

WISCONSIN CIVIL TRIAL JOURNAL

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DRI State and Local
Defense Organization
Diversity Award!**



**Wisconsin
Defense Counsel**

Defending Individuals And Businesses In Civil Litigation

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JOURNAL POLICY

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

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

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WDC: The Voice of the Wisconsin Defense Bar

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

WDC Mission, Vision, and Values

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

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

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

WDC Benefits of Membership

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

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

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

... and so much more!



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- > Regulatory-related Investigations including:
 - Foreign Corrupt Practices and UK Bribery Acts
 - Whistleblower Investigations
- > Financial Institutional Bonds

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With more than 40 offices on 5 continents - and extensive language capabilities, our exceptional dedication and uniquely qualified professionals are the hallmarks of our firm.

For more information, please contact any one of our offices or visit us at mdd.com.



President's Message: Mentoring the Next Generation of Trial Lawyers

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

I started this journey quite some time ago. As a very young associate, I joined the Civil Trial Counsel of Wisconsin (CTCW), the predecessor to the Wisconsin Defense Counsel. At that time, all I cared about was trying a case. Several of my cases that had been slotted for trial managed to settle at the proverbial 11th hour, leaving me more than a bit disappointed. How could I be a trial attorney without any trial experience? Despite my desire to try cases, as time went on, I started to ask myself a more fundamental question: How could I be a trial lawyer if I had no idea how to actually try a case? Fortunately, CTCW helped to solve that problem. CTCW put together a program entitled “Defense on the Offense,” which was designed to teach newer attorneys the skills they would need to successfully try a case. The program was taught by experienced defense attorneys, and I found the program to be incredibly helpful in decreasing the grade of my learning curve.

In terms of the benefits that I enjoyed from being a member of CTCW, participating in “Defense on the Offense” was just the start. This program drew me in, and from there I was exposed to all the incredible opportunities the organization had to offer. I attended the seminars and continued to learn from others in the organization and at some point, instead of just attending the seminars I began contributing to the seminars, serving as a speaker and eventually a sponsor. Similarly, while I always found the articles published in the CTCW Journal beneficial to my practice, eventually I started writing articles for publication.

With everything it had to offer, CTCW helped me to become more knowledgeable about the law, more confident in the skills needed to be a successful trial attorney, and continually challenged me to think critically about how to apply the law for the benefit of my clients. As if all the legal education and professional development support was not enough, along the way I also had the good fortune to develop an extensive network of colleagues and friends through CTCW. As CTCW grew and expanded to become WDC, so did the number of members and available benefits. WDC is an incredibly vibrant organization.

A few years back, Past President Andrew Hebl invited me to become the program chair for WDC, which set me on the path to my current role as WDC President. As my presidential term came ever closer to commencing, I reached out to Jenni Kilpatrick for some sage advice as to what I was actually supposed to do as President. Jenni had the answers, as she always does, and she told me to pick a project and let that project be the focus of my service.

As I considered what that project should be, I thought about what CTCW and WDC did for me as I made my way from “wet behind the ears” to where I am today. I thought about what could be done to help the next generation of young attorneys succeed in this profession we have all chosen. I realized in this age of mediation and even COVID-delays, the younger attorneys who belong to our organization have not had as many chances to try cases as those of us who have been around for a while. For me, trying cases really is the most fun you can have as



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

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an attorney. Not only does the younger generation not have the same opportunities to try cases, they also generally do not receive the training they need to succeed when they do finally get “to court.” As all this ruminates in my mind, I realized the best way I could serve our organization would be to help our young attorney members learn the skills that they will need to succeed as trial lawyers. It is my hope that this training will help connect the younger generation with WDC while also allowing WDC to ingratiate all its benefits and offerings on this next generation of extraordinary lawyers, continuing to make WDC relevant, robust, and rewarding.

With the help of Nicole Radler, Charles Polk, Andrew Hebl, and Patricia Putney, WDC put together a litigation skills training session during the April 2023 Spring Conference. Participants were provided with materials from an actual case that was tried to verdict. Yes, the case was mine and no, it did not turn out as I hoped it would.

During the skills training session, time was spent educating participants on how to take the deposition of an opposition expert. Then, the participants broke into small groups where they practiced cross-examining the plaintiff’s expert witness and were provided with instant feedback and suggestions. The feedback we got after this session was positive and I will spend the rest of my time as President doing as much as I can to provide more opportunities like this one.

While this project is important to me, it will never come to fruition or be a success with only

my efforts. This is a group project, and the group is WDC. WDC needs all your help to make this endeavor a successful reality. We need experienced attorneys to lend their time. We need our senior members to invest in their younger associates and send them to these programs. We need your support to provide the facilities to accommodate these programs. With your involvement, we can help train the next generation of attorneys to provide not only high-quality legal services that our clients expect, but to successfully defend truth and justice in the courtroom. Please join WDC in making these programs successful. If you have any suggestions on how to make these programs a valuable reality, email me or better yet, pick up the phone and give me a call.

Author Biography:

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

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



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2023 WDC Winter Committee Awards

The WDC Winter Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders. Congratulations to the following award recipients who will be recognized during the WDC 2023 Winter Conference on December 1, 2023!



Insurance Law Committee Award: Erik Gustafson

Congratulations to Erik Gustafson for being selected by the Insurance Law Committee and the Awards Committee for the 2023 Insurance Law Committee Award! Erik is an associate in the Milwaukee office of Borgelt, Powell, Peterson & Frauen, S.C. His practice is entirely devoted to representing Wisconsin insurance companies, with his practice focused on first-party property and third-party liability insurance coverage. Erik earned his B.A., *summa cum laude*, from Creighton University in 2014, and his J.D., *magna cum laude*, from Marquette University Law School in 2017. Before joining Borgelt, Powell, Peterson & Frauen, S.C., Erik clerked for Justice Michael J. Gableman of the Wisconsin Supreme Court during the 2017-2018 court term.



Employment Law Committee Award: Elizabeth Pearce

Congratulations to Elizabeth Pearce for being selected by the Employment Law Committee and the Awards Committee for the 2023 Employment Law Committee Award! Elizabeth is a Senior Claims Attorney at SECURA Insurance. She earned her law degree from Marquette University Law School in 2007. Elizabeth is the former Chair of the Employment Law Committee. In 2021, Elizabeth helped put together a special employment law issue of the Wisconsin Civil Trial Journal dedicated to providing an overview of employment law topics and trends.



Litigation Skills Committee Award Recipient: Monte E. Weiss

Congratulations to Monte Weiss for being selected by the Litigation Skills Committee and the Awards Committee for the 2023 Litigation Skills Committee Award! Monte is a longstanding member of WDC, a frequent contributor to the Journal, has served on several Committees, and is the current President of WDC. Monte earned his J.D. from Case Western Reserve University School of Law in 1991. He practices primarily insurance defense at Weiss Law Office in Mequon.

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Get Involved by Joining a WDC Committee (or Two!) - Help Us Help You!

by: Heather L. Nelson, Everson, Whitney, Everson & Brehm, S.C.

There is no doubt that WDC membership has many benefits – great CLE and excellent networking are at the top. But you can ramp up your WDC experience and make our organization even more robust by participating in one or more of our committees.

“But I don’t have time.” “I’m already overcommitted.” Trust me, I hear you.

Our committees are not about needless meetings and “make work.” Each of them advances our organization and brings value to its members. WDC is at the heart of who we are and who we want to be as civil defense attorneys. Every effort by each one of us to improve our CLE programming, the content of our Journal, and to advance our mission makes a huge difference!

Committee involvement gives you the chance to keep your finger on the pulse of a particular practice area or issue. It can lead to wonderful growth opportunities, including connecting with fellow WDC members who have similar interests, chairing a committee, authoring Journal articles, and presenting CLE topics at our conferences.

Check out our list of committees below. Email info@wdc-online.org with any questions or to sign up! Also, be sure to follow WDC on its social media platforms to stay connected and informed!

Amicus Curiae Committee

Chair: Brian Anderson, Everson, Whitney, Everson & Brehm, S.C., Green Bay

The Amicus Curiae Committee works to assist members with supporting appeals in the Court of Appeals and Supreme Court of Wisconsin. In cases that have significance to our members and those whom they represent, the Amicus Committee will file a non-party brief to advance those efforts to improve Wisconsin case law in furtherance of the mission and goals of the WDC. Members are encouraged to contact the Amicus Committee before an appeal is filed to ensure enough time is available to recruit volunteer members to draft an amicus brief and learn about the case from members.

Diversity, Equity, & Inclusion

Chair: Morgan Stippel, Bell, Moore & Richter, S.C., Madison

The WDC Diversity, Equity, & Inclusion Committee is dedicated to promoting a culture that welcomes differences, promotes equality, and engenders respect. We continue to recruit, mentor, and promote talented lawyers and businesspeople with diverse backgrounds and experiences because we recognize that a diverse team makes us stronger and more effective in providing Wisconsin with proper representation and an equitable civil justice system. Our members do not discriminate based on race, gender, religion, sexual orientation, or disability, and are instead dedicated to helping and educating all who inhabit the communities we have the privilege of serving. The Committee meets

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December 2022

on a bi-monthly basis to discuss and educate one another on the diversity, equity, & inclusion issues affecting the legal profession and the steps we can take to promote diversity, equity, & inclusion efforts in our respective workplaces.

Employment Law Committee

Chair: Storm Larson, Boardman & Clark, LLP, Madison

The Employment Law Committee seeks to engage members with employment law topics and issues relevant to their practice. Employment law principles can arise unexpectedly in insurance coverage and merits defenses, and so a good working knowledge of these issues creates a more rounded defense mindset. The Committee is dedicated to educating and fostering community among WDC members to show how exciting, interesting, but more importantly—relevant—employment law is to defense practice.

Insurance Law Committee

Co-Chair: Mollie Kugler, von Briesen & Roper, S.C., Milwaukee

Co-Chair: Joshua Cronin, von Briesen & Roper, S.C., Milwaukee

The Insurance Law Committee brings together practitioners doing insurance coverage work in Wisconsin and strives to educate judges and other attorneys on standard and emerging topics. We hold brief Zoom meetings on a monthly basis, put together the yearly “We’ve Got You Covered” seminar with the State Bar, contribute articles to the WDC Journal, and try to get together socially at least once a year.

Law School Committee

Co-Chair: John Pinzl, von Briesen & Roper, S.C., Madison

Co-Chair: Monte Weiss, Weiss Law Office, S.C., Mequon

The Law School Committee’s goal is instituting programming at Marquette Law School and University of Wisconsin Law School to allow

students exposure to litigation, specifically insurance defense work. The Committee’s activities include developing relationships and coordinating with faculty from each law school to develop presentation opportunities on various topics of interest to students. The ultimate goal of the Committee is to increase law students’ exposure to the practice through educational programming and networking with members of the Wisconsin insurance defense bar.

Litigation Skills Committee

Chair: Andrew Hebl, Boardman & Clark, LLP, Madison

The Litigation Skills Committee focuses on providing opportunities to WDC members to improve their litigation skills and trial practice abilities. The Committee offers multiple sessions per year, both at WDC conferences and through stand-alone events, to teach various aspects of the litigation process and discuss trial practice techniques. The Committee fully understands that a key benefit of WDC membership is getting to learn from some of the best litigators and trial attorneys in Wisconsin, and is dedicated to providing that value to our members through its activities and offerings.

Membership Committee

Chair: John Shull, Klinner, Kramer, Shull, LLP, Wausau

Vice-Chair: Megan McKenzie, American Family Insurance, Madison

The Membership Committee is dedicated to growing our membership and to ensuring that our existing members’ interests are properly considered. Its most recent undertaking was an amendment to our bylaws to set forth differing classes of members and delineate the rights afforded to those classes, which is dependent upon the amount of time dedicated to the practice of civil defense.

Women in the Law Committee

Chair: Grace Kulkoski, Wisconsin Mutual Insurance, Madison

Vice-Chair: Megan McKenzie, American Family Insurance, Madison

The Women in the Law Committee provides an opportunity for members to form and strengthen professional connections and raise awareness about issues that are specific to women lawyers. The Committee is very active, and works on philanthropic activities, social events, and is often a source of presentations for WDC's conferences. There is room for all in this Committee, and we welcome any level of participation.

Young Lawyers Committee

Chair: Charles Polk, III, Amundsen Davis, LLC, Milwaukee

The Young Lawyers Committee has been very active both with its spirited and well-attended social gatherings and in developing CLE – most recently presenting well-received panel presentations at conferences highlighting practice issues facing younger attorneys (and specifically how our experienced attorneys and younger attorneys can benefit from each other and seeing issues from different perspectives).

Awards Committee

Chair: Chris Bandt, Nash, Spindler, Grimstad & McCracken, LLP, Manitowoc

The goal of the Awards Committee is to encourage committee involvement with the introduction of our committee awards and to recognize WDC members who have had a positive impact on the legal community and the defense bar/WDC. We have periodic meetings (phone/zoom/email) throughout the year to discuss and approve award recipients.

Wisconsin Civil Jury Instructions Committee

Representative: Amy Freiman, Hills Legal Group, Ltd., Waukesha

The Civil Jury Instructions Committee receives periodic updates from the Wisconsin Civil Jury Instructions Committee of the Wisconsin Judicial Conference on potential amendments to existing jury instructions or the creation of new jury instructions. If there are specific case opinions, topics, or concerns the Wisconsin Defense Counsel wants the Wisconsin Civil Jury Instructions Committee of the Wisconsin Judicial Conference to consider, we work with them to review those matters.

Website and Social Media Committee

Chair: William Brookely, Cross Jenks Mercer & Maffei, LLP, Baraboo

The Website and Social Media Committee regularly updates WDC members on the latest developments of relevant case law. The Committee also strives to expand the organization's social media footprint by highlighting the organization's services on a variety of social media platforms. We hope to continue to highlight the great work our members are doing within their local communities, so please tag us in your law firm's social media posts.

Author Biography:

Heather Nelson is a Shareholder at The Everson Law Firm in Green Bay. She is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back to her Green Bay roots. Her practice areas include motor vehicle accidents, premises liability, wrongful death, and products liability.



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How to Approach Cases Involving Plaintiffs Whose Ongoing Pain Complaints Are Being Caused by Unrelated Conditions

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

I. Introduction

At the 2023 WDC Summer Conference, I had the pleasure of presenting with Dr. Anne Eglash, a Family Practice physician from UW Health. The topic of the presentation was, *“My Whole Body Still Hurts... and it must be from that rear-ender 4 years ago!” – Or is it? A Candid Discussion with a Primary Care Doctor About Potential Physical and Mental Contributors to Ongoing Pain Complaints.*” We discussed the many underlying health concerns that can contribute to ongoing pain complaints in a patient – including plaintiffs pursuing personal injury cases who claim that *all* their symptoms are related to the accident you are defending, even when your strong hunch is that the symptoms complained of are unrelated to said accident or are going on for *way longer* than they should.

If you have practiced in insurance defense for any sustained length of time, you likely have encountered the “everything hurts” plaintiff, the “pain from head to toe” plaintiff, and the clearly depressed plaintiff with an obvious flat affect -- who refuses to admit that they are depressed. You have also likely seen patients undergo years of treatment for pain following a low impact rear-end accident (with barely a scratch, or no damage at all, to the vehicle), which anecdotally often seems to occur in the middle-aged (and frequently female) deconditioned plaintiff. The topics discussed at the conference included the prevalence of depression, anxiety, stress, substance abuse, hormonal issues (including perimenopause and menopause, which combined can span for *two decades* or more), insomnia, arthritis, degenerative disc disease,

fibromyalgia and other conditions, which are well established by the medical literature to contribute to and/or cause ongoing complaints of pain.

With only fifty minutes to cover such a dense topic, there was simply not time to explore how we, the defense bar, can best focus upon these alternate explanations in our defense of cases to persuade a jury that maybe the accident was *not* a cause of the ongoing pain complaints years later. How do we best approach a treating physician, who may be advocating for their patient, to raise these important issues and have them concede points helpful to a causation defense? The written feedback made clear that while attendees found the topic interesting and valuable, they were hoping to get thoughts on how best to practically use this information in the defense of their cases. That endeavor is the goal of this article: In short, how best can a defense attorney use other, underlying health conditions to explain ongoing pain complaints?

II. Depose the Treating Doctor

While some treating doctors will staunchly advocate for their patients and seem to bend over backwards to testify that the accident is the sole cause of their patient’s pain complaints, not all do. Some are more intellectually honest, especially when confronted with records they did not know about. I always recommend depositing the treating doctor in a case where I suspect other underlying health issues are at play.

Many treating doctors start seeing the patient *after* the subject accident and do not have the time to

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study *pre-accident* records – to which they may not even have access. Doctors are busy and are generally inclined to trust their patients. They “take their patients at their word” about the cause of their subjective pain complaints and as to when it started. It is our job to educate them about those prior records at their depositions. This also serves to educate the plaintiff’s attorney, who likewise is busy and may not be familiar with all of his or her client’s pre-accident records. If, for example, a treater links ongoing low back pain to the accident, it can be very enlightening to show him or her the notes reflecting years of low back pain complaints and treatment for all those episodes. If the plaintiff is somebody who espouses chiropractic treatment, do not hesitate to include those records, too. Many medical doctors are skeptical of chiropractors in my experience, especially those chiropractors who do adjustments to their patients multiple times per week.

My practice when deposing the treating doctor is to mark a packet of pertinent pre-accident records in chronological order, bates stamp them, highlight them with the relevant sections so they are quick and easy to review, and review each one with the treating doctor – even if a somewhat painstaking process. This does not need to be done in a “gotcha” or disrespectful way. But asking the doctor as you review the many notes if their patient (whom they trusted to be telling them the truth) *ever* told them about that other doctor visit, or that episode or that prior treatment, can be very effective as they repeatedly say “no,” “no,” “no” when asked about each record. This is especially true where there are prior accidents or injuries which their patient conveniently just never mentioned. You can then get them to concede that the description of the pain and its location appears to be the same as the reported post-accident pain. I have had many physicians testify, after being confronted with pre-accident records, that they can no longer testify to a reasonable degree of medical certainty that the subject accident was a cause of the ongoing pain complaints. Some dig in, but many do not. Even if they dig in and go into full “patient advocate” mode, you at least know what to expect at trial and

you can address that clearly biased patient advocacy in your defense.

III. Get an Independent Medical Evaluation of Your Own

While not every case requires an IME, many do. I recommend deposing the treating doctor before making this decision if timing allows, for the reasons described above. Especially in the situation where a treating doctor has dug in on causation even where pre-accident records make clear that this is not a new problem for the plaintiff, it is useful to have a physician who can more objectively refute this blind advocacy.

IV. Be Familiar with the Legal Definition of Causation

I have been surprised when attorneys at doctor depositions do not seem to use the legal definition of “cause” in their questions, and I have seen this arise with attorneys who have not yet had the opportunity to try a case. If the doctor being deposed has *not* been educated as to the required “buzz words” on causation, and has been confronted with numerous pre-accident records, defense counsel can sometimes get the doctor to concede that the accident was not “a substantial factor” in producing the current complaints.

“Cause” is defined in Civil Jury Instruction 1500 and makes clear that someone’s negligence does not need to be “*the* cause” of an injury, only “*a* cause,” because an injury can have more than one cause. Someone’s negligence was “a cause” of the injury “if it was a *substantial factor* in producing the injury.”¹

When faced with numerous pre-accident records demonstrating the same complaints, treating doctors will sometimes concede that they cannot state to a reasonable degree of medical certainty that the accident was “a substantial factor” in producing the injury. Since plaintiff has the burden of proof on causation as well as liability, this concession can be very helpful to the defense.



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V. Defense May Use Possibility Evidence

Defense counsel must recall that we do not have the burden of proof and can talk all we want about *possibilities* with the other side's experts, or with our own experts.² So, in the scenario where there is a clear prior history of depression, or pre-existing problems of the same nature, go ahead and question the treating doctor/expert witness as to whether it is *possible* that the history of depression or the other health condition, or the prior accident, is the explanation for the ongoing pain complaints. Many will have to say yes if they are being intellectually honest.

I will often also show photographs of the damage, or lack thereof, to the treating doctor as well since they usually know nothing about the actual impact. While some will refuse to opine on biomechanical issues and claim a lack of expertise, as we know, a picture is worth a thousand words. In a situation with no observable damage to the vehicle, or minor damage, this can be very useful during the treating doctor's deposition in conjunction with review of pre-accident records of import.

VI. Use Learned Treatises and Do Not Hesitate to Ask the Doctors about Medical Literature

While medical articles are routinely relied upon and used during trial in medical malpractice cases, the same is not true in general liability cases. But they should be in the right case. In the WDC seminar outline for my presentation, I provided citations to numerous peer-reviewed and widely accepted articles setting forth, *e.g.*, the correlation between depression, menopause, and other health conditions to pain complaints. It would be helpful to discuss those articles with the treating doctor where appropriate.

The proper foundation must be laid pursuant to Wis. Stat. § 908.03(18) (the "Learned Treatise" hearsay exception). However, it is not that difficult to get a doctor to admit that a journal or author is a recognized authority in his or her field. Even

if the doctor refuses to acknowledge the author's authority, there is nothing stopping defense counsel from reading portions of the article aloud and asking the doctor if they are familiar with certain statements or concepts and then asking whether they agree with them. They will either answer honestly or be evasive – either way, it is helpful to know. Juries do not love evasive or dishonest witnesses.

Keep in mind that if you wish to have a learned treatise admitted at trial, you must comply with the 40-day notice filing provision found in Wis. Stat. § 908.03(18)(a).³

VII. Attack the "Aggravation" Jury Instructions Head-On

The jury instructions on aggravation of pre-existing injury or latent conditions must be addressed and can be a thorn in defense counsel's side. It is important to be aware of their verbiage and to try to get the treating doctor off the idea that the subject accident was the triggering factor in the patient's symptoms. If the doctor has not been thoroughly prepared by the plaintiff's attorney, they may well hand you a gift and indicate that they cannot state to the requisite degree that this accident either aggravated or activated the condition complained of. The two jury instructions to be mindful of are Wis. JI-Civil 1715 and 1720:

1715 AGGRAVATION OF PREEXISTING INJURY

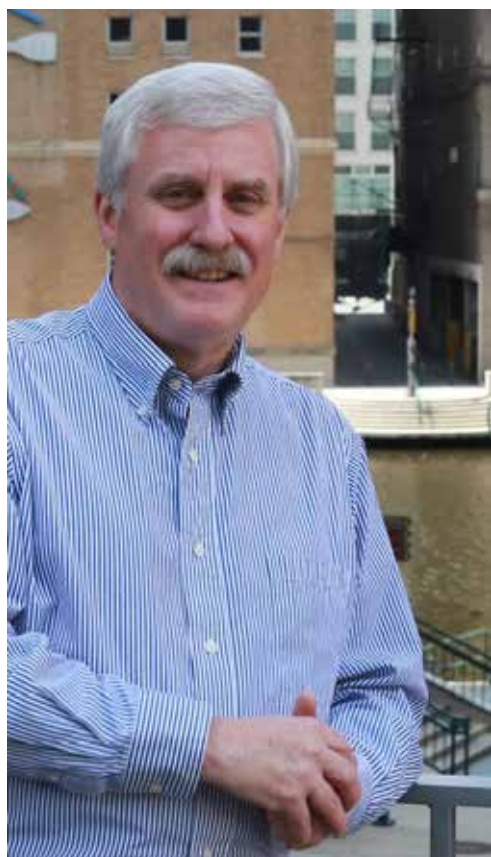
The evidence shows that the plaintiff was previously injured when (briefly describe event). If the injuries of the plaintiff received in the accident on (date) aggravated any physical condition resulting from the earlier injury, you should allow fair and reasonable compensation for such aggravation but only to the extent that you find the aggravation to be a natural result of the injuries received in the accident.

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

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1720 AGGRAVATION OR ACTIVATION OF LATENT DISEASE OR CONDITION

In answering subdivision of question ____, you cannot award any damages for any (preexisting disease, condition, or ailment) (predisposition to disease) except insofar as you are satisfied that the (disease, condition, or ailment) (predisposition to disease) has been (aggravated) (activated) by the injuries received in the accident on (date). If you find that the plaintiff had a (preexisting disease or condition which was dormant) (predisposition to disease) before the accident but that such (disease or condition) (predisposition to disease) was (aggravated) (brought into activity) because of the injuries received in the accident, then you should include an amount which will fairly and reasonably compensate (plaintiff) for such damages (plaintiff) suffered as a result of such (aggravation) (activation) of the condition.

Any ailment or disability that the plaintiff may have had, or has, or may later have, which is not the natural result of the injuries received in this accident, is not to be considered by you in assessing damages. You cannot award damages for any condition which has resulted, or will result, from the natural progress of the preexisting disease or ailment or from consequences which are attributable to causes other than the accident.

If the plaintiff was more susceptible to serious results from the injuries received in this accident by reason of a (preexisting disease or condition) (predisposition to disease) and that the resulting damages have been increased because of this condition, this should not prevent you from awarding damages to the extent of any increase and to the extent such damages were actually sustained as a natural result of the accident.

Being aware of these jury instructions will help you craft your questions carefully. There are certain experts who are deposed frequently and who chant the mantra “the accident aggravated the patient’s underlying condition.” Ask the experts for their methodology and how they can quantify this aggravation, acceleration, or worsening. Chances are high that they cannot do so. Make them say so!

VIII. Keep *Daubert* Motions in Mind

While space considerations prevent a detailed discussion on this topic, prior WDC publications have reviewed the *Daubert* factors in depth. A *Daubert* motion should be considered in the above scenario. If the doctor’s opinion is not based on reliable methodology or data as required under the law and is merely *ipse dixit* (i.e., “because I say so” testimony), file a *Daubert* motion on the causation opinion.⁴ While many courts are very deferential to doctors’ opinions on causation and permanency, the opinion may be barred by the right judge, one brave enough to call *ipse dixit* testimony out for what it is.

IX. Conclusion

Keep in mind the above considerations the next time you are defending a case where there are significant pre-existing records or a clear history of underlying health conditions, including depression, which may well be contributing to the plaintiff’s ongoing complaints.

Author Biography:

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



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

References

- 1 Wis. II-Civil 1500 CAUSE (“In answering question(s) __, you must decide whether someone’s negligence caused the (accident) (injury). (This) (These) question(s) (does) (do) not ask about “the cause” but rather “a cause” because an (accident) (injury) may have more than one cause. Someone’s negligence caused the (accident) (injury) if it was a substantial factor in producing the (accident) (injury). An (accident) (injury) may be caused by one person’s negligence or by the combined negligence of two or more people.”)
- 2 *Martindale v. Ripp*, 2001 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698.
- 3 Wis. Stat. § 908.03(18) (“LEARNED TREATISES. A published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in the writer’s profession or calling as an expert in the subject. (a) No published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art may be received in evidence, except for impeachment on cross-examination, unless the party proposing to offer such document in evidence serves notice in writing upon opposing counsel at least 40 days before trial. The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered. (b) No rebutting published treatise, periodical or pamphlet constituting a reliable authority on a subject of history, science or art shall be received in evidence unless the party proposing to offer the same shall, not later than 20 days after service of the notice described in par. (a), serve notice similar to that provided in par. (a) upon counsel who has served the original notice. The party shall deliver with the notice a copy of the document or of the portion thereof to be offered. (c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.”)
- 4 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Seifert v. Balink*, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816; *Bayer v. Dobbins*, 2016 WI App 65, 371 Wis. 2d 428, 885 N.W.2d 173.

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WDC Wins the 2023 DRI State and Local Defense Organization Diversity Award!

WDC is honored to announce that it is the recipient of this year's DRI State and Local Defense Organization Diversity Award! DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. DRI's Annual Professional Achievement and Service Awards celebrate and honor outstanding performance by state, local, and national defense organizations (SLDOs/NDOs), DRI law firms, and individual members. The SLDO Diversity Award recognizes organizations which have achieved significant success in demonstrating a commitment to diversity within and outside of their organization and demonstrated a commitment to diversity as evidenced by a formal diversity plan committed to achievement, sensitivity, and receptivity to diversity issues, including promotion of its minority and women lawyers or volunteers.

Members of the WDC Executive Committee accepted the 2023 SLDO Diversity Award at the DRI Annual Conference in San Antonio in October. Below is an excerpt from the nomination material submitted on behalf of WDC for the award.

In 2021, the WDC Board of Directors underwent an intensive strategic planning process. The resultant Strategic Plan includes both a specific emphasis and goal of increased diversity, equity and inclusivity, as well as a mandate that all of our organization goals and decisions be examined through a DE&I lens.

I. Diversity, Equity, and Inclusion Committee

The most visible achievement was the formation of our Diversity, Equity, and Inclusion Committee. Despite being only two years old, the Committee has seventeen active members and continues to grow in numbers and commitment. As the Committee's first order of business, it adopted the following Mission Statement:

The WDC Diversity, Equity, and Inclusion Committee is dedicated to promoting a culture that welcomes differences, promotes equality, and engenders respect. We continue to recruit, mentor, and promote talented lawyers and business people with diverse backgrounds and experiences because we recognize that a diverse team makes us stronger and more effective in providing Wisconsin with proper representation and an equitable civil justice system. Our members do not discriminate based on race, gender, religion, sexual orientation, or disability, and are instead dedicated to helping and educating all who inhabit the communities we have the privilege of serving.

Since its establishment, the Committee has held consistent meetings (approximately once every eight weeks) to discuss DE&I matters affecting the

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Bell, Moore & Richter, S.C. has been involved in insurance defense litigation for most of its existence. Due to the firm's extensive experience with all aspects of insurance litigation, we are often called on to defend insurance companies and their insureds in the courtroom and in appeals, both in state and federal court. Our attorneys pride themselves on keeping up to date on the latest changes in insurance law and can help clients untangle the constant legislative and case law changes in insurance. For decades, our attorneys have also successfully defended medical professionals practicing in a broad range of specialties and a wide variety of claims. We know how to build a strong defense to workers' compensation claims and disputes and help employers on all issues which may arise. Our experience has led to successful results in defending claims both in State and Federal courts as well as before the State Medical Examining Board and Medical Mediation Panel. In the defense of business litigation, we bring the experience and judgment of seasoned practitioners from both business and transactional attorneys, on the one hand, and proven civil litigation practitioners on the other. We also have considerable experience helping to defend insurance agents as well as real estate agents and brokers in litigation. Let us help you.

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legal profession and our organization. The purpose of each meeting is to educate and share information with one another, create a safe space to foster open discussions about sensitive topics, and leave with action items that members can implement within their practices and workplaces. We have had education and discussion on such topics as Indigenous Peoples, Black History, Jewish History and Anti-Semitism, and LGBTQ+ History. The Committee's Founding Chair, Charles Polk, has provided thought-provoking educational materials that WDC has used to create social media content that is shared with its broader membership and beyond.

The Committee has also been active and visible in WDC's programming. At the 2022 WDC Spring Conference, the Committee organized and moderated a DE&I panel that was well-received and given positive feedback by those in attendance. Currently, the Committee is working on articles for publication in *The Wisconsin Civil Trial Journal*, as well as a standing update in the publication to educate our entire membership regarding the Committee's activities. The Committee has engaged Judge Derek Mosley to present on unconscious bias at the 2023 WDC Summer Conference. We hope this presentation will serve as a stepping stone and pave the way for deeper conversations about DE&I topics at future WDC conferences. These activities recognize that our Committee members are self-selected as embracing the importance of DE&I, and that we must work to incorporate our efforts into our entire membership.

The Committee has also instituted an award program to recognize members who demonstrate outstanding effort, participation, and engagement in committee activities. The award has been presented twice to very deserving recipients.

II. Women in the Law Committee

WDC has long had a very robust Women in the Law Committee. The Committee has implemented an annual award to recognize outstanding members and has organized large charitable efforts. The Committee further works to ensure that women are appropriately represented in our leadership and in our programming. An example is bringing in a national speaker for a separate workshop focusing on networking strategies for women. Our Committee has also fostered incredible business relationships and ongoing referrals. WDC's Board of Directors is over 55% women.

III. Organizational Commitment

We are proud that our organization's efforts to become more diverse, equitable, and inclusive are not relegated to a single committee. In our strategic planning process, it was important to the Board that we incorporate DE&I principles in all aspects of our organization. For example:

1. We developed WDC speaker guidelines to remind presenters to use language that is as inclusive as possible, in as many respects as possible;
2. We review our slate of presenters for each conference from a DE&I perspective to attempt to provide as many different individuals and viewpoints as possible;
3. Our strategic plan includes goals to specifically target diverse populations as potential members;
4. Our plan also includes an action item to provide an organization-wide program on implicit bias; and
5. Our leadership succession plan focuses on recruiting and welcoming diverse leaders for our organization.



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Are Plaintiffs Complying with Wisconsin's Third-Party Financing Disclosure Requirement?

by: Adam Jordahl, The Hamilton Consulting Group, LLC, and
Nicole Marklein, Cross Jenks Mercer & Maffei, LLP



I. Introduction

Pursuant to 2017 Wisconsin Act 235, parties to litigation in this state are required to disclose—“without awaiting a discovery request”—any financing arrangements whereby

any person (other than the party's attorney) has a right to recover that is contingent on and sourced from the proceeds of the litigation.¹ Now that this legislation has been in place for over five years, has it been effective in its intended purpose? This article will explore the purpose of third-party litigation financing disclosures, the requirements under Wisconsin law, and will provide suggestions for how to more effectively ensure that plaintiffs are complying with them.

II. Background

Third-party litigation funding (TPLF) or “litigation financing” is a form of investing in which hedge funds and other financiers invest in a lawsuit in exchange for a portion of any settlement or judgment award. The investment provides cash to plaintiffs to litigate a claim, while the financier—thanks to its sophisticated underwriting—anticipates the case to end in a large enough judgment or settlement to satisfy its obligations.

According to one report, American litigation funders invested \$3.2 billion in 2022.² Those companies had a combined total of \$13.5 billion in assets under

management.³ Critics of litigation financing argue that it raises litigation costs, delays settlements, supports unmeritorious lawsuits, and risks allowing third parties to influence or control a party's decisions. Specifically, obligations to litigation funders can prevent a plaintiff from accepting an otherwise reasonable settlement offer because the plaintiff would be left with very little recovery after paying his or her attorney and the financier.

A recent example of this practice concerns Burford Capital, a financial services firm specializing in legal activities. Burford is the largest provider of litigation financing in the world.⁴ The dispute between Burford and its client, food distributor Sysco, arose from an ongoing lawsuit involving antitrust claims filed by Sysco against several large meat producers.⁵ According to court filings from Burford subsidiaries, the firm advanced more than \$140 million to Sysco to finance the lawsuit.⁶ The filings also show that Burford had a contractual right to review and consent to any settlement offers, as long as Burford's consent was not “unreasonably withheld.”⁷ When Sysco attempted to settle its claims against some of the defendants, Burford intervened because the firm felt the settlement amounts were too low.⁸ An arbitration panel ruled that Burford could prevent Sysco from settling those claims.⁹ Sysco filed suit, contending that Burford is “forcing Sysco to continue to litigate against its will” and “attempting to unlawfully seize control of Sysco's settlement rights and rewrite the terms of [the] contract.”¹⁰

This high-profile dispute between a plaintiff and a litigation financier demonstrates the importance of



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reasonable, commonsense regulations on litigation financing, which are needed to prevent conflicts of interest and protect the integrity of the legal system. For instance, courts and all other parties to a lawsuit should be made aware of a third party's financial interest in the case, especially if that third party may control or influence a party's decisions. Without this transparency, it is difficult for parties, judges, and juries to make informed decisions about a case.

III. Statutory Text and History

In Wisconsin, since the enactment of 2017 Act 235, a litigation financing agreement must be disclosed to the court and other parties to a case.¹¹ Act 235 created Wis. Stat. § 804.01(2)(bg), which provides:

Third party agreements. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

This broad disclosure requirement applies to any litigation funding or settlement advance agreement, whether large or small, made between a financier and an individual consumer or a commercial entity. One legal analysis focused on insurance defense has noted that the provision should also be useful “in cases where providers agree to forego their charges until after a verdict.”¹² Prior to Act 235, such an agreement had to be specifically asked for in discovery, “but now must be disclosed without request.”¹³

The disclosure provision was created as part of a larger, landmark civil litigation reform law aiming to address the high transactional costs of litigation by reforming the discovery process, aligning class action procedure with rules used in federal courts and many other states, and reducing various statutes

of limitation and repose.¹⁴ Wisconsin's first-in-the-nation transparency law in particular was praised by U.S. Chamber Institute for Legal Reform as a “groundbreaking” model that other states should follow.¹⁵

Federal authorities are beginning to take notice of the litigation financing industry, as evidenced by a recent congressional hearing on TPLF oversight held by the U.S. House Committee on Oversight and Accountability. In written comments to the committee, the U.S. Chamber of Commerce emphasized the need to require disclosure of litigation financing agreements, in part due to potential national security risks:

[T]here is a growing concern that a large volume of foreign-sourced money may be pouring into U.S. courts via TPLF, raising significant national and economic security risks. The limited information available because of the secrecy of the practice suggests that sovereign wealth funds and non-U.S. citizens are participating in TPLF against U.S. companies. The result is that a foreign actor could control the litigation and influence its strategy to advance their own national interests, such as to gain access to sensitive information, damage U.S. companies, and influence U.S. policy to advance its own strategic interests at the expense of competing U.S. priorities.¹⁶

The comments also argue that some litigation financing agreements violate legal ethics principles, which generally prohibit fee-splitting between an attorney and a nonlawyer or the possession of an ownership interest in a law firm by a nonlawyer.¹⁷

Tort reform advocates are hoping to see a similar transparency requirement implemented at the federal level. A broad national coalition including the U.S. Chamber, DRI Center for Law and Public Policy, American Tort Reform Association, and various business groups, has asked the Advisory Committee on Civil Rules to amend Rule 26 of the Federal Rules of Civil Procedure to require

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disclosure of a litigation financing agreement in any civil action filed in federal court.¹⁸

IV. Suggestions for Ensuring Compliance

Anecdotally, it appears to the authors that few voluntary disclosures of third-party litigation financing arrangements have been made since the enactment of the disclosure requirement in Wisconsin. Nor could we find any available court filings in which this issue has been addressed. We question whether this is because: a) third-party litigation financing agreements are not common; b) plaintiffs are unaware of their disclosure obligations; c) plaintiffs are not being forced to comply with their disclosure obligations; or d) some combination of these or other factors.

Unfortunately, the new disclosure provision does not provide an explicit enforcement mechanism or penalties for noncompliance. The sanctions applicable to misrepresentations to the court under Wis. Stat. § 802.05 are expressly inapplicable to disclosures and discovery under Wis. Stat. § 804.01.¹⁹ Nonetheless, we suggest that there are options for the defense bar to encourage litigation financing disclosure while the related case law is still developing.

One option is to request that the Court set a very early date in the scheduling order by which the plaintiff must comply with the disclosure requirement of § 804.01(2)(bg). This will educate both the judge and plaintiff's counsel on this requirement and will also set up the ability to seek sanctions under Wis. Stat. § 802.10(7)²⁰ for violating a court order if the plaintiff does not comply.

Although it is not required, defense counsel may make discovery requests seeking information about third-party financing of the litigation. The request can specifically note that it is not subject to the statutory limitations on the number of interrogatories set forth in Wis. Stat. § 804.08(1)(am).²¹ Some sample discovery requests include:

REQUEST FOR ADMISSION: Admit that no person or entity, other than your attorney or any subrogated party named in this action, has the right to receive any portion of your recovery from this lawsuit, whether by settlement or judgment.

INTERROGATORY: Pursuant to Wis. Stat. § 804.01(2)(bg), list the name, address and phone number of any person or entity, other than your attorney, who has any right, whether contractual or otherwise, to receive any portion of your recovery from this lawsuit. (**Note:** Pursuant to § 804.01(2)(bg), this interrogatory does not count against the number of interrogatories permitted as a matter of course under Wis. Stat. § 804.08(1)(am).)

REQUEST FOR PRODUCTION: Provide a true and accurate copy of all communications, contract, agreements, and other documents related to any agreement described in Wis. Stat. § 804.01(2)(bg).

It will be important to track and document each time a plaintiff's attorney or his or her firm fails to make a voluntary disclosure of a third-party financing agreement as required by law. If an attorney or firm fails to comply more than once, particularly after being ordered to do so in a court's scheduling order or specifically asked in a discovery request, there is a better case for sanctions or other remedial action.

V. Conclusion

It is well documented that third-party litigation financing arrangements can interfere with the timely and reasonable resolution of litigation. By helping to reveal all interested parties, disclosure requirements such as the one found in Wis. Stat. § 804.01(2)(bg) help parties to identify and head off these problems early in litigation. However, in order to benefit from this relatively new requirement, the defense bar must educate judges and counsel and force compliance so that disclosure of third-



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party financing arrangements becomes routine and expected in Wisconsin civil cases.

Author Biographies:

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Nicole Marklein (nmarklein@cjmmlaw.com) represents businesses and individuals in various types of litigation, from contract disputes to personal injuries. She also enjoys providing her business clients with cost-effective employment advice and representation to help avoid employment claims and limit potential exposure if a claim arises. Noting the growing need for quality representation of individuals seeking to help provide or build their families, Attorney Marklein has gained expertise in the field of alternative family reproductive law. She is an LGBTQ ally and enjoys providing cost-effective legal assistance to all types of families. Attorney Marklein serves as the Immediate Past President of the Wisconsin Defense Counsel, and is an active member of DRI, representing Wisconsin on DRI's State Legislation and Rules Task Force. She also serves on the Wisconsin Civil Justice Council.

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- 2 Sara Merken, “Litigation funders deployed \$3.2 bln in U.S. investments last year - report,” REUTERS, February 16, 2023, available at: <https://www.reuters.com/markets/us/litigation-funders-deployed-32-bln-us-investments-last-year-report-2023-02-16/> (last accessed October 30, 2023).
- 3 *Id.*
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- 17 *Id.*, Rule 5.4 of the Model Rules of Professional Conduct “prohibits fee-splitting between a lawyer and a nonlawyer. Certain TPLF agreements violate Rule 5.4’s fee-splitting prohibition because funders often are paid a percentage of the legal fees secured by the plaintiff’s attorney. Rule 5.4 also prohibits nonlawyers from having an ownership interest in law firms. Some litigation funders would like to abolish Rule 5.4 to acquire ownership interests in law firms, which would allow them to streamline their business model at the expense of a lawyer’s independence and professional judgment.”
- 18 U.S. Chamber Institute for Legal Reform, “ILR Urges Advisory Committee to Adopt Mandatory Uniform Disclosure of TPLF,” May 9, 2023, available at: <https://www.uschamber.com/lawsuits/statement-for-the-record-for-the-house-oversight-hearing-unsuitable-litigation-oversight-of-third-party-litigation-funding> (last accessed October 30, 2023).

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institutelegalreform.com/blog/ilr-urges-advisory-committee-to-adopt-mandatory-uniform-disclosure-of-tplf/ (last accessed October 30, 2023).

- 19 “**Inapplicability to discovery.** Subsections (1) to (3) do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to ss. 804.01 to 804.12.” Wis. Stat. § 802.05(5).

- 20 “**Sanctions.** Violations of a scheduling or pretrial order are subject to ss. 802.05, 804.12, 805.03, and 895.044.”

- 21 “A party shall be limited, unless otherwise stipulated or ordered by the court in a manner consistent with s. 804.01 (2), to a reasonable number of requests, not to exceed 25 interrogatories, including all subparts.”

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2023 International Day of Service

by: Grace M. Kulkoski, Wisconsin Mutual Insurance Company, Heather L. Nelson, The Everson Law Firm, and Mollie T. Kugler, von Briesen & Roper, S.C.



This year, the DRI Foundation held its second annual International Day of Service. DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. The DRI Foundation's mission is to

provide financial, educational, and volunteer aid to those with needs.

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

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

Green Bay/Fox Valley Area Service Project

On September 20, 2023, WDC members in the Green Bay/Fox Valley area served a meal at the New Community Shelter in Green Bay. The New Community Shelter was founded in 1994 to help the homeless and the hungry. In addition to serving

dinner to its residents daily, the shelter also serves an evening meal to any members of the community who find themselves in need. WDC members served between 150 and 180 meals in the hour-long dinner service. The event was sponsored by the Everson Law Firm, which generously purchased the ingredients for the meal. Thanks to the volunteers for taking time out of their busy schedules to give back (Heather Nelson, Wendy Diehlmann, Tracy Merkle, and Christine Mankse)!



Madison Area Service Project

On September 22, 2023, WDC members in the Madison area volunteered at Way Forward Resources (previously Middleton Outreach Ministry), an organization that assists area residents with food security and housing stability. Thanks



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to the volunteers for taking time out of their busy schedules to give back (Andrew Hebl, Julie Piper-Kitchin, John Moroney, Amy Scholl, Grace Kulkoski, Megan McKenzie, Roger Flores, and Ashleigh Johnson)!



Milwaukee Area Service Project

On October 10, 2023, WDC members in the Milwaukee area volunteered at the Kinship Community Food Center located at 924 E. Clarke St. Kinship strives to use the work of feeding hunger as a catalyst for well being in the community. Thank you to the volunteers for making the time to give back (Mollie Kugler, Janet Cain, Maria Sanders, John Pinzl Sarah Laughlin, and Terra Ensley)! Stay tuned to hear about other volunteer events



taking place throughout the state as part of this and other initiatives!

Author Biographies:

Grace M. Kulkoski is Legal Counsel at Wisconsin Mutual Insurance Company in Madison. She obtained her bachelor's degree from the University of Notre Dame du Lac and her law degree from the University of Wisconsin Law School. She is a member of the Wisconsin Defense Counsel and currently serves as the Program Chair of WDC.

Heather L. Nelson is President and Shareholder at The Everson Law Firm in Green Bay. She is an experienced trial attorney, having successfully



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tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back to her Green Bay roots. Her practice areas include motor vehicle accidents, premises liability, wrongful death, and products liability. Heather is currently the Secretary/Treasurer of WDC.

Mollie T. Kugler is a shareholder in the Litigation and Risk Management Practice Group at von Briesen & Roper, S.C. in Milwaukee. She focuses her practice on representing and counseling insurance companies in litigation and disputes.

Mollie graduated from Georgetown University, cum laude, in 2008. She earned her JD from Fordham University in 2022. She is admitted to practice in Wisconsin and Illinois state courts, the eastern and western federal district courts in Wisconsin, the central and northern federal district courts in Illinois, the eastern federal district court in Michigan, and the U.S. Court of Appeals for the 7th Circuit. In addition to WDC, Mollie is a member of the Defense Research Institute, the National Association of Women Lawyers, the Association for Women Lawyers, the State Bar of Wisconsin, and the Milwaukee Bar Association. She also serves as Georgetown's Milwaukee-area Chair and Alumni Interviewer for the Georgetown University Alumni Admissions Program. Mollie was selected by The Best Lawyers in America® in Insurance Law in 2022.



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News from Around the State: Trials and Verdicts

The WDC regularly publishes notable trial verdict results in its Journal and on its website. If you have recently tried a civil case to verdict in Wisconsin, you are encouraged to submit a short summary of the case to Journal Editor Vincent Scipior at vscipior@cnsbb.com. Please include the case caption, county and case number, a description of the facts and legal issues for trial, information about any pre-trial settlement offers and demands, and verdict outcome (liability and damages).

Jenna L. Huseboe, et al. v. State Farm Mut. Auto. Ins. Co.

Milwaukee County Case No. 22-CV-705

Trial Dates: September 25-26, 2023

Facts: This was a UIM claim. The plaintiff—a 29-year-old female—was involved in an intersection accident. She was hit on the front passenger side by a car that pulled out from a stop sign. Her most significant injury was an avulsion fracture of the left index finger metacarpal head (knuckle; dominant hand) with collateral ligament injury. Plaintiff had her hand on the horn when her airbag deployed. Other injuries included shin bruising, neck and back pain, and laceration to palm side of left hand requiring seven sutures. Plaintiff underwent ORIF surgery, occupational and physical therapy, and a second surgery a year later for hardware removal. Plaintiff claimed permanent hand injury affecting activities of daily living (*i.e.*, resulting pain and limitations), in addition to resulting scars from original laceration and surgeries. Plaintiff's doctor, Dr. Patrick Hettinger (Froedtert), provided a report and testimony that plaintiff's injury was permanent, that she would continue to have pain, decreased range of motion, and arthritic changes, eventually needing joint replacement or fusion surgery.

Plaintiff received \$50,000 from the at fault driver's liability carrier and sought additional UIM benefits from State Farm. Defense had a medical examination performed by Dr. Amin Afsari (The Orthopedic Institute of Wisconsin). Dr. Afsari confirmed injury, appropriateness of treatment and resulting decreased range of motion. Dr. Afsari did not find any resulting disability, or any arthritic changes, or any need for future treatment.

Issues for Trial: Just prior to trial, plaintiff dismissed her claim for past or future medical expenses.

At Trial: Plaintiff asked the jury for \$650,000 to \$800,000 for her past and future pain, suffering, disability, and disfigurement, and left the value of her husband's loss of consortium claim to the jury's discretion. The defense argued for up to \$20,000 for past damages and \$7,500 for future damages, with no comment on the loss of consortium claim. The jury awarded plaintiff \$20,000 for past damages, \$12,500 for future damages, and \$0 for loss of consortium.

Plaintiff's Final Pre-Trial Demand: \$183,500

Defendant's Final Pre-Trial Offer: \$109,000

Verdict: \$32,500

For more information, contact Gino M. Alia at gma@addmlaw.com.



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Retained Foreign Object Case

Facts: Plaintiff was admitted to a hospital for treatment for an infection in his neck. Prior to undergoing a planned surgical procedure, the plaintiff lost his airway. The physician performed an emergency tracheotomy commonly referred to as a “slash tracheotomy.” The physician was able to restore the patient’s airway, but the surgical team encountered extensive bleeding, in part, because the patient was on multiple blood thinners. The surgical team was ultimately able to control the bleeding by packing the wound. Several months later, it was discovered that a sponge remained in the wound. The patient then underwent a surgical procedure to remove the sponge.

Issues for Trial: A claim was brought against both the hospital and the doctor alleging that the hospital’s nurses and doctor were negligent for failing to remove the sponge.

At Trial: After four days of trial, the jury returned a defense verdict finding that neither the hospital nor doctor was negligent.

For more information, contact Michael Johnson at mjohnson@otjen.com or Randy Guse at rguse@otjen.com.

Gail Bodin v. State Farm Mut. Auto. Ins. Co., et al.

Ashland County Case Number 19-CV-99

Trial Dates: June 13-15, 2023

Facts: This was an auto accident case. Plaintiff was a front seat passenger in a 2013 Chevy Tahoe being operated by William Blake on westbound Highway 2 in Saginaw, Minnesota. When the highway went from one lane in each direction separated by a double yellow line to two lanes in each direction separated by a median, Mr. Blake struck the median and a divided highway sign. Mr. Blake’s vehicle sustained \$15,923.90 in damage to the driver’s side from striking the divided highway sign. The Tahoe’s side curtain airbags deployed. In addition to muscle sprains/strains, Ms. Bodin claimed to have suffered a rotator cuff tear for which she eventually had surgery.

Issues for Trial: Mr. Blake passed away about a month before the trial.

At Trial: Plaintiff claimed \$72,105.41 in past medical specials and \$40,000 in lost earnings. She called the following experts to testify at trial: Dr. Cummins (orthopedic surgeon), William Smith, DC (chiropractor), and a physical therapist that performed a functional capacity evaluation. Defendants called Dr. Thomas Viehe and Dr. Ronald Fijalkowski as their witnesses. Plaintiff’s counsel asked for \$508,000 in closing.

The jury awarded \$7,500 for past medical expenses, \$13,150 in past pain and suffering, and \$0 for future medical expenses, past earnings, future earnings, and future pain and suffering.

Plaintiff’s Final Pre-Trial Demand: \$185,000

Defendant’s Final Pre-Trial Offer: \$78,000

Verdict: \$20,650

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



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Erik D. Johnson v. Germantown Mut. Ins. Co., et al.

Price County Case Number 21-CV-44

Trial Dates: June 13-14, 2023

Insurers and defense counsel are occasionally confronted with the difficult situation of an insured being sued by a friend or family member. In such cases, the insured may have a strong incentive to testify favorably to the plaintiff and not the insurer. Often insurers and defense counsel are reluctant to take such cases to trial. In just such a case, a Price County jury returned a complete defense verdict in favor of the insurer in a slip-and-fall case with bad damages.

Facts: The plaintiff was a 45-year-old “beloved special education teacher” in a small town who slipped and fell in the driveway of his mother’s residence. He sustained a compound and comminuted fracture of both the tibia and fibula requiring multiple surgeries, significant disability, and the likelihood of future surgeries. Plaintiff brought suit against his mother’s insurer (he did not sue his mother).

Plaintiff’s mother was an elderly woman who lived independently and insisted on taking care of all of the outside maintenance including ice and snow removal. She cooperated with the insurer and defense counsel but insisted that her son’s fall was all her fault because she failed to salt the driveway on the evening in question. She accepted full responsibility for the fall both at her deposition and on the witness stand at trial. In short, she claimed that she knew the weather had deteriorated throughout the course of the evening and simply forgot to salt the driveway even though she knew her son would be coming over later that evening to pick up his dog. She claimed that she had a bucket of ice melt near the front door at all times and it simply slipped her mind that evening to apply the ice melt despite knowing of the deteriorating weather conditions.

Issues for Trial: Liability and damages were at issue.

At Trial: The plaintiff testified that he was picking up his dog from his mother’s house when he slipped and fell on the driveway. The condition of the driveway was glare ice according to the report of the emergency medical technicians shortly after the fall. Interestingly, the plaintiff himself testified that he had no trouble with his footing until the fall itself. The weather was approximately freezing temperatures with freezing drizzle or mist.

Alcohol was an issue. The plaintiff had been at a Super Bowl party and admitted consuming alcohol throughout the evening. The plaintiff took great pains to stretch out the number of hours of his drinking and emphasized how much he had to eat throughout the night. A blood test two hours after the fall came back with a BAC of .04. The defense consulted (but did not use) a toxicologist who indicated that the plaintiff was probably a .07 or .08 at the time of the fall. The defense decided to rely upon the medical records in which the plaintiff acknowledged drinking a substantial quantity throughout the day and let the jury conclude for itself how the alcohol consumption affected his contributory negligence. The plaintiff tried to keep all alcohol use out of evidence on motions in *limine* but was not successful in doing so.

The plaintiff insisted that he was not under the influence when the fall occurred. Likewise, his mother of course verified that her son was not under the influence at the time of the fall. They claimed the medical bills were well into six figures with a future amount likely. He walked with a significant limp and credibly claimed some significant disability. The plaintiff called as witnesses the insured (adversely?), the plaintiff,



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the orthopedic surgeon, and the chiropractor (who testified the limp caused a spinal imbalance needing future treatment).

The defense called no witnesses and offered no substantive exhibits. The jury deliberated for approximately 2.5 hours. The jury returned a verdict finding no negligence on the insured and 100% negligence on the plaintiff. The jury awarded the past medical bills and a portion of the future medical bills. They did not award any dollars for pain and suffering.

Verdict: \$0

For more information, contact Erik J. Pless at epless@olgsc.com.

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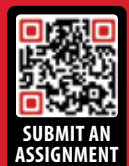
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CIVIL LITIGATION DEFENSE

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A photograph of two scientists, a woman and a man, both wearing safety glasses and lab coats, working in a laboratory. The woman is in the foreground, wearing a blue lab coat with a name tag that says 'Sara'. The man is behind her, wearing a white lab coat with a 'CTL Group' logo. They are looking down at a piece of equipment on a lab bench. In the background, there are green gas cylinders, one of which has a label that says 'Air'.

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NOVEMBER 30, 2023

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DECEMBER 1, 2023

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