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DEPARTMENT OF JUSTICE

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The Honorable Robin Vos
Chairperson
Assembly Committee on Organization
211 West, State Capitol
Madison, WI 53702

Dear Representative Vos:

¶ 1. The Wisconsin State Assembly, through your request as Chair of the Assembly Committee on Organization, asks for my opinion on issues under the emergency detention statute related to (1) the right of an individual in custody to make his or her own healthcare decisions; (2) the authority of a police officer to make healthcare decisions for an individual in the officer's custody; and (3) the duty of a healthcare provider to the individual and public when the officer and county do not proceed with an emergency detention.[1] *See* Wis. Stat. § 51.15 (2013-14) (emergency detention).

¶ 2. Emergency detention provides treatment to mentally ill, drug dependent, and developmentally disabled individuals when there is reason to believe that the individual is unable or unwilling to cooperate with voluntary treatment. Wis. Stat. § 51.15(1)(ag). A police officer may take such an individual into custody when the officer has cause to believe that the individual exhibits a substantial probability of physical harm, impairment, or injury to himself, herself, or another person. Wis. Stat. § 51.15(1)(ar). A police officer also may take into custody an individual with a mental illness when the individual exhibits a substantial probability that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue because the individual is unable to satisfy basic needs. Wis. Stat. § 51.15(1)(ar)4.

[1]The Assembly's request originates from recommendations by the Speaker's Task Force on Mental Health (*see* Letter from The Speaker's Task Force on Mental Health, to Speaker Robin Vos (Oct. 9, 2013), http://legis.wisconsin.gov/documents/MentalHealthReport.pdf).

Once in custody, an individual remains within the custody of the officer until the individual is admitted to one of the approved facilities enumerated by statute. 81 Op. Att'y Gen. 110, 113 (1994) (citing Wis. Stat. § 51.15(2)). When an individual in custody experiences a medical condition, an officer may need to take the individual to a hospital emergency department for treatment by a healthcare provider. But not every hospital is an approved facility for emergency detention under the statute. 81 Op. Att'y Gen. 110. So the officer cannot relinquish custody of an individual to the hospital emergency department if it is an unapproved facility. *Id.* at 110-13; *see Sherry v. Salvo*, 205 Wis. 2d 14, 28-29, 555 N.W.2d 402 (Ct. App. 1996). Custody of the individual remains with the officer until arrival at a facility approved for emergency detention evaluation, diagnosis, and treatment. Wis. Stat. § 51.15(2), (3), and (8).

¶ 3. The Assembly inquires about an individual's right, a police officer's authority, and a healthcare provider's duty prior to custodial transfer to an approved facility. I conclude that an individual in custody has the right to make decisions regarding his or her own health care subject to certain exceptions. I also conclude that an officer does not have the authority to make healthcare decisions for the individual in custody. I further conclude that a healthcare provider has a duty to take whatever steps are reasonably necessary to prevent harm to a patient's individual self and others.

¶ 4. The Assembly asks whether an individual has the right to make his or her own healthcare decisions while in the officer's custody under an emergency detention. Wisconsin Stat. ch. 51 explicitly rejects an implication that a person needing emergency detention is incompetent. Wis. Stat. § 51.59. So the question assumes that the individual in custody is legally competent. *See id.*

¶ 5. Individuals have the right of self-determination, described by the U.S. Supreme Court as "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891), *quoted in In re Guardianship of L.W.*, 167 Wis. 2d 53, 68, 482 N.W.2d 60 (1992). The right of self-determination later expanded "to create the doctrine of informed consent: Every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Guardianship of L.W.*, 167 Wis. 2d at 68 (citation omitted) (internal quotation marks omitted). Wisconsin has codified the doctrine of informed consent. Wis. Stat. § 448.30.

¶ 6. The doctrine of informed consent is the individual's right to consent and, conversely, the right to refuse medical treatment. *Guardianship of L.W.*, 167 Wis. 2d at 68. Courts and the Legislature "have embraced the notion that although the physician is the expert, the patient should have the opportunity to understand what is happening to his or her body and autonomously and intelligently consent or refuse to consent to proposed medical care." *Jandre v. Wis. Injured Patients & Families Comp. Fund*, 2012 WI 39, ¶ 12, 340 Wis. 2d 31, 813 N.W.2d 627; *cf.* 2013 Wisconsin Act 111 (amending Wis. Stat. § 448.30 after *Jandre*).

¶ 7. The right of informed consent recognizes that an individual does not possess absolute autonomy over his or her body. *See Scaria v. St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 12-13, 227 N.W.2d 647 (1975). For example, informed consent does not extend to an individual incapable of consenting. Wis. Stat. § 448.30(6). But the law presumes a person's right to informed consent absent a statutory provision to the contrary.

¶ 8. An individual in custody who is an adult of sound mind retains the right of informed consent. *Guardianship of L.W.*, 167 Wis. 2d at 68. The Wisconsin Supreme Court has recognized that precommitment detainees have a right of informed consent. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 735, 416 N.W.2d 883 (1987) (citing Wis. Stat. § 51.15). In *Jones*, the court found an irrational disparity in the statutes for granting the right of informed consent to precommitment detainees, while depriving involuntarily committed individuals of such a right. *Id.* at 733-34. Although subsequent statutory amendments superseded portions of the decision, *Jones* remains instructive. *See State v. Anthony D.B.*, 2000 WI 94, ¶ 18, 237 Wis. 2d 1, 614 N.W.2d 435 ("the legislature repealed and re-created [Wis. Stat.] § 51.61(1)(g) in 1987 Wis. Act 366"). The emergency detention statute authorizes an individual to refuse medication and treatment after arrival at the approved facility. Wis. Stat. § 51.15(8), *cited in Jones*, 141 Wis. 2d at 734. The statute does not expressly address consent and the right to refuse medication or treatment prior to arrival at an approved facility for an individual in custody. Wis. Stat. § 51.15(3). However, since the right of informed consent must be presumed to apply, it is applicable to an individual in custody during the pre-arrival stage of detention to the same extent as after arrival at the approved facility. Thus, an individual in custody has the right to make his or her own healthcare decisions absent a provision to the contrary.

¶ 9. The Assembly asks whether a police officer has authority to make healthcare decisions for an individual in custody under an emergency detention, including when the individual has an emergency medical condition while in custody.[2] The Assembly specifically asks whether "custody" means that the officer is a "person acting on the individual's behalf," which is a phrase from the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"). *See Burks v. St. Joseph's Hosp.*, 227 Wis. 2d 811, 818 n.9, 596 N.W.2d 391 (1999) (quoting 42 U.S.C. § 1395dd(c)(1)(A)(i)). The question assumes that neither the individual designated the officer as his or her health care agent, nor a court appointed the officer as the individual's guardian. *See* Wis. Stat. §§ 54.15(3) and 155.01(10); *see also* Wis. Stat. § 54.46(2)(b); *see generally* Wis. Stat. ch. 155 (power of attorney for health care).

¶ 10. The officer does not have the authority to make healthcare decisions for an individual in custody under an emergency detention. The EMTALA uses the phrase "person acting on the individual's behalf" within the context of an individual's right to refuse consent to treatment or transfer—consistent with rights entrusted to an individual's healthcare agent. 42 U.S.C. § 1395dd(b)-(c). The individual—not an officer—has the right to appoint a healthcare agent to serve as his or her surrogate decision-maker. *See* Wis. Stat. ch. 155 (power of attorney for health care); *see also Guardianship of L.W.*, 167 Wis. 2d at 82-83 (citing Wis. Stat. chs. 155 (health care agent) and 880 (guardian)); *but see* 2005 Wisconsin Act 387 (renumbering and substantially revising guardianship law from Wis. Stat. ch. 880 to ch. 54). The officer is not the individual's healthcare agent. So the officer is not a person acting on the individual's behalf for purposes of making healthcare decisions.

¶ 11. Moreover, Wis. Stat. ch. 51 provides no authority for an officer to make healthcare decisions on the individual's behalf. The statutes generally permit the approved facility—not an officer—to evaluate, diagnose, and treat the individual when he or she consents. Wis. Stat. § 51.15(8) (citing Wis. Stat. § 51.61(1)(g) and (h)). Requiring medical professionals at the approved facility to obtain consent from the individual demonstrates that an officer cannot assume decision-making authority during transport. *See id.*

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[2]In this opinion, an "emergency medical condition" means "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result" in a condition described as "placing the health of the individual . . . in serious jeopardy," "serious impairment to bodily functions," or "serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii); *see also* 42 C.F.R. § 489.24(b).

¶ 12. Even if an emergency medical condition prevents the individual from exercising his or her right of informed consent, an officer still does not have authority to make healthcare decisions for the individual. The informed consent statute identifies a physician—not an officer—as the person responsible for making treatment decisions in an emergency. Wis. Stat. § 448.30(5). So the officer does not have the authority to make healthcare decisions for an individual in custody when the individual has an emergency medical condition.[3]

¶ 13. The officer's role in an emergency detention is only to transport the individual in custody to an approved facility for detention, and for evaluation, diagnosis, and treatment. *See* Wis. Stat. § 51.15(2)-(3). In *Sherry*, the court of appeals confirmed that an officer performs an important, but limited, role. 205 Wis. 2d at 27-28. The court considered liability when officers subdued an individual in an emergency room for his own safety and the safety of others. *Id.* at 28. The court concluded that the officers subdued the individual prior to commencement of a detention. *Id.* So there was no liability under Wis. Stat. ch. 51 because the conduct occurred prior to the officers' taking the individual into custody. *Id.* at 24-29. The court observed that an officer's limited role under an emergency detention "is only to transport the individual to the facility."[4] *Id.* at 27-28.

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[3]The Assembly's request presents three situations and inquires whether an officer has the authority to make healthcare decisions for an individual in custody having an emergency medical condition in each situation. But the officer is not a person acting on the individual's behalf for purposes of making healthcare decisions. So the officer cannot make healthcare decisions for an individual in custody under any of the situations presented.

[4]An officer may transport the individual from one medical facility to another facility before arrival at an approved emergency detention facility. For example, an officer may take an individual at an emergency room into custody for emergency detention. *See, e.g.*, *Sherry*, 205 Wis. 2d 14. The officer then may place the individual into protective custody when the person appears incapacitated by alcohol. Wis. Stat. § 51.45(11)(b). The officer may also transport the individual to a public treatment facility for emergency treatment. *Id.* After detoxification, the protective custody device ends. *State v. B.A.S.*, 134 Wis. 2d 291, 296, 397 N.W.2d 114 (Ct. App. 1986). But the individual remains in the officer's custody for transport to the approved emergency detention facility. Wis. Stat. § 51.15(3). The officer makes statutorily prescribed custodial—not healthcare—decisions when transporting an individual from one facility to another.

¶ 14. Although the officer cannot make healthcare decisions, the individual must remain in the officer's custody until the ultimate transfer to an approved facility. *See* Wis. Stat. § 51.15(3). An individual experiencing an emergency medical condition at an unapproved facility cannot be transferred or removed from the officer's custody. The individual is not a prisoner. Wis. Stat. § 46.011(2). But the custodial status of the individual at an unapproved facility is similar to a prisoner being treated in a hospital. *See* Wis. Stat. § 302.38(1). In such a situation, the officer maintains security over the individual. *Id.* Because a hospital emergency department is not an approved facility, the individual remains within the custody of the officer throughout admission to and discharge from the emergency department.[5] *See* 81 Op. Att'y Gen. at 110-13.

¶ 15. The Assembly also asks whether a healthcare provider has a duty to the individual and public when the officer and county do not proceed with an emergency detention. The question assumes that the healthcare provider believes that the individual is legally competent. *See* Wis. Stat. § 51.59. The question further assumes that the healthcare provider believes that the individual evidences a substantial probability of meeting one of the standards for emergency detention and the individual does not voluntarily agree to treatment. *See* Wis. Stat. § 51.15(1)(ag). The question also assumes that an officer declined to take the individual into custody or the county does not approve the need for emergency detention. *See* Wis. Stat. § 51.15(1)(ar) and (2).

¶ 16. The Assembly's question requires examining the duty a healthcare provider owes to a patient and others as compared to the liability exemption contained within the emergency detention statute. *Compare* Wis. Stat. § 51.15(11) (liability), *with Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 98 n.36, 235 Wis. 2d 700, 612 N.W.2d 297 (a hospital assumes a duty to care for admitted patients, including a duty to prevent harm). The emergency detention statute does not address duty of care. *See generally* Wis. Stat. § 51.15. Instead, the statute contains a liability exemption: "Any individual who acts in accordance with this [emergency detention] section, including making a determination that an individual has or does not have mental illness or evidences or does not evidence a substantial probability of harm . . . is not liable for any actions taken in good faith." Wis. Stat. § 51.15(11).

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[5]This opinion answers the Assembly's question about the meaning of "custody" under an emergency detention. *See* Wis. Stat. § 51.15(3). This opinion does not answer who bears the cost for healthcare expenses incurred while the individual is in custody as this question was not posed and therefore outside the scope of the Assembly's request.

¶ 17. The liability exemption extends to a healthcare provider acting in accordance with the emergency detention statute. *See id.* An appellate court recently explained that "[b]y granting immunity to *any* individual . . . the legislature plainly intended to expand immunity beyond those authorized to take individuals into physical custody." *Estate of Hammersley v. Wis. Cnty. Mut. Ins. Corp.*, 2012 WI App 44, ¶ 19, 340 Wis. 2d 557, 811 N.W.2d 878. Immunization from liability for a healthcare provider does not depend upon whether an officer takes or declines to take an individual into custody. *See id.* ¶ 23. And immunity does not depend on whether the county approves of the need for emergency detention. *See id.* So a healthcare provider acting under the emergency detention statute is immune from liability regardless of the officer and county's ultimate determination regarding the need for detention.

¶ 18. However, a healthcare provider's immunity from liability is not absolute. For example, a healthcare provider may be liable when the provider fails to consider a commitment. *Schuster v. Altenberg*, 144 Wis. 2d 223, 262, 424 N.W.2d 159 (1988). By failing to even consider an emergency detention under the statute, a healthcare provider cannot avail himself or herself to the statute's immunity provision. *See id.* at 234, 262. Even when a healthcare provider initiates an emergency detention proceeding, the provider exposes himself or herself to liability for any action not taken in good faith. *See* Wis. Stat. § 51.15(11). The phrase "[g]ood faith" means "a state of mind indicating honesty and lawfulness of purpose." *Hammersley*, 340 Wis. 2d 557, ¶ 29 (quoting Webster's Third New Int'l Dictionary 978 (unabr. 1993)) (internal quotation marks omitted). Although the statute presumes good faith, the presumption may be defeated "by 'clear, satisfactory, and convincing' evidence to the contrary." *Id.* ¶ 27 (citing Wis. Stat. § 51.15(11)). A healthcare provider generally receives immunity from liability under the emergency detention statute provided he or she acted in good faith in accordance with the statute. *See* Wis. Stat. § 51.15(11).

¶ 19. Further, although the emergency detention statute provides a liability exemption, the exemption does not extend to acts beyond the statute. *Schuster*, 144 Wis. 2d at 234, 262. A healthcare provider has immunity from liability for actions taken in good faith when "making a determination that an individual has or does not have mental illness or evidences or does not evidence a substantial probability of harm." Wis. Stat. § 51.15(11). But the healthcare provider cannot avail himself or herself to the exemption once the provider is no longer carrying out duties within the ambit of the statute. *See id.*; *see also Schuster*, 144 Wis. 2d at 234, 262. After an officer declines to take the individual into custody or the county does not approve the need for emergency detention, the healthcare provider is no longer

evaluating or treating for emergency detention, but rather is providing, or declining to provide, the care he would to any individual. *See* Wis. Stat. § 51.15(1)-(2) and (11). So the healthcare provider's statutory immunity ceases even though the provider has an ongoing duty to the individual as a patient. *See Jankee*, 235 Wis. 2d 700, ¶ 98 n.36.

¶ 20. A healthcare provider has the duty to "exercise such ordinary care as the mental and physical condition of its patients, known or should have been known, may require." *Kujawski v. Arbor View Health Care Ctr.*, 139 Wis. 2d 455, 462-63, 407 N.W.2d 249 (1987). The phrase "ordinary care" means "the care which a reasonable person would use in similar circumstances." Wis. J.I.–Civil 1385 (1999). This duty exists when it is "foreseeable that an act or omission to act may cause harm to someone." *Schuster*, 144 Wis. 2d at 237-38. This includes a duty to protect the individual patient and public through clinical interventions when the patient is a dangerous individual. *Id.* at 239-40, 244. In exercising this duty, the provider may physically restrain or isolate the individual without his or her consent in an emergency situation. Wis. Stat. § 51.61(1)(i)1. And the provider may administer medication or treatment to an individual without his or her consent when necessary to prevent serious physical harm to the individual or to others. Wis. Stat. § 51.61(1)(g)1.

¶ 21. A healthcare provider may have a duty to prevent an individual from leaving the facility against medical advice, or to require an individual to involuntarily receive services to remove the substantial probability of harm. But whether such a duty exists is evaluated by whether such conduct was consistent with the profession's accepted standard of care. *Schuster*, 144 Wis. 2d at 248. The healthcare provider's "duty is no greater than the duty already owing to the patient." *Id.* at 261 (citation omitted) (internal quotation marks omitted). And such a duty does not necessarily expose a healthcare provider to liability because "[p]ublic policy considerations may preclude liability." *Garrett v. City of New Berlin*, 122 Wis. 2d 223, 233, 362 N.W.2d 137 (1985) (citation omitted) (internal quotation marks omitted).

¶ 22. In sum, I conclude that an officer has no authority to make healthcare decisions for an individual in custody under an emergency detention because the individual generally has the right to make his or her own healthcare decisions. A healthcare provider has statutory immunity while acting under the emergency detention statute, as long as his actions are undertaken in good faith. If no officer or

county decides to proceed with an emergency detention, a healthcare provider has a duty to take reasonable steps to prevent harm to an individual or others.

Very truly yours,

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