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SUPREME COURT OF WISCONSIN

ALLEN GAHL ATTORNEY IN FACT,
ON BEHALF OF HIS PRINCIPAL,
JOHN J. ZINGSHEIM,

APPELLANT,

V.

Appeal No. 2021 AP1787-FT

AURORA HEALTH CARE, INC. D/B/A/ AURORA MEDICAL CENTER-SUMMIT,
RESPONDENT.

PETITION FOR REVIEW

Amos Center for Justice & Liberty
Karen L. Mueller
State Bar No. 1038392
18261 57th Avenue,
Chippewa Falls, WI 54729
715-855-9011
karen@amoscenterforjustice.org

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INTRODUCTION

Allen Gahl petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals District II in *Allen Gahl, Attorney in Fact, on Behalf of His principal, John J. Zingsheim v. Aurora Health Care, Inc. D/B/A Aurora Medical Center-Summit*, Appeal No. 2021AP1787-FT filed on 05-25-2022.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The appeals court stated in its decision that "both parties in this case agreed that the main issue in this case was whether the circuit court had authority to compel Aurora to administer a treatment that, in its professional judgment, is below the standard of care." P.19 ¶33. Gahl maintains that he, through his powers as the Healthcare Power of Attorney for his uncle John Zingsheim, had the same authority to obtain the necessary drug, Ivermectin, that his uncle requested prior to being placed in a drug-induced coma and would have continued to request, had he been conscious and making his own decisions, based upon the rights outlined in the Wisconsin statutory HCPOA form. Even though Aurora was no longer offering new treatments the hospital asserted that the circuit court had no authority to intervene in this healthcare decision-making process as long as they, the healthcare provider, deemed that the requested treatment fell below their "standard of care."

On appeal the court posed the question: whether the circuit court had erroneously exercised its discretion by granting temporary injunctive relief based on a pleading that failed to state a viable legal claim. To analyze this question, the appeals court looked to the legal claims presented by the petitioner and analyzed each of them.

To determine whether the circuit court erroneously exercised its discretionary power, the appeals court stated that "we must determine whether Gahl has identified any law, claim, or recognized cause of action under Wisconsin law by which a patient may compel a health care professional to administer a

course of treatment contrary to that medical professional's judgment." P. 21 ¶34. The appeals court then identified four issues raised by petitioner that as a matter of law, if true, would give the court the authority to grant a declaratory judgment and injunction. The four identified issues are:

1. Whether the "plain-meaning" of the Health Care Power of Attorney form which was created statutorily by Wis.Stat. § 155.30(1) gave the circuit court the authority to grant declaratory and injunctive relief to John Zingsheim or other patients?

   Answered by the circuit court: Yes

   Answered by the court of appeals: No

2. Whether a violation of the Hippocratic Oath or Aurora's contractual duty of "good faith and fair dealing" breach an implied contract between the patient and Aurora Hospital?

   Answered by the circuit court: Unclear

   Answered by the court of appeals: No

3. Whether the Circuit Court has the inherent authority to provide equitable remedy for the patient?

   Answered by the circuit court: Yes

   Answered by the court of appeals: No

4. Whether the Circuit Court have the authority under Wis. Stat. § 448.30 to provide declaratory and injunctive relief to the patient?

   Answered by the circuit court: Yes

   Answered by the court of appeals: This question was not addressed by court of appeals because they believed that it had not been properly raised as an issue in the lower court.

STATEMENT OF THE CRITERIA SUPPORTING REVIEW

The criteria for review are set forth in Wis. Stat. § 809.62(1r) and coincide with the supreme court's institutional interest in overseeing the orderly and uniform development of the law. The two criteria in Wis. Stat. § 809.62(1r) that apply for the reasoning and arguments to this petition for review include:

3. A decision by the supreme court will help develop, clarify, or harmonize the law, and

   a. the case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation;

   b. the question presented is a novel one, the resolution of which will have statewide impact; or

   c. the question presented is not factual in nature but is a question of law of the type that is likely to recur unless resolved by the supreme court.

4. The court of appeals' decision is in conflict with controlling opinions of the U.S. Supreme Court or the supreme court or with other court of appeals' decisions.

STATEMENT OF THE CASE

This case is about Allen Gahl's attempt to get a potentially lifesaving drug, Ivermectin, administered to his drug induced, comatose and ventilated uncle, John Zingshiem, so that he might have a chance to survive the ravaging effects of Covid 19 and previous treatments which the Aurora Hospital system had administered over the course of his hospital stay. Without any sign of improvement. Allen Gahl, HCPOA filed a petition seeking an order from the Waukesha County Circuit Court which would require Aurora hospitals to administer Ivermectin to his uncle and principle. The order was granted on Oct. 12, 2021 but before the drug was administered, the circuit court rethought the

issue and the following day modified its order verbally so that the hospital would not have to administer the Ivermectin itself but rather the circuit court held that Allen Gahl could get a doctor to come into the hospital to administer the drug. But before the drug was administered the Appeals Court of District II accepted the case and stayed the circuit court's order on its own motion. Allen Gahl then petitioned for a by-pass to the Wisconsin Supreme Court which was denied on Oct. 25, 2021.

ARGUMENT

I. Whether the "plain-meaning" of the Health Care Power of Attorney form which was created statutorily by Wis.Stat. § 155.30(1) gives the circuit court the authority to grant declaratory and injunctive relief to John Zingshiem or other patients?

Petitioner asserts that the appeals court's decision on this issue was "as a matter of law" incorrectly decided and should be reviewed by this honorable Supreme Court based upon the criteria found in Wis. Stat. § 809.62(1r):

> 3.c. A decision by the supreme court will help develop, clarify, or harmonize the law, and the question presented is not factual in nature but is a question of law of the type that is likely to recur unless resolved by the supreme court and
>
> 4. The court of appeals' decision is in conflict with controlling opinions of the U.S. Supreme Court or the supreme court or with other court of appeals' decisions.

On appeal, Allen Gahl argued that the "plain-meaning" of Wis.Stat. § 155.30(1)

was very clear that the legislators *mandated* that the following words were required to be on every Wisconsin HCPOA form sold or distributed in the state and that they intended that those words would have power and authority regarding requests for medical treatment:

NOTICE TO PERSON MAKING THIS DOCUMENT
YOU HAVE THE RIGHT TO MAKE DECISIONS ABOUT YOUR HEALTH CARE. NO HEALTH CARE MAY BE GIVEN TO YOU OVER YOUR OBJECTION, AND NECESSARY HEALTH CARE MAY NOT BE STOPPED OR WITHHELD IF YOU OBJECT.

The majority in the three-judge appeals court of District II rejected Gahl's reading of the statutory language by stating "That language serves informative and instructive functions, for example, for purposes of estate planning, to declare a person's preferences for the degree of intervention in the case of a terminal illness…" See p. 24 ¶41.

But this reading of the statute limits and excludes the "plain meaning" of the statute and cuts off further analysis of the words themselves and possible legislative intent. It is not likely that the legislature would have mandated these very clear and unambiguous words if they did not intend for those words to carry power and authority. In fact, it would have been very reckless to do so because words matter to the people that read them. To say that the words the legislature required to be in a statutory form do not have the force of law and do not mean what they actual say, is befuddlingly at best and directly conflicts with previous decisions held by this court. Reviewing this case would implicate the supreme court's function to help develop, clarify and harmonize the law where there is likely to be further recurrence of similar questions.

The "plain meaning" analysis found in *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110 (Wis. 2004) (holding that the court is not at liberty to disregard the plain, clear words of

the statute) is directly in conflict with the decision made by the appeals court in this case. In *Kalal* the Wisconsin Supreme Court stated, "If the meaning of the statute is plain, the inquiry stops, and the meaning is applied." *Id.* But this directive was not followed by the appeals court when they avoided the plain meaning of the words and instead inserted a legislative intent without authority. Again, for these reasons a review by the Wisconsin Supreme Court will help develop, clarify, and harmonize the law, on a very important life and death issue that has already recurred and is likely to recur again through hospitals throughout the State of Wisconsin as hospitals establish questionable standards of care from board rooms decisions rather than from the patient's own doctors.

It is critical that the Supreme Court weigh in on this extremely important topic so that people can know whether to trust the written words of their own Wisconsin legislative bodies. If the decision of the court of appeals is accurate then the legislature should have added a "just kidding" disclaimer in paratheses at the end of the statute, but they did not.

The Court in *Kalal* explained further "We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *Id.*

In *Stroede v. Soc'y Ins.*, 397 Wis.2d 17, 959 N.W.2d 305, 2021 WI 43 (Wis. 2021) the majority of the Appeals Court took the plain meaning of the phrase "other lawful occupant" and narrowed it to create a new meaning altogether. The dissent in that case indicated that they might as well have said a turkey is not an animal. The dissent then went on by stating "Rather than mechanically reciting *Kalal*, the majority should have applied the ordinary-meaning canon it espouses, 'the most fundamental semantic rule of interpretation'

under which '[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.'..."

In the case at hand, every person/principal that has executed this statutory form and/or will read one regarding their own future health care needs would assume from this statute's every day, ordinary meaning that they would be entitled to receive necessary medical treatment if they were to request it because of the language in this statutory form. Furthermore, it is reasonable for people reading this form to assume that the legislature has made this statement part of the law since it is the legislature that ultimately has the authority to also determine the licensing criteria not only for doctors but also for the huge medical systems that operate in this state only so long as they follow Wisconsin laws.

This appeals court decision conflicts directly with decisions from the United States Supreme Court which has said "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see also *Hartford Underwriters Ins. v. Union Planters Bank*, 530 U.S. 1, 6 (2000).

In *Hartford Underwriters Ins. v. Union Planters Bank,* 530 U.S. 1, 6 (2000) the Bankruptcy Court ruled for Hartford, and the District Court affirmed. However, the en banc Eighth Circuit reversed, concluding that §506(c) could not be invoked by an administrative claimant. The Supreme Court affirmed the Eighth Circuit, indicating that the statute was quite plain. In *Hartford*, the plain-meaning standard was applied when Petitioner looked to §506(c), which constitutes an important exception to the rule that secured claims are superior to administrative claims. That section provides as follows:

> "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." § 506(c). The statute appears quite plain in specifying who may use §506(c)--"[t]he trustee."

Although the statutory text does not say that persons other than the trustee may not seek recovery under §506(c), several contextual features support that conclusion. First, a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume non-exclusivity. Second, the fact that the sole party named--the trustee--has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide power to him and not to others.

In *Connecticut Nat. Bank* v. *Germain,* 503 U. S. 249, 254 (1992) the United States Supreme Court unanimously reversed and remanded it to the Court of Appeal Second Circuit. However, the justices disagreed on the extent to which legislative history was to be consulted. The Second Circuit held that a court of appeals may exercise jurisdiction over interlocutory orders in bankruptcy only when a district court issues the order after having withdrawn a proceeding or case from a bankruptcy court, and not when the district court acts in its capacity as a bankruptcy court of appeals.

The court in *Hartford* went on to explain that "Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute, a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Rubin v. the United States*, 449 U.S. 424, 430 (1981). It appears that the appeals court's analysis of the statute in question does not follow the rules laid out by either the Wisconsin Supreme Court or the United States Supreme Court. A review of this case is needed.

II. Whether a violation of the Hippocratic Oath or Aurora's contractual duty of "good faith and fair dealing" breached an implied contract between the patient and Aurora Hospital?

The appeals court in this case found no implied contract between the

patient and Aurora Hospital despite that fact that the Aurora expected to be paid for performing its services to the patient in question regardless of the determined standard of care. The court of appeals stated "Gahl points to no evidence in the record from which we could deduce the existence, nature, or terms of any implied contract between Aurora and the patient that Aurora will provide a treatment that does not meet the standard of care." P. 25, ¶44. However, to analyze whether there is an implicit contract between a hospital and patient should not require evidence beyond taking judicial notice of the fact that hospitals, despite their non-profit status, are not charities and require payment for their medical services. That in itself should be sufficient evidence that an implicit contract existed between Mr. Gahl's principal, his uncle, and the hospital system, Aurora. This case alleged a breach of contract that related directly to the fact that "good faith and fair dealing" was not used by the hospital because an arbitrary and capricious "standard of care" was proffered which increased the likelihood of harm to Mr. Zingshiem and other patients.

III. Whether the Circuit Court has the inherent authority to provide equitable remedy for John Zingshiem and other patients?

Courts in Wisconsin have the inherent authority to provide equitable remedies where a grave injustice or harm is about to occur. The Circuit Court was provided with evidence John Zingshiem was in danger of dying on the ventilator if an alternate treatment was not tried. John Zingshiem had a right to request and to be given a reasonable and necessary treatment in an attempt to save his life. The Honorable Judge Lloyd Carter, of the Wauskesha Circuit Court understood that simple fact and used the court's inherent authority to craft an equitable remedy to prevent an extraordinary injustice from occurring within his jurisdiction. The appeals court erroneously over-turned Judge Carter's attempt to provide justice for John Zingshiem and countless other patients across Wisconsin in this past year. The decision filed May 25, 2022 in the Court of Appeals District

II should be overturned.

CONCLUSION

For the foregoing reasons, Allen Gahl, through his attorney, respectfully requests that the court grant this petition for review.

Dated June 24, 2022.

Amos Center for Justice and Liberty

Karen L. Mueller

State Bar No. 1038392

18261 57th Avenue, Chippewa Falls, WI 54729

715-855-9011

karen@amoscenterforjustice.org.

APPENDIX

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a petition produced with a proportional serif font. The length of this petition is 16 pages and 3646 words.

Signed: Kari L Mueller

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that:

This electronic petition for review 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 petition for review filed with the court and served on all opposing parties.

Dated: June 24, 2022

Signed: Kari L Mueller