2015 WL 3719657 (Wis.App. I Dist.) (Appellate Brief)
Court of Appeals of Wisconsin, District I.

Ascaris MAYO and Antonio Mayo, Plaintiffs-Respondent-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, M.D., Donald C. Gibson,
Infinity Healthcare, Inc. and Medical College of Wisconsin Affiliated Hospitals, Inc., Defendants.

No. 2014AP2812.
May 11, 2015.

Appeal from the Circuit Court for Milwaukee County, the Honorable
Jeffrey A. Conen, presiding, Circuit Court Case No. 12-CV-6272

Appellant's Brief

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***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

Cases

Statutes

*1 ISSUES PRESENTED FOR REVIEW

1. Does the Cap [1] violate due process and equal protection as applied to the Award [2] without any evidence the Mayos have been treated differently than all other seriously injured Claimants [3] subject to the Cap?

Answered by the Circuit Court: Yes. (R. 191; App. 000372.)

2. Can the Mayos prove beyond a reasonable doubt that there is no rational basis for applying the Cap to the Award?

Answered by the Circuit Court: Yes. (R. 191; App. 000373.)

3. Does a proper as-applied due process and equal protection challenge to the Cap exist when the facts and circumstances giving rise to that challenge are not unique and result in no constitutional application of the Cap in any circumstance?

Answered by the Circuit Court: Yes. (R. 191; App. 000371 -000372.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this case. The material facts relevant to resolving the issues presented for review are not in dispute. The briefs and appendices before the Court will present the issues on appeal and develop the legal theories and authorities of each party to the appeal.

Publication of the Court's opinion is appropriate pursuant to ***2** Wis. Stat. § 809.23(1)(a)1. It will enunciate a new rule of law. No appellate court decision has analyzed the constitutionality of the Cap. Thus, this case is one of first impression.

The Court's decision should also be published because it presents an opportunity for this Court to clarify the law governing as-applied constitutional challenges. *Id.* It affords this Court an opportunity to explain the distinction between facial and as-applied challenges and explain the requirements for bringing a proper as-applied challenge.

Publication is also appropriate because it is a case of substantial and continuing public interest. Wis. Stat. § 809.23(1)(a)5. There are numerous medical malpractice actions pending across the State. (App. 000561 -000563.)[4] In many of those cases, Claimants allege the Cap is unconstitutional both facially and as-applied. *(Id.)* A published decision would resolve those existing challenges, avoid inconsistent decisions, and clarify for all Claimants the available damages for noneconomic injury.

STATEMENT OF THE CASE

Plaintiffs-Respondents-Cross-Appellants, Ascaris and Antonio Mayo ("the Mayos"), filed a medical malpractice action against Donald Gibson, P.A. and Wyatt Jaffe, M.D. ("the Defendant Providers") on June 6, 2012. (R. 1, 39.) The Mayos alleged the Defendant Providers were negligent in Mrs. Mayo's care and treatment and failed to obtain informed consent for that care and treatment. *(Id.)* Defendant-Appellant-Cross-Appellant, the Injured Patients and Families Compensation Fund ("the Fund"), was named as a defendant in the action pursuant to Wis. Stat. § 655.27(5). *(Id.)*

***3** The Mayos' complaint also sought a declaration that the Cap violates the Wisconsin Constitution.[5] *(Id.)* The Mayos alleged the Cap violates (1) the right to a trial by jury; (2) the right to a certain remedy; (3) the due process and equal protection clause; and (4) the separation of owers doctrine (the "Constitutional Challenes."). *(Id.)*

On March 7, 2013, the Fund filed a motion for judgment on the pleadings, seeking dismissal of the Mayos' declaratory judgment action. (R. 57.) Following briefing and oral argument, the circuit court issued a Decision and Order dated April 10, 2014 ("April Order"). (R. 126; App. 000384 - 000400.) The April Order rejected all of the Mayos' Constitutional Challenges and found the Cap facially constitutional in all respects:

[T]he Court has conducted a thoughtful examination of the statutory scheme and determined that the Cap is rationally related to the legislature's goals. Studies, reports, and testimony were considered by the legislature, which then saw fit to advance four specific goals supported by the evidence... Having reviewed the documentation on which the legislature relied, the Court cannot say that the goals articulated are 'wholly irrelevant.' The documents on which the legislature relied contain evidence to reasonably support each goal.... Capping noneconomic damages at $750,000 rationally advances the legislative purpose of protecting accessible and affordable healthcare by curtailing high medical malpractice insurance premiums. Certainly, the legislature could have enacted a larger cap to more fully compensate a wider class of medical malpractice victims. However, the Court should disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.... The Cap is valid so long as it is not wide of any reasonable mark, and the Court does not think that it is.... [T]he Cap bears a rational relationship to its stated purpose.

(R. 126; App. 000398 - 000399)(internal citations omitted.)

***4** On July 7, 2014, the jury returned a verdict in the Mayos' favor. (R. 157; App. 000383.) It awarded damages totaling $25,342,096, including the Award. (Id.) On August 1, 2014, the Fund filed a motion to reduce the Award consistent with the Cap ("Fund's Post-Verdict Motion"). (R. 159.)

On August 7, 2014 the Mayos filed a motion seeking entry of judgment on the verdict ("Mayos' Post-Verdict Motion"). (R. 165.) The Mayos renewed their facial challenges to the Cap and also argued the Cap is unconstitutional as-applied to the Award. (Id.) To support their as-applied argument, the Mayos rested on (a) the arguments advanced in support of their facial challenge; (b) the factually mistaken claim that the Cap does not apply to other noneconomic damage awards over $750,000; and (c) the small percentage of the Award that the Mayos would receive if the Cap were applied. (R. 166, 183.)

The constitutional issues were again fully briefed for the circuit court. (R. 159, 165, 166, 183, 185.) The circuit court held a hearing on September 5, 2014, during which, it repeatedly reaffirmed the facial constitutionality of the Cap:

[T]he facial challenge has been dealt with and the Court is not going to at this point change its ruling and find that the law is unconstitutional across the board.

I am not striking down this statute overall statewide as being unconstitutional because I've already ruled on that.

I already ruled that it's clearly constitutional on its face for the reasons that I set forth.

(R. 271; App. 000463: 25, 000464: 1 - 4; App. 000467: 13 - 16, App. 000468: 13 - 15.)

The circuit court issued a Decision and Order on the parties' post-verdict motions dated October 3, 2014 ("October Order"). (R. 191; App. 000358 - 000378.) The circuit court again reaffirmed the Cap is facially constitutional and confirmed that rational basis review governed the as-applied challenge. (R. 191; App. 000373.) The circuit court then found that ***5** applying the Cap to the Award violates the due process and equal protection clause of the Wisconsin Constitution. (R. 191; App. 000372.) The circuit court provided the following reasons for its conclusion:

Deducting the [Mayos'] $16.5 million award from the Fund will not affect its profitability.

Given the relatively few payments the Fund actually makes, there is no concern that payment of the [Mayos'] actual award will deprive other claimants of money due to them.

The viability of the Fund is significant because it demonstrates... the Cap is not rationally related to the Cap's purposes.

An isolated $16.5 million payment will not force insurers to increase premiums.

The [Mayos'] $16.5 million award seems large but the number is dwarfed by the wealth of the Fund.

This is not a runaway verdict... The size of the jury's award is commensurate with injuries this severe, and it was not unnecessarily high or unpredictable.

[T]he 41.4% reduction that was ruled unconstitutional in Ferdon stands in stark contrast to the 95.46% reduction confronting [the Mayos].

(R. 191; App. 000374 - 000377.) The October Order did not identify any circumstances in which the Cap may be constitutionally applied. (R. 191; App. 000358 - 000378.)

On December 3, 2014, the Fund timely filed a Notice of Appeal. (R. 220.) It seeks review of that portion of the October Order finding the Cap violates the equal protection and due process clause of the Wisconsin Constitution as-applied to the Award.

STATEMENT OF FACTS

In 1975, the Legislature enacted chapter 655 of the Wisconsin Statutes to ensure the viability and affordability of health care services for Wisconsin citizens. ***6** *State ex rel. Strykowski v. Wilkie,* 81 Wis. 2d 491, 508, 261 N.W.2d 434, 442 (1978). The Legislature determined that increases in medical malpractice actions harmed the public by increasing the cost and limiting the availability of heath care to consumers. 1975 Wis. Laws ch. 37, §§ 1(a)-(b). High insurance premiums deterred physicians from providing necessary, but potentially risky, health care services. *Id.* § 1(g). In addition, the rising number and cost of lawsuits led to extensive, as well as expensive, diagnostic procedures. *Id.* §§ 1(e)-(f). This, in turn, increased both the cost of medical care and inconvenience to patients. *Id.*

The Legislature also found that the cost and difficulty of obtaining liability insurance discouraged physicians from practicing in Wisconsin and caused doctors to curtail or cease their practices altogether. Id. §§ 1(h)-(j). In summarizing its findings, the Legislature stated: "It therefore appears that the entire effect of such suits and claims is working to the detriment of the health care provider, the patient and the public in general." Id. §1(k).

In response, the Legislature implemented a comprehensive medical malpractice system set forth at chapter 655. *Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liability Ins. Plan,* 200 Wis. 2d 599, 607, 547 N.W.2d 578, 580-81 (1996). That system created several integral and interrelated components that work together to balance the interests of health care providers ("Providers") [6], Claimants, and the public. *See Wisconsin Medical Society, Inc. v. Morgan,* 2010 WI 94, ¶¶9- 10, 14, 328 Wis. 2d 469, 787 N.W.2d 22. The components include, among others, the creation of the Fund, mandatory primary insurance and Fund participation, and a cap on noneconomic damages. These components benefit Providers and Claimants, alike.

I. THE FUND EXISTS FOR THE BENEFIT OF PROVIDERS AND CLAIMANTS.

First, the Legislature created the Fund "... to [finance] part of the liability incurred by [Providers] as a result of medical malpractice claims and to ensure proper claims are satisfied." Wis. Stat. § 655.27(6).

***7** A. The Fund's Obligation To Providers.

In exchange for purchasing primary insurance coverage and paying annual assessments to the Fund, Providers are ensured that the Fund will cover any medical malpractice liability beyond the limits of their primary insurance policy. *Morgan,* 328 Wis. 2d 469, 1 96. Between the Provider's primary insurance and Fund protection, all Providers are assured they will not be personally liable for damages arising from medical negligence. *Patients Compensation Fund v. Lutheran Hosp.-LaCrosse, Inc.,* 223 Wis. 2d 439, 459-60, 588 N.W.2d 35, 43 (1999).

The number of Providers participating in the Fund has steadily increased over the past fifteen (15) years, growing from 11,485 Providers in 1996 to 15,807 Providers as of December 31, 2014. (R. 94; App. 000496, 000525) [7] In addition to 13,672 physicians, Providers include 121 hospitals with 18 affiliated nursing homes, 19 hospital-owned or controlled entities, 68 ambulatory surgery centers, 22 partnerships, and 1,173 corporations. (App. 000496.) The Fund's protection extends to the employees of these Providers. Wis. Stat. § 655.005(2). Thus, any citizen of this state seeking medical care

or treatment from these Providers will be assured that every person participating in that medical care or treatment has the protection of the Fund. *Id.*

B. The Fund's Obligation To Claimants.

The Fund also ensures that proper Claimants - today and in the future - receive full and complete payment for all damages allowed under law. *Morgan,* 328 Wis. 2d 469, 1 77. Unlike other jurisdictions, Wisconsin's medical malpractice compensation system does not limit ***8** potential recovery for actual economic losses, including past and future medical expenses. [8] As a result, chapter 655 assures Claimants full recovery of all of their actual monetary losses. *Morgan,* 328 Wis. 2d 469,1 77. The Legislature caps only noneconomic damages. [9] Thus, the Legislature caps that category of damages that rests entirely on the trier of fact's subjective assessment of a Claimant's suffering and intangible loss.

From July 1, 1975 through December 31, 2014, the Fund has paid $848,668,865 in claims. (App. 000499.) The Supreme Court in Morgan recognized the increasing severity of claims brought against the Fund:

From its inception through March of 2005 (approximately 30 years), the Fund had paid approximately $586.3 million in total claims. By December 31, 2007, this number had increased to $666.1 million, and by December 31, 2009, it had increased to $770.8 million. Annual claim payments have steadily increased over the last four years, with the 2008-09 fiscal year seeing the largest annual payment of claims since the Fund's inception.

328 Wis. 2d 469,¶21.

There were eighty-three (83) total claims filed against the Fund in Fiscal Year 2013 - 2014. (App. 000502.) This is the highest number of claims opened in any given fiscal year since 2009. (Id.) Court statistics show that medical malpractice lawsuits have comprised the same percentage of suits filed in Wisconsin for nearly a decade.10 (R. 93, 94, 166; ***9** App. 000537 - 000547.)

II. PROVIDERS MUST OBTAIN PRIMARY INSURANCE.

Second, all Providers must be insured. Providers must carry minimum amounts of primary liability insurance coverage from authorized insurance carriers. Wis. Stat. § 655.23(3)(a). Currently, the minimum coverage amount is $1 million per occurrence and $3 million per year. Wis. Stat. § 655.23(4)(b)(2). The primary liability insurance must also provide coverage for all defense costs in addition to the minimum coverage amounts. Wis. Admin. Code INS. § 17.25(3)(b). The insurer retains the obligation to pay all costs of defense. Id.; See Wisconsin Patients Compensation Fund v. Physicians Ins. Co. of Wisconsin, Inc., 2000 WI App 248, ¶ 10, 239 Wis. 2d 360, 620 N.W.2d 547.

III. PROVIDERS PAY MANDATORY FUND ASSESSMENTS.

Third, all Providers must participate in the Fund and pay annual assessments to the Fund. Wis. Stat. §§ 655.27(3). Providers who are unable to provide proof of primary insurance coverage or who fail to pay mandatory Fund assessments are reported to the Department of Safety and Professional Services ("Department"). Wis. Stat. § 655.23(7). The Department may then withhold the Provider's licensure to practice in Wisconsin. Id. Thus, no licensed Provider in Wisconsin may practice without both primary liability insurance coverage and participation in the Fund. Id.

IV. NONECONOMIC DAMAGES CAP.

Finally, the Legislature imposed a limit on noneconomic damages. When originally enacted, chapter 655 did not include a noneconomic damages cap. However, the Legislature later recognized that chapter 655 ***10** was not adequately controlling health care costs, and, in 1986, enacted a $1 million noneconomic damages cap. *Maurin v. Hall,* 2004 WI 100, 1 60, 274 Wis. 2d 28, 682 N.W.2d 866, *overruled in part on other grounds by Bartholomew v. Wisconsin Patients Compensation Fund,* 2006 WI 91, 293 Wis. 2d 38, 717 N.W. 2d 216. That cap expired in 1991. 1985 Wis. Act. 340, §§ 30, 72. Following its expiration, insurance rates and health care costs rose. *Maurin,* 274 Wis. 2d 28, 1 65 n.7 (citing to testimony and evidence presented to the Assembly Committee on Insurance, Securities and Corporate Policy hearing on medical malpractice reform). In 1995, the Legislature reinstated a cap in the amount of $350,000 ("the $50,000 cap"). *Id.*

A. The Ferdon Decision.

The $350,000 cap remained unchanged [11] until *Ferdon v. Wisconsin Patients Compensation Fund,* 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440. In a 4 - 3 decision, the Wisconsin Supreme Court concluded that the $350,000 cap did not survive rational basis scrutiny. Id., ¶¶ 10, 175, 187, 189. However, in their concurring opinion, Justices Crooks and Butler agreed a reasonable cap may be appropriate. Id. 1 189 (Crooks, J., concurring). Thus, the Court agreed a "reasonable" damages cap can pass constitutional muster. Id. ¶¶ 13, 16, 189. Almost immediately after Ferdon, Fund assessments increased 25%. *Morgan,* 328 Wis. 2d 469,¶22.

B. The Legislature Creates A New Cap After Ferdon.

In response to Ferdon and rising costs, the Legislature empaneled the Assembly Medical Malpractice Task Force ("Task Force"). (R. 99; App. 000001.) The Task Force reviewed numerous reports, heard testimony of various constituencies and recommended to again enact a cap. (R. 99; App. 000001 - 000005.) Ultimately, the State Assembly introduced 05 AB 1073 (the "Bill"), which had 62 bipartisan co-sponsors. (R. 99; App. 000009.) The Bill was referred for consideration to the Assembly Committee on Insurance (the "Committee"). (R. 99; App. 000009 - 000011.) The Committee again held public hearings on the proposed ***11** legislation and accepted written testimony. (R. 99; App. 000009 - 000071.)

The Committee voted to recommend passage of the Bill. (R. 99; App. 000011.) On March 22, 2006, less than a year after Ferdon was decided, the Legislature enacted 2005 Wisconsin Act 183 ("Act 183"). Act 183 created the current Cap. The Cap, increased to $750,000, was effective April 6, 2006. 2005 Wis. Act. 183, §§ 1, 7.

The purpose of Act 183 is "to ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice." Id. § 3. Within the text of Act 183, the Legislature took the extraordinary step of explaining how the Cap furthers the purpose of Act 183:

1. Protecting access to health care services across the state and across medical specialties by limiting the disincentives for physicians to practice medicine in Wisconsin...;

2. Helping contain health care costs by limiting the incentive to practice defensive medicine, which increases the cost of patient care;

3. Helping contain health care costs by providing more predictability in noneconomic damage awards, allowing insurers to set insurance premiums that better reflect such insurers' financial risk...; [and]

4. Helping contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the fund and allow the fund's board of governors to approve reasonable assessments for health care providers.

Id.

Act 183 also identified the numerous reports recognizing the value of the Cap in achieving the legislation's purpose. Id. A chart correlating the legislative objectives with many of the reports, studies and testimony cited by or made available to the Legislature is attached in the Fund's Appendix. (App. 000353 - 000357.)

***12 ARGUMENT**

I. SUMMARY OF ARGUMENT AND APPLICABLE STANDARD OF REVIEW.

The central issue before this Court is whether applying the Cap to the Award violates the Mayos' equal protection and due process guarantees set forth in the Wisconsin Constitution. Whether application of a statute is constitutional is a question of law that the Court *reviews de novo. See State v. Quintana,* 2007 WI App 29, 1 19, 299 Wis. 2d 234, 729 N.W.2d 776 (citation omitted).

A fundamental question in any equal protection or due process analysis is whether the challenged legislation results in arbitrary or disparate treatment. *See also City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). The Mayos are treated the same as all Claimants with a noneconomic damages award exceeding $750,000. Thus, there is no constitutional violation that results from applying the Cap to the Award. The October Order should therefore be reversed.

The October Order should also be reversed because the Mayos cannot meet their heavy burden under rational basis review. *Ferdon,* 284 Wis. 2d 573, 1 65 (applying rational basis review to determine constitutionality of $350,000 cap). The Mayos must prove beyond any reasonable doubt that there is no rational basis for applying the Cap to the Award. *State v. Wood,* 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63 (Proving legislation is unconstitutional beyond a reasonable doubt applies regardless whether the challenge is facial or as-applied).

In undertaking rational basis review, the court is:
[O]bligated to locate or, in the alternative, construct a rationale that might have influenced the legislative determination. Once the court identifies a rational basis for the statute, the court must assume the legislature passed the act on that basis, and "[a]ll facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court." The rational basis test does not require the legislature to choose the best ***13** or wisest means to achieve its goals. Deference to the means chosen is due even if the court believes that the goal could be achieved in a more effective manner.

Ferdon, 284 Wis. 2d 573, ¶¶ 74-76; *Treiber v. Knoll,* 135 Wis. 2d 58, 65, 398 N.W.2d 756, 758 (1987) ("The court cannot try the legislature and reverse its decision as to the facts."). "[D]eference to the legislature reflects the court'S awareness that drawing lines and creating distinctions to establish public policy is a legislative task." *Doering v. WEA Ins. Group,* 193 Wis. 2d 118, 132, 532 N.W.2d 432, 437 (1995). Any doubt that exists about a statute's constitutionality must be resolved in favor of its constitutionality. *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 47, 205 N.W.2d 784, 793 (1973). This case underscores the need for the Cap and highlights the rational relationship to legitimate legislative objectives.

Finally, the October Order should also be reversed because the Mayos did not bring a proper as-applied challenge to the Cap. In a proper as-applied challenge, the constitutional infirmity results only from applying an otherwise permissible legislative enactment to a unique set of facts and circumstances. *State v. Smith,* 2010 WI 16, 1 59, 323 Wis. 2d 377, 780 N.W.2d 90. The Mayos have no unique facts or circumstances. Moreover, the practical effect of the October Order is

to eviscerate the Cap, leaving no constitutional application. As set forth below, the law does not permit this result in an as-applied challenge.

II. THE AS-APPLIED CHALLENGE FAILS AS A MATTER OF LAW.

The circuit court erred in concluding the Cap is unconstitutional as-applied to the Mayos. (R. 191; App. 000372 - 000377.) First, the Mayos are treated no differently than all other persons to whom the Cap applies. Second, the Cap withstands rational basis scrutiny. Thus, the October Order should be reversed.

A. The Mayos Are Treated The Same As All Other Claimants With Awards Subject To The Cap.

The Mayos' as-applied due process and equal protection challenge ***14** fails because they do not explain how they are treated differently than all other Claimants with an award subject to the Cap. Article I, Section 1 of the Wisconsin Constitution sets forth the guarantees of equal protection and due process:

> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Although substantive due process and equal protection may have different implications, "[t]he analysis ... is largely the same." *State v. Quintana,* 2008 WI 33, ¶ 78, 308 Wis. 2d 615, 748 N.W. 2d 447. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell,* 418 U.S. 539, 558 (1974). Likewise, the equal protection clause "is designed to assure that those who are similarly situated will be treated similarly." Treiber, 135 Wis.2d at 68. To prove a violation of equal protection or due process, the party challenging a statute's constitutionality must show that "the statute unconstitutionally treats members of similarly situated classes differently." *In re Commitment of W.,* 2011 WI 83,¶ 90, 336 Wis. 2d 578, 800 N.W.2d 929 (quoting *State v. Post,* 197 Wis. 2d 279, 318, 541 N.W.2d 115, 128-29 (1995)).

Wisconsin appellate courts have squarely rejected as-applied equal protection and due process challenges where the plaintiffs fail to show different treatment from all other individuals subject to the challenged legislation. *Brown v. State Dep't of Children & Families,* 2012 WI App 61, ¶¶ 41- 43, 341 Wis. 2d 449, 819 N.W.2d 827 (Denying plaintiffs as-applied equal protection and due process challenge because "the facts ... show that the [Department of Children and Families] treated [Brown] almost identically to other individuals whose licenses were revoked..."); *see also Buckner v. Heidke,* No. 12AP2598, 2014 WL 2974316, ¶ 28-29 (Wis. App. July 3, 2014) (unpublished opinion)(Denying as-applied equal protection analysis because ... "Buckner does not point to any facts to show that she was treated differently from other childcare providers convicted of felony forgery."), *rev. denied,* 2014 WL 5840718. (App. 000553.) The same result is warranted here.

*15 1. The Cap Is Uniformly Applied To All Awards Exceeding $750,000.

The October Order suggests the Mayos belong to a class of catastrophically injured Claimants receiving an award in excess of the Cap who are only partially compensated. [12] (R. 191; App. 000374.) Moreover, the October Order appears to suggest that within that class, the Mayos are treated differently. (Id.) [13] Additionally, the Mayos state that there is "disparity in application" of the Cap and that their damages are "being disproportionately cut" by the Cap. (R. 166.) There is nothing to substantiate this argument. (Id.)

The Cap applies uniformly to any noneconomic damages award over $750,000, regardless by how much or how little the award exceeds that amount. Wis. Stat. § 893.55(4)(d)(1)("The limit on total noneconomic damages for each occurrence on or after April 6, 2006 shall be $750,000".) There is nothing in the Record that suggests the Fund picks and chooses when to enforce the Cap. Rather, as a creature of statute, the Fund is obligated to pay only awards authorized under the applicable law. Wis. Stat. § 655.27(1). The Fund always asks that courts reduce any noneconomic damages award subject to the Cap. There is nothing to suggest the Fund has asked for anything different in this case than is requested in all other similar cases.

The Record confirms that fact. For example, the Mayos' Post- ***16** Verdict Motion specifically discusses *Tyree Roberts, et al. v. Proassurance Wisconsin Insurance Company, et al.,* Milwaukee County Case No. 11-CV-10605. (R. 166.) Mr. Roberts was awarded $1.5 million in noneconomic damages. (R. 168; App. 000557.) Those damages were awarded to compensate Mr. Roberts for the permanent loss of sensation and mobility in his leg following the failure to diagnose compartment syndrome. (Id.) The Fund moved to reduce Mr. Roberts' noneconomic damages award. (Id.) That relief was granted. (App. 000560.)

Likewise, and consistent with its obligation to only pay those damages allowed by law, the Fund opposes challenges to the constitutionality of the Cap in all cases and seeks to enforce the Cap. (App. 000561 - 000563.)

There is nothing to support the argument the Cap has been applied differently or arbitrarily here. Thus, the Mayos cannot maintain an as-applied equal protection or due process claim. *In re Commitment of W.,* 336 Wis. 2d 578,¶ 90; *Brown,* 341 Wis. 2d 449, ¶43; *Buckner,* 2014 WL 2974316, ¶¶ 28-29. (App. 000553.) The circuit court's October Order should be reversed.

2. Unequal Results Do Not Offend Due Process Or Equal Protection.

The thrust of the Mayo's position - and that of the circuit court - is that uniform application of the Cap is unfair because it produces unequal results. (R. 166, 183, 191; App. 000373, 000376 - 000377.) The Mayos and the circuit court stress that applying the Cap to the Award results in a 95.46% Award reduction. (R. 191; App. 000373, 000377.) However, the fact that uniform application of the Cap may affect the Mayos more harshly is not disparate treatment and does not result in a violation of the Mayos' due process or equal protection rights.

The Wisconsin Supreme Court has long held that the rational basis test does not require perfection. *State v. Smart,* 2002 WI App 240, ¶7, 257 Wis. 2d 713, 652 N.W. 2d 429. The only question is whether the statute has some relationship to advancing the Legislature's goal. Id. "The fact [that] a statutory classification results in some inequity... does not provide ***17** sufficient grounds for invalidating a legislative enactment." State v. McManus, 152 Wis. 2d 113, 131, 447 N.W.2d 654, 660 (1989). Rational basis review acknowledges that classifications often are imperfect and can produce inequities. *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund,* 2000 WI 98, 1 57, 237 Wis. 2d 99, 613 N.W.2d 849 (J. Bradley, dissenting). Therefore, rational basis review in equal protection and due process analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993)(emphasis added).

Applying this standard, courts across the country have upheld noneconomic damages caps against the same "fairness" arguments raised here. For example, the Alaska Supreme Court upheld a $400,000 noneconomic damages cap applicable to all tort victims:

[W]hile limiting the noneconomic damages for such a grievous injury may seem harsh, we have held that 'under a minimum scrutiny analysis, we do not determine if a regulation is perfectly fair to every individual to whom it is applied.' Rather, 'we must decide only if the regulation bears a fair and substantial relationship to a legitimate government objective.'

C.J. v. State of Alaska, 151 P.3d 373, 381 (2006). (App. 000588.) The court went on to state:

[W]e appreciate that there will be severely injured persons who are under-compensated as a result of this legislation, and we are under no illusion that this result will seem fair to them. In deciding that the cap is constitutional, we express no opinion about whether damages caps are good policy. As we noted in Evans, '[i]t is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people.'

Id. at 382. (App. 000589.) The Utah Supreme Court reached the same conclusion in *Judd v. Drezga,* 2004 UT 91, 103 P.3d 135. (App. 000597 - 000613.) Upholding a $250,000 noneconomic damages cap applicable to medical malpractice cases, the court reasoned:

> We cannot conclude that the cap on quality of life damages is arbitrary or unreasonable. The legislature's determination that it needed to respond to the perceived medical malpractice crisis was logically followed by ***18** action designed to control costs... While we recognize that such a cap heavily punishes those most severely injured, it is not unconstitutionally arbitrary merely because it does so. Rather, it is targeted to control costs in one area where costs might be controllable.

Id. ¶ 16. (App. 000602.)

No Wisconsin appellate court has addressed the constitutionality of the Cap. However, the Wisconsin Supreme Court has repeatedly recognized that it may not abdicate its duty to apply settled law simply because it produces a harsh result. In denying retroactive application of an increased damages cap in wrongful death cases, it concluded:

> The record illustrates that the legislature heard persuasive testimony about the need for this amendment... from the family members of children killed through the negligent actions of another person... In our analysis of the legal question presented in this case, we do not and cannot dispute the suffering that these families have experienced or the gravity of their loss. However, *the role of the judicial branch here is to apply established rules of law to the constitutional issue presented.*

Neiman v. Am. Nat. Prop. & Cas. Co., 2000 WI 83, ¶ 17, 236 Wis. 2d 411 613 N.W.2d 160 (emphasis added). The Wisconsin Supreme Court rejected an invitation to deviate from Neiman despite arguably more "egregious" facts:

> Although the result in *Neiman* is harsh for families of victims and contrary to the express direction of the legislature, the plaintiffs do not provide any justification, in this case, for overturning the *Neiman* decision... Plaintiffs merely present a variation of the facts expressly discussed in *Neiman*... However, no change in the law is justified simply by a case with more egregious facts.

Schultz v. Natwick, 2002 WI 125,¶ 38, 257 Wis. 2d 19, 653 N.W.2d 266. Wisconsin appellate courts have followed this lead.

For example, in Brown, Ms. Brown challenged the constitutionality of legislation that resulted in the permanent revocation of her childcare license. Brown, 341 Wis. 2d 449,¶ 2. The challenged legislation, among other things, required the Department of Children and Families ("Department") to permanently revoke the childcare license of any licensee ***19** who had ever been convicted of public assistance fraud. Id., ¶ 7. The challenged legislation applied regardless when the conviction occurred. Id.

At the time of her license revocation, Ms. Brown had been a licensed childcare provider for nine (9) years. Id. ¶ 3. She earned her living as a licensed childcare provider. Id. ¶¶ 5-6. Almost twenty (20) years had passed since her fraud conviction and she had no intervening convictions for any crime. Id. Ms. Brown argued that as-applied to her, the challenged legislation violated her equal protection and due process rights. Id. ¶41. In so doing, Ms. Brown highlighted that she had proven "for ten years that she can be trusted with the care of children and with childcare funds." Id.

The appellate court rejected the as-applied challenge. Id. The court expressly noted the challenged legislation's harsh impact:
... [Ms. Brown] is undoubtedly correct in highlighting the harshness of the new law...

... [Ms. Brown's] particular situation - a single welfare conviction for events occurring more than two decades ago - is unfortunate.

Id. ¶¶ 40, 43. Nevertheless, the court emphasized that it must keep in mind that legislative perfection "is neither possible nor necessary." Id. ¶ 43 (citation omitted). Thus, the fairness or harshness resulting from consistent application of the legislation was not an appropriate factor in the court's equal protection or due process analysis. Id.; See also Buckner, 2014 WL 2974316, ¶ 42 (Rejecting as-applied challenge where conviction was over fifteen (15) years old and wholly unrelated to defrauding the government). (App. 000555.)

The same is true here. The Cap is applied to the Mayos exactly as it is to all other individuals receiving an award in excess of $7750,000. The Mayos allege there is "disparity in application" of the Cap. (R. 166.) However, what they really describe is disparity in results. This is insufficient as a matter of law to succeed on an equal protection or due process challenge. The October Order should be reversed.

***20 B. Applying The Cap Is Rationally Related To Providing Accessible And Affordable Healthcare.**

The October Order should also be reversed because the Mayos failed to prove beyond any reasonable doubt that the Cap lacks any rational relationship to furthering legitimate government objectives. Morgan, 1 37, 328 Wis. 2d 469, 787 N.W.2d 22. The Legislature took the extraordinary step of expressly identifying the objectives for the Cap. Wis. Stat. § 893.55(1d)(a) 1 - 4. (App. 000353 - 000357.) It identified with specificity studies, data, research and investigation that evidenced a link between the Cap and achieving those objectives. Id. (App. 000353 - 000357.) Nothing in the October Order gave any weight or deference to these Legislative findings.

A proper rational basis review reveals: (1) it is entirely rational - if not the most rational - to apply the Cap to the Award; (2) each of the Legislature's stated objectives are furthered by applying the Cap to the Award; and (3) it is rational to apply the Cap to the award to ensure the ongoing viability, integrity and success of chapter 655.

1. Awards Such As The Mayos' Are The Reason The Cap Exists And Is Rational.

The Award is precisely the type of noneconomic damages award the Cap intends to curb. Wis. Stat. § 893.55(1d)(a) 1 (Cap is intended to protect access to health care by, among other things, eliminating the threat of unpredictable or large noneconomic damage awards). It is the large noneconomic damages awards that Providers and Claimants are most concerned with, that have the greatest potential to create unpredictability for insurers and that can most quickly deplete the Fund's resources. Therefore, application of the Cap to the Award directly correlates to the Legislature's objectives of (a) encouraging Providers to practice in Wisconsin; (b) creating stability for insurers; and (c) protect the ongoing viability of the Fund. Wis. Stat. § 893.55(1d)(a) 1 - 4. Accordingly, it is not only rational to apply the Cap to the largest noneconomic damages awards, like the Award, it significantly advances the Legislature's stated objectives.

***21** The Wisconsin Supreme court recently confirmed that caps are a rational means to avoid the risk of high judgments:

> We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.

Bostco, LLC v. Milwaukee Metro Sewerage District, 2013 WI 78, 1 77, 350 Wis. 2d 554, 835 N.W.2d 160 (*quoting Stanhope v. Brown County,* 90 Wis. 2d 823, 842, 280 N.W.2d 711, 719 (1979)).

Courts in other states agree. For example, when upholding a $250,000 cap on noneconomic damages, the California Supreme Court noted the Legislature's concern about high unpredictable noneconomic damages:
The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates... [T]he Legislature may have felt that the fixed $250,000 limit would promote settlements by eliminating "the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble." Finally, the Legislature simply may have felt that it was fairer to malpractice plaintiffs in general to reduce only the very large noneconomic damages awards, rather than to diminish the more modest recoveries for pain and suffering and the like in the great bulk of cases. Each of these grounds provides a sufficient rationale for the $250,000 limit.

Fein v. Permanente Med. Group, 695 P.2d 665, 683 (Cal. 1985) (App. 000626.), *see also Stinnett v. Tam,* 130 Cal. Rptr. 3d 732, 738 (Cal Ct. App. 2011)(Expressly addressing and reaffirming the holding in *Fein*). (App. 000644 - 000652.)

Refusing to apply the Cap to the largest noneconomic damages awards would have the practical effect of nullifying the very purpose of the Cap and dramatically narrowing its effectiveness. Unpredictability in the amount of noneconomic damages awards would remain a concern, as would the potential for and impact of large awards. Thus, if the Cap is not applied to the largest awards, then more Providers will practice costly ***22** defensive medicine. Additionally, other Providers would leave Wisconsin (or never come). (R. 99; App. 000045 - 000048.) Unpredictability in liability would rise, assessments would increase, and the Fund would face increased risk of uncapped total liability for the most significant and impactful jury awards.

This is not the case where applying the Cap is irrational. To the contrary, awards such as the Mayos' are precisely why the Cap exists and is rational.

2. Applying The Cap Is Rationally Related To The Legislative Objectives Set Forth In The Statute.

Applying the Cap to the Award furthers each of the Legislature's stated objectives. Thus, the Cap survives rational basis scrutiny.

First, application of the Cap incentivizes physicians to practice medicine in Wisconsin. Wis. Stat. § 893.55(Id)(a)1. (App. 000353 - 000357.) When deciding to enact the Cap, the Legislature heard and considered direct testimony of physicians and physician recruiters from within the state. (R. 99; App. 000045 - 000048.) Those individuals testified that the very existence of a noneconomic damages cap is an important factor physicians consider when choosing where to practice medicine, and that physicians chose not to practice medicine in Wisconsin as a result of the Ferdon decision striking the old cap. *(Id.)*

The circuit court never attempted to refute the link between the Cap and "limiting the disincentives for physicians to practice medicine in Wisconsin...." Wis. Stat. § 893.55(Id)(a)1. Indeed, the October Order is silent on this legislative objective and the testimony relevant to it. (R. 191; App. 000353 - 000378.) Instead, the October Order frustrates the objective and discourages physicians to practice in Wisconsin.

The October Order provides no assurance that the Cap can ever be constitutionally applied in any case. It is the act of applying the Cap, and knowing that it will be uniformly applied, that attracts physicians to Wisconsin. Without that assurance, the Fund's potential liability increases, thereby creating a likelihood of increased assessments. Historically, each ***23** and every time a cap has sunset or been invalidated, costs rise. *Maurin,* 278 Wis. 2d 28,¶ 60; Morgan, 328 Wis. 2d 469,¶ 22. This is exactly what happened after Ferdon. The effect here: Wisconsin no longer becomes an environment attractive for physicians to practice. This rationale, alone, renders application of the Cap to the Mayos constitutional. [14]

Second, application of the Cap limits the practice of defensive medicine and reduces healthcare costs. Wis. Stat. § 893.55(1d)(2). (App. 000353 - 000357.) The Legislature specifically identified studies that supported that conclusion. Wis. Stat. § 893.55(1d)(a)2. (App. 000085, 000112, 000116, 000210 - 000211, 000213, 000265, 000268.) Without citing any authority, the circuit court simply disagreed with that conclusion. It engaged in the type of legislative second-guessing expressly prohibited under rational basis review. Treiber, 135 Wis. at 65 ("The court cannot try the legislature and reverse its decision as to the facts."). Had the circuit court adhered to proper rational basis review, it would have deferred to the Legislature's conclusion - based on data, studies and testimony - that application of the Cap limits defensive medicine, and thus reduces healthcare costs. (App. 000353 - 000357.) This was the circuit court'S finding in its April Order. (R. 126; App. 000398) ("The documentation on which the legislature relied contains evidence to reasonably support each goal.") Absent properly discounting this stated objective beyond a reasonable doubt, applying the Cap to the Award is constitutionally permissible.

Third, application of the Cap promotes predictability and limits large noneconomic damage awards. Wis. Stat. § 893.55(1d)(a) 1. (App. 000353 - 000357.) The Cap sets the maximum exposure for the most speculative item of damages awarded in medical malpractice litigation and is uniformly and consistently applied. See Section II.A. Thus, it is hard to argue that applying the Cap to the Award does not further the Legislature's clear objective. In reaching a different conclusion, the circuit court fundamentally misunderstood, and thus wrongly disregarded, the role of the Cap in furthering "more predictability in noneconomic damage awards..." ***24** Wis. Stat. § 893.55(1d)(a)3. The circuit court found that this objective was inapplicable because the Award was predictable given the severity of her injuries. (R. 191; App. 000376.) The circuit court's analysis is flawed.

The Cap was not implemented only to limit "runaway verdicts." (Id.) A cap is unnecessary to address such awards because the courts already possess the power of remittitur for unforeseen and excessive damages. See Wis. Stat. § 805.15(1). Instead, the Cap ensures that no matter the plaintiff, no matter the injuries, and no matter the ultimate amount of an award, noneconomic damages will never exceed $750,000. That is the predictability goal of the Cap, and that is the predictability that makes Wisconsin so attractive to Providers and insurers. That predictability is also beneficial to Claimants who now have certainty of available damages when bringing a claim, along with certainty of recovery in each and every case.

The irony of the October Order is that it discards predictability in favor of determining noneconomic damages on a case by case "as-applied" basis. If this analysis stands, it creates an even more irrational and unfair system than the one the Mayos challenge here. Instead, application of the Cap will be left to the sole discretion of each court - an outcome the Legislature clearly and rationally attempted to avoid. Wis. Stat. § 8936.55(1d)(a) 1. In fact, if the circuit court's analysis stands, there is the real risk that the outcome of a Cap challenge will vary in each one of the many circuit court cases with a Cap challenge currently pending around the State. (App. 000561 - 000563.) Neither the law nor policy of this State permits this result. In re Termination of Parental Rights to Max G. W., 2006 WI 93, ¶ 20, 293 Wis.2d 530, 716 N.W.2d

845 ("[W]here the constitutionality of a statute is at issue, courts [should] attempt to avoid an interpretation that creates constitutional infirmities") (quoting Panzer v. Doyle, 2004 WI 52,¶ 65, 271 Wis.2d 295, 680 N.W.2d 666).

Fourth, application of the Cap limits the largest awards and thereby helps to protect the financial integrity of the Fund. Wis. Stat. § 893.55(1d)(a)4. (App. 000353 - 000357.) The circuit court reasoned that the Fund is currently so financially strong that application of the Cap to the Mayos would have no bearing on the Fund's financial integrity. (R. 191; App. 000374 - 000375.) Yet, as set forth in Section II.B.1., application of ***25** the Cap to the largest awards, like the Mayos', does the most to protect the financial integrity of the Fund. Indeed, one can easily imagine (as the circuit court should have) a negligent act by a hospital employee involving multiple patients, i.e. use of an improper method to close surgical wounds used in multiple procedures before detected. Absent application of the Cap to these largest awards, it would only take one Provider producing a series of malpractice cases with awards like the Mayos' to severely deplete the Fund's financial resources.

Further, the circuit court failed to recognize that the Fund's financial health can, and inevitably will, change over time due to any number of factors, such as:

● The well documented and continuing increase in severity of claims filed against the Fund. Statistics show that in its first thirty (30) years the Fund paid claims totaling $586.3 million. Morgan, 328 Wis. 2d 469, 1 21. In the past ten (10) years, the Fund has paid approximately $262.4 million. (App. 000499.) Thus, the Fund's average annual payments have risen from $19.5 million in its first thirty (30) years to $26.2 million.

● The well documented and continuing increase in the number of Providers and their employees who the Fund must cover. (R. 94; App. 000496, 000525.) Currently the Fund has liability for over 15,800 Providers and their employees throughout Wisconsin. (App. 000496.)

● The well documented fluctuation in the number of claims filed each year, together with the fact that the number of claims opened in FY 2013 - 2014 is the highest it has been since 2009. (App. 000502.)

● The Fund's continued obligation to pay all economic and noneconomic damages in cases that accrued before April 6, 2006. Ferdon, 284 Wis. 2d 573, ¶¶ 187 - 188 (finding the $350,000 cap unconstitutional and thus of no legal effect). The risk of such uncapped liability will exist through April 6, 2016.

Thus, if the circuit court's reasoning were to stand, an identical ***26** plaintiff, with identical injuries, by an identical negligent act, resulting in identical noneconomic damages will be subject to the Cap - or not - depending on whether a particular court believes the Fund is financially sound to cover all future claims. This creates an unworkable scenario in which the constitutionality of the Cap is permanently in flux, depending on the decisions of courts making constitutional assessments while looking at a snapshot in time. In re Gwenevere T., 333 Wis. 2d 273,¶ 97 (J. Bradley, dissenting) ("[The] analysis is flawed because it appears to conceive of the existence of a [constitutional right] that is in constant flux, depending upon the totality of the circumstances at any given moment. [It] provides unclear guidance to fact-finders and undermines constitutional protections.").

3. Other Rational Bases Exist For Applying The Cap To The Award.

Applying the Cap to the Award is also constitutional because it is rationally related to preserving the careful balancing of interests integral to the viability, integrity and success of chapter 655.

For proper rational basis review, the Court must do more than simply assess the Legislature's stated objectives. Rather, it must go beyond those stated objectives and "construct" a rationale that might have influenced the legislative determination. Ferdon, 284 Wis. 2d 573, ¶¶ 74-76. The Court must then "assume the legislature passed the act on that

basis, and all facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court." Id. (internal quotations omitted). The circuit court failed in this regard.

Applying the Cap to the Mayos is constitutional because the Cap is an integral part of a larger medical malpractice system where Providers and Claimants share in the benefit and the burden of a system that ensures quality and affordable healthcare for all of Wisconsin. The system mandates that Providers purchase primary insurance and pay assessments to the Fund - an obligation not imposed in most other jurisdictions. In exchange for these burdens, Providers are assured they will not be personally liable for damages arising from medical negligence. See Lutheran Hosp.-LaCrosse, Inc., 223 Wis. 2d at 459-60.

***27** The assessments help support a solvent and robust Fund. That Fund then ensures that Mrs. Mayo suffers no out-of-pocket expenses whatsoever. To date, she has been reimbursed for all of her medical expenses. (R. 209, 210.) Her past and future earnings have been restored. (Id.) Mrs. Mayo received almost $9 million from the Fund within weeks of entry of judgment. (R. 210.) While Mrs. Mayo may feel the harshest impact of the Cap, she is certainly among those who benefit the most from Wisconsin's system that affords guaranteed and unlimited recovery for economic damages. Guaranteed recovery of both unlimited economic damages and up to $750,000 of noneconomic damages afforded by Wisconsin law also helps ensure that all proper Claimants have access to counsel and the courts because collectability will never be a factor in any potential plaintiff's decision to file suit in the first instance.

The trade-off for Claimants is a share of the burden - a reduction in recovery for those items of damage that are not only impossible to measure, but arguably can never satisfy the real loss. The bottom line is although everyone must sacrifice something for this system, everyone benefits from the system. Certainly it was rational for the Legislature to spread the burden among all of those who benefit from the system.

III. THE "AS-APPLIED" CHALLENGE IS IMPROPER BECAUSE IT EVISCERATES THE CAP.

The October Order should also be reversed because it is not a proper as-applied challenge. All of the facts advanced in support of the Mayos' "as-applied" challenge are common to all Claimants subject to the Cap. As a result, if the October Order is upheld, there can never be a Cap applied in a medical malpractice case. This result cannot be reconciled with applicable law or policy. Reversal is appropriate.

A. Facial Versus As-Applied Constitutional Challenges.

The two major types of constitutional challenges are facial and as-applied. *In re Joseph E.G.,* 2001 WI App 29, 1 5, 240 Wis. 2d 481, 623 N.W.2d 137. A facial challenge to a statute's constitutionality requires proof that "there are no possible applications or interpretations of the ***28** statute which would be constitutional." *State v. Cole,* 2003 WI 112, ¶30, 264 Wis. 2d 520, 665 N.W.2d 328. In an as-applied challenge, the constitutionality of the statute itself is not attacked. In re Gwenevere T., 333 Wis. 2d 273, ¶ 47. The statute is presumed to have constitutional application. Id. Instead, the constitutional infirmity results only from applying an otherwise permissible legislative enactment to a unique set of facts and circumstances. Smith, 323 Wis. 2d 377, ¶ 59. "The practical effect of holding a statute unconstitutional 'as-applied' is to prevent future application in a similar context but not to render it utterly inoperative." *Simpkins v. Grace Brethren Church of Delaware,* 2014-Ohio-3465, 16 N.E.3d, at ¶ 66 (Analyzing and rejecting as-applied constitutional challenge to cap on noneconomic damages). (App. 000655 - 000677.) In other words, a proper as-applied challenge leaves the challenged legislation intact and constitutionally applicable to the vast majority of all persons to whom it applies. The Mayos' as-applied challenge fails in this regard.

B. There Are No Unique Facts Or Circumstances To Support A Proper As-Applied Challenge.

The Mayos and the circuit court identified several "facts" to support the as-applied challenge. Not one fact or circumstance advanced for striking the Cap as-applied to the Award is unique. First, the circuit court reasoned that the Fund is so financially sound, the Mayos could receive their full Award without jeopardizing the Fund's integrity or solvency. (R. 191; App. 000374 - 000375.) However, each and every plaintiff with a noneconomic damages award in excess of the Cap will always argue their award is "dwarfed" in comparison to the Fund. (R. 191; App. 000376.)

Second, the circuit court claimed the Award is an isolated payment. (R. 191; App. 000375.) Thus, allowing "an isolated $16.5 million payment" will not result in any risk to the Fund's financial health. (Id.) As a preliminary matter, this ignores the fact that the Fund has paid almost $900 million to Claimants since its inception. (App. 000499.) Thus, no verdict is ever isolated. Moreover, it is undisputed that the Mayos received one of the most significant medical malpractice jury awards in recent memory. Thus, if as the circuit court suggests, payment of this "isolated" verdict is inconsequential, then no verdict would ever be of consequence.

***29** Third, the circuit court stressed the Award is reduced significantly. (R. 191; App. 000373.) However, from the inception of their case, the Mayos argued that the Cap was unconstitutional both facially and as-applied. (R. 71, 74, 80, 166, 183.) The Mayos were always going to oppose any application of the Cap, no matter the reduction. The same is true of every Claimant with the potential for a noneconomic damages award over $750,000. This is evidenced by the fact that in the last four (4) years, the Fund has litigated no less than twenty-three (23) direct challenges to the Cap across the state. (App. 000561 - 000563.) In all but one of those cases, the challenge was brought at the outset of the case before the Claimants even know the amount of their award, if any. Thus, all Claimants, including the Mayos, will challenge any reduction, claiming that the Cap is unconstitutional. (Id.)

Finally, the circuit court emphasized that the Award is predictable given the severity of Mrs. Mayo's injuries. However, as noted in Ferdon, the Cap only applies to those Claimants "who are most seriously injured." Ferdon, 284 Wis. 2d 573, ¶ 97. Thus, all Claimants with awards over $750,000 will argue their awards are predictable because they are "seriously" injured. This is underscored by the Fund's experience with challenges to the Cap across the State. (App. 000561 - 000563.) Claimants, like the Mayos, bring the challenge at the outset of the proceedings because, if successful, they anticipate the nature of their injuries are of the type likely to secure a high noneconomic damages award. (R. 1, 39.)

Bottom line: there are no unique facts or circumstance that would permit a proper as-applied challenge. The challenge to the Cap is really a facial one. The fact that most of the Mayos' arguments regarding the facial constitutionality of the Cap are the same as those supporting their Post-Verdict Motion underscores this point. (R. 71, 74, 93, 103, 166, 183.) Having rejected the Mayos' facial challenge - and reaffirmed that decision in the October Order - the circuit court should have reached the same conclusion in deciding the Mayos' Post-Verdict Motion.

***30 C. The "As Applied" Challenge Leaves No Constitutional Application of the Cap.**

The October Order prohibits any constitutional application of the statute in all circumstances. Smith, 323 Wis. 2d 377, ¶ 59. Thus, it highlights the fact that the challenge was a facial one and not as-applied.

First, the circuit court reasoned that because of the Fund's wealth, full payment of the Award has no impact on the Fund's solvency and will not frustrate the Legislature's goals. (R. 191; App. 000374 - 375.) That reasoning would be true of every economic damages award falling below the $16.5 million award at issue here. In fact, the circuit court's reasoning would apply to any plaintiff receiving an amount less than $16.5 million. These smaller awards would have even less impact on the Fund. Accordingly, by the circuit court's reasoning, the Cap can never be constitutionally applied to any noneconomic damages award less than $16.5 million.

Second, the circuit court reasoned that eliminating all but "4.54%" of the Mayos' noneconomic damages award is an unconstitutional application of the Cap. (R. 191; App. 000373, 000377.) However, if awarding only 4.54% of a noneconomic damages verdict is an unconstitutional application of the Cap, then reducing recovery any further would necessarily also be unconstitutional. Thus, the Cap would be unconstitutional as to every plaintiff with an award greater than $16.5 million.

The combined effect of the circuit court's reasoning is no set of facts or circumstances in which the Cap can be constitutionally applied. The circuit court's as-applied analysis cannot stand, and the October Order should be reversed.

CONCLUSION

The Fund respectfully requests that this Court reverse the portion of the October Order finding the Cap unconstitutional as-applied to the Mayos. The Fund requests that this matter be remanded to the circuit court for entry of judgment consistent with the Cap and this Court's ruling.

Footnotes

1 The term "Cap" is used to refer to the $750,000 limit on recovery of noneconomic damages in medical malpractice actions set forth at Wis. Stat. § 655.017 and 893.55(4).

2 The term "Award" is used to refer to the $16,500,000 in noneconomic damages the jury awarded the Mayos on July 7, 2014. (R. 157; App. 000383.)

3 The term "Claimants" is used to refer to medical malpractice claimants in Wisconsin bringing a medical malpractice claim subject to and governed by chapter 655.

4 In its Appendix, the Fund provided the Court with a chart identifying cases in which various Claimants named the Fund and have challenged the constitutionality of the Cap. (App. 000561 - 000563.) The Court may take judicial notice of the facts set forth in that chart as they are capable of accurate and ready determination by resorting to sources whose accuracy cannot be reasonably questioned. *See* Wis. Stat. § 902.01.

5 The Mayos make no claim the Cap violates the United States Constitution. (R. 1, 39.) However, the protections afforded under Article I, Section 1 of the Wisconsin Constitution are equivalent to the 14th Amendment. *State v. McManus,* 152 Wis. 2d 113, 130, 447 N.W.2d 654, 660 (1989) ("This court has held the due process and equal protection clauses of the Wisconsin Constitution are substantial equivalents of their respective clauses in the federal constitution.").

6 Wis. Stat. § 655.002(1) identifies all persons and entities who are Providers within the meaning of chapter 655.

7 This data is taken, in part, from the 2014 Functional Progress Report ("2014 Report"). That Report is prepared by the Fund and updates the 2013 Functional Progress Report the Mayos provided to the circuit court. (R. 110.) The information is publicly available at http:// oci.wi.gov/ipfcf/progrpt2014.pdf (last accessed May 6, 2015). The Fund respectfully requests that this Court take judicial notice of the 2014 Report. (App. 000496 - 000520.) *See Wis. Stat.* § 902.01; *Sisson v. Hansen Storage Co.,* 2008 WI App 111, ¶¶ 11-13, 313 Wis. 2d 411, 756 N.W. 2d 667; *Bethke v. Auto-Owners Ins. Co.,* 2013 WI 16 ¶ 36 n.13, 345 Wis. 2d 533, 825 N.W. 2d 482 (easily accessible documents authored by state agencies have been deemed appropriate for judicial notice).

8 For example: Colorado limits total recovery in medical malpractice claims to $1,000,000. Colo. Rev. Stat. § 13-64-302. Indiana limits total recovery in medical malpractice claims to $1,250,000. Ind. Code § 34-18-14-3. Nebraska limits total recovery in medical malpractice claims to $2,250,000. Neb. Rev. Stat. § 44-2825. Virginia limits total recovery in medical malpractice claims to $2,150,000. Va. Code Ann. § .01-581.15.

9 Noneconomic damages are "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." Wis. Stat. § 893.55(4)(a). [FN10]

10 The Mayos provided court statistical data only through 2012. (R. 93, 94, 166.) The Mayos' statistical data is included in the Appendix but the Fund has submitted additional data for 2013 and 2014 with its Appendix. (App. 000546 -000547.) It is publicly available at http:// www.wicourts.gov/publications/statistics/circuit/circuitstats.htm (last accessed May 6, 2015). The

Fund respectfully requests that this Court take judicial notice of the data. (App. 000546 - 000547.) See Wis. Stat. § 902.01; Sisson, 313 Wis. 2d 411¶¶ 11-13; Bethke, 345 Wis. 2d 533, ¶ 36 n.13.

11 The $350,000 cap also had a provision to raise the cap to keep pace with inflation. 1995 A.B. 36, Fiscal Estimate (enacted as 1995 Wis. Act 10; 1995 Wis. Act 10, §§ 5, 8, 9.)

12 The facial nature of the Mayos' challenge is underscored by this class description because it captures the entire class of persons to whom the Cap is intended to apply.

13 To the extent the circuit court and the Mayos are alleging the Mayos constitute a "class of one," the Court's analysis is no different. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000). To succeed, the Mayos must demonstrate that they have been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id. Alternatively, the Mayos must illegitimate legislative animus directed at them. *McDonald v. Village of Winnetka,* 371 F.2d 992, 1001 (7th Cir. 2004). As set forth above, the Mayos are treated identical to all individuals subject to the Cap, and there is a rational basis for applying the Cap to their Award. Moreover, there are no allegations of, let alone record evidence of, any Legislative animus directed at the Mayos.

14 Because of the correlation between the Cap and assessments, the Cap also furthers the Legislative objective of allowing the Fund's Board of Governors "to approve reasonable assessments for [Providers]." Wis. Stat. § 893.55(1d)(a)4. For this reason alone, there is a rational basis to apply the Cap to the Award.

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