

STATE OF WISCONSIN
SUPREME COURT

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OF WISCONSIN**

Case No. 2009AP000728

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

Plaintiffs-Appellants,

vs.

MICHAEL L. MORGAN,

Defendant-Respondent.

APPEAL FROM THE DECEMBER 19, 2008 DECISION AND
ORDER OF THE CIRCUIT COURT OF DANE COUNTY, THE
HONORABLE MICHAEL N. NOWAKOWSKI PRESIDING

AMICUS CURIAE BRIEF AND APPENDIX OF THE
ADVOCATES FOR MEDICAID PATIENTS

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STATEMENT OF THE ISSUES

Did the trial court correctly conclude that the Legislature acted appropriately in transferring money from the Patients Compensation Fund to the Medical Assistance Trust Fund for the protection of Wisconsin's poorest and most vulnerable citizens?

INTERESTS OF THE ORGANIZATIONS THAT COMPRISE THE AMICUS "ADVOCATES FOR MEDICAID PATIENTS"

The "Advocates for Medicaid Patients" consists of the following organizations:

Disability Rights Wisconsin ("DRW") is the private non-profit Protection and Advocacy organization for the State of Wisconsin and part of the national system of federally mandated independent disability agencies. Designated by the Governor of the State of Wisconsin to ensure the rights of all state citizens with disabilities, DRW is the second largest legal

services provider in Wisconsin and the primary provider of legal services and other advocacy assistance to adults and children with any disabling condition. As part of its mission, DRW provides individual and systemic advocacy assistance to many Wisconsin residents in their efforts to access and retain Medicaid funding and services. DRW attorneys also provide assistance to the State's Disability Benefits Specialists on Medicaid issues through training, case supervision and technical assistance and direct representation.

ABC for Health (Advocacy and Benefits Counseling for Health Inc.) is a Wisconsin-based nonprofit public interest law firm dedicated to linking children and families, particularly those with special health care needs, to health care benefits and services. ABC for Health's mission is to provide information, advocacy tools, legal services, and expert support needed to obtain, maintain, and finance health care coverage

and services. Its vision is to develop a nationally recognized, integrated model of Health Benefits Counseling, legal services, and policy advocacy that promotes a universal system of health care coverage and access for all people. It develops multi-purpose education strategies to inform customers, providers, and the broader community of health care coverage options while also advocating directly for individuals disenfranchised from health care coverage and services. ABC for Health also serves as a catalyst in the development of local Health Watch Coalitions as well as other partnerships and strategic alliances to influence public policy and opinion while also working to maximize all available health care coverage options for all people.

The **Community Advocates Public Policy Institute**, which was founded in 2008, has as its primary goal to help design and put in place the policy changes that will

dramatically reduce the level of poverty in Milwaukee and Wisconsin. To that end, it works closely with many individuals and organizations in Milwaukee, throughout Wisconsin, and across the nation who also focus on greatly reducing poverty. While the Institute's primary task is reducing poverty itself, the Institute also seeks to reduce the many frustrations and burdens that the poor face as they navigate through life. It is committed to working closely with other advocates of the poor to ensure that low-income individuals can easily obtain affordable health insurance, AODA treatment, mental health services, housing, and utility services, as well as quality education for their children.

The **Wisconsin Council on Children and Families** was established in 1881 as the Wisconsin Conference on Charities and Corrections. For well over a century, the organization has focused on improving conditions for families and children

through policy change, expanded public investments and public education that lead to improvements in outcomes and practices in the delivery of publicly funded health care, education, workforce development and social services.

The mission of the **Lake Superior Community Health Center** is to improve access, particularly financial access, to primary health care through the provision of clinical care, health education, screening, assisted referrals and advocacy.

Family Health / La Clinica (“FHLC”) is a community health center located in Wautoma, Wisconsin. Its core services include medical, dental, behavioral health, and WIC (Women, Infants, and Children Supplemental Nutrition Services).

Westside Healthcare Association, Inc., has been providing quality health care in Milwaukee to people of all ages since 1999. Its mission is to improve the health and

quality of life of the community by providing culturally competent services that address identified needs.

Kenosha Community Health Center (“KCHC”) is a Federally Qualified Community Health Center. As a nonprofit organization, KCHC offers underserved citizens comprehensive healthcare which enables patients to maintain their well-being by addressing health disparities and providing access for all.

ARGUMENT

I. INTRODUCTION.

The United States is in the midst of the worst recession since the Great Depression of the 1930s. As a consequence there has been a significant decline in state tax revenues and huge pressure on state budgets. Wisconsin is no exception.

Even before the severe economic downturn, when the Legislature considered the 2007-2009 budget, the State of

Wisconsin was facing a \$4 billion deficit. The Legislature, as part of its effort to refrain from raising taxes but still meet its obligations to the sick and disabled, transferred \$200 million from the Patients Compensation Fund, a fund which contained over \$840 million, an amount greater than the Fund had paid out in claims during its 22 year existence, to the Medicaid Trust Fund. The State's fiscal circumstances have worsened because of the recession and the 2009-2011 budget was and continues to be even more challenging.

The Wisconsin Supreme Court has long held that "[i]t is the province of the legislature, not the courts, to determine public policy. We hardly see how . . . it can be said that the legislature, which is the voice of the people, has no freedom of action in determining the best methods of giving to the public that service for which it is willing and able to pay. It is the best judge of what is necessary to meet the needs of the public and

in what manner the service shall be directed.” (internal citation omitted) *Flynn v. Department of Administration*, 216 Wis. 2d 539, 545, 576 N.W.2d 245 (1998). Concomitant with that authority, “the legislature has the constitutional authority to allocate and reallocate scarce resources.” *Id.* at 545

Through this lawsuit, the Wisconsin Medical Society (“the Medical Society”) is trying to reverse the Legislature’s decision. The Legislature had ample reason to make that policy choice. Were the Court to disturb it, the Court would be acting as a super legislature, a role which it has tried to avoid. As Justice Prosser aptly noted:

“Our form of government provides for one legislature, not two.” *Flynn v. DOA*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998). This court is not meant to function as a “super-legislature,” constantly second-guessing the policy choices made by the legislature and governor.

Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund, 2005 WI 125, 284 Wis.2d 573, 682, 701 N.W.2d 440, 494 (Prosser, J., dissenting)

In this time of an extraordinary fiscal crisis, the Court should be most careful to avoid substituting its policy views for those of the Legislature.

This brief will provide a succinct overview of the Patients Compensation Fund and the Wisconsin Medicaid program, and the State's fiscal condition, which will allow the Court to more fully appreciate the Legislature's policy decision to move funds from the Patients Compensation Fund to the Medicaid Trust Fund. It will then explain why the Legislature had the authority to use the funds as it did.

II. THE PATIENTS COMPENSATION FUND MUST BE VIEWED AS PART OF AN OVERALL LEGISLATIVE SCHEME TO ENSURE THE HEALTH OF THE CITIZENS OF WISCONSIN.

The Patients Compensation Fund primarily exists for the benefit of patients who have been injured through the negligence of physicians. But, the Fund has an additional purpose: it helps to stabilize medical malpractice insurance

rates. That, in turn, provides an incentive for doctors to maintain their practices in Wisconsin and helps to ensure that quality medical care is available to Wisconsin's citizens.

The Fund, however, cannot be viewed in isolation from our State's policies that are designed to ensure the health of all of its citizens. The doctors who are encouraged to stay in Wisconsin are available to treat the poor and vulnerable patients for whom the State provides medical coverage through the Medicaid program.

While the Advocates for Medicaid Patients ("the Advocates") believes that the Patients Compensation Fund is an example of good patient focused public policy so, too, is the State's Medicaid program. A properly funded and broadly based Medicaid program is a crucial part of the infrastructure that ensures the health and welfare of the State's most vulnerable citizens.

The transfer of \$200 million from the Patients Compensation Fund to the Medical Assistance Trust did not jeopardize the Fund's ability to pay claims of injured patients. Nor did it prompt a medical liability crisis. The Advocates fear that reversing the transfer will require the State to make deep cuts in the Medicaid programs, resulting in reductions in eligibility or services to vulnerable children and families during this economic crisis and upsetting the careful balance of priorities set by the Legislature.

III. THE WISCONSIN MEDICAID PROGRAM IS UNDER TREMENDOUS FINANCIAL PRESSURE.

Medicaid is a complicated program that has evolved over time to provide for medical care to a number of vulnerable groups:

[It] is a federal-state program that provides health and long-term care services to 52 million low-income Americans. Federal Medicaid matching funds for the costs of these services are available to states that elect to participate in the program. As a condition of

participation, states must cover certain populations (e.g., elderly poor receiving Supplemental Security Income) and certain services (e.g., hospital care). These are referred to as “mandatory” eligibility groups and “mandatory services.

Participating states may also receive federal matching funds for costs of covering other populations (e.g., elderly poor not eligible for SSI) and services (e.g., prescription drugs). These are known as “optional” eligibility groups and “optional” services. The use of the term “optional” is completely unrelated to whether a particular population or service is somehow less worthy or necessary than another. Instead, the term simply reflects whether, under federal Medicaid rules, a state may receive federal matching funds for the costs of covering a specific population group or service. Coverage of these “optional” eligibility groups and “optional” services is not required by federal law.

Medicaid: An Overview of Spending on “Mandatory” vs. “Optional” Populations and Services, The Henry J. Kaiser Family Foundation Issue Paper, June 2005. (Amicus App. p. 1)

As noted over eight years ago in a report by the Urban Institute, Wisconsin’s Medicaid program was, even then under significant financial pressure:

Wisconsin has one of the lowest rates of uninsurance in the country, due in large part to a very high rate of private insurance coverage, leaving the state with a

smaller gap to fill with public programs. Wisconsin's Medicaid program is one of the country's most extensive in terms of covered benefits and eligibility, although it is less than 14 percent of the state budget. Nevertheless, there is strong upward pressure on the Medicaid budget due to increasing enrollment, higher prescription drug costs, and demands for provider rate increases.

Recent Changes In Health Policy for Low-Income People in Wisconsin <http://www.urban.org/UploadedPDF/310437.pdf>

That pressure has increased in recent years. According to a

Wisconsin Taxpayers Alliance report issued in December,

2009:

[Wisconsin Taxpayers Alliance] found the state's MA-recipient numbers had grown 174%, or an average of about 9.6% per year, from 395,000 in late 1998 to 1.085 million last month. . . . Medicaid costs have grown almost as fast over the same period.

Wisconsin Taxpayers Alliance Statement, February 2, 2009
http://www.wistax.org/news_releases/2009/0912.html

The upward cost pressure on Medicaid is compounded by the decreasing tax revenues caused by the recession and the well-

known extraordinary and unrelenting increase in health care costs generally.

Because of the deficit that the Legislature faced when considering the 2007-2009 budget, it could have saved money by reducing or eliminating “optional” benefits under the Medicaid program, like prescriptions, dental examinations for adults or the community waiver program that allows seniors and people with disabilities to receive care in their own homes rather than nursing homes. (“Optional” benefits are those not mandated by Federal law.) Rather than make such draconian funding cuts and in lieu of raising taxes, the Legislature transferred \$200 million from the Patients Compensation Fund to the Medicaid Trust Fund. That choice, while difficult, was legitimate. It reflected the “will of the people.”

Medicaid is not immune from cuts, however. Among other difficult cuts in the current 2009-2011 budget, the

Legislature reduced funding in the medical assistance, BadgerCare Plus, and SeniorCare programs. In total, the funding reductions enacted, were anticipated to reduce benefits costs by approximately \$633.1 million (-\$207.7 million in state funds and -\$425.4 million in federal matching funds) (Memorandum of Bob Lang, Legislative Fiscal Bureau, to the Joint Finance Committee on Forward Health Rate Reform Project and Program Status, December 17, 2009, Amicus App. 10) That represented a reduction of approximately 4.8% of total Medicaid costs in the biennium (approximately \$13.3 billion) *Id.*

Meanwhile, during the first five months of 2009-2010, Medical Assistance enrollment trended significantly higher than the projections used to establish the level of benefits funding provided in the 2009-2011 budget, as more Wisconsin

children and families turn to public assistance in the current economic crisis.

The State's overall fiscal condition is faring no better. According to the Legislative Fiscal Bureau's most recent revenue projection, the closing balance of the general fund at the end of this biennium is expected to be \$55.7 million, which is \$219.5 million below the balance that was projected upon enactment of the 2009-2011 biennial budget and \$9.3 million less than the required statutory balance of \$65 million. (Letter of Bob Lang, Legislative Fiscal Bureau, to Joint Finance Committee Co-Chairs, January 27, 2010. Amicus App. 18)

The shortfall in the current budget is due largely to decreases in tax revenues due to the recession, despite significant reductions in overall state spending. *Id.* The Legislative Fiscal Bureau has warned that an additional \$120 million to \$150 million general purpose revenue may be

needed to support Medicaid program benefits in the 2009-2011 biennium, due to increased program enrollments. *Id.* at 20

It is within the climate of this overall state budget crisis and national economic downturn that the Medical Society asks this Court to require the State to return \$200 million to the Patients Compensation Fund. That is a request for the Court to make a policy decision. The Advocates urge the Court to resist the Medical Society's attempt at an end run around the Legislature.

IV. THE LEGISLATURE HAS THE POWER TO MOVE FUNDS FROM THE PATIENTS COMPENSATION FUND TO THE MEDICAID TRUST FUND.

The essence of the Medical Society's claim about the Patients Compensation Fund is this: no matter how much money is in the Fund, it may only be used to provide paid claims on behalf of doctors who negligently injure patients and the legislature cannot touch it. That is essentially the same

as the argument made by the petitioners in *Wisconsin Professional Police Association v. Lightborn*, 2001 WI 59, 243 Wis.2d 512, 627 N.W.2d 807. The Court soundly rejected it stating:

No one in this litigation suggests that Act 11 abrogates the statutory and constitutional obligation of employers to fulfill benefit commitments to participants. These “benefits accrued” for “service rendered” are the essence of the property right enjoyed by participants. There is no taking of property or impairment of contract when everyone concedes that accrued benefits must be paid.

Chapter 40 does not give active participating employees a property right to determine exactly how employers fulfill their benefit commitments. It gives them a property right in having their benefit commitments fulfilled. Participants do not have a legal right to veto legislative decisions about benefit funding without showing some tangible injury. In this, petitioners have failed.

Id. at ¶¶175, 179.

The *Lightborn* rationale applies to the physicians who claim a property interest in the Patients Compensation Fund no less than the beneficiaries who actually had a property

interest in the employees trust fund. No one has suggested that the commitments made to Wisconsin physicians will not be met. No one has claimed that the insurance coverage the Fund provides to them will be eliminated or diminished. Just like the beneficiaries of the Wisconsin Retirement System, those physicians have no “legal right to veto legislative decisions about benefit funding without showing some tangible injury.” *Id.* at ¶179.

The Medical Society has shown no injury. Its members have suffered no loss. They are not entitled to have the Court substitute its policy judgment for the Legislature’s.

V. CONCLUSION.

Over time, the Legislature constructed a well-conceived Medicaid program that provides a broad array of services designed to keep the poor, the elderly and the disabled as healthy and as productive as possible.

The Medical Society wants this Court to reverse the Legislature's policy decision in the 2007-2009 budget to transfer \$200 million to the Medicaid Trust Fund, asserting that the money in the Patient Compensation Fund is sacrosanct. It wants that \$200 million returned to the fund now, despite the severe economic downturn and despite the likelihood that Medicaid services will be further reduced as the means of finding \$200 million.

The Legislature's decision in the 2007-2009 budget was in the best interest of the health of all of the citizens of this State. The Court should refuse to prefer the narrow concerns that the Medical Society has about malpractice claims, over the broader interests of Wisconsin's most vulnerable citizens.

The decision of the Circuit Court should be affirmed.

Dated this 1st day of April, 2010.

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By: /s/ Lester A. Pines

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CERTIFICATIONS

Regarding Form and Length: I hereby certify that this Brief and Appendix conforms to the rules contained in Sections 809.19(8)(b) and (c) Wis. Stats., for a brief and appendix produced using a proportional serif font. The length of this Brief is 2,884 words.

Regarding Appendix: I hereby certify that filed with this brief, either as separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an

administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate reference to the record.

Regarding Electronic Filing: I hereby certify that I have submitted an electronic copy of the Brief which complies with the requirements of Section 809.19 (12) Wis. Stats.; and this electronic Brief is identical in content to the printed form of the Brief as filed; and 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 1st day of April, 2010.

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