OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

October 25, 2021

To:

Hon. Lloyd Carter
Circuit Court Judge
Waukesha County Circuit Court
515 W. Moreland Blvd.
Waukesha, WI 53188

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Ralph C. Lorigo
Lorigo Law Office
101 Slade Avenue
West Seneca, NY 14224

Randall R. Guse
Michael L. Johnson
Jason J. Franckowiak
Otjen, Gendelman, Zitzer,
Johnson & Weir, S.C.
20935 Swenson Dr., Ste. 310
Waukesha, WI 53186

Karen L. Mueller
Amos Center for Justice and Liberty
18261 57th Avenue
Chippewa Falls, WI 54729

You are hereby notified that the Court has entered the following order:

No. 2021AP1787-FT Allen Gahl v. Aurora Health Care, Inc., L.C. 2021CV1469

The court has before it the emergency petition to bypass the court of appeals submitted pursuant to Wis. Stat. §§ 808.05 and 809.60 on behalf of petitioner-respondent, Allen Gahl, along with the response brief of respondent-petitioner, Aurora Health Care, Inc. ("Aurora Health") and the parties' joint status report regarding settlement.

This case commenced on October 7, 2021, when Gahl filed a complaint for emergency declaratory and injunctive relief in Waukesha County Circuit Court as attorney in fact for John Zingsheim, who is hospitalized at Aurora Medical Center - Summit. The complaint sought an order directing Aurora Health to enforce a prescription for Ivermectin written by a physician (Dr. Edward Hagen) not privileged to practice at Aurora Medical Center - Summit, and to order Aurora Health to immediately administer Ivermectin to Mr. Zingsheim. Aurora Health opposed the request, explaining, among other things, that Mr. Zingsheim's current health care providers at

Aurora Medical Center - Summit believe the administration of this drug would fall below and constitute a violation of professional medical standards of care because the prescribed dosage may be lethal, and cannot be administered to the patient, who is intubated.

On October 12, 2021, the circuit court conducted a hearing on the matter. The circuit court noted that the prescribing physician "has never met Mr. Zingsheim . . . [and has] never reviewed medical records from Mr. Zingsheim." At the conclusion of the hearing, the circuit court and the parties agreed that the parties would submit supplemental affidavits later that day to further inform the circuit court's decision-making. The parties timely submitted supplemental affidavits.

Just before 5:00 p.m. on October 12, 2021, the circuit court issued an "Order to Show Cause," stating that "on the 12th day of October, 2021, at 1:30 pm [sic]," the court would hold a hearing at which Aurora Health would be required to show cause why it should not be compelled "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." The order additionally ordered Aurora Health to "immediately enforce Dr. Hagen's, [sic] order and prescription to administer Ivermectin to their mutual patient, Mr. Zingsheim, and thereafter as further ordered by Mr. Gahl."

That same day, in response to the circuit court's "Order to Show Cause," Aurora Health filed three items: (1) a letter with the circuit court identifying certain concerns with the order; (2) a notice of motion and motion for relief, asking the circuit court to stay the order pending appeal; and (3) a petition and memorandum filed in the court of appeals seeking leave to appeal the circuit court's non-final order.

On October 13, 2021, the circuit court conducted an order to show cause hearing. Counsel for Aurora Health explained that day that Mr. Zingsheim had tested negative for COVID-19. The court stated during that hearing that it intended to modify the order it had issued on October 12, 2021. The court and the parties discussed various modifications.

On October 14, 2021, the parties filed for the circuit court's consideration a mutually-agreed draft order that they believed accurately reflected the modifications that the circuit court had found to be appropriate during the October 13, 2021 hearing. Summarized, this draft order required Gahl to: (1) locate a doctor to administer the Ivermectin prescribed by Dr. Hagen to Zingsheim; (2) have this doctor apply with the Aurora credentialing committee for temporary emergency privileges at Aurora for the sole purpose of administering the Ivermectin to Zingsheim; and (3) sign a full release of Aurora from all liability related to the administration of the Ivermectin.

On the same day, before any modified order issued, the court of appeals granted Aurora Health's petition and memorandum for leave to appeal the circuit court's non-final order of October 12, 2021, and, sua sponte, stayed the circuit court order and the circuit court proceedings.

On October 20, 2021, Gahl filed this pending emergency petition to bypass the court of appeals. By order dated October 21, 2021, this court directed the respondent, Aurora Health, to file a response to the petition to bypass no later than 12:00 noon on October 22, 2021. The court

further directed the parties to file a joint status report outlining any efforts towards the settlement of this matter by the same date and time. The documents were timely filed. Aurora Health writes that it "takes no position on the Petition to Bypass so long as the parties will be permitted the necessary opportunity to fully and adequately brief the issue presented on appeal, should this Court take jurisdiction of the appeal."

The question for this court is whether to grant the petition to bypass. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1r), and one the court concludes it ultimately will choose to consider regardless of how the court of appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision. S. Ct. Internal Operating Procedures III.B.2.

IT IS ORDERED that the petition for bypass is denied. The petition presents unresolved questions of fact and fails to establish that this case presents a sufficiently well-developed legal issue that meets our criteria for review.

REBECCA GRASSL BRADLEY, J. (*dissenting*).

> "It is hard to have patience with people who say, 'There is no death' or 'Death doesn't matter.' There is death. And whatever is matters. And whatever happens has consequences, and it and they are irrevocable and irreversible."
>
> —C.S. Lewis, A Grief Observed 15 (HarperCollins Paperback 1st ed. 1994) (1961).

Wisconsin judges are rarely asked to make life-or-death decisions. This case presents one of those rare circumstances. The circuit court made a decision on the side of life. The appellate courts chose the irrevocable and irreversible alternative. But nothing in the law compelled it.

In this case, the family of John Zingsheim, who is on a ventilator and in a drug-induced coma battling COVID-19, asked the circuit court to order potentially life-saving treatment Mr. Zingsheim's doctor prescribed—Ivermectin—but Aurora Medical Center-Summit declined to administer it. After reviewing evidence, hearing testimony, and considering arguments, the circuit court ordered Aurora to administer the treatment. While Aurora's interlocutory appeal was pending, the parties agreed that Aurora would grant temporary privileges to a doctor—chosen by the family—to administer the medication, while the family would release Aurora from any liability arising from it. The circuit court modified its order to reflect the agreement. The court of appeals stayed the circuit court order and proceedings, without knowledge of the substance of the modification, even though Aurora did not ask the court of appeals for such relief. Mr. Zingsheim's family petitioned this court to take the case but a majority of this court, after senselessly delaying the matter, now refuses to act at all.

If Aurora is right and a court cannot compel a health care provider to administer treatment it considers ill-advised, the circuit court's decision is reversible, but in the meantime Mr. Zingsheim

receives the potentially life-saving treatment he and his family desire and his physician prescribed. In stark contrast, the unreasoned decision of the court of appeals to deny Mr. Zingsheim that treatment, and the refusal of a majority of this court to act, impose irrevocable and irreversible consequences on Mr. Zingsheim, who will receive only palliative care going forward.

Aurora asked the court of appeals to decide the following issue:

> Did the Trial Court improperly exceed its authority or otherwise enter the Order to Show Cause, which compels a healthcare provider independently licensed by the State of Wisconsin to administer medical treatment which the healthcare provider believes falls below the professional standard of care?

The legal question Aurora raises should be answered, after briefing and oral argument, and in the form of a reasoned opinion. But in this case, the modified order does not compel any healthcare provider to administer treatment. The court of appeals nevertheless accepted the appeal on an interlocutory basis and effectively answered the question in Aurora's favor, but with no analysis, and also issued a stay of the circuit court's order the court of appeals hadn't even seen—a stay that no one requested. The modified order reflecting the parties' agreement did not compel Aurora (or any other unwilling provider) to administer the treatment prescribed by Mr. Zingsheim's physician. Aurora itself acknowledges that the legal issue in this case "transcends" the treatment Mr. Zingsheim individually receives.[1] Of course, for Mr. Zingsheim the importance of that legal issue pales in comparison to the immediate resolution of a medical dispute over his wish to try potentially life-saving treatment. Seemingly recognizing this, Aurora never asked the court of appeals to stay the circuit court's order, never urged this court to maintain that stay, and took no position on the petition to bypass; instead, Aurora urged the court to afford the parties sufficient opportunity for thorough briefing necessary for careful consideration of the legal question it poses. And rightly so. The issue presented is unquestionably of great significance and importance to health care providers, patients, and their families statewide, particularly during an ongoing pandemic for which much of the medical community offers no remedy. The answer to this question must come in the course of the appellate process. In contrast, Mr. Zingsheim cannot wait for this court to reverse a stay issued with no legal basis.

Although both parties emphasize the importance of the issues presented by this case, the same majority of this court that regularly takes a pass on significant cases (Justices Ann Walsh Bradley, Rebeca Frank Dallet, Brian Hagedorn, and Jill Karofsky)[2] again can't be bothered to

---

[1] Aurora's Response Br. at 11.

[2] Hawkins v. Wis. Elections Comm'n, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam); Stempski v. Heinrich, No. 2021AP1434-OA, unpublished order (Wis. S. Ct. Aug. 27, 2021); Gymfinity, Ltd. v. Dane Cnty., No. 2020AP1927-OA, unpublished order (Wis. S. Ct. Dec. 21, 2020); Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA, unpublished order (Wis. S. Ct. Dec. 4, 2020); Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. S. Ct.

resolve a pressing dispute of grave importance to the people of Wisconsin, which Aurora recognizes is likely to recur.[3] "A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues."[4] In addition to presenting a novel issue this court will likely be called upon to resolve, this case meets at least two criteria for this court's review: "A decision by the supreme court will help develop, clarify or harmonize the law, and . . . 2. The question presented is a novel one, the resolution of which will have statewide impact" and the issue "is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. §809.62(1r)(c)2 and 3 (2019–20).

Sometimes urgency itself warrants this court's review. "At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision."[5] Given Mr. Zingsheim's declining medical condition, there is unquestionably a clear need to hasten the ultimate appellate decision in this case. Even if the majority does not regard Mr. Zingsheim's individual circumstances as justification for supreme court action, the likely recurrence of the novel legal issue presented during a pandemic, as acknowledged by Aurora, warrants this court's immediate attention in light of its statewide impact on the people of Wisconsin, including health care providers and their patients. "'[A] speedy resolution, and one with clarity and finality,' is often 'in the public's best interest' with respect to cases involving COVID-19 related legal issues."[6]

Even if the majority requires the insights of the court of appeals before it is ready to tackle the issues presented, it was duty-bound under the law to reverse the stay imposed by the court of appeals. No party asked for one. Nevertheless, before entertaining this remedy, the court of appeals was supposed to consider and weigh a number of factors. In this case, it completely sidestepped this legal prerequisite.

Dec. 3, 2020); Mueller v. Jacobs, No. 2020AP1958-OA, unpublished order (Wis. S. Ct. Dec. 3, 2020).

[3] Aurora's Response Br. at 9.

[4] Wis. S. Ct. IOP III.B.2 (June 30, 2021).

[5] Id.

[6] Stempski, No. 2021AP1434-OA, at 9 n.11 (Rebecca Grassl Bradley, J., dissenting from the order denying the petition for leave to commence an original action) (quoting Skylar Reese Croy, As I See It: Examining the Supreme Court's Broad Original Jurisdiction, Wis. Law., July-Aug. 2021, at 31, 34, https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=7&ArticleID=28514).

In State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), this court held that a stay pending appeal is appropriate only if the moving party makes a strong showing that it is likely to succeed on the merits of the appeal and shows (1) it will suffer irreparable injury unless a stay is granted; (2) the other party will not be substantially harmed; and (3) a stay will not harm the public interest. In this case, the court of appeals paid lip service to the likelihood of success on the merits, concluding without any analysis that Aurora was likely to succeed on its appeal. The court of appeals erred in completely neglecting to address the other mandatory factors, which overwhelmingly militate against imposing a stay of the circuit court's order. Aurora would not suffer irreparable injury absent a stay; the modified order to which the parties agreed required Mr. Zingsheim's family to procure a physician to administer the medication and to release Aurora from any liability arising from the treatment. Although resolution of the legal issue presented impacts the public more broadly, the public interest is arguably not implicated by the administration of prescribed medication to a dying individual who wishes to try it. The single factor that tips the balance overwhelmingly against the imposition of a stay is the substantial and irrevocable harm it inflicts on Mr. Zingsheim. Without the medication, he will receive only palliative care that ostensibly will make him more comfortable but will do nothing to improve his dire condition. The court of appeals neglected to perform this analysis and this critical error warrants reversal of the stay.[7]

Judicial decisions have consequences. While every judicial decision must be well-grounded in the law, in this case nothing in the law supports the court of appeals' decision nor compels this court's inaction. The likely consequence of those unreasoned decisions is irrevocable, irreversible, and grave harm inflicted on Mr. Zingsheim. I dissent.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice PATIENCE DRAKE ROGGENSACK join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

---

[7] "The court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review. We therefore conclude that the court of appeals' failure to explain its exercise of discretion in the instant case is an erroneous exercise of discretion." State v. Scott, 2018 WI 74, ¶¶40–41, 382 Wis. 2d 476, 914 N.W.2d 141. This court would have been well-within its authority to vacate the stay. Under Wis. Stat. § 809.60(4) (2019–20), "the supreme court may grant the petition upon such conditions as it considers appropriate."