Appeal No.2021AP001787 LV

Circuit Court Case No. 2021CV001469

SUPREME COURT OF WISCONSIN

ALLEN GAHL, Attorney-in-fact, on behalf of his principal,

JOHN J. ZINGSHEIM,

Petitioner-Respondent-Petitioner,

v.

AURORA HEALTH CARE, INC.

d/b/a AURORA MEDICAL CENTER-SUMMIT,

Respondent-Appellant

Granted September 14, 2022, Petition for Review of decision of the Wisconsin Court of Appeals, District II on Reversing Order of the Circuit Court for Waukesha County, Case No. 2021CV001469, the Honorable Lloyd Carter, Presiding

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BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

On October 12, 2021Waukesha County Circuit Court Judge Lloyd Carter ordered the Aurora Health System-Summit Hospital upon the petition of Allen Gahl, Health Care Power of Attorney for his uncle, John Zingsheim, to administer Ivermectin to him as hospitalized patient. See APP.502. Zingsheim had tested positive for Covid 19 at their hospital. The hospital did not administer the drug, but instead contacted Judge Carter by letter and expressed their concern regarding his order. See APP.500. They also filed a pre-order petition for appeal to the District II Appeals Court. Judge Carter reconvened the hearing the next day, on October 13, 2021 and modified his order verbally, stating that Gahl would need to find a doctor acceptable to the hospital to administer the Ivermectin and that he must sign a waiver of liability. See Certified Transcript at 176, lines 2-25 (October 13, 2021). Both parties agreed to the terms but before the judge could sign the order the Appeals Court granted the interlocutory appeal and stayed Judge Carter's order granting the administration of the Ivermectin to John Zingsheim.

Whether the Appeals Court erred in granting the motion without a *final order* signed by Judge Carter regarding his modification of the October 12, 2021 signed order.

Whether the Appeals Court erred in *staying* the order without a motion from either party.

Whether the Appeals Court erred in overturning Judge Carter's order granting the administration of Ivermectin on October 12, 2021 when a compromise had already been agreed to. See APP.485.

STATEMENT REGARDING NECESSITY OF ORAL ARGUMENT

Petitioner Gahl requests that there be oral arguments in this case. There is a strong need for oral arguments in this case to effectively communicate the various issues that came together as a perfect storm which denied a very sick man potentially life-saving treatment.

STATEMENT REGARDING WHETHER DECISION SHOULD BE PUBLISHED

This case should be published so that all people in Wisconsin understand what their rights are going forward if they or a loved one becomes a patient in a Wisconsin hospital (whether this Honorable Supreme Court decides in favor of or against the Petitioner, Allen Gahl). *Gahl v. Aurora Health Care, Inc., 2022 WI App 29* has already been published which makes it all the more important to publish this case whatever this Court's decision is.

Wisconsin citizens have the right to know when they or a loved one goes into a Wisconsin hospital, whether or not the hospital will be required under the written law and under the State of Wisconsin's licensing terms for hospitals, to fulfill all of their express and implied contractual obligations in performing their stated or inferred missions of helping sick or injured people, with the duty of "good faith and fair dealing" being upheld.

Going forward, the people of Wisconsin must know whether or not the bills that their legislature enacts and then publishes using specific mandated words or phrases, means what they actually say or whether those words can now be re-interpreted by the courts or anyone else for that matter, in such a way that they make new law or where they simply end the law, because the

meaning of mandated words used in legislation is now subject to re-defining such that laws that have the "form of law" without the "power of law."

STATEMENT OF THE CASE

Allen Gahl, Health Care Power of Attorney for his uncle, John Zingsheim, originally filed a petition on October 7, 2021 in Waukesha Circuit Court seeking to have the drug Ivermectin administered by the hospital to his uncle, John Zingsheim who was in the ICU unit of the Respondent's Summit Hospital Campus located in Waukesha County. See APP.451. Mr. Zingsheim had developed an upper respiratory condition and was admitted first to Aurora Hartford hospital and then was transferred to Aurora Summit a few days later. He tested positive for Covid 19 and was placed in the Aurora-Summit Hospital's ICU as part of the Covid 19 Protocols, which included being intubated. He was started on a course of Remdesivir, but after two days the family demanded that he be taken off that drug due to the severe side effects of the drug that they had heard about. See APP. 336. After that, the doctors and staff communicated to the family and Mr. Gahl that there was nothing more they could do for Mr. Zingsheim and that there were no other treatments available to help him.

At the hearing on Oct. 12, 2021 in Waukesha County Circuit Court Judge Lloyd Carter heard both sides through their respective legal counsel. Judge Carter then ordered the hospital to given John Zingsheim the Ivermectin to attempt to save Mr. Zingsheim's life. See APP.502 & 504. Aurora Summit through their legal counsel sent an ex parte communication, in the form of a letter, to Judge Carter asking him to reconsider the decision which he had signed. See APP.500. The hospital also filed an emergency appeal with District II Appeals Court asking them to hear the case on an interlocutory

appeal. See APP.412. Judge Lloyd Carter called for a second hearing on Oct. 13, 2021 to reconsider. Following that hearing he revised his order. See APP. 488. The new order required the hospital to allow Allen Gahl to find a doctor outside of the hospital to administer the Ivermectin to his uncle. The judge then verbally approved an agreement between the parties which included Gahl and family to sign a "hold-harmless" agreement for the hospital and to provide a signed informed consent document. See APP.488. But before that order could be signed by Judge Carter, the District II Appeals Court notified the parties that it was taking the case. See APP.485. Additionally, the District II Appeals Court, *without a motion from the parties*, stayed Waukesha Circuit Judge Lloyd Carter's order to allow Allen Gahl to bring in an outside doctor to administer the ivermectin to his uncle, John Zingsheim. See APP.485.

Following the acceptance of that appeal by District II, Allen Gahl sought an emergency by-pass to the Wisconsin Supreme Court. After a preliminary decision on October 21, 2021 to ask for a joint status report by both parties, the Wisconsin Supreme Court then issued its final decision on October 25, 2021 by declining to accept the case on a by-pass petition.

This case was then remanded back to the District II Appeals Court where briefing commenced. On May 25, 2022 in a two to one judge decision, the appeals court decided in favor of the hospital by agreeing with Aurora that the Judge Carter had no authority to either order the hospital to administer the Ivermectin or to allow an outside physician to give Mr. Zingsheim the potentially life-saving treatment. See *Gahl v. Aurora Health Care, Inc.*, 2022 WI App 29; APP.20. Gahl appealed that decision to the Wisconsin Supreme Court for review, which was granted on September 14, 2022. See Supreme Court Order, APP.1.

Mr. Gahl presents the following arguments to support his position that the District II Appeals Court erred in its holding to overturn Waukesha County Circuit Court Judge Lloyd Carter's October 13, 2021 decision to allow his family to find a physician to give Mr. John Zingsheim ivermectin in order to give him and hundreds of other Wisconsinites in similar circumstances in hospitals throughout the State of Wisconsin the chance to survive the ravages of Covid 19 by being treated with Ivermectin.

CRITERIA FOR REVIEW BY THIS HONORABLE COURT

On Petition for Review the Petitioner Gahl cited issues as being relevant and ripe for the Wisconsin Supreme Court to hear on review.

The issues are novel but are likely to continue and to recur in significant numbers throughout the State of Wisconsin: 1) Covid 19 hospital protocols are still being used throughout the state, which have caused needless deaths. The appeals court decision has been published and has left a wake of confusion with citizens regarding the right to request to receive Ivermectin. The "plain meaning" analysis of statutes in Wisconsin in disarray and leaves Wisconsin citizens wondering if they can trust any written laws in the future.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS TO REVERSE JUDGE LLOYD CARTER'S DECISION AS AN ERRONEOUS EXERCISE OF DISCRETION, IS ITSELF, AN ERROR OF THE APPEALS COURT MAJORITY, WHICH THE PETITIONER ASK THIS HONORABLE COURT TO REVERSE

A. The appeals court held that the circuit court lacked the authority to issue a preliminary injunction and because of that finding it reversed Judge Carter's decision, in error, due to a mischaracterization of certain evidence, exhibits, processes and incorrect legal analysis.

In arriving at this decision, the appeals court ignored the central question which dissenting Judge GROGAN, J, correctly presented as: "Whether the circuit court, after reviewing the filings, hearing arguments, and considering the evidence presented, erroneously exercised its discretion in entering an order granting the requested temporary injunctive relief." See APP.58a ¶66. GROGAN, J. concluded that the circuit court "did not erroneously exercise its discretion" and dissented. *Id.*

Aurora Summit Hospital in its petition to the appeals court argued that Judge Carter did not have the authority to order the medical provider to prescribe and administer a medical treatment such as Ivermectin where the provider stated that the drug fell beneath the hospital's standard of care for patient safety. The hospital later claimed that Judge Carter failed to develop a legal theory upon which relief, such as an injunction, could be provided.

But the record shows that Judge Carter went through the steps found in *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County, 2016 WI App 56, 370 Wis. 2d 644, 833 N.W. 2d 154* that are needed to grant a temporary injunction. The Court said:

> ...considering a temporaty injunction/restraining order. And it requires the moving party here, the petitioner, demonstrate that the movant is likely to suffer irreparable harm if the temporary injunctive relief is not issued; also, secondly, that the movant has no other adequate remedy at law; thirdly, a

temporary injunction is necessary to preserve at status quo; and, finally, the movant has a reasonable probability of success on the merits. The issue with those elements is put before the Court as a matter of exercising its discretion. Those standards were established and supported in various cases, but most significantly, I think, and most cited is the *Milwaukee Deputy Sheriff's Association v. Milwaukee County* case from 2016. So that's the basis and the background legally that the Court has to utilize as a framework and in assessing the circumstances of this case.

See Certified Hearing Transcript at APP.129, lines 1-17 (Octorber 12, 2021).

B. Judge Grogan, dissenting, continued her analysis of the majority's decision by pointing out that the two judges relied on incorrect premises that could cause a health provider's *incorrect* standard of care to be used. This possibility led her to write FN 11 at APP. 69 which follows:

The majority's decision is based on incorrect premises.

First, it says a court cannot force Aurora to administer treatment. But, that is not what the circuit court's final order does. Rather, the order says that *Gahl's physician* can administer the requested treatment to Zingsheim. Contrary to what the majority states, Gahl submitted an affidavit/declaration from physicians who opine that the proper treatment here is different than Aurora's. Gahl also submitted sworn testimony from a senate hearing from an expert on the treatment of COVID-19, indicating a standard of care different than Aurora's.

Second, the majority says there is no legal right underlying the injunction. But, as discussed in part III of this dissent, patients have the right to medically viable alternative treatments. That the FDA recognizes a health care provider and patient may decide to use a repurposed drug.

Third, although the majority recognizes the long-established objective standard of care, its opinion effectively adopts a subjective standard of care tied to Aurora's beliefs and personal medical judgment, which it then applies in determining that Gahl has no legal right to the treatment sought. By redefining the changes to the definition of "standard of care" to mean what the treating physician believes it to be, the majority effectively requires all courts going forward to simply accept the health care provider's belief as to the standard where a patient seeks an injunction based on a disagreement with the provider's course of action in providing care. That cannot possibly be the case because the health care provider's standard of care might actually be wrong. The majority's new standard may also inadvertently alter current standards used in medical malpractice lawsuits.

APP.69, FN 11

The dissent then continued its critique of the majority's work in the next paragraph by stating that "based on the majority's determination that the requested treatment is not a medically viable alternative; it decides this patient has no legal right. By exceeding this court's role in reviewing the circuit court's final order, the majority decides unnecessary issues and creates new law that is in direct conflict with longstanding Wisconsin law." See APP.69, FN 11, ¶2.

In ending the extensive FN11 Judge Grogan accused the court of appeals of being "misleading" and then closed with the accusation that "The majority also discussed numerous cases where courts rejected patients' requests for treatment but declines to address Wis. Stat. § 450.137 (2019-20), Wisconsin's Right to Try law." See Id. She concluded "that the circuit court did not erroneously exercise its discretion in granting the requested injunctive relief and would therefore affirm." See APP.70, ¶86.

Gahl asserts that not only is the dissent correct in being concerned about the possibility that the "standard of care" might be wrong, but that it *is* wrong, as Dr. Pierre Kory's Affidavit, Senate Testimony and his supporting documents found in his Exhibits to his affidavit prove. See APPS.184,188,204,225,254,332,336,345,352 &360. See also APPS. 442 &450 Supporting Exhibits to Allen Gahl's Affidavit at APP.428.

C. The appeals court misleadingly stated that Gahl did not present affidavits from health care providers showing that the proposed treatment was within the accepted standard of care for Covid-19.

This statement causes inaccurate conclusions to be drawn because it leaves the impression the Dr. Pierre Kory was not present, when in fact he was present by Zoom (as the record Certified Hearing Transcript APP.153, lines 15-22. (October 13, 2021) shows. Dr. Kory was prepared and was ready to testify to the truth of his Department of Homeland Security Senate testimony given on December 20, 2020. See APP.188. He was also ready to explain and discuss Exhibits A-G, K &L which he provided to support his signed affidavit. See APP.188, 204, 225, 254, 332, 336,345,352,360,442&450.

During the hearing on October 13, 2021 Attorney Ralph Larigo, appearing on behalf of Gahl, pointed out to Judge Lloyd Carter that the affidavit of Dr. Pierre Kory including his exhibits supporting his affidavit and his Department of Homeland Security Testimony from December 20, 2020 were "no longer hearsay" since Dr. Kory was present by Zoom (as was everyone else in attendance). He was prepared to testify. See Certified Hearing Transcript APP.153, lines 15-21(October 13, 2021) (quoting "The Court: Okay. It just came up. So we have—I will note that we, for the record, we have another participant listed as Dr. Pierre Kory who is muted just now. I'm going to confirm, Dr. Kory – This is Judge Carter, Dr. Kory. We called the case. I just want to confirm that you can see and hear everything that is happening." Dr. Kory: "I can. Thank you."). Atty. Ralph Lorigo stated, "Dr. Kory took the time yesterday to provide this affidavit to the Court with a great deal of information. It was our view yesterday that the information is hearsay. It's no longer hearsay. Dr. Kory's resume is attached. It is substantial. He is considered to be the number one expert in this world with regard to COVID and Ivermectin. He's published numerous publications. He's licensed to practice in Wisconsin." See Certified Hearing Transcript APP.157, lines 4-12 (October 13, 2021).

Judge Carter did not call him to testify but Dr. Kory's willingness to appear for testimony and cross-examination changed everything because Dr. Kory was a well credentialed expert on Ivermectin whose proffered evidence resoundingly declares the efficacy and the safety of this drug.

On the other hand, the affidavits from the Aurora team for the most part simply repeated the misinformation the from the CDC and FDA regarding Ivermectin being unsafe to use. See APP. 522 &530. The evidence showed

that Aurora's standard of care which was widely accepted by hospital board room members throughout the United States was wrong and was harming people. See Exhibit K & Dr. Pierre Kory, Department of Homeland Security Senate Committee Testimony (December 20, 2020), APP188.&450. During this senate committee testimony Dr. Kory described Ivermectin as a "miracle drug" and gave testimony during that hearing as to why this was true. The transcript of that hearing was submitted to the circuit court as Exhibit K & K1. See APP. 188&450.

Mr. Lorigo argued to the judge "So, look, his standard of care, the standard of care in this hospital has now caused over 700,000 deaths in this country. That is the problem we have, Your Honor. We are only asking for an alternative after they've done their standard of care, an alternative that, again, the NIH lists as the second treatment for COVID after Remdesivir and lists it in the specific .2 to .6 milligrams per kilogram of body weight, the exact amount that was prescribed by this treating—or by this physician." See Certified Hearing Transcript at 126, lines 14-23 (Oct.12, 2021). The NIH Chart E was submitted to the circuit court as evidence that Ivermectin was a safe drug according to NIH standards. See Exhibit D. APP.332.

D. The appeals court in *Gahl v. Aurora Health Care, Inc., 2022 WI App 29* mischaracterized the issue presented to them as one where both parties agreed it 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." See APP.38, ¶33.

This characterization of the issue was not entirely accurate in that Gahl only agreed that the *hospital board members* and *administration* stated that

the ivermectin fell beneath the hospital's standard of care, but Gahl never agreed that Ivermectin was *actually beneath a reasonable medical provider's standard of care*. In fact, Gahl argued from the beginning that Ivermectin was a safe drug while the drugs administered to John Zingsheim were very dangerous for him as well as for most patients. The evidence presented through Dr. Pierre Kory was strong in support of this premise Ivermectin's safety record was very good, but also that Ivermectin was effective at different stages of the infection. See APP.254.

E. The appeals court misleadingly stated that "He admits that using the proposed treatment for COVID-19 is not approved by the FDA, as it is an 'off-label use of the drug.' FN 21" See App.39, ¶33.

This statement is only partially true but the way it was stated it may leave a reader to believe that Ivermectin has not been approved by the FDA, and therefore it is not safe. The most accurate statement is that Ivermectin is an FDA approved drug for humans, but it has not been approved for treating Covid 19. Thousands of "off-label" prescription drugs are prescribed every day for uses that the FDA has not "approved" of in the United States. This interpretation could easily lead a reader to believe the drug must be unsafe. Mr. Gahl agrees with the contents of the court of appeal's footnote 21 from the FDA website which states the FDA's definition and usage of "off-label" prescription drug use:

> Unapproved use of an approved drug is often called "off-label" use. This term can mean that the drug is:
>
> - Used for a disease or medical condition that it is not approved to treat, such as when a chemotherapy is approved to treat on type of cancer, but healthcare providers use it to treat a different type of cancer.
> - Given in a different way, such as when a drug is approved as a capsule, but it is given instead in an oral solution.

> • Given in a different dose, such as when a drug is approved at a dose of one tablet every day, but a patient is told by their healthcare provider to take two tablets every day.
>
> If you and your healthcare provider decide to use an approved drug for an unapproved use to treat your disease or medical condition, remember the FDA has not determined that the drug is safe and effective for the unapproved use.

App.39 FN21

F. The appeals court stayed Judge Lloyd Carter's order on its own motion, leaving John Zingsheim with no positive treatment for his Covid 19 damaged lungs.

From the time Aurora Summit Hospital appealed the case (before the original decision had been made and signed) to when the appeals court had accepted the case, the Circuit Court modified its original order by verbally agreeing that the parties could include: drafting a "hold-harmless" agreement by the parties, Gahl giving informed consent, and Mr. Gahl's requirement of finding a doctor who would be acceptable to the hospital's credentialing team that could administer the Ivermectin to Mr. Zingsheim. The order simply needed to be reduced to writing so that Judge Lloyd Carter could sign it, which it was on October 14, 2021. See APP.488. But before the document was signed by Judge Carter the appeal was accepted by the District II Appeals Court and the Judge Carter's order was stayed *sua sponte*. See APP.485. This left John Zingsheim with Covid 19 damaged lungs and no treatment available for attempting to heal them.

II. MR. GAHL'S PETITION FOR REVIEW CONTAINED FOUR SOURCES OF JUDICIAL AUTHORITY THAT ALLOWED FOR JUDGE LLOYD CARTER TO GRANT A TEMPORARY INJUCTION. THREE WILL BE DISCUSSED HERE.

A. The Health Care Power of Attorney statutory form created under Wis. Stat. § 155.30(1) grants the principal of that signed document the ability to request and receive a "necessary treatment."

The long relied upon "plain-meaning" analysis of both the Wisconsin Supreme Court and the United States Supreme Court demands that an accurate reading of Wis. Stat. §155.30 provides that any patient in the State of Wisconsin has the *right to receive necessary medical treatments that they request.*

Despite the precedence regarding "plain-meaning" analysis, the Appeals Court majority rejected this statutory language within the mandated HCPOA form as a source of authority for Judge Lloyd Carter' decision in this case. See APP.43, ¶41. By doing so, the majority placed itself and its decision at odds with both the Wisconsin Supreme Court's and U.S. Supreme Court's precedence regarding the doctrine of "plain-meaning" analysis of statutes.

The Wisconsin Health Care Power of Attorney statute reads:

> **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.**
>
> **Wis. Stat.§ 155.30(1)**

The Appeals Court majority agreed with the hospital's argument that the HCPOA statutory form's language did not mean what it actually said.

Instead, the appeals court stated the following regarding the meaning of the statute:

> "We reject Gahl's reading of this statutory language. Wisc. Stat. § 155.30(1) merely sets out standard language that must be included on HCPOA forms that are distributed or sold in Wisconsin for use by persons who lack legal counsel. 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, or to 'empower another to make these decisions in the event of his or her incompetency, through a health care power of attorney.' 4 JAY E. Grenig, Wis. Legal Forms § 29:5 (2022 ed.)."
>
> APP.43, ¶41.

But this reasoning makes no sense for several reasons. It ignores state and federal precedence. Furthermore, it does not resolve the argument that what a legislature *requires* to be written into a statute about statutory forms must carry the weight of the law because their requirement of specific words *reveals* their legislative intent. To require that a statement be in a statutory form that the legislature *does not intend to give the force of law to*, defeats the purpose of the writing laws regarding mandated forms.

The majority references estate planning as one use for these forms. This is true. Attorneys have the unique ability in Wisconsin to write customized HCPOA documents, thereby opting not to use the statutory documents in their estate practices. But if estate attorneys do customize their documents in lieu of the statutory form, attorneys are still mandated by Wis. Stat. § 155.30 (2), to include "either the notice specified in sub. (1) or a certificate signed by the principal's lawyer stating: 'I am a lawyer authorized to practice law in Wisconsin. I have advised my client concerning his or her rights in connection

with this power of attorney for health care and the applicable law.'" This is the "notice" mentioned in subsection (2) that it titled "Notice to Person Making this Document" found on page 1 of the 6-page statutory HCPOA form.

The appeals court majority next pointed out that on page 2 of the 6-page form:

> "For the purposes of this document, 'health care decision' means an informed decision to accept, maintain, discontinue, or refuse any care, treatment, service, or procedure to maintain, diagnose, or treat my physical or mental condition."
>
> APP.43,¶41-¶42

The majority then argued that the "health care decision" definition on page 2 made the earlier words on page 1 virtually meaningless by describing them as only being "instructive" and "informational. But those words included on page 2 of the statutory HCPOA form do not negate the meaning of the previous words "necessary health care may not be stopped or withheld if you object" found on page 1 at the top of the form. In *Gister v. Am. Family Mut. Ins. Co., 342 Wis.2d 496, 818 N.W.2d 880, 2012 WI 86 (Wis. 2012)* this court explained "Where the legislature includes a word in one provision and omits it from a similar, parallel provision within the same statute, we are even more reluctant to diminish the independent significance of the word." (citing *Cf. Graziano v. Town of Long Lake, 191 Wis.2d 812, 822, 530 N.W.2d 55 (Ct.App.1995)* (("[W]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings.") (citing *Armes v. Kenosha Cnty., 81 Wis.2d 309, 318, 260 N.W.2d 515 (1977)*)).

The first paragraph of the first page of the HCPOA clearly outlines the breadth and scale of the health care rights of Wisconsinites that the legislature intended to give a person executing this document, in order to protect their constitutional "right to life" and their civil rights to due process found under our constitutions.

But in this decision, the appeals court ignored a long history of cases with precedential authority at both the State and Federal levels which Gahl cited in his Petition for Review to this Supreme Court. One prominent Wisconsin Supreme Court case outlines the "plain meaning" analysis is *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). The decision at hand is in direct conflict with the decision in *Kalal*. In that case 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 phrases and instead inserted a new legislative intent, thereby making a new law.

The majority in the three-judge District II Appeals Court as previously stated, rejected Gahl's reading of the statutory language of the HCPOA form with the conclusory statement: "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 App.43, ¶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 the 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 mandated to be in a statutory form, now does not have the force of law, is befuddling at best. This conclusion of the appeals court directly conflicts with previous decisions held by both the U.S. Supreme Court and the Wisconsin Supreme Court.

But the majority went even further in its analysis to point out that the words on page 2 of 6, of the document, were not the same words as those used on page 1 of 6. The reasoning for this comparison was apparently that since the words were not identical, then the words on page 2 of 6 must be more important and more meaningful than the words on page 1 of 6. But this rational makes no sense because this is a six-page document that the legislature clearly intended to be one whole, cohesive document. This truth of this fact is further evidenced by the numbering scheme of the pages: 1 of 6, 2 of 6, 3 of 6, etc... There was never an attempt to minimize the importance of the first page, except by the District II Appeal Courts. In fact, as earlier argued, lawyers are required to either give their clients this first page of the HCPOA even if they customize the rest of the document or write a statement that says they notified their clients of their rights.

What is clear is that the legislature intended that the two sets of phrases in question here were intended to complement each other and were never intended by the legislature to have mutually exclusive meanings. It is therefore obvious that the legislature intended both sets of phrases to have significant meaning. If this were not true, then the page designated "instructive and informational" by the majority would not have been numbered at all and page 2 of 6 would have been changed to read 1 of 5.

It is also important to note that there are two *legislatively* designated "instructive" and "informational" pages that are not numbered and are given out by the "Department of Health Services." The seal of Wisconsin is at the top of the first of these two pages. Directly underneath the seal it reads "Instructions to Complete the Power of Attorney for Health Care Form." Therefore, it is unlikely that page numbered 1 of 6, is just an "instructive and informational" page as the appeals court insisted.

The appeals court points out that the first page (1 of 6) is missing from the exhibit that was submitted by Gahl which seemed to be used to discredit the importance of said document. See App.435-Exh A, of documents supporting Allen Gahl's affidavit. The fact that this very important first page of the executed HCPOA is missing, is of concern but these were the only pages released by Aurora-Summit Hospital to Allen Gahl when he made that request. The first page that proclaimed "notice" of his uncle's healthcare rights under Wisconsin law were not to be found in the packet Gahl received from the hospital.

Given the above analysis, the majority in the case at hand has violated the basic tenets of determining the "plain meaning" of a statute in Wisconsin. The Court in *Kalal* stated "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'..."

The appeals court's majority decision is also in conflict with multiple decisions from the United States Supreme Court which have 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 *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.

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.

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).*

The appeals court's majority analysis of Wis. Stat. § 155.30 (1) does not follow the rules laid out by either the Wisconsin Supreme Court or the United States Supreme Court. 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 are entitled to receive necessary medical treatment if they were to request it because the language in this statutory form is just that plain. It is reasonable that everyday people (on whose behalf this form was enacted) reading this form would assume that the legislature made this statement part of the law since it is the legislature that also has the ultimate authority to determine the licensing criteria for not only medical doctors but also for the huge medical systems that operate in this state.

Because the State of Wisconsin licenses hospitals and nursing homes these corporations must follow the laws, statutes and even the Constitution of the State of Wisconsin in order to remain licensed to do business in the State of Wisconsin. See Wisconsin Chapter 50 and Chapter DHS 124. Thus, hospitals do not have the ability to pick and choose what laws they will follow.

When citizens/patients/principals sign a Wisconsin Health Care Power of Attorney document, they have every right to be certain that they will receive the necessary medical treatments that they request based upon the plain meaning of Wis. Stat. § 155.30(1) or that they will receive the necessary medical treatments that their Health Care Power of Attorney's requests on their behalf if they cannot do so for themselves.

The District II Appeals Court found that Mr. Gahl as the HCPOA for his uncle had no legal right, even as a "person who had stepped into the shoes of his uncle," to request and receive Ivermectin for his uncle, as a necessary treatment to attempt to save his uncle's life. The analysis of the "plain-meaning" of the legislative statements includes assertions and promises found in the Wisconsin Statutory HCPOA form that Mr. John Zingsheim and thousands of other people who are legal residents of Wisconsin rely on every day when they read the assurances of their rights found in those legislatively mandated words. Principals sign their advance directives believing that the assertions the legislature made via enacted legislation are true and can be relied upon.

For these reasons, it is critical that the Wisconsin Supreme Court tell the citizens of Wisconsin what the "plain-meaning" of Wis. Stat. §155.30 (1) analysis looks like so that people can know whether to trust the written words of their own Wisconsin legislative bodies.

The case at hand is one of life and death for many people throughout the State of Wisconsin, who are still being denied the right to try Ivermectin, while the hospitals in this state continue to offer no positive treatments and no hope. Similar circumstances have already recurred repeatedly in hospitals throughout the State of Wisconsin in the past year. Because hospitals now have established questionable "standards of care" regarding patient safety which were all formulated in the comfort of hospital board rooms rather than from hospital ICU's rooms where patients, their families and their doctors used to be in control, it is critical that the Wisconsin Supreme Court give Wisconsin's citizens across this state the correct and "just" interpretation of this statute.

B. The inherent equitable authority of the circuit court was the second source of authority that Judge Lloyd Carter could have used to make his ruling

The appeals court held that the Waukesha Circuit Court Judge Lloyd Carter had no inherent authority to order the hospital to give the Ivermectin to John Zingsheim. They stated: "Nothing in this case involves a court's inherent powers." APP.48, ¶49.

But in so reasoning they ignored the court's primary purpose which is to provide for justice. The appeals court stated:

> "while we agree that circuit courts have 'authority to grant equitable relief, even in the absence of a statutory right,' that relief 'must be in response to the invasion of legally protected rights.... Obviously, not every perceived injustice is actionable.' *Breier v. E.C., 130 Wis. 2d at 388-89.*"
>
> App.29, ¶50.

The appeals court's dismissive statement which minimized the task of saving John Zingsheim's life to that of only a "perceived injustice" that was not likely to be "actionable" under the inherent powers of the circuit court should shock the conscience of every Wisconsin citizen. That statement negated and ignored the fact that when the circuit court made its decision in October of 2021 to allow the family to find an outside doctor to administer Ivermectin, the Waukesha Circuit Court Judge Lloyd Carter rightly understood and believed that he was helping the John Zingsheim's family make a "Hail, Mary" pass in an effort to save this man's life. As previously noted, the dissenting judge on the appeals court also noted that John Zingshiem had a constitutionally protected "right to life" under the Wisconsin

and U.S. Constitutions. See APP.GROGRAN, dissenting, APP. 51 FN11 Accordingly, the exact words of the majority opinion that it quoted from *Breier*, stating that a "legally protected right" would give a circuit court the "authority to grant equitable relief" actually gave Judge Carter the authority to grant equitable relief in the case at hand.

By the time the family petitioned the Circuit Court in Waukesha, Aurora had already given up on Mr. Zingsheim and was offering only a ventilator and palliative care. The hospital had offered Remdesivir a very dangerous drug for John Zingsheim, which his family demanded be stopped. The juxtaposed characterizations of this dangerous drug alongside the derogatory and disparaging descriptions in which the hospital and its doctors characterized Ivermectin, is startling. The facts outlined in Dr. Pierre Kory's DHS senate testimony and his affidavit strongly disputes their assessments of this drug and the "reasonableness" of Aurora's "standard of care for patient safety."

The fact that Mr. Zingsheim survived and slowly improved over the past year, does not lessen the impact or injustice of the appeals court's "stay" order on this "life-saving" decision issued by Judge Lloyd Carter. That "stay" also affected hundreds of families throughout the State of Wisconsin whose loved ones were denied Ivermectin and were instead treated with failed Covid 19 protocols which included withholding Ivermectin and administering Remdesivir, a drug known to have over a 50% chance of causing kidney and liver failure. See APP.188, 204, 225, 254, 332, 336,345,352,360,442&450.

The "inherent authority" of the circuit court is derived from the same source that the Wisconsin Supreme Court gets its authority and power: The Wisconsin State Constitution which provided for the setting up of the court

system through Articles VII: JUDICIARY and the "Maintenance of free government" through Articles I, §2 DECLARATION OF RIGHTS: "The blessings of a free government can only be maintained by a firm adherence to *justice*, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

In 2019 this Wisconsin Supreme Court discussed at length the concept of the inherent authority of courts in *State of Wisconsin v Schwind*, 2019 WI 48, ¶13. The court stated that "Inherent authority is implicit in the Wisconsin Constitution. When the framers created the judiciary in Article VII, they 'had in mind that governmental institution known as the common law possessing powers characterizing it as a court and distinguishing it from all other institutions.'" *Id.* (citing *In re Kading, 70 Wis. 2d 508, 518, 235. N.W. 2d 409 (1975)*). This Supreme Court then went on to explain that "the Wisconsin Constitution did not devise a new entity called a "court;" rather, by using the word "court," it was referring to the institution known as a court, together with the powers it was understood at common law to necessarily possess. Therefore, we generally consider historical practices when determining whether a certain power is inherent in the judiciary." *Id.*

The issue in *Schwind* was whether Wisconsin Courts had the inherent authority to reduce or end the probation of convicted felon. This Court discussed the differences between sentence length and probation terms and stated: "the judiciary's power to sentence and its power to order probation are distinct powers that come from different sources. The judiciary's sentencing power existed at common law and is a part of the Wisconsin Constitution; the power to impose probation, on the other hand, is a statutory creation that cannot be altered by the courts." *Id.* For these reasons, the Wisconsin

Supreme Court held that they lacked the inherent authority to end the probation of *Schwind*.

The case at hand is distinguishable from the holding in *Schwind*. The sources of power regarding the dissimilar issues of a court's intervention in a potential probation reduction case versus intervention in a life-or-death matter are completely different. John Zingsheim had a fundamental "right to life" that was understood under the common law before Wisconsin even became a state. That "understanding" under the common law became a Wisconsin State Constitutional right under Article I, § 1 when Wisconsin became a state in 1848, which reads: "All people are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." This means that neither John Zingsheim's life nor the life of any other individual this state may be taken by the actions or omissions of state actors or those acting on behalf of a governmental agency without having full due process and equal protection rights, first being afforded to them.

It has been established in the record that the hospital relies heavily on the CDC and the FDA for directions on what drugs to give and what drugs to withhold from their patients. As it was explained in their Response to Petition for Review filed on July 8, 2022 they stated "The Petitioner 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." See APP.544,¶1. Their strict and blind adherence to unconstitutional edicts, guidelines and administrative rules of federal

agencies who had loftier goals than keeping John Zingsheim and many other Wisconsin citizens alive qualifies as a right that the majority in the court of appeals should have recognized as fundamental enough to trigger the inherent and equitable powers that all courts in the State of Wisconsin have. Judge Lloyd Carter recognized this basic fact when he signed the first order. See APP.502.

The court of appeals noted in this case that "none of the documents Gahl filed relating to Kory establish that Kory ever examined this patient or spoke with this patient's treating medical providers." See App.31,¶18. This is true statement, although as an expert in his field who testified before the Senate's Department of Homeland Security, Dr. Pierre Kory's testimony was that of an expert witness, who often do not examine patients before giving expert witness opinions to a court in a wrongful death lawsuits. Here, the Board of Directors of Aurora Hospital system who agreed to follow the Covid 19 protocols which excluded Ivermectin and included Remdesivir for people with COVID, also did not examine John Zingsheim personally and some of them were not even licensed medical doctors. At least Dr. Pierre Kory, who is a world renown expert on COVID treatments is licensed to practice medicine in the State of Wisconsin. See APP.225-Dr. Kory's Curricula Vitae.

The Wisconsin Constitution emphasizes and sets apart the importance the words "a firm adherence to justice..." by the authors of that document which was intended to insure that "justice" was provided in the State of Wisconsin. In 1848 when the Constitution was signed, the framers obviously believed that the rights of a free people required the administration of justice and that it would be a critical component in maintaining freedom and liberty in the state. Using the same rationale, a denial of justice on such a broad scale

would be a perversion of justice, would be no justice at all and would signify the loss of liberty to a once free society.

Judge Carter understood the need to establish facts regarding 1) irreparable harm to John Zingsheim (and other patients in similar circumstances if he did not provide relief in the form of a temporary injunction; 2) that there was no other remedy; 3) the need to maintain the status quo (Mr. Zingsheim's life); and 4) the likelihood of success on the merits by petitioner. See APP.128-138 & APP. 175, lines 11-25 & APP.176, lines 1-25.

The word "justice" means being just or fair. It means that a decision is not biased by actions, political beliefs or personal characteristics that favor one side over another. It is conformity to moral rightness in action or attitude, righteousness. Justice requires that the balances of a scale are level at the initiation of a court case and remain level throughout the proceedings and into the deliberations and ultimate decision. The procedures used during a hearing or controversy must be fair to ensure justice is done. The citizens of Wisconsin expect and deserve justice in this case.

C. The implied contract between Aurora hospital and John Zingsheim and other patients requires the hospital to uphold its end of the "bargain," whether express or implied, to not violate its duty of "good faith and fair dealing" and to "Do no Harm" to its patients.

Implied contracts can arise from the care that a doctor gives to an unconscious patient. See *Fischer v Fischer, 31 Wis.2d 293, 142 N.W.2d 857 (Wis. 1966)* (discussing implied contracts arising between patients and physicians) (overruled, in part, on other grounds). In general, contracts may

also arise when a patient has insurance and gives the card to the hospital for third party payment. Even though the hospital will receive reimbursement from an insurance company an implied contract still exists between the hospital and the patient.

The duty to act in "good faith" and to "deal fairly" with all of its patients was breached by the Aurora Medical system when it characterized that a safe and effective drug such as Ivermectin was rather a dangerous and ineffective drug, while at the same time characterizing Remdesivir, a dangerous and ineffective drug, as a "safe and effective drug." See APP.188, 204, 225, 254, 332, 336,345,352,360,442&450.

The Hippocratic Oath that requires doctors to Do No Harm is widely known. It is a phrase commonly repeated by everyday people. Therefore, if hospitals such as Aurora intend to no longer follow this oath, they have a duty say so, before people enter the hospital. By not publicly acknowledging this change in policy and basic level of protection for patients, hospitals violate consumer fraud protections. People who think they are going to the hospital for health care should be informed of these changes in hospital priorities and policies before going the hospital. To not do so is a medical fraud because the terms "Hippocratic Oath" and its meaning to average citizen deeply imbedded in the average person's mind when it comes to health care.

CONCLUSIONS AND RELIEF SOUGHT

Petitioner seeks relief from this Wisconsin Supreme Court by an order overturning the decision of District II Court of Appeals in *Gahl v. Aurora Health Care, Inc., 2022 WI App 29* which held that Judge Lloyd Carter of Waukesha County erred in his decision to grant a temporary injunction in an attempt to save John Zingsheim's life, because he lacked authority.

Petitioner seeks further relief in the form of a declaration that states the District II Appeals Court erred because that appeals court lacked the authority to issue a stay which blocked the administration of a potentially life-saving drug to John Zingsheim, a man that the hospital had, in fact, given up on and was no longer providing positive treatments to, other than oxygen through a ventilator which was causing his lungs to deteriorate.

Petitioner seeks any other extraordinary relief that the Wisconsin Supreme Court sees fit to grant to Allen Gahl, including reimbursement for attorney fees and court fees already paid and reasonable attorney fees for these appellate petitions.

Signed and dated October 14, 2022 in Chippewa County, Wisconsin.

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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).

The length of this brief is 41 pages long and has 10038 words (including certification pages and appendix).

Signed and dated October 14, 2022 in Chippewa County, Wisconsin.

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of 809.19(12).

I further certify that:

This electronic brief 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 brief filed with the court and served on all opposing parties.

Signed and dated October 14, 2022 in Chippewa County, Wisconsin.

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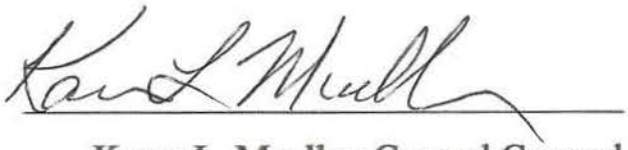
On behalf of his principal, John Zingsheim



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APPENDIX

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