STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP002711

TERRI FIEZ and MICHAEL FIEZ,

Plaintiffs-Appellants,

ESTATE OF ROBERT FIEZ,

Plaintiff,

v.

JONATHAN G. KEEVIL, M.D.,

Defendant-Respondent.

APPEAL FROM A JUDGMENT ENTERED OCTOBER 8, 2013, IN THE CIRCUIT COURT FOR DANE COUNTY, CASE NO. 10-CV-6451 THE HONORABLE JOHN MARKSON, PRESIDING

JOINT BRIEF *AMICUS CURIAE* ON BEHALF OF THE WISCONSIN HOSPITAL ASSOCIATION, INC., AND THE WISCONSIN MEDICAL SOCIETY, INC.

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BACKGROUND

The operative facts of this case are set forth in the parties' briefing and need not be repeated here. As framed by the parties, the issue presented for consideration is – as constitutional questions go – disarmingly simple. The physician defendant, Dr. Keevil, is an employee of the University of Wisconsin and is thus a state employee. State employees enjoy the legal protections embodied in Wis. Stat. § 893.82, including a $250,000.00 cap on damages contained in Wis. Stat. § 893.82(6). A jury found that the Fiezes were injured by Dr. Keevil in an amount in excess of the damages cap. The central question informing the positions of the parties, namely what amount of compensation should be provided to individuals making a claim against a state actor, is an important one.

This case, however, exists at the juncture of governmental liability principles and medical negligence jurisprudence and has potential implications to both these areas of the law. Neither the Fiezes nor Dr. Keevil, however, has noted what appears to be the potential impact this case could have outside the scope of governmental liability. *Amici* have asked this Court for permission to appear so that the Court may better appreciate the impact this case may have on medical negligence jurisprudence.

To understand why this is a concern requires the Court to examine one particular fact that both parties acknowledge, but neither has given focus to. That fact is that the mandate the Fiezes seek is judgment on the verdict. While that alone seems simple enough, to quote the tired but true bromide "the devil is in the details." Accordingly, a deeper exploration of what that request for judgment on the verdict means is required. The verdict was in the amount of $1,885,251.15 which included two awards of loss of society and companionship damages totaling $850,000.00 for family members. That figure is important because it undercuts key elements of the Fiezes' arguments and lays bare the need for this Court to defer resolution of the larger issues involved to the legislature.

Specifically, by requesting an award of non-economic damages of $850,000.00, the Fiezes are requesting relief against Dr. Keevil beyond what they could ever expect from any other physician in Wisconsin. All physicians and other health care providers in the state have caps on the damages that can be awarded against them. For county and municipal health care providers, the total cap is $50,000.00. Wis. Stat. § 893.80(3). For non-governmental physicians in the state, non-economic damages are capped at $750,000.00. Wis. Stat. § 893.55(4)(d). Should a member of a volunteer fire company be sued for medical negligence, the cap is $25,000.00. Wis. Stat. § 893.80. Federally affiliated health care providers

adopt the damage caps applicable to private actors. 27 U.S.C. § 2674. By requesting the mandate they do, the Fiezes are seeking relief not available to any other group of plaintiffs in a medical negligence action.

This is an important fact for two reasons. First, the fact that the Fiezes are in effect asking for preferential treatment belies much of their arguments regarding the alleged inequity of the cap. Second, and more importantly, if the result they seek were allowed to stand, this would remove a piece of a carefully crafted statutory scheme governing the delivery of health care in Wisconsin, usurping the role of the legislature in creating that scheme and reassessing it as necessary. For both these reasons, *amici* have grave concerns about the arguments presented by the Fiezes and urge this Court to affirm the decision of the trial court. When the legislature deems that it is in furtherance of the policies of the State of Wisconsin to address the concerns articulated by the Fiezes, it can do so in an informed and deliberate manner.

ARGUMENT

The Fiezes bring this challenge solely on constitutional grounds. While it is not *amici's* intent to repeat the constitutional analyses put forth by the parties, a few core principles bear emphasis. First, all statutes are presumptively constitutional. *Riccitelli v. Broekhuizen*, 227 Wis. 2d 100, 119, 595 N.W.2d 392 (1999). Reviewing courts must indulge every presumption to sustain a statute's constitutionality and all doubts must be

resolved in favor of finding a statute constitutional. *Aicher v. Wis. Patients Compensation Fund*, 2000 WI 98, ¶ 18, 237 Wis. 2d 99, 111, 613 N.W.2d 849, *citing Hammermill Paper Co. v. LaPlante*, 58 Wis. 2d 32, 46-47, 205 N.W.2d 784 (1973). The presumption of constitutionality is a product of the recognition that the judiciary is not as well positioned as the legislature to make economic, social and political decisions. *State ex rel. Carnation Milk Products Co. v. Emery*, 178 Wis. 147, 189 N.W.2d 564 (1922); *Aicher* at ¶ 19, *citing State v. Hezzie R.*, 219 Wis. 2d 849, 863, 580 N.W.2d 660 (1998).

To support their position and to presumably highlight their claim of random injustice attendant to the cap at issue, the Fiezes build their argument around the fact noted above, namely that the legislature has set different liability caps for different health care providers. This disparity of results is central to both their equal protection and right to jury trial arguments.

While the point made is not factually untrue, the Fiezes' argument neglects that the remedy they seek would not remove, but would simply flip, the central "problem" upon which they rely to argue their position. If the Fiezes were to prevail in their position, it would still be the case that a potential plaintiff would see a difference in recovery depending on the status of the provider they saw. Under the mandate they seek it would

merely make it more remunerative for them to have sued a state actor than anyone else. Because the legislature has determined that the highest award of noneconomic damages in claims of medical malpractice is $750,000.00, *see* Wis. Stat. § 893.55(4)(d), the Fiezes would not be entitled to the $850,000.00 in noneconomic damages they seek from any other provider.

Against this background, the Fiezes should not be heard to say that the jury did not hear their evidence and find the facts they were empaneled to find. The fundamental question of a right to jury constitutional challenge is whether a jury can hear the case and decide questions put to it. *See Guzman v. St. Francis Hospital, Inc. 2001 WI App,* ¶ 9, 240 Wis. 2d 559, 623 N.W.2d 776. This the jury did. The right to a jury trial does not confer a right to whatever a jury finds in excess of a statutory cap. *Maurin v. Hall,* 2004 WI 100, ¶ 99, 274 Wis. 2d 28, 682 N.W.2d 866, *overruled on other grounds, Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, 293 Wis. 2d 38, 717 N.W.2d 216. The jury served its role in the process here.

Similarly, if the fact that they would receive less compensation from a state actor is a problem of constitutional proportions, then that would still be the case if they received more compensation by virtue of suing a state actor. It is well recognized that different treatment under the law for different groups will be upheld as long as there is a rational basis supporting the distinction. *See Bostco LLC v. Milwaukee Metropolitan*

Sewerage District, 2013 WI 78, ¶ 76, 350 Wis. 2d 554, 835 N.W.2d 160. Avoiding the potentially crippling financial exposure of unlimited liability to different industries, through the use of caps and other tools in promotion of the public good, has long been recognized as a rational basis. The fact that there are many examples of legislatively imposed damage caps and claims processes reveal that the issues here would have a much broader impact.

More particularly, the fact that there would still be disparity between what the Fiezes and other plaintiff in a medical negligence case would receive if Wis. Stat. § 893.82(6) was invalidated demonstrates that this section is part of a larger statutory scheme to control health care costs. Recognizing the deleterious effects of high liability exposures for health care providers, including lost access to health care, ever spiraling insurance premiums and adverse impacts on employment, the legislature has made very clear its basis for wanting to control that exposure. *See* Wis. Stat. § 893.55(1d)(statement of legislative intent). It provided some actors with certain tools to control risk which are not available to others. It provided different damage caps to some. This is all part of a considered, complex undertaking by the legislature.

The Fiezes may disagree with these policy choices, but the inescapable fact remains that the legislature crafted these policies consistent

with the well accepted principle that it, and not the courts, is better suited to weigh the policies involved in that decision. It is for good reason that our Supreme Court cautions the judiciary is not as well positioned as the legislature to make the economic, social and political judgments involved in a matter like this. *Aicher* at ¶ 19. Accordingly, a*mici* ask the Court to consider the broader context in which Wis. Stat. § 893.82(6) operates in the delivery of health care in Wisconsin. That context is understood, as is so many others, by beginning with a review of operative statutes.

In 1975, the Wisconsin legislature enacted Wis. Stat. ch. 655 as part of an overarching effort to define parameters of health care liability. It established the Injured Patients and Families Compensation Fund. Wis. Stat. § 655.27. It established a mandatory mediation system for such claims. Wis. Stat. § 655.42. It defined both the claimants who can bring claims predicated on medical negligence, see Wis. Stat. § 655.007, and which providers are subject to its provisions. Specifically, Wis. Stat. § 655.002 identifies the providers who must participate in the requirements of the chapter and those for whom participation is optional.

In addition to requiring participation in the chapter 655 provisions for some and making participation optional for others, it was recognized at that time that some health care was delivered by state and municipal actors.

Importantly to this case, the legislature put those providers in a third category of providers who are not allowed to participate in chapter 655:

> Except as provided in s. 655.002(1)(c) this chapter **does not apply** to a health care provider that is any of the following:
>
> (1) A physician or nurse anesthetist who is a state, county or municipal employee or contractor covered under the federal tort claims act, as amended and who is acting within the scope of his or her employment or contractual duties.

Wis. Stat. § 655.003 (emphasis supplied).

This provision is recognition that different liability protection concerns apply to at least four[1] different groups of health care providers practicing in Wisconsin. Some providers are covered under the provision of Wis. Stat. ch. 655 and § 893.55, and their liability exposure is set by those provisions. State employees' liability exposure is determined by Wis. Stat. § 893.82 while County and municipal employees' liability exposure is determined by Wis. Stat. § 893.80. The liability of contractors covered under the federal tort claims act is determined by 27 U.S.C § 2674.

Each of these groups had different potential procedures and exposure for exactly the same act. State actors are subject to certain notice of claim provisions and have liability limited to $250,000.00. Wis. Stat. § 893.82.

[1] *Amici* recognize that there are more than four different groups of health care providers considered by the legislature, including those outside the traditional hospital/clinic model captured by the exclusion in § 655.003 (1). These include entities such as schools, correctional facilities and the like captured by the exemptions of § 655.003 (2) and (3). For expository simplicity, *amici* do not separately analyze every potential provider of health care as many of them overlap with other categories. The point remains that the legislature carefully thought through all instances in which health care is delivered in Wisconsin and crafted what it believed to be appropriate rules governing liability in those situations.

County and other municipal employees' have different notice of claim procedures and their liability is capped at $50,000.00. Wis. Stat. § 893.80. Though there are different procedural requirements, the United States and its contractors are liable "in the same manner and to the same extent as private individuals under the circumstances." 27 U.S.C. § 2674. Other providers have a cap on non-economic damages of $750,000.00. Wis. Stat. § 893.55(4)(d). Each of these different categories of defendants comes with their own unique procedural rules governing claims.

These differing processes reflect the legislature and Congress' considered value judgments regarding how to process claims as well as the appropriate balance of compensation to injured individuals with the need to protect public fiscs. The fact that the Wisconsin legislature made explicit reference to these categories in chapter 655 demonstrates that this is part of an overarching plan to deal with claims of medical negligence in Wisconsin.

When the legislature created Wis. Stat. ch. 655, it weighed the competing interests, considered the potential impact on the delivery of health care in the state, and determined, based on its deliberations that the state is best served by enacting laws that promote the cost-effective delivery of health care. It is well-recognized that legislative efforts to "tam[e] the costs of medical malpractice" by limiting the nature of claims is a

legitimate legislative objective." *Guzman v. St. Francis Hospital, Inc.*, 2001 WI App 21, ¶ 4, 240 Wis. 2d 559, 623 N.W.2d 776. The legislature chose to advance its policy goal through regulation of practice and procedure in medical malpractice actions; this it had the right to do. *See State v. Mitchell*, 144 Wis. 2d 596, 615-616, 424 N.W.2d 698 (1988); *State v. Holmes*, 160 Wis. 2d 31, 46, 315 N.W.2d 703 (1982). Clearly, the legislature was operating squarely within its sphere of power by creating this scheme.

This background is important to health care delivery in Wisconsin because it is not just the cap contained in Wis. Stat. § 893.82(6) that is the issue for Dr. Keevil and those in his position. Wisconsin Stat. § 655.003 exempts state, county, municipal and federal health care providers from **all** provisions of Wis. Stat. ch. 655. Those provisions provide guidance on all interrelated facets of medical negligence risk management, including processing, insurance and limitations. The actors identified in Wis. Stat. § 655.003 are consequently excluded from participation in the mediation program, which serves to divert medical negligence cases away from the court system when possible. They are denied access to the Injured Patients and Families Compensation Fund, which protects providers from liability exposures in excess of $1 million. These are but some of the important attributes in the well thought out and comprehensive statutory scheme.

In order to truly appreciate the reach of the Fiezes' request that the cap in Wis. Stat. § 893.82(6) be removed, the Court must consider the request in context of how that might impact the broader scheme so carefully crafted by the legislature. The immediate effect would be to remove the existing cap, but that ignores that the cap is but one element of the claims process constructed by the legislature. Would that necessarily take physicians like Dr. Keevil out of the notice of claims procedure included in Wis. Stat. § 893.82(3)? The answer is almost assuredly "no" as that is not relief that is sought and the issue is not before the Court on any record. This ignores that the notice of claim mechanism serves a critical screening purpose somewhat analogous to that served by medical mediation panels, namely to assist in early resolution and regulate exposure. The attorney general's office (which processes the notices of claim under Wis. Stat. § 893.82(3)) while comprised of talented individuals, has not had a chance to weigh in with the legislature regarding its ability or readiness to assume processing of claims with unlimited exposure. Dr. Keevil is excluded from participating in those mediation panels and there is not a ready alternative that would serve the same purpose in the dramatically altered landscape which would exist without the cap in place.

Similarly, would physicians in Dr. Keevil's position benefit from participation in and the protection of the Injured Patients and Families

Compensation Fund if they no longer had the protections of Wis. Stat. § 893.82(6)? The existence of the Fund is also considered an important and integral part of Wisconsin's health care liability system by serving as a form of excess insurance, an integral component of liability risk management. *See* Wis. Stat. § 655.27 (3). Fund participation may be an attractive choice for persons in Dr. Keevil's position when compared to uncapped liability sought by the Fiezes. Access to the Fund, however, is not relief this Court can order, nor can Dr. Keevil and his colleagues immediately opt to participate in the Fund because they do not even qualify for optional participation under Wis. Stat. § 655.002(2).

These are but two examples from a scheme of such intricacy and complexity that a full exploration of it would far exceed the scope of any *amicus* filing. The point of the foregoing, though, is obvious. Even assuming that it is time to revisit the potential liability exposure of health care providers who are also state actors, the inquiry does not exist in a vacuum. It requires a considered weighing of all the various considerations, options and statutory provisions that might potentially be impacted by that question. *Amici* respectfully submit that this is a task for which the legislature is uniquely qualified and not one this Court has the resources to embrace on the record before it.

CONCLUSION

For all the foregoing reasons, *amici* Wisconsin Hospital Association and Wisconsin Medical Society respectfully request that this court affirm the ruling of the Court below.

Dated this 19th day of May, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes).

The length of this brief is 2,949 words.

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I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed with the Court.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated this 19th day of May, 2014.

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