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STATE OF WISCONSIN
SUPREME COURT

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

Petitioner-Respondent-Petitioner,

v.

Appeal No. 2021AP001787 FT
Case No. 2021CV001469

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

Respondent-Appellant.

On a Petition for Review of a Decision of the Wisconsin Court of Appeals, District II, dated May 25, 2022, Reversing Order of the Circuit Court for Waukesha County, Case No. 2021CV001469, the Honorable Lloyd Carter, Presiding

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	4
INTRODUCTION.....	5
THIS CASE DOES NOT MEET THE CRITERIA FOR REVIEW UNDER WIS. STAT. § 809.62(1r)	5
FACTS UNDERLYING THE PETITIONER'S APPEAL.....	6
Factual Background.....	6
Procedural Status and Disposition	7
ARGUMENT.....	8
I. The Petition for Review should be denied as this case does not meet the criteria for review because the issue presented is not novel and does not present a conflict with any current appellate decisions.	8
II. The Petition for Review is defective on its face as it only seeks review of one of the criterion necessary for the granting of temporary injunctive relief.....	11
A. Reasonable probability of success on the merits.	12
1. Health Care Power of Attorney.....	13
2. Hippocratic Oath	13
3. Inherent authority	14
B. Likelihood of Irreparable Harm and Preservation of the Status Quo	15
CONCLUSION.....	17

CERTIFICATION AS TO FORM/LENGTH 19

CERTIFICATE OF ELECTRONIC FILING 20

TABLE OF AUTHORITIES

Cases

Gahl v. Aurora Health Care, Inc., 2022 WI App 29 12, 13, 14,
 15, 16

Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County, 2016 WI App
 56, 370 Wis. 2d 644, 883 N.W.2d 154..... 9, 12

State v. Henley, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350
 14

Statutes

§ 155.30(1), Wis. Stats. 13

§ 809.19(8)(b), Wis. Stats. 19

§ 809.19(8)(bm), Wis. Stats. 19

§ 809.19(8)(c), Wis. Stats. 19

§ 809.62(1g)(c), Wis. Stats. 17

§ 809.62(1r), Wis. Stats. 5

§ 809.62(1r)(c), Wis. Stats. 5, 17

§ 809.62(1r)(d), Wis. Stats. 17

§ 809.62(3), Wis. Stats. 7

INTRODUCTION

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).

The Court of Appeals reversed the circuit court's order holding that the circuit court erroneously exercised its discretion in granting the Petitioner's requested relief. The Petitioner now seeks review of the Court of Appeals decision by this Court.

THIS CASE DOES NOT MEET THE CRITERIA FOR REVIEW UNDER WIS. STAT. § 809.62(1r)

The Petitioner asserts that this case meets the criteria for review set forth under § 809.62(1r)(c), Wis. Stats. However, this case meets none of the criteria for review cited by the Petitioner.

The Court of Appeals determined that the circuit court erroneously exercised its discretion in granting the Petitioner's requested relief. In order to reach its conclusion, the Court of Appeals analyzed the circuit

court record applying the criteria necessary for a party to establish in order to obtain the injunctive relief sought. In so doing, the Court determined that the circuit court failed to identify any viable claim upon which the temporary injunctive relief could be granted and that Gahl did not show that there was a reasonable likelihood of success on the merits.

In addition, the Court analyzed two additional criteria necessary for granting a temporary injunction. The Court looked at whether the requested relief was necessary to avoid irreparable harm and whether the Court's order preserved or restored the status quo between the parties. In both cases, the Court of Appeals determined that the circuit court either failed to consider the particular criteria or made no findings regarding a particular criterion.

The question presented in this case is not novel nor is it in conflict with any appellate court decisions. Rather, it is a straightforward, routine analysis of whether the circuit court properly determined whether a party seeking temporary injunctive relief established the four criteria necessary to allow the circuit court to grant the relief requested. It does not break any new ground one way or the other in terms of current jurisprudence concerning a circuit court's discretion in granting temporary injunctive relief. Therefore, the Petitioner has failed to establish that this case meets the statutory criteria for review.

FACTS UNDERLYING THE PETITIONER'S APPEAL

FACTUAL BACKGROUND

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).

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.

It should be noted that the patient, John Zingsheim, was discharged from Aurora Medical Center-Summit on February 10, 2022.¹

PROCEDURAL STATUS AND DISPOSITION

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).

¹ The Respondent acknowledges that there is no provision under Wis. Stat. § 809.62(3) for supplementing the record. However, the Respondent would note that the Court of Appeals, in footnote 16, referenced the fact that it had no additional information as to the current status of Mr. Zingsheim. Further, the dissent appears to have been based, in part, on the assumption that Mr. Zingsheim remains hospitalized at Aurora Medical Center-Summit. Thus, the Respondent believes it is appropriate to inform this Court of the fact that Mr. Zingsheim is no longer a patient of Aurora Medical Center-Summit.

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).

This matter was fully briefed before the Court of Appeals and on May 25, 2022, the Court of Appeals issued its decision finding that the circuit court erroneously exercised its discretion by granting the temporary injunctive relief sought by the Petitioner.

The Petitioner now seeks review of the Court of Appeals decision.

ARGUMENT

I. THE PETITION FOR REVIEW SHOULD BE DENIED AS THIS CASE DOES NOT MEET THE CRITERIA FOR REVIEW BECAUSE THE ISSUE PRESENTED IS NOT NOVEL AND DOES NOT PRESENT A CONFLICT WITH ANY CURRENT APPELLATE DECISIONS.

The Petitioner in this case seeks review of a Court of Appeals decision reversing the circuit court's granting of temporary injunctive relief. Specifically, the Court of Appeals determined that the circuit court in this case erroneously exercised its discretion in granting temporary injunctive relief to the Petitioner which required the

Respondent, Aurora Health Care, Inc. d/b/a Aurora Medical Center Summit (hereinafter “Aurora”), to administer a treatment that Aurora reasonably believes is beneath the standard of care and compelling Aurora to credential an outside provider to provide care that is below the standard of care. In reaching its holding, the Court of Appeals applied well-settled legal principles governing a court’s consideration of temporary injunctive relief to determine whether the circuit court appropriately exercised its discretion in granting the relief sought. The Court of Appeals determined that the circuit court failed to identify any viable claim upon which the temporary injunctive relief could be granted. Thus, while the Court of Appeals ultimately determined that the circuit court had no authority to compel Aurora to administer treatment that it reasonably felt was beneath the standard of care or compel Aurora to credential an outside doctor to administer said care, it did so by reviewing the circuit court record to determine whether the court properly considered the criteria to be applied by a circuit court in reaching its determination as to whether to grant temporary injunctive relief.

A circuit court may issue a temporary injunction if the movant establishes four criteria: “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee County*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. This is the framework upon which the Court of Appeals analyzed the circuit court record to determine whether the circuit court properly

exercised its discretion in awarding the Petitioner the injunctive relief sought. The criteria applied by the Court of Appeals to the circuit court's decision is based on well-settled law and is the type of analysis in which appellate courts in Wisconsin engage on a regular basis. Thus, there is nothing novel or unique about the Court of Appeals' analysis in this case. Further, the Petitioner fails to cite to any cases that set forth different criteria or call into question the criteria utilized by the Court of Appeals in this case. In fact, the Petition for Review fails to raise any argument that the criteria applied by the Court of Appeals were improper, or any case law that would support an argument that the Court of Appeals' analysis was in error. Rather, the Petition for Review is simply a recitation of the arguments set forth by the Petitioner in its Court of Appeals brief and is limited to only one of the criterion considered by the Court of Appeals.

The Petition for Review also asserts that this case meets the criteria for review because 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." (Petition for Review p. 6.) Yet, the Petition for Review does not cite to any cases decided by any appellate court that conflict with the Court of Appeals' application of the criteria necessary for a party to obtain temporary injunctive relief in this case.

Moreover, as is true in the Petitioners' briefing in the Court of Appeals, the Petitioner cites to no legal authority from any court that stands for the proposition that a court has the authority to compel a medical provider to render treatment that it reasonably believes is beneath the standard of care, or authority allowing a circuit court to

compel a medical provider to credential a physician to administer said care. Thus, the Petitioner has failed to meet this criterion for review. In fact, based on the cases cited by the Court of Appeals in its decision, this case is actually in harmony with other jurisdictions that have considered the issue presented in this case.

Finally, the Petitioner asserts that “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.” (Petition for Review, p. 6.) The Petitioner fails to establish this criterion because the question presented *is* of a factual nature. Whether or not a circuit court properly exercises its discretion in granting temporary injunctive relief is, in part, based upon the particular facts underlying a party’s request for injunctive relief and the application of the four criteria necessary for a court to grant the relief sought. Thus, this Court cannot resolve the question presented in this case in a manner that will preclude litigation in other cases involving a party’s claim for temporary injunctive relief. Therefore, the Petitioner fails to establish this case warrants review based on this criterion.

II. THE PETITION FOR REVIEW IS DEFECTIVE ON ITS FACE AS IT ONLY SEEKS REVIEW OF ONE OF THE CRITERION NECESSARY FOR THE GRANTING OF TEMPORARY INJUNCTIVE RELIEF.

As referenced above, the four criteria necessary for the granting of temporary injunctive relief are as follows: “(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a

reasonable probability of success on the merits.” *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee County*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. In this case, the Court of Appeals determined that the Petitioner failed to meet three of the four criteria. (The Court of Appeals did not address whether the Petitioner had no other adequate remedy at law.) Yet, the Petition for Review only seeks review of the Court’s determination as to whether the Petitioner had a reasonable probability of success on the merits. As summarized below, the Court of Appeals determined that not only did the Petitioner fail to establish a reasonable probability of success, the Petitioner also failed to establish the element of irreparable harm, or that the granting of injunctive relief would preserve the status quo.

A. REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

Of the four criteria necessary to establish that a party is entitled to injunctive relief, this is the only criterion that the Petitioner seeks to have reviewed.

The Court of Appeals, after scrutinizing the record in the circuit court, determined that the circuit court erroneously exercised its discretion by granting temporary injunctive relief based on a pleading that fails to state a viable legal claim, and consequently, a claim upon which the Petitioner could show a reasonable likelihood of success. *Gahl v. Aurora Health Care, Inc.*, 2022 WI App 29, ¶55. In reaching its conclusion, the Court addressed the three arguments that the Petition for Review sets forth.

1. Health Care Power of Attorney

Initially, the Petitioner argues that Wis. Stat. § 155.30(1) empowers a circuit court to grant declaratory relief and an injunction ordering a health care provider to administer specific treatment. The Court of Appeals' analysis with regard to this argument is a routine application of principles of statutory interpretation. In applying those principles, the Court of Appeals determined that Wis. Stat. § 155.30(1) contains no language that would require a health care provider to act on a health care power of attorney's requests or demands for specific treatment that are below the standard of care. *Id.* ¶42. As pointed out by the Court of Appeals, the Petitioner not only failed to point to specific language within the statutory framework governing health care power of attorneys, the Petitioner also failed to cite to any case law that supports the Petitioner's argument that a health care power of attorney can require a health care provider to provide treatment that it reasonably believes is beneath the standard of care. *Id.* ¶40.

2. Hippocratic Oath

The Court also addressed the Petitioner's argument that the Hippocratic Oath, in and of itself, establishes an implied contract between a patient and a health care provider. Once again, the Court of Appeals rejected this argument out of hand as the Petitioner failed to present any legal authority to support his argument that the Hippocratic Oath provides a basis to argue that the Oath creates an express or an implied contractual obligation by healthcare providers to provide care that the patient demands. *Id.* ¶46. The Court of Appeals determined

that the lack of legal authority for the Petitioner's argument provided no basis for the circuit court to grant the requested injunctive relief. *Id.*

3. Inherent Authority

Finally, the Court also addressed whether the circuit court had inherent authority to provide equitable relief. As set forth by the Court of Appeals, inherent powers are powers “that are necessary to enable courts to accomplish their constitutionally and legislatively mandated functions.” *Gahl* at ¶ 48, citing, *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350. These powers have been exercised in three areas: “(1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice.” *Id.* “In other words, ‘inherent powers’ are those powers ‘needed to ‘maintain [the courts]’ dignity, transact their business, [and] accomplish the purposes of their existence.’” *Gahl* ¶ 48, citing, *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350. The Court of Appeals succinctly rejected the Petitioner's argument on the basis that “[n]othing in this case involves a court's inherent powers.” *Id.* ¶49. The Court further explained that “[t]he power to compel a health care provider to provide a requested treatment, especially one that the provider deems below the standard of care, does not clearly fall within any of the three areas in which inherent authority has been exercised.” *Id.*

In short, for each of the three arguments the Petitioner sets forth in his Petition for Review, the Court of Appeals rejected each one primarily on the basis that the Petitioner failed to cite to any applicable

legal authority to support the Petitioner's claim or to establish a reasonable probability of success on the merits. The Petition for Review cites to no legal authority that the Petitioner believes the Court overlooked or failed to address. It is merely a recitation of the arguments previously made in the Petitioner's Court of Appeals brief.

B. LIKELIHOOD OF IRREPARABLE HARM AND PRESERVATION OF THE STATUS QUO.

Although the Petition for Review seeks review of the Court of Appeals' analysis pertaining to one of the criteria necessary to establish that a party is entitled to temporary injunctive relief, the Court of Appeals also addressed two of the other criteria necessary for a party to obtain temporary injunctive relief. The Petition for Review does not seek review of the Court's analysis with regard to these two criteria. Thus, the Petition for Review is defective on its face. Even if this Court were to grant the Petition for Review and ultimately reverse the Court of Appeals on this one issue, the Petitioner would be unable to obtain the injunctive relief sought, as the Court of Appeals also determined that the Petitioner failed to state a claim for relief with regard to likelihood of irreparable harm and preserving the status quo.

Regarding the likelihood of irreparable harm, the Court of Appeals determined that the circuit court made no findings as to this requirement and that its independent review of the facts suggested that the Petitioner could not show irreparable harm. *Gahl* at ¶56. In fact, the Court of Appeals' analysis suggested that by granting the relief requested, it was Aurora that might actually suffer irreparable harm by having to administer treatment that it reasonably believed was beneath the

standard of care, and/or having to credential an unaffiliated and unknown physician to administer said treatment. *Id.* at ¶57

Finally, the Court also addressed whether the granting of the relief sought by the Petitioner would preserve the status quo. Initially, the Court of Appeals pointed out that the circuit court did not address this factor directly, but acknowledged the importance of this particular criterion given the concerns raised by Aurora. The Court of Appeals determined that the circuit court's order actually had the effect of changing the status quo "because it changed the position of the parties and compelled the acts which constituted all or part of the ultimate relief sought—requiring Aurora to operate outside the boundaries of the law—below the standard of care." *Id.* ¶61.

In addressing both these criteria, the Court of Appeals made it clear that the circuit court either did not consider these criteria in reaching its decision, or made no findings regarding a particular criterion. This is critical to the determination as to whether the Petitioner has set forth the criteria necessary for review of this case because it highlights that the underpinnings of the Court of Appeals' decision are based entirely upon whether the circuit court appropriately analyzed and made findings regarding the four criteria necessary to grant the temporary injunctive relief sought in reaching its determination. Again, this is the type of analysis that comes before appellate courts frequently and involves well-settled principles of law concerning requests for temporary injunctive relief. Thus, a review of the Court of Appeals' analysis in this case does not present a novel issue nor would it operate to resolve conflicts concerning the application of relevant law pertaining to injunctive relief within the appellate courts of

Wisconsin. Moreover, even if this Court grants the review and even reversed the Court of Appeals with regard to the relief sought by the Petitioner, the Petitioner still cannot prevail on his underlying claim for temporary injunctive relief as the Petitioner failed to establish two other criteria necessary for the granting of temporary injunctive relief.

CONCLUSION

The Petitioner in this case simply disagrees with the Court of Appeals' conclusion and rationale, but that is not a proper basis to grant a Petition for Review. *See* Wis. Stats. § 809.62(1g)(c). As set forth above, none of the criteria under Wis. Stats. §809.62(1r)(c) and (d) that the Petitioner cites is the basis for this petition is applicable. The Court of Appeals reached its decision based upon a straightforward application of law governing the granting of temporary injunctive relief and determined that the circuit court erroneously exercised its discretion when it granted relief based on a pleading that failed to state a claim and for which the Petitioner provided no legal basis to satisfy the four criteria necessary for obtaining temporary injunctive relief.

Based upon the foregoing, the Respondent, Aurora Health Care, Inc. d/b/a Aurora Medical Center Summit, respectfully requests that the Court deny the Petition for Review.

Dated at Waukesha, Wisconsin, this 8th day of July, 2022.

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 20 pages and 4,231 words.

Dated at Waukesha, Wisconsin, this 8th day of July, 2022.

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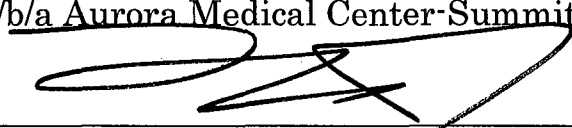
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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Waukesha, Wisconsin, this 8th day of July, 2022.

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