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STATE OF WISCONSIN
SUPREME COURT

DOROTHY SHANNON,
Individually and on behalf of a class of
others similarly situated,

Plaintiff-Respondent-Petitioner,

v.

MAYO CLINIC HEALTH SYSTEM –
NORTHWEST WISCONSIN REGION, INC.,

Defendant-Appellant.

Appeal No.: 2020AP1186

Circuit Court Case No.: 19CV204

PETITION FOR REVIEW AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER OF THE COURT OF APPEALS DISTRICT III ON APPEAL OF A CLASS CERTIFICATION ORDER OF THE DUNN COUNTY CIRCUIT COURT, CASE NO. 19-CV-204, THE HONORABLE ROD W. SMELTZER, PRESIDING

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June 28, 2021

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I. PETITION FOR REVIEW

Shannon seeks review of the Court of Appeals decision pursuant to Wis. Stat. §809.62. This case concerns the recently amended version of Wis. Stat. §803.08 that governs class actions. This case presents an opportunity for the Court to provide guidance on the issues that are properly considered by a Circuit Court and whether a motion to certify a class is proper to resolve liability issues.

Shannon contends that when considering a motion for class certification, the Circuit Court is tasked with deciding whether the requirements set forth in Wis. Stat. §803.08 have been met by the movant. The class certification procedure is not to adjudicate the merits of any claim. There are other procedures applicable to resolving the merits of claims.

In this case, the Appellant-Respondent Mayo Clinic Health System - Northwest Wisconsin Region, Inc. ("Northwest") did not contest that each of the necessary requirements under Wis. Stat. §803.08 were met. Instead, Northwest argued that the merits of the claims should be considered by narrowly defining the class definition

to exclude it as a corporate entity from any liability. [1] The Court of Appeals concurred and redefined the class that effectively granted Northwest immunity from the claims asserted in the complaint.

This Court should correct the Court of Appeals and follow precedent that a party may not seek liability determinations in the context of a motion to certify a class. Merit issues are only properly raised and resolved by motions that address the merits of claims, e.g., summary judgment or a motion to dismiss.

This case presents an opportunity for the Court to establish policies concerning the current version of the class action statute and clarify, develop, and harmonize the class action procedure law which is a proper basis for review under Wis. Stat. §809.62(1)(r)(2) and (3). It may also resolve a potential conflict between the Court of Appeals decision here with the published decision in *Harwood v. Wheaton Franciscan Services, Inc.*, 388 Wis.2d 546, 2019 WI App 53, (Ct. App. 2019).

In *Harwood*, the Court of Appeals affirmed the certification of a class because the statutory requirements were met. 388 Wis.2d at

[1] Northwest was the surviving non-profit entity after it merged with an entity known as Mayo Clinic Health System – Red Cedar ("Red Cedar").

572, 2019 WI App 53 at ¶ 51 ("In its eleven-page order, the trial court set forth the applicable legal standards for each statutory requirement and stated a factual basis for concluding that each had been satisfied.") The Defendants in *Harwood* had also sought to litigate one party's liability through the class certification process arguing that "the class should not be certified because it had offered an affidavit of the CEO stating that one of the defendants 'had nothing to do with any of this in this case[.]'"388 Wis.2d at 563, 2019 WI App 53 at ¶ 29.

The Circuit Court "acknowledged the factual issues raised by Wheaton Franciscan, and noted that "most of those go to the merits of the case, potential defenses, inability to prove damages or whatever it might be, but that's not what I'm deciding today." 388 Wis.2d at 565, 2019 WI App 53, ¶ 32. The question for this Court to decide is whether the *Harwood* decision, that accepted the Circuit Court's refusal to consider the merits of the claims as part of the class certification process, or the Court of Appeals decision here, that entertained a merits issue as part of the class certification process, is

the proper path for Circuit Courts in deciding class certification motions.

The second issue raised by Shannon concerns the effect of a merger between corporations. The Court of Appeals relied on a 1947 decision, *Wisconsin Elec. Power Co. v. Wisconsin Dept. of Taxation*, 251 Wis. 346, 349 (Wis. 1947) that addressed a specific statute limited to utility mergers that was interpreted in the context of whether the successor could claim a state income tax deduction.

The Court of Appeals extrapolated that narrow holding and applied it to a non-tax issue relating to the liability of a non-utility corporation under a different merger statute. The determination of the effect of mergers on claims asserted against the surviving entities is appropriately considered and resolved by this court to provide all guidance. It is appropriate under Wis. Stat. §809.62(1)(r)(3) to determine if the 1947 *Wisconsin Elec. Power Co.* case analyzing tax deductions after a merger of utility entities should be applied to non-tax deduction issues relating to non-utility corporate mergers or not.

To the extent that the 1947 *Wisconsin Elec. Power Co.* case was appropriately applied by the Court of Appeals outside tax issues

of non-utility corporate entities, the issue is ripe for re-examination under Wis. Stat. §809.62(1)(r)(e)(“ The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.”)

For the above reasons, Shannon’s Petition for Review should be granted.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals commit error when it decided a merits issue raised in the context of a class certification motion?

Disposition by the Circuit Court:

The Circuit Court properly held that the class was properly certified with naming the surviving entity - Mayo Clinic Health System - Northwest Wisconsin Region, Inc..

Disposition by the Court of Appeals:

The Court of Appeals effectively decided a merits issue by re-writing the class definition limiting the class to only charges by a defunct corporation - Mayo Red Cedar.

2. Did the Court of Appeals commit error when it determined that a class definition should be limited to a defunct corporation that had been merged?

Disposition by the Circuit Court:

The Circuit Court properly held that naming the merged entity was proper.

Disposition by the Court of Appeals:

The Court of Appeals errored when it determined that the class definition should limit liability to a defunct corporation Mayo Red Cedar.

III. STATEMENT OF THE CASE

FACTUAL BACKGROUND

This class action arose from Ms. Shannon's personal injury claim for which she hired Herrick and Hart to represent her. (R. 1) Ms. Shannon authorized her attorney, Jay Heit, of Herrick and Hart, to obtain her health care records by signing HIPAA release forms giving to her attorneys authorization to receive her health information. (R. 1)

Attorney Heit subsequently submitted requests for Ms. Shannon's health care records. (R. 1). When fulfilling the requests, Mayo imposed illegal fees contrary to what is allowed by Wis. Stat. § 146.83(3f)(b)4.-5. (R. 1)

PROCEDURAL HISTORY

Shannon filed a class action against two Mayo entities, Red Cedar and Northwest. (R. 1) Red Cedar moved to dismiss the action against it contending that it no longer existed as a result of a merger. (R. 26) It was merged into the remaining Defendant, Northwest, and Red Cedar contended it could no longer be sued as a separate entity. (R. 26) The trial court granted Red Cedar's motion to dismiss. (R. 60)

Thereafter, Plaintiff filed a motion to certify a class. (R. 71-72) Plaintiff's motion set forth that each of the prerequisites under Wis. Stat. §803.08(1) were met; these are commonly referred to as numerosity, commonality, typicality, and adequacy. See e.g., *Harwood v. Wheaton Franciscan Services, Inc.,* 388 Wis.2d 546, 559, 2019 WI App 53, ¶ 23 (Ct. App., 2019) ("The statute requires the plaintiff to first establish three facts about the proposed class and the

representative—referred to as numerosity, commonality, and typicality—and one fact about the plaintiff's ability to represent the class."). After satisfying the above prerequisites, a party must also show that one provision of §803.08(2) is met. Shannon showed that the provisions of (2)(c) were met. §803.08(2)(c) requires a party to show "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Given that Shannon met all of the requirements, and Northwest did not contest that each and every requirement was met, the only issue raised by Northwest was its contention that the surviving entity of the merged corporations, Northwest, should not be named in the class definition but instead that the court should direct a notice be sent out that only named the former entity, Red Cedar - an entity that did not survive the merger and ceased to exist. (R. 82) The trial court agreed with Shannon and enter an order granting class certification.

THE COURT OF APPEALS DECISION

The Court of Appeals reversed and remanded the action. (App. 001) It granted Northwest's request holding "Northwest does not have any liability for its own actions charging Shannon and the other class members for health care medical records, as Northwest did not provide records or charge anyone for them at the relevant time". (App. 10, Ct. App. decision at ¶ 23.)

The Court of Appeals also held that Northwest as the surviving entity of a corporate merger could be treated separately from an entity that was merged out of existence and did not survive the merger with the claims limited to being asserted against the now non-existent entity. Decision at ¶ 20.

If it were only a question of semantics, it may not be an issue for this court to consider, but it was an effort to resolve a merits issue because the Northwest sought an affirmative determination it had no liability without any evidence and contrary to the allegations in the Complaint. This was not done by a motion addressed to the merits but by excluding it from the class definition. It also is inconsistent with the statutory provision governing merger that says the non-

surviving entity ceases to exist. Under the Court of Appeals ruling the non-surviving entity still has an ongoing identity that courts will recognize and include in notices that is separate and apart from the surviving entity.

IV. GROUNDS FOR REVIEW

This case satisfies the criteria for granting review set forth in Wis. Stat. §809.62(1r)(c)2.–3. Wis. Stat. 809.62(1)(r) is not an exclusive list of the considerations for this Court to exercise review. These are issues of first impression under Wisconsin law. Can merits issues be decided in a motion for class certification? And can a merged entity continue to exist and be named in the class certification definition? These issues, which present pure questions of law, are also likely to recur unless resolved by this Court. *See* Wis. Stat. §809.62(1r)(c)3.

The Court of Appeals' published decision if not reviewed and vacated in the instant case will be binding on all Wisconsin state courts.

V. ARGUMENT

A. CLASS CERTIFICATION IS A PROCEDURAL DEVICE, AND DOES NOT AND SHOULD NOT DECIDE MERITS

In *Mussallem v. Diners' Club, Inc.*, 69 Wis. 2d 437, 230 N.W.2d 717 (1975) this Court held: "In Schlosser, we concluded that it was in the public interest as declared by the legislature to permit class actions in those cases which meet the criteria established by sec. 260.12, Stats." See also, *Mercury Records Productions, Inc. v. Economic Consultants, Inc.,* 91 Wis.2d 482, 490, 283 N.W.2d 613 (Ct. App. 1979) ("It is considered to be in the public interest as declared by the legislature to permit class actions when the three prerequisites are met.") The law in Wisconsin has been if the class met the statutory requirements, then procedurally a class should be certified.

The question raised by this case is whether that view of class actions still remains the law. Because if it is still the law, then the Court of Appeals erred in reversing the decision of the Circuit Court because there was no dispute that all the requirements were met. Northwest asked the Court of Appeals to go beyond the statutory

requirements and make a dispositive merits decision that "Northwest did not provide records or charge anyone for them at the relevant time". (App. 10; Ct. App. decision, ¶ 23.) In addition, to whether that question was properly considered as part of a class certification, it also raises the question - on what evidence did the Court of Appeals make this conclusion?

Shannon contends the Court of Appeals erred. The Court of Appeals decision changes the approach to motions seeking class certification from a procedural determination as to whether it is appropriate to resolve claims on a class basis if the statutory requirements are met into a vehicle for dispositive, merits based decisions. Here, the latter procedure was employed by using the class definition to release parties from potential liability at the class stage instead of the merits stage.

There is nothing in Wis. Stat. §803.08 that mandate the merits of any claims against a particular party be adjudicated as part of class certification. However, the Court of Appeals explicitly or implicitly incorporated such a requirement and decided that

Northwest's liability could be limited based on a record and motion that did not seek to address the merits of the claims.

The Court of Appeals decision states that "…without a modification, there would be no class members, *as the undisputed evidence shows that Northwest did not improperly charge any individuals for medical records during the relevant time period*." There was no evidentiary record made before the Circuit Court as to whether or not Northwest made any charges, improper or otherwise.

This was a procedural motion to determine if the requirements set forth in the current version of Wis. Stat. §803.08 were met. Among these requirements is if there were common questions of law or fact presented and if the common questions also were the predominant issues in the case. As explained by the Supreme Court in addressing the federal class action rule, Rule 23, the Court stated:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to

> the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such '(a)s soon as practicable after the commencement of (the) action . . ..' **2153 In short, we agree with Judge Wisdom's conclusion in Miller v. Mackey International, 452 F.2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:
>
> 'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' Id., at 427.

Eisen v. Carlisle and Jacquelin, 94 S.Ct. 2140, 2152–53, 417 U.S. 156, 177–78 (1974) [2]

The Court of Appeals foray into the merits here was in error and inconsistent with an inquiry into whether the requirements of Wis. Stat. §803.08 were met. The class certification motion is not intended to be a vehicle for resolving the common issues of fact or law – only to identify whether there are sufficient common issues.

[2] No doubt Mayo will argue that the *Eisen* decision was later rejected by the Supreme Court by a footnote in a later case, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552, 564 U.S. 338, 352 FN 6 (U.S.,2011)(*Dukes*) But, the rejection by *Dukes* was that *Eisen* had created a per se rule that the merits can never be considered. The *Dukes* court rejected a per se rule since merits may be appropriate to consider under certain circumstances in pretrial proceedings. *Dukes* did not mandate the determination of the merits of an action into the certification process as the Court of Appeals did here. The Court of Appeals made an affirmative ruling that there were no claims that could be asserted against Northwest based on a *factual* finding from a record that addressed the requirements for a class action under Wis. Stat. §803.08.

The Court of Appeals decision appears to have arrived at its decision by finding that the class claims would not succeed against Northwest. By doing so, the Court of Appeals resolved Northwest's liability through a class motion, without any evidentiary record and bypassing the procedures that are in place to resolve liability issues such as a motion for summary judgment.

But Shannon alleged in the Complaint that Northwest had illegally charged her, charged other patients and had also assumed the duties of responding to the requests and was liable. (R. 1, ¶27, 42, 64) Plaintiff alleged:

> The Defendants have charged other Wisconsin residents a request, retrieval, basic, processing, certification and/or other fee although the request for the health care records was made by the patients themselves or persons authorized in writing by them.

Id. ¶64.

The Court of Appeal's went beyond the allegations in the complaint and its decision in effect grants judgment in favor of Northwest through the procedural class process, without any evidence, by saying the claims could not proceed against Northwest and therefore the class cannot proceed against Northwest, but

Northwest never showed that it was entitled to summary judgment as required by Wis. Stat. §802.08.

The Court of Appeals approach to a class certification is inconsistent with the approach to class certification as a procedural issue and can lead lower courts to conclude that they should adjudicate the merits of a case or a party as part of the class certification process rather than through the procedures established for resolution of merits issues.

Of course, if this Court agrees with the approach taken by the Court of Appeals the public and the bar will benefit in being informed of that sooner rather than later. If the class certification is to be an alternative to summary judgment to address the merits of claims, then the public and all parties should be provided that guidance now because it will require a substantially different record than one required to show that the requirements set forth in Wis. Stat. §803.08 are met. And, if this is a new rule that Shannon's action should be remanded so she may address the merits of Northwest's liability and whether in fact it never improperly charged anyone for copies of health care medical records.

B. THE COURT OF APPEALS ERRED IN NAMING A DEFUNCT ENTITY IN THE CLASS DEFINITION

The Court of Appeals reliance on the 1947 decision in *Wisconsin Elec. Power Co.* was in error. That case does not provide guidance for the effect of non-utility corporate mergers. The only issue addressed in *Wisconsin Elec. Power Co., supra* was whether the surviving entity of a utility merger could deduct federal tax payments it made for the non-surviving utility entity on its state tax returns. That narrow tax issue is not presented by this case nor does this case involve merger of utility entities.

Utilities are different than regular corporations. There are laws that specifically relate to the operations of utilities and there is also a specific law relating to the merger of utilities. Specifically, mergers of utilities are governed by Wis. Stat. §196.80. This was the only statute reviewed by the Court in *Wisconsin Elec. Power Co.* Wis. Stat. §196.80 differs from the merger statutes for non-utilities. Among the differences, §196.80 makes no provisions for the termination of the separate existence of the non-surviving entities. The statute governing mergers of non-utilities, Wis. Stat. §181.1106,

specifically provides that after a merger the non-surviving entities no longer exist:

> (a) Every other business entity that is party to the merger merges into the surviving business entity, and the separate existence of every business entity that is a party to the merger, except the surviving business entity, ceases.

Under the Court of Appeals decision, a non-surviving entity, Red Cedar, that has been extinguished as a matter of law, still exists in some way for purposes of establishing liability despite the statutory provision that provides it ceases. The Court of Appeals arrived at this conclusion based on the decision in *Wisconsin Elec. Power Co*. but as explained above, that case does not provide guidance here because it addressed a different type of entity that was governed by a different statute and was limited to addressing tax issues relating to the merger.

Wis. Stat. §§181.1106 also includes a provision that addresses the surviving entity is liable for all debts:

> (c) The surviving business entity has all liabilities of each business entity that is party to the merger.

The utility merger statute does not address the liability of the surviving entity from a utility merger. Shannon contends that the Court of Appeals decision that relied on *Wisconsin Elec. Power Co*. is

flawed and inconsistent with the statutory provisions relating to the effect of mergers of non-utilities due to the differences in the statutory provisions that apply to the respective mergers. As it stands now, the Court should reexamine whether the prior decision in *Wisconsin Elec. Power Co.* should be applied outside the context of utility mergers.

CONCLUSION

There is no dispute that Shannon met all the requirements of the class action statute. The Circuit Court was correct in rejecting Northwest's request to name a non-existent entity in a notice being sent out under its direction. The Circuit Court's refusal to name a non-existent and determine a merits issue was a proper exercise of its discretion in certifying a class.

The Court of Appeals errored by defining the class definition to name only a defunct entity and went beyond its authority in resolving merits issues without any evidentiary basis. There was no record that Northwest did not charge any class members and the Court of Appeals decision was contrary to the allegations in the complaint.

Finally, the Court of Appeals misapplied the merger doctrine and erred in naming a defunct corporation in the class definition that had been merged.

This Court should accept the Petition for Review and reverse the Court of Appeals and uphold the Trial Court's Order.

Dated this 28th day of June , 2021.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §806.62(4) and §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,887 words.

Dated this 28th day of June, 2021.

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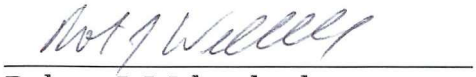

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12) and 809.92(4).

I further certify that this electronic petition is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of June , 2021.

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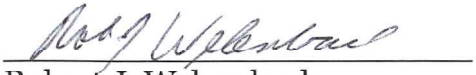

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CERTIFICATION OF THIRD PARTY COMMERCIAL DELIVERY

I certify that on June 28, 2021, this brief was picked up by a third-party commercial carrier for delivery to the Clerk of Supreme Court for the same day. I further certify that the brief was correctly addressed and a copy was served on all parties.

Dated this 28th day of June, 2021.

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