STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

SCOTT SCHARA, Individually, and as the Administrator of the Estate of Grace Schara

Case No. 23-CV-345

Plaintiff,

and

WISCONSIN DEPARTMENT OF HEALTH SERVICES

Involuntary Plaintiff,

v.

ASCENSION HEALTH,
ASCENSION NE WISCONSIN, INC.
GAVIN SHOKAR, M.D.,
DAVID BECK, M.D.,
DANIEL LEONARD, D.O.,
KARL BAUM, M.D.,
RAMANA MARADA, M.D.,
HOLLEE MCINNIS, R.N.,
ALISON BARKHOLTZ, R.N.
WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND, and
JOHN DOES 1,2,3,4 – MEDICAL PROVIDERS

Defendants.

PLAINTIFF SCOTT SCHARA'S COMBINED BRIEF IN OPPOSITION TO MOTIONS FOR DISMISSAL

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Plaintiff Scott Schara responds in opposition to Defendant Ramana Marada ("Defendant Marada"), M.D.'s August 17, 2023 Motion for Partial Dismissal and supporting brief (the "Marada Brief") and Daniel Leonard, D.O.'s August 25, 2023 Motion to Dismiss and supporting brief (the "Leonard Brief").

I. FACTS

Ms. Grace Schara died on October 13, 2021 at 7:27 p.m. at St. Elizabeth's Hospital[1] from acute respiratory failure with hypoxemia. Am. Complaint, Doc. # 65, ¶ 77. Grace's lungs shut down because she was given a lethal cocktail of sedative drugs, including morphine, Ativan, and Precedex, to which she did not consent. Id. at ¶¶ 59-68, 103.

Grace's contact with the defendants began on October 6, 2021 when Grace presented to Ascension Richmond Street Urgent Care in Appleton, Wisconsin. Id. at ¶ 24. At this point, Grace's oxygen saturation was in the high eighties. Id. at ¶ 25. Based on an elevated D-dimer level, Urgent Care physicians recommended that Grace transfer to an emergency room for a CT scan to rule out a pulmonary embolism (clot in the lung). Id. at ¶ 26. Grace was transferred via ambulance to Ascension St. Elizabeth Hospital Emergency Room in Appleton, Wisconsin. Id. at ¶ 27.

Physicians and nurses, including the natural person defendants, treated Grace at St. Elizabeth.

On October 7, 2021, at approximately 00:12, Grace was admitted to St. Elizabeth Hospital as an inpatient. Id. at ¶ 32. That evening, Defendant David Beck, M.D. ordered Ativan and Precedex without consent. Id. at ¶¶ 34-36, 103. That same day, Defendant Marada ordered Precedex at a rate of 1.0 microgram per kilogram of body weight per hour (or simply a rate of 1.0)

[1] St. Elizabeth's Hospital is owned and operated by Defendant Ascension Health and/or Defendant Ascension NE Wisconsin, Inc.

without obtaining consent. Id. at ¶¶ 36, 103. Grace became oversedated at the 1.0 rate, which was reduced to 0.7. Id. at ¶ 38.[2] [3]

On October 10, 2021, at approximately 08:00, Defendant Alison Barkholtz, R.N., and one or more of the other defendants had Grace's father, Plaintiff Scott Schara, removed from the hospital by a guard. Id. at ¶ 41. As a basis, one or more of the defendants cited Scott turning off non-essential bedside alarms. *Id*. In fact, Scott was trained to turn off the alarms by a nurse at the hospital and did so because the alarms were disturbing Grace's sleep. *Id*. Scott Schara's removal left Grace completely without family present or advocacy for about thirty (30) hours. Id. at ¶ 42.

The Schara family and Ascension Health eventually agreed to allow Grace's sister, Jessica, into Grace's room. *Id*. at ¶¶ 44-48. Jessica was allowed into the room at approximately 15:30 on October 11, 2021. *Id*. at ¶ 49. In contravention of the agreement, the hospital forced Jessica to leave the room at 19:00 that evening. *Id*. at ¶ 50. Jessica was finally allowed to return at 11:00 the following day. *Id*. at ¶ 51. The hospital's violation of its patient visitation agreement with the Scharas left Grace without family present or advocacy for an additional seventeen (17) hours.

During the period of no advocacy (and no consent), the defendants increased the Precedex rate six times. *Id*. at ¶ 52. All administration of Precedex was done without consent. *Id*. at ¶ 103.

On October 13, 2021, at approximately 10:13, Defendant Shokar called Scott and Cindy Schara. *Id*. at ¶ 54. The discussion included statements that Grace was doing well that day and overnight. *Id*. Defendant Shokar stated that he wanted to get Grace out of bed to watch TV and to place a feeding tube to improve nutrition. *Id*. Defendant Shokar and Scott also discussed Scott and

[2] The Precedex titration rate was adjusted several times over the next approximately 18 hours, when it was temporarily turned off at 16:11 on October 8, 2021. Id. at ¶ 39.
[3] That this rate led to oversedation is particularly important because, infra, the defendants later gave Grace an even higher dose of Precedex.

Cindy's intentions for Grace if there was a need to respond to a severe decline in Grace's condition. *Id*. at ¶ 55. Scott and Cindy stated that Grace would not be intubated (DNI). *Id*. At no time did Scott or Cindy, as Grace's medical power of attorney, consent to or discuss a Do Not Resuscitate order (DNR) with Defendant Shokar or any other physician. *Id*. at ¶ 56. At no time did Scott or Cindy, as Grace's medical power of attorney, consent to or discuss palliative care or comfort care with Defendant Shokar or any other physician. *Id*. at ¶ 57.

While Defendant Shokar was on the phone with Scott, Defendant Holly McInnis, R.N., without consent, increased the titration rate of Precedex to the highest allowable dose of 1.4. *Id*. at ¶¶ 58, 103. At 10:56, simultaneous with the end of the call with Scott and Cindy, Defendant Shokar entered a blanket DNR on Grace's chart despite not having obtained consent, informed or otherwise. *Id*. at ¶ 57.

With the illegal DNR in place, the defendants began to pile more drugs into Grace's body. *Id*. at ¶¶ 58-64. At 11:25, Holly McInnis, R.N. administered 0.5 mg of Ativan under the original October 7, 2021 PRNQ6H order. *Id*. at ¶ 62. Before this dose, Grace had not received Ativan since October 7, 2021. *Id*. At 17:46, Holly McInnis, R.N. administered another 0.5 mg of Ativan under the original October 7, 2021 PRNQ6H order. *Id*. at ¶ 63. At 17:49, only three minutes later, Holly McInnis, R.N. administered another 0.5 mg of Ativan. *Id*. at ¶ 64. There was no valid order for this third administration of Ativan. *Id*. at ¶ 65. At 18:15, Holly McInnis, R.N. administered 2.0 mg of morphine under Dr. Shokar's order. *Id*. at ¶ 66. Meanwhile, Grace was still receiving the maximum dose of Precedex. *Id*. at ¶ 68. All of these drugs were given without consent, informed or otherwise. *Id*. at ¶ 103.

At approximately 18:45, Jessica felt Grace's temperature dropping and repeatedly summoned nurses to diagnose the issue. *Id*. at ¶ 69. The nursing staff refused to assist. *Id*. No

doctor or nurse came into Grace's room after morphine was administered. *Id*. at ¶ 70. Defendant McInnis told Jessica from outside the room that Grace's drop in body temperature was normal and to cover her with a blanket. *Id*.

At approximately 7:20 p.m., Grace's heart rate crashed, and her respiration slowed due to the sedative drugs. *Id*. at ¶ 71. Jessica immediately initiated a FaceTime call inside Grace's room with Scott and Cindy. *Id*. at ¶ 72. The entire family begged the medical staff to save Grace. *Id*. The staff responded from the hallway that Grace was coded Do Not Resuscitate. *Id*. Scott and Cindy screamed, "She's not DNR, save our daughter," and demanded the staff resuscitate her. *Id*. Before this moment, the family did not know that Defendant Shokar had put a DNR on Grace's chart. *Id*.

Medical staff refused to resuscitate Grace or give her the morphine reversal drug (Naloxone). *Id*. at ¶ 73. A guard was stationed by the doorway. *Id*.

Seven minutes later, Grace died from hypotension and bradycardia caused by the improper, reckless, and unauthorized administration of palliative care while the medical staff stood by and did nothing. *Id*. at ¶ 77.

II. LAW AND ARGUMENT

A. Plaintiff States Valid Claims for Relief.

Wisconsin Statute § 802.02 sets forth the pleading requirements. The statute directs that a pleading must only provide a "short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief…" and a "demand for judgment for the relief the pleader seeks." Wis. Stat. § 802.02.

A motion to dismiss for failure to state a claim tests the complaint's legal sufficiency. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 676, 849 N.W.2d 693, 698. In analyzing the motions, the Court should accept all allegations in Plaintiff's Amended

Complaint as true. *Id*. The complaint is only insufficient if it appears to a certainty that no relief can be granted under any set of facts which Plaintiff could prove. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis.2d 365, 375, 563 N.W.2d 585, 589 (App. 1997).

As further stated herein, Plaintiff adequately pled his case, and Defendants cannot meet their burden for dismissal.

B. It is Possible for a Medical Professional to Commit a Battery Against a Patient.

The "Amended Complaint is now the operative pleading." Marada Brief at p. 2. Plaintiff pled five claims in his Amended Complaint:

1. Wrongful Death
2. Medical Negligence
3. Violation of Informed Consent
4. Battery
5. Declaratory Judgment

Defendants attempt to subsume Claim 4 (Battery) under Claim 3 (Violation of Informed Consent) so that the Battery claim will fall under Wis. Stats. Ch. 655. This issue is important because Wis. Stats. Ch. 655 limits Plaintiff's damages and does not allow punitive damages.

Defendants are incorrect. The core of this issue lies in what it means to 1) fail to obtain informed consent; compared to what it means to 2) commit a civil battery. Both claims involve consent, but they are not the same.

Wis. Stat. § 448.30 defines the informed consent as a legal duty:

> Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments. The reasonable physician standard is the standard for informing a patient under this section. The reasonable physician standard requires disclosure only of information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances.

As shown by the plain words of the statute, informed consent, under Wisconsin law, is about information and disclosure by a treating physician. In other words, before initiating treatment, the physician must inform the patient about the benefits and risks of that treatment. The idea is that if a patient agrees to a treatment but is not informed of the benefits and risks, that agreement is not real (informed) consent. *See Hageny v. Bodensteiner*, 316 Wis.2d 240, 2009 WI App 10, 762 N.W.2d 452, ¶ 8 ("The purpose of the informed consent discussion is to provide the patient the risks and benefits of available treatment options ... a reasonable patient would need to know in order to make an informed decision about their treatment").

Battery, on the other hand, is intentional unpermitted (nonconsensual) contact that causes damage. *McCluskey v. Steinhorst*, 45 Wis. 2d 350, 357-58, 173 N.W.2d 148, 151-52 (1970). A plaintiff is not required to prove a hostile intent or desire to harm. *Id*. at 357. If a person acts intending to cause contact and the contact is unpermitted, it follows that the intent is also unlawful. *Id*.

To be sure, Defendants failed to obtain informed consent in many ways, and Plaintiff pled as such. However, Defendants' actions go far beyond failing to provide information and disclosure. The plaintiff alleged multiple Defendants administered end-of-life drugs without consent, informed or otherwise. This is a battery.

Imagine a physician who fails to fully inform a patient about the risks of a leg amputation, but the patient does agree to have his leg amputated. This violates the duty to obtain informed consent under Wis. Stat.§ 448.30. Now imagine a physician who amputates a patient's leg without obtaining consent or telling the patient or the patient's family what he is doing (and, in this case, removing the patient's power of attorney and parent from the hospital first). That is a battery.

Since 1922, a medical procedure performed without a patient's consent has been a battery. *Throne v. Wandell*, 176 Wis. 97, 186 N.W. 146, 147 (1922), *Paulsen v. Gundersen*, 218 Wis. 578, 260 N.W. 448, 451 (1935), *Suskey v. Davidoff*, 2 Wis. 2d 503, 505, 87 N.W.2d 306, 308 (1958).

The only relevant authority presented by either defendant is a citation to footnote 14 of *Bubb v. Brusky*, 2009 WI 91[Marada Brief at p. 5; Leonard Brief at p. 8], which partially quotes *Hannemann v. Boyson*, 2005 WI 94, ¶ 35, 282 Wis. 2d 664, 686, 698 N.W.2d 714, 725, which quotes *Trogun v. Fruchtman*, 58 Wis. 2d 569, 600, 207 N.W.2d 297, 313 (1973).

The original quote from *Trogun*:

> For these reasons, we conclude it is preferable to affirmatively recognize a legal duty, bottomed upon a negligence theory of liability, in cases wherein it is alleged the patient-plaintiff was not informed adequately of the ramifications of a course of treatment.

Trogun v. Fruchtman, 58 Wis. 2d 569, 600, 207 N.W.2d 297, 313 (1973) (emphasis added).

The original quote from *Hannemann*:

> In *Trogun*, this court determined that it was no longer appropriate to treat the failure to obtain informed consent as an assault and battery and instead "recognize[d] a legal duty, bottomed upon a negligence theory of liability, in cases wherein it is alleged the patient-plaintiff was not informed adequately of the ramifications of a course of treatment."

Hannemann v. Boyson, 2005 WI 94, ¶ 35, 282 Wis. 2d 664, 686, 698 N.W.2d 714, 725 quoting *Trogun v. Fruchtman*, 58 Wis. 2d 569, 600, 207 N.W.2d 297, 313 (1973) (emphasis added).

Defendants purposely omitted the underlined (above) portion of the *Trogun*/*Hannemann* quote. See Marada Brief at p. 5; Leonard Brief at p. 8. The reason for Defendants' omission is clear: This portion of the quote supports Plaintiff's argument because it differentiates informed consent (lack of information) from battery (lack of permission).

Plaintiff alleged much more than that Grace was "not informed adequately of the ramifications of a course of treatment." He alleged that there was no consent given whatsoever—a battery.

Trogun actually supports Plaintiff's argument. In *Trogun*, the Supreme Court considered the existing rule of medical assault (battery). *Trogun* at 592. Specifically, the Court considered whether a physician's failure to advise a patient of the potential adverse effects of a drug should continue to be considered assault. *Id*. In other words, *Trogun* was about informed consent, where a doctor failed to inform a patient about the risks of a procedure to which the patient consented. The concept in *Trogun* differs from this case because the defendants injected Grace Schara with morphine, Ativan, and Precedex without consent (informed or otherwise), and the drugs directly and proximately caused Grace's death. See Am. Compl., generally.

Defendant Marada would be correct in asserting *Trogun* limited claims where a doctor did not inform a patient of the risks of a procedure the patient consented to. But *Trogun* did not limit doctors' liability from intentional torts where they performed procedures on patients without consent. *Trogun* makes this clear:

> While the unauthorized removal of an organ **yet fits the concept of battery**, the failure to adequately advise of potential negative ramifications of a treatment does not.

Trogun at 599 (emphasis added). This excerpt from *Trogan* is omitted from the defendants' briefs. The purpose of omission is obvious.

Here, while no organ was removed, Plaintiff alleged intentional contact- administering powerful drugs- without consent. These drugs killed Grace Schara. This is far beyond a failure to inform a patient of the risks of a treatment. It is a failure to obtain any consent whatsoever.

Despite Defendants' assertions, a claim is not subject to chapter 655 simply because the alleged bad action is related to healthcare. In *McEvoy by Finn v. Group Health Co-op. of Eau Claire*, 213 Wis.2d 507, 523, 570 N.W.2d 397, 404 (1997), the plaintiff filed a bad faith action against Group Health Co-op ("GHC"). *McEvoy* at ¶ 1. GHC was a health maintenance organization. *Id*. at ¶ 1. GHC offered health care services to network participants through staff physicians operating GHC clinics in Wisconsin. *Id*. at ¶ 2. The suit followed GHC's denial of psychological care to the plaintiff. *Id*.

Like Defendant Marada, GHC moved to dismiss the bad faith claim because (it argued) its patient-related decisions were subject to the medical malpractice statute, which, according to GHC, prevented bad faith (intentional) tort claims. *Id*. at ¶ 35 ("GHC would have us read ch. 655 as controlling all suits brought against HMOs, whether for a medical mistake or for disputed coverage decisions."). The Supreme Court of Wisconsin disagreed: "an examination of the language of chapter 655 reveals that the legislature did not intend to go beyond regulating claims for medical malpractice." *Id.* (emphasis added). The Supreme Court affirmed the decision to deny summary judgment to GHC on the bad faith claim, recognizing that "cases will exist where a particular [action] or omission may constitute both bad faith and malpractice." *Id*. at ¶ 23 (emphasis added).

The *McEvoy* ruling applies to more than bad faith claims. It shows Chapter 655 does not subsume all other claims just because the actions that gave rise to the claim(s) were taken by medical staff at a medical facility. The Supreme Court of Wisconsin:

> We conclude that ch. 655 applies only to **negligent** medical acts or decisions made in the course of rendering professional medical care. To hold otherwise would exceed the bounds of the chapter and would grant seeming immunity from non-ch. 655 suits to those with a medical degree.

Id. at ¶ 37 (emphasis added). Plaintiff alleges negligence, but also intentional battery. Chapter 655 does not control all of Plaintiff's claims.

Defendants want this Court to rule that a patient with Down syndrome can be intentionally restrained [Am. Compl. at ¶ 53], intentionally deprived of advocacy [*id*. at ¶¶ 42, 51], and intentionally administered deadly sedatives [*id*. at ¶¶ 58-77], all without consent, and these actions are simple medical negligence.

Subsuming Battery under Chapter 655 in such a way would make hospitals walled gardens where any intentional misconduct would be treated as simple negligence. Indeed, Defendant Marada envisions a world where "there is no common law claim for the failure of a health care provider to obtain consent that falls outside of Ch. 655, Stats." Marada Brief at p. 6. In this world, an unethical or financially motivated physician may administer deadly drugs without consent for malign purposes, including making room for new patients or adhering to Diagnosis-Related Group (DRG)[4] payment guidelines and standards. The physician's liability would be limited under Ch. 655, and even that liability would be subject to insurance coverage. Plaintiff did not plead this type of malfeasance, but these possibilities and motivations exist in the universe of a battery claim.

Despite Defendants' assertions, Ch. 655, Wis. Stats. only applies to medical malpractice claims and derivative claims of the same. Wis. Stat. § 655.007 ("any patient… [having a claim] for injury or death on account of malpractice is subject to this chapter." (emphasis added); *McEvoy by Finn v. Group Health Co-op. of Eau Claire*, 213 Wis. 2d 507, 570 N.W.2d 397, ¶ 35 (1997) ("an

[4] The Diagnosis-Related Group (DRG) system is a method of classifying hospital cases into groups. It was originally developed as a research tool but has been adopted as a basis for payment and resource allocation in many healthcare systems, most notably the United States' Medicare system. Under DRG-based payment systems, hospitals are reimbursed a fixed amount for each case they treat, based on the DRG category to which that case is assigned. Under this system, a provider is incentivized to discharge a patient within a certain timeframe to avoid treatment cost overruns.

examination of the language of chapter 655 reveals that the legislature did not intend to go beyond regulating claims for medical malpractice."). The allegations in this case support battery.

C. Plaintiff Pled a Case Supporting Punitive Damages.

The State of Wisconsin adheres to the doctrine of punitive damages. *Jones v. Fisher*, 42 Wis. 2d 209, 218, 166 N.W.2d 175, 180 (1969). "For the award of punitive damages, it is sufficient that there be a showing of wanton, willful, or reckless disregard of the plaintiff's rights." *Id*. at 219 quoting 6 C.J.S. Assault and Battery s. 55b(3), p. 904.

These damages are "not dependent on the underlying cause of action, but rather, upon proof of the requisite 'outrageous' conduct…[and] punitive damages are in the nature of a remedy and should not be confused with the concept of a cause of action." *Brown v. Maxey*, 124 Wis. 2d 426, 431, 369 N.W.2d 677, 680 (1985).

Punitive damages can be awarded where a malicious motive activates the defendant's transgressions. *Jones v. Fisher*, 42 Wis. 2d 209, 218, 166 N.W.2d 175, 180 (1969). However, "punitive damages need not be limited where there is no proof of malice." *Id*.

Defendants' citation to *Lund v. Kokemoore*, 195 Wis. 2d 727, 537 N.W.2d 21 (App. 1995) does not apply. Marada Brief at p. 6; Leonard Brief at p. 9. In *Lund*, the parties agreed the action was "controlled by the [medical malpractice] statutory scheme set forth in ch. 655…." *Lund* at footnote 1. Plaintiff makes no such stipulation and argues the opposite.

As such, Defendants' argument against punitive damages is misplaced. Ch. 655 may control the malpractice negligence part of this case, but it does not control the intentional tort of battery. Defendants do not present any law that suggests that punitive damages are unavailable in a battery case because battery is just the type of intentional and harmful conduct that warrants punitive damages.

The allegations of the Amended Complaint support punitive damages regarding Plaintiff's battery claim. After an unauthorized DNR was placed on record and her power of attorney removed from the premises, Grace was injected with morphine, Ativan, and Precedex without her or her power of attorney's knowledge or consent. Am. Compl. at ¶¶ 58-77.[5] These actions killed her. As alleged, this conduct was willful, wanton, or reckless, supporting punitive damages under *Jones v. Fisher*, *supra*.

D. Plaintiff's Request for Declaratory Judgment Should Not Be Dismissed.

i. Plaintiff's Request for Declaratory Judgment Is Not Moot.

Both moving defendants argue that Plaintiff's request for declaratory judgment is moot because Grace Schara passed away. Marada Brief at p. 9; Leonard Brief p. 7.

Specifically, Defendant Marada argues that Plaintiff's request is moot because it is "purely academic." Marada Brief at p. 7. The nonconsensual administration of drugs, and the DNR's legality and the procedures that resulted in the DNR are anything but purely academic. In the Amended Complaint, Plaintiff alleged specific facts regarding the care and death of his daughter. The central component of this case are the drugs and the DNR order placed on Grace's chart. Plaintiff requests a determination from this Court about the actual events that led to Grace's death including nonconsensual administration of drugs and a DNR that was used to justify not reviving Grace from a drug overdose. His request is not academic. Unsurprisingly, Defendant Marada provides no other support for his contention.

In turn, Defendant Leonard argues that the claim is moot simply because Grace passed away. Except for arguing under ripeness doctrine, Defendant Leonard does not provide any legal

[5] Plaintiff also alleges that Grace was put into restraints without consent [Complaint at ¶ 53]; however, because Grace's death was caused by oversedation, the administration of drugs is the main focus of plaintiff's battery claim.

support for his assertion of mootness. Claims are not moot simply because the subject of such claims passes away. Specifically, a request for declaratory judgment is not moot until "its resolution will have no practical effect on the underlying controversy." *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 673, 766 N.W.2d 559, 568. The declaratory judgment requested in this case will substantially affect the underlying controversy. It is not moot.

ii. Plaintiff's Request for Declaratory Judgment is Ripe.

Both defendants, directly or indirectly, argue that Plaintiff's request for declaratory judgment is not ripe because Grace Schara is deceased. Marada Brief at p. 8; Leonard Brief at pp. 7-8.

Defendant Marada argues, "as a result of Grace's death, the validity and enforceability of the DNR is too hypothetical, abstract or remote to justify a declaratory ruling under Wis. Stat. § 806.04." Marada Brief at p. 8.

It is unclear how or why Defendant Marada believes the subject issues are hypothetical, abstract, or remote, and Defendant Marada does not explain. Taking the allegations of the Amended Complaint as true, Grace's family never discussed a DNR order with any defendant. Am. Compl. at ¶ 56. Despite this, a DNR order was put in Grace's medical chart. *Id*. at ¶ 59. This occurred while Grace was administered a deadly cocktail of sedative drugs. *Id*. at ¶¶ 58-68. These drugs killed Grace. *Id*. at ¶ 77. The DNR was used to justify letting her die. *Id*. at ¶ 75. Now, Plaintiff would like a determination of whether this DNR and administration of drugs were illegal and/or violated hospital policies. *Id*. at ¶¶ 113-120.

The legality of the administering powerful drugs without consent, and the DNR and the procedures relevant to its initiation, are germane to this case. Contrary to Defendant Marada's assertion, after Grace's death, the validity of the DNR became more important because one or more

defendants used it to justify ignoring the acute respiratory failure that led to Grace's death. Whether the DNR was valid is important to the claims in this case.

There is nothing hypothetical, abstract, or remote about Plaintiff's request for declaratory judgment.

In turn, Defendant Leonard argues that "Mr. Scott Schara is not the proper party to assert a claim for declaratory relief as he lacks the legally protectable interest in the controversy."[6] Leonard Brief at p. 8. Defendant Leonard ignores that Scott Schara is a party to this case both in his individual capacity *and as Administrator of the Estate of Grace Schara*. The Estate of Grace Schara absolutely possesses a legally protectible interest in the controversy of whether "the DNR order in question, and the non-consensual injection of certain drugs into Grace's body, was unlawful and/or in violation the hospital's policies and procedures." Am. Compl at ¶ 120. The DNR, the nonconsensual administration of drugs, and the other malfeasance alleged in Plaintiff's Amended Complaint caused Grace's death and led to the creation of her estate. The Estate of Grace Schara clearly has a protectable interest in the controversy regarding the events that caused Grace Schara's death. Defendant Leonard's position is untenable.

Defendant Leonard briefly argues that "a declaratory judgment action is for resolving controversies prior to the time that a wrong has been threatened or committed." Leonard Brief at p. 8, partially quoting *Lister v. Bd. of Regents of Univ. Wis. Sys.*, 72 Wis. 2d 282, 303, 307, 240 N.W. 2d 610 (1976) (internal quotations omitted).

[6] Defendant Leonard appears to conflate standing, mootness, and ripeness in his section arguing under mootness doctrine. *See* Leonard Brief at pp. 7-8. *Compare Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 15, 376 Wis. 2d 479, 495, 899 N.W.2d 706, 714 (A party's standing to bring a declaratory judgment action is generally analyzed under declaratory judgment requirement that a party seeking relief have a legally protectable interest in the controversy).

Defendant Leonard's citation to *Lister* is unpersuasive. In *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976), the Supreme Court of Wisconsin explicitly recognized that "there may be occasions when a declaration of rights may be appropriate in aid of a future action for damages…" *Lister* at 308, 625; *see Lynch v. Conta*, 71 Wis. 2d 662, 674, 239 N.W.2d 313 (court approved of declaratory relief based upon past acts and future acts). Regarding a declaratory judgment action, "Ripeness merely requires that the facts be sufficiently developed to allow a conclusive adjudication." *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, 376 Wis. 2d 479, 899 N.W.2d 706, n. 10 citing *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis.2d 365, 749 N.W.2d 211. In this case, the facts are undoubtedly sufficiently developed for ripeness.

Finally, declaratory judgment may indeed help streamline complicated issues in this case. But it is more than just a component of Plaintiff's damages claims. Plaintiff seeks a declaration from a court of law that it was unlawful to administer dangerous drugs and a DNR order without consent. The importance of this declaration is self-evident and stands for much more than whether defendants breached the standard of care. *See Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, 255 Wis. 2d 447, 478, 649 N.W.2d 626, n. 16 ("If one or more of the claims for relief are properly justiciable through a declaratory judgment, the action should proceed.")

iii. A Motion to Dismiss is an Improper Vehicle to Dismiss Claims Involving Disputed Facts.

Defendant Marada separately argues that this Court should dismiss Plaintiff's request for declaratory judgment because the "defendants dispute the plaintiffs' allegations, and those disputes will be resolved by a jury in the trial of plaintiffs' substantive claims." Motion at p. 7.

First, the argument itself is improper at this phase of the case. While the defendants denied Plaintiff's allegations in their *Answer*, there is no evidence before the Court to form the basis of a disputed fact. The parties have not conducted substantial discovery. Therefore, Defendant Marada

is premature when he asserts that this Court could not possibly make a ruling as a matter of law after discovery concludes.

Second, Defendant Marada ignores Wisconsin law when he argues that disputed facts derail this Court's ability to reach a judicial declaration. As acknowledged by Defendant Marada, Wis. Stat. § 806.04 outlines a request for declaratory judgment in this state. Marada Brief at p. 7. Wis. Stat. § 806.04(9) specifically contemplates declaratory judgment in the face of disputed facts:

> Jury trial. When a proceeding under this section involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

This means that this Court is free to issue declaratory judgment at summary judgment, if the requisite facts are undisputed, or after the jury establishes the facts of this case. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 387, 749 N.W.2d 211, 222 ("The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment.")

E. Plaintiff Did Not Assert a Claim for Negligent Infliction of Emotional Distress.

Defendants argue that "Plaintiff's claim of negligent infliction of emotional distress is not permitted by Wisconsin law…" Leonard Brief at p. 7; see Marada Brief at p. 10. Plaintiff did not assert a negligent infliction of emotional distress claim in his First Amended Complaint.

Defendants take issue with ¶ 85.c. of the First Amended Complaint- a subparagraph under Plaintiff's wrongful death claim. This subparagraph is part of a delineation of damages under Plaintiff's wrongful death claim. Specifically, this subparagraph asserts "Emotional pain and mental anguish suffered by Scott Schara and other statutory beneficiaries because of Grace's wrongful death…" Am. Compl. at ¶ 85.c.

Defendants incorrectly conflate Plaintiff's wrongful death claim with a claim for negligent infliction of emotional distress. The two claims are separate. Plaintiff witnessing his daughter's death is not an element or prerequisite of his (and other family members') wrongful death claim. The wrongful death claim was brought separately in connection with each of Plaintiff's claims, including Plaintiff's claim for battery, which is not controlled by chapter 655. *See* Wis. Stat. § 895.04(4) ("…[a judgment may be awarded in the amount of] $350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased…"). Plaintiff did not plead a negligent infliction of emotional distress claim, therefore there is no such claim to dismiss.

F. Plaintiff Asserted a Valid Medical Negligence Claim.

Defendant Leonard argues separately that Plaintiff did not assert a valid medical negligence claim. Leonard Brief at p. 4. Specifically, Defendant Leonard argues that Plaintiff failed to plead Dr. Leonard's role in Grace's death with sufficient specificity. This is not true.

In paragraph 17 of the Amended Complaint, Defendant Leonard was made part of a named group referred to therein as the "Professional Defendants." The improper actions of the Professional Defendants, including Defendant Leonard, are set forth across the entire Amended Complaint. *See* Am. Compl. at ¶¶ 37, 41, 43, 52, 87, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 109, 111, 112, 115, 116, 117.

The State of Wisconsin did away with "ultimate fact" pleading in 1974 when the legislature passed Wis. Stat. § 802.02. *Alonge v. Rodriquez*, 89 Wis. 2d 544, 552, 279 N.W.2d 207, 212 (1979).[7] Wis. Stat. § 802.02 lays out the general rules of pleading in the State of Wisconsin. Under

[7] *See* Wis. Stat. § 802.02 Judicial Council Committee's Note 1974: "Sub. (1) does away with the "ultimate fact" pleading rule of s. 263.03 and adopts the pleading philosophy of the Federal Rules of Civil Procedure. Under that philosophy the complaint must still show a justifiable claim for relief; it must still contain a statement of the general factual circumstances in support of the claim

Wisconsin law, a pleading that sets forth a claim for relief shall contain: "A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." Wis. Stat. § 802.02. "A complaint must be given a liberal construction in favor of stating a cause of action." *Alonge* at 552, 212. The law does not require a pleading plaintiff to provide a detailed timeline of each actor's every involvement in the relevant events.

Plaintiff's Amended Complaint satisfied Wisconsin pleading requirements. Despite this, Defendant Leonard asserts that:

> For the Plaintiff to succeed in his medical negligence claim, the jury must find a causal connection between the Defendant's alleged negligence and the Plaintiff's claimed injuries or damages. This is impossible to achieve when there is no alleged negligent act or omission as the subject of this lawsuit, or any claimed injury or damages.

Leonard Brief at p. 5. First, a plain reading of the Amended Complaint reveals plenty of alleged negligent actions, omissions, and claims of injury and damages by the Professional Defendants, including Defendant Leonard. Second, it is inappropriate at this juncture to consider whether a jury will be able to find a causal connection between the damages and Defendant Leonard's actions and omissions. The parties have not yet engaged in substantial discovery. Defendant Leonard knows his involvement in Grace's medical treatment and mistreatment. In his Amended Complaint, Plaintiff identified "the transaction or occurrence or series of transactions or occurrences out of which the claim arises" in accordance with Wis. Stat. § 802.02, *supra*. As such, Plaintiff satisfied the pleading requirements under Wisconsin law.

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presented. However, in general, it may be said that less particularity is required under this statute than is required under s. 263.03. Hence, the motion to make more definite will be less frequently granted. Special rules of pleading for real property actions are contained in ss. 841.02, 842.05, 843.03 and 844.16." (emphasis added).

CONCLUSION

For these reasons, Plaintiff Scott Schara, individually and as the administrator of the Estate of Grace Schara, respectfully requests that this Court **DENY** Defendant Ramana Marada, M.D.'s Motion for Partial Dismissal and Defendant Daniel Leonard, D.O's Motion for Dismissal.

Dated and electronically signed this 23rd day of October, 2023,

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