

FILED

MAY 03 2021

No. 2019AP2034

CLERK OF SUPREME COURT
OF WISCONSIN

In the Supreme Court of Wisconsin

ANDREA TOWNSEND,
PLAINTIFF-APPELLANT,

v.

CHARTSWAP, LLC,
DEFENDANT-RESPONDENT-PETITIONER.

**MOTION OF RECORDQUEST, LLC FOR PERMISSION TO FILE
NON-PARTY BRIEF AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER AND FOR ORAL ARGUMENT TIME**

RecordQuest, LLC, moves for permission to file a non-party *amicus* brief in this case under Wis. Stat. § (Rule) 809.19(7), and for ten minutes of oral argument time. A copy of the proposed non-party *amicus* brief is submitted simultaneously with this Motion.

The grounds for this Motion are as follows:

1. This case considers the fee caps that the Legislature has imposed on a “health care provider”—a term specifically defined in Wis. Stat. § 146.81(1)—for furnishing copies of patient health care records upon request, Wis. Stat. § 146.83(3f)(b), and the imposition

of liability for “[a]ny person . . . who [] violates” these health-care-provider caps, Wis. Stat. § 146.84(1); *see* Opening Br.10–14.

2. Petitioner provides release-of-information services for health care providers in Wisconsin, including by furnishing copies of patient health care records upon request, on behalf of a patient’s health care provider. *See* Opening Br.5 & n.1, 14–16. Respondent claims that Petitioner violated Subsection 146.83(3f)(b)’s health-care-provider caps, and so faces liability under Section 146.84, in the course of Petitioner furnishing a copy of Respondent’s health care records on behalf of Respondent’s health care provider. *See* Opening Br.14–16; Resp.Br.2. In its Opening Brief before this Court, Petitioner argues that Subsection 146.83(3f)(b)’s health-care-provider caps apply only to a “health care provider,” not to a release-of-information-services company like Petitioner, who—according to Plaintiff’s allegation—acts only as an agent of a health care provider. Opening Br.25–43. Further, Petitioner argues that Wis. Stat. § 990.001(9) does not upend the common law of agency

to change that result—contrary to the conclusions of the Court of Appeals and Plaintiff. Opening Br.43–57.

2. Like Petitioner, RecordQuest also provides release-of-information services for health care providers in Wisconsin, including the furnishing of copies of patient health care records on behalf of health care providers, thus RecordQuest has a direct interest in this Court's proper interpretation of Subsection 146.83(3f)(b) and Section 146.84. *Amicus* Br.1.

3. RecordQuest is the defendant in *Smith v. RecordQuest, LLC*, 380 F. Supp. 3d 838 (E.D. Wis. 2019), *aff'd in part, rev'd in part* 989 F.3d 513 (7th Cir. 2021), the federal district court case that raises identical issues as the case here, and which the Court of Appeals attempted to distinguish below, *Amicus* Br.1–2. This Court's resolution of the case here will almost certainly determine the course of the *Smith* litigation, making RecordQuest's interests here especially acute.

4. While the *Smith* district court held that Section 146.84 does not impose liability on agents of health care providers like

RecordQuest, the Seventh Circuit subsequently reversed that holding “out of deference to the Wisconsin Court of Appeals[.]” decision below. *Smith*, 989 F.3d at 518–20. Yet, while following that decision, the Seventh Circuit expressed puzzlement by “the appeals court’s view of statutory purpose supersed[ing] the statutory text.” *Id.* The Seventh Circuit then denied RecordQuest’s request for panel rehearing and certification of this question to this Court in light of this Court’s grant of review of the case here. *Smith v. RecordQuest, LLC*, No. 19-2084, Dkt.54 (7th Cir. Mar. 12, 2021); *Smith*, No. 19-2084, Dkt.56 (7th Cir. Mar. 17, 2021).

3. RecordQuest’s proposed non-party *amicus* brief raises arguments that are important developments of, or distinct from, the arguments raised by Petitioner.

4. In particular, RecordQuest’s proposed non-party *amicus* brief presents a detailed textual analysis of Section 146.84, the only statute that imposes liability on “any person . . . who [] violates” Subsection 146.83(3f)(b)’s health-care-provider caps.

Wis. Stat. § 146.84; *Amicus* Br.6–8. As RecordQuest explains, Section 146.84’s “*person . . . who violates*” language plainly indicates that liability in this context extends only to a “health care provider,” since only such a provider is a person who could possibly “break, infringe, or contravene” Subsection 146.83(3f)(b)’s statutory fee schedule. *Amicus* Br.6–8, 12 (citations omitted).

5. Additionally, RecordQuest’s proposed non-party *amicus* brief makes a powerful argument, based upon the relevant statutory context, that Section 146.81(1)’s definition of a “health care provider” does not include the employees or other agents of a health care provider. Other statutory provisions within Sections 146.81–84 demonstrate that when the Legislature wishes to include employees or other agents of a health care provider within these provisions, it uses specific language to that effect. *Amicus* Br.8. Further, numerous statutory provisions beyond Sections 146.81–84 specifically incorporate Section 146.81(1)’s definition of a “health care provider” and then explicitly add

“agent” and “employee” to broaden their statutory scope. *Amicus* Br.8–10.

6. For the same reasons articulated above, RecordQuest respectfully requests ten minutes of oral argument time for its Counsel to present these important arguments more fully to the Court. Petitioner does not object to RecordQuest’s request for ten minutes of oral argument time; however, Petitioner does object to ceding any of its normally allotted time to RecordQuest. If the Court were to grant RecordQuest ten minutes of argument time, RecordQuest takes no position on whether the Court allots some or all of this ten minutes from Petitioner or simply adds an additional ten minutes of argument time to RecordQuest, with the understanding that Petitioner opposes the former option.

7. Finally, RecordQuest respectfully submits that, if this Court grants its motion for ten minutes of oral argument time and does not reduce Petitioner’s oral argument time by some amount, then fairness would support a commensurate increase in Respondent’s argument time. *See, e.g.*, Orders 12-19-2016 & 12-

29-2016, *Milewski v. Town of Dover*, 2017 WI 79, 377 Wis. 2d 38, 899 N.W.2d 303 (No. 2015AP1523) (granting motion of amicus requesting ten minutes of oral argument time in support of petitioners, and then expanding respondents' oral argument time to 40 minutes); Order 02-12-2020, *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (No. 2019AP1376) (same).

For the foregoing reasons, RecordQuest respectfully requests that this Court grant its motion for permission to file its simultaneously submitted proposed non-party *amicus* brief and for ten minutes of oral argument time.

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MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
DANIEL R. WALTZ
TROUTMAN PEPPER HAMILTON
SANDERS LLP
227 W. Monroe, Suite 3900
Chicago, IL 60606
Telephone: (608) 999-1240
Facsimile: (312) 759-1939
misha.tseytlin@troutman.com

RONALD I. RAETHER
(pro hac vice pending)
TROUTMAN PEPPER HAMILTON
SANDERS LLP
5 Park Plaza, Suite 1400
Irvine, California 92614
(949) 622-2700
Ron.Raether@troutman.com

Attorneys for RecordQuest, LLC