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Wisconsin Defense Counsel
*Defending Individuals and
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JOURNAL POLICY

WDC Members and other readers are encouraged to submit articles for possible publication in the *Wisconsin Civil Trial Journal*, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

Statements and expression of opinions in this publication are those of the authors and not necessarily those of the WDC or Editor. Letters to the Editor are encouraged and should be sent to the WDC office at 6737 W. Washington St., Suite 4270, Milwaukee, WI 53214. The Editor reserves the right to publish and edit all such letters received and to reply to them.



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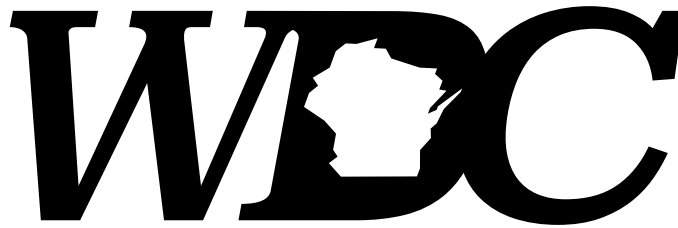
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Wisconsin Defense Counsel (“WDC”) is a premier statewide organization consisting of more than 375 defense attorneys. Founded in 1962, WDC (formerly known as the Civil Trial Council of Wisconsin) is dedicated to defending Wisconsin citizens and businesses in a professional manner, maintaining an equitable civil justice system, educating its members, creating referral sources for its members, providing networking opportunities for its members, and influencing public policy. To be eligible for membership, WDC bylaws require that an individual be a member of the State Bar of Wisconsin and “devote a substantial portion of his or her professional time in the defense of civil litigation.”

WDC Mission, Vision, and Values

Our Mission: Wisconsin Defense Counsel exists to promote and protect the interests of civil litigation defense attorneys and their clients by providing professional education and development, fostering collegiality, promoting principles of diversity and inclusion and striving to ensure equal access to justice for all defendants.

Our Vision: Delivering superior legal services with integrity and professionalism.

Our Values: Educate; Diversity & Inclusion; Collegiality; Integrity; Development; and Service.

WDC Benefits of Membership

Education: WDC holds three education programs during the year, all of which provide continuing legal education (CLE) credits.

Expert Witness & Deposition Requests: Members can find expert witnesses or copies of depositions in various subject fields by using the knowledge and experience of other members. Requests are sent by broadcast email to all WDC members.

Web Resources: Members are included in a searchable database on the WDC website. Members can also obtain all the seminar outlines that are presented at WDC educational events online. These outlines are a quick and easy way to get access to the latest information on various topics.

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President's Message: Time Well Spent: Reflections on My Time with the Wisconsin Defense Counsel

by: Grace Kulkoski, President, Wisconsin Defense Counsel

As I close in on my final days as the President of our organization, I would like to thank each member and sponsor of the Wisconsin Defense Counsel for your contributions, participation, ideas, leadership, and time. I have learned so much from you, and I have enjoyed getting to spend time with many of you both this past year and throughout the years that we have all been on this journey together.

As we defense attorneys know all too well, time is our scarcest resource. The task lists are endless, and our days are often filled for us—sometimes with minimal input from ourselves. When I start to feel that my own schedule is out of control, I like to remind myself of one of my favorite quotes: “How we spend our days is, of course, how we spend our lives.” This quote from Annie Dillard goes on to champion the power of daily habits, mindfulness, and the accumulation of small moments over time. I love this quote because it allows me to live in the hustle and busyness of everyday life, knowing that my hours and days are well spent—so long as I keep some intention in those hours and days.

Spending the last four years on WDC’s executive committee has certainly taken up some of those hours and days. Reflecting on those four years, I’m so grateful for that time spent. I know I am not alone in that gratitude.

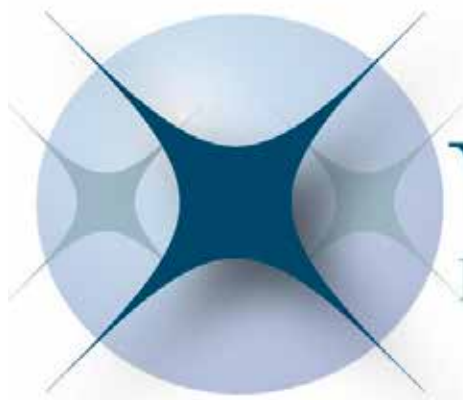
The time spent working to make WDC a great organization has helped many of us build a strong network of friends and colleagues, and those relationships certainly make it all worthwhile. Giving our time to this organization allows others to have that same opportunity. It also helps us stay

on top of current trends in our industry, so we can provide the best possible service to our clients. A strong organization of defense attorneys who help one another stay sharp and connected is so important to our industry.

Defense attorneys help ensure that the promise made in the insurance contract is fulfilled according to the terms of the contract—no more, no less. We fight inflated or fraudulent claims, challenge unsupported damage claims, and work toward reasonable claim settlements. Our work allows the insurance system to remain fair, affordable, and predictable. When we spend our minutes, hours, and days on our work, we spend our time protecting that system.

I certainly plan to stay involved in this organization after my term on the executive team is at an end. I hope you all do the same. There are so many ways to get involved, and my hope is that you find the same value out of that time spent as I have found.

Our committees are a great way to spend time focused on the specific areas of WDC that are most important to you. Our Women in the Law Committee has done great philanthropic work, and it serves as a valuable point of connection for one another. Our Amicus Committee has provided important perspective to the courts on appellate issues that affect our industry. For example, the Wisconsin Supreme Court recently adopted the arguments made in an amicus brief put together by the committee in *Wren v. Columbia St. Mary's Hospital Milwaukee, Inc.* Our Young Lawyers Committee allows our newest members to meet, connect, and find their home in this great organization. We also



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will be starting a new Past Presidents Committee, which will allow us to harness and retain some of the wonderful institutional knowledge that our past presidents have to offer from their years leading this organization.

In addition to committee work, writing articles for the journal and offering to speak on a relevant legal issue at our seminars are what truly make WDC great. We can learn and grow only if we continuously strive to improve ourselves, and we have so much we can teach each other. Sharing your knowledge, experience, and expertise is certainly time well spent.

Finally, if you have not done so already, I would urge you to consider a leadership role in WDC. Our board is an energetic, open-minded, and friendly group of skilled attorneys, all working to make our organization the best we can offer to our members. It is not a huge time commitment, but it is a meaningful one.

Thank you for this time we have spent together. And thank you for the opportunity to serve as your President. I cannot think of a better way to have spent this time.

Author Biographies:

Grace Kulkoski serves as in-house legal counsel to Wisconsin Mutual, where she oversees litigation, advises on claims, and performs other legal duties for the company. Before joining the Wisconsin Mutual team, Grace spent the first part of her career in private practice as a litigation attorney. Grace received her law degree from the University of Wisconsin, and her undergraduate degree from the University of Notre Dame.

Grace is an active member of various organizations supporting the insurance defense industry. She currently serves as the President of the Wisconsin Defense Counsel, and is also active in DRI, where she serves as a Vice-Chair of the Corporate Counsel Committee. She also serves in the litigation section of the Wisconsin State Bar. Outside of work, Grace enjoys running, spending time outside, and providing taxi services for her family.

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2026 WDC Annual Awards

The WDC Annual Awards recognize the talent, effort, and accomplishments of our incredible members. Congratulations to the following award recipients who will be recognized during the WDC 2026 Annual Conference on August 13–14, 2026!



2026 Advocate of the Year Award Recipient: Mark D. Malloy

Congratulations to Mark Malloy for being selected by the WDC Board of Directors as the 2026 Advocate of the Year! The Advocate of the Year Award

recognizes the member with the most defense work success of the prior calendar year.

Mark is a shareholder at Meissner Tierney Fisher & Nichols S.C. He is a trial lawyer who represents businesses in all types of commercial litigation, primarily advising companies in the areas of insurance coverage, extra-contractual liability, and professional liability. Mark is a member of the Wisconsin, Illinois, and Minnesota bar associations. He is a member of the Federation of Defense and Corporate Counsel, the DRI, and the Wisconsin Defense Counsel. For these organizations, he often speaks on topics related to coverage and extra-contractual liability. Mark's longstanding relationships with clients and ever-growing practice are the result of developed trust, premier advocacy, and successful results.

Over the last year, Mark spearheaded major defense victories, including the following examples.

In a six-figure homeowners insurance dispute, Mark obtained a complete and favorable summary judgment ruling on the plaintiffs' claims for breach of contract and bad faith. The court affirmed that neither delay in payment, in and of itself, nor an order to participate in appraisal supports a breach of contract claim. The

court also re-confirmed Wisconsin precedent that breach of contract is a prerequisite for bad faith claims and that denying a request for appraisal on a coverage dispute is not unreasonable or a basis for a bad faith claim. Finally, the court determined that even when a case is in litigation, discovery and settlement efforts do not replace proof of loss, which is mandated in order to allow insurers an opportunity to evaluate the claim.

In a medical malpractice claim involving a physician and his employer, in which Mark represented the physician, a dispute arose over primary coverage between the two. The parties filed cross-motions for summary judgment that resulted in a compromise trial court decision, awarding limited coverage to the employer under the physician's policy. On cross-appeal, Mark successfully obtained a complete reversal of the trial court's decision for his client. The appellate court determined that the employer was not entitled to coverage under the physician's policy.

In a high-profile wrongful death lawsuit against various engineering companies and contractors, wherein the plaintiff's estate alleged a defective design of a remote operating system, Mark successfully obtained complete dismissal on behalf of the engineering company and its insurer. The court agreed with Mark's argument that the applicable statute of repose, Wis. Stat. § 893.89, prohibited the action. The court determined that the plaintiff failed to plead the exceptions of fraud, concealment, or misrepresentation under § 893.89(4)(a).

Nominated By: *Jaclyn C. Kallie, Meissner Tierney Fisher & Nichols S.C.*





2026 Young Lawyer Award Recipient: Katherine Cortesy

Congratulations to Katherine Cortesy for being selected by the WDC Board of Directors as the recipient of the 2026 Young Lawyer Award! The Young Lawyer Award recognizes a young lawyer (up to ten years past their first bar admission date) who has shown not only excellence in her work and achievements in her career to date, but also a commitment to professional and ethical standards, as well as a commitment to the larger community.

Katherine is an attorney at Baker Sterchi Cowden & Rice LLC in Madison. She graduated from the University of Wisconsin Law School in 2023. She focuses her practice on insurance defense litigation with an emphasis on personal injury, products liability, and medical malpractice.

Katherine has been extremely involved with WDC. She is the Vice Chair for the WDC's Law School Committee. She is also a member of the WDC's Young Lawyer Committee and the WDC's Diversity, Equity & Inclusion Committee. Katherine authored an article entitled "Privacy Please: The Case Against Recorded Medical and Vocational Examinations," which appeared in the 2026 Spring Issue of the Wisconsin Civil Trial Journal.

Despite having now been in practice for only three years, Katherine has proven herself capable of handling the responsibility that goes along with being intimately involved in all phases of a case. For example, her care and attention to detail with her work preparing and examining expert witnesses has resulted in highly favorable outcomes for her clients. In one case, where the claimed damages exceeded \$50,000,000, Katherine's work with the defense experts, and her examination of a pathology expert at trial, were crucial to establishing one of the client's defenses, resulting in a favorable verdict after three weeks of trial.

In addition to her strong work on behalf of her clients, Katherine has taken the time to provide help to those

who are joining or have recently joined the practice of law. At Baker Sterchi Cowden & Rice LLC, she designed the firm's law clerk program, ensuring that the firm's clerks get the most out of their clerkship. She is also a reliable resource for the firm's newest attorneys as well, helping them, for instance, with the onboarding process. She is a true professional leader.

Nominated By: *Brian Anderson, The Everson Law Firm, and Mark Budzinski, Baker Sterchi Cowden & Rice LLC*



2026 Distinguished Professional Service Award Recipient: Grace Kulkoski

Congratulations to Grace Kulkoski for being selected by the WDC Board of Directors as the recipient of the 2026 Distinguished Professional Service Award! The Distinguished Professional Service Award recognizes a longtime member who has made consistent efforts to grow and improve WDC.

Grace serves as in-house legal counsel to Wisconsin Mutual, where she oversees litigation, advises on claims, and performs other legal duties for the company. Before joining the Wisconsin Mutual team, Grace spent the first part of her career in private practice as a litigation attorney. Grace is an active member of various organizations supporting the insurance defense industry. She currently serves as the President of the Wisconsin Defense Counsel, and is active in DRI, where she serves as a Vice-Chair of the Corporate Counsel Committee. She also serves in the litigation section of the Wisconsin State Bar.

Grace has been a longtime member of WDC, first in her role as a trusted litigator in private practice, and currently as legal counsel for one of our member insurers. As current President of WDC, Grace has demonstrated exceptional dedication to advancing the organization's mission and strengthening member engagement. She has been instrumental in developing and implementing an in-house counsel mentorship program and creating meaningful opportunities for professional development and connection across the

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defense community. In addition to her leadership as President of WDC, Grace actively serves on multiple WDC committees—the In-House Counsel Committee and the Wellness Committee—contributing her time, insight, and collaborative approach to numerous initiatives. She has been instrumental in bringing fresh ideas to help us to continue to grow and become more robust. Grace’s leadership, vision, and consistent service exemplify the high standards of professionalism and engagement that this award seeks to recognize.

Nominated By: *Megan McKenzie, American Family Insurance, Heather Nelson, The Everson Law Firm, and Nicole Marklein, West & Dunn, LLC*



**2026 Publication
Award Recipient:
Katherine Cortesy**

Congratulations to Katherine Cortesy for being selected by the WDC Journal Editor and Board of Directors as the recipient of the 2026 Publication Award!

The Publication Award recognizes a well-written, cutting-edge article written for the Wisconsin Civil Trial Journal. Katherine is receiving the award for her article entitled, “Privacy Please: The Case Against Recorded Medical and Vocational Examinations,” which appeared in the 2026 Spring Issue of the Journal. The article provides the law on the topic of recorded medical and vocational examinations, lays out the potential problems that may be caused by recording medical and vocational examinations, discusses the trends in the circuit courts with regard to how they are ruling on the issue, and sets forth strategies on how defense attorneys may push back on the recording of medical and vocational examinations when a recording is requested by plaintiff’s counsel.

Katherine is an attorney at Baker Sterchi Cowden & Rice LLC in Madison. She graduated from the University of Wisconsin Law School in 2023. She focuses her practice on insurance defense litigation with an emphasis on personal injury, products liability, and medical malpractice. Katherine has been extremely involved with WDC. She is the Vice Chair for the WDC’s Law School Committee. She is also a member of the WDC’s Young Lawyer Committee and the WDC’s Diversity, Equity & Inclusion Committee.



**2026 Friend of WDC
Award Recipient:
Taylor Naumann**

Congratulations to Taylor Naumann for being selected by the WDC Board of Directors as the recipient of the 2026 Friend of WDC Award! The

Friend of WDC Award honors an individual who has demonstrated exceptional support for WDC’s mission and the Defense Bar. This award recognizes those who may not be members of WDC, but who have made meaningful contributions through service that strengthens the organization and its members.

Taylor is a legal assistant at Hills Legal Group, Ltd. She has been an indispensable resource to WDC, helping it with its outreach efforts. Specifically, Taylor devoted a tremendous amount of time and effort to creating a comprehensive list of defense firms and attorneys throughout Wisconsin, providing the WDC Membership Committee with an invaluable tool for reaching prospective members. WDC is grateful to Taylor for giving her time and effort to grow the organization and its membership.



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The *Kyllonen* Gap: Why Wisconsin's Expert Witness Disqualification Statute Should Reach Contingency-Fee Public Adjusters and Contractors

by: Jacob A. Sosnay, Meissner Tierney Fisher & Nichols S.C.

I. Introduction

Picture the following. A public adjuster takes the stand in a first-party property insurance dispute. He testifies that the insured's roof was destroyed by hail and that the carrier owes the cost of a complete replacement. He is, he explains, testifying for free, not being compensated a dime for his time in court.

At his deposition, however, the public adjuster confirmed that his firm has a contract with the insured entitling it to 20 percent of whatever the insured recovers on the claim. But, the public adjuster explained, the contract with the insured is silent regarding the substance of the testimony he will provide during the trial. If the matter goes to trial and the jury returns a verdict in the insured's favor, the public adjuster pockets a substantial sum. If the carrier prevails, the public adjuster gets nothing.

This witness has a financial stake in the outcome, yet he stands before the jury as an objective expert. Isn't that exactly the problem Wis. Stat. § 907.02(2) was enacted to solve, since it bars expert testimony where the witness's compensation is contingent on a specific outcome of the case? Or does his contract's silence about trial testimony insulate him from the statute's reach?

After the Wisconsin Court of Appeals' decision of first impression in *Kyllonen v. Artisan & Truckers Casualty Co.*,¹ circuit courts are reaching inconsistent answers to that question. This article argues that the correct answer is straightforward: The plain text of Wis. Stat. § 907.02(2) and *Kyllonen* both compel

the exclusion of contingency-fee public adjusters and contractors who testify as expert witnesses in insurance coverage litigation. This is because the structural reality of their arrangements is the opposite of what the *Kyllonen* court found tolerable. Any other reading renders the statute a nullity.

II. The Statute

Wisconsin Stat. § 907.02(2), enacted in 2011 as part of Wisconsin's tort reform legislation,² provides:

Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if 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.

As the text of the statute indicates by the words "may not be admitted," the statute is mandatory, not discretionary.³ When its conditions are satisfied, exclusion is required as a matter of law. And the legislature's use of the word "any" before "compensation" signals a broad reach.⁴ The disqualification is not limited to formal expert retention agreements or to compensation explicitly labeled as payment for trial testimony.

The purpose of the statute is equally clear. Expert witnesses who carry a financial stake in the outcome of a case present a category of bias so fundamental that cross-examination—the normal tool for addressing witness partiality—is insufficient to cure



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it. The legislature understandably determined that the jury should not be exposed to such testimony at all.

For nearly 15 years after enactment, no Wisconsin appellate court interpreted the statute. Courts and practitioners were largely left to work out its application on their own, and, as one might expect, the results were uneven. That should have changed in December 2025, when the court of appeals issued its decision in *Kyllonen*,⁵ addressing the meaning and application of the statute. Unfortunately, as will be discussed below, *Kyllonen* has not prevented uneven application in the circuit courts.

III. *Kyllonen*: What It Held, and Why

Andrew Kyllonen was injured in an automobile-pedestrian accident.⁶ His counsel referred him to Aspen Orthopedics for treatment.⁷ Prior to his first appointment, Kyllonen's counsel sent Aspen a "letter of protection," which stated:

We represent Andrew Kyllonen in regards to injuries he sustained in an accident of October 10, 2017. It is our understanding he is receiving treatment from your office relating to that accident. *We agree to protect any outstanding liens you may have for medical bills relating to this motor vehicle accident from any recovery obtained on Mr. Kyllonen's behalf.* Your cooperation is greatly appreciated.⁸

Kyllonen had no health insurance at the time.⁹ As such, the letter functioned as a payment guarantee pending the outcome of his lawsuit.

When Kyllonen sought to call his treating physicians as expert witnesses at trial, the defense moved to exclude them under Wis. Stat. § 907.02(2).¹⁰ The circuit court granted the motion, reasoning that the statute's reference to "any compensation" was broad enough to encompass the outstanding medical bills whose collection was secured by the letter of protection.¹¹ Because the treating physicians would

practically benefit from a favorable verdict—that is, the verdict would improve Kyllonen's ability to satisfy the lien—the court concluded their compensation was "contingent on the outcome."¹²

The court of appeals reversed. Writing for a unanimous panel, Judge Grogan adopted what the court described as the "only reasonable interpretation of the statute."¹³ According to the court, Wis. Stat. § 907.02(2) precludes an expert witness from testifying where the witness's compensation is: "(1) specifically tied to providing *testimony*; and (2) dependent on the party proponent's ultimate success in the matter."¹⁴ More precisely, the statute bars testimony if the witness "will only be paid for his testimony if the party proponent obtains a positive (or otherwise favorable) outcome in the lawsuit."¹⁵

The *Kyllonen* court grounded this narrowing construction in the statute's own qualifying language—namely, that the "compensation" must be "contingent on the outcome of any claim or case with respect to which the testimony is being offered."¹⁶ Reading "any compensation" in isolation, the court explained, would sweep in the compensation of any service provider with outstanding bills.¹⁷ Every treating physician, every contractor, every engineer who has done pre-litigation work and has not yet been fully paid would be covered. According to the court, the legislature could not have intended a result that would exclude the testimony of virtually every service provider who has dealt with a party before a suit was filed.¹⁸

Critically, the *Kyllonen* court identified the specific feature that distinguished the treating physicians from the problem the statute targets. The obligation to pay the doctors' bills existed independent of the litigation. The physicians provided treatment; their bills accrued; Kyllonen was obligated to pay those bills regardless of what the jury decided.¹⁹ A verdict in the insurer's favor would not have erased the physicians' right to collect.²⁰ The letter of protection did not extinguish Kyllonen's liability if the case was unsuccessful.²¹ It merely promised to protect the lien from any recovery that materialized. Moreover, the letter of protection did not state that Aspen and/or the physicians would be paid only if

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Kyllonen succeeded at trial, but rather that counsel would “protect any outstanding liens . . . for medical bills relating to this motor vehicle accident from any recovery obtained on Mr. Kyllonen’s behalf.”²² As the court put it, “the fact that Kyllonen’s success at trial may ultimately have impacted his ability to pay his outstanding medical bills did not transform his financial obligations into contingency payments or contingent compensation within the meaning of Wis. Stat. § 907.02(2).”²³

In short, the treating physicians could truthfully say, “We would be owed these amounts even if the plaintiff lost.” And it is that sentence, and its structural implications, that is everything.

IV. The Public Adjuster and Contractor Problem

The contingency-fee public adjuster occupies a fundamentally different structural position from a treating physician with outstanding medical bills. So does the contingency-fee roofing contractor who signs an insured before inspecting the roof.

Consider the typical public adjuster arrangement. The public adjuster signs a contract entitling its firm to a percentage, commonly 10 to 20 percent, of whatever the insured recovers on the insurance claim. The contract specifies that the fee is due and payable upon the insurance company making any full or partial resolution or payment. If the carrier pays nothing, the firm receives nothing. Not a discounted fee. Not deferred compensation for services already rendered. Nothing.

The typical contractor contingency agreement is structured the same way. The insured authorizes the contractor to contact the insurance company on the insured’s behalf. The contractor’s payment is defined as the insurance proceeds: When the price from the insurance company is determined, that becomes the final contract price. No insurance proceeds, no payment.

Unlike the physicians in *Kyllonen*, neither the public adjuster nor the contractor can earnestly

say, “We would be owed these amounts even if the plaintiff lost.” The opposite is true. If the carrier prevails, they are owed precisely zero. The payment obligation does not pre-exist the litigation outcome. It is created by the litigation outcome. The entire economic relationship is structured as a bet on the verdict being in favor of the plaintiff.

An illustration drawn from cases now appearing in Wisconsin’s circuit courts is instructive. In a recent first-party property insurance dispute, the plaintiff named two expert witnesses to support a hail damage claim. The first was a public adjuster whose contract entitled his firm to 20 percent of the total amount of any claim recovery. The second was a roofing contractor whose contract provided that the insurance proceeds would become the final contract price, with no payment obligation from the insured absent carrier approval and funding. Both witnesses confirmed in their depositions that their compensation was entirely contingent on a favorable outcome for the plaintiff. The defense moved to exclude both witnesses under Wis. Stat. § 907.02(2).

The contrast with *Kyllonen* could not be sharper. The *Kyllonen* physicians were paid for medical treatment already provided. The public adjuster and contractor in the scenario just described were not to be paid for any pre-existing obligations. They were to be paid, if at all, from the proceeds of the lawsuit itself.

V. Applying the *Kyllonen* Test Correctly

a. Part One: Specifically Tied to Providing Testimony

The *Kyllonen* court required that the contingency compensation be “specifically tied to providing testimony.”²⁴ Courts that have declined to exclude public adjusters and contractors under this prong have typically reasoned that the public adjuster’s contract covers pre-litigation claim preparation, not trial testimony, and that the contract may even disclaim any obligation to participate in legal proceedings.



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This reasoning mistakes the label for the substance. The question the statute asks is not what the contract calls the service. It is whether the compensation flows from the testimonial function the witness performs. When a public adjuster takes the stand to offer expert opinion that the carrier underpaid a claim, he is performing exactly the function his contract contemplates: presenting the claim for loss, damage, and recovery in a manner designed to maximize the insured's payout. His testimony is the instrument of claim presentation in the litigation phase. The contract may disclaim "legal proceedings" while simultaneously defining the adjuster's job as maximizing claim recovery, but when the claim is in litigation, the two are inseparable.

The *Kyllonen* court itself clarified in a footnote that the statute cannot be read "so narrowly as to render payment for an expert witness's testimony sufficient to preclude that witness from testifying at all."²⁵ Rather, the statute is concerned with payment for testimony that is tied to obtaining a specific outcome.²⁶ The concern is not the fact of payment; it is the contingency. For the public adjuster, the contingency is direct and absolute. He is not paid for appearing. He is not paid for the hours of claim preparation he conducted. He is paid, if at all, from the recovery his testimony may help produce.

A contract disclaimer, like the one for "legal proceedings," is precisely the kind of formalism the statute is designed to reach with its broad language. As one court observed in an analogous context, the legislature did not condition the statute's reach on contract labels. It conditioned it on economic reality.²⁷

b. Part Two: Dependent on the "Party Proponent's Ultimate Success"

This prong presents no analytical difficulty with regard to the cases with the public adjuster or contingency-fee contractor discussed previously. Their compensation is not merely correlated with a favorable outcome. It is mathematically defined by that outcome. A 20-percent contingency fee

on a zero-dollar recovery is zero. The prong that the *Kyllonen* court found unsatisfied for treating physicians—compensation dependent on the plaintiff's ultimate success—is satisfied for both the public adjuster and the contingency-fee contractor.

As the *Kyllonen* court explained, the treating physicians' billing obligations pre-existed the litigation and would be owed regardless of the verdict.²⁸ The public adjuster's compensation rests on no such pre-existing obligation. It is contingent on the insurer writing a check. The public adjuster cannot say he has already provided the services that generate his payment. The service his contract defines is maximizing the recovery, and that service is incomplete until the check arrives.

VI. Statutory Construction: The Canons Cut Both Ways

As previously discussed, the *Kyllonen* court adopted its narrow construction in part to avoid an absurd result. According to the court, reading "any compensation" so broadly that all treating physicians with outstanding bills would be categorically disqualified from testifying about their own patients would be so absurd that it would be unreasonable to believe the legislature wrote such a statute.²⁹ I agree. That result would be unreasonable, and the court was correct to reject it.

But the canons do not inexorably lead to a narrower and narrower reading and application of the statute. They cut both ways under different circumstances. Importantly, Wisconsin courts should construe statutes in a manner that gives them operative effect and avoids rendering any portion redundant or meaningless.³⁰ An interpretation of *Kyllonen* that would immunize contingency-fee public adjusters from Wis. Stat. § 907.02(2) produces exactly that result, rendering the statute effectively meaningless in the real world.

Just consider what such an interpretation would entail. The only expert witnesses the statute would disqualify are those whose contracts expressly state: "I will testify in exchange for a percentage

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of the outcome.” That agreement does not exist in the real world. No sophisticated public adjuster, and certainly no plaintiff’s lawyer structuring the engagement, would ever draft it. The statutory disqualification becomes unreachable simply by omitting those words from a contract that already delivers exactly the contingency the words would describe.

If the legislature’s concern was testimonial bias arising from a financial stake in the outcome (and the statute’s text, structure, and evident purpose all confirm that it was), then a construction that allows anyone with a percentage-of-recovery arrangement to testify simply by disclaiming “legal proceedings” in the contract accomplishes nothing. The bias is not diminished by such a disclaimer. The public adjuster’s 20-percent stake in the verdict is equally real and equally corrupting whether his contract explicitly ties his work to testimony or not.

VII. The Broader Policy Problem: A System Designed to Coerce

To take a step back for a moment, the contingency-fee expert problem in first-party insurance litigation does not exist in isolation. It is part of a structural asymmetry that Wisconsin courts have repeatedly recognized and worked to address.

Take, for example, *Anderson v. Continental Insurance Co.*³¹ In that case, the Wisconsin Supreme Court created the first-party bad faith tort, anchored to a fairly debatable standard that requires both an objective coverage question and a subjective finding of unreasonable denial. The doctrine was calibrated to distinguish legitimate coverage disputes from genuinely unreasonable claim handling, not to expose carriers to tort liability whenever a coverage question was close.

In *Dahmen v. American Family Mutual Insurance Co.*³² and *Brethorst v. Allstate Property & Casualty Insurance Co.*,³³ the courts recognized that allowing bad faith discovery and litigation to proceed simultaneously with the contract claim created a structural problem. The threat of extra-contractual

exposure and wide-ranging institutional discovery functioned as a weapon to coerce settlement of coverage disputes that might otherwise be legitimately defensible. To address this issue, *Dahmen* established that a bifurcation and stay of bad faith claims is not merely permissible but presumptively appropriate.³⁴ And *Brethorst* closed the bad-faith-only pleading gambit by requiring breach of contract as a prerequisite to a bad faith claim, ensuring that plaintiffs could not gain access to bad faith discovery without first establishing the predicate coverage obligation.³⁵

The contingency-fee expert arrangement represents the witness-side version of the same structural problem. The public adjuster on a 20-percent contingency, the contractor whose entire payment comes from insurance proceeds, and the plaintiff’s counsel on a contingency fee are all arrayed on one side of the courtroom. Their collective financial stake in the outcome is massive, and their collective cost to the plaintiff is zero. On the other side, the carrier pays its own counsel, pays its retained engineer, pays the cost of deposing every financially interested witness on the plaintiff’s side, and absorbs the costs of the expert testimony it needs to challenge the plaintiff’s case.

The practical effect is an army of financially invested witnesses at zero marginal cost to the plaintiff presented to the jury as objective experts, while the defense absorbs all of the expense of challenging them. The legislature enacted Wis. Stat. § 907.02(2) precisely to address one piece of that asymmetry—the critical piece of the asymmetry where financially invested witnesses testify as though their stake in the outcome does not exist.

A misapplication of *Kyllonen* that immunizes the public adjuster and contractor from Wis. Stat. § 907.02(2) undoes what the legislature accomplished. Worse, courts sometimes engage in such misapplications entirely on the basis of drafting choices on the part of the plaintiff, public adjuster, or contractor that are themselves directly motivated by the desire to avoid the statute.



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VIII. The Path Forward

Kyllonen was a case of first impression from the court of appeals. It has not been reviewed or applied by the Wisconsin Supreme Court. The proper application of its two-part test to public adjusters and contingency-fee contractors, as distinguished from treating physicians with pre-existing billing relationships, remains an unsettled and practically significant question in Wisconsin insurance litigation.

That unsettled state of affairs calls for clarification, and two paths are available.

The first is judicial. A case presenting the public adjuster or contractor contingency arrangement, developed under *Kyllonen*'s framework with a preserved appellate record, is an appropriate vehicle for the Wisconsin Supreme Court to address whether *Kyllonen*'s narrow construction reaches the core cases that the statute was designed to address. The structural distinction between a physician with pre-existing billing obligations and a public adjuster whose entire compensation depends on the verdict is clear, and the Wisconsin Supreme Court is well positioned to draw it.

The second is legislative. The legislature could amend Wis. Stat. § 907.02(2) to specify that the statute reaches any arrangement under which an expert witness's compensation is defined as a percentage of, or is otherwise exclusively derived from, the proceeds of the claim or case about which the witness testifies, without regard to whether the witness's contract expressly conditions compensation on testimony. Such an amendment would eliminate the labeling game discussed in this article and restore the statute to its evident purpose without requiring courts to navigate the interpretive space *Kyllonen* created.

Either path is preferable to the status quo. Currently, in some cases, a financially invested witness testifies as an objective expert, disclaims compensation for his appearance, and then confirms on cross-examination that he goes home with nothing if the

carrier wins—a fact he has understood from the moment he signed his contract. This state of affairs is out of step with the spirit of Wis. Stat. § 907.02(2) and incompatible with a sensible system of justice.

IX. Conclusion

Kyllonen drew an important, and correct, line: Treating physicians with pre-existing billing obligations are not disqualified expert witnesses simply because a plaintiff's litigation outcome might improve their practical ability to collect. That holding protects a legitimate category of witnesses whose financial interest is incidental, pre-existing, and independent of the verdict.

But the public adjuster on a percentage-of-recovery contract and the contractor paid from insurance proceeds sit on the opposite side of that line. Their compensation does not pre-exist the claim. It does not exist absent a favorable outcome. It is defined, to the dollar, by the size of the verdict or settlement. They cannot say what the *Kyllonen* court said the treating physicians could say: that they would be owed certain sums even if the plaintiff lost.

Wisconsin Stat. § 907.02(2), properly read, requires their exclusion. The bias the legislature targeted—the financially invested expert testifying about the very claim that will determine whether he gets paid or not—is nowhere more present than in cases where a public adjuster or contractor, who has bet his fee on the outcome of the case he is testifying to win, presents himself to the jury as an unbiased witness.

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A Swan Song for *Kalal*: The Wisconsin Supreme Court Granted Review in a Case That Squarely Asks the Court to Overrule Wisconsin’s Seminal Case on Statutory Interpretation

by: Caleb R. Gerbitz, Meissner Tierney Fisher & Nichols S.C.

“Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history.”¹ On May 25, 2004, one month before her elevation to the Seventh Circuit, then-Justice Diane Sykes wrote these words in the Wisconsin Supreme Court’s majority opinion in *State ex rel. Kalal v. Circuit Court for Dane County*.² *Kalal*’s embrace of textualism as Wisconsin’s preferred method of statutory interpretation promptly made it a seminal case.

On the short list of Wisconsin Supreme Court decisions that every Wisconsin attorney knows, and can likely quote passages from by memory, *Kalal* is surely at the top of that list. It was “a watershed decision” when it was issued, and it has since become “the most cited case of modern times.”³ In the 22 years since *Kalal* was decided, the Wisconsin Supreme Court has cited *Kalal* in 422 cases; the Wisconsin Court of Appeals has cited it in 1,117 cases; and appellate advocates have referenced it in no fewer than 3,453 appellate briefs.⁴ And these numbers likely undersell *Kalal*’s impact since a number of decisions and briefs, instead of citing *Kalal*, cite opinions that follow the methodology set forth in *Kalal*.

Even so, *Kalal* will be overruled—or at least greatly diminished—next term.

In June, the Wisconsin Supreme Court granted petitions for review filed by the Department of Workforce Development (“DWD”) and the Labor & Industry Review Commission (“LIRC”) in *Abby Windows, LLC v. LIRC*.⁵ The issues presented

leave little doubt that the court took the case to revisit *Kalal*. In LIRC’s petition for review, it argued, “This Court should grant this petition and reexamine the *Kalal* framework for statutory interpretation.”⁶ Meanwhile, DWD’s petition urged the court “to reconsider, overturn, or modify the dictionary-first approach that courts engage in when attempting to follow *Kalal*, in favor of an investigative, comprehensive approach that gives due consideration to relevant extrinsic sources to interpret a statute’s meaning, conscious of those sources’ limitations.”⁷ In granting both petitions for review, the court signaled its intention to take up the request and revisit *Kalal*. Although the petitions were granted in a pair of unsigned orders, Justice Rebecca Grassl Bradley, whose term will conclude before the case is heard, registered solo dissents from both orders.⁸

In truth, this development is none too surprising. Last term, in *Service Employees International Union Healthcare Wisconsin v. WERC* (“*SEIU*”),⁹ Justice Dallet authored a concurring opinion—joined by a majority of the court—expressing her openness to revisiting *Kalal*.¹⁰ She “criticized *Kalal* and some of the cases applying it for adopting an overly rigid and formalistic, rather than holistic, method of statutory interpretation.”¹¹ Justice Dallet offered the following as an alternative to *Kalal*’s approach:

Rather than treat *Kalal* like an ironclad rulebook of statutory interpretation, I would dispense with its fictions and formalistic labels. Instead, we should embrace



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the “more comprehensive” and “holistic” approach to statutory interpretation that I have advocated for before. Under that approach, we should of course start with the text of the statute but also be upfront and honest about considering relevant extrinsic sources to interpret a statute’s meaning, conscious of course of those sources’ limitations. Doing that would allow us to focus less on labeling statutes ambiguous or unambiguous or arguing about where a particular source fits in *Kalal*’s one-size-fits-all hierarchy and more on our real task, interpreting statutes.¹²

Justice Dallet’s concurrence in *SEIU* was not a bolt out of the blue. As the prior quote indicates, Justice Dallet, joined by Justice Ann Walsh Bradley and then-Justice Karofsky, penned a number of separate writings in the past opposing *Kalal*’s framework. In *Clean Wisconsin, Inc. v. DNR*,¹³ for example, she argued that judges sometimes “label a statute ‘ambiguous’” in a pretextual manner so that they can consult relevant legislative history, which *Kalal* would otherwise mark as off-limits.¹⁴ In *James v. Heinrich*,¹⁵ Justice Dallet took aim at the court’s reliance on the canons of construction—a tool often favored by textualist judges over legislative history—which she argued are judge-made rules of thumb that are “notoriously malleable” and “just as subjective as any other” tool of interpretation.¹⁶ In a similar vein, in *Friends of Black River Forest v. Kohler Co.*,¹⁷ then-Justice Karofsky argued that textualism often acts as a “smokescreen,” masking policy-laden judgments: “Empirics and experience tell us that a textualist approach is as susceptible to a result-driven analysis as any of its alternatives. That is because textualism invites the very judicial discretion it claims to oust; it simply shifts that discretion to between the lines.”¹⁸ Accordingly, Justice Dallet’s concurrence in *SEIU* is significant, not because it critiqued *Kalal*, but because its criticism of the *Kalal* framework was joined by a majority of the court—signaling that *Kalal* is not long for this world.

Although four justices joined Justice Dallet’s concurrence in *SEIU*, the opinion went out of its way to make clear that “no party asked” it to revisit *Kalal*, and, therefore, the court in *SEIU* did “not overrule *Kalal*.”¹⁹ Now, with the issue squarely presented in *Abby Windows*, the court appears primed to take that step.

I offer two caveats for your consideration.

First, there has been some turnover on the court since *SEIU*. One of the four justices who joined Justice Dallet’s concurrence in *SEIU*, Justice Ann Walsh Bradley, retired. The prevailing wisdom is that the justice who replaced her, Justice Crawford, shares her predecessor’s enthusiasm for revisiting *Kalal*. Presumably, Justice-elect Taylor, who will replace the more conservative Justice Rebecca Grassl Bradley, will also be willing to revisit *Kalal*’s textualist framework. Even so, the presence of two new justices in the presumptive majority could have some meaningful impact on what the new statutory interpretation framework winds up looking like. I suspect the framework the court announces in *Abby Windows* will look a lot like Justice Dallet’s concurrence in *SEIU*, but I also would not be surprised if there is some tweaking to incorporate the particular views of Justice Crawford and Justice-elect Taylor.

Second, I also would not be surprised if the court, while overruling *Kalal*, declines to formally adopt a particular binding framework for statutory interpretation. A few terms ago, in *Wisconsin Justice Initiative, Inc. v. WEC*,²⁰ Justice Hagedorn authored a majority opinion that endorsed an originalist methodology to interpret the Wisconsin Constitution—much like *Kalal* had endorsed a version of textualism for statutory interpretation decades earlier.²¹ In a concurring opinion, Justice Dallet argued that “an earlier court’s choice of an interpretive methodology like originalism does not bind later courts to use that same methodology.”²² She elaborated:

In closing I note that even if the majority were correct that originalism is our consensus



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approach to interpreting the Wisconsin Constitution, that approach would nevertheless not be binding in future cases. That is because reliance on a particular method of interpretation in one case doesn't bind future courts to use that same method in all future cases.

We have never said that our methodological choices bind us in future cases even though we have occasionally assumed so in other contexts. For example, *State ex rel. Kalal v. Circuit Court for Dane County* and subsequent cases applying it appear to assume that its statutory-interpretation framework is binding. But there are good reasons to doubt that assumption. After all, the United States Supreme Court doesn't treat prior methodological choices as binding in either statutory or constitutional cases.

...

We should not pretend that these disagreements are settled merely because four members of the court have, in a few cases, applied a particular method of constitutional interpretation.²³

Along the same lines, in Justice Dallet's *SEIU* concurrence, while noting that the concurrence did not overrule *Kalal*, she added that it also did not "purport to bind our court or any other to use any particular methodology when interpreting statutes in the future."²⁴

For those wondering about the actual dispute in *Abby Windows*, it is an unemployment insurance ("UI") dispute. Abby Windows, a home-remodeling company in Waukesha, employed Daniel Tarpey as a door-to-door salesman, selling doors, windows, roofs, gutters, and siding to homeowners.²⁵

After Abby Windows terminated Mr. Tarpey's employment, Mr. Tarpey sought UI benefits.²⁶ In the litigation that followed, Abby Windows argued that Mr. Tarpey was not entitled to UI benefits because Wis. Stat. § 108.02(15)(k)16. creates an exclusion for employees who sell "consumer products" door-to-door on a commission basis.²⁷ Thus, the issue before the court is whether the products Mr. Tarpey sold—doors, windows, roofs, gutters, and siding—qualify as "consumer products."

In many respects, *Abby Windows* is a perfect vehicle for a court interested in revisiting *Kalal*. Available dictionary definitions support an expansive understanding of "consumer products." For example, the circuit court referenced a legal dictionary that defines "consumer product" as an "item of personal property that is distributed in commerce and is normally used for personal, family, or household purposes."²⁸ Similarly, the court of appeals referenced several non-legal dictionaries to conclude that "consumer products" refers to "physical or tangible items or objects an individual purchases for that individual's personal use in some manner."²⁹ Under either of these dictionary definitions, home-improvement goods purchased for installation on a family home fall comfortably within the meaning of "consumer products."

However, based on the briefing, I gather that the available legislative history may lend itself to a more confined interpretation of "consumer products." Specifically, LIRC and DWD point to a letter authored by a sponsor of the bill that became Wis. Stat. § 108.02(15)(k)16., remarking that the bill was important to those who sell products for well-known "producers such as Avon Products Inc., Amway, Mary Kay Inc., and Pampered Chef."³⁰ This legislative history arguably suggests that the definition of "consumer products" is limited to highly portable goods like hygiene products and kitchenware—not home-improvement goods like windows and siding.

Depending on how persuasive one finds the legislative history, interpretive methodology may well be determinative in *Abby Windows*. The



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dictionary definitions alone support the conclusion that the text is unambiguous, which, under *Kalal*, would preclude reference to legislative history. But when legislative history is consulted, the interpretation might become a closer call.

Watch for *Abby Windows* to be scheduled for oral argument somewhere between November and January, with a decision likely to follow in June or early July of 2027.

Kalal's swan song has begun.

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Caleb Gerbitz is an appellate and civil litigation attorney at Meissner Tierney Fisher & Nichols S.C. Since joining Meissner Tierney in 2022, Caleb has served as appellate counsel on more than two dozen appeals in the Wisconsin Court of Appeals, the Wisconsin Supreme Court, and the Seventh Circuit Court of Appeals. He has also authored more than a dozen amicus briefs filed in Wisconsin's appellate courts and the United States Supreme Court on behalf of organizations including the Wisconsin Defense Counsel, the Cato Institute, and the Institute for Reforming Government.

In addition to his practice, Caleb is the Wisconsin State Chair of the American Bar Association's Council of Appellate Lawyers and co-chair of the Milwaukee Bar Association's Civil Litigation Section. He serves on the Wisconsin Judicial Council's Appellate Procedure Committee and authors a Substack column, titled Appellate Approach, which features regular updates on cases in Wisconsin's appellate courts. Before entering private practice, Caleb clerked for Justice Brian Hagedorn of the Wisconsin Supreme Court.

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Questions Answered, More Questions Raised: An Analysis of the Wisconsin Supreme Court's Decision in *Estate of Lorbiecki v. Pabst Brewing Co.*

by: Matthew P. Martin, Meissner Tierney Fisher & Nichols S.C.

I. Introduction

Earlier this year, the Wisconsin Supreme Court issued its decision in *Estate of Lorbiecki v. Pabst Brewing Co.*¹ The case involves a number of important issues, such as the scope and application of Wisconsin's safe-place statute and how the statutory cap on punitive damages found in Wis. Stat. § 895.043(6) should be calculated. But the opinion also raises a host of important issues—like the scope of appellate review of denials of summary judgment—that the court failed to resolve, leaving those questions for another day. This article discusses the court's decision in *Lorbiecki* and outlines how the law may develop in light of the questions raised in the opinion.

II. The *Lorbiecki* Decision

a. Background

From the 1970s through the 2000s, Gerald Lorbiecki was a steamfitter who was hired by independent contractors and businesses to install or repair pipes located at business facilities.² One of the facilities Lorbiecki worked at was the Pabst Brewing Company's brewery.³ In the 1970s, Lorbiecki worked to repair piping at the Pabst brewery while under the employ of an independent contractor.⁴

At the facility, Lorbiecki, along with other steamfitters, cut out the existing insulated pipes and replaced them.⁵ The insulation around the pipes contained asbestos, which would become airborne when the insulation was removed.⁶ One expert at trial indicated that thousands of pounds of insulation

would have been removed.⁷ Evidence in the record indicated that Pabst knew that the pipe insulation contained asbestos and that airborne asbestos causes serious illness years before Lorbiecki began his work at the Pabst brewery.⁸ It appears that Pabst provided no documentation of asbestos abatement efforts that occurred prior to the early 1990s.⁹

After Lorbiecki was diagnosed with mesothelioma, he brought a lawsuit against Pabst, as well as a number of other businesses and independent contractors that he had worked for over the years.¹⁰ Over the course of the case, all of the claims against the defendants, except for those against Pabst, were dismissed.¹¹ As to Pabst, Lorbiecki alleged liability for common-law negligence and liability for negligence under Wisconsin's safe-place statute, Wis. Stat. § 101.11.¹² Lorbiecki contended that Pabst was negligent in failing to prevent him from being exposed to asbestos. (Lorbiecki passed away prior to trial, but for simplicity's sake, the plaintiff will continue to be referred to as Lorbiecki.)¹³

Pabst moved for summary judgment, which the circuit court granted in part and denied in part. The circuit court granted the summary judgment motion as to Lorbiecki's common-law negligence claim and denied the motion as to Lorbiecki's claim under the safe-place statute.¹⁴ After the trial, Pabst moved for judgment as a matter of law, which was also denied.¹⁵

The jury found in Lorbiecki's favor, awarding him compensatory and punitive damages. The jury concluded that "\$6,545,163.55 would 'fairly and reasonably' compensate for all of Lorbiecki's



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injuries, but [it] found that most of those injuries were caused by the negligence of four other non-party companies: Sprinkmann, Wisconsin Electric Power Company (WEPCO), Butters-Fetting Company, and Grunau Company.”¹⁶ The jury apportioned 22 percent liability to Pabst.¹⁷ The jury also awarded Lorbiecki \$20 million in punitive damages.¹⁸

Pabst moved for judgment notwithstanding the verdict, which the circuit court denied.¹⁹ The circuit court then imputed Sprinkmann’s 20 percent liability to Pabst—a decision that Pabst challenged at the court of appeals but not the Wisconsin Supreme Court.²⁰ After applying the statutory cap on loss-of-society and companionship damages, the circuit court allocated 42 percent of the total amount of compensatory damages to Pabst for a total of \$2,328,968.69.²¹ The circuit court also concluded that punitive damages were capped at two times the total amount of compensatory damages recovered from Pabst, or \$4,657,937.38.²² The circuit court accordingly entered judgment in the amount of \$6,986,906.07.

Pabst appealed, but the court of appeals largely affirmed the decisions of the circuit court.²³ Lorbiecki cross-appealed, arguing that the circuit court erred with regard to the cap on punitive damages. According to Lorbiecki, the punitive damages cap found in Wis. Stat. § 895.043(6) caps punitive damages at two times the compensatory damages awarded across all defendants—not merely those compensatory damages Pabst was responsible for paying—before any statutory caps on compensatory damages are applied.²⁴ The court of appeals largely agreed.

We conclude that within the punitive damages statute, “the amount of any compensatory damages recovered by the plaintiff” is fixed in relation to the plaintiff’s recovery—not to an amount connected to any particular defendant’s liability or the plaintiff’s recovery from any particular defendant. “Recover” is not the same as “receive a payment;”

moreover, the statute here does not address any practicalities of collecting a judgment. A plaintiff’s recovery arises out of the calculation of compensatory damages, even if a plaintiff may never touch a fraction of that amount due to other factors.²⁵

The court of appeals, however, disagreed with Lorbiecki that the compensatory damages are calculated based on the award from the jury prior to any statutory caps on compensatory damages being applied.²⁶ Accordingly, the court of appeals instructed the circuit court to enter punitive damages in the amount of \$11,090,327.10.²⁷

b. Wisconsin Supreme Court Decision

Before the Wisconsin Supreme Court were the circuit court’s denials of Pabst’s motions for summary judgment, judgment as a matter of law, and judgment notwithstanding the verdict. To start, the court clarified that Pabst’s appeal of the denial of summary judgment was reviewable under Wis. Stat. § (Rule) 809.10(4), which “brings before the [appellate] court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent . . . not previously appealed and ruled upon.”²⁸ This was important because, relying on precedent from the Wisconsin Supreme Court that predated the current version of the statute governing appellate review,²⁹ a recent unpublished court of appeals opinion held that denials of summary judgment are not reviewable.³⁰

The court, however, did not address the scope of appellate review of a denial of summary judgment. When a circuit court denies a motion for summary judgment and the case moves to trial, does a reviewing court look beyond the record as it existed at the time of the circuit court’s denial? As the court explained, it “express[ed] no view regarding the appropriate factual record to consider when, after a trial has taken place, an appellate court reviews a pre-trial order denying a motion for summary judgment.”³¹ That is because Pabst’s arguments were “purely legal” and “neither party suggest[ed]



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there [was] any material difference between the factual records at the time of summary judgment and after trial.”³²

With that in mind, the court rejected Pabst’s arguments that it was not liable as a matter of law under the safe-place statute. First, the court rejected that *Tatera v. FMC Corporation*’s general rule that “a principal employer is not liable in tort for injuries sustained by an independent contractor’s employee while he or she is performing the contracted work”³³ applies to the safe-place statute.³⁴ *Tatera*, the court explained, was a common-law negligence case, which has never been applied to the heightened duty of care imposed by the safe-place statute.³⁵

The court also rejected Pabst’s argument under *Potter v. City of Kenosha* (and similar cases)³⁶ that it had no liability under the safe-place statute because it turned over “complete control and custody of a safe place”—that is, the Pabst brewery—to the independent contractor and did not retain the right to supervise or control the independent contractor’s work.³⁷ The court concluded that based on the record before it, a reasonable jury could conclude that Pabst retained control over the place where Lorbiecki worked.³⁸ That was so, the court explained, because Pabst owned the brewery, told the independent contractor it would inspect the work area on a daily basis, and required notification whenever the independent contractor’s employees were going to weld or cut the piping or its insulation.³⁹ This, according to the court, went beyond the “limited right of inspection” in cases like *Potter*.⁴⁰

Next, the court rejected Pabst’s argument under the safe-place statute that a reasonable jury could not find that an unsafe condition existed in the Pabst brewery because undisturbed asbestos is not itself dangerous.⁴¹ The court concluded that it was sufficient that there was evidence in the record that Pabst knew that there were miles of pipes insulated with asbestos, that airborne asbestos is dangerous, and that the steamfitters would need to remove the insulation.⁴² There was, thus, evidence that Pabst “had notice of that unsafe condition,” but did not

make efforts to remediate the issue until the 1990s.⁴³ The court determined this analysis was supported by a number of decisions it considered analogous, such as *Neitzke v. Kraft-Phenix Dairies, Inc.*⁴⁴

The court next addressed the punitive damages award.⁴⁵ Although the court concluded there was sufficient evidence to submit the question of whether to award punitive damages to the jury, the court determined that the court of appeals erred on this issue.⁴⁶ According to the court, Wis. Stat. § 895.043(6), which provides that “[p]unitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or \$200,000, whichever is greater,” does not allow for the counting of compensatory damages attributable to parties that were previously dismissed in the action.⁴⁷

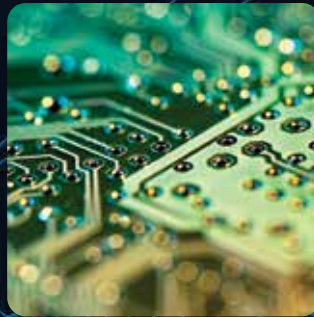
As the court explained, the word “recovered” in the punitive damages statute refers “only to money or property a plaintiff is legally entitled to receive after prevailing in a case, and thus obtaining a judgment.”⁴⁸ “[P]laintiffs cannot recover compensatory damages on the basis of a verdict alone; rather, plaintiffs may recover damages only on the basis of a judgment.”⁴⁹ Since Pabst was the “sole remaining defendant at trial”—“and thus the only party against whom Lorbiecki could legally receive compensatory damages after obtaining a judgment”—the compensatory damages that should have been considered under the punitive damages statute were those attributed or imputed to Pabst.⁵⁰ So the punitive damages against Pabst were capped at \$4,657,937.38.⁵¹

The court hastened to add, however, that its interpretation of the statute “does not import principles of comparative negligence into the calculation of punitive damages.”⁵² “The reason Lorbiecki could not recover any of the other compensatory damages included in the verdict is not because of comparative negligence, but simply because the other alleged tortfeasors were not parties, and thus judgment could not be entered against them.”⁵³

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c. Separate Writings by Justices Dallet and Ziegler

Recognizing its importance to courts and litigants alike, in a concurrence, Justice Dallet, joined by Justice Hagedorn, expanded on the issue of reviewing the denial of summary judgment.⁵⁴ She put the question this way: “When reviewing the denial of summary judgment on appeal, should an appellate court rely only on the pre-trial factual record developed in discovery, only on the evidence admitted at trial, or both?”⁵⁵ Somewhat surprisingly, although she acknowledged that “one might think that an appellate court reviewing the denial of summary judgment should rewind the clock to the moment the summary-judgment motion was decided and evaluate, based on the record that existed then, whether there were genuine issues of material fact and the moving party was entitled to judgment as a matter of law,” she suggested that appellate courts might be limited to the *trial record* in their review of denials of summary judgment.⁵⁶

As Justice Dallet explained, federal courts—which often have a strong influence on Wisconsin jurisprudence⁵⁷—do not “rewind the clock” when reviewing the denial of summary judgment.⁵⁸ In federal court, “[d]enials of summary judgment on factual grounds are ‘unreviewable after final judgment.’”⁵⁹ Because “the facts of the case are developed and clarified as the case progresses from summary judgment to a jury verdict,” “the summary-judgment record is superseded by the trial record,” rendering the pre-trial record “ancient history” that “is not subject to appeal.”⁶⁰ Pure questions of law, however, can be addressed on appeal “even if the party seeking review did not raise them again at trial through a motion for judgment as a matter of law or judgment notwithstanding the verdict” so long as they were raised in a motion for summary judgment.⁶¹ Even when reviewing these pure questions of law, “the pre-trial evidentiary record is irrelevant.”⁶²

Though Justice Dallet suggested that the federal rule might be adopted in Wisconsin, she did not definitively take a stance on the question.⁶³ She

concluded her concurrence by emphasizing the need for guidance in this area of the law, stating

it is important for litigants and courts to have clear guidance on what factual record to consider when the denial of summary judgment is reviewed on appeal. It is not hard to imagine a case in which the evidence at summary judgment will differ markedly from that at trial. Indeed, in such a case, it might be outcome-determinative if an appellate court is supposed to look only at the record as it existed at the time of summary judgment, or only at the trial record, or if fact-bound denials of summary judgment are unreviewable after trial. Accordingly, we should consider clarifying whether we will follow the federal courts’ lead on this question, or to chart our own path.⁶⁴

While Justice Dallet remained somewhat ambiguous regarding her stance on the issue, the dissent—written by Justice Ziegler and joined by Justice Rebecca Grassl Bradley—did not.⁶⁵ As the dissent saw things, “failing to review summary judgments using the record at summary judgment effectively denies review.”⁶⁶ Anything else would make denials of summary judgment “de facto unreviewable.”⁶⁷ The dissent also worried that “it is unclear whether the court’s decision” was “an implicit instruction” to practitioners that they must attempt to seek interlocutory review of denials of summary judgment because no review “will be afforded after trial.”⁶⁸ The dissent further observed that interlocutory review is inadequate recourse for defendants since such review is “unlikely to be granted.”⁶⁹

On the substance of the dispute, the dissent did not believe that, based on the records before or after the trial, the plaintiff had adequately shown Pabst was liable under the safe-place statute.⁷⁰ Arguing at length, the dissent contended that there was no



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evidence that Pabst retained control of the Pabst brewery or that there was an unsafe condition in the Pabst brewery prior to the steamfitters conducting their work (because it was undisputed that the undisturbed asbestos was not hazardous).⁷¹ The dissent argued that “the things the majority [said] constitute ‘control’ actually demonstrate Pabst’s compliance with its own ongoing safe-place duties to its employees and evolving OSHA regulations.”⁷²

III. Addressing the Questions Left Unresolved by the *Lorbiecki* Decision

The Wisconsin Supreme Court’s decision in *Lorbiecki* is significant both for what it decides and what questions it leaves open for another day. While articles can—and should—be written about the court’s interpretation and application of the safe-place statute, this discussion will focus on what the court decided and left for another day with regard to the review of denials of summary judgment on appeal and how the cap for punitive damages found in Wis. Stat. § 895.043(6) should be calculated.

Starting with the review of denials of summary judgment on appeal, it is welcome news that the Wisconsin Supreme Court clarified that denials of summary judgment are reviewable on appeal, rejecting that the court’s decisions in *Wittke v. State ex rel. Smith*⁷³ and *Richie v. Badger State Mutual Casualty Co.*⁷⁴ still apply despite the changes made to Wis. Stat. § (Rule) 809.10(4). As mentioned above, this is an incredibly important determination in light of a recent court of appeals decision that held that a party waived review of a denial of summary judgment because the case proceeded to trial.⁷⁵ Whether to apply the federal rule barring review of denials of summary judgment when the denial is based on factual grounds is an interesting question. But, on balance, it would be an error to import the federal rule into Wisconsin jurisprudence.

As discussed previously, under federal law, “factual issues addressed in summary-judgment denials are unreviewable on appeal,” but “the same is not true of purely legal issues—that is, issues that can be resolved without reference to any disputed facts.”⁷⁶

The different treatment for factual issues and legal issues comes down to the purpose of a trial, which is to find facts “not to hash out the law.”⁷⁷ A trial record supersedes the pre-trial record; the same is not true for pure questions of law.⁷⁸

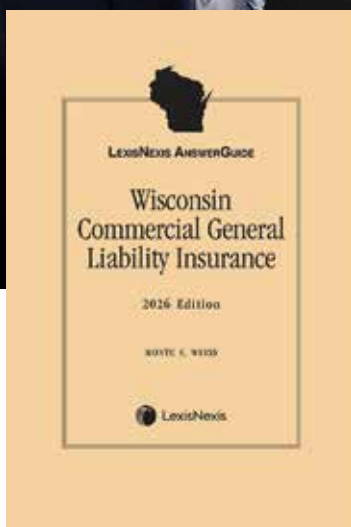
One of the principal reasons that the federal rule should not be brought into Wisconsin law is the difference between the statutes governing appeals at the federal and state levels. Federal law provides that the courts of appeals “shall have jurisdiction of appeals from all final decisions of the district courts.”⁷⁹ As the United States Supreme Court has determined, “orders denying summary judgment do not qualify as ‘final decisions’ subject to appeal.”⁸⁰ They are interlocutory decisions by nature.⁸¹ Pure questions of law addressed in a denial of summary judgment may be reviewed only because “such rulings merge into the final judgment.”⁸²

The Wisconsin statute governing the scope of review on appeal is quite different. It specifically states that an appeal from a final judgment or order brings before the appellate court “all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.”⁸³ It is difficult to reconcile the federal rule, which would make many denials of summary judgment unreviewable, with the statute’s command that all nonfinal orders and rulings are reviewable on appeal. Similarly, as Justice Ziegler observed in her dissent, looking beyond the record as it existed at the time of the denial of summary judgment would effectively deny review of the denial of summary judgment.⁸⁴

The federal rule might be supported by the intuition that it makes little sense to go back and review the record as it existed when summary judgment was denied when a more fulsome record is created during a trial. The whole point of summary judgment is to avoid wasting time and money on an unnecessary trial.⁸⁵ So, if a trial occurs, the value of summary judgment evaporates.



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That is a fair point. But I see two problems with it. First, Wis. Stat. § (Rule) 809.10(4)'s text appears to include all denials of summary judgment, and one would think that if an exclusion were to exist, it would show up in the text of the statute. It is not as if summary judgment is an unusual litigation tool that might have slipped the drafters' minds. Second, the point also ignores the unfairness on the other side of the issue. While going through a trial only for it not to matter may be inefficient and wasteful, it is also fundamentally unfair for a defendant to lose a case that it should have won at summary judgment simply because the circuit court erroneously denied summary judgment on a factual ground.

Given the ubiquity of summary judgment motions and the number of denials of summary judgment on factual grounds, it will be important to obtain clarity on this issue soon. In the meantime, attorneys should proceed with caution. Failure to obtain interlocutory review of a denial of summary judgment based on a factual dispute may waive a party's ability to have that denial reviewed on appeal.

Next there is the court's holding regarding punitive damages. The court was correct to hold that the statutory cap on punitive damages found in Wis. Stat. § 895.043(6) does not allow circuit courts to consider the compensatory damages attributed by the jury verdict to parties not before the court when calculating the cap on punitive damages. Section 895.043(6) provides that "[p]unitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or \$200,000, whichever is greater." If a person or entity is not a defendant before the court, then the plaintiff cannot recover compensatory damages from that person or entity.⁸⁶

But what if in *Lorbiecki* the other defendants had not been dismissed? Under those circumstances, would *Lorbiecki* then have been entitled to the \$11,090,327.10 in punitive damages ordered by the court of appeals? The Wisconsin Supreme Court was not faced with that question in *Lorbiecki*. To my mind, the answer to that question is likely "no."

First, a reading of Wis. Stat. § 895.043(6) that makes the punitive damages cap contingent on whether other defendants are also found to owe the plaintiff compensatory damages does not mesh well with the point of imposing punitive damages. As the name suggests, punitive damages are, well, a punitive measure against a defendant. "Punitive damages are not awarded to compensate the plaintiff for the loss sustained. They are allowed for purposes of public policy to punish the wrongdoer and to deter him and others from future similar wrongdoing."⁸⁷ In short, they "serve the same purposes as criminal penalties."⁸⁸ That is why the trigger for punitive damages—evidence that the defendant acted "maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff"—focuses on the conduct and state of mind of the defendant against whom punitive damages are sought.⁸⁹ It is hard to see how it makes sense, given the purposes of punitive damages, to impose a larger punishment on a defendant simply because other persons or entities also caused harm to the plaintiff.

A similar point can be made with regard to the traditional factors that a jury considers when determining how large of a punitive damages award it should impose. "Factors to be considered in determining the proper amount to be awarded as punitive damages include: the grievousness of defendant's acts; the degree of malicious intention; the potential damage which might have been done by such acts as well as the actual damage; and the defendant's ability to pay."⁹⁰ In light of the defendant-focused nature of these factors, it makes little sense to tie the statutory punitive damages cap to the liability for compensatory damages of all of the defendants involved in a matter.

The court of appeals rejected a similar argument made by Pabst, concluding that the argument poses no problem for the view that the damages calculation for purposes of Wis. Stat. § 895.043(6) should include the compensatory damages owed by each defendant. According to the court of appeals, the argument "ignores that the jury awarded \$20 million in punitive damages solely against Pabst; no imputation of punitive damages occurred, so



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Pabst's argument that it is being punished for the conduct of others is not persuasive."⁹¹ This response does not strike me as sufficient. The point is that Pabst would, under this view of the statute, be punished more harshly (many millions of dollars more harshly) because of the harmful conduct of other persons or entities.

Second, due process concerns are heightened under an interpretation of Wis. Stat. § 895.043(6) that requires the consideration of the compensatory damages owed by all of the defendants.⁹² That is because such a reading allows for an enhanced punishment against a defendant because of the conduct of other persons or entities. Due process concerns are also increased because under such a reading, the ratio between the compensatory damages and punitive damages owed by the defendant at issue is likely to be substantially larger than it would be under a reading that focuses exclusively on what the defendant at issue owes in compensatory damages.

When determining whether a punitive damages award is excessive under the Due Process Clause of the Fourteenth Amendment, courts consider the ratio between the award of compensatory damages and the award of punitive damages.⁹³ When doing so, courts focus on the portion of the compensatory damages that the defendant at issue is responsible for—not the total award of compensatory damages.⁹⁴ In light of this approach under the constitutional analysis, Wisconsin courts are likely to read Wis. Stat. § 895.043(6) similarly to avoid conflicts with the Constitution.⁹⁵

That said, we will have to wait for future cases to see how the Wisconsin courts handle these issues.

Author Biography:

Matthew P. Martin is an attorney in the Litigation Practice Group at Meissner Tierney Fisher & Nichols S.C. His practice focuses on complex commercial litigation, insurance disputes, and appellate advocacy. He is the Editor of the Wisconsin Civil Trial Journal.

Matthew earned his J.D., magna cum laude, from the University of Wisconsin Law School. There, he served as a Note & Comment Editor for the Wisconsin International Law Journal. During his time in Madison, he interned with the chambers of Justice Ann Walsh Bradley and Justice Rebecca Grassl Bradley. He went on to serve as a clerk for both Justice Rebecca Grassl Bradley and Chief Justice Annette Kingsland Ziegler.

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News from Around the State: Trials and Verdicts

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- Case caption (case name and number);
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 - Brief summary of the background facts;
 - Issues for trial (was liability contested, did the parties stipulate to damages, etc.);
 - At trial (what happened, who testified, what did the parties ask for, what did the jury award, etc.);
 - Plaintiff's final pre-trial demand;
 - Defendant's final pre-trial offer;
 - Verdict amount; and
 - Any other interesting information, issues, rulings, etc.
-

Demont Cowley, et al. v. American Family Mutual Insurance Company, S.I.

Milwaukee County

Case No.: 2023CV6579

Trial Date(s): June 29–30, 2026

Facts: This case involved an accident with two vehicles. The accident occurred on September 12, 2022. It took place on North 60th Street in Brown Deer, Wisconsin, just south of West Fairy Chasm Road. Travis Bowens (not a party) was driving southbound. A driver insured by American Family Mutual Insurance Company was parked on the street, facing south, in front of his house. He attempted to make an illegal U-turn in order to drive north. The collision occurred just as the insured started his U-turn. Mr. Bowens left his phone number, but he left the scene before police arrived. He reportedly had to leave to make funeral arrangements.

The plaintiffs, Demont Cowley and James Watson, claimed that they were passengers in Mr. Bowens' vehicle at the time of the accident. They also claimed they sustained soft tissue injuries. The insured, his father, who came out of the house after the accident, and a neighbor, who lived across the street, all said that there were no passengers in Mr. Bowens' vehicle at the time of the accident.

Issues for Trial: Liability, damages, and whether plaintiffs were passengers in Mr. Bowens' vehicle at the time of the accident were all contested.

At Trial: James Watson testified in person at the trial. Demont Cowley, however, failed to appear at the trial due to an alleged family emergency. The court denied Cowley's request to testify remotely. The court also denied Cowley's request to have his deposition transcript read into the record. Dr. Benjamin Gozon and the responding police officer testified by video at trial. The defense called American Family's insured,

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Before mediating full-time Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a plaintiff personal injury attorney and in-house counsel for a major insurer in addition to nearly three decades in private practice. Jim is a past president of WDC.

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who testified in person. The defense also called the insured's father and neighbor. Both testified by video. In addition to liability and damages questions, the special verdict also contained a question as to whether the plaintiffs were in Mr. Bowens' vehicle.

Plaintiffs' Final Pre-Trial Demand: \$5,000 (per plaintiff).

Defendant's Final Pre-Trial Offer: \$2,000 (per plaintiff).

Verdict: The jury found 100 percent fault against the insured, but neither of the plaintiffs was in Mr. Bowens' vehicle at the time of the accident.

For more information, contact Joshua Fiscus at joshua.fiscus@amfam.com or Joe Malone at Joe.Malone.2@amfam.com.

Mary Shegan v. Jeffrey Shere, M.D., et al.

Brown County

Case No.: 2024CV860

Trial Date(s): April 7–9, 2026

Facts: This medical malpractice case arose from a 2021 retinal detachment surgery. The plaintiff, Mary Shegan, claimed that the defendants used the incorrect intraocular gas during surgery, resulting in elevated intraocular pressure and permanent blindness in one eye. She alleged that the defendants failed to meet the standard of care. She sought damages for significant and permanent loss of vision. The defense maintained that the correct gas and concentration were used during the procedure. The defense further contended that the plaintiff's outcome was caused by aqueous misdirection, a known but rare postoperative complication that led to a drastic increase in intraocular pressure and resulting blindness in that eye.

Issues for Trial: Whether defendants failed to meet the standard of care when conducting the retinal detachment surgery.

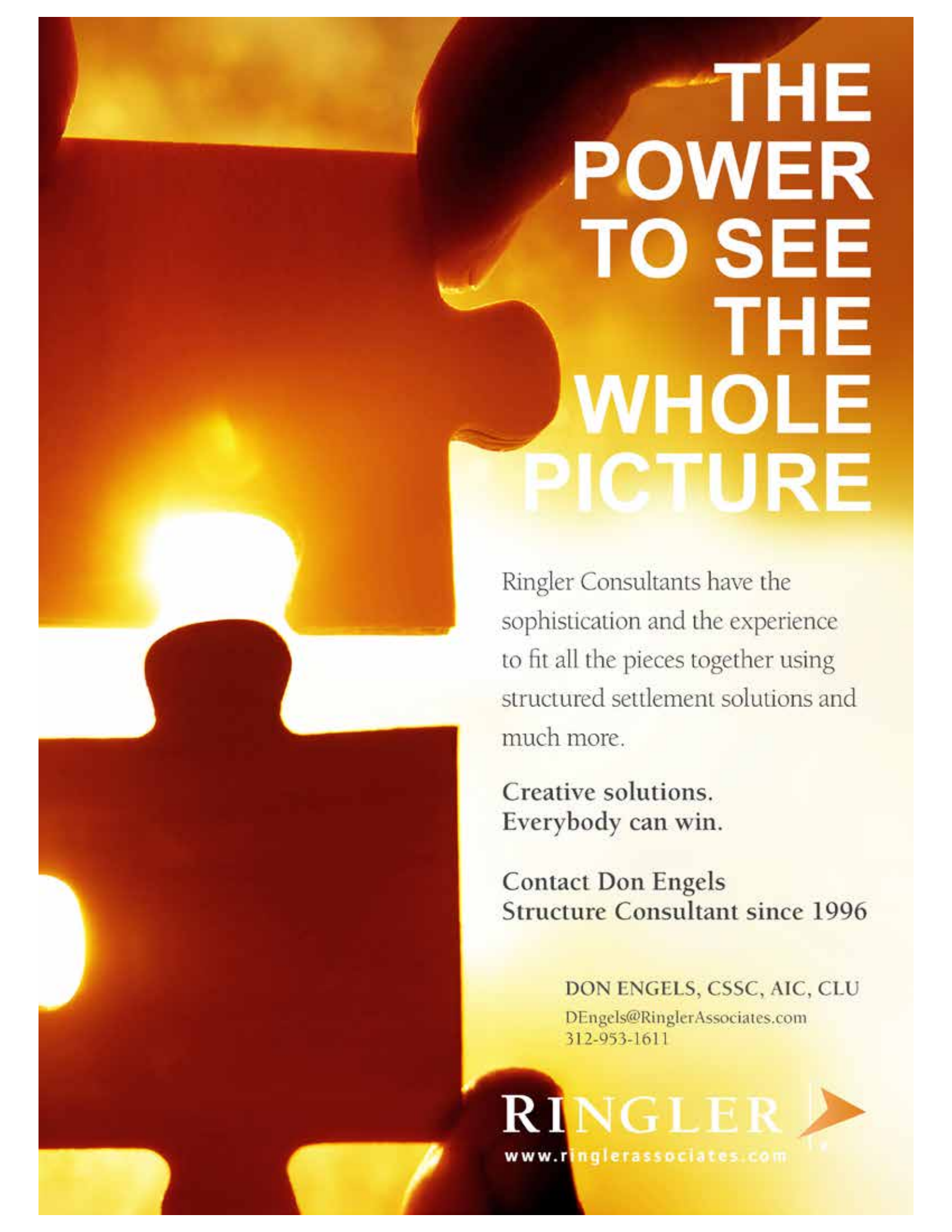
At Trial: The Honorable Marc A. Hammer presided over the case. At trial, the plaintiff asked the jury to award more than \$500,000. After hearing evidence that included testimony from medical experts from around the country, the case was submitted to the jury. Baker Sterchi Cowden & Rice LLC attorneys Mark Budzinski and Christa Keel represented the defendants.

Plaintiff's Final Pre-Trial Demand: No demand.

Defendants' Final Pre-Trial Offer: No offer.

Verdict: After less than two hours of deliberation, the jury returned a unanimous defense verdict, finding no negligence.

For more information, contact Mark Budzinski at mark.budzinski@bakersterchi.com or Christa Keel at christa.keel@bakersterchi.com.



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Gary Hirsch v. Andrea Hanlon
Jefferson County, Kentucky
Case No.: 2023CI7533
Trial Date(s): February 10–13, 2026

Facts: This personal injury case arose from a rear-end collision involving the plaintiff, Gary Hirsch, and the defendant, Andrea Hanlon. The plaintiff claimed the collision exacerbated a pre-existing lumbar disc herniation for which he had undergone surgery four months earlier. He alleged that his injuries forced him to sell his small business—a local fish market—several years earlier than he planned to do so. He also sought damages for significant pain and suffering. The defendant admitted liability for the accident, but disputed causation and damages. The defense maintained that the plaintiff did not sustain a permanent injury or suffer any loss of earnings as a result of the collision.

Issues for Trial: Causation and damages.

At Trial: At trial, the plaintiff asked the jury to award him \$1.7 million in damages for past and future pain and suffering and lost wages. After three defense causation and damages experts were withdrawn, Baker Sterchi Cowden & Rice LLC assumed the defense just six days before trial. Mark Budzinski served as lead trial counsel after being admitted pro hac vice four days before trial, supported by Katherine Cortesy. Local counsel served as second chair.

Plaintiff’s Final Pre-Trial Demand: Unknown.

Defendant’s Final Pre-Trial Offer: Unknown.

Verdict: After approximately two hours of deliberation, the jury returned a complete defense verdict, finding no permanent injury and no loss of earnings.

For more information, contact Mark Budzinski at mark.budzinski@bakersterchi.com or Katherine Cortesy at katherine.cortesy@bakersterchi.com.

Todd A. Arthur v. State Farm Mutual Automobile Insurance Company
Winnebago County
Case No.: 2024CV537

Facts: This case arose from an accident that occurred on November 12, 2021. The accident took place on Oregon Street in Winnebago County. The insured’s Dodge Challenger broke traction and fishtailed into the passenger side of the plaintiff’s Dodge Caravan. The Dodge Challenger sustained just over \$10,000 in damage. Plaintiff had a cervical laminectomy 10 months before the accident. He claimed a cervical fusion at the same levels as the laminectomy two years after the accident. The past medical specials were \$132,000. Past wage loss was \$10,000.

Issues for Trial: Damages.

At Trial: The plaintiff’s experts were Dr. Phillip Yazbak and Dr. Brittany Bartel. The defendant’s experts were Dr. Jeffrey Meincke and Dr. Andrew Rentschler. The plaintiff asked for all the past medical specials and did not specify a number for past and future pain and suffering. The defendant argued for \$11,000 in past medical specials and \$10,000 in past pain and suffering.

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Plaintiff's Final Pre-Trial Demand: \$150,000.

Defendant's Final Pre-Trial Offer: \$30,000.

Verdict: \$11,000 for past medical specials and \$10,000 for past pain and suffering.

For more information, contact Joseph Ryan at josephryan@theryanlawoffice.com.

Scott Bandle v. Western National Mutual Insurance Company, et al.

Wood County

Case No.: 2024CV383

Trial Date(s): March 2026

Facts: This case arose from a motor vehicle accident that involved two semi-trucks. The plaintiff claimed that he suffered brain and nasal injuries as a result of the accident. The plaintiff claimed to suffer chronic headaches and migraines following the accident.

Issues for Trial: Comparative fault and damages.

At Trial: The plaintiff waived his past medical expenses but claimed: \$2.5 million for future medical expenses; \$90,000 for past wage loss; \$2.7 million for future loss of earning capacity; and \$6–10 million for past and future pain and suffering.

Plaintiff's Final Pre-Trial Demand: \$1.1 million.

Defendants' Final Pre-Trial Offer: \$400,000.

Verdict: The jury returned a verdict apportioning 40 percent fault to the plaintiff for traveling too fast given the foggy weather conditions and awarded \$9,000 for past wage loss, \$115,000 for past pain and suffering, and nothing for future damages.

For more information, contact Roger Flores at RFlores@crivellolaw.com or Pat Brennan at PBrennan@crivellolaw.com.

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