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SUPREME COURT

In the Supreme Court of Wisconsin

Appeal No. 2020AP1582

BEATRIZ BANUELOS,
Plaintiff-Appellant,

v.

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,
Defendant-Respondent-Petitioner,

ON REVIEW OF A DECISION BY THE COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER BY THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JUAN B. COLAS, PRESIDING

NON-PARTY BRIEF OF WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Civil Justice Council, Inc.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Wisconsin Civil Justice Council, Inc. (WCJC), is a not-for-profit business organization that advocates for the interests and missions of its members. The WCJC, whose members include a broad spectrum of Wisconsin businesses, advocates for public policies that enhance Wisconsin's economic image and promotes fairness and equity in Wisconsin's civil justice system. The WCJC and its members have long served as advocates for the modernization of Wisconsin's civil justice system to implement common-sense reforms to ensure fairness for all litigants.

This case presents an issue of great importance to WCJC: whether health care providers must give to a requestor electronic copies of medical records at no cost. The Legislature has created no such mandate. Yet the court of appeals held that health care providers must produce electronic records for free, shifting costs to other consumers and creating perverse incentives for the providers.

This Court should reverse the court of appeals' decision and hold that Wis. Stat. § 146.83 does not prohibit health care providers from charging a fee when it provides a requester with electronic copies of medical records. Such a fee is limited by federal law only.

ARGUMENT

Wisconsin Stat. § 146.83 does not ban health care providers from charging a fee to cover the cost of providing digital patient records to requesters.

A. The fee provisions in Wis. Stat. § 146.83(3f)(b) are limits on certain fees, not authorization for only those fees.

In a free society, private behavior is allowed unless prohibited by law. Free people do not need the government's permission before engaging in private conduct. The government's power to regulate private conduct, however, must be expressly authorized by law.

Well-established canons of statutory interpretation support those truisms. A statute's "express mention of one matter excludes other similar matters [that are] not mentioned." *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis. 2d 517, 960 N.W.2d 350 (alteration in original) (citation omitted). Under this doctrine, the government may exercise only the powers that the Legislature has specifically conferred on it. *Id.* This doctrine also means that "if the legislature had intended a statute to include a prohibition on certain conduct, . . . the legislature would have specifically mentioned that conduct, but where it did not, the statutory provision is deemed not to apply to that conduct." *Olympus Aluminum Prod., Inc. v. Kehm Enterprises, Ltd.*, 930 F. Supp. 1295, 1312 (N.D. Iowa 1996) (citing *Wiebenga v. Iowa Dep't of Transp.*, 530 N.W.2d 732, 735 (Iowa 1995)).

The court of appeals' reasoning violates those basic principles and thus suffers from a fatal flaw: it assumes that Wis. Stat. § 146.83(3f)(b) is an *authorization* to charge only certain fees for patients' medical records, rather than a *limit* on those fees. Because this statutory provision does not expressly authorize fees

for digital medical records, the court of appeals concluded that such fees are prohibited. The court of appeals relied on a prior version of this statute, which stated that health care providers could impose "a charge" for access to digital records, without limitation. Because the Legislature removed that fee provision when it amended the statute, the court of appeals thought that the Legislature had withdrawn its "permission" to charge fees for digital medical records.

There is no basis for "the necessary premise underlying that interpretation—*i.e.,* that conduct is prohibited unless expressly authorized." *See UR Health Chiropractic Corp. v. Progressive Select Ins. Co.*, 285 F. Supp. 3d 1345, 1348 (S.D. Fla. 2018). The court of appeals operated under the mistaken premise that health care providers are barred from charging fees for records unless such fees are expressly allowed by law. The plain language of Wis. Stat. § 146.83 and the prior version of this statute refute that view. Health care providers are allowed to charge fees for records unless prohibited by law.

The court of appeals pointed to the supposedly "operative language of Wis. Stat. § 146.83(3f)(b)," which states in part that a health care provider may charge "*no more than the total of all of the following [fees] that apply*." *Banuelos v. Univ. of Wisconsin Hosps. & Clinics Auth.*, 2021 WI App 70, ¶ 15, 399 Wis. 2d 568, 966 N.W.2d 78. According to the court of appeals, this language "makes clear that [section 146.83(3f)(b)] defines the total universe of fees that a provider may collect from a requester for the service of fulfilling a request for patient health care records under [section 146.83(3f)(a)]." *Id.*

The court of appeals overlooked important qualifying language in two paragraphs of the statute. Paragraph (a) states that a "health care provider shall provide the person making the

request copies of the requested records" if the person "requests copies of a patient's health care records, provides informed consent, and pays the *applicable fees under par. (b)*." Wis. Stat. § 146.83(3f)(a) (emphasis added). The key language in paragraph (b) states that "a health care provider may charge no more than the total of all of the following [fees] that apply for providing the copies [of records] requested *under par. (a)*." Wis. Stat. § 146.83(3f)(b) (emphasis added). When read together, the meaning of the italicized language in both paragraphs is plain. Paragraph (b) limits the amount of fees that a health care provider may charge for copies of records that are required to be shared under paragraph (a). And paragraph (a) requires a health care provider to share a copy of a record only if the request has an applicable fee under paragraph (b).

Wisconsin Stat. § 146.83(3f)(b) thus does not limit the amount of fees that health care providers may charge for digital records. Because paragraph (b) has no applicable fee for digital records, paragraph (a) does not require a health care provider to share digital records with requesters. A digital record is thus *not* a record requested "under par. (a)," *see* Wis. Stat. § 146.83(3f)(b), so paragraph (b) does not limit the amount of fee that may be charged for a digital record.

Amendments to Wis. Stat. § 146.83 in 2009 and 2011 confirm this view.[1] In 2009, the Legislature created Wis. Stat. § 146.83(1k) (2009–10), which generally required health care providers to share a record with a requester in a digital or electronic format. 2009

[1] A court may verify a statute's plain meaning by consulting prior enacted and repealed provisions of a statute, *Cnty. of Dane v. LIRC*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571, and legislative history, *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110.

Wis. Act 28, § 2433h. The Legislature also created Wis. Stat. § 146.83(1h)(b)3m. (2009–10), which stated that a health care provider could impose "a charge" for "providing copies in digital or electronic format." 2009 Wis. Act 28, § 2433f. The Legislature tried to impose a $5 fee limit for a digital record, but then-Governor Doyle used a line item veto to remove the $5 limit, allowing an unlimited fee. *See Banuelos*, 2021 WI App 70, ¶ 41.

Congress enacted similar provisions around the same time. In February 2009, Congress passed the Health Information Technology for Economic and Clinical Health Act (HITECH Act). This Act codified a person's general right to access his or her electronic health records and imposed a limit on fees for such access. *See* Pub.L. 111-5, § 13405, 123 Stat. 115, 268 (2009) (codifying 42 U.S.C. § 17935(e)). This section of the HITECH Act took effect in February 2010. 75 Fed. Reg. 40868-01, 40901 (proposed July 14, 2010) (to be codified at 45 C.F.R. Pts. 160 and 164).

In 2011, the Legislature repealed Wis. Stat. § 146.83(1h)(b) and (1k)—*i.e.,* the limitless fee provision for digital records and the general requirement to share digital records with requesters. *See* 2011 Wis. Act 32, §§ 2659y, 2660. The Legislature made those changes in response to passage of the HITECH Act. *See Banuelos*, 2021 WI App 70, ¶ 41.

The 2009 and 2011 amendments to Wis. Stat. § 146.83 show that the fee provision for digital records was tied to the requirement to share digital records with requesters. The Legislature enacted those two provisions together in 2009 and repealed them both in 2011. Under the 2009–10 version of the statute, like the current one, the fee limits applied only to records that a health care provider was required to share with a requester. Because this statute no longer requires health care providers to

share digital records with requesters, *see generally* Wis. Stat. § 146.83 (2019–20), it does not govern fees for digital records.

The timing of the 2011 amendment shows that the Legislature removed the digital-record mandate and the corresponding fee provision because the HITECH Act rendered them unnecessary or obsolete. By repealing those provisions, the Legislature indicated that health care providers should follow the recently effective federal law on digital patient records. The Legislature did not implicitly ban health care providers from charging fees for digital records.

Contrary to the court of appeals' view, the 2011 amendment to Wis. Stat. § 146.83 did not remove the Legislature's "permission" to charge fees for digital records. *See Banuelos*, 2021 WI App 70, ¶ 41. As just explained, the purpose of the digital-fee provision in Wis. Stat. § 146.83(1h) (2009–10) was to *clarify the fee limit* (or lack thereof) for a digital record. *See Banuelos*, 2021 WI App 70, ¶ 41. The purpose was *not* to grant "permission" for such a fee. Absent a ban on fees for digital records, health care providers could already charge such fees before the Legislature enacted section 146.83(1h) in 2009. By repealing that limitless fee provision in 2011, the Legislature did not implicitly ban health care providers from charging even a small fee for digital records. Instead, to bring state law into conformity with federal fee limits, the Legislature simply removed the ability to charge an *unlimited* fee for digital records.

If the court of appeals' analysis of this statutory history were correct, then a repeal of Wis. Stat. § 146.83(3f)(b) would constitute an implied ban on any fees for patient records (even paper records). That strange view would make sense only if the fee provisions in section 146.83(3f)(b) were legislative "permission" to charge only

those fees. But they are not. Those provisions are simply limits on the listed fees.

In short, because fees for digital records are not mentioned in Wis. Stat. § 146.83, they are permissible and have no limit under Wisconsin law. Such fees are limited only by federal law.

B. The court of appeals' view of Wis. Stat. § 146.83 raises constitutional vagueness concerns.

Besides having no support in the statute's plain language or history, the court of appeals' interpretation of Wis. Stat. § 146.83 raises serious constitutional concerns. This Court "disfavor[s] statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 31, 391 Wis. 2d 497, 942 N.W.2d 900. "A statute is unconstitutionally vague if it does not give fair notice of the conduct prohibited by the legislation." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 43 n.10, 339 Wis. 2d 125, 810 N.W.2d 465.

The court of appeals' interpretation of Wis. Stat. § 146.83(3f) raises a serious question as to whether this subsection is unconstitutionally vague. As the court of appeals noted, this subsection does not mention electronic copies of patient health care records. *Banuelos*, 2021 WI App 70, ¶¶ 14, 18. Yet the court of appeals held that section 146.83(3f) bans fees for electronic records in part because a previous version of this statute had expressly allowed such fees. *Id.* ¶¶ 22–27.

That reasoning is troubling. Under that rationale, people should look to prior versions of a statute when trying to conform their behavior to the law. People should then assume that, if certain language was removed from a statute, the current version of the statute implicitly bans the conduct that the removed

language had "authorized." A silent ban on certain conduct, based on an inference about what the Legislature intended when it amended a statute, does not satisfy the constitutional requirement of fair notice.

C. The court of appeals' decision, if affirmed, would produce absurd results and harm patients.

The court of appeals correctly noted that it must interpret statutes "reasonably, to avoid absurd or unreasonable results." *Banuelos*, 2021 WI App 70, ¶ 9 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110). But it failed to recognize that its interpretation of Wis. Stat. § 146.83(3f) would produce three absurd or unreasonable results. It would encourage health care providers to use paper records, motivate health care providers to legally circumvent the fee limits in section 146.83(3f), and shift health care costs to other patients.

First, the court of appeals' decision incentivizes health care providers to use paper records, instead of digital records, because they clearly may charge fees for paper records. *See* Wis. Stat. § 146.83(3f)(b)1.; 45 C.F.R. § 164.524(c)(4). Wisconsin law no longer requires health care providers to deliver patient records in a digital format. *Compare* Wis. Stat. § 146.83(1k) (2009–10), *with* Wis. Stat. § 146.83 (2019–20). Federal law creates "a right to obtain" a patient record "in an electronic format" *only if* the health care provider "uses or maintains an electronic health record." 42 U.S.C. § 17935(e)(intro.) & (e)(1). If health care providers may recoup their costs for paper records but not for digital records, they will have a strong financial incentive to use paper records.

Such a result would be absurd. Paper records are much less convenient than digital records for patients and health care providers. Paper records must be physically printed, stored, and shipped to a recipient. Digital records are more user friendly,

especially if they are text searchable. In addition, the use of more paper records would be an inefficient use of our planet's natural resources, including wood for the paper and fuel for the vehicles that ship the records. Finally, fees for paper records might far exceed the allowable fees for digital records. When providing a digital record, a health care provider may charge a fee that does not exceed "the entity's labor costs in responding to the request for the copy." 42 U.S.C. § 17935(e)(3). For paper copies, a patient may be charged a per-page fee, shipping costs, and taxes. Wis. Stat. § 146.83(3f)(b)1. & 6. Certain requesters may be charged additional certification and retrieval fees for paper records. Wis. Stat. § 146.83(3f)(b)4. & 5.

The Legislature did not intend to encourage health care providers to use inconvenient, inefficient, and costly paper records. Yet the use of paper records would make financial sense if a health care provider could recoup its costs for paper records but not for digital records. The digitization of medical records has been a positive development for society. The court of appeals' decision would reverse that progress by motivating health care providers to return to using (or continue using) paper records.

Second, a health care provider may circumvent the court of appeals' decision by hiring a company to deliver requested patient records on its behalf. If such a company is not a health care provider, then "it is not subject to the fee restrictions in Wis. Stat. § 146.83(3f)(b)." *Townsend v. ChartSwap, LLC*, 2021 WI 86, ¶ 2, 399 Wis. 2d 599, 967 N.W.2d 21. In *Townsend*, for example, this Court held that the fee restrictions in section 146.83(3f)(b) did not apply to ChartSwap, LLC, when it delivered patient records on behalf of a health care provider. *Id.*

The court of appeals' decision creates a powerful reason for health care providers to contract with companies like ChartSwap.

Because such an arrangement circumvents the fee restrictions in Wis. Stat. § 146.83(3f)(b), it is unreasonable to think that the Legislature intended to encourage such arrangements.

Oddly enough, the court of appeals suggested that its interpretation of Wis. Stat. § 146.83(3f) would prevent "unlimited fees." *Banuelos*, 2021 WI App 70, ¶ 21. It claimed that "[i]f Wis. Stat. § 146.83(3f)(b) does not establish the universe of fees that may be charged for the service of providing patient health care records, then nothing would prevent health care providers from charging any amount they wished for all items or services that do not correspond to an enumerated fee." *Id.* ¶ 19. The court of appeals was plainly wrong because federal law limits the amount of fees that health care providers may charge for access to patient records. *See, e.g.*, 42 U.S.C. § 17935(e)(3); 45 C.F.R. § 164.524(c)(4). Ironically, the court of appeals' decision could result in unlimited fees by encouraging health care providers to contract with companies that are not subject to legal fee limits under *Townsend*.

Third, the court of appeals' decision would force some health care providers to pass onto other patients the cost of providing digital records. If a health care provider incurs a cost by delivering a digital record to a patient, someone must absorb that cost. The most likely way to absorb that cost is by increasing the price of health care for patients in general. The Legislature did not intend this unreasonable result. Under Wisconsin and federal law, the person who receives the medical record should cover the cost incurred. *See* Wis. Stat. § 146.83(3f)(b); 42 U.S.C. § 17935(e)(3); 45 C.F.R. 164.524(c)(4). When the Legislature amended Wis. Stat. § 146.83 in 2011, it did not intend to shift the cost of some patients' records onto other patients.

CONCLUSION

This Court should reverse the court of appeals' decision and hold that Wis. Stat. § 146.83 does not prohibit health care providers from charging a fee to cover the cost of delivering a digital record to a requester.

Dated this 23rd day of May 2022.

Respectfully Submitted,

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Civil Justice Council, Inc.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,975 words.

Dated this 23rd day of May 2022.

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Civil Justice Council, Inc.

CERTIFICATE OF COMPLIANCE WITH 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 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 23rd day of May 2022.

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Civil Justice Council, Inc.