

FILED
09-04-2025
CLERK OF WISCONSIN
SUPREME COURT

SUPREME COURT
STATE OF WISCONSIN

SAVANNAH WREN, Individually and as Personal
Representative of the ESTATE OF CALVIN GORDON, Jr.,
and CALVIN GORDON,

Plaintiffs-Appellants,

v.

Appeal No. 24-AP-126

COLUMBIA ST. MARY'S HOSPITAL
MILWAUKEE, INC., JESSICA HOELZLE, M.D.,
JORDAN HAUCK, D.O., and INJURED PATIENTS
and FAMILIES COMPENSATION FUND,

Defendants-Respondents-Petitioners.

**JOINT REPLY BRIEF OF DEFENDANTS-RESPONDENTS-
PETITIONERS COLUMBIA ST. MARY'S HOSPITAL MILWAUKEE,
INC., JESSICA HOELZLE, M.D., JORDAN HAUCK, D.O., and
INJURED PATIENTS and FAMILIES COMPENSATION FUND**

Appeal from the Circuit Court for Milwaukee County, Case No. 23-CV-4960,
Honorable Kristy Yang, Circuit Judge Presiding

GUTGLASS, ERICKSON, LARSON & SCHNEIDER, S.C.

Mark E. Larson (State Bar No. 1016423)

Bradley S. Foley (State Bar No. 1026871)

Attorneys for Defendant-Respondent-Petitioner Columbia St.
Mary's Hospital Milwaukee, Inc.

735 North Water Street, Suite 1400

Milwaukee, WI 53202

Telephone: 414-273-1144

mark.larson@gebosc.com

bradley.foley@gebosc.com

LEIB KNOTT GAYNOR, LLC

Sean M. Gaynor (State Bar No. 1032820)

Ashley A. Brown (State Bar No. 1097649)

Attorneys for Defendant-Respondent-Petitioner Jordan Hauck,
D.O.

219 North Milwaukee Street

Milwaukee, WI 53202

Telephone: 414-276-2102

sgaynor@lkglaw.net

abrown@lkglaw.net

LARSON - KING, LLP

Mark A. Solheim (State Bar No. 1028001)

Kevin T. McCarthy (State Bar No. 1120231)

Patrick H. O'Neill, III (State Bar. No. 1125257)

Attorneys for Defendant-Respondent-Petitioner Jessica Hoelzle,
M.D.

2800 Wells Fargo Place

30 East Seventh Street

St. Paul, MN 55101

Telephone: 651-312-6500

msolheim@larsonking.com

kmccarthy@larsonking.com

phoneill@larsonking.com

OTJEN LAW FIRM, S.C.

Jason J. Franckowiak (State Bar No. 1030873)

Attorneys for Defendant-Respondent-Petitioner Injured Patients
and Families Compensation Fund

20935 Swenson Drive, Suite 310

Waukesha, WI 53186

Telephone: 262-777-2222

jfranckowiak@otjen.com

TABLE OF CONTENTS

INTRODUCTION 4

ARGUMENT..... 5

I. Ms. Wren’s constitutional analysis does not support affirming the court of appeals’ decision. 5

A. Ms. Wren confuses the right to a jury trial and the right of access to the courts.6

B. Even applying strict scrutiny, as Ms. Wren contends, Wis. Stat. § 895.4801 survives constitutional review.7

C. Ms. Wren’s issue presented, statement of facts, and standard of review do not accurately address the issue presented here.8

II. Contrary to Ms. Wren’s assertion, there was an end date to section 895.4801 at the time it was enacted.10

III. Because Ms. Wren does not present any arguments in opposition, Columbia St. Mary’s arguments addressing deference and the constitutional principles of bicameralism and presentment are conceded.11

CONCLUSION 12

CERTIFICATION PURSUANT TO WIS. STAT. § 809.19(8g)(a) 14

INTRODUCTION

Ms. Wren’s response brief asserts a broad issue presented as to whether the court of appeals “properly applied the constitution” that does not address the narrow issue requested by this Court, presents facts that have no relevance to the issue presented, presents a standard of review that applies in part federal law, and presents no opposition to Columbia St. Mary’s primary argument: the court of appeals improperly conflated the “right of access to the courts” and the right to a jury trial provided by Article I, Section 5 of the Wisconsin Constitution. *See Columbia St. Mary’s opening brief*, p. 18; *see also Wren v. Columbia St. Mary’s Hospital Milwaukee, Inc.*, 2025 WI App 22, ¶ 32, 415 Wis. 2d 758, 19 N.W.3d 614. Instead, when applying the constitutional standard of review, whether it is strict scrutiny or rational basis (and Ms. Wren devoted only two paragraphs in her brief to a rational basis analysis, pp. 18-19), Wis. Stat. § 895.4801 passes constitutional scrutiny and the statute must be found constitutional.

Ms. Wren, in the alternative, requests that if the court of appeals decision is reversed, this case must be remanded to the court of appeals for consideration of alternative grounds she presented on appeal. *Ms. Wren’s response brief*, p. 3 n.1¹. But the court of appeals noted the circuit court struck her supplemental argument that Wis. Stat. § 895.4801 violated equal protection principles, and she did not develop any argument on appeal that the circuit court was in error. *Wren*, ¶ 7 n. 6. Moreover, the court of appeals noted Ms. Wren “has incorrectly identified the right to a jury trial provided by the Seventh Amendment of the United States Constitution as applicable to her claims.” *Wren*, ¶ 29 n. 11 (citation omitted).

1

Ms. Wren failed to paginate her brief in the manner required by Wis. Stat. § 809.19(8)(bm).

ARGUMENT²

I. Ms. Wren’s constitutional analysis does not support affirming the court of appeals’ decision.³

Wis. Stat. § 895.4801's limitation on medical negligence claims during the state of emergency was a valid exercise of the legislature’s authority to regulate civil actions and does not infringe on the fundamental right to a jury trial. The right to a jury trial stated in Article I, Section 5 of the Wisconsin Constitution applies to legally recognized claims or “cases at law” and cannot be extended to cases where the legislature has specifically limited, suspended, or eliminated a cause of action. Wis. Const. Article XIV, Section 13. Wis. Stat. § 895.4801 does not infringe on the right to a jury trial because the legislature expressly immunized health care providers from claims arising out of medical services provided during the state of emergency. Under rational basis review, Wis. Stat. § 895.4801 is clearly constitutional. And even if Wis. Stat. § 895.4801 and all other immunity statutes are subject to strict scrutiny review, the statute’s time-limited grant of immunity to health care providers was narrowly tailored to serve the compelling government interest of permitting health care providers to serve the public during the state of emergency.

2

Ms. Wren refers to Columbia St. Mary’s as the “petitioners” in her brief. *Ms. Wren’s response brief*, p. 6. This is contrary to Wis. Stat. § 809.19(1)(i), which mandates reference be to parties by name, rather than by party designation, in the argument section.

3

In the standard of review and argument sections of her brief, Ms. Wren’s citation to Wisconsin and federal appellate court cases do not all follow Wis. Stat. § 809.19(1)(e), requiring pinpoint cites. Wis. Stat. § 809.19(1)(e) (“citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02.”); *see also* SCR 80.02(3)(stating citations shall include pinpoint cites).

A. Ms. Wren confuses the right to a jury trial and the right of access to the courts.

Although Ms. Wren contends the right to a jury trial is a fundamental right, *Ms. Wren's response brief*, p. 6 (although not explicitly stating it), she does not address the analysis presented by Columbia St. Mary's asserting that Wis. Stat. § 895.4801 does not restrict the right to a jury trial. *See Columbia St. Mary's response brief*, pp. 18-20. Unrefuted arguments are deemed conceded. *Charlais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). The court of appeals conflated the right of access to the courts and the right to a jury trial. *See Wren*, ¶ 32. The legislature has the authority to eliminate legal claims by way of statute. Wis. Const. Article XIV, Section 13. It can define and limit causes of action, and abrogate common law on policy grounds. *Aicher v. Wisconsin Patients and Families Compensation Fund*, 2000 WI 98, ¶ 51, 237 Wis. 2d 99, 613 N.w.2d 849.

The Wisconsin Constitution preserves the right to a jury trial to legally recognized claims. Ms. Wren's citation to *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53, 391 Wis. 2d 497, 942 N.W.2d 900, in opposition to this assertion, remarkably ignores the entire analysis of *Palm* presented in Columbia St. Mary's opening brief, pp. 29-34. *See Ms. Wren's response brief*, p. 9. As Columbia St. Mary's noted, the citation in *Wren*, ¶ 37, on which Ms. Wren relies is, in fact, not a reference to appellate case law, but rather to a U.S. Department of Justice Statement of Interests and an appellate case that did not present the entire sentence. *Columbia St. Mary's opening brief*, p. 31. The entire cite from that appellate case is: "[t]o be sure, individual rights secured by the Constitution do not disappear during a public health crisis, *but the Court plainly stated that right could be reasonably restricted during those times.*" *Id.*, pp. 31-32 (the emphasized words are what was not included in the cite).

The legislature and governor have promulgated statutes that grant broad immunity to citizens or industries, and other procedural limitations on the right to a jury trial. The right to a jury trial is not absolute and is frequently limited by legislative action. Statutes of limitation and statutes of repose do not just provide boundaries for filing a civil lawsuit, as Ms. Wren claims in her response brief, p. 12, but rather extinguish a right on one side and create a right on the other side. *Columbia St. Mary's opening brief*, p. 20. Ms. Wren asserts the Wisconsin constitution “forbid[s]” section 895.4801 and is a “pardon” to health care providers. *Ms. Wren's response brief*, pp. 10 and 11. But there are many laws that pass constitutional scrutiny but do not lead to a jury trial occurring – such as recreational and governmental immunity. *Columbia St. Mary's opening brief*, p. 20. Here, Wis. Stat. § 895.4801 does not restrict a litigant's right to a jury trial any differently than any other limitation on actions or grant of immunity.

B. Even applying strict scrutiny, as Ms. Wren contends, Wis. Stat. § 895.4801 survives constitutional review.

Even if strict scrutiny applies, Wis. Stat. § 895.4801 was narrowly tailored to address a compelling governmental interest. *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶28, 383 Wis. 2d 1, 914 N.W.2d 678. Ms. Wren misunderstands the scope of section 895.4801. The legislature and governor granted broad immunity to health care providers.

Ms. Wren is incorrect when asserting that extrinsic sources, such as legislative history, cannot be consulted. *See Ms. Wren's response brief*, p. 14. As stated by Columbia St. Mary's in its opening brief and not addressed in Ms. Wren's response brief, *SEIU Healthcare Wisconsin v. WERC*, 2025 WI 29, 416 Wis. 2d 688, 22 N.W.3d 876, held that extrinsic history can be used to confirm the plain meaning of a statute. *Columbia St. Mary's opening brief*, p. 25. As a result, the legislative history provides support to find Wis. Stat. § 895.4801 constitutional. It is clear that health

care providers were grappling with how to treat patients with concerns not related to Covid 19 at the start of a novel, worldwide pandemic. The Wisconsin Medical Society noted as such: Wis. Stat. § 895.4801 “is intended to be broadly applicable to the temporary changes in practice and standard of care in response to the COVID-19 pandemic.” (R. 53, p. 16). In fact, the court of appeals highlighted that a previous version of the bill that limited immunity to responding to the Covid 19 outbreak was later struck by a subsequent amendment to that bill that became Wis. Stat. § 895.4801. *Wren*, ¶ 34 n. 12. And the court of appeals noted, “the legislature passed 2019 Wis. Act 185 as part of the State of Wisconsin’s response to the state of emergency created by the COVID-19 pandemic.” *Wren*, ¶ 24.

Ms. Wren also asserts Wis. Stat. § 895.476 provided the means to keep hospital and clinics open by providing immunity in treating Covid 19 in a narrowly tailored way, as opposed to the broad immunity provided in Wis. Stat. § 895.4801. *Ms. Wren’s response brief*, p. 16. The court of appeals believed this also. *Wren*, ¶ 37 (section 895.4801 was not narrowly tailored for treatment of Covid 19). But, as noted above, Wis. Stat. § 895.4801 was not promulgated just for the treatment of Covid 19. It was, however, passed by the legislature and approved by the governor to provide immunity for treating all health care conditions, not just for Covid 19.

C. Ms. Wren’s issue presented, statement of facts, and standard of review do not accurately address the issue presented here.

Ms. Wren asks in her statement of the issue “[d]id the court of appeals properly apply the constitution?” *Ms. Wren’s response brief*, p. 1. The issue, however, is narrowly focused, as stated by this Court, to whether Wis. Stat. § 895.4801 complies with the right to a jury trial as stated in the Wisconsin Constitution, Article I, Section 5. *Supreme Court’s June 30, 2025 Order*, p. 1. This issue therefore does not address the application of the United States Constitution, although Ms. Wren misidentifies the

issue as involving the U.S. Constitution throughout her brief. *Ms. Wren's response brief*, pp. 6, 8, 9 and 10.

Additionally, Ms. Wren presents a statement of facts that discusses the details of the birth of the child at issue. *Ms. Wren's response brief*, pp. 3-6. These facts, other than that the alleged negligence occurred during the period of time in which Wis. Stat. § 895.4801 was applicable, do not have any relevance to the issue presented before this Court. In fact Ms. Wren asserts facts, such as on page five, footnote two of her response brief where she refers to guidelines, that have not been subject to discovery, as discovery was stayed pursuant to Wis. Stat. § 802.06(1)(b) when Columbia St. Mary's filed its motion to dismiss.⁴

Similarly, Ms. Wren presents standard of review cases that do not have relevance to the issue presented. Significantly, Ms. Wren erroneously cites on page six of her response brief to a purported court of appeals decision, *In Re Termination of Parental Rights to Lyle D.E. Jr.*, 2007 WL 602611. However the court of appeals actually certified the case to the supreme court. *Walworth County HHS v. Andrea L.O. (In re Lyle D.E.)*, 2008 WI 46, ¶ 1, 309 Wis. 2d 161, 749 N.W.2d 168. Of note, this Court actually held there is *not* a constitutional right to a jury trial in termination cases. *In re Lyle D.E.*, ¶ 29.

Ms. Wren cites to a case involving the First Amendment to the U.S. Constitution, *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 807 and 812 (2000), that does not pertain to the Wisconsin constitutional right to a jury trial. *Ms. Wren's response brief*, p. 7. Additionally, her citation to *James v. Heinrich*, 2021 WI 58, ¶ 39, 397 Wis. 2d 516, 960 N.W.2d 350, is misplaced. *Ms. Wren's response brief*,

4

In addition, regulations adopted by a private organization do not set the standard of care in a negligence case because the standard of care must be set by law. See *Johnson v. Misericordia Cmty. Hosp.*, 97 Wis. 2d 521, 537, 294 N.W.2d 501 (Ct. App. 1980), *aff'd*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981).

p. 6. The *James* court stated that when examining a law alleged to violate the exercise of religious freedom, and after two elements are established by the party challenging the statute, *then* the burden shifts to the state. *Id.* This is not a exercise of religious freedom case, nor does Ms. Wren accurately reflect the constitutional analysis established in that case that the burden still initially follows on the party challenging the constitutionality of the statute. And Ms. Wren's reference to *State ex rel. Ghashiyah (Khan) v. Sullivan*, 2000 WI App 109, ¶9, 235 Wis. 2d 260, 613 N.W.2d 203, is an equal protection case, and therefore not applicable to the instant case. *See Ms. Wren's response brief*, p. 7.

Instead, Ms. Wren ignores the substantial body of case law on the standard of review, including that a facial constitutional challenge must meet the highest level of proof, beyond a reasonable doubt, to succeed. *Columbia St. Mary's response brief*, p. 17. In addition, all legislative acts are presumed constitutional and courts indulge every presumption to sustain the law. *Id.*

II. Contrary to Ms. Wren's assertion, there was an end date to section 895.4801 at the time it was enacted.

Ms. Wren incorrectly contends section 895.4801 had no set end date at the time the statute was promulgated. *Ms. Wren's response brief*, pp. 12 and 17. In fact, the statute did have an end date at the time it was passed. The governor declared a state of emergency on March 12, 2020, pursuant to Executive Order No. 72. The act that formed the basis for section 895.4801, 2019 Wis. Act 185, was enacted on April 15, 2020. Wis. Stat. § 895.4801 cites to 60 days after the termination of the state of emergency declared under Executive Order No. 72. As has been noted throughout Columbia St. Mary's briefing, *see, e.g., Columbia St. Mary's opening brief*, p. 10 n. 1, by operation of Wis. Stat. § 323.10, Executive Order No. 72 expired on May 11, 2020, so the immunity provision did not expire until July 10, 2020. If Ms. Wren is attempting to argue there was a retroactive application of section 895.4801, and thus

it is unconstitutional, an emergency of great magnitude, such as the start of the Covid 19 worldwide pandemic, can constitutionally justify a retroactive state law. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 n. 24 (1978).

Here, once it was determined Covid 19 was spreading, the legislature and governor addressed the issue quickly. The Executive Order was issued and then legislation was passed by the legislature and approved by the governor to permit health care providers to provide care during the start of a novel, worldwide pandemic. These health care providers included not only physicians and physician assistants, but also dentists, podiatrists, and massage therapists. Wis. Stat. § 895.4801(1)(b) *citing* Wis. Stat. § 146.38(1)(b). The public interest of ensuring access to all types of health care including, for example, obstetric care, pediatric care, etc. certainly outweighed the concerns of maintaining a lawsuit based on negligent care during the narrowly defined period of time. In other words, the legislature and governor agreed to permit access to health care ranging from life threatening to wellness issues in light of the Covid 19 pandemic, without fear of liability.

III. Because Ms. Wren does not present any arguments in opposition, Columbia St. Mary's arguments addressing deference and the constitutional principles of bicameralism and presentment are conceded.

Ms. Wren does not address a number of Columbia St. Mary's arguments. Unrefuted arguments are deemed conceded. *Charlais Breeding Ranches*, 90 Wis. 2d at 109. There are a number of arguments Columbia St. Mary's presented to which Ms. Wren did not present any response, including Argument Sections III and IV, pp. 28-35 of Columbia St. Mary's opening brief. Argument Section III asserted the court of appeals did not provide any analysis of the deference courts provide to the policy choices of the legislature and governor, and instead substituted its own judgment.

Moreover, Ms. Wren does not present any argument in opposition to Argument Section IV. *Columbia St. Mary's opening brief*, pp. 34-35. Columbia St. Mary's

contended that in the legislature and governor passing and approving Wis. Stat. § 895.4801, the statute meets the constitutional principles of bicameralism and presentment.

CONCLUSION

For the above-stated reasons, defendant-respondents-petitioners Columbia St. Mary's Hospital Milwaukee, Inc., Jordan Hauck, D.O., Jessica Hoelzle, M.D., and the Injured Patients and Families Compensation Fund respectfully request the Court reverse the court of appeals and find Wis. Stat. § 895.4801 constitutional.

Dated this 4th day of September, 2025 at Milwaukee, Wisconsin.

GUTGLASS, ERICKSON, LARSON & SCHNEIDER, S.C.

electronically signed by Bradley S. Foley

Mark E. Larson (#1016423)

Bradley S. Foley (#1026871)

Attorneys for Defendant-Respondent-Petitioner
Columbia St. Mary's Hospital Milwaukee, Inc.

LEIB KNOTT GAYNOR, LLC

Dated: September 4, 2025 *electronically signed by Ashley A. Brown*

Sean M. Gaynor (State Bar No. 1032820)

Ashley A. Brown (State Bar No.1097649)

Attorneys for Defendant-Respondent-Petitioner Jordan
Hauck, D.O.

LARSON - KING, LLP

Dated: September 4, 2025 *electronically signed by Patrick H. O'Neill, III*

Mark A. Solheim (State Bar No. 1028001)

Kevin T. McCarthy (State Bar No. 1120231)

Patrick H. O'Neill, III (State Bar. No. 1125257)

Attorneys for Defendant-Respondent-Petitioner Jessica
Hoelzle, M.D.

OTJEN LAW FIRM, S.C.

Dated: September 4, 2025 *electronically signed by Jason J. Franckowiak*
Jason J. Franckowiak (State Bar No. 1030873)
Attorneys for Defendant-Respondent-Petitioner Injured
Patients and Families Compensation Fund

CERTIFICATIONCertificate of Compliance with Wis. Stat. § 809.19(8g)(a)

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b), (bm), and (c) for a brief.

The length of this brief is 2,772 words.

Dated this 4th day of September, 2025 at Milwaukee, Wisconsin.

**GUTGLASS, ERICKSON,
LARSON & SCHNEIDER, S.C.**

electronically signed by Bradley S. Foley

Mark E. Larson (State Bar No. 1016423)

Bradley S. Foley (State Bar No. 1026871)

Attorneys for Defendant-Respondent-Petitioner

Columbia St. Mary's Hospital Milwaukee, Inc.