STATE OF WISCONSIN
SUPREME COURT

No. 2014AP002812

ASCARIS MAYO AND ANTONIO MAYO,

Plaintiffs-Respondents-Cross-Appellants,

UNITED HEALTHCARE INSURANCE COMPANY AND WISCONSIN STATE DEPARTMENT OF HEALTH SERVICES,

Involuntary Plaintiffs,

v.

WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

Defendant-Appellant-Cross-Respondent-Petitioner,

PROASSURANCE WISCONSIN INSURANCE COMPANY, WYATT JAFFE, MD, DONALD C. GIBSON, INFINITY HEALTHCARE, INC. AND MEDICAL COLLEGE OF WISCONSIN AFFILIATED HOSPITALS, INC.,

Defendants.

BRIEF OF AMICI CURIAE WISCONSIN MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION LITIGATION CENTER

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The Wisconsin Medical Society ("Society") and the American Medical Association Litigation Center ("AMA") are organizations representing the interests of Wisconsin physicians. Their members provide the high-quality, patient-centered care depended upon by the people of Wisconsin. They depend upon the medical-malpractice liability system of Chapter 655 to balance myriad interests while providing essential protections for their patients.

The Court of Appeals' decision unbalances that system with the removal of an essential part: the cap on noneconomic damages (the "Cap"). App. 002. The Cap, contained in Wis. Stat. § 893.55(4)(d), is the lynchpin that allows Chapter 655 to guarantee recovery for *all* patients injured by medical negligence of *all* economic damages regardless of amount plus up to $750,000 in noneconomic damages.

Amici's members are proud to support, financially and through their advocacy, the enhanced protections for their patients provided by this system and urge this Court to place the Cap in its proper context as it determines whether the existence of the Cap in the Chapter 655 system is rational.

The Court of Appeals' decision would convert Chapter 655 into something the legislature never intended—a novel right to guaranteed, unlimited, uncapped, recovery—something no other state provides nor is

provided to any other tort claimant in this State. Such a judicially-created remedy would destabilize the Fund and Wisconsin's healthcare system.

ARGUMENT

The Cap Is An Integral Part of the Comprehensive Chapter 655 Medical-Liability System Benefitting Patients and Physicians.

The legislature has a longstanding interest in "ensur[ing] affordable and accessible health care" is provided for all Wisconsin citizens. Wis. Stat. § 893.55(1d)(a). This Court thus has recognized that the legislature is justified in constructing a system for malpractice claims that differs in important respects from the common law. *See State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 509-12, 261 N.W. 434, 443-44 (1978).

For physicians and patients, an uncontrolled medical-liability environment negatively impacts the attraction and retention of high-quality physicians, the control of costs incurred in providing care, and the practice of needed medical services (particularly high-risk services). *See* Wis. Stat. § 893.55(1d)(a). Under the current system, by contrast, the data confirm that physicians in Wisconsin are delivering high-quality care. Wisconsin is consistently ranked among (if not at) the top nationally in overall healthcare quality.[1] Strong physician-patient relationships drive this result—and those

[1] *See, e.g.*, United States Dep't of Health & Human Serv., Agency for Healthcare Research and Quality (AHRQ), Nat'l Healthcare Quality and Disparities Reports, Wisconsin: https://nhqrnet.ahrq.gov/inhqrdr/Wisconsin/snapshot/summary/All_Measures/All_Topics.

relationships thrive in a positive environment for the practice of medicine, where physicians can fully consult with patients and patients can engage confidently with physicians, not burdened by fear of litigation. Chapter 655 is an important legislative means toward these ends. Under its comprehensive system, patients receive care with access to unparalleled recovery should the unthinkable occur.

A. Chapter 655 Provides Guaranteed Access to "Adequate Compensation."

The comprehensive system in Chapter 655 ensures that those injured by medical malpractice will receive "adequate compensation." Wis. Stat. § 893.55(1d)(a). Under this system of integrated parts (professional liability insurance, Fund, and Cap), patients receive unparalleled protections:

- For those with injuries below $1 million, physicians are required to have insurance in at least that amount, guaranteeing patients' means of recovery.

- For those who incur more than $1 million in past and/or future medical expenses, the combination of mandatory primary insurance and unlimited excess Fund coverage ensures complete recovery of all medical expenses, past and future. The same is true of wage loss and other economic damages, no matter the amount.

- For those who are awarded more than $750,000 in noneconomic damages, their recovery is limited to that amount, but similarly guaranteed by the combination of mandatory primary insurance and existence of the Fund.

See Wis. Stat. §§ 655.002; 655.006; 655.007; 655.009; 655.015; 655.017; 655.23; 655.27; 893.55(4)(d).

The Court of Appeals equated "adequate" compensation with complete entitlement to a "full jury award," and found it lacking. App. 018. These are not the same things.[2] This Court explained in *Wiener v. J.C. Penney Co.*, 65 Wis. 2d 139, 150-51, 222 N.W.2d 149, 155 (1974): "[S]ec. 9, art. I of our constitution does not entitle Wisconsin litigants to the exact remedy they desire . . . the legislature may impose reasonable limitations upon the remedies available to parties."

The legislature imposed reasonable limitations in Chapter 655, specifically the Cap, to ensure protection for those severely injured, like the Mayos. Perhaps the best way to assess whether the Cap furthers the legislature's interest in providing injured patients with "adequate compensation" is to compare it to the alternatives. Had Mrs. Mayo's injuries been caused by a municipal employee, her total damages would have been capped at $50,000, or 0.2 percent of the total verdict. *See* Wis. Stat. § 893.80(3). Had Mrs. Mayo had been injured by a state employee, her total damages would have been capped at $250,000, or 1 percent of the total

[2] "Adequate" means "sufficient for a specific need or requirement; . . . of a quality that is acceptable but not better than acceptable." Merriam-Webster (2018); https://www.merriam-webster.com/dictionary/adequate.

verdict. *See* Wis. Stat. § 893.82(6). Had Mrs. Mayo's injuries occurred in a workplace, the worker's compensation system, Chapter 102, allows for guaranteed but limited damages, and this tradeoff, a "greater departure from common law tort actions" than that of Chapter 655, survived an equal protection challenge. *See State ex rel. Strykowski v. Wilkie,* 81 Wis. 2d 491, 509, 261 N.W.2d 434, 443 (1978). In these various other contexts, the amount of compensation *actually recovered* would not approach the more than $8 million the Mayos have already received.

The Mayos would face similar problems outside the Chapter 655 system. For example, if Mrs. Mayo's injuries instead had been the result of a motor-vehicle accident, she would have received a judgment for all noneconomic damages awarded by the jury. However, because Wisconsin drivers only need carry $25,000 in motor vehicle liability insurance, her ability to actually recover damages would depend on the amount of insurance voluntarily purchased and the available assets of the tortfeasor. *See* Wis. Stat. §344.33(2). If Mrs. Mayo's injuries had been the result of a personal liability, her judgment would be in the full amount, but her *recovery* would be similarly limited by the amount of insurance voluntarily purchased by the homeowner and any available assets.

Chapter 655, including the Cap, also provides guaranteed compensation for proper claimants greater than that in other states' medical

liability systems. If Mrs. Mayo's injuries had occurred in Indiana or Nebraska, her recovery would have been guaranteed, but her *total* recovery at that time would have been limited to $1.25 million and $1.75 million respectively. *See* Ind. Code §34-18-14-3 (effective to July 1, 2017); Neb. Rev. Stat. § 44-2825 (effective until December 2014).

As for actual recovery, in other states, plaintiff's ability to *actually recover* compensation depends on the amount of professional liability insurance voluntarily purchased by physicians and the nonexempt personal assets from which to collect. Wisconsin is one of only 14 states that require physicians to have sufficient professional liability insurance to practice or to qualify for liability reforms such as patient compensation funds or damage caps.[3] Even where insurance is required, the amount in many states is at or below the $1 million (occurrence) and $3 million (aggregate) of primary insurance required in Wisconsin, *see* Wis. Stat. §655.23.

Fewer states provide any form of guaranteed excess coverage such as the Fund provides in Wisconsin. Wisconsin is one of only 13 states that

[3] *See* AMA, Advocacy Resource Center, *State laws mandating minimum levels of professional liability insurance*, found in Medical Group Management Association 2015 Annual Conference materials (2015) http://s36.a2zinc.net/clients/mgma/MGMA15/Custom/Handout/Speaker0_Session907_5.pdf.

provide any sort of excess coverage, and four of these states have inactive or scheduled-to-be-phased out Funds.[4]

Actual recovery is an extraordinary problem for the most severely injured, and Wisconsin uniquely and entirely removes the concern and practical barrier of collectability for proper claimants, which benefits physicians as well. Justice Roggensack stated it squarely in dissent in *Ferdon v. Wisconsin Patients Comp. Fund*:

> Being awarded damages by a jury and being able to collect them are two very different things. Chapter 655 establishes a *statutory right to payment* that is unique in Wisconsin law. Ferdon complains that the chapter 655 right to payment is not good enough because he did not get all the jury awarded him. His plea ignores the fact that many people are not paid all a jury awards them because of the tortfeasor's inability to pay. Many more injured persons settle their claims for whatever insurance the tortfeasor has without going to trial because they recognize the tortfeasor's inability to pay limits their actual recovery.

2005 WI 125, ¶ 334, 284 Wis. 2d 573, 732, 701 N.W.2d 440, 519 (Roggensack, J., dissenting) (emphasis in original). This is where the well-crafted balance of Chapter 655 is most evident: it prioritizes the guaranteed recovery of *all*

[4] AMA, Advocacy Resource Center, *State Patient Compensation Funds* (2008) https://www.scribd.com/document/181171839/AMA-state-Patient-Compensation-Funds (listing states with excess coverage funds; two states have funds limited to infant neurological injuries).

amounts necessary to pay for medical care incurred or to be incurred related to a patient's injury and accounts for present and future lost wages.

In this case, for example, the Mayos already have received $8,842,096 million, representing the entirety of past and future medical expenses and past and future wage loss. (R. 209, 210, 211.) This *total recovery* of the unlimited amount of economic damages, combined with a guaranteed means of recovering up to $750,000 in noneconomic damages, is the embodiment of the legislature's commitment to provide proper claimants with "adequate compensation." Wis. Stat. § 893.55(1d)(a).

B. The Cap Is an Integral Part of the Chapter 655 System.

The Cap is essential to Chapter 655's ability to ensure the enhanced recovery described above. No state provides a statutory means of excess liability coverage for physicians that does not include a means to limit that coverage in some regard. Specifically, among nine states (including Wisconsin) that currently have active, comprehensive excess patient compensation systems, each limits the total exposure of their patient compensation fund in some manner—whether by limiting the total amount of damages recoverable, by limiting the amount of noneconomic damages recoverable, or by limiting the amount of excess coverage provided.[5] *No state*

[5] *See* n. 4;Advocacy Resource Center, *Caps on Damages* (2017) https://www.ama-assn.org/sites/default/files/media-browser/premium/arc/caps-on-damages_0.pdf.

provides the guaranteed, unlimited, uncapped recovery for patients injured by medical negligence that is the result of the Court of Appeals' decision here.

The Cap is essential to the enhanced means of recovery and patient protection afforded by the Fund. A cap was part of the original enactment of Chapter 655 and has existed for almost the entirety of the Fund's years of existence. *See Ferdon*, 2005 WI 125, ¶ 190, 284 Wis. 2d at 677, 701 N.W. 2d at 492 (Crooks, J., concurring). The legislature has repeatedly reenacted a cap when necessary, setting the dollar amount to balance "adequate compensation" for proper claimants with protecting the integrity of the Fund. *See, e.g.,* Wis. Stat. § 893.55(1d)(b).

Under the Chapter 655 system, proper claimants' actual recovery is guaranteed so long as the Fund is healthy. The Court of Appeals, based only on the Fund's current net position, seemingly decided that solvency will not be an issue again. App. 017. This ignores both the Fund's history and its future obligations.

It has been less than a decade since the Fund was in actuarial deficit. Following this Court's decision in *Ferdon*, there was a period when the Fund reported an accounting *deficit* of $122.7 million. *See* App. 598. The Fund's prudent management and the cooperation of Wisconsin physicians enabled the Fund to reach a better net position that benefits *all* Wisconsin patients. This success story is not now a basis for declaring the Cap unconstitutional.

The Cap provides a necessary check on the otherwise-unlimited exposure of the Fund, providing it with critical stability and sustainability and ensuring the system's guaranteed means of unlimited recovery of economic damages and a reasonable amount of noneconomic damages. Contrary to the assumption of the Court of Appeals, then, the Cap does not disproportionally burden severely injured patients. App. 017. Rather, it is *most* beneficial to the severely injured, who depend most on the health and sustainability of the Fund for adequate compensation. The Cap is the backstop that allows the Fund to provide the means of enhanced recovery received by Wisconsin patients such as Mrs. Mayo.

Physicians and other Fund participants have ensured this outcome by paying increased assessments to eliminate Fund deficits. *See* Injured Patients and Families Compensation Fund Report 16-4 at 4-7.[6] They also persuaded this Court, when the legislature raided the Fund to pay shortfalls in the State of Wisconsin budget, that the $200 million (with investment earnings and interest) be returned. *See Wisconsin Medical Society, Inc. v. Morgan*, 2010 WI 94, ¶ 7, 328 Wis. 2d 469, 477, 787 N.W.2d 22, 26; 2011 Wis. Act. 27. The additional amounts paid by Fund participants to cover

[6] https://legis.wisconsin.gov/lab/reports/16-4full.pdf.

shortfalls, combined with the $200 million and other monies, are substantially responsible for the Fund's current net asset level.

This Court has recognized that healthcare providers "have a right to the security and integrity of the entire Fund." *Morgan*, 2010 WI ¶ 5, 328 Wis. 2d at 476, 787 N.W. 2d at 26. The Cap additionally ensures the right, as also desired by healthcare providers, so as "to have excess judgments paid to the proper claimants." *Id.* The Fund must achieve these outcomes while limiting assessments charged to its participants, primarily physicians, to those amounts reasonably calculated to fund proper claims. As this Court recognized in *Morgan*, healthcare providers "have a right to realize the Fund's investment earnings to moderate, perhaps even lower, their assessments." *Id.*

The Court of Appeals' decision seems to penalize the Fund for its prudence, pointing to the Fund's current net position as a basis for declaring the Cap unconstitutional. *See* App. 017. However, the Fund *must* be conservative in its actuarial predictions because it *must* ensure that its assets are sufficient to pay an unknown amount of claims of unknown size. *See, e.g.,* Wis. Stat. §655.27(3). The 2011 actuarial audit, recommended by the Legislative Audit Bureau, has found reasonable the risk margin of 25% established by the Board. App. 173.

The need for prudence is borne out by the experience of other states. South Carolina, for example, had to eliminate its option of unlimited excess coverage in 2010 because it could not assess reasonable rates and premiums; though improving, the fund continues to operate at a net deficit of over $40 million as a result.[7]

The Cap also represents a backstop to protect the State from directly guaranteeing the Fund with public money. *See* Wis. Stat. § 655.27(5)(e) (permitting $100 million in state appropriations if the Fund cannot pay all claims). The Cap is a rational way for the legislature to ensure sufficient Fund assets exist to pay all proper claims, so the State may avoid the potential for using public funds. *Compare Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 77, 350 Wis. 2d 554, 602, 835 N.W.2d 160, 184.

C. Removing the Cap Fundamentally Changes the Chapter 655 System and Creates a Novel Remedy.

The Court of Appeals' decision would fundamentally change the comprehensive, well-functioning system of Chapter 655—and its benefits in the patient-physician relationship. In particular, the predictability and financial stability of Chapter 655 help avoid the negative effects of defensive medicine. The Court of Appeals seemed to acknowledge yet remain

[7] South Carolina Office of the State Auditor, South Carolina Medical Malpractice Patient's Compensation Fund, Audited Financial Statements, Year Ended June 30, 2017, at 4, 7: https://dc.statelibrary.sc.gov/bitstream/handle/10827/25930/OSA_Audited_Financial_Statements_MMPCF_2017-06-30.pdf?sequence=1&isAllowed=y.

unconvinced of the extent of this problem. App. 013-014. To be sure, measuring the precise extent of defensive medicine is difficult, as is estimating its impact on total health-care costs. *But see* Wis. Stat. § 893.55(1d)(a)(2). However, this is a concern of physicians,[8] and a reasonable basis for legislative action. The Cap provides a disincentive to practice defensive medicine by ensuring that patients and physician's interests are properly balanced.

Chapter 655 represents a well-balanced tradeoff that only a legislature can conduct. *See Strykowski*, 81 Wis. 2d at 506, 261 N.W. 2d at 441. This Court has recognized that, to ensure the protections of Chapter 655, the legislature needed to draw lines. In *Czapinski v. St. Francis Hosp., Inc.,* 236 Wis. 2d 316, 320, 333-336, 613 N.W.2d 120, 123, 129-131 (2000), the Court considered the legislature's decision to bar adult children from recovery of loss of society and companionship upon the death of a loved one. This Court upheld the legislature's decision against an equal protection challenge: "Because medical malpractice actions are substantially distinct from other tort actions, it is reasonable to conclude that the legislature has the constitutional authority to determine which classifications of persons are eligible to pursue a medical malpractice claim." *Id.*

[8] *See* AMA, *Medical Liability Reform Now!,* at 4-7 (2018), ttps:// www.ama-assn.org/medical-liability-reform-now.

Chapter 655 strikes the appropriate balance in providing the means of an enhanced remedy—guaranteed recovery of all economic damages and up to $750,000 in noneconomic damages—balanced with the Cap. Removing the Cap would destroy that balance and provide claimants with an unparalleled right to unlimited, guaranteed recovery; meanwhile physicians, most of whom will never be subject to a claim, will be forced to fund this novel right through increased Fund assessments. This alters the foundations of the Chapter 655 system with the result of threatening the patient-physician relationship, patients' access to high-quality care, and the guaranteed recovery of benefits received by plaintiffs in this case.

CONCLUSION

Amici, Wisconsin Medical Society and the American Medical Association Litigation Center respectfully request that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief of Amici Curiae Wisconsin Medical Society and American Medical Association Litigation Center conforms to the rules contained in s. 809.19(7),(8)(c) for a brief produced with a proportional serif font. The length of this brief is 2994 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this Brief of Amici Curiae Wisconsin Medical Society and American Medical Association Litigation Center, excluding the appendix, if any, which complies with the requirements of section 809.62 and 809.19(12), Stats.

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.

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MAILING CERTIFICATION

I, Anne Berleman Kearney, do hereby certify that the Brief of Amici Curiae Wisconsin Medical Society and American Medical Association Litigation Center was hand-delivered to a third-party carrier (Federal Express) on January 17, 2018 for delivery to Ms. Diane Fremgen, Clerk of Court, Wisconsin Supreme Court, 110 E. Main Street, Suite 215, Madison, Wisconsin 53703.

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