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 MOTION AND SUPPORTING BRIEF TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

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STATEMENT OF THE ISSUES PRESENTED

Whether Plaintiff has failed to state a claim upon which relief can be granted under any of the four counts alleged?

Count I – Whether Plaintiff has failed to assert a viable stabilization claim under the Emergency Medical Treatment and Labor Act ("EMTALA") since she admits that Beaumont physicians declared Titus as deceased on October 24, 2019 and thus, Beaumont admittedly has not determined that Titus suffers from an "emergency medical condition?"

Count II – Whether Plaintiff has failed to assert a viable claim for due process violations against Beaumont, a private entity, when Beaumont is not a state actor and Plaintiff cannot assert any facts showing state action?

Count III – Whether Plaintiff has failed to assert a viable claim for relief based on "unconstitutional vagueness [of] M.C.L. § 333.1033" when Beaumont is not a state actor and Plaintiff has failed to identify any part of the above statute that is vague?

Count IV – Whether Plaintiff's "claim" for declaratory judgment is simply a remedy that fails to assert a cause of action?

Beaumont responds in the affirmative to all these issues.

CONTROLLING AUTHORITY

Count I

42 U.S.C. § 1395dd

Moses v. Providence Hosp. and Med. Ctrs., Inc., 561 F.3d 573 (6th Cir. 2009)

Estate of Lacko, ex rel. Griswatch v. Mercy Hosp., Cadillac, 829 F. Supp. 2d 543 (E.D. Mich. 2011)

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Faparusi v. Case Western Reserve Univ., 711 Fed. Appx. 269 (6th Cir. 2017)

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Count III

600 Marshall Entertainment Concepts, LLC v. City of Memphis, 705 F.3d 576 (6th Cir. 2013)

Count IV

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S. Ct. 876 (1950)

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LOCAL RULE 7.1(a) CERTIFICATION

The undersigned counsel certifies that defense counsel communicated in writing with opposing counsel, explained the nature of the relief to be sought by way of this motion and sought concurrence in the relief; opposing counsel thereafter expressly denied concurrence.

MOTION

Sadly, no amount of litigation is going to change the fact that Titus Jermaine Cromer, Jr. ("Titus") was pronounced dead on October 24, 2019 following the "irreversible cessation of all function of [his] entire brain, including the brain stem," consistent with M.C.L. 333.1033(1)(b). Plaintiff has now filed a total of five complaints—an original and two amendments in Oakland County Circuit Court and an original and amended complaint before this Court—none of which have asserted a viable claim against Beaumont Health ("Beaumont").

As to the four counts filed in Plaintiff's most recent Amended Verified Complaint before this Court (ECF 2, Counts I-IV, PgID 176-188):

- Count I—Plaintiff cannot establish any violation of the Emergency Medical Treatment and Labor Act ("EMTALA") because she admits that Beaumont physicians declared Titus as deceased on October 24, 2019 and thus, Beaumont admittedly does not believe that Titus suffers from an "emergency medical condition";
- Count II—Plaintiff cannot maintain a due process claim against Beaumont because Beaumont is not a state actor;

- Count III—Plaintiff cannot maintain a void-for-vagueness claim because Beaumont is not a state actor and because she does not identify any part of M.C.L. 333.1033 that is vague; and
- Count IV—Plaintiff cannot maintain a "claim" for declaratory judgment because it isn't a proper cause of action and none of Plaintiff's other claims entitle her to the remedy sought.

Because Plaintiff still has no viable cause of action against Beaumont, and no cause of action would entitle her to the remedy sought, this Court should dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

/s/ Michael T. Price

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Date: November 27, 2019

BRIEF IN SUPPORT OF MOTION

INTRODUCTION

Beaumont respects that Plaintiff has suffered an unimaginable loss. But no amount of litigation is going to change the fact that Titus Jermaine Cromer, Jr. ("Titus") was pronounced dead on October 24. Much like the now-dismissed state court complaints, the Amended Verified Complaint fails to properly state a cause of action against Beaumont. Consequently, for the reasons provided below, this Court should dismiss this matter in its entirety.

FACTUAL BACKGROUND

On October 17, 2019, Titus was admitted to Beaumont Hospital – Royal Oak after suffering a traumatic injury that caused "damage to the brain as a result of low levels of oxygen and cardiac arrest." ECF 2, ¶ 15, PgID 169. From the time of his injury, Titus has required "a ventilator, tube feeding, and assistance with all activities of daily living." ECF 2, ¶ 16, PgID 169.[1]

Following multiple assessments, Beaumont pronounced Titus as deceased on October 24, 2019 based on the "irreversible cessation of all function of [Titus's] entire brain, including the brain stem," consistent with M.C.L. § 333.1033(1)(b). See ECF 2, ¶ 17, PgID 169.

[1] Consistent with the standard for motions under Fed. R. Civ. P. 12(b)(6), Beaumont cites to admissions in the complaint, documents appended to the complaint, documents incorporated by reference, and matters of which the court may take judicial notice. Of course, Beaumont disputes the overwhelming majority of the allegations in the Amended Verified Complaint.

On October 25, Plaintiff filed a complaint that included a request for temporary restraining order ("TRO") against Beaumont in Oakland County Circuit Court. ECF 2, ¶ 21, PgID 170. The matter was assigned to the Hon. Hala Jarbou ("Judge Jarbou"). Prior to appearing before the Court on October 28, Plaintiff filed an amended complaint. During an initial status conference with Judge Jarbou, "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.

Judge Jarbou thereafter conducted a hearing at Plaintiff's request, at which time Beaumont noted that the Oakland County Circuit Court lacked jurisdiction because Plaintiff had failed to plead any claims and had pleaded only remedies. (10/28/19 Transcript, **Ex. 1**, p. 10).[2] Other than irreparable harm, Judge Jarbou addressed no other factors for issuing injunctive relief. (Ex. 1, pp. 12-13, See 10/28/19 Order, **Ex. 2**). Rather, the judge simply granted a TRO, "and to allow Plaintiff time to facilitate the transfer and obtain expert witnesses," "set a hearing for a preliminary injunction for November 7, 2019. . . ." ECF 2-6, PgID 332.

After considering the matter further, Judge Jarbou issued an order on November 4 requiring counsel to appear and explain whether the Probate Court had exclusive jurisdiction over Plaintiff's claims. Judge Jarbou conducted a lengthy hearing on November 5. ECF 2-6, PgID 332. After that hearing:

[2] A "court may take judicial notice of other court proceedings, including transcripts." *Levine v. Levine*, 216 F. Supp. 3d 794, 805 (E.D. Mich. 2016).

> 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.

ECF 2-6, PgID 333. Judge Jarbou "held two more status conferences on November 7, 2019 at 8:35 a.m. and 9:03 a.m." ECF 2-6, PgID 333. Ultimately, Judge Jarbou determined that it was "not apparent to the Court when, or if, a transfer [could] be effectuated" by Plaintiff. ECF 2-6, PgID 333.

Consequently, later on November 7, Judge Jarbou issued an order addressing the issue of subject matter jurisdiction. ECF 2-6, PgID 332-337. Judge Jarbou noted:

> Plaintiff has not put forward a cognizable claim that the circuit court would have jurisdiction over. Plaintiff has only pled remedies in the form of declaratory relief and injunctions which are not causes of action in and of themselves.

ECF 2-6, PgID 336.

Judge Jarbou went on to hold that the state probate court had exclusive jurisdiction over this matter: "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 M.C.L. § 700.1302 vests exclusive jurisdiction in the Probate Court." ECF 2-6, PgID 336. Judge Jarbou then 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. Finally, Judge Jarbou noted the following in her opinion:

> While the parties and the Court agree that transferring Mr. Cromer is likely the ideal resolution, the jurisdictional considerations discussed

> herein demand action from this Court. Because of the jurisdictional defect, the Court cannot indefinitely defer dismissal of this case hoping Mr. Cromer can be transferred from Defendant's facility. The Court has afforded Plaintiff all the leeway it can give, but in this unfortunate circumstance, the lack of jurisdiction requires dismissal of this case.

ECF 2-6, PgID 336.

The following morning, on November 8, Plaintiff filed a Verified Complaint with this Court, and later an Amended Verified Complaint, requesting another TRO. ECF 1, ECF 2. Approximately an hour after Beaumont received notice of these filings, Presiding Judge Roberts held a telephone conference and subsequently issued a temporary restraining order that same day. ECF 4, PgID 340-342. The following day, Judge Roberts issued an Amended TRO. ECF 5, PgID 348-349. Neither order mentioned the four factors to be examined prior to granting injunctive relief.

Even though Plaintiff has not asserted any viable claim against Beaumont, it has faithfully honored the Court's TRO that compels Beaumont to continue the current level of care. However, Beaumont respectfully seeks an order bringing this case to a close as Plaintiff has not, and cannot, assert a viable claim against Beaumont.

LEGAL STANDARD

As this Court has previously observed:

> Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." In evaluating a motion brought pursuant to Rule 12(b)(6), "[c]ourts must construe the complaint in the light most favorable to plaintiff, accept all well-pled factual allegations as true, and determine whether the complaint states a plausible claim for relief." *Albrecht v. Treon,* 617 F.3d 890, 893 (6th Cir. 2010) (internal brackets, quotation marks, and

> citations omitted). To survive a Rule 12(b)(6) motion, the complaint must contain specific factual allegations, and not just legal conclusions, in support of each claim. *Ashcroft v. Iqbal,* 556 U.S. 662, 678–679, 129 S.Ct. 1937 … (2009) A complaint will be dismissed unless, when all well-pled factual allegations are accepted as true, the complaint states a "plausible claim for relief." *Id.* at 679...
>
> In ruling on a motion to dismiss, the Court may consider the entire complaint, documents incorporated by reference in the complaint and central to the claims, and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322, 127 S.Ct. 2499 … (2007). "[I]f a factual assertion in the pleadings is inconsistent with a document attached for support, the Court is to accept the facts as stated in the attached document." *Williams v. CitiMortgage, Inc.,* 498 Fed. Appx. 532, 536 (6th Cir. 2012) (citation omitted).

Fuoco v. Bank of Am., 115 F. Supp. 3d 874, 877 (E.D. Mich. 2015).

ARGUMENT

I. Count I: Plaintiff cannot establish an EMTALA violation because she cannot show that Beaumont physicians believe that Titus suffers from an emergency medical condition since he has been deceased since at least October 24, 2019.

In her first claim, Plaintiff asserts that Beaumont is violating § 1395dd(b) of EMTALA, 42 U.S.C. § 1395dd. ECF 2, Count I, PgIDs 176–80. However, this claim fails because Plaintiff admits that Beaumont does not believe that Titus suffers from an emergency medical condition as Beaumont pronounced him deceased on October 24. ECF 2, ¶ 17, PgID 169.

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."[3] *Estate of Lacko*, 829 F. Supp. 2d at 548 (emphasis added). Plaintiff cannot show an 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 has determined 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). Consistent with this language, the Sixth Circuit has confirmed that application of the statute turns on the hospital's belief regarding the existence of an emergency medical condition—even if the hospital is wrong. *Moses*, 561 F.3d at 585. It has stated: "[I]n order to trigger further EMTALA obligations, the hospital physicians must actually

[3] 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).

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). Since Plaintiff admits Beaumont has pronounced Titus as deceased, Plaintiff cannot show that Beaumont believes that an emergency medical condition exists.

As applied to Titus,[4] 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.

Titus was pronounced brain dead on October 24, consistent with M.C.L. § 333.1033(1)(b). While Plaintiff disagrees with that diagnosis, seeks to substitute its experts' diagnoses, and seeks to have this Court impose a different standard of care on Beaumont, EMTALA was not designed or intended to establish "standards of patient care" and provides for no cause of action if the Beaumont physicians "*do not believe an emergency medical condition exists*." *Moses*, 561 F.3d at 578, 585.

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

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 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).[5] The court concluded, "This case raises no serious questions under EMTALA" and the same is true here. *Id.*

[5] In a supporting affidavit appended to the Amended Verified Complaint, Plaintiff's first expert, Dr. Paul Byrne opines in part that a "[t]racheostomy is necessary for *long term care* outside of an ICU" and that a percutaneous endoscopic gastrostomy "PEG would be a *better way* to take care of [Titus] and it would be the *standard of care for longer term care*." ECF 2-3, ¶¶ 25-26, PgIDs 209-210 (emphasis added). In short, Plaintiff's expert simply disagrees with the brain death diagnosis and offers a different "standard of care" to support "longer term care" of Titus's body.

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.*[6]

[6] 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 noted "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 [p]laintiffs argue that [defendant] was negligent in failing to recognize [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 determined 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. Consequently, Plaintiff's EMTALA claims should be dismissed.

II. Count II: Plaintiff cannot maintain a due process claim against Beaumont because Beaumont is not a state actor.

In her second claim, Plaintiff appears to claim Beaumont has violated due process rights under the Fourteenth Amendment and 42 U.S.C. § 1983. But Beaumont is not a state actor or acting under color of law so Plaintiff cannot state a due process claim against it.

The due process guarantees of the Fourteenth Amendment are "triggered only in the presence of state action."[7] *Faparusi v. Case Western Reserve Univ.*, 711 Fed. Appx. 269, 275 (6th Cir. 2017) (quoting *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000)). Without a state-action requirement, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937; 102 S. Ct. 2744 (1982). Therefore, this requirement serves to

[7] The Sixth Circuit has noted analysis of the state-action requirement is the same under the Fourteenth Amendment and 42 U.S.C. § 1983. *Paige v. Coyner*, 614 F.3d 273, 278 (6th Cir. 2010).

exclude "merely private conduct, no matter how [allegedly] discriminatory or wrongful." *Blum v. Yaretsky*, 457 U.S. 991, 1002; 102 S. Ct. 2777 (1982).

Private actors like Beaumont, therefore, can "be held to constitutional standards" only when their "actions so approximate state action that they may be fairly attributed to the state." *Fapurusi*, 711 Fed. Appx. at 275. The Sixth Circuit employs three tests to determine if private action can be attributed to the state: "(1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test." *Id.*; see *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). Plaintiff has failed to articulate any basis for attributing Beaumont's actions to the state under any test, and their application reveals no basis for doing so.

A. The public function test.

"The public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state, such as holding elections." *Id.* The same test is also referred to as the "state-action doctrine," where "a private entity may be considered a state actor when it exercises a function 'traditionally exclusively reserved to the State.'" *Manhattan Community Access Corp. v. Halleck*, ___ U.S. ___; 139 S.Ct. 1921, 1926 (2019) (citation omitted). Plaintiff fails to identify any powers that would implicate this test, nor are any at issue, since physicians indisputably issue diagnoses and death pronouncements.[8]

[8] Further, under Michigan's Determination of Death Act, only a licensed physician or nurse may make a death pronouncement. M.C.L. § 333.1033(3).

B. The state compulsion test.

"The state compulsion test requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Id.*

In *Willis v. Charter Twp.*, 2007 WL 2463354, at *5 (W.D. Mich. Aug. 30, 2007), the plaintiffs attempted to impute private actors with state action by claiming a physician was "a state actor because he was compelled by M.C.L.A. 333.1033 to pronounce [decedent] dead." The district court disagreed, explaining:

> The statute merely provides that "a physician or registered nurse may pronounce the death of a person in accordance with this act." Nothing in the statute *required* [the physician] to do so. While the statute does require a physician who makes a determination of death to apply accepted medical standards, the Supreme Court has observed that a state is not responsible for decisions that "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." [*Blum*, 457 U.S. at 993]. The fact that [the physician] was licensed by the state to practice medicine and was thus authorized to perform various procedures is insufficient to transform his status from private actor to state actor.

Id.

Since Plaintiff fails to allege that Beaumont physicians were compelled to make a determination of death and any such allegation has already been rejected by one district court, Plaintiff cannot establish state action based on state compulsion.

C. The symbiotic relationship or nexus test.

"Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when 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." *Wolotsky*, 960 F.2d at 1335.[9] Again, Plaintiff fails to identify any symbiotic relationship or nexus.

In *Willis*, the district court rejected application of this test because the defendant physician "had no direct contact with state officials." *Willis*, 2007 WL 2463354, at *5 (discussing *Styles v. McGinnis*, 28 Fed. Appx. 362 (6th Cir. 2001)). No such contact is alleged between physicians and state officials here either.

In addition, the Sixth Circuit has made clear that "[m]erely because a business is subject to state regulation does not by itself convert its action into state action." *Wolotsky*, 960 F.2d at 1335. "Rather, it must be demonstrated that the state is intimately involved in the challenged private conduct in order for that conduct to be attributed to the state . . . ." *Id.* Again, here, there are no allegations of state involvement as there has been no state involvement in this case.[10]

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[9] Although Plaintiff will likely cite *West v. Atkins*, 487 U.S. 42; 108 S. Ct. 2250 (1988), the defendant physician in that case was under contract with the state to provide medical care "at a state-prison hospital." *Id.* at 42. Noting the physician's "relationship with other prison authorities was cooperative," the U.S. Supreme Court held that "a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983." There is no such nexus between Beaumont and the state here.

[10] Further, this Court has also recognized that EMTALA obligations do "not render [a] hospital a state actor for § 1983 purposes." *Price v. Doe*, 2019 WL 5538113, at *2 (E.D. Mich. Oct. 25, 2019) (order). "EMTALA, like licensure, is a form of regulation, and state regulation of a private entity is insufficient to support a finding of state action." *Id.* (citing *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006).

In short, Plaintiff cannot show any private action in this case is attributable to the state and thus, plaintiff has not alleged, and cannot show, that Beaumont was a state actor, and thus cannot sustain a due process claim.

III. Count III: Plaintiff's void-for-vagueness claim fails because she does not actually assert that the Determination of Death Act is vague.[11]

In her third asserted cause of action, Plaintiff asks this Court to enter an order "declaring that M.C.L. § 333.1033 is unconstitutionally vague." ECF 2, PgID 187. She has given this Court no reason to do so. Further, because a due process claim requires a state actor, Plaintiff cannot advance such a claim against Beaumont for the reasons set forth in Argument II above.

Setting aside the state action requirement, "[d]ue process requires that laws not be vague." *600 Marshall Entertainment Concepts, LLC v. City of Memphis*, 705 F.3d 576, 587 (6th Cir. 2013). Therefore, Plaintiff's specific allegations are important here because they do not identify any part of § 1033 that is vague:

> 82. M.C.L. § 333.1033 is vague and ambiguous, which allows entities like Defendant Beaumont Health to make life-altering decisions in a manner that is preferential to hospitals and health systems at the expense of patients.
>
> 83. In this case, M.C.L. § 333.1033 violates Plaintiff's constitutional rights three-fold, to wit:

[11] Since Plaintiff's pleadings question the constitutionality of a state statute, Plaintiff was obligated to file a notice of constitutional questions under Fed. R. Civ. P. 5.1(a)(1) and serve the pleadings and notice on the state attorney general. Beaumont has received no information to confirm that Plaintiff complied with these requirements.

a. The statute fails to provide a procedure of informing heirs at law that the decision to obtain opinions indicating death has been declared is underway and an opportunity to object to same or obtain further opinions from other experts prior to the declaration of death;

b. It does not prescribe for any procedures that would permit a party deemed to qualify under the statute to challenge such a decision. In other words, the statute permits entities like Beaumont to deprive an individual of fundamental rights without an opportunity to appeal, seek other opinions, or allow for the passage of time for the body to heal; and

c. Even if the modicum of standards set forth in the statute could be viewed as "procedural," they are far inadequate given the result—i.e. "death."

84. One need looks [sic] no further than Beaumont's conduct here to see this vagueness; i.e. Beaumont made decisions leading [to] a judgement [sic] of death without an[y] input or hearing by the family, due to obvious ambiguities in the statute.

ECF 2, PgID 186. Nowhere here, or anywhere, does Plaintiff identify a term in M.C.L. § 333.1033 that is subject to different interpretations or that is poorly defined.

"[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294 (1972). A danger of vague laws is that they allow for "arbitrary and discriminatory enforcement." *Id.* But a void-for-vagueness challenge fails if the plaintiff fails to actually challenge any language in the statute as vague. *600 Marshall*, 705 F.3d at 587.

Plaintiff's void-for-vagueness claim is much like that asserted in *600 Marshall*. There, a nightclub complained about what an ordinance governing dancing did and

did not address. The Sixth Circuit held that this did not state a void-for-vagueness claim: "The fact that the Ordinance does not contain provisions addressing adult entertainment or nonconforming uses may mean that the Ordinance is not all-encompassing, but it does not mean that it is vague." *Id.* The Court reasoned that "600 Marshall has not pointed to any term or provision in the Ordinance that it believes is vague." It rejected the nightclub's void-for-vagueness claim on these grounds even though "city officials demonstrated such confusion regarding the straightforward Ordinance they were responsible for implementing." *Id.*

Here, like the plaintiff in *600 Marshall*, Plaintiff "has not pointed to any term or provision" in the statute that she "believes is vague." *Id.* And unlike in *600 Marshall*, there is no evidence that anyone is confused about what § 1033 requires. Since Beaumont is not a state actor and Plaintiff cannot identify any term in § 1033 that is vague, the Court should similarly dismiss this claim.

IV. Count IV: Plaintiff's declaratory-judgment claim fails because it isn't a proper cause of action and no asserted cause of action is likely to entitle her to that remedy.

Finally, Plaintiff seeks an order "declaring that Plaintiff has not suffered brain death as determined by Defendant pursuant to MCL § 333.1033." ECF 2, Count IV. Since this isn't a proper cause of action, this Count should be dismissed.

A declaratory judgment is a remedy, not a cause of action: "§ 2201 [the Declaratory Judgment Act] does not create an independent cause of action." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S. Ct. 876 (1950). "A federal court accordingly must have jurisdiction already under some other federal statute

before a plaintiff can invoke the Act." *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007) (cleaned up).

Here, this means that if no proper federal cause of action is stated in Plaintiff's first three claims—and as explained above, none is—then this final claim similarly fails to state a cause of action on which Plaintiff can succeed in this Court. In other words, Plaintiff has failed to state a viable claim and this case should be dismissed.

V. Plaintiff's primary "argument"—that only she can determine when Beaumont can stop care—is not supported by law and none of her asserted claims are based on it.

Independent of her legal claims, Plaintiff's primary argument is that she has the exclusive right to determine when Beaumont may stop medical care for her son and to dictate the standard of care for Beaumont physicians. This argument fails for two reasons. First, her argument is contrary to Michigan law. Second, even if her argument had a legal basis, it isn't connected with any of her causes of action.

A. Michigan law has already recognized a hospital's legal right to stop medical care after a patient has died.

Plaintiff effectively argues that she has the sole "right to determine the care, custody and control of her son" notwithstanding the pronouncement of death pursuant to M.C.L. § 333.1033. See ECF 2, ¶ 69, PgID 182-138. That is simply not so.

A hospital has the right to stop medical care once it determines that the patient has died. The Michigan Court of Appeals has held the Determination of Death Act,

M.C.L. § 333.1031 *et seq.*,[12] provides the criteria under which hospitals may decide whether a patient has died. *In re Rosebush*, 195 Mich. App. 675, 690, 491 N.W.2d 633 (1992). The *Rosebush* court adopted the lower court's conclusion that "the statute only addresses one question: is the patient dead, so that life-support may be disconnected without fear of liability?" *Id.* Reason dictates that the freedom to do something without fear of liability is the right to do it.

The Michigan Court of Appeals made this implication explicit a few years after *Rosebush* in *Virk v. Detroit Receiving Hospital*, 1996 WL 33348748, at *1 (Mich. Ct. App. Oct. 25, 1996). The *Virk* decision, despite being unpublished, is particularly useful because the alignment of the parties in that case matches the alignment here. In *Virk*, the defendant hospital declared a young woman brain dead shortly after she was admitted to the hospital. *Id.* at *1. The young woman's family objected and asked for another opinion, which more than a week later confirmed the earlier determination that she had died. *Id. Virk* differs from this case only in that the young woman was removed from life support before the hospital learned that it had been enjoined from doing so. *Id.*

Much of the *Virk* case turned on who had the right to stop the young woman's medical treatment after she was determined to have died. The court reasoned the hospital could not be liable for intentionally inflicting emotional distress on the family even when the hospital knew that stopping care was sure to cause that distress because the hospital was acting within its rights: "Liability will not flow from conduct

[12] *Rosebush* considered the earlier version of the statute, but there's no reason to think that the purpose of the statute changed when its language was updated.

that may otherwise form the basis of a claim for intentional infliction of emotional distress where one does no more than insist upon his legal rights in a permissible way, even though it is certain to cause emotional distress." *Id.* at *2, citing *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 603, 374 N.W.2d 905 (1985).

The *Virk* court was then as explicit as it could be—"In this case, defendant had a legal right to withdraw life support." *Id.* The court explained its reasoning:

> The Determination of Death Act, M.C.L. § 333.1031 *et seq.*; M.S.A. 14.15(1031) *et seq.*, sets forth standards for ascertaining when a person is dead. M.C.L. § 333.1033; M.S.A. 14.15(1033).[13] The statute establishes guidelines for determining when a person receiving life-sustaining treatment has died so that life-support can be disconnected without fear of liability. [*Rosebush*, 195 Mich. App. at 690–91] (interpreting the predecessor of the current statute). Accordingly, defendant is generally shielded from a claim of intentional infliction of emotional distress *because it had a legal right to disconnect Virk's life-support*.

Id. (emphasis added).

Even when a child is alive, the parent's "right to control the custody and care of her children is not absolute." *In re Sanders*, 495 Mich. 394, 409–10, 852 N.W.2d 524 (2014), citing *Stanley v. Illinois*, 405 U.S. 645, 652, 92 S. Ct. 1208 (1972). Plaintiff cannot cite any authority for the proposition that a parent has the unbounded right to force a hospital to provide care for a child, particularly where the hospital believes that such care would be unethical because the child has died.

In short, Michigan law holds the opposite of what Plaintiff contends. After a hospital determines that a patient has died under the Determination of Death Act,

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[13] *Virk* considered the current version of the Determination of Death Act.

the hospital has the right to stop care. *Rosebush*, 195 Mich. App. at 690; *Virk*, 1996 WL 33348748, at *2. Consequently, Plaintiff cannot assert any claim that would entitle her to the relief she has sought and obtained on a temporary basis.

B. Plaintiff's contention that she has the sole right to determine when the hospital can end care is not tied to any of her asserted claims.

Further, the remedy seeks—to exclusively decide when the hospital may stop providing medical care to Titus—is not linked to any of her asserted causes of action. Her first claim is about whether the hospital has fulfilled its obligations to Titus under a federal statute. Her second is about whether her due-process rights under the U.S. Constitution have been violated through state action. Her third is that the Determination of Death Act is void because it is unconstitutionally vague. And her fourth is for a declaratory judgment, recognized not to be a cause of action at all. *Skelly Oil*, 339 U.S. at 671. These are the claims through which Plaintiff seeks relief, and none of them turn on whether she has the sole right to determine whether Beaumont can cease medical treatment. For this reason too, this matter should be dismissed.

C. The Michigan Estates and Protected Individuals Code ("EPIC") provides for addressing determinations of death.

Although Plaintiff's Amended Verified Complaint suggests that Michigan law provides no recourse following a determination of death under M.C.L. § 333.1033, § 1207 of EPIC provides in pertinent part:

> In addition to the rules of evidence in courts of general jurisdiction, the 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 (a). "'Court' means the probate court or, when applicable, the family division of circuit court." M.C.L.§ 700.1103 (j).

Since Plaintiff again has no viable legal claims against Beaumont and the above statute suggests that the instant issue belongs before the Michigan probate court (as Judge Jarbou previously found), this Court should again dismiss this matter.

CONCLUSION AND RELIEF REQUESTED

For all the reasons set forth above, this Court should dismiss this matter pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

/s/ Michael T. Price

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Date: November 27, 2019

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 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.

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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 are 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).

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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

INDEX OF EXHIBITS TO BEAUMONT'S BRIEF TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

1. 10/28/19 Transcript of hearing regarding "Emergency Motion for Temporary Restraining Order before the Honorable Hala Jarbou."
2. 10/29/19 Order Regarding Motion [for Temporary Restraining Order] entered by the Honorable Hala Jarbou.

EXHIBIT

1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

TITUS JERMAINE CROMER, JR.,
by his heir at law, LASHAUNA LOWRY,

Plaintiff,

v Case No. 2019-177547-CZ

BEAUMONT HEALTH,

Defendant./

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

BEFORE THE HONORABLE HALA JARBOU, CIRCUIT JUDGE

Pontiac, Michigan - Monday, October 28, 2019

APPEARANCES:

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WITNESSES

None

EXHIBITS RECEIVED

None offered.

Pontiac, Michigan

Monday, October 28, 2019 - 11:36 a.m.

* * * * * *

THE CLERK: All rise.

THE COURT: All right. Good morning, everyone. Please be seated.

THE CLERK: Now calling Cromer versus Beaumont, case number 2019-177547-CZ.

THE COURT: All right. Can I have appearances, please?

MR. RASOR: Thank you, Your Honor. Jim Rasor on behalf of the Plaintiff. Uh, plaintiff's heir at law Lashauna Lowry is, uh, present with me this morning. Thank you, Judge.

MR. TURCO: Good morning, Your Honor. Mike Turco on behalf of Beaumont.

MR. PRICE: And Michael Price on behalf of Beaumont.

THE COURT: All right. Thank you. Uh, the record should reflect that we did have an in-chambers conference that was recorded. It is on the record. As it relates to a complaint for a preliminary injunction and an emergency motion for a temporary restraining order file -- filed by the Plaintiff.

All right. Mr. Rasor?

MR. RASOR: Uh, Judge, thank you very much. Uh, Judge, this is a -- a catastrophic case and every parent's worst nightmare. Uh, nine days ago, uh -- uh, Titus Cromer who is 16 years old suffered, uh, an event that brought him to the hospital. He is, uh -- uh, junior at U. of D. Uh, he is a varsity wrestler. Uh, he is a good student. He is a, uh, very popular young man and the family is devastated.

Uh, Judge, we have had many conversations with Beaumont Healthcare concerning this matter. Uh, they have made determinations that we disagree with. Uh, the case law is clear, Judge, that these, uh -- that this di -- disagreement needs to come to this Court. Uh, we have asked, Judge, for you to impose a preliminary in -- or a temporary restraining order. That restraining order, uh, would keep, uh, the medical provider from withdrawing any treatment and keep him in the same status that he is in now. So essentially create a status quo until we have a hearing on our motion for a preliminary injunctive order. Uh, Judge, I think that that is completely appropriate given the circumstances.

And in this case, Judge, there's two determinations the Court really needs to make. Uh, and those determinations, uh, will be moot if life support is withdrawn because this young man will perish without, uh,

feeding and without, uh, breathing apparatus. However, I should indicate to the Court, uh, it is our belief -- not based on a miracle but belief -- but based on good science that we do believe that there is a pathway to recovery for him. And, Judge, that's why it's so crucial today that the Court enter, uh, a temporary restraining order so we can just keep the status quo until you're -- you are able to hear all of the medicine in this case and make a decision.

And the decision that you have to make in this case is first, who has the right to make this decision for this young man? Is it his family, his mother? Or is it the healthcare provider? And the second decision, Judge, is that even if the healthcare provider has found, uh, pursuant to Michigan's Death Statute that he is, uh, what they term brain dead at this time -- whether they have the ability, pursuant to that statute, to then remove lifesaving treatment for him or whether the family's right to make these medical decisions for their child is the only right that matters.

Judge, uh, we did have a conversation in chambers so I'm not gonna belabor the point. I think all four factors for a temporary restraining order are met in this case. Just very, uh, briefly. Judge, uh, pursuant to, uh, Thermatool versus Borzym cited in brief, the

likelihood the moving party will prevail. The second, the likelihood the moving party will be ir -- irreparably harmed absent an injunction. Three, the prospect that others will be harmed if the Court grants the injunction. And four, the public interest in granting the injunction. Judge, I believe those four factors militate, uh, towards, uh, us.

Uh, we have cited a case In Re Rosebush which clearly stands for the proposition that only the family can make this decision to remove life support. As a result of that I believe the likelihood of -- that we will prevail on the merits is high. Uh, obviously the likelihood that the moving party will be irreparably harmed absent the injunction is strong. He will perish if this life support is withdrawn. Uh, there is no higher standard, Judge, for irrep -- irreparable harm, Judge, then the death of this 16-year-old boy.

Uh, the prospect that others will be harmed if the Court grants the injunction. There is no other harm, Judge. Indeed, he is insured. Uh -- uh, the family is very, uh, well-employed. Uh, there is no harm to the public for him to be continued. And, uh, number 4, the public interest in granting the injunction, Judge. This is a -- a -- remarkably a case of first impression in the State of Michigan that defines these important statutes

and further delineates the rights and duties of the medical health care provider versus, uh, the parents in a dispute like this. So it's very important and ripe for a determination by this Court that'll give further people guidance in this particular area, Judge.

So for all of those reasons, we would ask the Court to grant our petition for a temporary restraining order, Judge, and set this matter for an evidentiary hearing, uh, on a preliminary injunctive, uh, basis. Uh, Judge, unless you have any questions, I'll sit down.

THE COURT: No. Mr. Turco?

MR. TURCO: Thank you, Your Honor. Uh, You -- Your Honor, gi -- given that we're here in -- in court, the -- it -- it -- it can only create the wrong impression that Beaumont is somehow callous about the issue because we have an adversarial sys -- system and this is how we resolve those disagreements. I -- I -- I want to immediately make sure the Court understands that's not the case. If -- if it hasn't been said, which I believe it has, I'll say it now in open court that Beaumont has very deep empathy for this family and every family that finds themself in a situation where a loved one has passed away. We -- we really do.

The fundamental issue and what brings us here is not some tension with these people. We -- we -- we really

do want to do what's ethical and what's legal for this family to support them. It -- it is a disagreement over the diagnosis at issue. And they reference it in the complaint and I will confirm for you that when we come to answer these allegations, Beaumont will explain that, unfortunately, very sadly, this young man satisfies the definition of brain death.

And -- and so the issue that's before you is what is the continuing care for somebody who is in that state. I'm not gonna take your time or patience to repeat the discussion we've already had. We respectfully disagree with the Plaintiff over they -- the -- that -- uh, the tension they have with that diagnosis. We disagree with their position on it and we will provide you with the medical support to explain why that diagnosis was very carefully and repeatedly made and why it's accurate.

But I think it's important for me to confirm here that I, when it comes time to briefing our response -- I do have the Plaintiff's consent to provide the Court and to use as evidence the medical records related to this young man's treatment and condition. Am I correct in that regard?

THE COURT: Mr. Rasor?

MR. RASOR: Uh, Judge, we had discussed this in chambers and Counsel and I would diligently work out an

appropriate protective order. Obviously, the medical condition of, uh, the minor child is at issue in the hearing. So there is no way for you to reach a conclusion concerning that without having the medical records and hearing in open court from the experts that we'll be calling.

THE COURT: Okay. Uh, but certainly in terms of their briefing which is gonna come prior to the hearing, uh, is there a waiver or a -- a stipul --

MR. RASOR: Uh, certainly, Judge. You -- I -- I'm sorry to interrupt.

THE COURT: Is there a waiver or a stipulation in terms of the health information that's to be provided?

MR. RASOR: Yes, Judge. It -- as we discussed there are certain areas that, uh, both Counsels feel, uh, is not appropriate for that briefing but otherwise the general medical condition of the patient including his medical records I think is fair game for the briefing that will be undertaken even though we had some, uh -- uh, I believe that that would be appropriate.

THE COURT: Okay. Is that sufficient, Mr. Turco?

MR. TURCO: It -- it is, Your Honor. And I appreciate you indulging that. We will provide you with a fully briefed response because I respect that this is a

very serious decision that you're being asked to make and a very serious issue and I trust that you would like to hear from the healthcare professionals who actually have the personal knowledge and have looked at the -- the -- the medical evidence here and so I'm not gonna attempt to repeat it for you this morning other than to say that although we do greatly empathize with this family, the -- the course that needs to be followed now is -- is the appropriate course when someone passes away. And we will reserve our argument for our brief because I owe you the medical support behind it.

I -- I will just point out to you though, Judge -- not as process but as a matter of substance -- as this matter is currently before you, one of the things the Plaintiff has to show is that they're more likely than not to prevail on the merits of their claim. They do not have a claim pending with this Court. They filed a complaint for injunctive relief. And, again, I'm not standing on process but your jurisdiction is tied to a cause of action. They do not have a claim pending and I don't want to be perceived as waiving that issue. They've simply asked for injunctive relief and if I were to brief it today, I would point out to you that there's a lack of jurisdiction because of that.

But -- but other than that, Your Honor, I

appreciate the time and we will respond fully to what's been characterized in their papers when I have a chance to brief this.

THE COURT: All right. Thank you. Anything else?

MR. RASOR: Uh, thank you, Judge. Just briefly. Uh, nothing that, uh -- I don't want to create an impression that Counsel and I have had, uh, difficulties or that I feel that, uh -- uh, that Beaumont is not proceeding in an academic, uh, way concerning this matter. I understand their concerns.

Uh, but, Judge, I -- I do believe that there is a, uh -- a -- I believe that the central issue as to why we're gonna prevail on the merits is -- is simply because, uh, he does have a chance. Now he doesn't have a great chance, Judge. He doesn't have the best chance but he has a chance of coming out of this. And -- and anything that we can do to make sure that he has that chance, that fighting chance to come out of it is important.

Also, I wanna just very quickly address the cause of action issue. Uh, in terms of the complaint, I think the complaint does state a cause of action for declaratory relief as to the Death Statute and, uh, as to, uh, the authority of the parents versus the healthcare provider to guide the medical care. Out of an abundance

of caution, Judge, we have already filed an amended, uh, complaint which delineates those declaratory judgment actions in more detail. Uh, just because, uh, Counsel and I feel that we need to have the -- the pleadings on a basis that are clearer so the Court knows exactly what we're asking the Court to do. Thank you, Judge.

THE COURT: Anything else, Mr. Turco?

MR. TURCO: Very briefly. The -- the final point that I'd like to make, Your Honor, is just so know -- and we'll provide a more thorough timeline when the time is right to do that -- but there was no rush to judgment here. Beaumont did attempt to work with the family on providing a meaningful period before assessments were made and, unfortunately, this -- this -- today we're here following all of that additional time and the additional assessments. But I just want to make sure I leave Court today and leave you with the impression accurately that Beaumont has not rushed to any judgment here today.

THE COURT: Thank you. All right. The Court having heard arguments both in-chambers, as I indicated on the record as well as, uh, this morning here in the courtroom, uh, as it relates to the Plaintiff's verified complaint for a preliminary injunction and emergency motion for temporary restraining order.

For the time being a temporary restraining order

is granted, uh, based on the limited information that I have and I don't have any medical information. Uh, I just have the status of the Plaintiff, the minor Plaintiff as it relates to this case. And that appearing that if that status is changed, that there would be immediate and irreparable injury to the minor Plaintiff. The Court does grant the Plaintiff's motion -- emergency motion for a temporary restraining order but I will set a hearing as it relates to the preliminary injunction, uh, as Counsel, in terms of the timing, needed some -- at least Plaintiff's Counsel needed some timing for some witnesses.

The hearing will be set for November 7th, next week, at 8:30 in the morning. Briefing, certainly from the Defense, uh, prior to that, uh, as well as any supplemental from the Plaintiff with sufficient time obviously for the Court. Uh, the sooner the better, uh, but anyone can give me any information.

As it relates to that medical information, obviously it'll have to be discussed so that needs to be work at -- worked out between the parties as it relates to the medical information that will become public. Uh, in the interim, the Defendant is to continue the current level of treatment and maintain the status quo and I will see everyone back next week Thursday at 8:30 --

MR. TURCO: Your Honor --

THE COURT: -- on the 7th.

MR. TURCO: -- do you want us to reduce any or all of that to a written order?

THE COURT: Yes. All of it. Uh, there should be blank orders.

MR. TURCO: Do you want us to do it before we leave today?

THE COURT: Uh, unless you can give it to me today, uh, it -- e-file it. But you can certainly -- there are blank orders. You can certainly put it all down before you leave.

MR. TURCO: What's your preference?

MR. RASOR: I -- are we allowed to -- to -- Judge, I thought with e-filing that we would have to submit an e-filed order but I suppose we could work one out and then e-file that one. So, yes, we'll do that right now.

THE COURT: You can do an order right now. We'll e-file it.

MR. RASOR: Oh, okay.

THE COURT: Okay. Unless --

MR. RASOR: I -- I didn't --

THE COURT: -- you want to do it --

MR. RASOR: -- know you could do that.

THE COURT: -- when you get back to your office

and then it gets, obviously, through the e-file system.

MR. TURCO: Okay. Thank you, Your Honor.

MR. RASOR: Judge, on behalf of, uh, my clients and my firm, I just want to thank you so much for your prompt attention to this. Your staff has been absolutely, uh, wonderful and we appreciate the Court's indulgence this morning.

THE COURT: Thank you. Thank you all for being here, obviously it's difficult for everyone involved. Thank you.

MR. PRICE: Thank you.

THE CLERK: All rise.

(At 11:51 a.m., proceeding concluded)

(At 11:59 a.m., case recalled)

THE CLERK: All rise.

THE COURT: All right.

THE CLERK: Now recalling Cromer versus Beaumont, case number 2019-177547-CZ.

MR. RASOR: Judge, Jim Rasor on behalf of the Plaintiff.

Judge, while we were --

THE COURT: Hold on. Appearances --

MR. RASOR: Sure --

THE COURT: -- for the -- everybody else, please.

MR. TURCO: Mike Turco for -- on behalf of Beaumont.

MR. PRICE: Michael Price on behalf of Beaumont.

THE COURT: Okay. What's the issue?

MR. RASOR: Judge, uh, the issue is -- is that, uh, we're trying to work out wording in the order concerning the current level of care. And I think we have a misunderstanding about what the Court said. My understanding is --

THE COURT: Uh -- uh, I don't need to know your understanding --

MR. RASOR: Okay.

THE COURT: -- or your understanding. My statement was that Defendant Beaumont is to continue the current level of care. Maintain the status quo. That's it. I don't know. I don't know what is -- is being provided or not being provided. I don't know. Whatever the current level of care is, that's what's to continue.

MR. RASOR: And -- and --

MR. TURCO: That's how it's currently drafted.

MR. RASOR: And here's the problem with that, Judge. So, uh, let's say tomorrow he, uh, has a need for a blood pressure medication. Currently he's not on one today. Tomorrow perhaps he would need to be on one. I don't want Beaumont to think that the current -- that the

words "current level of care" doesn't include appropriate reaction to medical conditions which come up which is what they've been doing. So I just felt like I needed to clarify that.

THE COURT: They've been doing what? I -- I -- I --

MR. RASOR: They've been doing all necessary medical management of the patient including --

THE COURT: Right.

MR. RASOR: -- putting him on medicine. Taking him off of medicine.

THE COURT: Right. And so what -- what about my statement that that's to continue. The current level of care which apparently, from what you're telling me, includes that. Wh -- what does that -- how is that different from --

MR. RASOR: I -- I think that --

THE COURT: -- what's been ordered?

MR. RASOR: -- that, uh -- I think, Judge, that you've already cleared that up. And I -- and I appreciate that. Based on what you said.

MR. TURCO: The -- the draft order that we are -- (indiscernible) -- that -- that -- that we've approved as to form --

THE COURT: Right.

MR. TURCO: -- says exactly what you just said.

THE COURT: Okay.

MR. TURCO: I mean, we were opposed to adding any additional language to what you ordered and that's what -- that's what you've ordered. That's what this says in writing. It will --

THE COURT: And it sounds like everybody's --

MR. TURCO: -- (indiscernible) as to form.

THE COURT: I'm sorry to interrupt. I'm -- and it sounds like everybody's in agreement that the current level of care is what has been done up to this point --

MR. RASOR: Thank you.

THE COURT: -- which includes what you're talking about.

MR. RASOR: Thank you, Judge.

THE COURT: So I don't know where the misunderstanding is.

MR. TURCO: So, here's where I want to be careful. None of us stand here as doctors today.

THE COURT: Correct.

MR. TURCO: Right? None of us do. I think what is the appropriate thing is the Court has entered an order. You've said what you've said. If, for some reason, and I -- and I hope it never, ever comes to pass. If for some reason there's a disagreement between the

family and the doctors, there's a mechanism to come back to you but we can't have some implicit language or actual language where lawyers pretend to be telling doctors, well, if this medication's necessary, you do it. It -- we can't do that. That's what the doctors are for and there's a mechanism if somebody disagrees with it. Your language is very clear. That's what this written order says. Hopefully we don't have to come back and see you ever but I -- I'm opposed to us as lawyers trying to script out what somebody else is supposed to be doing.

THE COURT: Nope. I think we've all said what we needed to say and the order should reflect what's been ordered.

MR. TURCO: Thank you.

MR. RASOR: One -- one moment, Judge.

(to Mr. Turco) Should -- I think we should put the current status (indiscernible) --

MR. TURCO: Well, I -- I think that -- so I'm -- I'm not -- I'm not -- I'm not -- the Judge has been very clear with us that whatever's there today is what has to be there.

MR. RASOR: Yeah. But what's your understanding of what's there today 'cause (indiscernible) --

MR. TURCO: Yeah. So, uh, Your Honor, the issue is the CPR and if he's not responsive to CPR. That's the

issue that -- that Mr. Rasor's raising.

THE COURT: Okay. So what's the current status on that?

MR. TURCO: My understanding is -- is that, uh, let me make sure I have the right language, Your Honor. He has full code -- he has full code cardiac response.

THE COURT: Okay. What -- what -- what else?

MR. RASOR: I -- I'm not sure what the modifier "cardiac response" means after full code. Our understanding is we have issued a directive to the hospital for full code without anything else but I think that's a detail that we can work out, Judge. Uh --

THE COURT: All right. As I've indicated -- that's -- I -- again, I'm not a medical doctor. Uh, full code with -- what -- what was it? With --

MR. TURCO: Full -- full code cardiac response.

THE COURT: Okay. Indicates to me that they will make attempts, uh, as it relates to that protocol for -- if that situation arises. So, as I've indicated, repeatedly, the current status appears to be, from everything that I've heard, that they are treating him. That if something comes up that they will meet that need and that that is to continue and we'll have a hearing on Thursday a -- a week from this Thursday on the 7th to see if that changes.

MR. RASOR: Judge, thank you so much.

THE COURT: Okay. Thank you, everyone.

MR. TURCO: Thank you, Your Honor.

THE CLERK: All rise.

(At 12:04 p.m., proceeding concluded)

* * * * * *

STATE OF MICHIGAN)

COUNTY OF OAKLAND)ss.

I certify that this transcript is a true and accurate transcription to the best of my ability of the proceeding in this case before the Honorable Hala Jarbou, as recorded by the clerk.

Proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

Dated: November 1, 2019

/s/ Alison Joersz

Alison Joersz, CER #9320

EXHIBIT

2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

Croner
Plaintiff,

Beaumont Health
Defendant,

Case No. 2019-177547-CZ

HONORABLE HALA JARBOU

ORDER REGARDING MOTION

At a session of said Court, held in the City of Pontiac, Oakland County, Michigan, on Oct 28, 2019

Present: **HONORABLE HALA JARBOU**
Circuit Court Judge

This matter having come before the Court on Plaintiffs Mtn 's:
(Plaintiff/Defendant)

Motion For Temporary Restraining Order
(Motion Title)

And the Court being advised in the premises;

IT IS HEREBY ORDERED that the motion is:

- ☒ Granted.
- ☐ Granted in part, denied in part.
- ☐ Denied.
- ☒ For the reasons stated on the record.

Further: For reasons stated on record Motion for Temporary Restraining Order is Granted. Beaumont is to continue current level of care. Hearing on Motion for Preliminary Injunction set for November 7th 2019 at 8:30 with briefing forthwith but no later than 11/1/2019

HONORABLE HALA JARBOU AS
Circuit Court Judge

Approved as to Substance and Form:

Approved as to Form only and not Substance