UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LASHAUNA LOWRY as Next Friend of
TITUS JERMAINE CROMER, JR.,

Case No.: 19-cv-13293
HON.: Mark A. Goldsmith

Plaintiff,

v.

BEAUMONT HEALTH,

Defendant.

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PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTIVE ORDER

NOW COMES Plaintiff, LASHAUNA LOWRY, AS NEXT FRIEND OF TITUS JERMAINE CROMER, JR., a minor, by and through legal counsel, RASOR LAW FIRM, PLLC, and for her Brief in Support of Motion for Preliminary Injunctive Order, states as follows:

I. INTRODUCTION

This is an Emergency action for a Declaratory Judgment and Preliminary Injunction pursuant to federal law and Michigan statutory and common law. Plaintiff's sixteen-year-old son, Titus Jermaine Cromer, Jr., is currently in a coma at Beaumont Hospital in Royal Oak, Michigan.

Defendant Beaumont believes that Titus suffered brain death as a result of traumatic injury. See Michigan Determination of Death Act, M.C.L. § 333.1033. Defendant Beaumont has indicated that it plans to withdraw Titus's life-sustaining medical treatment, which includes ventilation and artificial hydration and nutrition absent a court order requiring them to continue providing life-sustaining care. In other words, Beaumont believes that it has the right to withdraw life support without Titus' parents/guardian's consent.

II. STATEMENT OF FACTS

a. Procedural History

Plaintiff initially filed a case to prevent Beaumont from withdrawing life support on Titus in Oakland County Circuit Court, 19-177547-CZ, which was assigned to Honorable Hala Jarbou. Judge Jarbou initially granted a Temporary Restraining Order (TRO) on October 28, 2019 in which she ordered Defendant Beaumont Hospital to continue providing life support and other life-sustaining care. However, on November 7, 2019, Judge Jarbou entered an order that the

Circuit Court lacks jurisdiction over the case and that it will be dismissed on November 12, 2019. (**Ex. A**, 11/7/19 Circuit Court Order).

The following day, on November 8, 2019, Plaintiff filed this instant case and this Court granted a Temporary Restraining Order ("TRO") on November 8, 2019 to require Defendant Beaumont to continue life support for Titus until a hearing on Plaintiff's Motion for Preliminary Injunction on November 19, 2019. (**Ex. B**, 11/8/19 TRO, Dkt No. 4, PgID 340-342).

If this Court does not grant Plaintiff's Motion for Preliminary Injunction, it is anticipated that Defendant will remove Plaintiff's life support and he will perish shortly thereafter. For the reasons explained herein, Plaintiff seeks not only a preliminary injunction preventing Beaumont from removing Titus's life support but also an Order requiring Beaumont to either perform the necessary surgical procedures for Titus to be transferred to a long-term care facility *or* allow appropriate physicians of Plaintiff's choosing to come into Beaumont to perform these surgical procedures.

b. Beaumont's Determination of Titus's Death

Titus Cromer is a 16-year old child, whose mother is Plaintiff, LaShauna Lowry.[1] On October 17, 2019, Titus was transported to and admitted by Royal Oak Beaumont Hospital after suffering traumatic injury and it appears that Titus has

[1] As Titus' natural guardian and Mother, LaShauna Lowry does not require a petition for appointment of Next Friend in Federal Court. FRPC 17(c)(1)(A)

sustained damage to the brain as a result of low levels of oxygen and cardiac arrest. Titus is currently in a coma and is receiving treatment at Beaumont Hospital, Royal Oak ("Beaumont"). Titus currently requires a ventilator, tube feeding, and assistance with all activities of daily living. However, he is regulating his own temperature, heart rate and rhythm, exchanging oxygen and carbon dioxide in his lungs, producing urine and feces, and has facial hair and nails that are growing, abrasions on his skin are healing, and he would bleed when cut. His Aunt has indicated that when she has held his hand he has moved his fingers.

Yet, Defendant Beaumont believes that Titus suffered an "**irreversible** cessation of all functions of the entire brain, including the brain stem" as a result of traumatic injury. *See* Michigan Determination of Death Act, M.C.L. § 333.1033 (emphasis added). Because of this brain death determination, Beaumont has effectively decided that Titus is legally dead and no longer entitled to receive care, despite Titus's parents' objection. This opinion by Beaumont will also likely influence the payment of medical benefits by the family's insurer.

Contrary to Beaumont's doctors' determination, Plaintiff has two medical opinions that Titus **HAS NOT** suffered "cessation of all functions of the entire brain, including the brain stem" pursuant to MCL 333.1033 (**Ex. C**, Curriculum Vitae of Paul Byrne, M.D; **Ex. D**, Affidavit of Paul Byrne, M.D.; **Ex. E**, Curriculum Vitae of Dr. Richard P. Bonfiglio, M.D.; **Ex. F**, Affidavit of Dr.

Richard P. Bonfiglio, M.D.).[2] Beaumont Hospital, Royal Oak had previously indicated that it planned to withdraw Titus's life-sustaining medical treatment, which includes ventilation and artificial hydration and nutrition if the Oakland County Circuit Court had not granted a Temporary Restraining Order on October 28, 2019. In other words, Beaumont believes that it has the right to withdraw life support **without** Titus' parents/guardian's consent.

Titus is alive, has function of his brain and brain steam, and Plaintiff does NOT agree with Defendant's assessment of his medical condition as being that of "brain dead." Rather, as referenced above, both Plaintiff's experts have authored Affidavits that will be discussed further in this brief specifically disputing that finding based upon uncontroverted medical evidence contained in Titus's chart with Beaumont[3]. Titus does not meet the criteria in Michigan for "brain dead" as clearly shown in the medical record, as it is impossible for an individual with no

[2] Beaumont's Counsel stated during this Court's hearing on the Motion for Temporary Restraining Order that it will pose a *Daubert* challenge to Plaintiff's experts. However, it should be noted that MCL § 333.1033 does not impose any requirements on the specialties of physicians to pronounce "brain death" pursuant to the statute. Thus, Plaintiff's experts, a pediatrician and brain trauma rehabilitation physician, are qualified to opine pursuant to the statute. Furthermore, Plaintiff is awaiting an Affidavit from a Neurologist who also believes that Titus does not meet the statutory criteria for "brain death."

[3] Beaumont has steadfastly refused to allow Plaintiff's experts to examine the boy. Although Plaintiff's expert has authorized opinions based upon Beaumont's records, they cannot form a full opinion without an examination. Thus, Plaintiff's experts are at a distinct disadvantage over Beaumont's physicians, who have unfettered access to Titus. Plaintiff will therefore be filing a Motion to allow their experts/treaters to examine Titus.

brain function to regulate their own temperature and produce pituitary hormone. These functions are exclusively regulated in the brain's hypothalamus region. Ipso facto, Titus has not suffered "brain death."

Wisely, this Court granted Plaintiff's Motion for Temporary Restraining Order preventing Beaumont Health from ending Titus' life on Tuesday, November 12, 2019 when the TRO previously entered by the Oakland County Circuit Court was set to expire. This Court set a hearing date for the instant Motion on Tuesday, November 19, 2019. Despite clear instructions from LaShauna Lowry, Beaumont Hospital has indicated that it plans to withdraw Titus's life-sustaining treatment unless this Court continues to prevent that from occurring by granting a continuing Preliminary Injunction, necessitating this Motion.

III. LAW & ARGUMENT

a. Standard of Review

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Given this limited purpose, "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id*. Accordingly, a party "is not required to prove his case in full at a preliminary injunction hearing and the findings of fact and conclusions of law made by a court granting the preliminary injunction are not binding at trial on the merits." *Id*.

When considering a motion for preliminary injunction, a district court must balance four factors:

> (1) whether the movant has a strong likelihood of success on the merits;
>
> (2) whether the movant would suffer irreparable injury without the injunction;
>
> (3) whether issuance of the injunction would cause substantial harm to others; and
>
> (4) whether the public interest would be served by the issuance of the injunction.

Tumblebus, Inc. v. Cranmer, 399 F.3d 754, 760 (6th Cir. 2005). "Each of these factors '[should] be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction.'" *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014).

"The district judge is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007).

b. Applicable Law

i. Plaintiff's next friend has an absolute, exclusive and unalienable right to make his health care decisions

"It is well established that parents speak for their minor children in matters of medical treatment." *In re Rosebush*, 195 Mich. App. 675 (1992). "[B]ecause minors and other incompetent patients lack the legal capacity to make decisions

concerning their medical treatment" the parents must act on their behalf. *Id*. "In making decisions for minors or other incompetent patients, surrogate decision makers should make the best approximation of the patient's preference on the basis of available evidence; if such preference was never expressed or is otherwise unknown, the surrogate should make a decision based on the best interests of the patient." *Id*.

***ii. Michigan Determination of Death Act, MCL 333.1031,* et seq.**

In 1992, the Michigan Legislature passed the Determination of Death Act, MCL § 333.1031, *et seq*. This statute sets forth guidelines for how medical providers are to determine when a patient is legally deceased, including by "brain death." The term "brain death" is a legal fiction defined as the "irreversible cessation of all functions of the entire brain."[4] Michigan's statute reflects this definition, defining brain death as follows:

> An individual who has sustained either of the following is dead:
>
> (a) Irreversible cessation of circulatory and respiratory functions.
>
> **(b) Irreversible cessation of all functions of the entire brain, including the brain stem**.

M.C.L. § 333.1033(1) (emphasis added).

Michigan's brain death definition is a legal fiction because, as can be seen in the instant case, individuals who are very much alive from a cardiovascular

[4] Shah, Seema K., *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, 48 U. MICH. J.L. REFORM 301, 302 (2015) (quoting Unif. Determination of Death Act § 1 (1980), 12A U.L.A. 781 (2008)).

standpoint can nonetheless be deemed dead based on purported brain function. Notwithstanding the medical judgment issues involved with such a decision, it is undisputed that on its face, Michigan's Determination of Death Act contains neither any notice provision whereby a patient's family members are told that a decision is forthcoming nor any mechanism for challenging or appealing a death determination.

Moreover, the determination of death statute does not give the health care provider authority to removes life saving support, it merely immunized them for doing so. **In the case of a minor child, the decision to withdraw life support is solely, exclusively and absolutely vested in the minor's parent.** In a published Michigan case adjudging the rights of an incompetent minor whose life support was proposed to be withdrawn the Court was clear:

> **It is well established that parents speak for their minor children in matters of medical treatment**." *In re Rosebush*, 195 Mich. App. 675 (1992) (emphasis added). "[B]ecause minors and other incompetent patients lack the legal capacity to make decisions concerning their medical treatment" **the parents must act on their behalf**. *Id*. (emphasis added). "In making decisions for minors or other incompetent patients, surrogate decision makers should make the best approximation of the patient's preference on the basis of available evidence; if such preference was never expressed or is otherwise unknown, the surrogate should make a decision based on the best interests of the patient." *Id*.

The case makes in abundantly clear that a parent's right to choose is **NEVER** subordinate to a health care provider's opinion and preference. *See In re Sanders*, 495 Mich. 394 (2014) ("the right of parents to make decisions concerning

the care, custody, and control of their children" is a constitutionally protected fundamental right). This fundamental right "in the care, custody, and control" of a parent's child has been recognized by the United State Supreme Court as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Indeed, MCL § 333.1033 reinforces this, as the statute does not specifically authorize a health care provider to remove life assisting care after the determination of death is made. This is especially when such a determination would impinge on a parent's right to direct the treatment of her son. Had the Michigan legislature wished to reverse *Rosebush* and authorize a health care provider to have a right to withdraw and terminate care and prioritize that over the parent's right to choose, then it certainly could have made that addition. But it did not. Given the statute's language, the omission of a statutory provision addressing this exact issue is evidence the legislature intentionally left it out. See *AFSCME v Detroit*, 267 Mich App 255; 704 NW2d 712 (2005) ("Michigan recognizes the maxim '*expressio unius est exclusio alterius;* that the express mention in a statute of one thing implies the exclusion of other similar things'").

Defendant has cited to *Virk v. Detroit Receiving Hosp*, 1996 WL 33348748, at *2 (Mich. Ct. App. 1996), a non-published case, for its misplaced assertion. *Virk* was a case in which a suit was brought in negligence against a health care provider

who ended treatment for a person who had been determined to be dead pursuant to MCL § 333.1031. The holding in *Virk* is clear:

> The Determination of Death Act, M.C.L. § 333.1031 *et seq.* ... sets forth standards for ascertaining when a person is dead. MCL 333.1033. The statute establishes guidelines for determining when a person receiving life-sustaining treatment has died **so that life-support can be disconnected without fear of liability**. *In re Rosebush*, 195 Mich. App. 675, 690-91 (1992) (interpreting the predecessor of the current statute). Accordingly, defendant is generally shielded from a claim of intentional infliction of emotional distress because it had a legal right to disconnect Virk's life-support.

Id. (Emphasis Added). *Rosebush*, which *Virk* relies upon, does not support the dicta in *Virk* that "defendant had a legal right to withdraw life support,"[5] but rather clearly indicates the statutory purpose of MCL § 333.1031 in interpreting its predecessor statute is solely to preclude liability[6]:

> We agree with the trial court's conclusion, that "**the statute only addresses one question: is the patient dead, so that life-support may be disconnected without fear of liability?**" *Rosebush* at 690. (Emphasis Added)

[5] The holding in *Virk* **WAS NOT** that the health care provider had a legal right to disconnect life support superior to the parent's right, but rather, **they were immunized from tort liability for removing life support**. The *Virk* court did not reach the argument concerning the health care provider's right to withdraw support, because the child was already deceased.

[6] M.C.L. § 333.1021 states as follows: "A person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice in the community, there is the irreversible cessation of spontaneous respiratory and circulatory functions. If artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice in the community, there is the irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased."

Indeed, *Rosebush* could not be clearer that only the parents have the decision-making power concerning their child's withdrawal from life support, particularly when viewed that such an interpretation would impugn on the "oldest of the fundamental liberty interests." Plaintiff's argument garners more support from Michigan law, wherein the Court of Appeals again upheld the right of the parent's (surrogate decision maker of the minor child) to make the decision. Notably, there is absolutely no support for the Defendant's argument that a health care system is empowered to overrule the parent's decision making[7]:

> In the absence of clear and convincing evidence of the patient's actual preferences concerning medical treatment under the circumstances, **a decision whether to withhold or withdraw consent to life-sustaining medical treatment may be exercised by a surrogate decision-maker** applying the "substituted judgment" or the "best interests" standard articulated in *Rosebush*.... *Rosebush, supra*, 195 Mich. App. at 688–89, 491 N.W.2d 633. *In re Martin*, 200 Mich. App. 703, 712; 504 N.W.2d 917, 922 (1993) (emphasis added)

Thus, Defendant has dramatically overreached in attempting to overrule Plaintiff's clear, exclusive and absolute surrogate decision maker, Plaintiff's Mother. Absent clear legislative mandate—i.e. the State's compelling interest—the law does not provide the right to pull the plug, specifically in this circumstance. Plaintiff's position should be clear, however, that Plaintiff's Mother is not just basing her hope on upon divine intervention, it is based upon two factors: 1) A

[7] A distinction that the child in this case was not "brain dead" pursuant to statute is without a difference in that the case clearly only empowers the parent to make the decision about withdrawing treatment.

medical expert opinion that Titus is not "brain dead", and 2) There has not been enough time for Titus to reach maximum improvement from his injury.

iii. EMTALA

The Emergency Medical Treatment and Active Labor Act ("EMTALA"), as added by § 9121(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985, 100 Stat. 164, and as amended, 42 U.S.C. § 1395dd, places obligations of screening and stabilization upon hospitals and emergency rooms that receive patients suffering from an "emergency medical condition."

Congress enacted EMTALA after and in response to several highly publicized incidents where hospital emergency rooms allegedly failed to provide a medical screening or improperly transferred or discharged a patient, based only on the patient's financial inadequacy. *Estate of Lacko, ex rel. Griswatch v. Mercy Hosp., Cadillac*, 829 F. Supp. 2d 543, 548 (E.D. Mich. 2011). EMTALA's purpose is to "prevent hospitals from dumping patients who suffered from an emergency medical condition because they lacked insurance to pay the medical bills." *Cleland v. Bronson Health Care Grp., Inc.*, 917 F.2d 266, 268 (6th Cir. 1990); *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1134 (6th Cir. 1990). The statute was not designed or intended to establish guidelines or standards for patient care, provide a suit for medical negligence, or substitute for a medical malpractice claim. *Moses v. Providence Hosp. and Med. Ctrs., Inc.*, 561 F.3d 573, 578 (6th Cir. 2009).

"Under EMTALA, hospitals have two requirements: (1) to administer an appropriate medical screening, and (2) to stabilize emergency medical conditions." *Estate of Lacko*, 829 F.Supp.2d at 548. Under the circumstance here, only the stabilization requirement need be discussed.

Section 1395dd(b) of EMTALA, entitled "Necessary stabilizing treatment for emergency medical conditions and labor," provides, in relevant part:

> (1) In general
>
> If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide either—
>
> (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
>
> (B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section....

Section 1395dd(c) generally restricts transfers of unstabilized patients, and § 1395dd(d) authorizes both civil fines and a private cause of action for violations of the statute.

For all hospitals that participate in Medicare and have an "emergency department," the EMTALA sets forth two requirements. First, for any individual who "comes to the emergency department" and requests treatment, the hospital must "provide for an appropriate medical screening examination ... to determine whether or not an emergency medical condition ... exists." 42 U.S.C. § 1395dd(a).

Second, if "the hospital determines that the individual has an emergency medical condition, the hospital must provide either (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or (B) for transfer of the individual to another medical facility [.]" § 1395dd(b). Thus, for any individual who seeks treatment in a hospital, the hospital must determine whether an "emergency medical condition" exists, and if the hospital believes such a condition exists, it must provide treatment to "stabilize" the patient. *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1134 (6th Cir. 1990).

The statute defines "emergency medical condition" as "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in ... [inter alia] placing the health of the individual ... in serious jeopardy[.]" § 1395dd(e)(1)(A)(i). "To stabilize" a patient with such a condition means "to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility[.]" § 1395dd(e)(3)(A). "Transfer" is defined in the statute to include moving the patient to an outside facility or discharging him. § 1395dd(e)(4).

In *Moses v. Providence Hospital*, the defendant hospital argued that admitting a patient for six days and performing requisite diagnostic testing before

discharging the patient satisfied its EMTALA obligations. *Moses v. Providence Hosp. & Med. Centers, Inc.*, 561 F.3d 573 (6th Cir. 2009). The Sixth Circuit disagreed, finding that "[c]ontrary to Defendants' interpretation, EMTALA imposes an obligation on a hospital beyond simply admitting a patient with an emergency medical condition to an inpatient care unit." *Id.* at 582. The court explained that "the statute requires 'such treatment as may be required to stabilize the medical condition,' [], and forbids the patient's release unless his condition has 'been stabilized[.]'" *Id.* at 582 (citing § 1395dd(b) & § 1395dd(c)(1)). The court further addressed the stability issue, explaining that "[a] patient with an emergency medical condition is 'stabilized' when "no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during' the patient's release from the hospital." *Id.* at 582 (citing § 1395dd(e)(3)(B)). Accordingly, EMTALA "**requires a hospital to treat a patient with an emergency condition in such a way that, upon the patient's release, no further deterioration of the condition is likely**." *Id.* at 582 (emphasis added).

Here, its is clear that it is medically indicated that a tracheostomy and percutaneous endoscopic gastrostomy (PEG tube) satisfy the criteria. This is because any patient who is unconscious for a lengthy period of time such as Titus would have the procedures performed, as they reduce substantial irritation to the throat, provide superior flow of air, food and nutrients, and exposes less of a risk of infection. Indeed, Plaintiff's Expert Richard Bonfiglio has opined in his Affidavit

that such the medical procedures are medically necessary and required pursuant to EMLATA, and that they are required before he is transferred to a long-term care facility:

> c. That the need for this medical treatment constitutes an "emergency medical condition" as defined by the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd because the lack of treatment is a medical condition manifesting itself by acute symptoms of sufficient severity and risk such that the absence of immediate medical attention could reasonably be expected to result in placing the health of the Titus Jermain Cromer, Jr. in serious jeopardy due to infection, irritation of tissue and other medical factors.
>
> d. Performance of these surgical procedures is necessary for the medical stabilization of Titus Jermaine Cromer, Jr. before he can be safely transferred to a long-term care center.
>
> e. No long-term medical care/treatment center will accept Titus Jermain Cromer, Jr. as a patient without these procedures having first been performed.

(**Ex. F**, Affidavit of Dr. Richard Bonfiglio, M.D.).

Transfer absent these "stabilizing" procedures is a death sentence. Here, Plaintiff's "emergency medical condition" will only be remedies by these procedures, as evidenced by Dr. Bonfiglio's statements. Despite these lawful requirements, Beaumont has gone beyond refusing in violation of EMTALA. In fact, Beaumont will not even permit outside medical professionals to perform these procedures in its facility, which would effectively permit Titus' transfer. In essence, Beaumont has doubled-down on its violation of the EMTALA

requirements during this "emergency medical" procedure and failed to permit any stabilization.

Note that Plaintiff has identified two surgeons that appear ready, willing and able to perform these relatively simple procedures, yet Beaumont refuses to allow them to do so in its facility. Plaintiff has attempted to transfer Titus to their facility, but his status as an unconscious pediatric patient does not allow Promedica Monroe, a small community hospital, to perform such a procedure. They would normally transfer such a patient to a level one trauma center such a Beaumont. One of the surgeons has admitting privileges at SouthShore Hopital, but that is a Beaumont facility and they will not allow the transfer.

Moreover, it is not medically indicated that such a transfer would be in the best interest of Titus, as the amount of disturbance to the boy while intubated should be minimized, not maximized.

It should also be noted that once Titus is stabilized with a tracheostomy and PEG tube, Medilodge Farmington Hills, a long-term skilled care facility, has been contracted, has reviewed the medical records, and is committed to taking Titus, subject to the procedures being completed.[8]

[8] Medilodge has indicated that they cannot process the final documentation on this admission unless and until the procedures are completed, and then they can issue a final determination which has been represented by them to be forthcoming.

iv. Due Process

Plaintiff's constitutional claims arise out of the due process protections of the Fourteenth Amendment of the United States Constitution, which prohibits a State from depriving "any person of life, liberty, or property, without due process of law." 42 U.S.C. 1983 provides a remedy for deprivations of these rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Generally, the Fourteenth Amendment protects individuals only against government action, but private entities fall under these constitutional protections under the State action doctrine. *See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).*

"In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct or if it delegates its authority to the private actor." *Id*. at 192. State action has been found when the state delegates authority to contracted-for, private physicians at correctional facilities. See *West v. Atkins*, 487 U.S. 42 (1988) ("Respondent's conduct in treating petitioner is fairly attributable to the State…[t]he State has delegated that function to physicians such as respondent, and defers to their professional judgment").

If the Court is unwilling to hold Beaumont is a state actor under these circumstances, Plaintiff will amend the complaint to include an *Ex Parte Young* claim against Defendant Robert Gordon, the Director of the Michigan Department of Health and Human Services. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908); *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). The *Ex Parte Young* doctrine allows for the filing of suit against state officers seeking declaratory judgment and prospective injunctive relief "to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act." 209 U.S. at 157. This premise arises out of the idea that "because an unconstitutional legislative enactment is 'void,' a state official who enforces that law 'comes into conflict with the superior authority of [the] Constitution." *Va. Office*, 563 at 254 (internal quotations omitted). Not only does any function assigned by the Health code, including MCL § 333.1033, "vest" with Defendant Gordon pursuant to MCL § 333.2205, but the Health Department also issues death certificates, which follows from the unconstitutional finding that Titus is "dead." Accordingly, if Beaumont is determined not to be a state actor, Defendant Gordon is the proper party to challenge the Constitutionality of MCL 333.1033 as his department will record the erroneous death certificate filed by Beaumont with the State of Michigan.

Whether Beaumont or Defendant Gordon, the decision to "declare death" undeniably triggers due process protections. Titus has a legitimate interest in

continuing to live and/or being declared dead and his mother has a fundamental right to make decisions concerning the care, custody, and control of her children. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Because of these rights and the involvement of the State in depriving them, the constitutional due process protections are necessary here.

The Fourteenth Amendment has substantive and procedural components. The substantive component "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Likewise, the procedural component of the due process clause generally protects against arbitrary deprivations by ensuring safeguards are in place. See *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979) (in addressing state law allowing for the institutionalization of a child for mental health reasons, the Supreme Court held that due process required "some kind of inquiry should be made by a "neutral factfinder" to determine whether the statutory requirements for admission are satisfied"). Further, the due process clause requires a person to be informed as to what a "state law commands or forbids." *Lanzetta v. N.J.*, 306 U.S. 451, 453 (1939). In other words, procedural due process requires the unconstitutionality of a law that is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen Const. Co.*, 269 U.S. 385, 391 (1926).

While there is no precedent interpreting Michigan's declaration of death act in terms of its constitutionality under a procedural due process analysis, other like cases involving significant state determinations are helpful. This is because when determining substantial rights, "at a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). This means the "opportunity to be heard at a meaningful time and in a meaningful manner." *Dubac v. Green Oak Twp.*, 642 F.Supp.2d 694, 703 (E.D. Mich. 2009).

The United States Supreme Court has held that what process is due generally required depends on three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In *McDonald v. McLucas*, 371 F.Supp 831 (S.D. New York 1974), the plaintiffs challenged a federal law determining when a soldier missing in action is "dead." *Id*. at 833. The plaintiff's argument was that the statute facially violated procedural due process requirements because it "authorize[d] the Secretaries to

make determinations of death without providing a prior hearing or notice." *Id*. "While the exact contours of these procedural elements vary according to the interests involved … the [Supreme] Court has repeatedly insisted that rudimentary due process is satisfied only by providing the "kinds of 'notice' and 'hearing' that are aimed at establishing the validity" of the deprivation in question." The district court held that the statue at issue lacked procedural safeguards:

> These rudimentary procedural guarantees are absent from the face of the instant statutes. In addition, the stipulated statement of facts reveals that the services do not have any regulations requiring, and in fact, do not give, next-of-kin specific notice of the time and place of a review which might result in an "official report of death" or a "finding of death." The services also do not permit next-of-kin to attend or participate formally in any review or proposed status change.

Id. at 835.

Following that, the court set out specific standards which would bring this statute determining when servicemen can be declared "dead" in conformity with the due process requirements:

> [U]nder minimum due process standards notice must be given of a status review and the affected parties afforded a reasonable opportunity to attend the review, with a lawyer if they choose, and to have reasonable access to the information upon which the reviewing board will act. Finally, they should be permitted to present any information which they consider relevant to the proceeding. Once that is done, the requirements of due process have been satisfied.

Id. at 836.

c. Plaintiff is entitled to a Temporary Restraining Order to keep Titus alive.

Plaintiff's Complaint in this action includes a claim for violation of EMTALA. Pursuant to EMTALA's civil enforcement provision, "[a]ny individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and **such equitable relief as is appropriate**." 42 U.S.C. § 1395dd(d)(2)(A) (emphasis added). Thus, federal law permits Plaintiff to obtain injunctive relief here.

i. Plaintiff is likely to succeed on the merits of her underlying claim.

First, Plaintiff can show that MCL § 333.1033 violates the fundamental due process principles of the Fourteenth Amendment. Michigan's declaration of death act completely lacks the sufficient procedural safeguards the Fourteenth Amendment requires. This unconstitutionality is three-fold, to wit. First, it fails to provide a procedure of informing family members and/or decision makers that "death" has been declared and give these individuals the opportunity to object to this declaration or obtain further opinions from other experts prior to the declaration of death. Secondly, it does not prescribe for any procedures that would permit a party deemed to qualify under the statute to challenge such a decision. Plaintiff is not saying the procedures are inadequate; no, they are nonexistent. In

other words, the statute permits entities like Beaumont to deprive an individual of fundamental rights without an opportunity for a pre-determination hearing, to appeal, seek other opinions, or allow for the passage of time for the body to heal. Even if the modicum of standards set forth in the statute could be viewed as "procedural," they are far inadequate given the result—i.e. "death."

Looking at how this situation has evolved speaks volumes of the procedural inadequacy. Plaintiff had to rush to multiple Courts in emergency fashion without barely any documentation from Beaumont asserting its purported "decision." There is no review of Beaumont's decision and there is no process to even attempt a review. Moreover, the lack of "review" procedures violates the Health Code's own ambiguous "contested case" provision found in MCL § 333.1205, which states "[a]n applicant, licensee, or other person whose legal rights, duties, or privileges are required by this code to be determined by the department, after an opportunity for a hearing, has the right to a contested case hearing in the matter." However, because the Director has ambiguously delegated this decision to private actors, clearly this "opportunity for a hearing" is not applicable to MCL § 333.1033. In other words, the Health Code's internal procedural safeguards do not by definition apply to this matter.

MCL § 333.1033, as it stands, violates every essence of due process being a mandatory prerequisite to the deprivation of a fundamental right. In terms of procedures, the Statute does not describe any hospital-patient/family channels for

addressing either the Hospital's internal decision or what remedies may be available before the life support ceases. Like *McDonald*, this statute violates even most "rudimentary procedural guarantees" before declaring an individual dead.

Secondly, the statute is unconstitutional based on its obvious vagueness. One need looks no further than Beaumont's conduct here to see this vagueness; i.e. Beaumont made decisions leading to a judgement of death without a single check or balance; this was due to obvious ambiguities in the statute. A statute as ambiguous as MCL § 333.1033 cannot possibly satisfy the legal due process requirements given what is at stake: life and the fundamental right for Titus' mother to make critical parental decisions. No one—either the parties with their rights being deprived (plaintiff and his mother) or the parties being statutorily tasked with said deprivations (Beaumont)—knows exactly what the law allows and requires. Given this confusion and the high stakes involved with this ambiguity, the statute must be deemed unconstitutional until the legislature can add safeguards and procedural elements to this most-serious process. The lack of any procedural safeguards to avoid arbitrary, whimsical deprivations of the most fundamental of rights patently violates Titus and his mother's constitutional due process rights.

Given the above, it is necessary for this Court to adjudicate and declare the rights of the parties to this action to guide the parties' future actions and preserve their legal rights. This Court's determination that MCL § 333.1033 is

unconstitutional for the above-referenced reasons will further resolve this issue of and ensure that Plaintiff's constitutional rights are not violated.

Secondly, Plaintiff can show a likely success on the merits regarding the EMTALA claim as well. The two issues there are the existence of an "emergency medical condition" and the degree of stabilization before transfer. Here, Titus's continued treatment and care arises out of an "emergency medical condition." Accordingly, EMTALA requires Beaumont to stabilize him, which per Dr. Bonfiglio's affidavit, includes providing a tracheostomy and percutaneous endoscopic gastrostomy (PEG) tube. Such stabilization will permit long-term ventilation and feeding, and Titus cannot be transferred to a long-term care facility without these procedures having first been performed.

Yet Defendant Beaumont not only refuses to perform these procedures to allow Titus to be transferred but refuses to allow any outside medical professional to perform the procedures in its facilities. If Defendant Beaumont transfers Titus (by either moving him to an outside facility or by discharging him) before he receives a tracheostomy and percutaneous endoscopic gastrostomy (PEG) tube, said transfer will, within in a reasonable degree of medical probability, result in a material deterioration of Titus's condition. Providing Titus with this medically necessary treatment, which naturally follows from Beaumont's requirement to provide Plaintiff adequate and appropriate care, will permit Titus to be safely

transferred to an alternative long-term care treatment facility. Such conduct squarely falls within the purview of EMTALA and thus Beaumont's legal duty.

ii. If the Court does not grant Plaintiff's request for Preliminary Injunction, Plaintiff's son will die.

As stated above, the harm that Plaintiffs will suffer is the most harmful possible. Titus, who is very much "alive" as evidenced by Plaintiff's expert opinions and has a chance to survive, will be deprived of his life. Further, Titus' mother's right to make parental decisions will be undone and eviscerated. This "harm" is again, beyond irreparable.

iii. Granting a Preliminary Injunction keeping Titus alive would not cause harm to Beaumont or anyone else and there is Strong public interest in keeping Titus alive.

As for the final two prongs of the test, an injunction will not be granted only when (3) issuance of the injunction would cause substantial harm to others; and (4) the harm to the public interest if the injunction is issued. The third element favors injunctive relief if the party opposing the injunction cannot demonstrate even "perceived harm." *See Entertainment Software Ass'n v. Granholm*, 404 F.Supp.2d 978, 983 (E.D. Mich. Nov. 9, 2005). As for the fourth factor, "the public interest always strongly favors the vindication of constitutional rights and the invalidation of any state action which infringes on those rights or chills their confident and unfettered exercise." *Michigan Chamber of Commerce v. Land*, 725 F.Supp.2d 665, 698 (E.D. Mich. July 23, 2010).

All the elements required for a preliminary injunction are satisfied. First, there is a likelihood that Plaintiff will prevail on the merits given the clear Michigan and Federal case law in favor of preserving human life and favoring her decision taking priority over a health care provider. The statute's utter lack of due process protections/safeguards and ambiguity regarding what actions (or inactions) ensure statutory compliance favor Plaintiff for this factor.

Second, there is a guaranteed likelihood that the moving party will be irreparably harmed absent the injunction because the hospital will remove life support despite the substantial amount of evidence that Titus is not in fact brain dead. In other words, Titus will suffer the ultimate "harm" absent further injunctive relief. Not only will Plaintiff be irreparably harmed if injunction is denied, he will die. Additionally, Titus's family will be irreparably harmed because of Beaumont's unnecessary and unilateral decision to end life-sustaining treatment. Lastly, there is public interest in granting the injunction because, the purpose of the injunction is to support the sanctity of human life. Like the cases above, Beaumont has not and cannot show how its harm even remotely touches on the same degree as Plaintiff's pending imminent irreparable harm. Because this matter deals with the utmost fundamental constitutional rights and principles, the fourth factor also weighs in Plaintiff's favor given the high degree of "public interest."

IV. CONCLUSION

WHEREFORE, Plaintiff respectfully requests this Honorable Court enter a Preliminary Injunction preventing Beaumont from removing Titus's life support but also an Order requiring Beaumont to either perform the necessary surgical procedures for Titus to be transferred to a long-term care facility *or* allow appropriate physicians of Plaintiff's choosing to come into Beaumont to perform these surgical procedures.

Respectfully Submitted,

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Dated: November 11, 2019

PROOF OF SERVICE

The undersigned certified that a copy of the foregoing instrument was delivered to each of the attorneys of record and/or unrepresented and/or interested parties on **November 11, 2019,** at their respective addresses as disclosed in the pleadings on record in this matter by:

- ☐ US First Class Mail
- ☐ Hand Delivery
- ☐ Fed Ex
- ☐ Facsimile Transmission
- ☐ UPS
- ■ Other: Efiling

/s/ Stephanie Moore
Stephanie Moore