

STATE OF WISCONSIN : CIRCUIT COURT : OUTAGAMIE COUNTY

THEDACARE, INC.,

Plaintiff,

v.

ASCENSION NE WISCONSIN, INC.,

Defendants.

Case No.

Code No(s). 30704 (Other Injunction or
Restraining Order)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER AND TEMPORARY INJUNCTION**

In the midst of the worst days of the Covid-19 pandemic, while hospitals across Wisconsin struggle with capacity and the provision of critical health care, Defendant Ascension NE Wisconsin, Inc. (“Ascension”) recruited seven of eleven total members of ThedaCare’s interventional radiology and cardiovascular team (the “IRC team”) at ThedaCare Regional Medical Center – Neenah (“Neenah Medical Center”) and set the stage for their simultaneous departure from ThedaCare. Simply put, these departing employees are not replaceable on a moment’s notice – they are highly trained invasive radiology technicians and nurses that provide life-saving treatment where patients might otherwise die minutes later. They are critical components of Neenah Medical Center, which provides care that Ascension – even with the departing employees – cannot provide. And yet, Ascension has chosen to ignore the consequences, knowing the detrimental impact it would have on critical patients in the Fox River Valley and throughout the state of Wisconsin.

The Court need not ignore the consequences to the public interest. Extraordinary circumstances necessitate extraordinary relief. To maintain the structural integrity of the state’s

health-care system during this public health emergency, the Court should issue a temporary restraining order and temporary injunction enjoining Ascension to either make available one invasive radiology technician and one registered nurse of the departing IR team members per day, or cease the hiring of the departing IR team members, until the time when ThedaCare has hired adequate staff to replace the departing IRC team members and maintain its level of service in support of public safety and health.

The circumstances meet the threshold for preliminary injunctive relief. First, ThedaCare and the public will suffer immeasurable irreparable harm without injunctive relief because ThedaCare will not have adequate staffing to treat trauma and stroke victims – some of whom will die as a result of the lack of timely care. Second, the immensity of the harm to ThedaCare and the public balances the harms squarely in ThedaCare’s favor. ThedaCare asks only that Ascension maintain the status quo on a short-term basis to avoid a public health calamity. Finally, ThedaCare has a reasonable probability of success on the merits of its claim for tortious interference with contract.

I. FACTUAL BACKGROUND

The facts relevant to ThedaCare’s application for a temporary restraining order and temporary injunction are set forth in the Affidavit of Lynn Detterman (“Detterman Aff.”) and in the accompanying exhibits. They are summarized below for the benefit of the Court:

1. ThedaCare is a Wisconsin nonprofit business corporation that provides health care services to individuals in northeast and central Wisconsin. ThedaCare serves communities in an approximately 60-mile radius from Neenah, Wisconsin, from Wausau to Manitowoc, from west to east, and from the Upper Peninsula of Michigan to communities south of Fond du Lac, from north to south. (Detterman Aff. ¶ 2.)

2. ThedaCare delivers care to more than 600,000 residents in 17 counties.

ThedaCare has 180 points of care, including seven hospitals. (Detterman Aff. ¶ 3.)

3. Among several medical facilities, ThedaCare operates Neenah Medical Center. (Detterman Aff. ¶ 4.)

4. Neenah Medical Center is ThedaCare's flagship facility and serves as a hub for specialized care for facilities in the ThedaCare network and for patients referred by medical facilities in other areas of the state. (Detterman Aff. ¶ 5.)

5. Neenah Medical Center staffs an IRC team. The IRC team includes invasive radiology technicians and nurses with specialized radiology and cardiovascular training. The IRC team is interdisciplinary and provides patients with neurological, cardiovascular, and trauma care, among other disciplines. (Detterman Aff. ¶¶ 6–7.)

6. The IRC team performs thrombectomies (removal of blood clots), embolization (placement of a substance to channel blood into a vessel and stop bleeding), and catheter placement, among numerous other specialty therapies. (Detterman Aff. ¶ 8.)

7. ThedaCare calls upon the IRC team each day to perform time-sensitive, life-saving care for patients. (Detterman Aff. ¶ 9.)

8. The consistent demand for this critical care is apparent in Neenah Medical Center's designation and certification as a center for trauma and stroke care.

9. Specifically, the Wisconsin Department of Health Services designates Neenah Medical Center as a Level II trauma center, a designation verified by the American College of Surgeons ("ACS"). ACS has verified Neenah Medical Center as a Level II trauma center since 1998. The classifications range from Level I (highest) to Level IV (lowest) and are based upon standards promulgated by ACS. (Detterman Aff. ¶ 10.)

10. The primary difference between Level I and Level II trauma centers is that Level I trauma centers have a full-time surgical residency and conduct trauma research. (Detterman Aff. ¶ 11.)

11. Notwithstanding the gradation between a Level I and a Level II trauma center, the ACS expects that clinical outcomes will be equivalent for severely injured patients at Level I and Level II trauma centers. In other words, the ACS standards for the provision of clinical care to injured patients for Level I and Level II trauma centers are identical. (*Id.*)

12. The primary difference between Level II and Level III trauma centers is that Level II trauma centers provide definitive surgical and intensive trauma care, while Level III trauma centers can provide assessment, resuscitation, stabilization, and emergency surgery prior to transferring patients to a Level I or Level II trauma center for definitive care. (Detterman Aff. ¶ 12.)

13. As a Level II trauma care center, Neenah Medical Center is able to provide initial definitive trauma care regardless of the severity of an injury. Neenah Medical Center provides comprehensive and time-sensitive critical care to trauma victims. It also serves as a hub for surrounding medical facilities – some as far as the Upper Peninsula of Michigan – to send patients in need of specialized care. (Detterman Aff. ¶¶ 1, 5, 11–12.)

14. Neenah Medical Center also hosts ThedaStar. ThedaStar provides helicopter transport and transfers for trauma patients and critically ill patients, including transport from rural hospitals. (Detterman Aff. ¶ 13.)

15. To maintain its designation and verification as a Level II trauma care center, Neenah Medical Center must maintain a minimum level of capability for a wide range of services. (Detterman Aff. ¶ 14.)

16. Among many requirements, Neenah Medical Center must provide 24-hour availability of interventional radiology procedures. (*Id.*)

17. This requirement recognizes that immediate access to interventional radiology is necessary to provide life-saving treatment to trauma victims. (*Id.*)

18. Neenah Medical Center is the only Level II trauma center in the Fox River Valley. No other hospital – including St. Elizabeth Hospital, a Level III trauma center – can offer the same level of care to trauma victims. (Detterman Aff. ¶ 15.)

19. Neenah Medical Center is also certified by De Norske Veritas – Health Care (an international certification society) as a Comprehensive Stroke Center. Neenah Medical Center’s certification as a Comprehensive Stroke Center recognizes its capability to receive and treat the most complex stroke cases. (Detterman Aff. ¶ 16.)

20. The certification of Neenah Medical Center as a Comprehensive Stroke Center requires that it maintain 24-hour coverage of certain medical services, including interventional radiology. (Detterman Aff. ¶ 17.)

21. Neenah Medical Center is the only Comprehensive Stroke Center in the Fox River Valley. No other hospital in the Fox River Valley – including St. Elizabeth Hospital, a Primary Stroke Center – can offer the same level of care to stroke victims. (Detterman Aff. ¶ 18.)

22. On December 21, 2021, ThedaCare learned that four members of its eleven-member IRC team intended to resign their employment with ThedaCare and begin employment with Ascension at its St. Elizabeth Hospital facility in Appleton, Wisconsin. These four IRC members constituted all of the invasive radiology technicians employed by the Neenah Medical Center. On December 29, 2021, ThedaCare learned that two nurses intended to resign their employment with ThedaCare and begin employment with Ascension at St. Elizabeth Hospital in

Appleton. On January 7, 2022, ThedaCare learned that one additional nurse intended to resign their employment with ThedaCare and begin employment with Ascension at St. Elizabeth Hospital in Appleton. Thus, in total, seven out of eleven members of ThedaCare's IRC team announced their intention to resign their employment. (Detterman Aff. ¶ 19.)

23. ThedaCare learned that the seven departing IRC team members would collectively resign on January 21, 2022 and start with Ascension on January 24, 2022. (Detterman Aff. ¶ 20.)

24. A review of the work e-mail accounts of the seven departing IR team emmbers shows that Ascension negotiated employment terms and interviewed the departing IR team members in November and December 2021. (See Detterman Aff. ¶ 21, Exhibit A, Young 12/6/21 E-mail; Exhibit B, Young 11/22/21 E-mail to Scott Fischer; Exhibit C, Young 11/30/21 E-mail to Leigh Ann Bohman.)

25. If the departing IRC team members collectively resign on January 21, 2022 as planned, ThedaCare will not be able to treat all patients that require critical care. ThedaCare will need to divert patients to other facilities, potentially as far as Madison or Milwaukee. (Detterman Aff. ¶ 22.)

26. The inevitable diversions of patients will irreparably harm patients because patient outcomes can change in a matter of minutes. (Detterman Aff. ¶ 23.)

27. The additional time it will take to transport patients to a diversion facility will result in negative patient outcomes as severe as death. (*Id.*)

28. The magnitude of the harm caused by diversion is compounded for two reasons. First, the Covid-19 pandemic has caused a shortage of available beds – even if a patient might survive transportation to a facility in Madison or Milwaukee, those facilities may not have space

when it is needed. Second, the Omicron variant has caused short-term staffing shortages among medical transport and ambulance services. Thus, even if a patient could survive transportation, *and* if a facility may have capacity notwithstanding the lack of statewide bed capacity, the patient *still* may suffer a negative outcome because there is no available transportation. (Detterman Aff. ¶¶ 24–26.)

29. In addition to negative patient outcomes, the failure to provide round-the-clock interventional radiology services is a Type I deficiency under standards promulgated by the ACS. A Type I deficiency will result in the loss of Neenah Medical Center’s designation and verification as a Level II trauma center. The same failure is a deficiency under standards promulgated by De Norske Veritas – Health Care and may result in the loss of Neenah Medical Center’s certification as a Comprehensive Stroke Center. (Detterman Aff. ¶¶ 27–29.)

30. The loss of Neenah Medical Center’s status as a Level II trauma center – a status it has held since 1998 – and a Comprehensive Stroke Center will significantly damage its reputation among patients and in the industry. Neenah Medical Center is relied upon by patients and health-care facilities as far as the Upper Peninsula of Michigan as a facility that can handle trauma and stroke patients presenting with complex and life-threatening conditions. ThedaCare will lose the trust of those partners if it cannot provide the services those facilities have come to expect from Neenah Medical Center. (Detterman Aff. ¶¶ 1, 9, 30.)

31. On January 14, 2022, ThedaCare attempted to negotiate with the departing IRC team members to continue their employment with ThedaCare or arrange for an orderly transition of employment that did not endanger patient care. ThedaCare and the departing IRC team members could not reach an agreement. (Detterman Aff. ¶ 31.)

32. After negotiations with the departing IRC team members failed, ThedaCare conducted negotiations with Ascension leadership on January 18, 2022 and January 19, 2022 to discuss an orderly transition of the departing IRC team members from employment with ThedaCare to employment with Ascension. (Detterman Aff. ¶ 32.)

33. On January 19, 2022, members of ThedaCare and Ascension leadership met to discuss trauma and stroke services in the Fox River Valley and surrounding communities if Ascension proceeded with its hiring of the departing IRC team members. (Detterman Aff. ¶ 33.)

34. At this meeting, ThedaCare requested that Ascension grant ThedaCare ninety days of access to one invasive radiological technician per day and one nurse with radiology training to provide sufficient time to identify replacement staff for the departing IRC team members (the “Collaboration Request”). (Detterman Aff. ¶ 34.)

35. ThedaCare made the Collaboration Request to ensure Level II trauma care and comprehensive stroke care remain available in the Fox River Valley and to rural hospitals that rely on proximity to Neenah Medical Center. (Detterman Aff. ¶ 35.)

36. Ascension rejected the Collaboration Request. Responding to ThedaCare’s concern about the lack of availability of Level II trauma care in the Fox River Valley, Ascension said that those patients could simply be diverted to Level II trauma centers in Green Bay. Responding to ThedaCare’s concern about the lack of availability of comprehensive stroke care in the Fox River Valley, Ascension said that Saint Elizabeth Hospital can provide the necessary care. However, St. Elizabeth Hospital is a Primary Stroke Center, not a Comprehensive Stroke Center. In fact, the nearest Comprehensive Stroke Center in the Ascension hospital network is located in Milwaukee. (Detterman Aff. ¶ 36–38.)

II. ARGUMENT

The Court may issue a temporary injunction if (1) the movant is likely to suffer irreparable harm if the temporary injunction is not issued; (2) the movant has no adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. *Service Employees Int'l Union, Local 1 v. Vos.*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35. The Court must also weigh each party's interests in issuing the injunction and find that the equities favor issuance. *See Carlin Lake Ass'n, Inc. v. Carlin Club Props., LLC*, 2019 WI App 24, ¶ 44, 387 Wis. 2d 640, 929 N.W.2d 228. The Court must also consider effects on the public interest. *See Kuntz v. Werner Flying Servs., Inc.*, 257 Wis. 405, 409, 43 N.W.2d 476 (1950). ThedaCare satisfies each element necessary for the Court to issue a temporary injunction.

a. ThedaCare and the communities that it serves will suffer irreparable harm without immediate injunctive relief.

Irreparable harm occurs where a later-issued permanent injunction would be “futile” without injunctive relief to preserve the status quo. *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). Indeed, the injuries that ThedaCare and Fox River Valley citizens and communities will suffer if Ascension proceeds will be immediate, irreparable, and without monetary remedy.

It is hard to imagine a more irreparable harm than the threat to public health that this matter presents to the Court. Neenah Medical Center is the irreplaceable core of health-care in the Fox River Valley, and patients have relied on Neenah Medical Center for more than a century for their critical medical needs. It also serves as a destination for referrals from smaller facilities, or facilities in more rural areas of the state. Ascension's raiding of ThedaCare's IR team would threaten ThedaCare's ability to provide stalwart service. Indeed, the harm is far

worse and irreparable – the loss of a critical mass of ThedaCare’s IR team will cause patient deaths.

Moreover, this crisis arises at a time when the broader health-care system is uniquely incapable of tolerating change to the status quo. Because of the Covid-19 pandemic, more than nine out of every ten hospital beds in the state are occupied. (Detterman Aff. ¶ 23.) The same statistic applies to intensive care unit beds in the state. (*Id.*) A *majority* of hospitals in the state are at their overall peak capacity, and more than three-quarters of the state’s hospitals cannot take in another patient needing intensive care. (*Id.*) The state’s health-care system is facing unparalleled strain and each actor must play its part or risk causing the house of cards to collapse. Neenah Medical Center’s inability to provide care to trauma and stroke victims will reverberate across Wisconsin, not just the Fox River Valley. Rural facilities accustomed to relying on Neenah Medical Center for complex cases will find that the next most capable facility is further south in Madison or Milwaukee – and that assumes that those facilities have the capacity to take in those patients. If Neenah Medical Center cannot care for patients during this public health emergency, ThedaCare will suffer damage to its reputation and credibility in the industry and in the community. *See Culligan, Inc. v. Rheaume*, 269 Wis. 242, 251–252, 68 N.W.2d 810 (1955) (recognizing reputational damages as a basis for temporary injunction).

Ascension’s responses to ThedaCare about these harms demonstrate either ignorance, at best, or callousness, at worst. When ThedaCare confronted Ascension about the loss of Level II trauma care in the Fox River Valley, Ascension responded that patients needing Level II care could simply be diverted to Level II trauma centers in Green Bay. (Detterman Aff. ¶ 36.) This response (1) ignores the danger posed to patients by longer transport times, (2) incorrectly assumes that sufficient transport would be available to divert patients to Green Bay in light of the

current transportation shortage, and (3) incorrectly assumes that Level II trauma centers in Green Bay – or Milwaukee or Madison for that matter – have sufficient bed capacity to accept diverted patients. (*See* Detterman Aff. ¶¶ 21–25.)

While undoubtedly piling in comparison to the negative patient outcomes that will occur if Ascension proceeds, Neenah Medical Center will also lose its verification as a Level II trauma center because it cannot provide the round-the-clock interventional radiology services required by the Wisconsin Department of Health Services and the American College of Surgeons. ACS has designated only eight facilities as Level II trauma centers in the state of Wisconsin. (Detterman Aff. ¶ 9.) Neenah Medical Center is the *only* DHS-classified Level II trauma center in the Fox River Valley. (Detterman Aff. ¶ 13.) Neenah Medical Center has invested significant resources in developing its trauma care program and would stand to lose on those investments if it lost its Level II trauma center status. Similarly, Neenah Medical Center could also lose its certification as a Comprehensive Stroke Center because it would not be able to meet the standard of having appropriate neurosurgical staff available on demand. (Detterman Aff. ¶ 28.)

It cannot be disputed that ThedaCare and the public stand to suffer irreparable damage for which monetary remedies are not adequate.

b. The balance of harms strongly favors the Court issuing a temporary injunction.

The Court should issue a temporary restraining order and temporary injunction because the harm to ThedaCare absent injunctive relief outweighs any harm that may result to the Defendants if enjoined. *See Columbia Cty. v. Bylewski*, 94 Wis. 2d 153, 163, 288 N.W.2d 129 (1980) (“competing interests must be reconciled and the plaintiff must satisfy the trial courts that on balance equity favors issuing the injunction”).

The balancing of harms in this case is straightforward and heavily in ThedaCare's favor. On one hand, if the Court does not issue the injunction, ThedaCare's ability to care for trauma and stroke patients will be hindered until it can find staff to replace those that departed. Consequently, ThedaCare will need to divert those patients away from Neenah Medical Center. This endangers lives in these communities when minutes matter and adds pressure to an overburdened health-care system.

On the other hand, if the Court issues the temporary injunction, Ascension will only endure delay in its plan to employ the departing IR team members. Maintenance of the status quo allows the continuation of the current system of trauma care and stroke care in the Fox River Valley region and the state. Failure to maintain the status quo will immediately plunge critical care into disarray in the region and affect the provision of medical services statewide. There is no harm in requiring Ascension to continue the status quo while Ascension and ThedaCare expeditiously address this issue. The need to ensure public health – *especially* during a pandemic – far outweighs this dispute.

c. ThedaCare has a reasonable likelihood of success on the merits.

ThedaCare is reasonably likely to succeed on its claim. To secure a temporary restraining order and temporary injunction, ThedaCare need only demonstrate it is *reasonably probable* to prevail on the merits. *See Vos*, 2020 WI 67, ¶ 93. This formulation is similar to that of the federal courts, which require a “reasonable likelihood” of success. There, the movant does *not* need to “show that it definitely will win the case” or even offer “proof by a preponderance.” *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020). Instead, the movant must simply demonstrate how it “proposes to prove the key elements of its case.” *Id.*

Indeed, ThedaCare has a cause of action for tortious interference with contracts *at least* sufficient to justify a temporary injunction preserving the status quo during the pendency of the case. The departing IR team members are currently employed by ThedaCare and ThedaCare expects their continued employment but for any improper interference. Moreover, ThedaCare – and prospective patients in the Fox River Valley – expected that Neenah Medical Center would maintain its critical care capabilities during this perilous time. Unfortunately, Ascension interfered not only with ThedaCare’s relationship with its employees, but also with its relationship with the patients whose lives it could save when it chose to selfishly raid ThedaCare’s IRC team.

ThedaCare has ample evidence to show that this interference, and the ensuing collective resignation that the interference caused, creates extraordinary damages. ThedaCare is not trading in hyperbole when it says that patient lives are at risk if the departing IR team members resign *en masse* as planned. (*See* Sections I(a) and (b), *supra*.) For that same reason, the interference was improper. Among the relevant factors for considering whether interference is improper are “the nature of the actor’s conduct,” “the interests of the other with which the actor’s conduct interferes,” and “the social interests in protecting the freedom of action of the actor and the contractual interest of the other.” *Cudd v. Crownhart*, 122 Wis. 2d 656, 660–61, 364 N.W.2d 158 (Ct. App. 1985) (citing Restatement (Second) of Torts § 767 (1979)). Each of these factors implicates the effect that Ascension’s actions will have on the community and the public interest. “The nature” of the conduct was to organize the simultaneous departure of critical care staff in derogation of ThedaCare’s interest and the interests of the broader public. While Ascension may have an interest in protecting its “freedom of action” to hire staff, the inevitable result is that it

prioritizes Ascension's self-interest. Ascension's raiding of ThedaCare's IR team, in light of the severe negative impact on the community, renders its interference improper.

To close, it bears repeating that the Court need not find at this juncture that ThedaCare will prevail. All that ThedaCare must show now is a reasonable probability of success on the merits. ThedaCare has met that burden by demonstrating how it proposes to prove the elements of its claim. The Court should give the benefit of the doubt to ThedaCare because the balance of harms weigh so deeply in favor of ThedaCare. *See Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) (describing federal courts' "sliding-scale" approach whereby threshold to show likelihood of success is lower where balance of harms weighs more heavily in favor of movant).

III. CONCLUSION

The Court should issue a temporary restraining order and temporary injunction to preserve the status quo and avoid significant impacts to ThedaCare's ability to provide crucial and timely medical services to the public.

Dated this 20th day of January, 2022.

GODFREY & KAHN, S.C.

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