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 RESPONSE TO BEAUMONT'S MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

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 Response to Beaumont's Motion to Dismiss Plaintiff's Complaint states as follows:

WHEREFORE, for the reasons set forth in the accompanying Brief in Support, Plaintiff respectfully requests that this Honorable Court deny in all respects Defendants' Motion to Dismiss.

Respectfully Submitted,

THE RASOR LAW FIRM, PLLC

/s/ Andrew J. Laurila

ANDREW J. LAURILA (P78880)
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Dated: December 18, 2019

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Counter Statement of Issues Presented

I. Whether Plaintiff has stated a plausible claim for a violation of the Emergency Medical Treatment and Labor Act based on Defendant's refusal to comply with the statute because of its interpretation and application of MCL § 333.1033.

Plaintiff Responds: Yes

Defendant Responds: No

II. Whether Plaintiff has stated a claim against Beaumont for violations of the Fourteenth Amendment's due process clause, including Plaintiff's "void for vagueness" count, because Beaumont's state-motivated act gives rise to it being a state actor?

Plaintiff Responds: Yes

Defendant Responds: No

III. Whether Plaintiff's claim for declaratory relief necessarily encompasses her constitutional challenges and is a proper remedy under the circumstances?

Plaintiff Responds: Yes

Defendant Presumably Responds: No

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PLAINTIFF'S BRIEF IN SUPPORT TO HER RESPONSE TO DEFENDANT BEAUMONT'S MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

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 her Response to Beaumont's Motion to Dismiss Plaintiff's Complaint states as follows:

FACTUAL BACKGROUND

Titus Cromer is a 16-year old child, whose mother is Plaintiff, LaShauna Lowry. 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 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 and despite being legally required to do so pursuant to the Emergency Medical Treatment and Labor Act.

Plaintiff filed a complaint asserting both violations of EMTALA and the Fourteenth Amendment and seeking preliminary injunction, a temporary restraining

order ("TRO"), and declaratory judgment on November 8, 2019. On the same day, Plaintiff filed an Amended Complaint correcting minor defects in the pleading. After the Court granted Plaintiff's TRO, the parties filed briefs as to the issuance of a preliminary injunction. On November 27, 2019, Defendant Beaumont filed a motion to dismiss Plaintiff's complaint. In response to Defendant's motion, Plaintiff filed a motion for leave to amend—though Plaintiff's position is she can amend as of right given it is in response to Defendant's 12(b)(6) motion—on December 9, 2019. Plaintiff's proposed amended complaint addresses Defendant's qualms with Beaumont's "state action" pertaining to Plaintiff's claims asserting Fourteenth Amendment due process violations in how Defendant Beaumont has applied and acted in accordance with M.C.L. § 333.1033.

Regardless, because the underlying facts have been heavily briefed in the parties' motions pertaining to Plaintiff's injunctive relief (Docket #s 10, 15, and 16), Plaintiff will not recite all of the pertinent facts. Moreover, because this motion rests on the pleadings, only Plaintiff's complaint and attached documentation are relevant to the Court's review. (See Docket #2 and Ex. 1-6).

STANDARD OF REVIEW

Defendants bring their instant Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the facial sufficiency of the complaint. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134

(6th Cir. 1996). Rule 12(b)(6) provides that the defendant bears the burden of demonstrating that a plaintiff has not stated a claim upon which relief can be granted.

As the Supreme Court provided in *Ashcroft v. Iqbal*, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” 556 U.S. 662, 679 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). The plausibility standard “does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].” *Twombly*, 550 U.S. at 556.

Ultimately, “[d]etermining whether a complaint states a plausible claim for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. This is particularly true when the claims rely on a Defendant’s knowledge and conduct related to the same. *See Moore v. First Advantage Enterprise Screening Corp.*, 2012 WL 4461505 (N.D. Ohio 2012) (Denying a 12(b)(6) motion because “[t]he degree of knowledge involved in the alleged violations is a matter uniquely within the Defendants’ knowledge and may not be capable of any more definite factual assertion prior to discovery”); *East Jordan Plastics, Inc. v. Blue Cross and Blue*

Shield of Michigan, 2013 WL 1876117 (E.D. Mich. 2013) (denying defendant's 12(b)(6) motion based on a "factual dispute" as to the plaintiff's knowledge).

ARGUMENT

I. Plaintiff's Complaint states a viable EMTALA claim against Beaumont

The Emergency Medical Treatment and Active Labor Act ("EMTALA") involves patients suffering from an "emergency medical condition." "Under EMTALA, hospitals have two requirements: (1) to administer an appropriate medical screening, and (2) to stabilize emergency medical conditions." *Estate of Lacko, ex rel. Griswatch v. Mercy Hosp., Cadillac*, 829 F.Supp.2d 543, 548 (E.D. Mich. 2011). 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:

> 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....

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) (emphasis added). 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 so, 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).

Defendant's position regarding the applicability of EMTALA is clear: the "application of the statute turns on the hospital's belief regarding the existence of an emergency medical condition." (Def's MSD, p. 8). Thus, the crux of Defendant's argument to dismiss Plaintiff's EMTALA claims on the pleadings is that the hospital's duty under EMTALA only extends to what it "believes" and what it "knew." In this regard, Defendant misconstrues *Perry v. Owensboro Health Inc.*,

2015 WL 4450900 (W.D. Ky. July 16, 2015). The court in *Perry* stated that "hospital staff members must have **actual knowledge** that an emergency medical condition exists for EMTALA's stabilization provision to apply." *Id.* at *7. This holding distinguishes between actual and constructive notice. Yet Beaumont is, at present, undeniably on actual notice of Plaintiff's emergency medical condition per Dr. Bonfiglio's affidavit and attempts to examine Titus:

> 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.

(Docket #10, Ex. F, Affidavit of Dr. Richard Bonfiglio, M.D.).

Beaumont surely does not contest that it determined Titus had an emergency medical condition when he first presented. Indeed, Beaumont performed extensive treatment on Titus prior to prematurely declaring him dead. While Beaumont appears to dispute the existence of a *continued* emergency medical condition, its

doctors undeniably recognized such a condition existed when they first encountered Titus. According to Dr. Bonfiglio's sworn Affidavit attached to Plaintiff's complaint and thus relevant to the Court's inquiry here on 12(b)(6), that medical emergency still exists and is worsening every day that the required medical treatment for his condition is ignored by Beaumont.

Moreover, Beaumont is presently in receipt of multiple affidavits (from Dr. Bonfiglio and Dr. Byrne) on behalf of Titus expressing that his status does not satisfy the statutory requirement for being "brain dead," which were attached to Plaintiff's complaint. This uncontrovertibly proves that Beaumont has "actual" knowledge of the existence of an emergency medical condition. The cases cited by Defendant did not reach this stage of the analysis because none included conflicting medical opinions as exist here.

Beaumont's argument here at the pleading stage is entirely improper. There is a significant factual dispute as to what Beaumont's knowledge and/or actions violating EMTALA in refusing to stabilize and transfer Plaintiff. Like *Moore* and *East Jordan Plastics, supra*, when a factual dispute exists pertaining to knowledge relevant to the underlying claims, dismissal on the pleadings is improper. Further, Defendant's reliance on *Fonseca v. Kaiser Med. Ctr. Roseville*, 222 F.Supp.3d 850 (E.D. Cal. 2016) is equally improper. *Fonseca* is factually and legally distinguishable here as it applied Ninth Circuit precedent and did not have the same factual disputes.

Not only does Defendant's argument for dismissal of Plaintiff's complaint lack credence, but Plaintiff has a viable EMTALA preemption claim pursuant to 42 U.S.C. § 1395dd(f) (EMTALA preempts any state law that "directly conflicts with a requirement of this section). In *Bowen v. Mercy Memorial Hosp.*, 1995 WL 805189 (E.D. Mich. 1995), this court held that a state law "pre-suit notice requirement" for medical claims was preempted by EMTALA because adopting the hospital's argument that the plaintiff's EMTALA claims were untimely "would effectively reduce the EMTALA's statute of limitations period from two years to one and one-half years." *Id*. at *3.

In response to Defendant's motion to dismiss, Plaintiff sought leave to amend her complaint on December 9, 2019. (Docket #27). Plaintiff's amended complaint seeks to add this count (IV) pursuant to EMTALA's preemption statutory provision. This proposed amendment addresses Beaumont's arguments for dismissal: "Plaintiff cannot show that Beaumont believes that Titus suffers from or risks an emergency medical condition as Plaintiff acknowledges that Beaumont has determines that he is deceased." (Def's MSD, p. 9). In other words, Beaumont's reliance on § 333.1033 requires this Court to determine Plaintiff has failed to state an EMTALA claim.

Per Defendant's logic, Titus is not entitled to EMTALA protections as a patient of Beaumont because Beaumont has unconstitutionally declared him dead. This is a clear-cut conflict between state and federal law giving rise to preemption. This is not to say that Michigan's Determination of Death Act and EMTALA are at

odds generally. Quite oppositely, Beaumont could have acted in a way which would not have triggered this analysis. But Beaumont's steadfast reliance on MCL § 333.1033—inaction given the state law provides the impetus for Beaumont's refusal to comply with EMTALA—is directly at odds with EMTALA and its statutory requirements. This conflict and Beaumont's inability to comply with a federal law due to its adherence to a state law triggers a finding of preemption. Again, not general preemption; but preemption as applied to Beaumont in this context.

Thus, there is no question that based on this fact-intensive inquiry as to Beaumont's "knowledge" and "belief," dismissal on the pleadings would be improper following Sixth Circuit law applicable here. Beaumont's basis for the dismissal of Plaintiff's EMTALA is disingenuous at best and at the least, requires a preemption analysis. Beaumont has admitted that it did not even attempt to comply with EMTALA's provisions beginning with a determination of Titus' suffering from an "emergency medical condition" because of its alleged determination of brain death. This refusal is *prima facie* evidence of an EMTALA violation and sufficient to state a claim. Beaumont assuredly has not attempted to comply with the "stabilization" or "transfer" statutory requirements. Even if Plaintiff has not stated a claim for violation of these general EMTALA provisions, Beaumont's subsequent position establishes a cognizable EMTALA preemption count pursuant to 42 U.S.C. § 1395dd(f) as articulated in Plaintiff's motion to amend.

II. Plaintiff's Complaint states a Due Process claim against Beaumont

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.

Defendant cites to *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992) for the assertion that "merely because a business is subject to state regulation does not by itself convert its action into state action." While true, this only furthers the invalidity of Defendant's argument as this is not Plaintiff's argument. If Plaintiff's state action derived from Beaumont being statutorily mandated to act pursuant to MCL § 333.1033, this argument would fail. But that is not the case. When a regulation is at

the root of the private actor's conduct, the challenging party must show "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Blum v. Yaretsky*, 457 U.S. 991 (1982).

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"). The Fourth Circuit has held a hospital as a state actor in the hospital's application of an anti-abortion policy pursuant to its perceived application of a state's criminal abortion statute. See *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 644 (4th Cir. 1975) ("the anti-abortion hospital policy rests firmly upon what was thought to be the compulsion of state law. Thus the hospital acted 'under color of law' when it refused to allow its facilities to be used by Doe for an abortion."). Similarly, the "under color" provision of § 1983 encompasses private actors who "derives some aid, comfort, or incentive, either real or apparent, from the state." *Lucas v. Wisconsin Elec. Power co.*, 466 F.2d 638, 655 (6th Cir. 1972) (internal citations omitted).

Plaintiff's complaint asserts a Fourteenth Amendment due process claim against Beaumont pursuant to 42 U.S.C. § 1983 for its application of MCL § 333.1033. Beaumont argues that this argument cannot form the basis that it is a state

actor. Like Defendant's other arguments, this is premature at this juncture. Beaumont has repeatedly alleged that its decision here rests on what turns on a determination of death "in accordance with accepted medical standards." See MCL § 333.1033(2). Yet at this stage, Plaintiff has no way of knowing if this is true and/or what this entails. In other words, the only evidence is that Defendant utilized this statute to declare Titus dead: traditionally a state function.

As determining and declaring death is traditionally a state function, placing this burden on a private entity like Beaumont is undeniably a delegation of authority. But this is not the sole basis for state action here; despite Defendant's best efforts to color it as so. The only evidence here evincing Beaumont's conduct towards Titus' treatment derives from the state statute. There is no evidence that absent the statute, Beaumont would have or could have declared Titus dead. While this may not be the case after discovery, absent such fact finding, the true role of the declaration of death act creates various factual disputes.

This case is akin to *Doe, supra*, where the hospital derived its authority involving abortions from a state law. In other words, the underlying challenged conduct was private hospital conduct derived from a state law. The plaintiff's argument for state action, which prevailed, was that the application of this state law to her treatment—i.e. medical judgment—violated multiple fundamental rights. Here, the only evidence at this stage of litigation is that Michigan's declaration of death act compelled Beaumont's conduct. But for MCL § 333.1033, Beaumont

would not have acted as it did regarding Plaintiff's treatment. This conduct in accordance and compelled by state law is a sufficient nexus to establish Beaumont as a state actor for purposes of Plaintiff's due process claims.

Likewise, viewing Beaumont's role in light of Plaintiff's procedural due process claim sheds like on its state actor-status. Given the lack of any procedural safeguards for these determinations, Beaumont is the sole party involved in assuring the legality of declarations of death pursuant to the statute. Whereas many private actors acting with state authority are not deemed state actors because they are just another cog in a wheel of decisions, Beaumont is the judge, jury, and executioner involving its application of MCL § 333.1033. Thus, as the party with the final decision on all the substantive rights at issue here—Titus' life and Titus' mother fundamental right to make parental decisions—Beaumont cannot claim it does not act with the authority of the state.

The disingenuity of Beaumont's position is dumb founding. One need look no further than Beaumont's title for section V.A., in its motion: "Michigan law has already recognized a hospital's legal right to stop medical care after a patient has died." (p. 19). Beaumont has steadfastly relied on MCL § 333.1033 for the validity of its actions throughout this litigation. Yet when Plaintiff challenged this undeniably state-law motivated conduct, Beaumont cowers behind its private status and alleged lack of state action. Beaumont cannot have its cake and it eat it, too.

Thus, based on Beaumont's application of this law to Plaintiff, there is no question a sufficient nexus exists giving rise to state action.

Even if Beaumont is deemed not a state actor for purposes of this analysis, Plaintiff's proposed amended complaint (Docket #27) addresses these issues. Plaintiff seeks to add Robert Gordon, the Director of Michigan Department of Health and Human Services ("HHS"), as a Defendant. As the Director of HHS, Gordon has the authority to both enforce MCL § 333.1033 and issue death certificates. However, even with the addition of Defendant Gordon to address the constitutional challenge to the declaration of death act, Beaumont still must remain a critical party. The collective conduct of the state law and Beaumont's application would require the Court to examine the entire conduct in ascertaining the validity of MCL § 333.1033. At the end of the day, Beaumont made the "determination of death" and Plaintiff has a right to challenge the validity of this decision on his and his mother's fundamental rights at issue. Thus, whether against Beaumont or Defendant Gordon via *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), Plaintiff has a valid due process claim challenging both the substantive and procedural requirements of MCL § 333.1033.

III. Plaintiff's "Void for Vagueness" count is entwined with her Constitutional Challenge and "declaratory judgment" claim arising out of Beaumont's reliance and application of MCL § 333.1033.

Defendant challenges Plaintiff's "void for vagueness" count on a misreading of Plaintiff's complaint. In other words, Defendant claims that state action aside,

Plaintiff's complaint fails to articulate a claim for how the statute is unconstitutionally vague. This inquiry first involves looking at the underlying claim.

"Due process requires that a law not be vague." *600 Marshall Entertainment Concepts, LLC v. City of Memphis*, 705 F.3d 576, 586 (6th Cir. 2013). A law is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that is authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008). Further, a statute will be held unconstitutionally vague when it permits arbitrary and ambiguous conduct resulting in the challenging party's harm. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A law will be deemed vague when it "impermissibly delegate[s]…basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* (while applied to a criminal statute, the Supreme Court's analysis is relevant in this context).

Defendant does not argue that Plaintiff's constitutional challenge as to the vagueness of MCL § 333.1033 cannot stand; just that it does not adequately state a claim. Thus, the pleadings must be examined in a light most favorable to Plaintiff. And despite Defendant's best efforts, Plaintiff's complaint clearly articulates how the statute's vagueness has resulted in exactly the doctrine's fear: an arbitrary application of a law to Beaumont's determination of Titus' death.

The statute is beyond vague in terms of how this decision came to be. "Vagueness" is not limited to a literal vague meaning of a word. Notably, Defendant cites to ¶¶ 83.a-c and 84 of Plaintiff's complaint. Omitted from Defendant's citations, however, is ¶ 85, which articulates Plaintiff's theory: "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." Further, the complaint references the lack of any opportunity to "appeal, seek other opinion, or allow for the passage of time for the body to heal." (*Id*. at ¶ 83.b).

Defendant, in a different context, references an alleged section of Michigan's Estates and Protected Individuals Code ("EPIC") for the baseless conclusion that it does provide Plaintiff recourse in asserting a probate court action. Yet this absurd position lacks merit; both because the section at issue is equally vague and ambiguous as to any relevancy here and Michigan's probate court does not have jurisdiction over Plaintiff's federal constitutional challenge to MCL § 333.1033.

Paragraph 84 of Plaintiff's complaint sufficiently explains Plaintiff's void for vagueness claim in a nutshell. The statute has no checks and balances and is vague in terms of notice, effect, and timing. In other words, and as stated throughout the complaint, the statute is vague for the exact fears state laws have been stricken: it permits arbitrary conduct by the allegedly compliant party. Here, Beaumont "declared" Titus dead on what amounted to a whim and did not have a statutory duty

to even inform the family of this. After that, counsel had to rush to Court to obtain an injunction before Beaumont was going to arbitrarily pull the plug. Following that, Beaumont utilized a distinct, irrelevant statute to argue the Oakland County Circuit Court lacked jurisdiction—further evidence of vagueness. Neither Beaumont nor Judge Jarbou could articulate how a challenging party must assert a claim. This is the epitome of a "vague" statute. In allegedly complying with the statute, both Beaumont and the Oakland County Circuit Court's reading of the law permitted them to act in "an ad hoc and subjective basis, with the attendant dangers of arbitrary…application." See *Grayned, supra*.

Following the vagueness of the statute, Defendant argues Plaintiff's declaratory-judgment count fails as no asserted cause of action "is likely to entitle her to that remedy." Yet Plaintiff's due process count(s) both seek declaratory judgment holding the statute unconstitutional. (*See* Count II, p. 19, Declaratory relief from the Court that MCL § 333.1033 "is unconstitutional on its face for violating Titus and his mother's due process rights"; Count III, p. 22, "Plaintiff respectfully request this Honorable Court enter an Order declaring that MCL § 333.1033 is unconstitutionally vague"). The Count that Defendant cites to is not a distinct claim; it is wrapped up with Plaintiff's other declaratory relief to the extent that upon a finding of the unconstitutionality of MCL § 333.1033, the Court must declare Plaintiff has not "suffered brain death." (Def's Brief, p. 18).

Plaintiff has sought declaratory judgment as to the constitutionality of MCL § 333.1033. This is a permissible prayer for relief and use of 28 U.S.C. § 2201. See *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). When challenging a state law, it is proper for the challenging party to seek both declaratory judgment the state law at issue is unconstitutional and injunctive relief from the continued enforcement of the unconstitutional state law. *See Roe v. Wade*, 410 U.S. 113 (1973). Thus, because Plaintiff's claims hinge on the patent unconstitutionality of Defendant Beaumont's application of MCL § 333.1033, there is no question that she has properly asserted claims seeking declaratory judgment from this Court regarding the same.

IV. Plaintiff's claim that only Lashauna Lowry has a right to determine medical care for her son arises out of substantive due process constitutional theories

Defendant improperly and unsurprisingly again misconstrues the gravamen of Plaintiff's claims regarding Titus' mother "right to determine when Beaumont may stop medical care for her son." (Def's Motion, p. 19). According to Defendant, this claim fails because it is "contrary to Michigan law" and is not "connected with any of her causes of action." (*Id.*). But this claim arises out Titus' mother's right to make decisions "concerning the care, custody, and control of her children." See ¶ 56 of Plaintiff's complaint. This claim involving Titus' mother's rights evokes clear tenets of the Fourteenth Amendment's substantive due process provisions.

The substantive component of the Fourteenth Amendment "provides heightened protection against government interference with certain fundamental

rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The Supreme Court has found one of these inalienable rights to be a "parents' fundamental right to make decisions concerning the care, custody, and control of their children." See *Troxel v. Granville*, 530 U.S. 57, (2000); see *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Thus, Titus' mother's constitutional claims, distinct from Titus' fundamental right to life, still evoke due process protections. Having determined there is a fundamental right at issue, the Court's job will be the weigh this right with the state intervention (i.e. Beaumont's interference with the same) and whether it is related to the overarching purpose of the law. Further, this inquiry will seek Beaumont's application of the statute in lieu of these purposes and in lieu of the fundamental rights at issue. Beaumont has failed to argue this necessary analysis for any substantive due process defense. Solely viewing the pleadings, Plaintiff has stated a claim for substantive due process violations based on the deprivation of Titus' mother's ability to control Titus' care and upbringing, which includes Beaumont's impingement on his religious beliefs (See ¶ 33).

CONCLUSION

Plaintiff has asserted both viable claims of EMTALA violations and violations of the Fourteenth Amendment's due process clause. On the pleadings, Defendant has not shown any of these claims fail as a matter of law. Moreover, even

if Beaumont's lackluster theories have merit, Plaintiff's proposed amended complaint addresses these issues and permit Plaintiff's claims to succeed.

WHEREFORE, Plaintiff respectfully requests this Honorable Court deny Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully Submitted,

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Dated: December 18, 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 **December 18, 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