STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 2020AP001582

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

UW Health now primarily relies on two new issues never discussed in the circuit court, which it waived by failing to raise there. *Evelyn v. Evelyn*, 171 Wis.2d.677, 688, 492 N.W. 2d 361 (Ct. App. 1992).

Notwithstanding, these new arguments fail. The first is an attempt to have this Court rewrite the plain language of §146.83(3f), by exaggerating the legislature's intent in deleting §146.83(1k)(2009). This fiction is the new premise of UW Health's entire argument. When scrutinized, it collapses, like a house built on a shaky foundation.

UW Health wrongly claims that the deletion of §146.83(1k)(2009), which formerly ***required*** providers to supply electronic copies of records, was actually intended to change the entire statutory structure and definitions within §146.83, so it no longer applied to electronic medical records at all. That argument cannot be reconciled with §146.83(3f)'s language, history, purpose, or interpretation in *Moya v. Aurora*

Health Care, 2017 WI 45, 375 Wis.2d 38, 894 N.W.2d 405. To the contrary, the language and intent of §146.83(3f) prohibits charges for electronic copies, especially the exorbitant, per page fees at issue here. ***In 2011, the legislature repealed the permission to charge for electronic copies, it did not subject patients to unlimited, unreasonable fees.***

The rationale for deleting §146.83(1k) is not stated in the statute or drafting file, but it was likely done because it became redundant of federal law. At best, the deletion reflects the legislature's wish to give providers more flexibility in responding to requests for copies of records. ***The remaining statute does not mandate either paper or electronic copies***.

The changes did not alter either the structure of the cost limitation (the "maximum allowable charges" (S.App.90)) or the definition of "patient health care records," which includes electronic records.

Contrary to UW Health's argument, the drafting file ***shows that the legislature was aware when it removed the permission to charge for electronic copies that the remaining***

items would be the "maximum" allowed. (S.App.88-92). UW Health seeks to override the legislature's judgment and have this Court re-write this decades-old statute, contrary to its purpose and language.

The second new argument is that Banuelos did not request copies of "patient health care records" under §146.83(3f). Again, this dubious contention can be easily rejected based on §146.83(3f)'s language and the allegations of the Complaint. Banuelos requested copies of her medical records, exactly what §146.83(3f) regulates. (R.1:14, A.App.23). The only question for this Court to resolve is whether §146.83(3f) permits UW Health's charges, which it does not.

UW Health bemoans a hypothetical scenario, claiming it could have spent 20 hours scanning in physical records to transmit them to Banuelos, without reimbursement. That argument is disingenuous as 96% of major providers like UW Health have electronic medical records systems, and ***neither federal nor Wisconsin law required UW Health to physically***

scan in paper records to produce electronically. (Appellant Brief, p.22-24). This hypothetical *possibility* would never occur. In reality, providers like UW Health click a mouse or use an automated process to fulfill requests through an online "patient portal."[1] Charging hundreds or thousands of dollars in per page fees for electronic copies bears no relationship to any cost or effort providers spend.

I. AFTER 2011, §146.83(3f) PROHIBITED CHARGES FOR ELECTRONIC COPIES.

Noticeably absent from UW Health's brief is any substantive analysis of the language of §146.83(3f). Banuelos' brief showed the Court how §146.83(3f) limits charges for copies of "patient health care records" to those items listed in the statute and that "patient health care records" includes those created and copied electronically. (App. Brief, p.6-16). By not responding, UW Health concedes that interpretation. *Charolais Breeding Ranches v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App. 1979) (Where a party does not

[1] *See* federal Health Information Technology website, *available at* www.healthit.gov/faq/what-health-it.

address an issue raised by the opponent, the court assumes the party concedes it).

Despite UW Health's bald pronouncements, 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***" the applicable items listed, and electronic copies are not. §146.83(3f)(b). The statute allows a charge for "paper copies," not electronic. §146.83(3f)(b)1. The circuit court erred by determining that charges for items ***not listed in the statute*** are permitted.

When the statute is plain and unambiguous, as it is here, the court's "inquiry stops there." *Moya*, 2017 WI 45, ¶¶17-19. "…[T]he court is not at liberty to disregard the plain, clear words of the statute." *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110.

Considering the structure of the statute, the analysis is much simpler than UW Health claims. First, under §146.83(3f)(a), when the patient requests "patient health care

records," and pays the applicable fees, the provider must provide copies. "Patient health care records" broadly includes "***all records related to the health of a patient prepared by or under the supervision of a health care provider***;…" §146.81(4). "***All*** records**,**" by its plain and inclusive language, must include those created and copied electronically. The history of §146.83 confirms this interpretation because in 2009 the legislature recognized "digital or electronic" copies were a component of "patient health care records," and allowed "a charge" for such copies. §146.83(1f)(c)3m(2009). When the legislature repealed that permissible charge in 2011, it ***left the definition of "patient health care records" undisturbed***, which naturally still included electronic copies.

Subsection (a) does not mandate any format the copies must be requested or produced in. All that is required to trigger §146.83(3f)(b) is that the patient requests and the provider produces copies of "patient health care records."

Second, §146.83(3f)(b) limits the provider to charging "no more than the total of" the applicable items listed. Charges

for electronic copies, particularly per page charges, are not permitted. The structure of this statute is plain, unambiguous, and easy to follow.

This construction was confirmed in *Moya*. There, the court agreed that charges for items not included in §146.83(3f) are ***disallowed*** and cannot be charged by the provider. 2017 WI 45, ¶¶4-5, 31. Specifically, *Moya* ***prohibited*** charges for certification and retrieval fees because those charges were ***not included*** within §146.83(3f)'s permissible list. That same analysis applies here.

II. SECTION §146.83'S HISTORY CONFIRMS IT PROHIBIT CHARGES FOR ELECTRONIC COPIES.

In 2011, the legislature repealed the permission to charge for "copies in digital or electronic format." §146.83(1f)(2009); §146.83(3f)(b)(2011). The legislature did so while leaving the structure and scope of §146.83 undisturbed; it did not change the definition of "patient health care records" or the fee limitation ("no more than the total of" the applicable items listed). This history confirms that after

2011, the legislature intended to prohibit providers from charging for "***copies in digital or electronic format."*** *Cardinal v. Leader National Ins.*, 166 Wis.2d 375, 388, 480 N.W.2d 1 (1992) (omitted provisions alter the statute's meaning). In arguing that §146.83(3f) is "merely silent," UW Health seeks to avoid the legislature's choice.

UW Health's interpretation requires this Court to hold that both the 2009 and 2011 revisions were meaningless. "We are to avoid interpretations that render parts of statutes meaningless." *Norda, Inc. v. Wisconsin Educ. Approval Bd.*, 2006 WI App 125, ¶12, 294 Wis.2d 686, 718 N.W.2d 236. UW Health's argument that providers can charge anything for items ***not listed*** in §146.83(3f), renders the 2009 changes, allowing providers to include "a charge" for electronic copies, superfluous. According to UW Health, providers were already allowed to charge for electronic copies, because the prior statute was "silent" on the subject. So the 2009 change, which first allowed providers to charge for electronic copies, had no effect, if UW Health's construction were adopted.

More importantly, UW Health's construction moots the 2011 change, when the legislature repealed the permission to assess "a charge," for electronic copies. UW Health asks this Court to hold that the 2011 change again had no impact on the provider's ability to charge such fees. In 2009, the statute permitted a discretionary "charge" for electronic copies. §146.83(1f)(c)3m(2009). UW Health argues that repealing this permission in 2011 had no effect; providers could still assess a discretionary charge for electronic copies. Had the legislature wanted providers to continue charging fees at their discretion for electronic copies, it would have simply left §146.83(1f)3m in place. This statutory change was meaningful, and this Court must respect the legislature's judgment.

Moreover, ***the legislative history shows that the legislature knew the effect of repealing the permission to "charge" for electronic copies***. Contrary to UW Health's argument that the legislature wanted to avoid treating §146.83(3f) as an "exclusive list" of permissible charges (Resp. Brief, p.10), the 2011 drafting file confirms that

§146.83 limits the "maximum allowable fees" to those items listed:

- "fees that health care providers may charge for copies of patient health care records are established in state statute." (S.App.88).
- ". . .a health care provider may charge no more than the total of all of the following fees for providing copies to a patient or a person authorized by the patient:(then lists the charges allowed)" (S.App.88).
- "These fees, plus any applicable tax, would be the maximum amount a health care provider could charge for duplicate health care records, duplicate X-ray reports, or the referral of X-rays to another health care provider of the patient's choice." (S.App.90).
- "In general, the statutes establish the following maximum allowable fees:.." (S.App.92).

Accordingly, the legislature was aware that the statutory list constituted the "maximum" providers could charge when it repealed the permission for electronic copy fees. UW Health's argument that nothing has changed must be rejected.

UW Health's interpretation leads to absurd results contrary to the purpose of these statutes. While addressing a similar attempt to avoid §146.83(3f), claiming that it does not apply to providers' subcontractors, the court reaffirmed its vital

purpose for patients to "have access to medical records... without being charged more than the reasonable costs of copying and mailing them," and prevent providers form "charg[ing] fees of their own liking." *Townsend v. Chartswap*, No. 2019AP2034, 2020 WL 6732672, at *3 (Wis. Ct.App. Nov. 17, 2020).

Like in *Chartswap*, it would be absurd and contrary to purpose of §146.83(3f) to exempt records created or copied electronically. Excluding electronic records from the definition of "patient health care records" or §146.83(3f)'s cost controls would negate the objective of the statute, as virtually all "copies" are electronic today.

Any argument by UW Health that the legislature intended something different from the statute's language, must be rejected. *Buffham v. Racine*, 26 Wis. 449, 456 (1870) (holding that the legislature can correct its own mistakes, and "it would be very dangerous to put. . . a construction. . . that the legislature did not mean what it has expressed."). This

Court cannot override the legislature's choice to repeal the permission to charge for electronic copies. *Id*.

A. UW Health Grossly Overstates the Legislature's Intent in Deleting §146.83(1k)(2009).

UW Health grossly exaggerates the legislature's intent in deleting §146.83(1k)(2009). In 2011, the legislature removed the requirement for providers to supply patients with electronic copies of records. However, UW Health's argument that the legislature intended for §146.83 not to regulate electronic copies at all is unsupported. UW Health's over-reading finds no support in the legislative history (S.App.85-104) or language of the statute. As discussed, if the legislature wanted to stop regulating the cost of electronic records, it would have changed the definition of "patient health care records" and §146.83(3f)'s mandatory cost restriction, which it did not.

Moreover, the logic of the argument that because the legislature did not require providers to supply electronic copies, that the legislature also wanted to abandon any cost

control for providers who do so does not follow. First, as the drafting file indicates, the legislature was aware of the federal HIPAA law (that includes HITECH), which by 2011 ***already required*** providers to supply electronic copies. (S.App.88). The legislature likely recognized that the Wisconsin regulation doing the same thing was redundant and eliminated it. Alternatively, at best, the deletion of §146.83(1k)(2009) shows that the legislature wanted Wisconsin law to be more flexible in allowing providers to ***choose*** what type of copies to provide. The remaining statute does not ***require*** any format, not electronic or paper. Providers and patients now have flexibility, the essence of "deregulation." There is no logical connection between that policy choice and allowing providers to charge outrageous amounts for electronic copies. Certainly, the legislative history does not reflect an such intent. The opposite interpretation seems much more logical: while providers are not ***required*** to supply electronic copies, those who choose to, and have spent little or no cost doing so, are not permitted to profit from excessive fees.

Charges for retrieving and certifying the records are already prohibited, (*Moya*, 2017 WI 45, ¶¶4-5, 31) and providers' technology infrastructure has been paid for by the federal government. (Appellant Brief, p. 22-24). Beyond that, providers expend minimal effort and cost to transmit electronic records to the patient.

UW Health's interpretation, where "electronic copies" are simply not regulated by §146.83, would obligate providers to send paper copies ***contrary to federal law*** (42 U.S.C. §17935(e)(1)), and likely contrary to the wishes of most providers and patients in the modern era. Section 146.83(3f)(a) states that the "provider ***shall*** provide the person making the request copies of the requested records." If only paper copies were governed by this section, then providers would be ***required*** to produce paper copies in response to every request.

UW Health claims that the legislature wanted "deregulation," but then proposes a construction that burdens providers with an arcane and unreasonable rule to physically print or copy thousands of pages. There is no indication in the

legislative history or statutory text that the decision not to ***require*** electronic copies was meant to change the cost limitations when providers ***choose*** to supply them.

III. SECTION 146.836 SUPPORTS BANUELOS' INTERPRETATION.

UW Health persists in arguing that an unrelated statute, §146.836, controls the analysis, even though its plain language and purpose have no bearing on this case. The language of §146.836 ***confirms*** that the definition of "patient health care records" includes "digital information" and ensures the patient's right to confidentiality of and access. (Appellant Brief, p.27-34). That is its purpose.

Section 146.836 lists other sections within the Chapter that it "appl[ies]" to because those sections deal with the rights of access and confidentiality. (*Id.*). Sections §146.83(3f) and 146.84 are not listed in §146.836, because those sections do not. However, §§146.83(3f) and 146.84 dovetail from patients' rights to access and confidentiality to control the cost of obtaining access to the records and to enforce patients' rights. Those are the purposes of sections 146.83(3f) and 146.84.

It would be absurd to suggest that the legislature enacted §146.836 to ensure the right of confidentiality and access applies to all patient health care records (including electronic ones), but that the legislature meant for patients to be unable to effectuate those rights by obtaining copies under §146.83(3f) or enforce them under §146.84. Instead, these statutes must be harmonized to fulfill each's distinct purpose. Section 146.836 defines the rights of patient access and confidentiality broadly, while sections 146.83(3f) and 146.84 effectuate those rights.

The language and purpose of §146.836 supports Banuelos' construction. The legislature knew that electronic records were part of "patient health care records" before and after 2011, and that the Chapter applies to them. Nothing in the language of §146.836 differentiates between statutes that apply to electronic copies and ones that only apply to paper copies.

UW Health scoffs at, without rebutting, Banuelos' argument that §146.836 does not "apply" to §146.83(3f), because §146.836 identifies sections that "apply to ***all*** patient

health care records…," while §143.83(3f)(b) allows ***patients to request copies of records in a limited fashion,*** like only asking for records from certain dates. Despite the dismissive rhetoric, that is exactly how the legislature wrote these statutes: §146.836 broadly grants patients confidentiality and access to "all" records, while §146.83(3f)(a) lists permissible fees for "the requested records." UW Health's construction, which asks 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 nullify the legislature's chosen language in §146.83(3f), must be rejected. *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, ¶18, 245 Wis.2d 396, 629 N.W.2d 662 (one statute cannot be construed out-of-context to defeat the language and purpose of another).

IV. UW HEALTH WAIVED ITS CLAIM THAT BANUELOS' REQUEST DOES NOT FALL WITHIN §146.83(3F); REGARDLESS, THAT ASSERTION IS INCONSISTENT WITH §146.83(3F).

UW Health impermissibly argues that Banuelos' request for her patient health care records was not a request

under §146.83(3f) for the first time on appeal. *Evelyn*, 171 Wis.2d. at 688.

Notwithstanding, §146.83(3f) limits the permitted charges when a patient requests "copies of a patient's health care records." As discussed, §146.81(4)'s definition of "patient health care records" does not exempt records created or copied electronically. Both §146.836 and the prior iterations of §146.83(3f) confirm that electronic records ***are*** included.

The Complaint alleges that Banuelos requested "patient health care records." (R.1:14, A.App.23) (she requested "All medical records. . . regarding my care and treatment"). UW Health complied and transmitted the "patient health care records" electronically. (*Id.*).

UW Health's assertion that Banuelos' request was made under federal law and it can disregard state law is not supported by the record or any authority. UW Health agrees, "medical records are regulated both by federal laws… and… state law," which is common in many areas. (Resp. Brief, p.5). With respect to patient health care records, the federal HITECH act

identifies state regulations that are preempted. 45 C.F.R. §160.203. Plaintiff raises no issue UW Health's compliance with federal law, and there has never been any argument that §146.83(3f) is preempted. **The only question is whether the UW Health's charges are permitted under §146.83(3f)**. As discussed, §146.83(3f) prohibits UW Health from charging for electronic copies of Banuelos' "patient health care records."

Dated this 21st day of December, 2020.

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CERTIFICATE OF FORM, LENGTH, 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 produced with a proportional font. The length of this brief is 2973 words.

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

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

Dated this 21st day of December, 2020.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on December 21, 2020, this brief was 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 was correctly addressed.

Dated this 21st day of December, 2020.

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