

MORE HONORS FOR OUR ATTORNEYS

The new lists of *Super Lawyers*® and *Rising Stars* are out and O'Neil Cannon is proud to announce that 12 (approximately 40%) of our lawyers made the lists. The lists are published in the December 2011 edition of *Milwaukee Magazine*. Our lawyers making the list are:

Super Lawyers

- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Dean P. Laing
- Gregory W. Lyons
- Patrick G. McBride

Rising Stars

- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby

The lists of *Super Lawyers* and *Rising Stars* are limited to 5% and 2.5%, respectively, of the lawyers practicing in Wisconsin.

Milwaukee Magazine also published lists of the Top 50 Lawyers in Wisconsin and the Top 25 Lawyers in the Milwaukee area, and both Mr. Laing and Mr. Faust made those lists as well. This is the sixth consecutive year that Mr. Laing has made the list of the Top 50 Lawyers in Wisconsin, making him the only commercial litigator in Wisconsin to have done so.

As described in the *Milwaukee Magazine* article, the process used for assembling the *Super Lawyers* and *Rising Stars* lists is as follows:

First, we ask lawyers across the state to name the top attorneys they've personally observed in action. We also perform our own research to find outstanding attorneys who may have been overlooked by their peers. Once we have our candidate pool assembled, we access the background, credentials and experience of each lawyer. Specifically, we look at 12 indicators of peer recognition and professional achievement—things like experience, verdicts and settlements, transactions, clients, honors and awards.

The lawyers are then evaluated by a blue ribbon panel of peers within their primary area of practice. Before final selections are made, we divide the lawyers by firm size and chose the top lawyers from each group until we have a list that represents 5 percent of the lawyers in

the state (*Rising Stars lists are limited to 2.5 percent*).

The list of Top 50 Lawyers in Wisconsin is comprised of the 50 lawyers in Wisconsin receiving the highest point totals in the nomination, research and blue ribbon review process. The list of Top 25 Lawyers in the Milwaukee area consists of the 25 lawyers in the Milwaukee area receiving the highest point totals in that same process.

ATTORNEYS LAING AND MCBRIDE PUBLISH ANNUAL EVIDENCE CHAPTER

The 2011 edition of the *Annual Survey of Wisconsin Law* published by the State Bar of Wisconsin CLE Books has recently been released for circulation and this year's work includes another contribution by Attorneys Dean P. Laing and Patrick G. McBride in the area of evidence. The *Annual Survey* reviews significant Wisconsin judicial and legislative developments from 2010 and is organized by individual chapters addressing recent developments in a specific area of law. Attorney Laing has been the author or co-author of the "Evidence" chapter of the *Annual Survey* for the past 23 years and Attorney McBride has been the co-author for the past 10 years.

This year's chapter on evidence addresses issues regarding the use of expert testimony, including whether the statutory prohibition to the admission of preliminary breath test results was trumped when the results were used as a basis for an expert's opinion, and whether expert testimony was required at summary judgment in a breach of contract action regarding a computer-services agreement. The Wisconsin courts also determined whether the state could play an edited portion of a child's video statement during closing argument in a sexual-assault trial without making the child available for cross-examination after showing the video, and whether the state needed to preserve apparently exculpatory evidence consisting of threatening cell-phone voice messages for use by the defendant in establishing the self-defense standard in a homicide trial. In a civil action, the court of appeals considered whether an affiant demonstrated the requisite personal knowledge to establish the admissibility of account statements under the hearsay exception for records of regularly conducted activity.

The "Evidence" chapter summarizes these decisions and others as they impact the development of the law of evidence in Wisconsin. A full copy of the "Evidence" chapter appearing in the *Annual Survey* can be found here. A copy of the *Annual Survey of Wisconsin Law* can be obtained through the State Bar of Wisconsin CLE Books at www.wisbar.org

OVER 50% OF O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ATTORNEYS RECOGNIZED ON SUPER LAWYERS 2010 LIST

Fifteen attorneys from O'Neil Cannon have been selected for inclusion on the Wisconsin *Super Lawyers* 2010 list.

Super Lawyers is a peer-nominated award that recognizes the top 5% of outstanding attorneys across the state of Wisconsin. The *Super Lawyers* are selected using a rigorous, multiphase rating process. Peer nominations and evaluations are combined with third party research, and each candidate is evaluated based on 12 indicators of peer recognition and professional achievement.

Super Lawyers:

- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Dean P. Laing*
- Gregory W. Lyons
- Patrick G. McBride
- Steven J. Slawinski

Rising Stars:

- Timothy C. Caprez
- Gregory S. Mager
- Chad J. Richter
- John R. Schreiber
- Robert J. Tess

*Top 50 *Super Lawyers* Recipient

SEVENTH CIRCUIT CONFIRMS

APPROPRIATENESS OF CLASS ACTION TREATMENT OF CONSUMER FRAUD CASES

In *Pella Corporation v. Saltzman*, No. 09-8025, 2010 WL 1994653 (7th Cir. May 20, 2010), plaintiffs alleged that the Pella aluminum-clad wood “ProLine” casement window contained a design defect that permitted the entry of water which accelerated the rotting of the wood. Pella has sold over six million of the windows over the last 18 years. Plaintiff’s further alleged that Pella attempted to modify its warranty through a service program designed to compensate customers and committed consumer fraud by concealing the inherent product defect. *Id.* at *1. The district court certified two classes of consumers: (1) a nationwide class under FRCP 23(b)(2) consisting of those class members whose ProLine windows manufactured from 1991 to the present have not yet manifested the alleged defect or whose windows have some wood rot but have not yet been replaced; and (2) a six statewide liability class under FRCP 23(b)(3) consisting of class members whose windows have had a manifest defect and have already been replaced, on the theory that Pella violated state consumer fraud laws in these states by failing to disclose the defect. *Id.* at *1-2.

Pella sought interlocutory review of the class certifications under FRCP 23(f), contending that consumer fraud cases are not amenable to class treatment as a general matter, due to various problems associated with causation, reliance, and the calculation of damages. *Id.* The Court of Appeals granted the petition and affirmed the district court’s certification of the two consumer classes. The appellate court specifically addressed Pella’s contention that prior decisions in the circuit supported the argument that consumer fraud cases are not appropriate for class treatment as a general matter and rejected the application of such a hard and fast rule. Instead, the court reasserted the proposition that class certification is “a sensible and legally permissible alternative to remitting all the buyers to individual suits each of which would cost orders of magnitude more to litigate than the claims would be worth to the plaintiffs.” *Id.* at *2 (citing *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 748 (7th Cir. 2008) (reversing grant of certification where no common issues of law existed). The Seventh Circuit found that the district court in Pella had properly determined that “the common predominant issue of whether the windows suffer from a single, inherent design defect leading to wood rot is the essence of the dispute and is better resolved by class treatment.” *Id.*

The court further noted that although class treatment of consumer fraud cases can present difficulties that must be addressed by the district court before deciding to grant class certification, that fact alone does not preclude the certification of a class or prevent class treatment of a group of consumers that are able to satisfy the procedural requirements of FRCP 23. *Id.* at *3. In rejecting the argument advanced by Pella, the Seventh Circuit confirmed that prior decisions of the court in *Thorogood, Oshana v. Coca-Cola Co.*, 472 F.3d

506, 514 (7th Cir. 2006) (class certification inappropriate where class representative's claims not typical of putative class) and *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018-19 (7th Cir. 2002) (class action unmanageable in tire-defect case given numerous different designs of allegedly defective tires) do not establish the proposition that class treatment of consumer fraud cases is inappropriate as a matter of general law in the circuit. *Id.* at *2. The fact that these actions may involve a more challenging review by the district court at the certification stage does not prevent the prosecution of these claims under the framework of FRCP 23. Rather, the appellate court made clear that in each particular action in which class certification is sought, the district court will be required to undertake a thorough review of the procedural requirements of FRCP 23 and determine whether issues of commonality and predominance, among others, are satisfied and there is a sufficient economy to class treatment. Under the right circumstances, certification of a consumer fraud class will be appropriate. *Id.* at *5. A full copy of the Seventh Circuit opinion can be viewed [here](#).

Attorney McBride is a shareholder in the Litigation Practice of the Firm and provides counsel to clients in matters related to the prosecution and defense of class actions in state and federal court.

ATTORNEYS LAING AND MCBRIDE PUBLISH ANNUAL EVIDENCE CHAPTER

The 2010 edition of the *Annual Survey of Wisconsin Law* published by the State Bar of Wisconsin CLE Books has recently been released for circulation and this year's work includes another contribution by Attorneys Dean P. Laing and Patrick G. McBride in the area of evidence. The *Annual Survey* reviews significant Wisconsin judicial and legislative developments from 2009 and is organized by individual chapters addressing recent developments in a specific area of law.

Attorney Laing has been the author or co-author of the evidence chapter of the *Annual Survey* for the past 22 years and Attorney McBride has been the co-author for the past nine years. This year's chapter on evidence addresses issues regarding the admissibility of intercepted communications under the Wisconsin Electronic Surveillance Control Law and whether the one-party consent exception applies when both the intercepting person and the person consenting to the intercept are law-enforcement officers; and whether other acts evidence relating to a confidential informant's observations on the day before the execution of a no-knock search warrant based on those observations was, nevertheless, admissible at trial to combat the defendant's claim that he acted in self-defense when he shot a police officer who entered his home while executing the warrant.

The Wisconsin courts also addressed the admissibility of a computer-generated animation, which purported to illustrate the combined testimony of various witnesses regarding how the alleged crimes occurred, through the trial testimony of a non-expert witness who had no personal knowledge of the underlying facts and had not visited the crime scene. In a civil action, the court of appeals examined whether a defendant, who had invoked his Fifth Amendment privilege against self-incrimination and refused to testify regarding non-corporate liability exposure during the three-year discovery period before trial, should be permitted to withdraw the prior invocation and waive the privilege to testify during the last week of trial regarding issues that he had previously hidden from discovery.

The evidence chapter summarizes these decisions and others as they impact the development of the law of evidence in Wisconsin. A full copy of the evidence chapter appearing in the *Annual Survey* can be found here. A copy of the *Annual Survey* of Wisconsin Law can be obtained through the State Bar of Wisconsin CLE Books at www.wisbar.org

ATTORNEY MCBRIDE SECURES DISMISSAL OF CLIENT FROM CLASS ACTION

On May 20, 2010, the Wisconsin Court of Appeals affirmed a lower court ruling dismissing Nissan Motor Co., Ltd. (“Nissan Japan”) from a price-fixing class action venued in Milwaukee County for lack of personal jurisdiction under Wisconsin’s long-arm statute, Wis. Stat. § 801.05. The class action involved anti-trust claims against various automobile manufacturers and their North American subsidiaries for allegedly conspiring to maintain new car prices in the United States at levels higher than in Canada for the same vehicles and as part of the conspiracy, further arranged for the United States dealers not to honor warranties on cars imported from Canada. The plaintiff claimed that the circuit court had jurisdiction over Nissan Japan because it had “directly or through [its] subsidiaries, affiliates or agents” conducted business in Wisconsin through Nissan dealerships located in the state.

After a period of jurisdictional discovery, the circuit court determined that Wisconsin did not have personal jurisdiction over Nissan Japan and that exercising jurisdiction over the foreign corporation would violate Due Process. The court of appeals affirmed the dismissal of Nissan Japan, agreeing with Attorney McBride’s argument that the foreign corporation was not subject to general jurisdiction under Wisconsin law based solely on the acts of its wholly owned subsidiary, Nissan North America, under an agency theory. Similarly, the court of appeals also determined that specific jurisdiction over Nissan Japan was not warranted under the long-arm statute, where there was no evidence in the record that the class action arose out of an injury to persons or property in Wisconsin based on an out-of-state action by Nissan

Japan.

The court of appeals further rejected an alternative argument advanced by the plaintiff related to the scope of jurisdictional discovery conducted prior to the circuit court's dismissal of Nissan Japan, holding that the plaintiff was not denied his right to an evidentiary hearing when the circuit court ordered the plaintiff to direct his jurisdictional discovery requests to Nissan North American rather than Nissan Japan. The parties had entered into a series of stipulations related to jurisdictional facts and the plaintiff had stated that he did not seek any further discovery from Nissan Japan.

Attorney McBride is a former law clerk to Wisconsin Supreme Court Justice Jon P. Wilcox (ret.) and provides counsel to clients dealing with appellate issues in both state and federal court. A full copy of the opinion can be found [here](#), along with an article from Law360 discussing the appellate decision.

ATTORNEY MCBRIDE SECURES APPELLATE COURT VICTORY

On May 4, 2010, the Wisconsin Court of Appeals affirmed a lower court ruling dismissing a series of claims against the defendants for lack of personal jurisdiction under Wisconsin's long-arm statute, Wis. Stat. § 801.05 and held that, as Attorney McBride had argued, personal jurisdiction over the corporation cannot be the sole basis for personal jurisdiction over an officer. Attorney McBride's argument enabled the appellate court to differentiate between the business contacts of the corporation with Wisconsin and the lack of specific contacts within the state by the individual defendants, former officers of the corporation.

While the appellate court noted that the business contacts of the corporation in Wisconsin were sufficient to impose jurisdiction over the corporation, it agreed with Attorney McBride's argument that the individual defendant's work on behalf of the corporation, all performed outside Wisconsin, was not sufficient to constitute "substantial and not isolated activities within this state" sufficient to impose personal jurisdiction over the former officers. As a result, the court of appeals determined that the exercise of personal jurisdiction over the individual defendants was not permissible under the long-arm statute.

Attorney McBride is a former law clerk to Wisconsin Supreme Court Justice Jon P. Wilcox (ret.) and provides counsel to clients dealing with appellate issues in both state and federal court. A full copy of the opinion can be found [here](#).

SIXTEEN OCHD ATTORNEYS AWARDED WITH SUPER LAWYERS DESIGNATION

Sixteen attorneys from O'Neil Cannon have been selected for inclusion on the Wisconsin *Super Lawyers* 2009 list.

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- John R. Schreiber
- Robert J. Tess

**Top 50 Super Lawyers Recipient*

SUPER LAWYERS RECOGNIZES OCHD

ATTORNEYS AMONG WISCONSIN'S TOP 5%

Milwaukee, WI (November) – Several attorneys from the law firm of O’Neil Cannon have been selected for inclusion in the 2008 Wisconsin *Super Lawyers* and *Rising Stars* lists. Attorneys recognized by *Law and Politics* include Jim DeJong, Dean Laing, Peter Faust, Patrick McBride and Randy Nash. Rising Star honors go to Seth Dizard, Chad Richter, John Schreiber and Bob Tess.

Only 5 percent of the licensed active attorneys in each state are named to the *Super Lawyers* list. In states where Rising Stars is published, no more than 2.5 percent are named. As part of the rigorous multi-step selection process, each candidate is evaluated based on 12 indicators of peer recognition and professional achievement. The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search for legal counsel.

ELEVEN OCHD ATTORNEYS AWARDED “SUPERLAWYER” DESIGNATION

Eleven attorneys from O’Neil, Cannon, Hollman, DeJong have been named as Wisconsin Super Lawyers for 2006 by *Law and Politics/Milwaukee Magazine*.

Super Lawyers is a peer-nominated award recognizing the top 5% outstanding attorneys across the state of Wisconsin.

The attorneys included in the Super Lawyer listing are:

- Jim DeJong
- Eugene Duffy
- Pete Faust
- John Gehringer
- Dean Laing
- Greg Lyons
- Randy Nash
- Patrick McBride
- Angela Champion

Additionally, Dean Laing was selected as one of the Top 50 Super Lawyers in the state.

Patrick McBride and Angela Campion were selected as Super Lawyers Rising Stars.

O'Neil Cannon is a full-service legal practice focusing on business law, estate planning, and major complex litigation with offices in Milwaukee and Port Washington. The firm was established in 1973 and is now listed as one of the Milwaukee-area's largest law firms.