STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I
Appeal No. 2024AP126

SAVANNAH WREN and CALVIN GORDON,

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

AMICUS CURIAE BRIEF OF THE WISCONSIN ASSOCIATION FOR JUSTICE

Appeal from an Order of the Circuit Court of Milwaukee County, Case No. 2023CV4960, the Honorable Kristy Yang, Presiding.

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STATEMENT OF AMICUS CURIAE INTEREST

The Wisconsin Association for Justice (WAJ) is a voluntary organization of trial lawyers organized for the purpose of securing and protecting the rights of injured individuals. Through its Amicus Curiae Brief Committee, WAJ seeks to submit non-party briefs to aid courts in determining important questions that affect the administration of civil justice within this State, including constitutional questions, such as those raised in this appeal.

ARGUMENT

I. WIS. STAT. §806.04(11) REQUIRES NOTICE OF A CONSTITUTIONAL CHALLENGE BE PROVIDED TO CERTAIN LEGISLATIVE OFFICIALS, BUT DOES NOT REQUIRE THAT THEY BE JOINED AS PARTIES.

Wis. Stat. §806.04(11) provides, in pertinent part:

> PARTIES… If a statute…is alleged to be unconstitutional,…the attorney general shall also be served with a copy of the proceeding and be entitled to be heard. If a statute is alleged to be unconstitutional, … the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding, and…are entitled to be heard. If the assembly, the senate, or the joint committee on legislative organization intervenes as provided under s. 803.09(2m), the assembly shall represent the assembly, the senate shall represent the senate, and the joint committee on legislative organization shall represent the legislature…. (Emphasis added).

The plaintiffs-appellants appear to have complied with the plain terms of this statute by serving a copy of their pleadings raising their constitutional challenges to Wis. Stat. §895.4801(2) to everyone required to receive such notice, e.g., the attorney general, speaker of the assembly,

president of the senate, and senate majority leader. (A-App 5; A-App 18). Nevertheless, the defendants-respondents asserted, and the trial court agreed, that the plaintiffs-appellants were required to do more: join these legislative officials as parties. Because they did not do so, the court determined that it lacked subject matter jurisdiction to consider their constitutional challenges. (Hrg. Transcript, Dkt.40 at 29-30). The trial court erred.

"[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. The starting point is the plain language of the statute, taking into consideration the context in which the provision under consideration is used. *Id.,* ¶¶45-46. Statutory language is given its common, ordinary, and accepted meaning. *Id.,* ¶45. The scope, history and purpose of the statute are also relevant to a plain-meaning interpretation of an unambiguous statute. *Id.,* ¶48. In addition, where related statutes containing the same subject matter are passed at the same time, they must be considered in *pari materia* and be construed together and harmonized if possible. *State v. Wachsmuth*, 73 Wis.2d 318, 326, 243 N.W.2d 410 (1976).

Wis. Stat. §803.09(2m), which is cross-referenced in and was enacted simultaneously with §806.04(11), provides:

> When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, … or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene … at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14. (Emphasis added).

Applying these rules of construction to §806.04(11) and §803.09(2m), the plain language of these statutes clearly requires notice to be given to certain legislative officials, so that they may *choose* whether to exercise their right to intervene and defend the constitutionality of a challenged statute. But these officials are not required to be joined as parties. *Compare with* the language regarding municipalities, which expressly requires that "the municipality shall be made a party, and shall be entitled to be heard."). §806.11(emphasis added).

Further support for this plain language interpretation is found in the legislative history. *See Teschendorf v. State Farm Insurance Companies*, 2006 WI 89, ¶14, 293 Wis.2d 123, 717 N.W.2d 258 ("[I]f the meaning of the statute is plain, we sometimes look to legislative history to confirm the plain meaning."). Wis. Stat. §806.04 was amended by 2017 Wis. Act 369, originating as 2017 Senate Bill 884. The Legislative Reference Bureau (LRB) Analysis for the Senate Bill discusses the impact of the relevant portions of the bill as requiring "a party that alleges that a statute is unconstitutional ... to serve the [legislative leaders] with a copy of the proceeding. The bill also requires that, in such cases, the assembly, the senate, and the Joint Committee on Legislative Organization (JCLO) are

entitled to be heard, representing the legislature and the state." (WAJ App 0002).

The LRB analysis further notes that the purpose of the amendment is to extend[ ] … the current statutory … requirements of service and an opportunity to be heard to the legislature when a statute is alleged to be unconstitutional …." Id. Finally, the LRB analysis explains that "[t]he bill also provides that when a party challenges the constitutionality of a statute ... as part of a claim or affirmative defense, the assembly, the senate, and JCLO have the right at any time to intervene and participate in the action and may also retain legal counsel other than the Department of Justice[,]" and that "the Committee on Assembly Organization may" likewise "intervene in the action, as well as obtain legal counsel[.]" (WAJ App 0003).

Other drafting notes reinforce that the substantive changes to the law were to institute a notice requirement as to the legislative leaders as well as an entitlement for those leaders, and the legislative body, to intervene and be heard in a case. *See* Summary of Provisions LRB 6071 and 6076, 9-10 (WAJ App 0016-17); *see also* Wisconsin Legislative Council Act Memo for 2017 Wis. Act 369, 3-4 (WAJ App 0022-23). Nothing in the drafting bill suggests any intent to require these legislative leaders to actually be joined as parties to litigation challenging the constitutionality of a statute.

When amending the statute, the legislature was not writing on a clean slate. Prior to its amendment, §806.04(11) has always required notice to be provided to the attorney general when the constitutionality of a statute is being challenged. Nevertheless, in interpreting the phrase "the attorney general shall also be served with a copy of the proceeding and be entitled to be heard," this Court has held that "the legislature did not intend to require that the attorney general be made a party." *Town of Walworth v. Village of Fontana-on-Geneva Lake*, 85 Wis.2d 432, 437, 270 N.W.2d 442 (Ct. App. 1978). *See also Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848, 855 (2009) (interpreting §806.04(11) as vesting discretion in the attorney general whether to intervene in an action where the constitutionality of a statute is being challenged).

Because the legislature in amending the statute used this identical language in connection with this new requirement to also provide service of the pleadings upon specified legislative officials, the purpose and intent must also be understood to be the same: they are required to be given notice of any proceedings challenging the constitutionality of a statute, but they are not required to be joined as parties, or required to intervene.

When amending §806.04(11), the legislature is presumed to have known how the courts previously construed the statute, so its failure to alter the language to specifically require the legislative leaders *be made*

parties evinces its acquiescence in this prior construction of the statute. *See* Zimmerman v. Wisconsin Electric Power Co., 38 Wis.2d 626, 634, 157 N.W.2d 648 (1968) ("[W]hen the legislature acquiesces or refuses to change the law, it has acknowledged that the courts' interpretation of legislative intent is correct."). The trial court erred.

II. A BROAD READING OF WIS. STAT. §895.4801(2) AS AFFORDING BROAD IMMUNITY TO HEALTH CARE PROVIDERS FOR ANY AND ALL NEGLIGENT ACTS OR OMISSIONS VIOLATES SUBSTANTIVE DUE PROCESS.

Read broadly, Wis. Stat. §895.4801(2) purports to grant expansive immunity to health care providers for any and all negligent acts or omissions occurring from the time of the Governor's COVID-19 emergency declaration on March 12, 2020 until July 10, 2020 (60 days following the termination of the state of emergency), regardless of whether there is any nexus between the negligent act or omission and any COVID-19 prevention, response, or mitigation. Such broad-sweeping immunity raises significant constitutional issues.[1]

[1] The plaintiffs-appellants are apparently conceding for purposes of this appeal that the statutory language is clear and unambiguous in extending the reach of the health care provider immunity that far. WAJ has a different view, believing that the statute is reasonably susceptible to a different interpretation that limits the immunity to a narrower scope of conduct, specifically, conduct that has some nexus between the alleged negligence and health care services being undertaken for the prevention or mitigation of COVID-19. WAJ recognizes that, as amici, it may not raise new issues on appeal that are not raised by the parties. *See, e.g., Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 45, 327 Wis.2d 572, 786 N.W.2d 177. However, should this Court permit, WAJ is prepared to submit a supplemental brief limited to addressing why this statute is ambiguous, and why, therefore, it should be narrowly construed to only grant immunity to acts or omissions involving some nexus to COVID-19 treatment,

Specifically, WAJ agrees with plaintiffs-appellants that construing §895.4801(2) to broadly immunize health care providers against any and all negligent acts or omissions deprives patients harmed by such conduct substantive due process.

Art. I, Section 1 of the Wisconsin Constitution provides that:

> 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.

This Section has been interpreted as providing the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution. *Mayo v. WI Injured Patients and Families Comp. Fund*, 2018 WI 78, ¶35, 383 Wis.2d 1, 914 N.W.2d 678. With regard to substantive due process, "[t]he touchstone … is protection of the individual against arbitrary action of government," and "[d]ue process bars certain arbitrary, wrongful government actions." Id., ¶38 (citations omitted).

A. Strict Scrutiny Review Applies.

In considering constitutional substantive due process challenges, the reviewing courts apply two different standards of review. Strict scrutiny applies to statutes that restrict a fundamental right or apply to a protected or suspect class. *See Mayo*, 2018 WI 78, ¶28*; see also League of*

prevention or mitigation measures, and not apply to non-COVID related negligent acts or omissions, such as those alleged in this case.

Women Voters of Wis. Educ. Network, Inc. v. Walker, 2014 WI 97, ¶¶139-40, 357 Wis.2d 360, 851 N.W.2d 302.

Here, §895.4801(2) implicates the fundamental right to a jury trial secured by Art. I, Section 5 of the Wisconsin Constitution:[2]

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.

The right to trial by jury as preserved by the Wisconsin Constitution is the right as it existed at common law at the time the Wisconsin Constitution was adopted in 1848. *Town of Burke v. The City of Madison*, 17 Wis.2d 623, 636, 117 N.W.2d 580 (1962).

The right to sue a health care provider for malpractice and have a jury trial on all issues was well established at common law in 1848, the year Wisconsin's Constitution was adopted. *See* Theodore Silver, One Hundred Years of Harmful Error, 1992 Wis. L. Rev. 1193, 1196 n.13 (noting that as early as 1374, the English common law recognized an action for medical malpractice). *See also Quinn v. Higgins*, 63 Wis. 664, 24 N.W. 482 (1885).

In commenting on this right, the Wisconsin supreme court has held:

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[2] Plaintiffs-appellants have alleged that § 895.4801(2) violates the right to trial by jury, but incorrectly premise that claim on the 7th Amendment to the United States Constitution, which does not extend to civil trials in state courts. *See Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916). WAJ agrees that the statute implicates the constitutional right to trial by jury, but the correct constitutional provision is Art. I, Sec. 5 of the Wisconsin Constitution.

> [t]he trial by jury as it existed of old is the trial by jury secured by our national and state constitutions. **It is not granted by these instruments; it is more – it is secured**. It is no American invention. Our fathers brought it with them to this country more than two centuries ago, and by making it a part of the constitution they intend to perpetuate it for their posterity, **and neither legislatures nor courts have any power to infringe even the least of its privileges**.

State v. Cameron, 2 Pin. 490, 499 (1850) (emphasis in original and added).

Under strict scrutiny analysis, a 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. *See also Monroe Cnty. Dep't of Human Servs. v. Kelli B.*, 2004 WI 48, ¶17, 271 Wis.2d 51, 678 N.W.2d 831. Strict scrutiny is an exacting standard, and it is the rare case in which a law survives it. *State v. Baron*, 2009 WI 58, ¶48, 318 Wis.2d 60, 769 N.W.2d 34. Moreover, statutes that restrict a fundamental right or impact a suspect class are not presumed to be constitutional. *State v. Castellano*, 506 N.W.2d 641, 644 (Minn. App. 1993).

B. Wis. Stat. §895.4801(2) Fails Strict Scrutiny Review.

Here, even assuming that there was a compelling state interest in granting immunity to health care providers for actions undertaken in an effort to serve the state's emergency response to COVID-19, granting broad immunity for negligent acts or omissions that have nothing whatsoever to do with the state's COVID-19 treatment, prevention, or mitigation efforts is not necessary to serve that interest. And immunizing

negligent health care providers for acts or omissions that have no connection whatsoever to COVID-19 is also not narrowly tailored to assisting health care providers in treating, preventing or mitigating the spread of COVID-19.

The very history behind the adoption of §895.8401(2) demonstrates that the legislature knew how to enact such a narrowly tailored statute that would have accomplished this goal through much less restrictive means. The original iteration of 2019 Wisconsin Act 185 (2019 Assembly Bill 1038) featured a more restricted form of immunity tied directly to COVID-19 related health care services. *See* 2019 Drafting Request LRB-6120/P4 (WAJ App 0064-65); *see also* LRB Analysis 2019 AB 1038, 11-13, 59-60 (WAJ App 0043-46). Notably, the original drafts of Wis. Stat. §895.4801(2) provided immunity for "actions or omissions taken in providing services to address or in response to a 2019 novel coronavirus outbreak under circumstances that satisfy all of the following . . ." *see* Id., 59-60 (WAJ App 0064) (emphasis added), but the ultimate statute enacted removed that qualifying language and replaced it with "actions or omissions that satisfy all of the following …." *See* Wis. Stat. §895.4801(2).

This change was effectuated by Amendment 4 to the bill. (WAJ App 0066,68). These amendments were requested and offered by Speaker Vos, but neither he nor his office articulated a reason for these

amendments in the drafting request to the LRB. The Assembly Journal does not indicate whether any debate was had on the amendment when offered. (WAJ App 0081,83-84). In its Amendment Memo, the Wisconsin Legislative Council described the health care provider immunity provision and the impact of Amendment 4 on that provision, as follows:

> **Immunity From Civil Liability for Health Care Providers**
> . . .
> **Assembly Amendment 4** removes the reference to actions or omissions "taken in providing services to address or in response to a 2019 novel coronavirus outbreak" and instead clarifies that, to qualify for immunity, the action or omission must be committed either: (1) during the state of emergency declared by EO 72; or (2) during the 60 days following the date on which the order terminates.

(WAJ App 0077,79-80).

The legislature clearly knew how to enact an immunity statute narrowly tailored to accomplish the objective of immunizing health care providers for actions or omissions taken in providing health services to address or in response to the coronavirus emergency. The statute enacted, however, is not narrowly tailored to only immunizing health care providers for actions or omissions undertaken in connection with serving the State's emergency response to the coronavirus pandemic. Instead, it purports to provide broad immunity to individuals harmed during a small time frame without any relationship to coronavirus-related treatment.

Undoubtedly, our State and nation found themselves in unchartered waters with the novel COVID-19 virus. Nevertheless, the framers did not intend for the protections and rights afforded under our national and state constitutions to be tossed to the curb, even during times of crisis. As D.C. Circuit Court Chief Judge William Cranch eloquently stated in 1807,

> [t]he constitution was made for times of commotion… Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.

United States v. Bollman, 1 Cranch, C. C. 373, 24 F.Cas. 1189, 1192 (1807). "Requiring a court to lend almost unfettered deference to the legislature seems incompatible with our duty of ensuring the legislature does not exceed its constitutional powers. The judiciary are to declare a legislative Act void which conflicts with the constitution, or else that instrument is reduced to nothing.'" *Mayo*, 383 Wis.2d at 42, ¶69 (Rebecca Grassl Bradley, concurring) (citations omitted).

The statute fails the strict scrutiny test and should be declared unconstitutional.

CONCLUSION

For the forgoing reasons, WAJ requests that this Court reverse the decision of the trial court, and declare §895.4801(2) unconstitutional.

Dated at Brookfield, Wisconsin this 28th day of May, 2024.

WISCONSIN ASSOCIATION FOR JUSTICE

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(8g)(a) and (b)

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

The length of this brief is 2,992 [words].

I further certify that the supplemental appendix accompanying this brief complies with the confidentiality requirements under s. 809.19(2)(am):

> I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 28th day of May, 2024.

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