COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP135 **Cir. Ct. No. 2009CV2340**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DISABILITY RIGHTS WISCONSIN,

PLAINTIFF-APPELLANT,

V.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS, DONNA KATEN-BEHENSKY, UW SCHOOL OF MEDICINE AND PUBLIC HEALTH, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM AND KEVIN P. REILLY,

DEFENDANTS,

GREGORY P. DEMURI, M.D., MARGO HOOVER-REGAN, M.D., NORMAN FOST, M.D., JIM MUEGGENBERG, M.D., AND JULIA WRIGHT, M.D.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: WILLIAM C. FOUST, Judge. *Affirmed*.

Before Blanchard P.J., Lundsten and Kloppenburg, JJ.

¶1 BLANCHARD, P.J. In this action based on substantive due process, the advocacy group Disability Rights Wisconsin challenges "end of life" care provided to legally incompetent patients by medical doctors employed by the State of Wisconsin. Disability Rights alleges that, following the directions of the patients' parents or guardians, the doctors did not provide potentially life-extending medical treatments to two developmentally disabled patients. Disability Rights claims that this alleged inaction by the doctors violated the substantive due process rights of the patients.

¶2 The doctors respond that this claim is deficient in part because their alleged conduct did not qualify as state action, as required to state a claim for violations of substantive due process. Separately, the doctors argue that, even if they were considered state actors in this context, the patients' substantive due process rights did not include a right to receive medical care.

¶3 We assume without deciding that the state-employed doctors were state actors in this context. On the remaining issue, we conclude that Disability Rights fails to provide a basis for us to conclude that it has identified a substantive due process right of the patients that would be violated by the alleged conduct of the doctors. Accordingly, we affirm the circuit court, which dismissed the action. [1]

[1] The Honorable Daniel R. Moeser was originally assigned to this case and issued a written decision in July 2010 addressing issues now raised on appeal. The case was subsequently reassigned to the Honorable C. William Foust, who addressed the same issues on a motion for reconsideration.

BACKGROUND

¶4 The only issue on appeal is a constitutional claim for declaratory and injunctive relief against five doctors brought by Disability Rights.[2] Disability Rights claims that the doctors, associated with the University of Wisconsin Hospital and Clinics (the hospital) and employed by the state, have violated and will likely again violate the rights of patients with developmental disabilities under the Wisconsin Constitution, specifically article I, section 1, which protects the substantive due process rights of individuals against certain types of state action.[3] In brief, substantive due process "'addresses "the content of what government may do to people under the guise of the law,"'" and protects against state actions that are "arbitrary, wrong, or oppressive, without regard for whether the state implemented fair procedures when applying the action." *See* ***State v. Wood***, 2010 WI 17, ¶17, 323 Wis. 2d 321, 780 N.W.2d 63 (quoted sources omitted).

¶5 We briefly summarize the allegations in the amended complaint. Most of the factual allegations, which we assume to be true for purposes of our review, do not matter to the respective legal positions advanced by the parties.

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[2] Disability Rights brings the action in its capacity as a non-profit agency charged with the responsibility, pursuant to federal and state statutory authority that is not at issue in this appeal, to investigate alleged incidents of abuse or neglect of people in Wisconsin with mental or physical disabilities.

[3] Article I, section 1 of the Wisconsin Constitution provides:

> **Equality; inherent rights**
>
> Section 1. [*As amended Nov. 1982 and April 1986*] All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

¶6 Patient 1 was a minor with severe developmental disabilities. While he was living in a pediatric care unit outside of the hospital system, he developed signs of pneumonia. At that time, one defendant doctor, who specializes in pediatric palliative care, consulted with Patient 1's parents.[4] In consultation with the palliative care specialist, the parents decided that Patient 1's prognosis and quality of life were so poor that "it would be very reasonable to limit medical interventions" in the event that Patient 1 came down with pneumonia again.

¶7 After Patient 1 showed new signs of pneumonia that same year he was transferred to the hospital. Patient 1 was transferred, Disability Rights alleges, "not for the purpose of saving [his] life, but to end it." During Patient 1's hospital stay of approximately one day, he received no treatment for pneumonia, and artificial nutrition and hydration were discontinued. These steps were taken pursuant to a decision by his parents, in consultation with the palliative care specialist. Patient 1 died following his subsequent transfer to a hospice center.

¶8 Patient 2 is a 72-year-old woman with developmental disabilities who was admitted to the hospital with a respiratory condition suggesting pneumonia. At the hospital, she was initially treated with intravenous antibiotics, but her condition appeared to worsen. Patient 2's guardian and family, in consultation with and on the advice of her attending doctor, one of the defendant doctors, "decided not to pursue feeding tubes and maintained her DNR/DNI status," referring to "Do Not Resuscitate" and "Do Not Intubate," and decided "to

[4] The amended complaint alleges that all five defendant doctors participated in pertinent decisionmaking regarding treatment of or decisions not to treat Patient 1, but for the sake of simplicity this summary focuses on allegations regarding the palliative care specialist.

discontinue her regular medications and pursue 'comfort care' measures." Patient 2's condition then improved and, ultimately, the doctor ordered resumption of the medication. Patient 2 was discharged to the nursing home where she had been living before admission to the hospital, and returned to her baseline health status.

¶9 The parties agree that both patients were legally incompetent at all pertinent times, and in fact had never been competent to make health care decisions for themselves. It is not disputed that, in general, medical decisions could be made on behalf of both patients by their respective surrogates.[5] The parties also agree that neither patient was at any pertinent time in a persistent vegetative state, which as discussed below is a condition referred to in legal precedent on which Disability Rights relies.

¶10 Disability Rights filed a complaint alleging, as pertinent to this appeal, that the defendant doctors violated the substantive due process rights of the patients in failing to provide "normal medical treatment" for each patient, and in "facilitating" decisions of both patients' surrogates to make "illegal" decisions to withhold, or in the case of Patient 1, to withdraw, life-sustaining medical treatment. As discussed more fully below, the allegation that the surrogates' decisions here were "illegal" is based on Wisconsin case law establishing that surrogates cannot, consistent with the best interests of their incompetent ward-patients, direct that life-sustaining treatment be withheld or withdrawn unless a

[5] We use the term "surrogates" to refer collectively to the family members of Patient 1 and the court appointed guardian and family members of Patient 2 referred to in the amended complaint. In doing so, we are mindful of the position of the doctors that it may be important in some legal contexts involving end-of-life decisions to distinguish between court appointed guardians and family members. However, neither party argues that there is a distinction that matters to resolve the issue on appeal here.

patient is in a persistent vegetative state or has previously provided a pertinent advance directive while competent. *See* ***Spahn v. Eisenberg***, 210 Wis. 2d 557, 571-73, 563 N.W.2d 485 (1997) (hereafter "***Edna M.F.***").

¶11 The circuit court, Judge Moeser presiding, dismissed the constitutional claim at issue here. The circuit court, Judge Foust presiding, later denied a motion for reconsideration on this claim. Both circuit court judges reached the same conclusion, namely, that Disability Rights failed to state a legally enforceable claim for relief for violations of substantive due process because, as Judge Moeser stated, the government "has no constitutional obligation to provide health care, offer services or act to save a person's life." Disability Rights appeals.

STANDARD OF REVIEW

¶12 Our review of the circuit court decision is de novo. *See* ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999) (whether a complaint states a claim for relief is a question of law reviewed de novo); ***Dairyland Greyhound Park, Inc. v. Doyle***, 2006 WI 107, ¶16, 295 Wis. 2d 1, 719 N.W.2d 408 (interpretation of a constitutional provision is a question of law reviewed de novo).

DISCUSSION

¶13 Both parties acknowledge that substantive due process protects people from governmental actions alone, not from actions of private parties. *See* ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶19, 271 Wis. 2d 51, 678 N.W.2d 831. The parties disagree, however, as to whether the alleged conduct of the state-employed doctors here qualifies as governmental action in this context.

¶14 Without expressing any view on the subject, we will assume without deciding for purposes of this appeal that the doctors are properly alleged to have engaged in state action.[6] We therefore move on to the question of whether, assuming the doctors to be state actors and assuming as true the allegations in the amended complaint, Disability Rights has stated a cognizable claim that the defendant doctors violated the substantive due process rights of legally incompetent patients, under article I, section 1 of the Wisconsin Constitution, by withholding or withdrawing medical treatment from the patients. Neither side argues that the terms of the Wisconsin Constitution or the holding of any Wisconsin appellate court opinion directly controls our decision, although as discussed below Disability Rights argues that the reasoning of three Wisconsin appellate court decisions settles the question in its favor.

¶15 "A court's task in a challenge based on substantive due process 'involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it.'" ***Wood***, 323 Wis. 2d 321, ¶18 (quoting ***Washington v. Harper***, 494 U.S. 210, 220 (1990) (citations and quoted source omitted)).[7] An interest will

[6] Separately, we reject the doctors' argument that we lack jurisdiction over this appeal because Disability Rights failed to file a timely appeal. Our decision is based on our prior determination, reflected in a November 12, 2013 order, that a February 28, 2013 stipulation and order filed in the circuit court was a non-final order that did not trigger the time period for filing an appeal.

[7] Here and elsewhere we cite Wisconsin Supreme Court opinions relying on United States Supreme Court opinions interpreting the Fourteenth Amendment to the United States Constitution to define aspects of substantive due process. We rely on precedent of the United States Supreme Court because our state supreme court treats the federal and state constitutional rights to substantive due process as substantively the same right. *See* ***State v. Hezzie R.***, 219 Wis. 2d 848, 891, 580 N.W.2d 660 (1998) ("This court has repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation."); *accord* ***State v. Konrath***, 218 Wis. 2d 290, 297 n.9, 577 N.W.2d 601 (1998); (continued)

qualify as a protected liberty interest only "if it is both fundamental and traditionally protected by our society." ***Georgina G. v. Terry M.***, 184 Wis. 2d 492, 516, 516 N.W.2d 678 (1994) (citing ***Michael H. v. Gerald D.***, 491 U.S. 110, 122 (1989)). We do not reach the issue of competing state interests, because we conclude that Disability Rights fails to identify a fundamental constitutional right of the patients that was implicated by alleged conduct of the doctors.

¶16 Disability Rights' argument that Patients 1 and 2 have a constitutionally protected fundamental right to treatment is based on Wisconsin case law. According to Disability Rights, three cases establish that an incompetent patient's surrogate decision maker may not refuse medical treatment on behalf of the patient—so long as the patient is not in a persistent vegetative state and has not made clear while competent a desire to refuse treatment—because such a refusal would violate the substantive due process rights of the patient. Given this limitation on a surrogate's ability to refuse medical treatment on behalf of a patient, Disability Rights' argument proceeds, the doctors here "have *acted on*

Reginald D. v. State, 193 Wis. 2d 299, 306-07, 533 N.W.2d 181 (1995). Disability Rights does not explicitly argue that we may not rely on United States Supreme Court precedent interpreting the Fourteenth Amendment to resolve this appeal. However, Disability Rights makes multiple references to the concept that the Wisconsin Constitution can provide greater civil rights protection than the federal constitution, by which Disability Rights may intend to suggest that Wisconsin's appellate courts have recognized a fundamental constitutional right under article 1, section 1 of the Wisconsin Constitution that extends beyond the interests protected by the Fourteenth Amendment.

It is true that exercising this prerogative is a possibility. *See* ***State v. Doe***, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977) ("Certainly, it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment."). However, this possibility has not transpired. Given the Wisconsin Supreme Court's "lock step" approach to date, we decline to adopt a new and different approach that would offer people in Wisconsin broader substantive due process rights than are provided under the Fourteenth Amendment.

their own" to "*directly* depriv[e] the patient of life," or to unnecessarily risk that outcome, which is a deprivation that qualifies as a substantive due process violation. (Emphasis in briefing.)

¶17 However, as the doctors point out, this argument rests on an unsupported leap from one set of topics to a different topic. The set of topics, discussed in the cases that Disability Rights cites, involves either the rights and obligations of surrogate decision makers in directing end-of-life treatment for incompetent patients, under sources of authority that include constitutional law, or the obligations of doctors to provide information to surrogates regarding end-of-life treatment for incompetent patients, under constitutional and tort law. The different topic is whether patients have a fundamental constitutional right to medical care from state-employed doctors. The Wisconsin cases cited by Disability Rights do not address the second topic even indirectly, much less do any of these cases recognize or suggest that there is a fundamental constitutional right to medical care from the government.

¶18 Before summarizing each of the three cases and explaining why we conclude that they do not support the constitutional argument made by Disability Rights, we provide a clarification. We express no opinion about any potential obligations that the doctors might have, under the facts alleged here, pursuant to nonconstitutional sources of authority that include tort law, or ethical, professional, or institutional codes. The only topic we address is the attempt of Disability Rights to persuade us that the particular substantive due process argument it advances is supported by any or all of the three Wisconsin appellate court cases it cites.

¶19 The first issued of the three cases involves the asserted right of an incompetent individual, L.W., who was in a persistent vegetative state, to refuse, through his court-appointed guardian, to receive medical treatment. *See* ***Lenz v. L.E. Phillips Career Dev. Ctr.***, 167 Wis. 2d 53, 482 N.W.2d 60 (1992) (hereafter "***L.W.***"). L.W. had not previously indicated his wishes about refusing medical treatment. ***Id.*** at 63. The circuit court concluded that a person in a persistent vegetative state retains the right to refuse treatment and further concluded that the guardian had "the authority to consent to withdrawal of all life-sustaining medical treatment, including artificial nutrition and hydration," if withdrawal was in the ward's best interests.[8] ***Id.*** at 65-66.

¶20 In affirming the conclusion that a guardian may consent to withdrawal of treatment, the supreme court explained that

> an individual's right to refuse unwanted medical treatment emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, section 1 of the Wisconsin Constitution.

Id. at 67; *see also* ***Cruzan v. Director, Missouri Dep't of Health***, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."). Based in part on the constitutional right to refuse treatment, after reviewing various sources of authority, the court in ***L.W.***

[8] The parties in this appeal make no distinction between a patient's general need for medical treatment and his or her specific need for nutrition and hydration, and we follow their lead on this point. *See* ***Lenz v. L.E. Phillips Career Dev. Ctr.***, 167 Wis. 2d 53, 70-73, 482 N.W.2d 60 (1992) ("[A]n individual's right to refuse unwanted life-sustaining medical treatment extends to artificial nutrition and hydration.").

concluded that, "where it is in the best interests of the ward to withhold or withdraw treatment, the guardian has not only the authority to but a duty to consent to the withholding or withdrawal of treatment." ***L.W.***, 167 Wis. 2d at 82. However, the court expressly limited its holding regarding the authority of guardians to refuse treatment on behalf of incompetent patients to cases involving patients in a persistent vegetative state, in part because in that state of existence "'[p]ain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible.'" ***Id.*** at 63, 84-85 & n.15 (quoting a federal government report).

¶21 We conclude that ***L.W.*** does not support Disability Rights' argument. ***L.W.*** addresses the authority of state-appointed guardians and their obligation to strike a balance between the right of an incompetent patient to refuse treatment and government interests that include preservation of life, but makes no suggestion that doctors have an obligation to provide treatment to avoid violating the due process rights of patients. *See* ***id.*** at 90-92. To the extent that the court addressed the obligations of doctors, the court limited its comments to references to their duties to comply with standards of medical ethics. *See* ***id.*** at 91.

¶22 In the second of the three opinions relied upon by Disability Rights, already referenced above, the supreme court resolved a question left open in ***L.W.***, namely, whether its holding should be limited to cases involving incompetent patients in a persistent vegetative state. In ***Edna M.F.***, the supreme court answered yes, holding that, if the incompetent patient is not in a persistent vegetative state, the patient's guardian could not direct the withholding of life-sustaining treatment without proof of an earlier, competent direction by the patient to withhold treatment. *See* ***Edna M.F.***, 210 Wis. 2d at 559-60. Like L.W., Edna had not executed any form of advance directive indicating a wish to avoid life-

sustaining treatment in identified circumstances, but unlike L.W., Edna was not in a persistent vegetative state at the pertinent time. ***Id.*** at 560-61. Nevertheless, the guardian sought permission from the circuit court to direct the withholding of medical care from Edna, on the grounds that the guardian believed that she would not want to continue to live in a dependent, non-responsive, immobile condition. ***Id.*** at 559-62.

¶23 The court in ***Edna M.F.*** declined to extend the right of a surrogate to refuse treatment on behalf of an incompetent patient, as discussed in ***L.W.***, where the incompetent patient is not in a persistent vegetative state, in part based on concern about the extent to which those not in a persistent vegetative state might experience pain due to the withdrawal of medical treatment, such as the pain associated with starving to death. ***Id.*** at 568. Disability Rights emphasizes that the court in ***Edna M.F.*** refused to extend the holding in ***L.W.*** even to decisions by surrogates on behalf of persons "with incurable or irreversible conditions," and that Edna's condition left her immobile, demonstrating "no purposeful response[s]" to stimuli, and completely dependent on others. ***Id.*** at 568-69, 574.

¶24 As with ***L.W.***, we conclude that ***Edna M.F.*** has nothing pertinent to say on the topic of doctor obligations, under the constitution or otherwise. The court in ***Edna M.F.*** focused narrowly on the question of whether "to extend the scope of ***L.W.*** beyond those incompetent wards who are currently in a persistent vegetative state." ***Id.*** at 572.

¶25 The last of the three cases relied on by Disability Rights, an opinion of this court, was a "wrongful life" claim involving a premature baby who was delivered by cesarean section and then survived after medical personnel resuscitated him. *See* ***Montalvo v. Borkovec***, 2002 WI App 147, ¶¶1-5, 256

Wis. 2d 472, 647 N.W.2d 413. The parents claimed negligence by doctors for allegedly violating the informed consent law in taking steps to save the baby's life without first having obtained the parents' informed consent. ***Id.*** In addressing the first prong of the informed consent law, which involves information that a doctor is obligated to provide to a patient or surrogate, the court noted that doctors are required "to provide information only about available and viable options of treatment." ***Id.***, ¶13. This raised the question whether a decision not to attempt to save the baby was an available alternative that doctors were obligated to explore with the parents.

¶26 On this available-alternative issue, this court in ***Montalvo*** relied on ***Edna M.F.*** to hold that the doctors had no viable alternative to resuscitating the baby, in part because, "either withholding or withdrawing life-sustaining medical treatment is not in the best interests of any patient who is not in a persistent vegetative state." ***Id.***, ¶¶16-17 (citing ***Edna M.F.***, 210 Wis. 2d at 566-68). "Thus, in Wisconsin, in the absence of a persistent vegetative state, the right of a parent to withhold life-sustaining treatment from a child does not exist." ***Id.***, ¶17.

¶27 We conclude that this third case also fails to support the Disability Rights argument. ***Montalvo*** involves the right of a parent to information about refusing life-sustaining treatment for a child, and does not expressly address a doctor's obligation to provide the treatment. Moreover, this court in ***Montalvo*** was not presented with a substantive due process question. It would be a clear departure beyond any statement made in ***Montalvo*** to hold that a patient has a fundamental constitutional right to receive life-sustaining treatment from a state-employed doctor.

¶28 Disability Rights may intend to argue that, even if no one of these decisions is dispositive in its favor, the cases support its position when various aspects of the cases are considered together. However, our explanation above is sufficient to reject this argument. None of the three cases suggests that doctors have an obligation, deriving from patients' fundamental constitutional rights, to begin or continue medical treatment, and therefore there is no starting point in this authority for the Disability Rights argument.

¶29 Disability Rights attempts to bridge the gap between the topics addressed in the three cases and the alleged violation of substantive due process by citing the rule from tort law that doctors are negligent if they fail to treat their patients with "'ordinary care,'" which includes "'*an effort to cure the patient*.'" *See* ***Nowatske v. Osterloh***, 198 Wis. 2d 419, 432-34, 543 N.W.2d 265 (1996) (emphasis in Disability Rights' briefing), *abrogated on other grounds by* ***Nommensen v. American Continental Ins. Co.***, 2001 WI 112, ¶52 n.6, 246 Wis. 2d 132, 629 N.W.2d 301. However, the question here is not whether the doctors were negligent in treating the patients. The question is whether, in allegedly deciding *not* to treat the patients, the doctors violated the patients' substantive due process rights. The authority cited by Disability Rights involves physician negligence, entirely unrelated to a patient's right to substantive due process. The fact that state-employed doctors, like all doctors, have obligations under tort law to the patients they treat does not mean that the doctors have affirmative duties under substantive due process to provide medical care in the first instance.

¶30 Moreover, ***Nowatske*** is of no value to Disability Rights for an additional reason. That opinion does not purport to address the narrow topic of a doctor's obligation to provide continuing life sustaining care, but instead speaks

more generally about the duty of doctors to use "ordinary care" in treating their patients. ***Id.*** at 432-39. ***Nowatske*** does not address, nor do we, the question of when it would fall below the duty of ordinary care under tort law for a doctor to decide *not* to provide care, or to discontinue care, for someone who has been in the past, or is at the moment, a patient of the doctor's.

¶31 Turning to a separate but related argument made by Disability Rights, it contends in part, regarding the two Wisconsin Supreme Court opinions, "If the constitutional 'presumption' established in ***L.W.*** and reaffirmed in ***Edna*** that 'continued life is in the best interests of the ward' is to have any actual meaning it must apply here, in the real world of hospital rooms where the voiceless person has no advocate." This broad statement misses the mark as a legal argument. It is a reference to the following statement in ***L.W.***: "In making the best interests determination, the guardian must begin with a presumption that continued life is in the best interests of the ward." ***L.W.***, 167 Wis. 2d at 86. This statement in ***L.W.*** describes one critical interest for guardians to weigh heavily in making medical decisions on behalf of wards, namely, the interest in sustaining human life. It tells us nothing about the constitutional obligations of government employed doctors.[9]

¶32 In sum, Disability Rights has not met its significant burden in identifying a fundamental constitutional right to obtain medical care from the

[9] One additional Wisconsin appellate court opinion relied on by Disability Rights is readily distinguishable on its face. *See* ***Professional Guardianships, Inc. v. Ruth E.J.***, 196 Wis. 2d 794, 803-04, 540 N.W.2d 213 (Ct. App. 1995) (holding unconstitutional a statute that effectively barred patient from obtaining particular medical treatment through the consent of guardian; no reference to duty of state to provide treatment).

government recognized by a federal or state court. As the United States Supreme Court has explained, the liberty interest protected by the Due Process Clause includes a limited number of specifically identified rights: "to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity[;] … to abortion"; and perhaps, "the traditional right to refuse unwanted lifesaving medical treatment." ***Washington v. Glucksberg***, 521 U.S. 702, 720 (1997) (citations omitted, except that last concept cited to ***Cruzan***, 497 U.S. at 278-279). And, the court added,

> we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Id. (quoted sources omitted).

¶33 It is not surprising that Disability Rights fails to identify authority in Wisconsin case law for the proposition that there is a substantive due process right to medical care from the government. Any such recognition would appear to run contrary to the fundamental principle that the government is not under a constitutional duty to affirmatively protect persons or to rescue them from perils "that the government did not create." *See* ***DeShaney v. Winnebago Cnty. DSS***, 489 U.S. 189, 195 (1989) (the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security"); ***Sandage v. Board of Comm'rs of Vanderburgh Cnty.***, 548 F.3d 595, 597 (7th Cir. 2008) (there is "no federal constitutional duty to protect or … to rescue from a peril that the government did not create").

¶34 We now address additional arguments made by Disability Rights not directly addressed above, and reject each.

¶35 Disability Rights repeatedly disavows that it seeks for its patients the benefit of an "unfettered right" to medical care from government doctors "in all circumstances." Instead, it contends that it has identified a violation of the patients' substantive due process "right to life" only in the situation in which doctors follow "directions to discontinue life-sustaining medical treatment from people who had no legal right to tell them to" discontinue treatment. However, Disability Rights fails to explain how it could prevail in this specific factual context if there is not a fundamental constitutional right to obtain medical care from state-employed doctors. Put differently, it does not add to Disability Rights' argument that it disavows an "unfettered right," when it cites no authority for the allegedly more narrow right that it claims.

¶36 Disability Rights also argues that it would be absurd for a court to require a surrogate to choose life-sustaining treatment for a patient, as in ***Edna M.F.***, but at the same time not require a state-employed doctor who has attended to that patient to provide the same life-sustaining treatment that the surrogate must request. We see several problems with this argument, but it is sufficient to note, again, that Disability Rights does not persuasively distinguish such authority as ***DeShaney***, which explains that the purpose of the Due Process Clause is solely to protect the people from affirmative wrongful acts of the state, not to require the state to provide assistance or protection, because "[t]he Framers were content to

leave the extent of governmental obligation in the latter area to the democratic political processes." *See* ***DeShaney***, 489 U.S. at 196.[10]

¶37 On a related note, Disability Rights argues that the Wisconsin opinions addressing obligations of surrogates are "merely hortatory, empty pronouncements, devoid of application in the real world of modern medicine," if the constitutionally protected liberty interests of the patients do not protect them from potentially life-ending inaction by state-employed doctors. This is essentially a policy argument that, despite the existence of rules from various sources of authority governing the conduct of surrogates and doctors, more robust regulation and more safeguards are needed. Attempting to address this policy argument would take us beyond the scope of our authority. We have the same view of the explicit policy arguments that Disability Rights adds to its constitutional law arguments.

¶38 Finally, at places in its briefing Disability Rights appears to suggest an additional issue, or sub-issue, on which it could prevail. The suggestion would be that the doctors violated the substantive due process rights of patients by allegedly "encouraging" a surrogate to make a decision to withhold or withdraw treatment, as opposed to conferring with the surrogate in a neutral manner or in a manner intended to discourage withholding or withdrawal of treatment. However,

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[10] Disability Rights does not argue that this is a situation, recognized in ***DeShaney v. Winnebago County DSS***, 489 U.S. 189 (1989), in which there is a "special relationship" between the government and an individual, which could create an affirmative, constitutional duty to protect, because the state has restrained an individual's liberty to such a degree that "it renders him unable to care for himself, and at the same time fails to provide for his basic human needs." ***Id.*** at 200. Neither patient here was incarcerated or involuntarily committed to the custody of the state. We do not address any aspect of the "special relationship" context.

we do not see this as adding anything to the constitutional issue we address above. Disability Rights fails to develop an argument, or to point to legal authority for the proposition, that a doctor's "encouraging" a surrogate to decide not to treat a patient or to discontinue treatment could be a substantive due process violation if the doctor's failure to provide treatment were not in itself a violation.

CONCLUSION

¶39 For these reasons, we affirm the order of the circuit court dismissing the only remaining count in the amended complaint.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.