WISCONSIN SUPREME COURT
Appeal No. 2020AP001582

BEATRIZ BANUELOS

Plaintiff-Appellant,

v.

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,

Defendant-Respondent-Petitioner.

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

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INTRODUCTION

When Beatriz Banuelos requested an electronic copy of her medical records, UW-Health charged her "paper copy" fees under Wis. Stat. § 146.83(3f)(b) despite not producing a paper copy of her records.[1] The court of appeals correctly held that UW-Health's charges were illegal because § 146.83(3f)(b) outlines the legislatively-defined allowable fees under Wisconsin law for medical records, and no fees are listed for "electronic pages."

UW-Health spend pages writing about how the Wisconsin legislature supposedly "wanted to get out of the business" of pricing electronic medical records in 2011 because fees for electronic copies were "now solidly in place" under federal law. If any of this were true, *why then did UW-Health charge Banuelos under Wisconsin state law for an electronic copy of her records*?[2] All roads lead

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[1] UW-Health did not impose retrieval or certification fees under Wisconsin law, specifically § 146.83(3f)(b)4. and 5., because that would be contrary to Moya v. Aurora Healthcare, 2017 WI 45, ¶34, 375 Wis.2d 38, 894 N.W.2d 405.

[2] UW-Health's agent, Ciox, priced *all requests* under federal HITECH laws for patient health care records "*according to the allowable costs under the laws of the states where the requests were being made, not the cost-based fee mandate of HITECH.*" (R.2: 6, ¶12 (emphasis added). The March 18, 2020 invoice for Banuelos' records from UW-Health's agent, Ciox, confirms this. That invoice tracks Wisconsin's per page "paper copy" rates found in Wis. Stat. § 146.83(3f), as indexed by the Department of Health Services pursuant to Wis. Stat. §146.83(3f)(c)2. Compare R.2: 15, Exh. 3 (showing Ciox's "paper" copy fees of $1.14, $0.86, $0.56 and $0.34) with 2019 Wis.Admin.Reg. No. 762A2, (June 10, 2019), Public Notice: Health Care Provider Fees 6-1-19 (indexing "Paper Copies (per page)" rates as $1.14, $0.86, $0.56 and $0.34, for requests made between 7/1/19 and 6/30/20), available at https://docs.legis.wisconsin.gov/code/register/2019/762a2/register/public

back to Wis. Stat. § 146.83(3f), which the court of appeals interpreted correctly. This Court should affirm.

ARGUMENT

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

"Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." State ex rel. Kalal v. Circuit Court for Dane Cty., 2004 WI 58, ¶44, 271 Wis.2d 633, 681 N.W.2d 110. Legislative intent is expressed in those words, which is "given its common, ordinary, and accepted meaning." Id., ¶45. 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.

The first question is whether Banuelos requested "copies" of "patient health care records." Copies can be demanded involuntarily under Wis. Stat. § 146.82(2) (such as by police, district attorneys, etc.) or voluntarily under Wis. Stat. § 146.83(3f) (by the patient, or those authorized in writing by the patient). The

notices/publice_notice_health_care_provider_fees_6_1_19/publice_notice_health_care_provider_fees_6_1_19.pdf

fee restrictions apply only to certain voluntary requests for records. Id. ("except as provided in sub. (1f) or 51.30 or 146.82(2)…."). Section 146.83(3f)(a) 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." Contrary to UW-Health's assertion, *there is no talismanic language to somehow "invoke" Wis. Stat. § 146.83*. If patient health care records are requested, informed consent is given, and the applicable fees are paid, the health care provider "shall provide the person making the request copies of the requested records under par. (a)." § 146.83(3f)(b). Banuelos' request plainly meets these requirements.

UW-Health says Banuelos still did not request patient health care records because she requested records in electronic format. This argument is incorrect, as indicated by a number of related statutes.

A. Patient Health Care Records Include Electronic Records.

Wisconsin Stat. § 146.81(4) defines "patient health care record" 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' UW-Health records relate to her health. 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. The "documentary account" is of our complaints, symptoms, progress, and the providers' findings, conclusions, and recommendations.

The format of that "documentary account" is unconstrained, and for good reason. Information that used to be chiseled in stone was later inscribed by quill on parchment, then was pressed through triplicate carbon-paper, and today is mostly typed into computers. Tomorrow's information medium is anyone's guess, but if it provides a "documentary account" related to a person's health under the supervision of a health care provider, then it is a "patient health care record." Electronic medical records are just as much "patient health care records" as paper records.

UW-Health contends otherwise, 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 either modifies or otherwise limits the broad definition of "patient health care records" found in § 146.81(4) to only paper copies. Basic rules of statutory interpretation preclude this.

First, UW-Health's position is absurd. If electronic records are not "patient health care records," then no patient can obtain a copy of their own records—or have someone obtain their records—under state law, as Wis. Stat. § 146.83(3f) is the only state statute that allows voluntary access to patient health care records. If this statute does not apply to electronic records, providers, who have a monopoly on the patient's information, can also charge whatever they want before disclosing it.

Second, § 146.836 is not definitional at all. 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 ("'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 many statutes and has 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 the broad, general definition* found in § 146.81(4). See 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." The evident reason for § 146.836 is to ensure these blanket protections extend blanket inclusiveness to "all" patient health care records, whereas access to patient health care records can be tailored to only "copies of the requested records." § 146.83(3f)(a).

Fourth, the same type of statutory interpretation raised by UW-Health was already rejected 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…." This definitional language 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) which 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. This Court rejected the argument:

> 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 follows here. While the legislature may have included electronic copies of medical records as illustrative examples in § 146.836, this Court must reject UW-Health's invitation to add language limiting the general definition of "patient health care records" in § 146.81(4) to paper copies. With its use of "all records," the legislature chose not to place any format limitations on what constituted "patient health care records," and this Court must give effect to that enacted text. 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 electronic records are "patient health care records," Wis. Stat. § 146.83(3f) limits what fees UW-Health could

charge for "copies of the requested 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 fees for electronic copies.

First, the requestor only 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 copy fees. As UW-Health notes, "[t]he expression of one thing implies the exclusion of others," meaning that fees not listed here are not "applicable."

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 is prohibitory, caps the rates that providers are allowed to charge, and forbids the providers from charging anything more. See, e.g., 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 fees provided for electronic copies, allowing UW-Health to charge electronic copy fees 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),[3] the legislature's chosen language 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. Electronic copies simply are not paper copies.

[3] "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.

Context supports this, as the legislature recognized that a person may request "copies" of a "patient's health care records" per subsection (3f)(a), but limited the fees that can be provided to "paper copies" under subsection (3f)(b). "Copies" is broader than "paper copies" and includes "electronic copies," but only fees for "paper copies" can be charged. When the legislature uses different terms in the same section, different meanings are intended. See Armes v. Kenosha County, 81 Wis.2d 309, 318, 260 N.W.2d 515 (1977).

Such an interpretation is consistent with the purpose of Wis. Stat. § 146.83. Two decades ago, it was 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. 344. 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." Producing patient health care records is not a profit center for health care providers, or their agents. 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 OUR PLAIN LANGUAGE INTERPRETATION.

The legislative history and evolution of Wis. Stat. § 146.83 confirms our interpretation. See Kalal, 271 Wis.2d 633, ¶51.

In 2009, the legislature amended Wis. Stat. § 146.83 to create subsection (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 providers to charge "[f]or providing copies in digital or electronic format…." The legislature also created subsection (1k), which required health care providers to provide electronic copies of patient health care records if feasible.

This alone proves that the definition of "patient health care records" is indeed format neutral. As the legislature was prescribing charges for "copies" of records "in digital or electronic format," 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 stand-alone actions in 2009 of allowing charges for electronic copies of medical records *conclusively* demonstrates otherwise.

In 2011, the legislature renumbered Wis. Stat. § 146.83(1f) as § 146.83(3f) and *deleted* subsection (1f)(c)3m. that allowed charges for electronic copies. In other words, the permission that was granted in 2009 was revoked in 2011. The legislature thus no longer authorized providers to charge for electronic copies of medical records.

UW-Health tries to paint this history different, but does so in an absurd way:

First, UW-Health believes that beginning in 1999 by operation of § 146.836, it was completely free to charge *whatever it wanted* for electronic copies because electronic records are not patient health care records.

Then, in 2009 by operation of Wis. Stat. § 146.83(1f)(c)3m, in which the legislature expressly allowed providers like UW-Health to charge "a fee" for electronic records, UW-Health contends that it was completely free to charge *whatever it wanted* for electronic copies because the legislature allowed it to do so.

Finally, after subsection (1f)(c)3m. was repealed in 2011, UW-Health contends that it is completely free to charge *whatever it wants* for electronic copies, because there is no legislative prohibition on these fees.

And therein lies the problem. If providers were already permitted to charge for electronic copies beginning in 1999, then the legislature did exactly nothing by statutorily authorizing providers to charge for electronic records in 2009. And by repealing the permission to charge a fee for electronic records in 2011, UW-Health would have this Court believe that the legislature did exactly nothing yet again. Courts do not assume that the legislature aimlessly writes laws. 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 electronic records, the legislature intended to rescind that permission. UW Health's position that it wins no matter what the legislature does must be rejected.

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 choose to provide electronic records to charge whatever they want. 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 gives the 2009 and 2011 statutory amendments any 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 13th day of June, 2022.

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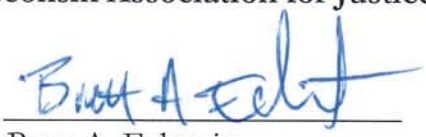
CERTIFICATION REQUIRED BY SEC. 809.19(7) AND 809.19 (8)(B), AND (C), Wis. Stat.

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 2,998 words.

Dated this 13th day of June, 2022.

Wisconsin Association for Justice

By: 

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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.

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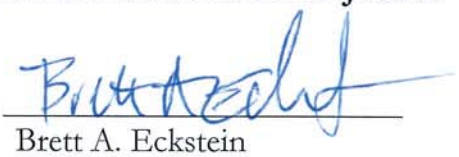
By: 

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