COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1696 **Cir. Ct. No. 2007CV4013**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SHELBEY N. BOMKAMP, MARGARET BOMKAMP AND DOUGLAS BOMKAMP,

PLAINTIFFS-APPELLANTS,

LAND'S END, INC. HEALTH CARE PLAN AND DEPARTMENT OF HEALTH AND FAMILY SERVICES,

INVOLUNTARY-PLAINTIFFS,

V.

INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

Before Anderson, Reilly, and Lundsten, JJ.

¶1 PER CURIAM. Shelbey Bomkamp, a minor, and her parents, Margaret and Douglas Bomkamp, settled their medical malpractice lawsuit against pediatric surgeon Dr. Leonard Go. The circuit court dismissed the Bomkamps' challenges to the constitutionality of WIS. STAT. § 655.015 (2009-10),[1] which requires the settlement to be paid into a future medical expense account administered by the Wisconsin Injured Patients and Families Compensation Fund. For the following reasons, we affirm the order of the circuit court.

¶2 Six-year-old Shelbey underwent an elective splenectomy. For the first time in his career, Dr. Go used a surgical device called a "morcellator" during the procedure. He never had seen a morcellator used or received any training or

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[1] WISCONSIN STAT. § 655.015 provides:

> If a settlement or judgment under this chapter resulting from an act or omission that occurred on or after May 25, 1995, provides for future medical expense payments in excess of $100,000, that portion of future medical expense payments in excess of an amount equal to $100,000 plus an amount sufficient to pay the costs of collection attributable to the future medical expense payments, including attorney fees reduced to present value, shall be paid into the fund. The commissioner [of insurance] shall develop by rule a system for managing and disbursing those moneys through payments for these expenses, which shall include a provision for the creation of a separate accounting for each claimant's payments and for crediting each claimant's account with a proportionate share of any interest earned by the fund, based on that account's proportionate share of the fund. The commissioner shall promulgate a rule specifying the criteria that shall be used to determine the medical expenses related to the settlement or judgment, taking into consideration developments in the provision of health care. The payments shall be made under the system until either the account is exhausted or the patient dies.

WISCONSIN ADMIN. CODE § INS 17.26 implements administration of the accounts.

All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

instruction in its use. During Shelbey's surgery, the morcellator damaged major blood vessels, leading to massive blood loss, cardiac arrest and brain anoxia. Shelbey suffered profound and permanent brain damage.

¶3 The parties settled the case for $17.3 million. Pursuant to the minor settlement and WIS. STAT. § 655.015, $8,204,327 was paid into a future medical expense account administered by the Fund. As medical expenses arise, the Bomkamps must submit them to the Fund for reimbursement. The Bomkamps contended the statute violates their rights to equal protection, due process and to a jury trial, and constitutes an uncompensated taking of property. The trial court dismissed the Bomkamps' challenges to the statute's constitutionality. The Bomkamps appeal, raising the same issues.

¶4 Whether a statute is constitutional presents a question of law that we review de novo. ***Dane County DHS v. Ponn P.***, 2005 WI 32, ¶14, 279 Wis. 2d 169, 694 N.W.2d 344. All legislative acts are presumed constitutional and every presumption must be indulged to sustain the law. ***Jackson v. Benson***, 218 Wis. 2d 835, 853, 578 N.W.2d 602 (1998). A challenger must establish beyond a reasonable doubt that a statute is unconstitutional. ***Id.***

¶5 The Bomkamps first argue that WIS. STAT. § 655.015 violates their right to equal protection and due process because the Fund selectively applies and enforces the statute's provisions. They contend that discrimination occurs as a result of a negotiated settlement when a plaintiff accepts a lesser amount from the Fund so as to receive a lump-sum payment up front.

¶6 In assessing an equal protection challenge, the basic question is whether the statute creates a classification that is irrational or arbitrary, or one that is rationally related to a valid legislative objective. ***State v. Joseph E. G.***, 2001

WI App 29, ¶8, 240 Wis. 2d 481, 623 N.W.2d 137 (Ct. App. 2000). Similarly, "[d]ue process requires that the means chosen by the legislature bear a reasonable and rational relationship to the purpose or object of the enactment; if it does, and the legislative purpose is a proper one, the exercise of the police power is valid." ***State v. McManus***, 152 Wis. 2d 113, 130, 447 N.W.2d 654 (1989).

¶7 First, we note that the Bomkamps' anecdotal "evidence" and unsupported claim that the Fund engages in this tactic to force lower settlements fall well short of proving discrimination that is "intentional, systematic and arbitrary." *See* ***Village of Menomonee Falls v. Michelson***, 104 Wis. 2d 137, 145, 311 N.W.2d 658 (Ct. App. 1981).

¶8 More importantly, even if we assume for argument's sake that the Fund does discriminate in the enforcement of WIS. STAT. § 655.015, the Bomkamps offer no legal support for their claim that the remedy for this selective enforcement is to strike down the statute. Indeed, the statute does not provide for that practice and, therefore, there is plainly nothing unconstitutional about the statute in this respect.

¶9 The Bomkamps also contend the statute violates their right to equal protection and due process because it draws arbitrary distinctions between classes of victims: those with future medical expenses above $100,000 and those with expenses below that amount; those whose money in the account is sufficient and those whose is insufficient;[2] those whose needed medical care is on the list

[2] This distinction is not created by the statute and, therefore, does not even arguably provide a basis for declaring the statute unconstitutional.

identified in the Wisconsin Administrative Code and those whose is not;[3] and those who die before the future medical expense account is exhausted and those who survive long enough to deplete it.

¶10 These constitutionality arguments fail because we can conceive of facts on which the legislation reasonably could be based. *See* ***County of Milwaukee v. Proegler***, 95 Wis. 2d 614, 630, 291 N.W.2d 608 (Ct. App. 1980). The legislature rationally could have determined that WIS. STAT. § 655.015 is integral to WIS. STAT. ch. 655, a comprehensive system designed to address the perceived health care crisis. It also rationally could have determined that the statute ensures that medical awards are used for necessary medical care and expenses and reduces the chance that malpractice victims will become wards of the State; ensures the solvency of the Fund; and sets a monetary threshold that justifies the State's administrative costs. It is immaterial if these reasons represent the actual legislative reasoning. We are obligated to locate or even construct a rationale that supports a legislative determination. *See* ***Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund***, 2005 WI 125, ¶74, 284 Wis. 2d 573, 701 N.W.2d 440.

¶11 The Bomkamps argue that an irrevocable trust or a guardianship would serve the same purpose as a Fund-administered account while allowing medical malpractice victims freer and less burdensome access to their money. As long as the chosen classifying scheme rationally advances reasonable legislative

[3] This argument presents a challenge to an administrative rule under WIS. STAT. § 227.40, not to the constitutionality of WIS. STAT. § 655.015. Thus, we need not even address this argument because it has not been pursued by the proper procedure.

objectives, however, we must disregard the existence of other, perhaps preferable, methods. ***Schweiker v. Wilson***, 450 U.S. 221, 235 (1981).

¶12 Significantly, our supreme court already has upheld WIS. STAT. § 655.015 against equal protection attacks. *See* ***State ex rel. Strykowski v. Wilkie***, 81 Wis. 2d 491, 510, 261 N.W.2d 434 (1978) (addressing the predecessor statute with a $25,000 future medical expense payment floor). The court concluded that the legislation establishing the delayed-disbursement procedure was "obviously intended for the benefit of the claimant with substantial injuries requiring long-term treatment" and was not unreasonable or a denial of equal protection. ***Id.*** Even if we disagreed, this court may not overrule or modify language in a supreme court opinion. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶54, 324 Wis. 2d 325, 782 N.W.2d 682. Neither are we persuaded by the Bomkamps' attempt to diminish ***Strykowski*** by citing to its dissenting opinion. "A dissent is what the law is not." ***State v. Perry***, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993).

¶13 Due process and equal protection analyses are largely the same. ***State v. Jorgensen***, 2003 WI 105, ¶32, 264 Wis. 2d 157, 667 N.W.2d 318. Accordingly, the ***Strykowski*** court's validation of the statute on equal protection grounds was a validation under due process as well. Moreover, since we conclude that the statute bears a rational relationship to the underlying legislative purpose, we, too, reject the Bomkamps' due process challenge.

¶14 The Bomkamps next assert that the statute forces claimants like Shelbey to prove their damages twice, once to a jury and a second time to the Fund when they submit expense payment claims. They contend that having to tender those claims to the Fund violates Shelbey's right to a jury trial on that second "proof" of damages. We disagree.

¶15 The legislature routinely enacts statutes of limitations or places limits on monetary awards. WISCONSIN STAT. § 655.015 does not undercut the jury's ability to determine a damages award; it simply creates a mechanism for how the award will be paid out. The Fund's oversight of the account is an appropriate exercise of the legislature's judgment of how best to disburse payments for future medical expenses. *Cf.* ***Maurin v. Hall***, 2004 WI 100, ¶¶99-100, 274 Wis. 2d 28, 682 N.W.2d 866 (holding that, because the jury still determines liability and damages, the legislature's limiting of wrongful death noneconomic damages arising out of medical malpractice did not usurp on the jury's role in assessing them), *overruled on other grounds*, ***Bartholomew v. Wisconsin Patients Comp. Fund***, 2006 WI 91, ¶¶127-30, 293 Wis. 2d 38, 717 N.W.2d 216. The Bomkamps' concern seems to be that the Fund's private contractor is too rigid or sparing with reimbursements. The statute does not require it to be implemented in that fashion, however.

¶16 The Bomkamps' final argument is that the statute constitutes a taking of Shelbey's property, contrary to WIS. CONST. art. I, § 13, which forbids taking a person's property "for public use without just compensation therefor." They contend that the Fund "takes" her future medical expense award and puts it in an account and then "takes" any balance remaining in account upon her death. The Bomkamps do not assert that the Fund has refused to pay claims from Shelbey's account for validly incurred medical expenses.

¶17 Restricting Shelbey's future medical expense award to an account for disbursement as needed for appropriate expenditures does not deprive her of "all, or substantially all, of the beneficial use of [her] property." *See* ***Howell Plaza, Inc. v. State Highway Comm'n***, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975). Also, the Fund credits her account with a proportional share of interest.

See WIS. ADMIN. CODE § INS 17.26(4)(b). In any event, state action may deny an owner some beneficial use of his or her property or restrict the owner's full exploitation of it, if the action is justified as promoting the general welfare by use of the police power. ***Webb's Fabulous Pharmacies, Inc. v. Beckwith***, 449 U.S. 155, 163 (1980). As already explained, we conclude that it is justified.

¶18 To the extent that the Bomkamps challenge the "taking" of the account balance if Shelbey dies, it is the administrative rule implementing the statute, not the statute itself, that so provides. *See* WIS. ADMIN. CODE § INS 17.26(4)(f). A challenge in that regard must follow the procedure set forth in WIS. STAT. § 227.40. *See* ***Ferdon ex rel. Petrucelli***, 284 Wis. 2d 573, ¶12.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.