COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2711 **Cir. Ct. No. 2010CV6451**

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

TERRI FIEZ AND MICHAEL FIEZ,

PLAINTIFFS-APPELLANTS,

ESTATE OF ROBERT FIEZ,

PLAINTIFF,

V.

JONATHAN G. KEEVIL, M.D.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Terri Fiez and Michael Fiez appeal a judgment awarding them money damages. The issue is whether the statutory cap of $250,000 on damage awards that may be obtained against state employees is unconstitutional. The appellants have not persuaded us that it is unconstitutional, and we therefore affirm.

¶2 Defendant Jonathan Keevil is a physician who was employed by the University of Wisconsin Medical School and who provided care to Robert Fiez at the University of Wisconsin Hospital and Clinics. The jury found Keevil negligent and awarded damages to the Fiez plaintiffs of more than $1 million. The circuit court applied the statutory cap found in WIS. STAT. § 893.82(6) (2011-12) and reduced the damages. The Fiezes appeal.

¶3 The Fiezes first argue that the cap violates the Wisconsin Constitution's equal protection clause, WIS. CONST. art. I, § 1. They argue that the statute lacks a rational basis.

¶4 In 2013, the supreme court rejected a similar challenge to the statutory cap on damages that may be obtained against *municipal* employees. ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶¶74-77, 350 Wis. 2d 554, 835 N.W.2d 160. The court repeated language from an earlier case to the effect that it is within the power of the legislature to use a damages cap to preserve public funds by allowing for fiscal planning and avoidance of high judgments, while still allowing victims to recover up to that amount. ***Id.***, ¶77.

¶5 The Fiezes have not persuaded us that there is a basis for us to reach a different result as to the cap on damages from *state* employees. They argue that the state cap is different because the state has greater financial resources and,

therefore, the awards that would occur would be proportionally less of a drain on resources. This argument fails for two reasons.

¶6 First, it is not obvious that the financial burden on the state would be proportionally less than on municipalities. There is no factual record in this case that clearly establishes what the expected value of the state awards would be. While the state may have greater resources, it also has more employees and is involved in more activities than any single municipality, thus creating a larger potential for liability than municipalities have. Furthermore, we note that the $250,000 damages cap for state employees is set at five times the $50,000 cap for municipal employees. *See* ***id.***, ¶75. This suggests that the legislature has already taken into account differences between municipalities and the state, and determined that a higher cap is appropriate at the state level.

¶7 Second, whatever the precise amount is of additional payments that would be required from the state if the cap were higher, it would not be zero. The Fiezes assert that the amount would be "negligible at best." However, the Fiezes themselves recognize that the "legislature's decision fixing a numerical cap must be accepted unless we can say it is very wide of any reasonable mark." *See* ***Ferdon v. Wisconsin Patients Comp. Fund***, 2005 WI 125, ¶111, 284 Wis. 2d 573, 701 N.W.2d 440. The Fiezes have not met their burden of showing that the current cap is very wide of a reasonable mark when the cap provides at least some financial benefit to the state, and also allows a recovery $200,000 larger than the municipal cap that was held to have a rational basis in ***Bostco***.

¶8 The Fiezes also argue that the cap lacks a rational basis because it has not been adjusted for inflation since it was set at the current level in 1979. They argue that this lack of adjustment, combined with higher potential damages

due to rises in costs of living, wages, and medical care, results in plaintiffs receiving a smaller percentage of their damages now than they did in 1979.

¶9 While the Fiezes may be correct that plaintiffs now receive a smaller portion of their potential awards, a corollary to that fact would be that the state now *pays* a smaller portion of the potential awards. That is to say, the inflation effect cuts both ways. To the extent the rational basis for the cap lies in limiting the financial burden on the state, the lack of adjustment has made the statute more effective over time, not less.

¶10 The Fiezes argue that the cap has lost its rational basis because the balance between the two competing interests has now moved to a different ratio than it was in 1979. However, this simply brings us back to whether the current balance can be said to be very wide of any reasonable mark. It is not apparent why that answer should depend on the historical path that led to the current balance. We already concluded above that the Fiezes have not given us a basis to say that the current balance is unconstitutional.

¶11 The Fiezes also argue that the state employee damages cap violates two other constitutional provisions, the "jury trial" and "certain remedy" clauses. *See* WIS. CONST. art. I, § 5, § 9. The Fiezes assert: "The Supreme Court has never directly addressed the issue of whether the State Cap *or other caps* violate the Jury-Trial and Remedy Clauses." (Emphasis added.) That statement may be true as to the state employee cap, but it is false as to "other caps." The supreme court has directly addressed both clauses in the context of a cap on non-economic damages from medical malpractice resulting in wrongful death in ***Maurin v. Hall***, 2004 WI 100, ¶¶96-100, 274 Wis. 2d 28, 682 N.W.2d 866, *overruled on other*

grounds by ***Bartholomew v. Wisconsin Patients Comp. Fund***, 2006 WI 91, 293 Wis. 2d 38, 717 N.W.2d 216.

¶12 In ***Maurin***, as to the jury trial clause, the court held that the cap on non-economic damages did not violate the right to a jury trial because the jury still decides damages, even though the jury's discretion is properly limited by the legislature. ***Id.***, ¶¶99-100. As to the remedy clause, the court rejected its application because that provision primarily protects the right of persons to have access to courts, and does not confer specific legal rights. ***Id.***, ¶99 n.18.

¶13 The Fiezes' attempts to distinguish ***Maurin*** are not persuasive. Indeed, the Fiezes do not appear to distinguish ***Maurin*** as to the remedy clause at all.

¶14 As to the jury trial clause, referring to ***Maurin*** and other Wisconsin cases, the Fiezes assert that "the Court was not asked in any of these cases to consider, and did not consider, whether the caps at issue were invalid in light of the fact that Wisconsin's Jury-Trial Clause preserves 'inviolate' the common-law right to trial by jury." As we have explained, this is a mischaracterization of ***Maurin***.

¶15 Next, the Fiezes argue that the legal sources relied on in ***Maurin*** do not actually support the conclusion reached. However, they do not explain how that would be a basis for this court to disregard highly relevant supreme court precedent.

¶16 In this right-to-a-remedy and jury-trial-clause context, the Fiezes rely again on the fact that the cap in their case has been reduced in value by inflation since 1979. However, they do not clearly explain how an inflation effect

would lead to a different result than the ***Maurin*** court reached. The Fiezes do not tie an inflation effect to any Wisconsin law on the jury trial clause. They cite no Wisconsin law holding that a damages cap might violate the jury trial clause if it is too low. And, ***Maurin*** appears to commit that decision entirely to the discretion of the legislature: "We do not find that legislative suspension of damages above and beyond a certain limit infringes upon the right to a jury trial when, in wrongful death actions, a jury still determines liability and assesses damages." ***Id.***, ¶100.

¶17 The Fiezes also distinguish ***Maurin*** on the ground that the cap in the Fiezes' case is a "more pernicious" assault on the jury trial right because it limits not only the jury's ability to assess non-economic damages, as in ***Maurin***, but also limits the jury's decision on economic losses of income and for medical care. However, they do not develop this argument with any discussion of legal authorities on the jury trial clause. And, it is not clear why limitation of *economic* damages is less of a matter for legislative discretion than *non*-economic damages were in ***Maurin***.

¶18 In summary, we conclude that, in light of existing precedent, the Fiezes have not shown a basis to conclude that the $250,000 statutory cap on damages from state employees violates the state constitution's equal protection, jury trial, or certain remedy clauses.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).