STATE OF WISCONSIN
IN SUPREME COURT

SINORA GLENN and
CHRISTOPHER GLENN,

Plaintiffs-Respondents,

v. Appeal No. 02-1426

MICHAEL T. PLANTE, M.D. and
FAMILY HEALTH PLAN,

Defendants-Appellants-Petitioners.

AMICUS BRIEF OF WISCONSIN MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION

ON APPEAL FROM THE MAY 14, 2002 ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MAXINE A. WHITE, PRESIDING

Timothy J. Muldowney
State Bar No. 1017596
Jennifer L. Peterson
State Bar No. 1033482
LaFollette Godfrey & Kahn
One East Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

Attorneys for Wisconsin Medical Society and American Medical Association

Mark L. Adams
State Bar No. 1006200
Melanie Cohen
State Bar No. 1019440
Wisconsin Medical Society
300 East Lakeside Street
P.O. Box 1109
Madison, WI 53701-1109
(608) 442-3800

Attorneys for Wisconsin Medical Society

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INTRODUCTION

The primary issue in this appeal is whether "compelling circumstances" exist to require a non-party physician to give expert testimony in a medical malpractice case. In *Burnett v. Alt*, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999), this Court adopted a broad, conditional privilege for expert testimony:

> [A]bsent a showing of compelling circumstances, an expert cannot be compelled to give expert testimony whether the inquiry asks for the expert's existing opinions or would require further work.

Although the court of appeals acknowledged *Alt*'s general rule, it concluded that "under the unusual circumstances of this case," the compelling circumstances exception applies. The court, therefore, held that Dr. Charles H. Koh could be compelled against his will to give expert testimony on behalf of the plaintiff, Sinora Glenn. *Glenn v. Plante*, 2003 WI App 96, ¶ 2, 264 Wis. 2d 361, 663 N.W.2d 375.

This case is significant because of the circumstances found to be "compelling" enough to overcome *Alt*'s general rule. The lower courts found the following circumstances sufficient to compel Dr. Koh to testify against his will:

- the plaintiff's attorney's failure to timely name a willing expert witness;

- Dr. Koh was the plaintiff's treating physician; and
- without Dr. Koh's expert testimony the plaintiff's case might be dismissed.

The court of appeals' conclusion that these facts constitute "compelling circumstances" threatens the independence of expert witnesses and would nearly eliminate the *Alt* privilege.

The Wisconsin Medical Society (the "Society") and the American Medical Association (the "AMA") submit this *amicus* brief because the issue presented is of direct and immediate concern to their members. Physicians are often called upon to testify both as fact witnesses and as expert witnesses in a variety of judicial proceedings. This brief does not question the legal and ethical obligation of physicians to testify in a judicial proceeding concerning facts within their personal knowledge, and it does not challenge the authority of a court to compel such testimony. Neither does it question the right of parties to retain physicians, with their consent, to serve as expert witnesses where their professional expertise may be utilized pursuant to Chapter 907, Stats. The only issue here is whether "compelling circumstances" exist so that expert testimony may be ordered to be given by a non-party physician in a medical malpractice case. The Society and the AMA ask this Court to reverse the court of appeals' decision and hold that a litigant's

own neglect cannot create “compelling circumstances” to require expert testimony from a non-party physician.

ARGUMENT

Physicians, like other professionals, are subject to codes of conduct and ethics. Consistent with these ethics, both organizations *encourage* physicians to testify as experts in their areas of expertise.[1] The Society and the AMA, however, oppose *compelled* expert testimony, particularly in circumstances, like those present here, where the facts underlying a litigant’s claim of “compelling circumstances” stem from that litigant’s own neglect.

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[1] The AMA House of Delegates has adopted policy H-265.994, which states that “the AMA encourages its members to serve as impartial expert witnesses.” *See Wisconsin Medical Society Policy* LIA-991 (“Expert Testimony In Medical Liability Actions: The Wisconsin Medical Society urges all physicians to make themselves available to review medical liability claims and, when appropriate, testify in liability actions.”). Moreover, ethical opinion E-9.07 of the *AMA Code of Medical Ethics* states: “As a citizen and a professional with special training and experience, the physician has an ethical obligation to assist in the administration of justice. If a patient who has a legal claim requests a physician’s assistance, the physician should furnish medical evidence, with the patient’s consent, in order to secure the patient’s legal rights.”

I. *ALT* ATTEMPTS TO BALANCE THE RIGHT OF EXPERT WITNESSES TO BE FREE FROM TESTIFYING AGAINST THEIR WILL AND THE NEEDS OF COURTS AND LITIGANTS FOR EXPERT TESTIMONY.

A. *Alt* Created A Bright Line Rule, Which Includes An Exception Only For "Compelling Circumstances."

Alt is premised on a "balance between the competing interests of the needs of the court and litigants for testimony and the implied privilege of expert witnesses to be free from testifying against their will." 224 Wis. 2d at 89. This balance embraces both a general rule, based on respect for personal autonomy, and a narrow exception, adopted in the interest of justice and fairness.

Under *Alt*, "an expert cannot be compelled to give expert testimony whether the inquiry asks for the expert's existing opinions or would require further work." *Id.* This Court recognized that such an absolute rule could create harsh consequences where "a particular expert's testimony is uniquely necessary." *Id.* at 88. For those cases, this Court balanced the general rule against a narrow exception—when the party could "demonstrat[e] a compelling need for the expert's testimony." *Id.* at 89. In addition, the party seeking the expert's testimony "must present a plan of reasonable compensation" and the expert "can only be compelled to give

existing opinions." *Id.* Finally, this Court added that "[u]nder no circumstances can an expert be required to do additional preparation." *Id.*[2]

Alt strikes a reasonable balance between the independence of expert witnesses and fairness to litigants.[3] This Court could have adopted a privilege similar to section 907.06, Stats. (2001-02), and prohibited *any* compelled testimony of expert witnesses. Instead, it chose to balance competing interests and provide a narrow "compelling circumstances" exception for those cases where the opinion of one particular expert is irreplaceable. Maintaining a narrow interpretation of the "compelling circumstances" exception ensures that the exception does not swallow the rule. If virtually any situation can give rise to "compelling circumstances" and justify an

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[2] The *Alt* rule is analogous to Fed. R. Civ. P. 45(c)(3)(B)(iii), which provides that a party may not subpoena an unretained expert's opinion or information unless the party "shows a *substantial need for the testimony* or material that cannot be otherwise met without undue hardship" and provides that the person will be reasonably compensated. (Emphasis added). Courts have used that rule to quash subpoenas requiring expert witness testimony because the particular expert "does not possess any unique facts relevant to the case or subject matter that plaintiff cannot obtain from other retained experts." *Bio-Technology General Corp. v. Novo Nordisk A/S et al.*, No. 02-235-SLR, 2003 U.S. Dist. LEXIS 7911, at *10 (D. Del. May 7, 2003) (Robinson, J.); *see Schering Corp. et al. v. Amgen Inc. et al.*, Nos. 98-97 and 98-98, 1998 U.S. Dist. LEXIS 13452 (D. Del. Aug. 4, 1998) (Schwartz, J.).

[3] *Alt* has not generated a substantial number of cases, which demonstrates that lower courts have no difficulty applying the broad, conditional privilege. Furthermore, the dissenting opinion's concerns have not come to fruition as attorneys have not viewed *Alt* as "a license to assert unsubstantiated privileges," and *Alt*, by itself, has not engendered incivility in the discovery process. 224 Wis. 2d at 115.

exception to the privilege—including a litigant's own neglect—then the *Alt* privilege will be thrown out of balance.

B. *Alt* Does Not Allow Litigants To Order The Lives Of Expert Witnesses.

The task of obtaining proper expert testimony should not be taken lightly by litigants. This Court has established rules to determine when expert testimony is admissible. *See* sec. 907.02, Stats. Furthermore, litigants often spend a great deal of time and money to find experts with appropriate credentials and demeanor. *See* Douglas Danner and Larry L. Varn, *Expert Witness Checklists* §§ 1:30-1:33 (3d ed. 2003). And regardless of the subject matter, providing expert testimony is no easy endeavor. It requires knowledge, skill, experience, or training. Experts are asked to employ the resources they have invested in their profession to draw inferences and form conclusions. This often involves study of the circumstances of the case at hand to form opinions. Offering expert testimony is an exercise much more involved than merely reporting one's perception of events observed.

A physician asked to render an opinion must draw upon years of education, training and study of medicine, all of which involve time, energy and expense. Because of its value, courts have recognized that all experts have a property interest in their talents

and skills. *In re "Agent Orange" Product Liability Litigation*, 105 F.R.D. 577, 582 (E.D.N.Y. 1985) (Weinstein, J.) ("An expert's knowledge is his or her stock in trade and the expert has a property right to that knowledge.") Compelling testimony against an expert's wishes, in essence, deprives that expert of control over his or her professional pursuits. In no other part of professional life are professionals generally required to forego their freedom of choice.[4] Within the confines of their own codes of ethics, physicians, likewise, should enjoy wide latitude to pursue the cases and work that they choose.[5]

[4] Lawyers, for example, are governed by ethical rules giving them freedom to choose clients and cases. *See* Charles W. Wolfram, *Selecting Clients: Are You Free To Choose?,* Trial, Jan. 1998, at 20. ("Under the professional codes any lawyer may refuse to represent any client for good reasons, for bad reasons, or for no reasons."). Lawyers are not required to provide their services without reasonable compensation. *See* SCR 20:1.5. In general, lawyers even have professional freedoms in choosing their pro bono service, including accepting appointments by the court. *See* SCR 20:6.1; SCR 20:6.2(c). Furthermore, lawyers can control the scope of their representation of a client, *see* SCR 20:1.2(c), and lawyers can decline or terminate representation of a client due to the client's behavior. *See* SCR 20:1.16(b)(3)-(5).

[5] Physician obligations are neither unlimited nor exist in a vacuum. Physicians have obligations other than to testify as experts in court. As Ms. Glenn's treating physician, Dr. Koh's relationship with her must be founded on mutual trust and collaboration, and he must place her welfare above his obligations to others. *See AMA Code of Medical Ethics*, Opinions E-10.01, 10.015, and 10.02. If Dr. Koh becomes an expert witness, he will necessarily assume an obligation to the court, as well, which may be incompatible with his role as a treating physician. His letter to the court concerning the quality of Ms. Glenn's prior medical care, while likely inadmissible at trial, exemplifies concern for his patient. Under the circumstances of this case, there is no reason to doubt that Dr. Koh satisfied his obligations under the *AMA Code of Medical Ethics*.

Due to the specialized nature of expert testimony, *Alt* affords wide berth to experts. Only under “compelling circumstances” may an expert’s decision to testify or not be made by someone else. Significantly, under *Alt*, the litigant is *never* the ultimate decision-maker. The court determines if and when “compelling circumstances” exist to trump the expert’s own decision. Accordingly, the “compelling circumstances” test, when properly applied, allows experts freedom of choice in their professional lives in nearly all situations.

The court of appeals’ decision is a significant departure from *Alt.* It gives litigants the ability to create “compelling circumstances”—for instance, through their own neglect. In fact, under the court of appeals’ interpretation of *Alt*, litigants will have greater power to compel expert testimony than any court does under section 907.06, Stats. The court of appeals’ application of the “compelling circumstances” exception in this case undermines the careful balance between freedom of choice and necessity for testimony.

II. *ALT*'S "COMPELLING CIRCUMSTANCES" EXCEPTION SETS A HIGH STANDARD THAT SHOULD NOT BE SATISFIED BY A LITIGANT'S OWN NEGLECT.

Alt created a narrow "compelling circumstances" exception for those cases where "a particular expert's testimony is uniquely necessary." 224 Wis. 2d at 88. This Court recognized that, in general, expert testimony is not so unique that it cannot be replaced.

> As appears to be the case here, there can be a number of people within a field with similar specialized knowledge capable of rendering an expert opinion on the question or questions asked. In such instance, the opinion of one particular expert is not irreplaceable. "[U]nlike factual testimony, expert testimony is not unique and a litigant will not be usually deprived of critical evidence if he cannot have the expert of his choice."

Id. at 89 (quoting *Mason v. Robinson*, 340 N.W.2d 236, 242 (Iowa 1983). In other words, only those cases involving a "peculiar need of the compelling party for the information sought and its unavailability from other sources," *Mason*, 340 N.W.2d at 241, constitute "compelling circumstances."

Wisconsin appellate courts do not use the phrase "compelling circumstances" casually or generously. It is a very high standard. Only the most convincing and extraordinary circumstances can satisfy it.

"Compelling circumstances" generally involve fundamental or constitutional rights rather than situations created by a litigant—especially situations created by a litigant's neglect. *See State v. Baldwin*, 101 Wis. 2d 441, 445-46, 304 N.W.2d 742 (1981) (failure to object to a jury instruction constitutes waiver except in cases of "compelling circumstances," including claims raising state and federal constitutional questions); *State v. Fearing*, 2000 WI App 229, ¶ 7, 239 Wis. 2d 105, 619 N.W.2d 115 (finding "compelling circumstances" to review challenges to the circuit court's sentence because they raise significant questions about the scope of the circuit court's authority).[6] Moreover, a "compelling circumstances" exception to a general rule of law imposes a high standard. *See State v. Kruse*, 194 Wis. 2d 418, 437, 533 N.W.2d 819 (1995) (Abrahamson, J. concurring) (summary contempt procedure should be invoked "only when compelling circumstances require immediate punishment"). For example, in *Barstad v. Frazier*, 118 Wis. 2d 549, 568, 348 N.W.2d 479 (1984), this Court listed the types of drastic behavior that would be "compelling" in child custody disputes to award custody to a third party:

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[6] Furthermore, the court of appeals has concluded that the lack of reference to "compelling circumstances" in a penal statute means that the legislature intended a mandatory penalty. *State v. Herman*, 2002 WI App 28, ¶¶ 22-23, 250 Wis. 2d

> Compelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child.

Id. Similarly, in a case challenging the public's access to court proceedings, this Court held that only claims of constitutional magnitude create compelling circumstances to close a courtroom. *LaCrosse Tribune v. Circuit Court for LaCrosse County*, 115 Wis. 2d 220, 235-6, 340 N.W.2d 460 (1983).

These cases demonstrate that the "compelling circumstances" exception in *Alt* is a high bar—not easily or frequently satisfied. They also demonstrate that "compelling circumstances" do not include situations within the control of any party. An attorney's actions (or failure to act) should not create "compelling circumstances." To hold otherwise, gives litigants the power to bring their case within the exception to the general rule. True "compelling circumstances" are situations out of a litigant's control.

Alt created the "compelling circumstances" exception only for those cases where "a particular expert's testimony is uniquely necessary." 224 Wis. 2d at 88.[7] To be "compelling," the relevant

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166, 640 N.W.2d 539, *review denied*, 2002 WI 48, 252 Wis. 2d 151, 644 N.W.2d 687.

[7] Here there has been no showing before the trial court that Dr. Koh's testimony even comes close to meeting that standard.

testimony must be highly unusual and exceptional. For example, where only a very small pool of experts is qualified in a specialty, the opinion of one particular expert witness might be difficult to replace. Allowing the "compelling circumstances" standard to be satisfied by facts less extraordinary—or testimony less "unique"—undermines this Court's clear intent as expressed in *Alt*.

The circumstances the court of appeals relied on to order Dr. Koh's expert testimony are far from "compelling." His testimony is not "uniquely necessary." His specialty—obstetrics—is not so esoteric that his testimony is irreplaceable. Nor does the fact that he treated Ms. Glenn make that testimony uniquely necessary. Under *Alt*'s high standard, Dr. Koh's treatment of Ms. Glenn "make[s] him no more and no less qualified than any other obstetrician to give an expert opinion" about the treatment rendered by Dr. Plante. 224 Wis. 2d at 90.

Contrary to *Alt,* the "compelling circumstances" the court of appeals relied on were created by circumstances entirely within a litigant's control: an attorney's neglect in failing to timely name a willing expert witness. A litigant's neglect should not create "compelling circumstances." The court of appeals' decision ignores the intent and plain language of *Alt*, as well as case law interpreting "compelling" to mean nothing less than extraordinary. The court

grafts upon the *Alt* privilege a litigant-controlled exception that would virtually swallow up that privilege.

Finally, the court of appeals was persuaded by the fact that without an expert witness the plaintiff's case may be dismissed. 2003 WI App 96, ¶¶ 16-17. Because "dismissal is a drastic remedy," the court held that Dr. Koh could be compelled to testify against his wishes. *Id*. That reasoning, however, is result-oriented and contrary to *Alt.* It ignores that the circuit court could have exercised its discretion to grant another extension to plaintiff's counsel for naming an expert witness, and that, regardless, Ms. Glenn is not left without a remedy. *See* Brief of Defendants-Appellants- Petitioners, Michael T. Plante, M.D. and Family Health Plan, p. 19. The Society and the AMA empathize with Ms. Glenn and the fact that her case may be dismissed. The law governing expert witness testimony, however, should not be watered down in a case where many better options exist to address this plaintiff's cause of action.

CONCLUSION

Permitting a party's own neglect to satisfy the "compelling circumstances" exception of *Alt* would undermine its broad, conditional privilege and place an unacceptable burden on physicians, and eventually, other experts as well. Moreover, the incentives it creates are unacceptable. For the reasons stated above, the Court should hold that a litigant's own neglect cannot constitute "compelling circumstances" to create an exception to the expert witness privilege in *Alt*.

Dated: December 22, 2003

LA FOLLETTE GODFREY & KAHN

By:

____

Timothy J. Muldowney
State Bar No. 1017596
Jennifer L. Peterson
State Bar No. 1033482
Attorneys for Wisconsin Medical Society and American Medical Association

LaFollette Godfrey & Kahn
One East Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

LaFollette Godfrey & Kahn is an office of Godfrey & Kahn, S.C.

Mark L. Adams
State Bar No. 1006200
Melanie Cohen
State Bar No. 1019440
Wisconsin Medical Society
300 East Lakeside Street
P.O. Box 1109
Madison, WI 53701-1109
(608) 442-3800
Attorneys for Wisconsin Medical Society

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 2,950 words.

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Jennifer L. Peterson

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