FOR MORE INFORMATION

STAFFORD ROSENBAUM LLP
Madison; Milwaukee,
Wisconsin
www.staffordlaw.com

Kyle Engelke
kengelke@staffordlaw.com

Larry Konopacki
lkonopacki@staffordlaw.com

Rick Manthe
rmanthe@staffordlaw.com

Kathleen McNeil
kmcneil@staffordlaw.com

Matthew Fisher
mfisher@staffordlaw.com

Gregory Jacobs
gjacobs@staffordlaw.com

ALFA International
The Global Legal Network
Local Relationships Worldwide

WISCONSIN

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

Under Wisconsin law, the self-critical analysis privilege remains undefined and untested. For reasons stated below, it is unlikely that a Wisconsin court would recognize such a privilege absent a statutory provision permitting the privilege. Ultimately, the purpose of the self-critical analysis is to limit the scope of discovery available from businesses which undertake candid self-evaluation of their processes and employees. Fletcher Cyc. Corp § 4670.15 Privileged communications—Self-critical analysis privilege; *see also* Melinda A. Bialzik et al., Wisconsin Discovery Law and Practice § 2.55 Critical Self-Analysis Doctrine (5th ed. 2017). This information is particularly valuable to opposing parties, and accordingly some jurisdictions have protected the information so long as the policy reasons stemming from encouraging such self-evaluation outweigh the need for the information.

Wisconsin does recognize a similar self-critical analysis privilege for medical review cases. Wisconsin Statute § 146.38 provides that records produced by entity based on investigations, inquires, proceedings and conclusions intended to improve the quality of health care services are not generally discoverable. *See also Hofflander v. St. Catherine's Hosp., Inc.*, 2003 WI 77, ¶ 118, 262 Wis. 2d 539 , 664 N.W.2d 545 (holding that the medical review privilege only extends to records produced from the review or evaluation and not records presented in such settings).

Wisconsin has not addressed self-critical analysis outside of the medical review context, and it is unlikely that a privilege will be recognized absent legislative action. Just after the enactment of Wis. Stat. § 146.38, the Wisconsin Supreme Court rejected a common law right or privilege to protect self-critical medical review documents. *Davison v. St. Paul Fire & Marine Ins. Co*., 75 Wis. 2d 190, 206, 248 N.W.2d 433, 442 (1977). The Court relied on the enactment of Wis. Stat. § 905.01 which effectively forecloses the existence of privileges which are "not provided by, inherent or implicit" in statute, Wisconsin Supreme Court rules, United States Constitution or Wisconsin's constitution. Consequently, it is unlikely that claiming self-critical analysis privilege will be successful without a statute on which to rely.

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

In 2018, Wisconsin became the first state to adopt a provision requiring the mandatory disclosure of litigation funding agreements where a third-party has a right to receive compensation contingent on or source from the civil action. Wisconsin Statute § 804.01(2)(bg) provides:

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

While this disclosure is mandatory, it does not contemplate the entirety of potential third-party litigation funding agreements. Notably, the statute does not require a party to disclose a third-party funder who does not have a right to receive compensation contingent on or sourced from the lawsuit. These arrangements are just as likely as arrangements resulting in a third-party receiving a compensation as a result of the lawsuit. Accordingly, the absence of a disclosure of a litigation funding agreement is not itself evidence of the absence of a third-party funder.

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

Wisconsin Statute § 804.05(2)(e) is analogous to a Federal Rule of Civil Procedure 30(b)(6) witness deposition. If the deponent is an officer, director, or managing agent of a corporate party, or other person designated under Wis. Stat. § 804.05(2)(e), the place of the deposition will be determined as if the deponent's place of residence, employment or transacting business in person were that of the party. Wis. Stat. § 804.05(3)(b)(6). If the corporate party is the plaintiff, the deponent may be deposed (1) within 100 miles of the place where the corporate party resides; (2) any place within the county where the action was commenced; or (3) as determined by court order. Wis. Stat. § 804.05(3)(b)(1). If the corporate party is a resident defendant, then the deponent may be deposed within 100 miles of where the business resides or transacts its business, or any other place determined by court order. Wis. Stat. § 804.05(3)(b)(1)-(3). If the corporate party is a non-resident, then the deponent may be deposed (1) within 100 miles of where the business resides or transacts business; (2) as determined by court order; or (3) within 100 miles of where the corporate party was served with the subpoena for deposition. Wis. Stat. § 804.05(3)(b)(1)-(3)

Employees who are not officers, directors, managing agents or otherwise corporate designees are treated like nonparties. In such instances, an employee may be compelled to give a deposition: (1) within 100 miles of his or her residence; (2) at a place determined by the court or (3) within 100 miles of where he or she was served within Wisconsin. Wis. Stat. § 804.05(3)(b)(4).

All that said, the actual place of the deposition is generally determined between the parties. In most instances, both parties are obligated to travel to some extent.

.

4. What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?

From a litigation perspective, the benefits or detriments of admitting that a driver was in the "course and scope" of employment for direct negligence claims is a case-specific determination. For instance, if an employee is bringing a claim against an employer, then the employer may want to admit that the employee was acting in the "course and scope" of employment to trigger the worker's compensation exclusive remedy. However, if a third party is bringing a claim against an employer, there is a greater concern for admitting that the employee was acting in the "course and scope" of employment. Principally, an employer would not want to admit that the drive was in the "course and scope" in instances where the employer is alleged to be vicarious liable. Alternatively, if it is clear that the employer is liable, then it may be appropriate and strategic

to admit that the employee was in the "course and scope" of employment. In these instances, you can eliminate unnecessary discovery against the employee and it may be helpful in coverage disputes.

5. Please describe any noteworthy nuclear verdicts in your State?

Wisconsin has had several noteworthy verdicts over the last couple of years, but two stand out for being particularly severe. In early February 2020, a Racine County court handed down a $38.1 million verdict in a products liability action against Hyundai. There, the plaintiff suffered a spinal fracture which rendered him a paraplegic when the driver's seat of his Hyundai Elantra allegedly failed after the vehicle was struck by a car driven by an individual defendant. The jury found that that defendant was negligent and caused the injuries and that the Hyundai Elantra was in defective condition and also a cause of the injury to the plaintiff. Ultimately, the jury found that Hyundai was 84% negligent while the other defendant was 16% negligent. Consequently, the jury awarded a $31,164,263 in compensatory damages for pain and suffering as well as past and future medical expense and an additional $7,000,000 for loss of consortium, society and companionship. This decision is currently on appeal.

Also, in August 2020, the Seventh Circuit reduced a $280 million punitive damage award to $140 million, which was equal to the compensatory damage award. *Epic Sys. Corp. v. Tata Consultancy Servs.*, 980 F.3d 1117 (7th Cir. 2020). There, Epic Systems sued Tata Consultancy Services for downloading thousands of documents contain Epic's confidential information and trade secrets. A jury awarded $140 million in compensatory damages stemming from the benefit TCS received from using the comparative-analysis spreadsheet, $100 million in compensatory damages stemming from the benefit TCS received from using Epic's other confidential information, and $700 million in punitive damages. The district court vacated the $100 million award and reduced the punitive damage award to $280 million.

On appeal, the Seventh Circuit further reduced the punitive damage award to $140 million. With respect to the compensatory damages for the comparative-analysis spreadsheet, the court found that there was sufficient evidence for the jury's $140 million verdict. The court determined that the award of damages depended on how much it would have cost TCS to independently develop the trade secrets at issue. Here, the Seventh Circuit focused on the benefit received by TCS, not the cost Epic incurred when it created the information. However, the court did not believe that there was sufficient evidence to support the $100 million award with respect to TCS using Epic's other confidential information, because Epic was unable to differentiate this information from the information incorporated in the comparative-analysis spreadsheet.

As for the reduction of punitive damages, the Seventh Circuit found that the award, while statutorily permissible, violated the TCS's due process rights under the United States Constitution and Wisconsin law. As discussed below, Wisconsin law recognizes that the Due Process Clause of the Fourteenth Amendment imposes constitutional limitations on punitive damages. In this instance, the Circuit found the $280 million award to not be justified on account that the Tata's conduct, "while reprehensible, was not egregious, and multiplying the substantial compensatory award … is unnecessary to reflect Epic's uncertain economic harm." *Epic Sys. Corp*, 980 F.3d at 1144. All things considered, a total $280 million damage award is still by all definitions nuclear.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

In Wisconsin, the collateral source rule precludes defendants from introducing evidence about amounts billed opposed to amounts actually paid. The plaintiff is entitled to the full amount billed, regardless of what is actually paid. Although the defendant may be unable to admit the difference between the amount billed and the amount paid, it still may be useful to seek the information through discovery. The information is still

valuable because it may confirm whether there are any outstanding items or unpaid bills. Further, there is a limited exception for the use of the information for impeachment. *See Leitinger v. DBart, Inc.*, 2007 WI 84, ¶30, 302 Wis.2d 110, 736 N.W.2d 1..

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

Efforts to obtain the amount actually charged and accepted by a healthcare provider runs into the same issues discussed above. In our experience, we have not experienced any difficulty obtaining this information.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

Whether a Wisconsin court has jurisdiction over a cause of action arising from an out-of-state employee's injury ultimately depends on what cause of action the employee has brought. The general rule is that a Wisconsin court may assume subject matter jurisdiction over claims arising under federal law as long as Congress has not prohibited the state court from doing so and there is no "disabling incompatibility." Peter L. Albrecht et al., Wisconsin Employment Law § 1.19 (7th ed. 2019) (citing *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). For the most part, Wisconsin courts and federal courts exercise concurrent jurisdiction for most employment related federal statutory claims.

With respect to actions arising under various Wisconsin employment statutes, Wisconsin courts and administrative forums retain exclusive jurisdiction over a few causes of action including workers' compensation and wage and hour claims. *Id.*, § 1.23. In Wisconsin, out-of-state employers must have workers' compensation if they have employees working in Wisconsin and Wisconsin must be a covered state under the policy. Accordingly, an out-of-state employee may bring a workers' compensation claim in Wisconsin, if the employer has properly followed Wisconsin requirements. For other actions, there is a high likelihood that a party may remove the claim to federal court pursuant to a diversity of citizenship or a federal question arising from the claim. If removed pursuant to diversity of citizenship, the federal court is still "obliged to follow state decisional law, as well as all other state law." *Houben v. Telular Corp.*, 309 F.3d 1028, 1032 (7th Cir. 2002). It is essential for an attorney to understand that causes of actions arising under Wisconsin law brought in a federal court may be dismissed if the accompanying federal claims are dismissed. In such instances, the absence of pendent jurisdiction will preclude the federal forum.

9. What is your State's current position and standard in regards to taking pre-suit depositions?

Generally, Wisconsin, like other jurisdictions, follows the requirement that depositions are to be taken *after* the commencement of the action. *Matter of Estate of Berth*, 157 Wis. 2d 717, 723, 460 N.W.2d 436 (Ct. App. 1990) (internal citations omitted). That said, Wisconsin Statute § 804.02 provides an exception. Per Wis. Stat. § 804.02, a party may take discovery—including depositions—*before* a lawsuit is brought in order to prevent "failure or delay of justice." The principal concern is that critical evidence may be lost prior to the actual filing of the lawsuit. A prime example of this is the deposition of a significantly injured or terminally ill witness who may not be available to testify after the filing of the action. It is important to note that § 804.02 may also be used for the production of documents and physical and mental evaluations. *See also* Wis. Stat. § 804.10.

Wis. Stat. 804.02 provides a procedure that a party must follow in order to take a pre-suit deposition:

First, the matter must "cognizable in any court of this state." Wis. Stat. § 804.02. Admittedly, this is a low threshold, yet it is incumbent on the attorney to evaluate issues that may arise with respect to preemption and jurisdiction.

Second, a petition must be filed in any Wisconsin court with subject matter jurisdiction. The petition must detail: (1) that the petitioner anticipates to be a party to an action; (2) the subject matter of the anticipated action; (3) "facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it"; (4) the names and addresses of potential adverse parties; (5) the names and addresses of persons to be examined and what the petitioner anticipates to elicit from each person; and (6) reasons for desiring the perpetuation of the testimony. Wis. Stat. § 804.02(1)(a).

Third, the petitioner is required to serve notice upon all potential adverse parties. The notice must state the "petitioner will move the court, at a time and place named therein, for the order described in the petition," and the notice must be served at least 20 days before the date of the hearing in compliance with Wis. Stat. § 801.11. Wis. Stat. § 804.02(1)(b).

If the petitioned court is satisfied that the "perpetuation of testimony may prevent a failure or delay of justice," then it shall order designating the persons whose depositions may be taken and the underlying subject matter. Wis. Stat. § 804.02(c). The court will also specify whether the depositions will be taken orally or through written interrogatories. *Id.* Further, the court may make orders for certain documents and evaluations under Wis. Stat. §§ 804.09 and § 804.10. Finally, the deposition that is ultimately taken, may be used in any action involving the same subject matter subsequently brought in a Wisconsin court. Wis. Stat. § 804.02(d).

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

Wisconsin does not have a hard and fast rule for how long a vehicle or a tractor-trailer must be held until it may be released. In large part, this depends on the discretion of the attorney. Motor vehicle collisions generally deal with a large amount of physical evidence and spoliation is always a concern. This is even more so the case when dealing with collisions involving tractor-trailers. This past year, the Wisconsin Court of Appeals upheld spoliation sanctions for a failure to retain a tractor-trailer's electronic control module (ECM) or "black box." *Gunderson v. Franks*, 2020 WI App 31, 392 Wis. 2d 380, 944 N.W.2d 347 (unpublished). Sanctions aside, the court can also strike pleadings and instruct the jury to assume that the evidence would be unfavorable to the trucking company. To avoid these harsh penalties, it is essential for the attorney to inform his client to retain all possible information, including in some instances storing the vehicle. The storage fee on a vehicle may be expensive, but an adverse instruction and potential sanctions could be substantially more costly.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

As explained below, yes, a plaintiff may be awarded punitive damages to the greater of twice the amount of compensatory damages or $200,000. Wis. Stat. § 895.043(6). To be awarded punitive damages, there must be evidence is admitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. Wis. Stat. § 895.043(3). A party acts maliciously where the party's actions are "the result of hatred, ill will, a desire for revenge or inflicted under circumstances where insult or injury is intended." *Strenke v. Hogner*, 2005 WI 25, ¶ 26, 279 Wis. 2d 52, 694 N.W.2d 296 (quoting *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 483, 464 N.W.2d 654 (1991)). A party acts with intentional disregard if the party: (1) "acts with a purpose to cause the result or consequence," or (2) "is aware that result or consequence is substantially certain to occur from the person's conduct." *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶¶ 63-64, 312 Wis. 2d 251, 752 N.W.2d 800 (citing *Strenke v. Hogner*, 2005 WI 25, ¶¶ 19, 36-40, 279 Wis. 2d 52, 694 N.W.2d 296). With respect to this option, the defendant's conduct must be "(1) deliberate, (2) in actual disregard of the rights of another, and (3) sufficiently aggravated to warrant punishment by

punitive damages." *Id.* (citations omitted).

The circuit courts are required to serve as gatekeepers and determine whether the evidence presented meets either of these high standards and can be presented to the jury. *Jasen Dane Ranch, LLC v. Nelson Hardwood Lumber Co., Inc.*, 2020 WI App 70, ¶ 7, 394 Wis. 2d 524, 950 N.W.2d 692. Further, the availability of punitive damages depends on the claimant actually suffering damages. *Groshek v. Trewin*, 2010 WI 51, ¶ 26, 325 Wis. 2d 250, 784 N.W.2d 163 (citing Tucker v. Marcus, 142 Wis. 2d 425, 440-441, 418 N.W.2d 818 (1988)). However, punitive damages do not require the injured party to be awarded compensatory damages. *See Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 563 N.W.2d 154 (1997).

There is a statutory limit on punitive damages: a plaintiff may not receive the greater of twice the amount of any compensatory damages recovered by the plaintiff or $200,000. Wis. Stat. § 895.043(6). This limit only applies to individuals who are not operating under the influence of an intoxicant. *Id*. As alluded to previously, there is also a substantive due process limit to the award of punitive damages. *See Trinity Evangelical Lutheran Church v. Tower Ins. Co*., 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-417 (2003)). Whether a punitive damage award violates due process depends on (1) the reprehensibility of the conduct; (2) the disparity between the harm suffered and the punitive damages awarded; and (3) the difference between the award and other penalties imposed. *Jacque*, 209 Wis. 2d at 627; *see also Epic Sys. Corp. v. Tata Consultancy Servs*., 980 F.3d 1117 (7th Cir. 2020).

Of those three factors, the Supreme Court has recognized the reprehensibility of the conduct as the most important. *Epic Sys. Corp*., 980 F.3d at 1141 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). Finally, it is important to note that while constitutionally there is no fixed ratio limiting punitive damages—like that seen in Wis. Stat. § 895.43—there are "few awards exceeding a single-digit ratio between punitive and compensatory damages … [that] will satisfy due process." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

Wisconsin currently has not mandated Zoom trials in its circuit courts. In March 2020, the Wisconsin Supreme Court suspended trials across the state indefinitely. Since May 2020, the Wisconsin Supreme Court has delegated to the circuit courts the responsibility to implement their own Covid-19 protocol. Since then, the circuit courts have taken several different routes. Because the pandemic is an ongoing process, some counties which originally held in-person jury trials have since postponed them indefinitely. As it stands, Zoom is used by some counties for bench trials and other hearings, but the counties which are or were holding jury trials held the trials in-person.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

The most recent noteworthy case in Wisconsin where a party was awarded punitive damages was the *Epic* decision discussed earlier. As mentioned, there the final verdict awarded $140 million in punitive damages. This undoubtedly an outlier verdict. With respect to motor vehicle accidents, the Wisconsin Supreme Court has provided meaningful guidance on the evidence needed to show a heightened mental state. In *Strenke*—the first case to address punitive damages after the enactment of § 895.043—the Wisconsin Supreme Court found that a defendant who had four times been convicted of drunk driving and had eighteen cans of beer before hitting the plaintiff's vehicle was acting in intentional disregard of the plaintiff's rights. *Strenke*, 2005 WI 25, ¶19. On remand, the Wisconsin Court of Appeals found that the $225,000 punitive damages verdict was appropriate in light of the only $2,000 in compensatory damages. The Wisconsin Court of Appeals decision in *Henrikson* contrasts with the *Strenke* in finding that an individual whose blood alcohol content was only slightly above the legal limit and had no prior OWI convictions was not acting in intentional disregard of

the plaintiff's rights. *Henrikson v. Strapon*, 2008 WI App 145, ¶18, 314 Wis. 2d 225, 758 N.W.2d 205.

Although these instances both dealt with drunk drivers, they are particularly helpful in demonstrating how high the standard for punitive damages really is. Two recent verdicts stand out. In 2019, in *Zankl v. Gaedtke*, a jury found that the defendant being admittedly intoxicated did not rise to the level needed for punitive damages. In 2020, in *Estate of Zhu v. Hodgson*, the circuit court refused the plaintiff's request to amend its complaint to assert a punitive damage claim on the basis that the defendant deleted several text messages from his phone and destroyed it after fatally crashing into a bicyclist. The defendant's activities post-accident did not have any effect on the bicyclist. In this instance, the plaintiff was awarded nearly 6 million dollars in compensatory damages.

Another noteworthy case which touches on what is needed to establish punitive damages is the Court of Appeals decision in *Jasen Dane Ranch v. Nelson Hardwood Lumber Co.*, 950 N.W.2d 692 (Wis. Ct. App. 2020). In *Jasen*, the boundary between the plaintiff and the defendant was unclear and the defendant harvested approximately 70 trees from the plaintiff's parcel. The court then engages in a thorough analysis of the evidence on the record as applied to the punitive damages standard as described in question 11. There, the court makes clear that there must be clear and convincing evidence on the record which links the defendant's conduct to the high standard of "intentional disregard." This case is a helpful benchmark to assess the availability of punitive damages.