# Wisconsin Civil Trial Journal

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**Wisconsin's COVID-19 Immunity Statute Ruled Unconstitutional by Court of Appeals**
***Myranda Stencil***

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Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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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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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

# WDC: The Voice of the Wisconsin Defense Bar

Wisconsin Defense Counsel ("WDC") is a premier statewide organization consisting of more than 375 defense attorneys. Founded in 1962, WDC (formerly known as the Civil Trial Counsel of Wisconsin) is dedicated to defending Wisconsin citizens and businesses in a professional manner, maintaining an equitable civil justice system, educating its members, creating referral sources for its members, providing networking opportunities for its members, and influencing public policy. To be eligible for 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.

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# President's Message: "None of Us Is As Good as All of Us"

*by: Heather Nelson, President, Wisconsin Defense Counsel*

When I was sixteen, I was a proud McDonald's employee and was one of a handful of McDonald's employees selected to be in a nationwide poster for Founder's Day (yes, the poster is framed and hanging in my house). I tell you without hesitation that McDonald's was one of the best employment experiences I have ever had – the company (from my point of view) was very well run, they had an excellent training program and, at least when I was there in (I'll say it) the mid-1980's I found it to be a great experience; they took young kids, taught us how to work together to make the store run smoothly, engendered pride in our roles and empowered us to be leaders. The quote "None of us is as good as all of us" was a famous quote of McDonald's founder Ray Kroc, emphasizing the power of teamwork and collective effort.

I will carry the quote game deeper into history, to Greek philosopher Aristotle, who said "the whole is greater than the sum of its parts." Both quotes underscore one of the great strengths of the Wisconsin Defense Counsel: our members are our strength and, dare I say, our superpower. There are many wonderful benefits to being a member of the Wisconsin Defense Counsel, many of which I will discuss below. Without an active and engaged membership, we simply would not be as strong.

Yet in recent years, WDC membership has declined to some degree. This is not unique to us – it is occurring throughout bar organizations across the country and likely in other industry organizations as well. As part of a strategic planning initiative which began several years ago, WDC's Board of Directors analyzed who we are and how we can best serve our members. We have made excellent strides honing in on that focus. The recent "Defense Skills Program" (hands-on litigation workshops) targeting training our younger lawyers is an excellent example.

Over the past several months, WDC's Membership Committee, Law School Committee, Board of Directors, and Executive Committee have put their efforts into stabilizing and ideally increasing WDC's membership. We have identified, as best we can, civil defense attorneys throughout Wisconsin who are not members and have reached out to them to let them know who we are and let them know of our many benefits. It occurred to me while doing so that even our current members may not realize all the benefits and advantages WDC membership offers. All of us play a pivotal role in sharing the benefits of WDC membership with our colleagues.

Have you ever received an e-mail from a law school friend or a friend of a friend somewhere outside of your practice area asking for information on a judge? an expert? an opposing counsel? in need of a conference room? I have received at least two of these inquiries within the least week alone. I am always happy to help, but only recently have I thought, "Hey, I need to tell this person about WDC and the vast network of attorneys with whom they could be connected if they joined." I am asking our membership to consider making a short "elevator pitch" about WDC to other defense colleagues who practice throughout the state.

A great selling point is the fact that the first year of membership is ***free***. After that first year, dues are very reasonable; attorneys admitted to the Bar three

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years or less pay $135 per year; attorneys admitted to the Bar four years or more pay $250 per year. WDC members pay a reduced registration cost for our three yearly conferences which are chock full of relevant practice-enhancing CLE.

When I was an in-house attorney with an insurance company, the rules were fairly restrictive as far as bar memberships and what would and would not be reimbursed – we would be reimbursed for **one** voluntary bar membership – anything else was on our own dime. It became obvious to me that Wisconsin Defense Counsel gave me by far the most bang for my buck and was not just another bullet point on my resumé or firm website bio.

Allow me to introduce (or reintroduce) you to the vast benefits and resources WDC membership offers:

- Access via publications, Listservs and conferences to a premiere network of approximately 350 defense attorneys across the state (and in some cases out of state), all of whom are dedicated to the representation and defense of individuals and businesses in civil litigation.
- Discounted access to three annual CLE-accredited education programs: (1) the Spring Conference in April, which has traditionally been held at the American Club in Kohler; (2) the Annual Conference in August, which has traditionally been held in the Wisconsin Dells; and (3) the Winter Conference in December, which has traditionally been held in the western suburbs of Milwaukee. Note that the December program is geared toward providing at least three CLE ethics credit hours to meet the end-of-year reporting deadlines.

  Our three yearly conferences typically include between six to eight CLE hours and include:

  » Presenters such as experts in a variety of fields (medical, liability, technical);

  » Panels discussing issues as wide-ranging as bridging generational divides in law firms, interactive ethical role play scenarios focused on issues which arise in our area of practice, and deposition skills; and

  » Individual speakers (often our members) speaking on topics including employment law, construction law, expert discovery, etc. Our members do a fantastic job presenting at conferences and educating our attendees. When I have had the opportunity to present, I often learn as much as those in attendance.
- Networking! The connections I have made, both professional and personal, in WDC have vastly enhanced my practice!
- A comprehensive professional publication – the *Wisconsin Civil Trial Journal*, published three times a year. The *Journal* includes substantive law articles often authored by WDC members as well as reporting of trial verdicts around the state. The trial verdict reporting alone is an excellent resource to see what juries are doing with various types of cases in various venues. The *Journal* is also an excellent opportunity for attorneys to become published in a well-respected publication with wide circulation. In addition to being circulated to our members, the *Journal* is posted publicly and is circulated to all judges throughout the state. Archived copies of the *Journal* are maintained on WDC's website for easily searchable reference.
- A members-only online forum which contains multiple Listservs/message boards through which members can share expertise and resources. Typical message board requests seek experts in various specialties, experiences with judges, seeking conference rooms in other cities, sharing expert transcripts, etc.
- Committees! Have a special area of interest? WDC has many committees includ-

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ing substantive areas of law (employment law, insurance law), an amicus committee (which consults with requesting members and can provide amicus briefs to the Appellate or Supreme Courts on issues impacting our members), as well as others to help you in your practice and life (litigation skills committee, wellness committee). Like WDC as a whole, the committees are only as good as their members, and there is much excellent work being done by our committees, including authoring articles, presenting hot topics at WDC conferences, and providing other helpful educational material and services.

- Defense Skills Programs (immersive trial skills workshops) - our immediate past President and respected trial attorney, Monte Weiss, along with our Litigation Skills Committee, were instrumental in developing and presenting a series of interactive workshops designed to provide trial skills and experience to newer attorneys. Topics included taking expert depositions, cross-examining an expert at trial, and motion practice. Some of our senior members have acted as mentors, witnesses and judges in these workshops, and the feedback has been fantastic. The plan is to offer this every other year, and we anticipate this returning in 2026. One of our main goals, as set forth in our Mission Statement, is to provide education and development for our members. Finding, educating, and growing our next generation of trial attorneys is a top priority of WDC.
- Have I mentioned networking? Yes? Well, I will mention it again. WDC offers many opportunities to network with other attorneys, claims professionals, experts, etc.

The next time you are at a deposition with or receive an e-mail from someone who does the same fine civil defense work we do, reach out and ask them if they are a member of WDC. If they are not, bend their ear for a few minutes about the many benefits and direct them to our website and/or any of our officers, and remind them that this is a no risk proposition as the first year is free!

**Author Biography:**

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


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# 2025 WDC Spring Committee Awards

The WDC Spring 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 2025 Spring Conference on April 10-11, 2025!

## Amicus Committee Award Recipient: Brian Anderson

Congratulations to Brian Anderson for being selected by the Amicus Committee and the Awards Committee for the 2025 Amicus Committee Award!

Brian was the chair of the Amicus Committee for a number of years during which the Committee participated in a number of appeals before the Wisconsin Court of Appeals and Wisconsin Supreme Court in support of WDC members before recently stepping back from the Chair role. The nature of the Committee is that we never know when a request will come in, which requires flexibility to read and assess the materials in the case at issue, and Brian always made time no matter the challenges on his own calendar. Brian guided the Committee in consistently applying guidelines for accepting a case while still valuing the input of all members. The Amicus Committee thanks Brian for his years of leadership.

Brian is an attorney at Everson, Whitney, Everson & Brehm, S.C. in Green Bay. He practices in the areas of insurance defense, insurance coverage, and medical negligence defense, and handles appeals in state and federal courts. Brian is an experienced trial attorney who defends insurance companies and insureds, litigates insurance coverage issues, and practices appellate advocacy in state and federal courts. He also defends physicians and hospitals in civil litigation and administrative actions.

Brian graduated with high honors from the Claude W. Pettit College of Law at Ohio Northern University, where he was Editor-in-Chief of the Law Review, a member of the Moot Court Board of Advocates, and was inducted into the Willis Society, the highest academic honor society at the College of Law. Brian began his legal career as the law clerk and legal advisor to the Chief Justice of the Supreme Court of Rwanda. He spent one year living in Kigali and working at the Supreme Court and supporting a USAID-funded project supporting promoting reforms to laws and legal institutions in Rwanda.

Prior to joining The Everson Law Firm, Brian was an Assistant Professor of Law teaching international and comparative law subjects, courses in legal research, and a required first-year course at the College of Law at Ohio Northern University. He was also engaged in law reform projects as a rule of law advisor in Eastern Europe, the Balkans, and sub-Saharan Africa.

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## Bylaws Committee Award Recipient: Caleb Gerbitz

Congratulations to Caleb Gerbitz for being selected by the Bylaws Committee and the Awards Committee for the 2025 Bylaws Committee Award!

Caleb has been an integral part of the Bylaws Committee since it was formed. He has attended nearly every monthly Committee meeting. He comes to the meetings with great ideas and a positive attitude. He has graciously agreed to serve as Vice Chair and has been the Committee's scribe for the purpose of documenting the rationale behind our proposed Bylaws changes. He more than deserves this recognition.

Caleb is an attorney in Meissner, Tierney, Fisher & Nichols, S.C.'s litigation practice group. He focuses on assisting clients in complex commercial, insurance, employment, and appellate matters. Caleb brings to his work a dedication to client service and a focus on providing skillful representation throughout a dispute—from pre-litigation, to trial, and through appeal if necessary.

In addition to his legal practice, Caleb makes a point of closely monitoring Wisconsin's appellate courts. He authors a Substack column, Appellate Approach, which features regular updates on civil cases before the Wisconsin Supreme Court and Court of Appeals. Caleb also co-hosts a monthly "Up for Review" segment on the MTFN Podcast in which he and a colleague discuss the latest developments in Wisconsin's appellate system. In practice, Caleb leverages his expertise in Wisconsin's appellate system to secure successful outcomes for his clients, both at the trial court level and on appeal.

Before joining Meissner Tierney, Caleb clerked for Justice Brian Hagedorn of the Wisconsin Supreme Court from 2020 to 2022. He graduated summa cum laude from Mitchell Hamline School of Law, where he also earned a certificate in conflict resolution and served as head managing editor of the Mitchell Hamline Law Review. Caleb previously served as a policy advisor in the Wisconsin State Senate and as a master-at-arms in the United States Navy Reserve.

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# The Amicus Committee: Help Us Help You

*by: Erik M. Gustafson, von Briesen & Roper, s.c.*

After years of dedicated service, Brian Anderson recently stepped away as the chair of WDC's Amicus Committee. WDC and the Committee thank Brian for his years of leadership. I was approved as the new committee chair and James Biese of Secura Insurance was approved as the new vice-chair.

With this change in leadership, I wanted to remind everyone of the committee's existence and how we can help you. The Amicus Committee is tasked with deciding when WDC as an organization will file an amicus ("friend of the court") brief on behalf of WDC. Once the Committee agrees to participate in a case, we solicit volunteer writers from the Committee.

The Committee typically gets involved in cases that concern at least one issue with broad impact on our organization and its members. This can include first-party coverage issues (property or UM/UIM), third-party coverage issues, and merits liability—anything that affects Wisconsin businesses, insurers, and their attorneys. We typically do not get involved in fact-specific or fact-intensive cases. The Committee typically gets involved at the supreme court rather than court of appeals, but raising a case at the court of appeals stage can still be valuable to put the case on our radar for future participation if it ends up before the supreme court. Though the vast majority of cases brought before the Committee are in state court, we will consider federal cases that raise issues of Wisconsin law.

The Committee considers involvement in a case when a WDC member raises it for Committee participation. The person raising the case to the Committee may, but need not be, counsel of record in the case. In addition, counsel of record in the case need not necessarily be WDC members, but WDC membership is a factor when the Committee considers involvement.

In order to bring a case to the Committee's attention, please send an email with brief description of the case, issue(s) on which you seek Committee participation, and representative briefs or filings (*e.g.*, circuit court briefing for a case going to the court of appeals, court of appeals decision for a case before the supreme court, etc.) to the chair, vice chair, or WDC. The Committee will then schedule a meeting to discuss the case. The person raising the case will have an opportunity to explain the case and issue(s). The Committee then discusses whether to participate outside the presence of any attorneys who are direct participants in the case, and solicits volunteer writers. The chair or vice chair then informs the requesting attorney of the Committee's decision.

Sometimes, the committee would like to participate in a case, but practical realities make it impossible. These practical realities usually come down to time and capacity. For those seeking Committee participation in a case, the biggest help to the Committee is time. **The Committee must file a motion to file an amicus brief within 14 days of the respondent's brief, with the brief then due on a date set by the court.** Thus, bringing a case to the Committee as quickly as reasonably possible after filing of the notice of appeal, the adverse court of appeals decision (for participation at the petition for review stage), or granting the petition for review


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(for participation at the supreme court on the merits), will maximize the opportunity and capacity of the Committee. Conversely, the Committee typically has a difficult time accommodating requests to participate that are made in response to another organization filing a motion to file an amicus brief in support of an opponent.

The Committee's other need is capacity—that is, the time of volunteer drafters. As an all-volunteer committee, we rely on the generosity of our members to draft the briefs in cases where the Committee agrees to participate in a case. New members to the Committee are always welcome. For WDC members with supervision responsibility at your firms, consider offering credit towards billable hours for associates who contribute to an amicus brief on behalf of the Committee. Drafting a brief with the Committee can be a valuable experience for younger attorneys to gain appellate experience.

**Author Biography:**

*Erik M. Gustafson is a Principal Associate at von Briesen & Roper, s.c., in the Milwaukee office. His practice focuses on insurance coverage (both first- and third-party) and appeals. Erik graduated from Marquette University Law School,* magna cum laude*, in 2017, where he was Technology Editor of the Marquette Law Review and earned a certificate in litigation practice. Prior to joining von Briesen, Erik was a law clerk at the Wisconsin Supreme Court and associate at a Milwaukee law firm.*

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# 2025-26 Legislative Session Update

*by: Tyler Clark, The Hamilton Consulting Group, LLC*

On behalf of the Wisconsin Defense Counsel (WDC), the Hamilton Consulting Group monitors developments impacting civil litigation, insurance law, and worker's compensation policy in Wisconsin, including Legislative opportunities and threats impacting Wisconsin's civil litigation environment. The Hamilton Consulting team is available to serve WDC and its members and can be contacted at clark@hamilton-consulting.com or hogan@hamilton-consulting.com.

## I. Introduction

At the time of writing in late February, the Wisconsin Legislature was two months into the 2025-26 Legislative Session. With a Supreme Court Election between former Attorney General and current Waukesha Circuit Court Judge Brad Schimel and Dane County Circuit Court Judge Susan Crawford looming, tense ongoing budget discussions between Governor Evers and the Legislature, several cases before the Wisconsin Supreme Court impacting Legislative powers and the Governor's powerful veto pen, and a host of new legislators and leadership changes on both sides of the aisle, the legislative session kicked off slowly. Very few proposals affecting civil litigation, whether positive or negative for civil defense practitioners, were formally introduced for consideration by the legislature.

## II. New Faces in the Wisconsin State Legislature

With new Legislative maps in place, the November 2024 election produced a host of new faces and changes in the Wisconsin Senate and Assembly. Overall, the Wisconsin Legislature welcomed 34 new members, including 27 Democrats and seven Republicans.

The majority in both houses shifted from the previous session. During the 2023-24 State Legislature, Republicans controlled the state Assembly by a 64-35 seat margin and controlled the state Senate by a 22-11 seat margin. This session, margins have slimmed significantly; Republicans are currently holding onto a 54-45 seat majority in the state Assembly, and an 18-15 seat majority in the state Senate. Going forward, this could continue to slow down negotiations in both houses as it may be harder for the majority party to pass high-profile legislation, including the state budget.

Of the 99 members in the State Legislature, nine are attorneys. They are:

State Assembly:

- Representative Ron Tusler, 3rd Assembly District (Republican – Harrison) – Chair of the Assembly Committee on Judiciary
- Representative Brent Jacobson, 87th Assembly District (Freshman Republican – Mosinee) – Member of the Assembly Committee on Judiciary
- Representative Andrew Hysell, 48th Assembly District (Freshman Democrat – Sun Prairie) – Member of the Assembly Committee on Judiciary
- Representative Tip McGuire, 64th As-

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sembly District (Democrat – Kenosha) – Member of the Assembly Committee on Criminal Justice and Public Safety

- Representative Ryan Spaude, 89th Assembly District (Democrat – Ashwaubenon) – Member of the Assembly Committee on Criminal Justice and Public Safety
- Representative Steve Doyle, 94th Assembly District (Democrat – Onalaska) – Member of the Assembly Committee on Criminal Justice and Public Safety

State Senate:

- Senator Eric Wimberger, 2nd Senate District (Republican – Oconto) – Member of the Senate Committee on Judiciary and Public Safety
- Senator Kelda Roys, 26th Senate District (Democrat – Madison) – Member of the Senate Committee on Judiciary and Public Safety
- Senator Jodi Habush Sinykin, 8th Senate District (Freshman Democrat – Whitefish Bay)

## III. Governor Evers' 2025-27 Biennial Budget

Governor Evers delivered his fourth biennial budget address on Tuesday, February 18th, unveiling his 2025-27 executive budget. His proposal included an operating budget of $118.9 billion over the next two fiscal years. For comparison, the final 2023-25 state budget spent $97.4 billion.

By law, Governor Evers' budget has been introduced as a bill in the Wisconsin Legislature. The Joint Committee on Finance (usually Joint Finance Committee, JFC) will spend several months reviewing and altering the proposal. Based on previous budgets, the process should proceed in the following order, roughly:

- The Legislative Fiscal Bureau (LFB) will release a plain-language summary of the budget
- JFC will hold agency briefings and conduct statewide public hearings on the budget recommendations
- The co-chairs of JFC will identify non-fiscal policy items and slate them for removal from the budget bill
- JFC will vote, agency by agency, on changes to the budget
- By mid-June, the full budget should be available for debate and passage by both houses of the Legislature.
- Governor Evers will then decide whether to veto the budget, approve the budget, or veto pieces of the Legislature's budget proposal

The Governor's new spending plan included many new and old proposals, some of which would impact civil litigation in Wisconsin. Governor Evers' proposals related to civil litigation are non-fiscal in nature and will therefore be removed by Republican Legislators during their budget deliberations. These items are extremely unlikely to be included in the final budget bill. They include:

- Create a false claim with *qui tam* provision to allow trial lawyers – in the name of the state – to sue private parties alleging public program fraud and allowing the trial lawyer to be awarded a bounty of up to 30% of the amount recovered.
- Create new avenues for civil suits against employers alleging gender identity and expression discrimination, unfair honesty testing, and unfair genetic testing.
- Create a new private right of action to sue broadband providers alleging provision of service discrimination.
- Create a new means by which service employees may sue employers alleging an employer is denying the employee's right to a predictable work schedule.
- Create a new public intervenor office to facilitate civil suits against health insurance

companies relating to coverage disputes with policyholders.

## IV. Legislation

Several bills have been circulated for legislative support (see below) thus far that propose new private causes of action. As of this writing, they have not been formally introduced before the legislature and have therefore not been directed to the appropriate standing committee. Similar to previous legislative sessions, a notable and concerning trend for civil defense and insurance attorneys and the state's business community is an increasing willingness among legislators of both parties to propose new civil causes of action as a way of advancing policy goals that could be accomplished by other means.

- **The Save Women's Sports Act –** Circulated by Representative Barbara Dittrich and Senator Rob Hutton. This bill defines "sex" as the sex of an individual determined at birth by a physician and requires educational institutions to prohibit students born male from participating in athletic competitions designated for females or using locker rooms designated for female. The bill also creates a private cause of action:
  - » A female pupil may bring a cause of action against an educational institution if she is deprived of the opportunity to participate or suffers any harm because a pupil who was born a male is participating in a female sport.
  - » A female pupil may bring a cause of action against an educational institution or athletic association if she is subject to retaliation or other adverse action by the educational institution or athletic association because she reported a pupil who was born a male is participating in a female sport.
  - » An educational institution may bring a cause of action against a governmental entity, licensing or accrediting organization, or athletic association if the educational institution is harmed by complying with not allowing a pupil who was born a male from participating in a female sport.

- **Riot Legislation –** Circulated by Representative Shae Sortwell and Senator Dan Feyen. The legislation would create a new civil action which may be brought by any person who suffers injury or loss to person or property as a result of an act committed in violation of an existing law prohibiting damage to property or a new statute prohibiting rioting. This new civil action could be brought against any person who committed the violation and against any person or organization that provided material support or resources with the intent that the material support or resources would be used to perpetrate the offense.
  - » Under the bill "material support or resources" is defined to be currency, payment instruments, other financial securities, funds, transfer of funds, financial services, communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.
  - » If successful, the offender could be ordered to repair the damage. If successful, the plaintiff – in addition to recovering compensatory damages – could recover damages for emotional distress and attorney fees.

## V. WDC Legislative Meetings

To kick off the legislative session, WDC leadership and Hamilton Consulting made a concerted effort to reach out to legislators on behalf of the organization. The goal of the meetings was to introduce WDC to legislators serving on the Senate Committee on Judiciary and Public Safety and the


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Assembly Committee on Judiciary as they will be the committees most likely to review legislation impacting civil litigation issues. Additionally, we took the time to provide legislators with WDC's 2025-26 Legislative Agenda and answered any questions they had regarding WDC or civil litigation issues.

WDC President Heather Nelson, Members of the WDC Board of Directors, Brian Anderson and Matthew Granitz, and DRI Representative Nicole Marklein each took time to join Hamilton Consulting in meeting with legislators in either Madison, the Fox Valley, or Milwaukee. Overall, WDC representatives along with Hamilton Consulting had productive and informative meetings with fourteen different Wisconsin legislators.

If you have any questions about legislative or policy matters, please contact the author at clark@hamilton-consulting.com.

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*Prior to his tenure in the Speaker's office, Tyler served as an advisor to Assembly Co-Chair of the Joint Committee on Finance, Mark Born. He also served three years for former Assembly Majority Leader Jim Steineke, gaining a well-rounded perspective on legislative operations and leadership priorities.*

*Tyler earned his Bachelor of Arts degree in Government and History from Lawrence University in Appleton, Wisconsin. His deep understanding of state government combined with his strategic insight makes him a trusted partner for clients looking to navigate Wisconsin's legislative and regulatory processes.*

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# *Lorbiecki v. Pabst Brewing Company:* An Unfair Application of the Punitive Damages Cap

*by: Hanna C. Day, Coyne, Schultz, Becker & Bauer, S.C.*

On May 7, 2024, the Wisconsin Court of Appeals issued an important decision instructing circuit courts on how to apply the punitive damages cap in Wis. Stat. § 895.043(6). In *Carol Lorbiecki v. Pabst Brewing Company*, the court of appeals ruled that punitive damages must be calculated based on total damages, not just the damages attributed to a particular defendant.[1] As discussed below, *Lorbiecki* could result in unfair judgments entered against defendants who are found minimally liable in high dollar cases. The Wisconsin Supreme Court has accepted the case for review but unless the decision is reversed, *Lorbiecki* is citable and binding on circuit courts. A summary and discussion of *Lorbiecki* is set forth below.

## I. Jury Verdict

Gerald Lorbiecki worked as a pipefitter in Wisconsin from the mid-1970s to the early 2000s at multiple worksites in Wisconsin, including Pabst Brewing Company, where he was exposed to asbestos-containing materials.[2] He was diagnosed with mesothelioma in 2017 and died in 2018.[3]

Prior to his death, Gerald initiated a lawsuit against Pabst and others for negligence and violations of the safe place statute relating to his asbestos exposure.[4] His wife, Carol, continued the lawsuit individually and on behalf of his estate after his death.[5] Before trial, all the defendants except Pabst were dismissed by stipulation. [6]

At the end of trial, the jury apportioned liability as follows:[7]

| | |
|---|---|
| Pabst Brewing Company: | 22% |
| Sprinkmann Sons: | 20% |
| Wisconsin Electric Power Company: | 22% |
| Butters-Fetting Company, Inc.: | 18% |
| Grunau Company: | 18% |
| Total: | 100% |

For damages, the jury awarded $5,545,163.55 in compensatory damages, including $195,163.55 for medical and funeral expenses, $5 million for pre-death pain and suffering, and $1.35 million for loss of society and companionship (which the court reduced to $350,000 per the wrongful death damages cap).[8] In addition, the jury awarded $20 million in punitive damages specifically against Pabst.[9]

## II. Post-Verdict Motions

Post-verdict, the circuit court imputed Sprinkmann's percentage of liability to Pabst because Sprinkmann was a subcontractor of Pabst's, and Pabst had a nondelegable duty under the safe place statute to maintain its premises in reasonably safe condition.[10] This resulted in Pabst being found 42% liable for the total compensatory damages, or $2,328,968.69.[11]

Next, Pabst argued that the punitive damages award should be reduced under Wis. Stat. 895.043(6), which provides: "Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff

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…." The circuit court agreed and calculated the punitive damages recoverable from Pabst as twice Pabst's apportionment of the compensatory damages, or $4,657,937.38.[12]

Based on these decisions, the court entered total judgment against Pabst in the amount of $6,986,906.07.[13]

## III. Court of Appeals

Both parties cross-appealed.[14] With regard to the punitive damages award, Lorbiecki argued that the circuit court erroneously interpreted the punitive damages statute and should have doubled the jury's total award of compensatory damages, not just the amount attributable to Pabst based on its comparative liability.[15] She based her argument on the language of § 895.043(6), which states that punitive damages are calculated based on "the amount of *any* compensatory damages recovered by the plaintiff," without reference to comparative fault.[16]

The court of appeals agreed with Lorbiecki and ruled that "[a] plaintiff's recovery arises out of the calculation of compensatory damages, even if a plaintiff may never touch a fraction of that amount due to other factors."[17] Applying the punitive damages cap to the total amount of compensatory damages awarded by the jury, the court of appeals remanded the case to the circuit court with instructions to increase the punitive damages award to $11,090,327.10 (an increase of approximately $6.5 million from the circuit court's original award).[18]

## IV. Conclusion

In its decision, the court of appeals conceded that its interpretation of the punitive damages statute could result in unconstitutionally excessive punitive damage awards.[19] For example, a jury could award $10 million in compensatory damages, find the defendant only 1% at fault (and other non-parties 99% at fault), award $20 million in punitive damages, and the plaintiff would be able to recover $100,000 from the defendant in compensatory damages and $20 million in punitive damages (a 200x multiplier). The court of appeals declined to rule, however, that its interpretation was facially unconstitutional or would always lead to an absurd result or violate due process in every circumstance.[20]

The Wisconsin Supreme Court has accepted the case for review. As of the date of publication, the case is currently being briefed. Oral arguments are expected to occur this fall.

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# Court of Appeals Declines to Impute Attorney's Egregious Conduct to Plaintiff in *Scudder v. Concordia University*

*by: Hanna C. Day, Coyne, Schultz, Becker & Bauer, S.C.*

*Scudder v. Concordia University, Inc.* is a published court of appeals decision involving a plaintiff attorney's "abject failure to prosecute her case."[1] After the circuit court dismissed the plaintiff's case for failure to prosecute, the court of appeals reversed because the plaintiff's attorney "misled her by withholding pertinent information and convincing her that delays were due to the opposing party."[2] The *Scudder* court ruled that the circuit court erroneously exercised its discretion by unreasonably concluding that the plaintiff was complicit in her attorney's misconduct.[3] As a result, the plaintiff was given a second chance, despite the significant delays and cost to the defense.

## I. Facts

Plaintiff Krista Scudder hired an attorney to file a religious discrimination claim against Concordia University.[4] The case was filed, and a scheduling conference was held.[5] Ms. Scudder was not aware of the scheduling conference, but her counsel attended.[6] The scheduling order was set, but Ms. Scudder was not given a copy by her counsel and was not made aware of the dates.[7]

Ms. Scudder's counsel did not meet the witness designation deadline and never asked Ms. Scudder for witness information.[8] Concordia timely filed their witness designation and served discovery requests upon counsel.[9] Ms. Scudder never received Concordia's witness designation or discovery requests.[10]

Concordia made multiple attempts to obtain the discovery responses from counsel and counsel made multiple representations he would provide the same.[11] Concordia scheduled Ms. Scudder's deposition, which was not attended by counsel or Ms. Scudder.[12] Ms. Scudder was not copied on any of the emails between counsel and had no knowledge of the pending discovery requests and scheduled deposition.[13]

Ms. Scudder attempted to contact counsel in May, June, and July, with no response from counsel.[14] She emailed counsel information, but was not made aware the information she was providing counsel was for discovery responses.[15]

Concordia filed a motion for sanctions for failure to respond to discovery requests and non-compliance with a scheduling order and sought an order prohibiting Ms. Scudder from introducing damages evidence.[16] A hearing was held shortly after.[17] Ms. Scudder was never aware of this hearing and counsel did not attend either.[18] The trial court granted Concordia's request.[19]

After not hearing from counsel for months, Ms. Scudder checked CCAP and found that she had been sanctioned.[20] Ms. Scudder requested copies of filings related to the sanctions and hired new counsel within a week of learning of the sanctions.[21]

## II. Dismissal

Ms. Scudder's new counsel filed a motion for relief from the sanctions and to amend the scheduling order.[22] Concurrently, Concordia filed a motion for summary judgment on the grounds that Ms. Scudder had no admissible evidence and could not prove her claims.[23] The circuit court denied Ms. Scudder's motion stating that three months of not hearing

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from your attorney is too long and she should have appreciated something was wrong.[24] The circuit court entered an order denying Ms. Scudder's motion, granting summary judgment in favor of Concordia, and entered a judgment awarding costs against Ms. Scudder.[25]

## III. Appeal

Ms. Scudder appealed.[26] On review, the court of appeals looked at whether there was a reasonable basis to impute complicity and responsibility to Ms. Scudder for her counsel's egregious conduct under a two-prong test.[27] The Court considered (1) the client's failure to act in a reasonable and prudent manner; and (2) the client's knowledge of or complicity in that conduct.[28] When the client is blameless, the attorney's conduct should not be imputed to the client.[29]

The *Scudder* court declined to impute counsel's egregious conduct to Ms. Scudder because she acted reasonably and prudently. The following factors played a part in the court of appeal's decision: (1) Ms. Scudder did not attend the scheduling conference; (2) she did not have personal knowledge of the deadlines in her case; (3) she was a first time litigant; (4) and she did not attend hearings where sanctions were issued.[30] Ms. Scudder's unanswered calls for three months did not establish knowledge or complicity because missed phone calls does not automatically lead to a conclusion counsel is ignoring litigation requirements.[31] Simply put, there was no knowledge or complicity established on Ms. Scudder for her counsel's egregious conduct.

The court of appeals also ruled that the circuit court used the improper legal standard in imposing a sanction that effectively dismissed Ms. Scudder's case. It is within the court's discretion to dismiss a case as a sanction if the conduct is "egregious and there is no clear and justifiable excuse for the conduct."[32] The circuit court did not dismiss the case outright but effectively dismissed the case by prohibiting Ms. Scudder from offering evidence to support her case and then granting summary judgment to the defendant.[33] In effectively dismissing the complaint, instead of other sanction options, the circuit court should have found there was no clear and justifiable excuse for the plaintiff's behavior.[34]

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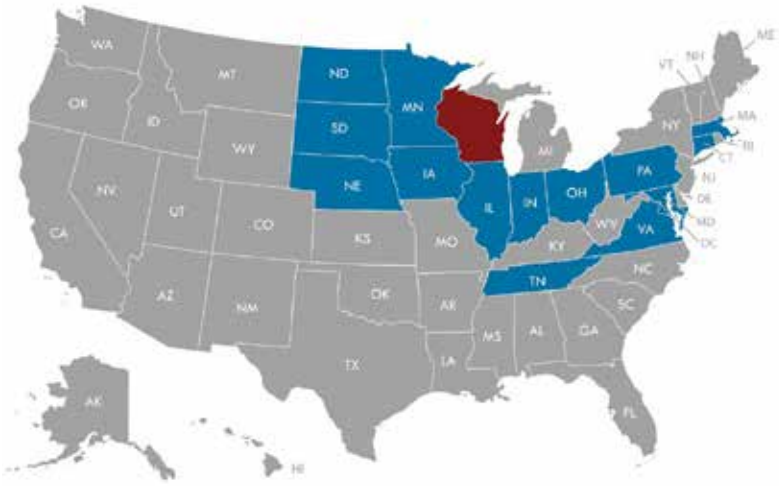


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# Wisconsin's COVID-19 Immunity Statute Ruled Unconstitutional by Court of Appeals

*by: Myranda Stencil, Coyne, Schultz, Becker & Bauer, S.C.*

On February 11, 2025, the Wisconsin Court of Appeals issued a formative decision on Wisconsin's COVID immunity statute, Wis. Stat. § 895.4801. In *Wren v. Columbia St. Mary's Hospital Milwaukee, Inc.*, the court of appeals held that Wis. Stat. § 895.4801—which provided broad immunity to healthcare providers for negligent acts or omissions which occurred during the COVID-19 pandemic—is unconstitutional because it is not narrowly tailored to serve the compelling state interest of responding to the pandemic when applied to claims unrelated to COVID-19.[1] A petition for review was filed on March 13, 2025. As of the date of this publication, the Wisconsin Supreme Court has not yet accepted the case for review. Unless the decision is accepted for review and reversed by the Wisconsin Supreme Court, *Wren* will act to preclude any immunity defense under Wis. Stat. § 895.4801.

## I. Procedural Posture

Savannah Wren, both individually and as the personal representative of the Estate of Calvin Gordon, Jr., and Calvin Gordon (collectively "Wren") filed a medical malpractice lawsuit against Columbia St. Mary's Hospital Milwaukee, Inc., Jessica Hoelzle, M.D., Jordan Hauck, D.O., and the Injured Patients and Families Compensation Fund (collectively "Columbia St. Mary's") related to the care she received during her pregnancy and the death of her newborn son in May 2020 during the COVID-19 pandemic.[2]

Columbia St. Mary's moved to dismiss the lawsuit, arguing that Wis. Stat. § 895.4801 provided them immunity from liability.[3] After Wren raised constitutional challenges to the COVID immunity statute, Columbia St. Mary's also argued that she failed to provide "notice" as required by Wis. Stat. § 806.04(11).[4]

The circuit court dismissed Wren's complaint, finding that she failed to name the required parties under Wis. Stat. § 806.04(11), that Wis. Stat. § 895.4801 provided immunity to Columbia St. Mary's, and that Wren failed to meet the burden of demonstrating that the statute was unconstitutional.[5]

Wren appealed the circuit court's order granting the motion to dismiss filed by Columbia St. Mary's, arguing that the circuit court erroneously found that Wis. Stat. § 806.04(11) required Wren to name the attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader as parties in this matter.[6] She also argued that the circuit court erroneously found that Columbia St. Mary's was entitled to immunity under Wis. Stat. § 895.4801, and that Wis. Stat. § 895.4801 is unconstitutional.[7]

## II. Controlling Law

Wis. Stat. § 806.04(11) establishes service requirements for constitutional challenges. Wis. Stat. § 806.04(11) provides, in pertinent part:

> If a statute, ordinance or franchise is alleged to be unconstitutional, or to be in violation of or preempted by federal law, or if the construction or validity of a statute is otherwise challenged, the attorney general

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shall also be served with a copy of the proceeding and be entitled to be heard. If a statute is alleged to be unconstitutional, or to be in violation of or preempted by federal law, or if the construction or validity of a statute is otherwise challenged, the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding, and the assembly, the senate, and the state legislature are entitled to be heard.

Wis. Stat. § 895.4801 established immunity for health care providers for certain acts or omissions beginning on March 12, 2020, and lasting for sixty days following the end of the state of emergency.[8] Wis. Stat. § 895.4801 provides, in pertinent part:

> Subject to sub. (3), any health care professional, health care provider, or employee, agent, or contractor of a health care professional or health care provider is immune from civil liability for the death of or injury to any individual or any damages caused by actions or omissions that satisfy all of the following:
>
> a. The action or omission is committed while the professional, provider, employee, agent, or contractor is providing services during the state of emergency declared under s. 323.10 on March 12, 2020, by executive order 72, or the 60 days following the date that the state of emergency terminates.
>
> b. The actions or omissions relate to health services provided or not provided in good faith or are substantially consistent with any of the following:
>
> 1. Any direction, guidance, recommendation, or other statement made by a federal, state, or local official to address or in response to the emergency or disaster declared as described under par. (a).
> 2. Any guidance published by the department of health services, the federal department of health and human services, or any divisions or agencies of the federal department of health and human services relied upon in good faith.
>
> c. The actions or omissions do not involve reckless or wanton conduct or intentional misconduct.

## III. Legal Reasoning

On the requirements of Wis. Stat. § 806.04(11), the court of appeals concluded that the plain language of Wis. Stat. § 806.04(11) requires service on the attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader, and nothing in the plain language of the statute indicates that any of these individuals must be named as a party to satisfy the requirements of the statute.[9] The court of appeals recognized that the statutory language had previously been interpreted to mean that the legislature did not intend to require that the attorney general be made a party, which was applicable to the speaker of the assembly, the president of the senate, and the senate majority leader as well.[10] The court also recognized that rather than stating that any of these entities shall be made a party, as the statute instructs for municipalities, Wis. Stat. § 806.04(11) instructs instead that these entities shall be "served."[11] Finally, the court concluded that the additional language found in Wis. Stat. § 806.04(11) and Wis. Stat. § 803.09(2m) regarding the intervening of parties would be surplusage if the statutory language required more than service.[12]

On the constitutionality of Wis. Stat. § 895.4801, the court of appeals concluded that the statute was unconstitutional as it was not narrowly tailored because its broad immunity applied even to claims unrelated to COVID-19, which was the compelling state interest.[13] The court of appeals applied strict scrutiny to Wren's facial challenge of the statute as the statute implicated the fundamental right to a jury trial provided in Article I, Section 5 of the Wisconsin Constitution.[14] The court recognized that the challenged legislation was different than a statute of limitations, statute of repose, or other statutory restrictions on medical malpractice claims, as it was an immunity statute for health care professionals and health care providers that completely eliminates any opportunity for a jury trial on one's claims.[15] The court noted that the statute completely shields health care professionals and providers from liability for anything short of acts or omissions involving reckless or wanton conduct or intentional misconduct.[16] A law subject to strict scrutiny will be upheld only if narrowly tailored to serve a compelling state interest.[17]

The court concluded that, even assuming Wis. Stat. § 895.4801 served the compelling state interest of responding to the COVID-19 pandemic, the statute is not narrowly tailored in furtherance of this purpose, and therefore, it does not survive strict scrutiny.[18] The court reasoned that the statute was broadly written and sweeping in the immunity it provides and there was no requirement that the acts or omissions have any nexus to the state of emergency declared in response to COVID-19.[19] While the court acknowledged that the health care system faced unique challenges during the pandemic, it concluded that Wren's right to a jury trial on her claims did not disappear as a result of the state of emergency created by the COVID-19 pandemic when the reason for her claims is unrelated to the compelling state interest of responding to COVID-19 that underlies the statute.[20] The court reasoned that simply because Wren was pregnant and had a baby during a pandemic does not make any health care she received related to COVID-19 and the state's response to it.[21] The fact that the statute was limited in time had no bearing on whether the statute was narrowly tailored to meet the compelling state interest in the first place.[22]

## IV. Conclusion

The court of appeals held that the plain language of Wis. Stat. § 806.04(11) requires only service on the attorney general, speaker of the assembly, president of the senate, and senate majority leader, and does not require naming them as parties.

The court of appeals also held that Wis. Stat. § 895.4801, which provided immunity to healthcare providers for negligent acts or omissions during the COVID-19 pandemic, is unconstitutional because it is not narrowly tailored to serve the compelling state interest of responding to the pandemic when applied to claims unrelated to COVID-19.

The court of appeals reversed the circuit court's order dismissing Wren's complaint and remanded the case for further proceedings.

On March 13, 2025, a petition for review was filed with the Wisconsin Supreme Court. As of the date of this publication, the supreme court has not yet accepted the case for review.

**Author Biography:**

*Myranda Stencil is an associate at Coyne, Schultz, Becker & Bauer, S.C. in Madison. She practices in civil litigation defense. She received her B.A. in 2014 from the University of Wisconsin-Madison and her J.D. in 2017 from the University of Wisconsin Law School, where she graduated cum laude. Myranda is admitted to practice in Wisconsin state and federal courts. She is a member of the Wisconsin Defense Counsel.*

***References***

1 *Wren v. Columbia St. Mary's Hosp. Milwaukee, Inc.,* 2025 Wisc. App. LEXIS 125, 2025 WL 452635, Appeal No. 2024-AP-126 (Ct. App. February 11, 2025).
2 *Id.* at ¶ 1.
3 *Id.* at ¶ 5.
4 *Id.* at ¶ 6.
5 *Id.* at ¶ 9.

6 *Id.* at ¶¶ 2, 4-5.
7 *Id.* at ¶ 2.
8 *Id.* at ¶ 5.
9 *Id.* at ¶ 15.
10 *Id.* at ¶ 16 (citing *Town of Walworth v. Village of Fontana-on-Geneva Lake,* 85 Wis. 2d 432, 436, 270 N.W.2d 442 (Ct. App. 1978).
11 *Id.* at ¶ 19.
12 *Id.* at ¶ 21.
13 *Id.* at ¶ 37.
14 *Id.* at ¶¶ 28-29.
15 *Id.* at ¶ 31.
16 *Id.* at ¶ 32.
17 *Id.* at ¶ 33.
18 *Id*.
19 *Id.* at ¶ 34.
20 *Id.* at ¶ 37.
21 *Id.*
22 *Id.* at ¶ 39.

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# Ask the Expert: A Rules-Based Approach to Deposing Expert Witnesses

*by: Robert M. Hanlon, Jr., Goldberg Segalla, LLP*

I had the privilege of learning how to depose experts from my father, who specialized in the expert-intensive practice of representing car and truck manufacturers in product liability litigation. I have since deposed and cross-examined many expert witnesses, and I genuinely enjoy doing so. But I also recognize that sitting across the table from a subject matter expert can be a daunting task for an attorney.

The purpose of this short article is to take some of the mystery out of the process and to provide a framework based on the two most important rules governing expert discovery, one procedural and one evidentiary. The questions suggested here are by no means intended to be a complete outline for an expert deposition. Rather, they are meant to provide a framework that covers the basics.

## I. Federal Rule of Civil Procedure 26

Federal Rule of Civil Procedure 26 governs discovery. If the witness has been retained to provide expert testimony or is an employee whose duties regularly involve giving expert testimony, then the witness must produce a written report that contains the following:

i. A complevte statement of all *opinions* the witness will express and the *basis and reasons* for them;

ii. The *facts or data* considered by the witness in forming them;

iii. Any *exhibits* that will be used to summarize or support them;

iv. The witness's *qualifications*, including a list of all publications authored in the previous 10 years;

v. A list of all other *cases* in which, during the previous 4 years, the witness *testified* as an expert at trial or by deposition; and

vi. A statement of the *compensation* to be paid for the study and testimony in the case.[1]

If the expert is not required to provide a written report, the party proffering the witness must still provide a disclosure of expert testimony, which must state:

i. The subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

ii. A summary of the facts and opinions to which the witness is expected to testify.[2]

## II. Deposition Questions Based on Rule 26

These disclosure requirements suggest a good set of opening questions to make sure you have been fairly apprised of the expert's opinions and the basis for those opinions. Such questions may include:

1. Is this an exact copy of your complete report? Have you prepared any other reports?[3]
2. Federal Rule of Civil Procedure 26 requires that your report contain a complete statement of all opinions you will express. Does your report contain *all* of your opinions?[4]


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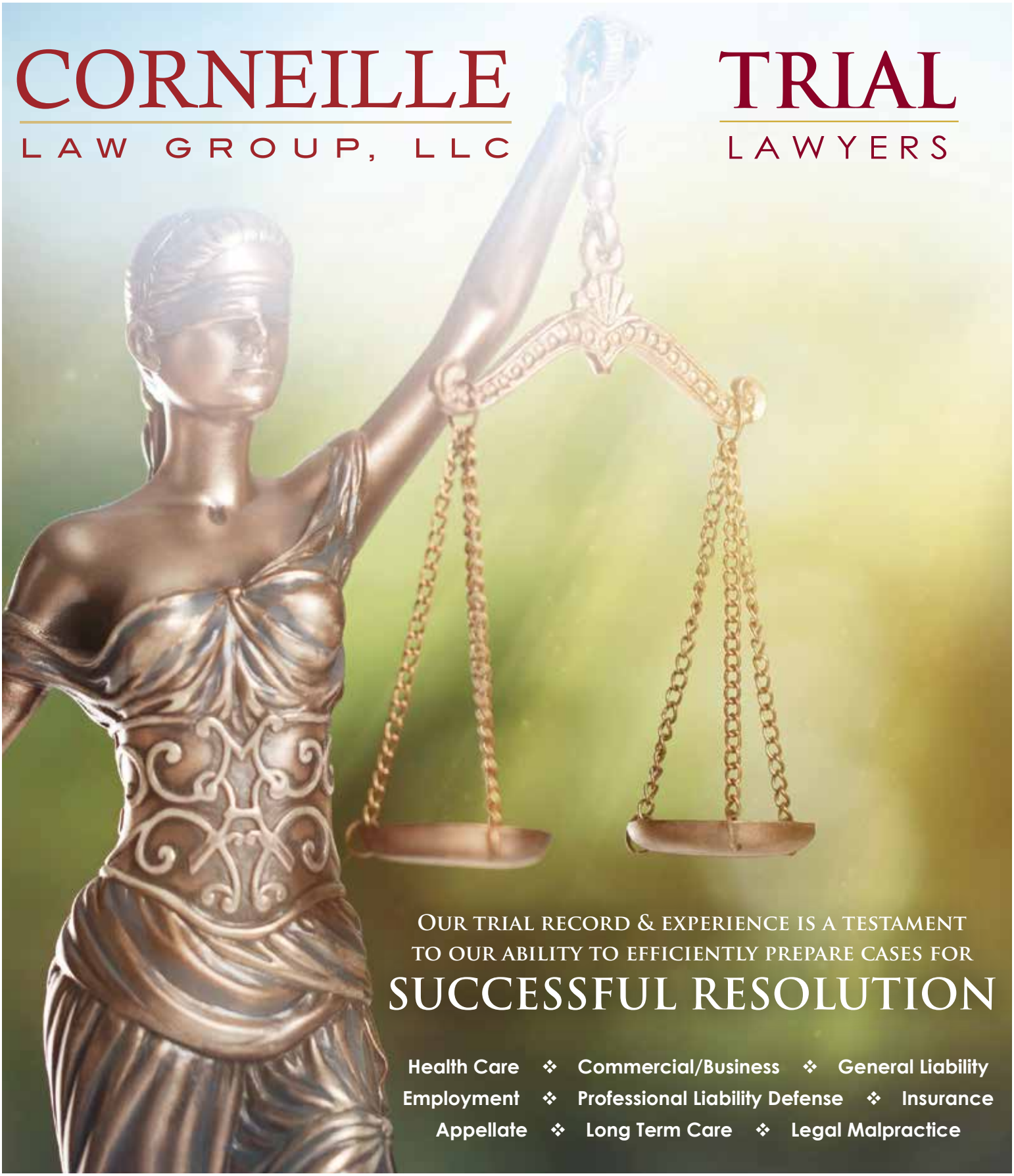
3. Rule 26 also requires that your report contain the basis and reasons for your opinions.
    a. Does your report contain all of the bases for your opinions?
    b. Does it contain all of the reasons for your opinions?
4. Rule 26 requires that your report contain the facts or data you considered in forming your opinions.[5, 6]
    a. Does your report contain all facts and data you considered?
    b. Have you asked for any additional facts or data that you have not yet received? If so, what did you ask for and why?
5. If there are relevant facts or data that the expert did not consider:
    a. Did you [insert what the expert did not do/review]?[7]
    b. May that have revealed additional relevant facts or data?
    c. May that additional information have affected your opinions?
    d. Have you done/reviewed that in other cases? Why?
    e. Why didn't you do/review that in this case?
6. Rule 26 requires that your report contain any exhibits that will be used to summarize or support your opinions. Does your report contain all such exhibits?
7. Rule 26 requires that your report contain your qualifications. Does your report summarize all of your qualifications?
    a. Do you hold any professional license(s)? Explain. Have any of your professional license ever been revoked or suspended? Explain.
    b. Have you ever been sued for malpractice? What was the outcome? Explain.
8. Rule 26 requires that your report include a list of all publications you have authored in the previous 10 years.[8]
    a. Does your report contain that list? Is it complete?
    b. Which of those publications were peer reviewed?
    c. Which of those publications are relevant to your opinions in this case? Explain.
    d. If there are statements in publications (whether authored by the expert or not) that undermine the expert's opinions, consider identifying them and asking the expert to admit that the publication is a reliable authority.[9]
9. Rule 26 requires that your report contain a list of all other cases in which, during the previous 4 years, you testified as an expert at trial or by deposition.
    a. Does your report contain that list? Is it complete?
    b. Has your expert testimony ever been limited or excluded by a court? Explain.
    c. In which of those other cases did you render opinions that are similar to (on the same topic as) your opinions in this case? Explain.
10. Rule 26 requires that your report contain a statement of the compensation to be paid to you for your study and testimony in the case.[10]
    a. Does your report contain that?
    b. Who is paying you in this case?
    c. Have much have you been paid so far? For how many hours?
    d. Are you owed any additional money for work that either has not yet been billed or has not yet been paid? How much? For how many hours?
    e. Approximately what percentage of your total annual income comes from providing services as an expert witness?
    f. Of that, what percentage comes from providing expert services for plaintiffs? For defendants?

These preliminary questions are designed to avoid surprises down the road, whether later in the deposition, in response to a motion to limit or exclude the expert's testimony, or at trial. They also provide a framework for dealing with any

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such surprises. If, in response to these questions, an expert witness announces a new opinion or a new basis for a previously disclosed opinion, the questioner can deal with that up front, perhaps by refusing to ask the witness about it unless/until it is properly and timely disclosed in a supplemental report or, after preserving your objection based on non-disclosure, by asking the witness about it but reserving the right to continue the deposition on that topic later after the court's ruling on your objection and after consulting with your own expert(s).

## III. Federal Rule of Evidence 702

Federal Rule of Evidence 702 governs the admissibility of expert opinion testimony. As fairly recently amended, it provides that a "witness who is *qualified* as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

a. The expert's scientific, technical, or other specialized knowledge will *help* the trier of fact to understand the evidence or to determine a fact in issue;

b. The testimony is based on *sufficient facts or data*;

c. The testimony is the product of *reliable principles and methods*; and

d. The expert's opinion reflects a *reliable application* of the principles and methods to the facts of the case."

## IV. Deposition Questions Based on Rule 702

These evidentiary requirements similarly suggest deposition questions. For *each opinion* expressed by the expert, such questions may include:

1. Why does that topic/issue/opinion require specialized knowledge? (Why is it beyond the ken of the average juror?)
2. What scientific, technical, or specialized knowledge do you bring to that opinion?[11]
3. What facts or data is that opinion based on? (Where in your report do you set forth the facts and data that opinion is based on?)[12,13]
4. What principles and methods did you utilize to reach that opinion?
5. If the reliability of the expert's principles or methods is questionable, challenge it.[14]
   a. Can that theory or technique be tested? Has it been tested?
   b. Has that theory or technique been published or otherwise peer reviewed?
   c. What is the known or potential error rate of that technique?
   d. Has that theory or technique been generally accepted in the relevant scientific community?
6. How did you apply those principles and methods to the facts of this case to reach that opinion?[15]

These foundational questions are designed to explore the strength and admissibility of the expert's opinions, which are only as strong as the facts, principles and methods they are based on. They are also designed to track the elements of Rule 702 so as to make it easier to later challenge the admissibility of seemingly speculative opinions.[16]

## VII. Conclusion

Since the disclosure and admissibility of expert opinion testimony is governed by rules, it makes sense to utilize those rules when deposing experts. Hopefully this article provides a framework both for doing that and for preparing your own expert to testify.

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## *References*

1 Fed. R. Civ. P. 26(a)(2)(B). Draft reports are governed by Rule 26(b)(4)(B). Supplemental reports are governed by Rules 26(a)(2)(E) and 26(e)(2).

2 Fed. R. Civ. P. 26(a)(2)(C).

3 Before the deposition, consider serving a demand for production of any other materials, including notes and calculations, prepared by or on behalf of the expert.

4 In a civil case, "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704.

5 Before the deposition, consider serving a demand for production of any materials reviewed by the expert that have not yet been produced in discovery.

6 At trial, as opposed to in discovery, "an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data." Opposing counsel may, of course, elicit those facts or data on cross-examination. Fed. R. Evid. 705.

7 E.g., Did you inspect the accident scene/vehicle? E.g., Did you review the [insert description] documents/photographs/videos? E.g., Did you review the plaintiff's medical records from before the accident? E.g., Did you review the radiology images, or only the radiology reports? E.g., Did you examine the plaintiff?

8 Before the deposition, consider serving a demand for production of all publications ("learned treatises"), whether authored by the expert or not, that the expert relies on in support of his opinions.

9 *See* Fed. R. Evid. 803(18), Exceptions to the Rule Against Hearsay, *Statements in Learned Treatises, Periodicals, or Pamphlets.*

10 Before the deposition, consider serving a demand for production of the expert's invoices.

11 Experts often express multiple opinions, some of which may fall outside their field(s) of expertise.

12 Keep in mind that an expert may base an opinion on facts or data that are not admissible in evidence if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject. Fed. R. Evid. 703. If the expert being deposed relies on inadmissible facts or data, inquire both as to whether they are the kinds of facts or data that are reasonably relied upon by experts in the field and as to the basis of a claim that they are.

13 As noted above, if there are important facts or data that the expert did not consider, confirm that.

14 *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-595 (1993) (identifying factors a court is to consider when making "a preliminary assessment of whether the reasoning or methodology [aka theory or technique] underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue," and emphasizing that "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138 (1999) (holding that the *Daubert* gatekeeping obligation applies not only to "scientific" testimony but also to "technical" or "other specialized" knowledge that is the subject of expert testimony).

15 *Id.* at 591 (explaining that the consideration of "fit" and Rule 702's requirement that the expert's testimony help the trier of fact "goes primarily to relevance" because "[e]pert testimony which does not relate to any issue in the case in not relevant and, ergo, non-helpful").

16 If the expert's report (or the proffering party's disclosure) clearly does not disclose a sufficient basis for his opinions, consider foregoing a deposition and moving to exclude the expert's opinion testimony on the grounds that his report does disclose the required facts and data, the required principles and methods, and the required application of those principles and methods to the facts of the case. As an alternative to exclusion, ask for a preliminary hearing to determine whether the testimony is admissible. Fed. R. Evid. 104.

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

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***Brianna Reynolds, et al. v. Rural Mut. Ins. Co.***
Grant County Case No. 23-CV-14
Trial Dates: November 25-26, 2024

**Facts:** A four-year-old boy was bitten in the face by a dog while at his paternal grandparents' farm. A direct action claim was made against the grandparents' liability insurer. The boy was seven years old at the time of trial. The boys' parents were never married and were not in a relationship at any time relevant to the injury or the lawsuit. They shared joint custody and placement. The mother was the one really pushing the claim.

**Issues for Trial:** The parties stipulated to liability and past medical expenses in the amount of $9,026.26. The only issue for trial was damages, particularly the value of facial scarring. The boy had a very faint scar on his left eyelid that was unnoticeable when the eye was open, and a more noticeable scar on the left check that became more pronounced and looked like a dimple when the boy smiled.

**At Trial:** Plaintiff's witnesses consisted of the minor's mother and maternal grandmother, as well as three medical experts who each testified via video deposition. The experts included the treating ER physician who attended to the minor the day of the injury, the treating oculoplastic surgeon that checked the status of the scars six months later, and a retained expert to opine on the necessity and cost of future scar revision surgery.

The retained expert testified that the minor would need revision surgery for both the eyelid and the cheek scar. It was revealed in testimony that the minor had a small scar near his eye from a prior, unrelated injury

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when his mother's dog knocked him down and he fell into an open drawer. When this scar was pointed out to the plastic surgeon, he could not explain why that scar was not bothersome while the scars from the dog bite at issue required revision.

The minor did not testify, but was brought in so the jury could see the scars in person and observe them with facial animation.

In closing arguments, plaintiff's counsel argued that the jury should award $75,000-$100,000 for past pain, suffering and disfigurement; $5,000-$10,500 for future medical expenses; and $100,000-$150,000 for future pain, suffering and disfigurement. The plaintiff's total verdict request of the jury was $189,026.46-$269,526.46. Defense counsel suggested awards of $20,000-$40,000 for past pain, suffering and disfigurement; $7,500-$10,500 for future medical expenses; and $5,000-$10,000 for future pain, suffering and disfigurement, for a total of $41,526.46-$69,526.46.

In addition to the stipulated past specials of $9,026.46, the jury awarded $35,000 for past pain, suffering and disfigurement, $10,500 for future medical expenses, and $15,000 for future pain, suffering and disfigurement, for a total verdict of $69,526.46 (the high end recommended by defense counsel)

**Plaintiff's Final Pre-Trial Demand:** $99,900
**Defendant's Final Pre-Trial Offer:** $85,000
**Verdict:** $69,526.46

For more information, contact Nicole Marklein at nmarklein@cjmmlaw.com.

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***Kay Anderson, et al. v. D.F. Chase, Inc., et al.***
Dane County Case No. 24-CV-407
Trial Dates: January 14-17, 2025

**Facts:** Defendants DF Chase (general contractor), Floors Unlimited (subcontractor), and Texas Flooring (sub-subcontractor) worked on a bathroom remodeling project at Old Dominion trucking facility in 2019. Part of the project called for heavy ceramic tiles to be installed on the nine-foot-high walls. In 2022, three years after the project was completed, three of the tiles spontaneously fell from the wall, and one tile allegedly hit the plaintiff—an Old Dominion trucker—while she was using the washroom. The plaintiff claimed chronic neck and head injuries from the incident.

**Issues for Trial:** Liability and damages were contested. Defendants admitted that the sub-subcontractor, who Floors Unlimited hired to perform the tile work, did not install the top row of tile in a workman like manner. Defendants argued that Texas Flooring, the sub-subcontractor (who defaulted) was responsible for the plaintiff's alleged damages. Defendants also challenged the plaintiff's alleged injuries. She claimed chronic head and neck pain from the incident. Dr. Marc Soriano testified that the plaintiff's complaints were not supported by the objective evidence. There were no marks on her body and all her post-accident films showed pre-existing degeneration but no accident-related trauma.

**At Trial:** Plaintiff called her treating doctor, who supported her claims, and a liability expert to testify that Texas Flooring installed the top row of tiles incorrectly. Defendants conceded that the top row of tiles were installed incorrectly by Texas Flooring. Dr. Soriano testified for the defense regarding the plaintiff's

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injury claims. In closing, the plaintiff asked the jury to award between $150,000 and $250,000. The jury awarded only $15,000. Neither DF Chase (represented by Paul Curtis) nor Floors Unlimited (represented by Jeremy Gill) were found causally negligent. Only Texas Flooring, who defaulted, was found causally negligent.

**Plaintiff's Final Pre-Trial Demand:** Plaintiff demanded $250,000 at mediation and reduced her demand to $150,000 before trial.
**Defendants' Final Pretrial Offer:** $50,000
**Verdict:** $15,000

For more information, contact Paul Curtis at pcurtis@axley.com or Jeremy Gill at jgill@nashlaw.com.

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***The Estate of James M. Hartson, et al. v. USAA Cas. Ins. Co., et al.***
Lincoln County Case No. 22-CV-28
Trial Dates: April 4-6, 2025

**Facts:** This was a wrongful death case stemming from a motor-vehicle-versus-pedestrian accident which occurred approximately 8:00 p.m. on State Highway 64 east of Merrill, Wisconsin. Weather conditions were clear and dark. 84-year-old James Hartson and his adult grandson were traveling westbound on Highway 64 and struck a deer. The Hartsons pulled their pickup truck off onto the shoulder next to the westbound lane. The grandson exited the truck to look for the deer. A few minutes later, James exited the truck and walked across the westbound lane and into the eastbound lane of Highway 64 where he was struck by a 2016 Ford Focus driven by State Farm's insured, Janice Klatt. Janice had her cruise control set at 59 mph. She applied the brakes less than 1/2 second before impact with Hartson. Hartson was thrown onto the Ford Focus before coming to rest on the shoulder next to the eastbound lane. Hartson was apparently conscious and screaming for help for a few minutes following the collision. Alcohol was not a factor as Janice testified she consumed no alcohol and blood tests confirmed it. Cell phone usage was not a factor as Klatt testified she was not using her cell phone and a forensic examination of the cell phone confirmed there was no cell phone usage in the hour prior to the accident.

**Issues for Trial:** The defense stipulated to $13,429.01 in funeral expenses. Liabilities and general damages were contested.

**At Trial:** The defense had two experts testify during trial: (1) Dr. David Curry, a human factors and lighting expert, and (2) Paul Erdtmann, a professional engineer who performed an accident reconstruction.

During closing arguments, plaintiffs' counsel asked the jury to award $1,000,000 to $3,000,000 for conscious pain and suffering and $500,000 to $700,000 for loss of society and companionship.

The jury found both Hartson and Klatt causally negligent but attributed 60% causal negligence to Hartson and 40% to State Farm's insured, Klatt. The jury awarded the $13,429.01 for funeral expenses, $200,000 for conscious pain and suffering, and $50,000 for loss of society and companionship. The total award was $263,429.01, but the plaintiffs recovered nothing since Hartson was more negligent than Klatt.

For more information, contact John Schull at jshull@ksrllp.com or Heather Nelson at hnelson@eversonlaw.com.

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***Timothy Smith, et al. v. Erie Ins. Exchange, et al.***
Jefferson County Case No. 22-CV-298
Trial Dates: February 5-6, 2025

**Facts:** Plaintiff was exiting Highway 26 in Fort Atkinson, Wisconsin, and stopped at a stop sign at the end of the exit ramp, angled to turn right. Defendant stopped behind him. Both parties were looking to their left, waiting for traffic to clear. When traffic cleared, defendant began moving before plaintiff, striking the rear of plaintiff's vehicle. Law enforcement was called. No injuries were reported and because there appeared to be less than $1,000 in vehicle damage, the Jefferson County Sheriff's Department declined to prepare a Motor Vehicle Accident Report.

Four days after the accident, plaintiff sought medical care, complaining of lower neck and upper back pain. The physician interpreted an x-ray taken at that visit as showing a normal cervical and thoracic spine. The physician diagnosed plaintiff with a strain of neck muscle and thoracic myofascial strain. He recommended rest, alternating ice or heat and the use of Tylenol and Ibuprofen and indicated his suspicion that the injuries would improve with conservative care.

A subsequent radiology report created over the weekend, however, showed, "possible compression fracture of T-8, and C spine with mild degenerative changes." Neither the physician nor the radiologist was able to determine the age or cause of the T8 fracture. Neither the subjective nor objective findings at the first visit indicated any pain in the thoracic T8 spine. In fact, upon receiving the radiology report noting the T8 fracture, the physician noted, "Thoracic spine official x-ray report documents presence of possible minimal compression fracture of T8, lower thoracic spine area. Patient did not have pain on exam over the area of T8. Suspect the finding of old possible minimal fracture is an old finding, not related to current MVA."

After the radiology report came in over the weekend, plaintiff was informed of the T8 fracture. He followed up about two weeks later, and, for the first time, complained of pain in the T8 area. Plaintiff then attended 24 sessions of physical therapy before being discharged from therapy with an estimated "85-90% back to his prior level of functioning."

**Issues For Trial:** Liability was conceded prior to trial and the insured was dismissed from the case. Trial proceeded against the insurance company only. The parties also stipulated to the sum of $12,092 in past medical expenses. No wage loss or future loss of earning capacity was claimed. The only issues for the jury were causation and past and future pain and suffering.

**At Trial:** Plaintiff's wife testified at trial about plaintiff's ongoing pain, the fact that they could no longer sleep in the same bed due to plaintiff's inability to sleep through the night, and plaintiff's inability to play with or participate in sports with his 8-year-old son any longer. Plaintiff also testified about the accident and about his pain. Plaintiff underwent a plaintiff's IME with Dennis Brown, who testified that plaintiff sustained a permanent injury to his neck and upper back that would cause him ongoing pain throughout his life. However, on cross-examination, he admitted that ongoing pain in the T8 area would be inconsistent with the injuries sustained in the accident and that he could not relate the T8 fracture to the accident. The deposition testimony of Plaintiff's treating physician and physical therapist were read into the record.

The insured was present throughout the trial and was permitted to sit at counsel table even though he was dismissed from the case. He testified about the facts of the accident. Dr. Wellington Hsu performed

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a medical records review but did not complete an IME of the plaintiff. Dr. Hsu appeared in person at trial and testified that the plaintiff sustained a cervical/thoracic strain and should have recovered in 4-6 weeks. However, he stated that it was reasonable for plaintiff to complete physical therapy and therefore put his end of healing two days after plaintiff was discharged from therapy. Dr. Hsu further stated that it could not be determined whether the T8 fracture was related to the accident, and therefore any ongoing pain in the T8 region was not related to the accident.

Plaintiff asked for $150,000 in past pain and suffering and $200,000 in future pain and suffering, for a total of $350,000. The defense argued that the jury should take off a zero, awarding $35,000 for past pain and suffering and nothing for future pain and suffering.

The jury awarded $50,000 for past pain and suffering and $35,000 for future pain and suffering, for a total of $85,000. When added to the medical bills the total amount Plaintiff was entitled to was $97,092.

**Plaintiff's Final Pre-Trial Demand:** $145,000
**Defendant's Final Pre-Trial Offer:** $40,000 (Offer of Judgment)
**Verdict:** $97,092

For more information, contact Mara Spring at mspring@conwayjosetti.com.

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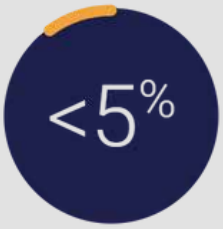


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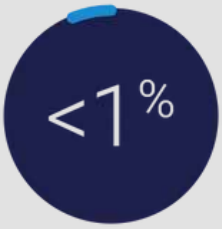


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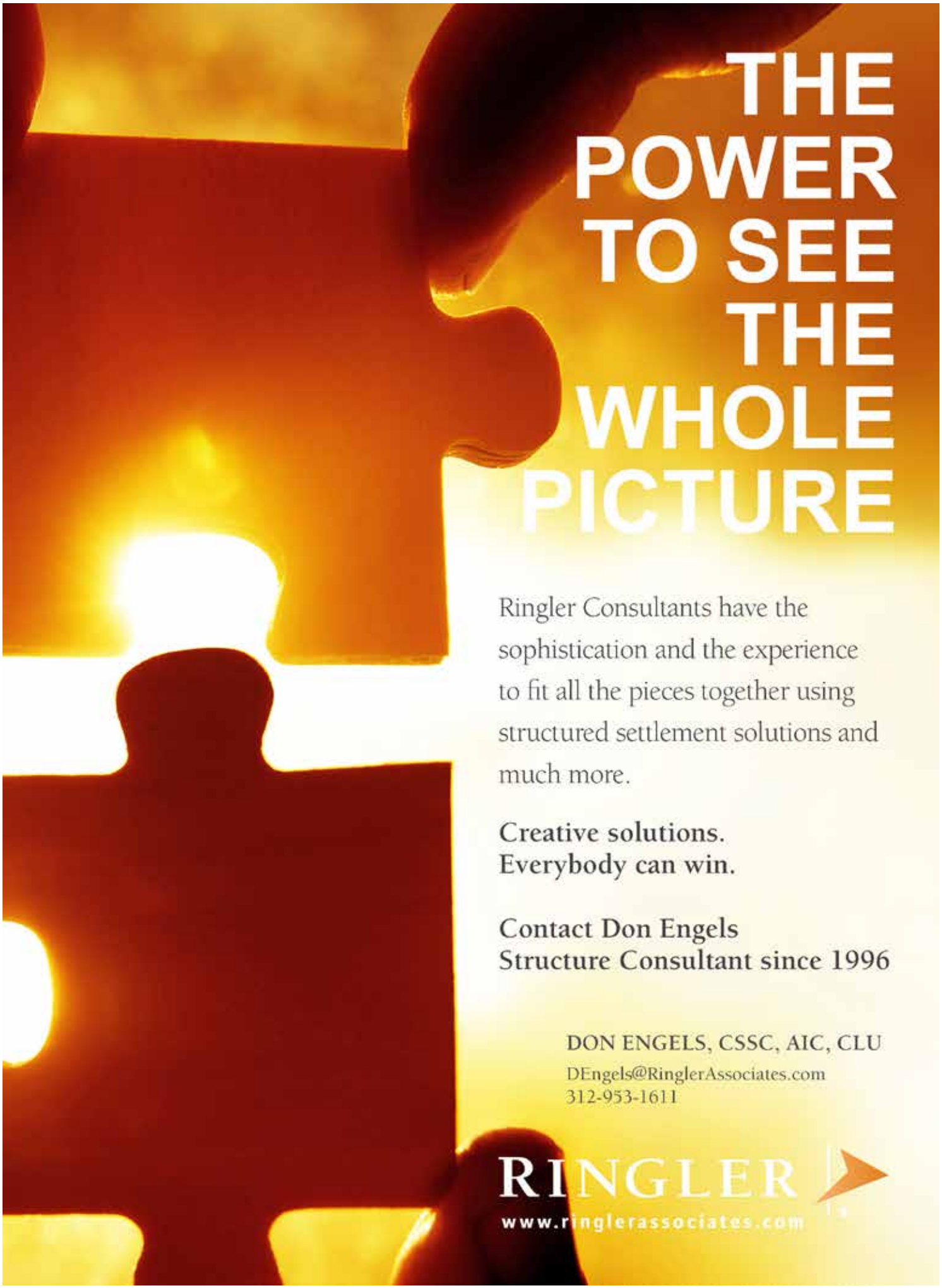
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# Calendar of Events

## August 14-15, 2025

## 2025 WDC Annual Conference