2015 WL 6744734 (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-Respondents,
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.
October 15, 2015.

On Appeal from Circuit Court for Milwaukee County
The Honorable Jeffrey A. Conen, Presiding
Circuit Court Case No. 12-CV-6272

Amicus Curiae Brief of the Wisconsin Hospital Association, the Wisconsin Medical Society and the American Medical Association

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*i TABLE OF CONTENTS

*ii TABLE OF AUTHORITIES

Cases

*1 INTRODUCTION

Wisconsin's medical liability system was enacted to curb health care costs and help secure access to affordable, quality health care for Wisconsin residents. Like the majority of states, that system includes a cap on the recovery of noneconomic damages. [1] Upsetting the Legislature's policy choice by invalidating the system's cap on noneconomic damages ("cap") - either as applied or on its face - would negatively impact the ability of Wisconsin to attract physicians to provide patient care to its residents, and thereby impair the ability of the members of the Wisconsin Hospital Association ("WHA"), the Wisconsin Medical Society ("Society") and the American Medical Association ("AMA") to provide the quality of health care services Wisconsin residents deserve.

ARGUMENT

I. THE LEGISLATURE HAD A RATIONAL BASIS FOR ENACTING THE MEDICAL LIABILITY CAP.

Following the Wisconsin Supreme Court's decision in ***2** *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund,* 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, the Legislature adopted the current Wis. Stat. § § 655.017 and 893.55(4) to "ensure affordable and accessible health care" for Wisconsin citizens "while providing adequate compensation to the victims of medical malpractice." Wis. Stat. § 893.55(1d)(a). The Legislature concluded that the cap accomplishes that objective by doing the following:

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....

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.

***3** These policy bases establish a rational basis for the system and its objectives, supported by federal and state studies and reports. Recent studies continue to support the legislative findings. It is within the Legislature's province to determine what evidence and arguments it finds to be most persuasive when making its policy choices. As the following demonstrates, there was, and continues to be, ample evidence supporting a cap to provide a rational basis for the Legislature's policy decision.

A. The Cap Protects Access To Health Care Services Throughout The State.

Just as a state's general litigation environment is an important factor in the decisions businesses make when deciding where to locate,[2] a state's medical liability environment affects physician decisions to practice in a particular state. Accordingly, Wisconsin's medical liability system affects its ability to compete with other states to attract and maintain sufficient numbers of physicians to continue to provide high-quality, cost-effective health care for ***4** Wisconsin residents. An estimated 100 additional physicians per year will need to enter the Wisconsin workforce to meet projected demands; without those new physicians, the projected shortage by the year 2030 will be over 2,000 physicians. One of the primary reasons physicians relocate to Wisconsin is the state's well balanced medical liability climate.[3]

There is a direct relationship between the medical liability climate in a state and its residents' access to high quality physicians. States with limitations on medical liability experience greater growth in physician supply (3% on average) than states without such limits.[4] For example, the cap adopted by Texas has attracted hundreds of new physicians to the state, outpacing the growth of the general population every year since 2007.

Overall, Texas has enjoyed a 61 percent greater growth rate in newly licensed physicians in the past four years compared to the four years preceding reforms. Since 2003,...[t]he ranks of high-risk specialists have grown more than twice as fast as the state's population.
***5** Pediatric sub-specialists have grown ten times faster than the state's population. The number of geriatricians has more than doubled.... The ranks of rural obstetricians have grown nearly three times faster than the state's rural population.... Forty-six counties that did not have an emergency medicine physician now do. Thirty-nine of those counties are rural. Fifteen counties that did not have a cardiologist now do. Fourteen of those counties are rural.[5]

In contrast, states without caps have struggled to attract and retain physicians. In Illinois, which has not had a cap since 2010, "[h]alf of all graduating medical residents or fellows trained in Illinois leave the state to practice medicine elsewhere, in large part due to the medical liability environment in Illinois."[6] A study by Northwestern University warned that Illinois could face a shortage of physicians, especially in rural areas, as new physicians continue to flee to states like Wisconsin given the "toxic medical malpractice environment" in Illinois. *Id.* In short, "a cap makes health care more affordable and increases the ***6** public's access to physicians and hospitals when they require care."[7]

Access to high-quality local care also impacts employers' decisions to locate or maintain jobs in Wisconsin.[8] "Access to high-quality health care will actually reduce health care costs over time, sometimes by as much as 40 to 50 percent... Because Wisconsin provides some of the best health care in the nation, companies located here or that choose to

locate within the state will provide their employees with exceptional health care at competitive rates, enjoy lower-than-average premium increases and improve productivity and job satisfaction - leading to a strong competitive advantage for Wisconsin's employees and employers." [9]

***7 B. The Cap Helps Contain Health Care Costs By Limiting The Incentive To Practice Defensive Medicine.**

A cap reduces the practice of "defensive medicine"- the ordering of additional diagnostic tests, procedures or hospital admissions by physicians to reduce their liability exposure. In states with caps, hospital expenditures have dropped by approximately five to nine percent within the first five years after the cap is adopted. [10] "[R]ecent research has provided additional evidence to suggest that lowering the cost of medical malpractice tends to reduce the use of health care services;" this is due to the reduction in the use of "diagnostic tests and other health care services when providers recommend those services principally to reduce their potential exposure to lawsuits." [11]

There is a direct correlation between higher malpractice awards, increased medical spending, and ***8** increased health care costs for consumers. [12] "[S]tates with high malpractice liability will have total Medicare spending that is 4.2 percent higher and spending on physicians that is 7.0 percent higher," resulting in an increase in Medicare spending alone of "$16.5 billion total and $7.1 billion on physician services." [13] Accordingly, a cap reduces defensive medicine, thereby reducing health care costs for consumers and government health care programs.

C. The Cap Helps Control Health Care Costs By Reducing Medical Liability Insurance And Health Insurance Premiums.

A cap lowers premiums for both medical liability insurance and private health insurance premiums. [14] Health care costs are directly lowered by reduced malpractice insurance premiums and reduced defensive medicine, which lowers health insurance premiums. [15]

***9** "Noneconomic damages caps and other reforms are... associated with lower premiums." [16] Prior to the invalidation of the Illinois cap, the Illinois Department of Insurance observed: (1) a decrease in medical malpractice premiums, with premiums declining from "$606,355,892 in 2005 to $541,278,548 in 2008;" (2) an increase in competition among medical malpractice insurance companies, including an increase from 14 major companies in 2005 to 19 major companies in 2008; and (3) the entry of new companies offering medical liability insurance, with five new major companies entering the market between 2005 and 2008. [17] Following the invalidation of the Illinois cap in 2010, medical providers faced an estimated 18% increase in the cost of medical liability insurance. [18]

***10** For consumers, medical liability reform also reduces the cost of private health insurance premiums or limits the amount of further increases. A comprehensive medical liability system, like Wisconsin's, that includes "caps on non-economic damages, collateral source reform, and joint and several liability reform reduce[s] self-insured premiums by 1 to 2 percent each. When the effects of reform are estimated jointly, caps on non-economic damages and collateral source remain independently significant and their point estimates imply a joint reduction of healthcare costs of 2.3 percent. In addition, the effect of reform tends to increase over time." [19] Accordingly, caps reduce insurance costs both for providers and consumers.

***11 D. The Cap Ensures The Financial Integrity Of The Fund And Guarantees Recovery Of Economic Damages By Injured Patients.**

The cap also helps protect the financial integrity of the Injured Patients and Families Compensation Fund ("Fund"). The Fund guarantees that injured patients recover all of their economic damages. The cap assures that the Fund will have sufficient resources to compensate recipients of malpractice awards for economic damages. The Fund places malpractice award recipients in a better position than other injured parties - recipients are guaranteed recovery from the Fund; other injured parties are not guaranteed recovery, left instead to hope that a tortfeasor has sufficient insurance coverage. Therefore, the continued health of the Fund is critical to the proper functioning of the system.

During the period when the prior cap was invalidated under *Ferdon,* the Fund's undiscounted, unpaid liabilities increased by approximately $173 million. This resulted in an increase in the Fund's estimated liabilities, decreasing the Fund's surplus and reflecting a future deficit on the Fund's financial statements. The Fund's provider assessments increased by 25 percent between the 2005-06 and 2006-07 ***12** fiscal years. [20] *See Wis. Med. Soc'y, Inc. v. Morgan,* 2010 WI 94, ¶22, 328 Wis. 2d 469, 787 N.W.2d 22. Although the Fund has a healthier net asset balance, "[i]n the event that the caps are overturned, the Fund is exposed to the potential of significantly larger claims than if the caps remain in place," thereby requiring the reconsideration of the appropriate net asset balance range "in light of the change in large loss potential." [21]

Following the *Ferdon* decision, the Fund made increased claim payments between the 2005-06 and 2008-09 fiscal years resulting from incidents that occurred prior to implementation of the new cap. "As a result, several claims paid during FY 2005-06 through FY 2008-09 included noneconomic damage awards that were significantly larger than either the old or the current limit." [22] Accordingly, any change to the application of the cap could have a negative ***13** impact on the Fund, which would directly impact the ability of patients to recover economic damages in medical liability cases.

II. THE CONSTITUTIONALITY OF THE CAP CANNOT BE DEPENDENT ON ECONOMIC MARKET CONDITIONS.

As the studies discussed above establish, the cap is just as necessary today as it was at the time of enactment. The Fund balance alone is not an indication that the legislative findings identified in the statute are no longer valid. To the contrary, the studies discussed above demonstrate that each of the four legislative findings and the purposes for the legislation continue to be as relevant today as when the law was enacted. No circumstances have changed that support the trial court's decision to undertake its own policy analysis to invalidate the cap on an as applied basis. If the Legislature believes that its policy analysis should be revisited due to changed circumstances, it is the sole province of the Legislature to revisit its policy choice.

The cap is one part of a "comprehensive, multifaceted scheme designed to address a perceived threat to [the] state's health care system." When considering the validity of a cap, "[i]t is not easy for courts to step in and say that what was ***14** rational in the past has been made irrational by the passage of time, change of circumstances, or the availability of new knowledge. Nor should it be. Too many issues of line drawing make such judicial decisions hazardous." *Chan v. Curran,* 237 Cal. App. 4th 601, 613 (2015). Therefore, the "modification or repeal of a statute made obsolete by virtue of changed conditions is a legislative, not a judicial, prerogative." *Id.* at 614. The success of a law in accomplishing its purposes does not render the law invalid. *Id.* at 618; *accord Bostco LLC v. Milwaukee Metro. Sewerage Dist.,* 2013 WI 78, ¶¶77-78, 350 Wis. 2d 554, 835 N.W.2d 160 (within the legislative authority to set a governmental damage cap to avoid "the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.").

Neither can the "as applied" analysis invalidate the Legislature's policy decision to implement the cap. The fact that the Fund currently has a higher balance than in the past does not invalidate those legislative policy decisions supporting the law, nor does the relationship between the Fund balance and the amount of the noneconomic damages award in this case. ***15** Petitioners further argue that the cap is unreasonable because the maximum amount allowed by the cap decreased the amount awarded by the jury in their case by approximately 98%. Respondents refute this argument as irrelevant, stating that, by comparing the jury award to the damages cap, Petitioners are improperly claiming that the cap "is

unconstitutional under Article 9 'as applied' to the verdict in this case." We agree with Respondents that ... we cannot and do not focus on the disparity between the jury award and the statutory cap. *See Prince George's Cnty. v. Longtin,* 419 Md. 450, 517 n. 13, 19 A.3d 859, 900 n. 13 (2011) (Harrell, J., concurring and dissenting) (rejecting the notion that a "damages cap becomes more or less valid, depending on the size of the trial award").

Espina v. Jackson, 112 A.3d 442, 462 (Md. Ct. Ap. 2015).

The Fund was created to ensure the availability of its assets for all potential claimants, not to ensure maximum, unlimited recovery in individual cases. The trial court's "as applied" challenge is actually a facial challenge; by questioning whether an individual award from the Fund will threaten the overall policies supporting the cap, the trial court usurped the role of the Legislature to make policy decisions on an aggregate basis for the good of all residents rather than on an as applied basis for the good of the current plaintiff.

The trial court's "as applied" analysis makes the existence of constitutional rights dependent on economic conditions: an injured patient will have a constitutional right to full recovery in robust economic times but the same injured patient will not have those same constitutional rights during ***16** recessionary times where the Fund has been depleted by investment losses, increased claims or the return of surplus to providers via reduced contribution levels. Yet, constitutional rights do not come and go based on the vagaries of economic market fluctuations. Such an interpretation of constitutional jurisprudence cannot reasonably be sustained. If economic circumstances have changed such that the current cap should be reconsidered, the "modification or repeal of a statute made obsolete by virtue of changed conditions is a legislative, not a judicial, prerogative." *See Chan,* 237 Cal. App. 4th at 614.

CONCLUSION

For the foregoing reasons, the Court should reverse the portion of the circuit court's decision finding the cap unconstitutional as applied.

Footnotes

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