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

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 Reply to Beaumont's Response to Plaintiff's Motion for Preliminary Injunction, states as follows:

Defendant Beaumont takes a rather unique approach in its response to Plaintiff's motion for preliminary injunction. First, it states it does not "oppose

continuation of the current temporary restraining order for a reasonable period to preserve the status quo while the family works to locate an alternate facility." (p. 1). However, it opposes Plaintiff's request to have a "tracheostomy or percutaneous endoscopic gastrostomy (PEG) tube" in place so Titus can be transferred. (p. 1). In other words, Defendant has not responded to Plaintiff's arguments pertaining to the unconstitutionality of MCL § 333.1033, ceding a preliminary injunction is appropriate. In one broad-sweeping, ambiguous sentence, however, Beaumont appears to save arguing the statute's constitutionality and its underlying conduct leading to this litigation for another day: "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." (p. 5).

Defendant next challenges the applicability of the EMTALA to this matter. While Plaintiff will address the merits of this argument, first the underlying basis of this argument must be explained. The following are excerpts from Defendant's brief correlating the "determination of death" with Plaintiff's purported failure to state a sufficient EMTALA claim:

- "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.'" (p. 6).

- "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." (p. 7).

- "Because Titus has died, Beaumont cannot have determined that he is suffering from an emergency medical condition, and so EMTALA does not apply here." (p. 7).

- "… Beaumont instead believes that Titus is deceased." (p. 10).

- "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." (p. 10).

Per the above-referenced conclusions made in Defendant's brief, there is no question that Defendant's purported compliance with the EMTALA—i.e. Plaintiff's ability to state an EMTALA claim—is inherently intertwined with Beaumont's compliance with MCL § 333.1033. In other words, Beaumont claims EMTALA does not apply here because the determination of death effectively makes it moot. Yet this theory poses problems beyond using an unconstitutional statute as its foundation.

EMTALA requires hospitals such as Beaumont to "determine whether or not an emergency medical condition exists. 42 U.S.C. § 1395dd(a). Further, an "emergency medical condition" 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 ... [inter alia] placing the health of the individual ... in serious jeopardy[.]" § 1395dd(e)(1)(A)(i). And finally, EMTALA preempts any state law that "directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). 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.

Defendant's argument that Plaintiff's death pursuant to MCL § 333.1033 prohibits the application of EMTALA brings in the preemption argument. Beaumont's reliance on § 333.1033 imputes that it need not consider if Plaintiff has an "emergency medical condition" pursuant to Section 1395dd(e). Moreover, because Plaintiff's claims include a Fourteenth Amendment due process argument pertaining to the constitutionality of MCL § 333.1033, any reliance on § 333.1033 barring a determination of these claims would equally be improper.

Looking past Defendant's preempted reliance of state law to avoid EMTALA liability, Defendant has also erroneously relied on EMTALA case law. The crux of Defendant's argument in this regard 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.).

Beyond that, 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 te 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, 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 these 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". This shows 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 there were not conflicting reports. Indeed, Titus' attending physician, Dr. Jimmi Mangala, was shown the Affidavits from Plaintiff's experts at his deposition on Tuesday, November 12, 2019, yet remarkably denied having seen them before.[1] When pressed about them, he said that they didn't matter, and even if a million such affidavits were procured by qualified medical professionals, he would not change his mind. Thus, Beaumont is frustrating the transfer of Titus, as they refuse to perform the procedures required to allow the transfer even in the face of countervailing opinions.

Moreover, they are ignoring how transfers work between facilities. Beaumont's attending physician, Dr. Jimmi Mangala, testified that families do not arrange transfers; hospitals do. Although this family has contacted dozens of facilities to attempt to comply with Beaumont's wishes, they have not been successful because it is a fool's errand. When hospitals do arrange transfers, he said, it is to a facility that can care for a patient whose needs exceed that of the transferee hospital. Here, Titus is an unconscious pediatric patient that is rated as ASA 5 for

[1] The transcript of this Deposition is being prepared, and Plaintiff would request the ability to amend this submission with the references to the Deposition when it is available. Statements attributed to the attending physician are therefore from Plaintiff's Counsel's recollection and notes.

the procedures.[2] Beaumont is a level one trauma center that can perform the necessary procedures at the bedside in the ICU in about an hour.

Indeed, the attending physician, Dr. Jimmi Mangala further testified that these simple procedures are well within his scope of practice, and anesthesia and a surgical suite were unnecessary. They can be done at the bedside in the ICU. Further, he testified that the "determination of death" and his own fear of liability, were the only roadblocks to having the procedures completed. Based upon Beaumont's "determination of death", there are no facilities that will take Titus to perform the procedures. However, Plaintiff has located a skilled nursing facility can take him, but only after the procedures are done.

Because Defendant did not argue beyond the general applicability of EMTALA in its response brief, whether the statute requires stabilization, the extent of that stabilization, and/or transfer is not at issue. But like Beaumont's argument above, it claims that per Dr. Mangla's recent testimony, Titus need not receive either a trach and a peg tube because Titus "has already passed away." (p. 10). In other words, Defendant relies on Dr. Mangla's testimony arising out of the application of MCL 333.1033 to determine what EMTALA requires of Beaumont, but ignores the opinions of Plaintiff's Experts, who have opined that he does require the procedures

[2] "ASA" is the rating system for surgical procedures, from I to VI. Because Titus is an unconscious pediatric patient, he is rated a V on the scale, which requires a level one facility. As a result, when Plaintiff's family attempted to obtain a transfer to Promedica Hospital in Monroe, a community hospital, the ASA V level exceeded their policy for transfers, and they could not take him.

on an emergent basis, and that he does have a chance of survival, but only if he has the procedures, and immediately is started on rehabilitative treatment. Beaumont refuses both, and every day they are minimizing the changes that Titus will recover.[3]

Conclusion

Defendant's entire theory for EMTALA's inapplicability here and thus this Court denying Plaintiff's request for Beaumont to perform a tracheostomy or PEG tube procedure derives from a statute (MCL 333.1033) Plaintiff has argued is unconstitutional and preempted by EMTALA. An ambiguous, procedurally devoid state law cannot form Beaumont's refusal to comply with the federal "stabilization" and "transfer" requirements of EMTALA. Further, Defendant does not "oppose" the entry of a preliminary injunction.

Given this, Plaintiff respectfully requests this Honorable Court enter a Preliminary Injunction preventing Beaumont from removing Titus's life support. Further, Plaintiff respectfully requests this Court enter an Order requiring Beaumont to either perform the necessary surgical procedures for Titus to be transferred to a

[3] Defendant erroneously states that Plaintiff has not been diligent in arranging for emergency credentials for Dr. Bonfiglio, however, that is false. Dr. Bonfiglio will testify that he immediately reached out to the Medical Director at Beaumont to obtain such dispensation, but that he has not been contacted to commence the process. Defendant is stonewalling any attempts by Plaintiff's experts who desire to examine the boy, and to prescribe necessary treatment. Dr. Bonfiglio is a board-certified brain injury rehabilitation physician who works on these cases with positive results, Dr. Byrne is a pediatrician. Dr. Bonfiglio is ready, willing and able to take over the care of Titus. In contrast, Dr. Mangla is a trauma surgeon, with no expertise in treating severely brain damaged pediatric patients per his own testimony.

long-term care facility *or* allow appropriate physicians of Plaintiff's choosing to come into Beaumont to perform these surgical procedures.[4]

Respectfully Submitted,

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Dated: November 15, 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 15, 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

[4] Plaintiff has identified several qualified physicians who will perform the required medical procedures at Beaumont, but Beaumont will not allow them to perform the procedures at its location. If Beaumont would allow the procedures to be performed at Royal Oak, it would minimize disruption to Titus, and he would be likely be transferred to the skilled nursing facility the very next day to begin neurorehabilitation under the care of Dr. Bonfiglio and Titus' pediatrician, who has agreed to round on him weekly.