2015 WL 6744732 (Wis.App. I Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District I.

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,
PROASSURANCE WISCONSIN INSURANCE COMPANY, Wyatt Jaffe, MD, Donald C. Gibson,
Infinity Healthcare, Inc. and Medical College of Wisconsin Affiliated Hospitals, Inc., Defendants.

No. 2014AP2812.
October 15, 2015.

Appeal of a Final Order of the Milwaukee County Circuit Court, The Honorable Jeffrey A. Conen, presiding
Milwaukee Circuit Court Case No. 12-CV-6272

Amicus Curiae Brief on Behalf of the Wisconsin Assocation for Justice and Supplemental Appendix

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*1 INTRODUCTION

The Wisconsin Association for Justice ("WAJ") submits this Amicus Curiae Brief in support of the Plaintiffs-Respondents-Cross-Appellants, Ascaris Mayo and Antonio Mayo ("the Mayos"). WAJ joins in the arguments of the Mayos, both as to the "as applied" and to the facial challenge to the constitutionality of Wis. Stat. § § 655.017 and 893.55(4)(d). In this Brief, WAJ will focus on a facial challenge to the constitutionality of the cap and the flawed trust structure of § 655.26(7).

The rationale of the case of *Ferdon v. Wisconsin Patients Compensation Fund,* 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, applies to this case. The *Ferdon* court held that it "must" test whether the legislative hypothesis that a cap on noneconomic damages bears a rational relationship to malpractice insurance premiums had a basis in reality. 2005 WI 125,¶110. Importantly, the court further held that a statute may be constitutionally valid when enacted, but may become constitutionally invalid because of changes in the conditions to which the statute applies. *Id.* 1114. "A past crisis does not forever render a law valid." *Id.* The Ferdon court determined that the cap on noneconomic damages was unreasonable and arbitrary because it was not rationally related to the legislative objective. *Id.* 1113.

ARGUMENT

I. THERE IS NOT A RATIONAL RELATIONSHIP BETWEEN THE CAP AND THE GOALS IT SOUGHT TO ACHIEVE.

The facts of the case at bar show conclusively that the statutory limitation on noneconomic damages is not a "reasonable and rational response to the current medical liability situation." *See* § 893.55(1d)(c) (2013-14). [1]

***2 A. Deaths and Injuries Caused by Medical Negligence Are Rarely Compensated.**

The authors of an article published in the medical journal *Health Affairs* in April 2011 determined that 1,503,323 people died or were injured in 2008 as a result of medical errors.[2] Compare that number to the number of people who have received compensation for death or injuries caused by doctor negligence, as reported to the National Practitioner Data Bank over the last 13 years:

2001 - 15,898
2002 -15,141

2003 - 15,124

2004 - 14,516

2005 - 13,613

2006 - 11,737

2007 - 11,256

2008 - 10,862

2009 - 10,783

2010 - 9,885

2011 - 9,780

2012 - 9,518

2013 - 9,447

2014 - 8,875[3]

These numbers, which include all of the states, with and without caps on damages, show a remarkable 44% drop in 13 years, with each year lower than the preceding year. When the Wisconsin legislation was enacted in 2006, the latest information available to the legislators on a national scale was the 2005 number shown above. Look at what happened since then. More to the point, look at the Wisconsin ***3** payments to people who died or were injured by doctor negligence, as shown by the National Practitioner Data Bank:
2001 - 114

2002 - 101

2003 - 122

2004 - 86

2005 - 85

2006 - 71

2007 - 63

2008 - 71

2009 - 73

2010 - 40

2011 - 58

2012 - 41

2013 - 43

2014 - 37[4]

B. The Status of Medical Malpractice in 2005 Is Not the Status of Medical Malpractice Today.

If one divides the population of each state by the number of payments, Wisconsin had the least number of payments per population in the nation last year, one payment for every 155,610 people. When Wisconsin enacted the cap on noneconomic damages in 2006,[5] legislators knew about the 85 payments made in 2005, more than double the number paid last year. Prorating the number of deaths and injuries determined by the authors of the *Health Affairs* article above, there would be just under 27,000 people who die or are injured in Wisconsin per year as a result of medical errors. That means that about one out of every 729 injured people was compensated last year in Wisconsin.

***4** Does Wisconsin need a cap on noneconomic damages to keep the Injured Patients and Families Compensation Fund (the "Fund") viable? On June 30, 2015, the end of the 2015 fiscal year, the Fund had assets of $1,223,669,958, *with a total net position of $728,695,763.*[6] The term "net position" means surplus. Since June 30, 2010, the Fund's assets have increased by $368,544,431. Its net position has increased by $595,892,919.[7] The legislators who passed the 2006 law capping noneconomic damages could have had no idea that the Fund would grow as much as it has. Strong evidence that the Fund will continue to grow exponentially, as it has been growing, is that there were only ten payments made by the Fund during the last three fiscal years, 2012 through 2014. That is just over three payments per year. If we include the last five fiscal years, there have only been a total of twenty payments, four a year.[8]

Perhaps even stronger evidence of there being no need for a cap on noneconomic damages is the unbelievable profits earned by the medical professional liability insurance companies in Wisconsin. The National Association of Insurance Commissioners ("NAIC") has tracked each state's medical malpractice combined loss ratio from 1991 through 2014. The combined loss ratio is the percentage of earned premiums used to pay claims and to defend claims. For the most recent 15 years tracked by NAIC, Wisconsin had the lowest combined loss ratio of the 50 states and the District of Columbia, 43%.[9] In other words, for each dollar of earned premium received by the Wisconsin medical malpractice insurance companies, only 43 cents was used to ***5** pay injured people and defense lawyers, expert witnesses, etc. The national average for those 15 years was 76%. The remarkable fact, however, which could never have been imagined

by the legislators in 2006, is found at the Wisconsin Insurance Reports for the past three years, 2012 through 2014. The Wisconsin medical malpractice insurers in 2012 had direct earned premiums of $75,226,437 and direct losses incurred of *negative* $21,801,125, for a loss ratio of *negative* 29%. Negative losses incurred result from companies having overestimated the cost to settle open claims as of the end of the prior year. In 2013, the medical malpractice insurers had direct earned premiums of $72,743,869 and direct losses incurred of $4,077,592, for a loss ratio of 6%. In 2014, the companies had direct earned premiums of $72,315,990 and had direct losses incurred of $2,509,479, for a 3% loss ratio. [10]

Further proof that the cap on noneconomic damages is unnecessary is that the number of medical negligence lawsuits has been dropping precipitously. Here are the number of medical malpractice cases filed from 2004 through 2014, as shown by the Director of State Courts:
2004 - 221

2005 - 240

2006 - 204

2007 - 150

2008 - 139

2009 - 137

2010 -147

2011- 122

2012 -117

2013 - 140

2014- 84 [11]

***6** The 84 lawsuits filed in 2014 is a relatively small fraction of the 240 lawsuits the legislators considered when they enacted the cap legislation.

With the record low number of medical malpractice cases being filed in circuit court, with the record low number of payments being made to people injured by doctor negligence, and with only three or four payments being made per year by the Fund, it is evident that fewer and fewer lawyers are willing to represent clients with medical malpractice causes of action. The cap serves no purpose, and for the reasons given by the *Ferdon* court, should be determined to be unconstitutional.

The Florida Supreme Court faced a very similar situation in a case it decided last year involving a constitutional challenge to a Florida statute capping noneconomic losses in medical malpractice wrongful death cases. In *Estate of McCall v. U.S.,* 134 So.3d 894 (Fla. 2014), the court determined that the cap violated Florida's constitutional guarantee of equal protection of the law. The court held that even if a "crisis" existed when the statute was enacted, a crisis is not a permanent condition. Conditions can change and negate the justification for the law, transforming what may have once been reasonable into arbitrary and irrational legislation.

The *Estate of McCall* court held: "Having evaluated the current data, we conclude that no rational basis exists to justify continued application of the noneconomic damages cap of section 766.118." 134 So.3d at 913. The court noted that medical malpractice filings in Florida had decreased significantly. There had also been fewer medical malpractice payments made. The court noted that the medical professional liability insurance companies were "far from struggling financially." The Florida Supreme Court concluded:

> ***7** Thus, even if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided. No rational basis currently exists (if it ever existed) between the cap imposed by section 766.118 and any legitimate state purpose... At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members. Moreover, it has never been demonstrated that there was a proper predicate for imposing the burden of supporting the Florida legislative scheme upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence. Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications. Accordingly, and for each of these reasons, the cap on wrongful death noneconomic damages in medical malpractice actions does not pass constitutional muster.

Id. at 914-15.

The conclusion of the *Estate of McCall* court quoted above is the correct conclusion in Wisconsin, as it was in Florida, in light of what has been learned since the enactment of the legislation, which was based on what the legislators perceived to be true at the time. Experience since then, however, has proven those perceptions to be incorrect. The statute is unconstitutional on its face.

II. THE § 655.27(6) FORMAL TRUST UNDERSCORES THE LACK OF A RATIONAL RELATIONSHIP BETWEEN THE CAP AND ITS INTENDED GOALS.

The Wisconsin Supreme Court has found that the legislature created the Patient's Compensation Fund ("the Fund") as a formal trust. But today's reality, discussed *supra,* highlights the flaw and irrationality of that entire trust system. A vast surplus exists in the Fund, but there is no mechanism by which to distribute the surplus to competing beneficiaries. As we now demonstrate, if the circuit court's decision is not upheld, the very trust structure itself is irrational and thus unconstitutional.

A. Section 655.27(6) Makes the Fund a Formal Trust.

In *Wisconsin Medical Society, Inc. v. Morgan,* 2010 WI 94, ¶71, 328 Wis. 2d 469, 787 N.W.2d 22, the Wisconsin Supreme Court recognized that the Patient's ***8** Compensation Fund operates as a formal trust. *See also* § 655.27(6). As such, the Fund includes a trustee and beneficiaries. *Id.* According to *Morgan,* the board of the Fund ("the Board") is the trustee and holds legal title to the trust. The Board has the duties of a common-law trustee. *Id.* ¶66. The beneficiary classes hold equitable title, referred to as a "beneficial interest," and there are just two classes of beneficiaries - one class of health care providers and another class of proper claimants. *Id.* ¶75. Thus, health care providers and proper claimants clearly have property interests in the Fund. *Id.* ¶77.

Because it is a formal trust, the Fund trustee owes equitable duties to the beneficiaries of the Fund. *Id.* ¶67. Indeed, as *Morgan* recognizes, the Fund trustee has a fiduciary duty to all beneficiaries of the trust, including the duty of *undivided loyalty.* [12] *Id.* ¶66 WAJ submits that the concept of undivided loyalty is the same for a trustee and an agent. According

to *Select Creations v. Paliafito America, Inc.,* 911 F. Supp. 1130 (E.D. Wis. 1995), the duty of undivided loyalty requires the following:

The fiduciary duty owed by an agent to a principal includes the duty of undivided loyalty. See Restatement (Second) of Agency § 387 ("An agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.") Absolute fidelity and loyalty to the interests of his principal is the first duty and the highest obligation of an agent...

Id. at 1553.

Accordingly, for purposes of the trust created by § 655.27(6), WAJ submits that the Fund trustee is required to show undivided loyalty to health care providers and proper claimants.

***9 B. The § 655.27(6) Trust Compounds the Irrational Nature of the Cap in § 893.55(4).**

The legislative structure fails when one considers the issue of how the Fund trustee can possibly have undivided loyalty to two classes that so clearly have adverse interests, and the surplus that exists today magnifies that problem exponentially.

As noted above, a very sizeable surplus exists within the Fund corpus. The *Morgan* Court held that health care providers are Fund beneficiaries, 2010 WI 94, 180 ("health care providers have equitable title to the Fund as named beneficiaries of the Fund"), that proper claimants are Fund beneficiaries, *id.* 197 ("Proper claimants are beneficiaries of the Fund."), and that Fund beneficiaries have a vested right in any Fund surplus, *see id.* 193 ("The health care providers have a vested right in the Fund's surplus because it will either be returned to them in the form of lower assessments or reinvested for the Fund's future security."). But the legislative scheme does not set forth the respective rights of the beneficiaries. In other words, the Fund formal trust creates two equal classes of beneficiaries, but there is no mechanism, let alone guidance, for the trustee as to how to allocate the benefits of the surplus among the competing beneficiaries. WAJ submits that the system, as designed, is clearly flawed.

C. The Legislature Vested Courts with the Power to Modify § 655.27(6) when Presented with Unanticipated Facts.

The inequity that exists today is completely inconsistent with the provisions of Chapter 701, but WAJ notes that Chapter 701 does authorize courts to modify the terms of trusts and submits that, interpreted properly, Chapter 701 provides independent authority to uphold the circuit court's decision in this case.

***10** More specifically, § 701.0106 provides that it should be understood that principles of equity supplement Chapter 701. Section 701.0201 provides that a Court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law. In intervening, § 701.0201(3) makes clear that a court may (a) determine the validity of all or any part of a trust, (k) resolve a question arising in the administration of a trust, including a question of construction of a trust instrument, and (L) determine any other matter involving a trustee or beneficiary. Section 701.0803 mandates: "[I]f a trust has 2 or more beneficiaries, the trustee shall act impartially in... managing and distributing the trust property, giving due regard to the beneficiaries respective interests..." By the clear terms of Chapter 701, the legislature has vested the Courts with certain powers vis-a-vis *all* trusts. For example, § 701.0412 provides in part as follows: *"The court may modify* the administrative or *dispositive terms of a trust* or terminate the trust if, *because of circumstances not anticipated by the settlor,* modification or termination will further the purposes of the trust. To the extent practicable, the court shall make the modification in accordance with the settlor's probable intention [Emphasis supplied]."

One cannot square a claim that the cap in § 893.55(4) is rationally related to medical negligence with the formal trust in § 655.27(6) without ignoring the obvious power of the courts to modify the distribution under the trust in order to achieve fairness between the two classes of beneficiaries of that § 655.27(6) trust. That is precisely what the circuit court did here, and WAJ respectfully submits that, for that reason alone, the circuit court's decision should be affirmed.

*11 CONCLUSION

The Supreme Court teaches in Ferdon that the Courts must from time to time revisit the legislative hypothesis of 2005 in § 893.55(1d)(c) that a cap on noneconomic damages bears a rational relationship to malpractice insurance premiums. As noted supra, § 893.55(1d)(c) was based on what the legislators perceived to be true in 2005. However, experience since then has proven those perceptions to be incorrect. The facts of the case at bar show conclusively that the statutory limitation on noneconomic damages is not a "reasonable and rational response to the current medical liability situation." The cap in § 893.55(4) is thus unconstitutional on its face.

Compounding the irrationality caused by the foregoing, the formal trust created in § 655.27(6) creates two equal classes of beneficiaries but contrary to the principles of Wisconsin trust law there is no mechanism for the beneficiaries to share in any aspect of the § 655.27(6) trust or surplus.

Footnotes

1 Wis. Stat. § 893.55(1d)(c) was first added by the Legislature in 2005, *see* 2005 Wis. AB 1073, and was last amended because of a spelling error in 2007, see 2007 AB 300.

2 Jill Van Den Bos et al., The $17.1 Billion Problem: The Annual Cost of Measurable Medical Errors, Health Affairs 596, 599 (2011), *located at* http://content.healthaffairs.Org/content/30/4/596.abstract.

3 http://www.npdb.hrsa.gov/resources/npdbstats/npdbStatistics.jsp#ContentTop. WAJ submits that this Court can take judicial notice of the foregoing because it is a U.S. Government web site. *See Bethke v. Auto-Owners Ins.,* 2013 WI 16, ¶36, n. 13, 345 Wis. 2d 533, 825 N.W.2d 482.

4 *Id.*

5 *See* note 1, *supra.*

6 *See* October 1, 2015 Fund Reply to Open Record Request, included in the attached Supplemental Appendix.

7 Wisconsin Office of the Commissioner of Insurance, Insurance Reports 2010-14.

8 *See http://oci.wi.gov/ipfcf/progrpt2014.pdf.*

9 *See www.naic.org/documents/research* stats medical malpractice.pdf (from the National Association of Insurance Commissioners and located in the attached Supplemental Appendix).

10 Wisconsin Office of the Commissioner of Insurance, Insurance Reports, 2010-2014.

11 Wisconsin Court System: Publications, located at *www.wicourts.gov/publications/statistics/circuit/circuitstats.htm.* As a court document, WAJ submits this Court can also take judicial notice of same. See note 3, supra.

12 *See Dick & Reutman v. Doherty Realty,* 16 Wis. 2d 342, 349, 114 N.W.2d 475 (1962) (citing Restatement 2d of Trusts § 170 concerning undivided loyalty and stating "a trustee is to administer a trust solely for the benefit of the beneficiaries.")