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**SUPREME COURT
STATE OF WISCONSIN**

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

Plaintiffs-Appellants,

Appeal No. 2024AP126

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-Petitioners.

**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 submits non-party briefs to aid courts in determining important legal questions, including constitutional questions such as those raised herein.

On its face, Wis. Stat. §895.4801(2) grants expansive immunity to health care providers for any 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 any nexus between the negligent act or omission and any COVID-19 prevention, response, or mitigation. The Court of Appeals, considering a substantive due process challenge brought by the Plaintiffs-Appellants ("Wrens"), determined that because the statute infringes upon their fundamental right to a jury trial, it must survive strict scrutiny review. Wren v. Columbia St. Mary's Hospital Milwaukee Inc., 2025 WI App 22, ¶¶29, 32, 415 Wis. 2d 758, 19 N.W.3d 614. Applying this Court's well-established strict scrutiny test, the Court of Appeals then correctly determined that the statute failed this test. Specifically, the statute is not narrowly tailored to further the purpose of responding to the COVID-19 pandemic, because it broadly immunizes

all negligent acts or omissions, regardless of whether they have any nexus to the state of emergency declared in response to the COVID-19 outbreak. As the Court aptly stated:

Simply because Wren was pregnant and had a baby during a pandemic does not make any health care she received related to COVID-19 and the state's response to it, and she cannot be denied a right to a jury trial on her claims when her medical care was unrelated to the compelling state interest behind the statute.

Wren, 415 Wis. 2d 758, ¶37.

The Court of Appeals' analysis was "spot-on." WAJ respectfully requests that this Court similarly declare §895.4801 unconstitutional on its face.

ARGUMENT

I. THE TEXT AND HISTORY OF WIS. STAT. §895.4801(2).

Wis. Stat. §895.4801(2) grants health care providers immunity from civil liability for injuries or deaths resulting from "actions or omissions" that satisfy all of the following:

- (a) The action or omission is committed while the professional, provider, employee, agent, or contractor is providing services during the state of emergency declared under s. 323.10 on March 12, 2020, by executive order 72, or the 60 days following the date that the state of emergency terminates.
- (b) The actions or omissions relate to health services provided or not provided in good faith or are substantially consistent with any of the following:
 1. Any direction, guidance, recommendation, or other statement made by a federal, state, or local official to address or in response to the emergency or disaster declared as described under par. (a).
 2. Any guidance published by the department of health services, the federal department of health and human

services, or any divisions or agencies of the federal department of health and human services relied upon in good faith.

- (c) The actions or omissions do not involve reckless or wanton conduct or intentional misconduct.

(Emphasis supplied). The insertion of the conjunction “or” in paragraph (2)(b) removes any required nexus between the negligent act or omission and any COVID-19 prevention, response, or mitigation.

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. (WAJ App 0066,68). This amendment was offered by Speaker Robin Vos, but no reason was given for this late hour amendment in the drafting request to the LRB. Nor does the Assembly Journal show that any debate was held

on the amendment. (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:

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).

II. WIS. STAT. §895.4801(2) IS UNCONSTITUTIONAL ON ITS FACE.

As enacted, Wis. Stat. §895.4801(2) deprives patients, like the Wrens, who are harmed by medical negligence wholly unrelated to COVID-19 treatment, prevention, or mitigation efforts, of substantive due process.¹ 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.” Mayo v. WI Injured Patients and Families Comp. Fund, 2018 WI 78, ¶38, 383 Wis.2d 1, 914 N.W.2d 678 (citations omitted). Here, the arbitrary granting of blanket immunity to health care

¹ The Wrens raised a substantive due process challenge under the 14th Amendment to the United States Constitution. Art. I, Section 1 of the Wisconsin Constitution similarly but in broader libertarian language also guarantees the right of substantive due process to its citizens.

providers for all negligent acts or omissions regardless of whether the acts or omissions have anything whatsoever to do with COVID-19, done through a last-second amendment offered without discussion or debate, is just the type of arbitrary and wrongful government action that substantive due process protects against.

A. Wis. Stat. §895.4801(2) Infringes Upon The Fundamental Right To Trial By Jury Guaranteed And Preserved By Art. I, §5, So Strict Scrutiny Applies.

In considering constitutional substantive due process challenges, 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 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:

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 negligence and have a jury trial on all issues was well established at common law in 1848. 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); Reynolds v. Graves, 3 Wis. 371 (1854); Nelson v. Harrington, 72 Wis. 591, 40 N.W. 228 (1888); Gates v. Fleischer, 67 Wis. 504, 30 N.W. 674 (1886). Beyond question, the fundamental right to trial by jury extends to medical malpractice actions.

In commenting on the right to trial by jury, this Court has held:

[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 ... 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).

Our framers could not have used any clearer language. “Inviolable” means “[f]ree from violation; not broken, infringed, or impaired.” BLACK’S LAW DICTIONARY (12th ed. 2024). This section is not advisory. It does not provide that the right to trial by jury shall remain inviolable except in medical malpractice cases, or except when the legislature says otherwise. Rather, the right to a jury trial shall *never* be infringed upon.

This Court declared that trial by jury “is justly esteemed one of the principal excellencies of our Constitution; *for what greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood?*” Norval v. Rice, 2 Wis. 17, 20-22 (1853) (emphasis supplied).

Almost a century ago, this Court declared that “[i]t would be inconceivable that the people of Wisconsin, in establishing a government to secure the rights of life, liberty, and the pursuit of happiness, should by general grant of legislative power have intended to confer upon that government authority to wholly subvert those primary rights....” State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 532-33, 90 N.W.2d 1098 (1902).

Unquestionably, the right to bring a civil claim to remedy injuries and have a trial by jury on all issues is among those “primary rights.” See WIS. CONST. art. I, §5.

The legislature does not have carte blanche and unchallengeable plenary power to modify the common law at its whim, including the power to outright eliminate an injured person’s right to sue and have a jury trial where such a right was recognized at common law in 1848. Petitioners suggest that Art. XIV, §13 of the Wisconsin Constitution grants such power, which provides that the common law in existence at the time of the Constitution’s adoption “shall be and continue part of

the law of this state until altered or suspended by the legislature.”
However, this Court has made clear that the legislature only has power to modify the common law *within constitutional bounds*:

Although the legislature has the authority to alter Wisconsin’s common law, it may not do so contrary to the provisions set forth in the Wisconsin Constitution.

State v. Hansberry, 219 Wis. 2d 226, 235 n. 10, 580 N.W.2d 171 (1988).

See also La Bowe v. Balthazor, 180 Wis. 419, 423, 193 N.W. 244 (1923)

(“The public policy of the state...is determined by the constitution so far as jury trials are concerned, and *the legislature is not permitted to circumvent the constitutional provision in order to even secure a better public policy*. That can only be done by constitutional amendment.”) (emphasis added).

Consistent with these constitutional guardrails on legislative overreach, this Court has upheld legislative restrictions on the exercise of the right to trial by jury in only three limited areas, none of which are applicable to the COVID healthcare immunity law. First, the legislature may impose reasonable restrictions on the time, place and manner of exercising the right to trial by jury. State ex rel. Sowle v. Britnich, 7 Wis. 2d 353, 360, 96 N.W.2d 337 (1958). Thus, in upholding the constitutionality of provisions of ch. 655, which required mandatory screening by a patients compensation panel before a lawsuit could be filed, this Court in State ex. rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 523, 261 N.W.2d 434 (1978), held that “[t]he legislature may modify old

procedures, or create new ones, *if the substantive right to a jury trial is preserved.*” Id. at 523 (emphasis added). The legislation at issue in Strykowski simply delayed a medical malpractice plaintiff’s right to submit a case to a jury; it in no way eliminated a patient’s right to sue and have a jury trial on all issues.

Second, Wisconsin law distinguishes between purely statutory causes of action and those causes of action, like medical negligence, recognized at common law and resolved by jury trial at the time of our constitution’s adoption. See, e.g., Mead v. Walker, 17 Wis. 189 (1863). For example, as there was no common law cause of action against the state or municipalities, Holytz v. City Milwaukee, 17 Wis. 2d 26, 37, 115 N.W.2d 618 (1962), or to have a jury assess damages on account of wrongful death, Wangen v. Ford Motor Co., 97 Wis. 2d 260, 312, 294 N.W.2d 437 (1980), the legislature acts within constitutional bounds when it limits the damages recoverable in such legislatively created causes of action.

Third, the right to a jury trial is not implicated where the legislature *completely abolishes* a cause of action in lieu of a new and exclusive statutory recovery scheme (i.e., provides an alternative *quid pro quo*). Under the workers compensation act, for example, the types and amounts of damages recoverable on account of workplace injuries is determined strictly by statute. However, the workers compensation

scheme does not violate the right to a jury trial because there is no longer any “case at law,” the common law tort action against the employer having been completely abolished in favor of the no-fault guaranteed compensation scheme. Oliver v. Travelers Ins. Co., 103 Wis. 2d 644, 651, 309 N.W.2d 383 (Ct. App. 1981); Messner v. Briggs & Stratton Corp., 120 Wis. 2d 127, 134, 353 N.W.2d 363 (Ct. App. 1984).

The COVID immunity statute completely eliminates the right to sue for persons injured by medical negligence between March 12 and July 10, 2020. There is no alternative remedy provided. Those individuals unfortunate enough to be injured during that time period are barred from pursuing a civil claim and having a jury determine all issues.

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

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).

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.

As noted above, the very history behind the adoption of §895.4801(2) demonstrates that 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 original iteration of 2019 Wisconsin Act 185 would have done that. 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).

The final statute enacted, however, is not narrowly tailored to only immunize health care providers for actions or omissions undertaken in connection with serving the State's emergency response

to the coronavirus pandemic. Instead, it provides 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 uncharted 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 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). There is no exigency exception to complying with the constitution.

As this Court stated:

Since *Marbury v. Madison*, it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is. We deem it to be this court's duty to resolve disputes regarding the constitutional functions of different branches of state government; we may not avoid this duty simply because one or both parties are coordinate branches of government. It is the responsibility of the judiciary to act, notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences.

State ex rel. Wisconsin Senate v. Thompson, 144 Wis. 2d 429, 436-37, 424 N.W.2d 385 (1988)(Internal citations omitted).

Stated differently, “[r]equiring 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 1, ¶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 4th day of September, 2025.

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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 2,998 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 4th day of September, 2025.

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