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STATE OF WISCONSIN
COURT OF APPEALS
District IV
Appeal Nos. 2020AP2103 & 2020AP2081

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

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

BRIEF OF *AMICUS CURIAE* GANNETT CO., INC. d/b/a USA TODAY NETWORK-WISCONSIN, d/b/a GREEN BAY PRESS-GAZETTE, AND DOUG SCHNEIDER

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INTRODUCTION

The action below is an attempt to use a request for declaratory relief in a way that would potentially undermine *amici's* and others' rights under the Public Records law. For that reason and as further explained herein, *amici* Gannett Co., Inc. d/b/a USA TODAY-NETWORK-WISCONSIN, d/b/a Green Bay Press-Gazette, and Doug Schneider (collectively referenced herein as "Gannett") respectfully request that the Court reverse the Circuit Court's orders and require that the action be dismissed.

STATEMENT OF PERTINENT FACTS

Prior to the commencement of the proceedings below, Gannett filed a separate action seeking records from Brown County that contain the same information that Plaintiffs-Respondents (collectively referenced herein as "WMC") are trying to preclude the Defendants (collectively referenced herein as "the State") from releasing through the arguments asserted in this case. R:56:4-17 (Complaint).[1] Brown County has raised the same arguments against release of those records that WMC asserts in this case. R.56:47-51.

[1] This Court may take judicial notice of other court proceedings when appropriate to the consideration of issues presented in a case. *See, e.g., Teacher Retirement Sys. of Texas v.*

Recognizing that Brown County might try to piggyback on any relief that may granted WMC in this case, Gannett submitted a motion for leave to file an *amicus* brief in the proceedings below. R. 55, 56, 57. The motion was neither granted nor mentioned in the Court's decision issuing a temporary injunction. Proceedings were conducted by Zoom, and participation was not offered to non-parties. *See* R. 100, 101, 102 (hearing transcripts).

Gannett's Brown County action is in dispositive motions briefing. Affidavit of April Rockstead Barker in support of Motion for Leave to Participate as *Amicus Curiae*, filed in this Court on March 16, 2021, Ex. 1.

ARGUMENT

I. Declaratory Relief Is Not A Proper Mechanism For Depriving *Amici* of Their Rights Nor For Depriving the Public of Rights *En Masse.*

Gannett is in the unique position of having filed a prior pending lawsuit to enforce, under the Public Records law, requests for public records that contain the type of information that WMC

Badger XVI Ltd. Partnership, 205 Wis.2d 532, 540, 555 N.W.2d 415, 418 (Ct. App. 1996) at n.3.

seeks to declare categorically off limits to the public. Through a subsequently-filed collateral attack, and in one fell swoop, WMC and its allies hope to defeat not only Gannett's rights, but those of all Wisconsin residents who would seek access to these records.

WMC's suit perverts the purpose of declaratory relief as a judicial tool. Declaratory relief is intended to settle rights where there is an existing controversy between identified parties. Declaratory relief is not to be used anytime parties have "a difference of opinion as to the proper construction and application of a particular statute." *Lister v. Board of Regents of the University of Wisconsin System,* 72 Wis. 2d 282, 306, 240 N.W.2d 610 (1976).

To ensure that a *bona fide* controversy exists and that the court, in resolving the questions raised, will not be acting in a merely advisory capacity, there are several prerequisites that must be satisfied when a party seeks declaratory relief. *Id.* The request for relief must (1) involve a claim of right on the part of the plaintiff ***which is asserted against one who has an interest in contesting it; (2) is between two persons whose interests are adverse***; (3) involves

a legally protectible interest in the person seeking declaratory relief; and (4) is ripe for judicial determination. *Id.*

The statute further requires that "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration***, and no declaration may prejudice the right of persons not parties to the proceeding***." Wis. Stats. §806.04(11) (emphasis added). As a fundamental corollary of these principles, requests for declaratory relief have been recognized as inappropriate when the requested relief would affect the rights of others who have not been joined to the action.

> An action for a declaration of "rights and other legal relations". . . serves a legitimate purpose where all persons who are interested in or might be affected by the enforcement of such "rights and other legal relations" and who might question in a court the existence and scope of such rights, are parties to the action and have opportunity to be heard.

Manhattan Storage & Warehouse Co. v. Movers and Warehousemen's Ass'n of Greater New York, Inc., 43 N.E.2d 820, 832 (N.Y. Ct. App. 1942).

Therefore, where a request for declaratory relief seeks adjudication of the rights of others who are not parties, "A court

may, and ordinarily must, refuse to render a declaratory judgment in such case." *Id. See also* Wis. Stat. §806.04(6) (Declaratory relief is discretionary and may be refused where it "would not terminate the uncertainty or controversy giving rise to the proceeding"); *Lister*, *supra,* at 306 (on a motion to dismiss a complaint for declaratory relief, the question presented to the court is whether the controversy is one which should be considered on the merits).

In *Lister*, the Wisconsin Supreme Court held that declaratory relief was inappropriate where an action that was, for all practical purposes, intended to establish the amount of liability owed by the state on a claim was instead creatively pleaded as a claim "against the individual officer or agency acting in excess of his or its authority" regarding the purportedly "erroneous application of a statute." The Supreme Court rejected that characterization of the action as a "fiction," noting that "A court cannot close its eyes to the purpose which a declaration of rights will serve in the particular case." *Id.*

In this case, WMC filed suit against the custodian of the records – the Department of Health Services ("DHS"), but did not

join Gannett, despite its status as a plaintiff in the Brown County suit. And of course, WMC did not and cannot join all parties who may seek to obtain records under the Public Records law. While WMC may contend that this fact makes its recourse to declaratory relief necessary, in fact, it illustrates why judicial relief is inappropriate in these circumstances: The controversy is not justiciable as against all the world, nor against all of the state's residents. Without joinder of the parties whose rights are truly affected, a decree is merely obtained against a straw man.[2]

By suing the records custodian, WMC is effectively suing the records themselves, treating this as an *in rem* proceeding that merely declares rights to property against all the world. But even in proceedings that are appropriately initiated *in rem*, the interests of

[2]By noting their own status as some of the real parties in interest in these proceedings, Gannett does not mean to denigrate the substantial and capable arguments asserted by the State's counsel in this case. The State's position is aligned with Gannett's in many respects, which is unsurprising given that DHS has strong interests in protecting its authority to release information in furtherance of its statutory mission and mandates, which are described further in Section II, *infra*.

others in the property at issue are not affected except as to those who are served with a summons. Wis. Stats. §801.07.[3]

As Gannett explained in its (presumptively-denied) motion for leave to participate in the circuit court proceedings in the instant case, it is also improper for one court to interfere with a matter over which another court has previously acquired jurisdiction. *See, e.g.*, *Salter v. Cook,* 131 Wis. 2d 824, 110 N.W. 823, 824 (1907); *Libby v. Central Wisconsin Trust Co.*, 182 Wis. 599, 197 N.W. 206, 208 (1924) ("A court of co-ordinate jurisdiction will not interfere" with another court's power to grant relief); *In re Clark,* 135 Wis. 437, 115 N.W. 387, 389-90 (1908) (holding injunction entered against parties involved in other proceedings was invalid); *Eau Claire Leader-Telegram v. Barrett,* 146 Wis. 2d 647, 651, 431 N.W.2d 741 (Ct. App. 1988) (circuit court had no authority to order another circuit court to release records or pay attorneys' fees).

[3] While concluded actions may affect others' rights through *stare decisis,* the holdings are determined through actual controversies that are presented to courts for decision under rules that are intended to ensure the joinder of those who have interests in the proceedings. *See* Wis. Stats. §803.03(1)(a)-(b).

In Gannett's Brown County action, the Court is being asked to review testimony of DHS witnesses and to examine the facts surrounding the argument – in that case, made by Brown County, but mirroring the position taken by WMC in these proceedings -- that the release of the records would violate medical privacy laws or public policy. *See* Affidavit of April Rockstead Barker filed in support of Motion for Leave to Participate as Amicus Curiae, Ex. 1, at pp. 1-6. No such facts were developed in this case prior to an early grant of extraordinary relief in the form of a temporary injunction. *See* R. 100, 101, 102 (transcripts of hearing and oral decision); R. 75 (written order granting temporary injunction).

The lines of authority that limit declaratory relief to controversies that include the affected parties, on one hand, and that prohibit courts from interfering with matters properly before other courts, on the other hand, are complementary. Both work to ensure that the judicial system is not manipulated to use one legal action in a way that deprives other parties of their rights to pursue claims in their own actions. WMC's action amounts to a pre-emptive collateral attack on Gannett's rights to pursue claims that were

previously initiated in another court and that are poised to be presented for a substantive determination by that court based on properly developed facts. Gannett respectfully requests that the Court reject the end-around that WMC has attempted in this case as an improper use of declaratory relief.

II. Other *Amici*'s Invasion of Privacy Arguments Ignore The Mission of Public Health.

Contrary to the argument presented to this Court by *amicus* Waukesha County Business Alliance and its co-*amici* (collectively referenced hereafter as "WCBA"), the outcome of this case threatens no unwarranted "invasion of privacy" through DHS' release of information concerning COVID-19 or other reportable communicable diseases. As numerous Wisconsin statutes make clear, there is no privacy expectation in the existence and locations of communicable diseases, especially those that create public health emergencies:

- Chapter 146, the chapter of the statutes that contains the provisions relating to privacy of health records, specifically tracks and adopts federal regulations that provide that restrictions on the release of otherwise-protected health information "do not apply to a use, disclosure, or request for disclosure of protected health information" regarding a patient "in a good faith effort to prevent or lessen a serious and imminent threat to the health or

safety of a person or the public." Wis. Stat. §146.816(2)(b)(4); *see also* Wis. Stat. §146.816(2)(a) (incorporating 45 CFR §164.500 to 45 CFR §164.534); 45 CFR §164.512((b)(1)(i); 45 CFR §164.512(b)(2).

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- Wisconsin Statutes Section 250.042(3)(a) provides that when a state of emergency is declared, such as the well-known public health emergency that was declared relating to COVID-19, DHS "***shall inform state residents of all of the following:***

  1. When a state of emergency related to public health has been declared or is terminated.

  2. ***How to protect themselves from a public health emergency.***

  3. ***What actions the public health authority is taking to control a public health emergency.***

  Id. (Emphasis added.)

- Section 250.042(3)(b) further provides that:

  (b)***The public health authority shall provide the information specified . . . by all available and reasonable means calculated to inform the general public,*** including reasonable efforts to make the information accessible to individuals with disabilities and to provide the information in the primary languages of individuals who do not understand English.

  Id. (emphasis added).

- Even in the absence of a public health emergency, DHS is required by statute to "analyze occurrences, trends and patterns of acute, ***communicable or chronic diseases***, maternal and child

> health, injuries and ***occupational and environmental hazards and distribute information based on the analyses***." Wis. Stats. §250.04(3)(b)(1) (emphasis added).

According to these statutes, which codify Wisconsin public health policy, and in keeping with basic common sense**, personal expectations of medical privacy end when public health is endangered.**[4]

This basic tenet, and the public health statutes that enforce it, refute and expose as the will o' the wisps that they are the parade of horribles raised by the WCBA, including its shrill warnings of imminent explosions of lawsuits and privacy claims. Releasing information in accordance with public health laws violates no one's reasonable expectations. *See also Newspapers, Inc. v. Brier*, 89 Wis. 2d 417, 432, 279 N.W.2d 179 (1979) (noting that the

[4] There is no credible argument that DHS' sharing of COVID-19 outbreak information with local public health agencies occurred in any capacity as a "covered entity" so as to trigger the protections of federal law under HIPAA. *See* 45 CFR §160.102(a)(1)-(3); 45 CFR §160.103. But even assuming, *arguendo*, that it applied, HIPAA contains exceptions for the release of public health information by agencies attempting to control and prevent outbreaks of communicable disease. 45 CFR §164.512((b)(1)(i); 45 CFR §164.512(b)(2).

Legislature has determined that individuals have no right of privacy in materials that may be released to the public by law).

As state public health policy recognizes, concealing information regarding communicable diseases substantially decreases citizens' ability to avoid exposure. Consistent with sound public health policy, Wisconsin law empowers citizens to take steps that they deem appropriate to protect themselves based on information that cannot and should not be withheld from them.[5] For similar reasons, Wisconsin law provides that even those who knowingly *assist* in exposing others to communicable diseases violate the law. Wis Stat. §252.19. WCBA's arguments are animated by the same disregard for others' well-being that is manifest in the conduct deterred by Section 252.19, on a larger scale.

As is so often the case in government transparency disputes, WCBA is using the mantra of privacy as a cloak to disguise the fact that its arguments are nothing more than a new twist on the claim

[5] WCBA's pretense that its arguments are rooted in employee privacy are cynical and disheartening. WCBA is masquerading as an advocate for employees while claiming that employees must be denied critical information about occupational health hazards that Wisconsin statues insist they be provided. *Cf.* Wis. Stat. §250.04(3)(b)(1), *supra.*

that the release of public records and public information could hypothetically cause harm to its members' reputations, rather than harm to any legitimate public interests. Such claims have repeatedly been rejected as a basis for denying access to public records in this state. *See, e.g., Linzmeyer v. Forcey*, 2002 WI 84, ¶31, 254 N.W.2d 306, 646 N.W.2d 811. In the name of facilitating robust public health response to public health emergencies, the argument should be rejected all the more forcefully in this case.

CONCLUSION

For the reasons set forth above, respectfully request that the Court reverse the Circuit Court's orders granting a temporary injunction to WMC and denying the State's and Intervenor Milwaukee Journal Sentinel's motions to dismiss the proceedings below.

Dated this 18th day of March, 2021.

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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 an amicus brief and appendix produced with proportional serif font. This brief is 2,535 words, calculated using the Word Count function of Microsoft Word.

Dated this 18th day of March, 2021.

_/s/ April Rockstead Barker_____
April Rockstead Barker

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 this 18th day of March, 2021.

__/s/ April Rockstead Barker_____
April Rockstead Barker

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify that on March 18, 2021, this Brief and Appendix 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. The undersigned further certifies that she has caused three (3) true and correct copies of the foregoing Brief to be served upon counsel of record via third-party commercial delivery within 3 calendars days along with a courtesy copy to be provided to opposing counsel by e-mail.

Dated this 18th day of March, 2021.

_/s/ April Rockstead Barker_____
April Rockstead Barker