No. 04-1436

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREA SMITH, Personal Representative of the
Estate of Kelly Snider Smith, Deceased,

Plaintiff-Appellee,

v.
BOTSFORD GENERAL HOSPITAL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan

**BRIEF AMICUS CURIAE OF PUBLIC CITIZEN
IN SUPPORT OF APPELLEE ANDREA SMITH**

Allison M. Zieve
David Arkush
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

*Attorneys for Amicus Curiae
Public Citizen*

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Amicus Curiae Public Citizen makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **No.**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

__________________________ October 27, 2004

(Signature of Counsel) (Date)

TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. Michigan's Medical Malpractice Liability Cap Does Not Apply to EMTALA Claims. 2

B. EMTALA's Legislative History Does Not Support Applying the Michigan Cap. 7

C. Policy Arguments Cannot Alter EMTALA's Plain Meaning. 10

CONCLUSION 12

RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

CASES **Page**

Brooks v. Maryland General Hospital, Inc.,
996 F.2d 708 (4th Cir. 1993) 6, 7

Bryant v. Oakpointe Villa Nursing Centre,
471 Mich. 411, 684 N.W.2d 864 (2004) 4, 5, 7

Cannon v. McKen,
296 Md. 27, 36, 459 A.2d 196 (1983) 6, 7

Cleland v. Bronson Health Care Group, Inc.,
917 F.2d 266 (6th Cir. 1990) 3

Erie Railroad Company v. Tompkins,
304 U.S. 64 (1938) 7

Ewing v. California,
538 U.S. 11 (2003) 10

Good Samaritan Hospital v. Shalala,
508 U.S. 402 (1993) 7, 8

Martinez v. Hospital Menonita de Cayey,
32 Fed. Appx. 591, 591 (1st Cir. 2002) 4

Power v. Arlington Hospital Association,
42 F.3d 851 (4th Cir. 1994) 6, 7

Reid v. Indianapolis Osteopathic Medical Hospital,
709 F. Supp. 853 (S.D. Ind. 1989) 8

St. Anthony Hospital v. Department of Health & Human Services,
309 F.3d 680 (10th Cir. 2002) 3

Summers v. Baptist Medical Center Arkadelphia,

91 F.3d 1132 (8th Cir. 1996) 4

Thornton v. Southwest Detroit Hospital,
895 F.2d 1131 (6th Cir. 1990) 2, 4

STATUTORY MATERIALS

42 U.S.C. § 1395dd(a)-(i) 1, 3

H. Rep. No. 99-241 (Part 3) (1986), *reprinted in* 1986 U.S.C.C.A.N. 42 8

1991 Colo. Rev. Stat. § 13-21-102.5(3)(a) 9

Alaska Stat. § 09.17-010 9

Idaho Code § 6-1603 9

Kan. Stat. Ann. § 60-19a01(b) 9

Me. Rev. Stat. Ann. tit. 18-A § 2-804(b) 9

Md. Code Ann., Courts & Judicial Proceedings § 11-108 9

Mich. Comp. Laws Ann. § 600.1483 . . . . 3, 11, 12

Or. Rev. Stat. § 31.710 9

Wyo. Stat. Ann. § 1-4-101 9

MISCELLANEOUS

Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* at 7, Jan. 8, 2004, *available at* www.cbo.gov/ftpdocs/49xx/doc4968/01-08-MedicalMalpractice.pdf 10

General Accounting Office, *Medical Malpractice: Implication of Rising Premiums on Access to Health Care*, Aug. 2003, *available at* www.citizen.org/documents/GAO_ReportAugust2003.pdf 10, 11

Stephanie Mencimer, *False Alarm*, Washington Monthly, Oct. 2004, *available at* www.washingtonmonthly.com/features/2004/0410.mencimer.html 9

Public Citizen, *The Costs of Medical Malpractice to Patients and Consumers Versus the Cost to Doctors*, *available at* www.citizen.org/documents/cost_medmal_to_patients_chart.pdf 11

Public Citizen, *Insurance Companies and Their Lobbyists Admit It: Caps on Damages Won't Lower Insurance Premiums*, Feb. 2003, *available at* www.citizen.org/documents/cost_medmal_to_patients_chart.pdf 11

Public Citizen, *Medical Malpractice Briefing Book: Challenging the Misleading Claims of the Doctors' Lobby*, Aug. 2004, *available at* www.citizen.org/documents/MedMalBriefingBook08-09-04.pdf 11

INTEREST OF AMICUS CURIAE

Public Citizen is a non-profit consumer advocacy organization with approximately 150,000 members nationwide. Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues, including consumer access to the courts and accountability in the medical profession. Public Citizen works to educate the public about health care, among other issues, through reports and publications, such as its monthly *Health Letter*. Public Citizen has also published a report called *Questionable Hospitals*, which identifies hospitals that have violated the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd(a)-(i) ("EMTALA"). *See* Public Citizen Health Research Group, *Questionable Hospitals*, *available at* www.questionablehospitals.org.

Public Citizen submits this amicus brief solely to address the issue whether Michigan's medical malpractice cap limits recovery under EMTALA. This brief argues that it does not. Public Citizen's motion for leave to file accompanies this brief.

SUMMARY OF ARGUMENT

Under EMTALA, an emergency patient injured by a hospital's refusal to diagnose and stabilize her condition may "obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate." 42 U.S.C. § 1395dd(d)(2)(A). Under Michigan law,

damages for personal injury are not generally capped. Although Michigan law limits damages in medical malpractice actions, the cap applies only to claims alleging that a member of the medical profession breached the professional standard of care. EMTALA actions do not allege breach of a professional standard of care. Therefore, the Michigan cap does not limit Ms. Smith's recovery under EMTALA.

In light of EMTALA's unambiguous language, this Court need not reach the legislative history argument advanced by appellant Botsford General Hospital ("Botsford"). In any event, EMTALA's legislative history reveals nothing beyond what its text states—that the statute incorporates state personal injury law.

Finally, this Court should reject Botsford's invitation to read damages caps into EMTALA to forestall an alleged liability crisis. Botsford's policy arguments on this point are irrelevant and lack merit. More importantly, this Court should not venture beyond EMTALA's plain language to amend the statute based on policy concerns properly addressed by legislative bodies.

ARGUMENT

A. Michigan's Medical Malpractice Liability Cap Does Not Apply to EMTALA Claims.

Congress enacted EMTALA to ensure that hospitals offer equal screening and basic care to all emergency patients. *See, e.g.*, *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir. 1990). The statute provides, in relevant part:

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate.

42 U.S.C. § 1395dd(d)(2)(A).

In a stabilization claim such as Ms. Smith's, the question is not whether the hospital met a professional standard of care, but whether it stabilized all known emergency medical conditions. If the hospital did not, then it is liable. On the other hand, even if a hospital commits malpractice by failing to diagnose a patient's emergency medical condition, it will not be held liable under EMTALA if it stabilizes known conditions, *see, e.g.*, *St. Anthony Hosp. v. Dep't of Health & Human Servs.*, 309 F.3d 680, 705-06 (10th Cir. 2002), and if its diagnostic failure did not result from discrimination against the patient. *See Cleland v. Bronson Health Care Group, Inc.*,

917 F.2d 266, 271-72 (6th Cir. 1990). In this sense, EMTALA imposes strict liability. *See St. Anthony Hosp.*, 309 F.3d at 705-06.

1. Because EMTALA incorporates state personal injury law, this case involves a dispute over Michigan law. Michigan does not limit personal injury damages generally, but it does limit damages in actions alleging "medical malpractice." Mich. Comp. Laws Ann. § 600.1483. As defined by the Michigan Supreme Court, "medical malpractice" means "the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science." *Bryant v. Oakpointe Villa Nursing Centre*, 471 Mich. 411, 424, 684 N.W.2d 864, 872 (2004).

EMTALA claims easily fall outside the scope of medical malpractice claims under Michigan law because they do not allege breach of a standard of care. *Thornton*, 895 F.2d at 1133 ("A cause of action under [EMTALA] is not analogous to a state medical malpractice claim[.]"); *see also Summers v. Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1137 (8th Cir. 1996) (en banc) ("So far as we can tell, every court that has considered EMTALA has disclaimed any notion that it creates a general federal cause of action for medical malpractice in emergency rooms. . . .

[C]laims of misdiagnosis or inadequate treatment are left to the state malpractice arena."). Indeed, medical malpractice allegations do not even state a claim under EMTALA. *See, e.g.*, *Martinez v. Hospital Menonita de Cayey*, 32 Fed. Appx. 591, 591 (1st Cir. 2002) (unpublished) (affirming dismissal of EMTALA complaint because it "stated only a garden variety malpractice claim"). Thus, an EMTALA claim is not a medical malpractice claim, and Michigan's cap on damages in medical malpractice suits is inapplicable here.

2. The fact that Ms. Smith filed both EMTALA and medical malpractice actions arising out of the same conduct does not transform her EMTALA claim into a malpractice claim. One set of facts will often give rise to distinct causes of action. In state-law cases alleging medical malpractice and other claims arising from the same factual circumstances, the Michigan courts parse each cause of action and apply medical malpractice limitations only to claims that meet the definition of medical malpractice. *See, e.g.*, *Bryant*, 684 N.W.2d at 872-76 (distinguishing between medical malpractice claims and ordinary negligence claims for statute of limitations purposes).

Similarly, the presence of medical expert testimony in this case does not transform Ms. Smith's EMTALA claim into a medical malpractice claim. It is true that Michigan courts hold that, in determining whether a particular claim alleges medical malpractice, courts should inquire whether "the reasonableness of the health

care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience" (ordinary negligence claims) or whether the jury can evaluate reasonableness "only after having been presented the standards of care pertaining to the medical issue . . . by experts" (medical malpractice claims). *Id.* at 872. However, that framework concerns whether experts are required to explain the proper standard of care. Again, standard of care is not an issue under EMTALA.

3. Botsford relies heavily on *Power v. Arlington Hospital Association*, 42 F.3d 851 (4th Cir. 1994), in which the Fourth Circuit applied Virginia's medical malpractice cap to an EMTALA claim. However, the Fourth Circuit has made clear that, for EMTALA purposes, Virginia's cap is distinct from caps like Michigan's. *Id.* at 861. Although the relevant Virginia statute is labeled a "medical malpractice" cap, it actually limits virtually *all* tort liability for healthcare providers, extending even to intentional torts such as battery and sexual misconduct. *Id.* Based on the cap's broad scope, the Fourth Circuit in *Power* held that the Virginia law reaches claims wholly distinct from traditional medical malpractice, such as EMTALA claims. *Id.*

At the same time, the Fourth Circuit explicitly distinguished Virginia's law from narrower malpractice caps. Prior to *Power*, the Fourth Circuit had held that Maryland's medical malpractice limitation did *not* apply to EMTALA claims. Like Michigan's statute, the Maryland law applies only to "traditional malpractice claims

arising from the breach by a professional of his duty to comply with a standard of care." *Brooks v. Maryland General Hosp., Inc.*, 996 F.2d 708, 712 (4th Cir. 1993) (citing *Cannon v. McKen*, 296 Md. 27, 36, 459 A.2d 196, 201 (1983)).[1] In *Power*, the Fourth Circuit distinguished between the Maryland and Virginia laws for EMTALA purposes, confirming that traditional medical malpractice caps do not limit EMTALA recovery. *Power*, 42 F.3d at 861 (distinguishing *Brooks*). Accordingly, Botsford's reliance on *Power* is misplaced.

In a series of opinions that carefully distinguish medical malpractice claims from other claims that happen to arise in the context of health care, the Michigan courts, like Maryland's, have rejected an expansive interpretation of their state's medical malpractice cap. *See, e.g.*, *Bryant*, 684 N.W.2d at 870-72. Applying the Michigan medical malpractice cap to limit EMTALA recovery would require expanding it beyond the Michigan Supreme Court's own construction, contravening this Court's duty to respect that state's authority as the final arbiter of its own law. *See Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

B. EMTALA's Legislative History Does Not Support Applying the Michigan Cap.

---

[1]Maryland's medical malpractice limitation is a set of special procedural requirements rather than a damages cap. *See Brooks*, 996 F.2d at 711-12. Maryland courts have construed it to apply to the same class of cases to which Michigan courts have construed the Michigan cap to apply. *See Cannon*, 459 A.2d at 201.

Because EMTALA plainly incorporates state personal injury law, Michigan does not cap personal injury damages generally, and the Michigan medical malpractice cap applies only to traditional medical malpractice claims, this Court need go no further to resolve the issue presented here. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993). Nonetheless, Botsford argues that EMTALA's legislative history supports capping damages in this case. Appellant Br. at 38-39. Botsford is wrong.

EMTALA's legislative history offers no insight into this issue. The House Committee Report includes one sentence expressing concern over liability, *see* H. Rep. No. 99-241 (Part 3), at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 42, 727, but there is no evidence that Congress acted on that concern. *See Reid v. Indianapolis Osteopathic Med. Hosp.*, 709 F. Supp. 853, 855 (S.D. Ind. 1989) ("The legislative history of section 1395dd is *completely silent* on the question of whether the phrase 'those damages available for personal injury under the law of the state' should be read as including state limitations on medical malpractice damages.") (emphasis added). Although *Reid* nonetheless concluded that § 1395dd(d)(2)(A) would be meaningless without the incorporation of medical malpractice caps, *id.*, that conclusion was incorrect. When Congress provided a private cause of action for EMTALA violations, it had either to create new law governing damages or to incorporate existing federal or state law. Section 1395dd(d)(2)(A) embodies a decision to incorporate state law.

Therefore, it therefore serves a purpose even in EMTALA actions brought in states with no damages caps.

Botsford argues that because several states were considering medical malpractice damages caps during the year in which EMTALA passed, Congress must have intended to incorporate those caps. Appellant Br. at 38-39. Yet the legislative record provides no evidence that Congress intended to do so. Furthermore, Botsford fails to note that, at the time of EMTALA's passage, many states were considering general liability caps. *See* Stephanie Mencimer, *False Alarm*, Washington Monthly, Oct. 2004, *available at* www.washingtonmonthly.com/features2004/0410.mencimer .html (in 1986, forty-four states considered some 1,600 tort reform measures, and twenty-one states enacted some kind of reform).[2] If Congress had been aware of states' consideration of medical malpractice caps, then surely it would have been aware of their consideration of broader caps as well. Therefore, even assuming Congress enacted § 1395dd(d)(2)(A) with caps in mind, Botsford's argument begs the

---

[2]To date, several states have enacted general liability caps. *See* Alaska Stat. § 09.17-010 (1986) (cap on non-economic damages for personal injury); 1991 Colo. Rev. Stat. § 13-21-102.5(3)(a) (cap on non-economic damages for "any civil action other than medical malpractice actions"); Idaho Code § 6-1603 (1991) ($400,000 cap on non-economic damages for personal injury); Kan. Stat. Ann. § 60-19a01(b) (1990) ($250,000 cap applicable in any personal injury action); Me. Rev. Stat. Ann. tit. 18-A § 2-804(b) (1979) (cap on non-economic damages in wrongful death claim); Md. Code Ann., Courts & Judicial Proceedings § 11-108 (1989) (non-economic cap in personal injury action); Or. Rev. Stat. § 31.710 (1987) (cap on damages for "bodily injury"); Wyo. Stat. Ann. § 1-4-101 (1977) (limit on damages in wrongful death claim).

question of which caps Congress intended to incorporate. The clearest evidence on that point is the language Congress used, which leaves no doubt that it incorporated general personal injury law, not medical malpractice law.

C. Policy Arguments Cannot Alter EMTALA's Plain Meaning.

Botsford attempts to sway this Court by arguing that doctors and hospitals will be forced to close their doors to emergency patients if the Court declines to fashion liability caps under EMTALA. Appellant Br. at 38-39. To begin with, if Botsford disagrees with the law as enacted, its recourse is to Congress or the Michigan Legislature, not to this Court. *See Ewing v. California*, 538 U.S. 11, 24-25 (2003) ("[O]ur tradition of deferring to state legislatures in making and implementing . . . important policy decisions is longstanding.").

In any event, like many industries, medical providers and insurers have long campaigned to limit their liability. Here, Botsford invokes the medical industry's general arguments about a medical malpractice liability crisis but does not identify a specific problem with EMTALA liability, the subject of this litigation. Moreover, reports by the Congressional Budget Office and the General Accounting Office illustrate that claims regarding a medical liability crisis are often misleading and overblown. *See* Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* at 7, Jan. 8, 2004, *available at* www.cbo.gov/ftpdocs/49xx/doc4968/01-08-MedicalMalpractice.pdf; General Accounting Office, *Medical Malpractice:*

Implication of Rising Premiums on Access to Health Care, Aug. 2003, *available at* www.citizen.org/documents/GAO_ReportAugust2003.pdf.[3]

EMTALA has been in existence for eighteen years without liability caps in Michigan or most other states. Botsford cites no example of a Michigan hospital ceasing to provide emergency care as a result of EMTALA liability. Should such a situation arise, the Michigan Legislature or the United States Congress can remedy the problem. This Court, however, is bound by the language of EMTALA and Mich. Comp. Laws Ann. § 600.1483.

---

[3]*See also* Public Citizen, *The Costs of Medical Malpractice to Patients and Consumers Versus the Cost to Doctors*, *available at* www.citizen.org/documents/cost_medmal_to_patients_chart.pdf; Public Citizen, *Insurance Companies and Their Lobbyists Admit It: Caps on Damages Won't Lower Insurance Premiums*, Feb. 2003, *available at* www.citizen.org/documents/cost_medmal_to_patients_chart.pdf; Public Citizen, *Medical Malpractice Briefing Book: Challenging the Misleading Claims of the Doctors' Lobby*, Aug. 2004, *available at* www.citizen.org/documents/MedMalBriefingBook08-09-04.pdf.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's ruling that Mich. Comp. Laws Ann. § 600.1483 does not limit EMTALA recovery.

Respectfully Submitted,

____

Allison M. Zieve (DC Bar No. 424786)
David Arkush (IN Bar No. 2470349)
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Attorneys for Amicus Curiae Public Citizen

RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Amicus Curiae Public Citizen complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure and Sixth Circuit Rules) contains 2,434 words.

____

Allison M. Zieve

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 27th day of October, 2004, he caused to be served by U.S. mail, first-class postage prepaid, two copies each of the foregoing Brief for Amicus Curiae Public Citizen on the following:

Robert G. Kamenec
Ernest R. Bazzana
Kristen M. Tolan
Plunkett & Cooney, P.C.
38505 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304

Gregory W. Moore
Hall Render Killian Heath
& Lyman, PLLC
201 W. Big Beaver Road
Columbia Center, Suite 315
Troy, MI 48084

Donald M. Fulkerson
P.O. Box 85395
Westland, MI 48185

____
David Arkush