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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REPLY BRIEF

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Now comes the Petitioner-Respondent-Petitioner, Allen Gahl, through his attorney Karen L. Mueller, to Reply to the Response Brief from Respondent-Appellant, AURORA HEALTH CARE, INC, to seek both declaratory and injunctive relief. Judge Lloyd Carter of Waukesha County Circuit Court did not violate his judicial discretion in ordering that Aurora either administer the Ivermectin itself or allow another outside doctor to do so.

I. THE QUESTION BEFORE THE COURT AS FRAMED ORIGINALLY BY AURORA WAS "WHETHER THE COURTS HAVE THE AUTHORITY TO INTERVENE WHEN THE MEDICAL PROVIDER STATES THAT THE MEDICAL TREATMENT FALLS BENEATH ITS "STANDARD OF CARE" FOR PATIENT SAFETY.

A. Aurora Hospital is not a "medical provider" under Wisconsin Law and does not have the ability to set the "standard of care" for patient safety.

To practice medicine in the State of Wisconsin a person must be licensed as a physician.

> **Wis. Stat. 448.03(1) states: LICENSE REQUIRED TO PRACTICE. (a) No person may practice Medicine and surgery or attempt to do so or make a representation as authorized to do so, without a license to practice medicine and surgery granted by the board.**

Because hospitals do not have that licensure, they cannot determine a "standard of care" for patient safety.

> **Under Wis. Stat. 448.08 (1) DEFINITIONS. As used in this section:**
>
> **(a) "Hospital" means an institution providing 24-hour continuous service to patients confined therein which is primarily engaged in providing facilities for diagnostic and**

> **therapeutic services for the surgical and medical diagnosis, treatment and care, of injured or sick persons, by or under the supervision of a professional staff of physicians and surgeons, and which is not primarily a place of rest for the aged, drug addicts or alcoholics, or a nursing home. Such hospitals may charge patients directly for the services of their employee nurses, nonphysician anesthetists, physical therapists and medical assistants other than physicians or dentists,**

Clearly the legislature intended that a hospital is an "institution" that is "primarily engaged in providing facilities . . ."

B. Only doctors licensed to practice medicine can determine what the "standard of care" is. Board members and administrators, unless they are licensed physicians, cannot.

Any hospital board member's decision that results in setting of "standards of care" or of treatment protocols" by agreeing with Medicare or Medicaid (CMS) so as to get reimbursements or bonuses for patient services from the federal government by agreeing to "standards of care" or protocols from the federal government, are illegal under Wisconsin law.

C. Under Wis. Stat. 448.08 (5) CONTRACT EXCEPTIONS; TERMS. Notwithstanding any other provision in this section, when a hospital and its medical staff or a medical education and research organization and its medical staff consider that it is in the public interest, a physician may contract with the hospital or organization as an employee or to provide consultation services for attending physicians as provided in this subsection.
(a) Contracts under this subsection shall:

> **(1) Require the physician to be a member of or acceptable to and subject to the approval of the medical staff of the hospital or medical education and research organization.**
> **(2) Permit the physician to exercise professional judgment without supervision or interference by the hospital or medical education and research organization.**
> **(3) Establish the remuneration of the physician.**
> **(b) If agreeable to the contracting parties, the hospital or medical education and research organization may charge the patient for services rendered by the physician, but the statement to the patient shall indicate that the services of the physician, who shall be designated by name, are included in the department charges.**
> **(c) No hospital or medical education and research organization may limit staff membership to physicians employed under this subsection.**
> **(d) The responsibility of physicians to patients, particularly with respect to professional liability, shall not be altered by any employment contract under this subsection.**

Wis. Stat. 448.08 (5)

The autonomy and independence of physicians was important to the legislature. In subsection (a)(2) the legislature carefully preserved the independence of physicians practicing medicine in Wisconsin *even if they were employed by a hospital*. This requires that the physician have complete control over the patient's care and treatment *without supervision or interference* by the hospital, including administrators or board members. This statutory fact precludes the mandatory use of any hospital manufactured "standards of care" or protocols that would interfere with the doctor/patient relationship and their ability to make jointly decided medical treatments. In furtherance of these rights to practice medicine autonomously, the legislature

also made clear in subsection (d) that a physician remains liable for his/her decisions and that fact cannot be altered by an employment contract.

Under normal circumstances, a patient or his/her family could take his/her "business" (medical needs) to another physician or hospital, if the patient disagreed with the care and had requested a different care. But under the current CMS Covid 19 protocols Aurora hospital and virtually every other hospital in Wisconsin has agreed to through their board members, patients have nowhere to go for alternative, effective treatments.

II. GAHL PROVED THE FOUR PRONGS NECESSARY FOR A TEMPORARY INJUNCTION

Gahl successfully identified and proved each prong necessary under the analysis found in *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App. 56, 370 Wis. 2d 644, 659, 883 N.W. 2d 154.

1) Irreparable harm would result without temporary injunction

John Zingshiem was in danger of dying. His nephew believed it because the hospital told him palliative care and a ventilator was all they could do. Aurora now suggests that of the four affidavits submitted by doctors in this case, only the two doctors from Aurora's "treatment team" should be relied upon by this court because they had direct access to Mr. Zingshiem's medical records and had briefly stood by his bed. But those two doctors received paychecks from Aurora. They are not independently practicing physicians and their sworn statements should be given the weight of anyone else testifying in a court of law who stands to lose a job if testify against their employer. Their credibility should be tested because neither one of these physicians claimed to be an expert regarding Ivermectin as Dr. Pierre Kory

does. Both doctors stated that the treatment fell beneath the "standard of care" See RBrf, p. 13, ¶ 2. This standard of care was not developed by independent physicians, but rather was determined by Aurora Hospital and others. This assertion has already been disproved, above, through Wisconsin's licensing guidelines for practicing medicine and the statutes which limit the corporate practice of medicine in Wisconsin.

Dr. Pierre Kory, took time to be prepared to testify by Zoom, with no remuneration expected or received. He was present by Zoom, and was ready, willing and able to testify. Dr. Kory had nothing to gain personally. He has had his reputation besmirched by people across the world who repeatedly disparage his character and his professional reputation because of his positive position on the efficacy and safety of Ivermectin. If Ivermectin works and saves lives, then the EUA with its immunity for health care facilities and pharmaceutical companies become no longer applicable.

Aurora claims that a strict adherence to process requires that Dr. Pierre Kory's affidavit should be rejected because it was not sworn to. If Aurora's counsel had questions regarding the veracity of his statements within his affidavit or his senate committee testimony, they could have demanded that he testify. They did not do so.

Dr. Hagen has been repeatedly attacked by opposing counsel in Aurora's court documents when, in fact, he has been trying to keep the people alive by keeping them out of hospitals. Dr. Hagen was sanctioned by the Wisconsin Department of Safety and Professional Services (DSPS) for providing care to a patient eight years ago by a method that today is commonly referred to as "Telemedicine." See RBrf, p. 11, fn1. Today DSPS threatens

the licenses of doctors who attempt to prescribe Ivermectin, a legal drug, at the urging of a national non-profit, the Federation of State Medical Boards (FSMB). This harassment has been effective at preventing Covid 19 patients from being able to seek out alternative treatments which may have saved their lives.

2) The movant had no other adequate remedy at law

Allen Gahl, the nephew and HCPOA for John Zingsheim had no other adequate remedy at law. He believed, based upon what the Aurora doctors were telling him, there was no other care available for his uncle and that they had abandoned any affirmative care.

3) A temporary injunction was necessary to preserve the status quo

If Aurora's "status quo" definition is correct, then it can only accurately be understood as continuing to use a Covid 19 protocol which has led to the death of 1000's of patients across America. The only "status quo" that makes sense legally, logically, morally, and ethically is maintaining the life of patients. But that shift would deviate from the path that medical facilities in Wisconsin are now using because of the CMS' Covid 19 Protocols. These policy changes come through CMS but were developed somewhere in the federal government and were then communicated to such non-profits as the AMA, AHA, APA and their Wisconsin counterparts. See FN1 of "Motion for Leave to File Nonparty Brief as Amici Curiae of the American Medical Association and the Wisconsin Medical Society," where the AMA self-admits that it published a guidance which opposed "the ordering, prescribing, or dispensing of Ivermectin to prevent or treat COVID-19 outside of a clinical trial." These actions interfered directly with John Zingshiem's medical

requests, his implied contract with Aurora and altered the "standards of care" without Mr. Zingsheim's knowledge or informed consent. The FN1 then continues: "See Am.Med.Assn., Press Release: AMA, APFA, ASHP Statement on Ending Use of Ivermectin to Treat COVID-19 (Sept. 1, 2021)." The AMA then stated that the above guidance "partially informed Respondent-Appellant Aurora Health Care, Inc.'s understanding of the standards of care applicable to Petitioner-Respondent-Petitioner Allen Gahl's request that Ivermectin be administered to John J. Zingsheim. See *Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 977 N.W.2nd 756, 762 (Wis. Ct. App. 2022)."

4) The movant has a reasonable probability of success on the merits.

Gahl proved through the evidence submitted by himself and Dr. Pierre Kory that there were at least three sources of authority that the circuit court had to make his judgement in favor of Mr. Gahl. Those sources of judicial authority are:

i. Wisconsin statutory health care power of attorney form.

The Legislature was unambiguous when it wrote the words it intended to empower a future HCPOA with, in the statutory Health Care Power of Attorney form. If the Legislature did not intend to give people executing this document the understanding that they had the power to not only refuse medical care but also to receive *the necessary, medical treatment that they requested*, then why would the legislature have mandated these words? The "limiting" language that Aurora points out was intended to be clarifying: it means that the HCPOA document *only* gives powers to the POA regarding *medical* decisions and does not grant them any *special powers related to*

finances or the alienation of property, powers routinely given in a financial POA.

ii. Aurora breached its implied contract with John Zingsheim by breaching its duty of "good faith" and "fair dealing" and by leading patients to believe that it was the doctors making the decisions when it was not and that hospital staff said they followed "do no harm" oath but Aurora argues that there is no such adherence to the Hippocratic oath in its facilities.

Obviously, a "meeting of the minds" would not occur with an unconscious patient and a physician; yet, the court still applied the general rule of requiring a patient to pay the doctor in exchange for medical services rendered in *Fischer v. Fischer*, 31 Wis. 2d at 308-09. Aurora now states that there was no "meeting of the minds" between the Zingsheim and Aurora-Summit's "treatment team" to render any medical treatment that was outside of the "treatment plan" devised by Mr. Zingsheim's "team of specialists," including Ivermectin." But the "team of specialists" Aurora claims makes the decisions for Mr. Zingsheim appears to be the board members/administrators of the hospital. In fact, the lethal, federally written Covid 19 Protocols are enforced by hospital boards or administrators, including isolating patients from family members. For examples see on page APP.520, ln.4 of Petitioner-Respondent-Petitioner's Appendix Allen Gahl's hand-written notes, Ex.A, which he submitted with his signed and sworn affidavit dated October 12, 2021:

> "worked through chaplain to get Courtney and Mitchell [John Zingshiem's children-C&M] in to see him to get clarity from John on his wishes. Chaplain arranged it but C&M weren't allowed in the room in the end! My camera video call w/ C&M & me & Chaplain going in and out of room and talking to him.

> Too hard to hear him but could understand some words. Got "no" to resuscitation, "no" to ventilator, and "yes" to IVM & IV "C."

Mr. Gahl then continues his note by discussing his interaction with Tammy Waterman, Risk Manager at Aurora Hospital:

> "then called administration to try to get C&M in the room and get IVM [Ivermectin] and IV Vit C [Intraveous Vit C]. (Tammy) They said after 3 calls she'd take it to the board. Called back 1 to 1 ½ hours later and were willing to extend an olive branch to C&M since their mom died a year ago and couldn't see her much-gave them 1 hr. that night in the room w/ him. Will not discuss IVM @ all & can't sign something to give them no [sic] immunity-won't do it. Court order may help. IV C? 'talk to doctor & convince him.'"

Mr. Gahl continued his notes:

> "Now talked to C & M about if they are ok w/ no ventilator even though both options are bad. They ok'd it; too much risk in ventilation procedure-in shock to a degree but so am I. Sarah called more lawyers."

Despite these statements against being ventilated Mr. Zingshiem was placed on a ventilator when he was alone and isolated. He and many other patients have been "imprisoned" by the invisible walls of these new federal government protocols that have destroyed any patient/doctor relationship by denying any individualized care or treatments that a doctor might want to administer or prescribe. CMS policies dictate every treatment that every Covid patient will be treated with which means the physicians are not actually making decisions about the patient's care; instead, the pre-determined, board-room-bargained-for-federal-government-protocols make the decision for the patients. Dr. Hesham Mostafa Gharib Elghannam, a doctor that regularly saw

John Zingsheim could not even order an IV with vitamin C for him without getting the approval of the hospital "administration." See id.

In the last three lines of Mr. Gahl's notes on that same page it said:

> "I talked to Doc again & nurse, talked to others, too & left voicemail for administration since Doc said he would look into IVC & if we can get admin to help, he'll do it."

The hospital had given up on Mr. Zingsheim. They were only willing to give palliative care but still refused to give the Ivermectin he and later, his nephew Allen Gahl, had requested.

iii. Inherent power of the court

As previously briefed, the court has the inherent authority to grant an injunction where a fundamental right is in danger of being violated by a governmental actor. Under the Wisconsin Constitution there is nothing more fundamental than the "right to life." The deprivation of such a right by a governmental actor without due process offends the Wisconsin Constitution.

Aurora Hospital cites several cases in their brief on pp. 27-29 for the proposition that no court has recognized a patient's general "right" to receive specific medical care on demand. But these cases can all be distinguished because none of the cases involve the federal government issuing lethal protocols to use on helpless, vulnerable patients in hospitals whose board members have agreed to such policies, so they can continue receiving CMS reimbursements.

The federal government through CMS has created a deadly monopoly throughout the nation, that dictates that the Covid 19 protocols in any hospital must be followed and enforced to receive Medicare and Medicaid reimbursements. Because virtually every hospital in Wisconsin must follow

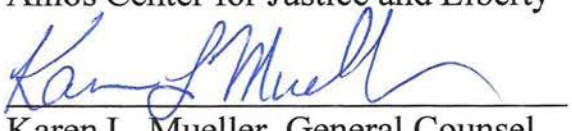
this federal protocol or be denied federal reimbursement, patients deemed Covid 19 positive in Wisconsin are left with no alternative "marketplaces" in which to "shop" for a different medical treatment in different hospitals that *will* provide life-saving treatments, such as Ivermectin rather than dangerous drugs such as Remdesivir and Baricitinib.

CONCLUSION

The circuit court did not abuse its judicial discretion in granting Gahl an injunction because he had three separate avenues of authority. This Wisconsin Supreme Court should overturn the District II Appeals decision and declare that in Wisconsin, patients have a fundamental right to *receive, necessary medical treatment they request* without unconstitutional interference from the federal government under Wisconsin's due process clause and the 10th Amendment to the U.S. Constitution. The federal government and its "helpers" do not have the right to interfere through CMS or any other government agency in the necessary, life-saving medical treatments of Wisconsin citizens. Gahl asks for any other relief this Honorable Court sees fit to give.

Respectfully submitted and dated this 2nd day of December, 2022.

Amos Center for Justice and Liberty



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in

§ 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2981 words excluding signature and certification pages.

Dated this 2nd day of December, 2022.

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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 with the Court and will be served on all opposing parties.

Dated this 2nd day of December, 2022.

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