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Nos. 2020AP2081-AC & 2020AP2103-AC

In the Supreme Court of Wisconsin

No. 2020AP2081-AC

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE AND NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU,
PLAINTIFFS-RESPONDENTS-PETITIONERS,
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,
AND
MILWAUKEE JOURNAL SENTINEL,
INTERVENOR- APPELLANT.

No. 2020AP2103-AC

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE AND NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU,
PLAINTIFFS-RESPONDENTS-PETITIONERS,
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,
AND
MILWAUKEE JOURNAL SENTINEL,
INTERVENOR.

On Appeal from the Waukesha County Circuit Court,
the Honorable Lloyd V. Carter, Presiding

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

Nos. 2020AP2081-AC & 2020AP2103-AC

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ARGUMENT

Plaintiffs-Respondents-Petitioners ("the Associations") offer two brief points in reply to the State's and the Milwaukee Journal-Sentinel's (collectively, "Defendants") responses.

I. Defendants' Positions on the Merits Underscore the Need for This Court's Review

The court of appeals' holding that "doctrines that can confer standing on a party cannot be substituted for a statutory or constitutional provision that creates a legally protectable interest" is demonstrably incorrect under this Court's case law. Pet. 18–25. Implicitly conceding as much, the Journal Sentinel ignores this troublesome quote altogether. *See generally*, MJS Resp. 7–12. It instead skips ahead to the part of the court's decision that concludes, in the alternative, that the Associations fail to meet the standing doctrines here. MJS Resp. 8 (citing Pet. App. 18–20). But of course, absent this Court's review, the first holding will remain just as controlling as the second. After all, courts in Wisconsin may not disregard language in a published court of appeals opinion—even dicta. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997); *see also Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 57, 324 Wis. 2d 325, 782 N.W.2d 682 ("By concluding that a statement in a[n] … opinion is dictum,

the court of appeals necessarily withdraws or modifies language from that opinion.").

For its part, the State argues that the court was *correct* to hold that "doctrines that can confer standing on a party cannot be substituted for a statutory or constitutional provision that creates a legally protectable interest." State's Resp. 5–6, 9–10 (quoting Pet. App. 17, ¶ 27). But the State's defense—far from rehabilitating the court's erroneous conclusion—only draws attention to it. If the State is correct that a plaintiff must be in the zone of interests of a particular statute or constitutional provision to raise taxpayer standing, State's Resp. 13–15, then this Court's precedents are wrong and must be overruled. Pet. 20–22. There can be no middle position.

Addressing the decision's discussion of the confidentiality (or lack thereof) of *information* contained in medical records, the State insists that the court of appeals did not really mean what it said. It contends that the court did *not* hold that information contained in medical records is unprotected. State's Resp. 18–19. But to support this reading, the State incorrectly paraphrases the opinion. The court did not, as the State suggests, "'express no view' regarding the release of information contained in a record generally." State's Resp. 19 (quoting and

paraphrasing Pet. App. 16 n.9). The actual line from the court's opinion says that it "express[es] no view as to whether some other scenarios might present a close question as to whether the content of released information so closely matches the content of a record that the release of the information is the functional equivalent of release of the record." Pet. App. 16 n.9. As to the "release of information contained in a record generally," State's Resp. 19, the court was very clear: "the statutory definition" of "patient health care records" "*does not encompass information that is merely derived from a record*." Pet. App. 16 n.9 (emphasis added). Because information is not a "record," it is not "protected by Wis. Stat. §[] 146.82." *Id.* This proposition of law is flatly incorrect and, if allowed to stand, will prove to be quite radical. Pet. 30–32.

The State alternatively defends the court's holding that information derived from confidential records is not protected. State's Resp. 18–19 (citing *Wall v. Pahl*, 2016 WI App 71, 71 Wis. 2d 716, 886 N.W.2d 373). This again demonstrates the need for this Court's review, as this purported rule of law conflicts with decisions of this Court and the

court of appeals and, importantly, with the language of the statutes themselves.*

II. Defendants' Suggestion That the Decision Below Is Simply Too Important to Warrant This Court's Attention Is Self-Refuting

If this matter had remained in the circuit court—as the Associations argued it should have—it might have concluded by now. But, having lost at the dismissal stage, Defendants chose a different path. They decided to pursue a permissive interlocutory appeal of a preliminary order. *See* Petition for Leave to Appeal, *Wisconsin Manufacturers and Commerce v. Tony Evers*, No. 2020AP2081-AC (Dec. 17, 2020); Petition for Leave to Appeal, *Wisconsin Manufacturers and Commerce v. Tony Evers*, No. 2020AP2103-AC (Dec. 18, 2020). And they had every right to do so.

The rich irony, however, is that after having put this case on an irregular appellate track, Defendants now insist that there is simply no time for this Court to weigh in. State's Resp. 21; MJS Resp. 14–15. But, of course, any "delay" caused by this Court's review would be entirely of

* Again, while the State and Journal Sentinel argue that this portion of the court of appeals' decision is dictum, State's Rep. 19; MJS Br. 14, they are incorrect to suggest that that characterization (even if correct) matters. *See Cook*, 208 Wis. 2d at 189–90; *see also Zarder*, 324 Wis. 2d 325, ¶ 57.

the Defendants' doing. Their unilateral (and opposed) decision to seek interlocutory appeal is hardly reason to deny the *Associations* their right to full appellate review, having lost at the first stage of interlocutory review. As Defendants have made their bed, so they must lie in it.

Regardless, Defendants forget that the Supreme Court and the court of appeals have different roles. This Court, "unlike the court of appeals, has been designated by the constitution and the legislature as a law-declaring court." *State ex rel. La Crosse Tribune v. Circuit Court,* 115 Wis. 2d 220, 229–30, 340 N.W.2d 460 (1983). Indeed, this tribunal's purpose, unlike that of the court below, is precisely "to oversee and implement the statewide development of the law." *Cook*, 208 Wis. 2d at 189 (citation omitted). Thus, the Defendants' argument that the court of appeals' decision is simply too important to be reviewed (or to be reviewed in the normal course) by this Court backfires.

CONCLUSION

This Court should grant the Petition for Review.

Dated: May 20, 2021

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,015 words.

Dated: May 20, 2021.

RYAN J. WALSH

CERTIFICATE OF COMPLIANCE WITH 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. § 809.19(12)(f).

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: May 20, 2021.

RYAN J. WALSH

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2021, I caused three true and correct paper copies of the foregoing brief to be delivered to counsel of record, addressed as follows:

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