CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
V.	§	HARRIS COUNTY, TEXAS
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

DEFENDANT HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL** ("Houston Methodist" or the "Hospital"), and files this Response to Plaintiffs' Motion for Summary Judgment, and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

This Court should deny Plaintiffs' Motion for Summary Judgment in its entirety because:

- **The constitutionality of Texas Health and Safety Code § 166.046 is an issue more appropriately addressed by the Texas Legislature;**
- **Houston Methodist is not a state actor; and**
- **This cause of action is moot because the controversy is not capable of repetition.**

II.
BACKGROUND FACTS

On October 12, 2015, Aditya Uppalapati, M.D., admitted David Christopher Dunn ("Dunn") to Houston Methodist with diagnoses of, among other things:

- end-stage liver disease;
- the presence of a malignant pancreatic neoplasm with suspected metastasis to the liver;
- complications of gastric outlet obstruction secondary to his pancreatic mass;
- hepatic encephalopathy;
- acute renal failure;
- sepsis;
- acute respiratory failure;
- multi-organ failure, and
- gastrointestinal bleed.

Shortly after Dunn's admission, Dr. Uppalapati advised Dunn's family that his condition was irreversible and progressively terminal.

Having treated Dunn since October 12, 2015, his treating physicians concluded that he was suffering from the treatment necessary to sustain his life, and with no expectation for improvement, life-sustaining treatment was medically inappropriate for Dunn. As a result, Dunn's attending physicians and patient care team recommended to his divorced parents that these aggressive treatment measures be withdrawn and that only palliative or comfort care be provided. The patient's father, David Dunn, strongly agreed with the recommendation and plan to provide comfort measures only, while the patient's mother, Evelyn Kelly, strongly disagreed with the providers' recommendation to discontinue life-sustaining treatment. Since Dunn had no advanced directives in place, was not married, and

had no children, his parents became his statutory surrogate decision makers.[1] The divisive situation between Dunn's divorced parents created a significant conflict between the two people the Hospital looked to for direction of his medical care.

On October 28, 2015, the matter was referred to the Houston Methodist Biomedical Ethics Committee ("Ethics Committee") for consultation. J. Richard Cheney, Project Director of Spiritual Care at Houston Methodist Hospital, provides in his affidavit:

> At the time of the care that was provided to David Christopher Dunn ("Chris"), I was the Project Director of Spiritual Care at Houston Methodist Hospital. Furthermore, I served as the Meeting Chair for the Houston Methodist Bioethics Committee (the "Committee"), which was consulted by Chris's treating physicians to review the ethical issues involved in his care at Houston Methodist Hospital. I am familiar with this matter, including the meetings and communications between Chris's health care providers and Chris's family, and the events that lead to the determination that the continuation of life-sustaining treatment was medically inappropriate. I was personally involved in communications between Chris's family and his health care providers. Further, I coordinated the ethical review process by which Chris's family was informed of the Biomedical Ethics consultations, the processes involved and the Committee's ultimate determination that the life-sustaining treatment being provided to Chris was medically inappropriate.
>
> At the time of admission to Houston Methodist Hospital, Chris was not married and had no children. Multiple physicians declared him lacking the requisite mental capacity to understand his terminal medical condition, its predicted progression and his capacity to make informed decisions about his care. Therefore, pursuant to Texas statute, his divorced parents, Evelyn Kelly and David Dunn, became Chris's legal surrogate decision makers regarding Chris's medical care. Houston Methodist Hospital looked to both parents for direction on issues relating to Chris's care and treatment. On Wednesday, October 28, 2015, Chris's treatment team consulted the Biomedical Ethics Team regarding increased discordance between his divorced parents on whether to continue aggressive supportive care measures or de-escalate treatment to comfort care only. A Clinical Ethicist from the Biomedical Ethics Committee consulted with Chris's treatment team and his family.

[1] *See* TEX. HEALTH & SAFETY CODE § 597.041(a)(3) (2015).

During the meeting, it was noted that the patient had recently left another facility against medical advice, refused to undergo a liver biopsy and refused treatment following the diagnosis of a pancreatic mass. The patient's father, David Dunn, expressed that his son "did not want to go to the hospital for treatment, because he believed he would die there." Accordingly, Mr. Dunn requested that the treatment team provide comfort care measures only to his son in accordance with what he thought Chris would want. The patient's mother, Evelyn Kelly, was unable to support any decision about transitioning the patient to comfort measures, opining that Chris would have wanted aggressive support, despite his prior conduct in leaving the prior hospital against medical advice, refusing liver biopsy and refusing treatment. At the conclusion of the meeting, Ms. Kelly requested additional time to discuss the matter with her family.

On Monday, November 2, 2015, members of the Biomedical Ethics Committee, along with several of Chris's treating physicians, multiple members of Chris's family, including his mother and siblings, again met to discuss Chris's terminal condition, prognosis and recommendations regarding his continued care and treatment. After hearing about the patient's terminal condition, prognosis and recommended transition to comfort care from Chris's treating physicians, Ms. Kelly requested additional time to discuss the matter with her family. Chris's father, David Kelly, did not attend the meeting, but continued to request that Chris's care be transitioned to comfort care only out of respect for Chris's wishes.

On Friday, November 6, 2015, I was present at a meeting with Ms. Kelly, Aditya Uppalapati, M.D. (ICU intensivist and critical care specialist caring for Chris), Andrea Downey (a member of Houston Methodist's palliative care department), and Justine Moore (a hospital social worker assigned to the case). The meeting was convened at Chris's bedside to discuss Chris's terminal condition and the physicians' recommendation that the patient be switched to comfort care and the ventilator be removed. Ms. Kelly continued to be unable to make the decision, and informed the group that she'd discuss the matter with her family on Monday. During the meeting, I personally described Houston Methodist Hospital Policy and Procedure PC/PS011 titled, "Medically Inappropriate Decisions About Life-Sustaining Treatment" in the event a consensus couldn't be reached. During this meeting, I answered Ms. Kelly's questions regarding the issues involved, including the process going forward, including the fact that another meeting of the Committee would be held where she would have the chance to address the Committee personally. I further assured her of the hospital's commitment to help her identify an

alternative care facility should she continue to pursue aggressive treatment options. I told her that I would provide her with notice of the date and time for the formal Committee review, and that she would have the opportunity to participate in the meeting. I informed Ms. Kelly that hospital personnel would assist the physicians with efforts to transfer Chris should she change her mind and allow the hospital to seek transfer to another facility. Further, I assured Ms. Kelly that life-sustaining treatment would continue to be administered to Chris throughout this review process.

On Monday, November 9, 2015, I was present for a meeting with Evelyn Kelly, David Dunn, Daniela Moran, MD (ICU intensivist), Andrea Downey (palliative care), and Justine Moore (social work), and numerous members of the patient's family. During this meeting, the medical team again suggested to the family that due to Chris's terminal condition, it was recommended that Chris be shifted to comfort care and the ventilator removed. David Dunn asked that the meeting be adjourned so the family could discuss Chris's treatment and the treating physicians' recommendations. At this point, I explained that the Committee review process would go forward, and life-sustaining treatment will continue to be administered while the family seeks out opportunities to transfer Chris to another facility.

Later that evening, I was informed that the two divorced parents still could not reach a joint decision on Chris's care. Ms. Kelly requested that full aggressive treatment continue, while Mr. Dunn requested that Chris be transitioned to comfort care only and removal of the ventilator.

On Tuesday, November 10, 2015, I hand delivered letters addressed to Evelyn Kelly and David Dunn providing notification of the Committee review, which was scheduled to take place on November 13, 2015. These letters invited his family to attend to participate in the process and included the statements required by Tex. Health & Safety Code §166.052 and §166.053.

On Friday, November 13, 2015, the Committee review meeting took place. Evelyn Kelly was present, participated in discussions and addressed the Committee. Shortly after the Committee meeting, I hand delivered letters addressed to Evelyn Kelly and David Dunn providing a written explanation of the decision reached by the Committee during the review process. The letter described the Committee's determination that life-sustaining treatment was medically inappropriate for Chris and that all treatments other than those needed to keep him comfortable would be removed in eleven days from that date. I included the statements required by Tex. Health & Safety Code

§166.052 and §166.053, and provided Ms. Kelly a copy of Chris's medical records for the past 30 days.[2]

Over the next days, hospital representatives exhausted efforts to transfer Dunn to another facility. In fact, as delineated within the affidavit of Justine Moore, a Houston Methodist Hospital Social Worker assigned to Dunn's case, some sixty-six (66) separate facilities were contacted by Houston Methodist representatives requesting transfer.[3] When calling potential transfer facilities, the facility is provided with the patient's demographic information and recent clinical information so a transfer determination can be made.[4] According to Ms. Moore, all sixty-six (66) facilities declined the transfer. Ms. Moore further describes the situation whereby the health care providers at Houston Methodist were caught in a "firestorm" between Dunn's mother, his father, and the outside forces influencing them.[5]

On November 20, 2015, attorneys acting purportedly on behalf of Dunn, filed Plaintiff's Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief despite the fact that he had been determined mentally incapacitated since his admission to the Hospital.[6] In their filing, counsel sought a Temporary Restraining Order preserving the status quo of the life-sustaining treatment being provided to Dunn while an alternative facility could be located, but also sought a declaration that Houston Methodist's implementation of TEXAS HEALTH AND SAFETY CODE §166.046 violated

[2] *See* Affidavit from J. Richard Cheney, attached hereto as "Exhibit A."

[3] *See* Affidavit from Justine Moore, LMSW, attached hereto as "Exhibit B."

[4] *See id.* at 2, ¶ 4.

[5] *See id.* at 4, ¶ 9.

[6] *See* Plaintiff's Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief, attached hereto as "Exhibit C."

Dunn's due process rights afforded by the Texas and United States Constitutions.[7] On the same day and without the necessity of a hearing, Houston Methodist voluntarily agreed to an Agreed Temporary Restraining Order preserving the status quo by continuing life-sustaining treatment to Dunn, and extending the statutory ten (10) day period by another fourteen (14) days in order to continue efforts to locate a transfer facility. The Temporary Injunction hearing was scheduled for December 3, 2015.

Prior to the Temporary Injunction hearing, Houston Methodist formally appeared in the matter.[8] In its pleading, Houston Methodist requested an abatement of the matter, which necessarily acted as a prolonged extension of Houston Methodist's agreed provision of life-sustaining treatment, while guardianship issues of an incapacitated Dunn, the current plaintiff, could be resolved through the probate court system. This Honorable Court agreed with the assessment of Dunn's incapacity and executed an Order of Abatement, the form of which was agreed to by counsel for all parties.[9] It is monumentally important to note the specific language in the Order of Abatement whereby Houston Methodist voluntarily agreed to preserve the status quo by continuing all life-sustaining treatment. In the Order, which was acknowledged by counsel for all parties, the parties specifically AGREED that:

> **Houston Methodist Hospital voluntarily agrees to continue life-sustaining treatment to David Christopher Dunn during this period of abatement or until such time as a duly appointed guardian, if any, agrees with the recommendation of David Christopher Dunn's treating physicians to withdraw life-sustaining treatment.**[10]

---

[7] *See id.*

[8] *See* Houston Methodist Hospital's Verified Plea in Abatement, Special Exceptions and Original Answer, attached hereto as "Exhibit D."

[9] *See* Order of Abatement dated December 4, 2015 from the 189th Judicial District of Harris County, Texas, attached hereto as "Exhibit E."

[10] *See id.* (emphasis added).

In the probate matter, Dunn's counsel inexplicably sought an expedited guardianship process and determination. If Dunn's representatives only sought more time to locate alternative treatment providers while preserving the provision of life-sustaining treatment, then why would they want to expedite anything? They were given the precise remedy that they demanded in their pleadings to this Court – time.

The final autopsy report of Dunn revealed a 7x6x5 cm cancerous mass on Dunn's pancreas with metastasis to the liver and lymph nodes, and micrometastasis to the lungs.[11] Further, the report showed Dunn suffered obstructive jaundice, hepatic encephalopathy, peritonitis, acute renal failure, acute respiratory failure and sepsis.[12]

It is undisputed that from the day of his admission until the time of his natural death, Houston Methodist Hospital provided continuous life-sustaining treatment to Dunn. In fact, following his death, Evelyn Kelly, Dunn's mother, wrote, "we would like to express our deepest gratitude to the nurses who have cared for Chris [Dunn] and for Methodist Hospital for continuing life sustaining treatment of Chris [Dunn] until his natural death."[13] Despite the expressed gratitude by Evelyn Kelly following Dunn's death, this lawsuit inexplicably continues.

On February 2, 2016, Plaintiffs filed their First Amended Petition naming Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn, as Plaintiff.[14] In her First Amended Petition, Plaintiff states that as a result of Houston Methodist's conduct,

[11] *See* Final Anatomic Diagnosis of David Christopher Dunn, attached hereto as "Exhibit F."

[12] *Id.*

[13] *See* Evelyn Kelly Statement dated December 23, 2015, http://abc13.com/news/chris-dunn-dies-after-fight-over-life-sustaining-treatment-attorney-confirms/1133520/ attached as "Exhibit G."

[14] *See* Plaintiffs' First Amended Petition attached as "Exhibit H."

she sustained injury individually, and on behalf of the Estate.[15]

As evidenced by a more complete and accurate resuscitation of the facts surrounding this case and the legal standards set out below, Plaintiffs cannot prove, as a matter of law, all elements of their causes of action. Furthermore, genuine issues of material fact irrefutably exist, which preclude Plaintiffs' attempt at summary judgment. Therefore, summary judgment is not proper and this Court must deny Plaintiffs' motion.

III.
ARGUMENTS AND AUTHORITIES

A. Applicable Legal Standard for Summary Judgment.

A nonmovant in a traditional summary judgment proceeding is not required to produce summary judgment evidence until after the movant establishes it is entitled to summary judgment as a matter of law.[16] In deciding whether there is a disputed issue of material fact that precludes summary judgment, the court takes as true all evidence favorable to the nonmovant.[17] The court must view the evidence in the light most favorable to the nonmovant and must indulge every reasonable inference and resolve all doubts in favor of the nonmovant.[18] In light of these standards, this Court should deny Plaintiffs' traditional motion for summary judgment because Plaintiffs have failed to prove all elements of their causes of action, resulting in genuine issues of material fact.

[15] *See id.* at 4, ¶ 10.

[16] *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989).

[17] *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

[18] *Limestone Prods.*, 71 S.W.3d at 311; *Nixon*, 690 S.W.2d at 549.

B. The Constitutionality of Texas Health and Safety Code § 166.046 is an Issue More Appropriately Addressed By the Texas Legislature.

Plaintiffs spend a majority of their motion attempting to discredit the constitutionality of TEXAS HEALTH AND SAFETY CODE § 166.046; however, this issue is better suited for assessment by the Texas Legislature. As such, Houston Methodist does not take a position on the constitutionality of the statute, but denies any assertion that the Hospital committed any wrongdoing in its care and treatment of Dunn, or its implementation of TEXAS HEALTH AND SAFETY CODE § 166.046. Houston Methodist simply initiated the process set forth in TEXAS HEALTH AND SAFETY CODE § 166.046 during the course of Dunn's care, but never actually allowed the statutory process to come to fruition. The very act for which Plaintiffs complain, namely the violation of Dunn's constitutional rights through the removal of life-sustaining treatment, never occurred because care and treatment was never removed, and he was allowed to die a natural death.

Houston Methodist specially excepts to Plaintiffs' declaratory judgment cause of action regarding the constitutionality of TEXAS HEALTH AND SAFETY CODE § 166.046. With Mr. Dunn's natural death there is no longer a justiciable controversy concerning the administration of life-sustaining treatment. As further discussed below, declaratory judgment is not available when, like the case at bar, there is no justiciable controversy.[19] Therefore, all of Plaintiffs' claims must be dismissed.

Texas courts may not render advisory opinions.[20] Nor do courts decide cases where no controversy exists between the parties.[21] In other words, a court must not render an

[19] *Bonham State Bank v. Beadle*, 907 S.W. 2d 465, 467 (Tex. 1995).

[20] TEX. CONST. ART. V, § 8; *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968).

[21] *Lazarides v. Farris*, 367 S.W.3d 788, 803 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Chenault v. Jefferson*, No. 03-07-00176-CV, 2008 WL 2309178, at *1 (Tex. App.—Austin June 4, 2008, no pet.); *Camerana v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988).

advisory opinion in a case where there is no live controversy.[22] A declaratory judgment is only appropriate when a justiciable controversy exists concerning the rights and status of the parties and the controversy will be resolved by the declaration sought.[23] That is, the Declaratory Judgment Act does not empower a court to render an advisory opinion or to rule on a hypothetical fact situation.[24] There are two prerequisites for a declaratory judgment action: (1) there must be a real controversy between the parties and (2) the controversy must be one that will actually be determined by the judicial declaration sought.[25] "An advisory opinion is one which does not constitute specific relief to a litigant or affect legal relations."[26]

Clearly, there is no justiciable controversy between Plaintiffs and Houston Methodist as Mr. Dunn's death has mooted any conceivable justiciable controversy between the parties.[27] Plaintiffs seek a declaratory judgment that Houston Methodist's "actions and planned discontinuance of life sustaining treatment" violated Plaintiffs' due process rights

---

[22] *Id.*; *see also Scurlock Permian Corp. v. Brazos County,* 869 S.W.2d 478, 487 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("Courts may not give advisory opinions or decide cases upon speculative, hypothetical, or contingent situations.").

[23] *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004).

[24] *Id.* at 164.

[25] TEX. CIV. PRAC. & REM. CODE § 37.008; *see also Brooks*, 141 S.W.3d at 163–64.

[26] *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 401 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Lede v. Aycock*, 630 S.W.2d 669, 671 (Tex.App.—Houston [14th Dist.] 1981, no writ) (citation omitted).

[27] *See Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 312 (5th Cir. 1997) (plaintiff's request for declaratory relief under Americans with Disabilities Act, arising from his claim that auto dealer from whom plaintiff attempted to help his son purchase auto repudiated contract upon discovering that plaintiff was afflicted with the HIV virus, did not survive plaintiff's death; no actual controversy existed between plaintiff and dealership because plaintiff was deceased); *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (per curiam) (where suit was brought to determine both police officer's liability for death of plaintiff's son and for declaratory judgment as to constitutionality of Missouri statute authorizing officers to use deadly force in apprehending person who has committed felony following notice of intent to arrest, and there was no longer any basis for damage claim since no appeal was taken on the claim for damages, there was no basis for declaratory judgment as to constitutionality of statute as suit did not present a live case or controversy); *Lee v. Valdez*, No. CIV.A.3:07-CV-1298-D, 2009 WL 1406244, at *14 (N.D. Tex. May 20, 2009) (holding death of plaintiff prisoner rendered moot his declaratory judgment action that sheriff violated his civil rights by providing inadequate medical care because there was no continuing injury).

under both the Texas and United States Constitutions.[28] However, it is undisputed that Houston Methodist never discontinued life-sustaining treatment, and even more importantly, Mr. Dunn is now deceased. Thus, Houston Methodist did not discontinue life sustaining treatment to Mr. Dunn and obviously cannot discontinue such life sustaining treatment in the future given Mr. Dunn's death. Because there is no longer a justiciable controversy between Plaintiffs and Houston Methodist, a declaratory judgment is improper under well-settled Texas law and all claims in this lawsuit should be dismissed.[29]

A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome."[30] "The mootness doctrine implicates subject matter jurisdiction."[31] "[W]hen a case becomes moot the only proper judgment is one dismissing the cause."[32] Due to Mr. Dunn's death and the undisputed fact that Houston Methodist never withdrew life-sustaining care, there is no longer a controversy between the parties for the Court to decide.

At this juncture, it is clear the special interest group attached to Plaintiffs simply want to challenge the constitutionality of TEXAS HEALTH & SAFETY CODE § 166.046. Houston Methodist is not the proper entity to defend the constitutionality of a statute drafted and passed by the state legislature. Now that there are no proper claims asserted against it, Houston Methodist has no interest or incentive to zealously litigate on what now amounts to

[28] Plaintiff's First Amended Petition, at 4. Plaintiff's Original Petition also sought a declaratory judgment that Texas Health & Safety Code §166.046 is unconstitutional. This Court has refused to entertain this cause of action. Such a declaratory judgment is also improper because the claims in this lawsuit are now moot and no controversy exists between the parties. *See Lazarides*, 367 S.W.3d at 803; *Chenault*, 2008 WL 2309178, at *1; *Camerana*, 754 S.W.2d at 151; *Scurlock Permian Corp.*, 869 S.W.2d at 487.

[29] *See Lazarides*, 367 S.W.3d at 803; *Chenault*, 2008 WL 2309178, at *1; *Camerana*, 754 S.W.2d at 151; *Scurlock Permian Corp.*, 869 S.W.2d at 487; *Brooks*, 141 S.W.3d at 163–64.

[30] *Allstate Ins. Co. v. Hallman,* 159 S.W.3d 640, 642 (Tex. 2005).

[31] *City of Dallas v. Woodfield*, 305 S.W.3d 412, 416 (Tex. App.—Dallas 2010, no pet.).

[32] *Polk v. Davidson*, 196 S.W.2d 632, 633 (Tex. 1946); *see also Woodfield*, 305 S.W.3d at 416 ("If a case is moot, the appellate court is required to vacate any judgment or order in the trial court and dismiss the case.").

an advisory opinion on a Texas Health & Safety Code provision. That advocacy role belongs to the State of Texas, the legislature, or the Texas Attorney General.

Because all claims asserted by Plaintiffs are now moot in this case, Plaintiffs' claims should be dismissed in their entirety.[33]

C. This Cause of Action is Moot Because The Controversy Is Not Capable of Repetition.

Contrary to Plaintiffs' assertion, this matter is moot as it is not capable of repetition. In their argument, Plaintiffs fail to cite an important piece of jurisprudence regarding the "capable of repetition yet evading review" exception to the mootness doctrine: to invoke this exception, a plaintiff must prove that "a reasonable expectation exists that the *same complaining party* will be subjected to the *same action again*."[34] Not only must a plaintiff show that the challenged action is too short in duration as to evade review, but also must show a "reasonable expectation" or "demonstrated probability" that the same controversy will recur *involving the same complaining party*.[35] The "mere physical or theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test."[36]

In the present case, it is impossible for the same complaining party to be subjected to the same action in the future. Mr. Dunn is no longer living, and therefore, cannot be subject to the same action or controversy.[37] Additionally, because of the expiration of Mr. Dunn's natural life, he can never again, in any capacity, be a complaining party to a lawsuit. As such,

---

[33] *See id.*

[34] *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (emphasis added); *see Murphy v. Hunt,* 455 U.S. 478, 482 (1982); *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975); *Blum v. Lanier,* 997 S.W.2d 259, 264 (Tex. 1999); *Gen. Land Office v. OXY U.S.A., Inc.,* 789 S.W.2d 569, 571 (Tex. 1990).

[35] *Murphy v. Hunt*, 455 U.S. at 482.

[36] *Trulock v. City of Duncanville*, 277 S.W.3d 920, 924-25 (Tex. App.—Dallas 2009, no pet.).

[37] *See Williams*, 52 S.W.3d at 184–85.

there is no possible way, let alone reasonable expectation, that the same complaining party will be subjected to the same action or controversy.[38]

Based on Plaintiffs' inability to meet the "capable of repetition" prong of the mootness exception, there is no need to consider whether the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, or whether Plaintiffs could obtain review before the issue became moot, as both elements are necessary for the exception to apply. Therefore, because this matter is not capable of repetition yet evading review and thus moot, any decision rendered by this Court would constitute an advisory opinion.[39]

D. Houston Methodist is Not a State Actor.

Additionally, notwithstanding the fact that Houston Methodist takes no position on the constitutionality of TEXAS HEALTH AND SAFETY CODE § 166.046, Houston Methodist is not a state actor and thus cannot be sued in the capacity in which Plaintiffs' seek. As indicated in *Jones v. Memorial Hospital*, state-actor status can be an extremely fact-intensive issue that is difficult to get resolved by summary judgment evidence.[40] Further, as the movant, Plaintiffs are responsible for conclusively establishing that Houston Methodist is a state actor.[41] However, to date, there has been neither a single piece of discovery exchanged,

[38] *Id.*

[39] "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (citing *Ala. State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461 (1945); *Firemen's Ins. Co. v. Burch,* 442 S.W.2d 331, 333 (Tex. 1968); *Cal. Prod., Inc. v. Puretex Lemon Juice, Inc.,* 160 Tex. 586, 591 (Tex. 1960)). "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury." *Tex. Air Control Bd.*, 852 S.W.2d at 444.

[40] *Jones v. Mem'l Hosp. Sys.*, 746 S.W.2d 891, 896 (Tex. App.—Houston [1st Dist.] 1988, no writ.) ("Whether a private hospital has actually functioned as a public entity involves a mixed question of fact and law. To make an accurate determination of that issue requires a full development of all relevant facts and a careful consideration of all pertinent laws.").

[41] *Id.* at 896.

nor a single deposition taken. As such, it would seem impossible for a court to determine that a full development of all relevant facts has been made, enough to conclude Houston Methodist is or functions as a state actor.

However, contrary to Plaintiffs' crafty argument, Houston Methodist is not a state actor. Because Plaintiffs' § 1983 claim involves federal constitutional rights, precedent from the Supreme Court and Fifth Circuit are particularly instructive.[42] In *Rendell-Baker v. Kohn*, the Supreme Court assessed whether a privately owned school held state actor status for purposes of determining whether the petitioners had a viable claim for relief for employment-related claims.[43] The school had a close relationship with the state and was, in part, regulated by the state since Massachusetts sent troubled public school children to this school in lieu of operating its own alternative school.[44] The school received a significant portion of its income from government funding, and the Court even acknowledged that the school performed a public function in educating maladjusted high school students.[45] Yet, the Supreme Court held that the school was not a state actor for purposes of the plaintiffs' claims.[46]

In line with the Court's precedent, Houston Methodist cannot be a state actor. Houston Methodist's relationship with the state of Texas is tenuous at best, as the Hospital is a private entity, staffed by private employees, and regulated by a group of private individuals. Though Plaintiffs attempt to inject "state actor" status into Houston Methodist

[42] *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Bass v. Parkwood Hosp.*, 180 F.3d 234 (5th Cir. 1999).

[43] 457 U.S. 830 (1982).

[44] *Id.* at 841.

[45] *Id.* at 840, 843.

[46] *Id.* at 843–44.

because the Hospital performs a sort of government service in administering health care, such a fact is not conclusive of state action as the Court expressed in *Rendell-Baker*.[47]

Plaintiffs place great emphasis on the fact that Houston Methodist relied on a state statute to support its actions as they relate to Mr. Dunn. However, "a private hospital is not transformed into a state actor merely by statutory regulation."[48] In *Bass v. Parkwood Hospital*, the Fifth Circuit held that a private hospital did not assume state actor status by participating in the procedure under Mississippi law of civilly committing a mentally ill person.[49] It appears to be Plaintiffs' position that any private individual becomes a state actor by relying on a state statute implemented by the Texas legislature. Such an argument is absurd, and would lead to implausible results.

Houston Methodist's use of the procedures outlined in TEXAS HEALTH AND SAFETY CODE § 166.046 is strikingly analogous to the hospital's use of the statutory commitment procedures. Further, as the court held of Mississippi's commitment procedures, § 166.046 neither compels nor encourages the private initiation of its processes and procedures. Instead, the statute merely authorizes and regulates the commission of such acts.[50] As such, contradictory to Plaintiffs' accusations, the fact that Houston Methodist's actions were in accord with TEXAS HEALTH AND SAFETY CODE § 166.046 does not transform the Hospital into a state actor.

---

[47] *Id.* at 842.

[48] *Bass*, 180 F.3d at 242; *see also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State….").

[49] *Bass*, 180 F.3d at 243; *see, e.g., Pino v. Higgs,* 75 F.3d 1461 (10th Cir. 1996); *Ellison v. Garbarino,* 48 F.3d 192 (6th Cir.1995); *Rockwell v. Cape Cod Hospital,* 26 F.3d 254 (1st Cir. 1994); *Harvey v. Harvey,* 949 F.2d 1127 (11th Cir. 1992); *Spencer v. Lee,* 864 F.2d 1376 (7th Cir. 1989).

[50] *Bass*, 180 F.3d at 243.

Federal precedent leaves no room for conjecture — Houston Methodist is not a state actor, and does not function as a state actor. Therefore, Plaintiffs' Motion for Summary Judgment must be denied on this point.

IV.
CONCLUSION & PRAYER

Plaintiffs' Motion for Summary Judgment must be denied in its entirety because Plaintiffs have failed to show that no genuine issue of material fact exists, and have also failed to prove various elements of their claims.

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL,** respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment in its entirety, and for any such other and further relief to which Houston Methodist shows itself justly entitled.

Respectfully submitted,

SCOTT PATTON PC

By: */s/ Dwight W. Scott, Jr.*

DWIGHT W. SCOTT, JR.
Texas Bar No. 24027968
dscott@scottpattonlaw.com
CAROLYN CAPOCCIA SMITH
Texas Bar No. 24037511
csmith@scottpattonlaw.com
3939 Washington Avenue, Suite 203
Houston, Texas 77007
Telephone: (281) 377-3311
Facsimile: (281) 377-3267

ATTORNEYS FOR DEFENDANT, HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record pursuant to Rule 21a, Texas Rules of Civil Procedure, on this the 21st day of October, 2016.

Via E-file
James E. "Trey" Trainor, III
Trey.trainor@akerman.com
AKERMAN, LLP
700 Lavaca Street, Suite 1400
Austin, Texas 78701

Via E-file
Joseph M. Nixon
Joe.nixon@akerman.com
Brooke A. Jimenez
Brook.jimenez@akerman.com
1300 Post Oak Blvd., Suite 2500
Houston, Texas 77056

Via E-File
Emily Kebodeaux
ekebodeaux@texasrighttolife.com
TEXAS RIGHT TO LIFE
9800 Centre Parkway, Suite 20
Houston, Texas 77036

ATTORNEYS FOR PLAINTIFF

/s/ Dwight W. Scott, Jr.
DWIGHT W. SCOTT, JR.