Wisconsin Medical Society
Legal Advocacy 2013-2014

The Society's Office of General Counsel (OGC) regularly monitors cases in Wisconsin's state and federal courts and seeks permission to file amicus (friend of the court) briefs in cases likely to affect the medical practice of a significant number of Wisconsin physicians or the medical liability environment, interfere with the patient-physician relationship or impose non-evidence-based constraints on the practice of medicine.

The Society's amicus briefs contain helpful information to assist courts in deciding important issues—information the parties in the case are not likely to provide. The Society's briefs frequently provide context for the legal issues, legislative history and public policy perspective, information about the potential impact of the court's decision on physicians, patients and the medical liability environment and technical information about medicine or medical practice issues that the Society is uniquely qualified to offer the court through the knowledge and experience of its members.

During the 2013-2014 calendar years, the Society filed amicus briefs in the cases mentioned below.

2014

David Buchanan, MD v. Circuit Court of Outagamie County, Branch 1 (14AP410-W)

The *Buchanan* case stems from an Outagamie circuit court judge's discovery order in a medical liability case, *Herron, et al. v. Buchanan, MD, et al.* (case number 13-CV-91). In *Herron*, the trial judge ordered the disclosure of certain documents created by a hospital committee with responsibility for evaluating the health care services provided to Daniel Herron. The court also ordered the disclosure of certain incident reports and other related documents involving care provided by Dr. Buchanan to other patients. Doctor Buchanan and Appleton Medical Center, also named in the lawsuit, petitioned the court of appeals to permit an appeal of the trial court's order on the basis that Wis. Stat. § 146.38 protects the information from disclosure. The court of appeals denied the petition for review and Dr. Buchanan petitioned the Wisconsin Supreme Court to direct the court of appeals to grant review of the trial court's order or alternatively to instruct the trial court to deny the plaintiff's request for disclosure of the documents. The plaintiff asserts that the privilege in Wis. Stat. § 146.38 does not apply to the specific documents in dispute, which are under seal. Currently, only the judges involved with the case have reviewed the documents and Dr. Buchanan will not disclose the documents unless compelled to do so by the court.

The Society filed a joint motion and amicus brief with the Wisconsin Hospital Association on April 30, 2014, to inform the Court about:

- the Legislature's recent clarification and strengthening of the privilege in Wis. Stat. § 146.38 through statutory amendments effective February 1, 2011.
- the importance of preventing the potential erosion of the privilege through court orders, if left unchecked.
- information about the potential chilling effect the trial court's order could have on health care quality efforts throughout Wisconsin, if

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the court fails to properly apply the privilege to the specific facts of the *Herron* case.

"The Legislature's amendments to Wis. Stat. § 146.38 in a manner that clarifies and strengthens the health care review privilege clearly demonstrates the Legislature's belief in the purpose and importance of the privilege," the amicus brief states. "The Legislature responded affirmatively to the concerns of the health care community by sending a clear message that it intended to improve patient care and safety by strengthening the guarantee of confidentiality that is so crucial to robust health care services review activities."

The Society will monitor this case and update members regarding the outcome.

Fiez v. Keevil (13AP2711)

The *Fiez* case involves a challenge to the constitutionality of the statutory cap on the amount recoverable in a lawsuit against state employees, including state-employed physicians. In *Fiez*, a jury found a state-employed cardiologist negligent in his care of Mr. Fiez and that the physician failed to obtain Mr. Fiez's informed consent. The jury awarded the plaintiffs (Mr. Fiez's widow and his estate) damages totaling $1,885,551.15. However, under Wis. Stat. § 893.82(6), the amount recoverable from a state employee is capped at $250,000 (per plaintiff), and the plaintiffs' recovery was accordingly reduced to approximately $500,000. Plaintiffs appealed, claiming that the cap is unconstitutional because it violates their rights guaranteed by the Wisconsin Constitution to equal protection, to a determination by a jury and to a remedy. However, in the 2013 case *Bostco LLC v. Milwaukee Metropolitan Sewerage District*, the Wisconsin Supreme Court upheld a $50,000.00 cap applicable to employees of municipalities against a similar constitutional challenge.

The Society filed a joint motion and amicus brief with the Wisconsin Hospital Association in the Wisconsin Court of Appeals on May 19, 2014, to provide the Court with information about the importance of the statutory cap within the larger Wisconsin medical liability system. The state employee cap was part of the Wisconsin legislature's considerations when it crafted a carefully balanced medical liability system in the 1970s. Any change to that system, the brief argues, should come from the legislature, not the courts. The brief argues that a change to this system "requires a considered weighing of all the various considerations, options and statutory provisions that might potentially be impacted by that question. Amici respectfully submit that this is a task for which the legislature is uniquely qualified and not one this Court has the resources to embrace on the record before it."

The Society will monitor this case and update members regarding the outcome.

2013

United States of America, ex rel Watson v. King Vassel (11-CV-236)

Toby Watson, a psychologist, filed a False Claims Act case in US District Court in the Eastern District of Wisconsin, alleging that Dr. King's prescription orders for Clonidine, Prozac, Risperdal, Seroquel, Strattera and Zoloft for a minor patient were fraudulent claims for Medicaid payment because the prescriptions were for off-label uses. Watson argued that a federal statute that defines "medically accepted indication" as covered outpatient drugs approved under the Federal Food, Drug, and Cosmetic Act (FDCA) or the compendia—his primary legal authority for filing the lawsuit—rendered Dr. King's prescriptions fraudulent because they were off-label. Each claim had a potential civil penalty up to $10,000 per claim under Wisconsin law and up to $11,000 per claim under federal law. Watson's lawsuit ignored the relevant federal statutes that grant states, such as Wisconsin, discretion to provide reimbursement for medications prescribed for off-label uses. Wisconsin has a Drug Utilization Review program to assure that medications not listed in the FDCA or compendia, including medications prescribed for off-label purposes, are appropriate, medically necessary and unlikely to result in adverse medical results. Doctor King's prescribed off-label uses were vetted and approved by Wisconsin's Drug Utilization Review program.

On November 26, 2013, the Society filed a motion and amicus brief in support of Dr. King's motion seeking the entry of judgment in her favor on dispositive issues in the case, without a trial. The Society's brief provided information to the court about the lawfulness of physicians using their best judgment to prescribe medications for off-label uses, a common and well-accepted practice. The Society's amicus brief also informed the court that prescriptions for off-label uses sometimes offer patients the best care for certain conditions and promote innovation in clinical practice.

"In situations where the diagnosis and medical evidence support the physician's use of an off-label drug to provide treatment, a physician needs to be able to prescribe an off-label drug," the brief stated. "Physicians should not be forced to ignore effective treatments that benefit patients solely because a patient's specific condition is not listed on the FDA-approved label."

The District Court issued an order granting the Society's motion to file the amicus brief, in which the judge stated, "WMS notes that this case raises substantial issues regarding the ability of Wisconsin's doctors—WMS's primary constituents—to best serve their patients, and states that its views may assist the court by providing relevant information on the issues animating this litigation and the consequences affecting patient care…The Court has reviewed WMS's proposed brief, and finds that it does, in fact, provide valuable information, which the Court may consult as this case progresses…."

A few days after accepting the Society's amicus brief, the judge held a pretrial conference during which he directed the parties to confer about disputed issues and about the direction of the case. Shortly thereafter, Watson agreed to dismiss all claims with prejudice, which prevents him from refiling the claims in the future. Doctor King agreed that she would not seek costs or sanctions against him.

Planned Parenthood of Wisconsin, Inc. et al. v. Van Hollen, et al. (13-CV-465)

The *Planned Parenthood* case challenges the requirement in Wisconsin Act 37, that physicians who perform an abortion have admitting privileges at a hospital within 30 miles of the location where the physician performs the abortion. Federal District Judge William Conley issued a temporary injunction preventing the enforcement of the admitting privileges pending a trial in the case. The state appealed the grant of the temporary injunction to the Seventh Circuit Court of Appeals.

The Society joined the American College of Obstetricians and Gynecologists in filing an amicus brief on October 23, 2013, in the Seventh Circuit Court of Appeals, in support of affirming Judge Conley's grant of a temporary injunction because the admitting privileges requirement is not evidenced-based and unnecessarily interferes with the patient-physician relationship. The amicus brief argues that the admitting privileges requirement is arbitrary, as the state does not impose a similar requirement on other outpatient procedures and the current health care model, which uses hospitalists and on-call specialists, does not support such a requirement.

"The Act's admitting privileges requirement represents a direct infringement on the patient-physician relationship," the amicus brief states. "By imposing such an ineffective and non-science-based government mandate onto medical science, the Wisconsin legislature will impede the evolution of potentially beneficial standards, while doing nothing to ensure patient safety."

The Seventh Circuit Court of Appeals issued an Order affirming the District Court's temporary injunction of the admitting privileges requirement. On March 19, 2014, the state petitioned the US Supreme Court for review.