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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2020AP001582

BEATRIZ BANUELOS

Plaintiff-Appellant,

v.

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,

Defendant-Respondent.

Appeal from an Order of the Circuit Court of
Dane County, Case No. 2020CV000903,
The Honorable Juan B. Colas, Presiding,

WISCONSIN ASSOCIATION FOR JUSTICE'S AMICUS CURIAE BRIEF

CANNON & DUNPHY, S.C.
Brett A. Eckstein
State Bar No. 1036964
Edward E. Robinson
State Bar No. 1025122
595 N. Barker Rd.
P.O. Box 1750
Brookfield, WI 53008-1750
Telephone: (262) 796-3702

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INTRODUCTION

Ms. Beatriz Banuelos requested an electronic copy of her patient health care records from UW-Health. When processing that request, UW-Health charged her "paper copy" fees despite not producing a paper copy of her records.[1] (See R.1-15). The narrow issue in this case is whether a healthcare provider can charge for "paper copies" under Wis. Stat. § 146.83(3f)(b)1. when producing electronic copies of patient health care records. Based on the plain language of the statutes, as confirmed by the statutory history of § 146.83, the answer to this question is "no."

ARGUMENT

I. PROVIDERS CANNOT CHARGE FOR "PAPER COPIES" WHEN PROVIDING ELECTRONIC COPIES OF PATIENT HEALTH CARE RECORDS.

It is of course a "solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the

[1] UW-Health did not impose a "retrieval fee" or "certification fee" under § 146.83(3f)(b)4. and 5., because the supreme court held in Moya v. Aurora Healthcare, Inc., 2017 WI 45, ¶34, 375 Wis.2d 38, 894 N.W.2d 405, that the patient or "a person with a written authorization from a patient does not have to pay the certification charge or retrieval fee for obtaining health care records." (See R.1-15).

language of the statute. We assume that the legislature's intent is expressed in the statutory language." State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶44, 271 Wis.2d 633, 681 N.W.2d 110. Statutory interpretation is "given its common, ordinary, and accepted meaning." Id., ¶45 (citing Wis. Stat. § 990.01(1)). Language is also interpreted "in the context in which it is used … in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." Id., ¶46.

Wisconsin Stat. § 146.83(3f) states that "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." The threshold question is whether Banuelos requested "copies" of a "patient's health care records." UW-Health says Banuelos did not because she requested them in electronic format, but that runs headlong into the legislature's specific definition of the term "patient health care record." From there, giving plain meaning to the language surrounding the "applicable fees" and how a health care provider "may charge no more than" the fees that apply demonstrates unequivocally that § 146.83(3f)(b)1. does not allow UW-Health to

charge for "paper copies" when providing electronic copies of patient health care records.

A. Patient Health Care Records Includes Electronic Formats.

Under Wis. Stat. § 146.81(4), the term "patient health care record" is defined broadly as "mean[ing] *all records* related to the health of a patient prepared by or under the supervision of a health care provider…." (Emphasis added). "All" of course "means all," Pfister v. Milwaukee Economic Development Corp., 216 Wis.2d 243, 270, 76 N.W.2d 554 (Ct. App. 1997), and there's no dispute that Banuelos' medical records from UW-Health relate to her health and were prepared by a health care provider. See id. What remains is to give meaning to the term "records." The plain meaning of this term is "the documentary account of something [;] confidential medical *records*." https://www.merriam-webster.com/dictionary/record (last visited 1/26/21). In this context, the "documentary account" is of our health: the history of our complaints, symptoms, and progress, and the providers' findings, conclusions, and recommendations.

The format of that "documentary account," however, is legislatively unconstrained, and for good reason. What used to be chiseled in stone was later inscribed by quill on parchment, then was written and pressed through triplicate carbon paper forms,

and today is mostly typed into a computer by keyboard. Tomorrow's information medium is anyone's guess, but if it provides a "documentary account" related to a person's health and made under the supervision of a health care provider, then it is a "patient health care record." A patient's medical records in electronic format are indeed "patient health care records."

UW-Health contends that this cannot be, since a different statute further down states that "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 UW-Health believes that this statute either modifies or otherwise limits the broad definition of "patient health care records" found in Wis. Stat. § 146.81(4) to only paper copies of records. Basic rules of statutory interpretation preclude this.

First, as an initial matter, UW-Health's position is nonsensical. If UW-Health is correct that electronic records are not "patient health care records," then no patient would ever have the ability to access their electronic patient health care records, since Wis. Stat. § 146.83(3f) is the the only statute that allows patients access to their records. See Townsend v. Chartswap,

LLC, 2020 WI App 79, ¶8, __ Wis.2d __, __ N.W.2d __. Further, there would be no cost containment protection over those providers that use electronic medical records or that choose to satisfy all requests in electronic format.

Second, § 146.836 is not a definitional statute at all and in no way modifies § 146.81(4). Section 146.81 contains the definitions and states that "*In ss. 146.81 to 146.84* … 'patient health care record' *means* all records related to the health of a patient…." Id. (emphasis added). The definition of "patient health care record" plainly runs from § 146.81 all the way through § 146.84 (with § 146.836 sandwiched in between), and the legislature's decision to use the word "means" further proves that this definition is indeed "complete." State v. James, 2005 WI 80, ¶25, 281 Wis.2d 685, 698 N.W.2d 95 ("When utilized in statutory definitions, 'means' is a term indicating … completeness….").

Third, § 146.836 is a separate substantive statute that extends record content requirements (§ 146.815), confidentiality (§ 146.82 and § 146.835), and safeguards against falsification (§ 146.83(4)) 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." (Emphasis added). The word

"including" appears in other statutes and has already been interpreted to mean "not one of all-embracing definition, but connotes simply an illustrative application of the general principle." Milwaukee Gas Light Co. v. Wis. Dep't. of Taxation, 23 Wis.2d 195, 203, 127 N.W.2d 64 (1964); compare State v. Popenhagen, 2008 WI 55, ¶43, 309 Wis.2d 601, 759 N.W.2d 611. This is even truer where, as here, the word "including" appears in a section that follows a general definition. James, 281 Wis.2d 685, ¶¶26-28. If UW-Health is correct that § 146.836 relates to the definition in § 146.81(4), at best § 146.836 simply illustrates that "patient health care records" does include "those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics."

Fourth, the same type of statutory interpretation raised by UW-Health here—namely that a separate statute not found in Wis. Stat. § 146.81 somehow limits the scope of the definitions found in § 146.81—was already rejected by the supreme court in Moya. Moya addressed whether a lawyer with a written authorization from the patient was a "person authorized by the patient" as that term was defined in § 146.81(5) such that the lawyer did not have to pay certification and retrieval fees under §

146.83(3f)(b)4.-5. Moya, 375 Wis.2d 38, ¶2. The term "person authorized by the patient" is specifically defined in § 146.81(5) as "any person authorized in writing by the patient…." The supreme court held this definitional language unambiguously and obviously included lawyers, and anyone else, with written authorization from the patient. Id., ¶¶20-21.

The defendant in Moya contended that a separate statute, Wis. Stat. § 146.83(1b) that specifically included public defenders as "persons authorized by the patient," demonstrated that the legislature intended to generally exclude attorneys from the definition of "persons authorized by the patient" in § 146.81(5). Id., ¶29. The supreme court rejected this argument, writing:

> While the legislature may have intended to expressly include public defenders [under § 146.83(1b)], we decline Healthport's implicit invitation to add limiting language to Wis. Stat. § 146.81(5). The legislature, with its use of "any person," chose not to place a limit on who could be authorized in writing by the patient under § 146.81(5), and we give effect to the enacted text. And more to the point, nothing about the express inclusion of public defenders leads us to conclude the legislature intended to exclude other attorneys.

Id., ¶30.

The same result must follow here. While the legislature may have included electronic copies of patient health care records as illustrative examples in Wis. Stat. § 146.836, this Court must reject UW-Health's implicit invitation to add language limiting

Wis. Stat. § 146.81(4) to paper copies. The legislature with the use of "all records" chose not to place any format limitations on what constituted "patient health care records," and this Court should give effect to the enacted text. Further, nothing about the express illustration of electronic media as being included within patient health care records should lead this Court to conclude that the legislature intended to exclude these formats within the definition of "patient health care records." See Moya, 375 Wis.2d 38 ¶30.

B. There Is No "Applicable" Fee For Electronic Copies of Patient Health Care Records.

Because records in electronic format are "patient health care records," Wis. Stat. § 146.83(3f) limits what fees UW-Health could legally charge for "copies" of these records. Subsection (3f)(a) states that "if a person requests copies of a patient's health care records … and *pays the applicable fees under par. (b)*, the health care provider shall provide … copies of the requested records." Id. (emphasis added). Subsection (3f)(b) states in relevant part:

> **(b)** … a health care provider *may charge no more than the total of all the following that apply* for providing the copies requested under par. (a):
>
> 1. *For paper copies*: [unit rates listed]….(Emphasis added).

In overlapping ways, this language forecloses UW-Health from charging paper copy rates for electronic copies.

First, the person requesting the records has to "pay[ ] the applicable fees under par. (b)." Wis. Stat. § 146.83(3f)(a). Subsection (3f)(b) defines the categories of fees available as: paper copy fees under (b)1., microfiche fees under (b)2., x-ray fees under (b)3., certification fees under (b)4., retrieval fees under (b)5., and shipping and tax under (b)6. There is no fee category for electronic copies. As UW-Health notes, "[t]he expression of one thing implies the exclusion of others," meaning that fees not listed here are not "applicable." (See Resp. Brf. at 20-21).

Second, in setting the "applicable fees," subsection (3f)(b) states that "a health care provider *may charge no more than* the total of all of the following that apply…." (Emphasis added). This language itself is prohibitory, caps the rates that providers are allowed to charge, and forbids the providers from charging anything more. See, e.g., Wisconsin Bill Drafting Manual, § 2.01(8) (2009-10) ("Use 'no person may' or 'a person may not' to forbid behavior."); Brookhouse v. State Farm Mut. Auto Ins. Co., 130 Wis.2d 166, 171, 387 N.W.2d 82 (Ct. App. 1986) ("'May not' is a negative term. Where statutory restrictions are couched in negative terms, they are usually held to be mandatory."); Milwaukee Alliance v. Elections Board, 106 Wis.2d 593, 609, 317 N.W.2d 420 (1982) ("'No person may' negates …the permission

[to act] and is, therefore, the stronger prohibition."). Because there is no rate provided for electronic copies, allowing UW-Health to charge for electronic copies contravenes this legislative prohibition in every which way.

Third, the legislature expressly told providers that they can only charge for "paper copies." While both paper and electronic records can be *copied* (i.e. reproduced),[2] the legislature's chosen language clearly differentiates *paper* from electronic copies, with "paper" being commonly understood as "a felted sheet of usually vegetable fibers laid down on a fine screen from a water suspension." https://www.merriam-webster.com/dictionary/paper (last visited 1/26/21). Electronic copies simply are not paper copies.

Context supports this differentiation as well, as the legislature recognized that a person may request "copies" of a "patient's health care records" under subsection (3f)(a), but limited the fees that can be provided to "paper copies" under subsection (3f)(b). When the legislature uses different terms in the same section, the legislature did not intend the terms to have

[2] "Copy" is defined as "an imitation, transcript, or reproduction of an original work (such as a letter, a painting, a table, or a dress)." https://www.merriam-webster.com/dictionary/copies (last visited 1/26/21).

the same meaning. See Armes v. Kenosha County, 81 Wis. 2d 309, 318, 260 N.W.2d 515 (1977). "Copies" is plainly broader than "paper copies" and includes "electronic copies," but only fees for "paper copies" can be charged.

This interpretation is consistent with the purpose of Wis. Stat. § 146.83. Two decades ago, this Court held that § 146.83 "expresses the legislature's intent that a person is entitled to obtain his or her medical records at a reasonable cost…." Cruz v. All Saints Healthcare Sys., 2001 WI App 67, ¶8, 242 Wis.2d 432, 625 N.W.2d 344. Just months ago, this Court reaffirmed as much when it held that the purpose of § 146.83 "is to protect patients from being charged excessive fees for access to information in the custody and control of health care providers…." Townsend, 2020 WI App 79, ¶13. Through its chosen language, the legislature rightfully determined that charging for "paper copies" when no paper copies were actually provided is not a "reasonable cost" and would be "excessive." Producing patient health care records is not intended to be a profit center for health care providers. If UW-Health has costs to recoup beyond the subsidies it already receives from the federal government for maintaining electronic health records, that is not an issue that this Court can redress.

II. LEGISLATIVE HISTORY CONFIRMS WAJ'S PLAIN LANGUAGE INTERPRETATION.

The legislative history and evolution of Wis. Stat. § 146.83 confirms WAJ's and Banuelos' plain language interpretation of the statute. See Kalal, 271 Wis.2d 633, ¶51.

In 2009, the legislature amended Wis. Stat. § 146.83 to create § 146.83(1f)(c), which outlined the fees health care providers could charge for providing patient health care records. Newly created subsection (1f)(c)3m. specifically allowed health care providers to charge "[f]or providing copies in digital or electronic format…." At the same time, the legislature created § 146.83(1k), which required health care providers to provide electronic copies of patient health care records if feasible.

This history alone proves that the definition of "patient health care records" is indeed format neutral. As the legislature was prescribing what could be charged for producing "copies" of records "in digital or electronic format" and was requiring health care providers to produce electronic copies, it made no change to the threshold definition of "patient health care records" in Wis. Stat. § 146.81(4). And while UW-Health believes that Wis. Stat. § 146.836 (enacted in 1999) evinces the legislature's intent to exclude electronic copies from the definition of patient health care records, the legislative actions in 2009 of allowing charges for

electronic copies of patient health care records conclusively demonstrates otherwise.

In 2011, the legislature renumbered Wis. Stat. § 146.83(1f) as § 146.83(3f) and in so doing deleted subsection (1f)(c)3m. which allowed charges for copies in digital or electronic format. In other words, the permission that was granted in 2009 was revoked in 2011. The only conclusion to draw from this is that the legislature no longer authorized health care providers to charge for providing electronic copies of patient health care records.

UW-Health sees this history differently. UW-Health apparently believes that beginning in 1999 (by operation of Wis. Stat. §146.836) health care providers were free to charge whatever they wanted for electronic copies until the legislature created subsection (1f)(c)3m. in 2009. But, if health care providers were already permitted to charge for electronic copies, then the legislature obviously did not need to enact § 146.83(1f)(c)3m. Yet, between 2009 and 2011, UW-Health agrees that health care providers were free to charge for electronic copies because of subsection (1f)(c)3m. However, after subsection (1f)(c)3m. was repealed in 2011, UW-Health contends that health care providers somehow remain free to charge whatever they want for electronic

copies because there is no legislative prohibition. Under UW-Health's view, both the 2009 enactment of § 146.83(1f)(c)3m. and its subsequent deletion in 2011 are entirely meaningless. This is clearly unreasonable. See Wagner v. Milwaukee Co. Election Comm., 2003 WI 103, ¶33, 263 Wis.2d 709, 666 N.W.2d 816. By repealing the legislative permission to charge for records in electronic or digital format, this Court has to conclude that the legislature intended to rescind that permission.

UW-Health speculates that the legislature's 2011 repeal of § 146.83(1k) *requiring* health care providers to provide patient health care records in electronic format means that the legislature intended to allow health care providers who *chose* to provide electronic records to charge whatever they want for those records. But the former simply does not follow the latter. Had the legislature actually intended to continue to allow health care providers to determine their own charges for electronic copies, it would not have repealed subsection (1f)(c)3m in 2011.

The only construction that harmonizes the statutory provisions and gives the 2009 and 2011 statutory amendments meaning is one that recognizes that while health care providers were allowed to charge fees for electronic copies of records beginning in 2009, that permission was eliminated in 2011. Any

perceived unfairness in this interpretation is to be addressed by the legislature, not this Court.

Respectfully submitted this 27th day of January, 2021.

Wisconsin Association For Justice

By: *electronically signed by Brett A. Eckstein*
Brett A. Eckstein
State Bar No. 1036964
Edward E. Robinson 1025122
State Bar No.
Cannon & Dunphy, S.C.
595 N. Barker Rd.
Brookfield, WI 53008
262-796-3702

CERTIFICATION REQUIRED
BY SEC. 809.19(7) AND 809.19 (8)(B), AND (C), Wis. Stat.

I hereby certify that this Non-Party Brief conforms to the rules contained in Wis. Stats. §§ 809.19(7)(a) and 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of this brief is 2,964 words.

Dated this 27th day of January, 2021.

Wisconsin Association for Justice

By: *electronically signed by Brett A. Eckstein*
Brett A. Eckstein
State Bar No. 1036964
Cannon & Dunphy, S.C.
595 N. Barker Rd.
Brookfield, WI 53008
262-796-3702

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format 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 opposing parties.

Dated this 27th day of January, 2021.

Wisconsin Association for Justice

By: *electronically signed by Brett A. Eckstein*
Brett A. Eckstein
State Bar No. 1036964
Cannon & Dunphy, S.C.
595 N. Barker Rd.
Brookfield, WI 53008
262-796-3702