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SUPREME COURT OF WISCONSIN
Appeal No. 2020 AP 2103
Appeal No. 2020 AP 2081
Circuit Court Case No. 2020 CV 1389

WISCONSIN MANUFACTURERS AND COMMERCE,
MUSKEGO AREA CHAMBER OF COMMERCE, AND
NEW BERLIN CHAMBER OF COMMERCE AND
VISITORS BUREAU,

Plaintiffs-Respondents-Petitioners,

v.

TONY EVERS,
ANDREA PALM, AND
JOEL BRENNAN,

Defendants-Appellants,

MILWAUKEE JOURNAL SENTINEL,

Intervenor-Appellant.

ON APPEAL FROM THE
CIRCUIT COURT OF WAUKESHA COUNTY
HONORABLE LLOYD CARTER, PRESIDING

BRIEF OF NON-PARTIES WAUKESHA COUNTY BUSINESS ALLIANCE, OSHKOSH CHAMBER OF COMMERCE, RACINE AREA MANUFACTURERS AND COMMERCE, WISCONSIN GROCERS ASSOCIATION, VENTURE COOPERATIVE, AND WISCONSIN DAIRY ALLIANCE AS *AMICUS CURIAE*

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INTRODUCTION

In an effort to combat the spread of COVID-19, Wisconsin's employers have been complying with requests from state and local health officials to provide information about employees who have tested positive for the virus. This information is being collected and aggregated by the Wisconsin Department of Health Services (DHS). On September 30, 2020, in response to a request made under Wisconsin's Open Records Law, Department of Administration Secretary Joel Brennan stated his intention to release the names of all businesses in Wisconsin with over 25 employees who had at least two employees test positive for COVID-19. (Comp., ¶17.) But for the circuit court's temporary restraining order and subsequent temporary injunction order, such information would have been released on October 2, 2020.

The State defendants and the intervenor Milwaukee Journal Sentinel filed interlocutory appeals of the circuit court's order denying their motions to dismiss. In a published decision, the court of appeals reversed.

Amici joined the Plaintiffs-Respondents-Petitioners at the circuit court in arguing in favor of the motion for a temporary

injunction and to prohibit the release of information concerning businesses with over 25 employees who have had at least two employees test positive for COVID-19. Amici respectfully submit this brief to the Wisconsin Supreme Court to provide additional arguments as to why the circuit court's order should be affirmed. Specifically, disclosure of the information requested would violate the statutory and constitutional right of privacy. Moreover, the Open Records Law must comply with these rights, and hence the public's "right to know" does not trump the rights of individuals and companies to keep their medical information private.

ARGUMENT

I. DISCLOSURE OF THE REQUESTED INFORMATION WOULD VIOLATE WISCONSIN'S RIGHT OF PRIVACY STATUTE

A. History of the Right of Privacy Statute

Wisconsin's Right of Privacy Law was enacted in 1977 following a decades-long legal and political effort. *See* Bradden C. Backer, *The Scope of Wisconsin's Privacy Statute*, WIS. LAW., Sept. 2003. The statute creates a private cause of action for anyone "whose privacy is unreasonably invaded," and provides for equitable relief, compensatory damages, and attorney's fees. Wis. Stat. § 995.50(1).

There are four types of claims for invasion of the right to privacy. *See* Wis. Stat. § 995.50(2)(am). Amici will focus on the third type of claim, which provides that the following constitutes an invasion of privacy:

> Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

§ 995.50(2)(am)3. The Wisconsin Court of Appeals has broken down the elements of such a claim as follows:

> (1) a public disclosure of facts regarding the plaintiff;
>
> (2) the facts disclosed must be private facts;
>
> (3) the private matter made public must be one which would be highly offensive to a reasonable person of ordinary sensibilities; and
>
> (4) the defendant must act either unreasonably or recklessly as to whether there was a legitimate public interest in the matter, or with actual knowledge that none existed.

Hillman v. Columbia Cty., 164 Wis. 2d 376, 393, 474 N.W.2d 913 (Ct. App. 1991).

In *Hillman*, the court recognized that unauthorized disclosure of medical information can constitute a claim for invasion of privacy based on the above elements. The facts in that case were that while Hillman was incarcerated in the Columbia County Jail, he began experiencing significant health problems. *Id.* at 384. After returning from a hospital stay with an envelope containing a medical report, Hillman observed several jail employees open the envelope and review the report. *Id.* Shortly thereafter, knowledge of Hillman's AIDS infection spread throughout the jail amongst the staff and inmates. *Id.* Hillman sued Columbia County, the Sheriff's Department, the County Sheriff, and numerous Sheriff's Deputies for a variety of claims, including invasion of his statutory and constitutional right to privacy.[1] *Id.*

[1] Hillman pled two claims under the Right of Privacy Law, one for "intrusion upon the privacy of another" under what is now Wis. Stat. § 995.50(2)(am)1., and one for "public disclosure of private facts" under § 995.50(2)(am)3. *Hillman v. Columbia Cty.*, 164 Wis. 2d 376, 383, 474 N.W.2d 913 (Ct. App. 1991). The "intrusion upon the privacy of another" claim was dismissed on the grounds that the statute requires such intrusion to occur at "a place," such as someone's home or other geographic location. *Id.* at 392. Because Hillman's medical records were not "a place," the court of appeals affirmed the dismissal of that claim. Amici are raising a "public disclosure of private facts" argument, and so accordingly will focus on Hillman's claim under Wis. Stat. § 995.50(2)(am)3., as it is directly on point to these circumstances.

In examining Hillman's claim for invasion of privacy based on "public disclosure of private facts," the court of appeals held that the word "publicity" as used in the statute did not mean "publication," which is a term of art for defamation cases. *Id.* at 394 (citing RESTATEMENT (SECOND) OF TORTS § 652D (1977)). All that is needed to meet the requirement of private information becoming publicized is for information to be conveyed to enough people "that the matter must be regarded as substantially certain to become one of public knowledge." *Id.* Accordingly, because "oral communication among numerous employees and inmates of a jail is sufficient to constitute 'publicity,'" Hillman properly pled a cause of action under Wis. Stat. § 995.50(2)(am)3. *Hillman*, 164 Wis. 2d at 395.

B. Disclosing the Names of Businesses Whose Employees Have Tested Positive for COVID-19 Would Unleash a Torrent of Right of Privacy Claims

If the information requested of DHS is released to various media outlets, this Court would open up the proverbial Pandora's Box of potential Right of Privacy claims, on behalf of both individuals and businesses.[2]

[2] The Right of Privacy statute is not limited to natural persons.

Consider small businesses. Once DHS divulges information about which businesses have had multiple employees test positive for COVID-19 to media outlets and the information is published, consumers are liable to begin bombarding the businesses with questions seeking to discover the employees who tested positive. Business owners will not be legally able to supply the information, which in turn will likely create greater customer agitation. The end result of such phone calls is unhappy customers who quickly turn into former customers.

Even if DHS does not name which employees tested positive, it would not be difficult in many cases to deduce those who contracted the disease, especially for smaller businesses where every employee knows one another. Employees will then likely start asking questions of store managers or human resource officers in an attempt to identify which employees were the ones who tested positive. These are untenable situations for employers to face.

Under these scenarios, a business would surely suffer an invasion of privacy. Consider the elements of such a claim, which would be brought against the entity that released or published the information. As to the first element, a front-page news article that a

corner drug store had five employees test positive for COVID-19 is surely a public disclosure. On the second element, the result of a medical test is certainly a "private fact." Third, our society recognizes—both legally and intuitively—that medical test results are private matters that should not be disclosed without consent of the patient.

Finally, the fourth element looks at whether the defendant acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter. On this point, media entities would likely argue that the public has an interest in knowing which businesses are so-called "COVID hot spots."[3] This argument would be undercut by the fact that the COVID-19 data will be outdated by the time it is acquired by prying open records requesters. Indeed, if the purpose of publishing such information is to "inform" the public about businesses to avoid due to COVID-19 test results, there is no utility in publishing such information long after the test results are turned over to contact tracers. If the waitress at your favorite

[3] Amici query whether the Intervenor Milwaukee Journal Sentinel has committed to publishing the list of its employees who have tested positive for COVID-19.

restaurant tested positive for COVID-19 last summer, what is the public interest in knowing that information now?

Now consider the other side of the coin: employees suing their employers for violating their Right of Privacy. Once DHS releases the names of businesses who had employees test positive and when, it is exceedingly likely that the names of the employees would become public as well, either through deductive reasoning by fellow employees or an inadvertent slip of the tongue. Under this scenario, the employee will pin the blame on his employer, either for turning over his health information to contact tracers, or for not fighting DHS over the release of such information. Businesses could then face their own Right of Privacy lawsuits.

Such Right of Privacy claims would necessarily be fact-intensive, but under *Hillman*, the scenarios outlined above would be enough to survive a motion to dismiss. The end result will be years of expensive litigation over information that should not have been disclosed in the first instance.

II. WISCONSIN'S PUBLIC RECORDS LAWS MUST COMPLY WITH THE RIGHT OF PRIVACY

While Wisconsin's Open Records Law, Wis. Stat. §§ 19.31 to 19.39, is designed to promote open government, access to information

is not unlimited. Specifically, Wisconsin law recognizes three exceptions to the Open Records Law: (1) statutory exceptions; (2) common law exceptions; and (3) public policy exceptions. *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100, ¶10, 372 Wis. 2d 460, 888 N.W.2d 584. Wisconsin has long recognized a common law concern for the privacy of its citizens outweighing the need for public disclosure. More than 50 years ago our supreme court held:

> [T]he right to inspect public documents and records at common law is not absolute. There may be situations where the harm done to the public interest may outweigh the right of a member of the public to have access to particular public records or documents. Thus, the one must be balanced against the other in determining whether to permit inspection.

State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 681, 137 N.W.2d 470 (1965), *reh'g denied and opinion modified*, 28 Wis. 2d 672, 139 N.W.2d 241 (1966). This principle has been reaffirmed time and time again. *See, e.g.*, *Wisconsin Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 778, 546 N.W.2d 143 (1996) (collecting cases).

Here the right to privacy is not only a common law right, it has been codified in our statutes. For the reasons articulated above, the

rights of employers and employees alike to maintain the confidentiality of their medical records weighs strongly in favor of this Court precluding DHS from disclosing the requested information regarding COVID test results.

This Court should also consider the public policy factors. As amici argued in the previous section, once this information is disclosed to media entities, the horse is out of the barn. The consequence is likely to engender acrimony between companies and their customers, and employees and their employers, with litigation to follow. As a result, businesses would then have a strong incentive to refuse to assist state and local governments with supplying information to COVID-19 contact tracers. The CDC has stressed the importance of employers "collaborat[ing] with health departments when investigating exposure to infectious diseases," while at the same time noting that companies must comply with state and federal privacy laws. *Case Investigation and Contact Tracing in Non-healthcare Workplaces: Information for Employers*, last updated Oct. 22, 2020, available at https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html. If this Court permits DHS to disclose the requested information to anyone

making an opens records request, the goals and objectives of contact tracing will be undermined.

The Evers administration recognized these concerns, and argued to the circuit court that "an aggrieved individual whose medical records were to be released [is not] without a remedy; that individual could bring a private right of action under Wis. Stat. § 995.50(2)[(am)3.]."[4] (Dkt. 22, page 14.) Not if DHS releases the information pursuant to a public records request. This is so because the applicable provision of the Right of Privacy statute provides that "[i]t is not an invasion of privacy to communicate any information *available to the public as a matter of public record*." § 995.50(2)(am)3. (emphasis added). In a case applying the interplay between the Open Records Law and the Right of Privacy Law, the Seventh Circuit has held that "a finding under the Open Records Law that a record should be made public would necessarily mean that 'the information was available to the public as a matter of public record.'" *Hutchins v. Clarke*, 661 F.3d 947, 953 (7th Cir. 2011). In other words, once DHS releases the requested information pursuant to an Open Records request, there can be no cause of action for violation of the

[4] The State Defendants referenced Wis. Stat. § 995.50(2)(c), which has since been renumbered § 995.50(2)(am)3. *See* 2019 Wis. Act. 72, § 1 (effective Jan. 22, 2020).

Right of Privacy for disclosure of such information. So while the Evers administration is using its right hand to assure courts that individuals who suffer an invasion of privacy from the release of COVID-19 data will have a remedy, the Evers administration uses its left hand to extinguish the remedy. A neat trick.

III. DISCLOSURE OF THE REQUESTED INFORMATION WOULD VIOLATE THE CONSTITUTIONAL RIGHT OF PRIVACY

In addition to possessing a common law and statutory right to privacy, Wisconsin courts also recognize a constitutional right to privacy rooted in the 14th Amendment to the United States Constitution. "The United States Supreme Court has recognized that the fourteenth amendment extends protection to at least two different types of privacy interests: 'One is *the individual interest in avoiding disclosure of personal matters,* and another is the interest in independence in making certain kinds of important decisions.'" *Hillman*, 164 Wis. 2d at 400 (quoting *Whalen v. Roe*, 429 U.S. at 599–600 (1977) (emphasis added). The first interest—which is implicated in this case—concerns "the right not to have an individual's private affairs made public by the government." *Hillman*, 164 Wis. 2d at 400 (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980)). In *Hillman*, the Wisconsin Court of Appeals

recognized that unauthorized disclosure of a prisoner's medical information to third-parties constitutes a violation of the constitutional right to privacy. *Hillman*, 164 Wis. 2d at 400-02 (collecting cases). If those constitutional protections are afforded to prisoners—whose liberties are necessarily curtailed—then the constitutional right to keep one's medical information private surely extends to businesses and their employees.

CONCLUSION

For the reasons set forth herein, amici respectfully submit that the court of appeals' decision should be reversed and the circuit court's temporary injunction should remain in place.

Dated this 13th day of May, 2021.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 20 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 13 pages and 2,521 words.

Dated this 13th day of May, 2021.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 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 13th day of May, 2021.

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