WISCONSIN COURT OF APPEALS
DISTRICT I

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.

JOINT RESPONSE BRIEF OF THE DEFENDANTS-RESPONDENTS

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

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[1]The plaintiffs-appellants will be referred to as Ms. Wren. *See* Wis. Stat. § 809.19(1)(i). Ms. Wren failed to paginate her brief in the manner required by Wis. Stat. § 809.19(8)(bm).

TABLE OF AUTHORITIES

[2]Ms. Wren's Table of Authorities only references case law and not statutes. Wis. Stat. § 809.19(1)(a).

STATEMENT OF THE ISSUES[3]

ISSUE NO. 1:

Is Wis. Stat. § 895.4801(2)'s limitation on medical negligence claims constitutional on its face?

The circuit court answered this issue "yes."

ISSUE NO. 2:

Was Ms. Wren required to name and serve the state Attorney General and state legislative leaders to properly challenge the constitutionality of Wis. Stat. § 895.4801(2)?

The circuit court answered this issue "yes."

Of note, Ms. Wren improperly presents argument in this section, beyond stating the issues presented for review and how the circuit court decided them. *See* Wis. Stat. § 809.19(1)(b).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22(2)(b), oral argument is not necessary in this case. The issues presented can be adequately addressed through the briefing process.

Publication is not warranted in this case because the issues presented involve the straightforward application of existing Wisconsin law to undisputed facts. Wis. Stat. § 809.23(1)(a).

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[3]As this brief is presented on behalf of all defendants-respondents, Columbia St. Mary's Hospital Milwaukee, Inc., Jordan Hauck, D.O., Jessica Hoelzle, M.D., and the Injured Patients and Families Compensation Fund, the name "Columbia St. Mary's" will serve as the reference throughout this brief for all the defendants-respondents. *See* Wis. Stat. § 809.19(1)(i).

STATEMENT OF THE CASE

In her statement of the case, Ms. Wren fails to provide any citation to the Record. *See* Wis. Stat. § 809.19(1)(d). "An appellate court is improperly burdened where briefs fail to properly and accurately cite to the record." ***Hedrich v. Board of Regents***, 2001 WI App 228, ¶ 1 n. 2, 248 Wis. 2d 204, 635 N.W.2d 650. A court is not required to sift through the record for facts. ***Keplin v. Hardward Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). Absent exceptional circumstances not applicable here, an appellate court does not consider "assertions of fact that are not part of the record." ***Parr v. Milwaukee Bldg. & Constr. Trades***, 177 Wis. 2d 140, 144 n. 4, 501 N.W.2d 858 (Ct. App. 1993).

While Ms. Wren provides a lengthy litany of facts without any reference to the Record, the facts, for the purpose of this appeal, are quite simple and straightforward. Ms. Wren alleges on May 24, 2020 she gave birth, and on the same day, her child was pronounced deceased. (R. 5, ¶ 21). In fact Ms. Wren asserts facts, such as on page five of her opening 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]

Ms. Wren alleges defendant-respondent Jessica Hoelzle, M.D. was negligent in providing care and treatment to her and her child. (R. 5, ¶¶ 22-26). Ms. Wren also contends defendant-respondent Jordan Hauck, D.O. was negligent in her care and treatment of her and her child. (R. 5, ¶¶ 27-30). Last, she asserts defendant-respondent Columbia St. Mary's Hospital Milwaukee, Inc. was also negligent in its care and

[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).

treatment of her and her child. (R. 5, ¶¶ 31-35). Ms. Wren also sued defendant-respondent Injured Patients and Families Compensation Fund. (R. 5, ¶ 13).

Subsequent to the filing of the complaint, Columbia St. Mary's filed its joint defense motion to dismiss the plaintiffs' complaint. (R. 48 and 49). In sum, Columbia St. Mary's contended that Wis. Stat. § 895.4801(2) expressly provided immunity for the health care providers named in this lawsuit as their care and treatment was provided during the immunity time period specified in the statute, and their actions were not alleged to be reckless, wanton, or intentional misconduct. (R. 49, pp. 1-2).

Ms. Wren responded, (R. 51), and Columbia St. Mary's replied. (R. 53 and 54). A hearing on the motion to dismiss was originally scheduled to occur on November 10, 2023, but was adjourned (R. 74, pp. 17-18). The motion to dismiss hearing occurred on December 6, 2023. (R. 73).

A. The Circuit Court Granted the Motion to Dismiss at a December 6, 2023 Hearing.

In her procedural background, Ms. Wren did not reference the parties' discussion of the constitutionality of Wis. Stat. § 895.4801(2) at the December 6, 2023 hearing, nor the circuit court's decision upholding the constitutionality of that statute. *See Ms. Wren's opening brief*, p. 6. As a result, a recitation of what occurred at that hearing will be presented below. Although not addressed in her briefing in this court, *Ms. Wren's opening brief*, pp. 18-25, Ms. Wren stated at the hearing that she was presenting a facial constitutional challenge to Wis. Stat. § 895.4801(2). (R . 73, p. 16).

1. Columbia St. Mary's Supported the Constitutionality of Wis. Stat. § 895.4801(2) and the Application of Wis. Stat. § 806.04 (11) at the December 6, 2023 hearing.

At the December 6, 2023 hearing, Columbia St. Mary's argued in support for the constitutionality of Wis. Stat. § 895.4801(2), including its purpose. Columbia St.

Mary's stated the "clear purpose of the statute at issue here 895.4801 was to actually preserve access for all person[s] in Wisconsin to all aspect[s] of health care during the pandemic." (R. 73, p. 19). As noted by Columbia St. Mary's, the purpose of section 895.4801(2) was to encourage health care providers to remain available during the pandemic. ***Id.*** It applied to not only physicians, but nurses, chiropractors, and other health care providers. ***Id.*** The statute's purpose was to allow the public to still be able to receive health care, even if the patient's condition was not related to a Covid issue. (R. 73, p. 19).

In response to Ms. Wren's argument that Wis. Stat. § 895.476 was also written to address Covid health issues and therefore section 895.4801(2) was overbroad, Columbia St. Mary's noted that was the point: "In contrast to the statute that the plaintiffs are citing to, that they're saying was more tailored, 895.476, [it] was actually written for a completely different purpose, and that's why it was tailored in the way that it was." (R. 73, p. 20). Wis. Stat. § 895.476 was enacted to address immunity for Covid exposure in a whole range of activities in life, including businesses and schools that were not considered health care providers. (R. 73, p. 20). The focus of section 895.476 was to protect a wide range of functions in society from being shut down for fear they might become liable for exposure to Covid. (R. 73, p. 20).

Wis. Stat. § 895.4801(2), in contrast, was meant to encourage health care providers to remain open and address any health care issues that might arise, such as a birth, broken arm, etc. (R. 73, p. 20). Thus, it was very clear the legislature and the Governor enacted a statute that provided broad immunity to health care providers so that people, like Ms. Wren, would have continued access to health care that was not simply limited to Covid issues. (R. 73, p. 21); *see also* (R. 73, p. 22, Columbia St. Mary's attorney discussing that Wis. Stat. § 895.4801(2) is very clear that it provides immunity for health care providers so patients can access them).

Thus, there was immunity for medical services provided during the time frame at issue, March 12, 2020 to July 10, 2020.[5] (R. 73, p. 22). The attorney for Ms. Wren agreed that the incident that is the subject of this action occurred on May 24, 2020, during the immunity period provided by Wis. Stat. § 895.4801(2). (R. 73, p. 24). In sum, the purpose of section 895.4801(2) was to provide health care to all citizens in Wisconsin during the extremely unusual period of time when people were afraid to go to places for fear of Covid, including health care facilities. (R. 73, p. 23).

Columbia St. Mary's also discussed what the legislature chose to do in passing section 895.4801(2). It chose to specifically broaden the statute to encourage the provision of health care in all aspects, not just related to Covid. (R. 73, p. 25). Any reference to previous drafts of section 895.4801 before the actual bill became a law provided further evidence the legislature made a conscious decision to protect health care providers during the Covid crisis facing the state and the nation. (R. 73, p. 26).

The application of Wis. Stat. § 806.04(11) was also addressed at the hearing. As noted by the attorney for Columbia St. Mary's, the case law cited, ***Walt v. City of Brookfield***, 2015 WI App 3, ¶36 n.7, 359 Wis. 2d 541, 859 N.W.2d 115, and the case it relied on, ***O'Connell v. Board of Education***, 82 Wis.2d 728, 734-35, 264 N.W.2d 561 (1978), held that subject matter jurisdiction required compliance with the statute. (R. 73, p. 3).

2. The Circuit Court Upheld the Constitutionality of Wis. Stat. § 895.4801(2) and Interpreted Wis. Stat. § 806.04(11) as Requiring the State Attorney General and State Legislative Leaders Be Made Parties.

The circuit court held that based on "the Court's reading of [Wis. Stat. §] 806.04(11)[,] based upon submissions to the Court *and argument of the parties today*,

[5]The dates were provided in Columbia St. Mary's initial brief in support of its motion to dismiss. (R. 49, pp. 1-2).

the Court is of the understanding that 806.04(11) requires that all persons to be made parties." (R. 73, p. 28)(emphasis added). The Court held that "it is clear that there are constitutional issues being raised here, and 806.04(11) provides that when a statute is alleged to be unconstitutional, certain individuals or entities must be notified and pursuant to that statute made parties to the action." (R. 73, pp. 28-29). The Court concluded that "that's not what has occurred here in this case. Therefore, the Court finds that the Court does lack subject matter jurisdiction." (R. 73, p. 29).

Even though the Court found it lacked subject matter jurisdiction, it also addressed the constitutionality of Wis. Stat. § 895.4801. In assessing whether section 895.4801 is constitutional, the circuit court noted that statutes are presumed to be constitutional, (R. 73, p. 29), and that any doubt regarding the constitutionality of a statute must be resolved in favor of finding a statute constitutional. (R. 73, p. 30). The Court further noted that "[t]o succeed on a constitutional challenge, a statute must be shown to be unconstitutional beyond a reasonable doubt." (R. 73, p. 30).

The Court addressed the legislative history of section 895.4801. The Court held that "upon a review of the submissions from the defendants, the legislative history shows that the legislature made a deliberate choice to provide broad immunity when the COVID-19 pandemic first started." (R. 73, p. 30). The Court concluded that Ms. Wren "has not met the heavy burden of proving that a statute is unconstitutional by merely pointing to a more narrowly construed statute because they must prove it beyond a reasonable doubt. Thus, the facts pled in the complaint satisfy the immunity provide[d] by 895.4801." (R. 73, p. 31). The Court granted the motion to dismiss with prejudice. (R. 73, p. 32). The Order for Dismissal with prejudice was signed and filed on December 14, 2023. (R. 71).

ARGUMENT[6]

I. THE APPELLATE STANDARD OF REVIEW.[7]

The interpretation of the state constitution and statutes are questions of law decided *de novo*, but benefitting from the circuit court's analysis. ***State v. Hamdan***, 2003 WI 113, ¶ 19, 264 Wis. 2d 433, 665 N.W.2d 785. Whether a statute is constitutional presents a question of law that an appellate court reviews de novo. ***Dane County Dep't of Human Services v. P.P.***, 2005 WI 32, ¶14, 279 Wis. 2d 169, 694 N.W.2d 344.

II. STATUTES ARE PRESUMED CONSTITUTIONAL, AND MS. WREN MUST ESTABLISH WIS. STAT. § 895.4801 IS UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT.

The standard of review presumes the constitutionality of a statute. "All legislative acts are presumed constitutional and we must indulge every presumption to sustain the law. [citation omitted.] Any doubt that exists regarding the constitutionality of the statute must be resolved in favor of its constitutionality." ***Madison Teachers, Inc***. ***Walker***, 2014 WI 99, ¶13, 358 Wis. 2d 1, 851 N.W.2d 337 (citations omitted). Every presumption and doubt are resolved in favor of the statute's constitutionality. ***State v. McManus***, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989).

Because of the strong presumption in favor of constitutionality, a party bringing a constitutional challenge to a statute bears a "heavy burden." ***State v.***

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[6] Throughout her argument, Ms. Wren refers to herself as the "plaintiffs" or "plaintiffs-appellants." This is contrary to Wis. Stat. § 809.19(1)(i), which mandates that reference be to parties by name, rather than by party designation, in the argument section.

[7] In the standard of review and argument sections of her brief, Ms. Wren's citations to Wisconsin appellate court cases do not follow 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(1).

Carpenter, 197 Wis. 2d 252, 276, 541 N.W.2d 105 (1995). It is not sufficient for a party to demonstrate "that the statute's constitutionality is doubtful or that the statute is probably unconstitutional." ***State v. Smith***, 2010 WI 16, ¶ 8, 323 Wis. 2d 377, 780 N.W.2d 90. The presumption can be overcome only if the party establishes "the statute is unconstitutional *beyond a reasonable doubt*." ***Id.*** (citation omitted)(emphasis added).

And when a party makes a facial challenge, as here, it bears a heavy burden because a court's presumption is grounded in its understanding and respect for the differing roles of the legislature and the judiciary. ***Vincent v. Voight***, 2000 WI 93, ¶52 n.22, 236 Wis. 2d 588, 614 N.W.2d 388. "A facial constitutional challenge to a statute is an uphill endeavor." ***State v. Dennis H.***, 2002 WI 104, ¶5, 255 Wis. 2d 359, 647 N.W.2d 851.

Additionally, a court will not reweigh the policy choices of the legislature. ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 506, 261 N.W.2d 434 (1978). "The presumption of statutory constitutionality is the product of our recognition that the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature." ***Aicher v. Wisconsin Patients and Families Compensation Fund***, 2000 WI 98, ¶ 20, 237 Wis. 2d 99, 613 N.W.2d 849.

In light of this high bar on appellate review for Ms. Wren to establish Wis. Stat. § 895.4801(2) is unconstitutional, Ms. Wren's arguments fail to cross over this hurdle.

III. THE CIRCUIT COURT CORRECTLY CONCLUDED WIS. STAT. § 895.4801(2) IS CONSTITUTIONAL.

Of note, despite the state Attorney General's office requesting notice if an appeal in this case raises an issue of the constitutionality of a statute, Ms. Wren has never stated she complied with this request despite her arguments in this appeal asserting Wis. Stat. § 895.4801(2) is unconstitutional. *See* (Doc. 68). Also of note,

Ms. Wren fails to provide Record cites in any of her argument as to why Wis. Stat. § 895.4801 is unconstitutional. *Ms. Wren's opening brief*, pp. 18-25. The court of appeals has no duty to scour the Record to review arguments unaccompanied by adequate record citation. ***Roy v. St. Luke's Med. Ctr.***, 2007 WI App 218, ¶ 10 n. 1, 305 Wis. 2d 658, 741 N.W.2d 256.

A. Wis. Stat. § 895.4801 is Constitutional, Even Assuming the Strict Scrutiny Standard Applies.

Ms. Wren contends strict scrutiny should be applied when assessing the constitutionality of Wis. Stat. § 895.4801(2), and that the circuit court did not analyze the constitutionality of the statute in that context. *See Ms. Wren's opening brief*, p. 19. But the circuit court extensively discussed the principles cited above that Ms. Wren needs to establish section 895.4801(2) was unconstitutional beyond a reasonable doubt, as noted in its decision at the December 6, 2023 hearing. But, for the purpose of this appeal only, Columbia St. Mary's will also address strict scrutiny.

Strict scrutiny is applied to statutes that interfere with the exercise of a fundamental right or that operate to the disadvantage of protected classes. ***Mayo v. Wisconsin Injured Patients & Families Comp. Fund***, 2018 WI 78, ¶28, 383 Wis. 2d 1, 914 N.W.2d 678. Because Ms. Wren contends Wis. Stat. § 895.4801(2) removes the right to a jury trial, U. S. Const. Amend. VII and Wis. Const. Art. 1, Sect. 9, it is assumed this is infringing on a fundamental right. "When strict scrutiny is applied, the statute must serve a compelling state interest; the statute must be necessary to serving that interest; and the statute must be narrowly tailored toward furthering that compelling state interest." ***Mayo***, ¶ 28. Wis. Stat.§ 895.4801 (2) passes strict scrutiny, even if applicable. Section 895.481(2) was enacted to serve the compelling state interest to encourage hospitals, clinics, and the like to be open and see patients for all medical concerns, not just for Covid-19. The provision of non-Covid-19 medical care was changed during the pandemic. This impacted not only providers, but everyone in

the provision of care chain, including staffing and suppliers. The immunity provision was a conscious decision to broaden immunity to allow providers to provide care given the extraordinary circumstances of a novel pandemic. The statute was narrowly tailored, providing such immunity for a period of approximately four months. The legislature tied the immunity period to the duration of the emergency declaration of the Governor, plus 60 days. Wis. Stat. § 895.4801(2)(a).

Although Ms. Wren contends Wis. Stat. § 895.4801(2) was not narrowly tailored to serve a state interest as compared to the legislature's passage of Wis. Stat. § 895.476, *Ms. Wren's opening brief*, p. 23, this distinction was addressed at oral argument by Columbia St. Mary's before the circuit court. Columbia St. Mary's noted Wis. Stat. § 895.476 was enacted to address immunity for Covid exposure in the myriad of activities in life, including businesses and schools that were not involved in providing health care. (R. 73, p. 20). The focus of section 895.476 was to protect a wide range of functions in society from being shut down for fear they might become liable for exposure to Covid. (R. 73, p. 20).

In contrast, Wis. Stat. § 895.4801(2) was meant to encourage health care providers to remain open and address any health care issues that might arise, such as a birth, broken arm, etc. (R. 73, p. 20). Thus Wis. Stat. § 895.4801(2) was narrowly tailored to serve a compelling state interest. Ms. Wren even concedes this in her brief: "Plaintiffs [sic] do not dispute that the COVID-19 pandemic created unprecedented challenges to the state and healthcare system." *Ms. Wren's opening brief*, p. 23.

In the instant case, the legislature created a law, Wis. Stat. § 895.4801(2), to provide immunity to health care providers in order for them to address every type of health care concern, not just related to Covid. Viewed through the lens that statutes are presumed constitutional, Wis. Stat. § 895.4801 meets the strict scrutiny standard: it serves a compelling state interest in permitting health care providers to provide all types of services to patients despite the Covid pandemic; it was necessary to serve that

interest; and it was narrowly tailored to further that interest, as the immunity period was between March 12, 2020 and July 10, 2020.

B. Ms. Wren Fails to Engage in any Substantive Analysis that Her Right to a Jury Trial Was Violated by Wis. Stat. § 895.4801(2).

In the circuit court, Ms. Wren contended that Wis. Stat. § 895.4801(2) *threatens* the right to a jury trial, but never stated it violated that right. (R. 51, p. 4). She only raised this argument in one sentence. ***Id.*** Now, on appeal, Ms. Wren broadly states, in one paragraph, that Wis. Stat. § 895.4801(2) directly violates her right to a jury trial. *Ms. Wren's opening brief*, pp. 20-21. An appellate court need not consider arguments that are unsupported by adequate legal citations or are otherwise undeveloped. ***State v. Petit***, 171 Wis. 2d 627, 646-647, 492 N.W.2d 633 (Ct. App. 1992). A litigant has an obligation to spell out its arguments squarely and distinctly. ***State v. Alexander***, 2013 WI 70, ¶ 31 n. 10, 349 Wis. 2d 327, 833 N.W.2d 126. As a result, this argument must be struck, including an undeveloped reference to the First Amendment to the United States Constitution. *Ms. Wren's opening brief*, p. 20.

But even if this argument is considered, Ms. Wren bases this argument in part on the Seventh Amendment to the United States Constitution. *Ms. Wren's opening brief*, p. 20. As Columbia St. Mary's raised in the circuit court, any challenge to the Seventh Amendment to the United States Constitution must be struck. (R. 59, p. 7). "[I]t has been long-decided . . . that the Seventh Amendment to the U.S. Constitution does not apply to actions in state court." ***Village Food & Liquor Mart v. H & S Petroleum, Inc.***, 2002 WI 92, ¶ 7 n.3, 254 Wis. 2d 478, 647 N.W.2d 177.

As to a claim that Article I, Section 9 of the Wisconsin Constitution was violated, that analysis will be briefly presented here. Article I, § 9 of the Wisconsin Constitution provides:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being

> obligated to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

Article 1, Section 9, however, does not confer any legal rights. ***Aicher***, ¶ 43. As a result, Ms. Wren's contention that Wis. Stat. § 895.4801 violates her right is without a basis in law. Moreover, the right to remedy clause "applies only when a prospective litigant seeks a remedy for an already existing right."***Id.*** No court has ever found Article I, Section 9 inconsistent with legislation barring a suit before an injury actually occurs. ***Aicher***, ¶ 45.

Here, the legislature chose, based on policy reasons, to bar claims against health care providers based on negligence, for a short period of time in 2020. As noted by the supreme court, "[w]e cannot preserve a right to obtain justice where none in fact exists." ***Aicher***, ¶ 54. "The legislature formulates the statutory law of Wisconsin, pursuant to constitutional authority. The legislature's authority includes the power to define and limit causes of action and to abrogate common law on policy grounds." ***Id.***, ¶ 51.

Section 895.4801 (2) is not the only limitation on a cause of action that affects the right to a jury trial. Statutes of limitation and statutes of repose also represent policy decisions that dictate when the courthouse doors close for particular litigants. ***Aicher***, ¶ 27. "We remain persuaded that the time limitation periods articulated by statutes of repose inherently are policy considerations better left to the legislative branch of government." ***Id.***, ¶ 53.

Given the deference to the legislature, and Article I, Section 9 has not been held to strike legislation that bars a suit before an injury occurs, this argument fails to support Ms. Wren's position that Wis. Stat. § 895.4801 is unconstitutional.

C. When Addressing an Equal Protection Challenge, Rational Basis Review is the Standard, But Ms. Wren Never Raised Her Argument that Wis. Stat. § 895.4801(2) Disadvantages a Suspect Class in the Circuit Court.

Ms. Wren contends, without citation to the Record, that Wis. Stat. § 895.4801(2) disadvantages a suspect class, relying on an equal protection argument. *See Ms. Wren's opening brief*, pp. 21-22. Ms. Wren, however, never raised this argument before the circuit court. (R. 51, pp. 4-6). As noted above, Ms. Wren raised this argument in her supplemental memorandum in opposition to Columbia St. Mary's motion to dismiss, (R. 52, pp. 2-3), but the circuit court struck this brief. (R. 74, p. 18); *see also Order Arising Out Of The November 10, 2023 Hearing on the Defendants' Joint Motion to Dismiss the Plaintiffs' Complaint* (R. 74, p. 3). Ms. Wren does not appeal this decision. An appellate court does not generally consider issues that are raised for the first time on appeal. ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶ 10, 261 Wis. 2d 769, 661 N.W.2d 476. "A fundamental appellate precept is that we 'will not . . . blindside trial courts with reversals based on theories which did not originate in their forum.'" ***Id.***, ¶ 11 (citation omitted). An appellate court will not consider an issue not properly raised in the circuit court. ***Hoida, Inc. v. M & I Midstate Bank***, 2004 WI App 191, ¶ 25, 276 Wis. 2d 705, 688 N.W.2d 691.

Without waiving or forfeiting the position that the equal protection argument should not be considered in this appeal, Columbia St. Mary's, for the purpose of this appeal only, presents the standard of review. A court will uphold a statute under equal protection grounds if it finds that a rational basis supports the legislative classification. ***Aicher***, ¶ 56. Ms. Wren incorrectly asserts an equal protection analysis is subject to strict scrutiny. *Ms. Wren's opening brief*, p. 22. The statute must be sustained unless it is "patently arbitrary" and "bears no rational relationship to a legitimate government interest."***Aicher***, ¶ 57 (citation omitted)."[R]ational basis review does not 'allow us to substitute our personal notions of good public policy for those of' the legislature." ***Blake v. Jossart***, 2016 WI 57, ¶32 n.16, 370 Wis. 2d 1, 884 N.W.2d 484 (citation omitted).

> A legislative classification satisfies the rational basis test if it meets five criteria"
> (1) All classifications must be based upon substantial distinctions which make one class really different from another.
> (2) The classification adopted must be germane to the purpose of the law.
> (3) The classification must not be based upon existing circumstances only. [It mus not be so constituted as to preclude addition to the numbers included within a class.]
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at the least the propriety, having regard to the public good, of substantially different legislation.

Aicher, ¶ 58. Ms. Wren does not address any of these factors in her opening brief, and it is not for Columbia St. Mary's nor the Court to develop these arguments. An appellate court need not consider arguments that are unsupported by adequate legal citations or are otherwise undeveloped. ***Petit***, 171 Wis. 2d at 646-647. Regardless, as discussed in the above strict scrutiny argument, there is a rational basis to support the constitutionality of Wis. Stat. § 895.4801(2).

Even so, Ms. Wren refers in footnote two of her brief, *Ms. Wren's opening brief*, p. 21, to a study that was never presented in the circuit court. Not only was her supplemental brief struck by the circuit court, (R. 74, p. 18), but the reference to "NCHS Health E-Stats" is a *different* article, dated 2022, *see Ms. Wren's opening brief*, pp. 21-22, n. 2, than was cited in her circuit court brief that was struck. *See* (Doc. 52, p. 2 n. 1)(citing a 2023 NCHS Health E-Stats article). Moreover, discovery had yet to occur because of the application of Wis. Stat. § 802.06(1)(b). In addition, the studies cited are dated 2022 and 2023, well after the alleged negligence occurred in May 2020, and therefore lack foundation and are not relevant. Wis. Stat. § 904.01.

D. Wis. Stat. § 895.4801(2) is Not Vague, and Thus Meets the Requirements of Due Process.

Ms. Wren also asserts a due process constitutional challenge. *Ms. Wren's opening brief*, pp. 18, 19, 20, and 21. It is assumed she is referring to procedural due process, rather than substantive due process, because she refers to notice. *Ms. Wren's opening brief*, p. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." ***Casteel v. McCaughtry,*** 176 Wis. 2d 571, 579, 500 N.W.2d 277 (1993) (citation omitted)(emphasis in original). A court employs a two-step analysis to determine whether there has been a violation of procedural due process. First, it is determined "whether there exists a liberty . . . interest which has been interfered with by the State"; and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient." ***Id.*** (citation omitted).

Even though Ms. Wren asserts section 895.4801 is vague, "[w]e will not invalidate a statute on vagueness grounds 'if any reasonable and practical construction can be given its language[.]'" ***State v. Hibbard***, 2022 WI App 53, ¶23, 404 Wis. 2d 668, 982 N.W.2d 105 (citation omitted). "Vagueness is essentially a procedural due process concept which is driven by notions of fair play." ***State v. Ruesch***, 214 Wis. 2d 548, 561, 571 N.W.2d 898 (Ct. App. 1997). Due process requires "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." ***Elections Board v. Wisconsin Mfrs. & Commerce***, 227 Wis. 2d 650, ¶ 30, 597 N.W.2d 721 (1999) (citation omitted).

Here, it is undisputed Wis. Stat. § 895.4801 was enacted on April 15, 2020 and, 39 days later, on May 24, 2020, the alleged negligence occurred. *See Ms. Wren's opening brief*, p. 21. Thus not only was section 895.4801 well in effect at the time of

the alleged negligence, but also news reports, one of which is noted above, had discussed the immunity provisions before the alleged negligence occurred. Every person is presumed to know the law and cannot claim ignorance of it as a defense. ***Putnam v. Time Warner Cable of S.E. Wis.***, 2002 WI 108, ¶13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626. Lack of knowledge does not enhance a vagueness challenge. ***State v. Parmley***, 2010 WI App 79, ¶ 27, 325 Wis.2d 769, 785 N.W.2d 655.[8]

E. Statutory Interpretation Favors the Constitutionality of Wis. Stat. § 895.4801(2).

Absent from Ms. Wren's analysis of Wis. Stat. § 895.4801(2) is any discussion of statutory interpretation guidance from the appellate courts. *See Ms. Wren's opening brief*, pp. 18-25. That analysis is presented here.

Wis. Stat. § 895.4801(2) expressly provides that any health care professional or an employee of a health care provider "is immune from civil liability for the death or injury to any individual or any damages caused by actions or omissions" where the services were provided between March 12, 2020 and July 10, 2020,[9] and the acts or omissions were not reckless, wanton, or intentional misconduct.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "We assume that the legislature's intent is expressed in the statutory language." ***Id.***

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[8]Ms. Wren relies, in part, on the non-precedential concurrence of a U.S. Supreme Court decision to support this argument that should be rejected. *See Ms. Wren's opening brief*, p. 20.

[9]The statute cites to 60 days after the termination of the state of emergency declared under Executive Order No. 72 on March 12, 2020. 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.

When interpreting a statute, courts begin with the statutory language. ***Id.*** The words used by the legislature are to be given their "common, ordinary, and accepted meaning." ***Id.***, ¶ 45. If the meaning of the statute is plain, courts ordinarily stop the inquiry. ***Id.***, ¶ 45. Statutory language must be interpreted to avoid absurd or unreasonable results. ***Id.***, ¶ 46. In addition, a review of statutory history is part of the analysis "because it is part of the context in which [courts] interpret statutory terms." ***County of Dane v. LIRC***, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (quoted source omitted). Courts favor an interpretation of a statute that fulfills a statute's purpose. ***State v. Hanson***, 2012 WI 4, ¶ 17, 338 Wis. 2d 243, 808 N.W.2d 390.

Legislative history can be consulted to confirm or verify a plain-meaning interpretation. ***Kalal***, ¶51. The statutory history of section 895.4801 establishes that the legislature deliberately chose to expand immunity for all health care providers during the period of time provided in the statute.

Wis. Stat. § 895.8501 was enacted on April 15, 2020. 2019 Wis. Act 185. Prior to the statute's enactment, the legislative history of the bill shows that on April 13, 2020 the Speaker of the State Assembly's office "want[ed] to make a change to the provider liability language to encompass the changes in the attached PDF (named section 98) with the exception of we do NOT want to change 60 days to 90 days. Leave at 60." (R. 53, pp. 3-7).

The PDF referred to by the Speaker's office specifically removed the description of immunity for health care providers in Wis. Stat. § 895.4801(2) "taken in providing services to address or in response to a 2019 novel coronavirus outbreak [. . . .]" ***Id.*** In other words, the legislature, before voting on the bill that became section 895.4801, deliberately chose to remove the limitation on Covid specific care and instead chose to *broaden immunity* to all alleged actions or omissions taken by any health care provider during the time period at issue. ***Id.*** Courts decline to read into

the statute words the legislature did not see fit to write. ***Dawson v. Town of Jackson***, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316.

The Governor acknowledged the final bill broadly expanded civil liability immunity for health care providers.

> The final bill was drastically different from anything the governor would have supported as a stand-alone provision. And it is drastically different from what Wisconsin needs. But despite his serious concerns about this particular provision, the governor signed the bill because it included critical, time-sensitive provisions, such as waiver authority to obtain more than $600 million in federal funding (which had a deadline from the federal government of 4/17) and the suspension of the one week unemployment insurance waiting period for folks who need this immediate relief.

(R. 53, p. 12).

The Wisconsin Medical Society similarly agreed that Wis. Stat. § 895.4801 broadly expanded immunity for health care providers during the time period.

> The civil liability safe harbor grants physicians and many other health care workers immunity from civil suits in relation to their actions or omissions in delivering care during the pandemic. The duration of the immunity extends 60 days past the end of Governor Evers's initial Safer at Home order. This provision is critical as physicians are providing care to patients for a diagnosis for which there is currently no approved treatment or vaccine and the standard of care has been dramatically impacted due to recommended changes in practice guidelines. Additionally, *the language of the provision is intended to be broadly applicable to the temporary changes in practice and standards of care in response to the COVID-19 pandemic*. The Society collaborated with the Wisconsin Hospital Association to include the safe harbor provision in the bill; and thanks the Wisconsin Academy of Family Physicians, Wisconsin Chapter of the American College of Emergency Physicians, Wisconsin Psychiatric Association, Wisconsin Society of Anesthesiologists, Wisconsin Chapter of the American Academy of Pediatrics and the Wisconsin Radiological Society for their help as well.

(R. 53, p. 16)(emphasis added).

In other words, Covid-19 was impacting the provision of care in all areas of health care. The broad immunity of Wis. Stat. § 895.4801(2) encouraged hospitals, clinics, and the like to be open and see patients for all medical concerns, not just for Covid-19. As acknowledged by the Wisconsin Medical Society, the provision of non-Covid-19 medical care was changed during the pandemic. This impacted not only providers, but everyone in the provision of care chain, including staffing and suppliers. This immunity provision was a conscious decision to broaden immunity to allow providers to provide care given the extraordinary circumstances of a novel pandemic.

Here, the change of wording prior to final passage of the legislation was a deliberate word choice to broaden the application of immunity. "This [wa]s no mere accident of legislative drafting." ***State ex rel. Nudo Holdings, LLC v. Board of Review for the City of Kenosha***, 2022 WI 17, ¶ 23, 401 Wis. 2d 27, 972 N.W.2d 544.

F. Ms. Wren's Citation to *James v. Heinrich* Actually Supports Columbia St. Mary's Position that Wis. Stat. § 895.4801 is Constitutional.

Ms. Wren contends the supreme court addressed similar questions as presented in the case at bar in ***James v. Heinrich***, 2021 WI 58, 397 Wis. 2d 516, 960 N.W.2d 350. But the case at bar and ***James*** are, in fact, vastly dissimilar. The difference between the case at bar and ***James*** is significant. ***James*** involved the review of an order issued by a local health officer to determine its constitutionality in the context of the statute on which it was purported to be based, and the state constitution. On the other hand, the case at bar presents the constitutional review of a statute, enacted by the legislature.

In ***James***, the Dane County, Wisconsin health officer issued a series of emergency orders, including "regulating COVID-19 safety protocols in public and private schools throughout the county." ***James***, ¶¶ 7-9. One day after the health

officer issued her order, a parent of students in a private school filed a petition for original action in the state supreme court challenging the lawfulness of the order. ***Id.***, ¶ 10. Other parties then also filed petitions for original action. ***Id.***, ¶¶ 11-12. The petitioners challenged the order, arguing it exceeded the public health officer's statutory authority pursuant to a Wisconsin statute, and that the order violated the Wisconsin Constitution's free exercise of religion provision. ***Id.***, ¶ 13.

The supreme court concluded that the local health officer's order was "statutorily unlawful." ***James***, ¶ 16. In reaching this conclusion, the court analyzed the order in the context of the statute upon which the local health officer had relied in issuing her order. ***Id.***, ¶¶ 18-19. The court concluded the legislature withheld the authority to close schools from local health officers. ***Id.***, ¶ 20. The court noted the absence in the statute of any "express grant of authority allowing local health officers to close schools [. . . .]" ***Id.***, ¶ 21. "Nothing in the text of the statute confers upon local health officers the power to close schools. [. . .] Because we are a court and not the legislature, it would exceed the constitutional boundaries of our authority to rewrite the law in this manner." ***Id.***, ¶ 22.

In fact, not only did the supreme court review the statutory text to determine if the local health officer's order was constitutional, but the court also examined the legislative history, similar to what Columbia St. Mary's presents in the instant case. The court stated that the plain text of the statute did not confer any authority on the local health officer to close schools, and could have ended its analysis at that point. ***Id.***, ¶ 26. But the court noted that legislative history is sometimes consulted to "'confirm or verify a plain-meaning interpretation." ***Id.***, ¶ 26 (citation omitted). The court then reviewed the legislative history to confirm that local health officers do not have the power to close schools. ***Id.***; *See the legislative history discussion*, ***James***, ¶¶ 27-31.

Of significance, and mimicking what occurred in the case at bar in the passage of Wis. Stat. § 895.4801(2), the court noted that the legislative choice to exclude providing the power to close schools to local public health official "was no accident." ***James***, ¶ 30. The court noted early drafts of the bill revealed the legislature "at one point contemplated giving local health officer the power to close schools." ***Id.***, ¶ 30. And even through several amendments to the statute over the years, the legislature never chose to provide the power to close schools to local public health officials. ***Id.***, ¶ 31.

IV. FAILURE TO PROVIDE NOTICE TO THE ATTORNEY GENERAL AND STATE LEGISLATIVE LEADERS DEPRIVED THE CIRCUIT COURT OF SUBJECT MATTER JURISDICTION.

Ms. Wren spends six pages of her opening brief addressing the application of Wis. Stat. § 806.04(11) to this case. *Ms. Wren's opening brief*, pp. 12-17. But as noted by the attorney for Columbia St. Mary's at the oral argument before the circuit court, the case law cited, ***Walt v. City of Brookfield***, 2015 WI App 3, ¶36 n.7, 359 Wis. 2d 541, 859 N.W.2d 115, and the case it relied on, ***O'Connell v. Board of Education***, 82 Wis.2d 728, 734-35, 264 N.W.2d 561 (1978), held that subject matter jurisdiction required compliance with the statute. (R. 73, p. 3). This Court may similarly lack subject matter jurisdiction because Ms. Wren has not provided notice that she has notified the state Attorney General of her assertion that Wis. Stat. § 895.4801(2) is unconstitutional.

Even if this Court concludes the failure to name as parties the state Attorney General and state legislative leaders does not mean the circuit court did not have subject matter jurisdiction, *see* Wis. Stat. § 806.04(11), the above arguments supporting the constitutionality of Wis. Stat. § 895.4801(2) can still be addressed. The circuit court addressed this argument, as did the parties in the circuit court and on appeal.

CONCLUSION

For the above-stated reasons, defendant-respondents 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 this Court affirm the decision of the circuit court dismissing the plaintiffs' claims with prejudice.

Dated this 3rd day of April, 2024 at Milwaukee, Wisconsin.

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CERTIFICATION

Certificate 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 6,754 words.

Dated this 3rd day of April, 2024.

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