WISCONSIN

Kyle W. Engelke
Gregory M. Jacobs
Matthew V. Fisher
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., Ste. 900
PO Box 1784
Madison, WI 53201-1784
Phone: (608) 256-0226
Fax: (608) 259-2600
E-Mail: kengelke@staffordlaw.com
E-Mail: gjacobs@staffordlaw.com
E-Mail: mfisher@staffordlaw.com
www.staffordlaw.com

1. Provide an update on current black box technology and simulations in your State and the legal issues surrounding these advancements.

Under Wisconsin law, a "simulation" must be "based on scientific or physical principles and data entered into a computer, which is programmed to analyze the data and draw a conclusion from it and courts generally require proof to show the validity of the science before the simulation evidence is admitted." Computer-generated evidence, especially simulations, are closely scrutinized for any factual inaccuracies because the jury may be so persuaded by its life-like nature that it becomes unable to visualize an opposing or differing version of the event. *See* § 904.01:2Special problems, 3B Wis. Prac., Civil Rules Handbook § 904.01:2 (2019 ed.). Wisconsin adopted the *Daubert* standard in reviewing the admissibility of expert testimony. Wis. Stat. § 907.02.

By comparison, "animation" describes computer-generated evidence that is used to illustrate and explain a witness's testimony. As demonstrative evidence, the CGA must be authenticated by lay testimony or expert testimony. State v. Denton, 2009 WI App 78, ¶ 20, 319 Wis. 2d 718, 768 N.W.2d 250. Lay testimony must be predicated upon a witness's personal knowledge, as required by Wis. Stat. § 906.02 and § 909.01. Thus, a witness must testify that the CGA "fairly and accurately represented her recollection of events," which means *a fortiori* that the CGA must be shown to the witness in court while testifying subject to cross-examination. The critical concern here is that the CGA illustrate the witness's testimony, that is, her personal knowledge, and not "more than that." State v. Denton, at ¶ 18.

CGA evidence may also be used in conjunction with expert testimony. An expert opinion need not be based solely on personal knowledge, unlike lay testimony. Rather it may be predicated upon a variety of facts or data, admissible or inadmissible, including hearsay, provided it is the type of information reasonably relied upon by experts in the field in forming opinions. Expert testimony is often admissible to reconstruct "what happened" provided it meets the standards required of expert opinion testimony generally, as regulated by § 907.02(1). Simply put, if a CGA

is offered to illustrate an expert opinion, both the opinion and the demonstrative CGA must comport with this foundation. State v. Denton, at ¶ 19. Finally, counsel must make an adequate record for purposes of appeal. Care should be taken to preserve whatever images were shown in court. A running narration that describes the complex events depicted in a CGA is likely insufficient in most cases. *See also* § 401.601Animations and simulations, 7 Wis. Prac., Wis. Evidence § 401.601 (4th ed.).

For example, if there is a Leica scan (used to show reconstruction of scene and measurements), the parties would need to carefully construct the record to comply with the foregoing standard. No Wisconsin appellate court has specifically addressed the admissibility of such a scan and/or an animation and/or simulation referencing reliance on black box technology.

2. Besides black box data, what other sources of technological evidence can be used in evaluating accidents and describe the legal issues in your State involving the use of such evidence.

Please see response to Question No. 1.

3. Describe the legal issues in your State involving the handling of post-accident claims with an emphasis on preservation / spoliation of evidence, claims documents, dealing with law enforcement early and social media?

Failure to preserve black box data after an accident has been sanctioned by Wisconsin courts with monetary awards and adverse inference instructions on multiple occasions. *White v. Rasner*, 2015 WI App 43, ¶ 41, 362 Wis. 2d 539, 865 N.W.2d 885; *Gunderson v. Franks*, No 2018AP981, 2020 WL 1943531, at *8 (Wis. Ct. App. Apr. 23, 2020).

There are two kinds of spoliation sanctions: dismissal of the case, *see, e.g., American Family Mutual Insurance Co. v. Golke,* 768 N.W.2d 729 (Wis. 2009), and the spoliation inference. ("Dismissal of action as sanction for spoliation of evidence is an extreme sanction that is only justified in cases of egregious conduct involving, more than negligence, a conscious attempt to affect the outcome of the litigation, or a flagrant, knowing disregard of the judicial process; lesser spoliation sanctions, such as pre-trial discovery sanctions and negative inference instructions may be appropriate for spoliation where a party violated its duty to preserve relevant evidence, but where the destruction of such evidence did not constitute egregious conduct.") *Id.* at ¶ 40.

The spoliation inference permits the trier of fact to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it. *See, e.g., S.C. Johnson & Son, Inc. v. Morris*, 779 N.W.2d 19 (Wis. 2009).

The award of sanctions is wholly within the court's discretion, but the court is required to make factual findings that the conduct of the spoliator was in "bad faith" or egregious. The burden is on the party making the accusations of spoliation to prove by clear and convincing evidence that the other party "intentionally destroyed the evidence." The sanction should be commensurate with the harm, and a court cannot award excessive sanctions for acts that are merely negligent. An independent tort of spoliation is not recognized in Wisconsin.

As for claims documents, these need to be preserved as well, and there is an indistinct line in Wisconsin on when the work product doctrine will apply to investigative documents. A party's routine report to an employer about an accident may not be protected. While there is a good faith basis to claim work product based on the investigation of an adjuster (as prepared in anticipation of litigation), this issue has not been squarely addressed by Wisconsin courts. Engaging counsel at an early stage helps strengthen any claim to privilege because "mental processes" of counsel will be protected. *See generally*, § 1:21.Work product doctrine—Prepared in anticipation of litigation, 8 Wis. Prac., Civil Discovery § 1:21 (2d ed.); *State ex rel. Dudek v. Circuit Court for Milwaukee Cty.*, 34 Wis. 2d 559, 150 N.W.2d 387 (1967).

As for social media, no Wisconsin appellate court has reviewed the preservation duty for social media content. Lawyers are permitted to advise clients to restrict access by changing privacy settings; however, clients likely do have an obligation to avoid deleting social media content.

4. Describe the legal considerations in your State when defending an action involving truck drivers who may be considered Independent Contractors, Borrowed Servants or Additional Insureds?

Under Wisconsin law, an "independent contractor" is a person who contracts with another to do something for him or her, but who is not controlled by the other, nor subject to the other's right to control, with respect to his or her physical conduct in the performance of the undertaking. Wis. J.I. Civil 4060.

In deciding whether a person is an "independent contractor," a jury considers the following: (1) the contract between the parties; (2) the course of conduct of the parties, if the terms of the contract are in doubt as to control; (3) the nature of the business or occupation of the parties; (4) the party furnishing the instrumentalities or the tools for the work; (5) the place of the work; (6) the time of employment; (7) the method of payment; (8) the right to summarily discharge employees; (9) the intent of the parties to the contract, so far as it is ascertainable; (10) and any and all of the surrounding circumstances that tend to characterize the relationship. Wis. J.I. Civil 4060.

Generally, an owner is not responsible to a third person for the negligence of an independent contractor. However, an owner must exercise ordinary care to prevent injury to third persons or damage to their property. Wis. J.I. Civil 1022.6.

For insurance purposes, Wisconsin is a direct action state, meaning a plaintiff can bring suit directly against a driver's insurer. Wis. Stat. § 623.24.

5. What is the legal standard in your state for allowing expert testimony on mild traumatic brain injury (mTBI) claims and in what instances have you had success striking experts or claims?

Wisconsin adopted the *Daubert* standard. Wis. Stat. § 907.02. Expert medical opinion must be to a reasonable degree of probability. *See e.g., Balz v. Heritage Mut. Ins. Co.*, 2006 WI App 131, ¶ 41, 294 Wis. 2d 700, 724, 720 N.W.2d 704, 716. There are no cases discussing *Daubert* challenges to mTBI claims and challenges are most often decided as a question of weight, not admissibility because courts have treated the *Daubert* standard as quite permissive. *See e.g., Seifert ex rel Scoptur v. Balink*, 2015 WI App 59, 364 Wis. 692, 869 N.W.2d 493 (affirming admissibility of expert's opinion based solely on own personal preferences as reliable based on experience, and expert's failure to rely on medical literature in forming opinion did not render testimony unreliable).

6. Is a positive post-accident toxicology result admissible in a civil action in your State?

The fact that an analysis shows that the person had an alcohol concentration of 0.04 or more is prima facie evidence that he or she was under the influence of an intoxicant with respect to operation of a commercial motor vehicle and is prima facie evidence that he or she had an alcohol concentration of 0.04 or more. Wis. Stat. Ann. § 885.235.

There are very strictly enforced rules surrounding how the test results are obtained which need to be followed for the sake of admissibility. *See* Wis. Stat. § 343.305.

7. What are some considerations for federally-mandated testing when drivers are Independent Contractors, Borrowed Servants, or Additional Insureds?

There is no direct Wisconsin authority on this topic. Even if a driver was deemed an employee, Wisconsin courts have provided public policy grounds to argue that corporate officer's cannot be held vicariously and personally liable. *Casper v. Am. Int'l S. Ins. Co.*, 2011 WI 81, 336 Wis. 2d 267, 800 N.W.2d 880. In *Casper*, the corporate officer approved the route, and even if such route was negligent in light of federal safety regulations, this alleged negligent was too remote in time, distance, and cause to make corporate officer personally liable where corporate officer did not hire, train, supervise or even the driver prior to the accident. *Id.* In light of the driver being found under the influence of at least three prescription medications, Wisconsin law would not permit a negligence finding against the corporate officer. Although this case involved an employee driver, the same policy arguments could in response to a putative claim regarding a trucking company's oversight/enforcement of federally mandated testing. *See also Danks v. Stock Bldg. Supply, Inc.*, 2007 WI App 8, 298 Wis. 2d 348, 727 N.W.2d 846 (explaining an entity that hires an independent contractor becomes liable for injuries sustained by an employee of the contractor only if that entity commits an affirmative act of negligence).

8. Is there a mandatory ADR requirement in your State and are any local jurisdictions mandating cases to binding or non-binding arbitration?

No, but many courts will order mediation. Wis. Stat. § 802.12(2) states that a judge may order the parties to engage in ADR, but many judges order that mediation be completed by a particular deadline in the case (almost always subject to modification by the parties). Judge are

prohibited from requiring the parties to submit to binding or non-binding arbitration. *Id.*, Judicial Council Note, 1993.

9. Can corporate deposition testimony be used in support of a motion for summary judgment or other dispositive motion?

Yes. Parties are permitted to depose corporate designees under Wis. Stat. § 804.05(2)(3). Deposition testimony is permitted to be used as evidence supporting a dispositive motion so long as the deposition transcript is properly authenticated by affidavit. *Clark v. London & Lancashire Indem. Co.*, 21 Wis. 2d 268, 274-75 (1963).

10. What are the rules in your State for contribution claims and does the doctrine of joint and several liability apply?

In Wisconsin, a claim for contribution "requires the discharge of a common liability, and distributes the loss by requiring each person to pay his proportionate share of the damages on a comparative fault basis." *Estate of Kriefall v. Sizzler USA Franchise, Inc*., 2012 WI 70, ¶ 35, 342 Wis. 2d 29 (citations and quotation marks omitted). The right to bring a contribution claim does not materialize until a party seeking reimbursement can prove that it has made a payment, a portion of which it seeks to recover from another at-fault party. *Id*. An action for contribution must be raised within one year from the time of the payment for which the party seeks contribution. Wis. Stat. § 893.92; *Mil. Mut. Ins. Co. v. Priewe*, 118 Wis. 2d 318, 321 (Ct. App. 1984).

Wisconsin applies a modified version of joint and severable liability. Under Wis. Stat. § 895.045(1), a party is jointly and severally liable for all damages if that party's percentage of causal negligence is found to be 51% or more. Any party whose percentage of causal negligence is found to be 50% or less is responsible only for the total causal negligence attributed to that party. These same rules apply to product liability claims. *See* Wis. Stat. § 895.045(3)(d).

11. What are the most dangerous/plaintiff-friendly venues in your State?

Milwaukee County and Dane County (includes the City of Madison) are the most plaintiff-friendly venues in Wisconsin. Milwaukee County constitutes the entire District I Court of Appeals, which is plaintiff-friendly, and Dane County is part of the District IV Court of Appeals, which is also plaintiff-friendly.

12. Is there a cap on punitive damages in your State?

Wis. Stat. § 895.043 governs punitive damages awards in Wisconsin. Subsection (6) states that an award of punitive damages may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater. This cap does not apply, however, to a plaintiff seeking punitive damages from a defendant whose actions included operation of a motor vehicle while under the influence of an intoxicant to a degree that rendered the defendant incapable of safely operating the vehicle.

13. Admissible evidence regarding medical damages – can the plaintiff seek to recover the amount charged or the amount paid?

In general, a plaintiff's recovery for medical services is for the reasonable value of the services, not for the expenditures actually made or the obligations incurred, so evidence of a reduced or negotiated rate would not be admissible. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 23, 302 Wis. 2d 110, 121, 736 N.W.2d 1, 6. (The Collateral Source Rule providers that a tortfeasor's liability to an injured individual is not reduced because the injured individual received payments from some other source.) *Id.* at ¶ 26. However, there is a rebuttable presumption that the amount of medicals billed reflects the reasonable value of the services incurred. Wis. Stat. § 908.03(6m)(bm).