STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2024AP1515

ANDREW J. KYLLONEN,
Plaintiff-Appellant,
WISCONSIN DEPARTMENT OF HEALTH SERVICES and
UNITEDHEALTHCARE OF WISCONSIN, Inc.
Involuntary-Plaintiffs
v.

ARTISAN AND TRUCKERS CASUALTY COMPANY,
PATRICIA ANN STARK,
ATHLETIC & THERAPEUTIC INSTITUTE OF MILWAUKEE, LLC,
SMART CLINIC LIMITED PARTNERSHIP and
UNITED STATES LIABILITY INSURANCE COMPANY,
Defendants-Respondents,
AURORA MEDICAL CENTER GRAFTON LLC,
Defendant.

On Appeal from a final judgment entered in the Circuit Court for
Ozaukee County, Circuit Court Case No. 2020CV0301,
the Honorable Steven M. Cain, presiding.

WISCONSIN ASSOCIATION FOR JUSTICE'S AMICUS BRIEF

On behalf of the Wisconsin Association for Justice ("WAJ"):

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WAJ's members, who represent injured tort victims across the state, are extremely concerned with Artisan's attempt to expand Wisconsin Statutes § 907.02(2) beyond its plain language to disqualify treating medical experts who are issued letters of protection – a well-accepted practice that § 907.02(2) has nothing to do with.

The practical reality for tort victims is that following an injury, many lose their income stream and sometimes their health insurance. Victims of others' negligence are often forced into difficult choices soon after an injury, like whether to pay bills, including medical expenses, or put food on the family table.

Likewise, medical providers, who have no direct recourse against tortfeasors, confront significant economic inefficiency when treating injured patients. Medical providers are often required to incur the expense of initiating collections actions and potentially forcing the patient into bankruptcy to recover the sums owed.

Letters of protection mitigate the short-term economic hardship for both sides without altering the patient's ultimate financial obligation. They allow necessary financial breathing room for injured patients. They also eliminate the economic inefficiency of an immediate collections action for medical providers who are willing to wait until the completion of the case to be paid. If a case is unsuccessful, the medical provider is in the same position he or she was previously – the patient still owes the remaining balance. However, with the passage of time, many injured patients regain their ability to earn and can make arrangements to pay what is owed. This is why letters of protection have been long recognized as "commonplace,"

appropriate, and enforceable. *Yorgan v. Durkin,* 2006 WI 60, ¶ 21, 290 Wis. 2d 671, 715 N.W.2d 160.

Letters of protection are not contingent compensation arrangements under § 907.02(2), because the patient still owes the medical provider for any unpaid balance, ***regardless of the outcome of the case***. Testifying medical experts, as here, are compensated separately for their time in court. As such, letters of protection do not compensate testifying experts on a contingent basis.

Artisan wishes to expand § 907.02(2) well beyond its plain language to disqualify experts who have a ***financial incentive*** related to the case. If Artison's untenable construction were adopted, it would all but eliminate the practice of issuing letters of protection. Plaintiffs would never issue letters of protection if doing so could preemptively disqualify their best and most necessary expert witnesses. *See* e.g., *Bleyer v. Gross*, 19 Wis. 2d 305, 311, 120 N.W.2d 156 (1963) (in most cases, plaintiffs must produce expert medical testimony to substantiate injuries). Moreover, under Artisan's construction, numerous experts, including those retained by defendants, would be at risk of exclusion.

To the best of WAJ's knowledge, Artisan's argument has never been advanced in a Wisconsin court (certainly never on appeal) in the 14 years of § 907.02(2)'s existence. Artisan's construction is not supported by a single authority or secondary source establishing its plausibility. To the contrary, every court and commentator that has evaluated whether letters of protection constitute contingent compensation arrangements has concluded they do not. The unambiguous language of § 907.02(2) requires this Court to reach the same conclusion.

I. A Letter of Protection Is Not a Contingent Compensation Agreement.

Wisconsin Statutes § 907.02(2) prohibits admission of expert testimony where "the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered." A straightforward application of this Court's rules of statutory interpretation leads to the inescapable conclusion that a letter of protection is not "compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered" within the meaning of § 907.02(2). The Court's paramount consideration in interpreting and applying statutes is to "ascertain the intent of the legislature." *Randy A.J. v. Norma I.J.*, 2004 WI 41, ¶ 22, 270 Wis. 2d 384, 677 N.W.2d 630 (internal citations omitted). This analysis typically begins and ends with "the language the legislature chose to use." *Id*. Courts give the "language its plain and ordinary meaning." *Id*. When determining the plain and ordinary meaning of words, courts may look to definitions in a recognized dictionary. *Frank v. Wisconsin Mut. Ins. Co.*, 198 Wis. 2d 689, 695, 543 N.W.2d 535 (Ct.App.1995). If the language is clear on its face, courts go no further and simply apply it. *Randy A.J.*, 2004 WI 41, ¶ 22.

The late Justice Scalia, Seventh Circuit Judge Sykes, Wisconsin Supreme Court Justice Rebecca Bradley, and numerous others have referred to this cardinal rule as courts' "first principle of statutory interpretation." *See Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 360 (7th Cir. 2017) (Sykes, J., dissenting):

> When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not

> authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

Id.

Here, application of § 907.02(2) is simple and clear: a letter of protection is not a contingent compensation agreement because the injured plaintiff continues to owe the testifying physician for the medical services rendered ***even if the case is unsuccessful***.[1] The ordinary meaning of "contingent" is "dependent or conditioned by something else…. [For example,] payment is conditioned on fulfillment of certain conditions." *See* Miriam-Webster Dictionary definition of "contingent" (available at www.merriam-webster.com/dictionary/contingent) (last visited January 17, 2025). On its face, a letter of protection does not provide compensation "dependent" on the outcome of the case – to the contrary, compensation is owed ***regardless of the outcome***. The benefit a letter of protection offers to the medical provider is ease of collection. Allowing the provider a contractual source of recovery in exchange for payment flexibility does not make the provider's compensation contingent on the outcome of the case.

Every court around the country that has confronted this issue has agreed. In the seminal case, the Eighth Circuit held that a district court errs

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[1] Artisan wrongly asserts that the circuit court *exercised its discretion* in excluding Kyllonen's experts, when this appeal involves an issue of law that this Court reviews *de novo*. The primary issue is the proper interpretation of § 907.02(2), which this this Court decides independently as a matter of law. *Xerox Corp. v. Wisconsin Dep't of Revenue*, 2009 WI App 113, ¶ 46, 321 Wis. 2d 181, 772 N.W.2d 677 (interpretation of a statute is an issue of law reviewed *de novo*). Moreover, unlike many other evidentiary rules, § 907.02(2) does not vest the circuit court with any discretion – it mandates exclusion of experts with contingent compensation agreements. Application of a statue to undisputed facts is also a question of law reviewed *de novo*. *State v. Zimmerman,* 185 Wis.2d 549, 554, 518 N.W.2d 303 (Ct.App.1994). While the parties emphasize different facts, it does not appear that the circuit court resolved any relevant factual disputes. Certainly, whether a letter of protection qualifies as a contingent compensation arrangement under § 907.02(2) is an issue of law.

by determining that a letter of protection constitutes expert compensation "contingent on the outcome of the litigation." *Taylor v. Cottrell, Inc.*, 795 F.3d 813, 817 (8th Cir. 2015). Where treating medical experts are paid for their testimony separately and do not give up "the right to collect" the amounts owed for medical services regardless of the outcome of the case, a court errs in labeling letters of protection as contingent compensation arrangements. *Id*. That there may be a greater likelihood that the expert is able to collect the balance owed if the case is successful is an issue of bias that can be explored on cross examination. *Id.*; *see also Koenig v. Theofilos*, 933 So. 2d 1293, 1294 (Fla. Dist. Ct. App. 2006) (letter of protection was not a contingent compensation agreement with testifying medical provider); *Berrios v. Deuk Spine*, 76 So. 3d 967, 972 (Fla. Dist. Ct. App. 2011) (rejecting claim that a letter of protection gave provider an interest contingent on outcome of the case such that provider should be joined as a party).

Wisconsin's foremost evidentiary commentator, Professor Daniel Blinka of the Marquette University Law School, agrees that § 907.02(2)'s prohibition on contingent compensation agreements was not intended to encompass letters of protection:

> Although the rule clearly extends to classic contingent fee (for testimony) agreements, it should not be more broadly applied to instances where health care providers are paid later based on settlements or verdicts. Where witnesses have provided treatment and await payment, they have not exchanged testimony for fees contingent on the lawsuit's outcome. Financial inducements may always be explored through cross-examination and impeachment, especially for bias, which is never a collateral issue.

7 Wis. Prac., Wis. Evidence § 702.7 (4th ed.).

Moreover, as an exception to the general rule of admissibility of expert testimony, § 907.02(2) should be interpreted narrowly. *See Hake v. Zimmerlee*, 178 Wis. 2d 417, 423, 504 N.W.2d (Ct. App. 1993) (construing

exceptions to a statutory rule narrowly); *Flores v. Goeman*, 2013 WI App 110, ¶ 8, 350 Wis. 2d 454, 839 N.W.2d 409; *State ex rel. Leiser v. State*, 2012 WI App 62, ¶ 14, 341 Wis. 2d 489, 815 N.W.2d 406; § 47:11. Exceptions, 2A Sutherland Statutory Construction § 47:11 (7th ed.) (traditionally statutory exceptions are narrowly construed and doubts are resolved "in favor of the general provision rather than the exceptions"). Section 907.02, which also includes the *Daubert* rule, is generally applied in favor of admission of expert testimony. For example, even under the *Daubert* reliability analysis, "[t]he Rules of Evidence embody a strong preference for admitting any evidence that may assist the trier of fact." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008). Rather than exclusion, the appropriate means of attacking "shaky but admissible" expert testimony is by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof...." *Seifert v. Balink*, 2017 WI 2, ¶ 86, 372 Wis. 2d 525, 888 N.W.2d 816. Like the *Daubert* standard in § 907.02(1), the contingent compensation exception in § 907.02(2) must be applied narrowly to admit relevant evidence and allow juries to decide the merits of disputes.

Courts must also construe the statute as a whole "so that no part of it is surplusage, giving effect to all the words that are used." *Randy A.J.*, 2004 WI 41, ¶ 22 *(citing Donaldson v. State,* 93 Wis.2d 306, 315, 286 N.W.2d 817 (1980)). Artisan ignores that the prohibited contingent compensation must be "with respect to which the testimony is being offered." Wis. Stat. § 907.02(2). Letters of protection provide no basis for expert disqualification under § 907.02(2) because they relate to compensation for medical services rendered, not for testimony at trial.

Kyllonen correctly argues that § 907.02(2)'s unambiguous language codifies attorneys' ethical prohibition against contingent witness

compensation as a substantive rule of evidence. The Wisconsin Supreme Court's rules prevent attorneys from compensating expert witnesses with "improper inducement," including "a contingent fee." *See* Wis. SCR 20:3.4(b), comment 3. Contrary to Artisan's argument, the legislature may codify existing common law for a variety of reasons. *See, e.g., Murphy v. Columbus McKinnon Corp.*, 2022 WI 109, ¶ 31, 405 Wis. 2d 157, 982 N.W.2d 898 (the legislature may choose to "codify the common law Wisconsin courts have developed and applied for decades…"). Here, the legislature likely chose to codify the ethical rule prohibiting expert contingency fees, because it was not substantively enforceable between parties to litigation. Wis. Stat. § 751.12 (supreme court rules cannot affect substantive rights of parties); *State v. Soto*, 2012 WI 93, ¶ 32, 343 Wis. 2d 43, 817 N.W.2d 848. Also, courts around the country are split on whether contingent compensation agreements, while unethical, disqualify an expert from testifying. *See Taylor*, 795 F.3d 816 (discussing the split in authority). By adopting § 907.02(2), the legislature settled any controversy over whether such testimony would be admissible in Wisconsin courts despite the ethical prohibition.

Also contrary to Artisan's argument, without a clear directive, courts presume that the legislature intends not to alter the existing common law:

> …[A] statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent. Statutes in derogation of the common law are strictly construed. A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute. To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory.

Fuchsgruber v. Custom Accessories, Inc., 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833. Wisconsin common law has consistently upheld the permissibility of letters of protection, never viewing them as prohibited "contingent fee" arrangements. *See Yorgan*, 2006 WI 60, ¶ 21 (letters of protection are "a common practice by which lawyers representing personal injury plaintiffs ensure clients will receive necessary medical treatment, even if unable to pay until the case is concluded."); *Riegleman v. Krieg*, 2004 WI App 85, ¶ 25, 271 Wis. 2d 798, 679 N.W.2d 857 ("…this type of document—i.e., the type containing language agreeing to protect a medical provider's right to payment for services from any insurance settlement—is a valid contract which creates an assignment and entitles the medical provider … the right of contractual enforcement against both the patient … and the patient's lawyer."); Wisconsin Ethics Opinion E-09-01, p. 2-3 (*available at* www.wisbar.org/formembers/ethics/Ethics%20Opinions/E-09-01.pdf) (acknowledging that letters of protection are common and discussing attorneys' legal and ethical obligations to comply with them). Section 907.02(2) includes no language clearly demonstrating the legislature's intent to effectively prohibit letters of protection, which are well-accepted in Wisconsin common law.

A. Artisan impermissibly seeks to re-write § 907.02(2) to drastically broaden its scope.

Courts "cannot, under guise of judicial statutory construction, rewrite [statutes] to reflect the intention the legislature might have had." *Harris v. Kelley*, 70 Wis. 2d 242, 250, 234 N.W.2d 628 (1975). Without citation to a single authority, secondary source, drafting memorandum, or support of any kind, Artisan baldly asserts that the legislature enacted §

907.02(2) to disqualify experts who "have a direct financial interest in the outcome of the action which raises serious questions about the integrity of the expert's testimony." (Respondent's Brief, p. 29). Section 907.02(2) contains no such language. Artisan invites this Court to abandon first principles and re-write the statute's narrow prohibition on contingent compensation arrangements to disqualify all experts with any financial interest in the outcome of the suit. This Court must reject that invitation as adopting such a standard would dramatically expand § 907.02(2)'s scope beyond its language.

If ***any financial interest*** in the case's outcome prevents an expert from testifying, many experts on both sides of civil litigation would face potential disqualification. For example, the plaintiff's treating providers, regardless of any letters of protection, would have a higher probability of collecting outstanding balances and/or funding future treatment if the plaintiff prevails. Under Artisan's bloated and unsupported definition of contingent compensation, such financial interest would be the basis for disqualification. Likewise, testifying experts who are retained by defendants and insurance companies often have a financial interest in the outcome of the case (as is routinely explored on cross-examination) because insurers are much more likely to continue retaining experts who provide favorable testimony that is adopted by juries. These experts have a financial interest in the outcome based on the expectation of future retention and would be subject to potential exclusion under Artisan's interpretation. Similarly, any expert who is employed by (such as an in-house engineer) or even maintains a small investment interest in a party could be subject to exclusion. Precious few testifying experts have no financial incentive related to the case. Contrary to Artisan's position,

financial incentives present issues of credibility and bias for the jury to weigh, not a basis for exclusion. Section 907.02(2)'s plain language controls the analysis, and the Court must limit its scope to contingent compensation agreements as the legislature unambiguously intended, not letters of protection.

CONCLUSION

WAJ respectfully requests that this Court author an opinion correctly interpreting Wisconsin Statutes § 907.02(2) as inapplicable to letters of protection issued to testifying expert medical providers. Without delving into the particular facts of this case as the parties did in their submissions, WAJ wishes to ensure that issuing a letter of protection for amounts owed by the plaintiff for medical services rendered cannot serve as the basis for exclusion of expert testimony under § 907.02(2) where the letter does not eliminate the plaintiff's obligation to pay if the case is lost. Exclusion of a testifying expert under these circumstances is error as a matter of law.

WAJ takes no position on whether Kyllonen should be entitled to a new trial, although Artisan's argument that the circuit court could erroneously exclude three critical experts from testifying without causing irreparable prejudice to the plaintiff and a "reasonable possibility" of altering the outcome seems absurd on its face.

Respectfully submitted this 20th day of January, 2025.

On behalf of the Wisconsin Association for Justice:

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8) for a brief produced with a proportional serif font. The length of the brief is 2,842 words.

Dated this 20th day of January, 2025.

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