
WISCONSIN MEDICAL SOCIETY, INC.,
and DAVID M. HOFFMAN, M.D.,

Plaintiffs,

vs.

Case No. 07-CV-4035

MICHAEL L. MORGAN,

Defendant.

AMICUS CURIAE BRIEF OF THE MEDICAL COLLEGE OF
WISCONSIN IN SUPPORT OF THE PLAINTIFFS' POSITION

INTRODUCTION

The Medical College of Wisconsin submits this brief in support of the plaintiffs' motion for summary judgment. The Department of Administration's withdrawal of \$200 million from the Injured Patients and Families Compensation Fund (the "Fund") is unconstitutional under the Wisconsin Constitution and the United States Constitution.

BACKGROUND

The Medical College of Wisconsin has paid assessments into the Fund on behalf of the physicians it employs. The annual assessments paid by the Medical College of Wisconsin in 2006 were \$748,963.67 and in 2007 were \$919,095.90. See Ravdin Affidavit. The Medical College has paid these assessments based upon the promise made by the Wisconsin Legislature that the Fund "is held in irrevocable trust for the sole benefit of health care providers participating in the Fund and proper claimants." See Section 665.27(6). The Department of Administration has raided this trust fund for the

supposed benefit of the general public and presumably for the legislators' personal benefit of being able to tell voters that they have not increased taxes.

UNDISPUTED FACTS

1. Section 655.27 provides as follows:
 - a. The Fund is established "to curb the rising costs of health care." Sec. 655.27(6).
 - b. The Fund is established to finance "part of the liability incurred by health care providers as a result of medical malpractice claims and to ensure that proper claims are satisfied." Id.
 - c. The Fund "including any net worth of the Fund, is held in irrevocable trust for the sole benefit of health care providers participating in the Fund and proper claimants." Id.
 - d. "Moneys in the Fund may not be used for any other purpose of the state." Id.
 - e. "Moneys shall be withdrawn from the Fund by the commissioner [of insurance] only upon vouchers approved and authorized by the board of governors." Sec. 655.27(4).
2. Not all licensed physicians or nurse anesthetists practicing in Wisconsin participate in the Fund. Sec. 655.002 & 655.003.
 - a. Physicians who practice their profession less than 240 hours in a year are not mandated to participate in the Fund. Sec. 655.002.
 - b. Physicians who are employed by the state, a county

or the federal government are not covered by the Fund. Sec. 655.003.

3. Every health care provider "shall be conclusively presumed to have accepted to be bound by Chapter 655." Section 655.006.
4. Health care providers who are required to pay the assessment to the Fund, but fail to do so, may have their license suspended. Sec. 655.23(7).
5. According to 2007 Wisconsin Act 20, Section 9225(2) (the "New Act"): "Notwithstanding Section 655.27(6) of the statutes, there is transferred from the [Fund] to the Medical Assistance trust fund \$71,500,000 in fiscal year 2007-08 and \$128,500,000 in fiscal year 2008-09."
6. The Medical Assistance trust fund does not finance any part of the liability incurred by health care providers as a result of medical malpractice claims.
7. The Department of Administration (not the Commissioner of Insurance) has withdrawn \$71.5 million from the Fund.

ARGUMENT

- I. THE DEPARTMENT OF ADMINISTRATION HAS UNCONSTITUTIONALLY TAKEN THE PROPERTY OF PHYSICIANS WITHOUT ANY COMPENSATION.

Both the Wisconsin Constitution and the United States Constitution provide that the "property of no person shall be taken for public use without just compensation." Wis. Const., Art. I, § 13; U.S. Const. Amend. V. Here, it is undisputed that the Department of Administration has taken \$71.5 million from the Fund and plans on taking \$128.5 million more. It is also uncontested that the beneficiaries of the Fund and the participants in the Fund

have not received any compensation, much less "just compensation," for the withdrawal of the money. Consequently, the only arguable fact regarding the Department's violation of the takings clause is whether the participating physicians and nurse anesthetists have a "property right" in the Fund.

The Wisconsin Supreme Court has repeatedly and consistently held that a beneficiary of a trust fund associated with the State of Wisconsin has a "protectable property interest" in the trust fund. See *Association of State Prosecutors v. Milwaukee County*, 199 Wis.2d 549, 552, 544 N.W.2d 888 (1996); *Wisconsin Retired Teachers Association v. Employee Trust Funds Board*, 207 Wis.2d 1, 16, 558 N.W.2d 83 (1997); *Professional Police Association v. Lightbourn*, 2001 WI 59 at ¶ 100 & 103. The Wisconsin legislature "cannot simply confiscate" trust funds over the objection of the beneficiaries. *Lightbourn* at ¶ 103.

Here, the physicians employed by the Medical College of Wisconsin are beneficiaries of the Fund.¹ The Fund pays a portion of valid medical malpractice claims. See Sec. 655.27(1). Without the Fund, a physician likely would have to reach into his or her own pocket to pay any malpractice claim in excess of his or her malpractice policy limits. The entire net worth of the Fund is held for the "sole benefit" of the physicians participating in the Fund and proper claimants. Section 665.27(6). Because the Medical College Physicians are participants in the Fund and beneficiaries of the Fund, they have a property right in the Fund. Consequently, the legislature cannot confiscate any part of the Fund without

¹ Hereinafter, the physicians employed by the Medical College of Wisconsin will simply be referred to as the "Medical College Physicians."

compensating the Medical College Physicians.

In summary, the Medical College Physicians have a property interest in the Fund; the Department of Administration withdrew \$71.5 million dollars from the Fund; and the Department of Administration gave no compensation for the money it took. Therefore, the actions of the Department of Administration constitute an unconstitutional taking of the Medical College Physicians' property without compensation.

II. THE ACT UNCONSTITUTIONALLY IMPAIRS THE PHYSICIANS' CONTRACTUAL RIGHTS RELATING TO THE TRUST.

Both the Wisconsin Constitution and the United States Constitution provide that "No . . . law impairing the obligation of contracts, shall be passed." Wis. Const. Art. I, § 12; U.S. Const. Art. I, § 10.

Here, Chapter 655 established a trust. The trust constituted a contract between the Medical College Physicians and the Commissioner of Insurance and the Board of Governors. The bargain was that the Medical College Physicians would pay money into the Fund and monies could only be withdrawn by the commissioner when approved and authorized by the Board of Governors to pay proper claims. See Section 655.27(4). The statute uses contract language when it states that physicians "have accepted to be bound by Chapter 655." See Section 655.006. In fact, if physicians do not keep their end of the bargain by paying their assessments, they could lose their license to practice medicine. See Section 655.23(7). By passing the New Act, the Wisconsin legislature has severely impaired the Medical College Physicians' contract rights.

This case is very similar to *State ex. rel. Cannon v. Morgan*, 111 Wis.2d 544, 331 N.W.2d 369 (1983). In *Cannon*, the Wisconsin

Supreme Court held that a new law that reduced judge's salaries was an unconstitutional impairment of the judge's contract rights. In essence, the judge's had made an election to receive a pension based upon one promise and the legislature later passed a new law which reduced the judge's salaries in the amount of their pensions. The court found the new law "caused them a completely unexpected and substantial loss." 111 Wis.2d at 559.

Here, the New Act has caused the Fund "a completely unexpected and substantial loss." The Medical College Physicians had paid assessments into the Fund based upon each person's potential for malpractice claims. The Department of Administration's withdrawal of \$200,000,000 has unexpectedly jeopardized the Fund's ability to pay proper claims. The Medical College Physicians had expected their assessments to be used to pay valid malpractice claims. Instead, the Wisconsin legislature has significantly altered the contractual expectations of the Medical College Physicians by withdrawing more than 25% of the amount held in trust. According to the reasoning in *Cannon*, the new law is such a severe impairment of contractual obligations that it is unconstitutional.

III. THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE.

Medical care providers participating in the Fund, including the Medical College Physicians, are entitled to equal protection under the law based upon the United States Constitution and the Wisconsin Constitution. See U.S. Const. Amend. XIV; Wis. Const. Art. I, § 1. A statute violates the equal protection clause if it unconstitutionally treats members of similarly situated classes differently. *Nankin v. Village of Shorewood*, 2001 WI 92.

In the present situation, the Medical College Physicians are

being treated differently from physicians employed by the State, such as the physicians working at the University of Wisconsin Hospital. The Medical College Physicians have been required to pay assessments into the Fund in order to keep their licences. On the other hand, physicians employed by the State or Federal government have *not* been required to pay assessments into the Fund. When the Department of Administration withdrew \$71,500,000 from the Fund, it treated the Medical College Physicians (and all other participating physicians) differently from physicians employed by the State or Federal government.

The Medical College of Wisconsin pays almost \$1,000,000 in assessments every year into the Fund. See Ravdin Affidavit. Physicians working for the State at the University of Wisconsin Hospital, for example, pay nothing into the Fund. The Department of Administration has now withdrawn \$71.5 million from the Fund and given it to the Medical Assistance trust fund. The money is no longer available to protect Medical College Physicians from multimillion dollar malpractice claims. The Medical College paid the assessments to attract and keep the best doctors in Wisconsin. Secretary Morgan's withdrawal from the Fund jeopardizes the security this group of physicians gained from the Fund.

The \$71.5 million was a windfall to the Medical Assistance trust fund. The citizens receiving assistance through that fund may seek treatment from the Medical College Physicians or from physicians working at the University of Wisconsin Hospital. The patients do not distinguish between the contributing physicians and non-contributing physicians. There is no rational basis for having one group of physicians being assessed millions of dollars to go

towards medical assistance, while other groups of physicians pay no assessments. Without some rational basis for this distinction, the New Act violates the equal protection clause.

If the legislature needed money for the Medical Assistance trust fund, the burden should have fallen on all Wisconsin taxpayers. Instead, it made an arbitrary distinction and withdrew money that participating physicians (such as the Medical College Physicians) had paid into the Fund. Whether a doctor (unknowingly) contributes to the Medical Assistance trust fund should not depend on which hospital or clinic employs him. This "arbitrary classification" violates the equal protection clause. See Nankin v. Village of Shorewood, 2001 WI 92 at ¶ 11.

IV. SECRETARY MORGAN HAD NO AUTHORITY TO WITHDRAW \$71.5 MILLION FROM THE FUND.

According to Secretary Morgan's responses to interrogatories, the Department of Administration "booked a transfer" which decreased the amount in the Fund by \$71.5 million and increased the amount in the Medical Assistance trust fund by the same amount. See Exhibit P to Buchko Affidavit. The New Act, however, did not grant him this authority. The New Act states that "there is transferred from the [Fund] to the Medical Assistance trust fund \$71,500,000." The statute is written in the passive tense. It does not grant anyone authority to make this transfer. Consequently, Secretary Morgan had no authority to "book" the transfer and this transaction should be reversed.

Furthermore, the Wisconsin legislature did not repeal or amend Section 655.27(4) which gives authority to the commissioner of insurance to withdraw money from the Fund "only upon vouchers

approved and authorized by the board of governors." This statute does not mention the Department of Administration or Secretary Morgan and certainly does not authorize them to withdraw money from the Fund. The New Act did not attempt to take authority away from the Commissioner of Insurance or the Board of Governors. Consequently, when Secretary Morgan booked a "decrease" of \$71.5 million from the Fund, it was beyond any authority that he had. Because he lacked any authority and because no one followed the statutory procedure of obtaining the approval and authorization of the Board of Governors, the transaction should be rescinded.

CONCLUSION

Secretary Morgan's withdrawal of millions of dollars from the Fund was unconstitutional and unauthorized by statute. This court should rescind the transfer and grant declaratory and injunctive relief to restrain any further withdrawals by Secretary Morgan.

Dated July 1, 2008.

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