ILLINOIS STATE BAR ASSOCIATION

APRIL 2022 VOL 8 NO. 3

Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

Editor's Note

BY SANDRA M. BLAKE

In addition to an appellate law update and news on the ongoing work of the Illinois Mental Health Task Force, this issue of *Mental Health Matters* features an article on a line of cases in Illinois and beyond that were sparked by the COVID-19 pandemic.

As always, thanks to the contributing authors.

Mental Health Matters has an extensive list of subscribers, and is always looking for new contributors. Please contact the editor via the comment section or the Section Council community discussion pages for information on how to get published.■

Can Illinois Courts Compel Hospitals and Doctors to Provide Medical Care? Lessons From Recent Cases Using Ivermectin for COVID-19 Patients

BY JOSEPH T. MONAHAN

Courts are often called upon to decide emergency questions for persons who lack capacity to make their own medical decisions. Illinois law relies on a number of substitute decision makers available to make these decisions. The substitute decision makers include agents under a power of attorney, court-appointed temporary or plenary guardians, attorneys in fact under the mental health treatment declaration act, or surrogates under the health care surrogate act.

Substitute decision makers obtain their authority from the advanced directive document appointing them or from the statute. The documents define the scope of the agents' power or the statute will

Continued on next page

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CONTINUED FROM PAGE 1

set parameters under which the substitute decision makers must operate.

Recently we have encountered a slight variation on the notion of written and informed consent by substitute decision makers. Instead of the medical professional seeking consent from the substitute decision maker, the substitute decision maker is demanding the hospital/medical provider provide specific treatment for their loved one who is not capable of providing direction or consent to the medical provider.

In these cases, the plaintiffs have filed pleadings seeking emergency injunctive relief seeking to compel the medical staff and/or the hospital to provide ivermectin. The treating physicians and the hospital argued the use of ivermectin was not within the standard of care and not approved by the FDA, CDC, AMA and many other professional associations. In response, plaintiffs argued the ivermectin was safe and was similar to many medications that were often given as "off label" uses.

In nine recent Illinois trial court decisions, the courts were asked to decide emergency motions seeking to require hospitals to administer ivermectin to patients who lacked decisional capacity who were in the hospital intensive care unit (ICU), were on a ventilator, and suffering from COVID-19 or the after-effects of COVID-19. The cases were filed claiming the patient was near death and needed urgent medical care.

In the first case, *In re Estate of Nurije Fype*, the plaintiff, a daughter of a patient in the hospital's ICU, went to court in a temporary guardianship proceeding without any notice to the hospital and obtained an *ex parte* order directing the hospital to administer ivermectin to the patient. *In re Estate of Fype,* Case No. 21 P 542 (DuPage County), Decision Issued April 30, 2021. Upon learning of the *ex parte* order, the hospital objected to its entry and asked for an opportunity to respond. The court did not allow the hospital to present any medical evidence, ruling that the hospital must "step aside" and allow the administration of ivermectin to the patient. The hospital appealed the court's order, but the appellate court ruled that the appeal was moot because the patient had been discharged from the hospital while the appeal was pending. *In re Estate of Fype,* 2021 IL App (2d) 210259-U (Order filed July 27, 2021 under Supreme Court Rule 23(b)).

In *Fype* , the court reasoned it was a "court of equity" and therefore had the authority to order a hospital to give the medication. It stated it was an emergency, and the court had the authority to act even without hearing medical testimony from the treatment team. The court relied on the pleadings filed by the daughter who was an agent under a power of attorney and an affidavit of a medical doctor who had not examined the patient. The court reasoned it could act because of what it perceived to be the emergent circumstances and the clinical condition of the patient.

In *Wilson v. Advocate Condell Medical Center,* with only little notice to the hospital, the plaintiff obtained a court order requiring the hospital to allow the administration of ivermectin to a patient in its ICU. After the patient suffered severe adverse reactions shortly after the administration of the ivermectin, the hospital filed an emergency motion, and the court stayed its order. The patient's family subsequently withdrew their request and voluntarily dismissed the action. *Wilson v. Advocate Condell Medical Center,* Case No. 21 MR 957 (DuPage County).

In *Ng v. Edward-Elmhurst Healthcare*, the plaintiff's lawyers again went into court without notice to the hospital and obtained an *ex parte* order directing the hospital to give an unaffiliated outside physician "temporary emergency privileges" to administer ivermectin to a patient in the hospital's ICU. The hospital was able to get the initial order dissolved, and the judge set the matter for an evidentiary hearing. After three days of testimony, including from three

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This is the newsletter of the ISBA's Section on Mental Health Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year.

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medical doctors on behalf of the hospital and affidavits from two other doctors treating the patient, the judge ruled against the hospital. The hospital appealed, and the appellate court reversed the trial court's order. The appellate court issued a Rule 23(c) Summary Order, meaning that it cannot be used as precedent or persuasive authority in subsequent cases. *Ng v. Edward-Elmhurst Healthcare, No. 2-21-0670 (2d Dist. December 21, 2021, filed under rule 23(c)(2)).*

In *Abbinanti v. Presence Central and Suburban Hospitals Network,* the judge denied the plaintiffs' request for an emergency temporary restraining order against the hospital. The plaintiffs appealed, and the hospital won the appeal. The appellate court held that the plaintiffs had not demonstrated a legal right in need of protection or a likelihood of success on the merits of their action, and that granting the plaintiffs' request for the administration of ivermectin would not maintain the status quo. *Abbinanti v. Presence Cent. & Suburban Hosps. Network (2021 IL App (2d) 210763, Opinion filed December 29, 2021).*

In *Hager v. Palos Community Hospital*, the judge ruled in favor of the hospital, refusing to grant the plaintiff's request for emergency injunctive relief. *Hager v. Palos Community Hospital (No. 2021-CH-06155 (Cook County), Order entered December 22, 2021).*

In *Adamczyk v. Alexian Brothers Medical Center,* the court ruled in favor of the hospital. Specifically, the court denied the plaintiff's request for injunctive relief and issued a 30-page ruling addressing many of the arguments being made in these types of cases. *Adamczyk v. Alexian Brothers Medical Center (No. 2021 CH 06297 (Cook County), Decision Issued December 30, 2021).*

In *Schultz v. Presence Central and Suburban Hospitals Network,* the court denied the plaintiff's motion for a preliminary injunction but gave the plaintiff an opportunity to amend her complaint. The hospital moved to dismiss, and after hearing arguments the trial court dismissed the case with prejudice. *Schultz v. Presence Central and Suburban Hospitals Network, Case No. 2021 CH 76 (21st Jud'l Cir., Kankakee Cty.) No published opinion.*

There have also been trial court decisions in Sangamon County and in Madison County. In those cases both courts denied the plaintiff's request to order the ivermectin be used after evidentiary hearings.

- *Clouse v. Memorial Medical Center, Case No. 2021 CH 84 (Sangamon County), Decision Issued September 3, 2021*, denying plaintiff's request for a preliminary injunction and dismissing plaintiff's complaint.
- *Criswell v. Anderson Healthcare, Case No. 21 CH 200 (Madison County), Decision Issued November 15, 2021*, denying plaintiff's motion for mandatory injunction and dismissing plaintiff's complaint with prejudice.

Counsel for the Illinois hospitals involved in these cases were:

- *Fype*, *Wilson*, *Ng*, *Abbinanti*, *Hager*, and *Adamczyk* cases – Monahan Law Group (Joseph Monahan, John Whitcomb, Elizabeth Lawhorn, Joe Willuweit, and Monique Patton Woody)
- *Schultz* case – Neal Gerber & Eisenberg (Steve Pflaum, Thomas Zahrt, and Benjamin Boris)
- *Clouse* case – Brown, Hay & Stephens (William Davis and Garrett Kinkelaar)
- *Criswell* case – HeplerBroom (Beth Bauer and Emilee Bramstedt)

Two Appellate Court decisions in Michigan and Texas are also worth noting. In these cases both courts presented a careful analysis of the legal requirements courts must follow before ordering injunctive relief and requiring providers to administer specific medication.

- *Texas Health Huguley, Inc. vs. Jones*, 2021 Tex. App. Lexis 9432 (November 18, 2021)
- *Frey v. Trinity Health-Michigan*, 2021 Mich. App. Lexis 6988 (December 10, 2021)

Our Illinois courts have found that injunctive relief is a drastic remedy which should only be used in exceptional circumstances and for a brief duration. The purpose of a TRO is to allow a trial court to preserve the status quo until a hearing can be held. The party seeking a TRO or preliminary injunction must show: 1.) A clear right in need of protection; 2.) Irreparable injury; 3.) No adequate remedy at law; and 4.) A likelihood of success on the merits. The more recent of these cases and the Appellate Court rulings provide guidance to courts and lawyers involved in cases where plaintiffs are trying to insist that treatment be used even when medical testimony establishes that it is not within the standard of care. In order to meet the clear standards meriting an order from the court for emergency injunctive relief, there must be clear facts to establish each one of the required elements for injunctive relief. A medical emergency is not enough to allow a court to compel medical treatment, particularly when the treatment desired is not within the standard of care and against medical advice.

These cases are important to consider for practitioners who are dealing with individuals who are not capable of making their own written and informed consent decisions and rely on substitute decision makers. They are also important to consider when proposing the court impose medical treatment on providers when the medical providers do not agree that the medical intervention is appropriate or within the standard of care.■

This article was provided by Joseph T. Monahan, MSW, JD, ACSW, the founding partner of Monahan Law Group, LLC, in Chicago. The firm focuses its practice in mental health, confidentiality, guardianship, probate and health care law. He may be contacted at **jmonahan@monahanlawllc.com**

Appellate Update

BY ANDREAS LIEWALD

***Gibbons v. OSF Healthcare System*, 2022 IL App (2d) 210038, opinion filed January 18, 2022.** Plaintiff, Kathleen Gibbons, sued OSF Healthcare System, a nurse, and Dr. Fields with false imprisonment, assault, and medical battery. ¶1. Plaintiff later settled with the hospital and nurse, leaving only her false imprisonment claim against Dr. Fields. ¶1. Plaintiff and Dr. Fields filed cross-motions for summary judgment on that claim, with the trial court ultimately denying plaintiff's motion and entering judgment on Dr. Field's behalf. ¶1. Plaintiff appealed and the appellate court affirmed. ¶1.

Background

Plaintiff's complaint alleged that she was found unresponsive at a church, and emergency personnel brought her to Saint Anthony Medical Center (Saint Anthony's) in Rockford on January 28, 2015. ¶4. A few hours later she regained her cognitive abilities. ¶4. According to plaintiff, from January 28, 2015, through February 5, 2021, Dr. Fields was overseeing her care and medications, and ordered her to take medically invasive tests and denied her the right to refuse medication and leave the hospital. ¶4. Plaintiff further alleged that Dr. Fields, during that time period, (1) failed to properly prepare, serve, initiate, or file any involuntary commitment documents under the Mental Health and Developmental Disabilities Code (Mental Health Code) (405 ILCS 5/1-100 *et seq.*), and (2) ordered, against her will, that hospital personnel detain and restrict her liberty, ensuring that she did not leave her room or the hospital. ¶4. Plaintiff alleged that she was entitled to damages against Dr. Fields for her loss of liberty and false imprisonment. ¶4.

The discovery evidence established that Dr. Fields was a consulting psychiatrist at the hospital, but he was not compensated by it. ¶7. At the request of plaintiff's admitting physician, on January 29, 2015, Dr. Fields examined plaintiff and reviewed her psychiatric history. ¶7. Dr. Fields concluded that plaintiff was subject to involuntary admission because she was a danger to herself and needed placement in a facility that offered inpatient mental health care and treatment. ¶8. As a result, Dr. Fields prepared a certificate under the Mental Health Code finding that plaintiff was reasonably expected to place herself or another in physical harm or in reasonable expectation of being physically harmed, and that she was in need of immediate hospitalization. ¶8. Plaintiff remained hospitalized at St. Anthony's from January 28, 2015, to February 5, 2015, while the hospital attempted to locate a bed for her at a nearby mental-health facility. ¶9. During plaintiff's stay at St. Anthony, Dr. Fields visited plaintiff nearly daily. ¶9. On each occasion, after his examination, he prepared a first certificate, opining that hospitalization was appropriate to prevent plaintiff from harming herself, through her transfer on February 5, 2015, to satisfy the statutory requirement that a first certificate be prepared within 72 hours prior to admission to an inpatient mental health facility. ¶9. While he agreed in his deposition that plaintiff was not free to leave the hospital, Dr. Fields testified that *he* did not order any hospital personnel to ensure that she did not leave. ¶9. He argued that the responsibility for the oversight of the patient went to the hospital or its staff, as providing the patient with documentation. ¶9. He testified that he had no responsibility to prepare a petition for involuntary admission or that patient received judicial intervention. ¶9.

Analysis

The appellate court held that summary judgment in Dr. Field's favor was proper. ¶31.

To avoid summary judgment on plaintiff's false-imprisonment claim, she had to produce evidence that *Dr. Fields* detained her and that his detention of her was *unlawful.* Citing *Doe v. Channon,* 335 Ill. App. 3d 709, 713 (1st Dist. 2002) ("Imprisonment under legal authority is not false imprisonment.") ¶34. The appellate court found that plaintiff failed on both counts. ¶34.

First, the appellate court found that although Dr. Fields prepared the first certificates in compliance with the Mental Health Code, the plaintiff did not offer evidence to rebut that the *hospital staff* detained her. ¶35. "While the hospital may have based *its actions* on Dr. Field's assessment that plaintiff was at risk of harming herself and required treatment at an inpatient mental-health facility, plaintiff presents no evidence that Dr. fields personally took any action to detain her or ordered that anyone at the hospital do so." ¶35. The appellate court distinguished this case from *Marcus v. Liebman*, 59 Ill. App. 3d 337, 340-41 (1978), where the court found that threats by a psychiatrist to have a voluntarily hospitalized mental health patient involuntarily committed to a state hospital were sufficient to establish restraint for purpose of a false-imprisonment cause of action, such that the court's directed verdict in the psychiatrist's favor during a jury trial was improper. ¶35. Unlike *Marcus*, plaintiff was not voluntarily hospitalized and then subjected to threats of commitment by her treating physician. ¶35. The appellate court found that other than preparing first certificates, plaintiff pointed to no actions Dr. Fields allegedly took to restrain her. ¶35. The appellate court held that plaintiff's false-imprisonment claim failed on this element alone. ¶35.

Second, although the appellate court determined that plaintiff's claim failed due to lacking evidence that Dr. Fields detained her, it disagreed with plaintiff's

argument that Dr. Field's actions violated the Mental Health Code, and thus his alleged detention of her was unlawful. ¶36. The appellate court found that even if various provisions of the Mental Health Code were violated with respect to plaintiff's involuntary stay at St. Anthony, the plaintiff did not present evidence rebutting Dr. Fields' testimony that it was not his responsibility to serve plaintiff with documentation under the Mental Health Code, prepare or file petitions with the court, or prepare the second certificate (second certificate must be completed by someone other than the psychiatrist who prepared the first certificate. See 405 ILCS 5/3-610 (West 2014)). ¶36. "To the contrary, the evidence showed only that Dr. Fields was a consulting psychiatrist, not compensated by the hospital." ¶36. The appellate court concluded that plaintiff had not demonstrated that, to the extent that procedures under the Mental Health Code were not followed, *Dr. Fields* was responsible for those failures. ¶36 The appellate court further disagreed with the plaintiff's argument that Dr. Fields violated the Mental Health Code by completing multiple first certificates or that, if he did, the good-faith exemption in section 6-103 of the Mental Health Code did not apply. ¶37. While the appellate court understood that the Mental Health Code provides specific timing requirement for certain actions with respect to involuntary detention, the appellate court found that the plaintiff did not point to any provision outright precluding the preparation of multiple first certificates, such that doing so, alone, reflected a violation of the statute. ¶37.

The appellate court disagreed that, viewed in plaintiff's favor, the evidence reflected bad faith or negligence in Dr. Field's preparation of the first certificates. ¶38. The appellate court found that, to the contrary, the evidence demonstrated only that Dr. Fields prepared the certificates to comply the with the Mental Health Code and to facilitate, in accordance with the statute's requirements, plaintiff's transfer to a mental-health facility. ¶38. The appellate court found that Dr. Fields completed the certificates after reviewing plaintiff's medical records—including her suicide attempt—examining her, and developing an opinion that she was at risk of harming herself. ¶38. "He did so believing, in his professional psychiatric opinion, that had he *not* done so, plaintiff would have died from a successful suicide." ¶38. The appellate court noted that to the extent that other parties, acting in reliance upon Dr. Field's certificates, held plaintiff while failing to prepare and file with the court a petition and second certificate, serve her with documents, or release her in compliance with the Mental Health Code, plaintiff either had not pursued legal actions against them or had reached a settlement with them. ¶38.

In sum, the appellate court held that plaintiff had not established that Dr. Fields restrained her, that *he* failed to comply with the Mental Health Code, or that, if he did, his actions were not taken in good faith. ¶39. The appellate court finally held that as his actions in treating plaintiff were not unlawful, the trial court properly granted summary judgment in Dr. Field's favor on plaintiff's false-imprisonment claim. ¶39. The judgment of the circuit court was affirmed. ¶41, 42. ■

Andreas Liewald is a staff attorney with the Illinois Guardianship and Advocacy Commission, West Suburban (Hines) Office.

Mental Health Task Force Continues Its Work

BY NANCY HABLUTZEL

Led by Chief Justice Anne M. Burke and Illinois State Court Administrator Marcia Meis, an Illinois delegation attended the National Summit on Mental Health and then returned to Illinois to plan for and convene a very important six-part series held virtually in the Fall of 2020.

On December 7, 2021, a web event was held to present an overview of national and local approaches to mental health issues in the courts. One of the major announcements was the appointment of Scott Block as Statewide Behavioral Health Administrator within the Administrative Office of the Illinois Courts. He is available at sblock@illinoiscourts.gov or (312) 793-1876.

Another announcement was the reorganization of the Illinois judicial districts, and a very thorough examination of pretrial services availability throughout the state. Pretrial services are immensely important to persons with mental health issues. Because it was clear that only certain areas of the state had established pretrial services, some had limited services and some had none at all, the task force looked at getting pretrial services into every county in the state. This will take a while, and the task force has identified those counties to be involved in the first phase of establishing pretrial services, but the plan is to expand services to every county in the state.

An excellent summary of the work of the task force is available online on the Illinois Courts website www.illinoiscourts.gov. ■

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