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**When Criminal and Civil
Law Intersect:
Effectively Representing
a Plaintiff/Victim and
Defendant/Insured**

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About the Presenters...

Judge Kristin Cafferty is a proud graduate of Marquette University (B.S. '91, J.D. '94). She was appointed to Racine County Circuit Court, Branch 5, in 2021 and was re-elected, unopposed, in 2022. She has served in family, probate and juvenile court, and will be transitioning to civil court on August. Prior to taking the bench worked as a trial lawyer in Southeastern Wisconsin for over 25 years. Judge Cafferty is a frequent speaker to lawyers, judges and the community on topics involving civil and juvenile law. She and her husband, Patrick, also an attorney, have raised their four children in Racine.

Patrick Cafferty is a partner in the law firm of Cafferty & Scheidegger, S.C., specializing in criminal defense. He has acted as lead counsel in over 125 jury trials and been named in Best Lawyers In America and Superlawyers. Attorney Cafferty has appeared as a legal consultant on CNN, MSNBC, PBS, and WTMJ4.

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When Criminal and Civil Law Intersect: Effectively Representing a Plaintiff/Victim and Defendant/Insured

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INTRODUCTION

When a victim is injured due to a criminal act, questions of civil and criminal procedure and liability arise; but so do opportunities for the advantageous resolutions for all parties. A victim's civil case can create opportunities to reduce or avoid criminal charges for the offending conduct. A pending criminal case can often provide leverage in the resolution of the civil case. It is important for the victim's civil attorney to be aware of the potential for and follow any criminal proceedings against the defendant. The defendant's civil attorney must be mindful of the potential for criminal charges when evaluating the defense of their client. Likewise, a criminal defense attorney must be informed of the client's potential for civil liability when advising the client.

These cases require a civil and criminal attorney to understand areas of the law that are complicated and specialized, and to evaluate their client's criminal and civil exposure. This presentation will focus on a framework for civil and criminal attorneys when confronted with situations where their clients are involved in conduct that is subject to both criminal and civil liability.

I. The Role of the Prosecutor.

The charging of a crime is generally a two-step process. First, law enforcement conducts an investigation into the incident and makes a charging recommendation to the correct prosecutorial unit. Second, a prosecuting attorney within that unit decides what, if any, criminal

charges to file. If the prosecutor elects to file charges, he or she will draft a criminal complaint setting forth the criminal charges and the “essential facts” supporting the charges.

There are a number of considerations that go into the charging determination, including:

1. The high burden of proof in a criminal case;
2. The nature and extent of injuries suffered by the victim and the defendant;
3. Whether the matter is negligent, reckless, or intentional conduct;
4. Whether the matter is better resolved through the civil system;

5. The interest and wishes of the victim. *See* Wis. Const. art. I, § 9m (known as *Marsy’s Law*). In addition, §971.095 governs the district attorney’s obligation to consult with the victim regarding charging decisions, plea agreements and sentencing recommendations. Subsection (2) provides:

In any case in which a defendant has been charged with a crime, the district attorney shall, as soon as practicable, offer all of the victims in the case who have requested the opportunity an opportunity to confer with the district attorney concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations. The duty to confer under this subsection does not limit the obligation of the district attorney to exercise his or her discretion concerning the handling of any criminal charge against the defendant.

Ethical rules govern a prosecutor’s communication with unrepresented parties. Supreme Court Rule 20:3.8(d) provides:

When communicating with an unrepresented person a prosecutor may discuss the matter, provide information regarding settlement, and negotiate a resolution which may include a waiver of constitutional and statutory rights, but a prosecutor...shall not: (1) otherwise provide legal advice to the person, including, but not limited to whether to obtain counsel, whether to accept or reject a settlement offer, whether to waive important procedural rights or how the tribunal is likely to rule in the case...

It can be difficult to know whether and when a charging decision will be made. Although this process seems relatively straight-forward, it is riddled with issues that can cause delay.

Investigative delays can exist for good reasons, such as:

- trying to locate a critical witness
- follow-up investigation by law enforcement
- waiting on information from experts, like traffic investigators or test results.

It is also common to have prosecutorial delays due to internal disorganization or the file load of the prosecuting attorney. Although less common, law enforcement or prosecutors may also engage in strategic delays in hopes that the suspect will make an admission or some other mistake resulting in a stronger case. When a civil case surrounding potential criminal allegations is ongoing, counsel should assume law enforcement and/or a prosecutor is watching the case to see what evidence is produced to assist in the state's case.

Excessive pre-charging delays may, under some circumstances, amount to a Due Process violation. However, a motion to dismiss based upon pre-charging delay requires the defense to prove 1) the defendant has suffered actual prejudice and 2) that the delay arose from improper motives by law enforcement or the prosecutor. *State v. Monarch*, 230 Wis. 2d 542, 551, 602 N.W.2d 179 (Ct. App. 1999). This high burden typically leaves the defense with only the criminal statutes of limitations to protect against stale prosecutions. Statutes of limitations in criminal cases are set forth in Wis. Stat. §939.74, Stats., which range from three years for misdemeanors to offenses which have no time limit.

Prosecuting attorneys have the authority to decline prosecution prior to the filing of charges. Such a decision is often referred to as a “no prosecution” or “no pros.” However, a “no prosecution” agreement is only binding upon the State if it meets standard contract law principles of offer –acceptance—reliance. *State v. Rippentrop*, 2023 WI App 15, 406 Wis. 2d 692 (Ct. App. 2023). While “offer” and “acceptance” need no explanation, “reliance” is a more complicated piece of the equation. In a criminal context, reliance requires some act by the person to his or her

detriment. The client must take some affirmative detrimental action that they were not previously obligated to take.

When engaging in negotiations with a prosecutor to “no pros” a case, the attorney should always condition the “no pros” on some detrimental action by their client. For example, the attorney may agree that their client will complete an alcohol/drug assessment, 5 hours of community service or payment of restitution as a condition precedent to the “no pros.” If such an agreement is reached, memorialize it in writing with the prosecutor. Such agreements are within the authority of the prosecutor and are not against public policy. *Id.*

A prosecutor may also agree to dismiss or amend charges if a defendant agrees to pay restitution. In fact, a prosecutor is required to represent the victim in a restitution claim if the restitution is addressed prior to or at the sentencing, or the court orders it. §973.20(14)(a), Stats. A prosecutor often does not have the time or the interest in proving the victim’s damages; they will rely on information from the victim or victim’s attorney in addressing restitution. Prosecutors may also recommend the victim consult a personal injury attorney.

It may not be practical to delay civil litigation without knowing when—or if—criminal charges may ever be brought. Being proactive in managing the criminal exposure is often the best method of handling this dilemma.

II. The Role of the Civil Defense Attorney.

If a civil defense attorney believes that there is a potential for a criminal exposure, counseling the client to secure an attorney, or even hiring a consulting criminal attorney, is a best practice. The fact that the individual client is not aware of any potential efforts to bring criminal charges does not relieve civil defense counsel of the responsibility to counsel the defendant about potential criminal liability. Supreme Court Rule 20:2.1, Comment 4 reads:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation.

A civil defense attorney can be challenged when the insured's interests in settling the case conflict with the interests of the insurance company in defending the case. Wisconsin Formal Ethics Opinion E-99-1: *Ethical Risks Inherent in Representing Both Insurers and Insureds* contains an excellent discussion of these competing interests.

An individual who becomes a defendant in a civil matter usually cooperates with civil defense counsel. However, that is not always the case. For an excellent discussion of coverage issues related to non-cooperation by an insured subject to criminal prosecution, please see "*Link v. Link: Examining the Essential Duty of Cooperation with Coverage Counsel*" in the Summer 2022 Edition of *The Wisconsin Civil Trial Journal*. The insurance company can, for example, require a statement upon oath if the insurance company requires it. Such a request is an example of the interplay between the liberty interest and the financial interest of a defendant.

III. The Role of the Criminal Defense Attorney.

Obviously, the defendant should seek advice from counsel if charges are issued. But securing the advice of a criminal defense attorney even before the charging decision is made can influence whether the case is charged, the nature of the charges, the venue for the charging decision, and the timing of the decision. In some cases, criminal charges may not be contemplated until an incident receives additional attention through the civil lawsuit. It is always a good idea to recommend that the individual retain separate criminal counsel who can assist both the client and civil attorney in protecting the client's constitutional rights.

A criminal defense attorney will often be the first to recognize the need to address a client's potential civil liability. The victim may not have even retained a civil attorney for their injuries at the time the charging decisions are being investigated. The criminal defense attorney may be confronted with a victim who is friendly with the defendant. This creates some ethical considerations when the defense attorneys are collecting necessary information about the victim's injuries. For example, Supreme Court Rule 20:4.3, Dealing with unrepresented person requires certain information be disclosed:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

The lawyer for a defendant is not prohibited from negotiating with a victim.¹ Furthermore, counsel must be very careful when discussing the victim's role in the criminal prosecution, as Supreme Court Rule 20:3.4 prohibits a lawyer from counseling or assisting a witness to testify falsely, or offering an inducement to a witness that is prohibited by law, and from requesting a person other than a client to refrain from voluntarily giving relevant information to another party. There is an

¹ Comment 2 to Supreme Court Rule 20:4.3 states:

The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. *This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.* (emphasis added).

exception to this Rule: if (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. SCR 20:3.4(f). A lawyer may inform an unrepresented witness that they are under no obligation to speak with the lawyer's adversary, but the lawyer should not provide any other legal advice aside from recommending that the witness obtain counsel. For these reasons, the criminal defense attorney's job in defending the client is often easier when the victim is represented by an attorney, because the two can share information about injuries, insurance coverage and the wishes of the victim as to charging decisions.

The criminal defense attorney should be aware that there are potential insurance coverage issues that may arise if the client is not cooperative with the insurance company, and that there are types of conduct that can be the basis for an exclusion of coverage, for example, Intentional Acts or Other Exclusions. The criminal defense attorneys should have a general understanding of the coverage limits and how they impact restitution, and whether there is a potential for their client to receive an excess verdict against them, and whether there is a potential for a bad faith claim. The criminal defense attorney can sometimes assist the civil defense attorney in finding other avenues for insurance coverage.

The criminal defense attorney's interest is in avoiding criminal liability, not the defendant's civil exposure. If the defendant has questions about civil consequences, the defense attorney will refer them to a civil attorney and/or encourage them to report the event to their insurance company. Once the defendant is equipped with information from the civil attorney, the defendant can discuss what is more important to them –financial consequences or the potential loss of liberty.

It is important to advise a client to seek criminal counsel as soon as possible whenever criminal liability is a reasonable possibility. A criminal law expert can assist both you and your

client in protecting the client's rights through the civil litigation and can help ensure that you do not advise outside of your expertise. Savvy criminal counsel will be able to advise on all aspects related to potential criminal liability, such as unintended consequences or other potential bases for criminal liability that would not be covered by double jeopardy and the original charging decision.

IV. The Role of the Personal Injury Lawyer.

The plaintiff/victim's attorney may also find some value in working with the criminal defense attorney and/or the prosecutor to help prove liability or to use restitution as an avenue for recovery. Civil attorneys can work with criminal attorneys to craft a civil recovery that also achieves favorable outcomes in the criminal case. These can be delicate situations, but if handled within the ethical rules, agreements can be reached. For example, in cases of catastrophic injuries and limited insurance coverage, a negotiation for restitution in amounts in excess of the available insurance may work to lower the criminal sentence and assist the victim in recouping some losses. The victim's attorney must make certain to address the language in any release that is signed to protect a client's future right to restitution. *See supra, Section VI.*

The victim's attorney may also work with the prosecutor to share liability information, witnesses and evidence, in the pursuit of justice for the client. Likewise, prosecutors would gladly hand off the obligations of representation at a restitution hearing to the victim's attorney, who is better equipped to prove the losses incurred by the victim. It is helpful for the personal injury attorney to stay involved with the criminal case, to assist in the completion of paperwork in the criminal case, and to make sure the victim does not give statements or testimony contrary to their interests.

If there is no available recovery for a victim of a crime, an application may be made to this program and the district attorney/victim witness can assist with the application. Chapter 949

governs crime victim compensation. If there is an available civil recovery, this program will not be available. However, 973.20(9)(a), Stats., gives the state a right of subrogation for any amounts paid. The amounts available are limited to \$40,000.

V. Fifth Amendment Considerations.

The Fifth Amendment to the United States Constitution is widely known to provide United States citizens with the right to avoid self-incrimination. U.S. Const. amend. V. The Wisconsin corollary is located in Article 1, Section 8(1). These provisions are commonly understood to afford individuals the right to “plead the fifth” in response to a question or demand which would otherwise legally compel their response if such response would tend to incriminate the individual in a criminal matter. The Fifth Amendment states, in relevant part:

No person shall be ... subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself ...

The Fifth Amendment “privilege extends to all court proceedings, civil and criminal.” *In re: Matter of Sheila Grant*, 83 Wis. 2d 77, 81, 264 N.W.2d 587 (1978). “The privilege against self-incrimination exists whenever a witness has a real and appreciable apprehension that the information requested could be used against him in a criminal proceeding.” *Id.* The privilege “extends not only to testimony which would support a conviction but also to evidence which would furnish a link in a chain of evidence necessary to prosecution.” *Grant*, 83 Wis. 2d at 81. “It has long been recognized in Wisconsin that a person may invoke the fifth amendment in a civil case in order to protect himself from the use of such evidence against him in a subsequent criminal action.” *Grognet v. Fox Valley Trucking Service*, 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969) (citing *Karel v. Conlan*, 155 Wis. 221, 144 N.W. 266 (1913) and *Milwaukee v. Burns*, 225 Wis. 296, 274 N.W. 273 (1937)).

Wis. Stat. § 905.13 provides, however, that the privilege is not treated equally in civil and criminal actions:

905.13. Comment upon or inference from claim of privilege; instruction.

(1) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

(4) Application; self-incrimination. Subsections (1) to (3) do not apply in a civil case with respect to the privilege against self-incrimination.

(Emphasis added.) While juries are instructed in criminal matters that the invocation of this right should not be held against a defendant, they receive the opposite instruction in civil matters. WI JI-Criminal is the applicable criminal jury instruction, which provides:

A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

Wis JI-Criminal 315. By contrast, a court may provide a jury with the following instruction in a civil matter, Wis JI-Civil 425:

A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate (the witness) (him) (her). You may find by this refusal to answer that the answer(s) would have been against the interest of (the witness) (him) (her).

Both the civil and the criminal defense attorneys should consider their ethical obligations to advise their joint client of the right and consequence of pleading the Fifth in the civil action. The preamble to the Wisconsin Supreme Court's Rules of Professional Responsibility provides, in part, that, "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and

obligations and explains their practical implications.” Therefore, an attorney has the obligation to explain to a client the right to invoke his or her Fifth Amendment privilege.

A. Assert 5th Amendment Privilege in Answer

Preserving a client’s right to invoke his or her Fifth Amendment privilege starts with the answer to the civil complaint. It is wise for the civil defense attorney to fully assert this privilege from the beginning of the case. After admitting any basic background facts, potential answer language to the remaining allegations may be:

Answering all other allegations contained in the Complaint, the answering defendant invokes [his/her] Fifth Amendment privilege, which has the effect of a denial. *See National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1983).

Next, it is wise to include in the scheduling order a generous amount of time to amend pleadings to provide the opportunity to revoke the assertion of privilege and file a more substantive answer. While you can always later agree to waive privilege, it is not guaranteed that a judge will allow the defense to amend its answer if the time to do so pursuant to statute or the scheduling order has passed. *See Wis. Stat. § 802.09*. This poses the risk of plaintiff’s counsel attempting to introduce the assertion of privilege to a jury at trial, which is almost always prejudicial to the defense.

B. Analyze Issues/Impact on Case and File Appropriate Motions in Civil Case.

i. Motions *In Limine*.

A civil defense attorney must also carefully analyze how the assertion of the privilege will impact the civil case. In some situations, an individual defendant’s invocation of his or her Fifth Amendment privilege may have almost no negative impact on a civil case. For example, civil defense counsel often chooses to admit liability in order to make the resulting jury trial only about damages. In doing so, the defense can obtain an order *in limine* excluding from evidence the defendant’s intoxication and other factors which are irrelevant to damages and may inflame the

jury. An admission of negligence and causation in a civil matter will not operate as an admission of all of the elements of criminal recklessness, which requires the prosecution to prove ordinary negligence to a higher degree. Wis. Stat. § 939.25.

Even if there is an admission of liability, the victim's counsel may want to depose the defendant driver on other bases, such as testimony regarding his or her perceptions of the plaintiff and things that may have been said or otherwise witnessed at the accident scene. If the defendant driver is compelled to attend a deposition, the civil and criminal defense attorneys may counsel the individual to assert his or her Fifth Amendment privilege in response to any questions about the accident. If this occurs, plaintiff's counsel will likely attempt to put the defendant driver on the stand at trial as a fact witness so that the jury will observe him or her refusing to answer questions and asserting the Fifth Amendment privilege. In this case, defense counsel may wish to file a second motion *in limine* prohibiting plaintiff's counsel from calling the defendant driver as a witness at trial on the grounds that liability is stipulated and any additional testimony that the individual may provide is greatly outweighed by the prejudice to the defense. This argument will be even stronger in cases where the defendant driver did not witness anything relevant to the plaintiff's damages and has no additional evidence than that supplied by other witnesses.

In other cases, however, a defendant's assertion of his or her Fifth Amendment privilege may have serious consequences for the civil litigation. The most obvious is a case in which there is a solid defense to liability, but litigating the defense would require the defendant driver to waive his or her Fifth Amendment privilege. For example, imagine a single-vehicle accident resulting in the death of a passenger. The defendant driver tested positive for the presence of alcohol in his or her system, but the defense believes that not only was the presence of alcohol not causal of the accident, but that the defendant driver was not even negligent. Instead, the defense believes that

the driver sustained a medical emergency that caused him or her to lose consciousness and leave the roadway. Under these facts, the defense will be eager to proffer evidence that the defendant driver was not negligent and therefore not liable for the accident. However, doing so would require the driver to testify in deposition and waive his or her Fifth Amendment privilege.

ii. Motion to Stay.

Civil and criminal defense counsel may attempt to stay the civil litigation or, alternatively, to protect the individual defendant from discovery, for as long as possible. As noted above, a judge may be reluctant to stay a civil lawsuit if a criminal charging decision has not been made. However, the facts of the specific situation may create a compelling reason to do so. For example, the civil defense attorney may have specific information that criminal charges are forthcoming, or the criminal statute of limitation may be about to expire. Under such circumstances, the defense could argue that the stay would not be indefinite and is required to protect the rights of the individual defendant. *See, e.g., Wallace v. Kato*, 549 U.S. 384, 393-94 (2007) (“...[I]t is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.”) (citation omitted).

As an alternative to a complete stay on all litigation of the civil matter, defense counsel may seek a protective order on any discovery from the individual defendant. This may make sense in cases where there are many additional witnesses or a lot of other discovery to be conducted. This option allows the case to proceed in some fashion while preserving the rights of the individual defendant.

Substantively, whether the motion is to stay the entire civil litigation or only certain discovery from the defendant, the basis will be essentially the same:

[A]ll parties—those who invoke the Fifth Amendment and those who oppose them—should be afforded every reasonable opportunity to litigate a civil case fully

... Based on this policy, the general rule is that if the claimant makes a timely request to the court, the court should explore all possible measures to select that means which strikes a fair balance and accommodates both parties. Striking a fair balance between both parties requires a careful assessment of each case's precise facts. The court should give due consideration to the nature of the proceeding and the potential for harm or prejudice to opposing parties.

S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, ¶¶ 12-13, 322 Wis.2d 766, 779 N.W.2d 19 (citations omitted). As this language from the Wisconsin Court of Appeals notes, the strength of the argument will depend heavily on the precise facts and circumstances of each case. If possible without the testimony of the individual defendant, counsel may be able to impress upon the court the strength of any liability defenses. This may highlight the additional prejudicial effect of the defendant not being able to present his or her side and, even worse, the jury being instructed that the defendant's silence may be used as a presumption against the defense. Counsel may also be able to demonstrate that a decision regarding criminal charges is forthcoming or that the stay or protective order will not unreasonably delay the litigation under the circumstances. Whatever the specific facts of the case, it is important to remember that the court must balance the equally compelling rights of the plaintiff in obtaining swift resolution with that of the defendant to assert and avail him- or herself of the constitutional right against self-incrimination in a meaningful way.

VI. Restitution.

i. Basics of Restitution.

Adult restitution² must be ordered to any victim of a crime or to the victim's estate unless there is a substantial reason not to, or in a domestic abuse case, unless there is undue hardship on

² Restitution in juvenile cases is handled differently. A juvenile can be ordered to pay for property damage or actual physical injury to another, excluding pain and suffering, and can be ordered to make cash payments or if the victim agrees, performance of services for the victim, or both. The court must make a finding that the juvenile alone has the ability to pay. A juvenile shall receive credit for any restitution that is paid by a parent. A juvenile who is under 14 years of age can only be ordered to pay \$250 in restitution or to perform 40 hours of services for the victim. 938.34(5)(c), Stats. A juvenile's custodial parent may also be required to pay restitution. 938.45(1r)(a), Stats. The maximum amount of the order is \$5,000 for any one act or the same act committed by 2 or more juveniles in the

the defendant or the victim. Restitution is a condition of probation/extended supervision/parole, and is enforceable in the same manner as a judgment in a civil action by the victim or enforced by contempt of court. §973.20, Stats. However, the restitution hearing differs from a civil action, in that the rules of evidence do not apply, there is usually no discovery, and the amounts recoverable as restitution are narrower than those recoverable in personal injury. *See* §§973.20 and 938.34(5), Stats. Despite the phrase “any defense” contained in the statute, courts have concluded that only defenses as to the amount of the restitution, and not the right of restitution, are available to a defendant. For example, the statutes of limitation and liability defenses do not apply. *State v. Sweat*, 208 Wis. 2d 409, 561 N.W.2d 695 (1997).

Restitution is limited to “all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing. §973.20(5)(a), Stats. §973.20(3) applies to bodily injury, and allows for orders requiring the defendant to:

- (a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.
- (b) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation.
- (c) Reimburse the injured person for income lost as a result of a crime considered at sentencing.
- (d) If the injured person’s sole employment at the time of the injury was performing the duties of a homemaker, pay an amount sufficient to ensure that the duties are continued until the person is able to resume performance of the duties.

If a crime considered at sentencing resulted in death, the restitution order may also require that the defendant pay an amount equal to the cost of necessary funeral and related services under s. 895.04 (5). §973.20(4), Stats. Special damages have been construed by the court of appeals to include

custody of the same parent. The court must also make a finding that the parent is financially able to pay. This discussion will focus on adult restitution.

future loss of earning capacity, future medical and health care expenses, and the future value of lost sick time benefits. *State v. Loutsch*, 2003 WI App 16, ¶17, *overruled on other grounds by State v. Fernandez*, 316 Wis.2d 598 (2009). Restitution does not encompass pain and suffering, anguish or humiliation.

The valuation of property is different from civil cases, as the court has the option to order:

1. Return the property to the owner or owner's designee; or
2. If return of the property under subd. 1. is impossible, impractical or inadequate, pay the owner or owner's designee the reasonable repair or replacement cost or the greater of:
 - a. The value of the property on the date of its damage, loss or destruction; or
 - b. The value of the property on the date of sentencing, less the value of any part of the property returned, as of the date of its return. The value of retail merchandise shall be its retail value.

§973.20(2)(am), Stats. This can mean that, particularly for vehicles, the amount of restitution can exceed the amounts available in a civil action. *State v. Kennedy*, 190 Wis.2d 252 (Ct. App. 1994). Rental fees may also be recoverable. *State v. Kayon*, 2002 WI App 178, 256 Wis. 2d 577, 649 N.W.2d 334. The trial court can appoint a referee or arbitrator to address a restitution claim. §973.20(13).

An appellate court has ruled that reasonable attorney fees expended to recover losses from parties who are civilly or criminally liable may be awarded as restitution in a fraud case. *State v. Anderson*, 215 Wis. 2d 673, 680, 573 N.W.2d 872 (Ct. App. 1997). *But see State v. Longmire*, 2004 WI App 90, ¶32 and n.9, 272 Wis.2d 759, 681 N.W.2d 534, in which attorney fees were denied as an element of restitution, although the facts were differentiated from *Anderson*. An unpublished decision in *State v. Brabson*, 2015 WL 6457467, ¶ 29 (Ct. App. October 27, 2015) concluded that allowing recovery of attorney's fees for pursuing John Doe proceedings would encourage civil plaintiffs to utilize the criminal courts for civil recovery, contrary to our supreme court's repeated admonition that "the criminal justice system should not be employed to

supplement a civil suit or as a threat to coerce the payment of a civil liability or to perform the functions of a collection agency.” *Id.*, ¶ 34 (quoting *Huggett v. State*, 83 Wis.2d 790, 803–04, 266 N.W.2d 403 (1978)).

Nonetheless, the trial court has broad discretion to set the amount of restitution, and must consider all of the following:

1. The amount of loss suffered by any victim as a result of a crime considered at sentencing.
2. The financial resources of the defendant.
3. The present and future earning ability of the defendant.
4. The needs and earning ability of the defendant’s dependents.
5. Any other factors which the court deems appropriate.

§973.29(13)(a), Stats. The burden of proof for (1) is on the victim to prove, by a preponderance of the evidence, the amount of restitution that is a “substantial factor” of the offense; the burden shifts to the defendant to demonstrate (2)-(4). §973.20(14), Stats. The ability to pay is not limited to the time a defendant is serving a sentence. Any unpaid restitution is converted to a civil judgment at the end of a criminal defendant’s sentence. There is no right for a victim to be compensated twice for the same damages, and the defendant is entitled to an offset. §973.20(8), Stats. However, the burden is on the defendant to demonstrate that a credit is warranted. *State v. Muth*, 2020 WI 65. Restitution awards are not admissible in the civil case. §973.20(8), Stats. Restitution amounts are not dischargeable in bankruptcy. Therefore, it is extremely important for all of the civil and criminal attorneys to understand the implications of the unpaid restitution and any releases that are signed in the civil case.

ii. Release Considerations.

In *Huml v. Vlazny*, 2006 WI 187 and *State v. Muth*, 2020 WI 65, the Wisconsin Supreme Court addressed the interplay between a civil settlement and criminal restitution. Each of these cases involved the victim of a drunk driver who was charged criminally. In *Huml*, Vlazy was

ordered to pay restitution in the amount of \$140,000. Upon the completion of his sentence, a civil judgment was entered in the amount of \$107,900.46. During the sentence, Huml settled with Vlazy and his insurer for \$548,000 and in exchange, Huml signed a release which contained the following language:

The parties agree that in consideration of the full discharge of past, present and future claims arising out of the allegations set forth in Plaintiff's Amended Complaint . . . , as a result of the alleged actions or omissions of Defendants, Insurer agrees to pay the sum hereinafter specified. . . . This Settlement Agreement and Release shall apply to all claims, whether known or unknown, on the part of all parties to this Agreement. In consideration of the payments called for herein, Plaintiff completely releases and forever discharges Defendants, Insurer, and their agents . . . from any or all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, including court costs, legal expenses and attorneys' fees which the undersigned now has or had or which may hereafter accrue on account of or in any way arising out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries . . . resulting from the accident, casualty or event listed in Plaintiff's Amended Complaint.

The court concluded that during the pendency of the sentence, the restitution order will remain in effect unless it can be proven that the defendant is entitled to an offset for double recovery. However, upon the restitution being entered as a civil judgment, the terms of the agreement *may* preclude the enforcement of the restitution judgment. In Huml's case, the terms "in full," "any," "all," "whatsoever," and "global" included the restitution judgment.

However similar language was not enough to preclude restitution in *State v. Muth*, 2020 WI 65, in which a civil settlement was reached with the three children of the victim in the amount of \$100,000 and a standard release was signed. The children later sought restitution in Muth's criminal case and the court awarded. The court awarded approximately \$8,000 in lost wages to the spouses of two of the children. Muth argued accord and satisfaction applied, that the broad release precluded the restitution award. The court concluded:

Restitution is not a cause of action but a sanction for criminal conduct owned by the State; as such, victims cannot unilaterally terminate the State's interest in making them whole, rehabilitating the offender and deterring criminal conduct.

Id., at ¶2. Ultimately, the defendant did not meet his burden of proof to show that the civil settlement and the restitution amount were for the same damages.

The lessons from these cases for all attorneys involved in these types of cases is to beware- the defendant may need to prove a setoff should the victim claim additional amounts in restitution or receives a civil judgment, and the victim should be equally as wary of signing a broad release in case the unpaid restitution is converted to a civil judgment and the insurer may need to protect its insureds. Depending on the timing of the civil and criminal cases, the victim(s) injuries, available insurance, and assets of the defendant, it is best to consider how to craft a release that will allow your client to protect their rights in the event either party returns to court. It may ultimately be in the best interest of all parties to craft releases that identify the nature and type of damages that are being compensated by a payment – either a release of general damages, a release of specific special damages, or a global all-encompassing release of all general and special damages.

Hon. Kristin Cafferty is a circuit court judge in Racine County. Prior to taking the bench, Kristin was a board-certified trial lawyer specializing in personal injury. She and her husband have four children and live in Racine.

Patrick Cafferty is a partner in the law firm of Cafferty & Scheidegger, S.C., specializing in criminal defense. He has acted as lead counsel in over 125 jury trials and been named in Best Lawyers In America and Superlawyers. Attorney Cafferty has appeared as a legal consultant on CNN, MSNBC, PBS, and WTMJ4.

Nicole Marklein is a partner with West & Dunn, practicing in its Waunakee and Baraboo, Wisconsin locations. She concentrates her practice on civil defense litigation, both defending insureds on the merits of claims and representing insurers regarding coverage issues. Attorney Marklein also specializes in employment law, wherein she provides employers cost-effective advice and defends employment-related claims should they arise. Attorney Marklein currently serves in leadership roles with the Wisconsin Defense Counsel and DRI and is active in legislation and other topics impacting the civil defense bar. Attorney Marklein wishes to credit Jay Englund of Englund & Associates Law Office, LLC for his contribution to the above. Jay Englund owns

and manages Englund & Associates Law Firm, LLC . He has devoted his career to criminal defense litigation and currently focuses his practice on the defense of felony, misdemeanor and drunk driving charges. He appears regularly in Adams, Columbia, Juneau, Monroe and Sauk Counties.

PLAINTIFF,

Plaintiffs,

Intervening Plaintiff,

v.

Case No. _____

DEFENDANT,

Defendants.

DEFENDANTS AND INSURANCE COMPANY’S BRIEF IN SUPPORT OF THEIR MOTION TO STAY PROCEEDINGS AND ALTERNATE MOTION FOR PROTECTIVE ORDER AND BRIEF IN OPPOSITION TO PLAINTIFFS’ MOTION TO COMPEL

Defendants, and Insurance Company, by their attorneys, _____ presents this Brief in support of their Motion to Stay and Alternate Motion for Protection, and Brief in Opposition to Plaintiffs’ Motion to Compel.

INTRODUCTION

On _____, defendant was criminally charged by the _____ County District Attorney’s Office with [INSERT FACTS] on ____-CF-____. It is undisputed that the facts and circumstances in both the criminal and civil actions are exactly the same, as they involve the same incident:

STANDARDS

A trial court has the discretion of deciding whether a civil action should be stayed pending the outcome of a separate criminal proceeding. *See, e.g.* Wis. Stat. §801.63; *Regal Ware, Inc. v. TSCO Corp.*, 207 Wis. 2d 538, 558 N.W.2d 679 (Ct. App. 1996). A stay is appropriate where, as in this case, there exists a parallel criminal investigation or proceeding. *Bruner Corp. v. Balogh*, 819 F. Supp. 811, 813 (E.D. Wis. 1993). Similarly, the decision whether to stay *discovery* is also committed to the trial court’s discretion. *Dahinen v American Fam. Mut. Ins. Co.*, 2001 WI App 198, ¶ 11, 247 Wis. 2d 541, 548-49, 635 N.W.2d 1. A stay or postponement of civil discovery is appropriate where the “interests of justice require such action.” *Balogh*, 819 F. Supp. at 813.

The trial court “may exercise its discretion [to stay a civil action pending the outcome of a parallel criminal proceeding] so that the defendant will not find himself in the position” of having to choose between two potentially fatal positions. *Id.* at 813. The court also considers whether the subject matter of the parallel proceedings are “sufficiently intertwined” so as to conclude that “there exists more than a ‘possibility’ that the [defendant’s] testimony could ‘aid in’ the state prosecution against him.” *Id.* at 814. The question is whether the discovery requested in the civil case “might prejudice [the defendant] in a contemporaneous criminal proceeding.” *Id.* at 815. When deciding whether to grant a stay, the *Balogh* court ultimately determined that “special circumstances” must exist and there must be a need to avoid “substantial and irreparable prejudice.” *Id.* at 815.

The right against self-incrimination is a fundamental right guaranteed by both the Wisconsin Constitution and by the United States Constitution, which is applicable to the states by reason of the due process clause of the Fourteenth Amendment. *In re Grant*; 264 N.W. 2d 587, 587, 590 (Wis. 1978) (citing WIS. CONST. art. I, sec. 8, and U.S. CONST., amend. V). This right extends to all proceedings, civil and criminal. *Id.* The privilege exists in those instances where the witness has a “real and appreciable apprehension” that the information being requested “could be used against him in the criminal proceeding.” *Id.* Similarly, the privilege extends to testimony that would support a conviction as well as “to evidence which would furnish a link in a chain of evidence necessary to prosecution.” *Id.*

There is a downside, however, to asserting the privilege against self-incrimination in a civil proceeding. First, although the privilege remains intact in a civil proceeding, the party’s assertion is a fact about which the jury may be apprised and from which it is free to draw a negative inference of liability. *See* Wis. Stat. § 905.13; *see also Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969) (inference of guilt against witness may be drawn from invocation of Fifth Amendment); *Molloy v. Molloy*, 46 Wis. 2d 682, 68 7-88, 176 N.W.2d 292 (1970) (trial court erred in failing to consider inference to be drawn from invocation of Fifth Amendment). As such, a party wishing to assert the privilege faces a Catch-22: the party can, on the one hand, “invoke the Fifth Amendment in [the] civil case, thus risking a loss there, or answer[] the questions in the civil context, thus risking subsequent criminal prosecution.” *Balogh*,

819 F. Supp. at 813.

Although the dilemma does not rise to the level of a constitutional prohibition, courts nevertheless have recognized the concern to be of such a serious nature that a “[trial] court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions ‘when the interests of justice seem [] to require such action....’” *Id.* at 813. The defendant is entitled to protection where a “criminal investigation” is proceeding. *Id.* at 814.

ARGUMENT

I. THE INTERESTS OF JUSTICE REQUIRE THAT THIS CASE BE STAYED PENDING THE OUTCOME OF THE CRIMINAL PROCEEDINGS IN ORDER TO PREVENT SUBSTANTIAL AND IRREPARABLE PREJUDICE.

The Plaintiffs have sued DEFENDANT for _____ and personal injuries sustained in the _____ which is at the heart of this action as well as the criminal proceedings. Normally, DEFENDANT would engage in a vigorous defense through discovery, as well as all other available avenues. In this instance, however, DEFENDANT finds himself in the dilemma of having to face the _____ County District Attorney’s active and ongoing criminal prosecution into the same issues alleged in Plaintiffs’ Complaint. Therefore he is faced with a severe limitation on his ability to defend this case. Moreover, the presence of the protective order issued in the criminal matter has significantly changed the present landscape, especially in light of the plaintiffs’ motion to compel. The protective order issued in the criminal matter should not be permitted to be effectively abrogated by this Court at the request of the plaintiffs.

A. Absent A Stay Or Protective Order, DEFENDANT Loses Any Ability To Meaningfully Defend This Case, Which Substantially Prejudices Him.

DEFENDANT can choose to proceed with a defense of the civil action in order to defeat the Plaintiffs’ claims. However, in doing so, DEFENDANT would be forced to respond to the Plaintiffs’ outstanding discovery requests, appear for deposition, and answer any additional discovery served by plaintiffs. If answered, however, the Plaintiffs’ discovery requests would “prejudice [the defendant] in a contemporaneous criminal proceeding.” *Balogh*, 819 F.Supp. at 815. Likewise, in responding to discovery, DEFENDANT would waive his Fifth Amendment right against self-incrimination and thereby “aid in the

state prosecution against him.” *Id.* at 814.

The only other alternative would be for DEFENDANT to assert his Fifth Amendment right against self-incrimination. However, this would severely prejudice his defense of the civil action. DEFENDANT would have sacrificed his ability to wage an effective and viable defense. Moreover, the assertion of the Fifth Amendment privilege would be a matter for the fact-finder’s consideration. *See* Wis. Stat. §905.13; *see also Grognet*, 45 Wis. 2d at 239; *Molloy*, 46 Wis. 2d at 687-88. Although a negative inference may be drawn, the Court has the power to prevent this unfair result pending the outcome of the criminal investigation.

DEFENDANT’s invocation of his Fifth Amendment right to prevent the use of his testimony by prosecutors should not render him liable in a parallel civil proceeding.

B. Granting Plaintiffs’ Motion To Compel DEFENDANT To Provide Medical Authorizations Would Circumvent Judge _____ Protective Order And Result In Substantial and Irreparable Prejudice To DEFENDANT

On _____, Judge _____ issued a protective order in DEFENDANT’s criminal case sealing all medical records and limiting the State’s ability to freely obtain DEFENDANT’s medical records. The presence of the protective order in DEFENDANT’s criminal case presents precisely the type of “special circumstances” and risk of “substantial and irreparable prejudice” that dictate the granting of a stay of the civil proceedings. *See Balogh*, 819 F.Supp at 815. If the civil action were permitted to go forward or if this Court orders DEFENDANT to comply with the plaintiffs’ discovery demands, DEFENDANT will suffer substantial and irreparable prejudice since the compliance with the plaintiffs’ discovery requests will permit the plaintiffs, and the State in DEFENDANT’s criminal proceedings, to have unfettered access to DEFENDANT’s medical records which have been ruled to be off limits by Judge _____. Such a result would be precisely the sort of “special circumstances” and would certainly cause “substantial and irreparable prejudice” that requires a stay of the civil proceedings.

C. The Statutory Exception to the Physician-Patient Privilege, at §805.04(4)(c), Stats., Is Not Applicable Here Because DEFENDANT Is Not Relying Upon His “Condition” As An Element Of His Defense.

Plaintiffs rely upon *Ranft v. Lyons*, 163 Wis. 2d 282 (Ct. App. 1991) for their contention that DEFENDANT has made his physical condition at the time of the accident an element of his defense, which

nullifies the physician-patient privilege provided in §905.04, Stats. (*See* Plaintiffs’ Brief in Support of Motion to Compel p. 6). However, the facts in the present case are distinguishable from the facts in the *Ranft* decision

Section 905.04(2), Stats., provides a privilege to producing medical records, which states as follows:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, among the patient, the patient's physician, the patient's registered nurse, the patient's chiropractor, the patient's psychologist, the patient's social worker, the patient's marriage and family therapist, the patient's professional counselor or persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician, registered nurse, chiropractor, psychologist, social worker, marriage and family therapist or professional counselor.

One exception to this privilege is where the defendant has used the condition disclosed in the medical records as an element of his or her defense. Section 905.04(4)(c), Stats., states:

There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense....

In *Ranft*, the defendant denied that he was responsible for punitive damages and specifically contended that his actions did not constitute outrageous, wanton and reckless conduct. *Ranft*, 163 Wis. 2d. at 291.

Another significant distinguishing factor making the *Ranft* decision inapplicable is the fact that the *Ranft* defendant specifically made the assertion that he was “not impaired.” *Id.* at 292. DEFENDANT has merely denied that his actions constitute an intentional disregard of the rights of the users of the road, and has never asserted that he was “not impaired”. In fact, in making its decision, the *Ranft* court specifically held that the defendant had relied upon his condition in his defense by asserting that he was not impaired. *Id.* The court held that the privilege provided by §905.04(2) was invalidated because of the defendant’s assertion that he was not impaired, *not* solely due to his denial of the punitive damages claim. Accordingly, merely denying liability for punitive damages does not equate to DEFENDANT “relying upon the condition” as an element of his defense; the *Ranft* decision indicates that more is needed. Moreover, being “impaired” does not entitle the plaintiffs to punitive damages; they must still satisfy the criteria of Wis. JI-Civil 1707.1.

Finally, the medical information that the *Ranft* plaintiff was seeking was much more specific and related to the accident in question than the broad fishing expedition the plaintiffs in the present case wish to undertake through DEFENDANT's medical records. In *Ranft*, the plaintiffs sought access to the records of an evaluation the defendant had done at the request of his criminal-defense attorney which was conducted *after* the accident. *Id.* at 288. Here, the plaintiffs are seeking broad medical authorizations which would provide them access to DEFENDANT's medical records which date *before* the accident. The relationship between the record request in *Ranft* is far more closely connected with the accident in question, particularly given the *Ranft* defendant's denial that he was "not impaired." There is no such corollary in the present case since the records requested have no relation to the accident in question and DEFENDANT has not relied upon his condition as an element of his defense.

Therefore, the statutory exception to the physician-patient privilege, at §905.04(4), does not apply and the privilege remains in place to bar the production of DEFENDANT's medical records. Finally, there has been no indication that the information contained in Dr. DEFENDANT's medical records is even relevant, material or admissible; but defendants reserve that argument for another day.

D. The Criminal Proceeding Involves The Same Set of Operative Facts At Issue In This Case.

It is undisputed that the same core set of facts are at the heart of DEFENDANT's criminal case and the present case. The strongest case for granting a stay is where a party under criminal indictment is required to defend a civil proceeding involving the same matter. *SEC v. Dresser Industries* 628 F.2d 1368, 1376-76; *Doe v. City of Chicago*, 360 F.Supp.2d 880, 881 (N.D.Ill.2005). While the Constitution does not mandate a stay in such circumstances, denying a stay might undermine a defendant's Fifth Amendment privilege against self-incrimination.

The _____ County District Attorney's office is prosecuting the very incident and subject matter that lies at the heart of the Plaintiffs' allegations. Accordingly, the parallel proceedings are "sufficiently intertwined," such that "there exists more than a 'possibility' that the [defendant's] testimony could 'aid in' the state prosecution." *Balogh*, 819 F. Supp. at 814. When there is substantial overlap of the

issues involved in the civil and criminal proceeding, the risk of impairing a party's Fifth Amendment rights is rather severe. Therefore, this civil proceeding against DEFENDANT should be stayed, along with all discovery directed toward those him, pending the outcome and final resolution of the criminal case.

II. JUDICIAL ECONOMY IS SERVED BY STAYING THE CIVIL PROCEEDS BECAUSE THE OUTCOME OF THE CRIMINAL TRIAL MAY HAVE AN IMPACT ON THE FACTS IN THIS CASE

The movants are not seeking an indefinite stay in order to evade a final determination of liability in this case. Rather, they are seeking protection until the criminal proceedings against DEFENDANT conclude. The defendants appreciate that any stay may potentially result in some inconvenience and delay to Plaintiffs, however, the Fifth Amendment should be the more important consideration. *Mitchell v. United States*, 526 U.S. 314, 327 (1999). Once the criminal trial is completed, matters of collateral estoppel must be addressed. See *Crowall v. Heritage Mut. Ins. Co.*, 118 Wis. 2d 120 (Ct. App. 1984)(holding that a fully litigated criminal conviction can be used for collateral estoppel purposes). This Court will be required to evaluate the facts in the civil case in light of the criminal determination. DEFENDANT, in the motion to compel, is asked to provide materials which may not be relevant after the criminal trial is completed. Consequently, waiting for the criminal determination will give this Court greater insight into the real issues presented in the civil case. Furthermore, the plaintiffs are still accumulating the medical information. No final reports have been provided. This case has been pending less than one year from the date of the accident. The plaintiffs are consequently unable to present their complete damage picture. It may also be a better allocation of the Court's resources to order mediation rather than get involved in costly and time consuming discovery disputes.

III. THERE IS NO PREJUDICE TO THE PLAINTIFFS BECAUSE NONE OF THE SUBJECTS OF THE MOTION TO COMPEL ARE TIME SENSITIVE

All the discovery issues presented in this motion can be answered after the criminal case without any loss of information or evidence. The medical records will be available and DEFENDANT will be present to answer interrogatory questions. Progressive has provided all the information it has available in its answers to identical interrogatory questions. Consequently, there is absolutely no prejudice to the plaintiffs to wait the short time until the criminal trial is concluded to make a decision on liability questions. Considering that at

this point in time, the plaintiffs cannot quantify their damages in this case, it is certainly reasonable for this Court to defer these determinations until the conclusion of the criminal case. It would be equally reasonable to defer liability discovery, and the cost thereof, until after the plaintiffs can quantify their damages. Unnecessary expense can be avoided by all parties if the initial focus is on the damages in the case. However, this is a determination this Court should make after the criminal proceedings have concluded, when this Court has more information and can better use its resources to navigate through the complexities of the civil case.

CONCLUSION

Based on the foregoing, DEFENDANT and Insurance Company respectfully request that the Court issue an Order staying all claims and causes of action being asserted against them in the present action until the conclusion of any and all criminal proceedings.

Alternatively, Defendants DEFENDANT and Insurance Company request that the Court issue a protective Order barring discovery directed toward DEFENDANT until the conclusion of any and all criminal proceedings.

Finally, Defendants DEFENDANT and Progressive request that the Court deny plaintiffs' motion to compel.

Dated _____ day of _____, 2026.

CAFFERTY & SCHEIDEGGER S.C.

By:

Patrick K. Cafferty, SBN. 1022402
Attorneys for Defendant

840 Lake Avenue, Suite 300
Racine, WI 53403
(262) 632-7541

PLAINTIFF,

Plaintiffs,

v.

Case No.

DEFENDANT,

Defendants.

**DEFENDANT’S BRIEF IN SUPPORT
OF HIS MOTION TO STAY TRIAL PROCEEDINGS**

Defendant, by his attorneys, _____, presents this Brief in support of his Motion to Stay Trial Proceedings.

INTRODUCTION

[INSERT FACTS]

The parties have resolved all issues in this matter other than plaintiffs’ punitive damages claim. The plaintiffs have been compensated with respect to their injuries, having agreed to receive all the insurance and the \$ _____ as restitution by Judge _____. The remaining issue for trial, punitive damages, goes to the state of mind of the defendant. Wisconsin Statute. § 895.043 provides that “[t]he plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.”

The statutory phrase “acted maliciously toward the plaintiff” requires actual intent to harm the plaintiff on the part of the defendant. *See Strenke v. Hogner*, 2005 WI 25, ¶26, 279 Wis.2d 52, 58-59, 694 N.W.2d 296, 299 (explaining that malicious acts are defined as those that “are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended” by the defendant). In *Strenke v. Hogner*, the Wisconsin Supreme Court interpreted the statutory phrase “an intentional disregard of the rights of the plaintiff” to mean “that a person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff’s rights, or is aware

that his or her acts are substantially certain to result in the plaintiff's rights being disregarded." *Id.* at ¶ 3.

As a result, Wis. Stat. § 895.043 requires proof of either the actual intent of the defendant or that the defendant is aware that his acts are substantially certain to result in the plaintiff's rights being disregarded. In order to adequately defend his case on the issue of punitive damages, defendant will need to testify concerning his intent and state of mind with respect to the CRIMINAL EVENT, which is the same very same incident out of which defendant's criminal proceedings arose. All the plaintiffs have named _____ a potential witness. In order to testify in this matter and to adequately defend his case, defendant will have to waive his 5th amendment protection, which may jeopardize his ability to successfully pursue post conviction relief. This places defendant in a no-win situation, unless the trial in this civil matter is adjourned until after the conclusion of all criminal proceedings.

The purpose of punitive damages is to punish and deter the defendant, not to compensate a plaintiff for any loss. *See Reyes v. Greatway Ins. Co.*, 220 Wis. 2d 285, 303, 582 N.W.2d 480 (Ct. App. 1998). As a result, punitive damages are not intended to compensate plaintiffs for their injuries. As noted, plaintiffs have already been compensated for their injuries in the award of compensatory damages; therefore, plaintiffs will not be harmed by delaying the trial on punitive damages until after the conclusion of all criminal proceedings.

STANDARDS

A trial court has the discretion of deciding whether a civil action should be stayed pending the outcome of a separate criminal proceeding. *See, e.g.*, Wis. Stat. §801.63; *Regal Ware, Inc. v. TSCO Corp.*, 207 Wis. 2d 538, 558 N.W.2d 679 (Ct. App. 1996). A stay is appropriate where, as in this case, there exists a parallel criminal investigation or proceeding. *Bruner Corp. v. Balogh*, 819 F. Supp. 811, 813 (E.D. Wis. 1993). Similarly, the decision whether to stay a civil matter is committed to the trial court's discretion. *Dahinen v American Fam. Mut. Ins. Co.*, 2001 WI App 198, ¶ 11, 247 Wis. 2d 541, 548-49, 635 N.W.2d 1. A stay or postponement of civil matters is appropriate where the "interests of justice require such action." *Balogh*, 819 F. Supp. at 813.

The trial court "may exercise its discretion [to stay a civil action pending the outcome of a

parallel criminal proceeding] so that the defendant will not find himself in the position” of having to choose between two potentially fatal positions. *Id.* at 813. The court also considers whether the subject matter of the parallel proceedings are “sufficiently intertwined” so as to conclude that “there exists more than a ‘possibility’ that the [defendant’s] testimony could ‘aid in’ the state prosecution against him.” *Id.* at 814. The question is whether the defendant’s testimony in the civil case “might prejudice [the defendant] in a contemporaneous criminal proceeding.” *Id.* at 815. When deciding whether to grant a stay, the *Balogh* court ultimately determined that “special circumstances” must exist and there must be a need to avoid “substantial and irreparable prejudice.” *Id.* at 815.

The right against self-incrimination is a fundamental right guaranteed by both the Wisconsin Constitution and by the United States Constitution, which is applicable to the states by reason of the due process clause of the Fourteenth Amendment. *In re Grant*; 264 N.W. 2d 587, 587, 590 (Wis. 1978) (*citing* WIS. CONST. art. I, sec. 8, and U.S. CONST., amend. V). This right extends to all proceedings, civil and criminal. *Id.* The privilege exists in those instances where the witness has a “real and appreciable apprehension” that the information being requested “could be used against him in the criminal proceeding.” *Id.* Similarly, the privilege extends to testimony that would support a conviction as well as “to evidence which would furnish a link in a chain of evidence necessary to prosecution.” *Id.*

There is a downside, however, to asserting the privilege against self-incrimination in a civil proceeding. First, although the privilege remains intact in a civil proceeding, the party’s assertion is a fact about which the jury may be apprised and from which it is free to draw a negative inference of liability. *See* Wis. Stat. § 905.13; *see also Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239, 172 N.W.2d 812 (1969) (inference of guilt against witness may be drawn from invocation of Fifth Amendment); *Molloy v. Molloy*, 46 Wis. 2d 682, 687-88, 176 N.W.2d 292 (1970) (trial court erred in failing to consider inference to be drawn from invocation of Fifth Amendment). As such, a party wishing to assert the privilege faces a Catch-22: the party can, on the one hand, “invoke the Fifth Amendment in [the] civil case, thus risking a loss there, or answer the questions in the civil context, thus risking subsequent criminal prosecution.” *Balogh*, 819 F. Supp. at 813.

Although the dilemma does not rise to the level of a constitutional prohibition, courts nevertheless have recognized the concern to be of such a serious nature that a “[trial] court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions ‘when the interests of justice seem to require such action....’” *Id.* at 813.

ARGUMENT

I. THE INTERESTS OF JUSTICE REQUIRE THAT THIS CASE BE STAYED PENDING THE OUTCOME OF THE CRIMINAL PROCEEDINGS IN ORDER TO PREVENT SUBSTANTIAL AND IRREPARABLE PREJUDICE.

The Plaintiffs have sued DEFENDANT for wrongful death and personal injuries sustained in the automobile accident which is at the heart of this action as well as the criminal proceedings. The only issue remaining in the case involves punitive damages. Punitives will not be covered by insurance. DEFENDANT’S property will be at risk to pay for any punitive damages. However, under the sentence imposed by Judge _____ it is likely he will not survive his incarceration. Consequently, it is DEFENDANT’S family, who would rely on his estate that will be most affected by any punitive award. Normally, DEFENDANT would engage in a vigorous defense. In this instance, DEFENDANT finds himself in the dilemma of having to face the results of the criminal prosecution versus the defense of claims that will impact his own family. Therefore, he is faced with a severe limitation on his ability to defend this case.

A. Absent A Stay, DEFENDANT Loses Any Ability To Meaningfully Defend This Case, Which Substantially Prejudices Him.

DEFENDANT can choose to proceed with a defense of the punitive damages in order to defeat the Plaintiffs’ claims. However, in doing so, DEFENDANT would be forced to respond to the Plaintiffs’ demand for testimony and invoke his constitutional rights. If he testified, DEFENDANT could waive his Fifth Amendment right against self-incrimination and thereby “aid in the state prosecution against him.” *Balogh*, 819 F.Supp. at 814.

In this case, DEFENDANT’S reservation of his Fifth Amendment right against self-incrimination may cause a potential jury verdict which may affect his own family. The assertion of the Fifth Amendment privilege would be a matter for the fact-finder’s consideration. *See* Wis. Stat. §905.13; *see*

also Grognet, 45 Wis. 2d at 239; *Molloy*, 46 Wis. 2d at 687-88. However, this would severely prejudice his defense of the civil action. The Court has the power to prevent this unfair result pending the outcome of the criminal matter. DEFENDANT's invocation of his Fifth Amendment right to prevent the use of his testimony by prosecutors should not render him liable in a parallel case demanding punitive damages.

II. THERE IS NO PREJUDICE TO THE PLAINTIFFS BECAUSE THE STAY DOES NOT AFFECT THEIR RIGHT OF COMPENSATION

There is absolutely no prejudice to the plaintiffs to wait until the criminal matter is concluded to try the case on punitive damages. There is no right to punitive damages. DEFENDANT has received a significant sentence and is currently in prison. He will not be free during any of the stay. It is clear that he has already been punished for his acts and in all likelihood will die in prison. The financial conundrum DEFENDANT confronts in the punitive damage claim is an independent issue. The rest of the case has been settled. DEFENDANT is only asking the court to allow him the right to defend to what is essentially a financial challenge to his family.

CONCLUSION

Based on the foregoing, Defendant, respectfully request that the Court issue an Order staying all claims and causes of action being asserted against him in the present action until the conclusion of any and all criminal proceedings.

Dated _____ day of _____, 2026.

CAFFERTY & SCHEIDEGGER, S.C.

By:

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STATE OF WISCONSIN

CIRCUIT COURT

JUNEAU COUNTY

Plaintiffs

v.

Defendants.

DEFENDANTS’ NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER

PLEASE TAKE NOTICE that Defendants _____ and

(collectively “Defendants”), by their attorneys, Cross Jenks

Mercer & Maffei LLP, hereby move the Court for an order pursuant to Wis. Stat. § 804.01(3)

that _____ is protected from any discovery in this matter until one year from the date of

the order or until a decision has been made by the Juneau County District Attorney regarding

whether _____ will be charged criminally as a result of the motor vehicle accident

underlying this civil action, whichever is sooner.

In support of their motion, Defendants assert that _____ has been advised that the

Juneau County District Attorney may bring criminal charges against him as a result of the

August 24, 2019 motor vehicle accident at issue, but no such criminal charges have been

asserted to date. Defendants further assert that justice requires the relief requested herein to protect them from irreparable and undue prejudice in this action.

The grounds for this motion will be further set forth in a supporting brief and affidavits to be filed with the Court.

Dated this 4th day of August, 2020.

CROSS JENKS MERCER & MAFFEI LLP
Attorneys for Defendants

Electronically signed by Nicole Marklein

Nicole Marklein
State Bar No. 01055685

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STATE OF WISCONSIN

CIRCUIT COURT

_____ COUNTY

PLAINTIFF

Plaintiff,

v.

Case No. 26 CV XX

DEFENDANT

Defendant.

DEFENDANT'S NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS

PLEASE TAKE NOTICE that Defendant, by the undersigned attorneys, hereby move the Court for an order that the proceedings in this matter are stayed until the related criminal charges currently pending as 26 CF XX and any related charges have been resolved via dismissal or conviction.

The grounds for this motion are further set forth in the accompanying brief and affidavit.

Dated: _____

WEST & DUNN, LLC
Attorneys for Defendant

By: _____

Nicole Marklein
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Telephone: (608) 301-5457
Facsimile: (608) 509-7054
Email: nmarklein@westdunn.com

STATE OF WISCONSIN

CIRCUIT COURT

_____ COUNTY

PLAINTIFF

Plaintiff,

v.

Case No. 26 CV XX

DEFENDANT

Defendant.

PROPOSED ORDER ON DEFENDANT’S MOTION TO STAY PROCEEDINGS

The Court having reviewed Defendant’s Motion to Stay Proceedings and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that the Motion is GRANTED.

IT IS FURTHER ORDERED that all proceedings in this matter are hereby STAYED until the related criminal charges currently pending as 26 CF XX and any related charges have been resolved via dismissal or conviction.

IT IS FURTHER ORDERED that all deadlines presently set forth in any scheduling order are hereby tolled during the pendency of the stay and that either party may move to request amended scheduling deadlines upon termination of the stay.

When Criminal and Civil Law Intersect: Effectively Representing a Plaintiff/Victim and Defendant/Insured

Hon. Kristin M. Cafferty, *Racine County Circuit Court*
Patrick K. Cafferty, *Cafferty & Scheidegger, S.C.*
Nicole Marklein, *West & Dunn*

1

Restitution

Is pain and suffering ever recoverable as restitution?

Answer: No.

§973.20(5)(a), Stats. Only special damages are recoverable. The ultimate question in deciding whether an item of restitution is “special damages” is whether the item is a readily ascertainable pecuniary expenditure attributable to the defendant’s criminal conduct that could be recovered in a civil action.

2

Restitution

Are there ever any damages available as restitution that are not available in the civil action?

Answer: Yes.

Damage to property can be 1) the reasonable repair cost; 2) the reasonable replacement cost; or 3) the value of the property on the date of the damage, loss, or destruction or the value of the property as of sentencing—whichever of those two amounts is greater.

The statute allows a circuit court to choose the “reasonable repair” option in determining the restitution amount even if the repair cost exceeds the property’s value. The value of the property—and the requirement that the circuit court choose the “greater” of two described amounts—comes into play only when the circuit court selects the third choice out of the three options in setting the restitution amount. *State v. Stone*, 2021 WI App 84.

3

Restitution

Is the victim “represented” by the District Attorney? Is the Defendant “represented” by the criminal defense attorney?

Answer: Depends.

If restitution is handled at or before sentencing, the DA/PD represents the victim/defendant. Also, if the defendant is incarcerated then the PD will defend. The court can order the attorneys to represent either the victim or the defendant or both. §973.20(14)(a) and (b), Stats.

4

Restitution

Is the burden of proof on restitution damages the same as burden of proof in the civil case?

Answer: Yes.

§973.20(14), Stats. Preponderance of the evidence is the standard.

5

Restitution

Do the Rules of Evidence Apply at a Restitution Hearing?

Answer: No.

The courts construe the restitution statute broadly and liberally to allow victims to recover their losses resulting from the criminal conduct. A restitution hearing is not the equivalent of a civil trial.

State v. Holmgren, 229 Wis.2d 358, 366, 599 N.W.2d 876 (Ct.App.1999).

6

Restitution

What does the restitution hearing look like and what if its too complicated?

Answer: The court can appoint a referee or an arbitrator to decide restitution. §973.20(13).

Parties are entitled to present evidence and to cross-examine witnesses.

The court, referee and/or arbitrator shall conduct the proceeding so as to do substantial justice between the parties according to the rules of substantive law.

The court, referee and/or arbitrator may waive the rules of practice, procedure, pleading or evidence, except provisions relating to privileged communications and personal transactions or communication with a decedent or mentally ill person or to admissibility under s. 901.05. §973.20(14)(d), Stats.

Discovery is not available except for good cause shown.

7

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Discovery is not available except for good cause shown.

8

Restitution

What defenses are available to the defendant in a restitution action?

Answer: The defendant can assert defenses to the *amount* of restitution but not the availability of restitution.

-Statute of limitations is not a defense available. *State v. Sweat*, 208 Wis. 2d 409, 561 N.W.2d 695 (1997).

-Contributory negligence may not be raised as a defense to restitution. *State v. Knoll*, 2000 WI App 135.

9

Restitution

Is the fact that restitution was paid admissible in the civil action?

Answer: No.

§973.20(8), Stats. Restitution ordered under this section does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action. The facts that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action.

10

Restitution

Is the defendant/insurer entitled to credit for amounts paid as restitution?

Answer: Yes, the defendant has the burden of proof.

§973.20(8), Stats. Any restitution made by payment or community service shall be set off against any judgment in favor of the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall hold a separate hearing to determine the validity and amount of any setoff asserted by the defendant.

11

Restitution

What happens after a defendant completes the sentence and has not met the obligation for restitution?

Answer: Civil Judgment is Entered.

§973.20(1r), Stats. After the termination of probation, extended supervision, or parole, or if the defendant is not placed on probation, extended supervision, or parole, restitution ordered under this section is enforceable in the same manner as a judgment in a civil action by the victim named in the order to receive restitution or enforced under ch. 785.

12

Restitution

Does a Release in a Civil Case Apply to Restitution ordered against the defendant?

Answer: Depends.

Huml v. Vlazny, 2006 WI 187 and *State v. Muth*, 2020 WI 65

PRACTICE TIP: Make sure that there is a very clear agreement as to what any payment is for – e.g. pain and suffering, so there is no argument that the amounts were already paid.

13

Restitution

Can Restitution Amounts be Discharged in Bankruptcy?

Answer: No.

State v. Sweat, 202 Wis. 2d 366 (Ct. App. 1996).

14

Drunk Motorcyclist Injures Passenger Girlfriend

ASSUME:

The defendant was operating a motorcycle with his girlfriend as a passenger. While operating the motorcycle, the defendant crashed. During the crash, the girlfriend fell off the back of the motorcycle and suffered a fractured skull.

The defendant is charged with Operating While Intoxicated Causing Great Bodily Harm. The girlfriend attends an office meeting with defense counsel and begins asking for advice regarding how to communicate with the District Attorney's Office and whether she should have contact with the defendant's insurance company.

The girlfriend states that she does not want to see the defendant go to prison or otherwise suffer consequences as a result of the accident.

15

School Resource Officer Causing Injuries to Student

The defendant was employed as a school resource officer at a local high school. During the course of his employment, a student became defiant after being confronted about bringing illegal substances into the school. The defendant took the student into custody, and during the encounter, the student actively resisted. In an attempt to secure the student, the defendant placed the student against the lockers in order to obtain better control of him.

The matter initially begins as a civil lawsuit against the school district and the local municipality that employed the defendant.

Following resolution of the civil case, criminal charges were filed against the defendant. The defendant is charged with Misconduct in Office, Battery, and Disorderly Conduct.

16

Shooting in Self-Defense

The defendant was at home with his daughter and her boyfriend after returning from a local tavern. While at the residence, the boyfriend continued consuming alcohol and became belligerent and violent toward both the defendant and his daughter. The boyfriend struck the defendant in the face, after which the defendant instructed him to leave the residence.

The boyfriend refused to leave and continued making threats. The defendant then shot the boyfriend after the boyfriend allegedly attempted to attack him again. The defendant claims he acted in self-defense.

The defendant is charged with Attempted Homicide, Aggravated Battery, Use of a Dangerous Weapon, and Possession of a Firearm While Intoxicated.

The boyfriend also retains civil counsel, and the defendant is civilly sued.

17

Questions?

Thank you!

18