UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiff,

v.

BEAUMONT HEALTH,

Defendant.

Case No. 2:19–cv–13293

Hon. Mark A. Goldsmith

BEAUMONT'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Sadly, no amount of litigation is going to change the fact that Titus Jermaine Cromer, Jr. was certified as dead on October 24, 2019. His brain was starved of oxygen due to a significant injury on October 17. Multiple widely accepted medical and neurological tests separately confirm a pronouncement of brain death. Two separate physicians at Beaumont, and two other physicians at the family's request, each separately confirmed the diagnosis of brain death. While Beaumont sincerely wishes it was different, the fact is that Titus has passed away.

Plaintiff filed this lawsuit to challenge Beaumont's determination and her pleadings indicate that the family is working to identify a long-term care facility that will accept Titus. While Beaumont has made its pronouncement of brain death, it has genuine compassion for Titus's grieving family, and as a result, Beaumont does not oppose continuation of the current temporary restraining order[1] for a reasonable period to preserve the status quo while the family works to locate an alternate facility.

But Beaumont opposes Plaintiff's motion to the extent she asks this Court to compel any Beaumont physician to perform a tracheostomy or percutaneous endoscopic gastrostomy (PEG) tube. Neither is medically indicated, required to stabilize Titus's body, or ethical to perform.

[1] ECF 4, ECF 7.

PROCEDURAL HISTORY

Beaumont pronounced Titus as brain dead on October 24, 2019 at 3:00 P.M. At that time, Beaumont informed Titus's family that medical ethics required Beaumont to stop all treatment. This is because, tragically, Titus has died.

Plaintiff, Titus's mother, filed a lawsuit in the Oakland County Circuit Court on the afternoon of October 24. On the morning of October 28, Plaintiff sought a temporary restraining order to compel Beaumont to refrain from withdrawing medical treatment to maintain the status quo. During an initial status conference before the hearing on October 28, "Plaintiff's counsel indicated that he and Mr. Cromer's family were seeking to have Titus Cromer (Minor) moved to another facility for long-term care." ECF 2-6, PgID 332.

At the October 28 hearing, Beaumont noted the Oakland County Circuit Court lacked jurisdiction over the matter because Plaintiff had failed to plead any claims and had pleaded only remedies. Based on "the limited information" presented to the court, the Oakland County Circuit Court granted a temporary restraining order "to continue the current level of care." Ex. 4, Order Regarding Motion. Other than irreparable harm, the court addressed no other factors. Finally, the court set a November 7 hearing date to address the preliminary-injunction request.

On November 4, the Oakland County Circuit Court issued an order directing the parties to appear on November 5 and "address why exclusive jurisdiction should not rest with the probate court pursuant to MCL 700.1302." Ex. 5, Order. This order also led both parties to address the "determination of death" provision of the Estates and Protected Individuals Code, which provides in part that the probate court "shall

determine death or status in accordance with the following . . . (a) Death occurs when an individual is determined to be dead under the determination of death act, 1992 PA 90, MCL 333.1031 to 333.1034." M.C.L. § 700.1207.

At the hearing on November 5, at the request of Plaintiff's counsel, the Oakland County Circuit Court and parties discussed Plaintiff's efforts to transfer Titus's body to another facility:

> Status conferences related to the transfer of [Titus] were held on November 6, 2019, at 9:45 a.m., 11:30 a.m., and 4:00 p.m. Plaintiff's counsel advised the Court during those status conferences that doctors and a facility willing to effectuate the transfer had been located and details were being worked out. The parties were instructed to provide all the relevant names of doctors, personnel, and facilities that would be involved in the transfer.

ECF 2-6, PgID 333. During this time, the court adjourned the November 7 hearing to November 14.

Despite Plaintiff's assurances that doctors and a facility were standing by ready to transfer Titus, by the next day it was clear that this was not the case:

> The Court held two more status conferences on November 7, 2019 at 8:35 a.m. and 9:03 a.m. During those status conferences, Plaintiff advised the Court that a facility willing to accept Mr. Cromer for the purpose of performing medical procedures had not yet been secured because of issues with Mr. Cromer's status as a minor. It [was] not apparent to the Court when, or if, a transfer can be effectuated.

ECF 2-6, PgID 333.

Later on November 7, the Oakland County Circuit Court issued an order determining that it did not have subject matter jurisdiction over the matter. ECF 2-

6, OCCC Opinion and Order. The court held that the state probate court has exclusive jurisdiction over this issue: "The rules of civil procedure and the probate code are both in agreement that an incapacitated minor must have a third party to represent their best interests; therefore, the controlling language found at MCL 700.1302 vests exclusive jurisdiction in the Probate Court." ECF 2-6, PgID 336. The court thus dismissed the case "as of Tuesday, November 12, 2019, at 12:00p.m., because exclusive jurisdiction rests in the Probate Court." ECF 2-6, PgID 337.

On the evening of November 7, Plaintiff's counsel confirmed that he would be filing a claim with the probate court the following morning. Despite the circuit court's holding that exclusive jurisdiction rests in the state probate courts, Plaintiff instead filed this federal action seeking a temporary restraining order and injunctive relief in federal court. ECF 2. Federal District Judge Roberts entered a temporary restraining order preserving the status quo until the Court decides whether to impose a preliminary injunction. ECF 4 (original TRO); ECF 7 (amended TRO).

Judge Roberts's temporary restraining order confirmed that "Plaintiff's medical expert(s) may 'seek emergency medical privileges' to examine Titus," a process to begin with contact to Beaumont's Chief Medical Officer. As of this filing, no one has contacted Beaumont about securing emergency privileges.

RESPONSE TO REQUEST FOR INJUNCTIVE RELIEF

Beaumont has consistently expressed its genuine compassion for Titus's family and confirmed, both in Oakland County Circuit Court and here, that it will work cooperatively and within reason to support the family's efforts to relocate Titus to a

long-term care facility. To that end, Beaumont does not oppose continuing the temporary restraining order for a reasonable period of time to preserve the status quo while Titus's family identifies an alternate support facility.

Beaumont respectfully reserves the right to challenge Plaintiff's claims, this court's subject matter jurisdiction, and to seek dissolution of the injunction, but it does not oppose continuing the injunction until further order of this Court.

RESPONSE TO PLAINTIFF'S EMTALA CLAIM AND REQUEST FOR FURTHER SURGICAL PROCEDURES

Separate from preserving the status quo, Plaintiff requests an injunction that forces Beaumont to either have its surgeons perform a tracheostomy or PEG, or to allow others into the hospital to do so. Plaintiff has not carried her burden—in fact, has not identified any authority supporting forcing a hospital to perform a surgery—and cannot obtain an order for this relief.

Plaintiff packages her request to force Beaumont to either perform medically improper surgeries, or to allow others to perform those surgeries at Beaumont, by arguing that Beaumont is violating § 1395dd(b) of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. ECF 2, Count I, PgIDs 176–80. This claim fails because Beaumont does not believe that Titus suffers from an emergency medical condition and EMTALA does not require Beaumont to do these things.

Congress enacted EMTALA "to prevent hospitals from dumping patients who suffered from an emergency medical condition because they lacked insurance to pay

the medical bills." *Estate of Lacko, ex rel. Griswatch v. Mercy Hosp., Cadillac*, 829 F. Supp. 2d 543, 548 (E.D. Mich. 2011); see *Perry v. Owensboro Health, Inc.*, 2015 WL 4450900, at *3 (W.D. Ky. July 16, 2015) (summarizing cases on legislative intent). The Sixth Circuit has held that *EMTALA does not create a standard of care*: "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). Instead, EMTALA requires only two things of hospitals: "(1) to administer an appropriate medical screening, and (2) to stabilize *emergency* medical conditions."[2] *Estate of Lacko*, 829 F. Supp. 2d at 548 (emphasis added). Plaintiff cannot succeed on her EMTALA claim because she cannot show that Beaumont believes that Titus has or is at risk of an "emergency medical condition." In fact, Plaintiff admits the hospital believes otherwise. ECF 2, ¶ 17, PgID 169.

By its plain language, § 1395dd(b) of EMTALA—the basis for Plaintiff's stabilization claim—applies only when "*the hospital determines* that the individual has an emergency medical condition." 42 U.S.C. § 1395dd(b)(1) (emphasis added). The Sixth Circuit has held that the application of the statute turns on the hospital's belief of the existence of an emergency medical condition. *Moses*, 561 F.3d at 585. This is so even if the hospital is wrong: "[I]n order to trigger further EMTALA obligations, the

[2] The "medical screening requirement" is covered under 42 U.S.C. § 1395dd(a) and the "necessary stabilizing treatment for emergency medical conditions" requirement is covered under 42 U.S.C. § 1395dd(b).

hospital physicians must actually recognize that the patient has an emergency medical condition; *if they do not believe an emergency medical condition exists because they wrongly diagnose the patient, EMTALA does not apply*." *Id.* (emphasis added).

As applied to Titus,[3] an "emergency medical condition" under EMTALA is

> 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--
>
> (i) placing the health of the individual . . . in serious jeopardy,
>
> (ii) serious impairment to bodily functions, or
>
> (iii) serious dysfunction of any bodily organ or part.

42 U.S.C. § 1395dd(e)(1)(A). Plaintiff cannot show that *Beaumont believes* that Titus suffers from or risks an emergency medical condition as Plaintiff acknowledges that Beaumont has determined that he is deceased. ECF 2, ¶ 17, PgID 169.

In this case, Titus was stabilized shortly after his admission on October 17 and placed on mechanical breath, organ, and nutritional support. Unfortunately, after multiple examinations, his death was pronounced on October 24. Because Titus has died, Beaumont cannot have determined that he is suffering from an emergency medical condition, and so EMTALA does not apply here.

The Eastern District of California reached the same conclusion in a similar case. In *Fonseca v. Kaiser Permanente Med. Ctr. Roseville*, 222 F. Supp. 3d 850, 858 (E.D. Cal. 2016), the plaintiff similarly claimed that the defendant hospital violated

[3] The definition of "emergency medical condition" includes other aspects that apply only to pregnant women. 42 U.S.C. § 1395dd(e)(1).

EMTALA by failing to maintain life support and "stabilize" a patient for transfer to another facility after repeated determinations that the patient was "brain dead" under California's Uniform Determination of Death Act (CUDDA). The *Fonseca* court reasoned in part that EMTALA imposes no obligations on a hospital once that hospital has determined that a patient has died:

> As a practical matter, after stabilizing [decedent], *[defendant] determined [decedent]'s condition was no longer an emergency medical condition because it found [decedent] had suffered brain death*. . . . [T]his is not a case where the patient still "seek[s] emergency stabilizing treatment for [medical] distress." Rather, [plaintiff] requests that [decedent] remain on a ventilator with additional treatment so he can be in his current condition once she has a plan for transfer. *The dispute here . . . raises at best a question of long-term care.* EMTALA does not obligate [defendant] to maintain [decedent] on life support indefinitely. Plaintiff identifies no date by which she would agree [defendant]'s obligations cease.

Id. at 869 (emphasis added). The court concluded, "This case raises no serious questions under EMTALA" and the same is true here. *Id.*

Other district courts in the Sixth Circuit have reached similar conclusions. In *Garrett v. Detroit Med. Ctr.*, 2007 WL 789023, at *6 (E.D. Mich. March 14, 2007), the Eastern District of Michigan addressed a plaintiff's claim that the defendants violated EMTALA by transferring the decedent to another hospital while he had an emergency medical condition. But the plaintiff did not allege that the hospital knew of any emergency medical condition. *Id.* "What Plaintiff argues is that Defendants *should have known* that [decedent] had an emergency medical condition . . . if they had followed the proper standard of care." *Id.* The Court held that this is not an

EMTALA claim: "This is a classic claim of medical malpractice, not a violation of EMTALA. In order to fail to stabilize an emergency medical condition, a defendant must know that there is such a condition to be stabilized. Plaintiff fails to present evidence that Defendants had such actual knowledge." *Id.* The *Garrett* court thus granted summary disposition on the EMTALA claim in favor of the hospital. *Id.*

The Western District of Kentucky did the same in *Perry v. Owensboro Health, Inc.*, 2015 WL 4450900 (W.D. Ky. July 16, 2015). In *Perry*, the plaintiffs attempted to file an EMTALA claim after the decedent was twice discharged by the defendant hospital despite having an alleged "rapidly deteriorating condition." *Id.* at *1. Although plaintiffs claimed the defendant had actual knowledge of the decedent's emergency medical condition based on medical evidence of her condition, the district court explained that "hospital staff members must have actual knowledge that an emergency medical condition exists for EMTALA's stabilization provision to apply." *Id.* at *7. The court held that EMTALA imposes a duty on a hospital only if its staff has actual knowledge of an emergency medical condition. *Id.* To hold otherwise, the court reasoned, would convert every claim for medical malpractice into a federal claim. *Id.* "[T]o the extent that [p]laintiffs argue that [defendant] was negligent in failing to recognize that [decedent] had an emergency medical condition, such an allegation does not fall under EMTALA and is reserved for state tort law." *Id.*

All these cases stand for the same proposition, that a plaintiff cannot state a claim under EMTALA unless it can show that *the hospital believed* that the patient was experiencing an emergency medical condition. Here, Plaintiff admits that Beaumont

has no such belief, and that Beaumont instead believes that Titus is deceased. ECF 2, ¶ 17, PgID 169. While Plaintiff may disagree with Beaumont's diagnoses and belief, that challenge is one to be resolved under state law, not EMTALA. So Plaintiff cannot succeed on her EMTALA claim, and Plaintiff cannot use that claim as a basis on which to secure a mandatory injunction that forces Beaumont to perform any surgeries on Titus.

Beaumont also opposes this request as a matter of medicine and ethics. Titus is stable.[4] Given the pronouncement of brain death, any further surgery on his body is medically unwarranted and unethical. Beaumont will not allow its physicians to operate on someone who has already passed.

Likewise, Beaumont is an accredited hospital with strict and consistent requirements for physicians to practice within its hospitals. Beaumont will not

[4] Late on Tuesday, November 13, the parties deposed Titus's attending physician, Dr. Jimmi Mangla. Dr. Mangla will be out of the country on November 19. Dr. Mangla responded to Plaintiff's argument that a tracheostomy and PEG tube are required to stabilize Titus. Dr. Mangla explained that Beaumont is providing Titus's body with adequate oxygen supply through a ventilator tube in his throat and supporting his organs with nutrients through a nasal feeding tube. Thus, neither surgical procedure that Plaintiff requests is required to maintain Titus's organ support. Dr. Mangla also refuted Plaintiff's argument that a tracheostomy and PEG are required to transfer Titus's body, and explained that Beaumont receives Level I trauma patients from hospitals across the state without the patients first receiving a tracheostomy or PEG. Additionally, Dr. Mangla explained that Titus should not undergo surgery because he has already passed away and it would be unethical to operate on the deceased. As of this filing, Dr. Mangla's transcript is not available. Beaumont will provide this Court with a copy of the transcript upon receipt. Beaumont will also have Titus's current attending physician available to testify on November 19 if the Court requires further evidence on this issue.

ethically or legally allow another physician to come into Beaumont to operate on Titus. As noted above, Beaumont will maintain the status quo and assist the family in transferring Titus to a facility of their selection, but Beaumont opposes performing or allowing others to perform medically or ethically unindicated surgeries on Titus.

CONCLUSION AND RELIEF REQUESTED

Now is not the time for advocacy. Even though Beaumont made a medically sound, careful, and compassionate pronouncement of brain death, it does not oppose continuing the temporary restraining order to preserve the status quo for a reasonable period of time to be set by this Court, subject to its jurisdictional and substantive defenses and right to seek dissolution of any injunction at a later date.

But for the reasons stated above, Beaumont opposes any request for a mandatory injunction that seeks to compel Beaumont physicians to perform medical and ethically improper surgeries on Titus or to force Beaumont to allow others to perform any such surgery at its hospital.

Respectfully submitted,

BROOKS WILKINS SHARKEY & TURCO

/s/ Michael R. Turco
Michael R. Turco (P48705)
Michael T. Price (P57229)
Counsel for Beaumont Health
401 S. Old Woodward Avenue, Suite 400
Birmingham, Michigan 48009
248.971.1800
turco@bwst-law.com
price@bwst-law.com

Date: November 14, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2019, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of the filing to all counsel of record.

/s/ Michael R. Turco (P48705)
Counsel for Beaumont Health
401 S. Old Woodward Avenue, Suite 400
Birmingham, Michigan 48009
248.971.1800 / turco@bwst-law.com

LOCAL RULE CERTIFICATION

I certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

/s/ Michael R. Turco (P48705)
Counsel for Beaumont Health
401 S. Old Woodward Avenue, Suite 400
Birmingham, Michigan 48009
248.971.1800 / turco@bwst-law.com