STATE OF WISCONSIN
SUPREME COURT
Appeal No. 03-0988

MATTHEW FERDON, by his Guardian Ad Litem, VINCENT R. PETRUCELLI, CYNTHIA FERDON, and DENNIS FERDON,

Plaintiffs-Appellants-Petitioners,

v.

WISCONSIN PATIENTS COMPENSATION FUND, MEDICAL PROTECTIVE COMPANY, MICHAEL J. BROCKMAN, M.D., and AURORA HEALTH CARE, INC., d/b/a BAY WEST GYNECOLOGY & OBSTETRICS, LTD.,

Defendants-Respondents,

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, a/k/a CIGNA INSURANCE, f/k/a HEALTHSOURCE PROVIDENT ADMINISTRATORS, INC., a/k/a HEALTHSOURCE PROVIDENT, and COUNTY OF OCONTO,

Nominal-Defendants.

On Appeal From the February 17, 2003 Decision of The Brown County Circuit Court, The Honorable Peter J. Naze, Presiding

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NON-PARTY BRIEF OF THE WISCONSIN MEDICAL SOCIETY AND THE AMERICAN MEDICAL ASSOCIATION

Section (Rule) 809.19(7), Stats.

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INTRODUCTION

Nearly thirty years ago, Wisconsin's legislature made a policy choice to create a comprehensive medical liability system by enacting Chapter 655 of the Wisconsin statutes. Section 893.55(4)(d), Stats.,[1] the statutory cap on noneconomic damages, is one part of that system, which, as a whole, works well to maintain a stable health care environment for consumers and health care professionals alike.

The constitutional challenges to the statutory cap on noneconomic damages in medical malpractice cases are neither novel, nor new. In fact, this Court's decision issued less than eight months ago in *Maurin v. Hall*, 2004 WI 100, 274 Wis. 2d 28, 682 N.W.2d 866, rejected constitutional challenges to the statutory cap on noneconomic damages in medical malpractice wrongful death cases. *Stare decisis*, therefore, governs this case and the constitutional challenges to section 893.55(4) must fail.

[1] Pursuant to section 655.017, Stats., "[t]he amount of noneconomic damages recoverable ... is subject to the limits under s. 893.55(4)(d) and (f)."

Especially when compared to other states, Wisconsin enjoys a stable environment for consumers and health care professionals, and persons injured by medical malpractice are guaranteed full recovery for their economic losses.[2] Foreign case law addressing similar constitutional challenges to statutory caps, therefore, must be viewed within the context of each state's constitutional parameters and each state's medical liability environment. Section 893.55(4) is critical to strong health care delivery and liability systems and should be upheld as constitutional.

[2] Significantly, section 893.55(4)(d) caps only noneconomic damages, which inherently are difficult to quantify. "'[N]oneconomic damages' means moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection." Sec. 893.55(4)(a), Stats.

ARGUMENT

I. WISCONSIN COURTS HAVE UPHELD AS CONSTITUTIONAL THE LEGISLATURE'S POLICY CHOICES IN ENACTING THE STATUTORY CAP ON NONECONOMIC DAMAGES, AND THOSE DECISIONS SHOULD NOT BE REVERSED.

A. The Statutory Cap on Noneconomic Damages Is Presumed Constitutional.

When faced with a constitutional challenge, Wisconsin courts always begin by presuming that the legislature's policy choices are constitutionally sound.

> Statutes are presumptively constitutional.... The court indulges every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, we must resolve that doubt in favor of constitutionality.

Aicher ex rel. La Barge v. Wisconsin Patients Compensation Fund, 2000 WI 98, ¶18, 237 Wis. 2d 99, 613 N.W.2d 849 (citation omitted). This standard requires courts to defer to the policy-making choices of the legislature. After all, "[i]t is not [the court's] role to determine the wisdom or rationale

underpinning a particular legislative pronouncement." *Id.* at ¶57 (citation omitted).

In evaluating the constitutionality of the statutory cap on noneconomic damages, it is not this Court's role to second-guess the legislature's creation of a comprehensive medical liability system. In 1975, the legislature enacted Chapter 655 "in response to a perceived economic and social crisis." *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 509, 261 N.W.2d 434 (1978). Based on serious concerns over the number and size of medical malpractice awards, rising malpractice insurance premiums, and the continued availability of quality health care, the legislature created what is now the "exclusive procedure" and remedy for medical malpractice in Wisconsin. *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶14, 236 Wis. 2d 316, 613 N.W.2d 120.

This Court recently acknowledged that Chapter 655 strikes a proper balance based on legislative policy choices.

> The Wisconsin legislature concluded, after taking into account economic, social, and political considerations, ... that a fair and equitable system considers not only the victim's survivors but also the overall cost of wrongful death awards on the system of health care providers that is vital to the people of Wisconsin.... The legislature has pursued a legitimate objective in its quest to balance important considerations.

Maurin, 2004 WI 100, ¶108.

B. Wisconsin Courts Previously Have Rejected Constitutional Challenges to Chapter 655.

This is not the first constitutional challenge to Wisconsin's comprehensive medical liability system. In 1978, this Court faced a constitutional challenge to several provisions of Chapter 655. *Strykowski*, 81 Wis. 2d at 502. This Court concluded that Chapter 655 does not violate equal protection or due process guarantees, does not constitute an unlawful delegation of judicial authority, and does not impair a malpractice claimant's right of trial by jury.[3] *Id.* at 531.

[3] *Strykowski* did not address the constitutionality of a statutory cap on medical malpractice noneconomic damages. A $1 million cap was in effect for claims filed between June 14, 1986 and December 31, 1990. That cap was eliminated as of January 1, 1991. The current $350,000 cap, which adjusts annually per section 893.55(4)(d), was enacted in 1995.

Over twenty years later, the court of appeals addressed a constitutional challenge to the statutory cap on recovery of noneconomic damages in section 893.55(4)(d). *Guzman v. St. Francis Hosp.*, 2001 WI App 21, 240 Wis. 2d 559, 623 N.W.2d 776. In *Guzman*, the plaintiffs claimed that section 893.55(4) violated their right to a jury trial, the separation of powers doctrine, equal protection and substantive due process guarantees, and their right to a remedy. The court properly rejected all of the plaintiffs' arguments and concluded that section 893.55(4) passes constitutional muster.

Just last term, this Court rejected constitutional challenges to the statutory cap on noneconomic damages in medical malpractice wrongful death cases. In *Maurin*, this Court held that in a medical malpractice wrongful death case, section 895.04(4) limits the plaintiff's total recovery for noneconomic damages. 2004 WI 100, ¶¶18-19. The Court also rejected several constitutional challenges to the statute, including claims that the cap violated the plaintiffs' jury trial

right, the separation of powers doctrine, and equal protection and substantive due process guarantees. *Id.* at ¶¶100, 104, 109, 111.

Since Chapter 655 became law, Wisconsin courts have soundly rejected constitutional challenges to several of its provisions, including statutory caps on noneconomic damages. Based on the logic and legal rationale of the *Maurin* and *Guzman* decisions, the constitutional challenges to section 893.55(4)(d) raised in this case should be rejected. *Maurin* and *Guzman* are sound and well-reasoned precedent. The legislature's policy choice to place a cap on noneconomic damages in medical liability actions should be respected here, as it has in the past, and upheld as constitutional.

C. There Is No Justification For Departing From *Stare Decisis*.

Maurin is controlling authority that the statutory cap on medical malpractice noneconomic damages is constitutional. *See id.* at ¶112. To conclude otherwise would require this Court

to reject the rationale in *Maurin*. None of the criteria for overturning precedent, however, apply. *See Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257, *cert. denied*, 124 S.Ct. 2070 (2004).

No changes or developments in the law have undermined the rationale behind the decisions upholding the noneconomic damage cap as constitutional. *See id.* at ¶98. *Maurin* is less than a year old. There has been little time to apply the case in Wisconsin courts,[4] let alone time for any changes or developments to undermine the *Maurin* rationale. The only change since *Maurin* is the make-up of this Court, and that is not a sufficient basis for overturning precedent. *See id.* at ¶95.

In addition, there is no showing that *Maurin* and *Guzman* have become detrimental to coherence and consistency in the law. *See id.* at ¶98. In *Johnson Controls*, this Court looked to case law from foreign jurisdictions – not as controlling authority

[4] *Maurin* has thus far been cited only once in other published court decisions. *State ex rel. Myers v. Swenson*, 2004 WI App 224, ¶6 (standard of review for constitutionality of a statute).

– but to understand the national environment regarding the issues at hand. *See id.* at ¶100 n.41. A look elsewhere now shows that some states are repairing ailing medical liability systems and that others are even turning to statutory caps on medical malpractice noneconomic damages. *See infra* sec. II.B. Wisconsin, accordingly, is not "out of step" with the rest of the country with a constitutional statutory cap on medical malpractice noneconomic damages.

There is no "need to make [the *Maurin*] decision correspond to newly ascertained facts." *See Johnson Controls*, 2003 WI 108, ¶98. Although *Maurin* was a wrongful death medical malpractice case, the Court's underlying rationale for upholding the statutory cap is not confined to those facts.

Finally, the decisions upholding the statutory caps as constitutional are workable and foster the purpose of Wisconsin's comprehensive medical liability system. Wisconsin courts have enforced the statutory cap since its enactment in 1995. Since 2001, courts and litigants have relied on precedent

upholding the cap as constitutional. *See Guzman*, 2001 WI App 21. In addition, lower courts now have *Maurin* to apply. There is no basis, therefore, to claim that the statutory cap and corresponding case law are "unworkable."

To the contrary, Wisconsin's comprehensive medical liability system works well and helps health care providers deliver quality, affordable health care to Wisconsin residents. There is no basis for departing from precedent upholding the statutory cap on medical malpractice noneconomic damages as constitutional.

II. WISCONSIN'S MEDICAL LIABILITY SYSTEM, IN CONTRAST TO OTHER STATE SYSTEMS, ENCOURAGES A STABLE ENVIRONMENT FOR CONSUMERS AND HEALTH CARE PROFESSIONALS ALIKE.

A. The Statutory Cap On Medical Malpractice Noneconomic Damages And The Injured Patients And Families Compensation Fund Should Not Be Ignored As Important Factors In Avoiding The Troubling Trends In Other States.

Chapter 655 was born out of a health care crisis facing Wisconsin in the 1970s. At that time, the legislature was concerned with the size and number of malpractice suits and awards, rising malpractice insurance premiums, and how these problems, in turn, affected Wisconsin's health care delivery and medical liability systems. Today many states are again experiencing crises in their health care systems, with several of the same concerns.[5] According to the American Medical

[5] Although there may be academic debate about the "crisis" label, there is little debate that physicians in many states are experiencing greatly increased malpractice insurance premiums and reduced physician availability, both of which affect the availability and affordability of health

Association ("AMA"), twenty states are experiencing a medical liability crisis, and many other states are showing problem signs.[6]

Wisconsin, fortunately, is among the six states that are "okay."[7] For example, medical liability insurance premiums in Wisconsin are not increasing at the rapid rates of other states.[8] In addition, Wisconsin is attracting physicians, including doctors leaving crisis states for a more favorable health care

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care services. *See, e.g.*, Blue Cross Blue Shield Ass'n, *The Malpractice Insurance Crisis: The Impact on Healthcare Cost and Access* 3 (2003), available at http://www.bcbs.com/costudies/reports/malpractice_Ins_Crisis/127.pdf; Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health and Human Servs., *Special Update on Medical Liability Crisis* (September 25, 2002) available at http://aspe.hhs.gov/daltcp/reports/mlupd1.htm.

[6] *See* American Medical Association, *America's Liability Crisis: A National View* (June 2004), available at http://www.ama-assn.org/ama1/pub/upload/mm/450/med_liab_20stat.pdf.

[7] California, Colorado, New Mexico, Louisiana and Indiana are also "okay." *Id.*

[8] *See* Steve Busalacchi, *Who Will Care For Our Families?*, Fall 2003, available at http://www.wisconsinmedicalsociety.org/health_news/yourdoctor/2003vol3_lead.cfm.

environment.[9] So, the net result is that while other states are decreasing health care services, Wisconsin is maintaining a stable health care environment for patients and health care professionals alike.

The statutory cap on medical malpractice noneconomic damages, as well as the existence of the Injured Patients and Families Compensation Fund (the "Fund"), have been important factors in avoiding the troubling trends in other states.[10] As vital components of Wisconsin's comprehensive medical liability system, the statutory cap and the Fund ensure that patients with medical liability claims recover their full economic losses and noneconomic damages subject to the statutory cap. *See* secs. 655.23(5) and 655.27(1), Stats.

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[9] *See* Gayle Worland, *Doctors Flee Insurance Costs, State*, Chicago Tribune, March 12, 2004, at C1.

[10] *See* Office of the Commissioner of Insurance, *An Audit: Injured Patients and Families Compensation Fund*, 04-12, at 20 (October 2004), available at http://www.legis.state.wi.us/lab/PastReportsByDate.htm.

Wisconsin mandates that health care providers carry medical liability insurance and requires additional malpractice coverage through mandatory participation in the Fund. Sec. 655.23(4), Stats. The Fund is financed by yearly assessments from health care providers, which are paid in addition to yearly insurance premiums. *See* sec. 655.27(3), Stats. The Fund's assessments and subsequent investments are what guarantee injured patients unlimited recovery for economic damages and ensure payment of noneconomic damages. By limiting the amount of noneconomic damages that may be awarded, section 893.55(4)(d) allows the Fund to ensure continued recovery to injured patients for all economic damages. As two components of the comprehensive medical liability system, the statutory cap on noneconomic damages and the existence of the Fund allow Wisconsin citizens to avoid health care availability and affordability concerns that are troubling other states.[11]

[11] Tangible research also confirms that the statutory cap helps maintain the Fund's sound financial position. For the past eight years, health care providers' assessments to the Fund have been reduced each year as a result

B. Foreign Case Law Addressing the Constitutionality of Statutory Caps Must Be Viewed In The Context Of Each State's Constitution, Medical Liability System And Environment.

Each state has a separate medical liability system, established under state law and pursuant to state constitutional authority. Authority from other jurisdictions addressing state constitutional challenges to statutory caps, therefore, must be viewed within the context of that state's constitution, medical liability system and environment. Although not controlling authority, foreign case law also aids this Court's understanding of national trends.

In *Maurin*, this Court looked to decisions from other state courts addressing constitutional challenges to statutory caps on noneconomic damages. *See* 2004 WI 100, ¶¶198-202, 210-11 (Abrahamson, C.J., concurring). Reliance on authority from

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of an annual assumed savings of somewhere between 16.85 percent and 20.19 percent in losses due to the cap on noneconomic damages, which, in turn, promotes a stable health care delivery system. *See* Wisconsin Patients Compensation Fund Actuarial Analysis as of September 30, 2003.

other states – including Florida, Illinois, New Hampshire and Texas – however, is misplaced without careful comparison of each of those state constitutions and how each differs from the Wisconsin constitution. *See Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Lucas v. United States,* 757 S.W.2d 687 (Tex. 1988); *Wright v. Central Du Page Hospital Ass'n*, 347 N.E.2d 736 (Ill. 1976); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980); *see also Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

None of those state constitutions contain a provision similar to Wisconsin Constitution article XIV, section 13, allowing the legislature to abolish the common law. The Kansas legislature's authority to abrogate the common law, for example, is itself only a function of common law. *See Manzanares v. Bell*, 522 P.2d 1291, 1301 (Kan. 1974). Moreover, each of the foreign jurisdictions previously cited requires a *quid pro quo* for any abrogation of rights existing at common law. *See Smith*,

507 So. 2d at 1089; *Lucas*, 757 S.W.2d at 690; *Wright*, 347 N.E.2d at 743; *Bell*, 757 P.2d at 259; *Carson*, 424 A.2d at 837-38. Wisconsin, in contrast, has rejected the *quid pro quo* requirement. *See Aicher*, 2000 WI 98, ¶40.

Foreign case law also must be viewed in the context of those states' health care environments, and as part of the national backdrop of medical liability systems generally. Texas and Florida, for example, recently enacted legislation – including statutory caps on medical malpractice noneconomic damages – to address their suffering medical liability systems. *See* Tex. Civ. Prac. & Rem. Code sec. 74.301; Florida Stat. sec. 766.118. The citizens of Texas even adopted a state constitutional amendment authorizing the legislature to enact the statutory cap and to allow the new statute to survive constitutional scrutiny. *See* Texas Const. art. III, sec. 66. Previous case law from Texas and Florida striking down statutory caps on noneconomic damages, therefore, does not reflect the current medical liability systems in those states.

Indeed, it appears that even states that previously struck down caps as unconstitutional are embracing new statutory enactments similar to Wisconsin's.[12]

Other jurisdictions, including states with "okay" medical liability systems, have upheld statutory caps on medical malpractice noneconomic damages in the face of constitutional challenges. *See, e.g., Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985).

Again, foreign case law does not control this Court's analysis and application of Wisconsin precedent. Other state cases, however, do allow this Court to compare Wisconsin's medical liability system – including the statutory cap on medical malpractice noneconomic damages – to other state systems and

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[12] In Wyoming, another "crisis" state, the Wyoming Healthcare Commission recently released a study estimating that a $250,000 statutory cap on noneconomic damages would reduce expected medical malpractice losses (indemnity) by about 19 percent. *See* Wyoming Healthcare Commission, *Projected Effect of Capping Non-Economic Damages on Physicians and Surgeons Professional Liability Costs*, October 13, 2004, available at http://www.wyominghealthcarecommission.org/_pdfs/2004_1013_Non_Economic_Damages_Rpt.pdf..

national trends. In doing so, it is clear that Wisconsin's medical liability and health care delivery systems are working well to provide affordable and accessible health care to Wisconsin citizens.

CONCLUSION

For the reasons stated above and based on the entire record in this action, the Wisconsin Medical Society and the American Medical Association ask the Court to affirm the circuit court and court of appeals' decisions.

Dated: February 14, 2005

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of sections 809.19(8)(b) and (d) and 809.62(4), Stats., for a brief produced with a proportional font. The length of this brief is 2899 words.

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