

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
BUTLER COUNTY, OHIO

JULIE SMITH, AS GUARDIAN OF
JEFFREY SMITH

Plaintiff,

-V-

WEST CHESTER HOSPITAL, LLC

Defendants

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Case Number: CV 2021 08 1206

JUDGE MICHAEL A. OSTER, JR.

DECISION DENYING
PLAINTIFF'S ACTION FOR A
PRELIMINARY INJUNCTION

It is impossible not to feel sympathetic to the Plaintiff in the case at bar. The Plaintiff wants her husband to get better. She has sought out a doctor who prescribed ivermectin with the hopes that it could help. The Defendant Hospital wants to follow what it believes are appropriate medical standards and make the husband get better using those protocols. Everyone involved wants Jeff Smith to get better. Simply stated, there are no bad actors in this case. Just the bad of a worldwide pandemic, COVID-19.

COVID-19 has found its way into and has disrupted every person's life, and it has now found its way into this courtroom. But, Judges are not doctors or nurses. We have gavels, not needles, vaccines, or other medicines. Yet, this Court now must make a decision on a potential treatment. Specifically, this Court must determine whether a hospital, when requested by a patient, is obligated to administer a medication that is not an approved course of treatment. This Court is not making a

decision on the effectiveness of ivermectin. Rather, the question is- Has Plaintiff met her burden to be entitled to a preliminary injunction under Ohio law.

As a citizen, it would be easy to think about wanting to help someone in Jeff Smith's condition, no matter the law. As a judge, the present case invites allowing emotions to steer one towards judicial activism. However, our legal system must stay firmly rooted in proper legal interpretation of the law, not what individual judges think the law should be. This Court is called upon to make its ruling irrespective of all sympathy, passion, or prejudice. Justice Antonin Scalia often spoke about his distaste for those that burned the American Flag. Even indicating that he would love to put them in jail for the act. Nevertheless, Justice Scalia recognized that he was not King, and the law, not his personal feelings, had to guide his decisions. This included being in the five-justice majority that twice found Constitutional protections for those that burned the flag. He had a personal distaste for the decisions, but he made them. See, *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533 (1989), *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404 (1990).

COVID-19 has ravaged the world. However, the rule of law must be followed once the court system is involved. The law in its purest form shall have neither hatred nor sympathy for anyone or anything. It shall stand unwavering in its truth, justice, and fairness to all. While the case at bar has emotion to it, the following decision will be strictly based upon the standards of law of a preliminary injunction case.

Legal Question: Should an injunction be granted to force a hospital to honor the prescription of a doctor that has not seen a patient and has no privileges at said hospital thus forcing the hospital to give ivermectin to a patient when the hospital's doctors, the FDA, CDC, and the AMA do not believe ivermectin should be a recommended way to treat COVID-19?

STATEMENT OF FACTS

This matter comes before the Court upon Plaintiff, Julie Smith's ("Plaintiff") Complaint for Emergency Medical Declaratory Judgment and Emergency Injunctive Relief filed Friday, August 20, 2021, which upon review is actually an action for an Injunction against Defendant West Chester Hospital, LLC ("Defendant"), pursuant to Ohio Civil Rule 65.

In Plaintiff's Complaint, Ms. Smith states that she is acting as the guardian for her husband Jeffrey Smith, who is currently receiving treatment for complications of COVID-19, in the Intensive Care Unit at West Chester Hospital, LLC. Mr. Smith is a 51 year old male with a wife, (Julie Smith), and three children.

According to the record, Mr. Smith tested positive for COVID-19 on July 9, 2021 and was admitted to the hospital in its Intensive Care Unit on July 15, 2021, where he remains today. After Mr. Smith's condition continued to decline, on August 1, 2021, Mr. Smith was sedated, intubated, and placed on a ventilator. See Plaintiff's

Complaint filed August 20, 2021.

Upon the filing of Plaintiff's Complaint, this case was randomly assigned by the Clerk of Courts to Judge Michael A. Oster, Jr. However upon learning of Plaintiff's filing on Monday, August 23, 2021, and due to the perceived medical urgency of the matter, the initial Temporary Injunction Hearing was held before Judge J. Gregory Howard, as Judge Oster had a large Criminal hearings docket already set on Monday, August 23, 2021, which the Judge was unable to postpone.

At the initial August 23, 2021 temporary injunction hearing before Judge Howard, Counsel for Plaintiff and Counsel for Defendant were present. After a review of the record and the oral arguments presented, Judge Howard **GRANTED** Plaintiff a Temporary Injunction for a period of fourteen (14) days, ordering that Defendant West Chester Hospital, LLC begin administering the drug ivermectin to the Plaintiff as prescribed by Plaintiff's husband's physician, Dr. Fred Wagshul. See Judgment Entry filed August 23, 2021. The ivermectin that was prescribed is for human use, and is approved by the FDA to treat internal and external parasites. However, Dr. Wagshul prescribed the medication without having seen Jeff Smith and does not have privileges at West Chester Hospital.

After Judge Howard's ruling, but before a hearing could be held before Judge Oster, the Center for Disease Control and Prevention (CDC), U.S. Food and Drug Administration (FDA), American Medical Association (AMA), American Pharmacists Association (APhA) and the American Society of Health-System Pharmacists (ASHP)

all issued statements or advisories against the use of ivermectin to treat COVID-19.

This case was then set for a Preliminary Injunction hearing before Judge Oster for Thursday, September 2, 2021, and Friday, September 3, 2021. At said hearing, testimony was received from Julie Smith, Dr. Wagshul, Dr. Robertson, Dr. Tanase, and Dr. Asghar. Both sides also admitted numerous items into evidence. Defendant filed an Answer to Plaintiff's Complaint for Emergency Medical Declaratory Judgment and Emergency Injunctive Relief on September 2, 2021. Defendant also filed Opposition to Plaintiff's Complaint on September 2, 2021. See Docket. Based upon a complete review of the record and upon consideration of the arguments and evidence presented at the Preliminary Injunction hearing this Court finds that Plaintiff's Complaint for an Injunction is not well taken and is **DENIED** for the reasons as set forth below.

LEGAL ANALYSIS

The decision whether to grant or deny injunctive relief is within the trial court's sound discretion and its decision will not be disturbed on appeal absent a clear abuse of that discretion. *DK Prods. v. Miller*, 12th Dist. No. CA2008-05-060, 2009-Ohio-436, citing *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604, 1995-Ohio-301, 653 N.E.2d 646 (12th Dist.). An abuse of discretion is no mere error of law or judgment, but instead, requires a finding that the trial court's decision is unreasonable, arbitrary or unconscionable. *Id.*

The purpose of a preliminary injunction is to preserve the status quo of the parties pending a final adjudication of the case upon the merits. See *Back v. Faith Props., LLC*, 12th Dist. No. CA2001-12-285, 2002-Ohio-6107, ¶36 (12th Dist.), citing *Yudin v. Knight Industries Corp.*, 109 Ohio App.3d 437, 439, 672 N.E.2d 265 (6th Dist.1996), citing *Cardinale v. Ottawa Regional Planning Comm.*, 89 Ohio App.3d 747, 754, 627 N.E.2d 611 (6th Dist.1993).

In determining whether to grant a preliminary injunction, the court must consider whether: (1) the movant has shown a strong or substantial likelihood of success on the merits, (2) the movant has shown irreparable injury will occur without the injunction, (3) the preliminary injunction could harm third parties, and (4) the public interest would be served by issuing the preliminary injunction. Each element must be established by the movant by clear and convincing evidence. No one element is dispositive. However; if there is a strong likelihood of success on the merits, an injunction may be granted even though there is little evidence of irreparable harm and vice versa. *Fischer Dev. Co. v. Union Twp.*, 2000 Ohio App. LEXIS 1873, 1, 2000 WL 525815 (Ohio Ct. App., Clermont County May 1, 2000).

A court issuing an injunction has inherent authority to modify or vacate its own injunctive decree. A court must never ignore significant changes in the law or circumstances underlying an injunction lest it becomes inequitable that the injunction should have prospective application. (decided under former analogous section) *Cleveland v. Ohio Dep't of Mental Health*, 84 Ohio App. 3d 769, 618 N.E.2d 244,

1992 Ohio App. LEXIS 6790 (1992).

In granting an injunction, the court must give due consideration to the rights of all parties in interest, not just the party seeking the injunction. Injunctive relief is generally prospective, not retrospective: (decided under former analogous section) *Cullen v. Milligan*, 79 Ohio App. 3d 138, 606 N.E.2d 1061, 1992 Ohio App. LEXIS 2333 (1992).

Based upon the facts and evidence, the Court finds as follows:

1) Plaintiff/Movant has not shown a strong or substantial likelihood of success on the merits.

After considering all of the evidence presented in this case, there can be no doubt that the medical and scientific communities do not support the use of ivermectin as a treatment for COVID-19. While there are some doctors and studies that tend to lend support to ivermectin, the Plaintiff has to prove by clear and convincing evidence that there is a strong likelihood of success on the merits. With the evidence presented to the Court, the Plaintiff simply cannot meet this burden.

This Court is not determining if ivermectin will ever be effective and useful as a treatment for COVID-19. However, based upon the evidence, it has not been shown to be effective at this juncture. The studies that tend to give support to ivermectin

have had inconsistent results, limitations to the studies, were open label studies, were of low quality or low certainty, included small sample sizes, various dosing regimens, or have been so riddled with issues that the study was withdrawn. As such, based upon these limitations, the medical community does not support the use of ivermectin as a treatment for COVID-19 at this time. The best support in the medical community is a neutral position by the National Institute of Health.

What is more, at the hearing, Plaintiff's own witness, Dr. Wagshul was only able to say that Jeff Smith "seems to be" getting better after receiving ivermectin. Dr. Wagshul further testified that "I honestly don't know" if continued use of ivermectin will benefit Jeff Smith. Julie Smith does believe that ivermectin is working.

All of the aforementioned evidence must then be balanced against the recommendations *against* the use of ivermectin by the FDA, CDC, AMA, APhA, and the doctors who testified on behalf of West Chester Hospital. In fact, as submitted as evidence to the court, no single public health body in the United States supports the use of ivermectin to treat COVID-19.

When the evidence presented to this court is taken as a whole, Plaintiff has simply not made the requisite showing that there is a strong or substantial likelihood of success on the merits. Plaintiff cannot satisfy her clear and convincing burden as to this prong of the test.

2) Plaintiff/Movant has not shown irreparable injury will occur without the injunction

The FDA, CDC, AMA, and APhA, and the doctors of West Chester Hospital do not believe that ivermectin should be used to treat COVID-19. No strong evidence by way of study or data analysis can, at this time, show that ivermectin should be recommended for COVID-19 treatment. Based on the current evidence, ivermectin is not effective as a treatment for COVID-19. If it is not an effective treatment, then this court cannot find by clear and convincing evidence that an irreparable injury will occur without the injunction. Even Plaintiff's own doctor could not say that that continued use of ivermectin would benefit Jeff Smith.

What is more, based upon the testimony, Jeff Smith is capable of being safely and medically appropriately moved to a hospital where Dr. Wagshul has privileges. If continued use of ivermectin under Dr. Wagshul's treatment regimen is desired, Plaintiff has this as an available option without the need of intervention by a court.

3) The preliminary injunction could harm third parties

The parties did not address this element with much argument. The crux of the case lies between a patient and the hospital. Anecdotal evidence suggests some potential harm to third parties (overdoses by using horse/animal medications as

opposed to human form ivermectin) but this court will find the third prong as neutral.

4) The public interest would not be served by issuing the preliminary injunction

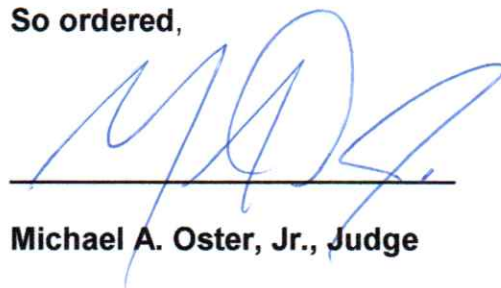
While this court is sympathetic to the Plaintiff and understands the idea of wanting to do anything to help her loved one, public policy should not and does not support allowing a physician to try “any” type of treatment on human beings. Rather, public policy supports the safe and effective development of medications and medical practices. A clinical trial would be one such method of a developmental process. However, a clinical trial is not at issue in this case. (Also not raised in the case is the “right to try.”)

What is more, public policy in this case encompasses a number of broader issues including a hospital’s standard of care decisions, mandating doctors and nurses to provide care they believe unnecessary, ethical concerns of all doctors involved, patient autonomy, fiduciary duty, accreditation standards for patient protections, obligating one doctor to carry out the treatment regimen/plan of another doctor, interplay of R.C. 4743.10, and whether a court should mediate or legislate from the bench.

As such, public policy would not favor the granting of the injunction by clear and convincing evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that Plaintiff Julie Smith's Complaint for Emergency Medical Declaratory Judgment and Emergency Injunctive Relief is hereby **DENIED**.

So ordered,



Michael A. Oster, Jr., Judge

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