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STATE OF WISCONSIN
COURT OF APPEALS – District IV
Appeal Nos. 2020AP2081 & 2020AP2013

Wisconsin Manufacturers and Commerce, Muskego Area Chamber of Commerce and New Berlin Chamber of Commerce and Visitors Bureau,
Plaintiffs-Respondents,

v.

Tony Evers, in his official Capacity as Governor of Wisconsin, Andrea Palm, in her official capacity as Secretary-Designee of the Wisconsin Department of Health Services, and Joel Brenna, in his official capacity as Secretary of the Wisconsin Department of Administration,
Defendants-Appellants,

Milwaukee Journal Sentinel,
Intervenor-Defendant-Appellant

Appeal from the Circuit Court of Waukesha County, Honorable Lloyd V. Carter Presiding, Case No. 20-CV-1389

REPLY BRIEF OF INTERVENOR-DEFENDANT-APPELLANT, MILWAUKEE JOURNAL SENTINEL

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I) THE ASSOCIATIONS LACK STANDING

The Associations put the cart before the horse. They assume that if they would be harmed by the release of the Disputed Records, they have a claim that is justiciable – that they have a legally-protected interest. But being harmed is not enough; they must have a legally-protected interest before injury to that interest supports standing. The Associations have not shown they have a legally-protected interest in not being harmed by the release of true information.

A) The Associations Have No Zone of Interest Standing

The Associations wish that Wis. Stat. § 146.82 were about them, but it is not. As demonstrated by the text of the statute and cases analyzing similar statutes, the thrust of the statute is protecting individual patients from the harms to their privacy and dignity they would suffer were their medical details made public.

Section 146.82 and the following sections protect the rights of individual patients. Their primary command is focused on those patients: "All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person

authorized by the patient." § 146.82(1) (emphasis added); *see also* § 146.83(1c) ("any patient or person authorized by the patient may . . . inspect the health care records of a health care provider pertaining to that patient") (emphasis added). In analyzing standing under a statute with nearly identical language, this Court has stated that "[t]he focus of the statute is on the individual—the patient—whose treatment records have been released." *Milwaukee Deputy Sheriff's Ass'n v. City of Wauwatosa*, 2010 WI App 95, ¶32, 327 Wis. 2d 206, 787 N.W.2d 438; *see also Olson v. Red Cedar Clinic*, 2004 WI App 102, ¶14, 273 Wis. 2d 728, 681 N.W.2d 306 (Under § 51.30, "[t]he subject individual is the one who receives treatment. . . . Thus, the right of confidentiality is [the patient's]."); *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukana*, 2013 WI App 113, ¶¶22-24, 350 Wis. 2d 435, 838 N.W.2d 103 (because a statute grants the right to challenge annexations to an enumerated list of entities, others have no standing to do so).

The Associations demonstrate this very point when they state that "the design of these laws is plainly to protect anyone who might be harmed by the unlawful release of private medical information." (Resp. Br. 18 (emphasis added).) If the Disputed Records would identify individual patients, the Associations argue, release would be unlawful. If it would not identify those

individuals, the release would be lawful and they would not be harmed. Therefore, the individual patients' harm depends directly on whether the release would be unlawful, demonstrating why they would have standing.

On the other hand, the Associations' alleged harm is not dependent on the legality of the release of the records. The harms that they hypothesize would occur if the records were released, regardless of whether the release is lawful. They have a "stake" in preventing release of the records, lawful or not. Therefore, the harms that these laws protect against have nothing to do with the harms the Associations claim give them standing. The lead opinion in *Foley-Ciccantelli v. Bishop's Grove Condo. Assoc.*, cited *passim* by the Associations, makes this exact point: "[T]he question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision." 2011 WI 36, ¶55, 333 Wis. 2d 402, 797 N.W.2d 789 (lead op.). The provisions of § 146.82 do not protect against the alleged harms to the Associations' reputations and pocketbooks, as those harms – if they occur at all – would occur with the release of the records regardless of whether patients would be identified.

Contrary to the Associations' arguments, *Milwaukee Deputy Sheriff's Association* controls this analysis. First, it is irrelevant that, in that case, the

Sheriff's Association did not argue associational standing, because if they had, they still would have had to have shown an underlying legal interest. *Wis. Envt'l Decade, Inc. v. PSC*, 69 Wis. 2d 1, 20, 230 N.W.2d 243, 253 (1975). The Associations argue that their underlying legal interest falls within medical record privacy statutes' zone of interests, which is the same argument made by the Sheriff's Association.

Second, it is also irrelevant that the Sheriff's Association did not argue it could have brought a damages claim under § 51.30. As the Associations note, if a person is permitted to seek declaratory relief, they may do so regardless of whether further relief could be sought. (Resp. Br. 24-25, 46 (quoting Wis. Stat. § 806.04(1)).)

Third, the Associations argue that the inclusion of language in § 51.30 about records being "privileged to the subject individual" makes that statute unlike § 146.82. But they do not explain how that language matters, yet both statutes say that patient records are confidential and that only patients can authorize release as a default position. The Associations claim that without that language, § 146.82 "does not foreclose the possibility" that other persons might have a privilege in patient health care records (Resp. Br. 27), but that is not enough to establish that they – as the employers of patients –have such

a privilege. The *Sheriff's Association* court's conclusion that "[t]he focus of the statute is on the individual—the patient—whose treatment records have been released," 2010 WI App 95, ¶32, holds just as true for § 146.82.

The Associations also argue that *Crawford v. Care Concepts, Inc.*, 2001 WI 45, 243 Wis. 2d 119, 625 N.W.2d 876, prohibits comparisons between § 51.30 and § 146.82. It does no such thing. The *Crawford* court concluded that because § 51.30 offered greater protections for extra-sensitive mental health records, courts could be less protective of the more generic health care records under § 146.82. 2001 WI 45, ¶33. The court therefore concluded that the exception for release pursuant to "lawful order of a court" had broader application in the context of § 146.82 than § 51.30. *Compare id.*, ¶32 (under § 51.30, limiting such lawful orders to situations similar to those enumerated) *with id.*, ¶33 (under § 146.84, questioning only whether the order was lawful). Nothing the court discussed suggests that the finding of no standing in *Sheriff's Association* under § 51.30 would not also apply to § 146.82; if anything, because the special nature of mental health records under § 51.30 requires greater protection, there is less reason to find standing to challenge an alleged violation of § 146.82.

Finally, the Associations miss the mark when they argue their reading would not render a portion of § 146.84(1)(c) surplusage. They claim allowing a declaratory judgment action would not create a surplusage because § 146.84(1)(c) allows for damages, where the Declaratory Judgments Act does not. But the portion of § 146.84(1)(c) being rendered surplusage is the portion allowing injunctive relief. If the Declaratory Judgments Act allows actions seeking to enjoin the release of records, then the grant of injunctive of relief in § 146.84(1)(c) is unnecessary and surplusage. So, too, would all the grants of injunctive relief in other confidential record statutes be rendered surplusage. *See, e.g.*, Wis. Stat. § 46.90(9)(c); § 51.30(9)(c); § 55.043(9m)(c).

B) The Associations Have No Taxpayer Standing

The doctrine of taxpayer standing has never been interpreted as broadly as the Associations suggest. They offer no cases holding that the expense of paying employees to perform routine job functions creates taxpayer standing. Expanding the doctrine to such cases would eliminate any meaningful restriction on the class of potential plaintiffs. Any individual or entity who pays a dime in taxes could sue to stop the release of any record,

regardless of whether the record had anything to do with them. Anybody who had any plausible argument why the release was illegal could sue.

And the Associations' argument that the expense of defending a lawsuit and the potential liability therefore creates taxpayer standing is nothing but bootstraps. They are arguing, "If we can sue you, you have to expend resources defending the suit, therefore we can sue you." "If we can sue you, you might have to pay damages, therefore we can sue you." These arguments make a mockery of standing requirements.

C) The Unique Circumstances of *McConkey* Do Not Apply Here

McConkey v. Van Hollen was a unique case where a voter challenged a constitutional amendment, arguing that the question put to voters improperly combined two different issues that should have been presented separately. 2010 WI 57, ¶2, 326 Wis. 2d 1, 783 N.W.2d 855. The Wisconsin Supreme Court expressed doubt as to whether McConkey had standing, noting that since he would have voted "no" on both questions anyway, he was not prevented from voting the way he wished for each question. *Id.*, ¶¶14, 17. Despite this doubt, the Court chose to decide the case for policy reasons, without concluding that McConkey had standing. *Id.*, ¶¶17-18.

Although the Associations list some of those policy concerns (Resp. Br. 16, 22, 34), they leave off others that show how this case differs from *McConkey*. The Court agreed to decide the case in part because the citizens of Wisconsin deserved to "have this important issue of constitutional law resolved," given the question of whether the amendment had been "effectually adopted." 2010 WI 57, ¶18 (emphasis added). The Court also noted that previous challenges under the separate amendment rule had similarly been decided "without articulating a specific injury." *Id.*

Unlike *McConkey*, this case does not involve questions of constitutional law, and courts require plaintiffs to have standing when challenging the release of records. *See, e.g.*, *Sheriff's Ass'n*, 2010 WI App 95, ¶¶30-33; *see also Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶¶37-39, 327 Wis. 2d 572, 786 N.W.2d 86 (lead op.); *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶¶18-21, 300 Wis. 2d 290, 731 N.W.2d 240.

McConkey is unique. The Court chose to ignore standing in order to decide whether our Constitution had or had not been amended. No court since has relied on *McConkey* to ignore standing requirements in a similar fashion. This Court should not be the first.

II) WIS. STAT. § 19.356(1) PROHIBITS THIS ACTION

The Associations express astonishment[1] at the idea that the law might not provide an avenue for the extraordinary relief they seek. All of their arguments boil down to the idea that they must be permitted to enjoin the release of records, and that therefore any restriction prohibiting them from doing makes the remedy "inadequate" as to them, which entitles them to bring a declaratory judgment action.

The Associations want to eat their cake and have it too. They insist that they have both a claim at law (damages if the records are released) and a claim in equity (an injunction prohibiting release). They insist that they must have both of these claims, and that it would be fundamentally wrong to deny them their free choice of remedies.

But the Associations ignore that remedies are often limited to one or the other. There are claims for which there is no remedy at law. Wisconsin municipalities are immune from intentional tort claims. Wis. Stat. § 893.80(4). As the Associations point out, the doctrine of sovereign immunity

[1] The Associations claim it "should not be controversial" that anybody who might be harmed by the release of records should get to sue to stop that release. (Resp. 41.) As a matter of public record, that idea was so controversial the Legislature created a study committee and passed an entire law to stop it. Wis. Leg. Council Report to the Legislature, Mar. 25, 2003.

largely prohibits damages claims against states and state officers for violations of the U.S. Constitution. (Resp. 48, *citing, e.g.*, *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 319, 529 N.W.2d 245 (Ct. App. 1995).) In such circumstances, only declaratory and injunctive relief are available. *See, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908).

And there are claims for which there is no equitable remedy – or at least no equitable remedy in the form of an injunction to halt behavior that has not yet occurred. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (striking down injunction against publishing names of black shoppers who refused to participate in boycott of white-owned stores); *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (striking down injunction against leafletting campaign encouraging locals to call private citizen's home phone and express their disapproval of his real estate practices). Any such prior restraint on speech carries a "heavy presumption" of unconstitutionality. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

The State has great leeway to decide how it and its subdivisions may be sued, by whom, and for what reasons. *See* WIS. CONST. art. IV, § 27. For example, until 1962, municipal tort immunity was the rule in Wisconsin. *See Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). Currently,

claims against the State and its subdivisions are strictly controlled and limited. *See, e.g.*, Wis. Stat. §§ 893.80, 893.82.

The State may therefore decide when and under what circumstances the release of government records may be challenged. And it has the ability, should it wish, to choose that the release of government records may never be challenged before the fact (as was the *status quo ante Woznicki*). The State's decision to allow challenges to the release of records only in a very narrow set of circumstances is a decision that must be respected.

This is not a question of whether another remedy provides "adequate relief," which makes cases about alternative and exclusive remedies inapposite. The Journal Sentinel is not arguing § 19.356 is an "alternative" that may be chosen instead of declaratory judgment. Section 19.356 is a strict prohibition on suits to halt the release of public records except in delineated circumstances. This makes this case comparable to *Lister v. Bd. of Regents*, where the Supreme Court concluded that the proper statutory procedure to be followed for a particular claim could not be considered as "merely an 'alternative' remedy" and that the Declaratory Judgments Act could not be used instead of that proper procedure despite the lack of a complete remedy for the plaintiff. 72 Wis. 2d 282, 307-09, 240 N.W.2d 610, 625 (1976).

This is yet another bootstraps argument the Associations present. They argue that if the State removes their access to a claim, the remaining procedures for that claim are inadequate as to them, therefore they must be allowed to bring a declaratory judgment action instead. But if that were true, then the State would never be able to place any effective restrictions on an equitable claim, because anybody left by the wayside could just turn to the Declaratory Judgments Act for relief, ignoring those new restrictions.

That is what the Associations are trying to do here – ignore and undo the restrictions the State placed on lawsuits seeking to halt the release of public records. They claim that the enactment of § 19.356 and that law's limitations on the *Woznicki* cause of action had no effect on what they are trying to do.

The trouble with their dismissal of *Woznicki* and § 19.356 is that they want to believe that what they are doing is something entirely different than *Woznicki* review. They try to separate the two concepts so they can say, "When the legislature passed 19.356, that affected *Woznicki* claims, but not any other claims trying to halt the release of public records." They claim a declaratory judgment action to halt the release of records predated *Woznicki*

(and survived § 19.356), but offer no instances of such a case ever having been brought.

The Associations do not explain in any meaningful way how what they are trying to do is different than *Woznicki* review. At its core, they are the same thing: somebody who does not want records about themselves being released to the public suing in court to stop that release. The theory behind the challenge is irrelevant, and the language chosen by the legislature prohibits all suits to stop records, except as otherwise specified, not just claims identical to those brought in *Woznicki*. *See* Wis. Stat. § 19.356(1).

The only thing that makes what the Associations are doing here different than *Woznicki* review is that they believe a much broader class of individuals and entities are entitled to stop the release of a much broader swath of records than the courts ever permitted under the *Woznicki* doctrine. If the Associations get their way, not only will direct record subjects be able to sue, but anybody who can claimed to be harmed by the release of records can sue and argue that release would be unlawful.

One has to wonder: If the Associations are correct, what was the point of creating Wisconsin Statute 19.356 at all? Why did the legislature go to all that trouble? Why commission a study and create a complex set of rules with

very precise and detailed limitations on when the release of records can be challenged, but leave a gigantic door open for anybody to file a declaratory judgment action, ignoring all those limitations? If the Associations are correct, then the limitations in § 19.356 are meaningless and we're back to square one.

CONCLUSION

In order to facilitate and preserve the public's access to public records, the Legislature decided to protect the vast majority of public records from pre-release challenge. The Associations seek to upend that decision and would allow the release of virtually any public record to be challenged by virtually anybody. To preserve the deliberate choice made by the Legislature, this case should be dismissed.

The Journal Sentinel respectfully requests that this Court reverse the Circuit Court and remand the case with directions for it to be dismissed.

Dated this March 12, 2021

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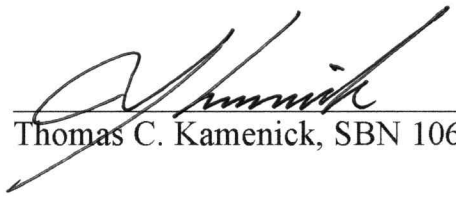

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 2,974 words long, calculated using the Word Count function of Microsoft Word 2016.

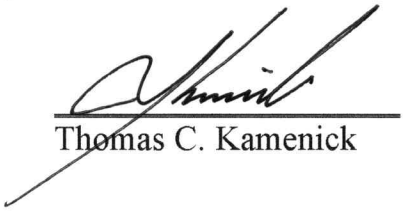
Dated: March 12, 2021

Thomas C. Kamenick

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 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: March 12, 2021



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