RECEIVED
11-17-2022
CLERK OF WISCONSIN
SUPREME COURT

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.

**APPEAL FROM THE CIRCUIT COURT OF WAUKESHA COUNTY,
THE HONORABLE LLOYD CARTER, PRESIDING
CASE NO. 2021CV001469**

RESPONDENT-APPELLANT'S RESPONSE BRIEF

Submitted by: Michael L. Johnson - SBN 1056247
Jason J. Franckowiak- SBN 1030873
Randall R. Guse – SBN 1024900
OTJEN LAW FIRM, S.C.
20935 Swenson Drive, Suite 310
Waukesha, WI 53186
Attorneys for Respondent Aurora
Health Care, Inc. d/b/a Aurora
Medical Center-Summit

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

ISSUES ON APPEAL

1. Did the trial court abuse its discretion in granting an order compelling independently licensed health care providers to administer medical treatment that was inconsistent with their patient's hospital treatment plan?
2. Did the trial court abuse its discretion in granting an order compelling a hospital to credential an outside physician who otherwise lacked hospital privileges, for the specific purpose of permitting that physician to render care to the hospital's patient that was inconsistent with the patient's hospital treatment plan?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

John Zingsheim was being treated for COVID-19 in the ICU of Aurora Medical Center-Summit (hereinafter "Aurora-Summit") subject to the hospital's COVID treatment protocol in October of 2021. Zingsheim's Health Care Power of Attorney, Allen Gahl, subsequently requested that the hospital administer ivermectin to Mr. Zingsheim. Mr. Zingsheim's hospital medical team declined to administer ivermectin on the basis that the administration of ivermectin to Mr. Zingsheim, given his then-existing medical condition, would be unhelpful to him, and would be contrary to the standard of care.

Gahl subsequently brought an emergency petition for declaratory and injunctive relief in the Circuit Court for Waukesha County, seeking to compel Mr. Zingsheim's treatment team at Aurora-Summit to administer ivermectin to Mr. Zingsheim. The Circuit Court issued an

order compelling the hospital staff to administer ivermectin to Mr. Zingsheim, but subsequently modified its order to instead compel the hospital to credential an outside physician of Mr. Gahl's choosing for the purpose of permitting that physician to administer ivermectin to Mr. Zingsheim in the hospital.

Before the Court's modified order could be signed, the Court of Appeals accepted Aurora's Petition for Review. The issue before the Court of Appeals was whether the Circuit Court had the legal authority to issue an injunction compelling Aurora to administer treatment that, in the professional judgment of its staff, fell below the standard of care, or to compel Aurora to credential a non-Aurora medical provider to administer the treatment. The Court of Appeals concluded that the Circuit Court had no legal authority to compel Aurora, an independent health care provider, to administer the requested medical treatment. The Court of Appeals further held that the Circuit Court had no legal authority to compel Aurora-Summit to credential an outside provider to administer the requested medical treatment.

II. FACTUAL BACKGROUND

On September 16, 2021, John Zingsheim was diagnosed with COVID-19, and three days later, was hospitalized at Aurora-Summit in the ICU. (R. 2:3). While hospitalized, Mr. Zingsheim received 24-hour care from a team of providers which included the Hospital Medicine Service, the Infectious Disease Service, the Pulmonary Service, and the Critical Care Service. (R. 61:2). A critical care plan of treatment was initiated. Zingsheim was receiving no less than 20 different medications while in the ICU at Aurora-Summit. (R. 61:3-4).

Allen Gahl, the nephew and Health Care Power of Attorney for Mr. Zingsheim, was concerned about the clinical progress of his uncle, and began to independently research alternative treatments. (R. 2:4). In the course of his "research," Mr. Gahl came across a medication known as ivermectin, which had been FDA approved for treatment of parasitic infections, but which had not obtained FDA approval for use in the treatment of COVID. (R. 2:4); R. 12, 13).

After learning of ivermectin, Mr. Gahl sought out a physician who would be willing to issue a prescription for ivermectin to his uncle, eventually settling upon a retired OB/GYN living in Hudson, Wisconsin – Dr. Edward Hagen. (R. 2:5). Dr. Hagen is the founder and the Chief Medical Officer at "Vivify Integrative Health" in Hudson, Wisconsin, focusing "on a personal approach that empowers each patient to achieve optimal health in mind, body and spirit." (R. 2:5). Dr. Hagen had never previously treated nor even seen Mr. Zingsheim, and did not have access to Mr. Zingsheim's medical records. Instead, Dr. Hagen was given Mr. Zingsheim's "medical history" secondhand through Mr. Gahl and another member of Mr. Zingsheim's family, Sarah Gahl. (R. 51:1; R. 62:1).

Despite having been sanctioned eight years earlier by the Medical Examining Board for "unprofessional conduct" as a result of having prescribed medication to a non-patient without conducting a proper medical examination, Dr. Hagen agreed to issue a prescription, sight unseen, to Mr. Zingsheim for 66 mg of ivermectin per day for a period of five days. (R. 18).[1] In doing so, Dr. Hagen did not conduct a medical

[1] In June of 2013, Dr. Hagen had been sanctioned by the Wisconsin Medical Examining Board (MEB), because he had prescribed medication to an individual who was not his patient, without performing a medical examination, without keeping any

examination of Mr. Zingsheim, review or create any medical records for him, nor speak with any of Mr. Zingsheim's treating providers at Aurora-Summit.

With a prescription for ivermectin in hand, Mr. Gahl approached his uncle's care team at Aurora-Summit and demanded that they immediately administer Dr. Hagen's ivermectin prescription to Mr. Zingsheim. (R. 2:6-7). The hospital treatment team declined to effectuate Dr. Hagen's prescription for a number of reasons:

- The FDA had not approved the use of ivermectin for the treatment of COVID-19, and has warned against its use as a treatment for COVID-19. (R. 45:7);
- The CDC had issued a health advisory warning against the use of ivermectin for the treatment of COVID-19. (R. 45:9);
- The AMA, the American Pharmacists Association, and the American Society of Health System Pharmacists had strongly opposed the ordering, prescribing, or dispensing of ivermectin to treat COVID-19 outside of a clinical trial. (R. 45:10);
- High doses of ivermectin, such as the proposed dose of 66 mg per day, can be dangerous to humans, causing hypotension, ataxia, seizures, coma, and death. (R. 45:11); and
- Providing ivermectin to Mr. Zingsheim given his then-current medical status would constitute a violation of the standard of care. (R. 45:12).

---

medical records, and without speaking to the individual's treating health care providers. (R. 11:2). The MEB determined that this conduct constituted "unprofessional conduct" under the Wisconsin Administrative Code. (R. 11:2). Dr. Hagen was able to avoid a more significant penalty from the MEB at the time, because he represented to the Board "that this was an isolated incident, and he will never write another prescription for anyone without having seen them in a clinic or hospital, completing an appropriate history and physical examination, developing an assessment, and completing a plan." (R. 11:2).

Mr. Gahl subsequently filed a "Complaint for Emergency Declaratory and Injunctive Relief" in Waukesha County Circuit Court on October 7, 2021, seeking to compel Mr. Zingsheim's treating providers at Aurora-Summit to immediately administer Dr. Hagen's ivermectin prescription of 66 mg per day to Mr. Zingsheim. (R. 2). The Petition was accompanied solely by an affidavit signed by Mr. Gahl, and was not supported with medical testimony from any physician or other health care provider.

Aurora filed a brief opposing Mr. Gahl's petition (R. 10), accompanied by signed and notarized affidavits from two physicians – Dr. James Holmberg, the Chief Medical Officer of Aurora-Summit, and Dr. David Letzer, an infectious disease specialist who was one of the physicians on Mr. Zingsheim's treatment team at Aurora-Summit. (R. 44, 45). Both physicians opined that the administration of ivermectin to Mr. Zingsheim would be contrary to the standard of care.

The Circuit Court conducted an initial hearing on October 12, 2021, at which Mr. Gahl appeared by a New York attorney named Ralph Lorigo, who presented no medical affidavits or testimony in support of Mr. Gahl's petition, relying instead upon media anecdotes and vague references to "studies" purporting to support the use of ivermectin as a treatment for COVID. (R. 85:5-31). The Circuit Court noted at the conclusion of the October 12th hearing that it had been provided by Mr. Gahl with no medical testimony in support of the Petition, and invited the parties to submit additional affidavits that afternoon. (R. 85:55-68).

Aurora subsequently filed a second affidavit from Dr. Holmberg, which detailed the treatment that was being provided to Mr. Zingsheim in the hospital. (R. 61). Gahl submitted a short affidavit from Dr. Hagen.

(R. 62). Hagen's affidavit stated "that the administration of ivermectin at the dosage indicated, gave the patient a realistic chance for improvement while presenting a low risk of side effects," but did not offer any opinion as to whether the administration of ivermectin to Mr. Zingsheim, given his then-present medical condition, was consistent with the standard of care. Nor did Dr. Hagen's affidavit offer any opinion to substantiate that the hospital's treatment protocol was not consistent with the standard of care. (R. 62). Dr. Hagen never disclosed his rationale for prescribing a dosage of 66 mg/day of ivermectin.

Gahl also submitted to the Court an unnotarized affidavit from a physician named Dr. Pierre Kory. (R. 50). Dr. Kory's affidavit attached a number of articles and other documents, but did not establish that the authors of any of those articles were, in fact, experts in their respective fields. (R. 50). Dr. Kory's affidavit also contained not a single mention of John Zingsheim, nor did it include any patient-specific information nor any opinions pertinent to Mr. Zingsheim's then-present medical condition. (R. 50). Dr. Hagen's affidavit contained no opinion to substantiate that the administration of ivermectin to Mr. Zingsheim was consistent with the standard of care in light of Mr. Zingsheim's then-existing medical condition. (R. 50).

In the late afternoon of October 12, 2021, Mr. Gahl's counsel submitted a proposed order to the Court for signature. (R. 66). That order contained the following pertinent language:

> NOW, upon the motion of Mr. Gahl, it is hereby
>
> ORDERED, that the Defendant show cause, at a term of the Circuit Court, before the honorable Lloyd V. Carter via Zoom … on the 12th day of October, 2021, at 1:30 p.m. or as soon

> thereafter as counsel can be heard, why this court should not issue an order as follows:
>
> A. Compelling the Respondent and/or their agents to comply with Dr. Hagen's order and prescription to administer ivermectin to their mutual patient, John Zingsheim and thereafter as ordered by Dr. Hagen; and
>
> B. Granting Mr. Gahl such other, further and different relief as this Court may deem just, equitable and proper; and it is further
>
> ORDERED, that pending further order of this Court, the Defendant, their agents, and assigns, and any third parties acting on its behalf, upon receipt of this Order to Show Cause and its supporting papers, shall immediately enforce Dr. Hagen's order and prescription to administer ivermectin to their mutual patient, Mr. Zingsheim, and thereafter as further ordered by Mr. Gahl.

(R. 66). The Circuit Court signed the Order on the evening of October 12, 2021, without issuing any further explanatory written order or decision, and without holding any further hearings that day. (R. 66).

Concerned that the Order, as signed, compelled the hospital to administer Dr. Hagen's ivermectin prescription thereafter "as further ordered by Mr. Gahl" (who was a non-physician layperson), counsel for Aurora notified the Circuit Court of Aurora's concerns that evening by letter. (R. 68). Aurora also filed, that same evening, a Petition for Leave to Appeal the trial court's order of that date, and a Motion for Relief Pending Appeal. (R. 69, 78).

The Circuit Court subsequently held a second hearing the following day, on October 13, 2021. (R. 86). Though Dr. Kory was present on Zoom for that hearing, Gahl's counsel did not elicit any

testimony from him on the record, and Dr. Kory never offered any testimony before the Circuit Court. (R. 86). Gahl's counsel presented no medical testimony at the hearing on October 13th. (R. 86).

At the conclusion of the hearing held on October 13th, the Circuit Court judge maintained his Order of the previous day compelling the administration of ivermectin to Mr. Zingsheim, but modified the earlier order somewhat; the modified order compelled the hospital to credential an outside physician of Mr. Gahl's choosing, for the specific purpose of allowing that outside physician to administer ivermectin to Mr. Zingsheim. (R. 86:30-36).

The Court's proposed modified order was put into writing, but before it could be signed by the Circuit Court, the Court of Appeals accepted Aurora's Petition for Leave to Appeal and stayed further proceedings in the Circuit Court. (R. 83; R. 84). The modified order was never signed by the Circuit Court, but the Court of Appeals invited the parties to brief any issues raised by the Court's unsigned modified order. (R. 84).

ARGUMENT

I. STANDARD OF REVIEW

A court may issue a temporary injunction when the moving party demonstrates four elements: 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 Sheriff's' Ass'n v. Milwaukee Cnty.*, 2016 WI App. 56, 370 Wis. 2d 644, 659, 883 N.W.2d 154. Injunctions, whether temporary or permanent, are not to be issued

lightly. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). The cause must be substantial. *Id.*

The grant or denial of injunctive relief is a matter of discretion for the Circuit Court. *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, supra, at 659. An erroneous exercise of discretion in the context of a temporary injunction occurs when the Circuit Court: 1) fails to consider and make a record of the factors relevant to its determination; 2) considers clearly irrelevant or improper factors; or 3) clearly gives too much weight to one factor. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, supra, at 370. An erroneous exercise of discretion may also be found where the Circuit Court made an error of law. *Id.*

II. PETITIONER GAHL DID NOT MEET HIS BURDEN TO PROVE EACH OF THE PREREQUISITES FOR INJUNCTIVE RELIEF BEFORE THE CIRCUIT COURT

A. The Record Does Not Support the "Irreparable Harm" Element Necessary for Injunctive Relief.

1. The only patient-specific medical opinions in the record that were issued by physicians having personal knowledge of Mr. Zingsheim's medical condition, and which address the appropriateness and safety of treating Mr. Zingsheim with ivermectin, were issued by Aurora physicians.

The record contains affidavits submitted by four physicians, comprising two affidavits submitted by Aurora-Summit's Chief Medical Officer, Dr. Holmberg (R. 45; R. 61); an affidavit by Dr. Letzer (R. 44); an affidavit submitted by Dr. Edward Hagen (R. 62); and an affidavit submitted by Dr. Pierre Kory (R. 50). Mr. Gahl also submitted two

affidavits, but there is no evidence in the record that he has any medical training or experience, so his affidavits cannot speak to the question of whether Mr. Zingsheim would be likely to experience "irreparable harm" if the Court did not compel the administration of ivermectin. The question of whether Mr. Zingsheim would likely experience "irreparable harm" in the absence of ivermectin is a matter that requires special learning or experience, and expert testimony is therefore required. *Cramer v. Theda Clark Memorial Hosp.*, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969).

As an initial matter, Dr. Kory's affidavit should not be considered because it is not notarized. (R. 50). Wisconsin statute § 887.01(1) states that "an … affidavit required or authorized by law … may be taken before any judge, court commissioner … (or) notary public … ; and, when certified by the officer to have been taken before him or her, may be read and used in any court and before any officer, board or commission." Signed but unnotarized affidavits merit no consideration. *Wis. Hosp. Ass'n v. Nat. Resources Bd.*, 156 Wis. 2d 688, 723, n.13, 457 N.W.2d 879 (Ct. App. 1990).

Of the four physicians who submitted affidavits before the Circuit Court, only two (Dr. Holmberg and Dr. Letzer) had access to Mr. Zingsheim's medical records and possessed personal knowledge of Mr. Zingsheim's course of treatment, and his then-existing medical condition (R. 44; R. 45). Dr. Hagen concedes that he knew nothing about Mr. Zingsheim beyond information that he received secondhand through Mr. Gahl and another of Mr. Zingsheim's relatives. (R. 62:1-2). Dr. Kory's unnotarized affidavit should be disregarded, but even if the affidavit were procedurally sufficient, it is entirely bereft of any reference to Mr.

Zingsheim, his medical history, his medical records, his hospital treatment history, or his then-existing medical condition. (R. 50).

Moreover, only Dr. Holmberg and Dr. Letzer offered opinions in their respective affidavits that are patient-specific, i.e., that speak to the efficacy and/or the dangers of ivermectin if administered to Mr. Zingsheim, specifically. For example, Dr. Holmberg opined in his initial affidavit:

- The hospital treatment team believed that ivermectin is not an appropriate treatment for Zingsheim's medical condition. (R. 45:12);
- The use of ivermectin in the treatment of John Zingsheim's COVID-19 symptoms would not meet the standard of care. (R. 45:19); and
- John Zingsheim was more likely to experience a negative outcome from the administration of ivermectin, including but not limited to, heart damage, stroke, liver damage and kidney damage as a result of the use of ivermectin, than he would be if the hospital's treatment plan were followed. (R. 45:20).

Dr. Holmberg also submitted a second affidavit to explain and update the care and the treatment plan for Mr. Zingsheim. (R. 61). In that affidavit, Dr. Holmberg stated that it was his medical opinion that ivermectin would have no beneficial effect to Mr. Zingsheim, given his then-existing medical condition. (R. 61:17).

Dr. Letzer, an infectious disease specialist who was part of Mr. Zingsheim's hospital treatment team, opined in his affidavit:

- John Zingsheim's treatment team believed that ivermectin would not be an appropriate treatment for him in light of his then-existing medical condition. (R. 44:11);

- The treatment team was distressed over the lasting physical consequences that it believed would result from the administration of ivermectin to John Zingsheim given his then-existing medical condition. (R. 44:14); and
- The use of ivermectin in the treatment of John Zingsheim's COVID-19 symptoms as of October 11, 2021 would not meet the standard of care. (R. 44:16).

Dr. Hagen's affidavit states simply that "the administration of ivermectin at the dosage indicated, gave the patient a realistic chance for improvement while presenting a low risk of side effects." (R. 62:3). His affidavit, however, does not justify the 66 mg dose of ivermectin that he had prescribed for Mr. Zingsheim, nor explain why that dosage (which was described as "inappropriately high" by Dr. Holmberg and Dr. Letzer in their respective affidavits), was required for this specific patient. Dr. Hagen offers nothing in his affidavit to support a contention that this medication, at this dosage, for this specific patient, was a treatment that met the standard of care. Dr. Hagen's affidavit fails to offer any opinion as to what Dr. Hagen would expect to occur in Mr. Zingsheim's case, given his then-existing medical condition, if ivermectin were not administered. (R. 62).

Dr. Kory's proposed affidavit is procedurally insufficient and should therefore not be considered. Even if it were to be considered, however, it is equally bereft of any medical opinion related specifically to Mr. Zingsheim and his unique medical situation as of October 13, 2021. Dr. Kory's affidavit provides absolutely no guidance as to the potential efficacy of ivermectin or the dangers thereof when administered to this particular patient – Mr. Zingsheim – given his unique medical needs and his then-existing medical condition. Dr. Kory's affidavit does not mention Mr. Zingsheim at all.

2. Lacking expert testimony to support the efficacy of ivermectin in treating Mr. Zingsheim from any physician having personal knowledge of Mr. Zingsheim's then-existing medical condition, the record does not establish a likelihood of "irreparable harm."

The Circuit Court made no findings, in writing or otherwise, as to the "irreparable harm" element necessary for a grant of injunctive relief. The circuit court recognized the elements that Mr. Gahl was required to prove in order to state a viable claim for injunctive relief (R. 85; 54), but never explained if, or how, the court had arrived at a conclusion that Mr. Gahl had established a "likelihood of irreparable harm." Nor did the Circuit Court explain what factors it considered in support of any such conclusion. This failure, alone, constitutes an erroneous exercise of discretion. *See School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d at 370 ("An erroneous exercise of discretion in the context of a temporary injunction occurs when the circuit court: 1) fails to consider and make a record of the factors relevant to its determination …").

The Circuit Court also failed to consider the information presented by counsel for Aurora during the hearing of October 13, 2021, that Mr. Zingsheim had tested negative for COVID-19 that very morning. (R. 86:9-10). Gahl's Petition had asserted that ivermectin was necessary for the treatment of COVID. Despite receiving information at the October 13th hearing that Mr. Zingsheim was COVID-negative as of that date, the Circuit Court, without explanation, maintained its prior ruling requiring the administration of ivermectin to Mr. Zingsheim. The Circuit Court made no record as to how this new information did or did

not affect the Court's decision to compel the administration of ivermectin to Mr. Zingsheim.

A circuit court also erroneously exercises its discretion in the context of a temporary injunction when the court considers improper factors. *School Dist. of Slinger*, supra, at 370. To the extent that the Circuit Court concluded that Mr. Zingsheim was likely to experience "irreparable harm," based upon the affidavits submitted by Dr. Hagen and Dr. Kory, the Court abused its discretion. Even if the Circuit Court had made the required record on the "irreparable harm" element, there is insufficient medical testimony in the record to support a conclusion that Mr. Zingsheim, given his then-existing medical condition, was likely to experience "irreparable harm" if not administered 66 mg of ivermectin per day for a period of five days, as prescribed by Dr. Hagen. There is no medical testimony in the record to justify this specific dose of this medication for this patient. Nor is there any medical testimony in the record establishing the likelihood that Mr. Zingsheim would suffer "irreparable harm" if 66 mg of ivermectin per day were not administered to him.

The Circuit Court abused its discretion in granting injunctive relief to Mr. Gahl in the absence of an adequate record, and in the absence of proof to support the "irreparable injury" requirement for a grant of injunctive relief.

B. The Injunctive Relief Ordered by the Circuit Court was Not Necessary in Order to "Preserve the Status Quo," Nor Did It.

A temporary injunction may only be issued if it would be necessary to preserve the status quo. *Milwaukee Deputy Sheriffs' Ass'n v.*

Milwaukee Cnty., supra, 370 Wis. 2d 644, at 659. The Circuit Court recognized that this was a necessary factor for injunctive relief. (R. 85:54), but did not make a record as to how or why injunctive relief was necessary in Mr. Zingsheim's case in order to maintain the status quo. Nor did the Circuit Court make a record of the factors that it considered in support of any such determination. This, in itself, constitutes an abuse of discretion. *See School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, supra, 210 Wis. 2d, at 370.

The function of a temporary injunction is to maintain the status quo, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought. *Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964). "[I]njunctions are not to be issued lightly, but only when necessary to preserve the status quo of the parties and where there is irreparable injury." *Pure Milk Products Cooperative v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974). This is particularly true for "mandatory injunctions," which seek to "compel the performance of some affirmative action." *Carpenter Baking Co. v. Bakery Sales Drivers Local Union*, 237 Wis. 24, 31, 296 N.W. 118 (1941). The power to issue mandatory injunctions should be sparingly used. *Gimbel Bros., Inc. v. Milwaukee Boston Store*, 161 Wis. 2d 489, 496, 154 N.W. 998 (1915).

Both of the Circuit Court Orders granting injunctive relief to Mr. Gahl not only failed to preserve the status quo, but actually changed the status quo. The "status quo" at the time of the filing of Mr. Gahl's Petition had Mr. Zingsheim receiving 24-hour care in the ICU at Aurora-Summit, overseen by an extensive team of specialists, who were rendering treatment according to hospital protocol and consistent with a

treatment plan devised by Mr. Zingsheim's treatment team based upon his unique medical needs, comorbidities, medications and then-existing medical condition. This treatment plan did not include the administration of ivermectin. (R. 61). Mr. Gahl's Petition for Injunctive Relief sought an order compelling the treatment team to effectuate Dr. Hagen's ivermectin prescription at a dose of 66 mg per day for a period of five days. (R. 2).

The Circuit Court's initial order of October 12, 2021 effectively "compelled the doing of an act which constituted all or part of the ultimate relief sought" – i.e., it required the hospital treatment team to do exactly what Mr. Gahl had demanded in his Petition – to administer ivermectin to Mr. Zingsheim at the dosage prescribed by Dr. Hagen. (R. 66). The Circuit Court's initial Order for Injunctive Relief effectively modified the "status quo," such that Mr. Zingsheim was no longer to receive care consistent with the existing treatment plan devised by his team of physicians at Aurora-Summit in accordance with his unique medical needs, but was instead to receive treatment prescribed by an outside physician – Dr. Hagen – a retired OB/GYN who had never treated Mr. Zingsheim.

The Circuit Court's subsequent modified order of October 14, 2021, likewise changed the status quo. (R. 83). Whereas prior to the Circuit Court's intervention, Mr. Zingsheim was receiving round-the-clock hospital care rendered by a team of specialist physicians, each of whom had been duly approved for hospital privileges by Aurora-Summit's governing body, the Circuit Court's modified order required that Mr. Zingsheim's care would thenceforth be provided in significant part by a previously-uninvolved outside physician, chosen by Mr. Zingsheim's

nephew on the sole criteria that the physician simply had to be willing to administer ivermectin, sight unseen, to Mr. Zingsheim.

Both of the Circuit Court's orders not only failed to "preserve the status quo" that existed at the time of Mr. Gahl's Petition for Injunctive Relief, but each actually improperly modified the status quo. Each of the Circuit Court orders also had the effect of "compelling the doing of acts which constituted all or part of the ultimate relief sought." This is not the function of a temporary injunction. *Codept, Inc. v. More-Way North Corp.*, supra, 23 Wis. 2d at 173.

The Circuit Court abused its discretion in granting injunctive relief to Mr. Gahl in the absence of evidence to support that such relief was necessary in order to preserve the status quo.

C. The Circuit Court Abused its Discretion in Granting Injunctive Relief where the Record Did Not Support that Petitioner Gahl Demonstrated a "Reasonable Probability of Success" on the Merits.

The Circuit Court recognized that one of the necessary elements required for injunctive relief was that Gahl's Petition had a "reasonable probability of success on the merits." (R. 85:54). The Court, however, did not explain in writing or otherwise, how Mr. Gahl had established this element, nor did the Court identify what, if any, facts it had considered in addressing this requirement for injunctive relief.

Petitioner Gahl now, as before the Court of Appeals, proffers three ostensible bases that he contends would support a "reasonable probability of success on the merits": 1) § 155.30 Wis. Stats., the Wisconsin Health Care Power of Attorney statute; 2) breach of implied contract; and 3) the "inherent authority" of a circuit court.

None of these arguments establishes that petitioner Gahl had a "reasonable probability of success on the merits," and the Circuit Court abused its discretion by granting injunctive relief in the absence of such a determination.

1. A temporary injunction may not issue in the absence of a "reasonable probability of ultimate success on the merits."

A temporary injunction is not to be issued unless the moving party has shown a reasonable probability of ultimate success on the merits. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, supra, 210 Wis. 2d at 374. Whether there is a chance of success on the merits in part turns on whether the moving party has stated a claim entitling it to relief. *Id.* If it appears that the party seeking injunctive relief is not entitled to a permanent injunction for failure to state a cognizable claim, a trial court misuses its discretion by giving the same relief temporarily. *Id.*

In order to demonstrate a reasonable probability of success on the merits, Gahl's Petition must have stated at least one viable legal claim, or protectable legal right, that would entitle him to judgment in the litigation. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, supra, 210 Wis. 2d at 374. As the Court of Appeals recognized, however, the "rights" upon which Mr. Gahl sought declaratory relief are difficult to identify and not well-developed. The Circuit Court never addressed any legal theory proffered by Mr. Gahl in any written order, nor at either the October 12th or October 13th hearings. (R. 85; R. 86). Because the Circuit Court failed to identify a viable legal claim or set forth reasoned analysis as to how Mr. Gahl had established a reasonable

probability of success on the merits, the Circuit Court abused its discretion by granting injunctive relief.

2. No court has recognized a patient's general "right" to receive specific medical care on demand.

There is no authority that would give hospital patients a legal right to demand a specific treatment against the medical judgment of their providers. For example, a condition of participation in Medicare is that hospitals "protect and promote" certain patient rights. 42 CFR § 482.13. This includes "the (patients) right to participate in the development and implementation of his or her plan of care" and "to make informed decisions regarding his or her care." *Id.* § 482.13(b)(1)-(2). That regulation, however, expressly provides that "this right must not be construed as a mechanism to demand the provision of treatment or services deemed medically unnecessary or inappropriate." *Id.* § 482.13(b)(2).

Petitioner Gahl has cited not a single case in which any court has determined that a patient like Mr. Zingsheim has a fundamental right to receive specific medical treatment upon demand. This dearth of authority is easily explained, as none exists. No court has recognized a fundamental right of a patient to receive specific medical treatment simply at the patient's request:

> No court has recognized a fundamental right to receive specific treatment from a specific provider at a specific facility. To the contrary, it appears that every court to consider the issue has rejected the argument that access to a specific treatment or a specific provider – let alone at a specific facility – is a fundamental right protected by the Constitution.

Birchansky v. Clabaugh, 2018 U.S. Dist. LEXIS 231419 at 56 (S.D. Iowa Oct. 17, 2018).

> … An individual has a fundamental right to obtain and reject medical treatment … but, this right does not extend to give a patient a fundamental right to use any drug, regardless of its legality. No court has acceded to this type of affirmative access claim, and plaintiffs cite to none ….

Mont. Cannabis Indus. Ass'n v. State, 286 P.3d 1161, 1166 (Mont. 2012).

> Other courts considering patient requests for treatments that fall outside the standard of care have concluded the patient does not have a right to obtain the medication of her choice. "Most federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider." Even the terminally ill do not have a constitutional right to procure and use experimental drugs. …

DeMarco v. Christiana Care Health Servs., 263 A.3d 423, 436-37 (D.E. 2021).

In Wisconsin, the District IV Court of Appeals has found that physicians have no obligation, deriving from a patient's fundamental constitutional rights, to begin or continue medical treatment. *Disability Rights Wis. v. Univ. of Wis. Hosp. & Clinics,* 2015 WI App. 13, 359 Wis. 2d 675, 859 N.W.2d 628.[2]

Not only have numerous courts concluded that a patient like Mr. Zingsheim does not have a fundamental right to receive specific medical treatment on demand, but the United States Supreme Court has

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

explicitly cautioned against an expansion of due process protections so as to establish such a right:

> … We "have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field" lest the liberty protected by the due process clause be subtly transformed into the policy preferences of the members of this court.

Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258 (1997). As the United States Court of Appeals for the D.C. circuit has aptly noted:

> … arguments about morality, quality of life, and acceptable levels of medical risk are certainly ones that can be aired in the democratic branches, without injecting the courts into unknown questions of science and medicine. Our nation's history and traditions have consistently demonstrated that the democratic branches are better suited to decide the proper balance between the uncertain risks and benefits of medical technology, and are entitled to deference in doing so.…

Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 713 (D.C. Circuit, 2007).

3. Petitioner Gahl has identified no competent legal basis to support a circuit court's authority to compel a licensed health care provider to provide specific medical treatment on demand.

Petitioner Gahl has cited no Wisconsin authority that would provide a legal basis conferring upon a circuit court the authority to compel an independently licensed health care provider to render a specific medical treatment upon demand. Before the Circuit Court, Gahl relied almost exclusively upon anecdotal references to media accounts and vague references to "studies" on ivermectin, as presented to the Court by Gahl's attorney, Ralph Lorigo. (R. 2; R. 85).

Before the Court of Appeals, and again before this Court, Gahl attempts to fashion three ostensible "legal bases" that he contends would support a conclusion that his Petition for Injunctive Relief had a reasonable probability of success on the merits. Each argument fails.

a. Neither § 155.30(1) Wis. Stats. nor petitioner Gahl's actual Health Care Power of Attorney document confers the authority to compel specific medical treatment from independently licensed health care providers on demand.

Petitioner Gahl contends that the "plain meaning" of § 155.30(1) Wis. Stats. establishes that "any patient in the state of Wisconsin has a right to receive necessary medical treatment that they request." Petitioner's brief at p. 19. As the Court of Appeals accurately noted, however, § 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. Gahl's interpretation of § 155.30(1) reads far too much into the language of a statute that is intended primarily to perform an informative and instructional function. When interpreting a statute, the "plain meaning" of the statutory language must be interpreted "in the context in which it is used; not in

isolation but as part of a whole." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110.

Moreover, Wisconsin courts have recognized that Powers of Attorney are to be strictly construed and interpreted to grant only those powers that are clearly delineated or specified. *Schmitz v. Firstar Bank Milwaukee*, 2003 WI 21, ¶ 28, 260 Wis. 2d 24, 36, 658 N.W.2d 442. § 155.01(5) Wis. Stats. provides that a "health care decision" is an "informed decision in the exercise of the right to accept, maintain, discontinue or refuse health care." Nothing in the plain language of § 155.30(1) or § 155.01(5) requires a health care provider to act upon a demand from a Health Care Power of Attorney for specific treatment that is inconsistent with a patient's plan of treatment or that is below the standard of care. Moreover, Gahl's proposed reading of § 155.30(1) Wis. Stats. violates the general rule that Powers of Attorney are to be strictly construed and interpreted to grant only those powers that are clearly delineated and specified. *See Schmitz*, supra, at ¶ 28.

Section 155.30(1) Wis. Stats. also contains specific limiting language, which Gahl's proposed reading of the statute overlooks. The first paragraph of § 155.30(1) Wis. Stats. provides:

> (1) A printed form of a Power of Attorney for Health Care instrument that is sold or otherwise distributed for use by an individual in this state who does not have the advice of legal counsel *shall provide no authority other than the authority to make health care decisions on behalf of the principal* and shall contain the following statement in not less than 10-point boldface type:
>
> …

§ 155.30(1) Wis. Stats. (emphasis added).

This language unambiguously limits the authority accorded to a Health Care Power of Attorney. Gahl's proposed reading of the statute would have it go far beyond merely providing the authority to make health care decisions on behalf of the principal. Instead, Gahl's interpretation of § 155.30(1) Wis. Stats. would imbue a Health Care Power of Attorney with an expansive power that is wholly unsupported by the law of any state – namely, the authority to request and receive specific medical treatment upon demand. As noted, supra, no court has recognized such a right.

Moreover, the language of the actual document that made Allen Gahl the Health Care Power of Attorney for John Zingsheim specifically confers only limited authority upon Gahl. That document designates Allen Gahl as John Zingsheim's Health Care Power of Attorney for the sole purpose of "making health care decisions on my behalf." (R. 23). That document further limits the definition of the term "health care decisions" to include only "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." (R. 23). Nowhere within the document that designates Allen Gahl as the Power of Attorney for John Zingsheim does it confer upon Gahl the authority to demand and receive a specific course of medical treatment for Mr. Zingsheim.

Section 155.30(1) Wis. Stats. does not confer upon a Health Care Power of Attorney in Wisconsin the expansive authority that Gahl advocates. Consequently, Gahl's reliance upon § 155.30(1) Wis. Stats. to establish that his Petition for Injunctive Relief had a reasonable probability of success on the merits is misplaced.

b. The record does not support the existence of an implied contract that would confer upon petitioner Gahl the right to obtain a specific course of medical treatment for his uncle upon demand.

Petitioner Gahl suggests that there existed an "implied contract" between Aurora-Summit and John Zingsheim which can serve as a basis to compel the hospital to render a specific course of medical treatment to Mr. Zingsheim upon demand. Gahl cites to a single case, *Fischer v. Fischer*, 31 Wis. 2d 293, 142 N.W.2d 857 (1966), for the ostensible proposition that "implied contracts can arise from the care that a doctor gives to an unconscious patient." Petitioner brief, p. 33. The *Fischer* case, however, is of no aid to Gahl. *Fischer* involved a discussion of an "implied contract" between a physician and a patient, but solely as relates to payment for medical services rendered:

> … The general rule is that, when a physician renders necessary medical services to an unconscious person or to a person who is unable to expressly contract, there arises an implied contract between the physician and the injured party *for the payment of what the services are reasonably worth*.…

Fischer v. Fischer, 31 Wis. 2d at 308-09. Nothing in the *Fischer* case stands for the proposition that an "implied contract" theory may be relied upon to compel an independently licensed health care provider to render a specific course of medical treatment upon demand.

Gahl cites no authority beyond the Fischer case in support of his "implied contract" theory. This is unsurprising, as Gahl's theory finds

no support under Wisconsin law. An implied contract necessarily requires a mutual intent to contract, i.e., a "meeting of the minds":

> … A contract implied in fact may arise from an agreement circumstantially proved, but even an implied contract must arise under circumstances which show a mutual intention to contract. The minds of the parties must meet on the same thing.…

Kramer v. Hayward, 57 Wis. 2d 302, 306-07, 203 N.W.2d 871 (1973). *See also, Gerovac v. Hribar Trucking, Inc.*, 43 Wis. 2d 328, 332, 168 N.W.2d 863 (1969) ("… Even an implied contract must be one which arises under circumstances which … show a mutual intention to contract.").

There was no mutual intent to contract, nor any "meeting of the minds" between Zingsheim and the Aurora-Summit treatment team to render <u>any</u> medical treatment that was outside of the treatment plan devised by Mr. Zingsheim's team of specialists, including ivermectin. The record is clear that, from the first time that Mr. Gahl demanded that the hospital administer ivermectin to his uncle, the hospital took the consistent position that ivermectin lay outside of Mr. Zingsheim's treatment plan; that it would not be helpful to him given his then-existing medical condition; and that the administration of ivermectin to Mr. Zingsheim would be contrary to the standard of care.

There is nothing in the record to support the existence of any "meeting of the minds" between either Mr. Zingsheim or Mr. Gahl and the treatment staff at Aurora-Summit as to the administration of a treatment, like ivermectin, that fell outside of Mr. Zingsheim's treatment plan. Without such, there can be no implied contract as a matter of law.

Gahl also advances a perfunctory argument based upon an amorphous alleged duty on the part of the hospital to "act in good faith" and to "deal fairly" with Mr. Zingsheim, but Gahl does not develop this argument, and cites no legal authority in support thereof. Arguments advanced without reference to legal authority, and issues that are inadequately briefed, should not be considered. *State v. Pettit,* 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Finally, Gahl argues that the Hippocratic oath constitutes a basis for some sort of "implied contract" between Mr. Zingsheim and his treatment team, commanding the administration of a medical treatment (i.e., ivermectin) that fell outside of Mr. Zingsheim's treatment plan. Gahl cites no case in which the Hippocratic oath has ever been cited or relied upon as the basis for an implied contract between a health care provider and a patient. Gahl does not cite to any written version of the Hippocratic oath, nor does he point to any authority that would suggest that the Hippocratic oath is a necessary requirement for a physician in order to graduate from medical school, or to be licensed to practice medicine in the state of Wisconsin. Gahl does not cite to any evidence in the record to suggest that any of the physicians comprising Mr. Zingsheim's treatment team at Aurora-Summit even took the Hippocratic oath, or that the "oath" contains a requirement to "do no harm."

Gahl's "implied contract" argument based upon the Hippocratic oath occupies a single paragraph in his brief, and is supported by no legal authority. This argument is insufficient to establish that his Petition for Injunctive Relief had a reasonable probability of success on the merits.

c. A circuit court's "inherent authority" under Wisconsin law is not broad enough to confer upon a circuit court the authority to compel an independent health care provider to render specific medical treatment upon demand.

Petitioner Gahl argues that a circuit court has the "inherent authority" to compel an independently licensed health care provider to administer a specific requested medical treatment on demand, because that "authority" is necessary "to provide for justice." Petitioner's brief, p. 28. Gahl does not, however, bother to address the tenets of Wisconsin law that govern and limit the exercise of a court's "inherent authority."

It is beyond dispute that circuit courts have "inherent, implied and incidental powers." *State v. Henley*, 2010 WI 97, 328 Wis. 2d 444, 577, 787 N.W.2d 350. These "inherent powers" are those that are necessary to enable courts to accomplish their constitutionally and legislatively mandated functions. *Id.*

Wisconsin courts have generally exercised inherent authority in three specific 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.* A court, therefore, is understood to retain inherent powers only when those powers are needed to maintain the courts' dignity, transact their business, or accomplish the purposes of their existence. *Id.* A power is "inherent" when it "is one without which a court cannot properly function." *Id.*

The inherent authority of the court derives from the doctrine of separation of powers, and allows the judiciary to preserve its role as a coequal branch of the government. *State v. Schwind*, 2019 WI 48, 386 Wis. 2d 526, 537, 926 N.W.2d 742. The Wisconsin Constitution creates

three separate coordinate branches of government, with no branch subordinate to the other. *Id.* No branch is to arrogate to itself control over the others except as is provided specifically by the Constitution. *Id.* Moreover, no branch is to exercise the power committed by the Constitution to another branch. *Id.* Defining the inherent authority of courts either too narrowly or too broadly has the potential do harm to the separation of powers among the branches of government. *Id.*

If the "inherent authority" of the courts is defined too broadly, the courts risk infringing upon the authority of the legislative and executive branches by replacing the policy preferences of those branches with those of the courts. *State v. Schwind*, supra, 386 Wis. 2d at 537-38. In recognition of the need for caution in defining the "inherent powers" of the courts too broadly, courts must be careful to invoke inherent authority if, and only if, such invocation is necessary to maintain the courts' dignity, transact their business, and accomplish the purposes of their existence. *State v. Schwind*, supra, 386 Wis. 2d at 538. This Court has recognized that the judiciary's "inherent authority" must be narrowly construed. *State v. Schwind*, supra, 386 Wis. 2d at 547.

Nothing in this case involves a court's inherent powers. Petitioner Gahl cites no authority to the contrary. In fact, the only case cited by Gahl in support of his "inherent authority" argument, *State v. Schwind*, supra, actually runs contrary to Gahl's position. In *Schwind*, the petitioner's motion for early termination of probation was denied, and the Supreme Court upheld that denial as proper, on the basis that Wisconsin courts do not have the inherent authority to reduce or terminate a period of probation. In so holding, this Court explained:

> … reducing a term of probation does not fit within any of the three areas in which courts have traditionally exercised inherent authority. Regarding the first area, reducing or terminating a period of probation does not guard against any action that would impair the efficacy of the court system.… Second, the power to reduce a probation term is not related to regulating the bench and bar.
>
> Third, the power to reduce probation terms is not necessary to ensure "the efficient and effective functioning of the court," or "to fairly administer justice.…"

State v. Schwind, supra, at 544-45.

The same conclusion must obtain here. The power to compel a health care provider to administer a specific course of medical treatment upon the demand of a patient does not involve a court's "internal operations." Nor is the power to compel a health care provider to render a specific course of medical treatment upon demand related to the regulation of the bench and bar. Finally, the power to compel a health care provider to render a specific course of medical treatment upon demand is not necessary to ensure the efficient and effective functioning of the courts, or to "fairly administer justice." As this Court has stated, "the fair administration of justice is not a license for courts, unconstrained by express statutory authority, to do whatever they think is "fair" at any given point in time. *State v. Schwind*, supra, at 546.

Petitioner Gahl's "inherent authority" argument does not support a conclusion that his Petition for Injunctive Relief had a reasonable probability of success before the Circuit Court.

III. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT ISSUED AN ORDER COMPELLING A HOSPITAL TO PERMIT AN UNCREDENTIALED PHYSICIAN TO RENDER MEDICAL TREATMENT TO A PATIENT IN THE HOSPITAL THAT WAS NOT CONSISTENT WITH THE PATIENT'S TREATMENT PLAN

The Circuit Court's initial order of October 12, 2021 compelled Aurora-Summit to administer a medical treatment –ivermectin – to patient John Zingsheim under the prescription of an uncredentialed physician, Dr. Edward Hagen. (R. 66). The Court's subsequent proposed amended order, issued orally the following day, modified the original order, but still required that Aurora-Summit, rather than administering the unapproved medication through its own staff, credential an outside physician (of petitioner Gahl's choosing), for the sole purpose of administering ivermectin to Mr. Zingsheim. (R. 83). This second order, like the first, also constituted an abuse of discretion.

A. The Only Patient-Specific Medical Opinions in the Record that were Issued by a Physician Having Personal Knowledge Relative to John Zingsheim, and Addressed to the Appropriateness and Safety of the Administration of Ivermectin to Mr. Zingsheim, were Issued by Aurora Physicians.

The Circuit Court did not set forth, either in written form or orally during the October 13, 2021 hearing, any rationale for the Court's decision to maintain its order compelling the administration of ivermectin, while modifying the manner in which the medication was to be administered. (R. 86). This, alone, constituted an abuse of discretion. *See School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d at 370 ("An erroneous exercise of discretion in the context of

a temporary injunction occurs when the circuit court: 1) fails to consider and make a record of the factors relevant to its determination; …").

To the extent that the Circuit Court's modified order was based upon any opinions submitted by the two physicians who contributed affidavits on Mr. Gahl's behalf before the Circuit Court, such reliance would be subject to the same infirmities as identified previously herein. Dr. Kory's affidavit is unnotarized, and should not have been considered in the first instance. *See* § 887.01(1) Wis. Stats.; *see also, Wis. Hosp. Ass'n v. Nat. Resources Bd.*, 156 Wis. 2d 688, 723 n.13, 457 N.W.2d 879 (Ct. App. 1990). Moreover, only Dr. Holmberg and Dr. Letzer provided any patient-specific medical opinions addressed to the potential efficacy, the potential dangers, and the standard of care governing the administration of ivermectin to Mr. Zingsheim, given his then-existing medical condition. Both the affidavits of Dr. Hagen and Dr. Kory make it clear that neither of those physicians had any firsthand knowledge (or in the case of Dr. Kory – any knowledge <u>at all</u>) relative to Mr. Zingsheim's medical history, treatment history within the hospital, then-current medications, or then-current medical status.

Lacking any patient-specific expert testimony on the efficacy versus the dangers of ivermectin from any physician who had personal knowledge of Mr. Zingsheim's medical records, history, and then-existing medical condition, the Circuit Court abused its discretion to the extent that it based its decision to issue its modified order of October 13, 2021 upon the affidavits submitted by Dr. Hagen and Dr. Kory. A trial court erroneously exercises its discretion in the context of a temporary injunction when the court considers improper factors. *School Dist. of Slinger*, supra, at 370.

B. Courts have Traditionally Refrained from Involving Themselves in Hospital Credentialing Issues.

As a hospital, Aurora Medical Center-Summit is regulated by governmental authorities such as the Centers for Medicare and Medicaid Services (CMS). Under 42 CFR 482.12, hospitals are required to have a governing body, which is then charged with credentialing and appointing physicians to the medical staff of the hospital. Criteria for selection to the hospital medical staff includes "individual character, competence, training, experience, and judgment." 42 CFR 482.12(a)(6).

In addition to federal requirements, the Wisconsin Supreme Court has recognized that hospitals in Wisconsin owe a duty to their patients to exercise reasonable care in the selection of medical staff, and in granting specialized privileges. *Johnson v. Misericordia Cmty. Hosp.*, 99 Wis. 2d 708, 744, 301 N.W.2d 156 (1981).

Courts have traditionally been loath to interpose upon the authority and the judgment of a hospital's decisions governing the appointment of medical staff. For example, the United States Court of Appeals for the Fifth Circuit has stated:

> … No court should substitute its evaluation of such matters for that of the hospital board. It is the board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The board has chosen to rely on the advice of its medical staff, and the court cannot surrogate for the staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to

> limited judicial surveillance. The court is charged with a narrow responsibility of assuring that the qualifications imposed by the board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of caduceus.

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

Hospitals are charged by law in Wisconsin with the responsibility for credentialing decisions, and can be held accountable for any alleged failures or deficiencies in such decisions. *See Johnson v. Misericordia*, supra. Though the amended order issued orally by the Circuit Court on October 13, 2021 purported to permit Aurora-Summit to apply its credentialing procedures to any physician chosen by Mr. Gahl before conferring hospital privileges, the order still required the hospital to credential a physician with no connection to Mr. Zingsheim beyond a blind willingness to administer ivermectin to him, sight unseen, at the request of Mr. Gahl. This would be true no matter who Mr. Gahl was able to locate as a prescribing physician. Mr. Gahl never identified any treating physician who actually had an existing physician-patient relationship with Mr. Zingsheim, and who was also willing to administer ivermectin. The only physician that Gahl had been able to locate for this purpose prior to October 13, 2021 was Dr. Hagen, a retired OB/GYN from northern Wisconsin who had never before treated nor even met Mr. Zingsheim, and who knew nothing about Mr. Zingsheim beyond a second-hand medical history that he received from Mr. Gahl. In forcing

Aurora-Summit to credential an outside physician who was willing to administer ivermectin, sight unseen, to Mr. Zingsheim in the absence of an existing physician-patient relationship, the Circuit Court was effectively ordering the hospital to permit "unprofessional conduct" to occur on its premises.[3]

Though not binding upon this Court, a case very recently decided by a Pennsylvania Appellate Court, *Shoemaker v. UPMC Pinnacle Hosps.*, 2022 Pa. Super. LEXIS 398; 2022 Pa. Super. 163, is instructive on this issue, given the remarkable factual similarities between that case and the instant case involving petitioner Gahl. The Shoemaker case, decided by the Superior Court of Pennsylvania on September 22, 2022, involved a hospital's appeal from an order issued by a lower Pennsylvania court which had granted a motion for a preliminary injunction filed by appellee Judith Shoemaker. The order appealed from had directed the defendant hospital to allow two uncredentialed physicians to administer ivermectin to hospital patient Glenn Cauffman. Plaintiff Shoemaker was the Power of Attorney for Mr. Cauffman. Shoemaker's attorney in that case was Ralph Lorigo, the same New York attorney who represented Mr. Gahl in the present case. One of the experts for Shoemaker in that case was Dr. Kory – again, as in Mr. Gahl's case. The issue identified by the Superior Court in the Shoemaker case was whether the trial court had erred in entering an injunction

[3] The Wisconsin Medical Examining Board has concluded that a physician's prescription of medication to a non-patient in the absence of a physical examination of that patient constituted "unprofessional conduct," and the Board had previously sanctioned Dr. Hagen for doing just that. (R. 11). Moreover, Ch. MED 10.03(2)(c) of the WI Administrative Code provides that it is "unprofessional conduct" to administer prescription medication in a manner that is inconsistent with the standard of minimal competence.

compelling a hospital to permit an uncredentialed physician to administer substandard care. *Shoemaker*, supra, at p. 15.

The arguments advanced by Shoemaker were in many respects identical to those advanced by Mr. Gahl here – down to her theory involving an "implied contract," and her argument invoking the Hippocratic oath. The Pennsylvania Superior Court ultimately determined that the lower court had improperly interfered with the defendant hospital's credentialing procedures when it granted injunctive relief ordering the hospital to permit otherwise uncredentialed physicians to administer ivermectin to the hospital's patient:

> Given the importance of the credentialing process, the trial court improperly interfered with the hospital's discretion to select, retain, and supervise the physicians who practice on its premises when it ordered the hospital to allow uncredentialed physicians to administer ivermectin within the hospital's ICU. Hospitals, not courts, have the resources and authority to determine whether a physician has the appropriate medical training, experience, and personal fitness to be eligible for medical staff privileges, especially within an intensive care unit.
>
> Consequently, there is no support for the trial court's conclusion that injunctive relief was appropriate when Ms. Shoemaker did not have the legal right to either force the hospital to administer ivermectin against the advice of his treating physicians and UPMC's treatment protocol or to demand that UPMC grant ICU privileges to unvetted physicians in order to administer this treatment on the premises.

Shoemaker, supra, at 25-26.

The Circuit Court's amended proposed order here, which required that Aurora-Summit credential an outside physician of Mr. Gahl's choosing to provide care to Mr. Zingsheim that was contrary to the hospital's treatment plan, effectively usurped the hospital's right and obligation to supervise and credential its staff. The proposed modified order filed in the Circuit Court on October 14th necessarily interfered with the hospital's ability to fulfill its duties under state and federal law to properly credential and supervise its medical and nursing staff.

C. Petitioner Gahl identifies no authority purporting to confer upon a circuit court the power to compel a hospital to permit an uncredentialed physician to render medical treatment to the hospital's patient that falls outside of the patient's hospital treatment plan.

In his brief to this Court, petitioner Gahl does not point to any case or statute that would support a circuit court's authority to usurp a hospital's legal right and obligation to select and supervise its own medical staff by issuing an order compelling the hospital to credential an outside physician for the specific purpose of rendering care to the hospital's patient that falls outside of the hospital's treatment plan.

The Circuit Court did not cite to any authority nor identify the legal basis upon which it ostensibly premised its proposed amended order of October 14, 2021. It was an abuse of the Circuit Court's discretion, therefore, to issue an order compelling the hospital to credential an outside physician chosen by Mr. Gahl, for the express purpose of permitting that physician to render medical treatment to Mr. Zingsheim that fell outside of the patient's treatment plan, in the absence of a properly-documented legal basis justifying such an order.

IV. THE OVERWHELMING WEIGHT OF AUTHORITY EMANATING FROM COURTS OUTSIDE OF WISCONSIN THAT HAVE CONSIDERED THE ISSUES PRESENTED BY THIS CASE SUPPORTS THE CONCLUSION REACHED BY THE WISCONSIN COURT OF APPEALS IN THIS CASE.

Petitioner Gahl has not cited any cases emanating from inside or outside of Wisconsin in which an order for injunctive relief compelling a hospital or its staff to render specific medical treatment upon demand was upheld by any appellate court over the objection of the hospital's staff. On the opposite side of the ledger, however, numerous courts outside of Wisconsin have had occasion to address the same issues that are at bar in the present case under the same or similar circumstances. Those courts have uniformly reached the same conclusion as did the Wisconsin Court of Appeals in this case – i.e., that a Circuit Court has no legal authority to compel a health care provider to render medical treatment outside of a patient's treatment plan, and further, that a Circuit Court has no legal authority to compel a hospital to credential an outside physician for the specific purpose of providing medical treatment to a patient of the hospital that is outside of the patient's treatment plan. *See Tex. Health Huguley, Inc. v. Jones*, 637 S.W.3d 202, 214 (Tex. App. 2021); *Pisano v. Mayo Clinic Fla.*, 333 S.O.3d 782, 789 (Fla. Dist. Ct. App. 2022) ("the question here is not about whether Mr. Pisano (or his proxies) may "choose life"; it is whether Mr. Pisano has identified a legal right to compel Mayo Clinic and its physicians to administer a treatment they do not wish to provide. The answer is no."); *Frey v. Trinity Health-Michigan*, No. 359446, 2021 Mich. App. LEXIS 6988, at 12 (Mich. Ct. App. Dec. 10, 2021) ("patients, even gravely ill ones, do not have a right

to a particular treatment, and medical providers' duty to treat is coterminous with their standard of care. This Court will wield its equitable powers only to enforce a right or duty; in their absence, relief is not available."); *Abbinanti v. Presence Central and Suburban Hospitals Network*, 2021 IL App. (2d) 210763, ¶¶ 20 ("every published appellate decision involving a request by a patient to force a hospital or doctor to administer ivermectin to treat COVID-19 has rejected that request"); *Marik v. Sentara Healthcare*, 109 Va. Cir. 88, 100 (Cir. Ct. 2021) ("… to say that the court is ill-equipped to determine the proper COVID-19 treatment protocols or the safety of such protocols – especially when experienced physicians disagree - … is a huge understatement.").

Furthermore, other petitions for injunctive relief that were filed by Attorney Lorigo, the same New York attorney who filed the Petition on behalf of Mr. Gahl in this case, have repeatedly resulted in decisions in which appellate courts have concluded that injunctive relief seeking the compelled administration of ivermectin was not supported. *See, Shoemaker*, supra; *DeMarco v. Christiana Care Health Servs., Inc.*, 263 A.3d 423, 426 (Del. Ch. 2021); *Smith v. Westchester Hosp, LLC*, No. CV2021081206, 2021 Ohio Misc LEXIS 103 (Ohio C.P. Sept. 6, 2021); and *D.J.C. v. Staten Isl. Univ. Hospital–Northwell Health*, 157 N.Y.S.3d 667 (N.Y. App. Div. 2021).

The conclusion of the Wisconsin Court of Appeals in this case is consistent with the conclusions of courts outside of Wisconsin that have considered the identical issues presented in this case. The Court of Appeals' decision should be affirmed.

CONCLUSION

Petitioner Gahl did not establish each of the necessary elements required for a grant of injunctive relief, and the Circuit Court failed to create a record identifying its rationale for granting an order compelling independently licensed health care providers to provide specific medical treatment upon the demand of a patient, and for granting an order compelling a hospital to credential an outside physician for the explicit purpose of providing care to the hospital's patient that falls outside of the patient's hospital-approved treatment plan.

The Circuit Court granted injunctive relief in the absence of any legal basis underlying the Court's authority to make that grant, and in doing so abused its discretion. The Court of Appeals of Texas perhaps put it best when that Court recognized:

> The judiciary is called upon to serve in black robes, not white coats. And it must be vigilant to stay in its lane and remember its role. Even if we disagree with a hospital's decision, we cannot interfere with its lawful exercise of discretion without a valid legal basis.…

Tex. Health Huguley, Inc. v. Jones, 637 S.W.3d at 214.

Respondent Aurora-Summit requests that this Court affirm the thorough and well-reasoned decision of the Court of Appeals, which concluded that a Circuit Court has no legal authority to compel a private health care provider to provide care that was outside of the patient's plan of treatment and standard of care, and further held that a circuit court has no legal authority to compel a hospital to credential an outside physician for the purpose of providing care to the hospital's patient that falls outside of the patient's plan of treatment and standard of care.

Dated at Waukesha, Wisconsin, this 17th day of November, 2022.

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

Electronically signed by Jason J. Franckowiak

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

20935 Swenson Drive, Suite 310
Waukesha, WI 53186
Ph: 262-777-2200
Fax: 262-777-2201

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 10,926 words.

Dated at Waukesha, Wisconsin, this 17th day of November, 2022.

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

Electronically signed by Jason J. Franckowiak

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

20935 Swenson Drive, Suite 310
Waukesha, WI 53186
Ph: 262-777-2200
Fax: 262-777-2201

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.

Dated this 17th day of November, 2022.

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

Electronically signed by Jason J. Franckowiak

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

20935 Swenson Drive, Suite 310
Waukesha, WI 53186
Ph: 262-777-2200
Fax: 262-777-2201