WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
JANUARY 2023

The cases listed below will be heard in the Supreme Court Hearing Room, 231 East, State Capitol. The cases listed below originated in the following counties:

Milwaukee
Waukesha

TUESDAY, JANUARY 17, 2023

9:45 a.m.	20AP1454	Neil J. Rennick v. Teleflex Medical Inc.
10:45 a.m.	21AP1787-FT	Allen Gahl v. Aurora Health Care, Inc.
1:30 p.m.	22AP652	State v. A.G.

Note: The Supreme Court calendar may change between the time you receive it and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
January 17, 2023
9:45 a.m.

2020AP1454 Neil J. Rennick v. Teleflex Medical Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that reversed the Milwaukee County Circuit Court order, Judge Kevin E. Martens presiding, that granted summary judgment to Teleflex Medical and dismissed Rennick's complaint.

This is a medical device products-liability case. Neil Rennick had a tumor on his left kidney and discussed options on how to remove the tumor with Dr. Mark Waples, a urologist. Rennick decided to pursue a procedure intended to remove a tumor from an organ while retaining the rest of the organ, known as laparoscopic partial nephrectomy. The procedure requires closing the kidney after excising the tumor. In April 2015 Rennick underwent the surgery, which was performed by Dr. Waples using Teleflex's Weck Hem-o-lock Ligation System clips to close the kidney (renorrhaphy). Dr. Waples used a "sliding clip technique" to reinforce and secure the sutures, which was not a use described in the instructions for Hem-o-lock clips. In March of 2016, Rennick experienced pain and internal bleeding and while urinating passed a closed Hem-o-lock clip. In November of 2016, Rennick underwent another operation, this time performed by Dr. Steven Weiner. During that operation, Dr. Weiner discovered a clip embedded in Rennick's kidney; the location of the clip was in an area where Dr. Waples indicated he would not have put any clips.

In April of 2018, Rennick filed a complaint against Teleflex in Milwaukee County Circuit Court. Rennick alleged that the Hem-o-lock clips were defective because they failed to stay permanently attached and therefore failed to perform as Teleflex intended and advertised.

Teleflex filed a motion for summary judgment asking the court to dismiss Rennick's complaint. Teleflex asserted, among other things, that there was no evidence that any act or omission of Teleflex caused Rennick's injuries; that the learned intermediary doctrine limited Teleflex's duty to Rennick; etc.

Rennick filed a response to the motion arguing that the learned intermediary doctrine did not apply, and that factual disputes precluded summary judgment. In June of 2020 the circuit court granted Teleflex's motion concluding there were no genuine material factual disputes, and that the learned intermediary doctrine did apply, which limited Teleflex's duty to warn.

Rennick appealed to the Court of Appeals, and the Court of Appeals reversed the circuit court's order granting summary judgment. The Court of Appeals concluded that the circuit court erroneously applied the learned intermediary doctrine. The Court of Appeals noted that the general rule in Wisconsin is that a manufacturer or supplier of a product has a duty to warn consumers directly of the known or knowable dangers associated with the use of its product, including a duty to "warn of dangers inherent in a use not intended by the manufacturer [ ] if such unintended use is reasonably foreseeable by the manufacturer." The Court of Appeals stated that the learned

intermediary doctrine "operates as an exception to this general rule in the case of a prescription drug or medical device." Noting that Wisconsin has not yet adopted this doctrine, the Court of Appeals concluded it did not need to decide whether to do so because Teleflex could not meet the threshold requirement for the doctrine to apply. Because the doctrine did not apply, Teleflex's duty to warn was not limited to Dr. Waples, but instead extended to Rennick, as the consumer. Therefore, the Court of Appeals concluded there were genuine issues of fact as to whether the lack of warnings caused Rennick's injury. Moreover, the Court of Appeals concluded that summary judgment was improperly granted because of the lack of discovery needed to support Rennick's other claims.

Teleflex filed a petition with the Wisconsin Supreme Court. The issues presented to this court are:

1. Consistent with the law of at least 35 other jurisdictions and Wisconsin federal court decisions, should the Court expressly adopt the learned intermediary doctrine as a matter of Wisconsin law?
2. Is the Court of Appeals permitted to reverse a circuit court decision based on incorrect statements by the Court of Appeals regarding what the circuit court decided and what was argued on appeal?

WISCONSIN SUPREME COURT
January 17, 2023
10:45 a.m.

2021AP1787-FT Allen Gahl v. Aurora Health Care Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha) that reversed the Waukesha County Circuit Court order, Judge Lloyd Carter presiding, that granted an injunction compelling Aurora Health Care to administer a proposed treatment related to the COVID-19 pandemic.

Allen Gahl holds health care power of attorney for his uncle, John Zingsheim. In the fall of 2021, Zingsheim was a patient in the Aurora hospital system and had tested positive for COVID-19. Gahl conducted internet research which led him to conclude that Ivermectin would be an effective treatment. On October 7, 2021, Gahl filed a "Complaint for Emergency Declaratory and Injunctive Relief" in circuit court seeking to compel Aurora to administer Ivermectin to Zingsheim. Gahl stated that he had received a prescription for Ivermectin from Dr. Edward Hagen, who wrote the prescription based on a detailed discussion of Zingsheim's condition with Gahl. The hospital staff refused to administer Ivermectin based on their conclusion that providing the medication would be below their standard of care.

Gahl's complaint sought: (1) preliminary and permanent injunctive relief requiring Aurora to administer the proposed treatment to the patient; (2) a declaration that Aurora "will honor Petitioner's wishes under the power of attorney respecting the medical treatment" of Zingsheim; and (3) an order requiring Aurora "to honor Mr. Gahl's request for the immediate utilization of" the proposed treatment. None of the information Gahl provided came directly from a medical professional. Gahl filed an affidavit which stated that Dr. Hagen had gained all of the information about Zingsheim from discussions with Gahl and Dr. Hagen never met Zingsheim or conferred with his treating physicians before writing the prescription for Ivermectin.

Aurora opposed Gahl's petition, stating "[t]here is no legal authority in Wisconsin that would authorize a court to compel a licensed health care provider to render treatment or to administer a medication that the provider reasonably believes would be below the standard of care in light of the provider's medical education, training, and experience." Aurora also noted that the Wisconsin State Licensing Board had previously disciplined Dr. Hagen for prescribing medications to a person who was not his patient and whom he had not examined. For these reasons, Aurora asked the circuit court to deny Gahl's request for emergency injunctive and declaratory relief.

The circuit court held a hearing on October 12, 2021, and subsequently issued an order compelling Aurora to administer the proposed treatment to the patient. The circuit court also scheduled a show-cause hearing for the following day, October 13, directing Aurora to demonstrate why the order should not go into effect.

Aurora filed a petition for leave to appeal a non-final order with the Court of Appeals. Aurora contended there is no legal authority for the circuit court's order compelling a private

healthcare provider to administer a treatment that the provider, in its professional judgment, has determined to be below the standard of care. Aurora further contended that the court erred in compelling administration of the treatment when Gahl failed to show that he was entitled to a temporary injunction. The Court of Appeals agreed, and reversed the circuit court's order.

The Court of Appeals concluded that requests for injunctive relief must be premised on the existence of a viable legal claim upon which the petitioner can show a reasonable likelihood of success. The Court of Appeals concluded that Gahl failed to meet this foundational requirement and failed to identify any source of Wisconsin law that gives a patient or a patient's agent the right to force a private health care provider to administer a particular treatment that the health care provider concludes is below the standard of care. The Court of Appeals concluded the circuit court erroneously exercised its discretion in granting Gahl injunctive relief.

Gahl petitioned this court to review the Court of Appeals' decision. The issues for this court to decide are:

1. Whether the "plain-meaning" of the Health Care Power of Attorney which was created statutorily by Wis. Stat. § 155.30(1) gave the circuit court the authority to grant declaratory and injunctive relief to John Zingsheim or other patients.
2. Whether a violation of the Hippocratic Oath or Aurora's contractual duty of "good faith and fair dealing" breach an implied contract between the patient and Aurora Hospital.
3. Whether the circuit court has the inherent authority to provide equitable remedy for the patient.
4. Whether the Circuit Court has the authority under Wis. Stat. § 448.30 to provide declaratory and injunctive relieve to the patient.

WISCONSIN SUPREME COURT
January 17, 2023
1:30 p.m.

2022AP652 State v. A.G.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee) that reversed the Milwaukee County Circuit Court order, Judge Ellen R. Brostrom presiding, that terminated A.G.'s parental rights.

On February 13, 2020, the State filed a petition to terminate A.G.'s parental rights to his daughter, "Anna."[1] The petition alleged that Anna was a child in continuing need of protection or services (continuing CHIPS) and that A.G. had failed to assume parental responsibility. A.G. requested a jury trial. At trial, he pled no contest to the CHIPS allegation; the failure to resume parental responsibility was dismissed. The case manager testified in support of A.G.'s plea. The circuit court found A.G. to be unfit and the case proceeded to disposition. After hearing argument and testimony, the circuit court found it was in the child's best interest to terminate A.G.'s parental rights.

A.G. filed a post-disposition motion seeking to withdraw his plea on the ground that it was not knowing, intelligent, and voluntary because the circuit court failed to establish that A.G. understood the potential dispositions that may occur after entering a no contest plea. He also alleged that the court improperly explained the statutory standard that would apply at disposition. The court held a hearing on A.G.'s motion, but denied the motion without taking evidence. A.G. filed an appeal with the Court of Appeals arguing the circuit court erred in denying his motion without holding a hearing. The Court of Appeals agreed with A.G. and reversed the order denying his post-disposition motion and remanded for an evidentiary hearing. The Court of Appeals explained it was not deciding if the circuit court should ultimately grant or deny A.G.'s motion to withdraw his plea, and it reiterated that at the hearing the State would have an opportunity to present evidence about A.G.'s knowledge and understanding of the potential dispositions and the statutory standard that applies at disposition.

The hearing on remand was held on March 30, 2022. A.G.'s counsel informed the court that A.G. was not present and counsel had no explanation for A.G.'s absence. The State had intended to call A.G. as a witness but stated that its argument could be made based on the transcripts of prior proceedings and moved the transcripts into evidence. Based on the transcripts, the State argued that A.G.'s plea was knowing, intelligent, and voluntary. The guardian ad litem (GAL) for Anna joined in the State's argument. A.G.'s counsel argued that the transcripts were insufficient for the State to meet its burden. The circuit court denied A.G.'s motion for plea withdrawal because the State had met its burden by clear and convincing evidence and the court

[1] A pseudonym.

had no evidence to the contrary. The circuit court took judicial notice of the hearing transcripts filed in the case and issued a written decision in line with its oral decision.

A.G. appealed again to the Court of Appeals, and the Court of Appeals again reversed the circuit court's order. A.G.'s argument on appeal was that his plea was not knowing, intelligent, and voluntary because the circuit court failed to establish that he understood the potential dispositions at the plea hearing, and the State failed to prove he did understand this information. The State and the GAL pointed to the transcript of the hearing on the petition, which was held ten months prior to the plea hearing, and showed that the circuit court did explain the potential dispositions, and A.G. said he understood. The Court of Appeals found this was not good enough to establish that A.G. understood the potential dispositions at the time of the plea hearing. Based on its conclusion that the State failed to meet its burden at the remand hearing to establish by clear and convincing evidence that A.G.'s plea was entered knowingly, voluntarily, and intelligently, the Court of Appeals reversed and remanded to the circuit court with directions that A.G. be permitted to withdraw his pleas.

The GAL and the State each filed a petition with this court to review the Court of Appeals' decision.

The GAL' s petition raised these issues:

(1) Whether criminal procedures regarding review of a motion to withdraw a plea should rigidly apply to termination of parental rights proceedings.

(2) Whether a respondent parent loses their right to appeal after failing to attend a remand hearing for which they were provided sufficient notice of the hearing and for which there is no excuse given for their lack of appearance.

The issue raised in the State's petition is whether A.G.'s plea was entered knowingly, intelligently, and voluntarily.