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THOMAS A. WILDER
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Cause No. 048-112330-19

T.L., A MINOR AND MOTHER, TRINITY LEWIS, ON HER BEHALF	§	**IN THE DISTRICT COURT**
PLAINTIFFS,	§	
V.	§	**TARRANT COUNTY, TEXAS**
COOK CHILDREN'S MEDICAL CENTER,	§	
DEFENDANT.	§	**48TH JUDICIAL DISTRICT**

PLAINTIFFS' MOTION FOR LEVEL 3 DISCOVERY CONTROL PLAN AND SCHEDULING ORDER

TO THE HONORABLE COURT:

Plaintiffs, T.L., and her mother, Trinity Lewis ("Trinity"), on her behalf, file this Motion for Level 3 Discovery Control Plan and Scheduling Order and would show unto the Court as follows:

I. INTRODUCTION

The Parties' proposed discovery control plans differ as widely as how they see this case. Defendant seeks the demise of T.L. as soon as possible. By contrast, Plaintiffs wanted a tracheostomy for T.L. to improve her health so she could leave Cook Children's Medical Center ("Cook's") alive. Defendant's ridiculously short discovery plan reflects its values. Plaintiffs' proposal, however, comports with Court rules and due process. There really has not been any discovery since the Temporary Injunction hearing on December 12, 2019. Cook's wants no discovery nor fair play. As demonstrated below, Plaintiffs' discovery plan is fair and equitable under the circumstances, and Plaintiffs respectfully request the Court enter their proposed docket control order.

II.
RELEVANT BACKGROUND & PROCEDURAL FACTS

This case involves the case of T.L., a child born with a congenital heart disease and chronic lung disease, who, until late August of 2019, did not need a ventilator to breathe. However, after a procedure at Cook, she developed complications and until March 30, 2021, was on a ventilator to aid her breathing. That ventilator is the means by which Cook sought to involuntarily passively euthanize T.L. by removing it against her mother, Trinity's, wishes. Cook invoked Texas Health & Safety Code §166.046 to do so as the state grants hospitals the authority to determine life and death with total civil and criminal immunity and no due process rights for the patient. Trinity obtained legal assistance and filed a Temporary Restraining Order to save her daughter's life, which was granted. The related Temporary Injunction was denied in the trial court, but granted by the Court of Appeals, which, in a lengthy opinion issued on July 24, 2020, determined that Cook is, in fact, a state actor under these circumstances.

Rather than start the discovery process shortly after July 24, 2020, Cook sought petition for review at the Texas Supreme Court, which was denied on October 16, 2020. It then filed a Petition for a Writ of Certiorari before the United States Supreme Court, which was also denied on January 11, 2021.

No later than Feburary 10, 2021, and then again on February 24, did the undersigned counsel reach out to Cook's counsel regarding putting a scheduling order in place. *See* Exhibit A. Subsequently, Plaintiffs' counsel requested a call to discuss the case on at least March 3, 2021. *See* Exhibit B. Again, on March 10, the Parties exchanged emails regarding a schedule. *See* Exhibit C. On March 24, the undersigned counsel sent Cook's counsel a proposed schedule, which is reflected here in this Motion. *See* Exhibit D.

On March 31, Cook's counsel, sent an email wherein Cook's wanted a earlier trial date. *See* Exhibit E. On April 1, counsel for Cook's and T.L. spoke about a schedule. *See* Exhibit F. On April 16, more than 2 months after T.L's counsel proposed working together on a scheduling order, Cook's now claims there is some sort of an emergency and this case must be tried by the end of July 2021. *See* Exhibit G. As the Court can see, any alleged emergency is of Cook's own making.

Soon after the August 2019 procedure at Cook's that required T.L. to be on a ventilator, Plaintiffs has attempted to get Cook to place a tracheostomy and G-tube in T.L. to aid her comfort, better her life, and to help make her a candidate for transfer to another facility by filing a Motion to Compel, which Plaintiffs withdrew. Cook continued to refuse to do so until on or about March 30, 2021.

As expected, T.L. has been more comfortable with the trach and the paralytic drugs she was on when ventilated, have been reduced. As a result, she is more active and alert. Moreover, a recent consultation with a neurologist discussed developmental and speech delays, but the key here is that speech is now being discussed again for T.L.'s future. When she was 11 months old, there was a note in her chart that mentioned speech therapy may be necessary for her in the future. Nevertheless, Cook still appears intent on killing T.L. at the first available opportunity with increasingly crass language and reasoning and hyperbolic, gross mischaracterizations and misrepresentations of her actual condition and prognosis. Against all odds this child has defied all odds and "expirations dates" given her by Cook. With the interlocutory appeals complete, it is time for a reasonable and just Discovery Control Plan to be put into place so that the facts and expert testimony necessary for this case may be developed and a trial on the merits completed.

III.
ARGUMENT & AUTHORITIES

Plaintiffs' Original Petition pled that discovery in this case should be under Level 3 of Texas Rule of Civil Procedure 190.4, which states: "The court must, on a party's motion, and may, on its own initiative, order that discovery be conducted in accordance with a discovery control plan tailored to the circumstances of the specific suit." Plaintiffs file this Motion seeking the entry of an appropriate Level 3 plan (detailed in the Section IV) that will ensure they have sufficient time for complete discovery in this case as well as the necessary time to designate their experts and respond to those experts Cook will designate. Cook's proposal does not allow for this and the parties could not reach an agreement without Court intervention.

The Texas Supreme Court has repeatedly and consistently held that: "'the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.'" *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) quoting *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984); citing *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 559 (Tex. 1990); *Garcia v. Peeples,* 734 S.W.2d 343, 347 (Tex. 1987). Moreover, "'[b]oth the plaintiffs and the defendants are entitled to full, fair discovery within a reasonable period of time…'" *Id.* quoting *Able Supply Co. v. Moye*, 898 S.W.2d 766, 773 (Tex. 1995). Denial of the ability to conduct discovery on matters that go "to the heart of the litigation" is especially problematic and have been the bases of mandamus relief. *Id.* at 941-942; *see also, Able,* 898 S.W.2d at 772 ("In *Walker v. Packer*, we noted that mandamus will issue where a party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error.") referencing *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992). This is because there is no adequate remedy by appeal after a case is disposed of on the merits because the merits cannot be adequately developed without sufficient discovery.

One issue in the *Colonial Pipeline* case was that the discovery control order there allowed written discovery responses to be made up until the time of the deposition of the responding party. The Court found this unreasonable and provided the following rationale which demonstrates why Cook's proposed schedule is equally unreasonable. The Court held:

> A party should generally be allowed a reasonable amount of time sufficient to allow for meaningful review of discovery responses before deposing a party. The purpose behind the taking of depositions is thwarted when parties are forced to do so without the basic facts surrounding the deponents claims or defenses. There may be instances where discovery responses are permissibly provided at the eve of a party's deposition, such as when the discovery requested is voluminous and the deponent has objected or otherwise made it known to the court or the opposing party that it will not be able to respond until that late date. In this case, however, there appears to be no legitimate reason why plaintiffs' discovery responses cannot be provided at an earlier time. The trial court abused its discretion in this case by arbitrarily lengthening the plaintiffs' response time without a showing of good cause.

Id. at 943.

This reasoning is relevant here because the proposal Cook sent to Plaintiffs did not necessarily allow written discovery to be completed before depositions would be conducted, nor did it give sufficient time for expert discovery, designations, drafting and determining motions to exclude, or trial preparation. Plaintiffs believe that following the ordinary course of discovery – written followed by depositions and expert discovery – is appropriate in this case as well.

This case is about whether the statute at issue comports with procedural and substantive due process and whether it violated Plaintiffs' due process rights "as written" and/or "as applied." Cook's defense is primarily continuing to provide medical treatment to T.L. – particularly aid in breathing – is medically inappropriate and should be withdrawn. This is apparently Cook's position even though T.L.'s condition – by its own admission – necessitated a tracheostomy. Apparently, Cook would turn off the oxygen to it as well now even though T.L. is improving.

Discovery is needed for both Plaintiffs' claims and Cook's defenses. Plaintiffs anticipate sending written discovery concerning not just T.L., but Cook's use of this statute in general, its policies, procedures, and decision-making process when invoking this statute, matters of ethics among its doctors and staff, exploring conflicts of interest in and among the ethics committee members, *inter alia*. Plaintiffs anticipate deposing Cook's Corporate Representative(s), treating doctors, members of the ethics committee, and Cook's designated experts. Cook has raised the issue of a Medicaid review of T.L.'s care and the costs of that care. Third party discovery relevant to this case is now also necessary.

Cook's proposed scheduling order also omits deadlines for dispositive motions, such as motions for summary judgment. While Plaintiffs will need to review to discovery, given the previous heaings and rulings from appellate courts, this case may be appropriate for summary judgment. Cook's proposed scheduling order omitting deadlines for summary judgment is deficient. While Cook wants to rush this case so it can rush to withdraw T.L.'s breathing support, a solid record must be made because, as Cook admits in its own filing, appeals will most likely happen after the trial. Plaintiffs have no intention of stopping the fight to save T.L.'s life and protect other Texans from the same harm. Cook's proposed scheduling order deprives Plaintiffs of the opportuntiy to present their case and would amount to a denial of Plaintiffs right to due process.

IV.
PLAINTIFFS' PROPOSED SCHEDULING ORDER

Plaintiffs submit the following proposed Scheduling Order and trial date which they believe strikes a balance between what is needed for sufficient discovery to be completed, a thorough record developed, and as expeditious a trial as the circumstances make possible:

TRIAL SETTING: 1/31/2022

PRETRIAL MATTERS:

Pretrial Hearing:	1/17/2022
Plaintiffs' Expert Designations:	8/13/2021
Defendant's Expert Designations:	8/27/2021
Plaintiffs' Rebuttal Experts:	9/10/2021
Defendant's Rebuttal Experts:	9/24/2021
Discovery Completion Date:	10/22/2021
Depositions Completion Date:	10/22/2021
Alternative Dispute Resolution/ Mediation:	5/10/2021
Motions for Summary Judgment:	11/5/2021
Motions to Exclude Expert Testimony:	11/19/2021
Hearing on *Daubert/Robinson* Challenges:	12/13/2021

Plaintiffs submit that their proposal is still quite efficient and with a fairly rapid trial date under the circumstances – only nine months from now. Yet, it allows for sufficient discovery to be completed, including expert discovery, and gives the Court time to decide critical pretrial matters ahead of the trial itself and allows sufficient time for trial preparation after pretrial motion practice is complete.

V.
CONCLUSION & PRAYER FOR RELIEF

Based on the foregoing, Plaintiffs request that the scheduling proposal submitted by Plaintiffs, which is in keeping with the legal principals behind discovery and will help ensure equity and fairness in this case, be entered in this case.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Counsel have conferred multiple times on the relief sought in this motion. A reasonable effort has been made to resolve this dispute without court intervention, but the parties have been unable to reach an agreement on the relief sought.

/s/ John F. Luman III
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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Civil Procedure, I hereby certify that on the 26th day of April, 2021, a true and correct copy of the foregoing document was served on the following counsel of record:

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