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 Reply Brief In Support of Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) [ECF 23][1]

[1] While the parties recently stipulated to having this motion heard along with Plaintiff's motions for preliminary injunction and leave to file a second amended complaint, ECF 10 and ECF 27, neither party has requested oral argument in conjunction with this motion, ECF 23, or Plaintiff's pending motion for leave to amend, ECF 30. Therefore, in the event this Court does not require oral argument, Beaumont requests that the Court simply issue an opinion and order addressing this motion, ECF 23, and Plaintiff's motion for leave to amend, ECF 27.

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INTRODUCTION

While Beaumont Health continues to sympathize with Plaintiff's indescribable loss, the fact remains that Beaumont has engaged in no wrongful conduct and consequently, Plaintiff cannot articulate a viable claim against Beaumont. Plaintiff, through counsel, continues to assert claims and theories without researching their applicability in a transparent effort to maintain injunctive relief against Beaumont that should not have been imposed. Since Plaintiff remains unable to articulate a valid claim,[2] this Court should dismiss all claims against Beaumont with prejudice.

ARGUMENT

I. Plaintiff cannot establish an EMTALA claim because Plaintiff admits that Beaumont believes—and has determined—that Titus is deceased.

A stabilization claim under EMTALA only arises when "*the hospital determines* that the individual has an emergency medical condition." 42 U.S.C. § 1395dd(b)(1) (emphasis added). Enacted as an "anti-dumping" statute, EMTALA "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). Likewise, EMTALA "was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence." *Bowen v. Mercy Memorial Hosp*.,

[2] Plaintiff interjects matters outside the pleadings in her response (including matters related to her pending motion for leave to amend, ECF 27). See e.g., ECF 28, PgID 707-708, 713. To the extent the Court considers such matters, Beaumont respectfully refers the Court to its response in opposition to that motion. ECF 29.

1995 WL 805189, at *2 (E.D. Mich. Dec. 8, 1995) (quoting *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851,856 (4th Cir. 1994)). If a hospital's physicians "do *not believe an emergency medical condition exists because they [allegedly] wrongly diagnose the patient, EMTALA does not apply*." *Moses*, 561 F.3d at 585 (emphasis added).

In the response, Plaintiff *admits* that "Beaumont believes that Titus suffered 'an irreversible cessation of all functions of the entire brain, including the brain stem' as a result of [his] traumatic injury." ECF 28, PgID 699. Since Plaintiff admits that Beaumont *believes* Titus is deceased,[3] and EMTALA turns on the hospital's belief, Plaintiff cannot sustain a stabilization claim because the hospital has admittedly "determined" that he is deceased under M.C.L. § 333.1033. Given that EMTALA is not a federal remedy for misdiagnosis,[4] the EMTALA claim must be dismissed.

II. Plaintiff has failed to identify any recognized form of preemption that would apply in this case.

Arguing for "preemption as applied to Beaumont in this context," ECF 28, PgID 708, Plaintiff does not appear to understand this legal doctrine.

> Federal law may preempt state law either expressly or impliedly. Express preemption exists where either a federal statute or regulation contains explicit language indicating that a specific type of state law is

[3] While Plaintiff dismisses *Fonseca v. Kaiser Permanente Med. Ctr. Roseville*, 222 F. Supp. 3d 850 (E.D. Cal. 2016) as a Ninth Circuit case, the factual similarities are striking, (i.e., planned cessation of medical treatment after determination of death), and the cited analysis is directly applicable. ECF 23, PgID 595.

[4] Plaintiff admits that her real complaint is one for an alleged misdiagnoses–by arguing (i) Beaumont has "prematurely declar[ed Titus] dead" and (ii) "conflicting medical opinions [by her experts] exist here." ECF 28, PgID 705-706.

> preempted. Implied preemption has been subdivided into "field preemption" and "conflict preemption." Field preemption exists "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

State Farm Bank v. Reardon, 539 F.3d 336, 341-342 (6th Cir. 2008) (citation omitted).

EMTALA provides: "The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section." 42 U.S.C. § 1395dd(f). Since the above provision fails to indicate "that a specific type of state law is preempted," express preemption is inapplicable. Similarly, "field preemption" is inapplicable since EMTALA expressly contemplates state supplementation to the extent it does not conflict with EMTALA.

Conflict preemption occurs in one of two forms: impossibility preemption; and obstacle preemption. *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 319 (6th Cir. 2017). Impossibility preemption occurs "where compliance with both federal and state regulations is a physical impossibility." *Reardon*, 539 F.3d at 342. Because it is not physically impossible to comply with EMTALA's screening and stabilization requirements under 42 U.S.C. § 1395dd and also make a determination of death under M.C.L. § 333.1033, impossibility preemption is inapplicable.

Finally, obstacle preemption occurs "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Reardon*, 539 F.3d at 342. Because a pronouncement of death made in "accordance

with accepted medical standards" under M.C.L. § 333.1033 does not stand as an obstacle to the "anti-dumping" objective of EMTALA, and the Sixth Circuit has noted EMTALA was *not* "intended to establish guideless or standards for patient care," *Moses*, 561 F.3d at 585, obstacle preemption is also inapplicable.

In short, no *recognized form* of preemption could be applied in a manner to find that EMTALA preempts[5] M.C.L. § 333.1033. Finally, there is no recognized form of preemption allowing for "preemption as applied to Beaumont in this context."

III. Plaintiff cannot establish "state action" on the part of Beaumont under any of the three recognized tests to support the asserted due process claims.

The Sixth Circuit has consistently articulated three tests for determining when private "actions so approximate state action that they may be fairly attributed to the state": "(1) the public function test; (2) the state compulsion test; and (3) the symbiotic relationship or nexus test."[6] *Faparusi v. Case Western Reserve Univ.*, 711 Fed. Appx. 269, 275 (6th Cir. 2017). Plaintiff offers random citations and conclusory assertions that "state action" is present without ever articulating any coherent

[5] In the midst of the preemption discussion, Plaintiff, through counsel, inaccurately contends that "Beaumont has admitted that it did not even attempt to comply with EMTALA's provisions … because of its alleged determination of brain death." ECF 28, PgID 708. Contrary to this erroneous statement, Beaumont has consistently maintained that it met all obligations under EMTALA.

[6] While Plaintiff repeatedly contends that determination of death is "traditionally a state function," Plaintiff fails to provide any authority for this proposition. Further, the suggestion that death determinations fall under the public function test would be absurd as that would have required the state to exclusively determine death for every individual prior to enactment of the Determination of Death Act.

application of any of these tests—because any such application reveals no state action in this case.[7] Since Plaintiff simply cannot articulate state action under any of these tests, dismissal of Plaintiff's due process claims is similarly warranted.

At bottom, Plaintiff essentially argues Beaumont's reliance on authorization to determine death "in accordance with accepted medical standards" under M.C.L. § 333.1033 constitutes "state action" and she has the right to challenge the decision. See ECF PgID 713. However, "the fact that the state has authorized, but neither compels nor coerces, a person to do something is insufficient to bestow state actor status upon a private individual." *Willis v. Charter Twp. Of Emmett*, 2007 WL 2463354, at *6 (W.D. Mich. Aug. 30, 2007) (citing *Benn v. Universal Health Sys., Inc*., 371 F.3d 165, 171 (3rd Cir. 2004)).[8] Since Plaintiff cannot demonstrate "state action" by Beaumont, this Court should dismiss all due process claims against Beaumont.

IV. Even if the void for vagueness doctrine applied in this context, Plaintiff has still failed to identify a term or provision of the statute that is vague.

As is evident from the authorities cited by both parties, "the void-for-vagueness doctrine is principally employed in the interpretation and application of criminal statutes [and] is also relevant in considering legislation imposing civil sanctions."

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[7] For brevity and to avoid duplication, Beaumont respectfully refers this Court to the discussions provided at ECF 23, PgID 597-601 and ECF 29, PgID 744-748, which provide a complete analysis of this case under each of the above tests.

[8] In *Willis*, the district court rejected the plaintiff's attempts to attribute state action to a determination of death made under M.C.L. § 333.1033. Plaintiff does not even attempt to distinguish this case—which is the only case Beaumont counsel has been able to locate that analyzes state action in conjunction with determination of death.

Courser v. Michigan House of Representatives, __ F. Supp. 3d __, 2019 WL 3034905, at *5, n. 6 (W.D. Mich. July 11, 2019) (quoting *Boutilier v. INS*, 363 F.2d 488, 485 (2nd Cir. 1966)). Since M.C.L. § 333.1033 does not provide for the imposition of any criminal liability or civil penalty, the doctrine has no application to this case. *Id*.

Further, when applied in the above contexts, the doctrine only applies when "prohibitions are not clearly defined"—necessarily requiring identification of some language that is vague. *600 Marshall Entertainment Concepts, LLC v. City of Memphis*, 705 F.3d 576, 587 (6th Cir. 2013). Since Plaintiff has still failed to point "to any term or provision in [§ 333.1033] that [she] believes is vague," she has failed to state a void for vagueness claim—assuming it could even apply in this context.

V. Plaintiff has failed to provide any response to the authorities that expressly allow Beaumont to discontinue care after a determination of death.[9]

As noted in the underlying motion, Michigan authority provides that a hospital has the right to stop care after it determines that a patient is deceased as provided under the Determination of Death Act. ECF 23, PgID 604-607 (citing *In re Rosebush*, 195 Mich. App. 675, 590, 491 N.W.2d 633 (1992) and *Virk v. Detroit Receiving Hosp.,* 1996 WL 33348748, at *2 (Mich. Ct. App. Oct. 25, 1996)). Plaintiff understandably fails to respond to the above authorities as they invalidate her entire case.

After collectively five filing attempts, Plaintiff is still unable to articulate a valid claim against Beaumont. Of course, the reason she cannot articulate a valid claim is

[9] Since Plaintiff admits her "declaratory judgment count" "is not a distinct claim," ECF 28, PgID 716, Count IV should be dismissed with the remaining claims.

because Beaumont has done nothing wrong. Again, Michigan authority authorizes a hospital to discontinue care after a determination of death and thus, there has never been any basis for the claims against Beaumont and the continuing injunctive relief imposed against it.[10] Given Plaintiff has failed to assert a valid claim and failed to provide any response to the above authorities authorizing Beaumont's actions, this Court should dismiss Plaintiff's complaint against Beaumont in its entirety.

CONCLUSION AND RELIEF REQUESTED

For all the reasons set forth above and in Beaumont's original motion, ECF 23, this Court should dismiss this matter pursuant to Fed. R. Civ. P. 12(b)(6) and necessarily dissolve the temporary restraining order as amended, ECF 4 and ECF 7.

Respectfully submitted,

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Date: January 2, 2020

[10] Per this Court's December 23 Order, tracheostomy and PEG procedures have now been completed. ECF 30. In the second amended complaint, Plaintiff alleged that "a long-term care facility will accept Titus upon the conclusion of" these two procedures. ECF 2, ¶ 31, PgID 174. Consequently, even if Plaintiff had stated a claim, there would be no need for continuation of the TRO.

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2020, 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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