

**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;  
ROBERT GORDON, in  
his official capacity,**

**Defendants.**

---

**RASOR LAW FIRM, PLLC**

James B. Rasor (P43476)  
Andrew J. Laurila (P78880)  
Attorneys for *Plaintiff*  
201 E. 4<sup>th</sup> Street  
Royal Oak, MI 48067  
248-543-9000  
[jbr@rasorlawfirm.com](mailto:jbr@rasorlawfirm.com)  
[ajl@rasorlawfirm.com](mailto:ajl@rasorlawfirm.com)

**Brooks Wilkins Sharkey & Turco, PLLC**

Michael R. Turco (P48705)  
Michael T. Price (P57229)  
Attorneys for *Defendant*  
401 S. Old Woodward Ave., Ste. 400  
Birmingham, MI 48009  
(248) 971-1800  
[turco@bwst-law.com](mailto:turco@bwst-law.com)  
[price@bwst-law.com](mailto:price@bwst-law.com)

---

**PLAINTIFF'S MOTION TO AMEND COMPLAINT TO INCLUDE  
ADDITIONAL FACTUAL ALLEGATIONS AND COUNT**

**NOW COMES** Plaintiff, LASHAUNA LOWRY, AS NEXT FRIEND OF  
TITUS JERMAINE CROMER, JR., a minor, through her attorneys, RASOR LAW

FIRM, PLLC, and for her Motion to Amend her Complaint to Include Additional Factual Allegations, Count and Defendant, states as follows:

1. This cause of action arises out of the tragic injury to Titus Cromer, a teenage boy, that ultimately led to a serious brain injury and Defendant Beaumont's subsequent, erroneous determination pursuant to Michigan's Determination of Death Act (MCL § 333.1033).

2. Plaintiff filed a Verified Complaint for Declaratory Judgment, Preliminary Injunction and Emergency Motion for Temporary Restraining Order on November 8, 2019 in this Honorable Court.

3. A few hours later, because of minor defects in the complaint, Plaintiff filed an Amended Complaint addressing identical claims and issues. (Docket #2).

4. On November 8, 2019, this Honorable Court entered a Temporary Restraining Order ("TRO") involving Beaumont to continue to provide life support for Titus pending this matter's resolution. The Court's Order set dates for the parties' filing of pleadings involving Plaintiff's pending motion for preliminary injunction.

5. While the Court filed an amended order on November 11, 2019, this did not affect the substantive dates addressed in the prior order.

6. Per the Court's Order, Plaintiff filed her Motion for Preliminary Injunctive Order on November 11, 2019 (Docket #10). In this motion, Plaintiff addressed the prospective issue of "state action" and why Defendant Beaumont was

a proper “state actor” for purposes of Plaintiff’s constitutional claims arising out of Defendant Beaumont’s application of MCL § 333.1033.

7. Plaintiff’s Motion stated that if the Court was unwilling to hold that Defendant Beaumont was a “state actor,” Plaintiff will seek to amend to include “an *Ex Parte Young* claim against Defendant Robert Gordon, the Director of the Michigan Department of Health and Human Services. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908).” (Docket #10, p. 20).

8. On November 14, 2019, Defendant Beaumont filed a response to Plaintiff’s Motion for Preliminary Injunction. (Docket #15). Notably absent from this response is any reference to its purported lack of “state action” as a defendant. In fact, Beaumont ceded continuing the temporary restraining order. (Docket #15, pp. 4-5). Instead of presenting valid arguments, Beaumont evidently determined it would hold off on those arguments: “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.” (Id.).

9. Plaintiff filed a Reply Brief on November 15, 2019. (Docket #16).

10. Based on arguments that Defendant Beaumont made in its response asserting that its non-compliance with the Emergency Medical Treatment and Active Labor Act (“EMTALA”) arises out of its application of MCL § 333.1033, Plaintiff

argued in her reply that such an argument necessarily evokes a “preemption” analysis. (Docket #16, p. 3). In other words, Beaumont claims EMTALA does not apply here because the determination of death effectively makes it moot.

11. Despite Plaintiff addressing both these substantive issues, and Defendant’s failure to argue anything pertaining to “state action” and/or being a proper party, Defendant filed a Motion to Dismiss Plaintiff’s Complaint pursuant to Fed. R. Civ. P. 12(B)(6) on November 27, 2019. (Docket #23).

12. For the first time in this motion does Defendant Beaumont assert it is not a state actor for purposes of Plaintiff’s constitutional claims arising out of Beaumont’s unconstitutional application of MCL § 333.1033 to Titus.

13. Plaintiff’s counsel unsuccessfully sought concurrence with defense counsel regarding these two issues pursuant to Local Rule 7.1.

14. Fed. R. Civ. P. 15(a) provides that leave to amend “shall be freely given when justice so requires.” This rule provides Courts broad discretion to permit amendments. *Tucker v Union of Needletrades, Indus, & Textile Emples*, 407 F.3d 784, 788 (6th Cir. 2005).

15. Likewise, although Plaintiff has already filed an amended complaint, this occurred before Defendant filed any responsive pleading; in this case, Defendant’s first responsive pleading was the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(B)(6).

16. Per Fed. R. Civ. P. 15(a)(1)(B), a plaintiff can amend a complaint as matter of course within 21 days of the opponent filing a “motion under Rule 12(b).”

17. Although this is technically a “second amended complaint,” because Plaintiff seeks leave based on and to respond to issues addressed in Defendant’s 12(B)(6) motion to dismiss, this proposed amendment should be granted as a matter of course.

18. Plaintiff seeks to formally add a count and an additional party. (See Exhibit 1, Proposed Amended Complaint).

19. Plaintiff’s proposed Count (IV) states a claim for “EMTALA Preemption” arising out of specific preemption statutory language (42 U.S.C. § 1395dd(f)) and the Supremacy Clause. This claim is premised on Defendant Beaumont’s subsequent position it has taken that it cannot comply with EMTALA because of its application of MCL § 333.1033.

20. Plaintiff’s proposed additional Defendant is Robert Gordon, the Director of Michigan Department of Health and Human Services (“HHS”). Proposed Defendant Gordon has the authority to both enforce MCL § 333.1033 and issue death certificates as the Director of HHS.

21. Plaintiff proposes to add Defendant Gordon pursuant to *Ex Parte Young* in the event that this Court determines that Beaumont is not a “state actor” for purposes of Plaintiff’s constitutional challenges to MCL § 333.1033.

22. The *Ex Parte Young* doctrine allows for the filing of suit against state officers seeking declaratory judgment and prospective injunctive relief “to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act.” 209 U.S. at 157. This premise arises out of the idea that “because an unconstitutional legislative enactment is ‘void,’ a state official who enforces that law ‘comes into conflict with the superior authority of [the] Constitution.” *Va. Office*, 563 at 254 (internal quotations omitted). Not only does any function assigned by the Health code, including MCL § 333.1033, “vest” with Defendant Gordon pursuant to MCL § 333.2205, but the Health Department also issues death certificates, which follows from the unconstitutional finding that Titus is “dead.” Accordingly, if Beaumont is determined not to be a state actor, Defendant Gordon is the proper party to challenge the Constitutionality of MCL 333.1033 as his department will record the erroneous death certificate filed by Beaumont with the State of Michigan.

23. When considering a motion to amend, a Court will consider several factors in making its determination: “undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision.” *Head v. Jellico Housing Authority*, 870 F.2d 1117, 1123 (6th Cir. 1989) (internal citations omitted).

24. Plaintiff has not delayed in bringing this amendment. These issues and the need to potentially amend the complaint only became evident upon reading Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(B)(6). Likewise, because of Defendant Beaumont's lackluster approach in its response to Plaintiff's Motion for Preliminary Injunctive Order (see Docket #15, pp. 4-5), Plaintiff had no reason to file an amended complaint.

25. Accordingly, Plaintiff's proposed amendment will not unduly prejudice Defendant as it solely involves issues arising in arguments made in Defendant's 12(B)(6) motion. The proposed amended complaint will preserve Plaintiff's constitutional claims if this Court determines Beaumont is not a "state actor."

**WHEREFORE**, Plaintiff respectfully requests that this Honorable Court enter an Order granting the present Motion and permit Plaintiffs to file her Second Amended Complaint.

Respectfully submitted,

/s/ James B. Rasor .

James B. Rasor (P43476)

Attorney for Plaintiff

**THE RASOR LAW FIRM, PLLC**

201 East Fourth Street

Royal Oak, Michigan 48067

(248) 543-9000

[jbr@rasorlawfirm.com](mailto:jbr@rasorlawfirm.com)

Dated: December 9, 2019

## **PLAINTIFF'S BRIEF IN SUPPORT**

Plaintiff, LASHAUNA LOWRY, AS NEXT FRIEND OF TITUS JERMAINE CROMER, JR., a minor, for her Brief in Support of her Motion to Amend states as follows:

### **Statement of Issue Presented**

I. Is Plaintiff Entitled to Amend the Complaint to Include a Claim for EMTALA Preemption and Include Defendant Robert Gordon Pursuant to *Ex Parte Young* as a Defendant for Plaintiff's Constitutional Claims Involving the Application of § MCL 333.1033?

**Plaintiff says: Yes**

**Defendant says: No**

### **Statement of Controlling Authority for the Relief Sought**

A motion to amend is governed by Fed. R. Civ. P. 15(a). An amendment "shall be freely given when justice so requires" and provides Court's broad discretion to permit amendments. *Tucker*, 407 F.3d at 788.

### **I. Brief Statement of Facts**

This is an Emergency action for a Declaratory Judgment and Preliminary Injunction pursuant to federal law and Michigan statutory and common law. Plaintiff's sixteen-year-old son, Titus Jermaine Cromer, Jr., is currently in a coma at Beaumont Hospital in Royal Oak, Michigan. Defendant Beaumont believes that Titus suffered brain death as a result of traumatic injury pursuant to the



Michigan Determination of Death Act, M.C.L. § 333.1033. Defendant Beaumont has indicated that it plans to withdraw Titus's life-sustaining medical treatment, which includes ventilation and artificial hydration and nutrition absent a court order requiring them to continue providing life-sustaining care. In other words, Beaumont believes that it has the right to withdraw life support, effectively ending Titus' life, without Titus' parents/guardian's consent. Defendant Beaumont's basis arises solely from the application of M.C.L. § 333.1033, a state statute.

Plaintiff filed a Verified Complaint for Declaratory Judgment, Preliminary Injunction and Emergency Motion for Temporary Restraining Order on November 8, 2019 in this Honorable Court. A few hours later, because of minor defects in the complaint, Plaintiff filed an Amended Complaint addressing identical claims and issues. (Docket #2). Then on November 8, 2019, after undertaking an emergency hearing this Honorable Court entered a Temporary Restraining Order ("TRO") requiring Beaumont to continue to provide life support for Titus pending this matter's resolution. The Court's Order set dates for the parties' filing of pleadings involving Plaintiff's pending motion for preliminary injunction. While the Court filed an amended order on November 11, 2019, this did not affect the substantive dates addressed in the prior order.

Plaintiff's claims in the First amended verified complaint included a violation of the Emergency Medical Treatment and Active Labor Act ("EMTALA") in

Beaumont's failure to stabilize and/or transfer Titus. Plaintiff also asserted Fourteenth Amendment constitutional challenges against Beaumont based on its reliance of MCL § 333.1033. Per these claims, MCL § 333.1033 violates the Fourteenth Amendment's due process provision in that it patently fails to provide any procedure and/or process for determining "death" and then disputing said determination; i.e. obvious fundamental rights.

Per the Court's Order, Plaintiff filed her Motion for Preliminary Injunctive Order on November 11, 2019 (Docket #10). In this motion, Plaintiff addressed the prospective issue of "state action" and why Defendant Beaumont was a proper "state actor" for purposes of Plaintiff's constitutional claims arising out of Defendant Beaumont's application of MCL § 333.1033. Plaintiff's Motion stated that if the Court was unwilling to hold that Defendant Beaumont was a "state actor," Plaintiff will seek to amend to include "an *Ex Parte Young* claim against Defendant Robert Gordon, the Director of the Michigan Department of Health and Human Services. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908)." (Docket #10, p. 20).

On November 14, 2019, Defendant Beaumont filed a response to Plaintiff's Motion for Preliminary Injunction. (Docket #15). Notably absent from this response is any reference to its purported lack of "state action" as a defendant. In fact, Beaumont ceded continuing the temporary restraining order. (Docket #15, pp. 4-5). Instead of presenting valid arguments, Beaumont evidently determined it would hold

off on those arguments for a later date: “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.” (*Id.*).

Plaintiff filed a Reply Brief on November 15, 2019. (Docket #16). Based on arguments that Defendant Beaumont made in its response asserting that its non-compliance with the Emergency Medical Treatment and Active Labor Act (“EMTALA”) arises out of its application of MCL § 333.1033, Plaintiff argued in her reply that such an argument necessarily evokes a constitutional and/or statutory “preemption” analysis. (Docket #16, p. 3). In other words, Beaumont claims EMTALA does not apply here because the determination of death (pursuant to state law) effectively makes it moot.

Despite Plaintiff addressing both these substantive issues, and Defendant’s failure to argue anything pertaining to “state action” and/or being a proper party, Defendant filed a Motion to Dismiss Plaintiff’s Complaint pursuant to Fed. R. Civ. P. 12(B)(6) on November 27, 2019. (Docket #23). For the first time in this motion Defendant Beaumont argued it is not a state actor for purposes of Plaintiff’s constitutional claims arising out of Beaumont’s unconstitutional application of MCL § 333.1033 to Titus.

Based on Defendant's Motion to Dismiss pursuant to Rule 12(B)(6), Plaintiff seeks to formally add a count and an additional party addressing arguments made in Defendant's motion. (See Exhibit 1, Proposed Amended Complaint). Plaintiff's proposed count (IV) states a claim for "EMTALA Preemption" arising out of specific preemption statutory language (42 U.S.C. § 1395dd(f)) and the Supremacy Clause. This claim is premised on Defendant Beaumont's subsequent position it has taken that it cannot comply with EMTALA because of its application of MCL § 333.1033. Plaintiff's proposed additional Defendant is Robert Gordon, the Director of Michigan Department of Health and Human Services ("HHS"). Proposed Defendant Gordon has the authority to both enforce MCL § 333.1033 and issue death certificates as the Director of HHS and is the proper party if Defendant Beaumont found not to be a state actor for purposes of its application of the unconstitutional MCL § 333.1033.

## **II. Legal Arguments**

Fed. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." This rule provides Court's broad discretion to permit amendments. *Tucker*, 407 F.3d at 788. Per Fed. R. Civ. P. 15(a)(1)(B), a plaintiff can amend a complaint as matter of course within 21 days of the opponent filing a "motion under Rule 12(b)."

Although Plaintiff has already filed an amended complaint, this occurred before Defendant filed any responsive pleading; in this case, Defendant's first responsive pleading was the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(B)(6). Thus, while Plaintiff's proposed amendments are technically a "second amended complaint," because Plaintiff seeks leave based on and to respond to issues addressed in Defendant's 12(B)(6) motion to dismiss, this proposed amendment should be granted as a matter of course without motion. Despite this, Defendant Beaumont refused to stipulate to Plaintiff's proposed motion, thus necessitating Plaintiff bring this motion. Despite Plaintiff having a right as a matter of course to amend at this juncture, Plaintiff will still address each proposed amendment as if Plaintiff was required to seek leave of the Court.

When considering a motion to amend, a Court will consider several factors in making its determination: "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision." *Head*, 870 F.2d at 1123 (internal citations omitted).

Here, Plaintiff seeks to add a count (IV) and a party (Robert Gordon). Plaintiff will address the merits of each proposed amendment in turn.

Plaintiff first seeks to add a count for EMTALA Preemption. The 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). The EMTALA requires the stabilization of a patient with such a condition, meaning “to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility[.]” § 1395dd(e)(3)(A). Further, “Transfer”—another statutory requirement—includes moving the patient to an outside facility or discharging him. § 1395dd(e)(4). And finally, the EMTALA has a statutory provision specifically addressing preemption, which effectively provides a plaintiff a private cause of action if a defendant’s application of any state law “directly conflicts with a requirement of this section.” 42 U.S.C. § 1395dd(f).

Along with the EMTALA statutory preemption provision, pursuant to Article VI of the United States Constitution (“Supremacy Clause”), “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,

any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

“A plaintiff who seeks injunctive relief from state regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983). When a state law impugns on federal rights (i.e. protections under EMTALA), federal courts have the authority to issue an injunction and/or enjoin the application of the state law. *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378, 1384 (2015).

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 gives rise to a preemption analysis under both EMTALA’s preemption provision and the Supremacy Clause. Beaumont’s reliance on § 333.1033 imputes that it need not consider if Plaintiff has an “emergency medical condition” pursuant to Section 1395dd(e). Put another way, according to

Defendant's logic Titus is not entitled to EMTALA protections as a patient of Beaumont because Beaumont has unconstitutionally declared him dead. This is a clear-cut case of conflict of state and federal law giving rise to preemption. This is not to say that Michigan's Determination of Death Act and EMTALA are at odds generally. Quite oppositely, Beaumont could have acted in a way which would not have triggered this analysis. But Beaumont's steadfast reliance on MCL § 333.1033—inaction given the state law provides the impetus for Beaumont's refusal to comply with EMTALA—the Determination of Death Act is directly at odds with EMTALA and its statutory requirements. This conflict and Beaumont's inability to comply with a federal law due to its adherence to a state law triggers a finding of preemption. Again, not general preemption; but preemption as applied to Beaumont in this context.

Here, there has been no undue undelay in asserting this amendment. In fact, Plaintiff has moved expediently to seek this amendment based on arguments Defendant Beaumont has made in the past three weeks. Similarly, because Beaumont has undeniably relied on its unconstitutional determination of "death" to preclude lawful requirements it has towards Titus under EMTALA, there is no question this preemption claim is not futile. Whether Beaumont is a "state actor"—an issue Plaintiff's amendment to include proposed Defendant Gordon addresses—



is irrelevant to this inquiry as Beaumont's reliance on this state law has impacted its ability to comply with its statutory duties pursuant to EMTALA.

Next Plaintiff seeks to amend to add Robert Gordon, the Director of Michigan Department of Health and Human Services ("HHS"), as a Defendant. Defendant Gordon will be added as a Defendant to Counts II-IV (Constitutional challenges to MCL § 333.1033). Proposed Defendant Gordon, as the head of HHS, has the authority to both enforce MCL § 333.1033 and issue death certificates as the Director of HHS. Plaintiff proposes to add Defendant Gordon pursuant to the *Ex Parte Young* doctrine in the event that this Court determines Beaumont is not a "state actor" for purposes of Plaintiff's constitutional challenges to MCL § 333.1033.

The *Ex Parte Young* doctrine allows for the filing of suit against state officers seeking declaratory judgment and prospective injunctive relief "to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act." 209 U.S. at 157. This premise arises out of the principle that "because an unconstitutional legislative enactment is 'void,' a state official who enforces that law 'comes into conflict with the superior authority of [the] Constitution.'" *Va. Office*, 563 at 254 (internal quotations omitted). Not only does any function assigned by the Health code, including MCL § 333.1033, "vest" with Defendant Gordon pursuant to MCL § 333.2205, but the Health Department also issues death certificates, which follows

from the unconstitutional finding that Titus is “dead.” Accordingly, if Beaumont is determined not to be a state actor, Defendant Gordon is the proper party to challenge the Constitutionality of MCL 333.1033 as his department will record the erroneous death certificate filed by Beaumont with the State of Michigan.

Plaintiff affirmatively states that Beaumont has acted under “color of the law” and is thus a state actor for purposes of this analysis. However, to preserve these constitutional claims, Defendant Robert Gordon is assuredly the proper party if Beaumont is not. Whether Beaumont or Defendant Gordon, the decision to “declare death” undeniably triggers due process protections. Titus has a legitimate interest in continuing to live and/or being declared dead and his mother has a fundamental right to make decisions concerning the care, custody, and control of her children. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Because of these rights and the inherent involvement of the State in depriving them, constitutional due process protections are triggered here.

In terms of the merits of these constitutional challenges and the addition of Defendant Gordon, the Fourteenth Amendment has substantive and procedural components. The substantive component “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Likewise, the procedural component of the due process clause generally protects against arbitrary deprivations

by ensuring safeguards are in place. See *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979) (in addressing state law allowing for the institutionalization of a child for mental health reasons, the Supreme Court held that due process required “some kind of inquiry should be made by a “neutral factfinder” to determine whether the statutory requirements for admission are satisfied”). Further, the due process clause requires a person to be informed as to what a “state law commands or forbids.” *Lanzetta v. N.J.*, 306 U.S. 451, 453 (1939). In other words, procedural due process requires the unconstitutionality of a law that is “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. Gen Const. Co.*, 269 U.S. 385, 391 (1926).

Just as Plaintiff’s proposed claim, there is no undue undelay and Defendant will not suffer any prejudice if Defendant Gordon is included. In fact, Plaintiff is the only party who will be prejudiced if the amendment is denied—i.e. it could potentially amount to Beaumont ceasing treatment and Titus’ ultimate death. The whole purpose of Fed. R. Civ. P. 15(a)(1)(B) is to permit a plaintiff to amend in response to a party’s 12(B)(6) motion so as to remedy defects that may give rise to a preliminary dismissal on the pleadings. Plaintiff seeking to add the “state actor” tasked with enforcing this unconstitutional state law is exactly that; potentially remedying Defendant Beaumont’s state action argument. Likewise, Plaintiff has been diligent in seeking this amendment as Defendant Beaumont filed its 12(b)(6)

motion on November 27, 2019. Accordingly, justice requires permitting Plaintiff to amend to include this new Defendant in the event Plaintiff's constitutional challenges necessitates a state actor.

### **III. Conclusions and Relief Requested**

Leave to amend a complaint should be liberally granted. This is particularly true when sought in response to a defendant's 12(b)(6) motion. In this instance, Plaintiff's leave to amend to add an EMTALA Preemption count and Defendant Robert Gordon as a Defendant/state actor has been performed in good faith. Further, the amendment will preclude the potential dismissal of substantive, material disputes arising out of a vague, unconstitutional state law. Defendant Beaumont's argument for 12(b)(6) seeks dismissal on a technicality; i.e. state action. There is no question that Plaintiff has a right and valid claim challenging the constitutionality of MCL § 333.1033. Thus, any dispute as to the proper party should not be the ultimate reason this Court dismisses these claims and permits Beaumont to pull the plug. At the least, Plaintiff's amended complaint will preserve the status quo as the parties litigate the constitutionality of Beaumont's underlying, unconstitutional reliance on the death act. As such, the proposed amended complaint (Exhibit 1) is neither futile nor will prejudice Defendant.

**WHEREFORE**, for the reasons set forth above, Plaintiff respectfully requests that this Honorable Court enter an Order granting the present Motion and permitting Plaintiff to file her Second Amended Verified Complaint.

Respectfully submitted,

/s/ James B. Rasor

James B. Rasor (P43476)

Attorney for Plaintiff

**THE RASOR LAW FIRM, PLLC**

201 East Fourth Street

Royal Oak, Michigan 48067

(248) 543-9000

[jbr@rasorlawfirm.com](mailto:jbr@rasorlawfirm.com)

Dated: December 9, 2019

#### **CERTIFICATE OF SERVICE**

I hereby certify that on **December 9, 2019**, I electronically filed the foregoing paper with the clerk of the Court using the ECF System which will send notification of such filing to all ECF participants, as well as via U S. first class mail to all non-ECF participants, in this matter.

#### **PROOF OF SERVICE**

The undersigned certified that a copy of the foregoing instrument was delivered to each of the attorneys of record and/or unrepresented and/or interested parties on **December 9, 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

