STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

WISCONSIN MANUFACTURERS AND COMMERCE, et al,
Plaintiff,
vs.

Case No. 2020CV001389

TONY EVERS, et al.,
Defendants,
&

MILWAUKEE JOURNAL SENTINEL,
Intervenor-Defendant.

AMICUS BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF WISCONSIN, PLUMBING, MECHANICAL SHEET METAL CONTRACTORS ASSOCIATION, MIDWEST-SOUTHEAST EQUIPMENT DEALERS ASSOCIATION, THE MIDWEST FOOD PRODUCTS ASSOCIATION AND WISCONSIN DAIRY BUSINESS ASSOCIATION, IN SUPPORT OF PLAINTIFFS

Now comes the Associated Builders and Contractors, Associated General Contractors of Wisconsin, Plumbing, Mechanical Sheet Metal Contractors Association, Midwest-Southeast Equipment Dealers Association[1] (collectively the "Construction Associations") and the Midwest Food Products Association, and Wisconsin Dairy Business Association (collectively the "Agriculture Associations") in support of an injunction.

I. INTRODUCTION

Plaintiffs' Combined Brief in Opposition to Dismissal and Reply Brief in Support of Temporary Injunction demonstrates several ways in which the Wisconsin Statutes and the DHS administrative code establish that the name of the employer along with a number of positive

[1] Midwest-Southeast Equipment Dealers Association is included within both the Construction Associations and Agriculture Associations as they supply equipment to both industries.

COVID-19 tests, must not be disclosed. In addition to the arguments raised by Plaintiffs, there are HIPAA[2] reasons and a balancing of interests that prevent disclosure.

The name of a patient's employer is protected health information that cannot be disclosed under HIPAA. Employees have a right to expect their COVID-19 test results to remain protected under HIPAA, and Wisconsin law does not allow DHS to take these results and disclose them, unless they are de-identified. The State acknowledges this duty to de-identify the records and asserts that it has done so. However, it is important for this court to understand what is meant by de-identification. The State cannot merely claim that it has de-identified medical records; there is a process for doing that which is defined by HIPAA. And this process applies to these records because HIPAA has been specifically incorporated by reference into the Wisconsin Statutes governing the specific information that has been requested under the open records request. Release of this information will violate those HIPAA protections.

Moreover, balancing of the interests weighs against disclosure. Disclosure will stigmatize employers and employees, undermine public health collaboration with employers, and thwart the efforts to contain COVID-19.

II. IDENTITY AND INTEREST

The Construction Associations that submit this brief as *amicus curiae* represent hundreds of contractors, who in turn employ thousands of hard-working men and women, union and non-

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[2] The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted to improve the efficiency and effectiveness of the health care system by facilitating the electronic exchange of information with respect to financial and administrative transactions carried out by health plans, health care clearinghouses, and health care providers; HIPAA protects the privacy and confidentiality of health information. 42 U.S.C.S. § 1320d-2. Where a conflict between HIPAA and state law exists, HIPAA's provisions shall supersede any contrary provision of State law. 42 U.S.C.S. § 1320d-7(a). State laws that provide "more stringent" privacy protections than HIPAA affords are not superseded by HIPAA. 45 C.F.R. § 160.203(b).

union, in Wisconsin. The vast majority of these employees live near the contractors' principle place of business. These employees usually drive vehicles imprinted with the name of the employer to jobsites in neighborhoods, office buildings, individual homes and apartment buildings, shopping malls, government buildings, manufacturing and other commercial businesses. They often wear insignia or uniforms with their employer's names. Issuing of a list of employers along with the number of COVID-19 cases associated with each employer will make those employers' insignia a "scarlet letter." This will impact not only the employee that had a positive COVID-19 test result, but his or her fellow workers, and the employer generally. If a worker is excluded from job sites because of this list, their employer will be harmed by the inability to complete the work.

The Agriculture Associations that submit this brief as *amicus curiae* represent hundreds of agriculture and food production companies in Wisconsin, that in turn also employ thousands of workers who produce food for our state, our nation and the world. Their reputations as food related companies are at risk from releasing a list associating their name with COVID-19 test results. Those results often have nothing to do with the work environment and most often involve individuals who were not working when infected by COVID-19. Yet, the list will imply that the cases are somehow work related by associating names of employers with the test results. This may improperly impact consumer purchasing decisions, based upon unfounded perceptions of sanitation deficiencies. A reduction in sales as a result of the release of a list, may harm the individual employee(s) whose medical record (positive tests) prompted the employer's placement on the list. This may result in a reduction in hours of work, or layoff due to lack of business, causing loss of income to employees. These employees have the right to privacy in their medical records, and this includes the right to expect that these records will not be disclosed and associated with their employer, potentially leading to a loss of income.

III. ARGUMENT

It may be helpful to this court to understand the genesis of the information that is the subject of this case. Wis. Stat. § 252.05 directs the production of the relevant records as follows:

> "(1) Any health care provider, as defined in s. 146.81 (1) (a) to (p), who knows or has reason to believe that a person treated or visited by him or her has a communicable disease, or having a communicable disease, has died, shall report the appearance of the communicable disease or the death to the local health officer."
> . . .
> (6) Any local health officer, upon receiving a report, shall cause a permanent record of the report to be made and upon demand of the department transmit the original or a copy to the department, together with other information the department requires. The department may store these records as paper or electronic records and *shall treat them as patient health care records under ss. 146.81 to 146.835*."

The form created by the department (DHS) for this purpose is Form F-44151, available at https://www.dhs.wisconsin.gov/forms/f4/f44151.pdf. The form does not ask where the patient was exposed to the communicable disease or any other information about exposure, cause or origin. But it does ask the name of the patient's employer in the demographic section of the form. This is one of the few demographic data points requested on the form. The name of the employer is helpful to public health, since it provides an avenue for contacting the patient. It is clear from the form that it is not intended to determine where the patient contracted the disease or virus. But the form does reveal that the patient has a communicable disease and it lists where the patient works, and it is therefore protected from disclosure.

A. The Name of A Patient's Employer is Protected Health Information That May Not Be Disclosed Under Federal or State Law.

1. The Wisconsin Statute Incorporates HIPAA.

Wis. Stat. § 252.05(6) unequivocally states that the information documented in the DHS form, which would include the name of the employer, must be treated as "patient health care records under ss. 146.81 to 146.835." *Id*. The statute does not exclude certain aspects of the records

from being treated as patient health care records. To determine the protections that apply to the information on the F-44151 form, the State is directed by Wis. Stat. § 252.05(6) to consult Chapter 146 concerning health care records. Chapter 146 incorporates the HIPAA regulatory scheme, thereby subjecting the State to HIPAA regulations. Wis. Stat. § 146.816(1)(c) states that "Disclosure" has the meaning given in HIPAA regulation 45 CFR § 160.103 and includes "redisclosures and rereleases of information."

HIPAA regulation 45 CFR § 160.103 defines disclosure as "the release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information." Under § 146.816, the uses and disclosures of protected health information, defines Protected Health Information (PHI) by incorporating the regulations governing HIPAA. Wisconsin law governing DHS disclosure thus mirrors the rules governing health care provider disclosure of health information. The protection afforded health care records does not change as those records are transferred to DHS. They are entitled to the same protection applicable under HIPAA. Therefore, if the name of the employer is PHI under HIPAA, then it must not be disclosed by DHS.

2. Pursuant to HIPAA, DHS Cannot Disclose Demographic Information.

Demographic information (including the employer name) is PHI which cannot be disclosed pursuant to HIPAA. HIPAA defines PHI to mean "individually identifiable health information." that is transmitted or maintained in any form or medium. 45 CFR § 160.103.

> Individually identifiable health information is information that is a subset of health information, <u>including demographic information</u> collected from an individual, and
>
> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) That identifies the individual; or

> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.'

Id. (emphasis added). Thus, under HIPAA regulations, demographic information is deemed to be individually identifiable information. The State argues that employer names are not protected, but the State cites no authority for that conclusion under HIPAA.

DHS's own mandatory health care provider form contains a section entitled "Demographic Data Patient Information." *See* DHS Form-44151. (emphasis added). That demographic information section requires the doctor to identify "Patient's Employer & Occupation or School, Day Care, Institution."[3] (emphasis added). DHS has admitted by virtue of its own form that employer, school, day care and institution is demographic information. DHS has not acknowledged in its brief that the employer name is protected health information, yet its own form does, by referring to the employer name as demographic information. Whether DHS acknowledges demographic information, including the employer name collected on its form, is protected information or not, the legislature has already provided that answer by incorporating HIPAA definitions into the Wisconsin Statutes. DHS cannot redefine what is or is not protected as it suggests in its opposition brief.

3. The Information Is Exempt from Disclosure

Unless the information can be de-identified, it cannot be disclosed. The State admits that "Wisconsin statutes require DHS to release de-identified health information…." (Doc. 22 p. 6) (emphasis added). Because HIPAA was incorporated into the Wisconsin Statutes (*see supra* at II.A.1-2), we look to HIPAA for the meaning of de-identification.

HIPAA defines de-identified health information as heath information "that does not

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[3] The next open records request may ask for a list of schools, a list of daycares, and a list of other institutions. That could include churches or other institutions.

identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual . . . ." 45 C.F.R. § 164.514(a). According to the State it has done that. But the State's argument does demonstrate compliance with HIPAA regulations concerning de-identification of health care records.

According to the guidance document issued by the U.S. Department of Health and Human Services ("HHS"),[4] issued in 2012, "§164.502(d) of the [HIPAA] Privacy Rule permits a covered entity or its business associate to create information that is not individually identifiable by following the de-identification standard and implementation specifications in §164.514(a)-(b)." U.S. Dep't of Health & Human Serv., *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, (2012) http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/De-identification/guidance.html (last visited Nov. 4, 2020). That document explains that there are two methods by which health information can be designated as de-identified. *Id.* at pp. 6-7.

The first method is the "Expert Determination" method. This method requires a person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable to give an opinion that the risk is very small that the information could be used, alone, or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information. *Id.* at p. 6. The expert also must document the methods and results of

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[4] The definitions of demographic information or protected health information is regulated by the federal equivalent of DHS – the HHS. The HHS Office for Civil Rights (OCR) enforces the HIPAA Privacy Rules. *See* Dept. of Health and Human Services, *About Us*, https://www.hhs.gov/ocr/about-us/index.html (last visited November 5, 2020).

the analysis that justify such determination. *Id. See also* 45 CFR § 164.514(b)(1).

The second method is the "Safe Harbor" method which contains many requirements. The very first sentence of the Safe Harbor rule requires that "[t]he following identifiers of the individual or of relatives, employers, or household members of the individual are removed: (A). Names..." *Id*. at p. 7. *See also* 45 CFR § 164.514(b)(2) (emphasis added). This requirement could not be clearer. Under the Safe Harbor method, employer names must be removed to achieve de-identification.

Thus, the only way DHS can avoid removal of the employer names, is by the Expert Determination method; this has not been done. The State's brief does not identify an expert opinion, nor does the brief constitute such an opinion. The DHS may not merely speculate that it would be difficult to determine the COVID-19 patient armed with the employer name. HIPAA requires an expert opinion for that conclusion. Without that opinion, disclosure by the DHS violates HIPAA, and necessarily, Wis. Stat. §252.05(6). Employer names taken from information supplied to the state by health care providers may not be disclosed in the manner contemplated by the open records request.

B. Balancing of Interests and Irreparable Harm.

In addition to the HIPAA concerns, when considering whether to issue an injunction, a court must determine whether a party will suffer irreparable harm, and ultimately must balance the interests of both sides. *See, e.g., Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979) ("[C]ompeting interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction.") Whether to release records requested pursuant to an open records request also requires a balancing test. *State ex rel. Journal Co. v. Cty. Court for Racine Cty.*, 43 Wis. 2d 297, 305, 168 N.W.2d 836 (1969) (The records custodian must balance the public interest in disclosure of the record against the public

interest favoring nondisclosure). The interests against release of the information and resulting harm far outweigh any interest in favor of releasing the information, especially since doing so is prohibited by HIPAA, which makes clear that the name of the employer is too much information to release.

1. Reputational Harm for Employers and Employees

Here, it is certain that the associations and employers will suffer irreparable harm and ultimately the interests weigh in favor of Plaintiffs and against disclosure. Specifically, if the information is released, the employers and employees are going to be faced with reputational stigma.

By requiring disclosure of this information, the employers and employees will suffer reputational damages. Many of these employees work in small crews, much like a military unit or basketball team. It is not difficult to imagine the speculation and interrogation that will be fostered by the release of employer names. The crew members are highly aware of when other crew members are absent from work in this team environment. For example, a plumbing contractor or harvest crew may consist of 2-10 workers. If one of those crew members is quarantined for 14 days, the crew will be well-aware of that. Upon release of a list of employer names and number of cases, it will not be difficult for crew members to draw conclusions as to the source of positive test results, even if those conclusions are incorrect. This may lead to harassment by co-workers if the absent employee did not tell co-workers that he/she tested positive, and may have exposed them (even if that is not the case).

The State argues in its brief that Plaintiffs have not shown it will suffer harm as a result of disclosure of the list. (Doc. 22 p. 15.) But owners of businesses have an interest in avoiding this type of internal conflict among workers. Also, the owner of a business may have tested positive, or may test positive at some time in the future. They have an interest in the protection of

information about their health, just as their employees do. While it is not certain that anyone would figure out that the owner of the business tested positive, there is no question that the release of the list identifying the name of one's business will cause harm to that business. One of the reasons a business may be on the list is because the owner sought medical care and was tested for COVID-19. The employer certainly has a right of protection against that information being disclosed and associated with his/her business.

2. Disclosure Will Be Counter Productive and Balancing Weighs in Favor of an Injunction and Against Releasing the Records.

By failing to issue an injunction and allowing that the records be released, employers will be discouraged from participating in collaboration with public health and from directing employees to get tests or from arranging for mass testing. The release of a list, such as the one submitted to the court under seal, is a message to employers that employee testing creates a business risk.

The reason that employers are on the list, is because employees sought medical care and were tested, or because an employer encouraged or required testing of employees, or because the employer actually purchased the test kits and hosted on-site testing at the workplace. By broadcasting the employer's information, employers may want to keep numbers low to prevent their placement on a list in the future. Some employers may no longer voluntarily test workers or encourage workers to get tested based on symptoms.

It is important for employers to have every incentive to collaborate with public health, and the publication of a list detracts from that goal. The balance weighs in favor of non-disclosure for the benefit of the public health of Wisconsin.

(a) Association and Employer Compliance Efforts

Both the Construction Associations and Agriculture Associations have engaged in

significant COVID-19 monitoring to manage response to the virus. The Centers for Disease Control ("CDC") makes the following recommendations for businesses concerning their work with local health departments:

> [h]ealth departments are responsible for leading case investigations, contact tracing, and outbreak investigations. When a COVID-19 case is identified that impacts a workplace, the health department may ask the employer for help. . . The [company] COVID-19 coordinator or team serves as a resource for the health department and workplace to help develop and put into action hazard assessment activities.

COVID-19 Case Investigation and Contact Tracing in Non-Healthcare Workplaces, CDC https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces/FS-Employers.html (last visited November 5, 2020.) The CDC also released a comprehensive checklist for agricultural employers ("CDC Agricultural Checklist"), which calls for the employers to monitor employees for symptoms and screen them before entering the facility. Center for Disease Control, *Agricultural Employer Checklist for Creating a Covid-19 Assessment and Control Plan* (2020), pp. 3-5, https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/Agricultural-Employer-checklist.pdf (last visited November 5, 2020). One or more of the members of one of the *amicus curiea* engaged with the FDA and CDC to generate this Checklist.

The CDC Agricultural Checklist directs the employer to coordinate with local health departments, as soon as an individual is identified with symptoms (*id.* p. 3), and to work with state, tribal, local and territorial (STLT) health officials to identify other exposed individuals (*id.* p. 5). A member of one or more of the trade associations worked with a local health department in Wisconsin to coordinate and arrange for COVID-19 testing of all employees at a specific location. This testing resulted in positive tests. These test results, associated with a specific employer, were the result of the public-private relationships developed between employers, and the FDA, CDC

and local health departments.

(b) Deterrence of Compliance

Voluntary testing, which has been taking place at some of the work locations of members of the *amicus curiae* associations, may generate positive results that will be added to future lists. If those lists are expected to be released based upon the precedent set in this case, it will deter future voluntary testing.

The pandemic is not over. The release of company names and number of positive cases has a chilling effect on these types of public private partnerships. Releasing a list of employer names associated with test results is harmful to public health and the efforts of trade associations to collectively serve the interests of their members, by developing programs to fight the pandemic. The balance in this case should be in favor of not releasing the list, since doing so may well impact the collaboration necessary to control the spread of COVID-19 now and in the future. Release of the list is a risk to public safety at a time when local health departments must rely on employer cooperation to combat the spread of the virus.

Most public health departments have reached contact tracing capacity at the time of this briefing. They have shifted to contacting employers for assistance, because the employer name is on the form, and because employers can work with their employees to quarantine them, conduct contact tracing and direct close contacts to get tested. In many cases, employers are stepping-in to supplement what public health would normally do, but cannot do, because of the spike in Wisconsin COVID-19 cases. While this list is not likely to discourage most employers from doing all they can do to stop the spread of COVID-19, it may make some employers hesitant to liberally direct employees to get tested, or engage in on-site mass testing. By generating more testing, employers increase the risk that they will find their names on future lists, and then in the newspaper.

While the media may feel it has an interest in publicizing locations where COVID-19 positive individuals work, the list alone improperly implies that the virus is connected to the workplace. There is really little value to such publication, other than to create a story about numbers of tests among certain groups of workers. Unfortunately, this may have more to do with the social interactions of these workers, living arrangements and outside activities, then it has to do with the work location. It is certainly going to put those employees in a spotlight along with their employer. It is clear from the source document, Form F44151, that connecting the employer to the positive test result is not inappropriate, as the form does not provide that connection. The *amicus curiae* will be harmed by this disclosure, since it will undermine collaboration between their organizations, their members and public health departments.

IV. CONCLUSION

The Construction Associations and Agriculture Associations respectfully request that this Court grant an injunction and direct the State Defendants not to release the confidential health care records under Wis. Stat. §§ 146 & 252.05(6).

Dated this 6th day of November, 2020.

Respectfully submitted,

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