press Trial Guide 2015. The Case Framing construct and extensive advice from Mandell were instrumental in obtaining a successful verdict in this case.

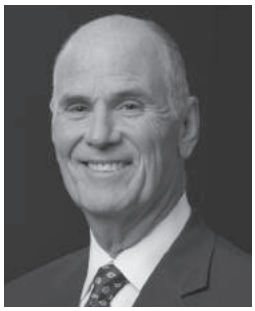
I have used a concept learned from Mark Mandell to identify my case frame in recent trials including Badger Guns. Mandell once concluded a trial and was told by a juror that there was a fact that had little or nothing to do with the underlying liability of the defendant but which significantly impacted the juror's view of the case. The juror said he "Just can't get over the fact that"…the defendant had not done one simple, expected task". When evaluating or discussing a case there is often a basic question that keeps being asked. It could be something as simple as "Why didn't the nurse call the doctor" or "Why didn't the contractor put up the barricade" or "Why didn't the store owner fill in the hole in its parking lot". In my mind, the frame is not so much the explanation as to why a simple action was not taken, but rather the reason why the juror just couldn't get over the fact that something simple was not done.

In the Badger Guns case, the issue that people I spoke with in trial preparation "just couldn't get over" was the fact that the salesman did not ask Collins why he had conflicting answers to the straw buyer questions. Why couldn't the salesman have simply asked some questions? That was something people could not get over because it was simple enough to do, it should have been standard procedure for sales people and because the store was selling guns, not groceries. Guns can be lethal. When selling something so potentially dangerous it seems incomprehensible that no questions were asked of a buyer who, in answer to one question, admitted he was an illegal straw buyer.

This "I Just Can't Get Over It" issue led to the case frame: "with rights come responsibilities." With the right to sell firearms, a product that poses a danger to the public if it falls into the wrong hands, came the responsibility of the dealer and its employees to have policies and procedures to properly screen buyers and to deny the sale if there was any doubt as to the buyer's status as a legal buyer. The rule that undergirds the frame was "if there is doubt, deny the sale", even if the buyer passes a background check.

Once the case frame was identified, the case presentation had a unifying principle that determined how to conduct voir dire, how to structure the opening, what issues to emphasize, who to call as witnesses and in what sequence.

PRACTICE POINTER: Don't confuse a "theme" with the "case frame." Identify the "I Just Can't Over it Issue", figure out why it is and you will have your frame. Once you have your case frame you have your organizational tool for every aspect of your case.



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VOIR DIRE

A case that could be easily hijacked by emotional political issues related to guns, police stops, and race, required a direct, probing, but delicate voir dire. The best way to handle this situation was to request that the court allow a jury questionnaire drafted by and agreed to by the parties. Individual in chambers voir dire would be necessary for some jurors to avoid poisoning the entire panel. The questionnaire dealt with the hot topic issues, allowed jurors to address them in a confidential way and allowed the attorneys and court to identify the jurors who should be individually questioned in chambers. The questionnaire was handed out to the 100 panel members. The panel completed the questionnaire in the morning. The parties had the questionnaires copied and delivered in the afternoon. The parties then spent the afternoon and evening identifying jurors who, 1) could be stipulated to as dismissed for cause and, 2) needed to be questioned in chambers.

The questionnaire was tedious but it improved the quality of the voir dire and was beneficial to both the parties and the court.

PRACTICE POINTER: Questionnaires are not often necessary. However, in a case with any significant potentially "hijacking issues" its use is an efficient use of the court's time and resources as well as helpful to the parties. Limit the questionnaire to key questions that can be answered by the jurors in no more than one hour.

ORGANIZING THE CASE PRESENTATION WITHIN THE CASE FRAME

The case frame of "with rights come responsibilities" led to emphasizing liability, rather than damages in the presentation. Within the liability issues the sale and the business practices that led to the sale became the focus. The best way to make the sale and the business practices the focus dictated that the initial witnesses would be the sales person, the owner of the gun store and the owner of the predecessor store. The frame also dictated that the opening would start with the dangers of guns, and the responsibilities of the dealer and its sales staff to adopt business practices that would minimize sales of dangerous weapons to potentially dangerous buyers and in particular would have prevented this sale to this straw buyer and prevented this shooting. Damages would not be addressed in detail in the opening and not until the end of the opening. The damage witnesses would not be called until the second week of trial and only after the liability witnesses were completed. The case frame also led to the decision not to show the shooting video. No matter when it was shown in the order of proof, the fear was it would change the focus from the gun store to the stop.

THE OPENING

A frequent and acceptable approach to Opening Statement is to begin with a summary of the theme of the case. As an example: "The plaintiff suffered a life changing injury because the defendant hospital cared more about processing patients than providing quality care to them." The theme statement is then often followed by a summary of the key facts of the case, a burden of proof discussion, the legal duties that have been breached by the defendant and the damages the plaintiff has suffered. Regardless of the order of the issues addressed in the Opening Statement, the emphasis is usually on the Plaintiff. In the Badger Guns case, the emphasis could not be on the plaintiffs. The case frame dictated that the emphasis be on Badger Guns, and the threat created by its business practices.

The Opening began with a litany of references to Badger Guns. "Badger Guns was in the business of selling guns." "Guns are dangerous when in the hands of the wrong people." "Badger Guns knew that selling guns to straw buyers put innocent people at risk." "Badger Guns knew that as a licensed dealer there were rules to follow to help keep guns out of the hands of criminals and protect the public." "Badger Guns accepted that responsibility when it was granted its license." The case was immediately framed as Badger Guns had rights to sell guns but responsibilities to do it right to protect the innocent public.

The Opening also addressed the cause issue while dealing with the burden of proof. The jury was advised that there were two systems of justice, the criminal and the civil. The criminal system had done its job. It dealt with the criminals, including the one who pulled the trigger in this case and had done its job by capturing, convicting and sentencing them. The jury was then advised that their role was to make the civil system work. The system that deals with determining the fault on Badger Guns for supplying the trigger that the criminal pulled. To

compensate the officers for the harms and losses Badger Guns caused by arming the criminal.

The Opening used the visuals of the two sales forms with conflicting answers and still shots from the in store surveillance video to anchor the facts of the gun sale and the obvious indicators of suspicion of a straw buy. This set up the rule of "when there is doubt about the buyer, deny the sale to protect the public".

The damages to the plaintiffs were only briefly addressed and the bulk of that discussion was at the end of the Opening. Of 24 transcribed pages, the damages were the last 5 pages.

PRACTICE POINTER: Do not fall into the trap of a standard opening structure. Your case frame should dictate what you cover, the sequence of covering it, and the amount of time you devout to covering it.

ORDER OF WITNESSES-LIABILITY

The first week of the trial consisted of voir dire, openings and adverse examinations of the key liability witnesses; the salesman, current owner of Badger Guns and predecessor owner of Badger Outdoors. The plaintiffs did not testify until week two and no damage testimony was offered until week two. The jury only heard about Badger Guns, the dangers of guns, the need to screen for straw buyers to protect the public by keeping guns out of the hands of criminals, the bad sale and the bad business practices that made this sale inevitable.

To avoid PLCAA immunity, proof of negligent entrustment was needed. To meet that burden and to establish the case frame, the plaintiffs called the salesman adversely as the first witness. The first series of questions immediately followed his name and employment as a Badger Guns salesman and got right to negligent entrustment. "Badger Guns was in the business of selling guns." "Guns are dangerous when in the hands of criminals." "Criminals are likely to misuse guns to harm people." "Straw buyers will likely buy guns for criminals." "It is equally important to screen for and deny sales to straw buyers to protect the public from harm caused by criminal misuse of guns." With "yes" answers to those questions, the legal burden of proof was met and the frame was set. The rest of the adverse detailed the transaction, established the red flags of a straw sale, the failure of the salesman to ask any questions despite the litany of red flags, and the lack of screening protocols or training from the business owner that made this sale inevitable.

The store owner was then called adversely, forced to admit the rights and responsibilities accepted by a licensed gun dealer and then grilled on his failure to know the federal regulations, establish screening protocols against the known danger of straw buyers or undertake any training or review of the competency of the sales staff.

Post-verdict juror interviews confirmed the importance of these two examinations and the frame. Jurors commented on how poorly the business was run and how cavalier it was considering that it was selling guns.

The week ended with the adverse examination of the prior owner. At the time of his pretrial deposition a series of hypothetical questions elicited a damaging admission that given the facts he would expect the sales people he trained to deny the sale. (He trained the man who made the sale). At trial on adverse he was asked the same questions as at the deposition: "If the purchaser answer the question on the form 'I'm not the purchaser' is that a red flag?" "A. Definitely. No ifs, ands or buts about it." He would not allow the purchaser to change the answer. "It's a definite decline immediately." We were also able to reaffirm the rule requiring screening to prevent straw buying from the deposition admission. This sale was suspicious and should have been denied.

PRACTICE POINTER: Consider how to best establish your case frame at the outset of the testimony. Do not be afraid to call witnesses adversely at the start of the case. Adverse examinations can put the focus where you want it, can be used to control the witness and, if you get the proper in limine ruling from the court, will preclude defense counsel from rehabilitating the witness or interjecting the defense into your case.

ORDER OF WITNESSES-DAMAGES

One of the officers suffered from severe, permanent Post Traumatic Stress Disorder, had a monosyllabic manner of speaking as well as a volatile temper. He could have been a very poor witness. To deal with that potential, the surgeon first testified to the underlying physical injuries, a neurologist then testified to the organic brain damage and how it caused organically based

personality changes. This was followed by the treating psychologist who testified to PTSD manifestations he was treating and the spouse who testified to home episodes of personality changes. After setting the table with these witnesses, the officer was called. No matter what the officer did on the stand, the jury would view him through the frame provided by the preceding witnesses and not be critical of him.

PRACTICE POINTER: The plaintiff may not be your best witness, even when seriously injured and presumably sympathetic. Be aware of the potential weakness of the plaintiff and call your witnesses in an order that will maximize the effectiveness of your plaintiff's testimony.

CLOSING

The Closing Argument started with the case frame. It stressed the rights and responsibilities that Badger Guns had to the public and how the trial had shown how and why Badger Guns had failed miserably. The verdict was extremely complicated and consisted of 23 questions. The questions and accompanying instructions helped organize the Closing. However, given the complicated nature of the law and how the proof interacted with the law, the use of power point summaries of key evidentiary points proved very useful. The Closing was not just a recitation of the evidence the jury already heard but argued how the key evidence compelled a "yes" answer to each special verdict liability question.

VERDICT

The jury found that Badger Guns had violated federal law in 4 respects and that it had negligently entrusted the gun to Collins AND that all but one of these acts was causal of the plaintiffs' injuries.

CONCLUSION

The Badger Guns case was important on a number of different levels. It added to the national spotlight on gun violence and the role that licensed gun sellers can play in reducing gun violence by proper screening of straw buyers. It was a wake-up call for licensed gun dealers who now knew that PLCAA was not an impregnable wall protecting them from liability for bad gun sales. It has encouraged other attorneys around the country to bring lawsuits against licensed gun dealers and hold their feet to the fire.

The case was also important because it reaffirmed that even in the most difficult and complicated cases, the proper identification of the key questions, the drivers of why a "jury just can't get over" something, creates a powerful organizational frame from voir dire through closing and contributes mightily to your client's chance of success.

Welcome New Members

Welcome aboard to our new members who have joined from August to September 2016.

Miranda Bork, Neenah
Kathryn Farnsworth, Madison
James Gay, Chicago
Michael Helgeson, Saint Paul
Angelique Imm, Beaver Dam
Brittany Running, Milwaukee
Christina Semi, River Falls
Michael Techmeier, Milwaukee

Complete WAJ membership information is available online at WisJustice.org or call : 608-257-5741

Terry Polich is a partner at Clifford & Raihala, S.C., specializing in civil litigation, personal injury, medical malpractice and consumer product warranty litigation. In his spare time, Terry enjoys running, cross-country skiing, reading, and the arts.

Alternative Fee Agreements; Opening the Courthouse Door

Many people and businesses decide not to pursue otherwise valid legal claims because they fear getting involved in expensive litigation and being unable to pay their own attorney fees. Prospective clients commonly ask, "Will I end up owing you more than I recover in the case." Yet, often litigation is the only way to achieve a meaningful remedy.

Failure to adequately address concerns regarding legal costs can cause people and business entities to decide not to pursue otherwise valid claims for which they deserve a remedy. As we all know, the contingent fee contract traditionally has been the answer. It gives litigants who cannot afford to pay an attorney's hourly rates access to the justice system. The attorney charges a percentage of the recovery, payable at the end of the case. Costs incurred in the litigation are payable when the case is resolved.

When prospective litigation is complex or risky, it may be ill advised for an attorney to take the case on a contingent fee basis. The prospective out-of-pocket costs may be prohibitive. Often, prospective clients involved in business or professional disputes have the means to defray costs or otherwise pay a portion of the fees and costs incurred in litigation. At the same time, they may lack the means, cash flow or inclination, to pay all of the costs or the attorney's full hourly rates.

Most traditional business litigation firms do not take contingent fee cases and will not modify the standard hourly rate billable contract. This creates an opportunity for firms willing to adopt a more flexible approach. Contingent fee contracts, blended hourly and contingent fee contracts and contracts where the client pays costs as they are incurred but only pays attorney fees if the case is successful, are all examples of alternative fee arrangements allowing our clients increased access to the court system. These arrangements allow claims to be pursued where more traditional hourly rate firms would not tread – while protecting the plaintiff's firm from excessive financial risk.

Our firm has represented plaintiffs in cases using alternative fee agreements on a number of occasions over the years, including in these representative matters:

A group of financial institutions pursuing an accounting malpractice case. The clients had been victimized by a massive fraud which their accountants had missed, endangering their financial stability. No other law firm would take the case except on an hourly basis. One firm even sought a $250,000 retainer up front. The clients had almost given up on the claim before they contacted us. We agreed to represent the clients on a contingent fee basis with the requirement that the clients pay out-of-pocket costs on a month-by-month basis. This helped insulate the firm from the expense of pursuing a very complex accounting malpractice case involving fourteen plaintiff financial institutions. We also charged a higher contingent fee, based on the high degree of risk involved in the case. The case resolved for a very large cash settlement which allowed our clients to continue operations.

A shareholder dispute involving a large commercial construction company. The client paid a substantially discounted hourly rate of $50 per hour monthly with the balance of our usual hourly rate due only if the shareholder prevailed. That hourly rate was increased to the extent that larger sums of money were recovered on behalf of the client. Eventually we recovered $2.4 million, allowing the client to successfully start his own commercial construction business. We were able to recover our premium rate under the retainer agreement.

A securities case. We charged a small initial retainer against which we billed at our customary hourly rate. Once the retainer was exhausted recovery of additional attorney fees was contingent on the outcome of the case. In the end, we were able to recover all of the money the client had lost due to the negligence of his financial advisor.

When considering any sort of alternative fee arrangement it is important to keep in mind the provisions of SCR 20:1.5 relating to attorney fees. SCR 20:1.5 prohibits lawyers from making an agreement for charging or collecting an unreasonable fee or an unreasonable amount for expenses. The rule sets forth a number of factors to be considered in determining the reasonableness of a fee including:

• The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

• The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

• The fee customarily charged by the locality for similar legal services;

• The amount involved and the results obtained;

• The time limitations imposed by the clients or by the circumstances;

• The nature and length of the professional relationship with the client;

• The experience, reputation and ability of the lawyer or lawyers performing the services; and

• Whether the fee is fixed or contingent.

Except in limited circumstances, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible must be communicated to the client in writing, before or within a reasonable time after commencing the representation. If the total cost of the cost of the representation to the client, including attorney fees is more than $1,000, the purpose and effect of any retainer or advance fee that is paid to the lawyer must be communicated in writing.

For any contingent fee agreement, the agreement must be in a writing signed by the client and must state the method by which the fee is to be determined, including the percentage or percentages that accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must also clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

SCR 20:1.5 also requires that upon conclusion of a contingent fee matter the lawyer is required to provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

Of course there are some cases in which contingent fees are not allowed: actions affecting

the family including divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption; and, representing defendants in criminal cases or any proceeding that could result in deprivation of liberty.

You should always be alert to special statutory provisions which limit contingent fees for certain claims. Contingent fees in federal tort claim cases are limited to twenty percent of any amount collected over $1million and twenty-five percent of amounts collected under $1million. Other special rules apply in medical malpractice cases.

Alternative fee arrangements serve an important role in providing remedies for wrongs. At the same time such fee arrangements help manage financial risk for plaintiffs' law firms while providing rewarding and fertile areas of practice for the lawyers involved. Ultimately, alternative fee arrangements have the potential to assist us in accomplishing one of the main missions of the trial bar: Holding the powerful accountable for wrongdoing and enforcing professional, business and safety standards on behalf of the public through our individual clients.

Good News in the Fight Against Forced Arbitration

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

Despite the ubiquity of mandatory arbitration clauses, recent decisions from the 7th and 9th Circuit Courts of Appeals may signal a turning of the tide. Together with proposed regulations in the consumer context, we can be optimistic about the fight against forced arbitration.

Plaintiffs' lawyers are keenly aware of the attack on our civil justice system via mandatory arbitration agreements. By inserting individual arbitration clauses into a wide variety of consumer, service, and employment contracts, corporations have insulated themselves from courts and juries, and prevented plaintiffs from banding together in class action lawsuits. In the last issue of The Verdict, Attorney Jacqueline Chada Groth discussed the enforceability of arbitration clauses in nursing home contracts. She examined potential legal grounds for attacking such clauses, including contract validity and unconscionability. Despite these thoughtful arguments, however, we know that plaintiffs still face an uphill battle.

Fortunately, a recent successful challenge to a mandatory employment arbitration contract could signal a positive change in the current landscape. For the first time, a federal appeals court has dealt a serious blow to class and collective action waivers in arbitration agreements. In Lewis v. Epic Systems Corporation, the 7th Circuit held that mandatory employment arbitration agreements with class and collective action waivers violate the National Labor Relations Act ("NLRA").

This article will contextualize and analyze the 7th Circuit's decision, discuss similar cases in other circuits, and provide an update on mandatory arbitration in the consumer context.

The Proliferation of Mandatory Arbitration

The Supreme Court decided two cases in the last five years that effectively gave corporations and employers the green light to circumvent the civil legal system with arbitration clauses. In AT&T Mobility LLC v. Concepcion, the Court considered a California state law that declared arbitration clauses with class action waivers unconscionable for low-value consumer claims. The Court held that California's law was preempted by the Federal Arbitration Act ("FAA") because it stood as an obstacle to Congress's purposes and objectives.

Two years later, the Court's decision in American Express Co. v. Italian Colors Restaurant made matters even worse for plaintiffs. There, the Court held that the FAA does not permit invalidation of class action waivers in arbitration agreements on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim far exceeds the potential recovery. In Italian Colors, the plaintiffs argued that the class action waiver thwarted the policies of federal antitrust laws because requiring individual litigation would effectively nullify their statutory rights. The Court rejected this argument, stating that the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. Because the substantive federal right to pursue antitrust claims in some forum remained, the arbitration agreement was enforceable.

Lewis v. Epic Systems

Against this backdrop, our firm, together with Hawks Quindel, S.C., filed a class action case in February 2015 against Epic Systems, a medical records software company based in Madison. The case was filed on behalf of a class of Epic's Technical Writers and alleged that those employees were misclassified as exempt from overtime. At the time of filing, Epic had electronically sent its employees a mandatory arbitration agreement. However, we believed that circumstances made this particular agreement different from those challenged in Concepcion and Italian Colors. Unlike consumers, employees have unique federal rights under the NLRA to join together in pursuit of better wages and working conditions. In addition, we believed that aspects of Epic's

agreement raised persuasive procedural and substantive unconscionability arguments. Epic disseminated its arbitration agreement by email in April 2014, in the midst of another class action case involving a group of Quality Assurance employees. The agreement was emailed to employees and gave them no opportunity to opt out. Continued employment was deemed acceptance of the terms, which effectively applied only to wage and hour claims and included a class action waiver. The District Court found the NLRA violation dispositive and did not analyze our contract arguments. Epic promptly appealed to the 7th Circuit.

The 7th Circuit's Decision

The crux of the 7th Circuit's decision and the factor that distinguishes class action waivers in the employment context is the NLRA, the bedrock of our federal labor laws. In addition to the right of self-organization and collective bargaining, the NLRA provides that all employees have the right to "…engage in concerted activity for the purpose of mutual aid and protection…" The 7th Circuit agreed with the National Labor Relations Board that "concerted activities" include the filing of collective or class action lawsuits to achieve more favorable terms or conditions of employment. Because Epic's arbitration agreement conflicted with employees' right to engage in concerted activity, and private contracts that conflict with the NLRA are unenforceable, the contract was void under the NLRA.

The Court's analysis would have ended there if not for the FAA and recent Supreme Court interpretations of it. The FAA provides that arbitration provisions in written contracts "… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (emphasis added). Epic argued that the NRLA conflicts with the FAA and that the FAA must override the NLRA. Epic had reason to be confident in this argument because the 5th Circuit had recently accepted it in D.R. Horton v. NLRB. The 5th Circuit reasoned that, because class arbitration sacrifices arbitration's "advantages," including informality, speed, cost, risk, and procedural hurdles, it has the effect of disfavoring arbitration. According to this logic, laws that even incidentally burden arbitration necessarily conflict with the FAA.

The 7th Circuit disagreed with the 5th Circuit's reasoning because it made no attempt to harmonize the FAA and the NLRA, as required by the rules of statutory construction. Neither Concepcion nor Italian Colors intimates that any law which potentially makes arbitration less attractive automatically conflicts with the FAA. In addition, the 5th Circuit argument fails to acknowledge longstanding federal labor policy that actually favors and promotes arbitration. An agreement to arbitrate work-related disputes does not conflict with the NLRA; an agreement with a class action waiver does. Finally, finding the NLRA in conflict with the FAA ignores the FAA's saving clause, which allows arbitration agreements to be invalidated by generally applicable contract defenses (i.e., illegality.) Accepting the 5th Circuit's position would render the FAA's saving clause a nullity. Therefore, Epic's arbitration provision was unlawful under the NLRA and thus met the criteria of the FAA's savings clause. This interpretation allows the NLRA and the FAA to be read harmoniously.

Epic's final argument was that, even if the NLRA does protect the right to class or collective action, this right is procedural only and not substantive. Accordingly, the FAA demands enforcement because procedural rights can be waived in arbitration agreements. In support of this argument, Epic pointed to employment cases involving other statutes that do not guarantee collective processes. The Court rejected this argument because Section 7, which includes the right to engage in concerted activities for mutual aid and protection, is the NLRA's only substantive provision. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it simply submits to their resolution in a different forum.

The Aftermath of Lewis and the Future of Arbitration Challenges

Despite the 7th Circuit's straightforward and commonsense analysis, many commentators on the defense side were critical of the decision. They characterized it as contravening the great weight of nationwide authority. In reality, however, only the 5th Circuit has engaged in a substantive analysis of the issues. The 2nd and 8th Circuits did not examine the relevant arguments in their decisions.

Following Lewis, there has been more

encouraging news. In August 2016, the 9th Circuit became the second Court of Appeals to invalidate an employment arbitration agreement with a collective and class action waiver. The 9th Circuit's analysis was very similar to that of the 7th and focused on the interaction of the NLRA and the FAA. Just two days later, the Eastern District of Michigan struck down another collective action waiver. Most recently, on September 2, 2016, Epic petitioned the Supreme Court for a writ of certiorari. Less than a week later, the defendant employer in the 9th Circuit petitioned. Finally, on September 9, 2016, the NLRB petitioned in a 5th Circuit case. It now appears likely that the Supreme Court will take one of these three cases, with a decision coming as early as Summer 2017.

Although resolution of this issue will not directly impact arbitration agreements in contexts outside the employment arena, increased awareness and concern regarding mandatory arbitration will build on the momentum of recently proposed regulations. On May 5, 2016, the Bureau of Consumer Financial Protection ("CFPB") proposed a rule that would prohibit mandatory arbitration clauses with class action waivers. Trade groups and Republican lawmakers continue to comment on the proposed rule this fall, voicing strong opposition. Once the CFPB issues a final rule, there will be a delayed effective date of 211 days. Any final rule could be delayed further by judicial review, meaning that it could be 2018 before we can realistically expect to see these clauses removed from consumer and service contracts. Although changes to the present state of affairs could not come quickly enough, plaintiffs' lawyers can remain hopeful that there are positive developments on the horizon.

(Endnotes)

1. Jacqueline Chada Nuckels, *Assessing the Enforceability of an Arbitration Clause in a Nursing Home Case,* 39:3 THE VERDICT 19-22 (Summer 2016).
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3 *Lewis v. Epic Systems Corp.,* No. 15-2997 (7th Cir. May 26, 2016).
4 *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011).
5 *Id.*
6 *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013).
7 *Id.* at 2310-2312.
8 *Id.*
9 *Id.*
10 *Lewis v. Epic Systems Corp.,* Case No. 15-cv-082, Opinion and Order Denying Motion to Dismiss, p. 1 (W.D. Wis. September 10, 2015).
11 *Id.* at p. 2.
12 *Id.* at p.1-2.
13 *Lewis v. Epic Systems Corp.,* No. 15-2997, p.2 (7th Cir. May 26, 2016).
14 *Id.*
15 *Id.*
16 *Lewis v. Epic Systems Corp.,* Case No. 15-cv-082, Opinion and Order Denying Motion to Dismiss (W.D. Wis. September 10, 2015).
17 *Lewis v. Epic Systems Corp.,* Case No. 15-cv-082, Notice of Appeal (W.D. Wis. September 11, 2015).
18 *See* 29 U.S.C. § 157
19 *See Brady v. Nat'l Football League,* 644 F.3d 661, 673 (8th Cir. 2011).
20 *D.R. Horton, Inc., v. NLRB,* 737 F.3d 344 (5th Cir. 2013).
21 *Lewis v. Epic Systems Corp.,* No. 15-2997, p. 11 (7th Cir. May 26, 2016).
22 *See* 9 U.S.C. § 2.
23 *Lewis v. Epic Systems Corp.,* No. 15-2997, p. 11-12
24 *D.R. Horton, Inc. v. NLRB,* 737 F.3d at 357 (5th Cir. 2013).
25 *Id.* at 359.
26 *Lewis v. Epic Systems Corp.,* No. 15-2997, p. 15 (7th Cir. May 26, 2016).
27 *Id.*
28 *Id.* at p. 16.
29 *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960).
30 *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011).
31 *Lewis v. Epic Systems Corp.,* No. 15-2997, p. 18 (7th Cir. May 26, 2016).
32 *Id.* at p. 19-20.
33 *Id.*
34 *Id.* at p. 21.
35 *Id.* at p. 19.
36 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985).
37 *Lewis v. Epic Systems Corp.,* No. 15-2997, p. 18 (7th Cir. May 26, 2016).
38 *Morris v. Earnst & Young, LLP,* No. 13-16599 (9th Cir. August 22, 2016).
39 *Id.*
40 *Gaffers v. Kelley Services, Inc.,* 2:16-cv-10128 (E.D. Mich. August 24, 2016).
41 *Lewis v. Epic Systems Corp.,* On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 16-__ (September 2, 2016).
42 *Morris v. Earnst & Young, LLP,* On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 16-300 (September 8, 2016).
43 *National Labor Relations Board v. Murphy Oil USA, Inc. v. NLRB,* On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit No. 16-__ (September 9, 2016).
44 *See* 12 CFR 1040.
45 *See* Pub. L. 111-203 §§ 1028(d) and 1040.5(a).

Why We Should Be Doing Pre-Discovery Focus Groups

Paul Scoptur is a trial lawyer and internationally recognized expert on developing case and trial strategies. He is one of America's most sought after trial consultants and has done focus groups on hundreds of cases in the US and Canada.

Theoretically, an attorney should be able to figure out the proof needed for any case. We can talk to someone with a similar case, read case law, review jury instructions, review a chapter from a treatise, and before long **we know** the proof needed (or think that we know). It's called "lawyer proof." Despite our experience or confidence, three things occur during discovery that reduce or gut the value of our cases. Whether it's a mediator, opposing counsel, or judge, someone points out that jurors:

1. May not be as persuaded, angry, or sympathetic about our case as we expect;

2. Are likely to want proof that is not part of the evidence we have compiled and/or focused on during discovery; and

3. There are parts of the defendant's case that are more persuasive than we could have imagined, and we don't have rebuttals in place.

These arguments inevitably diminish the recovery of any settlement or verdict, and all of them directly or indirectly refer to the "juror proof" needed. "Juror Proof" is the term for the proof that ends up being important in deliberations even though its not part of the legal "duty-breach of duty-causation-damages" model commonly used by lawyers. It's the proof that drives the deliberations and decision making. *The first adjustment you must make to whatever process you use for discovery planning is to make sure that you know what the "jury proof" is. Easy to say, but how do you do it?*

Can't We More or Less Predict What Jurors Will Want to Know?

The short answer is "yes." What jurors want to know or may think about a case is not always a surprise. We often know that there are certain things about the case that are or may become problems in the case, but we forge ahead making the best of what we have. By the end of the proof, or when we reach a turning point in negotiations or at mediation, these points often resurface. Unfortunately, the problem we knew about or recognized earlier is still there and may have evolved so that:

1. it has evolved and is stronger than we thought;

2. other issues have surfaced that "only the client knows about";

3. a pre-trial focus group (co-counsel, consultant, mediator, opposing counsel, judge) has brought up issues we never anticipated as part of the case.

The underlying problem that makes this so difficult for us is confirmation bias. We are all affected by it, regardless of education level, social standing, or world view. We all "hear what we want to hear". We see what we want (or expect) to see. As Paul Simon sings in The Boxer, "a man hears what he wants to hear and disregards the rest." When there is contradictory testimony or evidence in a case, our first response is to minimize it by assuming our witness, expert, or other evidence tends to have more persuasive weight. When we look at a photograph, animation or document, we see what we want to see or need to see in it and minimize the rest. Often, we are simply blind to those other parts of the photo, animation, document, testimony, or facts. When dealing with emotionally charged issues or deeply entrenched beliefs, the effect of confirmation bias is at its strongest. In other words, the deeper you are into the case – the stronger the effect of confirmation bias, the more vested you become and the more you ignore the juror proof.

Common Mistakes Made When Conducting Focus Groups

Mistake # 1 – Waiting too long. Rather than getting feedback from others early in the case, we wait until written discovery is over, the parties have been deposed, the proof is all but closed and oh, by the way, trial is in two weeks.

Mistake # 2 – Priming the group with favorable facts for the plaintiff. We prime the focus group (often unintentionally), making sure they know how worthy and honest the plaintiffs are.

We just did a focus group recently where the lawyer asked for 15 minutes at the end to come in and address the group. Um, sorry, no. He wanted to win. The point of a focus group is not to win. It's to gather information, find the jury proof and find the rebuttals to your landmines.

Mistake # 3 – Priming Against the Defendant . We prime the focus group with information that the defendant has been (almost) grossly negligent and/or a threat to the community. When we do this, in essence, the focus group is directed to find for the plaintiff. Instead, the information needs to be presented in a neutral manner, so that juror proof can be found and we hear a discussion that makes a difference.

Mistake # 4 – Giving the group conclusions rather than facts. We give the focus group members conclusions (this was a negligent hire) rather than facts. We need to give them the facts and see what conclusions they come to. In a recent focus group, several construction developments failed. The developers were suing each other, claiming mismanagement, accounting irregularities and other reasons. It was 2007-2008. We could have told the focus group members that the failure was due to a severe downturn in the condo and development market, but we wanted to see if they would come to that conclusion on their own. If they do, it's more powerful and they are more likely to continue to hold that belief, no matter what. And they did. Telling them the conclusions is meaningless. They are generally rejected as lawyer talk. But once they conclude it on their own, they develop sponsorship in the answer and have a hard time being convinced otherwise.

Mistake # 5 – Minimizing Negative/Hostile Conclusions. Bad answers need to be embraced, not run from or ignored. We learn from bad answers. It's sort of like voir dire. Bad answers are good, as they teach us the landmines in our cases. Sometimes those "bad things" are fights we cannot win, but cannot ignore. The focus group may help us find if there is a case that can be won where the problem is irrelevant.

Mistake # 6 – Assuming that 1 focus group is enough to tell you whether to settle or try a case. One focus group is a snapshot, it's a photograph. It gives us a picture at that point of time with a limited group of people. Bring in a different group of people – the discussion might not be the same

Second, no single focus group can address all the issues in a case. When we try to test everything at once, the discussions and takeaways are never as robust as when the group has had a more focused presentation and discussion. Multiple focus groups need to be done. Why? We need to see if what we hear on any significant issue is validated by subsequent groups. If so, great. If not, back to the drawing board.

Mistake # 7 – Asking how much - and assuming the answer means anything. And it means little. Dollars in focus groups are non-predictive. The "awards" mean nothing. The first number suggested by someone in the group who is persuasive is likely to drive the deliberation, and in different group, it can be an entirely different discussion.

What is important is to discover is not how much a group of people think your case is worth, but what are the facts that will drive damage discussions in a deliberation. What fact or facts would cause you to give a lot of money? What fact or facts would cause you to give little money? It's finding out the facts that will affect damages, not the number itself. The number a group suggests is meaningless.

Getting the most out of a discovery focus group

1. Discover the "norms" – what do potential jurors expect of the plaintiffs and defendants, before and after the event? How does that affect what you do in discovery?

2. Do potential jurors find anything in the case that might make it important? They will look for meaning, a reason to send a message or make a change. What is the case about? Is it just about some lawyer and his client getting rich? Are you looking for the information that might make the case important to jurors?

3. What suspicions do they have?. Every piece of evidence (testimony, photos, or otherwise) that can be minimized by a juror's suspicion is potentially problematic. Although you think your proof is "solid" on a point, what might jurors think about it? How can you meet their needs with your proof? Testing your key "most persuasive" exhibits early and often should be a rule you adopt.

4. What do they want to know about the defendant and the plaintiff and why? Has the defendant done this before; has the plaintiff had problems before this; has the plaintiff ever been injured or made a claim before? A frightening example: in a failure to diagnose breast cancer case, what is the juror proof that has nothing to

do with our proof, but everything to do with the jury returning a verdict? Where was the husband? He's here asking for money, where was he when his wife's cancer was growing? Why didn't he insist on a second opinion? All of these items of juror proof may be answered in a case, but we may underestimate their importance to the jury being able to return a just verdict.

5. What rules do they come up with on their own or will be comfortable adopting? Having some rules we think are great isn't enough. If it doesn't seem fair, it often doesn't matter what the law is or even if a "rule" has been violated. The ideas of fairness discussed often tend to favor defendants, e.g. "if it wasn't foreseeable should we hold the defendant liable, it was just an accident."

6. Is there a message they would like to send?. Jurors don't naturally think about "compensation" or "making someone whole". They do think about and believe in punishing and sending a message, and the message a group of non-lawyers comes up with may be compelling compared to our own fabricated message.

7. What are the anger and disgust factors in the case? We need to find out what angers the jury, what disgusts the jury. Without anger or disgust, it's just another case.

Focus groups are one of the most important tools that we can use to help prepare our cases. Not using them is a missed opportunity. One of our favorite sayings is "You don't want to know what 12 people think about your case on the first day of trial." Do them early and do them often.

Focus groups are not something to do when you realize a case won't settle. If you really want to maximize your chances at a fair settlement, focus your case before discovery.

Paul Scoptur and Phillip Miller have written a book on focus groups, "Hitting the Bulls-Eye" published by AAJ Press.

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F.R.C.P. 25: Keeping Your Federal Case Alive Following the Death of a Litigant

When a plaintiff dies during ongoing federal litigation, the deceased party's attorney must act quickly to substitute the proper party and keep the plaintiff's claims alive. To successfully preserve the plaintiff's claim in federal court, the attorney must be aware of certain nuances associated with the Federal Rules of Civil Procedure ("F.R.C.P.") and Wisconsin law, as both federal and state law intersect throughout the substitution process.

Pursuant to F.R.C.P. 25:

> *If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.*

For starters, the 90-day deadline to file the motion of substitution does not begin until the suggestion of death is filed and served on all parties and certain non-parties. The suggestion of death must be served on all parties to the case in the manner provided in F.R.C.P. 5, and all required non-parties in the manner provided by F.R.C.P. 4. Rule 25 does set forth criteria for which non-parties must be served with the suggestion of death. However, case law provides guidelines for which non-parties must be served in order to trigger the 90-day substitution deadline. As explained by Justice Richard A. Posner of the United States Court of Appeals for the Seventh Circuit, "nonparties with a significant financial interest in the case, namely the decedent's successors (if his estate has been distributed) or personal representative (if it has not been), should certainly be served."

If the deceased individual previously named a personal representative of the estate, or there are successors with a significant financial interest in the case, then the 90-day deadline to file does not begin until these non-parties are served with the suggestion of death in the manner provided by Rule 4. Therefore, service on the deceased party's attorney is not sufficient to begin the 90-day deadline. As a practical matter, however, the attorney for the deceased plaintiff should not rely on non-service of these individuals and risk filing after the 90-day deadline. Rather, a prudent attorney should sort out any lingering issues with the estate as soon as possible so that he or she can file the motion for substitution in a timely manner.

Conversely, F.R.C.P. 25 does not require the suggestion of death to be served on the deceased plaintiff's successor or representative if that individual has not been named. In these cases, the 90-day deadline to file may begin running upon filing of the suggestion of death and service on the deceased party's attorney.

Regardless, it is imperative that the deceased plaintiff's attorney sort out any lingering issues with the estate as soon as possible, because the attorney must determine the proper party for substitution prior to filing the motion. If the successor or representative has not been named, or if there is confusion surrounding the estate, then the attorney should file a motion for an extension of time to file for substitution. The procedure for filing a motion for an extension is set forth in F.R.C.P. 6(b).

Assuming that the proper party is available for substitution, the attorney must next determine whether the plaintiff's claims survive the plaintiff's death. In other words, the attorney must confirm that the "claim is not extinguished." This analysis involves a mix of state and federal law because "[w]hether an action survives the death of a party must be determined by looking to the law, state or federal, under which the cause of action arose." Generally, state law governs this issue absent federal authority explicitly stating that the cause of action survives the plaintiff's death. For example, even if the plaintiff's claims are brought under Title VII or 42 U.S.C. § 1983, Wisconsin's survival statute governs whether these claims survive the plaintiff's death.

In pertinent part, Wisconsin's survival statute states as follows:

> In addition to the causes of action that survive at common law, all of the following also survive:
>
> 2. Causes of action for the recovery of personal property or the unlawful withholding or conversion of personal property
>
> 4. Causes of action for assault and battery.
>
> 5. Causes of action for false imprisonment.
>
> 6. Causes of action for invasion of privacy.
>
> 7. Causes of action for a violation of s. 968.31(2m) or other damage to the person

The circumstances of each case will determine whether the plaintiff's claims survive his death. Notably, Wis. Stat. § 895.01(1)(am)7 is a very broad provision, which covers claims that may not otherwise survive at common law and are not specifically mentioned in the survival statute. For example, the plaintiff's hypothetical Title VII and § 1983 claims survive under this provision. The violation of a party's civil rights "may fairly be characterized as injuries to the person and as such, under Wisconsin law, survive [the plaintiff's] death." Once the attorney determines that the claims survive the death of the plaintiff, he or she can begin the process of filing the appropriate pleadings.

Pursuant to F.R.C.P. 25(a)(1), the motion for substitution may be made "by any party or by the decedent's successor or representative." More specifically, in addition to any party to the case, the motion for substitution may be made by "the executor or administrator of the decedent's estate, or, if the estate has already been distributed to the heirs, by them." This statutory language is important to note because, upon the plaintiff's death, the attorney no longer has a client in the case. Therefore, the attorney cannot file the motion in his or her own name. Rather, the attorney must file the motion for substitution on behalf of the personal representative. The court will typically grant a timely motion for substitution if the accompanying affidavit: (1) names the proper substituting party, and (2) contains legal authority establishing that the claims survive the death of the plaintiff.

The prudent attorney must act quickly following the death of a plaintiff during federal litigation. First and foremost, the attorney must realize that he or she no longer has a client in the case – therefore, the attorney must determine the identity of the proper party for substitution. If the plaintiff unexpectedly died and did not prepare a formal will, the attorney may need to reach out to an experienced trust and estates attorney to sort out this issue. Second, the attorney must determine whether the pending claims survive the plaintiff's death. In most circumstances state law governs this issue. Fortunately, Wisconsin's survival statute contains very broad language that includes any claims involving "damage to the person." Therefore, if the deceased party's attorney quickly determines the identity of the proper party for substitution, the federal case can continue on behalf of the party's heirs or representatives.

ENDNOTES

F.R.C.P. 25(a)(1)

F.R.C.P. 25(a)(1)

Atkins v. City of Chicago, 547 F.3d 869, 871 (7th Cir. 2008) (citations omitted); Barlow v. Ground, 39 F.3d 231, 234 (9th Cir. 1994) (service of suggestion of death by mail on non-party estate insufficient to trigger 90-day filing period); Fariss v. Lynchburg Foundry, 769 F. 2d 958, 961 (4th Cir. 1985) (holding that service on decedent's counsel alone was inadequate to commence running of 90-day deadline when a personal representative had been appointed following the party's death).

Id. at 870–71.

See Id. at 873.

F.R.C.P. 25(a)(1)

F.R.C.P. 25(a)(1)

Schimpf v. Gerald, Inc., 52 F. Supp. 2d 1150, 1153 (E.D. Wis. 1998).

See Hutchinson on Behalf of Baker v. Spink, 126 F.3d 895, 898 (7th Cir. 1997)

Atkins v. City of Chicago, 547 F.3d 869, 873 (7th Cir. 2008)

Wis. Stat. § 895.01(1)(am)

See Bell v. City of Milwaukee, 498 F. Supp. 1339, 1342 (E.D. Wis. 1980)

Id.

F.R.C.P. 25(a)(1)

Atkins, 547 F.3d at 872.

Wis. Stat. § 895.01(1)(am)7

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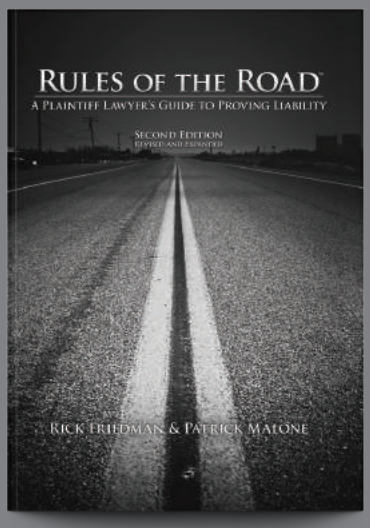

The Enhanced Injury Doctrine in Wisconsin:
An Overlooked and Underutilized way to Recover Damages in Cases where the Plaintiff is partially at Fault

Katie Christiansen is an associate attorney at Doar, Drill & Skow, S.C. She is a 2012 honors graduate of the University of Minnesota Law School, with a concentration in criminal justice. Katie's practice focuses on criminal defense and civil litigation. Katie was recently awarded the Wisconsin Law Journal's Up and Coming Lawyers Award.

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I. What is the Enhanced Injury Doctrine?

The Enhanced Injury Doctrine relates to the negligent failure to install, design, remove, use or maintain a safety device, the primary purpose of which is not to prevent an accident, or other injury causing event (hereinafter "the event"), but rather to minimize or prevent injuries when the event takes place.

The Doctrine creates tort liability for the "enhanced" injuries that are caused by the negligent failure to install, design, remove, use or maintain a safety device that could have prevented the enhanced injury.

II. A History of the Enhanced Injury Doctrine in Wisconsin

The Enhanced Injury Doctrine was first articulated in the Eighth Circuit's, Larsen v. General Motors Corporation. Larsen was a motor-vehicle accident case wherein the Plaintiff claimed his injuries were the result of the tortfeasor's negligence in causing the accident as well as the manufacturer's defective steering assembly in the Plaintiff's car. The Eighth Circuit found that the Plaintiff had articulated a cognizable legal claim against the manufacturer, even though the manufacturer did not cause the accident.

In 1975, the Wisconsin Supreme Court expressly adopted the Larsen rule, in a case where the Plaintiffs' enhanced injuries were sustained after a motor-vehicle accident when the gas tank in their vehicle ruptured and ignited.

III. Use of the Enhanced Injury Doctrine in Wisconsin

A. Defense use of the Doctrine as a Shield - Plaintiff's Negligence in Creating Own Injuries

The doctrine has often been used as a shield by the defense. Defendants assert the doctrine in cases in which a plaintiff's enhanced injuries are attributable to her own negligence. In Foley v. City of West Allis, the Plaintiff was found to be negligent in causing her own enhanced injuries by failing to wear a seat belt. The Foley court explained that in motor-vehicle cases in which a plaintiff fails to wear a seat belt, damages should be analyzed by separating the injuries into two separate events. The first event is the collision between the two vehicles, and the second event is when the plaintiff hits the vehicle's interior. Thus, when this defense is asserted, any injury incurred as a result of not wearing a seat belt will reduce the amount of damages recoverable by the plaintiff.

B. Plaintiff use of the Doctrine as a Sword – Products Liability

The Doctrine is commonly asserted by plaintiffs injured in motor-vehicle accidents or when operating equipment. In Farrell by Lehner v. John Deere Co., the Plaintiff was harvesting corn when his corn picker stopped running. To investigate, he placed his hand near the husking rolls. However, the picker started up again, pulling the Plaintiff's hand and arm into the picker and causing the Plaintiff severe injuries. The Court analyzed the causation issue in two separate parts: the initial entanglement of his hands, partially attributable to Plaintiff's negligence, and the enhanced injuries to his limbs, attributable to the manufacturer's failure to equip the corn picker with a stop device. The Enhanced Injury Doctrine allowed the Plaintiff to recover for his enhanced injuries, even though he was found more negligent than the manufacturer with regard to the initial injury-causing event.

C. Jury Instruction

Under Wis. JI-CIVIL 1723, the negligence causing the event is compared in order to allow, reduce or prevent recovery for the initial injuries caused by the event. Then, the negligence relating to the failure to install, design, remove, use, or maintain a safety device that causes enhanced injuries, are considered separate from the cause of the event itself.

Thus, where a jury finds:

1. Negligence in the cause of the accident
    a. Plaintiff 80%
    b. Defendant 20%

2. Negligent failure to install, design,

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remove, use or maintain a safety device
a. Defendant manufacturer 80%

The plaintiff will recover nothing in terms of the initial event, but will recover 80% of her enhanced injury damages.

However, where a jury finds:
1. Negligence in the cause of the accident
a. Plaintiff 20%
b. Defendant 80%

2. Negligent failure to install, design, remove, use or maintain a safety device
a. Defendant manufacturer 80%

The plaintiff will recover 80% of 20% + 80% = 96%.

IV. Logical Extensions in Application of the Enhanced Injury Doctrine

The Enhanced Injury Doctrine can logically extend to common law negligence cases. When analyzing a potential personal injury claim involving a client's negligence, consider whether it is possible to separate the accident into two events: 1) any negligence in bringing about the initial event, and 2) the incident causing your client "enhanced injuries" due to the negligence of some third party.

The following is a non-exhaustive list of factual scenarios where the Enhanced Injury Doctrine could be applied.

A. Premises Liability Cases

Imagine a plaintiff who was distracted, lost her balance, and fell down a stairwell. Further, that a construction company or landlord failed to properly install the stair railing. Indeed, the plaintiff has fallen, but instead of catching herself with the railing and suffering little to no injury, she tumbles to the bottom. Because of the construction company or landord's negligence, for her enhanced injuries. This is so regardless of the plaintiff's contributory negligence in becoming distracted and falling down in the first place.

B. Smoke Detector Case

Suppose tenant-plaintiff falls asleep with a lit cigarette, accidentally starting a fire. Unfortunately, landlord-defendant failed to replace the batteries in the smoke detector, resulting in failure to detect the fire.Tenant-plaintiff was negligent in starting the fire, but is not at fault for her significant enhanced injuries resulting from the smoke detector's failure to alert her of the fire. Thus, tenant-plaintiff could recover for her enhanced injuries from the landlord due to the failure of the smoke detector.

C. A New Take on Motor-Vehicle Accident Cases

Consider a plaintiff leaving the roadway and striking a utility pole that negligently existed in the clear zone along the road. Perhaps the accident was the fault of the plaintiff, but the cause of her enhanced injuries, was not. Here, the city, municipality, or construction company who installed the utility pole may be liable to plaintiff for her enhanced injuries.

D. Other Scenarios

1. A bullet proof vest does not prevent one from being shot, but is likely to prevent serious injury or death.

2. A line from a motorboat operator to a safety switch that disconnects the power from the motor if the operator is thrown from the boat does not prevent the operator from being thrown from the boat, but is likely to prevent serious injury or death to the operator and others.

3. A life jacket will not prevent falling into the water, but is likely to prevent serious injury or death when a fall occurs.

4. A carbon monoxide sensor does not prevent dangerous air quality, but is likely to prevent death.

5. Fall protection equipment and devices for those working at heights, such as construction workers and window washers, do not prevent the fall, but are likely to minimize or prevent serious injury or death.

V. Conclusion

The Enhanced Injury Doctrine recognizes that incidents resulting in serious injury or death are bound to occur, thus safety devices that are feasible, economical and do not impede function should be employed, and further, that the negligence related to the exclusion of these safety devices should not be precluded by the negligence of those at fault for the original event.

While the Enhanced Injury Doctrine has been applied as both a shield and a sword, its greatest potential for plaintiff's attorneys lies in its application to cases where plaintiff's contributory negligence to the initial injury causing event was significant and in cases where the defendant is uninsured or insolvent, but the enhanced injury defendant has sufficient financial resources from which plaintiff can recover.

Although this article does not represent a comprehensive overview of the Doctrine and its nuances, it will hopefully aid plaintiff's attorneys in conceptualizing the doctrine, and encourage attorneys to consider utilization of the Doctrine in a wider variety of contexts.

Endnotes

391 F.2d 495 (8th Cir. 1968).

Id. at 497.

Id. at 502.

Arbet v. Gussarson, 66 Wis. 2d 551, 553, 225 N.W.2d 431, 433 (1975).

113 Wis. 2d 475, 335 N.W.2d 824 (1983).

Id. at 483. This is known as the "seat belt defense".

Id. at 490.

Id. at 485; see also id. at 490 (explaining that a jury must first " . . . determine the causal negligence of each party at to the collision of the two cars . . ." then, " . . . reduce the amount of each plaintiff's damages from the liable defendant by the percentage of negligence attributed to the plaintiff for causing the collision . . ." then, " . . . determine whether the plaintiff's failure to use an available seat belt was negligence and a cause of injury, and if so what percentage of the total negligence causing the injury was due to the failure to wear the seat belt . . ." then, "reduce the plaintiff's damages . . . by the percentage of negligence attributed to the plaintiff . . . for failure to wear an available seat belt for causing the injury.").

However, the "seat belt defense" will only reduce Plaintiff's damages by a maximum of 15% under Wis. Stat § 347.48 (2m)(g). Further, because the plaintiff's failure to wear a seat belt is relevant only to the second event, a plaintiff's failure to wear a seat belt cannot be taken into account when determining contributory negligence of the first event. Foley, at 485.

In such cases, the plaintiff can recover from the manufacturer or retailer of the motor-vehicle or equipment if the design was a substantial factor in the causation of the enhanced injuries. Motor-vehicles: See Arbet, 66 Wis. 2d 551(1975); See Sumnicht v. Toyota Motor Sales, U.S.A Inc., 121 Wis. 2d 338, 360 N.W.2d 2 (1984); See Maskrey v. Volkswagenwerk Aktiengesellschaft, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985); Heavy Machinery: See Farrell, 151 Wis. 2d 45 (Ct. App. 1989) (corn picker); See Hansen v. New Holland N. Am., Inc., 215 Wis. 2d 655, 574 N.W.2d 250 (Ct. App. 1997) (hay baler); See Hansen by Llaurado v. Crown Controls Corp., 181 Wis. 2d 673, 512 N.W.2d 509 (Ct. App. 1993) review granted in part, decision vacated in part sub nom. Hansen v. Crown Controls Corp., 185 Wis. 2d 714, 519 N.W.2d 346 (1994) (forklift).

151 Wis. 2d 45, 443 N.W.2d 50 (Ct. App. 1989).

See id. at 55.

In 1994, the Wisconsin Jury Instruction Committee created Wisconsin Jury Instruction Wis. JI-CIVIL 1723, entitled "Enhanced Injuries." It includes a model special verdict form as well.

Representing negligence in regards to the initial event.

Representing negligent failure to install, design, remove, use or maintain a safety device.

Many signs along highways have break-off devices to utilize this same principle.

As opposed to a personal floatation device (PFD).

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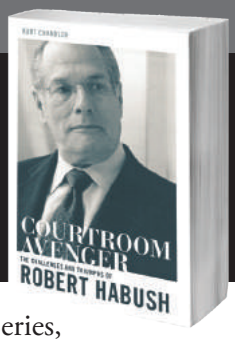
Courtroom Avenger: The Challenges and Triumphs of Robert Habush By Kurt Chandler



In this new addition to the acclaimed American Bar Association's Lawyer Biography Series, author Kurt Chandler paints a profile of prolific Wisconsin trial lawyer Robert Habush of Habush Habush & Rottier, based in Milwaukee. For over 50 years, Habush has represented the Davids of the world against Goliath interests.

His cases are the stuff of legend: Cases brought against General Motors, Chrysler, Firestone, Big Pharma, Big Tobacco. Claims made against doctors, motorists, manufacturers, and malefactors of every stripe. Juries swayed, judges convinced, judgments won, and settlements paid.

"When I wanted the very best lawyer to represent the people of Wisconsin in the largest piece of litigation in state history against the massive force of Big Tobacco, I chose Bob."

- Jim Doyle, Governor of Wisconsin, 2003-2011; Attorney General of Wisconsin, 1991-2003

"Courtroom Avenger is enthralling, the story of superstar lawyer Robert Habush, an iron-fisted, fearless, imaginative advocate with a big heart for his injured clients, with the determination to surmount every obstacle to assure they are compensated in the courts."

- Joan B. Claybrook, Past President of Public Citizen, former Administrator of the National Highway Traffic Safety Administration

"This is a man I would want standing next to me in any worthwhile fight for justice."

- Paul N. Luvera, Past President of the Inner Circle of Advocates, Member of the National Trial Lawyer's Hall of Fame

"It's a hundred year war," Habush says of his fighting instincts. "There's not going to be an armistice. There's not going to be a peace treaty. As long as I'm drawing breath I will get even, I will make them pay: the malpracticing doctors, the defective manufacturers, the companies who sell unsafe products. That's the way I am. There's no forgiveness in my heart. There's no turning the other cheek. There never was and there never will be."

"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. As a mother, reading Habush's story about how his daughter suffered irreparable damage from a vaccination as an infant was heart-wrenching. This horrible personal experience led him to become one of the most successful trial lawyers in U.S. legal history."

- Stacey E. Burke, book review in *Trial Magazine*

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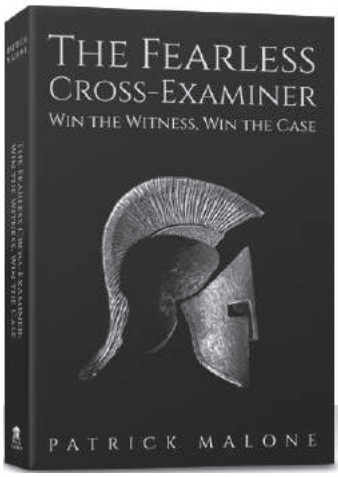
The Fearless Cross-Examiner: Win The Witness, Win The Case

By: Patrick Malone



In "The Fearless Cross-Examiner", legal stalwart, Patrick Malone, sets out to redefine the rules of cross-examination by exposing the reader to what he believes is a better way to approach, and handle cross. He posits that we must look at cross-examination as a way to build our cases, not simply as a way to tear down, or demolish a witness—which is the old school approach. Thus, the book begins with an introduction examining his "Ten Truths" of cross-examination, including Truth Number 2 "[m]uch of the received wisdom about cross-examinations—'don't ask one question too many', 'ask only leading questions,' and the like—is wrong, impossible to follow, and ill-focused," and Truth Number 5 that "[e]xcessive caution has ruined far more cross-examinations than excessive vigor." The author is quick to point out that these are "truths" -- not "commandments" -- because he believes that cross-examination cannot be distilled into a simple list of musts and never commandments.

The remainder of the book is well organized and broken down into five separate parts. Part I, entitled "You, the Cross-Examiner", focuses on the reader. In this section, the author challenges the reader to look into the mirror and undergo some introspection and analysis into his or her own core strengths and weed out self-destructive habits that may be holding each of us back from becoming effect cross-examiners. This part also examines stress and self-control and notes that jurors are not only paying attention to the content of the cross but also the context of the back-and-forth between the lawyer and the witness. Thus, the author addresses rules like staying polite, keeping your tone and volume even, not accusing the witness of lying; as well as axioms like "[y]ou can start nice and finish mean, but you can never start mean and finish nice."

The most interesting part of Part I—and perhaps the entire book—is Chapter 2 entitled "Freeing Yourself from the Ten Commandments of Cross." This chapter scrutinizes "the demons of cross-examination advice", (e.g. Be brief; Ask only leading questions; Don't allow the witness to explain; Don't ask one question too many, etc.) and makes note of what is dangerous in each of these commandments and then rewrites each in a manner that the author feels is more helpful. To borrow a word from the old Guinness Beer commercials, this chapter is "Brilliant!"

Part II, entitled "Building the Case with Cross-Examination", explores establishing and utilizing important liability Rules of the Road—and getting the witness to agree to these rules— when building your case. As one of the co-authors of "Rules of the Road: a Plaintiff Lawyer's Guide to Proving Liability," and "Winning Medical Malpractice Cases With the Rules of the Road Technique," the author provides a primer on these concepts and explains how the Rules will help you to build an effective cross. This part ends with a chapter on how to utilize learned treatises as an essential tool to your cross-examinations, offering useful excerpts from actual cross-examinations in the process.

A must read, for sure!

While Parts I and II focus on building your case, the author asserts that the demolition begins in Part III, entitled "Tearing Down the Witness." This part is the longest section of the book and thoroughly examines the basic "Witness Tear-Down Rules" that he introduced earlier in the book: lack of fit, ignorance, bias, and contradictions. The author dedicates a comprehensive chapter to each of these rules; also including a chapter on this topic cleverly entitled "Shooting It Out With The Hired-Gun Witness"—a chapter that systematically addresses why the old recipe of dealing with this type of one-sided expert—an expert who

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appears over-and-over again—does not work. The final chapter shows how to "polarize" this type of biased witness in such a way that he or she will either abandon their position and give you concessions or continue to maintain an extreme, non-credible position; either of which are favorable.

Part IV, entitled "Problems and Solutions", addresses special issues pertinent to cross-examination; issues such as evidentiary rules every cross-examiner must know (e.g. the rule of completeness); calling the defendant adversely; technique problems that erode the quality of cross-examination (e.g. wandering, dangling, hastening, and quarreling and quibbling); and different tactics one can utilize when dealing with a runaway witness.

Part V, entitled "Bringing It All Home" not only pulls together the lessons of the book but also provides a useful checklist when confronting a certain type of witnesses we all face in virtually every single one of our injury cases—the defense medical examiner. The author provides an outline of questions for the out-of-date expert who exaggerates his or her credentials; for the expert who testifies over-and-over again for certain firms or the defense in general; and for the expert who continually contradicts the treating doctor. The book concludes with a couple of appendices on truisms and rules, and an additional brief tutorial on how to write better rules for your cross-examination.

A must read, for sure!

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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.

Edited by David McCormick, The Previant Law Firm, S.C., Milwaukee; and Jim Rogers, Government Affairs Director, Wisconsin Association for Justice, Madison

Jury Verdict - Single Car Crash

This case arises from a single vehicle crash that occurred on February 10, 2012. At that time, the Defendant Peter J. Suelflow was driving his fiancé LouAnn Vega to breakfast from West Bend to Saukville in a snowstorm. During the drive, Mr. Suelflow lost control of the vehicle just east of Newburg. The vehicle went down an embankment and struck a grove of trees. Both parties had to be extracted rom the vehicle, and Ms. Vega was seriously injured. She underwent extensive medical treatment for her knee, neck and upper back.

Ms. Vega subsequently married Mr. Suelflow. Due to her marriage and a change in insurance, certain medical procedures were delayed. Ms. Suelflow had a lumbar discectomy and fusion in November of 2013. She underwent a separate total knee replacement in April 2014. Unfortunately, tragedy struck in May of 2014, as Ms. Suelflow was recuperating from her injuries. Ms. Suelflow awoke in the middle of the night and accidentally took her husband's diabetes medicine rather than her own pain pills. She was admitted to a hospital in a glycemic coma, where eventually she passed away.

LouAnn had extensive pre-existing conditions. She had been on narcotic pain medication for lower back pain for many years prior to the crash. This was described in her medical records as chronic. She also had a prior left knee surgery to repair her patella which had been injured in a 1977 car crash. That surgery was not successful, leaving her with an unstable knee.

The defendants obtained a defense medical review from Dr. Marc Novom, a neurologist. Dr. Novom opined that Ms. Suelflow sustained minor neck, left shoulder and low back injuries which resolved in approximately 3 months. He argued that her significant injuries to her low back and knee were pre-existing and that surgery was inevitable due to her prior conditions.

At trial, the driver Peter Suelflow testified he came upon a patch of unseen ice causing him to lose control. Fortunately he had not mentioned ice at his deposition, nor in his answers to interrogatories. Nevertheless, the defense was given the management & control: emergency and skidding instructions. Plaintiff's treaters were Dr. Thomas Doers, who related the back surgery to her injuries from the crash, and Dr. Joseph Davies who testified she injured her knee in the crash, but was unable to say that injury was a substantial factor in necessitating the knee surgery.

The jury returned a favorable verdict for the plaintiff.

Estate of Suelflow vs. Suelflow and American Family Insurance. Ozaukee County case no. 15-CV-42. That Plaintiff was represented by WAJ member Ryan J. Hetzel, Hetzel Law Office, LLC of West Bend, WI. The defendants were represented by attorney James T. Murray, Peterson, Johnson & Murray, S.C. Milwaukee, WI.

Mediation Settlement - Dog Bite Causes Serious Injury

Plaintiff Gabriele Capps was bitten by a dog that was loose on the highway. She had stopped to help catch the dog and was bitten when she reached for his collar. She underwent multiple surgeries on her hand and ultimately had her 5th finger amputated.

The dog was a rescue dog from Tennessee and was ultimately put down. Double damages did not apply.

The case settled at mediation.

Gabriele Capps, et al. v. Steven J. Alolor, et al., Waukesha County case no. 14-CV-2157, Hon. Maria Lazar, presiding. The Plaintiff was represented by WAJ members Timothy Aiken, Paul Scoptur and James Scoptur, Aiken & Scoptur, S.C., Milwaukee, WI. Defendants were represented by Karri Johnson of Emile Banks & Associates, LLC, Milwaukee, WI.

Mediation Settlement - Loading Dock Injury

The plaintiff was a warehouse laborer. At the time of the injury he was securing a load in the back of the defendant's. While the plaintiff was still in the back of the trailer, the defendant truck driver prematurely left the loading dock, causing the plaintiff to fall out of the back of the trailer onto the ground injuring his back. The back injury eventually required surgery.

The defendant truck driver claimed that a co-employee of the plaintiff gave him a signal to leave the loading dock. The plaintiff's co-worker denied he gave a signal to leave but rather signaled the driver to come inside the warehouse and sign the packing slip. Plaintiff testified that the defendant truck driver was supposed to check his cargo and sign the packing slip in the warehouse before leaving the loading dock.

Plaintiff claimed that the defendant semi-truck driver was negligent for leaving the loading dock prematurely, and that the defendant trucking company was also negligent for failing to properly train the defendant truck driver. Defendant truck driver and the defendants trucking company denied these claims.

In the discovery phase, the court ruled on plaintiff's motion to compel of other instances of the defendant trucking company prematurely leaving loading docks and ordered production of such materials.

The parties settled at mediation for a confidential amount.

Sandovol v. Bridge Terminal Transport, Inc., Maersk Trucking Holdings, Inc., et al., E.D. Wis., case No. 14-CV-639. Representing the plaintiff were WAJ members Thadd J. Llaurado and Keith R. Stachowiak of Murphy & Prachthauser, S.C., Milwaukee, WI. Representing the defendants was Donald W. Devitt of Scopelitis, Garvin, Light, Hanson & Feary, P.C., Chicago, IL.

Mediation Settlement - Products Liability Claim

Decedent was killed servicing a scrap shear machine manufactured by defendant Harris Waste Management Group, Inc. at decedent's place of employment, Sadoff Iron & Metal in Fond du Lac, WI. The decedent died of traumatic asphyxia when a 10,000 pound clamp unexpectedly came down onto him and crushed him while he was servicing the machine. The decedent's co-worker had forgotten to insert safety pins into the side of the scrap shear so as to prevent the clamp from coming down into the area where the decedent was working.

Decedent's parents brought claims in strict liability and negligence against the manufacturer of the scrap shear, Harris, claiming that the subject scrap shear was defective and unreasonably dangerous because the scrap shear design relied on the memory of a worker to install safety equipment rather than having the safety pins automatically set in place.

Plaintiffs also claimed there were safer alternative designs which would have reduced or minimized the hazard of the clamp coming down inadvertently onto a worker as well as the hazard of relying on the memory of workers to install a piece of safety equipment. Defendant Harris denied the plaintiffs' claims and claimed that the decedent's death was a result of employer negligence.

The parties settled for a confidential amount at mediation.

Jeffrey Lehner, Individually and as the Personal Representative of the Estate of Daniel V. Lehner, et al., v. Harris Waste Management Group, Inc., et al., Fond du Lac County case No. 14-CV-158, Hon. Richard J. Nuss, presiding. Plaintiff was represented by WAJ Members Thadd J. Llaurado and Michelle Hockers of Murphy & Prachthauser, S.C., Milwaukee, WI. Defendant was represented by Mr. Raymond D. Jamieson and Mr. Eric Matzke of Quarles & Brady, Milwaukee, WI.

Mediation Settlement - Multi-Car Crash in Texas

This claim arises out of a two vehicle collision involving a contributing non-contact vehicle that occurred on April 25, 2013, on State Highway 361 in Port Aransas, Texas. At the time of the collision, Dennis (driver) and Betty (passenger) Haskins were traveling south on Highway 361 in their 1996 Chevrolet G Series van. As they crossed the Access Road 1 intersection, their vehicle was struck by a northbound Dodge pickup truck driven by Gordon Causey. Just seconds before the impact, Mr. Causey had been forced to take evasive action to avoid colliding with a northbound semi-tractor trailer that was owned by Auyon Trucking and operated by Jessica Avila. Unfortunately for the Haskins, the evasive maneuver Mr. Causey chose was to veer to the left, directly into the path of their oncoming vehicle. The Haskins' vehicle was lawfully within its southbound lane of travel at the time of impact.

The movement of the Causey vehicle was so sudden and unexpected that prior to impact Mr. Haskins had no chance to take evasive action of his own.

Plaintiffs had many injuries stemming from the crash. Both Mr. and Mrs. Haskins suffered permanent injuries as a result of the crash. Past medical expenses for Dennis Haskins totaled $657,844.35. Betty Haskins' past medicals totaled $723,613.53.

Plaintiffs argued Ms. Avila was attempting an improper turn, causing Mr. Causey to take evasive action to avoid a crash. Causey's evasive action led him to cross the centerline and strike the Haskins vehicle.

The cased settled at mediation with Chuck Stierman.

The plaintiffs were represented by WAJ member Ralph J. Tease, Jr., Habush Habush & Rottier, Green Bay, WI. Defendants were represented by Larry Goldman, Goldman & Associates, PLLC, San Antonio, TX.

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David Prosser was appointed to the Wisconsin Supreme Court in 1998 by Governor Tommy Thompson. He had previously served 18 years in the State Assembly and in various positions at all levels of government. He retired from the Wisconsin Supreme Court, effective July 31, 2016.

Reining in Governmental Immunity

By Justice David T. Prosser, Jr.

Eighteen years on the Supreme Court is bound to produce of a flood of reflections on Wisconsin law. I appreciate the Association's invitation to share some of my reflections in the wake of my recent retirement.

My foremost thought is that the struggle to rein in governmental immunity must continue.

As a lifelong government employee, I clearly identify with public service and greatly value the work of state and local governments. People can have legitimate disagreements about the scope of government, and healthy disagreements about its means and ends. Ultimately, however, most people want to respect their government – in all branches at all levels – and most people would like their government to work well.

Some governmental immunity is necessary for government to function efficiently. Government employees are constantly called upon to make decisions. They should not be paralyzed by fear that they will be sued for every decision that goes awry. Thus, some limitations on tort liability and tort litigation are reasonable.

Too often, however, governmental immunity has shielded state and local governments from liability for negligence or deliberate decisions that have caused real injury for which non-government defendants would be held responsible.

Uncompensated injury from governmental action can lead to grievous personal hardships and resentment about the unfairness of the judicial system. It can facilitate carelessness and indifference within government. It can undermine confidence and support from the public at large.

Governmental decisions may pull the rug out from under people who have relied on previous government representations. And governmental negligence often hits victims at random without warning.

There ought to be a very compelling reason why government should not be accountable when it causes serious injury to people. It is hard to defend the proposition that random victims of governmental negligence simply have to "take one" for the city…or county…or state.

It is also hard to explain to private individuals and small businesses that they must be held responsible for the same conduct for which government is immune.

My first experience with governmental immunity came in early 1999 when the court reviewed a case involving multiple students who were nearly crushed to death at Camp Randall Stadium when the crowd rushed the field after a Wisconsin victory over Michigan.[i] The court attempted to apply the various doctrines it had developed after it abrogated governmental immunity in *Holytz v. City of Milwaukee* in 1962.[ii] The court split 3-3, thereby affirming the Court of Appeals' decision that the plaintiffs could not proceed.[iii] Because the case was dismissed I didn't realize then how far the court had backtracked on the original, inspirational, *Holytz* decision.

This became obvious in subsequent cases. Over time, the court had effectively restored governmental immunity by creating such narrow exceptions to immunity that recovery was extremely difficult.

In the ensuing years, I wrote separately at least three times, in *Willow Creek Ranch v Town of Shelby* (2000)[iv] , *Scott v. Savers Property and Casualty Ins. Co.* (2003)[v], and *Umansky v. ABC Ins. Co.* (2009)[vi] – imploring the court to revisit and revise its restrictive precedent.

In my view, real progress has been made in such cases as *Umansky, Pries v. McMillon* (2010)[vii], and *Legue v. City of Racine* (2014).[viii] But these cases do not represent a sea change in Wisconsin law. They represent mostly a broadening of "ministerial duty."

The court has not systematically changed its doctrine on when state and local governments should be held liable in tort and when they should be immune. If and when the court undertakes this task, it will do so without the two most consistent champions of reform – Justice N. Patrick Crooks and this writer. Consequently, the Wisconsin Association for Justice must think long and hard about how best to persuade the court that the recent trend must continue, with an enduring rationale.

The Association should also ask the legislature to rethink Wis. Stat. § 893.82(5), which requires service of notice of claims on the Attorney General by certified mail. *In Sorensen v. Batchelder* (2016) [ix], the Supreme Court affirmed the dismissal of a valid claim of negligence against a driver who was a state employee because the victim's notice of claim was mistakenly made by

personal service.

I must confess that I voted with the majority to dismiss the claim. The statute was not ambiguous and not unconstitutional. But the resulting dismissal, when the State had ample notice of the claim, was indisputably unfair to the victim.

The statute should be modified to allow for substantial compliance, so long as the government is not disadvantaged.

Government should not be permitted to injure its citizens and then escape responsibility by resorting to picayune technicalities…and immunity so broad that it lacks justification.

Endnotes

[i] Eneman v. Richter, 224 Wis.2d 258, 589 N.W.2d 414 (1999).

[ii] 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[iii] See note 1, supra. Justices Donald W. Steinmetz, William A. Bablitch, and Jon P. Wilcox voted to affirm. Justices Ann Walsh Bradley, N. Patrick Crooks, and David T. Prosser voted to reverse. Chief Justice Shirley S. Abrahamson did not participate.

[iv] 2000 WI 56, ¶¶ 59-172, 235 Wis.2d 409, 611 N.W.2d 693 (Prosser, J., dissenting).

[v] 2003 WI 60, ¶¶ 75-82, 262 Wis. 2d 127, 663 N.W.2d 715 (Prosser, J., dissenting).

[vi] 2009 WI 82, ¶¶ 37-81, 319 Wis. 2d 622, 769 N.W.2d 1 (Prosser, J., concurring).

[vii] 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648.

[viii] 2014 WI 92, 357 Wis. 2d 250, 849 N.W.2d 837.

[ix] 2016 WI 34, 368 Wis. 2d 140, 885 N.W.362.

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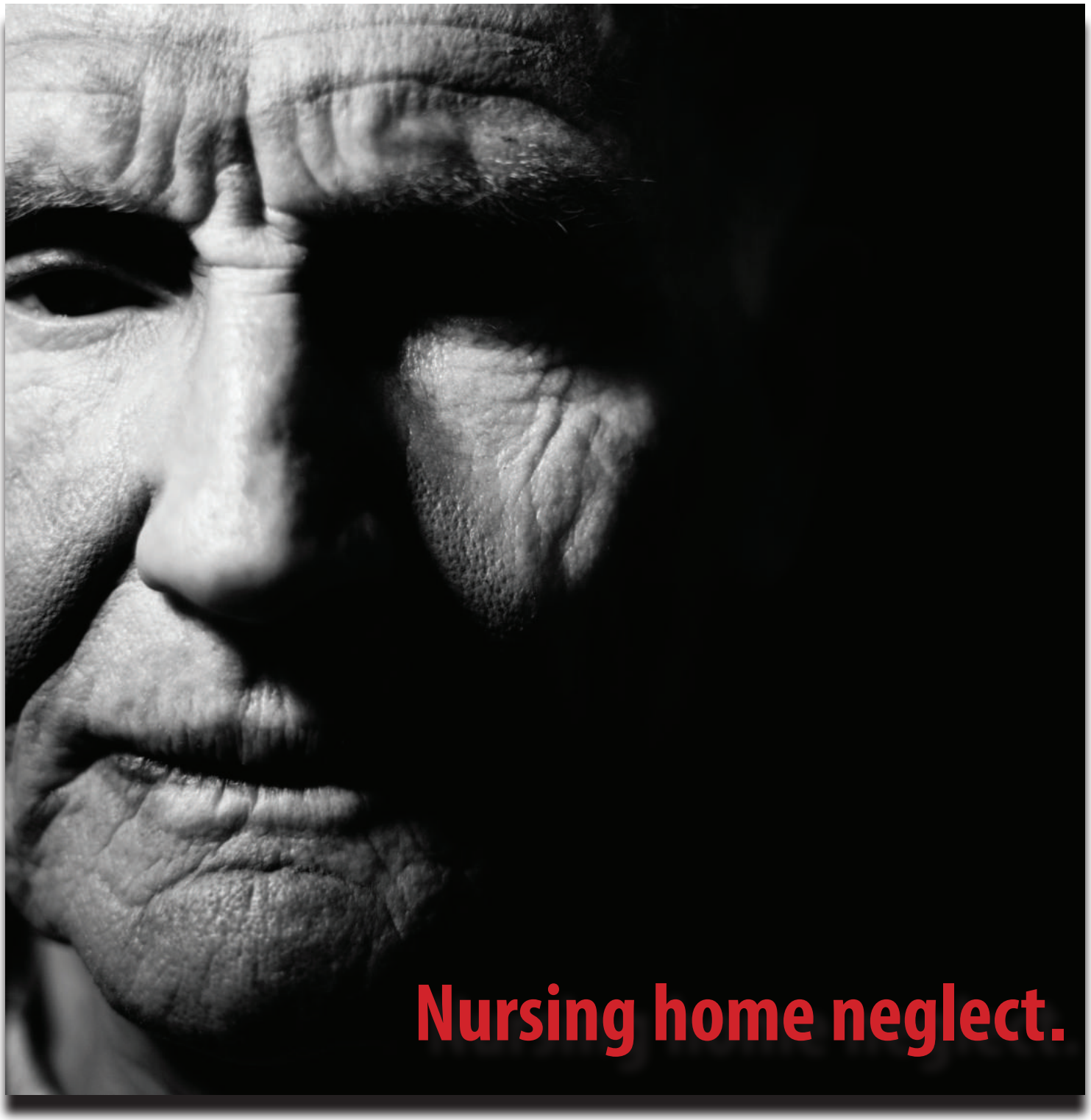

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