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October 25, 2022

*(Amended October 28, 2022)***To:**

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You are hereby notified that the Court has entered the following AMENDED order (amended to add dissent):

No. 2021AP1787-FT

Gahl v. Aurora Health Care, Inc., L.C. #2021CV1469

Petitioner-respondent-petitioner, Allen Gahl, has filed a renewed motion to waive the requirement of Wis. Stat. § 809.19(2)(ae) that the appendix shall be filed as a single document and to allow him to e-file his 540 page appendix in five sections due to the size of the electronic files. Petitioner-respondent-petitioner states that he contacted the e-filing support line for assistance and they were unable to decrease the size of his appendix to allow for any less than five separate pdf files. In his original motion, petitioner-respondent-petitioner stated:

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The reason for the large size of the appendix is to give this court of review the opportunity to see the evidence that Dr. Pierre Kory submitted in order to prove that the drug, Ivermectin was both safe and effective. . . . Judge Lloyd Carter did not have him testify but evidently Dr. Kory's presence and willingness to testify satisfied any hearsay issues or misgivings the court might have had regarding the extensive Exhibits and the Transcript of Dr. Kory's testimony before the U.S. Senate oversight committee for the Department of Homeland Security on December 8, 2020. . . . These documents and significant parts of the transcript are therefore all relevant to prove that Judge Carter did not abuse his discretion.

IT IS ORDERED that the motion to waive the requirement of Wis. Stat § 809.19(2)(ae) is denied. The Judicial Council Committee's Note, 1978 to Wis. Stat. § 809.19 states, "the original record serves as the primary evidence of what occurred in the trial court. The appendix becomes a very abbreviated document with only those items absolutely essential to an understanding of the case The failure to include some item in the appendix has no effect on the ability or willingness of the court to consider any matter in the record." The citations to the record contained in petitioner-respondent-petitioner's brief are sufficient to direct the court to Dr. Kory's testimony and exhibits. There is no need to reproduce that voluminous material again in the appendix.

PATIENCE DRAKE ROGGENSACK, J. (*dissenting*). Allen Gahl, as representative of John J. Zingsheim in the review pending before us, has moved us to permit exceptions to Wis. Stat. § 809.19(2) in three respects: (1) to permit the filing of an appendix of more than one volume; (2) to permit the electronic filing of an appendix of 540 pages; and (3) to permit the filing of 11 paper copies of the appendix, rather than 22 paper copies.

Aurora Health Care, Inc. did not oppose Gahl's motion. However, this court denied it. The court reasoned that denial was appropriate because the "Judicial Council Committee's Note, 1978 to Wis. Stat. § 809.19" says that an appendix is to be a "very abbreviated document," and because "[t]here is no need to reproduce that voluminous material [of the record] again in the appendix."¹ I could find no case where we denied a motion to modify Wis. Stat. § 809.19's directives based on a Judicial Council Committee Note and "no need" for a party's request.

The court could come to the conclusion "that there is no need" about any voluminous appendix; however, this court has not done so in other cases. For example, we permitted a two-volume appendix with a combined total of 890 pages to be filed as hard copy in Teigen v. WEC, 2022AP91 without a motion for multiple volumes. Gahl's appendices have a total of 540 pages.

I write in dissent because court rules should be applied with an even hand to all who interact in Wisconsin courts for pending disputes. I have concerns that Gahl is being treated differently because underlying the current motion is his effort to obtain treatment with Ivermectin for John J.

¹ Gahl v. Aurora Health Care, Inc., No. 2021AP1787-FT, unpublished order, at 2 (Wis. Oct. 25, 2022).

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Zingsheim, who is a former patient in the Intensive Care Unit at Aurora Health Care medical center.

Gahl and treatment of Zingsheim with Ivermectin have a significant history in Wisconsin courts. It began in October of 2021 when Gahl filed an action in Waukesha County Circuit Court to obtain Ivermectin treatment for Zingsheim, which Aurora opposed.

After several hearings, the circuit court entered a temporary injunction on October 12, 2021 that ordered Aurora to administer Ivermectin treatment by a physician identified by Gahl. That same day, Aurora petitioned the court of appeals for interlocutory review, which was granted without a response from Gahl. Aurora also filed a notice of motion and motion for relief asking the circuit court to stay the order pending appeal. On October 13, 2021, the circuit court conducted an order to show cause hearing, and on October 14, 2021, the parties filed a mutually-agreed draft order they believed reflected the modifications resulting from the October 13, 2021 hearing. The draft order, in sum, required Gahl to: (1) locate a doctor to administer the prescribed Ivermectin; (2) have the doctor apply for temporary emergency privileges with Aurora's credentialing committee; and (3) sign a full release of Aurora from any liability related to the administration of Ivermectin.

Then, before the circuit court's temporary injunction could be placed in written form, the court of appeals stayed that order. Aurora did not ask the court of appeals to stay the circuit court's injunction.

On October 20, 2021, Gahl filed a petition to bypass the court of appeals. On October 25, 2021, we denied bypass, in a four to three decision.² On May 25, 2022, the court of appeals decided the pending appeal, concluding that the circuit court had no statutory or inherent power to order Aurora to provide treatment with Ivermectin.³ Gahl petitioned us for review, which we granted. He then filed the current motion for relief from the requirements of Wis. Stat. § 809.19.

I would grant Gahl's motion because of the controversy that Ivermectin appears to have caused in courts' considerations of Gahl's petition for Zingsheim's treatment. For example, the court of appeals opinion discounts Ivermectin, asserting that Gahl's interest was "[b]ased on his internet research."⁴

I have no training or skill that would permit me to evaluate the medical merits of Ivermectin. However, part of the reason that Gahl is requesting permission to file an expanded appendix is to include testimony he submitted to the circuit court from medical experts who are of

² Gahl v. Aurora Health Care, Inc., No. 2021AP1787-FT, unpublished order (Wis. Oct. 25, 2021).

³ Gahl v. Aurora Health Care, Inc., 2022 WI App 29, ¶¶1, 64, 403 Wis. 2d 539, 977 N.W.2d 756.

⁴ Id., ¶3.

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the opinion that Ivermectin has significant benefits for certain patients. Although I could track down this testimony in the record, having it in the appendix will be a convenience to the justices who choose to read it. Accordingly, I would grant Gahl's motion to file an expanded appendix, just as we allowed in Teigen, and I respectfully dissent from the court's decision denying the permission he requested.

I am authorized to state that CHIEF JUSTICE ANNETTE KINGSLAND ZIEGLER and JUSTICE REBECCA GRASSL BRADLEY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court