

2021 WL 4129083 (Ohio Com.Pl.) (Trial Order)
Court of Common Pleas of Ohio,
General Division.
Butler County

Julie SMITH, as Guardian of Jeffrey Smith, Plaintiff,

v.

WEST CHESTER **HOSPITAL**, LLC, Defendants.

No. CV 2021 08 1206.

September 6, 2021.

Decision Denying Plaintiff's Action for a Preliminary Injunction

Jonathan Davidson, Davidson Law Office Co., LPA, 2 S. Third St., Suite 301, Hamilton, OH 45011, for plaintiff.

Jeffrey G. Stagnaro, Sharon J. Sobers, Stagnaro, Saba, & Patterson Co., LPA, 7373 Beechmont Ave., Cincinnati, OH 45230, for plaintiff.



Ralph C. Lorigo, Law office of Ralph C. Lorigo, 101 Slade Avenue, West Seneca, NY 14224, for plaintiff.

Charles B. Galvin, Bill J. Paliobeis, 9277 Centre Pointe Drive, Suite 300, West Chester, OH 45069, for defendant West Chester **Hospital**, LLC dba West Chester **Hospital**.

Michael A. Oster, Jr., Judge.

*1 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 indicting that he would love to put them in jail for the act, Nevertheless, justice Scafia 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*, 498 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](#).

*2 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 clear abuse of that discretion. *DK Prods. v. Miller*, 12th Dist. No. CA2008-05-080,2G09-Ohso~436, citing *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt Dist.*, 73 Ohio St.3d 590, 804, 1995-Ohio-301, 853 N.E.2d 848 (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.*

*3 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, 872 N.E.2d 285 (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 625815 (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 789. 818 N.E.2d 244, 1992 Ohio App. LEXIS 8790 (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) *Cuilen v. Milligan*, 79 Ohio App. 3d 138, 808 N.E.2d 1081, 1992 Ohio App. LEXIS 2333 (1992).

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

1) Plaintiff/Movarit 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.

*4 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, APbA, 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 (overdoes 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.

*5 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,

<<signature>>

Michael A. Oster, Jr., Judge

Copies to:

Jonathan Davidson

Davidson Law Office Co., LPA

2 S. Third St., Suite 301

Hamilton, OH 45011

Attorney for Plaintiff

Jeffrey G. Stagnaro

Sharon J. Sobers

Stagnaro, Saba, & Patterson Co., LPA

7373 Beechmont Ave.

Cincinnati, OH 45230

Attorney for Plaintiff

Ralph C. Lorigo

Law office of Ralph C. Lorigo

101 Slade Avenue

West Seneca, NY 14224

Attorney Pro Hac Vice for Plaintiff

Charles B. Galvin

Bill J. Paliobeis

9277 Centre Pointe Drive, Suite 300

West Chester, OH 45069

*Attorney for Defendant West Chester **Hospital**, LLC dba West Chester **Hospital***

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