STATE OF WISCONSIN
SUPREME COURT

MATTHEW FERDON, by his Guardian Ad Litem, VINCENT R. PETRUCELLI, CYNTHIA FERDON, and DENNIS FERDON,

Plaintiffs/Appellants,

v.

WISCONSIN PATIENTS COMPENSATION FUND, MEDICAL PROTECTIVE COMPANY, MICHAEL J. BROCKMAN, M.D., and AURORA HEALTHCARE, INC., d/b/a BAY WEST GYNECOLOGY & OBSTETRICS, LTD.,

Case No. 03-0988

Defendants/Respondents,

and

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, a/k/a CIGNA INSURANCE, f/k/a HEALTHSOURCE PROVIDENT ADMINISTRATORS, INC., a/k/a HEALTHSOURCE PROVIDENT, and COUNTY OF OCONTO.

Nominal Defendants.

BRIEF OF AMICUS *CURIAE* THE WISCONSIN HOSPITAL ASSOCIATION, INC. AND THE AMERICAN HOSPITAL ASSOCIATION

Appeal of Judgment by the Circuit Court of Brown County, Wisconsin, dated March 17, 2003 Case No. 01 CV 1897, The Honorable Peter J. Naze Presiding

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INTRODUCTION

Wisconsin's health care system is one to be envied by other states, and Wisconsin's hospitals are an integral part of the health care system's success. Hospitals are in the unique position of providing a full range of health care services to the community in which they are located, often on a not-for-profit basis. As set forth fully below, the ability of Wisconsin hospitals to attract and retain quality health care professionals and, therefore, provide affordable health care to Wisconsin citizens is inextricably linked to the comprehensive medical malpractice system, particularly the noneconomic damages cap, Wis. Stat. §§ 655.017 and 893.55(4), and the payment of future medical expenses into the injured patients and families compensation fund (the "Fund"), Wis. Stat. § 655.015.

Acting within its unique and constitutional role, the Wisconsin legislature chose to remedy what it determined was a health care crisis by enacting Wis. Stat. ch. 655 and Wis. Stat. § 893.55(4). The overwhelming evidence, both nationally and on the State level, demonstrates that the choice was reasonable. Medical malpractice insurance premiums in states with meaningful medical malpractice liability systems, such as Wisconsin, are lower than in other states. Lower medical malpractice premiums help hospitals retain qualified physicians and, in turn, provide a broad range of health care services to patients. Upsetting the legislature's policy choice by finding Wis. Stat. §§ 655.015, 655.017 and 893.55(4) unconstitutional could have a devastating impact on hospitals' ability to provide patient care.

The medical malpractice liability system in Wisconsin was enacted to curb health care costs and help secure affordable, quality health care for Wisconsin citizens. In short, the legislature had a reasonable basis for its policy choice. Moreover, the legislature's choice to curb the amount of noneconomic damages available in medical malpractice actions constitutes a valid exercise of the legislature's right to alter the common law.

ARGUMENT

I. THE LEGISLATURE'S RATIONALE FOR ENACTING WIS. STAT. §§ 655.015, 655.017 AND 893.55(4) WAS REASONABLE.

A. History And Intent Of Wis. Stat. §§ 655.015, 655.017 And 893.55(4).

The medical malpractice liability system has been in existence in Wisconsin for over 30 years. The initial and subsequently enacted provisions were based on concerns for the delivery of health care to Wisconsin communities. The experience of Wisconsin and other states demonstrate that the system is valid today, as it was at the time of its initial enactment. The factual underpinnings of the initial passage of Wis. Stat. ch. 655 in 1975 were clearly articulated by legislature:

> (a) The number of suits and claims for damages arising from professional patient care has *increased tremendously* . . .;
>
> (b) The effect of such judgments and settlements . . . has been to cause the insurance industry to uniformly and substantially increase the cost [of insurance]. . .;
>
> (c) These *increased insurance costs are being passed on to patients* in the form of higher charges for health care services and facilities;
>
> * * *
>
> (e) The rising number of suits and claims is *forcing both individual and institutional health care providers to practice defensively*, to the detriment of the health care provider and the patient;
>
> * * *
>
> (g) . . .health care providers are reluctant to and *may decline to provide certain health care services* which might

> be helpful, but in themselves entail some risk of patient injury;
>
> (h) The cost and the difficulty in obtaining insurance for health care providers discourages and has *discouraged young physicians from entering into the practice of medicine* in this state;
>
> (i) Inability to obtain, and the high cost of obtaining, such insurance has affected and is likely to further affect medical and hospital services available in this state to the detriment of patients, the public and health care providers;
>
> (j) Some health care providers have curtailed or ceased, or may further curtail or cease, their practices because of the nonavailability or high cost of professional liability insurance; and
>
> (k) It therefor appears that the entire effect of such suits and claims is working to the detriment of the health care provider, the patient and the public in general.

1975 Wis. Laws. ch. 37 § 1 (emphasis added).

While the 1975 legislation created a procedure for the processing of medical malpractice claims, it did not limit noneconomic damages. *Maurin v. Hall*, 2004 WI 100, ¶ 51, 274 Wis. 2d 28, 682 N.W.2d 866. As a result, "[t]he 1975 legislation was not successful in controlling health care costs." *Id.*, 2004 at ¶ 53 (citing 1985 S.B. 328). To meet its policy goal of lowering health care costs, the legislature enacted a $1 million cap on noneconomic damages. *See* 1985 Wis. Act. 340, §§ 30, 72.

In 1994, following the expiration of the $1 million cap in 1991, the Fund issued a report concluding that the reinstitution of a noneconomic damages cap was "essential to

stabilize medical liability premiums and awards."[1] To curb the impending health care crisis, the same crisis the original 1975 legislation was designed to address, the legislature passed 1995 Wis. Act 10 which instituted a $350,000 noneconomic damages cap. *See* 1995 Wis. Act 10, §§ 5, 9 and 10. The legislation "was another step in the legislature's unbroken pattern of narrowing the scope of noneconomic damages flowing from medical malpractice claims in order to control costs." *Maurin*, 2004 WI at ¶ 65-69

As this Court has repeatedly held, "[t]he court cannot reweigh the facts as found by the legislature." *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 506, 261 N.W.2d 434 (1978). "[T]his court is not concerned with the wisdom or correctness of the legislative determination. Rather, [it] determine[s] only whether there was a reasonable basis upon which the legislature enacted [the statutes]." *Czapinzki v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 29, 236 Wis. 2d 316, 613 N.W.2d 120 (citation omitted).

This Court has already determined that, "[t]he public has an important interest in the quality of health care, and the legislature's efforts to promote that interest cannot be said to be unreasonable." *Strykowski*, 81 Wis. 2d at 509-10. The legislature enacted and, when necessary, amended Wis. Stat. §§ 655.015, 655.017 and 893.55(4), "in response to a perceived economic and social crisis." *Maurin*, 2004 WI at ¶ 50 (citation and quotations omitted). "The cap on noneconomic [] damages is an appropriate exercise of the legislature's best judgment . . . as to what maximum amount of damages fully compensates for" pain and suffering. *Maurin*, 2004 WI at ¶ 99 (quotation omitted). Likewise, requiring payment of future medical expenses in excess of $100,000 into the Fund was "obviously intended for the benefit of the claimant with substantial injuries requiring long-term treatment. It cannot be said that the legislation is

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[1] *Wisconsin Patients Compensation Fund, Report to the Joint Legislative Audit Committee Executive Summary*, OCI, 3-4 (June 13, 1994).

unreasonable or denies equal protection of the law." *Strykowski*, 81 Wis. 2d at 510. [2]

B. Wisconsin's Medical Malpractice Liability System Has Successfully Curbed Health Care Costs And Helped Hospitals Retain Qualified Physicians, Thereby Improving Patient Access To Health Care.

The overwhelming evidence demonstrates that the legislature's policy choice was sound and has had a positive impact on the health care system in Wisconsin, particularly on patient access to health care. Currently, only six states have stable medical liability systems, Wisconsin, Indiana, Louisiana, Colorado, New Mexico and California.[3] Each of the six states has either a noneconomic damages cap or a total cap on economic and noneconomic damages.[4] The American Medical Association has identified twenty states that have health care systems that are experiencing a medical liability crisis.[5] None of those states have a meaningful medical malpractice liability system.[6]

The ability of hospitals to attract and retain physicians in all areas of specialty and thereby provide quality health

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[2] Appellants assert that strict scrutiny applies to their equal protection challenge because the constitutional rights to a jury trial and to a remedy are implicated. (A. Br., pp. 26-29.) This Court has already determined that the constitutional rights to a jury trial and to a remedy do not implicate fundamental rights. *See Maurin*, 2004 WI at ¶¶ 96-100; *Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 56, 237 Wis. 2d 99, 613 N.W.2d 849.

[3] *America's Medical Liability Crisis: A National View*, AMA (2004), *available at* http://www.ama-assn.org/ama/noindex/category/11871.html.

[4] *Medical Liability Reform - NOW!* ("*Med. Liability Reform*"), AMA, 24-25 (Dec. 3, 2004).

[5] *Id.* at 9. Medical liability crisis consists of high medical malpractice insurance premiums, increased health care costs, loss of physicians, particularly in specialty areas, and, most importantly, loss of access to health care by patients. *Id.* at 4-8.

[6] *Id.* at 10-22.

care to patients is inextricably linked to Wisconsin's medical malpractice liability system. Physicians and hospitals in states, such as Wisconsin, with caps on noneconomic damages experience lower medical malpractice insurance premiums than states without caps.[7] Between 1996 and 2002 medical malpractice insurance premiums for high-risk practices (e.g., surgical) in states that have a noneconomic damages cap between $250,000-$500,000 rose at a rate of 9%, compared to a 29% increase in states that do not have a noneconomic damages cap.[8] Consistent with those studies, the premiums charged by the Fund decreased significantly from 1995, the year the noneconomic damages cap was reinstituted, to 2003.[9]

Keeping medical malpractice insurance premiums reasonable, reduces the cost of practice for physicians and hospitals and, in turn, helps hospitals attract and retain physicians. States with a noneconomic damages cap have, on average, twenty-four more physicians (or 12%) per 100,000 residents than states without a noneconomic damages cap.[10] Indeed, 53.1% of hospitals in states with no meaningful medical malpractice liability system report that as medical malpractice liability expenses rise, it becomes harder to recruit physicians and 45% report that it is more difficult to staff certain critical areas, such as the emergency department.[11]

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[7] Hellinger, Fred J., Encinosa, William E., *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians* ("*Geographic Distribution of Physicians*"), U.S. DHFS, 4 (July 3, 2003).

[8] *Implications of Rising Premiums on Access to Health Care*, U.S. GAO, 30-31 (August 2003).

[9] Gomez, Jorge, *Report on the Impact of 1995 Wisconsin Act 10,* OCI, Attachment 2 (May 12, 2003).

[10] *Geographic Distribution of Physicians*, 11.

[11] *Professional Liability Insurance: A Growing Crisis*, AHA, 2 (2003), *available at* http://www.hospitalconnect.com/aha/press_roominfo/content/Liability030428.ppt.

Physician supply is much more tenuous for underserved populations due to "long-standing" desirability issues related to geography, culture and financing, of which the medical liability environment is an important component.[12] Thus, while the impacts of increased liability premiums might only dampen physician supply in high-reimbursement suburban areas where physicians and patients can absorb the cost, the added cost of increased liability premiums often tips the overall marginal cost of a physician providing care to an underserved population to the point where it is no longer desirable to continue to provide care to such a population. A recent analysis of physician recruitment, retention and distribution in Wisconsin concluded that there is an unmet need for primary care and specialty physicians, particularly in rural areas and Milwaukee.[13] Key to solving the shortage, which is projected to get worse as the demand for physicians increases as much as 20% by 2015, is maintaining "Wisconsin's favorable medical malpractice environment."[14]

Attracting and retaining qualified general and specialty physicians is crucial to a hospital's ability to ensure patient access to health care. States that do not have a meaningful medical malpractice liability system report reduced physician coverage for emergency and specialty-practice areas.[15] For example, doctors in three rural Washington towns recently stopped delivering babies because of liability insurance premiums; consequently, more pregnant women who had never had a prenatal check up began showing up at Spokane hospitals to deliver babies.[16] The legislature enacted Wis.

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[12] *Who Will Care for Our Patients* ("*Who Will Care*"), WHA and WMS, 5, 9 (March 2004). *See also* Trend Watch, Vol. 4, No. 3, *Medical Liability Insurance: Looming Crisis*?, AHA (June 2002).

[13] *Who Will Care*, 15.

[14] *Id.* at 2.

[15] *Med. Liability Reform*, 4-9, 23-24; *Confronting the New Health Care Crisis* ("*Health Care Crisis*"), U.S. DHFS (July 24, 2002).

[16] *Med. Liability Reform*, 21.

Stat. ch. 655 and Wis. Stat. § 893.55(4), in part, to avoid similar health care access crises at Wisconsin hospitals.

Hospitals provide emergency, surgical and, often, primary care services to Wisconsin citizens. Indeed, Wisconsin hospitals provide medical services to some of the most medically-underserved citizens of this State. Hospitals' commitment to their communities mean they will provide medical services to all those who need it in the communities where they are located. It is hospitals that must manage the consequences when physicians leave the State or clinics close. Without hospitals, some of Wisconsin's citizens would receive no health care at all, particularly in urban and rural areas where physician recruitment is already difficult.[17]

While the appellants assert there is no evidence that medical malpractice litigation has any discernable impact on the cost of medical malpractice insurance, the cost of health care in general, or the quality of health care provided to Wisconsin citizens, (A. Reply Br., pp. 1-2), the overwhelming evidence supports the legislature's conclusion that unchecked medical malpractice "suits and claims [] work[] to the detriment of the health care provider, the patient and the public in general." 1975 Wis. Laws. ch. 37 § 1(k). The legislature's response and policy choice, the enactment of Wis. Stat. §§ 655.015, 655.017 and 893.55(4), has successfully curbed health care costs and helped hospitals attract and retain qualified physicians. As a result, Wisconsin citizens have access to affordable, quality health care. Without the medical malpractice liability system, patient access to health care will be affected.

II. WISCONSIN'S MEDICAL MALPRACTICE LIABILITY SYSTEM DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO REMEDY, WIS. CONST. ART. I, § 9.

Appellants assert that the noneconomic damages cap, Wis. Stat. §§ 655.017 and 893.55(4), violates there constitutional right to a "complete" or "specific" remedy. In fact, the legislature did not foreclose the right to bring a

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[17] *Who Will Care*, 15.

medical malpractice action or to recover noneconomic damages. Instead, the legislature struck a balance between two important policies, affordable, quality health care and the right of injured parties to seek redress of wrongs done to them.

The legislature's policy choice has proven to have been wise. As set forth in Part I.B., *supra*, Wisconsin has a stable health care system. Reasonable medical malpractice insurance premiums help hospitals attract and retain qualified physicians thereby assuring patients' access to health care. Injured parties have the right to recover unlimited economic damages and substantial noneconomic damages. Even more importantly, because Wisconsin's medical malpractice liability system has the economically stable Fund,[18] injured parties are *guaranteed* to recover all amounts awarded to them.

The constitutional right to remedy, Wis. Const. Art. I, § 9, confers no legal rights; it merely guarantees access to the courts. *Doering v. WEA Ins. Group*, 193 Wis. 2d 118, 131, 532 N.W.2d 432 (1995). "The right-to-remedy clause thus preserves the right 'to obtain justice on the basis of the law as it in fact exists.'" *Aicher*, 2000 WI at ¶ 43 (citation omitted). The legislature, not the courts, defines "the law as it in fact exists," and the legislature has the authority to alter, vary or even abolish the common law. *Id.* at ¶¶ 44-51. The legislature's choice to curb noneconomic damages does not violate Wis. Const. Art. I § 9.

CONCLUSION

For the reasons set forth herein, and in the Fund's Brief, this Court should find that Wis. Stat. §§ 655.015, 655.017 and 893.55(4) are constitutional.

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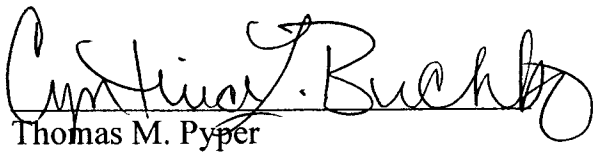
[18] The Wisconsin Legislative Audit Bureau concluded that the 1995 enactment of the noneconomic damages cap was a significant factor for the improved financial stability (e.g., operating at a liability deficit to operating at a liability surplus) of the Fund. *An Audit of the Patients Compensation Fund*, OCI, 11 (June 2001).

Dated this 21st day of February, 2005.

WHYTE HIRSCHBOECK DUDEK S.C.



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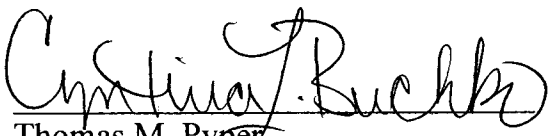
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is 2,626 words.



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