SUPREME COURT
STATE OF WISCONSIN

---

YVETTE M. MAURIN, as Personal Representative of the estate of Shay Leigh Maurin, deceased

Plaintiff-Respondent-
Cross Appellant

YVETTE M. MAURIN, Individually and as Personal Representative of the Estate of Shay Leigh Maurin, and JOSEPH MAURIN,

Plaintiffs-Respondents, Appeal No. 00-0072

and QUAD/GRAPHICS, INC.,

Plaintiff,

v.

GORDON HALL, M.D., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., and PATIENTS COMPENSATION FUND,

Defendants-Appellants-
Cross-Respondents

---

# AMICUS BRIEF OF THE WISCONSIN MEDICAL SOCIETY, THE AMERICAN MEDICAL ASSOCIATION, AND THE WISCONSIN HOSPITAL ASSOCIATION, INC.

---

**On Appeal From The November 29, 1999 Order Of The Washington County Circuit Court, The Honorable Lawrence F. Waddick, Presiding**

---

**On Certification From**
**The Wisconsin Court Of Appeals**

---


Timothy J. Muldowney
State Bar No. 1017596
Jennifer L. Peterson
State Bar No. 1033482
LaFollette Godfrey & Kahn
One East Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

Attorneys for Wisconsin Medical Society, American Medical Association and Wisconsin Hospital Association, Inc.

Mark L. Adams
State Bar No. 1006200
Melanie Cohen
State Bar No. 1019440
Wisconsin Medical Society
330 East Lakeside Street
P.O. Box 1109
Madison, WI 53701-1109
(608) 442-3800

Attorneys for Wisconsin Medical Society

Laura J. Leitch
State Bar No. 1022122
Wisconsin Hospital Association, Inc.
5721 Odana Road
Madison, WI 53719
(608) 274-1820

Attorney for Wisconsin Hospital Association, Inc.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

### CASES



### STATUTES

**OTHER AUTHORITIES**

## INTRODUCTION

> The legislature has made a policy determination that the efficient and effective provision of health care in Wisconsin requires not only a restructuring of medical-malpractice law in this state … but also that "[t]aming the costs of medical malpractice" by limiting the right of patients injured by medical malpractice to recover for their injuries "ensur[es] access to affordable health care" for all, and that this is a "legitimate legislative objective[]."

*Guzman v. St. Francis Hosp.*, 2001 WI App 21, ¶ 5, 240 Wis. 2d 559, 623 N.W.2d 776 (*quoting Aicher ex rel. LaBarge v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶ 78, 237 Wis. 2d 99, 613 N.W.2d 849).

In 1975, nearly 30 years ago, Wisconsin's legislature made a policy choice to create a comprehensive system to address medical liability by enacting Chapter 655 of the Wisconsin Statutes. 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.

Numerous related components of that comprehensive system together determine how persons injured by medical malpractice are compensated for their injuries. One such component of the

system—the statutory caps on medical malpractice noneconomic damages, section 893.55(4), Stats., and wrongful death damages, section 895.04(4), Stats.—is challenged in this appeal as unconstitutional. It is also asserted that these two statutes allow the "stacking" of damages above and beyond the stated caps. These statutes, however, should not be considered in isolation. Instead, they must be viewed in the context of Chapter 655 as a whole, keeping in mind the legislature's policy decision to address medical liability in Wisconsin through a comprehensive system.

Moreover, in reviewing these limits on noneconomic damages, the Court should consider how well Wisconsin's comprehensive system works when compared to other states. Unlike other states, Wisconsin is not experiencing recent trends that can severely damage a health care delivery system. Instead, under Chapter 655 Wisconsin maintains a stable environment for consumers and health care professionals, and persons injured by medical malpractice are guaranteed full recovery for their economic losses. Chapter 655 as a whole—including the caps on noneconomic damages and wrongful death damages—cannot be ignored for the significant impact it has on maintaining a healthy medical liability system in Wisconsin.

## I. THE STATUTORY CAPS ON MEDICAL MALPRACTICE NONECONOMIC DAMAGES AND WRONGFUL DEATH DAMAGES ARE WELL-REASONED POLICY CHOICES PREVIOUSLY UPHELD AS CONSTITUTIONAL BY WISCONSIN COURTS.

### A. The Statutory Caps Are A Vital Part Of The Legislature's Comprehensive System For Determining Compensation And Ensuring Recovery For Medical Liability.

In 1975, the Wisconsin legislature decided to address problems involving medical liability in this state because of a "perceived crisis [that] led the legislature to make a policy determination about the costs of health care." *See Aicher*, 2000 WI 98, ¶ 63. The legislature cited several concerns that led it to create a comprehensive medical liability system:

> a sudden increase in the number of malpractice suits, in the size of awards, and in malpractice insurance premiums … [The legislature also] identified several impending dangers: increased health care costs, the prescription of elaborate "defensive" medical procedures, the unavailability of certain hazardous services and the possibility that physicians would curtail their practices.

*State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 508, 261 N.W.2d 434 (1978). The legislative response to these concerns was Chapter 655, enacted to "control[] all claims for death or injury resulting from medical malpractice." *Czapinski*, 2000 WI 80, ¶ 18. The legislature made a policy determination that "[m]edical malpractice

actions are substantially distinct from other tort actions," and "declare[d] that the circumstances surrounding medical malpractice litigation and insurance required the enactment of [Chapter 655]." *Strykowski*, 81 Wis. 2d at 509. "It is now firmly established that Chapter 655 constitutes the exclusive procedure and remedy for medical malpractice in Wisconsin." *Finnegan v. Wisconsin Patients Compensation Fund*, 2003 WI 98, ¶ 22, 263 Wis. 2d 574, 666 N.W.2d 797 (citations omitted).

Chapter 655 is a comprehensive system for determining compensation for medical malpractice liability. Among other things, the statute creates mediation panels to review claims, *see* sec. 655.465, Stats., and establishes the Patients Compensation Fund (the "PCF"). *See* sec. 655.27, Stats. The PCF "provide[s] excess medical malpractice coverage for health care providers." *Patients Compensation Fund (Insurance and Health and Family Services)*, Joint Committee on Finance, Paper #458, April 23, 2003.

> Under current law, health care providers must obtain primary medical malpractice insurance from private insurance companies in the amount of $1 million per occurrence and $3 million per policy in the aggregate. PCF provides coverage in excess of the primary insurance, and fund coverage is unlimited.

*Id.*; *see* sec. 655.23(4), Stats. The PCF is a significant component of Wisconsin's comprehensive medical liability system because it

guarantees payment of liability above and beyond the required primary insurance coverage of a health care provider. Patients with medical liability claims need not depend on a health care provider's ability to answer for exposure in excess of his or her primary insurance coverage. Instead, the PCF is obligated, by law, to pay medical malpractice damages beyond the limits set by the legislature for a provider's individual financial responsibility. *See* secs. 655.23(5) and 655.27(1), Stats.

The comprehensive medical liability system also ensures that health care providers are able to obtain the minimum primary liability coverage mandated by statute. Section 619.04, Stats., establishes mandatory health care liability risk-sharing plans offered by the Office of the Commissioner of Insurance. Significantly, these plans ensure primary liability insurance coverage to health care providers who otherwise may be unable to obtain coverage in the private sector.

Another significant component of Wisconsin's comprehensive medical liability system is the statutory caps on noneconomic damages. 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)." Accordingly, section 893.55

"enumerate[s] and limit[s] the damages that may be collected in medical malpractice actions which, as a primary matter, remain governed by Chapter 655." *Finnegan*, 2003 WI 98, ¶ 31.

Section 893.55(4) defines noneconomic damages and places limits on the recovery thereof.

> "[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. Previously, the legislature imposed a $1 million cap on noneconomic damages in medical malpractice claims.[1] In 1995, however, the legislature adopted a $350,000 cap on noneconomic damages and mandated that the cap be adjusted "to reflect changes in the consumer price index … at least annually." Sec. 893.55(4)(d), Stats.

The medical liability statutes also include a cap on recovery of noneconomic damages for medical malpractice actions resulting

[1] The $1 million cap was in effect for claims filed between June 14, 1986 and December 31, 1990. The provision, however, had a sunset provision eliminating the cap as of January 1, 1991.

in death. Section 893.55(4)(f)[2] provides that the wrongful death limit on noneconomic damages in section 895.04(4) applies to medical malpractice claims even though the limit in section 893.55(4)(d) also applies. Section 895.04(4) limits noneconomic damages in a wrongful death case to $500,000 per occurrence for a deceased minor or $350,000 per occurrence for a deceased adult.

The statutory caps on noneconomic damages in sections 893.55(4) and 895.04(4) are an important part of the comprehensive medical liability system. These statutes limit recovery for those very subjective and intangible losses. Compensation to be awarded for "pain and suffering," "embarrassment" and "worry" is highly subjective and can be equally difficult to quantify. Awards, therefore, can vary greatly. The legislature's decision to place a reasonable, maximum recovery on those injuries sensibly ensures the integrity of the liability system as a whole.

The caps are especially important because Chapter 655 does not limit recovery for economic damages. Since there is no statutory cap on recovery of medical malpractice economic damages,

[2] "Notwithstanding the limits on noneconomic damages under this subsection, damages recoverable against health care providers … for wrongful death are subject to the limit under s. 895.04(4). If damages in excess of the limit under s. 895.04(4) are found, the court shall make any reduction required under s. 895.045 and shall award the lesser of the reduced amount or the limit under s. 895.04(4)." Sec. 893.55(4)(f), Stats.

claimants are assured full recovery of their economic losses through the PCF. The caps on recovery for highly subjective damages—noneconomic damages—is the legislature's method to control the overall magnitude of medical liability claims without adversely affecting full recovery of economic losses or threatening the integrity of the medical liability system as a whole.

### B. Wisconsin Courts Have Upheld As Constitutional The Legislature's Policy Choices In Enacting The Statutory Caps, And Those Decisions Should Not Be Reversed.

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*, 2000 WI 98, ¶ 18 (citing *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46-47, 205 N.W.2d 784 (1973)). This standard necessarily 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).

This is not the first constitutional challenge to Wisconsin's comprehensive medical liability system. As early as 1978, this Court was faced with a constitutional challenge to several provisions of Chapter 655. *Strykowski*, 81 Wis. 2d at 502. Significantly, 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. *Id.* at 531.

Over twenty years later, the court of appeals specifically addressed a constitutional challenge to the statutory cap on recovery of noneconomic damages in section 893.55(4)(d). *Guzman*, 2001 WI App 21; *see Czapinski*, 2000 WI 80 (rejecting equal protection challenge to section 893.55(4)(f)). 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 denied their constitutional right to a remedy. The court properly rejected all of the plaintiffs' arguments and concluded that section 893.55(4) passes constitutional muster.

Wisconsin courts already have soundly rejected the constitutional challenges to the statutory caps on noneconomic

damages raised in this case.[3] Based on the holdings in *Guzman*, including the underlying rationale, the constitutional challenges to the statutory caps on noneconomic and wrongful death damages should be rejected. *Guzman* is sound and well-reasoned precedent. The legislature's policy decisions to cap noneconomic and wrongful death damages in medical malpractice cases, therefore, should be upheld.

## II. TODAY, WISCONSIN'S COMPREHENSIVE MEDICAL LIABILITY SYSTEM, INCLUDING THE STATUTORY CAPS, CONTINUES TO WORK WELL BY ENCOURAGING A STABLE ENVIRONMENT FOR CONSUMERS AND HEALTH CARE PROFESSIONALS ALIKE.

Chapter 655 originated out of a health care crisis facing Wisconsin in the 1970's. At that time, the legislature was greatly concerned with, among other things, the size and number of malpractice suits and awards, and rising malpractice insurance premiums. Today, many states are again experiencing crises in their health care systems, with several of the same concerns. According to the American Medical Association ("AMA"), nineteen states are experiencing a medical liability crisis, and many other states are

[3] Although *Guzman* specifically addressed the constitutionality of section 893.55(4), the rationale underlying the court's decision applies equally to claims regarding section 895.04(4).

showing problem signs.[4] Wisconsin, fortunately, is among the six states that that are "okay."[5]

Last July, for example, the AMA announced Wyoming as "the 19th state in a full medical liability crisis."[6] The report came as Wyoming physicians faced significant increases in their professional liability insurance premiums, which in turn hampered efforts to recruit new Wyoming physicians and caused many physicians practicing there to plan early retirement. American Medical Association, *America's Medical Liability Crisis Backgrounder* (June 27, 2003), at http://www.ama-assn.org/ama1/pub/upload/mm/31/wyomingbackgrounder.doc.

Unfortunately, the net result of the problems for health care providers is a decrease in health care services for consumers.

- A trauma unit in Jackson, Wyoming "is in jeopardy of closing as its surgeons are struggling to obtain affordable medical liability insurance. Without the

[4] According to the AMA, Arkansas, Connecticut, Florida, Georgia, Illinois, Kentucky, Mississippi, Missouri, New Jersey, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wyoming are currently experiencing a medical liability crisis. Twenty-five other states are "showing problem signs." American Medical Association, *America's Medical Liability Crisis: A National View* (July 2003), at http://www.ama-assn.org/ama1/pub/upload/mm/31/crisismap0303.pdf.

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

[6] Press Release, American Medical Association, *Wyoming Becomes 19th State in a Medical Liability Crisis* (July 8, 2003), available at http://www.ama-assn.org/ama/pub/article/1617-7862.html.

trauma care in Jackson, patients will be forced to travel to Idaho Falls, ID, or Salt Lake City, UT [for emergency care]—travel that will take hours in good weather." *Id.*

- Many counties in Pennsylvania "are now considered either at or near medically underserved." *See* Steve Busalacchi, *Who Will Care for Our Families?*, Fall 2003, available at http://www.wisconsin medicalsociety.org/health_news/yourdoctor/2003vol3_ lead.cfm. "There's not a single hospital in South Philadelphia that has a maternity service—not a single one." *Id.*

With nineteen states in crisis and twenty-five states showing problem signs, these are merely a sample of similar crises that physicians and consumers are experiencing across the country.[7] Even health care providers as close as Illinois are closing their doors.[8]

Unlike these other states now in crisis, Wisconsin is not experiencing these recent trends, so potentially damaging to the health care system. Medical liability insurance premiums in Wisconsin are not increasing at the rapid rates of other states. *See* Busalacchi, *supra.* Wisconsin actually is attracting physicians.

---

[7] *See* Tanya Albert, *Pennsylvania Tort Crisis; Lawmakers Fiddle,Doctors Burn*, American Medical News, January 12, 2004, available at http://www.ama-assn.org/amednews/2004/01/12/prl10112.htm; *Legislative Preview '04: Rising medical malpractice premiums to be issue*,The Daily Record (Baltimore), January 9, 2004.

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

"Wisconsin's market is so stable that doctors are coming here from across the country." *Id.* In fact, doctors are leaving crisis states, like Illinois, to come and practice medicine in Wisconsin's favorable health care environment. *Id.;* Worland, *supra* note 8.

Wisconsin's statutory caps on noneconomic damages should not be ignored as one important factor in avoiding the troubling trends of other states. Recently, a study concluded that caps on noneconomic damages in medical malpractice cases are associated with increased physician supply.[9] In addition, tort reforms—including caps on noneconomic damages—are being offered as a solution to the problem of rapidly rising medical malpractice insurance premiums in other states.[10]

Wisconsin has research identifying the specific impact of the statutory caps on health care providers right here at home. Pursuant to section 601.427(9), Stats., the Office of the Commissioner of Insurance ("OCI") submits a report to the legislature every two years evaluating the impact of the statutory caps. In May 2003, OCI

---

[9] Press Release, U.S. Department of Health and Human Services, Agency for Healthcare Research and Quality (July 7, 2003), available at http://www.hhs.gov/news/press/2003pres/20030707.html

[10] *See, e.g., Tort Reform Bill Passes Mississippi Senate,* Picayune Item, February 26, 2004; *Tort Reform Issue Faces Major Vote March 9,* Tribune-Review (Pittsburgh), February 27, 2004.

reported that the total number of health care providers in Wisconsin since 1996 has remained relatively steady. Office of the Commissioner of Insurance, *Report on the Impact of 1995 Wisconsin Act 10* (May 12, 2003). This is especially significant when compared to provider declines being suffered in crisis states. A steady population of health care providers certainly enhances Wisconsin's ability to provide accessible and high quality health care to consumers.

The OCI report also concludes that the statutory caps on noneconomic damages have had a discernible impact on health care providers by reducing the assessments collected by the PCF over the last seven years. *Id.* Health care providers pay annual assessments to the PCF pursuant to section 655.27(3), Stats. The primary factor in determining those assessments is the "overall financial position of the [PCF]." *Id.* For the past eight years, health care providers' assessments to the PCF have been reduced each year as a result of an annual assumed savings of somewhere between 16.85% and 20.19% in losses due to the cap on non-economic damages. Wisconsin Patients Compensation Fund Actuarial Analysis as of September 30, 2003, Supplemental Exhibits to Report to the Actuarial Committee, Exhibit 52. The statutory caps on noneconomic damages, therefore,

play a significant role in maintaining the PCF's overall healthy financial position, and, consequently, a strong health care delivery system. Furthermore, consumers ultimately benefit from the reduced assessments through affordable and accessible health care services.

The statutory caps have had a proven, positive impact on Wisconsin's health care providers and, in turn, the health care consuming public. As just one part of Wisconsin's comprehensive medical liability system, the statutory caps should not be dismissed as a significant factor in helping to provide and maintain a stable health care environment for consumers and health care professionals alike.

## CONCLUSION

Sections 893.55(4) and 895.04(4) are a vitally important part of Wisconsin's comprehensive medical liability system. Along with the other elements of Chapter 655, they work to promote affordable health care while ensuring full recovery for economic losses stemming from medical liability. They are constitutionally permissible legislative policy choices and should be upheld against the challenges advanced in this case.

Dated: March 12, 2004

LA FOLLETTE GODFREY & KAHN

By: _____

Timothy J. Muldowney
State Bar No. 1017596
Jennifer L. Peterson
State Bar No. 1033482

LaFollette Godfrey & Kahn
One East Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

*LaFollette Godfrey & Kahn is an office of Godfrey & Kahn, S.C.*

Mark L. Adams
State Bar No. 1006200
Melanie E. Cohen
State Bar No. 1019440
Attorneys for Wisconsin Medical Society
330 East Lakeside Street
P.O. Box 1109
Madison, WI 53701-1109
(608) 442-3800

Laura J. Leitch
State Bar No. 1022122
Attorney for Wisconsin Hospital Association, Inc.
5721 Odana Road
Madison, WI 53719
(608) 274-1820

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 2,995 words.

Jennifer L. Peterson

Dated: March 12, 2004

G:\DBD\Litigation Center\Briefs (electronic)\Maurin v. Hall.doc