STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 2020AP000285

BEATRIZ BANUELOS

Plaintiff-Appellant

vs.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY

Defendant-Respondent.

Case No. 2020AP001582
Case Code: 30701

APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY
Honorable Juan B. Colas
Dane County Case No. 2020CV000903

PLAINTIFF-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE

Wisconsin Statutes § 146.83(3f) limits what health care providers may charge to patients for "copies of a patient's health care records" to the items specifically listed in the statute. In 2011, the legislature deleted electronic copies from the list of permissible charges. Can a provider charge excessive, per-page fees for providing an electronic copy of the patient's health care records when such fees are not permitted by the statute?

Answer by the circuit court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Banuelos would welcome oral argument if the Court has questions for the parties but does not feel it is necessary otherwise. Banuelos does advocate for publication. While this issue should be a simple matter of statutory construction with reliance on prior Wisconsin Supreme Court precedent, this Court's interpretation will have wide-ranging effect, as it will govern health care providers' efforts to charge unreasonable

fees outside of Wisconsin Statutes § 146.83(3f) for providing patients access to electronic health care records.

STATEMENT OF THE CASE

This case presents a simple issue of whether health care providers, like UW Health, are permitted under Wisconsin law to charge exorbitant fees for transmitting ***electronic copies*** of health care records to patients. The question is unambiguously controlled by Wisconsin Statutes § 146.83(3f), which by its plain language does not permit UW Health to charge Banuelos for providing an electronic copy of her patient health care records.

A. Facts, Procedural Status, and Disposition by the Circuit Court.

Since 2009, 96% of major health care providers have adopted electronic medical records systems after the passage of the federal Health Information Technology for Economic and Clinical Health (HITECH) Act, where the federal government paid for providers to establish the technological infrastructure necessary to manage patient health care records electronically. (R.20:4 *citing* "What is the HITECH Act?,"

HIPAA Journal, *available at* https://www.hipaajournal.com/what-is-the-hitech-act/). Since the government paid for these electronic records systems and since provision of records is considered a part of the care the patient has already paid for, the federal Department of Health and Human Services recommends that health care providers make electronic copies of patient health care records available for free. *(See* DHHS guidance, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html). Following the implementation of HITECH in 2011, the Wisconsin legislature *eliminated* the provision of § 146.83(3f) that allowed providers to charge patients for electronic copies of health care records.

Banuelos sued UW Health, alleging it violated § 146.83(3f) by charging her a "per page fee" for paper copies of patient health care records when she requested and received electronic copies. (R.1:6-7, A.App.15-16). The pertinent facts – (1) that Banuelos requested electronic copies of her patient

health care records, (2) that UW Health provided the electronic copies, and (3) that UW Health still charged her a per page rate attributable to paper copies under § 146.83(3f)(b)1 – were accepted as true at the pleading stage. (*Id.*; R.26:2-3, A.App.3-4). UW Health moved to dismiss the Complaint. (R.6). The circuit court granted the motion, declaring that UW Health could charge anything it wanted for providing electronic copies of patient health care records under § 146.83(3f) because it felt that the statute was silent as to fees allowed for electronic copies. (R.24, A.App.1; R.26:4-7; A.App.5-8).

ARGUMENT

I. STANDARD OF REVIEW

Wisconsin Statutes § 146.83(3f) prohibits providers from charging fees for items not listed in the statute, like charges for electronic copies of patient health care records. The statute is not silent as to these charges – it disallows them. The only issue to be decided here is the correct interpretation

of § 146.83(3f), which is an issue this Court reviews d*e novo*.[1] *State v. Szulczewski,* 216 Wis.2d 495, 499, 574 N.W.2d 660 (1998). "'[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.' Statutory interpretation begins with the text of the statute. If the text of the statute is plain and unambiguous, our inquiry stops there." *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶¶ 17-19, 375 Wis. 2d 38, 894 N.W.2d 405 (interpreting § 146.83(3f)) (internal citations omitted). This Court should reverse the decision of the circuit court because the plain language of § 146.83(3f) does not permit providers like UW Health to charge for providing ***electronic copies*** of "patient health care records."

[1] Granting a motion to dismiss for failure to state a claim upon which relief may be granted is also reviewed *de novo* by this Court. *State ex rel. Lawton v. Town of Barton,* 2005 WI App 16, ¶¶ 2, 9, 278 Wis.2d 388, 692 N.W.2d 304. However, the circuit court and the parties agreed that whether the Complaint states a claim for relief here depends upon the correct interpretation of § 146.83(3f), namely whether it permits or prohibits charges for electronic copies of patient health care records.

II. THE PLAIN LANGUAGE OF § 146.83(3f) DOES NOT PERMIT A HEALTH CARE PROVIDER TO CHARGE FEES FOR PROVIDING ELECTRONIC COPIES OF PATIENT HEALTH CARE RECORDS.

In misreading § 146.83(3f), the circuit court overlooked its critical language that providers "***may charge no more than the total of***" the items specifically listed in the statute "that apply to the request." Instead, the circuit court incorrectly held that providers ***are permitted*** to charge for items not listed in § 146.83(3f).[2] (R.26:4-7; A.App.5-8).

Section 146.83(3f) limits what providers can charge for providing "patient health care records" to those items it specifically lists:

[2] Even UW Health did not propose or advocate for the interpretation adopted by the circuit court, that statute is merely "silent" as to electronic copies, and therefore the provider can impose any charge it likes for providing access. (R.7:4-9). As discussed below, UW Health argued that a different statute controls the analysis. (*Id.*). The circuit court did not accept UW Health's interpretation. (R.26:4-7; A.App.5-8).

> (a) . . . if a person requests copies of a patient's health care records, provides informed consent, and pays the applicable fees under par. (b), the health care provider shall provide the person making the request copies of the requested records.
> (b) . . . ***a health care provider may charge no more than the total of all of the following that apply for providing the copies requested under par. (a)***:
> 1. For ***paper copies***: $1 per page for the first 25 pages; 75 cents per page for pages 26 to 50; 50 cents per page for pages 51 to 100; and 30 cents per page for pages 101 and above.
> 2. For microfiche or microfilm copies, $1.50 per page.
> 3. For a print of an X-ray, $10 per image.
> 4. If the requester is not the patient or a person authorized by the patient, for certification of copies, a single $8 charge.
> 5. If the requester is not the patient or a person authorized by the patient, a single retrieval fee of $20 for all copies requested.
> 6. Actual shipping costs and any applicable taxes.

(emphasis added). These cost restrictions apply to all health care providers (which UW Health unquestionably is). *Id*. The plain language chosen by the legislature is all-inclusive and mandatory. The unambiguous language of § 146.83(3f) does not allow a charge for providing ***electronic copies*** of "patient health care records," because a provider "***may charge no more than the total of***" those items enumerated in the statute that "apply" to the request, and electronic copies are not listed. § 146.83(3f)(b). Therefore, charges for electronic copies are not permitted. *Id*. The circuit court erred when it ignored this

critical language and held that charges for items ***not listed in the statute*** are permitted.

Further, the circuit court's holding is contrary to the Wisconsin Supreme Court's interpretation of § 146.83(3f), set forth in *Moya v. Aurora Health Care.* In *Moya*, the Wisconsin Supreme Court agreed that charges for patient health care records not specifically itemized in § 146.83(3f) are disallowed by the statute's plain language. 2017 WI 45, ¶ 31. *Moya* started by confirming that "[a]ccess to patient health care records is governed by Wis. Stat. § 146.83," and that the statute allows health care providers to "impose ***certain costs*** on the person requesting health care records. . . ." *Id.* ¶¶ 4-5 (emphasis). Those costs not included in § 146.83(3f)'s permissible list cannot be charged by the provider. *Id.* ¶¶ 4-5, 31. More specifically, the *Moya* court held that the provider was not permitted to charge certification and retrieval fees to a person authorized by the patient because those charges are not permitted by § 146.83(3f)(b)4-5. *Id*. ¶ 25 ("Put simply, had the legislature intended to place parameters of the kind . . . on a

person authorized in writing by the patient, 'it would have done so.' . . . It did not, and so we do not."). Since those charges were ***not included*** within § 146.83(3f)'s permissible list, the Court held that ***they were disallowed***.

Moya controls, and the same analysis must apply here. The legislature did not allow a charge for providing electronic copies of Banuelos' heath care records, and therefore no charge is permitted. § 146.83(3f). The legislature did allow a per page fee for ***paper copies*** of the records but chose not to allow such fees for ***electronic copies***. § 146.83(3f)(b)1.

The circuit court misread the statute and failed to address *Moya* in determining that where the statute does not list a particular item – electronic copies in this instance – the provider can impose any charge it likes. To the contrary, *Moya* holds that providers cannot charge for items ***unless*** they are specifically listed in the statute. ¶¶ 4-5, 31. If the circuit court's reasoning were to control, the charges in *Moya* would have been allowed because the statute does not address them.

That is the opposite of what the Supreme Court held, and the circuit court erred in failing to adhere to it.

Based on the circuit court's holding here, a provider could charge whatever it wants as long as the charge is not identified in the statutory list – entirely defeating the purpose of the statute. For example, under the circuit court's rationale, a provider could charge a "basic fee" or "labor fee" in any amount it choses for providing records, because those are not within the statute's enumerated items. *Moya* held the opposite. Allowing providers to charge for items not listed in the statute would undermine the entire system of cost control it imposes. Essentially providers could charge whatever they want as long as they named the fees as something other than those items listed in the statute. Under the circuit court's reasoning, a "certification fee," which is prohibited under *Moya*, could be renamed a "legal compliance fee" to avoid the statute's cost limitations. The circuit court's analysis has already been rejected in *Moya* and should again be rejected here.

A. The Statutory Definition of "Patient Health Care Records" Includes Electronic Copies.

Because section 146.83(3f) limits the charges permitted when a patient requests "copies of a patient's health care records," the circuit court's interpretation could only stand if ***electronic copies*** somehow did not qualify as "patient health care records" under § 146.83(3f). Such an interpretation also conflicts with the plain language of the statute as "patient health care records" broadly includes "all records" related to the health of the patient: "'***Patient health care records' means all records related to the health of a patient prepared by or under the supervision of a health care provider***; . . ." Wis. Stat. § 146.81(4). The definition does not exempt records because they are stored, copied, or transmitted electronically. Instead, records in any format qualify if they are (1) related to patient health and (2) prepared by the provider. *Id*. "***All records,***" by its plain language, must include those which are created, stored, transmitted, or copied electronically. Because "patient health care records" includes those maintained and/or copied electronically, then the cost limitation of § 146.83(3f)

unambiguously applies. Because the plain language of § 146.86(3f)(b) is clear, this Court must "stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44, 271 Wis.2d 633, 681 N.W.2d 110.

Moreover, the term "patient health care record" has been previously interpreted by this Court:

> As relevant here, the term "patient health care records" means "all records related to the health of a patient prepared by or under the supervision of a health care provider [.]" Wis. Stat. § 146.81(4). This definition has three salient facets, for purposes of this case. First, a patient health care record must be a "record." The statutory definition does not encompass mere information that is not reduced to a record. . . . Second, the record must have been prepared by or under the supervision of a health care provider. *See* § 146.81(4). Third, the record must relate to the patient's health. *See id.*

Wall v. Pahl, 2016 WI App 71, ¶ 28, 371 Wis. 2d 716, 886 N.W.2d 373 (internal citations omitted). This is exactly what Banuelos requested and received:

> All medical records, without limitation, physician records, nurse's notes, radiological reports, lab reports. . . . and any other information contained in your records regarding my care and treatment.

(R.1:14, A.App.23). Banuelos asked that the records be provided "on PDF format on CD or via electronic delivery." (*Id.*). Particularly in this modern era of medicine, where

virtually all patient health care records are created, maintained, and transmitted in electronic format by major providers such as UW Health, the statutory definition of "patient health care records," which includes "all records," must encompass those stored and/or copied electronically.

Further, "[i]t is a foundational principle of statutory construction that 'no word or clause shall be rendered surplusage.'" *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶55, 350 Wis.2d 554, 835 N.W.2d 160 *(quoting Donaldson v. State*, 93 Wis.2d 306, 315, 286 N.W.2d 817 (1980)).

The circuit court's interpretation renders both the definition of "patient health care records" and the language of § 146.86(3f)(b) surplusage. Whether the copies are electronic or on paper, "patient health care records" are still "patient health care records" and subject to the cost controls of § 146.86(3f). Under the circuit court's interpretation, "patient health care records" would not include records created or copied electronically. That renders the term's definition, which

includes "***all records*** related to the health of a patient prepared by or under the supervision of a health care provider. . . ," surplusage. § 146.81(4). Further, § 146.86(3f)(b) mandates that "a health care provider ***may charge no more than*** the total of all of the following that apply for providing the copies requested. . . ." Again, the circuit court's interpretation renders that language surplusage, as it permits providers to collect more than what the statute allows.

In addition, the Court cannot interpret a statute in a way that leads to an "absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶ 46. The cardinal rule in statutory interpretation is that courts favor a construction that adheres to the stated purpose of the act over a construction that would defeat its manifest object. *Milwaukee County v. DILHR*, 80 Wis. 2d 445, 453, 259 N.W. 2d 118 (1977). Consequently, it is the Court's duty "to construe statutes on the same subject matter in a manner that harmonizes them in order to give each full force and effect." *State v. Aaron D.*, 214 Wis. 2d 56, 66, 571 N.W.2d 399 (Ct. App. 1997).

The circuit court's interpretation leads to absurd results contrary to the purpose of these statutes. The health care records statutes (§§ 146.81-146.84) were created so that patient health care records "remain confidential," are "released only to the persons . . . authorized by the patient," and so that patients receive copies for "reasonable costs." 1979 Wis. Ch. 221, p. 1182-84. It would be absurd and contrary to the purpose of these statutes to exclude records stored, transmitted, and/or copied electronically from the provisions governing patient access to and the cost of obtaining such records. Excluding electronic records from the definition of "patient health care records" or § 146.83(3f)'s cost controls would be unconscionable as it would almost entirely negate the objective of the statute in the modern world.[3] It would also result in patients losing their statutory right to access electronic records. Doing so would undermine not only the statute's express language and purpose in providing patients cost-effective

[3] 96% of major hospital-based providers like the defendant have implemented electronic records systems. (R.20:5 citing "What is the HITECH Act?," HIPAA Journal, (*available at* https://www.hipaajournal.com/what-is-the-hitech-act/).

access to their records, but also would negate the requirements of access, confidentiality, and disclosure, as the definition of "patient health care records" is carried throughout these statutes. That would mean that patients have no right of access and confidentiality for virtually all modern patient health care records because they are created, stored, and transmitted electronically. Pertinent here, § 146.83(3f)'s cost regulation would become entirely moot, as virtually all "copies" of patient health care records are maintained and copied electronically today. That interpretation cannot stand.

B. Legislative History Confirms that that Legislature Intended ***Not*** to Allow Any Charge for Electronic Copies Because It Removed "Providing Copies in Digital or Electronic Format" from § 146.83(3f)'s Permissible Charges in 2011.

Any ambiguity as to whether electronic records qualify as "patient health care records" or whether § 146.83(3f) prohibits charges for electronic copies can be easily resolved based on the statute's history. *Moya* held that the "past iterations" of § 146.83(3f) are important to understanding its plain meaning. 2017 WI 45, ¶ 28. Even without ambiguity,

courts "may consult extrinsic sources to confirm our understanding of the plain language of a statute." *Id.* ¶ 28. (*citing Kalal*, 2004 WI 58, ¶51). Critical here is the Supreme Court's longstanding holding that ***omission of a word when amending a statute "indicates an intent to alter its meaning."*** *Cardinal v. Leader National Ins. Co.,* 166 Wis.2d 375, 388, 480 N.W.2d 1 (1992).

Section § 146.83(3f)'s history conflicts with the circuit court's determination that it does not address electronic records because the statute formerly permitted a charge for providing "copies in digital or electronic format," and later removed that permission – all without changing the definition of "patient health care records." In 2009, the legislature allowed "a charge" for **"**providing copies in digital or electronic format.**"** *Compare* § 146.83(1f)(2009) *with* § 146.83(3f)(b)(2011). Then, in 2011, the legislature removed the permissible charge for "providing copies in digital or electronic format," which has remained to the present. § 146.83(3f)(2011). This legislative history confirms that for at least the last 9 years, the

legislature intended for providers not to be able to charge for "***providing copies in digital or electronic format"*** under § 146.83. *Cardinal,* 166 Wis.2d at 388. The legislature did so without altering the definition of "patient health care records," the right of patient access, or the requirement that the provider charge "no more than" the fees listed for the enumerated items applicable to the request. *Compare* § 146.81(4)(2009) and § 146.81(4)(2011), § 146.83 (2009), and § 146.83(2011) *with current versions*. The change from allowing "a charge" for "***copies in digital or electronic format***" in 2009 to disallowing such charges in 2011 is shown as follows:

§ 146.83(1f)(2009)	**§ 146.83(3f)(2011)**
(a) . . . if a patient or a person authorized by the patient requests copies of the patient's health care records, . . . the health care provider shall, . . . provide the patient or person authorized by the patient copies of the requested records after receiving the request. **. . .** **(c)** . . . ***a health care provider may charge no more than the total of all of the following that apply*** for providing copies requested under par. (a) or (b): **1.** For paper copies, 35 cents per page. **2.** For microfiche or microfilm copies, $1.25 per page. **3.** For a print of an X-ray, $10 per image. **3m.** ***For providing copies in digital or electronic format, a charge for all copies requested.*** **4.** Actual shipping costs. **5.** If the patient or person authorized by the patient requests delivery of the copies within 7 or fewer days after making a request for copies, and the health care provider delivers the copies within that time, a fee equal to 10 percent of the total fees that may be charged under subds. 1. to 4.	**(a)** . . . if a person requests copies of a patient's health care records, provides informed consent, and pays the applicable fees under par. (b), the health care provider shall provide the person making the request copies of the requested records. **(b)** . . . a health care provider may charge no more than the total of all of the following that apply for providing the copies requested under par. (a): 1. For paper copies: $1 per page for the first 25 pages; 75 cents per page for pages 26 to 50; 50 cents per page for pages 51 to 100; and 30 cents per page for pages 101 and above. 2. For microfiche or microfilm copies, $1.50 per page. 3. For a print of an X-ray, $10 per image. 4. If the requester is not the patient or a person authorized by the patient, for certification of copies, a single $8 charge. 5. If the requester is not the patient or a person authorized by the patient, a single retrieval fee of $20 for all copies requested. 6. Actual shipping costs and any applicable taxes.

(emphasis).

To the extent that there could be any ambiguity as to whether "copies in digital or electronic format" are included within the definition of "patient health care records," the 2009

version of the statute unquestionably shows that they are. The 2009 version also definitively shows that "copies in digital or electronic format" are subject to § 146.83(3f)'s cost controls. When the legislature removed the permission for providers to charge a fee for "electronic copies" in 2011 without changing the definition of "patient health care records," such charges were no longer permitted. The omission of this permission in 2011 shows the legislature's intent to disallow it. *Cardinal,* 166 Wis.2d at 388.

The circuit court focused on the governor's partial veto statement from 2009, where the governor vetoed the legislature's language limiting the charge for electronic copies to $5 in favor of allowing a "reasonable charge." (R.26:6, A.App.7). It is true that in 2009, both the governor and the legislature wanted providers to be able to charge for electronic copies – they simply differed on what the allowable charge should have been. That supports Banuelos' position, because in 2011 the permission to charge for "electronic records" ***was removed and the governor did not veto that change***. So in

2011, both the governor and the legislature agreed to remove the permission to charge for electronic copies, and that change has remained undisturbed for the last nine years.

Further, prior to 2009, the legislature directed an administrative agency to publish maximum charges based on an "approximation of actual costs," "operating costs"," and "costs of advances in technology." *See* § 146.83(3m)(a) (2007). The ability to pass on the "actual costs," "operating expenses" and "costs of advances in technology" was removed from the statute in 2009.[4] § 146.83(1f)(c)(2009); 2009 Wis Act 28, § 2433F. The legislature's change from allowing providers to charge their actual cost, operating expenses, and cost of technology to itemizing specific permissible costs is also significant as it conflicts with UW Health's argument to the circuit court that it should be able to "recoup" and "defray"

[4] The removal of providers' ability to pass on operation and infrastructure costs to patients requesting records in § 146.83 coincides with the federal government passing HITECH where the it subsidized providers' electronic medical records systems. After 2009, it made little sense for providers to pass on such costs to patients because the federal government reimbursed providers for those costs.

technology infrastructure cost by passing those costs on to patients requesting copies of medical records. (R.7:1).

C. There is No Legitimate Argument that Providers Should Be Permitted to Charge Exorbitant Fees to Recoup Costs for Providing Electronic Copies as the Federal Government Has Subsidized Providers' Electronic Medical Records Systems and Recommends that Providers Not Charge for Providing Electronic Copies.

In 2009, federal government passed the HITECH law designed to financially incentivize health care providers to adopt systems for electronic medical records. (R.20:4 *citing* Rodriguez, "HITECH Act Resulted in Significant Gains in EHR Adoption in Hospitals," AMJC, 2017, *available at* https://www.ajmc.com/newsroom/hitech-act-resulted-in-significant-gains-in-ehr-adoption-in-hospitals). This resulted in the vast majority of health care providers adopting systems for electronic medical records:

> Prior to the introduction of the HITECH Act in 2008, only 10% of hospitals had adopted EHRs (electronic healthcare records). . . .While many healthcare providers wanted to transition to EHRs from paper records, the cost of making such a change was prohibitively expensive. The HITECH Act introduced incentives to encourage hospitals and other healthcare providers to make the change. . . . The Act increased the rate of adoption of EHRs from 3.2% in 2008 to 14.2% in 2015. By 2017, 86% of office-based physicians had adopted an EHR and 96% of non-federal acute care hospitals has implemented certified health IT.

(R.20:4 *citing* "What is the HITECH Act?," HIPAA Journal, *available at* https://www.hipaajournal.com/what-is-the-hitech-act/).

Since 2009, HITECH has required institutional medical providers like the defendant who maintain patient healthcare records electronically to supply patients and patients' designees with electronic copies of the records. 42 U.S.C. § 17935(e)(1).[5] In short, HITECH entitles a patient to obtain electronic copies of medical records or direct the provider to send them to the patient's lawyer. *Id.*

The Department of Health and Human Services recommends that providers transmit the electronic copies for free and confirms that the cost of technology infrastructure, which has been paid for in part by the federal government, should not be passed on to the patient:

[5] The text reads "[I]n the case that a covered entity uses or maintains an electronic health record with respect to protected health information of an individual . . . the individual shall have a right to obtain from such covered entity a copy of such information in an electronic format and, if the individual chooses, to direct the covered entity to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific."

> [C]overed entities ***should provide individuals who request access to their information with copies of their PHI free of charge***. While covered entities should forgo fees for all individuals, not charging fees for access is particularly vital in cases where the financial situation of an individual requesting access would make it difficult or impossible for the individual to afford the fee. Providing individuals with access to their health information is a necessary component of delivering and paying for health care.

(See DHHS guidance, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html).[6]

That § 146.83(3f) does not allow providers to charge for electronic copies makes perfect sense in light of the federal

[6] There is no question relating to HITECH or any other federal law that the Court must decide here. The only pertinent federal regulation required UW Health to transmit Banuelos' patient health care records to her electronically, which UW Health complied with. 42 U.S.C. § 17935(e)(1). HITECH's guidance documents and regulations also impose some significant cost limitations on patient requests for electronic medical records, but according to a recent federal court decision, *Azar v. CIOX*, No. 18-cv-0040 (D.C. Cir. Jan. 20, 2020), those cost controls to do not apply, when, as here, the patient requests that the copies be forwarded to a lawyer. Banuelos does not challenge that ruling or raise any issue of federal law to be decided by the Court in this case. While HITECH pre-empts less stringent state laws, more ***stringent*** state regulations governing access to patient health care records are not preempted. 45 C.F.R. § 160.203. Therefore, as relevant to this case, HITECH required UW Health to comply with Banuelos' request to transmit electronic copies of health care records to her lawyers (42 U.S.C. § 17935(e)), but the stricter cost controls imposed by Wisconsin Statutes § 146.83(3f) are enforceable and not preempted. *Id*. UW Health did not dispute that Wisconsin Statutes Chapter 146 controls the issue here.

subsidies providers have received to implement electronic records systems, and that it only takes a few mouse clicks to identify and transmit the records requested to the patient. Moreover, many states, like Wisconsin, do not permit providers to charge for providing electronic copies of medical records to patients under various circumstances. *See, e.g.*, KRS § 422.317 (Kentucky law allows one free copy of patient health care records); Vermont *Title 18 Ch. 221, § 9419 (no charge for records for social security claims); California* Health and Safety Code § 123110(d), (e) (one free copy for social security and disability claims); Conn. General Statutes § 20 –7c(d) (no charge for copy for social security and disability claims); MN Statute 144.292 Subd. 6(d) (2007) (flat fee of $10, no per page fees); Neb. Rev. Stat § 71-8405 (no charge for records for social security and disability claims); Ohio Revised Code 3701.741, 3701.742 (no charge for records for social security and disability claims); Texas Code, Health & Safety § 161.201 -161.204 (no charge for records for social security and disability claims). As the federal government has paid

providers to implement electronic medical records systems, federal law recommends that providers charge no fee for providing electronic copies, and several states explicitly require cost-free records, it is no great surprise or imposition for Wisconsin to mandate the same for electronic copies of patient health care records. The circuit court erred in permitting UW Health to charge Ms. Banuelos for digital copies of her health care records. Reversal of that incorrect decision is required.

III. THE CIRCUIT COURT CORRECTLY REFUSED TO ADOPT UW HEALTH'S PROPOSED STATUTORY CONSTRUCTION.

While the circuit court was mistaken in its reading of § 146.83(3f), it correctly rejected the arguments made by UW Health. UW Health wrongly argued that (1) an unrelated statute, § 146.836, exempts electronic copies of medical records from § 146.83(3f)'s cost controls, (2) that the legislature needed to use magic words in order to require transmission of electronic medical records without a charge, and (3) that the per page rate for paper copies should apply to

electronic copies. The circuit court correctly refused to adopt any of these arguments.

A. Wisconsin Statutes § 146.836 Supports Banuelos' Interpretation.

Contrary to the UW Health's argument that § 146.836 exempts electronic copies of medical records from § 146.83(3f)'s cost controls, § 146.836 ***confirms*** that "patient health care records" include electronic and digital information:

> Sections 146.815, 146.82, 146.83 (4) and 146.835 apply to all patient health care records, ***including those*** on which written, drawn, printed, spoken, visual, ***electromagnetic or digital information*** is recorded or preserved, regardless of physical form or characteristics.

Wis. Stat. § 146.836 (emphasis). Because § 146.836 ***confirms*** that "patient health care records" "include[e]. . . ***electromagnetic or digital information*** . . . recorded or preserved, regardless of physical form or characteristics," permissible charges for requesting for electronic copies of "patient health care records" ***must*** be controlled by § 146.83(3f). Banuelos' interpretation properly gives effect to these statutes' plain language, leaves no provision or term

superfluous, is consistent with the purpose of the statutes, and properly harmonizes them.

Contrary to the UW Health's argument, § 146.836 does not change § 146.83(3f)'s cost limitations for accessing "patient health care records." The plain language and purpose of § 146.836 is to ensure that all electronic records, paper records, diagnostic films, spoken recordings, audio recordings, visual recordings, handwritten notes, and drawings are preserved and subject to confidentiality. In creating this statute in 1999, the legislature expressly stated this purpose:

> AN ACT to create 51.30 (4) (b) 25., 51.30 (4) (g), 51.30 (5) (f), 146.82 (2) (a) 20. and 146.836 of the statutes; relating to: ***the form of patient health care records and mental health treatment records subject to confidentiality and other restrictions*** and release ***without informed consent*** of patient health care records and mental health treatment records that do not identify the patient.

1999 Wis Act 78 (Emphasis added). The state agencies responsible for enforcing these statutes interpret § 146.836 the same way, as the BadgerCare Plus and Medicaid website regarding "Provider Enrollment and Ongoing Responsibilities: Documentation" states:

> Wis. Stat. § 146.836 specifies that the requirements apply to "all patient health care records, including those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics." ***Paper and electronic records are subject to Wisconsin confidentiality laws***.

(*See* https://www.forwardhealth.wi.gov/WIPortal/Subsystem/KW/Print.aspx?ia=1&p=1&sa=17&s=1&c=3&nt=).

That the legislature subjected electronic records to confidentiality but did not permit providers to charge for copying them in § 146.83(3f) is meaningful, particularly because it amended § 146.83 several times after creating § 146.836 in 1999. Reading these statutes in harmony, considering the purpose and history of both, shows that the legislature intended for electronic copies of "patient health care records" to be subject to the cost controls of § 146.83(3f) (especially since the legislature allowed a charge for electronic records in 2009, and removed the charge in 2011 without changing § 146.81(4)'s definition of "patient health care records" or § 146.836).

UW Health's construction, which asked the Court to ignore the plain language of § 146.83(3f), write-in new terms to serve its purpose, and unreasonably construe § 146.836 to overwhelm and nullify the legislature's chosen language in § 146.83(3f), was properly rejected.

UW Health's argument was based entirely on the alleged contextual relationship between these two statutes, rather than the language of the controlling statute. This is not how the Court interprets independent statutes:

> There are limits as to how much and what kind of statutory context is relevant to the analysis of a particular word in an individual statutory section. "The risk of misunderstanding as a result of allowing irrelevant portions of a text to influence the meaning attributed to the segment of text being construed is probably just as risky as taking any statement out of context." . . . Without something more, such as one statute being incorporated into another, or two statutes addressing closely related subjects that consideration of one would logically bring the other to mind, "[e]very statute is an independent communication, for which either the intended or the understood meaning may be different." . . .

Kopke v. A. Hartrodt S.R.L., 2001 WI 99, ¶ 18, 245 Wis. 2d 396, 629 N.W.2d 662.

Section 146.836 does not control the issue here. UW Health incorrectly claimed that § 146.836 differentiates

between statutes that apply to electronic copies of patient health care records and the ones that apply only to paper copies. However, that argument has no basis in the language of § 146.836. Section 146.836 makes no distinction between statutes that relate to paper versus electronic records. Instead, it confirms that "patient health care records" encompass all types of records, even spoken recordings and handwritten notes. Nowhere does the statute state or imply that a patient's request for "electronic copies" of records is outside the purview of § 146.83(3f). Section 146.836 does not change the definition of "patient health care records" when used in elsewhere in the chapter. UW Health's argument was inconsistent with § 146.836's plain language and purpose.

It is obvious why § 146.836 does not apply to § 146.83(3f). Section 146.836 identifies sections that "apply to ***all*** patient health care records. . . ." Section 146.836 could not govern the cost controls within § 143.83(3f)(b) because ***patients can request their health care records in a limited fashion***. A few examples are as follows:

- As here, the patient may request electronic records, rather than paper records.
- Patients frequently limit their requests by date.
- A patient under certain circumstances may only want paper records.
- In other instances, patients may not want copies of x-rays and diagnostic films or handwritten notes.

Under § 146.83(3f), the request made by the patient drives what records must be produced, and the applicable charges. If § 146.836 were to apply as the defendant suggests, the medical provider would be obligated to produce "all records" every time a request is made, regardless of what the patient asks for. These examples help to explain why § 146.836 states that certain sections within the chapter "apply to all patient health care records."

The sections listed within § 146.836 ensure that ***all*** patient health care records remain confidential and subject to

strict rules of access. A review of the sections listed in § 146.836 demonstrates this correct interpretation:

- § 146.815 requires certain information to be included within hospital in-patient health care records.
- § 146.82 mandates confidentiality of patient health care records and designates those who may receive the records without informed consent.
- § 146.83(4) prohibits falsifying, concealing, or withholding information in a patient health care record "to prevent its release to the patient. . . ."
- § 146.835 limits the right of access to parents that are denied physical placement of a child.

The sections listed in § 146.836 demonstrate its purpose to ensure maintenance, confidentiality, patient access, and limitations to access by others for ***all*** patient health care records. For example, that § 146.836 applies to § 146.83(4), which prohibits providers from withholding information from

a record (including paper and electronic records) "to prevent its release to the patient. . . ," shows that the right of access to patient health care records applies to electronic records. Because patients have a right to access ***all*** of their records, including electronic ones, such requests ***must*** be subject to the cost controls imposed by § 146.83(3f). Simply put, § 146.836 does not limit the patient's right to obtain electronic copies of records or the cost of doing so. Should defendant raise this misinterpretation of § 146.836 as a basis for affirmance, this Court, like the circuit court, should reject defendant's misinterpretation, which does not resolve any issue here.

B. The Legislature Does Not Have to Use Magic Words, Other Than Plain, Unambiguous Text When Limiting What Providers May Charge for Obtaining Copies of Health Care Records.

No cases cited by UW Health below held that the legislature is required to use specific language or "magic words" to limit the allowable costs for patients to access their medical records. For example, UW Health cited a federal district court case that is not authority, *Almond v. Pollard*, No. 09-CV-335-BBC, 2010 WL 3123141, at *1 (W.D. Wis. Aug.

9, 2010), claiming that courts "do[] not require that copies [of medical records] be provided free of charge to a party." (R.7:5). However, *Almond* has nothing to do with the medical records statutes. It analyzed documents produced under Federal Rule of Civil Procedure 34(a)(1)(A). None of the cases cited by UW Health related to this issue or held that the Wisconsin legislature has to use certain words when requiring a party to do something without charge. Defendant agrees that the "plain language of the statute" governs. (R.7:4). Examples of other statutes that use different language in totally irrelevant contexts have no bearing on the language of § 146.83(3f).

Moreover, the Wisconsin Supreme Court in *Moya* has already rejected this argument based on the exact same statute. 2017 WI 45, ¶ 31. The *Moya* court held that under § 146.83(3f), providers are required to provide patients and their lawyers certification of records ***free of charge*** (which, as the Court is aware, involves appending a certification page filled out by the records custodian to the records, certifying that the records are complete and accurate under § 908.03(6m)). *Moya*

concluded based on the identical language of § 146.83(3f) that the legislature only allowed certain enumerated charges. *Id*. Since charges for certification (as well as basic/retrieval fees) are not amongst them, the provider must certify the records free of charge. *Id*. *Moya*'s interpretation controls here as well. When § 146.83(3f) states that providers "***may charge no more than***," that is exactly what it means.

C. There Is No Support in § 146.83(3f)'s Language to Apply the Per Page Rate for Paper Copies as a Baseline Fee for Electronic Copies.

UW Health's argument that the charges for "per page" fees applicable to "paper copies" should apply to electronic copies is without any basis in the language of the statute. § 146.83(3f)(b)1. As discussed throughout, § 146.83(3f) does not permit a fee for electronic copies of records. If the legislature had intended for the same rates to apply to ***paper and electronic copies***, it would have said so, and would not have limited the allowable charge to "paper copies." Also, as discussed, the legislature did allow such a charge in 2009, but then disallowed it from 2011 to present day. UW Health

cannot legitimately bemoan the cost of providing electronic copies as the federal government provided financial assistance to set up electronic records systems, considers providing copies of patient records a part of the medical treatment already charged for, and encourages providers to provide electronic copies for free. *(See* DHHS guidance, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html). Like several other states, the Wisconsin legislature has made the federal recommendation mandatory in § 146.83(3f). It would be absurd under the circumstances for major providers, like the defendant, to charge "per page" fees for the couple of mouse clicks required to transfer electronic records already prepared and stored in electronic format to a web-based patient portal or inexpensive digital media.

UW Health's request to allow it to use the paper copy per page rate would require this Court to re-write the statute and legislate from the bench. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear

words of the statute." *Id.* ¶ 46 (internal citations omitted). Courts "cannot rewrite [statutes], to meet [a party]'s desired construction of it. If a statute fails to cover a particular situation, and the omission should be cured, the remedy lies with the legislature, not the courts." *LaCrosse Lutheran Hosp. v. LaCrosse Cty.*, 133 Wis. 2d 335, 338, 395 N.W.2d 612, 613 (Ct. App. 1986); *see also Wagner Mobil, Inc. v. City of Madison*, 190 Wis.2d 585, 594, 527 N.W.2d 301 (1995) ("[I]t is not the function of this court to usurp the role of the legislature."); *Holtzman v. Knott,* 193 Wis.2d 649, 711, 533 N.W.2d 419 (1995) (Steinmetz, J., concurring in part & dissenting in part) ("A state court functions at its lowest ebb of legitimacy when it ... legislates from the bench, usurping power from the appropriate legislative body and forcing the moral views of a small, relatively unaccountable group of judges upon all those living in the state."). UW Health's remedy lies with the legislature, not with the courts. Under existing law, it cannot impose unreasonable, exorbitant per-page fees to profit

from selling patients like Banuelos electronic copies of their own health care records.

CONCLUSION

For the foregoing reasons, Banuelos respectfully requests that this Court reverse the decision of the circuit court dismissing the case. The Court should hold that § 146.83(3f) does not permit providers like UW Health to charge a fee for providing electronic copies of patient health care records. Banuelos requests that this Court remand with instructions to allow issue to be joined and the litigation to proceed in earnest to adjudicate the statutory violations and the appropriate remedy.

Dated this 3rd day of November, 2020.

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CERTIFICATE OF FORM, LENGTH, APPENDIX AND ELECTRONIC FILING

I hereby certify that:

This brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and separate appendix produced with a proportional font. The length of this brief is 7221 words.

I have submitted an electronic copy of this brief and appendix, which complies with the requirements of Wis. Stat. § 809.19(12) and (13). The text of the electronic brief is identical to the printed form of the brief filed as of this date. The content of the electronic appendix is identical to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all parties.

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court entries;

(3) the findings or opinion of the circuit court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using the first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references in the record.

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Dated this 3rd day of November, 2020.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on November 3, 2020, this brief and separate appendix were delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief and appendix were correctly addressed.

Dated this 3rd day of November, 2020.

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