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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2020AP2081-AC

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, KAREN TIMBERLAKE, in her official capacity as Interim Secretary of the Wisconsin Department of Health Services, and JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration,

Defendants,

MILWAUKEE JOURNAL SENTINEL,

Intervenor-Appellant.

Case No. 2020AP2103-AC

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, KAREN TIMBERLAKE, in her official capacity as Interim Secretary of the Wisconsin Department of Health Services, and JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration,

Defendants-Appellants,

MILWAUKEE JOURNAL SENTINEL,

Intervenor.

ON APPEAL FROM NONFINAL ORDERS ENTERED BY
THE WAUKESHA COUNTY CIRCUIT COURT
THE HONORABLE LLOYD V. CARTER, PRESIDING

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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INTRODUCTION

The plaintiffs' legal theory is a moving target, and for a reason. The only substantive provision that could apply—the patient health care records law—has no application to them. In fact, the plaintiffs rely on no recognized legal right, and then attempt to recast that void as a free pass to prevent the release of public records that identify no patients. (Resp. Br. 23; R. 101:44–45.)

These distractions do not change that the patient health care records law, by its terms, has nothing to offer the plaintiff trade associations, and the public records law also expressly bars their effort to block access to public records.

ARGUMENT

I. The plaintiffs lack standing under the plain language of the patient health care records law.

The plaintiffs are trade associations that are not covered by laws governing *patient* health care records, including the remedy provision in Wis. Stat. § 146.84(1)(c).[1] Nothing they argue excuses this basic deficiency.

A. The plaintiffs are not covered by the patient health care records statutes.

The "essence" of standing is "whether the injured interest of the party whose standing is challenged falls within the ambit of *the statute*." *Foley-Ciccantelli v. Bishop's Grove*

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[1] To be clear, DHS would not be releasing patient health care records, only the names of businesses, their addresses, and a count of associated COVID cases, as the records themselves show. (State's Br. 17–19; R. 43–45 (sealed records).) The plaintiffs say that proposition is factual and cannot be addressed on a motion to dismiss (Resp. Br. 29–30), but the substance of the records are properly considered for purposes of reviewing the temporary injunction (State's Br. 2 (raising both)).

Condo. Ass'n, Inc., 2011 WI 36, ¶ 54, 333 Wis. 2d 402, 797 N.W.2d 789 (emphasis added). Restated, a plaintiff must have "a legally protectible interest." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211. This Court "*must* determine . . . whether the interest allegedly injured is arguably within the zone of interests . . . protected or regulated by the statute." *Milwaukee Deputy Sheriff's Ass'n v. City of Wauwatosa*, 2010 WI App 95, ¶ 31, 327 Wis. 2d 206, 787 N.W.2d 438 (citation omitted).

The plaintiffs flunk this threshold test. Just invoking the declaratory judgments act does not meet it—a person must point to a source of law that protects him. (State's Br. 20–21.)

The statutory scheme that the plaintiffs invoke concerns patient health care records: it makes "patient health care records" confidential.[2] Wis. Stat. § 146.82(1). "Patient" and "patient health care records" are defined to, logically, cover *patients* and *their* medical records. Wis. Stat. § 146.81(3), (4). And only "[a]n *individual* may bring an action to enjoin any violation of s. 146.82." Wis. Stat. § 146.84(1)(c). The plaintiffs say they have "always argued" that they are covered by these statutes, but those arguments have come with no citation to a substantive provision protecting their rights. (Resp. Br. 23 n.15.) That is because the patient health care records statutes have nothing to say about the plaintiffs' members' businesses. The plaintiffs are not arguably within the zone of interests of Wis. Stat. §§ 146.82–.84.

[2] In their brief, the plaintiffs allude to HIPAA, but they have pled no HIPAA claim. (R. 37.) Even if they had, it would suffer from the same standing problems and related deficiencies.

B. The plaintiffs' response arguments are unavailing.

1. The plaintiffs are in no sense within the patient health care record statutes' ambit.

The plaintiffs base their "zone of interests" theory on parts of chapter 146 that they admit they have not invoked. (Resp. Br. 16–18, 23–24, 28 (relying on Wis. Stat. § 146.84(1)(b) and (bm).) They say that "*if* the State *were* to release the records at issue here, Plaintiffs and their members *could* bring claims under Section 146.84(1)(b) or (bm) for the damages caused to them by the State's violation of Section 146.82." (*Id.* at 23–24 (emphasis added).)

Wisconsin Stat. § 146.84(1)(b) and (bm) govern claims for "damages" resulting from a "violation" of the patient health care records law. However, the relief the plaintiffs sought was a prospective injunction, not damages from a release of records. (R. 37:11–12, 18.) Yet they argue they are within the zone of interests of Wis. Stat. §§ 146.82 and 146.84 because subsections (1)(b) and (bm) state that "[a]ny person, including a state or any political subdivision of the state, who violates s. 146.82 . . . shall be liable to *any person injured as a result of the violation*." (Resp. Br. 17 (plaintiffs' emphasis).)[3] They are wrong.

First, they say that they can be a "person" entitled to damages but offer no coherent support for that argument. Nothing in the substantive provisions of the patient health care records law covers businesses or their reputational interests. (*See* State's Br. 13–14; Resp. Br. 17.) It makes no sense that an entity could get damages for alleged violations

[3] Further, the plaintiffs omit key words after "violation," namely, "for *actual damages* to that person." Wis. Stat. § 146.84(1)(b), (bm).

of provisions that do not apply to the entity. (State's Br. 16–17.) In other words, the plaintiffs ignore context and, in doing so, twist the patient health care records law into absurdity. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (explaining that text is interpreted "in the context in which it is used" and "reasonably, to avoid absurd or unreasonable results").

Second, obtaining an injunction as to patient health care records is governed by Wis. Stat. § 146.84(1)(c). It only allows an "individual" to "bring an action to enjoin any violation of s. 146.82." (State's Br. 14–17.) Therefore, the plaintiffs wrongly rely upon subsections (1)(b) and (bm) when they are not seeking damages, and injunctive relief is only available to an "individual."

That the plaintiffs are entitled to no legal protection here is plain on the face of the statutes. It also is supported by the reasoning in *Milwaukee Deputy Sheriff's Association*, which addressed a similar statutory structure in Wis. Stat. § 51.30. The decision correctly recognized that a person must be protected by the law he invokes. *Milwaukee Deputy Sherriff's Ass'n*, 327 Wis. 2d. 206, ¶ 31. (State's Br. 16–17, 21.)

That proposition of course holds true across contexts. The plaintiffs nonetheless argue that this logic should not apply here because Wis. Stat. § 51.30(4) refers to a "privilege[ ]" of "the subject individual," whereas Wis. Stat. § 146.82(1) only states that "[a]ll patient health records shall remain confidential." (Resp. Br. 27.) But Wis. Stat. § 146.81(3) defines "patient" to mean the "person who receives health care." Thus, the concept of "subject individual" is built into the definition (and, for that matter, the whole statutory scheme).

Further, the plaintiffs fail to develop their argument. They say patient health care records may be privileged as to others, beyond just patients, but it would not follow that they are privileged *as to the plaintiffs here*. (Resp. Br. 27.) Business

trade associations have no conceivable privilege as to patient records.

The plaintiffs also rely upon *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45, ¶ 3, 243 Wis. 2d 119, 625 N.W.2d 876, and say it means that section 51.30 is not relevant. But they excise key text in quoting that case. (Resp. Br. 28.) The full quote is: "Our method of analysis of Wis. Stat. § 51.30 **in *Billy Jo W.*** [*v. Metro*, 182 Wis. 2d 616, 514 N.W.2d 707 (1994)] is not applicable to Wis. Stat. § 146.82." *Crawford*, 243 Wis. 2d 119, ¶ 33 (emphasis added). The supreme court did not hold that sections 146.82 and 51.30(4) cannot be read in context—only not as in *Billy Jo W.* And *Crawford*'s discussion of *Billy Jo W.* says nothing that matters here: it was about applying the language "pursuant to a lawful order of the court" in Wis. Stat. § 51.30(3). *Crawford*, 243 Wis. 2d 119, ¶ 32.

These quibbles also miss the bigger point: what the statutes expressly cover. Like Wis. Stat. § 51.30, the rights covered by the substantive provisions in Wis. Stat. §§ 146.82–.84 are those of "the patient" and concern "the release of [his] confidential information." *Milwaukee Deputy Sheriff's Ass'n*, 327 Wis. 2d 206, ¶ 32. It makes no sense to read the law's remedy provisions as offering remedies for trade associations, which are not patients. The plaintiffs are not arguably within the zone of interests of Wis. Stat. §§ 146.82–.84 or the remedy provided in section 146.84(1)(c), so they cannot invoke those laws or rely on them for standing.

2. The plaintiffs' policy and taxpayer standing arguments fail under the statutes' plain terms and established precedent.

The plaintiffs make arguments about policy and taxpayer standing, but none excuse them from the zone of interests test. Their assertions cannot change that the patient health care records law does not even arguably apply to them.

Their arguments also fail for various other reasons.

The plaintiffs say their interests "merit 'recogni[tion]' as a matter of 'judicial policy'" when the "design of these laws is to protect anyone who might be harmed by the unlawful release of private medical information." (Resp. Br. 18 (citation omitted).) But the design of the laws is to protect patients, not just anyone and certainly not businesses. Thus, their premise is simply wrong. Similarly, "judicial policy" cannot trump a statute that does not apply to a plaintiff. The "question is whether the party's asserted injury is to an interest protected by a statutory . . . provision." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 55. It is not.

As for taxpayer standing, the plaintiffs' own statement of their theory demonstrates its implausibility: they say that it is enough to pay taxes (i.e., not be a tax-dodger) and allege "that the State's actions are 'unlawful.'" (Resp. Br. 20.) They say that is "all that taxpayer standing demands." (*Id.*) But that demands nothing. *Every* complaint about government action or inaction alleges that something the government did is unlawful. That concept of taxpayer standing is limitless—anyone can come to court to complain about any government act if they filed their taxes. That eviscerates the legally protectible interest requirement and the taxpayer standing version of it.

As the cases in the opening brief demonstrate, that is not the standard: rather, the special circumstances of taxpayer standing require a bona fide expenditure that impacts a particular class of taxpayers. (State's Br. 21–24.) The plaintiffs' citation to *Voters with Facts v. City of Eau Claire* does not demonstrate otherwise; rather, it applied established principles to the affected taxpayers' allegations that a city unlawfully created tax incremental districts—which would directly result in the government "financ[ing] development" and impacts on "tax revenue." 2017 WI App 35, ¶ 5, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds*, 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131 (not reaching standing). Even then, this Court concluded that the taxpayers—"City residents"—lacked standing. *Id.* ¶¶ 2, 8.

The plaintiffs also cite *Coyne v. Walker*, where this Court said that the plaintiffs sufficiently pled there would be a "disbursement of tax revenues" by the alleged illegal acts related to Act 21 and rule drafting and promulgation. 2015 WI App 21, ¶ 12, 361 Wis. 2d 225, 862 N.W.2d 606, *aff'd*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520 (not addressing standing, as it was not raised at that stage). That is not the case here: there is no plausible allegation that tax revenues are being disbursed by sending records with a response. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693 ("Plaintiffs must allege facts that plausibly suggest they are entitled to relief."). Complying with the public records law is just a "routine duty." Wis. Stat. § 19.31.

In any event, this Court's *Coyne* decision did not purport to change the binding principles discussed in the opening brief, nor could it. Hitting send versus not hitting send as to certain records implicates no "expenditure" as that term is used in the cases, nor does any expenditure impact the plaintiffs as taxpayers in a way that would create standing.

The plaintiffs say that it does not matter that they have no unique taxpayer interest; they say it only matters that they are taxpayers as opposed to being tax-dodgers. (Resp. Br. 33.) That also is wrong. The cases, including *City of Appleton*, discuss an injury uniquely affecting a class of taxpayers affected by an expenditure—like the taxpayers in a particular city allegedly harmed financially by that city's real-world expenditures. (State's Br. 22–24.)

Here, in theory, the people who might have standing are those covered by the patient health care record law's substantive provisions—if patient records actually were being released, as opposed to just names of businesses. In other words, the present scenario has nothing to do with taxpayer standing.[4]

II. Wisconsin Stat. § 19.356(1) also bars the plaintiffs' action.

On the public records bar, the plaintiffs' premise essentially is this: because Wis. Stat. § 19.356(1) specifically limits who may obtain prerelease relief (and does not include the plaintiffs), then it somehow follows that the plaintiffs have limitless options to seek relief under the declaratory judgments act. (*E.g.*, Resp. Br. 41.)

That argument fails for the reasons discussed in the opening brief. Again, the public records law squarely addresses this: it bars prerelease review unless an exception applies. And the declaratory judgments act cannot "otherwise

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[4] The plaintiffs also assert it should matter that, according to them, the State may be sued by other people for damages. (Resp. Br. 19 n.11, 33 n.18.) They make no effort to develop this as an argument, nor could they. Speculation about what other people may do—and further speculation that they might actually prevail—does not confer standing. *See Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 39, 376 Wis. 2d 479, 899 N.W.2d 706.

provide[ ]" what the plaintiffs would need. *See* Wis. Stat. § 19.356(1). (State's Br. 26–31.) A declaratory judgment is a type of relief; invoking that tool does not *create* an underlying right. *See* Wis. Stat. § 806.04(1) (potentially providing "relief" tied to a "right"). The plaintiffs sometimes seem to understand that—they acknowledge lawsuits must be premised on a legally protectible interest—but then fail to identify a legally protectible interest that could belong to them. (*E.g.*, Resp. Br. 41.) They thus offer nothing to analyze under the "otherwise provided" language.

The plaintiffs posit a two-part test that is equally unavailing. (Resp. Br. 35.) They say they should be able to bring a declaratory-judgment action if not foreclosed by an "exclusivity" construction and if another remedy is inadequate. But the cases cited do not contain that broad proposition, and especially not in a way that is relevant here. *E.g.*, *State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 82 Wis. 2d 529, 542–43, 263 N.W.2d 196 (1978) (in a quo warranto action, discussing the general exclusivity of chapter 227 actions and the ability to raise bona fide challenges in them).

Rather, what the plaintiffs propose here is to use a declaratory-judgment action to *ignore* a statutory limitation. They have no right to do that. (State's Br. 28–31.) For example, they cite *Lister*, but that case is about sovereign immunity barring a declaratory-judgment action that seeks damages against the State for tuition reimbursement. *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976). It does not hold that a plaintiff can bring a declaratory-judgment action where, as here, that plaintiff is foreclosed from bringing the claim under the applicable statute. *See also Lamar Cent. Outdoor, LLC v. DOT*, 2008 WI App 187, ¶ 32, 315 Wis. 2d 190, 762 N.W.2d 745 (simply discussing whether a statutory procedure was adequate for a sign owner to seek just compensation).

The problem here is not of a plaintiff selecting between available avenues; it is of a plaintiff having no right to an avenue. The public records law's limit on who can halt a proposed release cannot be converted into a free pass to seek what the statute says is unavailable, simply by citing the declaratory judgments act.

The plaintiffs' discussion of *Woznicki*, predating current Wis. Stat. § 19.356(1), also does not change that. (Resp. Br. 36–39.) Their premise seems to be that, because section 19.356(1) postdates *Woznicki*, then it follows that section 19.356(1) only bars *Woznicki*-like claims. Whatever the plaintiffs have in mind, it does not matter. What matters is what the statute says, and it is not specific to *Woznicki*. Rather, it bars prerelease review unless one of the exceptions applies or another source actually provides for it.

More generally, the plaintiffs imply that someone with a constitutional claim should be able to seek an injunction irrespective of section 19.356(1), and they suggest this means that they should be able to pursue their claim here. (Resp. Br. 42.) That argument is both irrelevant and undeveloped. They have pled no constitutional claim and, in fact, have no substantive claim. There may be times when Wis. Stat. § 19.356(1) allows prerelease claims premised on provisions applicable to a challenger; that is what the "otherwise provided" language potentially provides. But the plaintiffs offer nothing of the sort.

This case is about releasing truthful information about quantities of COVID-19 cases associated with certain businesses, under the mandates of the public records law. The plaintiffs have no right to block that from public view.

CONCLUSION

This Court should reverse the circuit court's nonfinal orders and direct that on remand this case be dismissed.

Dated this 12th day of March 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2990 words.

Dated this 12th day of March 2021.

ANTHONY D. RUSSOMANNO
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 12th day of March 2021.

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