IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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S.K., individually and as special
administrator to the estate of R.A.,
M.D., J.L. and J.P.,

OPINION and ORDER

Plaintiffs,

12-cv-567-bbc

v.

UNIVERSITY OF WISCONSIN HOSPITAL
AND CLINICS AUTHORITY, JASON PARIKH,
PAUL A. RUTECKI and CONTINENTAL CASUALTY COMPANY,

Defendants.

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Plaintiffs S.K., M.D., J.L. and J.P. are the wife and children of R.A., who died in October 2010 from complications related to HIV/AIDS. The individual plaintiffs and R.A.'s estate are suing defendant University of Wisconsin Hospital and Clinics Authority and two physicians who work there for disclosing R.A.'s condition without permission, in violation of their constitutional right to privacy, Wis. Stat. § 895.50 (regarding invasions of privacy), Wis. Stat. § 252.15 (regarding disclosure of HIV test results) and state common law.

Various motions are before the court, but the main ones are defendants' motions to dismiss plaintiffs' amended complaint. Dkt. ##32 and 33. (Defendants filed these motions after plaintiffs amended their complaint in response to defendants' motions to dismiss the original complaint, dkt. ##5 and 15. I am denying these earlier motions as moot.) Also

before the court are plaintiffs' motion for leave to file a surreply brief, dkt. #41, which I am granting as unopposed, and motions by both sides for leave to file materials outside the pleadings, dkt. ##4 and 26, which I am denying as unnecessary because none of the materials would make any difference to the outcome of defendants' motions to dismiss.

I am denying defendants' motions to dismiss with respect to most of the estate's claims because accepting defendants' arguments would require drawing inferences against the estate, which I may not do in the context of a motion to dismiss. Although the evidence may show later that defendants had legitimate reasons for making the disclosures they did, resolution of those questions will have to wait for summary judgment or trial. The one exception is the estate's claim against defendant Rutecki under Wis. Stat. § 252.15. Because that statute is about HIV test results and plaintiffs do not allege that Rutecki disclosed such results, I am dismissing that claim. In addition, I conclude that plaintiffs have forfeited any claim for injunctive relief by failing to respond to defendants' argument on that issue.

I am dismissing all of the claims brought by R.A.'s family members. Although plaintiffs may have their own privacy interests with respect to R.A.'s medical information, their claims fail because they allege that defendants disclosed this information to other family members only. It is one thing to say that family members have the right to keep information about the family private from the general public, but it is asking courts to draw too fine a line to say that a third party has a right to keep one family member's personal information private from other family members. That sort of line drawing is best left to the legislature.

Plaintiffs fairly allege the following facts in their amended complaint.

ALLEGATIONS OF FACT

On September 4, 2010, R.A. was admitted to the University of Wisconsin Hospital for medical treatment related to expressive aphasia and right-sided weakness. An MRI revealed that R.A. had white matter disease. As part of "an exhaustive work up," R.A. was tested for HIV/AIDS and the results were positive.

On September 8, defendant Jason Parikh, a physician employed by the hospital, entered R.A.'s hospital room. Plaintiffs S.K. (R.A.'s wife) and M.D. (R.A.'s son) were visiting R.A., who was sleeping at the time. Rather than wait for R.A. to awaken, defendant Parikh disclosed to S.K. and M.D. that R.A.'s HIV/AIDS test was positive, though R.A. had not authorized Parikh to do so. S.K. and M.D. were "stunned and devastated" by the news.

Later, when R.A. woke up, M.D. told him about the diagnosis and asked him how he could have contracted the disease. R.A. became "distraught," but he confessed that he had had sexual affairs with other men. S.K. and M.D. had not been aware of this information and R.A. had not intended to disclose it to them.

After this incident, S.K. and M.D. spoke to hospital staff about maintaining strict confidentiality about R.A.'s medical information. (Plaintiffs do not identify these staff members.) Staff assured S.K. and M.D. that "strict confidentiality would be maintained."

On September 13, defendant Paul Rutecki, a state physician employed at the hospital, entered R.A.'s hospital room with a resident and medical students. One of R.A.'s sisters was

visiting R.A. at the time. In her presence, defendant Ruetecki discussed R.A.'s condition with the resident and students, stating that R.A. had "PML." R.A. had not authorized his health care providers to discuss his condition in the presence of his sister.

R.A.'s sister conducted an internet search of PML and discovered that it was commonly associated with HIV/AIDS. She asked her brother whether he had HIV/AIDS and, if so, how he contracted it. R.A. again became "distraught" but confessed that he had the disease and he likely contracted it as a result of same-sex sexual affairs. R.A.'s condition "was subsequently disclosed, either directly or indirectly" to plaintiff J.L. (R.A's daughter), plaintiff J.P. (R.A.'s other son), R.A.'s thirteen siblings and his mother.

Plaintiffs S.K. and M.D. spoke to hospital staff again in an attempt to prevent further disclosures from occurring. Staff promised to include a request for confidentiality in every clinical note in R.A.'s medical chart and to require a password before giving out any medical information about R.A. However, S.K. had to remind staff to ask for the password and she and M.D. received confidential information about R.A.'s condition at least once without giving the password.

On October 8, 2010, R.A. died at the hospital. Plaintiff S.K. is fearful that R.A.'s condition and infidelity will become known in her community.

OPINION

A. Estate's Claims

1. Constitutional right to privacy

As an initial matter, I note that defendants refer repeatedly to both the Health Insurance Portability and Accountability Act, Pub. L. No. 104–191,110 Stat.1936 (1996), and state law in the context of their argument about plaintiffs' constitutional claims. Obviously, neither a state or federal statute can limit or expand the scope of a federal constitutional right. Although those statutes may embody important interests, it is those interests and not the precise contours of a particular statute that inform the constitutional analysis. The parties should keep this is mind when crafting their arguments in this case.

a. Defendant Parikh

Plaintiffs contend that defendant Parikh violated R.A.'s constitutional right to privacy when he disclosed to S.K. and M.D. that R.A. had a diagnosis of HIV/AIDS. Defendants say that Parikh acted reasonably because R.A.'s ability to communicate was limited, so disclosure to family members was appropriate. In addition, defendants rely on a document filed with their motion showing that S.K. had authorized the HIV test. Under those circumstances, defendants say, Parikh did not violate R.A.'s constitutional rights or, if he did, he is entitled to qualified immunity. For the purpose of their motion, defendants assume that R.A.'s constitutional claim survived his death and that defendant Parikh acted under color of law, so I will do the same.

The Supreme Court has never resolved the question whether individuals have a constitutional right to privacy with respect to personal information, but it has discussed the issue in several cases. In Whalen v. Roe, 429 U.S. 589 (1977), the Court considered a claim that privacy rights were violated by a New York statute requiring that prescriptions for certain "dangerous" drugs be forwarded to the state department of health. In analyzing the claim, the Court assumed that there was a constitutional right "in avoiding disclosure of personal matters." Id. at 599. However, the Court concluded that the interest in preventing illegitimate uses of prescription drugs was an important one and that there were adequate safeguards for protecting privacy rights built into the statute. Id. at 601-04.

In Nixon v. Administrator of General Services, 433 U.S. 425, 455 (1977), the Court rejected a claim by a former President that his privacy rights were violated by a federal statute that allowed certain presidential materials to be used in judicial proceedings. Citing Whalen, the Court acknowledged that even public officials "are not wholly without constitutionally protected privacy rights in matters of personal life." Id. at 458. Again, however, the Court concluded that there was an important public interest in preserving the materials and there were extensive procedures in place to insure that personal information was not disseminated beyond the archivists screening the materials. Id. at 464.

Most recently, in National Aeronautics and Space Administration v. Nelson, 131 S. Ct. 746, 759 (2011), the Court again assumed without deciding that the Constitution includes a right to informational privacy. In that case, the question was whether NASA could ask applicants for employment about "treatment or counseling" for illegal drug use.

The Court concluded that it could because the question was "a reasonable, employment-related inquiry." Id. at 760. It rejected a view that the government must show that the information was "necessary" or the least restrictive means of furthering its interests. Id.

The Court of Appeals for the Seventh Circuit has been more explicit: "[we] have interpreted Whalen to recognize a constitutional right to the privacy of medical, sexual, financial, and perhaps other categories of highly personal information—information that most people are reluctant to disclose to strangers—and have held that the right is defeasible only upon proof of a strong public interest in access to or dissemination of the information." Wolfe v. Schaefer, 619 F.3d 782, 785 (7th Cir. 2010) (citing Denius v. Dunlap, 209 F.3d 944, 955-58 (7th Cir. 2000), and Anderson v. Romero, 72 F.3d 518, 521-22 (7th Cir.1995)). See also Schaill v. Tippecanoe County School Corp., 864 F.2d 1309, 1322 n.19 (7th Cir. 1989) (recognizing "a substantial privacy interest in the confidentiality of medical information"); Pesce v. J. Sterling Morton High School, 830 F.2d 789, 795-98 (7th Cir.1987) ("The Federal Constitution does, of course, protect certain rights of privacy including a right of confidentiality in certain types of information"). This court too has held in multiple cases that a constitutional right to informational privacy exists. Simpson v. Greenwood, No. 06-C-612-C (W.D. Wis. Nov. 22, 2006); Woods v. White, 689 F. Supp. 874, 876 (W.D. Wis. 1988).

In light of this law, defendants' motion to dismiss is premature as it relates to defendant Parikh. Although the standard of review in privacy cases has not been defined

precisely, the Supreme Court and court of appeals seem to employ a straightforward approach in which they balance the need for privacy against the government's interest in disclosure. In this case, defendants do not dispute that R.A. had a strong interest in keeping his HIV/AIDS diagnosis private. Woods, 689 F. Supp. at 876 ("Given the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity and intravenous drug use, it is difficult to argue that information about this disease is not information of the most personal kind, or that an individual would not have an interest in protecting against the dissemination of such information."); Simpson, slip op. at 7 ("Although nearly twenty years has passed since I decided Woods, HIV and AIDS remain among the most stigmatizing diseases from which one can suffer."). Further, defendants do not develop an argument that R.A.'s privacy interest existed with respect to the general public only and not to members of his family. Rather, the dispute seems to be whether Parikh had good reasons for the disclosure.

Defendants' primary argument is that Parikh's disclosure was justified because R.A. was "unable to communicate," so Parikh needed the help of family members to convey the results. (Defendants do not argue that Parikh was justified in disclosing the test results to S.K. because of the possibility that she needed to be tested as well, so I do not consider that question.) The problem with defendants' argument is that it is not supported by the allegations in the amended complaint. Although plaintiffs allege that R.A. had aphasia, which the parties agree affects speech, plaintiffs do not allege that R.A. was unable to talk. Rather, they allege that R.A. continued to have conversations with his family and was able

to answer and understand questions after he was admitted to the hospital. Am. Cpt. ¶17, ¶ 21, dkt. #25 (Plaintiffs have filed a motion for the court to consider certain medical records, which they say show that R.A. was still able to communicate at the time of Parikh's disclosure. However, I am denying this motion because it was not necessary for plaintiffs to support their allegations with evidence at the pleading stage.) Although R.A. was sleeping at the time Parikh disclosed R.A.'s diagnosis, defendants do not suggest that the slight inconvenience to Parikh of having to wait until R.A. woke up would outweigh R.A.'s privacy interest.

If the facts show later show that defendant Parikh reasonably believed that R.A. was too impaired to understand the diagnosis or discuss his treatment with staff, he may be entitled to judgment in his favor. Even if he believed this *negligently*, it is likely that this would be enough to defeat this claim. United States v. Norwood, 602 F.3d 830, 835 (7th Cir. 2010) ("[O]nly intentional conduct violates the Constitution."). However, at this stage, I could not make that determination without drawing inferences against plaintiffs, which I am not permitted to do. Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010).

Alternatively, defendants seek leave to file a document, which they say shows that S.K. authorized the HIV test. Dkt. #8-1. If she authorized the test, defendants believe it follows that she would be entitled to know the results. This is another premature argument. To begin with, the general rule is that a court may not consider documents submitted by the defendants in support of a motion under Fed. R. Civ. P. 12(b)(6) unless the complaint refers to those documents. Santana v. Cook County Board of Review, 679 F.3d 614, 619 (7th

Cir. 2012). Although defendants acknowledge that rule (and rely on it to oppose a similar motion filed by plaintiffs), the portions of the complaint they cite do not mention any authorization by S.K. A review of the remainder of the complaint (and amended complaint) does not reveal any reference to this document either.

Even if I assume that I may consider the document, it would not require dismissal of this claim. For one thing, the document does not identify why S.K. authorized the test rather than R.A. According to plaintiffs, the authorization is simply another example of hospital staff's failing to obtain R.A.'s permission without good reason. If Parikh did not obtain the authorization himself, but relied reasonably (or even negligently) on it to believe that S.K. was acting on R.A.'s behalf, that might be enough to enter judgment in Parikh's favor. However, neither side discusses whether Parikh relied on the authorization or was even aware of it, so it is not dispositive.

Any conclusion about qualified immunity would be premature as well. Defendants are correct that the precise contours of the constitutional right to informational privacy are not well established, but this does not mean that all claims for money damages against individuals must fail. It *is* well established in this circuit that public officials must have some justification for disclosing personal information and plaintiffs allege that Parikh had no justification in this case. When general principles are sufficient to prove a violation, plaintiffs are not required to identify cases with similar facts to overcome a qualified immunity defense. Michael C. v. Gresbach, 526 F.3d 1008, 1017 (7th Cir. 2008) ("Officials can still be on notice that their conduct violates established law even in novel

factual circumstances."). Again, the undisputed facts at summary judgment or trial may show that Parikh is entitled to immunity, but I cannot make that determination at this stage.

b. Defendant Rutecki

Plaintiffs contend that defendant Rutecki violated R.A.'s right to privacy when he disclosed R.A.'s PML in the presence of R.A.'s sister. Rutecki argues that plaintiffs cannot sue him under § 1983 because he did not act "under color of law" within the meaning of that statute. In addition, he says that any disclosure he made was reasonable under the circumstances.

1) under color of law

A person may not be sued under § 1983 unless he acted "under color of law," which the Supreme Court has equated with "state action." United States v. Price, 383 U.S. 787, 794 (1966). In this case, defendant Rutecki says that he did not act under color of law because "[t]here is no allegation in the complaint that any state agency brought R.A. to the hospital or compelled him to obtain treatment from a specific physician" or that "anything gave Dr. Rutecki the authority to treat R.A. other than his status as a licensed physician and his privileges at the hospital." Dft. Rutecki's Br., dkt. #16, at 7.

Defendant Rutecki has misstated the standard for determining whether he acted under color of law; a plaintiff does not have to show that he was "compelled" to obtain services from the defendant. Rather, "a public employee acts under color of state law while

acting in his official capacity or while exercising his responsibilities pursuant to state law." West v. Atkins, 487 U.S. 42, 49-50 (1988). In this case, plaintiffs allege that Rutecki was employed by the state and was providing services as part of his duties for that position, which is sufficient for the purpose of pleading. Malak v. Associated Physicians, Inc., 784 F.2d 277, 281 (7th Cir. 1986) (defendant's "conduct as an official of a public hospital constitutes state action").

Defendant Rutecki cites several cases, but none of them support his view of the law. He cites Polk County v. Dodson, 454 U.S. 312 (1981), for the proposition that a state employee's actions "are not necessarily done under color of state law" even when they "are within the scope of his duties," Dft. Ryrecki's Br., dkt. #16, at 4, but Polk County was a case about public defenders, not state physicians. In concluding that public defenders do not act under color of law, the Court emphasized their adversarial relationship with the state. Polk County, 454 U.S. at 323 (public defender "is not acting on behalf of the State; he is the State's adversary"). See also West, 487 U.S. at 52 (Polk County "turned on the particular professional obligation of the criminal defense attorney to be an adversary of the State"). That important fact is obviously missing from this case. Further, the Court has emphasized the narrow scope of the holding in Polk County, stating that it "is the only case in which th[e] Court has determined that a person who is employed by the State and who is sued under § 1983 for abusing his position in the performance of his assigned tasks was not acting under color of state law." West, 487 U.S. at 50.

In West, 487 U.S. at 55, the Court did note that "[i]t is only those physicians

authorized by the State to whom the inmate may turn" in finding that a physician acted under color of law when he provided medical services to prisoners under a contract with the state. However, that was only one factor of many the Court found relevant; it did not hold that physicians act under color of law only when they are treating persons in custody. In addition, the defendant in that case was a contractor, not a state physician. Because he did not have a traditional employment relationship with the state, the Court found it necessary to look at other factors. This fact distinguishes the other two cases Rutecki cites as well. The defendant in Cunningham v. Southlake Center For Mental Health, Inc., 924 F.2d 106, 109 (7th Cir. 1991), was a private party; the defendant in Scott v. Ambani, 577 F.3d 642, 648-49 (6th Cir. 2009), was providing services at a private hospital. In this case, I must assume for the purpose of the motion to dismiss that Rutecki was a public employee providing services at a public hospital.

Defendant Rutecki argues that he was not acting under color of law because the plaintiffs do not allege that he had any "special powers" as a result of his position with the state, Dft.'s Br., dkt. #40, at 2, but it is not clear what Rutecki means by this. Obviously, it was because of his position as a state physician that Rutecki had the authority to treat plaintiff at the hospital. Although it may be true that a private doctor in a different setting would be able to make the same treatment decisions, the same would be true of a doctor at a prison. Rutecki's argument seems to be similar to the one rejected by the Court in West, that a doctor does not act under color of law when he is applying the standards of his profession rather than particular rules of the state. Id. at 51 ("The court [of appeals]

misread Polk County as establishing the general principle that professionals do not act under color of state law when they act in their professional capacities."). Accordingly, I cannot grant defendant Rutecki's motion on the ground that he was not acting under color of law.

2) merits

With respect to the merits, defendants say that Rutecki's disclosure was reasonable because he was discussing R.A.'s condition with medical students, something he was required to do under state law. Although I agree with defendants that the government has an important interest in teaching its students, plaintiffs are not challenging Rutecki's disclosure to the students, but to R.A.'s sister. Defendants do not provide any justification for speaking about R.A.'s condition in front of her, except to say that Rutecki was speaking in "technical" terms. In response, plaintiffs say that Rutecki used the acronym "PML," a condition that is commonly associated with HIV/AIDS. However, regardless whether PML is a "technical" term, plaintiffs allege that Rutecki was discussing R.A's medical information in front of a third party. Because the court of appeals has held that the right to privacy extends to medical information generally, plaintiffs' claim does not necessarily turn on whether a particular disclosure was about HIV/AIDS in particular. It may be that Rutecki had reason to believe that R.A.'s sister was familiar with R.A.'s condition, so discretion was not required. Again, however, I cannot make that determination from the allegations in the complaint, so dismissal of this claim would be premature.

3) Rutecki's responsibility for students

The parties briefly address the question whether defendant Rutecki may be held liable for any disclosure his students may have made to R.A.'s sister. I decline to consider this issue now because plaintiffs do not include any allegations in their amended complaint that his students *did* make any disclosures. If plaintiffs learn during discovery that it was one of Rutecki's students who initiated the discussion about PML, they may seek leave to amend their complaint. However, they should be aware that the general rule under § 1983 is that individuals may not be held liable for the conduct of others, even for those they supervise. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior."). Thus, plaintiffs cannot prevail on a claim that Rutecki violated R.A.'s constitutional rights simply because he is the supervisor of someone else who made an unlawful disclosure. Rather, "a supervisor may . . . be personally liable for the acts of his subordinates if he approves of the conduct and the basis for it. Supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." Backes v. Village of Peoria Heights, Illinois, 662 F.3d 866, 869-70 (7th Cir. 2011) (internal quotations, citations and alterations omitted). Any claim by plaintiffs under § 1983 that relies on the conduct of a subordinate must satisfy that standard.

c. University of Hospital and Clinics Authority

All parties assume that the standard for holding the hospital liable is the same as the one for municipalities, that is, plaintiffs must show that R.A.'s injuries were caused by a policy, practice or custom of the hospital. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 692 (1978). Defendants do not argue that the hospital is immune from liability under § 1983 on the ground that it is a state entity. Parker v. Franklin County Community School Corp., 667 F.3d 910, 926 (7th Cir. 2012) ("arms of the state" cannot be sued under § 1983 because they are not "persons" within the meaning of that statute). This may be because the Court of Appeals for the Seventh Circuit has held that the hospital is not an arm of the state for the purpose of sovereign immunity because it is funded privately and the state exercises little control over it. Takle v. University of Wisconsin Hospital and Clinics Authority, 402 F.3d 768 (7th Cir. 2005). This raises the question whether the hospital (and its employees) should be considered private and therefore outside the scope of § 1983. However, because all parties assume that the hospital should be treated as a municipal entity, I will do the same for the purpose of this opinion.

It is reasonable to infer from the allegations in the amended complaint that defendants Parikh and Rutecki were acting in accordance with the hospital's policies when they disclosed R.A.'s condition to S.K., M.D. and R.A.'s sister, particularly in light of the hospital's repeated assertions in its motion that the physicians did nothing wrong. Although plaintiffs do not allege that the hospital had policies expressly permitting the disclosures that occurred, that is not required. Rather, it is enough at this stage that plaintiffs have alleged

that any privacy policy the hospital had was so lacking that the hospital must have known that constitutional violations were likely. Woodward v. Correctional Medical Services of Illinois, Inc., 368 F.3d 917, 927 (7th Cir. 2004). Contrary to defendants' argument, plaintiffs do not have to show that defendants could have predicted how R.A. and his family reacted to the disclosures. That is an issue for damages, not liability.

Again, defendants do not deny in their briefs that Parikh and Rutecki were acting in accordance with hospital policies. Rather, they argue that the hospital cannot be held liable because Parikh and Rutecki acted reasonably or, at worst, negligently. Because I have rejected the arguments about the physicians as premature, I cannot rely on them as a basis to dismiss the claims against the hospital.

Although I am allowing the estate to proceed on a claim against the hospital, I pause to caution plaintiffs regarding their view that they may prove this claim with evidence that hospital staff failed repeatedly to follow the password procedure adopted *after* the alleged disclosures by defendants Parikh and Rutecki. Plaintiffs cite Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 822 (7th Cir. 2009), for the proposition that a public employer's liability can be "demonstrated indirectly by showing a series of bad acts and inviting the court to infer from them that the policy-making level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned the misconduct of subordinate officers." As the quote itself makes clear, a series of "bad acts" may be relevant as circumstantial evidence that policy makers knew their policies were insufficient to prevent constitutional violations from occurring. See also

Jackson v. Marion County, 66 F.3d 151, 152 (7th Cir. 1995) ("The usual way in which an unconstitutional policy is inferred, in the absence of direct evidence, is by showing a series of bad acts and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned, thus in either event adopting, the misconduct of subordinate officers.").

In this case, plaintiffs admit that they are not aware of anyone new who learned about R.A.'s condition as a result of the problems with the password, so those problems are not relevant to liability unless they show somehow that Parikh's and Rutecki's disclosures represented hospital policy. Obviously, incidents occurring after a constitutional violation cannot give notice that the violation might occur, so if plaintiffs intend to rely on those incidents in this case, they will have to identify another way the incidents may be relevant to showing the hospital's policy as of the time the alleged violations occurred.

2. State law claims

a. Wis. Stat. § 252.15

This statute is titled "Restrictions on use of an HIV test" and imposes civil liability on persons who violate certain provisions. Wis. Stat. § 252.15(8). Although plaintiffs do not cite a particular provision, the relevant one seems to be § 252.15(3m), which prohibits disclosure of the results of an HIV test to anyone other than the subject of the test or the subject's "authorized representative," except in specific circumstances not relevant to

defendants' motions.

Although plaintiffs do not say explicitly in their amended complaint that they intended to sue the hospital for violations of § 252.15, the parties all treat this claim in their briefs as if it were brought against all the defendants and they seem to assume that the hospital may be held liable for any violations by their employees. Accordingly, I will make the same assumption for the purpose of this motion.

1) Defendant Parikh

The factual basis for this claim is the same as the federal claim: defendant Parikh's alleged disclosure of R.A.'s HIV test results. The parties dispute whether S.K. and M.D. meet a particular definition for "authorized representative" under Wis. Stat. § 252.15(1)(ac)4: "For a person who is unable to communicate due to a medical condition, the person's closest living relative or another individual with whom the person has a meaningful social and emotional relationship." In particular, the question is whether R.A. was "unable to communicate." As I stated in the context of the federal claim, it is too early to decide that question, so I must deny defendants' motion to dismiss as it relates to this claim.

2) Defendant Rutecki

Plaintiffs contend that defendant Rutecki violated § 252.15 by discussing R.A.'s PML in the presence of R.A.'s sister, but I agree with Rutecki that the alleged conduct does not violate the statute, which limits disclosure of "the subject's HIV test results." Wis. Stat. §

252.15(3m)(b). Plaintiffs rely on the canon that remedial statutes are to be construed liberally to further their purposes, MBS-Certified Public Accountants, LLC v. Wisconsin Bell, Inc., 2012 WI 15, ¶ 43, 338 Wis. 2d 647, 666, 809 N.W.2d 857, 866, but this canon applies only when the statute is ambiguous and there are multiple, reasonable interpretations of the statute. Kannenberg v. Labor and Industry Review Commission, 213 Wis. 2d 373, 393, 571 N.W.2d 165, 175 (Ct. App. 1997) ("When statutory language is ambiguous and a choice must be made between two reasonable interpretations, one of the factors to consider in making this choice, if the statute is remedial in nature, is that it is to be liberally construed to effectuate its remedial purpose."). The canon does not give courts license to rewrite a statute. In this case, plaintiffs do not allege that Rutecki discussed HIV *or* test results and § 252.15(3m) cannot be interpreted reasonably as prohibiting a reference to "PML."

Plaintiffs say that defendant Rutecki's discussion of "PML was a direct cause of R.A.'s sister discovering that her brother had contracted HIV/AIDS," Plts.' Br., dkt. #29, at 7, but the statute does not prohibit the disclosure of information that "causes" someone else to discover on her own a patient's HIV status. Even if I were to assume that a physician's discussion of a patient's HIV *status* could qualify as a disclosure of HIV *test results*, plaintiffs do not allege that PML and HIV are the same thing or that PML is a condition that is suffered only by HIV/AIDS patients. Rather, they allege that PML's "incidence is much more common in HIV/AIDS patients than among other patient populations." Am. Cpt. ¶ 21, dkt. #25. The internet materials plaintiffs filed as part of their motion for leave to file matters outside the pleadings support the view that many but not all PML patients also have

HIV/AIDS. Dkt. #28-3 (PML "occurs almost exclusively in people with severe immune deficiency, such as transplant patients on immunosuppressive medications, receiving certain kinds of chemotherapy, receiving natalizumab (Tysabri) for multiple sclerosis, on long-term efalizumab (Raptiva) for psoriasis, or have AIDS"); dkt. #28-4 (PML "is rare and occurs in patients undergoing chronic corticosteroid or immunosuppressive therapy for organ transplant, or individuals with cancer (such as Hodgkin's disease or lymphoma). Individuals with autoimmune conditions such as multiple sclerosis, rheumatoid arthritis, and systemic lupus erythematosis—some of whom are treated with biological therapies that allow JC virus reactivation—are at risk for PML as well. PML is most common among individuals with HIV-1 infection / acquired immune deficiency syndrome (AIDS).").

I cannot rewrite the statute to prohibit disclosure of any condition that is more common among people with HIV/AIDS than others. Not only is plaintiffs' view unsupported by the language of the statute, but it is difficult to see how such an ill-defined standard could be applied in practice. How common would the condition have to be in HIV/AIDS patients before it qualified? Would it be enough if 75 percent of the patients also suffered from HIV/AIDS? How about 51 percent? 40 percent? Plaintiffs do not explain how a court (or a jury) could make that determination.

A second problem with plaintiffs' expansive view is demonstrated by a dispute between defendant Rutecki in his reply briefs and plaintiffs in their surreply brief regarding whether Rutecki even knew that R.A. had HIV/AIDS. After Rutecki pointed out in his reply brief that the amended complaint is silent on this issue, plaintiffs filed a surreply brief and

attached documents showing that Rutecki electronically signed documents that mention R.A.'s HIV test results. Dkt. #41-2. However, neither side explains the relevance of this dispute. Section 252.15(3m) does not include an intent or knowledge requirement; the question simply is whether defendant made an unlawful disclosure. Thus, if I agreed with plaintiffs that disclosing a condition that may be associated with HIV/AIDS qualifies as disclosing "HIV test results," a defendant could not avoid liability even if he were ignorant of the patient's HIV status. Plaintiffs seem to acknowledge that it would be unfair to impose liability without knowledge, but a court cannot correct one overly broad interpretation of a statute by reading in an element that is equally unsupported by the text. Of course, if the statute is applied according to its plain language, the need to add an element to prevent unfairness is eliminated.

Plaintiffs argue that it is necessary to broaden the scope of the statute to protect the privacy of HIV/AIDS patients, but the statute is about "Restrictions on use of an HIV test," not "Restrictions on information about patients with HIV." Many of the provisions in the statute have nothing to do with privacy, but relate to other issues that arise in connection with HIV tests, such as consent, exposure, the circumstances under which testing is required and even the sale of HIV tests. Although the provision at issue in this case is concerned with privacy, it is targeted specifically at HIV tests. As the other claims brought by plaintiffs show, other potential remedies exist for other types of disclosures. I am granting defendant Rutecki's motion to dismiss with respect to this claim.

b. Wis. Stat. § 995.50

Section 995.50 creates a cause of action for unreasonable invasions of a person's privacy. Again, the parties assume that the hospital may be held liable for any violations by defendants Parikh or Rutecki, so I will do the same.

For the most part, defendants simply repeat their arguments that they had good reasons for making the alleged disclosures. As discussed above, those arguments are premature.

Defendant Rutecki makes one new argument, which is that his alleged disclosure was not a "cause-in-fact" of R.A.'s injuries because it was R.A. and not Rutecki who disclosed to R.A.'s sister that he had HIV/AIDS and because it was someone other than Rutecki who disclosed R.A.'s condition to the rest of the family. There are two problems with this argument. The first is that Rutecki seems to be confusing two different components of causation. The test for whether particular conduct is a cause-in-fact for harm is simply whether the conduct "was a substantial factor in producing the injury." Miller v. Wal-Mart Stores, Inc., 219 Wis. 2d 250, 261-62, 580 N.W.2d 233, 238 (1998). Thus, a plaintiff does not have to show that the defendant's conduct was the only factor or even the primary one. Rutecki does not argue that his disclosure was not a substantial factor producing R.A.'s injuries; rather, his argument is that "there are simply too many events that occurred after the disclosure to assess liability against Dr. Rutecki for disclosing that S.K. was suffering from PML." Dft. Rutecki's Br., dkt. #16, at 13. In other words, he is arguing that "[t]he injury is too remote from the" conduct, which is part of the other component of causation,

proximate cause. Morgan v. Pennsylvania General Insurance Co., 87 Wis. 2d 723, 737, 275 N.W.2d 660, 667 (1979).

Defendant Rutecki seems to acknowledge his mistake in his reply brief by dropping any reference to cause-in-fact and citing Morgan for the proposition that "courts can preclude recovery when the alleged act is too remote from the injury to impose liability." Dft.'s Br., dkt. #40, at 6. Although Rutecki has a plausible argument that his actions were not the proximate cause of anyone other than R.A.'s sister learning about R.A.'s condition, I decline to resolve the issue now. Understandably, plaintiffs limited their argument regarding causation to cause-in-fact, so they have not had an opportunity to address an argument about proximate cause. Generally, courts do not address arguments raised for the first time in a reply brief. Narducci v. Moore, 572 F.3d 313, 324 (7th Cir. 2009).

In any event, even if I agreed with defendant Rutecki that the estate cannot recover for any injuries caused by disclosures to R.A.'s extended family, this would not require dismissal of the claim. Rutecki's argument ignores any emotional distress caused by the confrontation between R.A. and his sister, which is more directly linked to Rutecki's alleged disclosure. Because Rutecki does not address that alleged harm, this claim must go forward.

c. Negligence

With respect to the estate's negligence claims against defendants Parikh, Rutecki and the hospital, defendants repeat their argument that Parikh and Rutecki had good reasons for their disclosure and I need not consider those again. In addition, they argue that they could

not have foreseen that Parikh's and Rutecki's alleged disclosure would lead to R.A.'s confession about sexual affairs or that additional family members would learn about his condition. Defendants cite Doe v. Archdiocese of Milwaukee, 303 Wis. 2d 34, 50-51, 734 N.W.2d 827 (2007), and Jackson v. McKay-Davis Funeral Home, Inc., 830 F. Supp. 2d 635, 654 (E.D. Wis. 2011), for the proposition that the plaintiff must show that the defendant's conduct caused an injury, but they fail to explain why the alleged disclosures themselves would not be sufficient to satisfy the injury requirement. Accordingly, I am denying the motion as to these claims.

3. Injunctive relief

In plaintiffs' "fifth claim," they allege that they are "concerned that defendants may further invade their privacy by making further wrongful disclosures of R.A.'s HIV/AIDS" and they seek "equitable relief" under Wis. Stat. § 995.50 to "restrain any such further invasions of their privacy." Am. Cpt. ¶¶ 45-46, dkt. #25. Defendants argue that any claim for injunctive relief is not justiciable because plaintiffs have made no showing in their complaint that further disclosures are likely. O'Shea v. Littleton, 414 U.S. 488, 495-96(1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Plaintiffs do not respond to this argument in their opposition brief, but simply state that their claim for injunctive relief is limited to state law.

Plaintiffs' response is puzzling because defendants' argument was not limited to

plaintiff's federal law claim. To the extent plaintiffs are assuming that state law governs the justiciability of their state law claims, that is incorrect. Wheeler v. Travelers Insurance Co., 22 F.3d 534, 537 (3d Cir. 1994) ("Although this appeal is in a diversity case which was removed to federal district court, we apply federal law in determining Wheeler's standing because, '[s]tanding to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court.'") (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985)). Even if state law were controlling, it would make no difference because a similar rule applies in Wisconsin courts. Pure Milk Products Coop. v. National Farmers Organization, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) (to obtain injunctive relief, "plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and injure the plaintiff").

By failing to respond to defendants' argument, plaintiffs have forfeited a claim for injunctive relief. Bonte v. United States Bank, N.A., 624 F.3d 461, 466 (7th Cir. 2010). In any event, I agree with defendants that plaintiffs' amended complaint includes no allegations suggesting that further disclosures by hospital staff are likely to occur. Even if I assume that the hospital's privacy policies are inadequate, plaintiffs do not identify any circumstances in which the hospital would have reason to disclose R.A.'s condition to anyone else now that R.A. is deceased. Accordingly, I am granting defendants' motion as to plaintiffs' request for injunction relief.

B. Family Members' Claims

A threshold argument raised by defendants is that plaintiffs S.K., M.D., J.L. and J.P. "lack standing" to bring any of their claims. However, the fundamental question under a standing analysis is whether the plaintiffs were injured by defendants' conduct. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In this case, defendants do not so much argue that plaintiffs were not injured (all of the plaintiffs allege that defendants' conduct caused them emotional distress), but more that defendants did not violate their privacy rights under federal or state law because any facts defendants disclosed were about R.A., not members of the family. Thus, the appropriate question is not whether plaintiffs have standing, but whether they have stated a claim upon which relief may be granted.

In their opposition brief, plaintiffs do not address J.L.'s or J.P.'s right to bring a claim, so I will construe that silence as a concession that the complaint should be dismissed as to their claims. In addition, plaintiffs say that S.K. and M.D. did not intend to bring a claim under Wis. Stat. § 252.15, so I will not discuss that further.

With respect to plaintiffs S.K.'s and M.D.'s right to privacy under the Constitution and § 995.50, plaintiffs cite two cases in which federal courts stated that individuals may have their own privacy interests in personal information about family members. National Archives and Records Admin. v. Favish, 541 U.S. 157, 170 (2004) ("FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images."); Doe v. Borough of Barrington, 729 F. Supp. 376, 382 (D.N.J. 1990) ("[T]he Constitution protects plaintiffs from governmental disclosure of their husband's and

father's infection with the AIDS virus."). In addition, they cite Sawyer v. Midelfort, 227 Wis. 2d 124, 137, 595 N.W.2d 423, 430 (1999), in which the court concluded that parents could sue a therapist for malpractice for injuries they sustained after the therapist caused their child to develop false memories of abuse. In response, defendant Rutecki cites a number of cases from other states in which the court "declined to offer a relational right to privacy to relations of an aggrieved privacy victim." Dft. Rutecki's Br., dkt. #16, at 15-16 (citing Fitch v. Voit, 624 So. 2d 542, 543 (Ala. 1993); Smith v. City of Artesia, 108 N.M. 339, 341, 772 P.2d 373 (1989); Lambert v. Garlo, 19 Ohio App. 3d 295, 297, 484 N.E.2d 260, 263 (1985); Flynn v. Higham, 149 Cal. App. 3d 677, 678, 197 Cal. Rptr. 145, 146 (Ct. App. 1983); Loft v. Fuller, 408 So.2d 619, 624 (Fla. Ct. App.1981); Fry v. Ionia Sentinel-Standard, 101 Mich. App. 725, 730, 300 N.W.2d 687, 690 (1980)). Neither side cites any authority from this circuit regarding family members' constitutional right to privacy or from the Wisconsin courts interpreting § 995.50 with respect to third parties.

I will assume for the purpose of deciding the motions to dismiss that individuals have a right to privacy under the Constitution and § 995.50 with respect to certain information about their family members. However, I agree with defendants that, whatever the scope of that right is, it is not implicated in this case.

With respect to defendant Parikh, his disclosure of R.A.'s test results was limited to plaintiffs S.K. and M.D. Plaintiffs do not explain how their right to privacy could be violated by a disclosure to themselves; it would be nonsensical to suggest that an individual has a right to remain ignorant of certain facts. Certainly, learning unwelcome information

does not invade the *recipient's* privacy.

In their brief, plaintiffs argue that defendant Parikh violated S.K.'s right to privacy by disclosing R.A.'s status to M.D. This suggests a view that S.K. has a constitutional and statutory right to keep information about R.A. from M.D., but M.D. does not have a similar right to keep information about R.A. from S.K. Not surprisingly, plaintiffs do not cite any authority for this proposition. Rather, the cases they cite involve family members who sued because of actual or potential disclosure of private information to the general public. I am not of aware any case in which a court held that a third party has a right to keep information about one family member private from another family member. Plaintiffs seem to want the courts to create a hierarchy of familial relationships similar to an intestacy statute, allowing family members higher in the hierarchy to assert privacy interests against those lower down, but plaintiffs do not identify what authority the courts would have to make that determination. In the absence of statutes setting forth specific rules of disclosure, it is not for the courts to decide whether a wife, a child or a sibling have a greater interest in keeping personal information of a family member private.

In a footnote (one of many in plaintiffs' briefs), plaintiffs suggest that R.A.'s wife had a stronger privacy interest than R.A.'s son because R.A.'s HIV/AIDS status could suggest that she had HIV/AIDS as well. Plts.' Br., dkt. #27, at 20 n.14. That would provide some grounds for making a distinction between S.K. and M.D., but, in the absence of any authority, I am not prepared to say that S.K. has a right under the Constitution or § 995.50 to prevent R.A.'s son from learning about his father's condition because of what it might

convey about her. If I were to rely on that difference as controlling, it would suggest that any sexual partner of a patient would have the right to keep information about that patient from his own family.

My conclusion about plaintiffs' claims against defendant Parikh resolves any claim against defendant Rutecki as well. Rutecki's alleged disclosure was to another family member, R.A.'s sister. Plaintiffs allege that others later found out about R.A.'s condition, but they were also family members: R.A.'s mother, other children and other siblings. In any event, plaintiffs do not allege that *Rutecki* discussed R.A.'s condition with anyone other than his students and R.A.'s sister. If the disclosure to R.A.'s sister did not violate S.K. or M.D.'s rights, then Rutecki cannot be held liable for any additional disclosures the sister or anyone else may have made.

With respect to the hospital, all of plaintiffs' claims rely on alleged unlawful conduct by the individual physicians. Because I am concluding that defendants Parikh and Rutecki did not violate the family members' rights, this means I must dismiss the claims against the hospital as well.

ORDER

IT IS ORDERED that

1. The motions for leave to file matters outside the pleadings filed by plaintiffs Estate of R.A., S.K., M.D., J.L. and J.P., dkt. #26, and defendants University of Wisconsin Hospital and Clinics Authority and Continental Casualty Company, dkt. #4, are DENIED

as unnecessary.

2. Plaintiffs' motion to file a surreply brief, dkt. #41, is GRANTED as unopposed.

3. Defendants' motions to dismiss the original complaint, dkt. ##5 and 15, are DENIED as moot.

4. The motions to dismiss the amended complaint filed by defendants University of Wisconsin Hospital and Clinics Authority, Continental Casualty Company, Jason Parikh, dkt. #32, and defendant Paul Rutecki, dkt. #33, are DENIED with respect to the following claims:

(a) defendant Parikh disclosed R.A.'s HIV test results to S.K. and M.D., in violation of R.A.'s constitutional right of privacy, Wis. Stat. § 252.15, Wis. Stat. § 895.50 and the common law of negligence; the hospital may be held liable for these violations, either because it had a policy or practice that caused the violation (with respect to the federal claim) or under the doctrine of respondeat superior (with respect to the state law claims); and

(b) defendant Rutecki disclosed that R.A. had "PML" to R.A.'s sister, in violation of R.A.'s constitutional right of privacy, Wis. Stat. § 895.50 and the common law of negligence; the hospital may be held liable for these violations, either because it had a policy or practice that caused the violation (with respect to the federal claim) or under the doctrine of respondeat superior (with respect to the state law claims).

The motions to dismiss are GRANTED in all other respects.

5. The amended complaint is DISMISSED as to plaintiffs S.K., M.D., J.L. and J.P.

Entered this 6th day of November, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge