STATE OF WISCONSIN COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Governments.** Pre-Suit Notice Requirements in Wisconsin generally apply only when making a claim against a political corporation, government subdivision, or government officer or employee acting in its official capacity under WIS. STAT. § 893.80 (2008), or a state or state officer, employee, or agent under WIS. STAT. § 893.82 (2008).

B) **Statement of relief.** An itemized statement of the relief sought must also be presented to the governmental body as well. A plaintiff must wait 120 days for the governmental body to disallow the claim before filing an action. WIS. STAT. § 893.80(1)(g).

Relationship to the Federal Rules of Civil Procedure

Wisconsin has adopted the Federal Rules of Civil Procedure and codified them in §§ 800 through 806 of the Wisconsin Statutes. There are some differences in time constraints and commencement procedures but overall Wisconsin's civil procedure rules are quite similar to the Federal Rules.

Description of the Organization of the State Court System

A) **Structure.** Wisconsin is a three-tiered court system. In civil litigation, the initial court is the circuit court. Typically, circuit courts are divided into branches - civil, criminal, family, and probate - with at least one branch in every county. Civil branches also handle small claims actions where damages are claimed to be $5,000.00 or less. WIS. STAT. § 799.01 (2008). These include replevin actions and garnishment actions.

B) **Court of Appeals.** The Court of Appeals is Wisconsin's intermediate appellate court. This is a court of mandatory jurisdiction allowing litigants the right to appeal their case from the circuit court to the court of appeals. The Court of Appeals consists of four districts. There are a total of sixteen judges. Each district is managed by a presiding judge who is appointed by the chief judge of the court of appeals. Terms for appellate judges are six years in duration. WIS. STAT. § 752.01 *et seq.* (2008).

1) **Districts.** The Court of Appeals system consists of four districts.

   a) **District I.** District I consists of Milwaukee County.

   b) **District II.** District II encompasses the following counties: Calumet, Fond du Lac, Green Lake, Kenosha, Manitowoc, Ozaukee, Racine, Sheboygan, Walworth, Washington, Waukesha and Winnebago.

   c) **District III.** District III includes: Ashland, Barron, Bayfield, Brown, Buffalo and Pepin (combined 2-county circuit), Burnett, Chippewa, Door, Douglas, Dunn, Eau Claire, Florence and Forest (combined 2-county circuit), Iron, Kewaunee, Langlade, Lincoln, Marathon, Marinette, Menominee and Shawano (combined 2-county circuit), Oconto, Oneida,

Outagamie, Pierce, Polk, Price, Rusk, St. Croix, Sawyer, Taylor, Trempealeau, Vilas, and Washburn.

d) **District IV.** District IV consists of the following counties: Adams, Clark, Columbia, Crawford, Dane, Dodge, Grant, Green, Iowa, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Marquette, Monroe, Portage, Richland, Rock, Sauk, Vernon, Waupaca, Waushara, and Wood counties.

Id.

C) **Supreme Court.** The Wisconsin Supreme Court is composed of seven justices. It is the state's highest court. Supreme Court Justices are elected to ten years terms. It is a court of last resort. WIS. STAT. § 751.01 *et seq.* (2008).

Service of Summons

A) **Person.** Service of summons upon a person is governed by WIS. STAT. § 801.11(1) (2008). Service on a person includes (a) personal service either within or without Wisconsin; and (b) substituted service, which after reasonable diligence the person cannot be served then by leaving a copy of the summons at the persons usual place of abode with either (1) a competent member of the family at least 14 years of age or (2) a competent adult. The person who accepts service shall be informed of the contents of the summons.

1) **Mailing.** If with reasonable diligence the person can not be served under the above conditions, service may be made by publication of the summons and by mailing. If the person's address is known or can be reasonably ascertained, then the summons shall be mailed at or immediately prior to the first publication. *Id.*

2) **Nonresident real estate and business brokers.** Nonresident real estate and business brokers, doing business in Wisconsin, must consent to substituted service of process on Department of Regulation and Licensing. WIS. STAT. § 452.11(3) (2008).

3) **Nonresident motor vehicle operators.** A nonresident operator of a motor vehicle may be properly served by service on the secretary of transportation. WIS. STAT. § 345.09 (2008).

B) **Public corporations.** Service of Summons upon a public corporation is governed by WIS. STAT. § 801.11(5) (2008). Personal jurisdiction over a domestic or foreign corporation or limited liability company is acquired by personally serving an officer, director or managing agent of the corporation or Limited Liability Company. A copy of the summons may be left in the office of the officer, director or managing agent or with the person who is generally in charge of the office. If personal service can not be achieved after reasonable diligence, service may be accomplished by publication and mail.

C) **Private corporations.** Service of Summons upon a private corporation is governed by WIS. STAT. § 801.11(6) (2008). A summons shall be served individually upon each general partner known to the plaintiff in a manner prescribed for service on natural persons, natural persons under disability, or domestic or foreign corporations or limited liability companies. Service is proper even when fewer than all general partners are personally served. *CH2M Hill, Inc. v. Black & Veatch*, 206 Wis.2d 370, 382, 557 N.W.2d 829 (Ct. App. 1996). Any resulting judgment will be binding individually against each partner who was actually served and against the partnership's assets, no matter where located. WIS. STAT. §801.11(6); *CH2M Hill*, 206 Wis.2d at 382.

D) **Waiver.** Unlike federal law, Wisconsin law has no explicit service waiver statute. Any defect in service, however, must be raised as an affirmative defense or is deemed waived. WIS. STAT. § 802.06(8) (2008).

Statutes of Limitations

A) **Contracts**. The statute of limitations for actions on contracts is governed by WIS. STAT. § 893.43 (2008). An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services, except those mentioned in § 893.40 (2008), shall be commenced within 6 years after the cause of action accrues or be barred.

B) **Contribution**. The statute of limitations for contribution actions is governed by WIS. STAT. § 893.92 (2008). "An action for contribution based on tort, if the right of contribution does not arise out of a prior judgment allocating the comparative negligence between the parties, shall be commenced within one year after the cause of action accrues or be barred." *Id.* Accrual occurs upon a party paying more than its fair share or responsibility. *Id.*

C) **Employment.** Any action to recover "unpaid salary, wages or other compensation for personal services," excluding professional services, is barred unless commenced within 2 years of the cause accruing. WIS. STAT. § 893.44(1) (2008).

D) **Fraud**. The statute of limitations for fraud is governed by WIS. STAT. § 893.93(b) (2008). An action for relief on the ground of fraud shall be commenced within 6 years after the cause of action accrues or be barred. "The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." Discovery occurs when the party has knowledge that would cause a reasonable person to make sufficient inquiry to discover the fraud. *Owen v. Wangerin*, 985 F.2d 312 (1993).

E) **Governmental entities.** Notice of circumstances of claim and damages must be submitted within 120 days of the event giving rise to the claim. WIS. STAT. §§ 893.80, and 893.82 (2008). Failure to do so extinguishes claim.

F) **Personal injury**. The statute of limitations for personal injury actions is governed by WIS. STAT. § 893.54(1) (2008). An action to recover damages for injuries to the person shall be commenced within 3 years or be barred. Wisconsin has adopted the discovery rule for purposes of a cause of action accruing.

G) **Professional liability**.

1) **Medical malpractice.** The statute of limitations for medical malpractice actions is governed by WIS. STAT. § 893.55 (2008):

> An action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of 3 years from the date of the injury, or one year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered. . .

Id. An action may not be commenced more than 5 years from the date of the act or omission. *Id.*

a) **Mediation requests.** Wisconsin does have a mandatory medical mediation procedure. The applicable statute of limitations can be affected by the date of filing a request for mediation under WIS. STAT. §§ 655.44 and .445.

b) **Concealment.** WIS. STAT. § 893.55(2) states:

> If a health care provider conceals from a patient a prior act or omission of the provider which has resulted in injury to the patient, an action shall be commenced within one year from the date the patient discovers the concealment or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided above, whichever is later.

c) **Foreign objects.** WIS. STAT. § 893.55(2) states:

> When a foreign object which has no therapeutic or diagnostic purpose or effect has been left in a patients body, an action shall be commenced within one year after the patient is aware or, in the exercise of reasonable care, should have been aware of the presence of the object or within the time limitation provided above, whichever is later.

2) **Surveying.** The statute of limitations for an action against an engineer or land surveyor is governed by WIS. STAT. § 893.37 (2008):

> No action may be brought against an engineer or any land surveyor to recover damages for negligence, errors or omission in the making of any survey nor for contribution or indemnity related to such negligence, errors or omissions more than 6 years after the completion of a survey.

Id.

3) **Accountants.** The statue of limitations applicable to actions against public accountants is governed by WIS. STAT. § 893.66 (2008):

> An action to recover damages, based on tort, contract or other legal theory, against any certified public accountant licensed or certified under ch. 442 for an act or omission in the performance of professional accounting services shall be commenced within 6 years from the date of the act or omission or be barred.
> If a person sustains damages covered under the above paragraph during the period beginning on the first day of the 6th year and ending on the last day of the 6th year after the performance of the professional accounting services, the time for commencing the action for damages is extended one year after the date on which the damages occurred.
>
> If a person sustains damages covered above and the statute of limitations applicable to those damages bars commencement of the cause of action before the end of the period specified above, then that statute of limitations applies.
>
> * * *
>
> This section does not apply to any person who commits fraud or concealment in the performance of professional accounting services.

H) **Property damage.** The statute of limitations for property damage actions is governed by WIS. STAT. § 893.52 (2008):

> An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed.

Id. An action brought under a fire insurance policy must be commenced within 12 months after the loss. WIS. STAT. § 631.83 (2008).

I) **Survival.** The statute of limitations in case of death actions is governed by WIS. STAT. § 893.22 (2008):

> If a person entitled to bring an action dies before the expiration of the time limited for the commencement of the action and the cause of action survives, an action may be commenced by the persons representatives after the expiration of that time and within one year from the persons death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement of the action and the cause of action survives, an action may be commenced after the expiration of that time and within one year after the issuing, within this state, of letters testamentary or other letters authorizing the administration of the decedents estate.

Id.

J) **Subrogation claims.** The statute of limitations for subrogation claims is the statute of limitations on the underlying tort. *General Accident Ins. Co. v. Schoendorf*, 202 Wis. 2d 98, 109-10, 549 N.W.2d 429 (1996); *Schwittay v. Sheboygan Falls Mutual Insurance Co.*, 246 Wis. 2d 385, 630 N.W.2d 772.

K) **Tolling.** The statute of limitations regarding persons under disability is governed by WIS. STAT. § 893.16 (2008):

> If a person entitled to bring an action is, at the time the cause of action accrues, either under the age of 18 years, except for actions against health care providers; or mentally ill, the action may be commenced within 2 years after the disability ceases, except that where the disability is due to mental illness, the period of limitation may not be extended for more than 5 years.
>
> A disability does not exist unless . . . it existed when the cause of action accrues.
>
> When 2 or more disabilities coexist at the time the cause of action accrues, the 2-year period does not begin until they all are removed.

Id.

Partial payment. Tolling can also occur with a partial payment. If an advance payment on settlement of damages is made, the limitation period is extended from the date of last payment. *See* WIS. STAT. § 893.12 (2008). That payment must be related to fault or liability. *Gurney v. Heritage Mutual Ins. Co.*, 188 Wis. 2d 68, 523 N.W.2d 193 (Ct. App. 1994).

L) **Wrongful death**. The statute of limitations for personal injury actions is governed by WIS. STAT. § 893.54(2) (2008). "An action brought to recover damages for death caused by the wrongful act, neglect or default of another" shall be commenced within 3 years or be barred.

Statutes of Repose

A) **Construction.** The statue of repose applicable to actions in construction is governed by WIS. STAT. § 893.89 (2008). The exposure period is 10 years immediately following the date of substantial completion of the improvement to real property:

> No cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.
>
> If a person sustains damages as the result of a deficiency or defect in an improvement to real property, and the statute of limitations applicable to the damages bars commencement of the cause of action before the end of the exposure period, the statute of limitations applicable to the damages applies.
>
> If, as the result of a deficiency or defect in an improvement to real property, a person

> sustains damages during the period beginning on the first day of the 8th year and ending on the last day of the 10th year after the substantial completion of the improvement to real property, the time for commencing the action for the damages is extended for 3 years after the date on which the damages occurred.
>
> An action for contribution is not barred due to the accrual of the cause of action for contribution beyond the end of the exposure period if the underlying action that the contribution action is based on is extended.

Id.

Venue Rules

A) Venue in governed by WIS. STAT. § 801.50 (2008). Venue is proper in the county where the claim arose, where real or tangible property which is a subject of the lawsuit is situated, or where a defendant resides or does substantial business. A defect in venue does not effect the competence of the court. The cure for such a defect is to change the place of venue. Any party may challenge venue on the grounds of noncompliance by filing a motion for change of venue at or before the time the party serves their first motion or responsive pleading under § 801.51. The court itself may, upon motion or by its own initiative, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses under § 801.52.

B) ***Forum non conveniens.*** The doctrine of *forum non conveniens*, codified at WIS. STAT. § 801.52 (2008), allows a Wisconsin court, upon a finding that as a matter of substantial justice the matter should be tried in another state, to enter an order staying further proceedings in Wisconsin. The moving party for such a ruling must consent to suit in the foreign jurisdiction and waive the statute of limitations in the foreign jurisdiction. Such a motion must be filed prior to the filing of an answer or concurrently with the filing of the answer. However, a court should ordinarily adjudicate the cases before it and should not disturb the proper forum choice of the plaintiff unless the balance is strongly in favor of the defendant. Also, it is insufficient to show that the current forum is inconvenient and unjust. Rather, there must also be a showing that the proposed forum is more convenient and more just. *U.I.P. Corp. v. Lawyers Title Ins. Corp.*, 65 Wis. 2d 377, 222 N.W.2d 638 (1974).

NEGLIGENCE

Comparative Fault/Contributory Negligence

WIS. STAT. § 895.045(1) (2008) is Wisconsin's comparative negligent statute. The negligence of the plaintiff is measured separately against each defendant or other entity (not necessarily a party) found to be causally negligent. There is no recovery against an individual defendant if the plaintiff is found to be more negligent than that defendant. For each person found to be causally negligent whose percentage of causal negligent is less than 51%, but still greater than the plaintiff's negligence, their responsibility is limited to the percentage of the total causal negligent attributed to that person. If a defendant is found to be greater than 51%, that party is jointly and severally liable for the damages.

Exclusive Remedy –Worker's Compensation Protection

A) **Exclusivity.** Worker's compensation is an injured employee's exclusive remedy against his or her employer, co-employees and its insurer. WIS. STAT. § 102.03(2) (2008). Liability for compensation exists where the employee sustains an injury while performing service "growing out of and incidental" to his or her employment. WIS. STAT. § 102.03(1). Exclusivity extends to agents of the worker's compensation carrier, *Walstrom v. Gallagher Bassett Servs., Inc.*, 2000 WI App. 247, 239 Wis. 2d 473, 620 N.W.2d 223, and to loaned employees. WIS. STAT. § 102.29(7) (2008).

B) **Exceptions.** Exceptions include intentional assault, operating a motor vehicle not owned or leased by the employer, and indemnification of the co-employee by a governmental unit pursuant to a collective bargaining agreement. WIS. STAT. § 102.03(2) (2008).

C) **Third parties.** WIS. STAT. § 102.29(1) (2008), specifically reserves the injured employee's right to bring suit against a third party.

Indemnification

There are two doctrines generally applicable to distribute a loss among persons liable for the same harm – contribution and indemnity. Although the doctrines are distinct, the two tend to merge.

A) **Contribution.** Contribution distributes the loss by requiring each person to pay his proportionate share of the damages on a comparative fault basis. *Pachowitz v. Milwaukee & Suburban Transport Corp.*, 56 Wis. 2d 383, 202 N.W.2d 268 (1972).

B) **Indemnification.** In Wisconsin, parties can be liable for express contractual indemnification or for equitable indemnification.

1) Wisconsin recognizes both contractual indemnification and equitable indemnification.

a) **Equitable indemnity.** Indemnification shifts the entire loss from one person who has been compelled to pay it to another who on the basis of equitable principles should bear the loss. *Kjellsen v. Stonecrest, Inc.*, 47 Wis. 2d 8, 12, 176 N.W.2d 321 (1970). It arises "whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." *Id.* "The two basic elements of equitable indemnity are the payment of damages and a lack of liability." *Brown v. LaChance*, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991).

b) **Contractual indemnity.** Indemnification contracts are valid and not against public policy. *Barrons v. J. H. Findorff & Sons, Inc.*, 89 Wis. 2d 444, 278 N.W.2d 827 (1979). Although one party may indemnify another for liability arising from the indemnitee's negligence, "an indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a specific and express statement in the agreement to that effect." *Spivey v. Great Atlantic & Pacific Tea Co.*, 79 Wis. 2d 58, 63, 255 N.W.2d 469, 472 (1977).

Joint and Several Liability

Damages are apportioned where there is a logical basis to do so. *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983). A defendant can only be held jointly responsible for all damages if found to be 51% or more negligent. WIS. STAT. § 895.045.

Strict Liability

A) **Standard.** Strict liability holds a person responsible for the damage caused by his or her actions regardless of fault. The RESTATEMENT (SECOND) of TORTS § 519(1) states that [strict] "liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity." Accordingly, liability may accrue regardless of the level of care taken by a defendant.

B) **Products liability.** Strict products liability generally requires a showing of five factors to recover by either an end-user or a bystander injured by the product:

1) that the product was defective when it left the defendant's possession;

2) that the product was unreasonably dangerous to the user or consumer;

3) that the defect was a cause of the claimed injuries;

4) that the transaction was part of the seller's usual business; and

5) that the product was received by the consumer without a substantial change in condition.

See Dippel v. Schiano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

Liability is not restricted to the originator of the product, rather anyone in the chain of distribution or who markets the whole product as his own may be liable under strict liability. *Id.*

C) **Abnormally dangerous activities.** A party may be held strictly liable if the harm caused was due to an abnormally dangerous activity. A court looks to six factors in determining whether something is an abnormally dangerous activity:

1) existence of a high degree of risk of some harm to the person, land or chattels of others;

2) likelihood that the harm that results from it will be great;

3) inability to eliminate the risk by the exercise of reasonable care;

4) extent to which the activity is not a matter of common usage;

5) inappropriateness of the activity to the place where it is carried on; and

6) extent to which its value to the community is outweighed by its dangerous attributes.

Grube v. Daun, 213 Wis. 2d 533, 570 N.W.2d 851 (1997).

D) **Learned Intermediary.** Wisconsin has not recognized the learned intermediary rule. *See Kurer v. Parke, Davis & Co.*, 2004 WI App. 74, 272 Wis. 2d 390, 679 N.W.2d 867 (Ct. App. 2004).

Willful and Wanton Conduct

A) Previously known as gross negligence in Wisconsin, this doctrine was abrogated by the case of *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

B) **Children.** A parent may be held responsible for damage caused by the "willfull, malicious or wanton act of a child." WIS. STAT. § 895.035(2)(a) (2008).

DISCOVERY

Electronic Discovery Rules

Unlike the Federal Rules of Civil Procedure, Wisconsin procedural law has not adopted discovery rules related directly to electronic discovery. Generally, however, parties may obtain "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." WIS. STAT. § 804.01(2)(a) (2008).

WIS. STAT. § 804.09(1) (2008) allows a party to request information including documents, data compilations or any other "tangible thing" which constitutes or contains discoverable matters under 804.01.

Expert Witnesses

A) **Expert witnesses.** Expert witnesses are governed by WIS. STAT. § 907.02 (2008). "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." *Id.*

1) **Forms of disclosure.** The discovery of facts known and opinions held by experts and acquired or develop in anticipation of litigation or for trial and who is expected to be called as a witness at trial may be obtained through written interrogatories and depositions per WIS. STAT. § 804.01 (2008).

2) **Reports.** There is no statutory requirement that experts provide reports, however, many courts require disclosure of expert witnesses and require reports.

3) **Rebuttal witnesses.** There is no statutory right to name rebuttal witnesses. WIS. STAT. § 906.11(1) (2008) allows the trial judge to control the mode and order of interrogation and presentation of witnesses. The decision to admit or exclude rebuttal witnesses is within the discretion of the court. *State v. Konkol*, 2002 WI App. 174, 256 Wis. 2d 725, 649 N.W.2d 300.

C) **Lay witnesses.** Lay witnesses are governed by WIS. STAT. § 907.01 (2008):

> If the witness is not testifying as an expert, the [witness'] testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Id.

Non-Party Discovery

A) Discovery, including non-party discovery, is governed by Chapter 804 of the Wisconsin statutes. Under Chapter 804, discovery of a non-party may take place through an oral deposition or written deposition questions.

B) **Notice.** For any type of deposition, oral or written, a notice of examination is required. Reasonable notice to each and every party is required. The notice must state the time and place of the deposition along with the name and address of the non-party deponent. Further, if inspection of tangible items is requested, such tangible items must be identified in the notice of examination. WIS. STAT. § 804.05(2) (2008).

C) **Forms.** In order to take the oral deposition of a non-party, one may either simply request their presence at the scheduled deposition or may compel the non party to attend through service of a subpoena. WIS. STAT. § 804.05. Subpoenas, governed by WIS. STAT. § 805.07 (2008), served upon a non party must be served 10 days in advance to provide sufficient time to object. One may order the non party to produce book, papers, documents or other tangible items at the time of their deposition. WIS. STAT. § 805.07 (2008).

D) **Written questions.** Non party deposition by written question, though rarely used in Wisconsin, is another option by which to obtain discovery from a non-party. Just as with an oral deposition, the non party can either voluntarily agree to answer the questions or can be compelled via a subpoena to do so. The deposing party serves the questions upon the non party and every other party. Cross questions and redirect questions are allowed. An officer, designated in the notice of written examination, then takes the responses of the non-party and creates a record. WIS. STAT. § 804.06 (2008).

Privileges

A) **Attorney-client privilege.** Wisconsin expressly imposes a duty on a lawyer to protect client communication. WIS. STAT. § 905.03 (2008) allows a client to refuse to disclose or prevent other from disclosing "confidential communication made for the purpose of facilitating the rendition of professional legal services to the client." The scope of the privilege includes representatives of a client, representatives of the lawyer, other lawyers representing the same client, and any other lawyer with a common interest. The privilege belongs to the client who can waive it or assert it regardless of the advice or interest of the attorney.

B) **Other privileged communications**. Other privileged communications include:

1) Communication with clergy, WIS. STAT. § 905.06 (2008);
2) Confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment, WIS. STAT. § 905.04(2) (2008);
3) Husband-wife privilege, WIS. STAT. § 905.05 (2008);
4) Privilege in crime victim compensation proceedings, WIS. STAT. § 905.14 (2008); and
5) The privilege against self-incrimination, U.S. CONST., art. I. § 8.

C) **Statements.** Pursuant to WIS. STAT. § 804.01(2)(d) (2008), a party may obtain a statement concerning the action or its subject matter previously made by that party. Similarly, a person not a party may obtain a statement made concerning the action or its subject matter previously made by that person upon request. *Id.*

Under WIS. STAT. § 804.01(2)(c), a document prepared in anticipation of litigation or for trial is work product unless the other party can show that there is a "substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Statements taken in anticipation of litigation are then work product under this statutory provision. If the witness who gave the statement testifies then the statement must be disclosed when that witness is placed on the stand. *Shaw v. Wuttke*, 28 Wis. 2d 448, 456, 137 N.W.2d 649 (1965).

Although statements are most likely classified as work product, the names and addresses of the persons who gave statements are discoverable. *Meunier v. Ogurek*, 140 Wis. 2d 782; 412 N.W.2d 155 (Ct. App. 1987).

D) **Work product.** WIS. STAT. § 804.01(2)(c) (2008), provides the basis for the production of the work product protection as well as the attorney client privilege. Attorney work product includes "the mental impressions, the legal theories and strategies that [an attorney] has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, or other tangible and intangible means." *State ex rel Dudek v. Circuit Court*, 34 Wis. 2d 559, 589, 150 N. W. 2d 387 (1967). This protection is not absolute.

1) **Requesting party need exception.** WIS. STAT. § 804.01(2)(c) (2008) allows discovery upon a showing that the requesting party needs the information and cannot obtain it or a substantial equivalent any other way.

2) **At issue exception.** A second recognized exception is the "at issue" doctrine. *State v. Hydrite Chemical Co.*, 220 Wis. 2d 51, 68-69, 582 N.W.2d 411 (Ct. App. 1998). The "at issue" doctrine exempts from the work product privilege conduct that resulted in an assertion of the privilege through affirmative act, such as filing suit; through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and application of the privilege would have denied the opposing party access to information vital to his defense. *Id.* at 66. Wisconsin has held the privilege is waived when the privilege holder attempts to prove a claim or defense by disclosing or describing an attorney-client communication. *Id.*

E) **Self-critical analysis.** Wisconsin has not recognized the "self-critical analysis" privilege.

Requests for Admission

A) Requests for admission, governed primarily by WIS. STAT. § 804.11 (2008), require the answering party to admit or deny the truth of the matters requested. Failure to admit or deny a request within 30 days is deemed admitted. Each matter of which an admission is requested must be set forth separately. An answering party may not deny knowledge or information unless they also state that they made a reasonable inquiry. The requests for admission may seek facts, opinions of fact, the application of law to fact or the genuineness of any document described in the request.

B) Once a matter is admitted by answering or failure to answer, the matter is conclusively established unless the court, on motion, allows withdrawal or amendment of the admission. *Id.*

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) An accident reconstruction expert, if it is found that he possesses the requisite qualifications to be considered an accident reconstruction expert, may testify as to his

opinion of how the accident occurred. *Martindale v. Ripp*, 2001 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698.

B) **Specialized knowledge.** "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." WIS. STAT. § 907.02 (2008). When the accident involves knowledge outside of the realm of the knowledge of an ordinary layperson, accident reconstruction testimony may be used. *Martindale*, 2001 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698.

C) **Police officers.** A police officer, though he may have general experience in observing post-accident scenes, is not automatically qualified as an accident reconstruction expert. Rather, the accident reconstruction expert must have experience, training or expertise in the area of physics or kinematics. *Id.*

Appeal

A) There are two forms of appeal in Wisconsin: appeals as of right and discretionary appeals.

B) **Appeals as of right.** Appeals as of right may only be taken from a final order or judgment. A final order or judgment is one that disposes of the entire matter in litigation and has been reduced to writing and filed with the circuit court clerk. Within 45 days of the entry of the judgment or order if a notice of entry has been given, or within 90 days if no such notice is given, the appellant must file a notice of appeal. A timely filing is crucial given that no extensions for filing are permitted. WIS. STAT. § 808.03 (2008).

C) **Discretionary appeals.** Discretionary appeals are those appeals made from nonfinal judgments or orders, in other words those which do not terminate the entire matter being litigated. Such appeals may only be taken with permission of the court of appeals. Under such circumstances, one files a Petition For Review with the appellate court and must persuade the appellate court that the case is worth adding to an already crowded and overburdened docket. WIS. STAT. § 808.03 (2008). Under WIS. STAT. § 808.03(2), the court then determines whether accepting the appeal will:

1) "Materially advance the termination of the litigation or clarify further proceedings in litigation;"

2) "Protect the petitioner from substantial or irreparable injury;" or

3) "Clarify an issue of general importance in the administration of justice."

D) **Procedural requirements.** The nuances of filing an appeal are detailed and complex. The precise requirements including font size, color of pages, margins, etc can be found in Chapter 809 of the Wisconsin Statutes and should be followed precisely.

E) **Supreme Court review.** A decision of the Wisconsin Court of Appeals is only reviewable by the Supreme Court upon a petition for review granted by the Supreme Court. The petition must be filed with the supreme court within 30 days of the date of the decision of the court of appeals. WIS. STAT. § 808.10 (2008).

Biomechanical Testimony

Biomechanical testimony is allowed if the court determines that it will assist the trier of fact "to understand the evidence or determine the fact in issue." WIS. STAT. § 907.02 (2008). "[A]ny relevant conclusions which are supported by a qualified witness should be received unless there are other reasons for exclusion. *State v. Donner*, 192 Wis. 2d 305, 531 N.W.2d 369 (Ct. App. 1995).

Collateral Source Rule

The Collateral Source Rule prohibits the admission of evidence of injured parties being paid or compensated by a source other than the tortfeasor who caused the injury. *Lambert v. Wrensch*, 135 Wis. 2d 105, 111 n.5 (1987). The rule is grounded in long-standing policy that it is the person injured who should benefit from a windfall as a consequence of an outside payment rather then the party whose wrongful acts caused the injury. *Koffman v. Leichtfuss*, 2001 WI 111, 246 Wis. 2d 31, 630 N.W.2d 201.

Convictions

A) **Criminal.** WIS. STAT. § 904.04(2) (2008), oversees the admissibility of other crimes, wrongs or acts. One may not show that a person acted in a certain manner by evidence that he or she acted in the same manner before.

WIS. STAT. § 906.09 (2008) addresses impeachment of a witness based on prior convictions. The trial judge determines, pursuant to possible prejudice under WIS. STAT. § 901.04 (2008), whether the evidence should be excluded. When a witness truthfully acknowledges a prior conviction, inquiry into the nature of the conviction may not be made. *Voith v. Buser*, 83 Wis. 2d 540, 266 N.W.2d 304 (1978). If the witness answers questions regarding the number of prior convictions inaccurately, all facts regarding his convictions can be elicited on cross-examination. *Nicholas v. State*, 49 Wis. 2d 683, 183 N.W.2d 11 (1971).

B) **Traffic.** Traffic citations are generally inadmissible. WIS. STAT. §. 345.38 (2008) provides that the payment of a citation "to a charge of violation of a traffic regulation shall not be admissible in evidence as an admission against interest in any action or proceeding arising out of the same occurrence as the charge of violation of a traffic violation."

Day in the Life Videos

Generally, "day in the life" videos are admissible. The admission of evidence lies within the sound discretion of the circuit court. *State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03 (2008). "Evidence is unfairly prejudicial if it tends to influence the outcome by improper means, or if it appeals to the jury's sympathies, arouses its sense of horror, promotes its desire to punish or otherwise causes the jury to base its decision" on extraneous considerations. *State v. Gulrud*, 140 Wis. 2d 721, 736, 412 N.W.2d 139 (Ct. App. 1987).

In circumstances where "day-in-the-life" videos help the trier of fact to understand the nature and extent of someone with special needs by providing the jury with a visual description of those needs, these videos are usually deemed relevant. *See* WIS. STAT. § 904.01 (2008) ("Relevant evidence'" means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Dead Man's Statute

The Dead Man's Statute is WIS. STAT. § 885.16 (2008). The statute applies to both deceased or insane persons and "disqualifies a witness to a transaction or communication with a decedent from testifying about that transaction or communication in his or her favor, or in the favor of any party to the case claiming under the witness." *Bell v. Neugart*, 2002 WI App 180, 256 Wis. 2d 969. The statute does not preclude an opposing party from calling adversely a witness to a communication or transaction with a decedent. *Id.*

Medical Bills

A) **Damages evidence.** Generally, a plaintiff's medical bills are admissible as damages evidence, regardless if the bills were paid partially or in full by an insurance company. They require expert testimony to support the reasonableness of the amount and that they were necessarily incurred as a result of the injury claimed.

B) **Recoverability.** *Hanson v. American Family Mut. Ins. Co.*, 2006 WI 97, 294 Wis. 2d 149, 716 N.W.2d 866 states that all medical bills incurred as a result of the incident, whether necessary or not, are damages recoverable by the plaintiff so long as the treatment was recommended by the doctor and plaintiff exercised ordinary care in selecting the doctor.

C) **Collateral sources.** The Wisconsin collateral source rule prohibits consideration of third-party payments or contractual discounts and states that the plaintiff is able to recover for the full amount of damages regardless of whether the plaintiff received a third party payment or a contractual discount. See "Collateral Source Rule" Section.

Offers of Judgment

A) **Defendant offers.** Settlement offers are governed by WIS. STAT. § 807.01 (2008). The defendant may make a written offer to allow judgment against the defendant for the sum, or property, or to the effect therein specified, with costs. If the offer is not accepted by the plaintiff the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but the defendant shall recover costs to be computed on the demand of the complaint.

B) **Plaintiff offers.** The plaintiff may make a written offer of settlement. If the offer is not accepted by the defendant the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs. WIS. STAT. § 807.01(3).

C) **Interest rate.** If there is an offer of settlement by a party which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is pa*Id.* WIS. STAT. § 807.01(4).

Offers of Proof

WIS. STAT. § 901.03(1)(b) (2008) controls offers of proof. An offer of proof is used to allow a party to introduce and preserve possible excluded testimony. The foundation and substance of evidence is made known to the judge outside the presence of the jury for purposes of determining its admissibility.

An offer of proof may be made in two ways. The most complete method is by question and answer to which the judge receives the disputed testimony into the record outside of the jury's presence. The second method is an attorney offer of proof for which the lawyer summarizes the subject matter of the proper evidence.

Prior Accidents

Callan v. Peters, 94 Wis. 2d 225, 231-32, 288 N.W.2d 146 (1979) states:

> The admissibility of evidence of the existence of similar defects, or of the occurrence of other accidents or injuries of a similar nature or similarly caused, depends on the purpose for which the evidence is offered and on whether the nature of the negligence which is claimed to have caused the accident or injury in question is such that proof of other accidents or defects will tend to throw light on the issue; and, where such is the case, evidence of this character is admissible.

Admissibility is in the discretion of the trial judge. When the prior incident is of little probative value, the trial judge, in his discretion, may refuse to admit such evidence. *Id.* "Both the

purpose for which the evidence of other injuries similarly caused, and the nature of the negligence claimed are to be considered in determining whether discretion has been abused." *Id.*

Relationship To The Federal Rules Of Evidence

Wisconsin has codified its own rules of evidence which are found in Chapter 901 of the Wisconsin Statutes. While substantially the same as the Federal Rules of Evidence, there are some minor differences.

Seat Belt and Helmet Use Admissibility

A) **Helmets.** Helmet use admissibility is governed by WIS. STAT. § 901.053 (2008). The evidence of use or nonuse of protective headgear by a person, other than a person required to wear protective headgear [under other statutory sections] is not admissible in any civil action for personal injury or property damage. *Id.* "The failure by a person who operates or is a passenger on a motorcycle or snowmobile to use protect headgear shall not reduce recovery for injuries or damages by the person or the person's legal representative in any civil action." WIS. STAT. § 895.049 (2008). The law still permits reductions if the claimant is a minor or someone with only an instructional permit, and thus required to wear a helmet. *Id.*

B) **Seatbelts.** The failure to wear a seatbelt can be admissible. The failure to use a safety belt is used to reduce damages only and not the causal negligence of a plaintiff. *Foley v. City of West Allis*, 113 Wis. 2d 475, 335 N.W.2d 824 (1983). Use of the seat belt defense requires expert testimony that the failure to wear a seatbelt was a cause of the plaintiff's injuries. The Wisconsin legislature limited the reduction of damage from the failure to wear a seatbelt to 15% maximum.

Spoliation

Spoliation is the withholding, hiding, or destruction of evidence relevant to a legal proceeding.

A) **Remedies.** "Courts have fashioned a number of remedies for evidence spoliation. The primary remedies used to combat spoliation are pretrial discovery sanctions, the spoliation inference, and recognition of independent tort actions for the intentional and negligent spoliation of evidence. Wisconsin has recognized the first two remedies." It has not recognized it as an independent cause of action. *Neumann v. Neumann (In re Estate of Neumann)*, 2001 WI App 61, 242 Wis. 2d 205, 626 N.W.2d 821 (Wis. Ct. App. 2001).

B) **Inference.** "Where the spoliation inference is applied, the trier of fact is permitted to draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it." *Id.*

Subsequent Remedial Measures

Subsequent remedial measures are governed by WIS. STAT. § 904.07 (2008):

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

However, subsequent remedial measures are admissible to prove an alleged violation of the Wisconsin Safe Place Statute.

Use of Photographs

Technically, photographs are normally attorney work product and not discoverable unless offered for use at trial. They are frequently produced however because the other parties have no other way to know what something looked like at a given time and can show the "need exception" under Section 804.01(2)(c). The original must be used except when a duplicate is admissible. WIS. STAT. § 910.01(3) (2008). Typically, a witness with knowledge that a photograph is an accurate depiction of what it claims to show is required to establish the foundation for admissibility of photographic data.

DAMAGES

Caps on Damages

There are several statutory caps on damages in Wisconsin. The two most common examples are the caps on noneconomic medical malpractice damages and loss of society and companionship under a wrongful death claim.

A) **Constitutionality.** In *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, the court held that the cap on noneconomic medical malpractice damages set forth in WIS. STAT. § 893.55(4)(d) (2004) violated the equal protection guarantees of the Wisconsin constitution. However, following *Ferdon* the legislature amended that statute and further increased the available damages for noneconomic medical malpractice damages to $750,000.00. 2005 Wis. Act 183, § 7 (effective Apr. 6, 2006). This new legislation has not yet been challenged as unconstitutional.

B) **Loss of society and companionship.** For loss of society and companionship under a wrongful death claim, damages are capped at $500,000.00 per occurrence in the case of a deceased minor and $350,000.00 per occurrence in the case of a deceased adult. WIS. STAT. § 895.04(4) (2008).

Calculation of Damages

A) Wisconsin allows plaintiffs to recover the following damages in bodily injury cases:

1) Past and future medical care expenses;
2) Pain and suffering;
3) Emotional or mental distress;
4) Past and future disability;
5) Lost earning capacity; and
6) Aggravated preexisting injuries.

The damages allowed are general or special damages.

B) **General damages.** General damages are broadly defined as those losses which naturally, or necessarily, result from the defendant's wrongful conduct.

In a personal injury action, for example, this would describe pain and suffering. "In the tortious interference with contract context, this most accurately describes the pecuniary loss of the benefits of the contract or prospective contract." *Musa v. Jefferson County Bank*, 2001 WI 2, 240 Wis. 2d 327, 620 N.W.2d 797. Such damages are generally defined as those that are the natural, but not the necessary result of an alleged wrong.

C) **Special damages.** "Special damages are those damages, the amount and nature of which are peculiar to each individual plaintiff," and consist of the cost of medical care, the amount of lost wages or impairment of earning capacity. *Id.*

There is no rule that an award of special damages is a prerequisite to an award of general damages.

Available Items of Personal Injury Damages

A) **Past medical bills.** An award of damages in a personal injury lawsuit may include past medical, hospital, and related expenses. Medical bills are recoverable if reasonably and necessarily incurred for treatment of injuries that are subject to the action. *Musa v. Jefferson County Bank*, 2001 WI 2, 240 Wis. 2d 327, 620 N.W.2d 797. A physician must testify to the reasonable degree of medical certainty or probability as to the reasonableness and necessity of the charge to support a claim for past medical care. *See Weber v. White*, 2004 WI 63, 272 Wis. 2d 121, 681 N.W.2d 137. The only exception to this requirement is when the bills are relatively small if the claimant proves the character of the injury, that he was treated for the injury, and the amount paid for those services, i.e., an emergency room bill immediately following an accident. *Gerbing v. McDonald*, 201 Wis. 214, 218, 229 N.W. 860 (1930).

A mistaken or unnecessary surgery may be compensable when a tortfeasor causes an injury a plaintiff who then undergoes medical treatment of those injuries despite having

exercised ordinary care in selecting her doctor. *Hanson V. American Family Mut. Ins. Co.*, 2006 WI 97, 294 Wis. 2d 553, 718 N.W.2d 118.

B) **Future medical bills.** Future medical bills are recoverable with physician testimony to establish that future care is probable. The plaintiff must prove that the injury suffered is permanent; that the injury will cause pain and suffering in the future; that the injury will require future medical treatment; and the cost of such treatment. *See id.*

C) **Hedonic damages.** Hedonic damages have not been recognized as a compensable damage separate from pain and suffering. The Wisconsin Supreme Court has found that "past and future pain, suffering, and loss of enjoyment of life" to be sufficiently different from "loss of society and companionship" to prevent a dismissal of a claim. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 138-39, 595 N.W.2d 423 (1999).

D) **Increased risk of harm.** Increased risk of harm damages are unusual. The court of appeals articulated a rule setting forth two elements a victim must establish by a preponderance of the evidence to prove that he or she is reasonably certain to endure mental distress as a consequence of the injury: (1) the possibility of the feared harm must have increased as a result of the negligently inflicted injury, and (2) the victim must have a reasonable basis for the fear of future harm. *Howard v. Mt. Sinai Hospital, Inc.*, 63 Wis. 2d 515, 217 N.W.2d 383 (1974).

Generally, there is no recoverable damage for increased risk of harm. However, fear of surgery that is reasonably certain is recoverable, even though there is no certainty that surgery will occur and even though the physician cannot testify to a reasonable degree of medical probability that the consequence feared will occur. Doctors cannot in all cases predict the development of an injury or disease to a reasonable degree of medical probability. *Brantner v. Jenson*, 121 Wis. 2d 658, 360 N.W.2d 529 (1985).

"Remotely conceivable complications which may develop from a physical injury caused by a defendant's negligence" are not recoverable. "Anxiety about a fictitious or imagined or highly unlikely consequence is not a recoverable element." *Id.*

E) **Loss of normal life.** Loss of normal life is not recognized as a separate compensable damage.

F) **Past and future pain and suffering.** Where there is proof of injury, pain and suffering damages are proper. A plaintiff may testify to his own pain and suffering. Expert testimony is not necessary for past pain and suffering but is required for claims of future pain and suffering. *See generally Bach v. Simonsen*, 157 Wis. 2d 261 (Wis. Ct. App. 1990).

G) **Loss of society.** Loss of society and companionship damages are recoverable. These damages involve the emotional and sentimental values of family relationships. *Sawyer v. Midelfort*, 227 Wis. 2d 124, 138, 595 N.W.2d 423 (1999). This is a separate, derivative, and independent cause of action. *Peeples v. Sargent*, 77 Wis. 2d 612, 643, 253 N.W.2d

459 (1977). Elements to consider include: love and affection, companionship, the privileges of sexual relations, the comfort, aid, advice and solace, the rendering of material services, the right of support, and any other elements that normally arise in a close, intimate, and harmonious relationship. WIS JI-Civil 1815.

1) **Parents of injured children.** A parent of an injured child may maintain an action against a tortfeasor for medical expenses and loss of society and companionship of the injured child. *Korth v. American Family Ins. Co.*, 115 Wis. 2d 326, 330, 340 N.W.2d 494 (1983).

2) **Minor children of injured parents.** A minor child can recover for the loss of care, society, companionship, protection, training and guidance of an injured parent. *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984).

H) **Lost income, wages, earnings.** A plaintiff has the right to recover for past and future impairment of the capacity to earn that is related to an injury. To establish such a claim, the injured person must present evidence to a reasonable degree of probability what would have happened economically if the injury had not occurred. *Schultz v. St. Mary's Hosp.*, 81 Wis. 2d 638, 657, 260 N.W.2d 783 (1978). Both the diminished capacity to earn and the amount of money necessary to compensate the injured party must be proven. *Id.* Whether the injured party is working at the time of the injury is irrelevant to a claim for lost earning capacity. *Hareng v. Blanke*, 90 Wis. 2d 158, 169, 279 N.W.2d 437 (1979).

Lost Opportunity Doctrine

Wisconsin does not recognize the "lost chance or opportunity doctrine." Wisconsin law relative to causation is set forth in Wis JI-Civil 1500 and has consistently adhered to the "substantial factor" concept of causation. *See Sampson v. Laskin*, 66 Wis. 2d 318, 326, 224 N.W.2d 594 (1975).

Mitigation

An injured person must use ordinary care to mitigate and lessen the damages. *Lobermeier v. General Tel. Co. of Wis.*, 119 Wis. 2d 129, 349 N.W.2d 466 (1984). This duty requires the plaintiff use ordinary care to seek medical treatment within a reasonable time to minimize the damages of an injury. WIS JI-Civil 1730.

Punitive Damages

A) Currently, under WIS. STAT. § 895.043(3) (2008), Wisconsin allows punitive damages in cases in which the defendant acted maliciously towards the plaintiff or with an intentional disregard for the plaintiffs rights.

B) **Procedure.** If the plaintiff can make a prima facie case for punitive damages with a showing of the required conduct on the part of the defendant, the plaintiff can then

introduce evidence of the wealth of the defendant and the judge submits a special verdict to the jury as to punitive damages. WIS. STAT. § 895.043(4).

C) **Insufficient conduct.** Conduct constituting mere negligence or a mere breach of contract is insufficient to warrant imposition of punitive damages. See generally WIS. STAT. § 895.043.

D) **Deterrence.** Punitive damages are not available against the estate of an individual as the purpose of punitive damages – deterrence - would not be served. *Wangen v. Ford Motor Co*., 97 Wis. 2d 260, 311, 294 N.W.2d 437 (1980).

E) **Joint and several liability.** The rule of joint and several liability, discussed *infra*, does not apply to punitive damages. WIS. STAT. § 895.043(5).

F) **Insurance.** Absent a specific policy exclusion, insurance coverage for punitive damages is provided in Wisconsin. *Wangen*, 97 Wis. 2d at 287. However, a party is not allowed to recover punitive damages under a claim for uninsured motorist coverage because the purposes of punitive damages, deterrence and punishment, would not be served. *Burns v. Milwaukee Mut. Ins. Co.*, 121 Wis. 2d 574, 360 N.W.2d 61 (Ct. App. 1984).

G) **Vicarious liability.** As for vicarious liability, discussed *infra*, punitive damages are recoverable against a principal for the acts of the agent, but only if the agent's action was authorized, ratified or participated in by the principal. *Mid-Continent Refrigerator Co. Mid-Continent Refrigerator Co. v. Straka*, 47 Wis. 2d 739 (Wis. 1970).

H) **Factors.** Some factors set out in Wisconsin cases to be used in determining the proper amount of punitive damages to be awarded are:

1) The grievousness of the defendant's acts – including whether the conduct was gross or outrageous;
2) The degree of the defendant's malicious intention;
3) The potential damage that could have been done by the defendant's actions;
4) The actual damage done by such acts; and
5) The defendant's ability to pay.

Trinity Evangelical Lutheran Church v. Tower Ins. Co., 2003 WI 46, P14 (Wis. 2003). Under *BMW v. Gore*, 517 U.S. 559 (1996), and subsequent United States Supreme Court cases, excessive awards of punitive damages violate the due process clause of the 14th Amendment. Wisconsin utilizes the factors set forth by the U.S. Supreme Court in determining whether a punitive damage award is excessive. *See Jacque*, 209 Wis. 2d at 627 and *Trinity Evangelical*, 2003 WI 46.

Recovery of Pre- and Post-Judgment Interest

A) **Prejudgment interest.** The recovery of prejudgment interest is governed by WIS. STAT. § 138.04 (2008) which provides the rate of interest on loans or forbearance of any money, goods, or things in action will be 5% annually.

B) **Post-judgment interest.** The recovery of post-judgment interest is governed by WIS. STAT. § 814.04(4) (2008). "[I]f the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs."

Except as provided above, "every execution upon a judgment for the recovery of money shall direct the collection of interest at the rate of 12% per year on the amount recovered from the date of the entry of the judgment until it is paid." WIS. STAT. § 815.05(8).

Recovery of Attorney's Fees

Wisconsin courts generally hold that attorney fees are not recoverable by the prevailing party unless provided for contractually or statutorily.

A) **Statutory authorization.** Whether an award of statutory attorney fees belong to the prevailing plaintiff or to the plaintiff's lawyer depends on the language of the statute creating the right, as well as the terms of the fee agreement. *See Gorton v. Hostak, Henzl & Birchler, S.C.*, 217 Wis. 2d 493, 577 N.W.2d 617 (1998); *cf. Shands v. Castrovinci*, 115 Wis.2d 352, 340 N.W.2d 506 (1983).

B) **Discretionary granting.** Actual attorney's fees can be recovered under specific circumstances such as frivoulous claims. Reasonable attorney's fees are also awarded at times. The determination of what constitutes reasonable attorney's fees is in the trial court's discretion. *Standard Theatres, Inc. v. Dept. of Transp.*, 118 Wis.2d 730, 349 N.W.2d 661 (1984).

Settlement Involving Minors

All settlements involving a minor, regardless of the amount and whether an action has been commenced, must receive the approval of the court. WIS. STAT. § 807.10 (2008).

Taxation of Costs

A) Wisconsin Statute Chapter 814 sets forth an extensive guide of the costs and fees a prevailing party may be entitled to following a litigated trial court matter. Under WIS. STAT. § 814.01(1) (2008), a prevailing plaintiff is entitled to recover taxable court costs. However, in the event that the plaintiff is not entitled to costs, the defendant is allowed costs "to be computed on the basis of the demands of the complaint" pursuant to WIS. STAT. § 814.03(1) (2008).

B) **Litigation expenses.** The right to recover taxable court costs is not synonymous with the right to recover the expenses of litigation. *State v. Foster*, 100 Wis. 2d 103, 106, 301 N.W.2d 192, 194. Many expenses of litigation are not allowable or taxable costs even though they are costs of litigation. *Id.*

C) **Specific items.** Specific items of costs are found in WIS. STAT. § 814.04 (2008). The items listed in WIS. STAT. § 814.04 include attorney fees, service of process fees, deposition expenses, expert witness fees, photocopying expenses and express or overnight delivery expenses. Mediation fees, on the other hand, are not an item of taxable court costs. *See Kleinke v. Farmers Coop Supply & Shipping*, 202 Wis. 2d 138, 147, 549 N.W. 2d 714, 717 (1996).