WISCONSIN COURT OF APPEALS
DISTRICT II

ALLEN GAHL, Attorney in fact,
On behalf of his principal,
JOHN J. ZINGSHEIM,

Petitioner-Respondent,

Appeal No. 2021AP001787FT

-vs-

AURORA HEALTH CARE, INC.
d/b/a AURORA MEDICAL CENTER-SUMMIT,

Respondent-Appellant.

RESPONDENT-APPELLANT'S BRIEF

APPEAL FROM THE CIRCUIT COURT OF WAUKESHA COUNTY, THE HONORABLE LLOYD V. CARTER PRESIDING - CIRCUIT COURT CASE NO. 21-CV-1469

Submitted by: Jason J. Franckowiak – SBN 1030873
OTJEN LAW FIRM, S.C.
20935 Swenson Drive, Suite 310
Waukesha, WI 53186
Attorneys for Aurora Health Care, Inc.
d/b/a Aurora Medical Center-Summit

ISSUE PRESENTED

1. Does a circuit court exceed its authority when it compels licensed health care providers, including physicians and hospitals, to render or allow to be rendered upon hospital premises, medical treatment that those providers believe to be below the standard of care?

Circuit Court Answer: No.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This appeal arises out of Allen Gahl's request for "Emergency Declaratory and Injunctive Relief," filed on behalf of his uncle, John Zingsheim, who was hospitalized at Aurora Medical Center-Summit ("Aurora") for treatment of COVID-19 (R. 2). The Petition sought an order compelling licensed Wisconsin health care providers to follow a course of treatment the hospital and medical staff determined fell below the standard of care for the patient – namely, administering a non-FDA non-CDC approved medication, ivermectin. The circuit court signed

an order compelling hospital staff to administer the medication against their medical judgment. (R. 66; A. App 1-2). The Court later modified its order, but still required the hospital to permit a physician, not a member of its medical staff, to enter Aurora for the sole purpose of administering ivermectin to the patient (R. 86; A. App. 73-110).

This appeal is not a referendum on the efficacy or appropriateness of the use of ivermectin to treat COVID-19; ivermectin is simply the factual vehicle through which a broader critical issue is brought before this Court – namely, whether a circuit court has authority to compel licensed health care providers, be they physicians or hospitals, to render or permit medical treatment those providers have determined to be below to the standard of care.

Aurora contends that a circuit court exceeds its authority when it compels a licensed health care provider to render or permit medical treatment the provider has determined falls below the standard of care.

II. PROCEDURAL STATUS OF THE CASE AND DISPOSITION IN THE TRIAL COURT

Allen Gahl filed a request for "Emergency Declaratory and Injunctive Relief" on October 7, 2021, and Aurora opposed it. (R. 2; 10). Following an initial hearing, the circuit court signed an order compelling Aurora's staff to administer ivermectin to Mr. Zingsheim upon the order of an outside physician, who never treated or met Mr. Zingsheim. (R. 66). Aurora immediately filed a Petition for Leave to Appeal, while simultaneously requesting a stay of the circuit court order pending resolution of the appeal. (R. 69, 78).

Following a second hearing, the circuit court maintained its order compelling Aurora to administer ivermectin to Mr. Zingsheim but modified its holding to provide that a physician chosen by the patient's representative must be allowed into Aurora to administer ivermectin. (R. 86; A. App. 73-110). Before a modified order could be signed by the Court, Aurora's Petition for Leave to Appeal was granted, staying further proceedings in

the circuit court. (R. 84). Respondent's subsequent Motion to Bypass was denied by the Supreme Court. (R. 96).

III. STATEMENT OF FACTS

The Petition for "Emergency Declaratory and Injunctive Relief" was submitted to the circuit court unsupported by any treating physician. (R. 2). The ivermectin prescription respondent sought to compel Aurora to administer was issued by a physician, Dr. Edward Hagen, who was not Mr. Zingsheim's treating physician, had never examined or treated the patient, and never reviewed his medical records. (R. 2). In response, Aurora submitted the affidavits of two physicians, explaining that the administration of ivermectin to the patient for treatment of COVID-19 was below the standard of care. (R. 44, 45).

There is no evidence Mr. Zingsheim ever expressed a desire to have ivermectin administered prior to his intubation. Gahl's affidavit establishes that he discovered ivermectin as a possible COVID treatment while conducting his own "research." (R. 3).

When the circuit court issued its order compelling Aurora's staff to administer ivermectin, Aurora immediately sought appellate review. (R. 72). The circuit court's subsequent modified proposed order (never signed by the court) memorialized the court's holding as issued orally at the October 13th hearing. (R. 86). Because the modified order was never signed by the court, Aurora never had an opportunity to appeal that modified order. Instead, this Court invited the parties to address the effect of the modified order in the briefing on this appeal. (R. 84).

ARGUMENT

I. THIS COURT HAS THE AUTHORITY TO ADDRESS THE ISSUES RAISED IN THE CIRCUIT COURT'S ORIGINAL "ORDER TO SHOW CAUSE" AND THE COURT'S UNSIGNED MODIFIED ORDER OF OCTOBER 13TH.

The circuit court's "Order to Show Cause" compelled Aurora to "immediately enforce Dr. Hagen's order and prescription to administer ivermectin to . . . Mr. Zingsheim, and thereafter as further ordered by Mr. Gahl." (R. 66). At a hearing the next day, the circuit court confirmed its order compelling Aurora to permit the administration of ivermectin to Mr. Zingsheim but modified

its ruling to require that Aurora permit an outside physician chosen by the patient's representative, subject to Aurora's credentialling process, to enter Aurora for the sole purpose of administering ivermectin to the patient. (R. 86; A. App. 73-110).

Both the Order to Show Cause and the subsequent modification thereof raise different, but related, issues of substantial importance to the delivery of health care in Wisconsin:

1) Is a circuit court empowered to compel a licensed health care provider to render medical treatment the provider believes to be contrary to the standard of care; and

2) Is a circuit court empowered to compel a hospital to credential and permit a physician who is not a member of its medical staff to enter the hospital for the sole purpose of rendering medical care that the hospital's medical staff believes contrary to the standard of care?

The circuit court's modification of the original Order to Show Cause does not preclude this Court from considering the

issue raised by the original Order. A court may overlook "mootness" if an issue is of great public importance; if the issue arises often, and a decision from a court is essential; if the issue is likely to recur and must be resolved to avoid uncertainty; or if the issue is likely of repetition and evades review. *Marathon Cty. v. D.K. (in re D.K.),* 2020 WI 8, 390 Wis. 2d 50, 63-64, 937 N.W.2d 901.

Because the related issues posed by the original "Order to Show Cause" and the circuit court's subsequent modification both invoke issues of great importance that are likely to recur and to evade review, this Court can and should address the questions raised by both the original "Order to Show Cause," and the circuit court's subsequent modification.

II. STANDARD OF REVIEW

A decision to grant a temporary injunction may be reversed for an erroneous exercise of discretion, or an error of law. *School District v. WIAA,* 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997).

III. THERE IS NO LEGAL AUTHORITY SUPPORTING A CIRCUIT COURT'S POWER TO COMPEL A LICENSED HEALTH CARE PROVIDER TO RENDER MEDICAL TREATMENT THAT THE PROVIDER BELIEVES FALLS BELOW THE STANDARD OF CARE, AND NO PATIENT HAS A RECOGNIZED RIGHT TO DEMAND AND RECEIVE SPECIFIC MEDICAL TREATMENT.

A. There is No Legal Authority Supporting a Circuit Court's Power to Compel a Licensed Health Care Provider to Render Medical Treatment That the Provider Believes Falls Below the Standard of Care.

Respondent's pleadings did not cite any legal authority supporting a court's power to compel a licensed health care provider to render medical treatment the provider believes falls below the standard of care. (R. 2, 3). The circuit court likewise cited no such case or other precedent in its ruling. (R. 85).

Circuit courts have certain inherent powers, but those powers are exercised only in limited areas, i.e., when necessary "to guard against actions that would impair the powers or efficacy of the courts or judicial system"; "to regulate the bench and bar"; and "to ensure the efficient and effective functioning of the court, and to fairly administer justice." *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 577, 787 N.W.2d 350, 366. The

power to compel a licensed health care provider to render medical treatment of the court's choosing does not lie within this limited class of inherent authority. "The fair administration of justice is not a license for courts, unconstrained by express statutory authority, to do whatever they think is 'fair' at any given point in time." *Id.* at ¶ 75.

B. No Court has Recognized a Patient's Inherent or Constitutional Right to Receive Specific Medication or Medical Treatment from a Health Care Provider.

Respondent sought from the circuit court an order compelling Aurora's medical staff to administer ivermectin to the patient. In doing so, respondent cited no case supporting a patient's right to receive specific medical treatment or medication from a health care provider. (R. 2, 3). The circuit court likewise identified no such authority in granting the requested relief. (R. 85; A. App. 3-72).

State and federal courts have periodically been called upon to determine whether a patient has a fundamental right to receive a specific medication or course of medical treatment, and

no such right has been recognized. *Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 378 U.S. App. D.C. 33, 35, 495 F.3d 695, 697 (2007) (there is no fundamental right of access to experimental drugs for the terminally ill); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) (most federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment, or to obtain treatment from a particular provider); *Mont. Cannabis Indus. Ass'n. v. State*, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161 (an individual does not have a fundamental affirmative right of access to a particular drug).[1]

In Wisconsin, the District Four Court of Appeals has found that physicians have no obligation, deriving from a patient's fundamental constitutional rights, to begin or continue medical treatment. *Disability Rights Wis. v. Univ. of Wis. Hosp. &*

[1] *See also, Birchansky v. Clabaugh*, N. 4:17-CV-00209-RGE-RAW, 2018 U.S. Dist. LEXIS 231419 (S.D. Iowa, Oct. 27, 2018)

Clinics, 2015 WI App. 13, 359 Wis. 2d 675, 859 N.W.2d 628.[2] (A. App. 127-136).

C. Medicare Requirements Governing Hospitals in Wisconsin Do Not Encompass a Right to Demand Treatment that is Deemed Inappropriate.

Section 50.32 to 50.39 Wis. Stats. codifies the Wisconsin "Hospital Regulation and Approval Act. *See* § 50.32 Wis. Stats. Under § 50.36 Stats., the conditions for Medicare participation are deemed the minimum standard applicable to hospitals in Wisconsin. 50.36(1) Wis. Stats. One condition for Medicare participation is the recognition of certain "patient rights," including the right to make informed decisions regarding medical care. 42 CFR 482.13. However, a patient's right to make informed decisions about medical care "must not be construed as a mechanism to demand the provision of treatment or services deemed medically unnecessary or inappropriate." 42 CFR 482.13(b)(2). The Medicare regulations applicable to Wisconsin

[2] *Disability rights Wis. v. Univ. of Wis. Hosp. & Clinics* is an unpublished case, but may be considered for its persuasive value under § 809.23(3) Wis. Stats.

hospitals recognize that a patient's right to make informed health care decisions does not encompass a right to demand medical treatment that is deemed "medically inappropriate."

IV. A COURT EXCEEDS ITS AUTHORITY WHEN IT COMPELS A HEALTH CARE PROVIDER TO RENDER MEDICAL TREATMENT THAT THE PROVIDER BELIEVES FALLS BELOW THE STANDARD OF CARE.

A. Courts Traditionally Defer to the Expertise of Physicians Where Medical Knowledge Is Required.

Federal courts are frequently faced with issues that demand medical knowledge, particularly in the context of Eighth Amendment claims alleging "deliberate indifference" in medical treatment. Recognizing that judges typically lack necessary grounding in medicine, these courts have routinely deferred to the medical decisions of physicians. *Jackson v. Kotter*, 541 F.3d 688, 697-98 (7th Cir. 2008) (noting that courts give deference to physicians' treatment decisions, because "there is not one proper way to practice medicine, but rather a range of acceptable courses."); *Estelle v. Gamble*, 429 U.S. 97, 107, 97 S. Ct. 285, 293 (1976) (noting that whether additional diagnostic techniques or

treatments were needed was a "classic example of a matter for medical judgment."); *Stenberg v. Carhart*, 530 U.S. 914, 971, 120 S. Ct. 2597 (2000) ("It is no part of the function of a court or a jury to determine which one of two modes [of treatment] was likely to be the most effective for the protection of the public against disease."). It is not the role of any court to determine what constitutes appropriate medical treatment.

B. A Court Order Compelling a Licensed Physician to Render Medical Treatment the Provider Believes Falls Below the Standard of Care Unfairly Imperils a Physician's License to Practice Medicine in Wisconsin.

Physicians in Wisconsin are regulated by the Wisconsin Medical Examining Board, which has the authority to sanction "unprofessional conduct" by a licensed physician. § 448.02 Wis. Stats. Physicians are required to act with reasonable judgment and competence at all times. Wis. Admin. Code Med § 10.01(2). The term "unprofessional conduct" is defined in section Med 10.03 of the Wisconsin Administrative Code, and specifically includes the act of "prescribing, ordering, dispensing,

administering, supplying, selling, giving, or obtaining any prescription medication in any manner that is inconsistent with the standard of minimal competence." Wis. Admin. Code § Med 10.03(2)(c). "Unprofessional conduct" further encompasses any act "departing from or failing to conform to the standard of minimally competent medical practice which creates an unacceptable risk of harm to a patient or the public. . .". Wis. Admin. Code § Med 10.03(2)(b). Aside from potential civil liability for medical malpractice, a physician's license is imperiled if they render medical care that falls below the standard of care. Courts should not place a physician in the position of choosing between disregarding a court order or losing their license to practice medicine.

V. A CIRCUIT COURT EXCEEDS ITS AUTHORITY WHEN IT REQUIRES A HOSPITAL TO PERMIT AN OUTSIDE PHYSICIAN TO PROVIDE MEDICAL CARE THAT THE HOSPITAL'S MEDICAL STAFF HAS DETERMINED FALLS BELOW THE STANDARD OF CARE.

A. A Circuit Court's Role in a Hospital's Credentialing Decisions Should Be Narrowly Limited.

The circuit court's modification of its original Order to Show Cause maintained the original ruling compelling Aurora to administer ivermectin to the patient. Though the modification allowed Aurora to follow its credentialing procedures, the order still compelled Aurora to credential an outside physician chosen by the patient's representative for the purpose of administering a course of treatment that Aurora determined to be below the standard of care.

Medicare regulations place the responsibility for physician credentialing upon a hospital's governing body. *See* 42 CFR 482.12(a). The Wisconsin Supreme Court is in accord. *Johnson v. Misericordia Cmty. Hosp.,* 99 Wis. 2d 708, 744, 301 N.W.2d 156, 174 (1981) (". . . We hold that a hospital owes a duty to its patients to exercise reasonable care in the selection of its medical

staff and in granting specialized privileges. The final appointing authority resides in the hospital's governing body. . .").

Courts traditionally refrain from interposing themselves upon hospital credentialing decisions, for good reason:

> . . . No court should substitute its evaluation of such matters for that of the hospital board. It is the board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The board has chosen to rely on the advice of its medical staff, and the court cannot surrogate for the staff in executing this responsibility. . . . The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. . . .

Sosa v. Bd. of Managers. of Val Verde Mem'l Hosp., 437 F.2d 173, 177 (5th Cir. 1971).

B. A Hospital Should Not be Compelled to Permit a Physician, not a Member of its Medical Staff, to Enter the Hospital for the Sole Purpose of Rendering Medical Treatment the Hospital Staff has Determined Falls Below the Standard of Care.

Medicare regulations require hospitals to provide medications to patients in accordance with applicable standards

of practice in order to ensure patient safety. 42 CFR 482.25(b). Both the original "Order to Show Cause" and the subsequent modification thereof in this case require Aurora to administer a medication ordered not by a treating physician, nor by a member of Aurora's medical staff, but by an outside physician who had never seen, treated, or examined the patient. In so doing, the circuit court imperiled the hospital's compliance with Medicare regulations by forcing it to provide a medication to a patient that the hospital's medical staff had determined to be contrary to "applicable standards of practice."

Moreover, in requiring a hospital to comply with an unaffiliated physician's unvetted prescription, the circuit court forced upon the hospital a duty to ameliorate any potential adverse effects following from the administration of the medication – because the patient remained under the care of the hospital. Several of Mr. Zingsheim's treating physicians warned of the dangers of the medication that respondent attempts to compel. (R. 44, 45). Dr. Hagen never explained to the circuit

court by affidavit or otherwise his rationale for the aggressive dosage (66 mg/day) of the medication that he prescribed. If a patient were to arrest after being administered an unvetted medical treatment or prescription ordered by a court, it would necessarily fall to Aurora's medical staff to emergently resuscitate the patient. A court does not have the authority to unilaterally impose this responsibility upon a hospital or its medical staff.

VI. COMPELLING A HEALTH CARE PROVIDER TO ADMINISTER MEDICAL TREATMENT THAT THE PROVIDER BELIEVES FALLS BELOW THE STANDARD OF CARE WILL ADVERSELY IMPACT THE DELIVERY OF HEALTH CARE IN WISCONSIN.

In a case remarkably similar on its facts to this case, a Delaware Court of Chancery recently denied a requested injunction to compel a hospital to administer ivermectin. *DeMarco v. Christiana Care Health Servs.*, No. 2021-0804-MTZ, 2021 Del. Ch. LEXIS 221 (Ch. Sept. 24, 2021). (A. App. 111-126). In doing so, the Delaware Court noted the adverse impacts that such an order could pose to the delivery of health care, including

1) harm to the stability of hospital administration and admitting privileges; 2) the undermining of "the traditional consensual nature of the physician-patient relationship"; 3) detriment to the public policy of allowing a health care provider to deliver treatment complying with the standard of care based on prevailing scientific and ethical norms and regulations; 4) interference with the delivery of evidence-based medicine; and 5) the likelihood that compelling a provider to operate outside the standard of care would improperly and imprudently move health care treatment decision making from the patient's bedside to a judge's bench. *Id.* at pp. 22-24. The circuit court's Order here poses identical threats. *See also*, Tex. Health Huguley, Inc. v. Jones, No. 02-21-003640CV, 2021 Tex. App. LEXIS 9432 (Tex. App. Nov. 18, 2021) (noting that "judges serve in black robes, not white coats"). (A. App. 137-174).

CONCLUSION

Respondent here sought an extraordinary remedy from the circuit court, based entirely upon an emotional appeal to the

circuit court to act "emergently." "Emergency," however, does not create power, increase granted power, or remove or diminish restrictions imposed upon power granted or reserved. *Home Bldg. & Loan Asso. v. Blaisdell,* 290 U.S. 398, 425, 54 S. Ct. 231, 235 (1934). Emotional appeals to haste are no proper basis for the granting of the extraordinary relief sought here. Circuit courts do not, and should not, have the authority to do what was requested of the circuit court here, whether in the form of temporary injunctive relief or otherwise.

Petitioner hereby seeks reversal of the circuit court's grant of injunctive relief, which impermissibly compelled independent licensed health care providers to render, or permit to be rendered, medical treatment that the providers believe falls below the standard of care.

Dated this 23rd day of November, 2021.

OTJEN LAW FIRM, S.C.
Attorneys for Aurora Health Care, Inc.
d/b/a Aurora Medical Center-Summit

Electronically signed by Jason J. Franckowiak
Jason J. Franckowiak
State Bar No.: 1030873
jfranckowiak@otjen.com
Michael L. Johnson
State Bar No.: 1056247
mjohnson@otjen.com
Randall R. Guse
State Bar No.: 1024900
rguse@otjen.com

P.O. ADDRESS:
20935 Swenson Drive, Suite 310
Waukesha, WI 53186
(262) 777-2200

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is 3,298 words.

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of §.809.19(12). I further certify that:

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 23rd day of November, 2021.

OTJEN LAW FIRM, S.C.
Attorneys for Aurora Health Care, Inc.
d/b/a Aurora Medical Center-Summit

Electronically signed by Jason J. Franckowiak
Jason J. Franckowiak
State Bar No.: 1030873
jfranckowiak@otjen.com
Michael L. Johnson
State Bar No.: 1056247
mjohnson@otjen.com
Randall R. Guse
State Bar No.: 1024900
rguse@otjen.com

P.O. ADDRESS:
20935 Swenson Drive, Suite 310
Waukesha, WI 53186
(262) 777-2200