

No. 23-6144 **ORIGINAL**

In The Supreme Court of the United States

Susanne Aspley

Supreme Court, U.S.  
FILED

SEP 18 2023

OFFICE OF THE CLERK

Petitioner

v.

MN Governor Tim Walz, Minnesota Heath Commissione Jan Malcolm

Respondents

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On Petition For A Writ Of Certiorari to the United States Court of Appeals For the  
Eighth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In March, 2020, during the height of the COvid Pandemic, MN Governor Tim Walz and Minnesota Health Department (MDH) Commissioner egregiously created two Emergency Orders to allow Covid virus infected patients into otherwise healthy nursing homes, resulting in the death of nearly 7,000 Minnesota elderly, including the plaintiff's mother on April 8, 2020.

- THE MN Fed court as well as the MN Appeals court of appeals has entered a decision in direct conflict to the 14th Amendment right to life.
- a
- and the Right to Life under Law
- 
- conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

### First Claim for Relief-Deprivation of Life

In violation of the Fourteenth Amendment to the Constitution of the United States protecting the life of LaVonne Aspley. 42 USC Section 1983) is a federal law that allows citizens to sue in certain situations for violations of rights conferred by the US Constitution or federal laws.

### Second Claim Deprivation of Rights Under Color of Law

The purpose of Section 242, acts under "color of law" include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers, prisons guards and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials. It is not necessary that the crime be motivated by animus toward the race, color, religion, sex, handicap, familial status or national origin of the victim.

## **PARTIES TO THE PROCEEDINGS**

Petitioner Susanne Aspley, Special Administrator of the Estate of LaVonne Aspley, Decedent was Plaintiff and Appellants below.

Respondents TiGovernor of Minnesota Tim Walz, The State of Minnesota, and Minnesota Department of Health Commissioner Jan Malcolm

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## **TABLE OF AUTHORITIES**

**CONSTITUTIONAL PROVISIONS**  
**US Const. amend. XIV**

**TITLE 18, USC, SECTION 242**

## **OPINIONS BELOW**

The decision of the Federal Court opinion, the Appeal's Court Oppinion and the Carver Couty Probate Court's order are reprinted in the Appendix.

## **JURISDICTION**

The United States District Court for the District of Minnesota had jurisdiction over this matter pursuant to 18 U.S.C. §§ 1153 and 3231. The Eighth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Eighth Circuit decided Plaintiff's appeal on June 20, 2023. No petition for rehearing was filed. This petition is timely filed pursuant to this Court's Order of June 20, 2023.

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **Deprivation of Life**

In violation of the Fourteenth Amendment to the Constitution of the United States protecting the life of LaVonne Aspley.

#### **Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC Section 1983 is a federal law that allows citizens to sue in certain situations for violations of rights conferred by the US Constitution or federal laws.

### **Deprivation of Rights Under Color of Law**

In violation of Federal Civil Rights Statute, Title 18, U.S.C., Section 242 - Deprivation of Rights Under Color of Law, that forbids any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the U.S.

## INTRODUCTION

### FACTUAL AND PROCEDURAL BACKGROUND

#### I. COVID PANDEMIC

Every year the state of Minnesota and major stakeholders conduct pandemic response drills. Representatives from Long Term Care Facilities (LTCF) participate. It has been known for years that a number of facilities lacked PPE and adequate staff training to protect vulnerable residents in a pandemic.

See Exhibit 3

Defendants knew what was likely to happen in our LTCFs, both from their own pandemic planning and after the experience of the Kirkland (WA) LifeCare Center in early January 2020.

Defendants failed to protect our elderly, and actually waived all safeguards to make it easier and faster to stuff covid patients into nursing homes under the guise of relieving hospital bed.

Minnesota Health Commissioner Jan Malcolm referenced the Seattle outbreak at a March 4, 2020, hearing, telling MN State lawmakers that it "obviously gives us a great deal of concern in making sure we are doing preparation in long-term care facilities here."

#### II. MINNESOTA'S RESPONSE TO COVID-19 AS OF MAY 7, 2020

According to Minnesota's Five-Point Battle Plan to Protect our Most Vulnerable, America's long-term care facilities face an elevated risk of Covid 19 outbreaks:

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Sovereign immunity refers to the notion that the government or government employees cannot be sued without their consent. Plaintiff argues this is not valid. The Federal Tort Claims Act waived federal immunity for numerous types of torts claims including the Claims that Plaintiff is filing with this court.

The Federal Tort Claims Act (FTCA) is federal legislation enacted in 1946 that provides a legal means for compensating individuals who have suffered personal injury, death, or property loss or damage caused by the negligent or wrongful act or omission of an employee of the federal government.

#### V. PLAINTIFF'S CLAIMS ARE NOT BARRED BY QUALIFIED IMMUNITY

To show the violation of a clearly established right to overcome qualified immunity, a plaintiff must show "that every reasonable official would [have understood] that what he is doing violates that right." *Reichle v. Howards*, 566 US 658, 664 (2012) (internal quotations omitted).

Defendants would only be entitled to qualified immunity if their conduct did not violate clearly established rights of which a reasonable person would have known. The doctrine "gives ample room for mistaken judgments but does not protect the plainly incompetent or those who knowingly violate the law." *Ludwig v. Anderson*, 54 F.3d 465, 470 (8th Cir. 1995), To defeat a claim of qualified immunity, a plaintiff must present sufficient facts to establish that: (1) the official's conduct violated a constitutional right and (2) that the constitutional right was clearly established. *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011).

"Unless both of these questions are answered affirmatively, [a government official] is entitled to qualified immunity."

The defendants violated two constitutional rights, and those rights were clearly established. An elderly person in a nursing home does not lose their Constitutional rights by being in such a place.

Walz and Malcolm clearly understood what they were doing by the their intentional actions which opened the flood gate for Covid Virus infected people into nursing homes.

#### **LEGAL STANDARD**

Plaintiff has a standing to sue in Federal Court per MINNESOTA STATUTES 2021 524.3-703, GENERAL DUTIES; RELATION AND LIABILITY TO PERSONS INTERESTED IN ESTATE; STANDING TO SUE.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as the decedent had immediately prior to death.

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Minnesota statutes allows Plaintiff to sue Pro Se. Upon decedents death, the estate was passed to plaintiff so it becomes plaintiff's estate personally, to manage all legal and financial aspects of it.. Although it's referred to the Estate of

"1. Residents are older and have more underlying medical conditions than overall population. 2. Congregate settings lead to closer contact with more people. 3. Pre-existing staffing challenges in the industry."

Defendants knew how dangerous to put Covid virus patients into nursing homes instead of a separate off site temporary facilities, an military field hospital, a comfort ship in Duluth harbor similar to the US Comfort in New York State, or the hundreds of empty hotels caused by the lockdowns.

### III. FEDERAL GUIDANCE FOR NURSING HOMES

The 'Everybody else is doing it' is not excuse for incompetence resulting in deaths. Only a small amount of states New York, New Jersey, Pennsylvania, and Michigan allowed the COVID-19 virus into nursing homes, and the above mentioned states had shocking death rate in their nursing homes as well. 45 other states did not because they did not have enough PPE, staff, ventilation equipment to handle a highly infections air-born disease.

All federal guidance states as long as the facility can follow CDC guidance for Transmission-Based Precautions.

Guidance from AMDA(American Medical Directors Association/Post-Acute and Long-Term Care Medicine issued March 19, 2020 with this warning WHEREAS, admitting patients with suspected or documented COVID-19 infection represents a clear and present danger to all of the residents of a nursing home;

See Exhibit 4

### IV. PLAINTIFF'S CLAIMS ARE NOT BARRED BY SOVEREIGN IMMUNITY

LaVonne Aspley, the estate was passed to plaintiff, and it is now legally transferred to plaintiff.

Had decedent survived Covid disease in the infected nursing home, Plaintiff could have filed a lawsuit Pro Se on her behalf in a court of law.

In Beard v. Branson, No. M2014-01770-SC-R11-CV (Tenn. Aug. 30. 2017) the Right of action is that a person who dies from injuries received from another, or whose death is caused by the wrongful act...by another, would have had against the wrongdoer, in case death had not been ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin[.]

Based on this language, the Court reasoned:

Thus, under the statute's plain language, the decedent's right of action that, under the common law, would have extinguished upon his death instead passes to the spouse. The statute does not merely authorize the surviving spouse to file the wrongful death action on behalf of the decedent; it "passes" or transfers the right of action to the spouse. This indicates that, in filing a wrongful death lawsuit, the surviving spouse does not represent the decedent but instead asserts the spouse's own right of action.

Further, the Court pointed out that the fact that the proceeds from a wrongful death suit go immediately to the surviving spouse or other beneficiaries and are not subject to claims from the decedent's creditors supports this interpretation.

Subdivision 1. Death action. When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission. An action to recover damages for a death caused by the alleged professional negligence of a physician, surgeon, dentist, hospital or sanitarium, or an employee of a physician, surgeon, dentist, hospital or sanitarium shall be commenced within three years of the date of death, but in no event shall be commenced beyond the time set forth in section 541.076. An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent. Any other action under this section may be commenced within three years after the date of death provided that the action must be commenced within six years after the act or omission. The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid. Punitive damages may be awarded as provided in section 549.20.

If an action for the injury was commenced by the decedent and not finally determined while living, it may be continued by the trustee for recovery of damages for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court on motion shall make an order allowing the continuance and directing pleadings to be made and issues framed as in actions begun under this section.

Subd. 2. Injury action. When injury is caused to a person by the wrongful act or omission of any person or corporation and the person thereafter dies from a cause unrelated to those injuries, the trustee appointed in subdivision 3 may maintain an action for special damages arising out of such injury if the decedent might have maintained an action therefor had the decedent lived.

Plaintiff was Decedents Power of Attorney. After death, Plaintiff petitioned the Carver County Probate Court to become Special Administrator for the Estate for the sole purpose of filing this lawsuit on decedent's behalf, and was granted Special Administrator statute October 2022.

This Court should review, and reverse, the lower court's decision.

## **STATEMENT OF THE CASE**

LaVonne Aspley was born on X/X/1933, in Sheyene North Dakota. 19. LaVonne Aspley died of Covid disease on May 12, 2020.

20. In October 2019, LaVonne Aspley moved to Excelsior Estates Nursing Home to recover from a broken hip resulting from a fall.
21. During the period January through May 2020, Residents in long-term care settings accounted for only 21% of Minnesota's total COVID-19 cases, yet they experienced 81% of total COVID-19 deaths.
22. On May 20, 2020, the Star Tribune reports, "Virus pipeline to elder care", which states: "Early in the pandemic, the Minnesota Department of Health turned to nursing homes and other long-term care facilities to relieve the burden on hospitals that were at risk of being overwhelmed by COVID-19 patients."
23. The respiratory illness is known to be especially lethal to older adults and those living in nursing homes and assisted-living facilities, where people live in close quarters.
24. Living conditions inside nursing homes are typically two to a room, with two rooms sharing a bathroom, resulting in a total of four people using same bathroom.
25. On March 13, 2020, Walz issued the Lockdown order, and nursing homes were closed to visitors yet covid positive patients were soon allowed to be transferred from hospitals to recover in nursing homes to include Excelsior Estates.
26. On April 8, 2020, Governor Walz signed two Emergency Orders, The Waiver to increase capacity at nursing homes, and Allowing Layaway beds to be added to nursing home rooms already at capacity, thereby stuffing covid virus patients into otherwise healthy nursing homes. 29. On May 1, 2020, Decedent complains on phone call to plaintiff there are new covid positive patients in her facility.
30. On May 5, 2020, plaintiff received phone call from nursing home that decedent tested positive for covid.
31. On May 7 Walz introduces his Five Point Battle Plan for assisting nursing homes, but fails to halt the transfer of covid positive patients into those nursing homes.
32. On May 12, 2020, LaVonne Aspley died from covid related symptoms.

33. On May 20, 2020, Walz clearly knew that allowing covid positive patients into nursing homes would result in death to those residents by the fact he purchased a 6.9 million cold storage warehouse to be used as a morgue, according the Start Tribune in article titled "State of Minnesota buys former produce warehouse to store bodies of COVID victims".

34. On May 20, 2020, the Star Tribune reports, "Virus pipeline to elder care", which states: "Nursing homes accepting infected patients, even as death toll mounts. Despite the devastating death toll, Minnesota nursing homes are still being allowed by state regulators to admit coronavirus patients who have been discharged from hospitals.

35. On May 27, 2020, the Park Rapids Enterprise reports on Walz's News Conference. The article states: "80% of the deaths in the state coming in long-term care settings, critics have suggested the homes are not built to allow safe distancing.

36. During the Governor Walz' news conference on May 27, 2020, when asked, Walz said "I think it's important to remember these are folks that went to the hospital, they recovered, but they're still in that mode, and they're going back to their home, and this is where they live," said Gov. Tim Walz during an afternoon press conference. "The rest of us, we may self-isolate, but where are we going to put (these) people?" Walz then continues, "This was not a mistake. It wasn't like no one thought about this. There was complexity in how you deal with this."

37. The May 27, 2020 Park Rapids Enterprise article reports that when asked about the practice of sending covid positive patients into healthy nursing homes, Jan Malcolm, Minnesota State Health Commissioner, said, "That's certainly a question a lot of people are asking. It has been an affirmative part of our plan all along (however), to get people out of a hospital as soon as they no longer need hospital-level care, both for their own protection — hospital-acquired infections are a real concern — as well to free up acute care capacity."

38. Walz failed due diligence in finding an appropriate, intelligent commissioner for the Minnesota Department of Health.

39. In January, 2018, Walz appointed Jan Malcolm as commissioner for the Minnesota Department of Health knowing she only has a four year degree in Pre Med and Philosophy.

40. On June 5, 2020, Jan Malcolm sent a followup letter to Senator Housely in response to the Senator's questions about placing covid patients into Minnesota nursing homes.

41. Jan Malcolm's June 5, 2020 letter states in part: "Since March, "To date, 319 of the 863 outbreak facilities have had a COVID-positive patient transferred from another facility or discharged back to a facility from the hospital (typically back to the facility where they resided prior to their hospitalization).

42. Jan Malcolm also admits in her June 5, 2020 letter that no alternative care site has been established, despite the tragic death toll at nursing homes- "At this time there are no designated "COVID Support Sites." Hospitals discharge patients and long-term care facilities conduct admissions if they meet the criteria of the patient needs of care."

43. Although Walz blamed staff for infecting patients, it's shameful to blame low paid, over worked, often English as a second language direct care workers who didn't have access to masks, gloves and face shields due to supply shortages.

44. Governor Tim Walz had a responsibility to exercise reasonable care to maintain the safety of

## **REASONS FOR GRANTING THE PETITION**

The Eight Circuit Appeals erred after plaintiff filed notice of Appeal, the COurt scheduled a hearing for March 14, then suddenly and without notice, the hearing was cancelled. Plaintiff immediately filed a Motion to file an informal brief, which was not ruled on. Instead, the Appeals court issued a summary judgment upholding the original decision with no ruling on the motion to file informal brief.

This Court should grant the petition and reverse the court below.

I. Executive Emergency Orders should not be made that causes the death of any citizen.

A. The Governor does not have unfetter Authority to make pUblic Health decision that may infect, harm or kill citizens.

B. The Lower Court Erred In using sovereign immunity, or qualified immunity, to make immune intentional acts that are deadly to citizens.

For the same reason, the lower court's interpretive choice violated the rule of lenity.

The Lower Courts Are Deeply Split Regarding the Level of Authority a governor with Emergency Powers can and cannot do.

Without clear or complete guidance from the Supreme Court, lower court judges have proposed an array of different approaches and formulations, producing a 'morass of conflicting lower court opinions' regarding the proper analysis to apply

## CONCLUSION

The petition for a writ of certiorari should be granted based on the above stated reasons and justice corrected.

Date *Sept 17, 2023*

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Respectfully submitted,  
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