SUPREME COURT OF WISCONSIN
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-Appellant

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

MILWAUKEE JOURNAL SENTINEL'S RESPONSE TO PETITION FOR REVIEW AND APPENDIX

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INTRODUCTION

It is long past time for this illegal lawsuit to end. For more than a year now, the public has been denied basic but crucial information about the worst pandemic in a century, thanks to the actions of organizations that are expressly forbidden from filing a lawsuit like this. If this Court takes this case instead of letting it end now, the Plaintiffs-Respondents ("Associations") will get the benefit of hiding the truth for even longer. The Legislature expressly forbade suits like this to avoid having the public's records tied up in endless litigation. The best way for this Court to respect the will of the Legislature is to let this lawsuit end sooner rather than later.

The Legislature passed Wis. Stat. § 19.356 in response to this Court's ruling in *Woznicki v. Erickson*, 202 Wis. 2d 178 549 N.W.2d 699 (1996), which recognized for the first time a common-law cause of action seeking to halt the release of the public's records. Wis. Stat. § 19.356(1) prohibits such lawsuits except as the Legislature specifically provides in statute. The Circuit Court failed to analyze this provision, but the Court of Appeals properly held that it barred this suit.

The Court of Appeals also correctly ruled that the Associations lack standing, applying longstanding precedent that a party must have a legally

protectible interest to file a declaratory judgment action. The Associations are significantly distorting the Court of Appeals' decision in this regard in an attempt to make it look as though review is warranted. The Court of Appeals' decision is consistent with other cases holding third parties lack standing to sue under medical record laws. Finally, the two additional claims of error the Associations raise are irrelevant to the Court of Appeals' decision and so, even if decided incorrectly, do not warrant review by this Court.

I) THE COURT OF APPEALS' RULING ON WIS. STAT. § 19.356(1) IS CONSISTENT WITH PRECEDENT

The Open Records Law broadly presumes that all government records shall be open to the public, subject only to explicit statutory and common law exceptions or a judicial determination that the public interest in secrecy outweighs the strong and presumed public interest in disclosure. Wis. Stat. § 19.31; *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶10-11, 254 Wis. 2d 306, 646 N.W.2d 811. Section 19.31 is "'one of the strongest declarations of policy to be found in the Wisconsin Statutes.'" *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶52, 319 Wis. 439, 768 N.W.2d 700, *quoting Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240.

Although the Open Records Law in its current form is a relatively modern creation, *see* 1981 Wis. Act 335, common-law and statutory rights

of public access to government records have a long history in Wisconsin. *See generally* Linda de la Mora, *The Wisconsin Public Records Law*, 67 MARQ. L.REV. 65, 73-74 (1983) (describing common-law and statutory rights of access going back into the 19th century). Custodians were long understood to have the unfettered discretion to disclose government records regardless of the wishes of a record subject. *See, e.g.*, *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 558, 334 N.W.2d 252, 262 (1983) ("[I]t is the legal custodian of the record, not the [record subject], who has the right to have the record closed if the custodian makes a specific demonstration that there is a need to restrict public access at the time the request to inspect is made.").

The Wisconsin Supreme Court dramatically altered that understanding in *Woznicki*, holding for the first time that a record subject had an "implicit" right to notice and judicial review before records concerning them were released. 202 Wis. 2d at 185, 194. Only a few short years later, the Legislature acted to curtail the excesses engendered by that decision, enacting Wis. Stat. § 19.356 in 2003. *See* 2003 Wis. Act 47. The Legislature chose to strictly limit both who could bring actions challenging the release

of records and what records could be challenged. The Associations admit they satisfy neither category. Slip op., ¶44 (PRE App. 24).

Wis. Stat. § 19.356 also provides that "no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record" except as provided in § 19.356 "or as otherwise provided by statute." The Legislature created this provision specifically to prohibit interference with the release of the public's records. *See Moustakis*, 2016 WI 42, ¶27. In other words, the Legislature decided that it – and not the courts – would be the arbiters of who is permitted to sue to halt the release of records.

The Legislature has not extended the right to file a lawsuit seeking to stop the release of the public's records to the Associations. No statute provides them that right, as the Court of Appeals correctly recognized. Slip op., ¶¶41-44 (PRE App. 23-24). The Uniform Declaratory Judgments Act ("DJA") does not create such a right, as that Act does not create any new rights, but rather creates a remedy to protect an existing right. *See Rudolph v. Indian Hills Estates, Inc.*, 68 Wis. 2d 768, 773-75, 229 N.W.2d 671, 675-76 (1975) (DJA does not "otherwise permit" a cause of action where more specific statutory provisions apply); *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukana*, 2013 WI App 113, ¶17, 350 Wis. 2d 435, 838 N.W.2d 103 (DJA

cannot "be used to do an end run around" more specific provisions for judicial review).

The Court of Appeals' decision is therefore consistent with the express and intentional decision of the Legislature to prohibit parties from using the courts to stop or delay release of the public's records except in narrow and carefully delineated circumstances.

Furthermore, the Court of Appeals' decision is consistent with prior precedent on this issue, particularly *Moustakis*. To be clear, *Moustakis* is not directly controlling, as the party seeking to prohibit the release of records in that case did not argue that the DJA provided an exception to § 19.356(1)'s prohibition. However, the Court of Appeals' decision is still consistent with *Moustakis* in two important ways.

First, the Court of Appeals treated the broad question here – are the Associations allowed to file this suit – as one primarily of statutory interpretation, which is consistent with how *Moustakis* approached the same question. *Moustakis*, 2016 WI 42, ¶3, n.2 (noting that standing and statutory interpretation are distinct and that the proper analysis is one of statutory interpretation); *see also Wisconsin's Envt'l Decade, Inc. v. PSC*, 69 Wis.2d 1, 11, 230 N.W.2d 243 (1975) (describing cases resolved "on the notion that

the statute relied upon by the person seeking review did not give legal recognition to the interest asserted" as "rest[ing] upon statutory interpretation rather than the law of standing itself.").

Second, the Court of Appeals' decision that § 19.356(1) prohibits the Associations' suit is consistent with the broad principle of *Moustakis* that § 19.356(1) is a strict prohibition and there is no free-standing right to challenge the release of records in court. *See* 2016 WI 42, ¶¶24-28, 63; *see also Moustakis v. DOJ*, No. 18-AP-373, ¶¶29, 35-37 (Wis. Ct. App., May 17, 2019) (unpublished), *review denied* 2019 WI 98, 389 Wis. 2d 32, 935 N.W.2d 675, *cert denied* 140 S. Ct. 937 (2020) (I. App. 1-22) (on remand from this Court, holding that the plaintiff had no right to judicial review of the decision to release his records because the statutes did not provide him such a remedy).

Finally, it must be noted that the Associations' Statement of Issue is highly misleading. They present this issue as "Whether the right to challenge a records release under the Uniform Declaratory Judgments Act survived the enactment of Wis. Stat. § 19.356 . . ." PRE, 3 (emphasis added). That question presumes that there ever was a right under the DJA to challenge the release of records, which is patently false. The Associations can point to no

case ever holding that the DJA provides such a right, and no such case exists. No court ever recognized such a right until *Woznicki*, and the *Woznicki* court did not rely on the DJA to create the right. *See* 202 Wis. 2d 178. The Associations' issue statement presumes a falsehood, and is the equivalent of that stereotypical improper question of a witness, "When did you stop beating your wife, Mr. Smith?" A fair presentation of the issue would be: "Whether the Uniform Declaratory Judgments Act 'otherwise provides' that the Associations are 'entitled to judicial review of the decision of an authority to provide a requester with access to a record' under Wis. Stat. § 19.356(1)."

II) THE COURT OF APPEALS' RULING ON STANDING IS CONSISTENT WITH PRECEDENT

Trying to tempt this Court into taking this case, the Associations present a heavily distorted explanation of what the Court of Appeals ruling on standing actually says. Contrary to the Associations' mangled reading, the Court of Appeals applied routine standing law, correctly holding that a party must have a legally protectible interest to have standing. Far from paving new ground as the Associations claim, the Court of Appeals' holding is consistent with other cases holding that third parties lack standing to sue under medical record laws. Finally, the two other claims of error raised by

the Associations are irrelevant to the Court of Appeals' decision and so, even if decided incorrectly, do not warrant review by this Court.

A) The Associations Distort the Court of Appeals' Ruling

The Court of Appeals did not change the law of standing as the Associations claim. The Associations claim that the Court of Appeals held that a party could have standing but not have a legally protectable interest. PRE, 4-5. This is false – the Court of Appeals found that the Associations did not have standing because they did not have a legally protectible interest. Slip op., ¶8 (PRE App. 7). The Associations also claim that the Court of Appeals "dismissed out of hand" the idea that the legally protectible interest requirement can be satisfied in three different ways. PRE, 23. This is also false – the Court of Appeals analyzed all three methods the Associations raised. Slip op., ¶¶30-32 (PRE App. 18-20). They also claim that the Court of Appeals "seems" to have discarded the connection between justiciability and standing. PRE, 23. This, too, is false – the Court of Appeals analyzed the standing question as one primarily of statutory interpretation but also analyzed the standing doctrines the Associations raised. Slip op., ¶¶15-33 (PRE App. 11-20).

It is obvious why the Associations are working so hard to obscure what the Court of Appeals actually did. They likely recognize that the Court of Appeals applied the long-standing, basic rule that a party must have a legally protectible interest in order to file a declaratory judgment action, but know that reviewing such a ruling is unlikely to interest this Court. They try, but fail, to make it look as though this case involves a novel and interesting question of law.

B) The Court of Appeals Correctly Held that a Party Must Have a Legally Protectible Interest to Have Standing

The Court of Appeals' thorough analysis of whether the Associations could bring a declaratory judgment claim seeking to stop the release of the public's records relies on a very basic, undisputed principle – that plaintiffs must have a legally protectible interest in order to bring a declaratory judgment claim. Slip op., ¶¶2, 8, 13-33 (PRE App. 4, 7, 10-20). The Court labeled that analysis under the heading "Legally Protectable Interest for Declaratory Relief." *Id.*, ¶13 (PRE App. 10). As the Court stated, "the Associations must assert . . . at least one 'legally protectable interest' satisfying the third factor [of the declaratory judgment justiciability test] in order to maintain this declaratory judgment action." *Id.*, ¶14 (PRE App. 10).

The Court of Appeals was completely correct in this regard. To bring a declaratory action, four elements are required, including that "[t]he party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest." *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175, 181 (1982), *quoting State ex rel. La Follette v. Dammann*, 200 Wis. 17, 22, 264 N.W.2d 627 (1936). "[T]he legal interest requirement has often been expressed in terms of standing." *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81. "To have standing, a party must 'have suffered or be threatened with an injury to an interest that is legally protectible, meaning that the interest is arguably within the zone of interests' that a statute or constitutional provision, under which the claim is brought, seeks to protect." *Zehner v. Vill. of Marshall*, 2006 WI App 6, ¶11, 288 Wis. 2d 660, 709 N.W.2d 64, *quoting Town of Baraboo v. Vill. of West Baraboo*, 2005 WI App 96, ¶35, 283 Wis. 2d 479, 699 N.W.2d 610. "In other words, the question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n Inc.*, 2011 WI 36, ¶55, 333 Wis. 2d 402, 797 N.W.2d 789 (Abrahamson, C.J., lead op).

All the Court of Appeals was saying is that having a legally protectible interest is necessary under any theory of standing. That formulation is uncontroverted. A plaintiff cannot simply allege that "I have standing" or even that "I have been harmed." *See Krier v. Vilione*, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517 ("Being damaged, however, without more, does not automatically confer standing.") Once the Associations' distortions are set aside, it is clear that the Court of Appeals' decision is consistent with precedent on the standing issue.

C) The Court of Appeals' Decision Is Consistent with Other Cases Holding that Third Parties Lack Standing to Sue under Medical Record Laws

The Court of Appeals' approach and rulings are also consistent with cases that deal specifically with the issue at hand – who has standing to assert claims under medical record laws. For example, the Court of Appeals' ruling here that associations of businesses have no legally protectible interest under Wis. Stat. §§ 146.82-.84 – because those statutes protect the interest of the Associations' members' employees as individual patients – is consistent with *Milwaukee Deputy Sheriff's Association v. City of Wauwatosa*, 2010 WI App 95, 327 Wis. 2d 206, 787 N.W.2d 438. In that case, the court ruled that a

union could not assert the interests of its members in the confidentiality of medical records under a similar statute, § 51.30. *Id.*, ¶¶30-33.

The Court of Appeals' decision is also consistent with *Olson v. Red Cedar Clinic*, 2004 WI App 102, 273 Wis. 2d 728, 681 N.W.2d 306, a case cited by *Milwaukee Deputy Sheriff's Association*, *see* 2010 WI App 95, ¶33. In *Olson*, a mother argued that a medical clinic unlawfully disclosed information about her that was contained in her son's medical records in violation of medical record privacy law. 2004 WI App 102, ¶13. However, the court concluded that because the right to confidentiality was specific to the person receiving treatment, anybody else identified in the record had no right of confidentiality and therefore no claim against the medical provider. *Id.*, ¶14. Likewise here, the Associations are trying to claim that the DHS is going to unlawfully release information about them that is allegedly contained in their members' employees medical records. The Court of Appeals' ruling is consistent with *Olson* in that in neither case does a third party – even a third party identified in a medical record – have any rights under the medical record privacy laws.

D) The Associations' Other Claimed Errors Were Irrelevant to the Court of Appeals' Ruling

Finally, the Associations raise two additional claims of error by the Court of Appeals, on the plausibility of their factual allegations and the status of the records as "patient health care records." *See* PRE, 25-32. Neither is worthy of this Court's review, because they were tangential to the Court of Appeals' ruling and, even if they were made in error, this is not an error-correcting court. The Journal Sentinel did not brief either of these two issues below, and for purposes of the Petition for Review, takes no position on their merits. However, even if they were decided correctly, they do not warrant review because they were minor points, irrelevant to the Court of Appeals' primary reasoning. Therefore, reversing them would not change the result in this case.

The Associations' first claim of error attacks the Court of Appeals' conclusion that the complaint failed to plausibly allege that individual patients could be identified as having COVID from the lists of businesses the DHS intended to release. *See* Slip op., ¶¶34-39 (PRE App. 20-22). But that conclusion was independent from the Court of Appeal's conclusion that the Associations lacked standing. *See id*. The Court of Appeals had already concluded that the complaint failed to state a claim upon which relief can be granted. *Id.*, ¶33 (PRE App. 20). Reversing that conclusion would have no effect on the ultimate outcome.

The Associations' second claim of error is a single footnote in the Court of Appeals' decision, where the Court "question[ed] whether the information that is alleged to be released constitutes one or more patient health care records." *Id.*, ¶25, n.9 (PRE App. 16). That statement was also independent from the Court of Appeals' conclusion that the Associations lacked standing. This footnote did not form the basis of any part of the Court of Appeals' conclusions, it was just a short aside. Reversing that footnote would also have no effect on the ultimate outcome.

Both of these discussions in the Court of Appeals' decision were therefore dicta, and even if incorrect, not worthy of review. This Court is not an error correcting court. *See Cook v. Cook*, 208 Wis. 2d 166, ¶¶50-51, 560 N.W.2d 246 (1997).

III) IF THIS COURT TAKES THIS CASE, IT SHOULD EXPEDITE REVIEW

Public records are supposed to be released "as soon as practicable and without delay." Wis. Stat. § 19.35(4)(a). Requests for the records at issue in this lawsuit go back as far as March, 2020. (R. 19:1.) The DHS delayed releasing these records, announcing they were going to release them six months later. (R. 7.) This lawsuit was filed immediately filed after that announcement, and the Associations have been successful in blocking access to public records for seven and a half more months, without any court ever

ruling that access to them is unlawful. If taken and allowed to proceed normally, Supreme Court review might add a year or more delay.

Where lawsuits seeking to stop the release of the public's records are actually permitted, court review is supposed to proceed rapidly. Recognizing the irreparable harm to the public interest caused when the release of records is delayed, the Legislature required that any lawsuit under Wis. Stat. § 19.356 be decided no later than 30 days after a complaint is served on the defendant. § 19.356(7). Appeals of such cases are also given precedence. § 19.356(8).

Proper suits seeking to enjoin the release of the public's records are given precedence; improper suits seeking the same result should not be treated any differently. Plaintiffs should not be able to deliberately slow a case down by proceeding under the wrong provisions. The Court of Appeals handled this appeal on an expedited basis, and the Journal Sentinel respectfully requests that this Court do so as well if it takes the case.

CONCLUSION

At its most basic level, this case should not exist. The Wisconsin Legislature eliminated the right to challenge a record custodian's decision to release records, except as to a very narrow set of record subjects who may challenge the release of only a very narrow set of records.

It is time for this lawsuit to end. This Court should not take this case, because the Court of Appeals correctly ruled that Wis. Stat. § 19.356(1) bars this suit and properly applied standing law, and because any errors on irrelevant issues are not worthy of review. If this Court does take this case, it should set briefing and oral argument on an expedited schedule and issue a ruling quickly.

Dated this May 18, 2021

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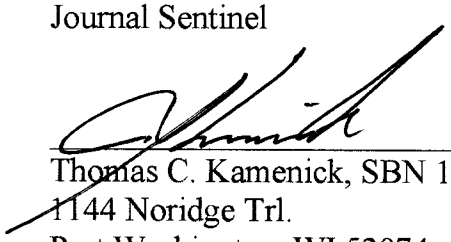

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) for a brief produced with proportional serif font. This brief is 3,378 words long, calculated using the Word Count function of Microsoft Word 2016.

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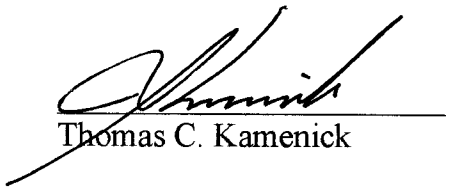

Thomas C. Kamenick

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.

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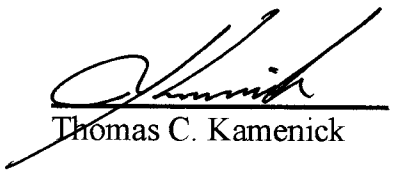

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CERTIFICATE OF COMPLIANCE WITH SECTION 809.62(3)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.62(3)(f) and that contains a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

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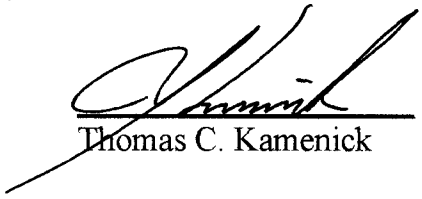

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