Appeal No. 2023AP498 **Cir. Ct. No. 2017CV360**

WISCONSIN COURT OF APPEALS
DISTRICT II

CHARLIE MAY BREKKE,

PLAINTIFF-APPELLANT,

V.

MIDWEST MEDICAL INS. CO. AND CRAIG M. BATLEY, D.O.,

DEFENDANTS-RESPONDENTS.

FILED

APR 9, 2025

Samuel A. Christensen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Gundrum, P.J., Grogan and Lazar, JJ.

¶1 Pursuant to WIS. STAT. RULE 809.61 (2023-24),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

¶2 Whether an unborn child (or any minor child) is a patient under WIS. STAT. § 448.30 and thus entitled to informed consent with the independent right to pursue legal action against a physician who fails to comply with said statute.

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[1] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

¶3 Wisconsin's informed consent statute, WIS. STAT. § 448.30, identifies both the circumstances in which a physician is and is not required to "inform *the patient* about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments[,]" and it also provides that "[t]he reasonable physician standard is the standard for informing a *patient* under this section." Sec. 448.30 (emphases added). As particularly relevant here, § 448.30 does *not* require a physician to disclose "[d]etailed technical information that in all probability a *patient* would not understand" or "[i]nformation in cases where the *patient* is incapable of consenting." Sec. 448.30(2), (6) (emphases added).[2] In other words, if one of these (or any

[2] WISCONSIN STAT. § 448.30 provides in full:

> **Informed consent.** Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments. The reasonable physician standard is the standard for informing a patient under this section. The reasonable physician standard requires disclosure only of information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances. The physician's duty to inform the patient under this section does not require disclosure of:
>
> **(2)** Detailed technical information that in all probability a patient would not understand.
>
> **(3)** Risks apparent or known to the patient.
>
> **(4)** Extremely remote possibilities that might falsely or detrimentally alarm the patient.
>
> **(5)** Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
>
> **(6)** Information in cases where the patient is incapable of consenting.

(continued)

other) enumerated exceptions applies, a physician is not required to comply with § 448.30's informed consent requirement prior to engaging in a course of medical treatment—and this is seemingly true regardless of whether another individual such as a parent or guardian would otherwise have the legal authority to provide informed consent on behalf of the patient given that § 448.30 refers *only* to the patient in terms of who must be informed and of what.

¶4 In this case, we are asked to determine whether Charlie May Brekke (Charlie) was a patient of Dr. Craig Batley, the physician who delivered her and who had provided prenatal care to her birth mother throughout the pregnancy and immediately prior to her birth, and if so, whether she was entitled to informed consent pursuant to WIS. STAT. § 448.30 in regard to her medical treatment and the method by which she was delivered—vaginal delivery versus cesarean section.

¶5 As is explained in greater detail below, the plain meaning of WIS. STAT. § 448.30 under the well-known ***Kalal***[3] statutory interpretation framework suggests that Charlie, assuming she was a patient immediately prior to birth, was *not* entitled to § 448.30 informed consent because at least one, if not both, of the following exceptions set forth therein applied: (1) "in all probability [she] would not understand" "[d]etailed technical information" regarding her treatment; and

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> **(7)** Information about alternate medical modes of treatment for any condition the physician has not included in his or her diagnosis at the time the physician informs the patient.

The legislature most recently revised § 448.30 in December 2013, at which time it, inter alia, incorporated the reasonable physician standard into the informed consent statute. *See* 2013 Wis. Act 111, §§ 1-3.

[3] ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

(2) she was "incapable of consenting." *See* § 448.30(2), (6). Such an interpretation, however, conflicts with prior Wisconsin Supreme Court case law, by which we are bound, that indicates Charlie *was* Dr. Batley's patient immediately prior to her birth and that she *was* entitled to informed consent, albeit through her surrogate birth mother. *See, e.g.*, ***Pierce v. Physicians Ins. Co. of Wis., Inc.***, 2005 WI 14, ¶28, 278 Wis. 2d 82, 692 N.W.2d 558 (acknowledging that both stillborn child and mother were patients); ***Preston v. Meriter Hosp., Inc.***, 2008 WI App 25, ¶1, 307 Wis. 2d 704, 747 N.W.2d 173 (unborn child was an inpatient for purposes of the Emergency Medical Treatment and Labor Act (EMTALA) upon his laboring mother's admission as an inpatient); ***Martin v. Richards***, 192 Wis. 2d 156, 162-63, 531 N.W.2d 70 (1995) (physician violated § 448.30 by failing to provide *minor patient's father* with information regarding viable alternate medical treatment options for minor's injury).

¶6 In light of this conflict, we respectfully request that the supreme court accept our certification as resolution of this issue will have statewide impact regarding the role of statutory informed consent in *all* healthcare-related matters involving minors (and potentially certain other individuals)—not only those healthcare matters involving pre-birth medical treatment—from whom WIS. STAT. § 448.30 informed consent could otherwise be obtained through a parent or legal guardian in spite of the exceptions and limitations set forth therein.

BACKGROUND

¶7 Charlie was born to a surrogate mother, Samantha,[4] in November 2015. Samantha was morbidly obese, and during the course of the pregnancy, Samantha, who had successfully carried multiple prior pregnancies (including multiple surrogate pregnancies), was diagnosed with gestational diabetes. Due to Charlie's large size—eleven pounds and five ounces at birth—complications arose during her delivery, and she ultimately suffered from shoulder dystocia, which Charlie describes as a condition that can occur "during a vaginal delivery" and "can result in severe and permanent injuries … including death."[5] As a result of the shoulder dystocia, Charlie "sustain[ed] a severe and permanent brachial plexus injury[,]" which "is an injury to the complex set of nerves that control the muscles of the fingers, hand, arm, and shoulder." Although the severity of a brachial plexus injury can vary, "Charlie will never regain full function of her arm, leaving her permanently limited and disfigured."

¶8 In April 2017, Charlie, by a Guardian ad Litem (GAL), filed a lawsuit against Dr. Batley, the physician who both delivered Charlie and provided prenatal care to Samantha throughout the pregnancy.[6] Specifically, Charlie's Complaint, which cites both WIS. STAT. § 448.30 and common law informed

[4] Because the surrogate birth mother is not a party to this action, we refer to her by a pseudonym to protect her privacy.

[5] In her response to Dr. Batley's partial summary judgment motion, Charlie further described shoulder dystocia as "ocurr[ing] when the baby's head delivers but her shoulders get stuck inside the mother's body requiring additional obstetrical maneuvers to release the shoulders."

[6] Charlie's biological father, Timothy Brekke, and his legal spouse, Chad Brekke, were initially named as Plaintiffs in this matter; however, both were ultimately dismissed with prejudice.

consent, alleged that Dr. Batley "failed to properly inform … [Charlie and Samantha], that there were reasonable alternative treatments and/or diagnostic tests available that would diagnose and treat their medical condition" and that Dr. Batley had also "failed to disclose the availability of reasonable alternate medical modes of treatment and the benefits and risks of these treatments … including but not limited to failing [to] disclose the risk of shoulder dystocia and a permanent brachial plexus injury and failing to offer a cesarean section as an alternate mode of delivery."[7]

¶9 Dr. Batley filed for partial summary judgment as to the informed consent claim, arguing as relevant here that WIS. STAT. § 448.30's plain language clearly requires that a physician need only provide information to the "patient" and not anyone else. Dr. Batley's references to the "patient," however, focused on Samantha—not Charlie—and he also argued that pursuant to the terms of the surrogacy agreement, Samantha alone "controlled all treatment decisions through delivery[.]"[8] Notably, Dr. Batley's partial summary judgment motion was largely devoid of any argument regarding whether *Charlie herself* was a patient and, if so, whether *she* was entitled to informed consent pursuant to § 448.30.

¶10 In response, Charlie specifically asserted that she was entitled to "bring an informed consent claim on her own behalf"—regardless of whether

[7] The Complaint also alleged a negligence claim against Dr. Batley, and that claim, which proceeded to trial, is not at issue.

[8] Timothy Brekke had not been dismissed prior to the resolution of Dr. Batley's partial summary judgment motion. Dr. Batley's argument regarding the surrogacy agreement primarily revolved around his position that the surrogacy agreement between Samantha and Charlie's parents was valid and that the surrogacy agreement did not grant Charlie's parents any rights related to Charlie's care and treatment prior to birth.

Samantha likewise pursued such a claim—and that Dr. Batley should therefore not escape "liability for his breach of his duty of informed consent to both the surrogate and to Charlie." In support of her argument, Charlie cited to multiple non-Wisconsin authorities, which she said held that children can maintain independent causes of action related to a lack of informed consent even when the child was in utero because the child was nevertheless a patient at the time, and she further argued that Wisconsin courts should follow suit as a matter of public policy, particularly given that in this case, she was born to a surrogate mother who no longer had any legal authority to bring a claim on her behalf and through whom she could not recover. Additionally, Charlie pointed to WIS. STAT. § 448.30, arguing that it "applies separately to both mother and child" and that the child, even while in utero, is a separate patient entitled to informed consent through the birth mother.

¶11 Dr. Batley disputed Charlie's assertions, pointing again to WIS. STAT. § 448.30's language and arguing that "[t]he right of informed consent in Wisconsin is *statutory*" and that because § 448.30 incorporates the reasonable physician standard, it is "illogical that an unborn child has a right of informed consent because the standard is what a reasonable physician would disclose to *the patient*." (Emphasis added.) Importantly, Dr. Batley specifically asserted that "[t]he patient here is [*Samantha*,]" who did not pursue an informed consent claim, and he did not otherwise directly address whether *Charlie herself* was his patient

immediately prior to birth and, if so, whether she was also owed a duty of informed consent under § 448.30. (Emphasis added.)[9]

¶12 At the ensuing motion hearing, Charlie's counsel argued, inter alia, that WIS. STAT. § 448.30 requires "that some third party has to be given this information" on behalf of the soon-to-be-born child (here Charlie), whereas Dr. Batley, in referring to Charlie, argued that based on § 448.30(6), there was "no obligation to provide the patient any information where the patient isn't capable of consenting" and that, accordingly, "if you're gonna bring the baby in utero within the protection of that statute, … there's an immediate exit because the baby is incapable of consenting."

¶13 Ultimately, the circuit court granted Dr. Batley's partial summary judgment motion as to the informed consent claim based on its conclusion that Samantha was Dr. Batley's patient and that, therefore, "[t]he informed consent would need to be given to the mother and no one else and that the claim would have to be brought through the mother or … if she died it would be through her estate and it is not attached to the child." In reaching this conclusion—that Samantha was the patient—the court seemingly made no attempt to determine whether *Charlie herself* was a patient within the meaning of WIS. STAT. § 448.30.

¶14 Charlie sought leave to appeal the circuit court's order granting Dr. Batley's partial summary judgment motion; however, we denied her request.

[9] In his summary judgment reply brief, Dr. Batley asserted that Samantha had "conceded that Dr. Batley engaged in an informed consent discussion with her." However, he made that statement without any citation to the Record. Moreover, even assuming that Dr. Batley had some type of informed consent discussion with Samantha, Dr. Batley failed to identify or otherwise describe the purported nature of such conversation(s), particularly as it related to any potential concerns regarding Charlie's delivery or the risks or benefits to her.

Charlie subsequently filed the pending appeal regarding the circuit court's partial summary judgment order following the jury trial on her negligence claim, which is not at issue here.

DISCUSSION

¶15 On appeal, the parties' respective arguments largely center on prior appellate case law, foreign jurisdiction case law, and public policy implications rather than focusing directly on WIS. STAT. § 448.30's plain language and the apparent conflict between the statute's plain language and binding Wisconsin case law, which is the issue we respectfully request that the supreme court accept for certification. To that end, in summarizing the parties' positions on appeal, we generally focus on the arguments raised that are most related to the certified issue.

Charlie's Position

¶16 Charlie's overarching argument is that she was Dr. Batley's patient immediately prior to her birth and that WIS. STAT. § 448.30 therefore provided her an independent right to informed consent that is separate and distinct from her birth mother Samantha's right to informed consent. In large part, her argument relies upon case law suggesting that an unborn child is a patient immediately prior to birth and that a child injured before or during birth may recover for those injuries if the physician failed to obtain informed consent from the birth mother on behalf of the unborn child. She also argues that Wisconsin follows an objective test in determining whether informed consent was obtained and that the objective test must be considered from her perspective—not the birth mother's—because she was the patient for purposes of that analysis.

¶17 WISCONSIN STAT. § 448.30 does not define "patient," and Charlie, in asserting she was Dr. Batley's patient immediately prior to birth for purposes of § 448.30, therefore cites to cases such as ***Pierce*** and ***Preston*** to establish that she was a patient within the statutory meaning immediately prior to her birth. In ***Pierce***, Charlie says, our supreme court determined that both the pregnant mother and soon-to-be-born child were the physician's patients—in other words, that there were two separate patients even though the child had not yet been born at the time. *See* ***Pierce***, 278 Wis. 2d 82, ¶28. And in ***Preston***, she says, the court of appeals, in addressing whether an unborn infant was an inpatient for purposes of the EMTALA, concluded that the mother and child were both "inpatients at the time of [the infant]'s birth as a matter of law." ***Preston***, 307 Wis. 2d 704, ¶56. Thus, Charlie argues, because the infant in ***Preston*** was an inpatient at birth, she herself was necessarily a patient immediately prior to birth as well.

¶18 Turning next to whether an unborn child who qualifies as a patient is entitled to WIS. STAT. § 448.30 informed consent separate and apart from the birth mother, Charlie points to ***Schreiber v. Physicians Insurance Co. of Wisconsin***, 223 Wis. 2d 417, 588 N.W.2d 26 (1999), for the proposition that Wisconsin law "specifically allows for a child to recover for injuries suffered as the result of a physician failing to obtain informed consent from the child's mother during labor and delivery." Although the ***Schreiber*** court seemingly focused on the birth mother's consent for her *own* treatment in determining that she had withdrawn her previously given consent and that other reasonable treatment alternatives existed, *see* ***id.*** at 420, Charlie points out that the supreme court determined that Kimberly Schreiber, the infant in that case, could recover for her pre-birth injuries stemming from her mother's lack of informed consent. ***Id.*** Based on this, Charlie says that both the birth mother in ***Schreiber*** and her birth mother, Samantha, "were in a

position during the labor process where there was no informed consent received *for the treatment being provided to their unborn children*" and that it therefore follows that Charlie was entitled to informed consent separate and apart from Samantha, albeit through Samantha given that she herself was a minor. (Emphasis added.)

¶19 Next, Charlie cites to ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 632, 545 N.W.2d 495 (1996), ***Martin***, and ***Schreiber*** for the proposition that "Wisconsin follows an objective test in regard to causation" and that we therefore must ask the following questions from her perspective because she is the "reasonable person" in this case and "the duty of informed consent ran directly to" her: (1) whether Dr. Batley provided information that a reasonable patient would want to know; and (2) whether a reasonable patient would have made a different treatment choice had she been given the information. According to Charlie, the answer to the first question is a resounding "no," and the answer to the second question is clearly "yes." She further acknowledges that because she was a minor, Samantha would have been the proper party to grant informed consent but that "only Charlie's best interests were material to her analysis."

¶20 Charlie also argues that Dr. Batley, despite being aware that "Charlie and her birth mother presented, inpatient, with almost all the known risk factors for shoulder dystocia during a vaginal delivery[,]" "never discussed a very simple reasonable alternative to a vaginal delivery, cesarean section, with Charlie's then legal guardian, her birth mother." She says, therefore, that in failing to discuss this alternative with Samantha, "Dr. Batley took away [her] right, through her birth mother, to make an informed decision regarding [her] delivery." She also says that extinguishing her independent right to statutory informed consent based on the fact that her birth mother is no longer her legal guardian following her

adoption by the Brekkes would violate article I, section 9 of the Wisconsin Constitution.[10]

Dr. Batley's Position

¶21 Dr. Batley takes the position that WIS. STAT. § 448.30's plain language precludes Charlie from asserting an independent informed consent claim and that Charlie's "interpretation would undermine the purpose of informed consent by creating a duty to the unborn child that potentially conflicts with the birth mother's well-informed, well-considered medical decision." He also says that Charlie's suggested statutory interpretation "would create unavoidable liability for Wisconsin physicians" because a physician "could dutifully carry out the birth mother's wishes to the birth mother's satisfaction, yet be subject to suit by the newborn if a birth injury occurs."

¶22 Like Charlie, Dr. Batley points to the common law origination of the doctrine of informed consent in Wisconsin and the later codification of that common law with the 1982 enactment of WIS. STAT. § 448.30. Despite conceding that he owed Charlie "a common law duty of reasonable care … before and during her birth," Dr. Batley argues that § 448.30 does not impose a *statutory* "duty to inform *an unborn child* of risks and alternative modes of treatment" and that it cannot "be assumed the Wisconsin legislature intended to create such a duty." Instead, he says the statutory language assumes that a physician can actually provide information directly to the patient, which is simply not possible in the case of a newborn or yet-to-be-born infant. Moreover, Dr. Batley asserts, even if an

[10] WIS. CONST. art. I, § 9.

unborn child such as Charlie is deemed to be a "patient" within the meaning of § 448.30, a plain-meaning analysis confirms that multiple exclusions would nevertheless apply so as to remove any obligation on the part of the physician to obtain informed consent. For example, he says, a physician is not required to inform a patient as to "technical information" the "patient would not understand" (§ 448.30(2)) or to obtain informed consent "where the patient is incapable of consenting" (§ 448.30(6)), and an unborn child would simply be incapable of both understanding technical information and consenting in the first place.

¶23 Next, Dr. Batley disputes Charlie's reliance on ***Pierce*** and ***Preston*** to establish that she was a patient pre-birth because ***Pierce*** was "a negligence case, not an informed consent case[,]" ***Preston*** failed to address what duties a physician owed to an infant prior to birth, and neither addressed whether a physician had a "duty to obtain the informed consent of an unborn child." Instead, Dr. Batley points to ***Vandervelden v. Victoria***, 177 Wis. 2d 243, 502 N.W.2d 276 (Ct. App. 1993)—despite acknowledging that it is "not on point because it does not address WIS. STAT. § 448.30 or the decision to proceed with a vaginal delivery versus a cesarean section"—for the proposition that an unborn infant injured during a pre-birth medical procedure performed with the birth mother's consent may proceed with a *negligence* claim but cannot recover under a theory of battery. Importantly, he says, the ***Vandervelden*** court determined that the circuit court had erred by "implicitly conclud[ing] that a fetus must independently give its consent to a medical procedure to which the mother has already consented." *See* ***id.*** at 250-51.

¶24 Dr. Batley also disputes Charlie's reliance on ***Schreiber*** for the proposition that an unborn child can recover for injuries sustained following a physician's failure to obtain the birth mother's informed consent and argues

instead that ***Schreiber*** addressed only "*a mother's* right of informed consent, not her unborn daughter's[,]" and that any reference to an unborn child's right to informed consent in ***Schreiber*** is merely dicta.

¶25 Finally, Dr. Batley argues that Charlie's proposed interpretation of WIS. STAT. § 448.30 would undermine both the statute's purpose and the quality of healthcare physicians provide because a statutory interpretation requiring "a physician to communicate with and obtain consent from a person other than the birth mother is impracticable[.]" While it appears that Dr. Batley's argument on this point is primarily related to Charlie's arguments earlier in the course of litigation that Charlie's natural father, Timothy, should have been included in any informed consent discussions with the birth mother during the course of labor, Dr. Batley acknowledges that on appeal, Charlie's argument is that Dr. Batley owed a duty of informed consent to her independently as well as to her birth mother. He says, however, that interpreting § 448.30 as requiring physicians to obtain informed consent from an unborn child (or newborn) would "create[] an impossible burden for physicians, expose[] them to unavoidable liability, or [would] undermine[] the rights of patients and the quality of healthcare overall." This is particularly so, Dr. Batley argues, because the interests of the unborn child and birth mother may "diverge" during the course of the birthing process, and should the infant be injured despite the birth mother having granted her *own* informed consent, the physician could be held liable for the child's injury if the child falls within § 448.30's ambit. Accordingly, he says that such an interpretation "should be barred by public policy."

Conflict Requiring Wisconsin Supreme Court Resolution

¶26 A WIS. STAT. § 448.30 informed consent claim "requires proof of the four elements of negligence: (1) a duty of care on the part of the defendant physician; (2) a breach of that duty; (3) a causal connection between the breach and the injury; and (4) an actual loss or damage as a result of the injury." ***Hubbard v. Neuman***, 2024 WI App 22, ¶21, 411 Wis. 2d 586, 5 N.W.3d 852, *review granted*, 2024 WI 40, 15 N.W.3d 24; ***Nieuwendorp v. American Fam. Ins. Co.***, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995); ***Schreiber***, 223 Wis. 2d at 434. Resolution of the ultimate issue presented on appeal—whether the circuit court erred in granting Dr. Batley's partial summary judgment motion on Charlie's claim that she has an independent right to informed consent pursuant to § 448.30—begins with a determination of whether Dr. Batley owed Charlie a duty of care under § 448.30. Answering this question, in turn, requires statutory interpretation.

¶27 Pursuant to what is by now a well-known framework, appellate courts review questions of statutory interpretation de novo, ***State v. Lickes***, 2020 WI App 59, ¶16, 394 Wis. 2d 161, 949 N.W.2d 623, *aff'd*, 2021 WI 60, 397 Wis. 2d 586, 960 N.W.2d 855, and interpret statutes using the well-established methodology articulated in ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. In doing so, appellate courts "ascertain and apply the plain meaning of the statutes as adopted by the legislature." ***White v. City of Watertown***, 2019 WI 9, ¶10, 385 Wis. 2d 320, 922 N.W.2d 61. "[S]tatutory interpretation 'begins with the language of the statute[,]'" and the "language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Kalal***, 271 Wis. 2d 633, ¶¶45-46

(citation omitted) ("Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.").

¶28 A statute is unambiguous if the interpretative process set forth above "'yields a plain, clear statutory meaning[.]'" ***Id.***, ¶46 (citation omitted). If a statute "is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." ***Id.*** "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses." ***Id.***, ¶47. "[D]isagreement about the statutory meaning" "is not enough" to render a statute ambiguous. ***Id.*** Rather, "the test for ambiguity examines the" statutory language "to determine whether 'well-informed persons *should have* become confused,' that is, whether the statutory … language *reasonably* gives rise to different meanings." ***Id.*** (quoted source omitted; omission in original).

¶29 Applying this framework here suggests that Charlie does *not* have an independent claim for informed consent pursuant to WIS. STAT. § 448.30 because even if she is considered a "patient" under the statute, at least one, if not multiple, exceptions to the informed consent requirement apply.

¶30 At the outset, we note that WIS. STAT. § 448.30 does not define "patient," and ***Kalal*** says we may therefore look to the common understanding of who constitutes a "patient." *See* ***Kalal***, 271 Wis. 2d 633, ¶¶45, 53. According to BLACK'S LAW DICTIONARY, a "patient" in the context of the medical setting is "[a] person under medical … care." *Patient,* BLACK'S LAW DICTIONARY (12th ed. 2024). Other frequently cited dictionaries offer similar definitions. *See, e.g.*,

Patient, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/patient (last visited Mar. 13, 2025) ("an individual awaiting or under medical care and treatment"); *Patient*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/patient_adj?tab=meaning_and_use #31769350 (last visited Mar. 13, 2025) ("A person receiving or … registered to receive medical treatment, esp. at a particular establishment or from a particular practitioner; a person staying in a hospital for medical treatment."). It therefore follows that any individual receiving or awaiting some type of medical diagnosis or treatment seemingly falls within § 448.30's protection as a "patient."

¶31 This case, however, requires the additional consideration of whether this common understanding extends to include an unborn child. While common dictionary definitions are generally silent on this question, Wisconsin case law appears to answer this question in the affirmative. In ***Pierce***, for example, the supreme court addressed not only whether a birth mother whose child was stillborn could pursue certain causes of action, but also whether she could bring a "derivative claim for wrongful death of the infant[,]" and it ultimately determined that the mother, in addition to being able to recover for her own injuries, could also "recover as a parent[] for the wrongful death of the stillborn infant[.]" ***Pierce***, 278 Wis. 2d 82, ¶1. While ***Pierce*** was not an informed consent case, it nevertheless involved a pregnant mother who had been admitted to the hospital for pregnancy-related reasons, and in the course of its analysis, the supreme court acknowledged that under the circumstances, "there [were] two patients"—the mother and the stillborn infant. ***Id.***, ¶28.

¶32 ***Preston***, a case decided a few years after ***Pierce***, is likewise instructive despite not involving an informed consent issue. In ***Preston***, we were tasked with determining whether the EMTALA required that the "hospital …

provide appropriate medical screening to a newborn infant born at the hospital after the infant's mother ha[d] been admitted and [wa]s therefore an inpatient." ***Preston***, 307 Wis. 2d 704, ¶17. After concluding that the EMTALA did not apply to inpatients, we explained that because the infant's mother "became an inpatient shortly after she arrived at the hospital while undergoing labor and delivering [the infant] in the birthing center[,]" "to conclude that [the infant] was not an inpatient at the hospital under EMTALA even though his laboring mother was, would defy common sense." ***Id.***, ¶¶54-55. Like ***Pierce***, this suggests that at the very least, where a pregnant woman is admitted to the hospital and is therefore undeniably a patient, her soon-to-be-born child is likewise considered a patient at that time.

¶33 In light of the commonly understood definition of "patient" and the case law indicating that an unborn infant qualifies as a "patient" immediately prior to birth, we are satisfied that Charlie was a patient within the statutory meaning of WIS. STAT. § 448.30.[11]

¶34 Although the first part of the plain-meaning analysis indicates that Charlie was a patient for purposes of WIS. STAT. § 448.30, applying the ***Kalal*** framework to § 448.30 as a whole nevertheless indicates that it does not apply to Charlie—in other words, Dr. Batley was not required to "inform [her] about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments"—because at least two of the exceptions

[11] Although neither ***Pierce v. Physicians Insurance Co. of Wisconsin, Inc.***, 2005 WI 14, ¶28, 278 Wis. 2d 82, 692 N.W.2d 558, nor ***Preston v. Meriter Hospital, Inc.***, 2008 WI App 25, ¶1, 307 Wis. 2d 704, 747 N.W.2d 173, was an informed consent case, we note both that WIS. STAT. § 448.30 has referred to a "patient" since its inception in 1982, *see* 1981 Wis. Laws, ch. 375, § 2, and that the legislature's 2013 amendment to § 448.30 did not limit or otherwise define the meaning of "patient." *See* 2013 Wis. Act 111, §§ 1-3.

permitting a physician to *not* disclose such reasonable alternate treatments apply to Charlie: (1) Dr. Batley was not required to inform Charlie of "[d]etailed technical information that in all probability [she] would not understand"; and (2) Dr. Batley was not required to inform Charlie because she was "incapable of consenting." *See* § 448.30(2), (6).

¶35 As to the exception set forth in WIS. STAT. § 448.30(2), Charlie clearly could not have understood "[d]etailed technical information" prior to her birth. Likewise, she herself was legally "incapable of consenting" prior to her birth. *See* § 448.30(6). While the legislature could have made § 448.30 applicable to a parent or other legal guardian where the patient is a minor, it seemingly chose not to do so given that the statutory language refers only to the "patient" and not to a patient's parent or guardian. Consequently, because § 448.30 refers only to the *patient* in regard to *who* must be informed, *who* can consent, and the circumstances in which an exception applies, a plain-meaning analysis of § 448.30 ostensibly results in the conclusion that Charlie was not entitled to statutorily required informed consent and that she therefore cannot pursue an independent claim for a lack of § 448.30 informed consent.[12]

¶36 That conclusion, however, directly conflicts with binding Wisconsin Supreme Court case law indicating that a minor patient, including an unborn child, *is* entitled to informed consent, albeit through a parent or guardian. For example,

[12] In the case of a minor, this plain-meaning interpretation would result in the conclusion that a physician would not, for example, be required to obtain statutory informed consent prior to proceeding with a tonsillectomy for a five-year old, an appendectomy for a 12-year old, administering vaccinations to an infant, and so on because, despite falling within the definition of "patient," those individuals would be "incapable of consenting" on their own behalf and similarly would likely not understand the information provided. *See* WIS. STAT. § 448.30(2), (6). Such a conclusion is arguably unreasonable.

in ***Scaria v. St. Paul Fire & Marine Ins. Co.***, the supreme court, while stating that "a doctor's duty to inform is further limited in cases … where *the patient is a child*," nevertheless recognized that where the patient is a child, "[c]onsent … is probably the obligation of the parent or guardian." 68 Wis. 2d 1, 13 & n.3, 227 N.W.2d 647 (1975). What the court did *not* say, however, is that a minor patient has *no* right to informed consent.

¶37 Importantly, when the legislature first enacted WIS. STAT. § 448.30 in 1982, *see* 1981 Wis. Laws, ch. 375, § 2, it "codifie[d] the common law set forth in ***Scaria***." *See* ***Johnson***, 199 Wis. 2d at 629-30.[13] Thus, the principle that a minor patient is entitled to at least some amount of informed consent through a parent or guardian, as acknowledged in ***Scaria***, would appear to be incorporated into § 448.30 despite the plain-meaning analysis of the statutory language suggesting otherwise. *See, e.g.*, ***Gibson v. Overnite Transp. Co.***, 2003 WI App 210, ¶16, 267 Wis. 2d 429, 671 N.W.2d 388 (explaining that the "[c]ommon law

[13] Comparing WIS. STAT. § 448.30's exceptions to those set forth in ***Scaria v. St. Paul Fire & Marine Insurance Co.***, 68 Wis. 2d 1, 227 N.W.2d 647 (1975), confirms that the statutory exceptions largely mimic—if not directly quote—the exceptions set forth in ***Scaria***. To wit, the ***Scaria*** court noted that:

> A doctor should not be required to give a detailed technical medical explanation that in all probability the patient would not understand. He should not be required to discuss risks that are apparent or known to the patient. Nor should he be required to disclose extremely remote possibilities that at least in some instances might only serve to falsely or detrimentally alarm the particular patient. Likewise, a doctor's duty to inform is further limited in cases of emergency or where the patient is a child, mentally incompetent or a person is emotionally distraught or susceptible to unreasonable fears.

Scaria, 68 Wis. 2d at 12-13 (footnote omitted); *see also* ***Martin v. Richards***, 192 Wis. 2d 156, 174-75, 531 N.W.2d 70 (1995) (noting that § 448.30's language "parrots that of the language in ***Scaria***").

prevails in Wisconsin until changed by statute" and that "[t]o abrogate the common law, the intent of the legislature must be clearly expressed, either in specific language or in a manner that leaves no reasonable doubt of the legislature's purpose").

¶38 The principle that a minor child is entitled to informed consent through a parent or legal guardian also appears in ***Martin***, a case decided more than a decade after the legislature's initial enactment of WIS. STAT. § 448.30. ***Martin***, 192 Wis. 2d 156. There, the supreme court confirmed that § 448.30 (1985-86)[14] required that the physician who evaluated the minor patient—a 14-year-old child—inform *the minor patient's father* that alternate, viable diagnostic and treatment options were available to treat his daughter's head injury. ***Martin***, 192 Wis. 2d at 162-63. In reaching that conclusion, the ***Martin*** court neither specifically addressed whether someone other than *the patient* was entitled to informed consent pursuant to § 448.30 despite the statute referring only to the patient nor whether the exceptions relieving a physician of providing certain information to a *patient* where there is "[d]etailed technical information that in all probability a patient would not understand" or "where the patient is incapable of consenting" applied, as would arguably be the case where the patient is a minor. *See* § 448.30(2), (6). Rather, the ***Martin*** court clearly assumed that in the case of a minor patient, the statutorily required informed consent simply runs through the parent.

¶39 The supreme court's decision in ***Schreiber***, although generally addressing whether the pregnant mother had withdrawn and then given new

[14] The injury occurred in July 1985. ***Martin***, 192 Wis. 2d at 163.

informed consent during the birthing process rather than specifically addressing or discussing the unborn child's right to informed consent, also signaled that an unborn infant may be entitled to informed consent regarding medical treatment surrounding the unborn child's birth. *See* ***Schreiber***, 223 Wis. 2d at 437-38. There, the infant "was born a spastic quadriplegic and she [could not] move below her neck or speak[,]" and the parties stipulated that "she would have been born a healthy child" had she been delivered approximately thirty minutes prior to the emergency cesarean section that occurred after her heart rate dropped while in the womb. ***Id.*** at 423. The court explained that although the mother had initially consented to attempting a vaginal birth, she had withdrawn her consent during labor when she requested that her physician perform a cesarean section, thereby triggering the physician's duty to engage in a new informed consent discussion. ***Id.*** at 430-31. The physician, however, not only refused her multiple requests but also failed to obtain informed consent from the mother after she withdrew her initial consent, and the court concluded that the Schreibers' informed consent claim—which included a claim on behalf of the infant—could proceed. ***Id.*** at 437-38. This suggests that the infant had an independent right to informed consent related to injuries she suffered prior to birth.

¶40 ***Bubb v. Brusky***, 2009 WI 91, 321 Wis. 2d 1, 768 N.W.2d 903, another informed consent case—albeit not one involving a minor patient—also suggests that where the patient is a minor, the WIS. STAT. § 448.30 informed consent requirement runs to the minor patient's parent or legal guardian. There, in explaining that § 448.30 codifies the common law informed consent standards set forth in ***Scaria***, the supreme court confirmed that "the standards set forth in

Trogun[15] and ***Scaria*** *are implicated in the interpretation of* … § 448.30." ***Bubb***, 321 Wis. 2d 1, ¶57 (emphasis added). Although the ***Scaria*** court's acknowledgment that informed consent would likely be "the obligation of the parent or guardian" if "the patient is a child" appeared in a footnote, that footnote was tied directly to language setting forth the common law informed consent standards—language that § 448.30 itself now parrots. *See* ***Scaria***, 68 Wis. 2d at 13 n.3; § 448.30. Given that ***Scaria***'s standards "are implicated" when interpreting § 448.30, it would seem that the Wisconsin Supreme Court has recognized that a minor patient is entitled to at least some measure of informed consent, albeit through a parent, despite the fact that the statutory language itself refers only to *the patient*.

¶41 Despite the foregoing, Dr. Batley, while acknowledging it is not on point, cites to the court of appeals' decision in ***Vandervelden*** and suggests that it can be read to stand for the proposition that there is no basis for a "fetal consent requirement" in Wisconsin law. ***Vandervelden***, 177 Wis. 2d at 250-51. ***Vandervelden***, however, arose in a very different context—informed consent was not at issue, and rather than an unborn child sustaining injury immediately prior to birth, the plaintiff sustained injuries while in utero as a result of an unsuccessful abortion performed when the mother was approximately six-to-eight weeks pregnant and to which she had undeniably consented. ***Id.*** at 245-46. Vandervelden filed a claim for battery against the physician who performed the unsuccessful abortion, and the court of appeals explained that the circuit court allowed the claim to proceed to trial after finding "that as a fetus, Joshua had

[15] ***Trogun v. Fruchtman***, 58 Wis. 2d 569, 207 N.W.2d 297 (1973).

failed to consent to the abortion procedure and that the mother's consent, therefore, could not serve as the basis for an affirmative defense[.]" ***Id.*** at 247.

¶42 The ***Vandervelden*** court identified the issue before it as "whether a physician who performs an unsuccessful abortion procedure on a non-viable fetus can be held liable for a battery against the unborn fetus where the mother has freely and fully given her consent to the abortion procedure[,]" and the court ultimately concluded that "where a woman has freely consented to an abortion procedure on a *non-viable* fetus, a physician may not be held liable for a battery to the unborn fetus." ***Id.*** at 248, 253 (emphasis added). In doing so, it rejected the circuit court's implicit conclusion "that a fetus must independently give its consent to a medical procedure to which the mother has already consented[,]" saying instead that a "'fetal consent requirement'" would "create[]" "logistical problems" and "has no basis in the law." ***Id.*** at 250-51.

¶43 While Dr. Batley argues that the above statement in ***Vandervelden*** supports the conclusion that Charlie was not entitled to informed consent prior to her birth, we believe ***Vandervelden*** is distinguishable. First, the injury to the infant in utero in ***Vandervelden*** occurred when the mother was approximately six to eight weeks pregnant and was therefore non-viable, as the ***Vandervelden*** court itself noted. *See* ***id.*** at 248. Thus, the court's stated agreement with the physician's argument that "a child injured *in utero* as a result of *a medical procedure performed with his or her mother's consent* cannot obtain recovery based on a battery theory, but rather, must plead and prove negligence by the physician" must be read within the context of the limited issue before it, which was expressly identified as involving a "*non-viable fetus*[.]" ***Id.*** at 248-49 (second and third emphases added). Here, Charlie was born at thirty-nine weeks and five days—long past the point of viability—and her injury occurred while her birth

mother was in the process of giving birth. Moreover, to the extent ***Vandervelden*** conflicts with the supreme court's decision in ***Schreiber*** where the infant was also injured in utero—a case decided almost six years *after* ***Vandervelden***—***Schreiber***, which involved injuries to a *viable* fetus, would control.

¶44 Second, it is not clear that a non-viable fetus would qualify as a "patient" within the meaning of WIS. STAT. § 448.30, particularly under ***Pierce*** and ***Preston***, which seemingly confirm that an unborn infant is a "patient" immediately prior to birth. If a non-viable fetus does not fall within the definition of "patient," then § 448.30 would not apply at all given that it expressly applies to "patient[s]." For these reasons, we are unconvinced that ***Vandervelden*** supports the proposition that a *viable* fetus does not have an independent claim for informed consent pursuant to § 448.30, particularly immediately prior to being born.

¶45 In summary, based on Wisconsin Supreme Court and court of appeals case law discussed herein and by which we are bound, it appears clear that Charlie was a patient within the meaning of WIS. STAT. § 448.30 and that she was entitled to § 448.30 informed consent through her birth mother despite the absence of any such indication resulting from a plain-meaning analysis of § 448.30. However, complying with our duty to apply binding legal precedent in this case would require that we disregard the plain-meaning interpretation of § 448.30 indicating that Charlie was *not* entitled to § 448.30 informed consent because at least one of the exceptions applied, which would violate the principles set forth in ***Kalal*** requiring that we apply a plain-meaning statutory analysis.

CONCLUSION

¶46 In light of the foregoing, we respectfully request that the supreme court accept this certification to resolve the apparent conflict between the plain-meaning interpretation of WIS. STAT. § 448.30 suggesting that Charlie (and other minors) are *not* entitled to statutory informed consent and the binding case law suggesting that § 448.30 *does* apply to minor patients through their parents or legal guardians despite the lack of any statutory language indicating this to be the case. Not only will the resolution of this issue impact the outcome of this case, it will have a significant statewide impact—particularly as it relates to the applicability of § 448.30 to minor patients who, due to their age, would likely be excluded from the statutory informed consent requirement pursuant to § 448.30(2) and (6).