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STATE OF WISCONSIN
IN SUPREME COURT

—
No. 2009AP000728

WISCONSIN MEDICAL SOCIETY, INC.,
AND DAVID M. HOFFMANN, M.D.,

Plaintiffs-Appellants,

v.

MICHAEL A. MORGAN,

Defendant-Respondent.

Appeal from a Decision and Order entered
December 19, 2008, in the Circuit Court for
Dane County, Case No. 2007-CV-4035,
the Honorable Michael N. Nowakowski, Presiding

RESPONSE OF RESPONDENT MICHAEL MORGAN
TO THE NON-PARTY BRIEF OF THE
WISCONSIN ASSOCIATION FOR JUSTICE

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RESPONSE OF RESPONDENT MICHAEL MORGAN
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INTRODUCTION

Respondent Michael Morgan files this response to the non-party brief of the Wisconsin Association for Justice (“WAJ”), formerly known as the Wisconsin Association of Trial Lawyers.

WAJ’s brief purports to represent the viewpoints of patients who have been injured through medical malpractice. No patients are parties to this action, and WAJ would not have standing to represent their interests

if they were. *Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1, 17, 20, 230 N.W.2d 243 (1975) (associational standing applies where member of an organization could bring suit). WAJ is an association of lawyers, not of patients. Further, WAJ raises new claims that are legally distinct from those raised by the parties, and on behalf of a non-party to the case. This Court has already declined to grant WAJ's motion to intervene as a party, and it should decline to decide the claims made by WAJ.

WAJ's claims are without merit, regardless, on a number of grounds. Even for patients with medical expense accounts, the group focused on by WAJ, the transfer would effectuate no taking. Further, whatever each patient's rights might be, they are not based on Wis. Stat. § 655.27(6) as a freestanding grant of a property interest. Finally, any claim based on future transfers would be speculative and unripe.

I. PATIENTS WITH MEDICAL EXPENSE ACCOUNTS HAD NO PROPERTY TAKEN.

WAJ focuses its argument on the rights of patients with medical expense accounts under Wis. Stat. § 655.015. Although these patients probably do have some property interest in their segregated accounts, there could be no taking because those monies remain there, earning interest.

Wisconsin Stat. § 655.015 requires a plaintiff to deposit amounts received from a verdict or settlement for future medical expenses in excess of \$100,000 with the Fund. The plaintiff is eligible to receive amounts as he submits invoices for reasonable medical expenses. Wis. Stat. § 655.015; Wis. Admin. Code § Ins 17.26. Any amounts remaining after the patient's death revert to the Fund. *Id.* During the patient's lifetime, the Fund is required to keep a separate account of those amounts and

to credit earnings on that amount. *Id.* According to the recent audit by the Legislative Audit Bureau, 27 individuals currently have such accounts. *See* March 2010 Audit of the Patients and Families Compensation Fund, (<http://www.legis.wisconsin.gov/lab/reports/10-4full.pdf>), at 13.

Because these account holders turned over monies that were paid by the provider's medical malpractice carrier, the money in the account is not solely Fund money. It would seem that the account holder has a property interest at least in the amount of monies turned over from non-Fund sources.

Those accounts, however, were not touched in the 2007 transfer. They are still there, separately accounted for on the Fund's books. *See* March 2010 Audit, at 35 ("Liabilities for future medical expense"). They would not be available to pay claims. Thus, the account holders could claim no taking of their property even if they were parties to this case.¹

To the extent WAJ would attempt to lump all potential claimants with the medical expense account holders, that effort would fail. The account holders' rights would spring from their judgment or settlement, together with their transfer of the medical malpractice carrier's payment into the medical expense accounts.

Further, even if some of those claimants did have a vested property interest in receiving the amount of their

¹As WAJ alludes to in its brief (WAJ br. at 1), WAJ disputes the constitutionality of the whole structure of Wis. Stat. § 655.015, apart from any transfer of Fund assets. Those issues were argued, but not reached by the Court, in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440. The challenge there argued that the statutory scheme "takes" the plaintiff's private property—the monies he has received from the medical provider's medical malpractice carrier—and converts it to state purposes. *See Ferdon*, 284 Wis. 2d 573, petitioners' br. at 35, 37, 2005 WL 4888733.

judgment, there is no assertion that anyone has sought compensation from the Fund and been denied. The Fund's balance, according to the LAB audit, was about \$650 million in June 2009 (LAB Audit, at 25). That amount does not include the additional \$100 million sum sufficient appropriation that is also available to pay claims. Wis. Stat. § 655.27(5)(e). There can be no violation of the Takings Clause until a claimant has sought compensation and been denied payment. *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701, 704 (7th Cir. 2002).

II. WHATEVER THE PATIENTS' RIGHTS ARE, THEY SPRING FROM THEIR RIGHTS IN THEIR CAUSES OF ACTION AND JUDGMENTS, NOT FROM WIS. STAT. § 655.27 AS A FREESTANDING SOURCE OF PROPERTY RIGHTS.

WAJ argues that, regardless of the assets available in the Fund to pay claims, that the transfer of a single dollar would constitute a taking. WAJ's claim is based solely on Wis. Stat. § 655.27(6).

The language in Wis. Stat. § 655.27(6) does not confer on a vested property right in the entirety of assets in the Fund.

A. Between 1975 and 2003, Wis. Stat. § 655.27(6) sometimes mentioned providers and "proper claimants," and sometimes not, with no suggestion that the language conferred property rights.

Other than the word "irrevocable," added in 2003 Wis. Act 111, the substance of the language in Wis. Stat.

§ 655.27(6) —“held in trust . . . for proper claimants”—
was part of the original 1975 act:

(7) INTEGRITY OF FUND. The fund shall be held
in trust for the benefit of insureds and other proper
claimants. The fund may not be used for purposes
other than those of this chapter.

Laws of 1975 ch. 37.²

In 1978, in *State ex rel. Strykowski v. Wilkie*, 81
Wis.2d 491, 514, 261 N.W.2d 434 (1978), this Court
addressed whether doctors had a financial interest in the
Fund that would preclude them from adjudicating cases
heard by the Fund’s patient compensation panel. The
Court concluded that any financial interest in the Fund
was so remote and speculative that it could not require
disqualification. *Strykowski*, 81 Wis. 2d at 515-16.

In 1985, Chapter 655 was extensively amended.
The legislature changed Wis. Stat. § 655.27(6) to read:

655.27(6) INTEGRITY OF FUND. The fund shall
be held in trust for the purposes of this chapter and
may not be used for purposes other than those of this
chapter.

1985 Wis. Act 340 § 67. According to the premise of
WAJ, this statutory change would have amounted to a
taking because it deleted the language mentioning
“insureds” and “proper claimants.” The legislative
history, however, suggests no controversy regarding the
change. There was no controversy because the 1975
language created no vested property rights, a point that
even the Medical Society appears to acknowledge.³

²The provision was re-numbered § 655.27(6) in Laws of
1979, chapter 194, § 11.

³See WMS response to amicus br. of the Advocates for
Medicaid Patients, at 13.

B. A statutory “trust” is not the same as a private trust and conveys no property rights.

It is unsurprising that Wis. Stat. § 655.27 was not discussed as creating property rights prior to 2003. A statutory trust fund confers no property rights on individuals benefitting from that fund.

To show a vested property interest in a state benefit program, the hurdle is particularly high: the plaintiffs’ case “requires precise identification of the ‘private’ property at issue as well as a ‘taking’ distinguishable from public regulation consistent with the purpose of the instrumentality.” *See Great Lakes Higher Educ. Corp. v. Cavazos*, 911 F.2d 10, 15 (7th Cir. 1990).

Relying on case law describing private trusts, WAJ argues that the statute creates a private trust relationship between its members and the state. (WAJ br. at 5-7.) The word “trust” in a statute, however, creates no legal relationship tantamount to a private trust for individuals. *Eckles v. Oregon*, 760 P.2d 846, 850-51 (Ore. 1988); *In re Certified Question, Fun ‘N Sun RV, Inc. v. Michigan*, 477 Mich. 765, 527 N.W.2d 468, 479-80 (1994).

The Wisconsin Legislature has created numerous trust funds in the statutes, including in Wis. Stat. ch. 25, setting forth a long list of trust funds. Many of these funds are denominated “non-lapsible.” *See, e.g.*, Wis. Stat. §§ 25.40 (transportation fund); 25.47 (petroleum inspection fund); 25.49 (recycling fund); 25.96 (utility public benefits fund). As discussed in the Respondent’s brief at pp. 3-4, the Legislature regularly transfers monies out of such trust funds into other, unrelated trust funds or to the general fund. The description “trust fund” creates no property rights on the part of persons who benefit from those programs.

**C. The word “irrevocable,”
added in 2003, did not
change the analysis.**

There appears to be little dispute that the providers and plaintiffs had no property interest based on Wis. Stat. § 655.27(6) before 2003, and thus no property interest in amounts in the Fund at that time. The primary change in 2003 from the original 1975 language was the addition of the word “irrevocable.” That word, however, does not create a property right as to amounts paid into the Fund since 2003.⁴

The drafter at the Legislative Reference Bureau correctly noted that the word “irrevocable” does not strip the Legislature of its right to amend legislation in a future legislative session. See August 1, 2003, Drafter’s Note of Pam Kahler, Senior Legislative Attorney (A-Ap. 090). As the Colorado Supreme Court recently held, the Legislature cannot constitutionally strip itself of the power to enact future legislation by purporting to create an “irrevocable” trust. *Barber v. Ritter*, 196 P.3d 238, 253-54 (Colo. 2008).

⁴Even if WAJ were correct in asserting that the word “irrevocable” created property interests on the part of patients in 2003, such property interests would not apply retrospectively to any funds collected prior to the 2003 amendment. Legislation presumably operates prospectively, not retroactively, unless the statutory language reveals by express language or necessary implication an intent that it apply retroactively. *Matthies v. Positive Safety Mfg. Co.*, 2001 WI 82, 244 Wis. 2d 720, 734, 628 N.W.2d 842.

D. The 2003 Legislature considered, and rejected at WAJ's urging, creating enforceable property rights in medical providers and claimants.

As discussed in the Respondent's brief, the Legislature explicitly rejected language that would have created vested rights in the Fund. When the legislation upon which WMS relies, 2003 Wisconsin Act 111, was originally drafted, WMS sought explicit contractual rights, which were included in 2003 Assembly Bill 487:

Health care providers and claimants have contractual rights in all assets of the fund for those purposes.

Id., sec. 24. A representative from WAJ (then still called the Wisconsin Association of Trial Lawyers) appeared at a September 9, 2003, hearing on Assembly Bill 487 before the Senate Agriculture, Financial Institutions and Insurance Committee to urge the deletion of that language:

Our main problem is the language giving health care providers "contractual rights" in the assets of the PCF. What contractual rights are these? Where is the contract defining these rights? Does it mean that a physician or hospital has a right to PCF assets if bankruptcy is declared? Does it mean third parties owed money by a physician or hospital can put a lien on the assets of the PCF? Will a physician or hospital have the right to object to payment of the PCF if they disagree with a settlement? If the PCF Board overestimates the amount needed to pay claims, will a physician have a right to ask for a return of a portion of the fees overpaid plus interest?

The language "contractual rights" is very broad and has every possible meaning imaginable without a definable stopping point. How can the Legislature endow health care providers with "contractual rights" without defining them?

Even including claimants in the category of having “contractual rights” may be a bit broad. . . . Does [the statute] merely confirm that a claimant has the right to sue the PCF and receive money if damages exceeded \$1 million per claim? Or does it mean the claimant can put a lien on the PCF assets until the malpractice claim is resolved?

Exhibit A to Morgan’s Response to Amicus, at p. 2. WAJ pointed out the problematic aspects of conferring contractual rights, not just on providers, but on claimants, as well. The sentence was subsequently deleted by Assembly Amendment 1 and replaced with the language in the statute today.

As WAJ correctly noted at the legislative hearing, creating vested, individualized rights in a state fund carries with it real-life repercussions. Those rights have an impact, not just on the transfer of monies from the Fund, but on any number of adjustments the Legislature might make in how the Fund is governed—changes to the Fund’s board, procedural requisites to the filing of a claim, and other amendments that the legislature might deem appropriate.⁵

Wisconsin Stat. § 655.27(6) created no property rights in either the providers or patients.

**III. WAJ’S SUBSTANTIVE DUE
PROCESS CLAIM IS NEW,
UNDEVELOPED AND
UNSUPPORTED.**

WAJ also asserts that the transfer violated all patients’ rights of substantive due process. Based on WAJ’s assumption that the patients were deprived of their

⁵ Wis. Stat. § 655.27(6) describes a trust only for the benefit of “proper” claimants. WAJ offers no suggestion of what a proper claimant must be, but simply being a “claimant” against the Fund would be insufficient to come within the ambit of that language.

vested property interests, WAJ argues that the legislature violated their rights of substantive due process, apparently because it failed to amend Wis. Stat. § 655.27(6). WAJ br. at 10-11.

A substantive due process claim was not raised by the parties to this litigation, and should not be considered in the context of a non-party brief. Generally, non-party briefs must accept the case as it stands on appeal, limited to the issues raised by the parties. 4 Am. Jur. 2d *Amicus Curiae* § 7; *Kootz v. Tax Commission*, 228 Wis. 306, 313-14, 280 N.W. 672 (1938) (“We do not consider this contention for the reason that amicus curiae have no standing upon this appeal to raise a constitutional question when none is raised by the parties to the appeal.”)

That principle is particularly true given the failure of the amicus brief to develop its substantive due process argument. The brief cites one case discussing denial of access to the courts (WAJ br. at 10, citing *Penterman v. Wis. Elec. Power*, 211 Wis. 2d 458, 565 N.W.2d 521 (1997)), and another discussing an arbitrary and capricious zoning restriction (WAJ br. at 10-11, citing *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780)). It fails to explain how either would apply to this case. WAJ concedes that the legislation may have contributed to the public welfare (WAJ br. at 11); it cites no case law for the notion that, in transferring the funds, the Legislature was required to amend Wis. Stat. § 655.27(6).

IV. WAJ MAKES NO CLAIM THAT THE TRANSFER RENDERED THE FUND UNABLE TO PAY CLAIMS; ITS ASSERTIONS BASED ON FUTURE TRANSFERS AND “OTHER MISAPPROPRIATIONS” ARE SPECULATIVE AND UNRIPE.

The amicus brief makes no contention that any patient has made a claim against the Fund and been told that the Fund has insufficient assets, or even that WAJ believes that the Fund is in crisis due to the transfer under 2007 Wis Act 20. Indeed, WAJ’s spokesman has stated publicly that it is “not worried the fund would run out of money.” Patrick Marley, “Audit finds medical fund in red,” MILWAUKEE JOURNAL SENTINEL, March 31, 2010, at 8A.

The amicus brief argues that, if the Legislature makes further transfers and “other misappropriations” out of the Fund so that it is gone, that patients could be denied their right to a jury under Article I, Section 5, and their right to a remedy under Article I, Section 9, of the Constitution. (WAJ br. at 12-13).

Were a patient a party to this litigation, such claims would be unripe and speculative. Ripeness depends on whether the facts needed to make a judgment are contingent or uncertain. *Putnam v. Time Warner Cable of Southeastern Wisconsin*, 2002 WI 108, ¶ 44, 255 Wis.2d 447, 649 N.W.2d 626. “[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention.” *Thomas ex rel. Gramling v. Mallet*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523, quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir.1993). Here, WAJ’s assertions are completely speculative, based on changes in the law that have not occurred.

CONCLUSION

For the foregoing reasons, as well as those stated in Morgan's respondent's brief, the circuit court's ruling was reasonable and should be upheld.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,793 words.

Dated this 13th day of April, 2010.

Charlotte Gibson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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. § (Rule) 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 April, 2010.

Charlotte Gibson
Assistant Attorney General