ANNUAL TORTS UPDATE

Edward E. Robinson
CANNON & DUNPHY, S.C.
595 N. Barker Road
Brookfield, WI 53045
erobinson@c-dlaw.com
(262) 796-3705

I. INSURANCE COVERAGE CASES

A. "Drive Other Car" Exclusions

Jackelen v. Russell, 2015 WI App 93, 366 Wis. 2d 255, 873 N.W.2d 265

- **Although an insured may have access to any number of vehicles in his or her employer's fleet of vehicles, for purposes of a "regular use exclusion" in the insured's own automobile policy which references "this auto," the insurer has to show that the particular vehicle being driven by the insured at the time of an accident was available or furnished for the insured's regular use.**

Hope Russell and Kelley Jackelen were involved in a motor vehicle collision. At the time, Hope was operating a Chevy Traverse owned by her husband Ryan's employer, Hertz. Pursuant to a Hertz employee vehicle use privilege policy, certain Hertz employees (including Ryan) are permitted to select any available Hertz vehicle to drive home in the evenings and on weekends. This policy further allows spouses of those employees to drive those vehicles on the employee's days off or while on vacations or holidays. ¶3. Hope drove the Chevy Traverse to the airport and parked it there while she flew to Kansas City to visit family over the weekend. The collision occurred when she was on her way back home from the airport on Sunday night. The only time she had used this particular vehicle was on her way to and from the airport. ¶4. At the time of the crash, the Russells owned one vehicle, a minivan, insured by Allstate. The Allstate policy provided liability coverage to "an insured" while operating "a non-owned auto used with the permission of the owner," provided that "[t]his auto [is] not available for the regular use of a person insured." ¶6.

Allstate brought a motion for declaratory judgment before the circuit Court, asserting that there was no coverage under the policy because vehicles in Hertz's fleet were regularly available for the Russells' use. The central issue before the court was whether

Allstate's policy, by using the terms "a non-owned auto" and "this auto," required Allstate to establish that the specific Chevy Traverse being operated by Hope was made available for her regular use, or whether it was sufficient that that Traverse was among a fleet of vehicles available for the Russells' regular use as a result of Ryan's employee use privileges. The circuit court agreed with Allstate's position, determining that the purpose of Allstate's "drive other car" exclusion" was "to exclude coverage when an insured can regularly use other vehicles," and the particular vehicle Hope was driving "was part of a Hertz fleet from which vehicles were made available to their employee, Mr. Russell, and his spouse for the regular use…." ¶8.

The court of appeals reversed. Addressing the central issue, the court held:

> We conclude that the proper analysis under the "drive other car" exclusion focuses on the specific vehicle for which coverage is being determined and that the "regular use" analysis looks to whether the specific vehicle was "available or furnished for the … regular use" of the insured driving that vehicle when the accident occurred.

¶16. The court explained that "the only reasonable reading of" the policy's reference to "this auto" and "a non-owned vehicle" is that it "refers to the specific, non-owned vehicle used with the owner's permission—here, the Chevy Traverse." ¶18. The court stated further that Allstate could have drafted a more restrictive "drive other car" exclusion to make the "regular use" analysis applicable to an entire fleet of vehicles rather than a specific vehicle, but did not. The court also noted that prior cases had applied the "regular use" analysis to the specific vehicle involved in an accident for which coverage was sought. "[W]e see no reason to depart from the vehicle specific analysis applied in a long line of cases applying the 'regular use' analysis, particularly where, as here, the policy language clearly and unambiguously indicates that the 'regular use' analysis is applied to the specific non-owned vehicle for which coverage is sought." ¶22.

Next, the court determined that under Allstate's policy, the "regular use" analysis "must be applied to the insured who was using the non-owned auto with the owner's permission at the time of the accident because the phrase 'a person insured' … in the Allstate policy is ambiguous." ¶27. Applying that analysis to the facts of the case, the court had no trouble determining that the specific Chevy Traverse being operated by Hope was not made available or furnished for her regular use. "[N]o reasonable fact-finder could conclude that Hope Russell's *actual use* of the Chevy Traverse rose to the level of 'regular use,' as the parties do not dispute … that the only two times that she drove the Chevy Traverse were on the weekend of the accident." ¶30.

Because it concluded that Allstate's "drive other car" exclusion did not bar coverage, the court declined to consider the alternative argument that Allstate's exclusion was invalid under Wis. Stat. § 632.32(5)(j).

B. What Constitutes An Occurrence

Oddsen v. Henry, 2016 WI App 30, 368 Wis. 2d 318, 878 N.W.2d 720

- **Issues of material fact precluded a determination as a matter of law that an insured's actions or non-actions in failing to obtain proper and timely aid for a friend who died of a drug overdose constituted an "accident," i.e., merely negligent conduct, in which case there would be a duty to defend and indemnify, or were intentional, in which case there would not be a duty to defend or indemnify.**

Oddsen went to Cavanaugh's home to watch a basketball game with Cavanaugh, Walters, Hoffman and Henry. At the party, Oddsen, "a regular abuser of drugs," consumed heroin, methadone, oxycodone and alprazolam, which caused his death the next morning. Oddsen left the party with Henry, and went to Henry's mother's condominium, where Henry also resided. Henry's mother had liability insurance through an insurance policy issued by State Farm. Oddsen allegedly showed signs of having overdosed while at Henry's home. However, there were various conflicting versions of what happened while Oddsen was at Henry's home. Oddsen's estate claimed that at approximately 4:00 a.m., Henry noticed that Oddsen was having difficulty breathing but delayed calling the police for 2 hours. Henry disputed this account, alleging, instead, that she did not notice anything was wrong with Oddsen until 5:45 a.m., and that as she was getting ready to take him to the hospital, he slumped over and became unresponsive, at which point she immediately called 911. Other individuals who were at the party with Oddsen gave conflicting versions about Oddsen's state at the time he left with Henry, as well as regarding phone calls and interactions with Henry in the early morning hours when Oddsen was at Henry's home.

Under its policy, State Farm agreed to defend and indemnify its insured if suit is brought "for damages because of bodily injury … to which this coverage applies, caused by an occurrence." "Occurrence," in turn, is defined as "an accident, including exposure to conditions, which results in: a. bodily injury … during the policy period." Coverage is excluded for "bodily injury" when it is "either expected or intended by the insured; or … which is the result of willful and malicious acts of the insured." ¶17. Before the circuit court, State Farm, which intervened in the lawsuit against Henry under a reservation of rights, moved for summary/declaratory judgment that it had no duty to

defend or indemnify Henry. First, State Farm argued that it had no duty to defend or indemnify Henry because she committed a series of volitional acts that led to Oddsen's death, and, therefore, there was no "accident" constituting an "occurrence." State Farm argued further that, even if there was an initial grant of coverage, the intentional acts exclusion barred coverage. Finally, State Farm argued that public policy should bar coverage in any event.

The circuit court granted State Farm's motion. Although concluding that "it may have never been [Henry's] intent to let Oddsen die," the circuit court found that "there were certain intentional actions on [her] part which contributed to her death," and concluded that no "reasonable insured" would expect coverage where the insured did "nothing over a period of several hours as her friend, who had consumed a large amount of illegal drugs in her presence in the evening, perished before her very eyes." The circuit court concluded that there was no occurrence and no initial grant of coverage because Henry's failure to obtain aid was not an accident. Instead, they were intentional actions. ¶19.

The court of appeals reversed and remanded. First, the court recited the well-established rules governing summary judgment. "Thus, the papers are 'carefully scrutinized,' and the nonmoving party is entitled to the benefit of all favorable facts and reasonable inferences drawn in his or her favor. Should the material presented on the motion be subject to conflicting interpretations or if reasonable people might differ as to its significance, then summary judgment must be denied." ¶26 (citing Grams v. Boss, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980)). Next, the court reviewed the rules applicable to determining whether a duty to defend exists. The court noted that, normally, the duty of an insurer to defend its insured "is determined by comparing the allegations of the complaint to the terms of the insurance policy, known as the 'four-corners rule.'" ¶27 (citing Estate of Sustache v. American Family Mut. Ins. Co., 2008 WI 87, ¶¶ 2, 24, 28, 311 Wis. 2d 548, 751 N.W.2d 845)). The court observed that there is an exception to this rule, however, where, as with State Farm, the insurer intervenes in the lawsuit against its insured and provides a defense under a reservation of rights. In that event, the "four-corners rule" does not apply and "this Court can look beyond the allegations in the [c]omplaint to determine if there is, in fact, any coverage under the terms of the [p]olicy." Id.

Here, State Farm's policy provides coverage "for damages because of bodily injury … caused by an occurrence," which is defined as "an accident." Because the term "accident" is not defined in State Farm's policy, the term is to be given its common everyday meaning, which is "an unexpected, undesirable event, or an unforeseen incident, which is characterized by a lack of intention." ¶30 (citing Doyle v. Engelke, 219 Wis. 2d 277, 289, 580 N.W.2d 245 (1998)). An accident includes coverage for negligence. Sustache, 2008 WI 87, par. 34. Whether an injury is accidental is viewed

from the standpoint of the insured. Schinner v. Gundrum, 2013 WI 71, ¶52, 359 Wis. 2d 529, 833 N.W.2d 685. An intentional act exclusion precludes coverage "only where the insured acts intentionally and intends some harm or injury to follow from that act. ¶31 (citing Liebovich v. Minnesota Ins. Co., 2008 WI 75, ¶52, 310 Wis. 2d 751, 751 N.W.2d 764).

Applying these standards, the court of appeals ruled that the circuit court erred in granting State Farm's motion. The "accident" here was Henry's negligent failure to render aid, resulting in Oddsen's death. The record reveals disputed issues of material fact as to whether Henry did anything over that several hour period of time before finally calling 911. "The fact finder at trial may believe the allegations in the complaint, if supported by evidence presented at trial; the fact finder may believe Henry's testimony; or it may find the facts lie somewhere between those two versions, given the testimony of others, such as Cavanaugh and Hoffman." ¶35. "In short, discovery has revealed that there are disputed issues of material fact as to whether Henry's conduct was intentional or accidental, making summary disposition of whether State Farm has a duty to indemnify Henry inappropriate. State Farm agreed to defend Henry under a reservation of rights, meaning that until there is a determination that State Farm has no duty to indemnify Henry, it has a continuing duty to defend her." ¶40.

The court declined to consider State Farm's argument that the Good Samaritan law, Wis. Stat. § 895.48(1), precluded liability, because "State Farm failed to adequately develop this issue, including an application of the elements of this defense to the facts of record." ¶39.

Finally, the court also rejected State Farm's invitation to dismiss the complaint on public policy grounds. First, State Farm's argument in this regard would require the court to determine disputed issues of fact and conclude as a matter of law that Henry's actions or non-actions were intentional, which it could not do. In addition, the court declined to address an alternative argument raised only in the dissent (discussed below) that public policy should bar coverage based on Oddsen's own actions in causing his death. ¶¶41-42.

Judge Reilly dissented. He would have concluded that Oddsen's own actions in causing his death should cut off any liability on the part of Henry, because Henry and her insurer did not cause Oddsen's ingestion of known lethal drugs.

C. Duty To Defend

1. Burgraff v. Menard, Inc., 2016 WI 11, 367 Wis. 2d 50, 875 N.W.2d 596

- **Where an insurer pays its full pro-rated contribution toward a settlement, it nevertheless has a continuing duty to defend where that payment amount is less than the policy limits.**

Burgraff was injured when a Menard employee loaded materials onto her truck. Burgraff's own auto insurer, Millers First Insurance Company, agreed to defend Menard as a permissive user of Burgraff's vehicle. The liability limits under the Millers First policy were $100,000. The policy also stated that if there is "other applicable liability insurance," Millers First's share would be "the proportion that our limit of liability bears to the total of all applicable limits." Menard had an excess liability policy issued by CNA with a self-insured retention ("SIR") in the amount of $500,000. ¶¶7-14.

Millers brought a motion for declaratory judgment, which the circuit court granted, determining that its share of any verdict or settlement would be one-sixth of $600,000 (Millers' $100,000 limits divided by the sum total of Miller's limits and Menard's SIR.) Thereafter, Millers settled with Burgraff for $40,000. Millers thereafter withdrew from Menard's defense, who then funded the defense through trial. At trial a verdict was rendered awarding approximately $345,000. ¶¶15-17.

On appeal, Menard asserted that Millers had a continuing duty to defend Burgraff because its settlement did not exhaust its policy limits, and, therefore, it breached its duty to defend. It also sought to recover damages it sustained as a result of that breach. The court of appeals agreed with Menard.

The supreme court granted Millers' petition for review, but ultimately affirmed the court of appeals on all issues and remanded to the circuit court for a determination of damages. Specifically, the supreme court held that Millers breached its duty to defend by withdrawing the defense before paying its full policy limits. The court found that although Millers may have paid its maximum potential liability for the claim, the policy language required Millers to continue defending until it pays its full policy limits. ¶57

After concluding that Millers breached its duty to defend, the court next considered the available damages flowing from that breach. In this regard, the court stated that an insured is only entitled to be put in the same position he would have been in had the insurance company fulfilled the contract. Here, the verdict amount itself did not result

from Millers' breach, and, therefore, Millers was not obligated to pay the full amount of the verdict, as Menard had requested. In so ruling, the supreme court reaffirmed its holding in Newhouse v. Citizens Security Mut. Ins. Co., 176 Wis. 2d 824, 501 N.W.2d 1 (1993), and adopted the Seventh Circuit's reasoning in Hamlin Inc. v. Hartford Accident and Indem. Co., 86 F.3d 93 (7th Cir. 1996), that insureds may only recover damages that were incurred as a result of an insurer's breach. ¶¶59-65. However, the court determined that Millers was liable for defense costs incurred after it withdrew its defense, as those costs were caused by the breach. ¶¶66-68

Finally, because Millers failed to follow Wisconsin procedure for contesting insurance coverage, the court held that Millers may not pursue a claim for equitable contribution against Menard for defense costs incurred after withdrawing the defense. ¶¶76-79

Chief Justice Roggensack, joined by Justice Ziegler, concurred in the majority's opinion that Millers breached it duty to defend, but dissented with respect to the majority's conclusion that Millers was not entitled to equitable contribution from Menard.

2. State Farm Fire & Cas. Co. v. Easy PC Solutions LLC, 2016 WI App 9, 366 Wis. 2d 629, 874 N.W.2d 585

- **An insurance policy's exclusion for injuries or damages resulting from a violation of the Telephone Consumer Protection Act (TCPA) barred coverage not only for claims alleging a violation of the TCPA, but also claims for conversion arising out of the same conduct that constitutes a violation of the TCPA.**

Wilder Chiropractic brought a class action against Easy PC Solutions alleging that it violated the Telephone Consumer Protection Act (TCPA) and committed conversion by sending "illegal faxes" on three separate dates in 2010. Easy PC tendered the defense to State Farm, which denied coverage and refused to defend. Easy PC then settled with Wilder, and assigned to Wilder its indemnity rights against State Farm. State Farm then brought a declaratory judgment action, seeking a determination that it had no duty to defend Easy PC against Wilder's claims. The circuit court agreed that State Farm had no duty to defend, and Wilder appealed.

The court of appeals affirmed. State Farm's policy contained a TCPA exclusion which precluded coverage for "bodily injury, property damage, personal injury, or advertising injury arising directly or indirectly out of any action or omission that violates or is alleged to violate … [t]he Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law…." Turning to the allegations of the complaint,

in connection with both the TCPA and conversation claims, Wilder's complaint set forth the same allegations regarding the transmission of unsolicited faxes. The only additional facts alleged with respect to the conversion claims were that the faxes "effectively stole" the time of Wilder's employees who were involved in receiving, reviewing and routing these "illegal faxes." ¶5. The court of appeals rejected Wilder's assertion that the TCPA exclusion did not apply to the conversion claims, because they involve different elements than TCPA violations and do not arise out of any action of omission that violates or is alleged to violate the TCPA. "All of the actions that Wilder's complaints alleges Easy PC took that give rise to the conversion claims are the same actions alleged to give rise to the TCPA violation…. The exclusion is directed at Easy PC's actions, not the effect of its actions." ¶6

The court also rejected Wilder's argument that even if the 2010-11 policy excluded coverage, earlier policies without the TCPA exclusion applied. Wilder argued that because this was a class action filed on behalf of a class of persons who received faxes from Easy PC between four and six years prior to the commencement of the class-action lawsuit, the complaint states claims that would potentially be covered under earlier policies that did not contain this TCPA exclusion. The court of appeals noted that Wilder's complaint only set forth three specific dates in which unsolicited faxes where sent, all of which were in 2010. ¶7. "Wilder's potential representation of an expansive class of similarly situated claimants is insufficient to trigger a duty to defend for any policy period untethered to a factual allegation in the complaint." ¶8.

Judge Neubauer concurred. She wrote separately to note that there was no reason to address whether any earlier State Farm policies provided coverage because "there is no allegation, or any evidence, that Easy PC ever requested a defense under the earlier State Farm policies." ¶10.

Significantly, the court of appeals failed to consider Wilder's argument that State Farm's exclusion could not be considered in determining if there was a duty to defend based on State Farm's denial without either bringing a declaratory judgment action or defending under a reservation of rights until the coverage issues could be decided. As set forth in Wilder's brief:

> This Court has enumerated the "procedures that insurers can use to raise the coverage issue and still retain their right to challenge coverage": (1) the insurer and the insured can enter into a nonwaiver agreement in which the insurer would agree to defend, and the insured would acknowledge the right of the insurer to contest coverage; (2) the insurer can request a bifurcated trial or a declaratory judgment so that the coverage issue can be resolved before the liability and damage issues; or (3) the insurer can file a reservation of rights which allows the insured to pursue his or her own defense not subject to the insurer's control, but the insurer agrees to pay for the legal fees incurred. Radke v. Firemen's Fund Ins. Co., 217 Wis. 2d 39, 44-45, 577 N.W.2d

366, 369 (Ct. App.), review denied, 219 Wis. 2d 923, 584 N.W.2d 123 (1998). See Southeast Wis. Professional Baseball Park Dist., 2007 WI App 185, ¶¶42-44.

When Easy PC tendered defense of the complaint, State Farm did none of these things. Instead, it abandoned Easy PC to litigate the claim on its own. Having allowed the case to proceed without providing Easy PC a defense, State Farm opted for what the Radke court termed the "more risky version of the third alternative": "for the insurer to not file a reservation of rights, but to simply reject the tender of defense and allow the insured to pursue his or her own defense." 217 Wis. 2d at 45. "[W]hen the case proceeds without a prior determination of coverage, the insurer who declines to defend does so at its peril." Id. (internal quotation omitted). "Where an insurer improperly refuses to defend, it will be held to have waived any subsequent right to litigate coverage." Id. Furthermore, "[p]rior to a determination of coverage, an insurer may be required to furnish a free defense to its insured, and a refusal to do so may be a breach of the insurer's duty to defend." Olson v. Farrar, 2010 WI App 165, ¶11, 330 Wis. 2d 611, 794 N.W.2d 245 (internal citations omitted), aff'd 2012 WI 3, 338 Wis. 2d 215, 809 N.W.2d 1.

As discussed above, State Farm breached the duty to defend. It is estopped to deny coverage. Therefore, State Farm has an obligation to pay the entire judgment or settlement as the automatic consequence of its breach of the duty to defend. See Radke, 217 Wis. 2d at 4 7.

Perplexingly, the court of appeals completely ignored and failed to address this argument or cited authorities. Instead, it simply resorted to reviewing the exclusion and applying its terms to determine if coverage was excluded, even though State Farm failed to defend and seek a prompt judicial declaration of whether any coverage was available.

D. Pollution Exclusion

Connors v. Zurich American Ins. Co., 2015 WI App 89, 365 Wis. 2d 528, 872 N.W.2d 109

- **An endorsement to a pollution exclusion rendered the policy's standard pollution exclusion ambiguous as to whether it excluded coverage for bacterial illness, thereby requiring the policy to be construed in favor of coverage.**

Connors, an employee of Grede Foundries, became ill and was diagnosed with pneumonia caused by exposure to the bacteria *Legionella pneumophilia*. An investigation by a federal agency determined that the water in the foundry cooling towers contained this bacteria. These towers were in close proximity to fresh air intakes at the foundry. During the pertinent time periods, the foundry had a liability insurance policy with Charter Oak Fire Insurance Company. ¶3. Connors brought a direct action against Charter, alleging that the foundry was negligent in not properly maintaining its

cooling towers, and other water sources, which allowed for the growth of the bacteria and Connors' exposure to it. ¶4. Charter Oak moved the circuit court to dismiss the complaint based on its pollution exclusion, or, in the alternative, to bifurcate the proceedings to resolve the coverage issue first. The circuit court granted Charter Oak's motion to bifurcate, and Charter Oak subsequently moved for summary judgment.

Charter Oak's policy contained a standard pollution exclusion which excluded coverage for bodily injury "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants … at or from any premises, site or location which is or was at any time owned or occupied by … any insured." ¶7. The policy defined the term "pollutants" to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." ¶8. However, the policy also contained an endorsement which changed the definition of pollutants by listing four categories of substances that constitute "pollutants:" 1) petroleum or petroleum derivatives, 2) chlorinated and halogenated solvents, 3) coal tar and manufactured gas plant byproducts, and 4) organic and inorganic pesticides and inorganic contaminants.

The circuit court granted Charter Oak's motion, determining that the *Legionella* bacteria was a "pollutant," and, therefore, the pollution exclusion unambiguously barred coverage for Connors' injuries. The circuit court rejected Connors' argument that the pollution endorsement limited the scope of the exclusion to only industrial or environmental pollution.

The court of appeals reversed. As an initial matter, while acknowledging the recent pollution exclusion decisions of the supreme court in Wilson Mutual Insurance v. Falk, 2014 WI 136, 360 Wis. 2d 67, 857 N.W.2d 156 (coverage excluded where liquid cow manure spread as a fertilizer contaminated a well), and Preisler v. General Casualty Insurance, 2014 WI 135, 360 Wis. 2d 129, 857 N.W.2d 136 (coverage excluded where decomposing septage spread on a farm field as a fertilizer contaminated a well), the court found these opinions "largely distinguishable because they interpret the standard pollution exclusion, not the pollution exclusion at issue here." ¶17. Here, by contrast, the policy contains an endorsement which "provides a significantly different definition of 'pollutants' that cannot be treated as surplusage." ¶29. Analyzing the language of that endorsement, the court held that "[t]he additional language provides a new definition of pollutants, under which it is ambiguous whether the bacteria alleged to have been inhaled are obviously in the nature of commercial or industrial byproducts specified in the pollution exclusion." Id. Accordingly, the court rejected Charter Oak's assertion "that the standard pollution exclusion is 'identical' to the pollution exclusion here, and that we should therefore apply the Wilson Mutual test to the different policy language here, without regard for the more detailed definition in the endorsement." Id. For the same reason, the court of appeals rejected Charter Oaks' reliance on Landshire

Fast Foods of Milwaukee, Inc. v. Employers Mutual Casualty Co., 2004 WI App 29, 269 Wis. 2d 775, 676 N.W.2d 528, in which the court interpreted the standard pollution exclusion to preclude coverage when the bacteria *Listeria monocytogenes* allegedly rendered food products unfit for consumption. ¶30.

The court agreed with Charter Oak "to the extent that it suggests that, if we were presented only with the language in the standard pollution exclusion, then coverage would be excluded." ¶35. However, "[w]hile there would be no coverage if the policy here included the standard pollution exclusion language only, … the specific, detailed endorsement language makes the difference…. Ambiguity arises because the replacement definition of pollutants in the endorsement limits the exclusion by specifying particular types of substances that qualify as pollutants." ¶40. "Without assigning detailed meanings to each term [in the endorsement], it is readily apparent that each category involves a type of product or byproduct that would be expected to be used in, or result from the operation of, particular types of commercial or industrial operations." ¶43. For this reason, the court stated, "[w]e see no reason to conclude that a reasonable insured reading any category would think of mist- or vapor-borne bacteria as belonging in any of the four categories." Id. The court stated further that "neither bacteria generally nor mist-or vapor-borne bacteria in particular are specified, and arguably they are not alluded to, in any category." ¶45.

In conclusion, "[w]hile coverage would not be available if the policy here contained the standard pollution exclusion, one reasonable interpretation of the included substances categories [in the endorsement] is that they involve products or byproducts that would be expected to be used in, or result from the operation of, certain commercial or industrial operations, and that would not include mist- or vapor-born bacteria." ¶57. Because of this ambiguity, the policy had to be construed against Charter Oak and in favor of coverage.

II. IMMUNITY CASES

A. Recreational Immunity

1. Roberts v. T.H.E. Insurance Company, 2016 WI 20, 367 Wis. 2d 386, 879 N.W.2d 492

- **A company providing hot air balloon rides at a charity event is not an "owner" of property used for recreational purposes, and, therefore, is not entitled to recreational immunity, even though the person injured is engaged in a recreational activity.**

- **The liability waiver form signed by the plaintiff was void because it was overly broad in scope, and provided on a "take it or leave it" basis without affording the plaintiff an opportunity to bargain over its terms.**

Roberts attended a charity event in 2011 sponsored by Green Valley Enterprises at a shooting range owned by Beaver Dam Conservationists, LLC. Sundog Ballooning, LLC, donated tethered hot air balloon rides at the event. At the event, Hanson, Sundog's co-owner, tethered a hot air balloon to two trees and a pick-up truck. He let passengers rise to a certain height before returning them to ground level. Roberts and her family signed up for the ride. While waiting in line for their turn, Roberts signed a waiver of liability while waiting in line for their turn. This waiver form provided as follows:

> I expressly, willing, and voluntarily assume full responsibility for all risks of any and every kind involved with or arising from my participation in hot air balloon activities with Company whether during flight preparation, take-off, flight, landing, travel to or from the take-off or landing areas, or otherwise. Without limiting the generality of the foregoing, I hereby irrevocably release Company, its employees, agents, representatives, contractors, subcontractors, successors, heirs, assigns, affiliates, and legal representatives (the "Released Parties") from, and hold them harmless for, all claims, rights, demands or causes of action whether known or unknown, suspected or unsuspected, arising out of the ballooning activities . . . .

¶9. While waiting in line, strong winds caused one of the tether lines to snap. The untethered balloon then moved toward those waiting in line. The balloon's basket struck Roberts and knocked her to the ground, injuring her. ¶10. Roberts subsequently commenced a lawsuit against Sundog and its liability insurer. Sundog moved for summary judgment, asserting that Roberts' claims were barred because she signed a liability waiver, and because Sundog was entitled to recreational immunity under Wis. Stat. § 895.52 in any event. The circuit court agreed with Sundog, and granted its motion for summary judgment. The court of appeals affirmed in an unpublished opinion. Roberts v. T.H.E. Ins. Co., No. 2014AP1508 (Wis. Ct. App. Mar. 26, 2015).

The supreme court granted Roberts' petition for review, and reversed the court of appeals in a 4-3 majority decision authored by Justice Ann Walsh Bradley. First, the majority addressed whether Sundog was entitled to recreational immunity, and concluded it was not. It was undisputed that Roberts was engaged in a "recreational activity" at the time of the incident, because the statute's definition of "recreational activity" includes "ballooning." Wis. Stat. § 895.52(g). In addition, "[t]he case law is clear that a spectator who attends a recreational activity is engaged in a recreational

activity." ¶24. Therefore, even though Roberts was still in line at the time of the incident, and not actually in the hot air balloon, was irrelevant to her status as a participant in a recreational activity. Nevertheless, Sundog was not entitled to recreational immunity, because immunity is only extended to an "owner" of property used for recreational activity, which the statute defines as "[a] person … that owns leases or occupies property." ¶¶26-27. Although in prior cases, courts had concluded that in certain circumstances, private organizations hosting an event on land they did not own were entitled to recreational immunity, the majority concluded that "[t[his case is different from [those] prior cases, because Roberts did not bring claims against the event producer or owner of the property." Here, "Green Valley Enterprises, not Sundog, produced the charity event where Roberts was injured," and "[t]he Conservationists, not Sundog, was the owner of the property where the event took place." ¶33.

Moreover, the purposes of the recreational immunity statute—allowing public access to private lands—would not be served by extending immunity to Sundog. "Immunizing Sundog would have no effect on whether the public had access to private land, because Sundog is not responsible for opening the land to the public." ¶37. The majority observed further that "[e]xtending immunity to Sundog could lead to limitless immunity…. If Sundog—who has no connection to the land—is granted immunity, there will be no stopping point to recreational immunity." ¶39. The majority concluded that "[g]ranting immunity to third parties that are not responsible for opening up the land to the public is unsupported by our prior case law [and] [i]n addition, it would create an absurd result with no logical stopping point that does nothing to further the legislative purpose of the statute." ¶41. Moreover, the majority also determined that recreational immunity did not apply to Sundog as "owner" of "property" because "the hot air balloon is not a structure as that term is applied in Wis. Stat. § 895.52(1)(f)." ¶45. Instead, "the hot air balloon … was transient and designed to be moved at the end of the day." Id.

Having concluded that Sundog was not entitled to recreational immunity, the majority turned to the liability waiver Roberts had signed. The majority concluded that this waiver violated public policy and was therefore void. First, although Roberts signed the waiver, she never returned it. Instead, it was found on the event grounds after the accident. However, the majority did not decide this issue based on that reason, but instead determined that it was "unenforceable as a matter of law because it fails to satisfy the factors set forth in our prior case law." ¶58. Applying the factors from prior cases, the majority found that the waiver was overly broad and all-inclusive. Amongst other things, it was not clear whether being injured while waiting in line for the hot air balloon ride was covered by the waiver. ¶60. Next, the waiver was on a standardized form, offering Roberts no opportunity to bargain or negotiate its terms. ¶61. In

addition, Sundog did not discuss its contents with her or any of the risks associated with ballooning activities. ¶62.

Justice Annette Ziegler wrote a sole concurrence. Although she agreed that Sundog was not entitled to recreational immunity, and that the liability waiver was unenforceable, she wrote to stress that the recreational immunity statute should not be read to "cloak a negligent actor with immunity no matter what they do." ¶67. Instead, she noted that Wis. Stat. § 895.52 "grants recreational immunity, not sovereign immunity, and … the protections offered by § 895.52 end when a landowner performs negligently in a capacity unrelated to the individual's ownership of the land." ¶75.

Justice David Prosser, joined by Chief Justice Patience Roggensack, wrote separately, concurring in part and dissenting in part. Justice Prosser agreed with the majority that the liability waiver was unenforceable because it violated public policy. However, he joined with Justice Rebecca Bradley's dissent in concluding that Sundog had recreational immunity because Sundog "occupied" the property where the injury occurred. "The Hansons flagged off the whole area. They set up a display and a sign-up table for the balloon ride, and they designated a waiting area for people to line up for a ride. In short, the Hansons completely controlled one section of the property for their ballooning operation…. In sum, the occupied the property." ¶98 He also encouraged the legislature to "promptly review the recreational immunity statute."

Justice Rebecca Bradley wrote a dissenting opinion. She would have concluded that Sundog was an "owner" of the property because it was "occupying" the property. In addition, she commented that the majority's decision "will discourage organizations such as Sundog from donating recreational activities at charity events for fear of incurring liability, which, in turn, will reduce sponsorship of such events by organizations because they will have less recreational options – if any at all – to draw attendance." ¶138.

2. Carini v. ProHealth Care, Inc., 2015 WI App 61, 364 Wis. 2d 658, 869 N.W.2d 515

- **Recreational immunity bars the claim of a person injured while walking to a picnic as a result of tripping over a temporary power cord placed on the ground.**

Carini, an employee of ProHealth Care, was injured while attending a company picnic hosted by ProHealth Care in the parking lot of the Milwaukee County Zoo, pursuant to a contract with the Zoo. While near a band stage and walking toward the picnic's food tent, Carini tripped and fell over a power cord extending from the stage, fracturing her

shoulder. The power cord was placed across the surface of the parking lot, and was not taped or otherwise secured down. Carini sued ProHealth Care, asserting that it was negligent with respect to the placement of the unsecured cord, which created a tripping hazard. ProHealth Care moved for summary judgment based on recreational immunity pursuant to Wis. Stat. § 895.52(2). Section 895.52(1)(d)1 defines "owner" for recreational immunity purposes as including "[a] person, including a governmental body or nonprofit organization, that owns, leases or occupies property." The circuit court denied its motion, and the case proceeded to trial, resulting in a verdict in favor of Carini. ProHealth Care appealed.

The court of appeals reversed. The court of appeals began its analysis by citing the pertinent language of the recreational immunity statute, Wis. Stat. § 895.52(2):

> NO DUTY; IMMUNITY FROM LIABILITY. (a) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:
>
> 1. A duty to keep the property safe for recreational activities.
>
> 2. A duty to inspect the property, except as provided under s. 23.115(2).
>
> 3. A duty to give warning of an unsafe condition, use or activity on the property.
>
> (b) Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for any death or injury resulting from an attack by a wild animal.

Because the parties conceded that ProHealth Care, as lessor of the property where Carini was injured, was an "owner" under the statute, the questions before the court of appeals were whether: (1) Carini was engaged in a "recreational activity" within the definition of Wis. Stat. § 895.52(1)(g); and (2) whether ProHealth Care's negligence was related to the condition or maintenance of the land.

Turning to the first issue, Carini argued that she was not engaged in a recreational activity. Although the statutory definition of "recreational activity" under § 895.52(1)(g) specifically includes "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including … picnicking," Carini argued that she had just arrived at the zoo and was merely walking from her car to the picnic when she fell, and, therefore, was not yet involved in a recreational activity at the time of the incident. The court of appeals rejected this argument, concluding that "[o]ur case law makes clear that the act of walking to or from an immune activity constitutes recreational activity." ¶12. The court explained that "while Carini may not have started eating or socializing when she fell, because she was walking in the picnic area on her way to partake in the

festivities, she was engaged in a recreational activity. Id. "[B]ecause Carini was walking in the designated picnic area on her way to partake in the picnic festivities when she fell, we conclude she was engaged in a "recreational activity." ¶14.

The court of appeals also rejected Carini's argument that immunity did not apply because ProHealth Care's negligence was not related to a condition or maintenance of the land, i.e., the picnic area. Carini argued that a power cord, brought in for a four-hour musical performance by a band, was too temporary to constitute a condition of the land. But the court cited several prior cases in which the courts had held that recreational immunity applied to temporary conditions placed upon the land, such as E. coli from animal waste at a county fair, Kautz v. Ozaukee Cnty. Agric. Soc., 2004 WI App 203, 276 Wis. 2d 833, 688 N.W.2d 771; a broken-down trail-grooming vehicle that had been abandoned on the premises less than a week earlier, Held v. Ackerville Snowmobile Club, Inc., 2007 WI App 43, 300 Wis. 2d 498, 730 N.W.2d 428; or a hole in the riverbed which was a temporary condition created by part of an ongoing bridge-replacement project, Sauer v. Reliance Ins. Co., 152 Wis. 2d 234, 448 N.W.2d 256 (Ct. App. 1989). "Considering the relevant cases, which make clear that a temporary, artificial condition still make constitute a 'condition' of the land, we are satisfied that ProHealth Care's alleged negligence did in fact stem from a condition of the picnic area." ¶21.

B. Notice Of Claim Statute, Wis. Stat. § 893.82

Sorenson v. Batchelder, 2016 WI 34, 368 Wis. 2d 140, __ N.W.2d __

- **Under Wisconsin's notice of claim statute, Wis. Stat. § 893.82, a notice of claim against a state employee must be sent by certified mail addressed to the attorney general's office in the capitol. Personal service of the notice of claim is not acceptable. Failure to strictly follow this certified mail service requirement bars a claim against a state employee.**

Batchelder, a state employee operating a state-owned vehicle, rear-ended a vehicle, causing that vehicle to then rear-end Sorenson's vehicle. Sorenson alleged property damage and bodily injuries as a result. As explained in the decision, prior to bringing suit,

> Sorenson served a notice of claim on the attorney general by personal service at the attorney general's office at the state capitol…. Personal service was accepted by a state employee, who acknowledged its receipt at the time of delivery. The notice of claim was then forwarded to the attorney general's Main Street office in Madison where

> it was processed and endorsed by another state employee on January 19, 2011; thereafter, it was returned to Sorenson's attorney's office.

¶5. Thereafter, the Bureau of State Risk Management resolved Sorenson's property damage claim, without raising any issues regarding the manner in which the notice of claim had been served. Nevertheless, after suit was filed, the Attorney General's office, on behalf of Batchelder, brought a motion to dismiss Sorensen's complaint due to improper service of the notice. The circuit court denied the motion, but the court of appeals reversed in an unpublished decision, holding that the plain language of Wis. Stat. § 893.82(5) requires service by certified mail, which was not complied with. Sorenson v. Batchelder, No. 2014AP1213 (Wis. Ct. App. Apr. 7, 2015).

The supreme court affirmed the court of appeals. The supreme court began its analysis by turning to the language of Wis. Stat. § 893.82(2m), which provides that "[n]o claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section." Next, § 893.82(3) provides that

> [N]o civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties . . . unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim . . . .

Finally, § 893.82(5) prescribes the manner of service, and provides that "[t]he notice under sub. (3) shall be sworn to by the claimant and shall be served upon the attorney general at his or her office in the capitol by certified mail. Notice shall be considered to be given upon mailing for the purpose of computing the time of giving notice."

Applying this statutory framework, the supreme court stated and held:

> The central issue before us is whether Sorenson's personal service of notice of claim satisfies Wis. Stat. § 893.82 such that her claim against Batchelder may be continued. We conclude that personal service does not comply with the plain language of § 893.82(5) because it requires service of notice of claim on the attorney general by certified mail. As § 893.82(2m) mandates strict compliance with requirements of § 893.82 in order to institute an action against a state employee, and Sorenson's service failed to so comply, we affirm the dismissal of Sorenson's claim against Batchelder. Accordingly, we affirm the decision of the court of appeals.

¶3. The supreme court rejected Sorenson's argument that strict compliance does not require literal compliance with the words of the statue, and that her delivery of the

notice of claim to the attorney general by personal service fulfilled the purpose of the statute and provided the attorney general with actual notice of her claim more effectively than by certified mail. Citing prior cases, the supreme court held that strict compliance requires "literal adherence to the words used in the statute." ¶¶22-23 (citing Kellner v. Christian, 197 Wis. 2d 183, 195, 539 N.W.2d 685 (1995) (concluding that a claimant "must adhere to each and every requirement in the statute"), and Modica v. Verhulst, 195 Wis. 2d 633, 641-42, 536 N.W.2d 466 (Ct. App. 1995) (explaining that strict compliance with § 893.82 is required; substantial compliance is insufficient)).

The supreme court also rejected Sorenson's argument that she complied with the statute, because the purposes of the statute were satisfied through personal service, and her notice of claim was processed in the same manner as if her notice had been sent by certified mail.

> While we do not dispute that the attorney general received actual notice through Sorenson's personal service, it is well established that Wis. Stat. § 893.82 is not simply an actual notice statute. Id. It is not enough to substantially comply with the statute by effecting actual notice, thereby fulfilling the underlying purposes of § 893.82(1). Simply stated, Sorenson cannot strictly comply with the plain language of § 893.82(5) by substantially fulfilling the purposes of § 893.82 because the legislature has chosen not to permit substantial compliance by requiring strict compliance with the terms of the statute. Wis. Stat. § 893.82(2m).

¶28 The supreme court stated that this result was required by the text of the statute and its legislative history. Amongst other things, a prior version of the notice of claim statute provided that it should be liberally construed, and courts interpreting the prior statute concluded that substantial compliance was sufficient. However, when the statute was amended to its current form, the legislature specifically stated that strict compliance was required. The court stated that "if we were to allow substantial compliance rather than enforcing strict compliance as mandated by Wis. Stat. § 893.82(2m), the certainty created by the requirement of certified mail would be undercut by costly case-by-case determinations of whether notice of claim was timely sent and received and whether the lack of procedural compliance affected the purposes of the notice statute." ¶31. Moreover, "[c]ondoning a deviation from the certified mail requirement could therefore encourage '[a] new level of litigation [to] be added to suits against state employees.'" ¶32 (citing Kelly v. Reyes, 168 Wis. 2d 743, 747, 484 N.W.2d 388 (Ct. App. 1992)).

The court also rejected Sorenson's argument that, because personal service is "stricter" than service by certified mail, her personal service of her claim on the attorney general should be deemed sufficient. Declining to follow a federal court decision (Weis v. Bd. of Regents of the Univ. of Wis. Sys., 837 F. Supp. 2d 971, 979 (E.D. Wis. 2011)) and a previous court of appeals' decision (Patterson v. Bd. of Regents of the Univ. of Wis. Sys., 103 Wis. 2d 358, 360-61, 309 N.W.2d 3 (Ct. App. 1981)), that adopted this

doctrine, the court stated that "holding that personal service constitutes 'stricter compliance' than service by certified mail would require us to override the statute's plain language when the legislature has so clearly chosen the mode of service necessary to satisfy Wis. Stat. § 893.82(5). We decline to do so." ¶38.

Finally, the court rejected Sorenson's argument that following the express language of the statute would lead to an "absurd" result. The court noted that "[s]trict compliance was not impossible for Sorenson to accomplish." ¶40. In addition, "[s]imply because another mode of service seemingly would fulfill these stated purposes does not give rise to an absurd result. The legislature specifically chose the acceptable mode of service, Wis. Stat. § 893.82(5), and we may not second guess its choice." ¶43.

Justice Abrahamson dissented, joined by Justice Ann Walsh Bradley. Justice Abrahamson repeated what the court of appeals had previously concluded in a prior case, which is that "[n]o one can literally (or 'strictly," see Wis. Stat. § 893.82(2m)) comply with the statute. ¶48 n.3 (citing Hines v. Resnick, 2011 WI App 163, ¶14, 338 Wis. 2d 190, 807 N.WS.2d 687 (noting that although the statute requires the attorney general to be served "by certified mail in his office at the Capitol," "service by certified mail to the attorney general's capitol office never occurs, and cannot occur, regardless of how a claimant addresses a notice, or what physical location the claimant has in mind as its destination."). This is because the state follows a procedure under which an authorized agent receives the attorney general's certified mail at a U.S. Post Office branch in Madison, and then delivers it to a single place: the attorney general's Main Street office, not to the capitol office. Justice Abrahamson observed that "[t]he record demonstrates that Sorenson's notice of claim, although served by a process server, was processed at the attorney general's office by the same individuals in the same manner as notices of claims served by certified mail," ¶50, and "[t]here is no reason why signing a receipt for an envelope delivered by a U.S. Postal employee is different from signing an acknowledgement or receipt on a copy of a notice of claim delivered by a deputy sheriff or other process server." ¶62. Justice Abrahamson concluded that because personal service fulfills the purposes of the statute and is stricter than service by certified mail, it is absurd to dismiss the complaint. ¶72.

C. Discretionary Immunity

D.B. v. County of Green Lake, 2016 WI App 33, 368 Wis. 2d 282, 879 N.W.2d 131

- **Discretionary immunity barred the minor plaintiff's claims against the county and police department for failing to properly investigate allegations of sexual abuse of the**

plaintiff by his uncle, resulting in the continuation of those sexual assaults.

In 2011, the principal of an elementary school notified the school's police liaison officer that first-grader D.B. had attempted to kiss and "dry hump" one of his classmates. The principal further advised the officer that D.B. said that his uncle Rob had "told him about humping" and had showed him pictures of naked people on his cell phone. The officer referred the allegations to the county's social services department, which promptly screened the matter. The screening investigation uncovered allegations that Rob had "touched D.B.'s privates." However, because the county determined that Rob was not a "caretaker" of D.B., it instead referred the abuse allegations pursuant to Wis. Stat. §§ 48.02(1)(b)-(f) and 48.981(3)(a)3.) to the Berlin Police Department to investigate.

Thereafter, police officers interviewed D.B., his mother, and Rob. Ultimately, the investigating officer informed D.B.'s mother that he would not be referring the case for criminal charges but would forward the information to the district attorney, who declined to issue charges against Rob. Two years later, D.B. began to exhibit additional behavior problems, and a subsequent investigation revealed that Rob had been sexually abusing him for several years. Rob pled no contest to first-degree sexual assault of a child.

D.B., by his mother, subsequently brought suit against the county and the police department, alleging that they were negligent in their investigation of the sexual assault allegations in 2011, which resulted in the continued sexual assault of D.B. D.B.'s mother claimed that Rob was a danger to D.B. and asserted that the county and the police department should have known he was a danger based on the allegations D.B. made.

The county and the police department filed motions to dismiss based on discretionary immunity. The circuit court denied the defendants' motions, concluding that the "known-danger" exception to governmental immunity applied.

The court of appeals reversed. Wis. Stat. § 893.80(4) provides immunity for the actions or inactions of local governmental bodies and their employees that are "legislative, quasi-legislative, judicial or quasi-judicial," which case law has granted with discretionary decisions. ¶13. An exception to governmental immunity is the "known-danger" exception, which "precludes immunity where a known and compelling danger creates a ministerial duty to act on the part of public officers or employees." ¶15.

Applying that framework to the facts of this case, the court of appeals concluded that "[t]he scope and breadth of the County's screening/investigation as well as their

conclusions as to whether Uncle Rob was a 'caregiver' were clearly discretionary acts entitled to immunity." ¶11. As for the police department, it performed its ministerial duty by promptly acting in response to the report from the school principal and performing a criminal investigation. However, "[t]he 'how' and 'scope' of the investigation performed by the Police Department is a discretionary act rather than a ministerial duty." ¶17

The court further concluded that the known-danger exception was inapplicable in this case, because D.B's mother, herself, conceded "that no one actually knew D.B.'s uncle was dangerous in 2011 and therefore no 'known danger' was present as an exception to immunity." ¶2

III. EVIDENTIARY ISSUES

A. ***Daubert*** **Challenges To The Admissibility Of Expert Testimony**

Seifert v. Balink, 2015 WI App 59, 364 Wis. 2d 692, 869 N.W.2d 493 (petition for review granted)

- **Under *Daubert*, a medical expert's opinion on standard of care issues in a medical malpractice case does not have to be based on peer-reviewed medical literature to be considered "reliable" and admissible.**

Braylon Seifert developed shoulder dystocia during an attempted vacuum extraction during birth, ultimately resulting in a permanent brachial plexus injury that inhibits the growth and use of his left arm. Seiferts' parents asserted that Dr. Balink, Braylon's delivering obstetrician, caused this permanent injury by applying excessive traction while dislodging his shoulder, and filed suit. The Seiferts supported their claim through the testimony of Dr. Werner, who opined that Dr. Balink's conduct fell below the standard of care because she 1) failed to utilize an ultrasound to estimate Braylon's fetal weight just prior to birth; 2) failed to order a three-hour glucose test for gestational diabetes; and 3) should not have performed a vacuum assisted delivery. According to Dr. Werner, these three factors are significant because together they increase the risk of shoulder dystocia. Dr. Balink sought to exclude Dr. Werner's testimony under Wis. Stat. § 907.02(1), asserting, among other things, that because his opinions were based on his own personal experiences and preferences and not based on any published, peer-reviewed literature, they were unreliable. The trial court denied the motion, and the case proceeded to trial, where a jury returned a verdict finding that Dr. Balink was negligent and that her negligence caused Braylon's injuries. ¶¶2, 4-7. After unsuccessfully seeking to overturn the verdict in post-verdict motions, Dr. Balink appealed.

The court of appeals affirmed. The court began its analysis by reviewing the genesis behind the legislature's 2011 amendment to Wis. Stat. § 907.02(1), which added the following requirements (emphasized in italics):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.*

Noting that Wisconsin's rule is patterned after Federal Rule of Evidence 702, the court discussed the two main United States Supreme Court decisions that have interpreted that rule: Daubert v. Merrell Dow Pharm. Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The court observed that these decisions provide a list of non-definitive factors for determining the reliable of proffered expert testimony, including: 1) whether the expert's theory or technique can be (and has been) tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error of a particular scientific technique; and 4) whether the subject of the testimony has been generally accepted. In fulfilling its "gate-keeping" function with respect to the admission of expert testimony, the district court has broad latitude, the Daubert standard must be flexible, and the factors outlined may not be applicable to all types of expert testimony. ¶18. The court also reviewed a series of federal decisions interpreting FRE 702 in the context of expert testimony provided by physicians, and commented that these courts "often draw a distinction between medical expert testimony and other scientific or specialized expert testimony due to the level of uncertainty presented when medical knowledge is applied to individualized patient treatment." ¶19.

Applying these legal standards and principles to Dr. Werner's testimony, the court upheld the trial court's admission of his testimony. First, the court rejected Dr. Balink's argument that Dr. Werner's opinions were based "solely on his own personal preferences derived from his extensive experience practicing medicine." This argument failed for several reasons. Amongst other things, both the Supreme Court in Kumho Tire and the advisory committee's note to the 2000 amendments to Rule 702 state that a court may consider personal experience and knowledge when determining the reliability of expert testimony. In addition, Dr. Balink did not challenge Dr. Werner qualifications in any way. ¶29.

The court of appeals also rejected Dr. Balink's argument that Dr. Werner's opinions were unreliable because they were not based on any applicable medical literature. Noting that "Dr. Balink's argument again misses the mark," the court stated that

"reliance on peer reviewed publications is just one factor that courts *may* consider under Daubert." ¶31. Repeating its earlier statement that the factors set forth in Daubert and Kumho are merely "guidelines to assist the court," and that "the court is afforded flexibility in deciding which factors are appropriate for the particular circumstances of each case," the court upheld the admission of Dr. Werner's testimony. Here, the trial court considered the pertinent factors to determine the reliability of his testimony, and properly determined that the underlying bases of Dr. Werner's opinions did not align well with the Daubert factor of peer review publication." ¶23. The court of appeals also rejected Dr. Balink's challenge that Dr. Werner did not reliably apply his opinions to the facts of the case. ¶32.

The court of appeals also addressed Dr. Balink's assertion of prejudicial error resulting from certain statements made by Braylon's counsel in closing arguments, which she alleged violated pretrial motion *in limine* orders. Prior to trial, defense counsel moved to preclude Braylon's counsel from analogizing medical negligence to the failure of an average driver to follow the rules of the road, which the trial court granted. During closing argument, Braylon's counsel made a reference to how a person needs to adjust his or her speed depending on the weather conditions, and argued that, similarly, that was what Dr. Werner explained had to be done when looking at the results of Braylon's mother's glucose blood screening results, given other risk factors that she had for a baby developing shoulder dystocia. The court of appeals agreed with the circuit court that this reference, although it did involve speed limits, did not suggest that medical negligence and ordinary negligence are comparable. Moreover, the court was unpersuaded that this analogy prejudiced the defense. ¶¶39-40. The court also determined that Braylon's counsel did not make an impermissible "Golden Rule" argument when he asked the jury, in response to some specific testimony of a defense expert, "[i]s that reasonable to you? Is that reasonable medicine to you? Is that how you want your doctor to care?" The court determined that the circuit court was in the best position to evaluate any prejudicial impact of this statement, and he concluded that it was "not a classic golden rule violation, where the jurors were explicitly asked to place themselves in the position of the plaintiff." Moreover, the court provided a curative instruction in any event. ¶¶43-44. Finally, the court of appeals concluded that Braylon's counsel's comments in rebuttal regarding defense counsel, to the effect that he—Braylon's counsel—apparently has a little more respect for the jury than defense counsel, were not improper or prejudicial. ¶46.

B. Emergency Doctrine Instruction

Kelly v. Berg, 2015 WI App 69, 365 Wis. 2d 83, 870 N.W.2d 481

- **Where the trial court improperly instructed the jury on the emergency doctrine and used a special verdict that was**

confusing with respect to damages for past pain and suffering, a new trial is required.

A dog owned by Berg and Finckler attacked a dog owned by their neighbor, Kelly. Kelly intervened and was injured in the process. Kelly sued Berg and Finckler and their homeowner's insurer, Manitowoc Mutual Insurance Company. The case proceeded to trial. At trial, the trial court, sua sponte, and over defense counsel's objection, announced that it would give a modified version of the emergency doctrine instruction to the jury, based on Kelly's actions in trying to save her dog from being attacked. The trial judge reasoned that it would be unfair for defendants to be allowed to argue that Kelly "should not have jumped in between the two dogs," without Kelly being allowed to defend those arguments by asserting that she was faced with an emergency, and reasoned that Kelly should therefore be "entitled to the same kind of instruction that somebody would have if someone blew a stop sign at an intersection and she had to take evasive action." ¶10. Following a trial, the jury awarded Kelly $5,296.22 for past medical expenses, $150,000 for past pain, suffering and disability (not related to PTSD), $5,280 for past pain, suffering and disability (related to PTSD), and $4,056.20 for past wage loss. Berg and Finkler appealed, asserting that the circuit court erred in giving the emergency doctrine instruction to the jury, because the time involved was not short enough to preclude a deliberate and intelligent choice of action by Kelly. They also asserted that the damage award was excessive.

The court of appeals reversed and remanded for a new trial. First, the court of appeals agreed that the circuit court erred in giving the emergency doctrine instruction. The court noted that the emergency doctrine generally developed in the context of automobile accidents, and that precedent of the supreme court established that this instruction should only be given when three elements are satisfied. First, the party seeking the benefits of the emergency doctrine must be free from negligence which contributed to the creation of the emergency. Second, the time element in which action is required must be short enough to preclude deliberate and intelligent choice of action. Third, the element of negligence being inquired into must concern management and control [of a vehicle] before the emergency doctrine can apply. ¶16 (citing Totsky v. Riteway Bus Serv., Inc., 2000 WI 29, ¶22, 233 Wis. 2d 371, 607 N.W.2d 637)). The court observed that, although the emergency doctrine typically arises in automobile accident cases, it is "by no means limited to negligence on the road." Id. (citing McCrossen v. Nekoosa Edwards Paper Co., 59 Wis. 2d 245, 259, 208 N.W.2d 148 (1973)).

Focusing on the "time" element, and citing prior precedent, the court stated that "[t]he application of the emergency rule rests upon the psychological fact that the time which elapses between the creation of the danger and the impact is too short under the particular circumstances to allow an intelligent or deliberate choice of action in

response to the realization of danger." ¶19 (citing Gage v. Seal, 36 Wis. 2d 661, 664, 154 N.W.2d 354 (1976)). Applying that time element to the facts of record, the court of appeals held that the trial court erred in giving the instruction. Kelly testified that she was inside her house when she first heard her dog yelping. She ran outside and observed her dog being attacked. She then yelled for her neighbor to help. It was only after the attack continued, and her dog stopped yelping, that she decided to intervene. Kelly testified that she thought to herself at that point "if I don't do something right now," her dog would be killed. "On this record, we conclude, as a matter of law, that Kelly had time to make a deliberate and intelligent choice whether to intervene. Consequently, the emergency doctrine does not apply." ¶22.

The court also rejected Kelly's argument that the emergency doctrine instruction was appropriate, because, under Wis. Stat. § 939.49(1), a person is "privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonable believes to be an unlawful interference with the person's property." While that statute provides a defense to criminal liability, "[i]t is irrelevant to the issue of whether the emergency doctrine can apply in this civil action to excuse Kelly's contributory negligence, if any, in intervening to stop [her dog from being attacked]." ¶25. Having concluded that it was error to give the instruction, the court of appeals concluded that the error was prejudicial, because it is probable that the jury was misled by the erroneous instruction. The court reasoned that, aside from damages, the primary issue at trial was whether Kelly was contributorily negligent when she intervened, and the court specifically instructed the jury that Kelly would be relieved of any contributory negligence if the jury concluded that she faced an emergency situation. ¶27.

Turning to the defendants' challenge to the damage award, the court of appeals declined to address their excessiveness challenge, because it determined, sua sponte, that a new trial on damages was warranted for a different reason: "the jury was likely confused by the damage question on the special verdict." For one thing, the special verdict improperly separated the plaintiff's damages into subcategories tied to PTSD and non-PTSD damages. ¶38. In addition, the circuit court confused a claim for future treatment of Kelly's PTSD arising out of the incident by a clinical psychologist—which had been recommended but not undertaken at that time of trial—with a claim for pain and suffering related to her PTSD. Apparently out of concern that the jury may award pain and suffering damages for Kelly's PTSD for an indefinite period of time, when there was no testimony that her PTSD condition would not respond to treatment and therefore be permanent, the circuit court instructed the jury to only award damages for her pain and suffering resulting from her PTSD "not to exceed 16 sessions." ¶36 In answering that specific damage question on the special verdict form relating to Kelly's past pain and suffering for her PTSD, they jury multiplied 16 by $330, the cost of her one

counseling session, to arrive at the figure. "The jury's decision to award the cost of future treatment therefore shows it was confused as to the proper measure of Kelly's damages." ¶37.

IV. CONTRACTUAL WAIVER OF RIGHT TO JURY TRIAL

Parsons v. Associated Banc-Corp., No. 2014AP2581 (Wis. Ct. App. May 10, 2016) (recommended for publication).

- **A party seeking a court trial based on another party's contractual waiver of a jury trial must timely raise that issue.**

- **Even if timely raised, a prelitigation contractual waiver of a right to jury trial may be procedurally and/or substantively unconscionable, and, therefore, unenforceable.**

Beginning in 2002, Taft Parsons and his wife Carol Parsons sought to convert a block of blighted houses in their Milwaukee neighborhood into new townhouses. They hired a general contractor, Central City Construction (CCC), who helped arrange a $774,000 construction loan through State Financial Bank. Months after the financing was approved, Moeser, the bank's loan officer, required Mr. Parsons to sign a packet of forms without fully reviewing them or consulting an attorney. Amongst other things, the forms in the packet authorized State Financial Bank, without Parsons' approval or consent, to approve disbursements from the construction loan, and also imposed a mortgage on the Parsons' home to secure the $774,000 construction loan. Over the next few years, Moeser approved payments to the contractor, even though no construction work had been performed. In early 2005, Taft received a notice of tax levy from the IRS against CCC for over $300,000 in back taxes, and ordering the townhouse project to pay the IRS any money the project was obligated to pay CCC. Taft forwarded this to Moser, who then canceled the construction loan and stopped payments to CCC. Unfortunately, the Parsons were left with a debt for the loan proceeds which had been paid out, which they were unable to pay. State Financial Bank subsequently commenced a foreclosure action against the Parsons' home. In 2006, Associated Bank took over State Financial Bank, and continued the foreclosure. The Parsons filed for bankruptcy, but made payments on the home equity loan to stop the foreclosure action.

In 2011, the Parsons filed suit against Associated Bank, as successor in interest to State Financial Bank, alleging that Moeser, in coordination with the general contractor and another individual, had engaged in a pattern of illegal racketeering activity, and that the bank had been negligent in hiring, training, and supervising Moeser. The Parsons demanded a jury trial. ¶¶11-12. Three years into the litigation, at the third pretrial

conference, Associated Bank for the first time bank raised an objection to the Parsons' jury demand, and filed a motion to strike that jury demand. Associated Bank based this motion on a promissory note Mr. Parsons had signed at Moeser's insistence (one of the nearly thirty pages of printed form documents presented to Mr. Parsons) which included a provision stating that the Parsons "hereby voluntarily, knowingly, irrevocably, and unconditionally waive[d] any right to have a jury participate in resolving any dispute (whether based upon contract, tort, or otherwise) between or among the borrower and the lender arising out of or in any way related to this document, any other related document, or any relationship between the borrower and the lender." ¶8. The circuit court granted Associated Bank's motion. The court of appeals granted the Parsons' motion for leave to appeal this non-final order.

The court of appeals reversed the circuit court. As an initial matter, the court noted that Wis. Stat. § 946.87(4) clearly provides civil remedies for victims of racketeering, including the right to "demand a trial by jury," which the Parsons had done in their complaint. ¶¶17-18. Next, the court noted that pursuant to Wis. Stat. § 805.01(2), "[a]ny party entitled to a trial by jury *or by the court* may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first." (Emphasis added). Subsection (3) of that statute provides that "[t]he failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver trial in such mode…." Here, Associated Bank, to the extent it objected to a jury trial and believed it was entitled to a court trial based on the waiver form signed by Mr. Parsons, was required to raise this at the time of the first scheduling conference, yet it did not. ¶19. The court observed that just as the right to a trial by jury can be waived, so too can a party's right to a court trial.

> Here, the bank ignored its claimed right to a court trial for three years, during which it appeared in court for numerous conferences all moving the case towards trial. At no point during those numerous opportunities did the bank advise the court that the bank believed only a court trial was available to the Parsons. Nor did the bank provide reasons to the circuit court which appear in the record before us that might excuse such an extraordinary delay. The passage of three years in litigation, without asserting a claim involving a right as fundamental as the type of trial to be had, we conclude is a forfeiture of the right to belatedly assert that right.

¶21.

Moreover, principles of equitable estoppel also barred Associated Bank from belatedly attempting to rely on the jury trial waiver.

> Here, the bank's failure to challenge the Parsons' jury demand resulted in the Parsons spending three years preparing for a jury trial. The Wisconsin Circuit Court Access record in this case discloses numerous motions, hearings, and other activity that appear to reflect the parties moving toward trial. That the Parsons prepared for a jury trial was

> reasonable because they had timely demanded a jury and because the bank participated actively in the pre-trial litigation activities. Participation by the bank, without objection to the mode of trial, is both action (actually participating) and inaction (not objecting to the mode of trial) upon which the Parsons reasonably relied. To change the mode of trial three years into the case is detrimental not only to the Parsons, but also to the reasonable and efficient administration of a court calendar. We conclude that the bank is equitably estopped from making its much belated claim for a court trial.

¶23.

Although these holdings effectively disposed of the appeal, the court of appeals also used this appeal as an opportunity to address the enforceability of prelitigation contractual waivers of a jury trial. The court of appeals noted that the issue of "whether the right to a jury trial may be contractually waived prelitigation" has not been addressed by Wisconsin courts. ¶24. In the absence of direct precedent, the court looked to the supreme court's decision in Brunton v. Nuvell Credit Corp., 2010 WI 50, 325 Wis. 2d 135, 785 N.W.2d 302, in which the court considered a contractual waiver of venue in a consumer credit case. There, the supreme court held that such a waiver would be valid if the party seeking to enforce the contractual waiver could show that: "(1) the opposing party had actual knowledge of the place of proper venue; (2) the opposing party had actual knowledge of the right to dismissal of an improperly venued action; and (3) the opposing party intentionally relinquished those rights." ¶28. The court of appeals concluded that "the [Brunton] court's allocation of the burden of proof and explanation of the elements of proof required for a valid waiver of a statutorily protected right to be binding on this court and the circuit court." ¶28. The court also considered the factors enumerated by the federal district court in Whirlpool Financial Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994), in evaluating a waiver of a right to jury trial contained in a promissory note. The Whirlpool factors include the extent of negotiations over the waiver provision, the conspicuousness of the provision, the parties' relative bargaining power, and whether the waiving party had the opportunity to consult counsel in advance of agreeing to the waiver. ¶26.

Determining that the criteria explained by the supreme court in Whirlpool are not in conflict with those set forth by the supreme court in Brunton, the court of appeals applied both sets of factors to analyzing whether Mr. Parsons had actual knowledge of the content and import of the waiver provision contained in the promissory note, and concluded that he did not. ¶¶29-31.

Finally, the court of appeals held that a contractual waiver of the right to a jury trial may be unconscionable. The court noted that there are two types of "unconscionability": procedural unconscionability, which focuses on whether there was a "real and voluntary meeting of the minds' of the contracting parties," ¶34, and substantive unconscionability, which "addresses the fairness and reasonableness of the

contract provision subject to challenge." ¶36. The court of appeals found the waiver at issue both procedurally and substantively unconscionable. It was procedurally unconscionable because, despite Mr. Parsons' age, education (he had an engineering degree), intelligence, and business acumen, he was compelled to sign the documents as a result of "threats from Moeser to pull the construction loan and leave the Parsons with tremendous debt and nothing to show for it." ¶35. The contractual waiver was also substantively unconscionable because the waiver "literally renders meaningless the Parsons' constitutionally and statutorily protected rights to a civil jury trial involving the bank or those for whose conduct it is responsible, regardless of the nature of the claim or the egregiousness of the misconduct," but, "by contrast, the bank gave up little or nothing of value by the terms of the waiver." ¶¶37-38.

V. LEGAL MALPRACTICE

Kraft v. Steinhafel, 2015 WI App 62, 364 Wis. 2d 672, 869 N.W.2d 506.

- **Expert testimony is not required to support all claims of legal malpractice, and is not required where the issue in dispute involves a pure credibility issue between the attorney's version of the facts and the plaintiff's version of the facts.**

Kraft, a licensed seller of insurance products in Wisconsin, hired Steinhafel to represent her in connection with a complaint filed against her in August 2006 by the Office of the Commissioner of Insurance (OCI), which sought revocation of her license based on allegations that Kraft had made false representations with regard to multiple life insurance applications. Following an evidentiary hearing before an administrative law judge in November 2006, Steinhafel negotiated a stipulation and order which Kraft ultimately signed, in which Kraft agreed to the revocation of all of her Wisconsin insurance intermediary licenses. This stipulation failed to specify a time within which Kraft could apply for a new license. This stipulation and order were entered in February 2007. Steinhafel left his law firm in the Spring of 2007 and practiced on his own for several months, before joining another law firm in October 2007. After joining his new firm, Steinhafel sent Kraft a letter asking her to continue as his client with his new firm. While with the new firm, Steinhafel and Kraft continued to communicate regarding her license revocation. Steinhafel remained with his new firm until May 2008, when he left on medical leave. Thereafter, the firm notified Kraft that she would need to find another attorney. Following the receipt of that notice, Kraft attempted on her own to reapply with OCI for her license. Unsuccessful, Kraft hired a new attorney, who requested an administrative hearing on OCI's denial of her application. In a written decision, the ALJ determined that because the February 2007 stipulation and order failed to specify a time period, Wis. Stat. § 628.10(3) required a maximum 5 year revocation period.

Kraft subsequently filed a legal malpractice suit against Steinhafel's original and subsequent law firms, asserting, amongst other claims, that 1) prior to her signing the stipulation and order, Steinhafel misinformed her as to the effect the document would have on her license, and 2) after the ALJ signed the stipulation and order, Steinhafel continued to "string her along" regarding her ability to regain her license much sooner than in five years. When Kraft did not name any expert witness, the defendant law firms moved to dismiss her claims, asserting that she needed expert testimony to prove those claims. The circuit court agreed, and dismissed her complaint. Kraft appealed.

The court of appeals reversed. "Based on the specific grounds of Kraft's appeal and the facts of this case, we hold that Kraft's remaining liability claims against the defendants-respondents are not so complex as to require expert testimony. ¶8. Here, the plain language of Wis. Stat. § 628.10(3) is unambiguous: "An order revoking an intermediary's … license … may specify a time not to exceed 5 years within which the former intermediary … may not apply for a new license. If no time is specified, the intermediary … may not apply for 5 years." Although expert testimony is generally required to prove that an attorney failed to exercise that degree of knowledge, care, skill, ability and diligence usually possessed and exercised by members of the legal profession in this state, it is not required "(1) where the breach is so obvious, apparent and undisputed that it may be determined by a court as a matter of law; or (2) where the matters to be proven do not involve specialized knowledge, skill, or experience." ¶12 (citing DeThorne v. Bakken, 196 Wis. 2d 713, 718, 539 N.W.2d 695 (Ct. App. 1995)).

The record in this case established a credibility dispute between Steinhafel and Kraft. Whereas Steinhafel testified that he made Kraft aware of this five-year rule and told her that her license would be revoked for five years based upon the stipulation and order, Kraft testified that Steinhafel did not make her aware of this five-year rule and instead had told her that she could reapply for her license immediately thereafter, and had thereafter repeatedly told her that she could reapply sooner. "These are simple credibility determinations—who is telling the truth—to be made by a fact finder and do not require specialized knowledge, skill, or experience to understand." ¶13. "What Steinhafel told Kraft regarding the length of time she would have to wait before getting her license back is a question of material fact for a fact finder to decide, and one that does not involve 'special knowledge or skill or experience on subjects which are not within the realm of the ordinary experience of mankind, and which require special learning, study, or experience." ¶18 (citing Olfe v. Gordon, 93 Wis. 2d 173, 181-82, 286 N.W.2d 573 (1980)).

With respect to Kraft's claims against Steinhafel's successor law firm, the court of appeals agreed with the law firm that nothing Steinhafel did or did not do while employed by them caused the five-year revocation of her license. However, because

that law firm continued to bill Kraft for Steinhafel's services during the period of time in which she alleges that he kept "stringing her along" and misrepresenting that he was working on trying to get her license reinstated, those allegations, if proven, would result in respondeat superior liability being imposed on the successor law firm for the additional legal fees Kraft incurred during that period of time. ¶¶23-26.

VI. DEFAMATION

1. Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, 870 N.W.2d 466

    - **You can't create a bogus Facebook page purporting to be someone else and then defame that person. Duh.**

On January 10, 2010, Beckett created a false Facebook page using the name Stephen Laughland II. At that time, Laughlin was an adjunct lecturer at Marquette University. Beckett used the email address consumer.advocate.WI@gmail.com for the Facebook account. Beckett was dating Placke, Laughlin's ex-girlfriend, with whom he had a child, and was involved in a custody dispute. Laughlin had never met Beckett. After creating the Facebook page, Beckett used the gmail address to send emails to Laughland berating him and making threatening statements such as, "your day has come" and "someday soon you will pay the price for your financial recklessness and dishonesty…" Laughland contacted Marquette University security and was referred to local law enforcement. At that time, Laughland remained unaware of the Facebook page. ¶2. Beckett stated on the fake Facebook profile that he considered the Facebook account to be "a public service for anyone that [sic] is not aware of Mr. Laughland's total disregard for the financial freedoms we as consumers cherish." He also defamed Laughland, referring to him, as amongst other things, a "preying swindler." ¶4 Beckett also made several postings, purporting to have been made by Laughland himself, in which he referred to himself as "a loser" who "took advantage of banks and credit card companies." He also sent friend requests to some of Laughland's friends, who were unware initially that this was not actually Laughland. ¶¶5-6.

On April 10, 2010, Laughland received an email from an acquaintance saying: "I received a [Facebook] friend request from you however, it must be someone using your name. It says horrible things about you etc. Just a FYI, you may want to report it." ¶3. On April 21, 2010, another acquaintance of Laughland found the site and sent Beckett a Facebook message inquiring about the poster's identity. Beckett responded that he maintained the page "in hopes that others may benefit from trusting avoiding corrupt individuals." ¶7. After being tipped off by these individuals, Laughland investigated and discovered the fake Facebook page Beckett created.

In July 2012, Laughland sued Beckett for defamation. At the time the page was created in 2010, the statute of limitations for defamations claims was two years. See Wis. Stat. § 893.57 (2008-2009). However, that statute was amended to three years effective February 26, 2010. Beckett moved to dismiss the lawsuit as untimely. The trial court denied the motion, finding that because the statute of limitations was extended to three years effective February 26, 2010, and because Beckett's last defamatory post was made in April 2010, the three year statute of limitations applied and the suit was not barred. Prior to trial, Beckett stipulated that he created the Facebook page and authored all of the posts. At trial, Beckett maintained that the posts were not defamatory, because 1) the statements were true based on facts in the public records (which related to foreclosure actions and Laughland's bankruptcy filing); and/or 2) the statements were simply his opinions. Following a trial to the court, the court found that Beckett had defamed Laughlin, and awarded $15,000 in general damages, and $10,000 in punitive damages. Beckett appealed, arguing that 1) the circuit court erroneously denied summary judgment on his statute of limitation claim; 2) his statements were not defamatory; and 3) the circuit court "failed to justify" the damage awards.

The court of appeals affirmed on all issues. With respect to the first issue, the court of appeals rejected Beckett's attempt to rely on the "single publication rule" announced in Ladd v. Uecker, 2010 WI App 28, 323 Wis. 2d 798, 780 N.W.2d 216. In that case, the plaintiff Ladd sued Robert Uecker and the Milwaukee Brewers claiming that she had been defamed by online postings which depicted her as a stalker. Specifically, Uecker posted an affidavit filed in a court proceeding to obtain a harassment injunction against Ladd, and the Brewers posted an online account of Ladd being removed from a spring training game. In each instance, there was a single internet posting by the two defendants. Ladd asserted that because both postings were still available online two years after they were posted, she was defamed each time a new website visitor viewed those postings. In rejecting her argument and concluding that her defamation lawsuit, brought more than two years after the initial internet publication date, was untimely, the court of appeals adopted the "single publication rule." In adopting that rule, the court reasoned that because any party posting material in the internet has no control over other websites' use or dissemination of that material, a plaintiff alleging defamation based on the posting has a single cause of action arising at the first instance of the publication, regardless of how many people see the publication over time after it is posted. Id., ¶¶11-12.

But "[u]nlike the facts in Uecker, Beckett actively updated the Facebook page by adding additional derogatory posts about Laughland. Beckett actively sought new audiences for these postings. Beckett's behavior demonstrates a continuing course of conduct that existed until April 2010. Because Beckett continued to actively publish material on the Facebook page until April 2010, the statute of limitations on Laughland's claims did not begin to run until Beckett's last publication." ¶18.

Turning to Beckett's challenge to the circuit court's finding that Beckett's posts were defamatory, the court noted as an initial matter that the standard of review requires it to uphold the circuit court's factual findings unless they are clearly erroneous. ¶20. Here, the record showed that Beckett's statements were not "substantially true." Some of the "many assertions made by Beckett" about Laughland included that he 1) was a "low life; 2) a "preying swindler," 3) a "loser;" 4) "defrauded banks;" and 5) engaged in "underhanded business practices." "Beckett claims that these statements are all based on public records," but "in fact, they are based only on Beckett's speculation about the meaning of those public records." ¶24. "Similarly, Beckett's public declarations that Laughland's foreclosure and bankruptcy constituted fraud and made Laughland a 'corrupt' 'low life loser,' among other things, are nothing more than Beckett's speculation." ¶26.

The court of appeals also rejected Beckett's argument that these statements were simply statements of his opinion, and, therefore, are protected by privilege. "We conclude that Beckett's statements were all variations of the underlying (and unsubstantiated) factual assertion that Laughland engaged in fraudulent financial activity." ¶28.

Next, the court of appeals determined that the record supported the circuit court's conclusion that the Facebook posts intended to, and did, devalue Laughland's reputation. The record established that Beckett's comments were viewed by third parties, and were accessible to other Facebook users. ¶32.

Finally, the court of appeals rejected Beckett's challenge to the circuit court's damage awards. Amongst other things, the circuit court based its award on Laughland's testimony about his humiliation when he performed a Google search and found the fake Facebook page. With respect to the punitive damage award, the evidence supported the circuit court's finding that Beckett had acted with "express malice" out of either "love" for, or in order to improve his own standing with, Laughland's former girlfriend, Placke. ¶39.

2. Salfinger v. Fairfax Media Ltd., 2016 WI App 17, 367 Wis. 2d 311, 876 N.W.2d 160

- **Publication of an article online to a potential world-wide audience is insufficient to confer personal jurisdiction over the publisher in Wisconsin in the absence of additional contacts with the state.**

On October 31, 2010, the Australian newspaper *Sydney Morning Herald* published an article entitled "Lawyers, guns, money: the sting in Yellow Tail." That article was

circulated in print in Australia, and was also made available worldwide through the paper's website. The subject article focused primarily on the Australian family behind the Yellow Tail wine label, but it also included references to the family's relationship with Roderick Salfinger, an Australian citizen that has resided in Shorewood, Wisconsin, since 2010. The article allegedly described Salfinger in "less than flattering" terms, and asserted that Salfinger "faces prosecution in the [United States] after allegedly producing a revolver at his daughter's wedding," an assertion that Salfinger disputes. Although it is "not entirely clear how many individuals in Wisconsin have actually accessed or read that article since first appearing online," more than eight hundred thousand users of the paper's website visited the Herald website between 2011 and 2014. ¶¶2-4. The website presented those users with targeted advertisements for Wisconsin businesses. Both Salfinger and his business, Threshold Aeronautics, LLC, filed a defamation lawsuit in Wisconsin state court. The lawsuit named the Australian companies that publish the Sydney Morning Herald as defendants. The allegations included both business and personal injuries resulting from the article.

The defendants moved to dismiss the complaint on several grounds. First, they argued that a Wisconsin court could not exercise personal jurisdiction under Wisconsin's long-arm statute, Wis. Stat. § 801.05(4). Alternatively, they argued that exercising personal jurisdiction would offend due process. The circuit court determined that jurisdiction was authorized under the long-arm statute, but agreed with the defendants that it would violate due process to exercise jurisdiction over them.

Salfinger appealed, and the court of appeals affirmed. The court of appeals stated that this appeal "presents the unique question of whether a Wisconsin court may exercise jurisdiction over foreign defendants whose only real connection to the State of Wisconsin is in having published an article online that is ostensibly available to anyone in the world and that also provides for targeted advertising based upon the user's location and interests." ¶11. In answering that question, the court stated that personal jurisdiction requires a two-step analysis. The first step is to determine whether the defendant is subject to jurisdiction under Wisconsin's long-arm statute, Wis. Stat. § 801.05(4). ¶13. If the court concludes that the statutory requirements are met, the second step is to "consider whether the exercise of jurisdiction comports with due process requirements" under the state and federal constitutions. ¶14. Turning to the first step in the analysis, the court affirmed the circuit court's determination that the exercise of personal jurisdiction over the defendants was authorized under Wis. Stat. § 801.05(4). That subsection, entitled "[l]ocal injury; foreign act," authorizes a Wisconsin court to exercise jurisdiction "[i]n any action claiming injury to person or property within this state arising out of an act or omission outside the date by the defendant, provided … that at the time of the injury … products, materials or things processed, serviced or manufactured by the defendant were used or consumed within

this state in the ordinary course of trade." The court noted that prior precedent had adopted a broad definition of the term "process" in the statute. Applying that broad definition here, the court of appeals had no problem determining that "an article published online is 'processed' within the meaning of" the statute. ¶20.

Turning to the due-process analysis, the court noted that under United States Supreme Court precedent, in order for an exercise of personal jurisdiction to comport with due process, the defendant must have "purposefully established minimum contacts in the forum State." ¶22 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)). The court noted further that in determining whether there are sufficient minimum contacts to support the exercise of personal jurisdiction, five factors must be considered: 1) the quantity of the defendant's contacts with the State; 2) the nature and quality of the defendant's contacts with the State; 3) the source and connection of the cause of action with those contacts; 4) the interests of Wisconsin in the action; and 5) the convenience to the parties of employing a Wisconsin forum. ¶22 (citing Rasmussen v. General Motors Corp., 2011 WI 52, ¶21, 335 Wis. 2d 1, 803 N.W.2d 623)). Salfinger argued that the defendants purposefully established minimum contacts in Wisconsin because 1) the defendants received online advertising revenue from Wisconsin users; 2) the defendants published another magazine, The Wisconsin Agriculturalist, which is specifically targeted at Wisconsin residents, and for which it has two full-time employees in Wisconsin; and 3) the defendants provide yearly online subscriptions to the Sydney Morning Herald to Wisconsin residents. The court rejected each of these bases.

Addressing The Wisconsin Agriculturist publication argument first, the court noted that it was published by a subsidiary of defendants, and "Salfinger … fails to explain how or why the non-party subsidiary's presence and actions in Wisconsin establish that the [defendants] have sufficient minimum contacts with Wisconsin," and also "fails to cite to any legal authority to support the position that sufficient minimum contacts can be established through a subsidiary." ¶29. Turning to Salinger's argument regarding the yearly online subscriptions, the court noted that these online subscriptions did not occur until nearly two years after publication of the subject article. The court rejected as "unsupported by any legal authority" Salinger's argument that the article is "re-published" each time it is viewed. ¶30.

The court of appeals also rejected Salinger's argument that sufficient minimum contacts can be established by placing an article in worldwide circulation for a worldwide audience.

> Applying the minimum contacts analysis to this case, it is essentially undisputed that in placing content on the *Sydney Morning Herald* website, the [defendants] could have reasonably understood that content placed on the website would ostensibly be

> accessible anywhere in the world with an internet connection. However, that alone is simply not sufficient to establish minimum contacts with a form. To the contrary, merely placing an article online on an Australian newspaper's website, particularly where the article does not even mention Wisconsin, fails to evince any connection with or conduct in Wisconsin.

¶37 (internal citations omitted). Moreover, it was undisputed that the paper was an Australian publication with a primarily Australian-targeted audience, and it could not be sincerely argued that its target audience includes Wisconsin. In addition, "the one offending sentence that Salfinger complains about" does not mention Wisconsin or identify him as residing in Wisconsin. ¶38. In summary, the court concluded that it was not "convinced that the fact that Wisconsin users have accessed the *Sydney Morning Herald* website connects the Fairfax parties to Wisconsin in any meaningful way." ¶39.

Finally, the court of appeals panel rejected Salfinger's argument that the *Sydney Morning Herald* had sufficient minimum contacts with Wisconsin to support the exercise of personal jurisdiction because it uses advertising software to bring up local business advertisements within articles based on the website visitor's geographic location. The court noted that the evidence in the record was that "numerous parties – the user, businesses that purchase advertisement space, third parties such as Google and Adobe, and the Fairfax parties – ultimately play a role in which advertisements appear to a user accessing the *Sydney Morning Herald* website," ¶48, and "[t]he record does not establish that the [defendants] proactively take any affirmative or purposeful step in directly targeting Wisconsin internet users or in independently placing Wisconsin-based advertisements on the Sydney Morning Herald website." ¶50. Accordingly, having determined that the defendants do not have sufficient minimum contacts with the State of Wisconsin, "exercising jurisdiction in this case would violate due process." ¶51.

VII. PREMISES LIABILITY

> Brenner v. National Casualty Co., 2015 WI App 85, 365 Wis. 2d 476, 872 N.W.2d 124 (petition for review granted)
>
> - **Where a long term lessee, with knowledge of a defective condition on the property, relinquishes control of the property to a new owner, and the new owner is or should be aware of that defective condition, only the new owner at the time of injury can be held liable.**

Brenner, while in the scope of his employment with Hunzinger Construction, fell through a large hole in the floor of a building owned by Milwaukee World Festival (MWF), suffering serious injuries as a result. The hole was covered with a large plywood panel box. ¶1. Brenner fell through the hole while he and coworkers were removing the plywood box, unaware that it covered a hole in the floor. They had previously removed other plywood boxes without uncovering any holes underneath. ¶15. MWF acquired ownership of the building in 2011. ¶12. Prior to that time, for approximately 21½ years, Garland Brothers owned the building. ¶7. For over twenty of those years, Charter Manufacturing leased the building under a "triple-net lease," pursuant to which Charter had the exclusive right of possession and the obligation to maintain and repair the building. Id. In 2009, Charter notified Garland Brothers of its intent to terminate its tenancy. Pursuant to its lease, Charter was required to remove its machinery when it vacated the premises. This machinery included large heat treat furnaces that extended through the metal grate floor into a pit below. To do this, Charter retained independent contractors to remove the furnaces, which resulted in holes being left in the floor. These floors were then covered with plywood boxes, although they were not marked in any way to indicate that they covered any large holes. ¶¶8-10. The building was sold to MWF in an "as-is" condition "with all faults." MWF bought the property with the intention of demolishing the building to create additional parking, but later decided to retain part of the property for storage and office space. ¶12. Prior to purchasing the building, MWF performed numerous inspections and walk trough's of the premises.

Brenner and his wife filed suit against 1) MWF, as the owner of the building at the time of Brenner's fall, and MWF's insurer; 2) Garland Brothers, as the former owner of the building and its insurer; and 3) Charter, as the former long-term tenant of the building, and its insurer. Applying the RESTATEMENT (SECOND) OF TORTS § 352, the circuit court concluded that, because Charter had relinquished possession of the premises before MWF purchased the property, liability was shifted solely to MWF.

MWF appealed, arguing that the RESTATEMENT (SECOND) OF TORTS § 352 did not apply to Charter because, as a long-term tenant, it was not a "vendor," and alternatively, that even if Charter qualified as a vendor under that section, the exception to that rule set forth in RESTATEMENT (SECOND) OF TORTS § 353 applied to make Charter liable. The court of appeals rejected both challenges.

Noting that the general rule in Wisconsin id that everyone owes a duty to everyone else, the court of appeals noted that Wisconsin recognizes an *caveat emptor* exception to this rule as set forth in RESTATEMENT (SECOND) OF TORTS § 352. That section provides:

> Except as stated in § 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken

> possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

¶20. Considering MWF's argument that Charter, as a lessee, was not a vendor, and, therefore, § 352 does not apply, the court of appeals noted there are no Wisconsin cases that have addressed whether a former tenant qualifies as a vendor. However, courts in other jurisdictions have considered this issue, and concluded that it does apply to former lessees of the property. ¶¶23-26 (citing Great Atlantic & Pacific Tea Co. v. Wilson, 408 N.E.2d 144 (Ind. Ct. App. 1980), and Brock & Rogers & Babler, Inc., 536 P.2d 778 (Alaska 1975)). Finding those decisions persuasive, the court commented that "[h]ere, as the former tenant of the property, Charter 'lack[ed] possession and control of property' at the time of the accident; MWF, the vendee, was in actual possession, and thus Charter 'should not be held liable for injuries which [it was] no longer in a position to prevent.'" ¶27 (citing Brock, 536 P.2d at 782).

Next, the court considered MWF's argument that the exception to non-liability set forth in § 353 of the RESTATEMENT (SECOND) OF TORTS applied to impose liability on Chartis. That section provides that a vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability for physical harm caused by the condition after the vendee has taken possession if (a) the vendee does not know or have reason to know of the condition or the risk involved, and (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk. ¶21. Applying that section to the facts of the case, the court concluded that it did not apply. Agreeing with the circuit court's "thoughtful and well-articulated decision," the court of appeals stated that in order for that section to apply, MWF must show that it did not have reason to know of the holes that had been cut in the floor above the pit or that plywood coverings hid the hazard. But "[b]ased on the record, MWF cannot make that showing." ¶32. It was undisputed that the removal of the heat treat furnaces left several large holes in the metal grate floor. It was further undisputed that while the holes could not be seen while standing on the metal grate floor because they were covered with plywood panels, the holes were clearly visible from the stair case and from the pits when looking up. In light of this, "[i]t is simply illogical to conclude, given the numerous MWF representatives who toured and inspected the building, that MWF did not know that the plywood panels on the floor, which were obviously unmarked and untethered, covered large holes in the floor that led to a pit below." ¶35.

In conclusion, "the undisputed material facts show that both MWF and Charter had reason to know that: (1) there were large holes in the metal grate floor that led to a pit; (2) the holes were covered by large plywood panels; and (3) the panels were unmarked and untethered and did not otherwise indicate that they hid the large holes.…

Unfortunately for MWF, Wisconsin law holds only the entity in possession and control of the property liable, as the entity in possession and control is the only entity in a position to prevent the accident." ¶36.

VIII. ACCESS TO PATIENT HEALTHCARE RECORDS

Moya v. Aurora Healthcare, Inc., 2016 WI App 5, __ Wis. 2d ___ , 874 N.W.2d 336 (petition for review granted)

- **A plaintiff's attorney is not a "person authorized by the patient" as that term is defined by § 146.81(5) and used in § 146.83, and, therefore, the lawyer can be assessed the retrieval and certification fees in connection with a request for the client's medical records.**

Moya was injured in a motor vehicle accident and hired a personal injury attorney. At the request of the attorney, the plaintiff signed a proper HIPAA form authorizing the release of her medical records to her attorney's office. In response, HealthPort, the medical record copying agent for the health care provider, sent certified copies of the medical records to the attorney along with invoices which included charges for the statutory $20 retrieval fee and $8 certification fee. The entire sums, including the retrieval and certification fee, were paid by the plaintiff's attorney. ¶2 Thereafter, Moya's attorney filed a class action complaint against HealthPort, asserting that it violated Wisconsin law by charging him and other attorneys similarly situated the retrieval and certification fees. As a "person authorized by the patient," the personal injury lawyer argued that he was exempt from having to pay retrieval or certification fees. ¶3. The circuit court denied HealthPort's motion to dismiss, agreeing, instead, with Moya's argument that a patient's attorney is a "person authorized by the patient," within the meaning of § 146.81(5), and, therefore, should not be assessed these fees.

The court of appeals granted HealthPort's petition for leave to appeal a non-final order, and reversed the circuit court. In its decision, the court stated that a client's signed HIPAA authorization only gives a personal injury attorney the right to *obtain and view* health care records, but not the right to have health care providers *release* those records to others. ¶4. In Wis. Stat. § 146.81(5), the legislature specifically defined "person authorized by the patient". Although the statute lists individuals who would qualify as a "person authorized by the patient," it did not specifically include personal injury attorneys whose clients have signed a HIPAA form. The court stated that if the legislature intended to include attorneys who obtain client's medical records in civil litigation, it could have added attorneys to the list as set forth. However, the legislature did not and, as such, the court determined that it was required to apply the definition as written. ¶11

The court further explained that the legislature, in drafting Wis. Stat. § 146.81(5), specifically defined and listed those persons who may, instead of the patient, make the decision to authorize a health care provider to release confidential patient records. Each individual listed by the legislature is a person who has the power derived from the patient (or the court) to make a decision about and request a health care provider release the patient's confidential records. The court reasoned that a "person authorized by the patient" means a person who has been authorized to consent to the release of a patient's health care records in place of the patient. By contrast, a HIPAA release only allows an attorney to obtain copies, but does not give the attorney the power to consent to the release of a patient's confidential health care records. The plain language and context of the definition of "person authorized by the patient" clearly showed the legislature's intent to protect the confidentiality of a patient's health care records and restrict the power to release health care records. ¶¶12-15

The court further concluded that the plain language as set forth in Wis. Stats. § 146.81(5), as applied to the facts of the case, unambiguously and clearly demonstrated that the personal injury attorney was not a "person authorized by the patient". The HIPAA form the patient signed gave her attorney the right to obtain and review her records, but it did not make her attorney a person authorized to decide and control whether health care providers should release her confidential medical records to others. As such, a personal injury attorney was not exempt from the retrieval and certification fees set forth in the Wisconsin Statutes. ¶16

Judge Kessler dissented. She wrote that the majority engaged in tortured statutory construction to reach its conclusion

IX. MEDICAL MALPRACTICE

John Doe 56, et al. v. Mayo Clinic Health System, 2016 WI 48, _____ Wis. 2d____, _____ N.W.2d ___

- **Although a sexual assault by a physician may constitute an actionable medical malpractice claim, in this case the statute of limitations barred the minor plaintiffs' claims because they accrued on the date the physician last touched the plaintiffs, rather than when the plaintiffs later learned the examination may have involved inappropriate touching.**

Two minor males were patients of Dr. David A. Van de Loo for a period of years between 2003 and 2008-09. Id. at ¶¶7-8. During annual physical examinations, Dr. Van de Loo asked the parents to leave the room during the genital examination. Id. at ¶9. In 2012, another minor male patient of Dr. Van de Loo's reported that the doctor

had inappropriately touched his genitals during a physical examination, which led to second-degree sexual assault charges. Id. at ¶10. The State ultimately charged Dr. Van de Loo with sixteen felony counts based on his conduct with male patients. Id.

The two minors, John Doe 56 and John Doe 57, and their parents filed a civil suit against Dr. Van de Loo, Mayo Clinic Health System, and their insurers, alleging several claims, including medical malpractice. The Does alleged they did not discover their damages until October 2012, when a news report about the criminal charges against Dr. Van de Loo aired. Id. at ¶1. The circuit court granted defendants' motions to dismiss on statute of limitations grounds. The court of appeals affirmed. Id. Both courts determined that the Does' claims accrued on the last day Dr. Van de Loo performed the genital examinations during which the alleged malpractice occurred. Id.

The supreme court first addressed whether allegations of sexual assault during a medical examination can be pursued as a medical malpractice action. Id. at ¶2. The supreme court distinguished a line of cases that held that improper sexual contact by a physician against a patient during an examination is intentional conduct, not medical malpractice. Here, however, the Does alleged that there could be a legitimate medical purpose for manipulating the boys' penises during their genital examinations, but that Dr. Van de Loo's "touching" was "unnecessary and improper treatment." Id. at ¶4. The court held such allegations could constitute actionable medical malpractice. Id.

The supreme court next addressed Wis. Stat. § 893.55(1m)(a), which provides that an action for medical malpractice "shall be commenced" within three years from the date of injury. The Does argued that there was no physical injury at the time of the allegedly inappropriate touching because they did not know at that time that the touching was improper. Id. at ¶20. The court stated it was "sympathetic to this argument," by was "not persuaded by it." Id. The court held that "[e]xpiration of the medical malpractice statute of limitations before a patient knows about the injury is unfortunately a consequence of the legislature's policy reasons for enacting the medical malpractice statute of limitations." Id. The court determined that here, the physical injurious change occurred when Dr. Van de Loo allegedly inappropriately touched the Does even if they did not then know it was inappropriate. The court reasoned that to accept the Does' argument that the news report of the criminal charges is what caused their injuries could indefinitely extend the statute of limitations or, in a case where there was no report, would mean that they never suffered an injury. Id. at ¶23. The court concluded that the physical injuries accrued on the date of the last genital examination, and that the psychological injuries from knowing the doctor had been criminally charged for inappropriate touching was a subsequent injury from the same tortious act. Id. at ¶24. Therefore, the three-year statute of limitations for medical malpractice had expired. Id. at ¶25. The supreme court affirmed the dismissal of that claim.