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 REPLY 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
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d/b/a Aurora Medical Center-Summit

I. RESPONDENT GAHL HAS IDENTIFIED NO BASIS SUPPORTING A CIRCUIT COURT'S AUTHORITY TO COMPEL A HEALTH CARE PROVIDER TO RENDER TREATMENT THAT FALLS BELOW THE STANDARD OF CARE.

A. The Materials in Gahl's Appendix Should Not Be Considered.

An appellate court's review is confined to those parts of the record that are made available to it. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). An appendix may not be used to supplement the record. *Reznichek v. Grall*, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545, 546 (Ct. App. 1989).

Respondent Gahl's appendix attaches an article and several hearing transcripts, none of which are in the record on appeal. Because Gahl may not use his appendix to supplement the record, the Court should not consider the contents of the appendix.

B. Section 155.30(1) Wis. Stats. Does Not Provide a Circuit Court Authority to Compel a Health Care Provider to Render Treatment the Provider Believes is Below the Standard of Care.

Respondent Gahl argues that § 155.30(1) Wis. Stats. grants a circuit court the authority to order a health care provider to administer a specific medical treatment or medication on demand. Gahl never raised § 155.30 Wis. Stats. before the circuit court as a basis supporting his position. A reviewing court will not consider arguments raised for the first time on appeal. *State v. Bustamante*, 201 Wis. 2d 562, 571, 549 N.W.2d 746, 749 (Ct. App. 1996).

Section 155.30 Wis. Stats. sets forth language that is required to be included in a Wisconsin Healthcare Power of Attorney form. The standard healthcare POA language defines the term "health care decision" to encompass only "an informed decision to accept, maintain, discontinue or refuse any care, treatment, service or procedure to maintain, diagnose or treat" a physical or mental condition. § 155.30(3) Wis. Stats. This definition does not include any right to demand and receive a specific course of medical treatment.

In fact, the actual Healthcare Power of Attorney form authorizing Respondent Gahl to speak for John Zingsheim, follows the standard language of the POA form set forth under § 155.30(3) Wis. Stats. It confers upon Gahl the authority only to "accept, maintain, discontinue, or refuse any care, treatment, service, or procedure. . .". (R. 3, Ex. A). Nowhere does the POA confer upon Gahl the authority to demand a specific course of medical treatment for Mr. Zingsheim, and nowhere within the POA does it confer any authority upon a circuit court to compel Mr. Zingsheim's physicians or hospital to provide a desired course of treatment.

Nothing in § 155.30 Stats. confers upon patients in Wisconsin the right to demand a specific course of medical treatment, and Gahl does not cite a single case that so holds. Gahl asserts that "the language found in the HCPOA form makes it clear that the person executing the HCPOA document has the power under the statute to receive the medical treatment that they request," yet cannot substantiate this contention with any

supportive caselaw. There is good reason why the response brief is bereft of citation to such caselaw – because no such "right" has ever been recognized by any court. While individuals have the right to refuse a particular medical treatment, there is no recognized right to compel a particular medical treatment. *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) (The decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, is not.).

Section 155.30 Wis. Stats. provides no support for Gahl's contention that a healthcare POA has a right to demand any course of medical treatment or medication, and further confers no authority upon a circuit court to compel a health care provider to render care the provider believes is below the standard of care.

C. Respondent's "Contract" Theory is Unavailing.

Respondent Gahl contends that "the contractual relationships of the patient, doctor and hospital system makes circuit court intervention necessary when hospital systems

breach their contractual duties of good faith and fair dealing." Once again, Gahl did not raise this contract theory before the circuit court. A reviewing court will not consider arguments raised for the first time on appeal or review. *State v. Bustamante*, supra, at 571.

Gahl identifies no written contract supposedly existing between the hospital and Mr. Zingsheim. An allegation that the hospital breached an express contract would require that Gahl attach or recite at least the relevant portions of any such written contract that are alleged to have been breached. Gahl has not done so.

Gahl also has not plead an implied contract to provide treatment that deviates from the standard of care. He refers generally to an unspecified "contractual duty" of "good faith and fair dealing," but fails to further elaborate, or to identify the terms of any such implied contract, or any allegations regarding how the hospital's refusal to administer ivermectin to Mr. Zingsheim violated such a "contract."

Mr. Gahl further offers no citation or reference to any statutory authority or caselaw that would establish that a patient, under Wisconsin law, may enter into an implied contract to receive a medication or medical intervention that deviates from the standard of care. Gahl's "contract" theory provides no support for his position that a circuit court has the authority to compel a health care provider to render specific treatment on demand.[1]

D. The Wisconsin Informed Consent Statute, § 448.30 Wis. Stats., Confers No Authority Upon a Circuit Court to Compel a Health Care Provider to Provide Medical Care the Provider Believes is Below the Standard of Care.

Respondent Gahl contends that § 448.30 Wis. Stats. somehow confers upon a circuit court the legal authority to compel a health care provider to render specific medical

[1] Moreover, Gahl makes a number of unsupported assertions in this section of his brief that have no citation to the record. For example, Gahl contends that Aurora chose to administer "dangerous medications" (remdesivir and baricitinib) to Mr. Zingsheim, but not ivermectin, strictly for "financial and/or political" reasons. Gahl, however, provides no citation to anything in the record that would support this bald-faced assertion. A court may choose not to consider arguments that lack proper citations to the record. *State v. McMorris*, 2007 WI App. 231, ¶ 30, 306 Wis. 2d 79, 742 N.W.2d 322.

treatment on demand. Once again, Mr. Gahl did not raise § 448.30 Wis. Stats. before the circuit court as a basis for his argument, and a reviewing court need not consider an argument raised for the first time on appeal or review. *State v. Bustamante*, supra, at 571.

Moreover, Respondent Gahl misinterprets the Wisconsin informed consent statute, § 448.30 Stats. That statute imposes a duty on medical providers to ensure that patients are informed about medical treatment that providers offer to patients. The right to "informed consent" is not a right to any particular treatment to which a patient or patient's representative is willing to consent. "Informed consent applies to a treatment actually rendered by a physician or health care provider; it does not apply to a treatment that the patient wants to compel the physician or provider to render." *Tex. Health Huguley, Inc. v. Jones*, No. 02-21-00364-CV, 2021 Tex. App. LEXIS 9432, at *18 (Tex. App. Nov. 18, 2021). Moreover, the 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). Section 448.30 Wis. Stats. provides no support for Gahl's position.

II. RESPONDENT'S BRIEF IGNORES THE ADVERSE IMPACT UPON THE DELIVERY OF HEALTH CARE THAT OCCURS WHEN A COURT IMPROVIDENTLY SHEDS ITS BLACK ROBE FOR A WHITE COAT.

Respondent Gahl argues that the Texas case of *Texas Health Huguley, Inc. v. Jones*, supra, is "not controlling," but fails to recognize that the *Huguley* case (and the Delaware case of *DeMarco v. Christiana Care Health Servs.)* were cited by Aurora in its initial brief simply for the analysis contained in those cases of the adverse health care impacts that result when a court of law encroaches upon the prerogatives of trained and independently licensed medical professionals. Gahl's response brief does not refute the "adverse impacts" identified in these cases.

CONCLUSION

As he did before the circuit court, Respondent Gahl cites to materials promoting ivermectin as a treatment for COVID-19, but fails to substantiate a legal basis conferring upon a court the

authority to dictate to a hospital and its physicians specific medical policies or courses of treatment for its patients. The judiciary is charged with interpreting the law, but it is not well-positioned nor authorized to decide which policies hospitals should adopt regarding the off-label use of a medication, or which medical treatments are appropriate for a given patient. The role of the courts is not to overrule the medical judgment of treating physicians or the policies of treating hospitals. Respondent has cited no colorable authority to the contrary.

Petitioner Aurora 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 12th day of January, 2022.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 1,537 words.

I have submitted an electronic copy of this brief, 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 12th day of January, 2022.

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