FOR MORE INFORMATION

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WISCONSIN

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

There is no Wisconsin case law on the admissibility or discoverability of preventability determinations or internal accident reports. Chapters 901 to 911 of the Wisconsin Statutes contain the Wisconsin Rules of Evidence. Chapters 901 and 904 govern most admissibility determinations.

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?

Wisconsin was the first state to adopt a provision requiring the disclosure of litigation funding arrangements. Wisconsin Stat. 804.01(2)(bg) "third party agreements" provides that "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.") In other words, all third-party litigation funding deals have to be disclosed—even if a discovery request has not been made for that information. The one exception is lawyer contingent fee arrangements. This provision was enacted in 2018 and there is no case law interpreting or applying it, to date.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

Because of obvious limits on what minors cannot do (e.g., sign legal papers, hire an attorney, request medical records, file a lawsuit, sign settlement agreements etc.), any case for damages must be pursued by the injured child's parents or guardian. If it becomes necessary to file a lawsuit, a guardian ad litem will be appointed by the court to advocate for the child's best interests. If there is a settlement agreement between the minor and a defendant, a minor settlement hearing occurs, since the terms of a settlement cannot be enforced at a later date against the minor unless a judge approves its validity after a full hearing.

Personal injury cases involving adults in Wisconsin generally carry a three-year statute of limitations; however, for any minor child injured in an accident, the statute of limitations is different, and typically much longer. Under Wisconsin law, a lawsuit must be filed within two years of the injured minor's 18th birthday. See Wis. Stat. § 893.16.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

Advantages: protection of employee; allows to direct and control litigation; eases burden for driver; driver likely more cooperative; more likely to lead to settlement over contentious litigation.

Disadvantages: plaintiffs seek full extent of policy limits; opens employer up to discovery; increases settlement amounts.

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

Wisconsin law recognizes that every litigant and party to an action has a duty to preserve evidence that is essential to the claims that are likely to be litigated. *Sentry Ins. v. Royal Ins. Co. of Am.*, 196 Wis. 2d 907, 918, 539 N.W.2d 911 (Ct. App. 1995). Not all "destruction, alteration, or loss of evidence qualifies as spoliation" and, accordingly, not every circumstance calls for sanctions. See *Insurance Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI App. 15, ¶ 15, 269 Wis. 2d 286, 674 N.W.2d 886.

After the lost evidence has been identified, the court must determine:

> (1) the relationship of the destroyed, altered, or lost evidence to the issues in the present action;
>
> (2) the extent to which the destroyed, altered, or lost evidence can now be obtained from other sources; and
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> (3) whether the party responsible for the evidence destruction, alteration, or loss knew or should have known at the time he or she caused the destruction, alteration, or loss of evidence that litigation against the opposing parties was a distinct possibility.

Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District, 177 Wis. 2d 523, 502 N.W.2d 881 (Ct. App. 1993); *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 718, 599 N.W.2d 411 (Ct. App. 1999). Then, the court must determine whether sanctions are appropriate. *Id*. at 532. Intentional spoliation may be subject to the harsher sanctions than negligent spoliation.

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

In Wisconsin, the collateral source rule states that benefits an injured person receives from sources that have nothing to do with the tortfeasor may not be used to reduce the tortfeasor's liability to the injured person. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 26, 302 Wis. 2d 110, 736 N.W.2d 1. This rule precludes defendants from introducing evidence about amounts billed opposed to amounts actually paid. *Id.*, ¶¶ 28-34. 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. Although the general rule of inadmissibility typically applies, 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 *Id.*, ¶ 30. There is an exception to these general rules allowing collateral source payments to be admitted in medical malpractice cases. *Weborg v. Jenny*, 2012 WI App. 67, ¶ 7,341 Wis. 2d 668, 816 N.W.2d 191 (citing Wis. Stat. § 893.55(7)).

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

The legal standard set forth under Wis. Stat. § 804.09 applies to EDR data in the possession or control of a party. The statute permits (1) inspection, copying, testing, and sampling of "items" specified in Wis. Stat. § 804.09(1)(a)1. and 2. (e.g., "electronically stored information, including … data or data compilations stored in any other medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form,"), and (2) entry upon designated "land or other property" for inspection and other activities. Wis. Stat. § 804.09 (2) outlines the procedure for requesting documents or electronically stored information from a party and the method of production.

Pursuant to Wis. Stat. § 805.07(2), an attorney may compel nonparties to release relevant data through subpoenas. Wisconsin has not yet adopted a procedure for the issuance of a subpoena to compel a nonparty to produce evidence without having to attend a deposition. Parties may, however, issue subpoenas to compel any person, even someone who is not a party to the litigation, to appear for a deposition, hearing, or trial in a civil action or special proceeding, Wis. Stat. § 805.07(1), and to command that person "to produce the books, papers, documents, electronically stored information, or tangible things designated" in the subpoena. Wis. Stat. § 805.07(2). The quoted language is consistent with Wis. Stat. § 804.09 in terms of the types of objects that a person may be compelled to produce. Thus, a subpoena requiring the production of material under Wis. Stat. § 805.07(2) can reach any of the types of documents or tangible things that could be reached under Wis. Stat. § 804.09 if they were in the control of a party.

Wis. Stat. § 805.07(2)(b) specifies certain procedures that must be followed when a third-party subpoena is issued for discovery purposes. Specifically, Wis. Stat. § 805.07(2)(b) requires that notice be provided to all parties at least 10 days before the scheduled deposition. Additionally, Wis. Stat. § 805.07(2)(b) provides that the items requested will not be produced until the time and date specified in the subpoena.

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

Punitive damages are allowed if the defendant acted maliciously toward the plaintiff or with an intentional disregard for the plaintiff's rights. Wis. Stats. §895.85(3). Punitive may also be recovered against a principal for the act of the principal's agent if the agent's action was authorized, ratified or participated in by the principal. *Marlatt v. Western Union Telegraph Co.*, 167 N.W.263 (1918) (holding that no matter how willful may be the act of the agent, the corporation, in the absence of a direction on its part to do the act in the manner in which it was done, is not liable in punitory damages, unless it appears that it ratified the conduct of its employee").

To recover punitive damages from corporation, a plaintiff must prove one of three things: (1) The corporation directed the employee to engage in the outrageous behavior, *Marlatt*, 167 Wis. 176 at 179–80, (2) the corporation ratified the employee's outrageous behavior after learning of the behavior, Id. at 180, 167 N.W. at 265, or (3) considering the factors in *Walter v. Cessna Aircraft Co.*, 121 Wis.2d 221, 228–29, 358 N.W.2d 816, 820 (Ct.App.1984), the corporation was recklessly indifferent to, and took conscious action in deliberate disregard of Plaintiff's rights. *Zeller v. Northrup King Co.*, 125 Wis.2d 31, 35–36, 370 N.W.2d 809, 812–13 (Ct.App.1985). In 2011, Wis. Stat. § 895.043 was amended to limit the amount of any punitive-damages award to twice the amount of compensatory damages recovered or $200,000, whichever is greater. See 2011 Wis. Act 2. However, this limitation does not apply to any plaintiff seeking punitive damages from a defendant who was operating a vehicle while under the influence of an intoxicant if the defendant was incapable of safely operating the vehicle. Wis. Stat. § 895.043(6).

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

On June 17, 2022, a federal jury in Wisconsin found *Man Wah Holdings LTD, Inc. and Man Wah (USA) Inc*. (collectively "Man Wah") liable for willful trade dress infringement, misappropriation of trade dress, false patent marking and willful patent infringement related to Raffel Systems, LLC's ("Raffel") integrated illuminated cup holder for motion furniture. Specifically, Raffel alleged that China-based Man Wah created and sold counterfeit, defective versions of Raffel's patented light-up cup holder for reclining furniture.

The jury awarded Raffel Systems more than $106 million, making it among the largest verdicts in the U.S. Eastern District of Wisconsin court. Of the $98.5 million awarded on Raffel's claim for the common law tort of misappropriation, $97.5 million consisted of an award of punitive damages while $1 million was awarded in compensatory damages.

Man Wah is challenging the jury's punitive damages award and plans to argue that the jury's award of $97.5 million exceeds Wisconsin's statutory damages cap which limits recovery of punitive damages to "twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater." Wis. Stat. § 895.043(6). In other words, Man Wah will argue that the punitive damages award should be reduced to $2 million.

In addition, an eight-person jury returned a $125 million verdict against a major retailer in favor of a Down Syndrome woman claiming disability discrimination. The case, *EEOC v. Walmart Stores East LP*, U.S. District Court for the Eastern District of Wisconsin, Case No. 17-cv-70, produced a plaintiff's award consisting of $150,000 in compensatory damages and an additional $125,000,000 in punitive damages following a four-day trial.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

In Wisconsin, a negligence claim based on an "alleged" violation of the FMCSR fails as a matter of law. The FMCSR cannot be used as evidence regarding the standard of care. *See Taft v. Derricks*, 2000 WI App 103, ¶ 2, 235 Wis. 2d 22, 613 N.W.2d 190 (holding that it is erroneous to use a statute "to define the standard of care" owed by a defendant, absent a legislative intent that a statute shall form the basis of civil liability); *see also Dakter v. Cavallino*, 2015 WI 67, ¶¶ 23-28, 363 Wis. 2d 738, 866 N.W.2d 656 (discussing the scope of three expert witnesses testimony regarding the safety standards and practices that govern semi-truck drivers; no expert testified to any alleged violation(s) of FMCSA, FMCSR, or CDL manuals).

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

While there is no Wisconsin case law addressing this issue, the determination is likely to be made on a case-by-case basis with an analysis of the factual background of the case. Plaintiffs' claims against the broker or shipper would be based on negligent hiring and supervision. Plaintiffs would argue that the broker had sufficient control so that the broker should be held vicariously liable for the negligent driver's actions. Again, the issue would be analyzed under the facts of the specific case and would focus on the due diligence performed by the broker in hiring, selecting, and retaining the motor carrier, and what, if any, control the broker maintained over the carrier.

Provide your state's comparative/contributory/pure negligence rule.

Wisconsin is a comparative negligence state. See Wis. Stat. § 895.045. In general, under Wisconsin's contributory negligence statute, an injured party may only recover damages against a party whose percentage of causal negligence equals or exceeds that of the injured party. Wis. Stat. § 895.045(1). If the comparison of negligence does not bar recovery, the amount of compensatory damages awarded to a plaintiff in a negligence action will be reduced by the percentage of causal negligence attributed to the plaintiff. Id. The negligence of the plaintiff is measured separately against the negligence of each person found to be causally negligent. *Id*.

Wisconsin law provides that a party that is less than 51% causally negligent is liable for damages only to the extent of its percentage of the causal negligence. However, parties that are at least 51% causally negligent are jointly and severally liable for all recoverable damages. *Id*.

Provide your state's statute of limitations for personal injury and wrongful death claims.

Personal Injury: 2 years pursuant to Wis. Stat. § 893.54(1m)(a).

Wrongful Death: According to Wis. Stat. § 893.54(2m), an action brought to recover damages for death caused by the wrongful act, neglect, or default of another and arising from an accident involving a motor vehicle shall be commenced within 2 years after the cause of action accrues or it is barred. The statute of limitations for wrongful death claims that do not arise from an accident involving a motor vehicle is 3 years. Wis. Stat. § 893.54(1m)(b).

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

A wrongful death claim may be filed by the "personal representative of the deceased person or by the person to whom the amount recovered belongs." Wis. Stat. § 895.04(1). Those parties may include a surviving spouse, domestic partner, child, parent, or guardian of the deceased and siblings if there is no surviving spouse, domestic partner, child, or parent. Wis. Stat. § 895.04(2).

Is a plaintiff's failure to wear a seatbelt admissible at trial?

The plaintiff's failure to wear a seatbelt is admissible evidence at trial; however, Wisconsin law states that the amount of compensation a plaintiff can recover cannot be reduced by more than 15% if they were not wearing a seat belt. Wis. Stat. § 347.48(2m)(g).

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

No, there are no limitations for such plaintiffs in Wisconsin.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

Wisconsin has abandoned the tort choice of law rule that the jurisdiction where an accident occurred governs an action against a tortfeasor. State Farm Mut. Auto. Ins. Co. v. Gillette, 2002 WI 31, ¶ 50, 251 Wis. 2d 561, 641 N.W.2d 662. Although a weak presumption favoring the forum law remains, the Wisconsin Supreme Court has adopted a more flexible methodology based on a qualitative analysis of the contacts that one or more jurisdictions have with the facts. Id.

The first rule in Wisconsin choice of law rules is "that the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance." Id. at ¶ 51. The Wisconsin Supreme Court has set forth the following five factors that influence the choice of law: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. Id. at ¶ 53.