No. 01-17-00866-CV

IN THE FIRST COURT OF APPEALS
AT HOUSTON, TEXAS

EVELYN KELLY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN
Appellant,

v.

HOUSTON METHODIST HOSPITAL
Appellee.

On Appeal from the 189th District Court, Harris County, Texas.
(No. 2015-69681)

APPELLANTS' BRIEF

James E. "Trey" Trainor, III
State Bar No. 24042052
trey.trainor@akerman.com
AKERMAN LLP
700 Lavaca, Suite 1400
Austin, Texas 78701
Tel: (512) 623-6700
Fax: (512) 623-6701

Joseph M. Nixon
State Bar No. 15244800
joe.nixon@akerman.com
AKERMAN LLP
1300 Post Oak Blvd., Suite 2500
Houston, Texas 77056
Tel: (713) 623-0887
Fax: (713) 960-1527

Kassi Dee Patrick Marks
kassi.marks@gmail.com
2101 Carnation Ct.
Garland, Texas 75040
Tel: (469) 443-3144
Fax: (972) 362-4214

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to the Texas Rules of Appellate Procedure, Appellant certifies that the following is a complete list of the parties, attorneys and other persons who have any interest in the outcome of this suit:

Appellants:	Evelyn Kelly, Individually and on Behalf of the Estate of David Christopher Dunn
Trial and Appellate Counsel:	Joseph M. Nixon joe.nixon@akerman.com AKERMAN LLP 1300 Post Oak Blvd. Suite 2500 Houston, Texas 77056 Tel: (713) 623-0887 Fax: (713) 960-1527 James E. "Trey" Trainor, III trey.trainor@akerman.com AKERMAN LLP 700 Lavaca Street, Suite 1400 Austin, Texas 78701 Tel: (512) 900-3205 Fax: (512) 708-1002 Kassi Dee Patrick Marks kassi.marks@gmail.com 2101 Carnation Ct. Garland, Texas 75040 Tel: (469) 443-3144 Fax: (972) 362-4214
Appellees:	Houston Methodist Hospital
Trial Counsel:	Dwight W. Scott dscott@scottpattonlaw.com SCOTT PATTON, PC 3939 Washington Ave. Suite 203 Houston, Texas 77007

Appellant Counsel:	Reagan W. Simpson rsimpon@yettercoleman.com YETTER COLEMAN LLP 909 Fannin Street, Suite 3600 Houston, Texas 77010

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STATEMENT OF CASE

David Christopher Dunn ("Dunn"), Plaintiff in the Court below, filed his Original Petition and Application for Temporary Restraining Order and Injunctive Relief against The Methodist Hospital ("Methodist") on November 20, 2015. (CR 11-30.) Methodist had previously sought to remove his life-sustaining treatment ("LST") against his will pursuant to its state-granted authority and the procedure set forth in TEX. HEALTH & SAFETY CODE ("§166.046"). (*Id.*) (*See also* **Tab B**.) Plaintiff also asserted that §166.046 is unconstitutional both facially and as applied to him as it violated his substantive and procedural due process rights. (*Id.*) On November 20, 2015, the Court entered an Agreed Order on Plaintiff's Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief wherein the trial court ordered that Methodist was to "cease and desist all actions of any nature to pursue the removal of Christopher David Dunn's LST through December 4, 2015." (CR 41-42.) On December 4, 2015, the trial court entered an Order of Abatement "pending the appointment of a guardian or recognized alternative to guardianship, if any…for the patient in: Cause No. 444710, *Guardianship of the Person of David Christopher Dunn, An Incapacitated Adult Person*, in the Probate Court No. 1 of Harris County, Texas." (CR 136-37.) Methodist agreed to continue LST to Dunn "until such time a duly appointed

guardian, if any, agrees with the recommendation of David Christopher Dunn's treating physicians to withdraw life-sustaining treatment." (CR 136.)

On January 8, 2016, Plaintiff filed a Motion to Lift Stay and Substitute Parties as Dunn died naturally on December 23, 2015. (CR 69-70.) On January 29, 2016, the trial court entered an Agreed Order Granting Plaintiff's Amended Motion to Lift Stay and Substitute Parties. (CR 181.) Plaintiffs' First Amended Petition was filed on February 2, 2016, and Appellants, Evelyn Kelly ("Kelly"), Individually and on behalf of the Estate of Christopher Dunn, continued the lawsuit challenging the constitutionality of §166.046 and seeking redress for the substantive and procedural due process violations. (CR 182-194.) A series of dispositive motions were filed by the parties. However, only the following were considered by the Court and were the basis of the Order which Plaintiffs now appeal:

- Plaintiff's Amended Motion for Summary Judgment (hereinafter, "Plaintiffs' MSJ") (CR 1152-1183) (**Tab D**);
- Defendant's Traditional and No-Evidence Motion for Summary Judgment (hereinafter, "Methodist's MSJ") (CR 1254-1274) (**Tab F**); and
- Defendant's Final Supplemental Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss (hereinafter, "MTD") (CR 1184-1251) (**Tab E**).

The trial court heard the Motions and then issued its Order of October 13, 2017, granting Methodist's MTD as to the mootness issue, denying it as to the

Chapter 74 issue, and based on its mootness decision, finding that it lacked subject matter jurisdiction to rule on Plaintiff's Amended MSJ. (CR 1544-45.) (**Tab A**.)

Plaintiffs timely filed their Notice of Appeal and Request for Record on November 7, 2017, and November 10, 2017, respectively. (CR 1551-1566.)

ISSUES PRESENTED

1. Did the trial court err in finding that Dunn's death mooted the civil rights claims under the Uniform Declaratory Judgment Act or 42 U.S.C. §1983.

2. Did the trial court err in implicitly denying Plaintiffs' Amended MSJ on the basis that the case was moot where Plaintiffs established that §166.046 is unconstitutional facially and as applied to Dunn and that Methodist violated Plaintiffs' civil right to due process under color of state law.

STATEMENT OF FACTS

David Christopher Dunn was admitted as a patient of Methodist on October 12, 215. (CR 1152.) On November 11, 2015, Methodist provided Evelyn Kelly with a letter informing Ms. Kelly that Methodist intended to terminate the life-sustaining treatment of her son, Chris Dunn, and that a meeting of the hospital's ethics committee would take place to discuss removing Mr. Dunn's treatment. (CR 1152-53; 1174.) The letter by Methodist was sent pursuant to Texas Health and Safety Code §166.046. (*Id.*) Methodist held an ethics committee meeting on November 13, 2015, and decided to terminate LST on Tuesday, November 24, 2015. (CR 25-30.) (**Tab C**.) Ms. Kelly obtained a temporary restraining order on November 20, 2015. (CR 1153.) Methodist subsequently agreed to continue life-sustaining treatment pursuant to that order until Mr. Dunn's natural death. Mr. Dunn died on December 23, 2015. (*Id*.)

SUMMARY OF THE ARGUMENT

The trial court erred in granting Methodist's MTD on mootness and implicitly finding that Chris Dunn's death rendered Plaintiffs' entire lawsuit moot. Dunn's death did not render moot either his or his mother's claims for past violations of due process and the constitutional challenge to §166.046. Alternatively, the mootness exception of repetition yet evading review sustains claims for

retrospective and/or prospective relief. Because it is not moot, this Court has subject matter jurisdiction to hear this case. Plaintiffs' protected interests in life and to determine their own medical needs were violated when Methodist – under color of state law by utilizing §166.046 – deprived them of those rights without due process. Plaintiffs' grievances may, therefore, be addressed under *42 U.S.C. §1983*. Because the trial court committed error, and there are cross-motions for summary judgment, this court must reverse and render the judgment that the trial court should have – that is, declare that this statute is unconstitutional and that the Plaintiffs are entitled to nominal damages for their due process violations pursuant to *42 U.S.C. §1983*.

ARGUMENT & AUTHORITIES

I. THE COURT SHOULD APPLY THE STANDARD OF REVIEW APPLICABLE TO A MOTION FOR SUMMARY JUDGMENT

Because of the manner in which Methodist presented and argued its MTD, it was effectively a Motion for Summary Judgment ("MSJ"). Plaintiffs also had a MSJ addressing overlapping issues, meaning the parties had cross motions for summary judgment, to which Methodist responded. (**Tabs E, H**.) The trial court only explicitly ruled on Methodist's MTD by granting it as to Plaintiff's civil rights actions and denying it was to the Ch. 74 argument. (CR 1544-45.) (**Tab A**.) However, it implicitly denied Plaintiffs' MSJ by finding it lacked subject matter

jurisdiction on the basis of its erroneous determination that Plaintiffs' claims were mooted by Dunn's death. These circumstances combine to allow this Court to hear Plaintiffs' denied MSJ, determine all issues presented, and reverse and render the decision the trial court should have.

The standard for review for a MTD is abuse of discretion.[1] It is well-established that "[a] trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or if it acts without reference to any guiding rules or principles."[2] Finally, the "[d]etermination whether a trial court abused its discretion is made on a case-by-case basis." *Id.* (Other citation omitted). Questions of law, however, will be determined *de novo*.[3] As importantly, what a party calls its motion is not dispositive of what the motion is or the standard of review for it on appeal.

A court of appeals "must look to the substance of the issue rather than the procedural vehicle employed to determine the appropriate standard of review."[4]

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[1] *See, e.g*, *Ghidoni v. Skeins*, 510 S.W.3d 707, 710 (Tex. App.—San Antonio 2016, no pet.) (other citations omitted).

[2] *Id.* citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

[3] *Id.* citing *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). Further, where an "order of dismissal does not state the grounds on which the trial court relied, any grounds presented to the trial court may support dismissal" which has been held to require that "an appellant attack all independent bases or grounds that fully support a complained-of ruling or judgment." *Id.* citing *Britton v. Tex. Dept. of Criminal Justice,* 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (Other citations omitted).

[4] *Harris Co. Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 312 (Tex. App.—Houston [14th Dist.] 2008, no pet.) citing *Sheth v. Dearen*, 225 S.W.3d 828, 831 (Tex. App.—Houston [14th Dist.] 2007, no pet.)

While mootness may be addressed by a MTD, where the MTD goes to the merits of a case, it becomes "more the functional equivalent of a motion for summary judgment than a motion to dismiss."[5]

In *Textac*, this court considered a similar situation where there where cross-motions by the parties intertwined the same issues.[6] The Court noted, "[n]either party has identified a case in which a court discusses the appropriate standard of review to apply to the dismissal of a condemnation action when a property owner raises claims similar to Textac's. However, often such claims are the subject of motions for summary judgment or, when fact issues exist, jury trials."[7] In this case, neither party addressed the standard of review for what Methodist called its MTD. Indeed, there is no case in Texas addressing the standard of review for MTD in a case challenging the constitutionality of §166.046.

In its Motion to Dismiss, Methodist jumped right into its version of the facts, including details about Dunn's condition, diagnoses, prognosis, the hearing, and conversations with his parents and family members. Then Methodist went into its

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[5] *Id.* at 312-313; *see also Nabelek v. City of Houston*, 2008 WL 5003737, at *6 (Tex. App.—Houston [1st Dist.] 2008, no pet.) relying on *Textac*. *Nabelek* summarized the holding in *Textac* in a parenthetical as follows: "concluding that motion to dismiss was functional equivalent of motion for summary judgment because it was directed to merits of claims, issues were concurrently developed in combined response to motion for summary judgment, same or similar issues were often subject for motions for summary judgment, and neither party had discussed appropriate standard of review to apply to dismissal; determining that appropriate standard of review to apply was that applied to grant of summary judgment." *Id.*

[6] *Id.* at 313.

[7] *Id.* at 313-314. (Other citations omitted).

arguments about mootness and Ch. 74.[8] Methodist argued what were and were not disputed facts and argued vehemently that it "provided Dunn with life-sustaining care until his natural death – life sustaining treatment was never withdrawn" and that "Houston Methodist never ended life-sustaining care in alleged violation of his due process and civil rights." (CR 1196, 1198.) Methodist also set forth evidence in an appendix and argued throughout the brief about whether facts were disputed or undisputed about Dunn's care and the medical ethics committee hearing in an effort to argue that it did not violate Dunn's procedural or substantive due process rights. (*E.g.*, CR 1210-32.) Thus, Methodist went into the merits of the overall case rather than simply making its argument about mootness.

Plaintiffs' Response to Methodist's MTD was combined with their Response to Methodist's MSJ.[9] (CR _.) (**Tab G**.) Plaintiffs incorporated their arguments in response to Methodist's MTD in Plaintiff's First Amended MSJ. (*Id.*) Methodist's combined Reply to its MTD and MSJs similarly combined its arguments. (CR 1469-80.) (**Tab H.**) The trial court then heard the Motion to Dismiss and both parties' Motions for Summary Judgment and Responses. (**Tabs D-I**.)

[8] The trial court's ruling on the Ch. 74 part of Methodist's MTD is not being challenged in this appeal.

[9] This pleading has been omitted from the Clerk's Record. However, Plaintiffs have requested it and will supplement the record and their Brief once it is available.

That is precisely what happened in *Textac*: both the MTD and the cross-MSJs were presented to the judge at the same time, no live witnesses were presented to the judge, the lawyers for both sides presented legal arguments about the effect of the evidence before the judge, and the judge ruled at the end of the hearing – all of which would happen in the complex summary judgment hearing – which this was.

The Court in *Textac* addressed their situation and ruled the trial court had heard the parties' cross motion for summary judgment:

> In addition, both the motion to dismiss and the summary judgment motions were presented to the judge at the same time, no live witnesses were presented to the judge, and the lawyers presented legal arguments about the effect of the evidence before the judge, just as they would in a complex summary judgment hearing. And the judge ruled at the end of the hearing, apparently based on the arguments made to him and the evidence discussed during arguments, just as might happen in a summary judgment case.[10]

Despite referring to its motion as a Motion to Dismiss, Methodist's MTD went into matters well beyond what was necessary to argue mootness. Methodist presented evidence, discussed facts and made arguments that are at the heart of the merits of this case, which were also covered in the cross-MSJ's, all of which were considered by the trial court in ruling on the motions. Methodist made arguments as to whether facts were disputed or not and argued that it did not violate Dunn's

[10] *Id.* at 313.

civil rights, none of which was necessary or relevant to a simple MTD. Methodist's MTD was, in actuality and substance, a Motion for Summary Judgment. As such, this case should be reviewed using the standard of review for motions for summary judgment – and cross-motions for summary judgment, issues to which Plaintiffs now turn.[11]

The traditional summary judgment standard is well-established: the movant has the burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.[12] "A defendant moving for summary judgment must either (1) disprove at least one element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense to rebut plaintiff's cause."[13] This Court in *Textac* held: "The propriety of summary judgment is a question of law; therefore, we review it de novo."[14] "Summary judgment is appropriate when there is no genuine issue as to any material fact and judgment should be granted in favor of the movant as a matter of law."[15]

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[11] Kelly voluntarily dismissed her claims for Intentional Infliction of Emotional Distress which was the sole basis of Methodist's No-Evidence MSJ. (CR 1544-45).
[12] TEX. R. CIV. P. 166a(c); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).
[13] *Frank's International, Inc. v. Smith International, Inc.*, 249 S.W.3d 557, 563 (Tex. App.—Houston [1st Dist.] 2008, no pet.) citing *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).
[14] 257 S.W.3d at 315 citing *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994).
[15] *Textac*, 257 S.W.3d at 315 citing *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2006).

The evidence conclusively establishes a matter if ordinary minds could not differ as to the conclusion to be drawn from the evidence.[16] When applying the summary judgment standard, the court should take as true all evidence favorable to the non-movant, and indulge every reasonable inference and resolve any doubts in the non-movant's favor.[17] This was not done by the trial court in this case.

II. BECAUSE THERE WERE CROSS-MOTIONS FOR SUMMARY JUDGMENT THIS COURT MAY RULE ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

In addition to Methodist's MTD (effectively a MSJ) as well as its Traditional MSJ, Plaintiffs filed their own MSJ which asked the court to declare under the Uniform Declaratory Judgment Act that §166.046 unconstitutional both facially and as it was applied to Dunn and to find that Methodist deprived Dunn of his civil right to due process (both substantive and procedural) under color of state law under 42 U.S.C. §1983 by utilizing §166.046. (**Tab D**.) Plaintiffs also argued that this case was not mooted by Dunn's death.[18] Plaintiffs submitted evidence, including, *inter alia,* videos of a conscious, alert Dunn asking – indeed praying – for his life, that is that his life-sustaining care be continued until his natural death. (*See* Videotape Evidence included as part of the CR). The trial court heard Plaintiffs' MSJ and the other listed motions at the same time, yet found it lacked

[16] *In re Estate of Hendler*, 316 S.W.3d 703, 707 (Tex. App.—Dallas 2010, no pet.)
[17] *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004); *see also, Textac,* 257 S.W.3d at 315 citing *Sudan v. Sudan,* 199 S.W.3d 291, 292 (Tex. 2006).
[18] *Id.*

subject matter jurisdiction to rule on Plaintiffs' MSJ, thereby implicitly denying it. (**Tab A**.)

In *Frank's* this Court held: "Generally, we do not have jurisdiction to hear the denial of a motion for summary judgment on appeal."[19] This Court continued, "However, an exception applies when, as here, the trial court has denied one motion and has granted the other, resulting in a final judgment."[20]

This Court further explain in *Frank's* that:

> We are aware that the trial court granted, in part, Frank's' cross-motion for summary judgment by dismissing Smith's conversion claim and that the record does not contain a denial of Frank's' motion as it concerns Smith's breach of contract claim. **In some cases a ruling can be implied.** *See* TEX. R. APP. P. 33.1(a)(2)(A). **Here, both Smith's and Frank's' motions addressed the same issue**, *i.e.*, both argued the existence of a valid contract. After the trial court granted summary judgment for Smith, it awarded damages, including interest and attorneys' fees, to Smith. The trial court's judgment states that it disposed of all parties and issues in the case. This is evidence that the trial court found no fact issues and resolved the matter of the existence of a valid contract in favor of Smith. **Such a ruling in Smith's favor**

[19] 249 S.W.3d at 559, n.3 citing *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1996); *See also Dallas Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 221 (Tex. App.—Dallas 2015, no pet.) ("Although a denial of summary judgment is generally not reviewable, we may review such a denial when both parties move for summary judgment and the trial court granted one and denied the other. In our review of such cross-motions, we review the summary judgment evidence presented by both sides and determine all questions presented. If we conclude the trial court committed reversible error, we render the judgment the trial court should have rendered.") (Other/internal citations omitted); *see also, Paxton v. Texas Health & Human Servs. Comm.*, 2017 WL 6504084, at *4 (Tex. App.—Austin 2017, no pet. hist.) (same); *Ferreira v. Butler*, 531 S.W.3d 337, (Tex. App.—Houston [14th Dist.] 2017, pet. filed) (same); *James v. Texas Workforce Comm.*, 2013 WL 1628244, at *2 (Tex. App.—Dallas 2013, no pet.); *General Agents Ins. Co. of America, Inc. v. El Naggar*, 340 S.W.3d 552, 558 (Tex. App.—Houston [14th Dist.] 2011, rev. denied) (same).

[20] 249 S.W.3d 557, 559, n.3 citing *Commn'rs Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997).

necessarily denied Frank's' motion on the same issue. *See Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex.1997).[21]

Here, the granting of Methodist's MTD on mootness necessarily denied Plaintiffs' MSJ on that same issue. The trial court's Order then "ORDERED, ADJUDGED AND DECREED that Plaintiff's lawsuit against Defendant…is hereby dismissed in its entirety with prejudice to refiling same." (CR 1544). (**Tab A**.)

The holding of this Court in *Frank's* applies with equal force to the case *sub judice*: **"[w]hen, as here, both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment proof presented by both sides and determine all questions presented**."[22] This Court in *CenterPoint* continued: "If we find error, we **must** render the judgment the trial court should have entered."[23]

When the trial court granted Methodist's MTD on the issue of mootness, which was also addressed in Plaintiff's MSJ, the trial court implicitly denied Plaintiff's MSJ. Therefore, the denial of Plaintiff's MSJ must be heard under these circumstances. Moreover, because the trial court erred in its determination of mootness, this court not only has subject matter jurisdiction over the case, it can

[21] 249 S.W.3d 557, 559, n.2. (Emphasis added).
[22] *Id.* at 563 citing *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). (Emphasis added).
[23] 177 S.W.3d at 430 citing *Agan,*[23] 940 S.W.2d at 81. (Emphasis added).

determine all questions presented, and then **must** render the judgment the trial court should have entered.

III. THE TRIAL COURT ERRED IN FINDING THAT DUNN'S DEATH MOOTED THE CIVIL RIGHTS CLAIMS UNDER THE UNIFORM DECLARATORY JUDGMENT ACT AND 42 U.S.C. §1983.

This Court must decide the issue of mootness, not just because it was the basis of the trial court's ruling below, but also because it determines whether this Court has subject matter jurisdiction to even hear this case. Mootness is a "threshold issue[] that implicate[s] subject matter jurisdiction."[24] "An appellate court is prohibited from deciding a moot controversy."[25]

A. Dunn's Death Did Not Moot the Due Process and Civil Rights Claims Asserted Against Methodist

Dunn's death did not moot his claims under the Declaratory Judgment Act or under 42 U.S.C. §1983. Nor did his death moot his mother's, Kelly's, claims for her own due process violations. Methodist consistently misstated the nature of the claims and certain important temporal distinctions which bear directly on the issue of mootness. Therefore, Plaintiffs will first set forth exactly the nature of their claims and the timing of them.

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[24] *Blackard v. Schaffer*, 2017 WL 343597, at * (Tex. App.—Dallas 2017, pet. filed). (Other citations omitted).

[25] *Id.* (Other citations omitted). Further, "[s]ubject matter jurisdiction cannot be waived..., can be raised at any time, and must be considered by the court sua sponte." *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 103 (Tex. 2012). (Other citations omitted).

Plaintiffs assert due process violations because Methodist employed §166.046 to begin to terminate life-sustaining treatment. Methodist ignored the due process claims in its MTD and made a deceptively simple argument: While Methodist decided to withdraw Dunn's life-sustaining care against his and his mother's will under §166.046, because (after this lawsuit was filed) it *voluntarily* decided it would not do so, it "never ended life-sustaining treatment in alleged violation of Dunn's due process and civil rights and Dunn has since succumbed to his terminal illnesses **naturally**." (CR 1198). (Emphasis added). In other words, Methodist asserts because it *voluntarily* decided not to withdraw his life-sustaining care after unilaterally deciding it would, against Dunn's and Kelly's will, and then Dunn died "naturally," this case is moot. Methodist's arguments are erroneous and helped lead the trial court into error for a number of reasons.

First, Methodist continually misstates the nature of Plaintiffs' claims. It is not merely the termination of his LST that is a civil rights violation. It is the lack of due process in the procedure and substance of the law that allows Methodist to reach the decision to terminate a patient's life prematurely against their will that is problematic. That Methodist was stopped with a restraining order does not make the due process violations leading to its early decision moot. The Court erred in not making this distinction.

Second, and relatedly, Methodist (and ostensibly the trial court) conflates "live controversy" with "live plaintiff." The two are not synonymous and a live controversy may still exist even when the same can no longer be said of one of the victims of the violation. Dunn's estate may continue with the claim for the past violation of his civil rights prior to this death. In addition, Kelly has her own cause of action for past violations of her civil rights as §166.046 applies to those who are the decision-makers for ill persons. Dunn may have died, but the controversy about his pre-death denial of constitutional rights, and those of Kelly, are still alive and the merits of those claims have not been adjudicated.

Third, as is briefed below, the mootness exception of capable of repetition yet escaping review applies here and there is a very real risk that this law will continue to be used by Methodist (who only voluntarily decided it would not use it against Dunn). Thus, Kelly has a prospective claim for relief as well in asking that this law be declared unconstitutional.

B. This Case is Not Moot Under the Uniform Declaratory Judgment Act.

It is true that under the Declaratory Judgment Act, "[a] declaratory judgment is available only when there is a justiciable controversy between the parties."[26] It is also true that a court may not "render an advisory opinion or [ ] rule on a

[26] *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 401 (Tex. App.—Houston [1st Dist.] 2006, no pet.) citing *Brooks v. Northglen Assn.*, 141 S.W.3d 158, 163-645 (Tex. 2004).

hypothetical fact situation."[27] There are two requirements for a declaratory judgment: "(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."[28] Section 37.008 actually says, "The court ***may*** refuse to enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding." (Emphasis added).

Here, the death of Dunn did not change the fact that both requirements are met, particularly as to the due process violations he and his mother endured prior to his death through Methodist's utilization of §166.046. Every bit of it happened before his natural death, except for Methodist actually "withdrawing treatment" as it had intended prior to this lawsuit being filed. A real controversy as to the constitutionality of §166.046 remains as it was applied to Dunn and his mother, as well as its facial constitutionality. Neither was mooted by his death. Moreover, this controversy will actually be resolved by the judicial declaration sought.

Accordingly, this case meets all of the requirements that the Texas Supreme Court said were necessary for a court to avoid rendering an advisory opinion:

> It was held that before a power could be classified as judicial under our constitution, the trial tribunal must have the authority to hear the facts, to decide the issues of fact made by the pleadings, to decide the questions of law involved, and possess the power to enter a judgment on the facts found in accordance

[27] *Id.*
[28] *Id.* citing Tex. Civ. Prac. & Rem. Code §37.008 (Vernon 1997).

> with the law as determined by the court. It follows that a tribunal which is not empowered to render a final judgment is not functioning in a judicial capacity. Since the federal court will enter the final decree, any decision we may make in this case will be advisory in nature.[29]

This Court, therefore, should decide if Dunn and Kelly suffered deprivations of their constitutional due process rights when Methodist used §166.046 as it did to determine that Dunn's life-sustaining care should be withdrawn against their express wishes in order to hasten Dunn's death – all of which happened before he died naturally, none of which has been undone by his death, and all of which can be determined by this Court. These are real and substantial rights violations and there remains a genuine conflict of tangible interests.

Additionally, a claim for nominal damages will save a case from a claim of mootness when the issue is of past conduct that violated one's civil rights or is otherwise subject to remedy. For example, in *Utah Animal Rights, supra,* the Court there held that a claim for nominal damages for past conduct survived a claim of mootness even where the ordinance at issue had been repealed.[30] The past conduct which was alleged to be unconstitutional under the now-repealed ordinance could be determined and was not moot.[31] Similarly, in *Morgan v. Plano I.S.D.*, the E.D.

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[29] *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 861 (Tex. 1965); *see also Chapman v. Marathon Manufacturing Co.*, 590 S.W.2d 549, 552 (Tex. 1979) ("there must be a real and substantial rather than a theoretical, controversy involving a genuine conflict of tangible interests").
[30] 371 F.3d at 1257-58.
[31] *Id.*

of Texas held that while a policy with First Amendment implications had been replaced and the district was unlikely to return to it, "the request for injunctive and declaratory relief was moot."[32] However, the court held that "[t]his is sound but it leaves aside plaintiffs' claim of nominal damages from the 2004 [replaced] Policy. This court and others have consistently held that a claim for nominal damages avoids mootness."[33] Thus, those claims implicating the prior policy had to be determined.[34]

Plaintiffs' declaratory judgment claims based on the violations of Dunn's and Kelly's due process rights are not moot as they have already occurred and did not cease to be a live controversy because of his death. Plaintiffs are still entitled to have those past violations determined and to be compensated for them, even if the claim is for nominal damages.

C. The Capable of Repetition Yet Escaping Review Exception to the Mootness Doctrine Keeps Plaintiffs' Claims Alive.

The death of Dunn does not render this case moot because it is capable repetition yet evading review.[35] "The 'capable of repetition yet evading review' exception is applied where the challenged act is of such short duration that the

[32] 589 F.3d 740, 748 (E.D. Tex. 2009).
[33] *Id.* at 748-49, n.33.
[34] *Id.* at 749.
[35] *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980).

appellant cannot obtain review before the issue becomes moot."[36] Importantly, Methodist did not challenge the short duration and inability to obtain review before the issue becomes moot in the court below.

The U.S. Supreme Court has held that "we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of…rights that gave rise to this lawsuit."[37] The issue in *Honig* involved a disabled student who was not at the time of the case facing a threat of losing his rights to a free public education in the school district where the deprivation had previously occurred through the use of an administrative hearing process to determine whether a student would be expelled or lose his rights to that free education.[38] At the time the case was before the Supreme Court, he did not reside in that district any longer, but remained a resident of the state and would still be entitled to that free education within the state.[39] The Court found his civil rights claim was not moot because it was capable of repetition yet evaded review.[40]

In analyzing the capable of repetition test, the Court noted that the dissent "overstates the stringency of the 'capable of repetition' test."[41] Citing to the *Murphy v. Hunt* case, the Court reiterated that "'[T]here must be a "reasonable

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[36] *Spring Branch I.S.D. v. Reynolds,* 764 S.W.2d 16, 18 (Tex. App.—Houston [1st Dist.] 1988, no writ).
[37] *Honig v. Doe,* 484 U.S. 305, 318 (1988).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 318, n.6.

expectation" *or* a "demonstrated probability" that the same controversy will recur' and in numerous cases decided both before and since *Hunt* we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable."[42] The Court found that "there is at the very least a reasonable expectation that he will exercise his rights under the EHA" and that given his past history of behavioral problems, he might again come within the disciplinary process whereby he could be expelled or lose their right to public funded special education.[43] The Court also took into account "the unique circumstances and context of this case" to find that it was capable of repetition.[44]

The Court then turned to the lengthy process provided in the statute which allowed for judicial review, but which had taken seven years in just this one case to fully adjudicate the claims.[45] By that point, some students affected could age out of the program before being able to challenge any disciplinary proceedings or loss of rights.[46] Thus, "any resulting claim he may have for relief will surely evade our review" so the Court determined the merits of the case.[47]

In *In re Guardianship of L.S. & H.S.*, the Nevada Supreme Court considered the same mootness exceptions in the context of parents refusing a medically

[42] *Id.*
[43] *Id.* at 318, n.6, 320.
[44] *Id.* at 321.
[45] *Id.* at 322.
[46] *Id.* at 322-23.
[47] *Id.* at 323.

necessary blood transfusion for their infant son based on religious convictions.[48] By court order the blood transfusion was accomplished by the time the case could be fully determined.[49] The Court noted the general rule against advisory opinions, just as the law is in Texas.[50] However, relying on the U.S. Supreme Court's capable of repetition yet evading review exception, even though it applied only in exceptional circumstances, the Court determined it had jurisdiction to determine the merits.[51] The Court stated that: "The challenged action must be too short in its duration to be fully litigated prior to its natural expiration, and a reasonable expectation must exist that the same complaining party will suffer the harm again."[52] In language that applies directly to this case, the Court held that temporary guardianships and medical emergencies are usually short in their duration; both expected to expire before the issues involving them can be fully litigated.[53] Further, the Court found that either the parents of these children ***or*** the hospital would be confronted with this same issue ***or*** injury again was reasonable.[54]

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[48] 120 Nev. 157, 159 (2004).
[49] *Id.* at 161.
[50] *Id.*
[51] *Id.*
[52] *Id.* citing *Washington v. Harper*, 494 U.S. 210, 219, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (noting that the injured party would likely be subjected to medications in the future); *Honig v. Doe*, 484 U.S. 305, 318, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (requiring a "reasonable likelihood" that the injured party would suffer the same harm again); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (requiring that the litigant face "some likelihood of becoming involved in the same controversy in the future").
[53] *Id.* at 162.
[54] *Id.* (Emphasis added).

Thus, the case was capable of repetition yet evading review.[55] It did not require that the same parties line up exactly to meet the exception, which is consistent with Supreme Court precedent.

Methodist's repeated claims of *voluntary* cessation of withdrawing Mr. Dunn's life-sustaining care is also not a valid basis to find this case moot. In *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.,* the U.S. Supreme Court addressed the issue of mootness in a similar situation.[56] In that case, the Court addressed a statute where certain groups had standing to bring a citizen suit seeking injunctive relief and civil penalties when a National Pollutant Discharge Elimination System permit holder failed to comply with provisions of the Clean Water Act.[57] The permit holder voluntarily complied with the statute after the suit had been filed.[58] The Court held:

> It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite [v. Aladdin Castle, Inc.]*, 455 U.S. [283], at 289, 102 S.Ct. 1070. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" *Id*., at 289, n. 10, 102 S.Ct. 1070 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might

[55] *Id.*
[56] 528 U.S. 167, 189 (2000).
[57] *Id.* at 174-175.
[58] *Id.* at 189.

become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). **The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.** *Ibid.*[59]

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Careful reflection on the long-recognized exceptions to mootness, however, reveals that the description of mootness as "standing[60] set in a time frame" is not comprehensive. As just noted, a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. *Concentrated Phosphate Export Assn.*, 393 U.S., at 203, 89 S.Ct. 361.[61]

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Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. **In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.** This argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died.[62]

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[59] *Id.* (Emphasis added).

[60] It is important to note that standing and mootness are different doctrines. In the trial court, some of the cases cited by Methodist for their mootness arguments were actually discussing standing. As the Tenth Circuit held in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, "[s]tanding generally deals with the question of 'who' and mootness with the question of 'when.'" 371 F.3d 1248, 1255 (10th Cir. 2004). The Court held further, "The crucial question is whether granting a present determination of the issues offered…will have some effect on the real world." *Id.* at 1256. (Internal quotations omitted; other citations omitted).

[61] *Id.* at 190.

[62] *Id.* at 191-192. (Other citations omitted; emphasis added).

At no time has Methodist agreed to a permanent injunction prohibiting it from utilizing §166.046. Thus, the fact that it *voluntarily* chose, after a TRO was sought, to not terminate life-sustaining treatment is not a factor in determining mootness. Further, that has nothing to do with the infringements of Dunn's and Kelly's due process rights which occurred by virtue of the ethics committee hearing and decision made pursuant to §166.046. The claims of Dunn and Kelly have for past due process violations survived his death and Kelly's claims for prospective relief continue despite his death. She has a continuing interest in the outcome of the litigation of these surviving claims.

Specifically, §166.046, on its face, applies to all persons for whom life-sustaining treatment is being utilized in all Texas hospitals. Even Methodist recognized the application of the Statute is capable of repetition when it cited to *Lee v. Valdez* in the court below, which states:

> [T]here may be rare instances where a court holds that a case involving a ***deceased*** prisoner is not moot, either because it is a class action or because it is capable of repetition yet evading review[.][63]

This logic was recognized In the *Conservatorship of Wendland*, where the California Supreme Court stated that rather than dismissing a case upon the

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[63] *Lee v. Valdez*, 2009 WL 1406244, *14 (N.D. Tex. May 20, 2009) (C.J. Fitzwater) (emphasis added) (citing *Kremens v. Bartley*, 431 U.S. 119, 133 (1977) (indicating that courts do not require or always anticipate that the repetition will occur to the same plaintiff in all circumstances – certainly, in the case of a deceased prisoner, the same prisoner will not receive the repeated action).

passing of the conservatee, it has the discretion to retain "otherwise moot cases presenting important issues that are capable of repetition yet tend to evade review."[64] The *Wendland* Court applied the exception, noting that the case raised "important issues about the fundamental rights of incompetent conservatees to privacy and life, and the corresponding limitations on conservators' power to withhold life-sustaining treatment."[65] Repeatedly, in Texas, patients on life-sustaining treatment are dealing with similarly important issues of their fundamental rights. Being provided 48 hours' of notice that a nameless, faceless panel of persons of unknown qualifications will decide whether to terminate life-sustaining treatment, the patient is afforded only a meeting, at which they will have no right to speak, no right to counsel, no advance knowledge of the rules or standards, no standard of evidence (such as clear and convincing), and with no right of review, is a deprivation of fundamental rights. Given that patients subject to §166.046 are almost all gravely ill, this denial of due process is unarguably subject to repetition. [66]

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[64] (2002) 26 Cal.4th 519, n.1; *e.g. Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1011, n.5.

[65] 26 Cal.4th at n.1.

[66] Similarly, where a guardian ad litem appealed to the Circuit Court in *Woods v. Com.* concerning the constitutionality of a statute governing the withdrawal of artificial life support after the passing of Mr. Woods to natural causes, the circuit court dismissed the case as moot, but the Court of Appeals reversed and remanded, "citing an exception to the mootness doctrine, applicable when the underlying dispute is 'capable of repetition, yet evading review.'"

Section 166.046 allows 48 hours' notice of the ethics committee meeting, and in 10 days' time, life-sustaining treatment may be removed, presumably resulting in death.[67] It is practically impossible for a patient bound to life-sustaining treatment, let alone any person, to retain counsel and complete a lawsuit, with resulting appeals, in just twelve days.[68] The application of §166.046 is inarguably capable of evading review.

D. Plaintiffs' Entitlement for Nominal Damages Keeps the Claims Made Pursuant to 42 U.S.C. §1983 Alive.

Death does not moot a §1983 claim for past damages that may be asserted by a decedent's estate.[69] In the §1983 context, "[d]amage claims can save a §1983 claim from mootness but only where such claims allege compensatory damages or nominal damages for violations of procedural due process."[70] Similarly, in *Memphis Community School Dist. v. Stachura*, the Court noted that "the basic purpose of damages under §1983 is compensatory and that absent proof of actual injury, courts can only award nominal damages."[71] The court also referenced

[67] *See* §166.046 (West 2017).
[68] *See* TEX. R. CIV. P. 99(b) ("The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof.").
[69] *See, e.g., Javits v. Stevens*, 382 F.Supp. 131, 136 (S.D.N.Y. 1974).
[70] *DA Mortgage, Inc. v. City of Miami Beach*, 486 F.3d 1254, 1259 (11th Cir. 2007).
[71] 477 U.S. 299, 310 (1986).

Carey v. Piphus "which endorses nominal damages awards in §1983 actions only to vindicate certain 'absolute rights' such as the right to procedural due process."[72]

Accordingly, the trial court erred in granting Methodist's MTD, as to mootness because Plaintiffs claimed past damages pursuant to *42 U.S.C. § 1983*. Having found error on an issue addressed in the cross-motions for summary judgment, this Court may determine all issues in the MSJs and render the decision that the trial court should have.

IV. THE TRIAL COURT ERRED IN IMPLICITLY DENYING PLAINTIFFS' AMENDED MSJ ON THE BASIS THAT THE CASE WAS MOOT WHERE PLAINTIFFS ESTABLISHED THAT § 166.046 IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED TO DUNN AND THAT METHODIST VIOLATED PLAINTIFFS' CIVIL RIGHTS TO DUE PROCESS UNDER COLOR OF STATE LAW.

Plaintiffs asked the trial court to (1) declare §166.046 unconstitutional both facially and as applied to Dunn; and (2) find that Methodist deprived Dunn of his civil right to due process under color of state law, 42 U.S.C. §1983, by utilizing §166.046. This case is not moot for the reasons previously set forth. Because the trial court implicitly denied Plaintiffs' MSJ on the basis of mootness, this Court must consider all issues and, if it finds error by the trial court – which it should based on the error in finding the case moot – must render the judgment that the trial court should have.

[72] *DA Mortgage,* 486 F.3d at 1259-60 citing 435 U.S. 247, 266-67 (1978).

Methodist chose – repeatedly – not to defend the constitutionality of the statute. Plaintiffs are aware that "[e]ach party bears the burden of establishing that it is entitled to judgment as a matter of law; neither side can prevail based on the other's failure to discharge its burden."[73] This simply means that "[e]vidence is conclusive only if reasonable people could not differ in their conclusions."[74] In this case, not only did Plaintiffs meet their burden on these matters, as reasonable minds cannot disagree, there is no controverting evidence and, therefore, no genuine issues of disputed fact.

A. The Court should grant summary judgment pursuant to Chapter 37 of the Civil Practice & Remedies Code (UDJA) because §166.046 is facially unconstitutional.

Section 166.046 allows a hospital to make an arbitrary and unreviewable decision to terminate life-sustaining treatment without due process.[75] The statute states: "If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee…"[76] If a conflict exists, the statute then gives a patient these rights:

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[73] *Grynberg v. Grey Wolf Drilling Co., L.P.*, 296 S.W.3d 132, 136 (Tex. App.—Houston [14th Dist.] 2009, no pet.)
[74] *Id.* citing *City of Keller v. Wilson,* 168 S.W.3d 802, 816 (Tex. 2005).
[75] To comport with due process, a person facing deprivation of life, liberty, or property must be confronted with reasonable notice of the claims against him so as to be able to mount a proper defense. *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.*, 239 S.W.3d 826 (Tex. App.—Austin 2007, no pet.).
[76] Tex. Health & Safety Code §166.046(a).

(b) The patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:

(1) may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;

(2) shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement;

(3) at the time of being so informed, shall be provided:

(A) a copy of the appropriate statement set forth in Section 166.052; and

(B) a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the department under Section 166.053; and

(4) is entitled to:

(A) attend the meeting;

(B) receive a written explanation of the decision reached during the review process;

(C) receive a copy of the portion of the patient's medical record related to the treatment received by the patient in the facility for the lesser of: (i) the period of the patient's current admission to the facility; or (ii) the preceding 30 calendar days; and

> (D) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided under Paragraph (C).[77]

As written, §166.046 denies patients constitutional due process before a life-terminating decision is made. There is no right to be heard by the committee. There is no standard set in the statute by which the committee is required to make a decision (such as clear and convincing evidence). There is no standard as to who sits on the committee. There is no record made of the committee's meeting. There is no requirement the committee substantiate its decision in writing. And, there is no right to review the committee's decision.

By statutorily protecting the hospital's committee and providing it the opportunity to deprive an individual of life by terminating life-sustaining treatment without any one of these rights, the statute guarantees a constitutional violation. A substantive due process violation occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of its power.[78] Here, there are simply no standards and no specific procedures to protect against a deprivation of due process. Rather, the procedures outlined in §166.046(b)(1)-(4) expose patients to a risk of mistaken or unjustified deprivation of life without protection, and an unjustified deprivation of life cannot be corrected.

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[77] Tex. Health & Safety Code Ann. § 166.046 (West 2017).
[78] *Byers v. Patterson,* 219 S.W.3d 514, 525 (Tex. App.—Tyler 2007, no pet.) (citing *Simi Inv. Co. v. Harris Cnty.*, 236 F.3d 240, 249 (5th Cir. 2000)).

For example, the time period in which notice is guaranteed falls short of any due process standards. Pursuant to the statute, the patient or person responsible for the health care decisions of the individual "shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement."[79] This brief statutory notice period of two days does not afford a patient with adequate opportunity to prepare for a meeting where the subject at stake is the individual's life. The State sets an unreasonable time period in which individuals must: evaluate available options (if any); determine and confirm persons or entities willing to assist; gather needed medical records; seek and secure counsel to attend the meeting. Effectively, the patient can be served with 48-hour notice on a Friday near close of business (at which time administrative offices of hospitals and lawyers' offices are closed), making any meaningful preparation or search for helpful assistance within those two statutorily-afforded days impossible. Additionally, the statute provides no right to participate or advocate in the meeting.

Similarly, the statute fails to require hospitals to provide notice as to why the institution has decided to unilaterally seek the withdrawal of life-sustaining treatment. The statute instead provides that the patient or surrogate: "**may** be given a written description of the ethics or medical committee review process and any

[79] §166.046(b)(2).

other policies and procedures related to this section adopted by the health care facility."[80] While the statute does not require hospitals to have policies or procedures, unpublished and unknown guidelines, criteria, or medical information undoubtedly leave patients and their families guessing at how to advocate on behalf of the patient. Without notice of the standards on which a hospital seeks to remove life-sustaining treatment or the process and procedure by which it makes its decision, the patient is not able to prepare for an ethics committee meeting. Ultimately, the statute allows for a life or death determination without any criteria or benchmarks for which patients are susceptible. Section 166.046 fails to provide patients with a reasonable opportunity to prepare for the crucial hearing where deprivation of life is being determined.

Section 166.046(b)(4) entitles the patient or their surrogate to "(A) attend the meeting." Attendance at a hearing in which the constitutional right to life is deliberated fails to meet a constitutional threshold of due process. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations [of property interests] can be prevented."[81]

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[80] §166.046(b)(1). (Emphasis added.)

[81] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o [sic] better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' *Fuentes v. Shevin*, 407

Section 166.046 fails to provide a patient a neutral or impartial decision-maker. Instead, the Code allows the hospital to appoint the committee members, without enforcing any standards of impartiality. A lack of neutrality is a deprivation of due process as a matter of law. As the United States Supreme Court said in *Marshall v. Jerrico, Inc.*,

> "This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals."[82]

Finally, there is no right of appeal or review of the hospital's decision. Due process cannot be ensured without a review of a life-depriving decision.[83] Otherwise, all other due process safeguards are illusory.

Due to the statute's failure to provide substantive or procedural due process, the Court should grant summary judgment pursuant to Civ. Prac. & Rem. Code §37, holding that the §166.046 is facially unconstitutional and was unconstitutionally applied to Dunn.

U.S. 67, 81 (1972) (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

[82] 446 U.S. 238, 242 (1980).

[83] *Parham v. J.R.*, 442 U.S. 584, 591 (1979).

B. The Court should grant summary judgment on Plaintiffs' 42 U.S.C. §1983 claim because the hospital deprived Plaintiffs of Due Process.

42 U.S.C. §1983 allows an individual to bring a civil action to recover damages sustained as a result of the violation of their constitutional rights. The statute serves as the vehicle to redress the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[84] To state a claim under the statute, a plaintiff must allege that (1) defendant deprived plaintiff of a federal right secured by the laws of the United States or by the Constitution and (2) acted under color of state law.[85] "Thus, a threshold inquiry in a 42 U.S.C. §1983 cause of action is whether plaintiff has alleged a violation of a constitutional right or of federal law."

C. The two elements to make a claim as required by 42 U.S.C. §1983 are met in this case—deprivation of federal rights under color of state law.

Due process requires a fair and impartial trial, accomplished by providing: (1) an opportunity to be heard (2) a reasonable opportunity to prepare for a hearing, (3) a reasonable notice of the claims against them, and (4) a decision to be reached

[84] *Gomez v. Toledo,* 446 US 635, 638 (1980).
[85] See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Schreiber v. City of Garland*, Tex. CIV.A. 3:06-CV-1170-O, 2008 WL 1968310, at *4 (N.D. Tex. May 7, 2008) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Bass v. Parkwood Hosp*., 180 F.3d 234, 241 (5th Cir.1999)).

through an impartial tribunal.[86] To constitute a competent trial, the trial (hearing) must be conducted before an unbiased judge.[87] Procedural due process rules are meant to protect persons not only from the deprivation, but from the mistaken or unjustified deprivation, of life, liberty, or property and interests protected by the Fourteenth Amendment.[88]

The right to due process is absolute. It does not turn on the merits of a claim, rather, "because of the importance to organized society," procedural due process must be observed.[89] Denial of the right to due process requires the award of nominal damages even without proof of actual injury.[90] The statute at issue disregards this constitutionally required process. Here, §166.046 violates multiple facets that make up the constitutional right to due process by: (1) failing to provide a patient (or their surrogate decision-maker) an opportunity to be heard, (2) failing to give a reasonable opportunity to prepare for a hearing, (3) failing to give

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[86] *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.*, 239 S.W.3d 826 Tex. App.—Austin 2007, no pet.); It is important to note, that while the Texas Constitution is textually different in that it refers to "due course" rather than "due process," the terms are regarded without meaningful distinction. *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 252–53 (1887). Consequently, Texas has "traditionally followed contemporary federal due process interpretations of procedural due process issues." *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *Mellinger*, 3 S.W. at 252-53.

[87] *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.— San Antonio 1972), writ refused n.r.e., (May 17, 1972).

[88] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972); *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[89] *County of Dallas v. Wiland*, 216 S.W.3d 344, 356 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[90] *Id.* at 356-57 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

adequate notice of the reasons why removal of life-sustaining treatment is to occur, and (4) failing to allow for a decision to be reached through an impartial tribunal, (5) failing to require objective standards, and (6) failing to provide a record or right of review.

1. Plaintiffs were not given an opportunity to be heard.

The opportunity to be heard constitutes a fundamental requirement of due process and must be provided at a meaningful time and in a meaningful manner.[91] While due process allows for variances in the form of hearing "appropriate to the nature of the case,"[92] depending on significance of the interests involved and nature of the subsequent proceedings, "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[93] Part of the

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[91] *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976). At the core of affording sufficient due process lies the opportunity to be heard in front of an impartial tribunal. *Johnson v. Mississippi*, 403 U.S. 212 (1971); The constitutional right to be heard serves as a basic tenant of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his [rights or] possessions. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (noting the high value embedded in our constitutional and political history in permitting a person the right to enjoy what is his, free of governmental interference). In discussing the deprivation of property, the United States Supreme Court noted that the purpose of this requirement is not only to ensure abstract fair play to the individual, but more particularly, is to protect a person's use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. *Id.*

[92] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).

[93] *Boddie v. Connecticut*, 401 U.S. 371, 378- 79 (1971).

opportunity to be heard is the ability to be represented at the hearing.[94] Dunn's mother was left without an advocate to defend her son's life.

The Texas Supreme Court has held that the "opportunity [to be heard] may not be attenuated to mere formal observance."[95] Here, while §166.046(b)(4) entitles a patient or surrogate decision-maker to attend the committee meeting and receive the patient's medical records, diagnostic results, and a written explanation of the committee's decision, that by no means equates to due process, and the constitutional right to be heard is glaringly absent in the statute.[96]

2. Plaintiffs were not given notice of the proceeding.

The unnecessary exclusion of *the* critical party from meaningful participation in a determination of this right to direct the course of medical treatment contravenes the basic tenets of our judicial system and affronts the

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[94] While U.S. Circuit Courts were split on whether a prohibition against representation of a plaintiff by and through counsel was a violation of plaintiff's right to due process when subject to permanent suspension, the Court in *Houston v. Sabeti* referred to and assessed five factors first laid out in *Wasson v. Trowbridge*, most notably were: the education level of the student, his/her ability to understand and develop the facts, whether the other side is represented, and fairness of the hearing. *Univ. of Houston v. Sabeti,* 676 S.W.2d 685, 687 (Tex. App. – Houston [1st Dist.] 1984, no writ). The *Sabeti* court held the student was met with due process upon determining that the *Wasson* factors were not present, for: 1) the proceeding was not criminal; 2) the government did not proceed through counsel; 3) the student was mature and educated; 4) the student's knowledge of the events enabled him to develop the facts adequately; and, 5) the other aspects of the hearing, taken as a whole, were fair. *Id*; *see Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).

[95] "Due process of law ordinarily includes: (1) hearing before condemnation; (2) accordance of reasonable opportunity to prepare for the hearing. Mandate of reasonableness of opportunity may not be attenuated to mere formal observance by judicial action." *Ex parte Davis,* 344 S.W.2d 153, 157 (Tex. 1961) (citing *Ex parte Hejda*, 13 S.W.2d 57, 58 (Tex. Comm'n App. 1929).

[96] The statute does not entitle the patient or surrogate decision-maker to offer evidence or utilize counsel. Tex. Health & Safety Code Ann. § 166.046(b)(4) (West 2017).

principles of individual integrity that sustain it.[97] As such, notice of the claims is a critical component of due process.[98] Strikingly, the statute does not require a conscious patient be guaranteed notice of the hearing that will determine whether the patient will be removed from life-sustaining treatment. The statutory language provides certain entitlements to "the patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision."[99] In this instance, his mother was handed the letter which stipulated the hearing date.

In fact, Dunn had made clear his intention to continue life-sustaining treatment and the attached summary judgment evidence of a video recording reveals this to be certain even post-hearing. (The video is part of the Clerk's Record.) Further, it was not until counsel was hired and a temporary restraining order was put in place that the hospital took the stance that Dunn was incapacitated. And, not until after Dunn hired a lawyer and obtained a restraining order, did the hospital seek the appointment of a permanent guardian. Where on its

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[97] *Edward W. v. Lamkins*, (2002) 99 Cal. App. 4th 516, 529 (holding that public guardian's routine of seeking notice waivers violated conservatee's due process rights); *Thor v. Superior Court* (1993) 5 Cal. 4th 725, 723, fn. 2.

[98] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank Tr. Co.* 339 U.S. 306, 314 (1950); *see Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (noting that notice is required to satisfy the traditional notions of fair play and substantial justice implicit in due process).

[99] Tex. Health & Safety Code Ann. § 166.046(b) (West 2017).

face and in practice, a statute neglects to safeguard the attendance or notification of the individual to be deprived of his constitutional right, the statute is facially void of due process, especially so, when hospitals can legally and arbitrarily deem individuals incapacitated.

3. Plaintiffs were not given ability to prepare for the hearing.

A disciplinary proceeding by which a medical student is dismissed for cheating demands a level of due process that consists of oral and written notice of the charges, written notice of evidence to be used against the student in the hearing, including a witness list and summaries of their respective testimonies, the right to counsel or other representation, a formal hearing with the opportunity to present evidence and cross-examine witnesses, and a right of appeal.[100]

It is ironic that §166.046 does not afford individuals on life-sustaining treatment any of these same procedural safeguards as are given to medical students.[101] Here, the interest at risk is higher, yet under §166.046, ethics meetings are held without providing the patient or surrogate with notice of evidence to be used, a witness list accompanied by summaries, notice of panel members with

[100] *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995).

[101] Even with the heightened procedural due process observed in *Than*, the Court held that due course of law was infringed when a student with a liberty interest is denied an opportunity to respond to a new piece of evidence against him obtained in an ex parte visit and given that the countervailing burden on the state is slight. 901 S.W. 2d at 932.

accompanying qualifications, right to counsel or the opportunity to present evidence and cross-examine witnesses.[102]

With the absence of uniform statutory guidance, the ability of a patient or surrogate decision-maker to address an ethics committee depends upon the internal policies of individual hospitals, the individual in charge of that hospital's ethics committee, and the good graces (if any) of the committee members. Effectively, a patient's ability to advocate before the body determining whether to continue his life may well depend on which hospital he finds himself. This lack of uniformity creates different due process availability to similarly-situated patients, and therefore, renders the statute facially unconstitutional. As Methodist applied an unconstitutional statute, it deprived Dunn of his civil rights under color of state law even before it determined that it would withdraw his LST against his expressed wishes.

4. The hospital ethics committee is not an impartial tribunal.[103]

The U.S. Supreme Court has stressed the importance of a "neutral factfinder" in the context of medical treatment decisions and the right to a review

[102] Medical students get, those rights while patients do not.
[103] *Johnson v. Mississippi*, 403 U.S. 212 (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.—San Antonio 1972), writ refused n.r.e., (May 17, 1972).

process.[104] Under §166.046, a fair and impartial tribunal did not and could not hear Dunn's case. The "ethics committee" members who are employed by the treating hospital cannot be fair and impartial. Their decision may have an adverse financial impact on the hospital or put a colleague's judgment in public question. Additionally, there is no safeguard against *ex parte* communications or the *ex parte* presentation of evidence which the patient or his surrogate could rebut.

Aside from hospital employees, the hospital itself has an inherent conflict of interest when acting as arbiter – treating any patient requires a financial burden upon the entity. Members of a fair and impartial tribunal should not only avoid a conflict of interest, they should avoid even the appearance of a conflict of interest, especially when a patient's life is at stake.[105] When a hospital "ethics committee" meets under §166.046 for a patient within its own walls, objectivity and impartiality essential to due process are nonexistent. Section 166.046 provides no mechanism by which a patient's desire to live is considered by an impartial tribunal. Accordingly, a lack of an impartial committee by Methodist was another violation of Plaintiffs' right to due process.

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[104] *Parham v. J.R.*, 442 U.S. 584, 591 (1979) (citing examples of hospital procedures where several hospitals' review boards are made up of non-staff community medical professionals and review processes afforded to patients).

[105] "There is a great potential for serious conflict of interest for the State when it is paying the medical bill for the treatment of its ward." *Woods v. Com.*, 142 S.W.3d 24, 64 (Ky. 2004).

5. Dunn was sentenced to a premature death.

The preservation of life in Texas is a long-valued right.[106] Courts recognize "no right is held more sacred, or is more carefully guarded, by the common law, than 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."[107] Here as such, the State of Texas has delegated life taking authority to a hospital's ethics committee. By the enactment of §166.046, the State of Texas has created a scheme whereby patients in Texas hospitals may have their life pre-maturely extinguished without any standard, being found guilty of nothing except that of being ill. Neither, the State of Texas nor its surrogate has the authority to sentence ill people to premature death.

In *Cruzan*, the United States Supreme Court noted that the Constitution requires that the State not allow anyone "but the patient" to make decisions regarding the cessation of life-sustaining treatment.[108] The Supreme Court went on to note that the state could properly require a "clear and convincing evidence"

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[106] "(a) A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide." Tex. Pen. Code Ann. §22.08 (West 2017); Additionally, courts across the nation have upheld similar statutes. *See Donorovich-Odonnell v. Harris,* 241 Cal. App. 4th 1118 (2015) (upholding a statute criminalizing the mere act of prescribing drugs as it "is active and intentional participation in the events leading to the suicide).

[107] *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); "It cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan,* 497 U.S. at 281.

[108] *Cruzan,* 497 U.S. at 286.

standard to prove the patient's wishes.[109] Where, as the Supreme Court in *Cruzan* held, the evidentiary standard could not be met, "it was best to err in favor or preserving life."[110]

Likewise, in *Wendland, supra,* the California Supreme Court held that Wendland's conservator would be allowed to withhold artificial nutrition and hydration only if she could prove, by clear and convincing evidence, either that the conservatee wished to refuse life-sustaining treatment or that to withhold such treatment would have been in his best interests.[111] The court "finding itself in uncharted territory" explained that "[w]hen the situation arises where it is proposed to terminate the life of a conscious but severely cognitively impaired person, it seems more rational…to ask 'why?' of the party proposing the act rather than 'why not?' of the party challenging it," and so placed the burden both of producing evidence and of persuasion on the conservator.[112]

Similarly, the Oklahoma Supreme Court asserted that the statute at the heart of a case involving a baby with abnormalities, a deteriorating and grim prognosis, "[did] not comport with the requirements of substantive due process because it permit[ted] a court to authorize a DNR order for a child in state custody without addressing what burden of proof applies and what findings the court must

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[109] *Id*. at 280.
[110] *Cruzan*, 497 U.S. at 273. (Other citations omitted).
[111] *Wendland*, 26 Cal.4th at 527.
[112] *Id.*

make."[113] Relying on *Cruzan*, the court concluded that "the trial court, in all future matters, shall not authorize the withdrawal of life-sustaining treatment or the denial of the administration of cardiopulmonary resuscitation on behalf of a child in DHS custody without determining by clear and convincing evidence that doing so is in the best interest of the child."[114] The court also noted that "the standard of proof is a matter of due process and serves to 'allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decisions.'"[115]

In each case, supreme courts have understood that the withdrawal of LST presents the risk of deprivation of a protected interest. The courts go further to demand the facts justifying such a decision be shown by clear and convincing evidence; the alternative being the statutes are unconstitutional for failure to comport with substantive due process. Further, the courts uniformly place the burden on the party seeking to withdraw care. In this case, however, there is no evidentiary standard imposed on hospitals by §166.046. An attending physician and hospital ethics committee are given complete autonomy and immunity by the state in rendering a decision that further medical treatment is "inappropriate" for a

[113] *Baby F. v. Oklahoma Cty. Dist. Court*, 348 P.3d 1080, 1084 (Okla. 2015).
[114] *Id.* at 1089.
[115] *Id.* at 1086 quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

person with an irreversible or terminal condition. This is an alarming delegation of power by the state law.

There is simply no precedent or constitutional justification for this authority to make a decision for someone of this magnitude without their consent or against their will. A final decision rendered behind closed doors, without an opportunity to challenge the evidence, present contrary evidence, or appeal a committee decision, is legally insufficient from the due process intended to protect the first liberty mentioned in Article 1, Section 19 of the Texas Constitution and that of the Fourteenth Amendment. Accordingly, the act of using §166.046 by Methodist deprived Plaintiffs' of their civil rights under color of state law.

D. The hospital acted under color of state law.

There is no absolute rule for what is and is not state action. The U.S. Supreme Court has "suggested that that 'something more' which would convert the private party into a state actor might vary with the circumstances of the case."[116] Conduct or action under color of state law requires that a defendant exercise power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.[117] A State cannot avoid constitutional

[116] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).
[117] *See Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)); see also *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 864 (Tex. App.—Amarillo 1993, cert. denied).

responsibilities by delegating public function to private parties.[118] "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action… Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor."[119] Courts have made clear that state action is concluded when "the State create[d] the legal framework governing the conduct."[120] Here, the State enacted §166.046, the legal framework granting authority to the hospital which deprived Dunn of his constitutional rights. And, Methodist used it. (CR 25.) (**Tab C**.)

Pursuant to the the statute, Methodist exercised statutory authority evocative of a government function in the following ways:

- Provided approximately two days' formal notice[121], that Dunn's life-sustaining could be removed;
- Held a hearing regarding whether Dunn's life-sustaining treatment should be removed[122];
- Came to a determination that Dunn's request to continue life-sustaining treatment should not be honored[123];

[118] *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).
[119] *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988).
[120] *Id.* at 192 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).
[121] *See* Tex. Health & Safety Code § 166.046(a)(2)(West 2017).
[122] *Id.* at §166.046(a).
[123] *Id.*

- Came to a determination that Dunn's life-sustaining treatment should be removed[124];

- Gave written notice that Dunn's life-sustaining treatment could be removed on or about November 24, 2015, as it can do under the Act[125].

Section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. This grant of authority indicates even a private hospital, when taking action under the statute, is performing a State function. The ability to take formal action which will result in death is not available to the public.[126] In making the decision to withhold life-sustaining treatment, the statute allows a hospital's ethics committee to sit as both judge and jury of a physician's recommendation to take action which will result in premature death. This judicial function of the "ethics committee" is similarly evocative of state action.

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[124] *Id.*

[125] *Id.* at §166.046(e). ("The physician and health care facility are not obligated to provide life-sustaining treatment after the 10th day after the written decisions required under Subsection (b) s provided to the patient or the person responsible for the health care decisions of the patient [.]").

[126] Compare *Lindsey v. Detroit Entertainment*, LLC, 484 F.3d 824, 828–31 (6th Cir. 2007) (casino security personnel were not engaged in state action when they detained a patron and thus owner could not be held liable for an unlawful seizure under § 1983, because security personnel are not licensed under state law to have misdemeanor arrest authority; although private security guards who are endowed by law with plenary police power may qualify as state actors, plaintiffs could not point to any powers beyond those possessed by ordinary citizens that the state delegated to unlicensed security personnel, and thus they could not show that defendant engaged in any action attributable to the state); see also *Johnson v. Children's Hosp. LaRabida*, 372 F.3d 894, 896-898, (7th Cir. 2004) (delegation of a public function to a private entity triggers state action and a privately employed "special officer" who possesses full police power pursuant to city ordinance will be treated the same as a regular Chicago police officer.

Private entities have been held to be acting under color of State law for performing traditionally government functions[127] as follows:

- *Marsh v. State of Ala.*, 326 U.S. 501 (1946) (company owned town);

- *Smith v. Allwright*, 321 U.S. 649 (1944) (primary election);

- *Watchtower Bible and Tract Society of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011), cert. denied, 132 S. Ct. 549, 181 L. Ed. 2d 396 (2011) (public streets within "urbanizations," which are neighborhood homeowners' associations authorized by city to control vehicular and pedestrian access, remain public property despite their enclosure, and regulating access to and controlling the behavior on public property is a traditional, classic government function; thus, urbanizations were state actors for purposes of § 1983 action challenging closure of access to public streets);

- *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 636-40 (6th Cir. 2005) (although private security guards who exercise some police-like powers may not always be viewed as state actors, where guards are endowed by state law with plenary police powers, they qualify as state actors under the public function test; casino's private security police officers were licensed by the state and had the authority to make arrests and thus were afforded power traditionally reserved to the state alone such that guard's conduct on duty on the casino's premises would be considered state action);

- *Belbachir v. County of McHenry*, 726 F.3d 975, 978 (7th Cir. 2013) (although employees of private firm hired to provide medical services at jail were not public employees, they were performing a public function and thus were acting under color of state law);

- *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002) (under *Brentwood*, it suffices that a nominally private party satisfy a single state action test and here private lessee of public outdoor area owned by city performed a

[127] *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) ("We have held that the question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'") (Other citations omitted; emphasis by Court.)

traditional sovereign function when it sought to regulate free speech activity on city-owned land; although not everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a state actor, here the city retained little, if any, power over the private entity and thus its policing of free speech in the public forum was a traditional and exclusive function of government);

- *Duke v. Massey*, 87 F.3d 1226, 1231 (11th Cir. 1996) (decision of presidential candidate selection committee for state Republican Party to exclude candidate from primary ballot pursuant to authority granted under state law constitutes state action for purposes of candidate's federal civil rights action despite argument that committee members made decision in their capacity as representatives of Republican Party); and

- *Duke v. Smith*, 13 F.3d 388, 393 (11th Cir. 1994), writ denied, 513 U.S. 867 (1994) (because bipartisan state-created committees are inextricably intertwined with the process of placing candidates' names on the ballot and it is the state-created procedures and not the political parties that make the final determination as to who will appear on the ballot, the power exercised is directly attributable to the state).

Section 166.046 clearly permits Texas hospitals, via its "ethics committees," to take action (such as to hear and determine whether a recommendation to withhold life-sustaining treatment against a patient's wishes is appropriate, and then exercise removal of life-sustaining care 10 days after providing written notice) normally only held in the hands of State officials such as peace officers and executioners who can take a person's life against that person's wishes with immunity.[128]

[128] *See, e.g. Cornish v. Correctional Services Corp.*, 402 F.3d 545, 550-51 (5th Cir. 2005) (private corporation delegated authority to operate juvenile correctional facility fell within public function test as far as its provision of juvenile correctional services to the county).

As Methodist has admitted to using §166.046, the elements to a 42 U.S.C. §1983 claim are met. There is no genuine issue of material fact that §166.046, even followed perfectly as Methodist did, deprives a patient and/or his surrogate of substantive and procedural due process rights as a matter of law. It is designed to be without procedural due process when taking a right such as the right of self-determination or the right to life.[129] It violates substantive due process because the government has deprived patients of their constitutional rights by an arbitrary use of power. Here, Methodist is a state actor because it utilizes this state authority to determine whether one lives or dies – a right not given to any other citizens – and does so with total and complete statutory immunity from civil or criminal liability.

CONCLUSION & PRAYER

Based on the foregoing, the trial court erred in granting Methodist Hospital's Final Supplemental Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot and in denying Plaintiff's Amended Motion for Summary Judgment when it determined it did not have subject matter jurisdiction over Plaintiff's claims due to mootness. Plaintiffs' claims are not moot, the trial court had jurisdiction to hear them, and committed reversible error when it did not. This Court has subject matter jurisdiction to determine all issues presented

[129] "An individual's right to control his medical care is not lessened when the treatment at issue involves life-sustaining medical procedures." *In re Gardner*, 534 A.2d 947, 951 (Me. 1987) (Other citation omitted).

in the cross-Motions for Summary Judgment, which includes Methodist's Motion to Dismiss (effectively, a Motion for Summary Judgment). Plaintiffs met their summary judgment burden to demonstrate as a matter of law that §166.046 is unconstitutional facially and as it was applied to Chris Dunn who is entitled to nominal damages for the infringement of his procedural due process rights prior to his death. Accordingly, Plaintiffs pray this Court reverse the judgment of the trial court and render the judgment requested in Plaintiffs Motion for Summary Judgment and remand the case to the trial court for an award of Plaintiffs attorneys' fees. Alternatively, Plaintiffs pray that this Court of Appeals find that the trial court abused its discretion in determining Plaintiffs' case was moot and that this Court reverse the trial court and remand this case for further proceedings so that the Plaintiffs' claims may be fully adjudicated. Finally, Plaintiffs pray for such other and further relief as they may show themselves justly entitled.

Respectfully submitted,

/s/Joseph M. Nixon

James E. "Trey" Trainor, III
State Bar No. 24042052
trey.trainor@akerman.com
AKERMAN LLP
700 Lavaca Street, Suite 1400
Austin, Texas 78701
Tel: (512) 623-6700
Fax: (512) 623-6701

Joseph M. Nixon
State Bar No. 15244800
joseph.nixon@akerman.com
AKERMAN LLP
1300 Post Oak Blvd., Suite 2500
Houston, Texas 77056
Tel: (713) 623-0887
Fax: (713) 960-1527

Kassi Dee Patrick Marks
State Bar No. 24034550
kassi.marks@gmail.com
2101 Carnation Ct.
Garland, Texas 75040
Tel: (469) 443-3144
Fax: (972) 362-4214

Counsel for Appellants

52.3 (J) CERTIFICATION

I certify that I have reviewed the factual statements contained in this

/s/Joseph M. Nixon .

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rules of Appellate Procedure 9.4(c)(3), the undersigned attorney hereby certifies that the forgoing brief contains 9,995 words, excluding those portions permitted by TEX. R. APP. P. 9.4(c)(1). The undersigned further certifies that their brief has been prepared using a typeface of no smaller than 14-point, except for footnotes, which are 12-point.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellants' Brief has been electronically filed and served on the Respondent and all counsel for the Appellees and Real Parties in Interest below on February 22, 2018.

Reagan W. Simpson
rsimpon@yettercoleman.com
YETTER COLEMAN LLP
909 Fannin Street, Suite 3600
Houston, Texas 77010

Dwight W. Scott
dscott@scottpattonlaw.com
SCOTT PATTON, PC
3939 Washington Ave. Suite 203
Houston, Texas 77007

/s/ Joseph M. Nixon
Joseph M. Nixon

No. 01-17-00866-CV

IN THE FIRST COURT OF APPEALS
AT HOUSTON, TEXAS

EVELYN KELLY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN
Appellant,

v.

HOUSTON METHODIST HOSPITAL
Appellee.

On Appeal from the 189th District Court, Harris County, Texas.
(No. 2015-69681)

APPENDIX

Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment	Tab G
Defendant Houston Methodist Hospital f/k/a The Methodist Hospital's Reply to Plaintiff's Response to Defendant's Motion to Dismiss, and Traditional Motion for Summary Judgment (CR 1469-1480)	Tab H
Defendant Houston Methodist Hospital f/k/a The Methodist Hospital's Response to Plaintiff's Amended Motion for Summary Judgment (CR 1281-1306)	Tab I

TAB A

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

ORDER

ON THIS DATE CAME TO BE HEARD the following:

- Plaintiff's Amended Motion for Summary Judgment;
- Defendant's Traditional and No-Evidence Motion for Summary Judgment; and
- Defendant's Final Supplemental Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss

The Court, after considering the above-referenced Motions, the parties' responses and replies, the pleadings on file and the arguments of counsel, including Plaintiff's oral motion in open court voluntarily dismissing all claims for Intentional Infliction of Emotional Distress, is of the opinion that Houston Methodist's Final Supplemental Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot should be GRANTED and Houston Methodist's Motion to Dismiss pursuant to Chapter 74 should be DENIED. As the Court has determined Plaintiff's claims to be moot, it lacks subject matter jurisdiction to rule on Plaintiff's Amended Motion for Summary Judgment.

It is therefore ORDERED, ADJUDGED AND DECREED that Plaintiffs' lawsuit against Defendant **HOUSTON METHODIST HOSPITAL F/K/A THE METHODIST HOSPITAL** is hereby dismissed in its entirety with prejudice to the re-

filing of same.

Signed this ____ day of _____, 2017.

Signed:
10/13/2017

_____
PRESIDING JUDGE

APPROVED AND ENTRY REQUESTED:

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

TAB B

Vernon's Texas Statutes and Codes Annotated
Health and Safety Code (Refs & Annos)
Title 2. Health
Subtitle H. Public Health Provisions
Chapter 166. Advance Directives (Refs & Annos)
Subchapter B. Directive to Physicians (Refs & Annos)

V.T.C.A., Health & Safety Code § 166.046

§ 166.046. Procedure If Not Effectuating a Directive or Treatment Decision

Effective: September 1, 2015
Currentness

(a) If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee. The attending physician may not be a member of that committee. The patient shall be given life-sustaining treatment during the review.

(b) The patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:

(1) may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;

(2) shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement;

(3) at the time of being so informed, shall be provided:

(A) a copy of the appropriate statement set forth in Section 166.052; and

(B) a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the department under Section 166.053; and

(4) is entitled to:

(A) attend the meeting;

(B) receive a written explanation of the decision reached during the review process;

(C) receive a copy of the portion of the patient's medical record related to the treatment received by the patient in the facility for the lesser of:

(i) the period of the patient's current admission to the facility; or

(ii) the preceding 30 calendar days; and

(D) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided under Paragraph (C).

(c) The written explanation required by Subsection (b)(4)(B) must be included in the patient's medical record.

(d) If the attending physician, the patient, or the person responsible for the health care decisions of the individual does not agree with the decision reached during the review process under Subsection (b), the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. If the patient is a patient in a health care facility, the facility's personnel shall assist the physician in arranging the patient's transfer to:

(1) another physician;

(2) an alternative care setting within that facility; or

(3) another facility.

(e) If the patient or the person responsible for the health care decisions of the patient is requesting life-sustaining treatment that the attending physician has decided and the ethics or medical committee has affirmed is medically inappropriate treatment, the patient shall be given available life-sustaining treatment pending transfer under Subsection (d). This subsection does not authorize withholding or withdrawing pain management medication, medical procedures necessary to provide comfort, or any other health care provided to alleviate a patient's pain. The patient is responsible for any costs incurred in transferring the patient to another facility. The attending physician, any other physician responsible for the care of the patient, and the health care facility are not obligated to provide life-sustaining treatment after the 10th day after both the written decision and the patient's medical record required under Subsection (b) are provided to the patient or the person responsible for the health care decisions of the patient unless ordered to do so under Subsection (g), except that artificially administered nutrition and hydration must be provided unless, based on reasonable medical judgment, providing artificially administered nutrition and hydration would:

(1) hasten the patient's death;

(2) be medically contraindicated such that the provision of the treatment seriously exacerbates life-threatening medical problems not outweighed by the benefit of the provision of the treatment;

(3) result in substantial irremediable physical pain not outweighed by the benefit of the provision of the treatment;

(4) be medically ineffective in prolonging life; or

(5) be contrary to the patient's or surrogate's clearly documented desire not to receive artificially administered nutrition or hydration.

(e-1) If during a previous admission to a facility a patient's attending physician and the review process under Subsection (b) have determined that life-sustaining treatment is inappropriate, and the patient is readmitted to the same facility within six months from the date of the decision reached during the review process conducted upon the previous admission, Subsections (b) through (e) need not be followed if the patient's attending physician and a consulting physician who is a member of the ethics or medical committee of the facility document on the patient's readmission that the patient's condition either has not improved or has deteriorated since the review process was conducted.

(f) Life-sustaining treatment under this section may not be entered in the patient's medical record as medically unnecessary treatment until the time period provided under Subsection (e) has expired.

(g) At the request of the patient or the person responsible for the health care decisions of the patient, the appropriate district or county court shall extend the time period provided under Subsection (e) only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted.

(h) This section may not be construed to impose an obligation on a facility or a home and community support services agency licensed under Chapter 142 or similar organization that is beyond the scope of the services or resources of the facility or agency. This section does not apply to hospice services provided by a home and community support services agency licensed under Chapter 142.

Credits

Added by Acts 1999, 76th Leg., ch. 450, § 1.03, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 1228, §§ 3, 4, eff. June 20, 2003; Acts 2015, 84th Leg., ch. 1 (S.B. 219), § 3.0503, eff. April 2, 2015; Acts 2015, 84th Leg., ch. 435 (H.B. 3074), § 5, eff. Sept. 1, 2015.

V. T. C. A., Health & Safety Code § 166.046, TX HEALTH & S § 166.046
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

End of Document

TAB C

HOUSTON Methodist
LEADING MEDICINE

J. Richard Cheney
Project Director

Biomedical Ethics
6565 Fannin Street, AX-200
Houston, Texas 77030-2707
Office: 713.441.4925
Fax: 713.669.9986
dcheney@houstonmethodist.org
houstonmethodist.org

13 November 2015

By Hand Delivery

Dear Ms. Evelyn Kelly and Mr. David Dunn:

On behalf of every member of the Houston Methodist Hospital Biomedical Ethics Committee, I express our sadness that your son, David "Chris" Dunn, is so ill. Thank you for meeting with the Committee to tell us of your hopes for Chris and of your request to continue life-sustaining treatment. After hearing from you and from Chris's physicians, the Committee has decided that life-sustaining treatment is medically inappropriate for Chris and that all treatments other than those needed to keep him comfortable should be discontinued and withheld.

Eleven days from today, Chris's physicians are allowed to withdraw and withhold life-sustaining treatments and to establish a plan of care designed to promote his comfort and dignity. During this period, the physicians and others will assist you in trying to find a doctor and facility that are willing to provide the treatments that you request. A copy of Chris's medical record for the past 30 days at Houston Methodist Hospital is delivered to you at this time for your use in trying to find other providers.

Also, for additional information, please see the enclosed copies of "When There Is A Disagreement About Medical Treatment" and the Registry created by the Texas Department of State Health Services. Houston Methodist Hospital personnel will assist you with any medically appropriate transfer that you arrange.

The ethics consultants you have already met will continue to be available to help you. Simply contact them as you have in the past or by calling 713-790-2201 and asking the page operator to page the ethics consultant on call.

Houston Methodist is honored to serve your son and you in a spiritual environment of caring.

Very truly yours,

J. Richard Cheney

J. Richard Cheney
Meeting Chair,
Houston Methodist Bioethics Committee

Enclosures

EXHIBIT
tabbies
25A

When There Is A Disagreement About Medical Treatment: The Physician Recommends Against Life-Sustaining Treatment That You Wish To Continue

You have been given this information because you have requested life-sustaining treatment,* which the attending physician believes is not appropriate. This information is being provided to help you understand state law, your rights, and the resources available to you in such circumstances. It outlines the process for resolving disagreements about treatment among patients, families, and physicians. It is based upon Section 166.046 of the Texas Advance Directives Act, codified in Chapter 166 of the Texas Health and Safety Code.

When an attending physician refuses to comply with an advance directive or other request for life-sustaining treatment because of the physician's judgment that the treatment would be inappropriate, the case will be reviewed by an ethics or medical committee. Life-sustaining treatment will be provided through the review.

You will receive notification of this review at least 48 hours before a meeting of the committee related to your case. You are entitled to attend the meeting. With your agreement, the meeting may be held sooner than 48 hours, if possible.

You are entitled to receive a written explanation of the decision reached during the review process.

If after this review process both the attending physician and the ethics or medical committee conclude that life-sustaining treatment is inappropriate and yet you continue to request such treatment, then the following procedure will occur:

1. The physician, with the help of the health care facility, will assist you in trying to find a physician and facility willing to provide the requested treatment.

2. You are being given a list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer, or to assist in locating a provider willing to accept transfer, maintained by the Texas Health Care Information Council. You may wish to contact providers or referral groups on the list or others of your choice to get help in arranging a transfer.

3. The patient will continue to be given life-sustaining treatment until he or she can be transferred to a willing provider for up to 10 days from the time you were given the committee's written decision that life-sustaining treatment is not appropriate.

4. If a transfer can be arranged, the patient will be responsible for the costs of the transfer.

5. If a provider cannot be found willing to give the requested treatment within 10 days, life-sustaining treatment may be withdrawn unless a court of law has granted an extension.

6. You may ask the appropriate district or county court to extend the 10-day period if the court finds that there is a reasonable expectation that a

physician or health care facility willing to provide life-sustaining treatment will be found if the extension is granted.

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*"Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

TEXAS Department of State Health Services

Registry List of Health Care Providers and Referral Groups

Texas Health Care Information Collection
Center for Health Statistics

This registry lists providers and groups that have indicated to THCIC their interest in assisting the transfer of patients in the circumstances described, and is provided for information purposes only. Neither THCIC nor the State of Texas endorses or assumes any responsibility for any representation, claim, or act of the listed providers or groups.

Health Care Provider or Referral Group	Willing to Accept or Assist Transfer of Patients on Whose Behalf Life-sustaining Treatment is Being Sought
C. T. Viers, LLC DBA Exceptional Home Health Care 1330 Church Street Sulphur Springs, TX 75482 903-885-5566 Fax 903-885-7766	
Cuidado Casero(CC) Home Health Care (Bilingual Staff) 6448 Hwy 290 E, Suite E-102 Austin, Texas 78723 512-419-7738 **www.cuidadocasero.com**	Willing to provide bilingual professional nursing services, therapy services, and home health provider services.
The Floyd Law Firm 401 Congress, Suite 1540 Austin, Texas 78701 512-687-3420 **www.austinfirm.com**	
Jerri Lynn Ward Garlo Ward, P.C. 505 E. Huntland Dr., Suite 335 Austin, Texas 78752 512-302-1103, extension 115 **www.garloward.com**	Willing to receive requests for legal counsel from families that are going through a transfer.
Robert Painter Painter Law Firm PLLC 12750 Champion Forest Drive Houston, Texas 77066 281-580-8800 **www.painterfirm.com**	
Phong P. Phan, Esq. The Phan Law Firm, PC P.O. Box 50227 Austin, Texas 78753 512-789-3890	Willing to receive requests for legal counsel from families that are going through a transfer. Assistance available in Vietnamese.

Health Care Provider or Referral Group	Willing to Accept or Assist Transfer of Patients on Whose Behalf Life-sustaining Treatment is Being Sought
www.phanlawaustin.com or **Facebook**	
Pro-Life Healthcare Alliance Program of Human Life Alliance 2900 Oak Shadow Circle Bedford, TX 76021 817-576-3022 or 651-484-1040 **www.prolifehealthcare.org**	
Texas Right to Life 6776 Southwest Freeway, Suite 430 Houston, Texas 77074 713-782-5433 **www.TexasRightToLife.com**	Willing to help transfer to a facility that provides treatment.
Woodrow W. Janese, MD, FACS BSME (G7246) 13303 Champion Forest Drive #4 Houston, Texas 77069 281-537-6000	

Health Care Provider or Referral Group	Willing to accept or assist transfer of patients on whose behalf withholding or withdrawal of life-sustaining treatment is being sought
No health care providers or referral group registered.	
None of the facilities named above are withholding or withdrawing life sustaining treatment when it is being sought.	

Last updated August 14, 2013

TAB D

8/21/2017 2:59 PM
Chris Daniel - District Clerk Harris County
Envelope No. 18974128
By: Deandra Mosley
Filed: 8/21/2017 2:59 PM

CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	HARRIS COUNTY, TEXAS
v.	§	
HOUSTON METHODIST HOSPITAL,	§	
Defendant.	§	189th JUDICIAL DISTRICT

PLAINTIFF'S AMENDED MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

Now comes Plaintiff Evelyn Kelly ("Mrs. Kelly"), individually and on behalf of the Estate of David Christopher Dunn ("Mr. Dunn"), and files this motion for summary judgment against Defendant Houston Methodist Hospital ("Methodist"), and as grounds thereof will show the Court the following:

SUMMARY OF THE ARGUMENT

Mrs. Kelly, individually and on behalf of her son's estate, asks this Court to (1) declare Tex. Health & Safety Code § 166.046 unconstitutional both facially and as applied to Mr. Dunn; and (2) find that Methodist deprived Mr. Dunn of his civil right to due process under color of state law, 42 U.S.C. § 1983, by utilizing Tex. Health & Safety Code § 166.046. This case is not moot because the Plaintiff's injuries are capable of repetition while escaping review.

FACTS AND PROCEDURAL BACKGROUND

Mr. Dunn was admitted as a patient of Methodist on October 12, 2015. On or about November 11, 2015, Methodist provided Mrs. Kelly with a letter (Exhibit A) informing Mrs. Kelly that Methodist intended to terminate the life-sustaining treatment of her son, Mr. Dunn, and that a meeting of the hospital's ethics committee would take place to discuss terminating Mr.

Dunn's life-sustaining treatment. The letter from Methodist was sent pursuant to Tex. Health & Safety Code § 166.046.

In response to receiving the letter, Mr. Dunn and Mrs. Kelly obtained a temporary restraining order on November 20, 2015. Methodist continued life-sustaining treatment pursuant to that order until Mr. Dunn's natural death on December 23, 2015.

In support of this Motion, Mrs. Dunn relies on her affidavit (Exhibit B), a video of her son praying to receive life-sustaining care (Exhibit C), and the affidavit of Mr. Nixon (Exhibit D).

ARGUMENT

I. The Court should grant summary judgment pursuant to Chapter 37 of the Civil Practice & Remedies Code (UDJA) because Tex. Health & Safety Code § 166.046 is facially unconstitutional.

A court has the power to issue a declaratory judgment on "issues of state law and issues of federal law."[1]

Tex. Health & Safety Code § 166.046 allows a hospital to make an arbitrary and unreviewable decision to terminate life-sustaining treatment without due process.[2] The statute states: "If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee..."[3] If a conflict exists, the statute then gives a patient these rights:

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[1] Tex. Civ. Prac. & Rem. Code Ann. § 37.003 (West 2017); see *Patel v. Tex. Dept. of Licensing and Regulation*, 469 S.W.3d 69, 88 (Tex. 2014). "A court having jurisdiction to render a declaratory judgment has power to determine issues of fact, issues of state law and issues of federal law if such questions be involved in the particular case." *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 858 (Tex. 1965); *Chapman v. Marathon Mfg. Co.*, 590 S.W.2d 549, 552 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

[2] To comport with due process, a person facing deprivation of life, liberty, or property must be confronted with reasonable notice of the claims against him so as to be able to mount a proper defense. *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.,* 239 S.W.3d 826 (Tex. App.—Austin 2007, no pet.).

[3] Tex. Health & Safety Code § 166.046(a).

(b) The patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision:

(1) may be given a written description of the ethics or medical committee review process and any other policies and procedures related to this section adopted by the health care facility;

(2) shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement;

(3) at the time of being so informed, shall be provided:

(A) a copy of the appropriate statement set forth in Section 166.052; and

(B) a copy of the registry list of health care providers and referral groups that have volunteered their readiness to consider accepting transfer or to assist in locating a provider willing to accept transfer that is posted on the website maintained by the department under Section 166.053; and

(4) is entitled to:

(A) attend the meeting;

(B) receive a written explanation of the decision reached during the review process;

(C) receive a copy of the portion of the patient's medical record related to the treatment received by the patient in the facility for the lesser of: (i) the period of the patient's current admission to the facility; or (ii) the preceding 30 calendar days; and

(D) receive a copy of all of the patient's reasonably available diagnostic results and reports related to the medical record provided under Paragraph (C).[4]

As written, Section 166.046 of the Health & Safety Code denies patients constitutional due process before a life-terminating decision is made. There is no right to be heard by the committee. There is no standard set in the statute by which the committee is required to make a decision. There is no standard as to who sits on the committee. There is no record made of the committee's meeting. There is no requirement the committee substantiate its decision in writing, and there is no right to review the committee's decision.

By statutorily protecting the hospital's committee and providing it the opportunity to deprive an individual of life by terminating life-sustaining treatment without any one of these

[4] Tex. Health & Safety Code Ann. § 166.046 (West 2017).

rights, the statute guarantees a constitutional violation. A substantive due process violation occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of its power.[5] Here, there are simply no standards and no specific procedures to protect against a deprivation of due process. Rather, the procedures outlined in Section 166.046(b)(1-4) expose patients to a risk of mistaken or unjustified deprivation of life without protection, and an unjustified deprivation of life cannot be corrected.

For example, the time period in which notice is guaranteed falls short of any due process standards. Pursuant to the statute, the patient or person responsible for the health care decisions of the individual "shall be informed of the committee review process not less than 48 hours before the meeting called to discuss the patient's directive, unless the time period is waived by mutual agreement."[6] This brief statutory notice period of two days does not afford a patient with adequate opportunity to prepare for a meeting where the subject at stake is the individual's life. The State sets an unreasonable time period in which individuals must: evaluate available options (if any); determine and confirm persons or entities willing to assist; gather needed medical records; seek and secure counsel to attend the meeting. Effectively, the patient can be served with 48-hour notice on a Friday near close of business (at which time administrative offices of hospitals and lawyers' offices are closed), making any meaningful preparation or search for helpful assistance within those two statutorily-afforded days impossible. Additionally, the statutes provides no right to participate or advocate in the meeting.

Similarly, the statute fails to require hospitals to provide notice as to why the institution has decided to unilaterally seek the withdrawal of life-sustaining treatment. The statute instead provides that the patient or surrogate: "**may** be given a written description of the ethics or

[5] *Byers v. Patterson,* 219 S.W.3d 514, 525 (Tex. App.—Tyler 2007, no pet.) (citing *Simi Inv. Co. v. Harris Cnty.,* 236 F.3d 240, 249 (5th Cir. 2000)).
[6] Tex. Health & Safety Code Ann. § 166.046(b)(2) (West 2017).

medical committee review process and any other policies and procedures related to this section adopted by the health care facility."[7] While the statute does not require hospitals to have policies or procedures, unpublished and unknown guidelines, criteria, or medical information undoubtedly leave patients and their families guessing at how to advocate on behalf of the patient. Without notice of the standards on which a hospital seeks to remove life-sustaining treatment or the process and procedure by which it makes its decision, the patient is not able to prepare for an ethics committee meeting. Ultimately, the statute allows for a life or death determination without any criteria or benchmarks for which patients are susceptible. Tex. Health & Safety Code § 166.046 fails to provide patients with a reasonable opportunity to prepare for the crucial hearing where deprivation of life is being determined.

Tex. Health & Safety Code § 166.046(b)(4) entitles the patient or their surrogate to "(A) attend the meeting." Attendance to a hearing in which the constitutional right to life is deliberated fails to meet a constitutional threshold of due process. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations [of property interests] can be prevented."[8]

Tex. Health & Safety Code § 166.046 fails to provide a patient a neutral or impartial decision-maker. Instead, the Code allows the hospital to appoint the committee members, without enforcing any standards of impartiality. A lack of neutrality is a deprivation of due process as a matter of law. As the United States Supreme Court said in *Marshall v. Jerrico, Inc.,*

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[7] Tex. Health & Safety Code Ann. § 166.046(b)(1) (West 2017).

[8] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o [sic] better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring).

> "This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals."[9]

Finally, there is no right of appeal or review of the hospital's decision. Due process cannot be ensured without a review of a life-depriving decision.[10] Otherwise, all other due process safeguards are illusory.

Due to the statute's failure to provide substantive or procedural due process, the Court should grant summary judgment pursuant to Civ. Prac. & Rem. Code § 37, holding that the Health & Safety Code § 166.046 is facially unconstitutional and was unconstitutionally applied to Mr. Dunn.

II. The Court should grant summary judgment on Plaintiff's 42 U.S.C. § 1983 claim because the hospital deprived Mr. Dunn of Due Process.

A. This is a proper claim under 42 U.S.C. § 1983.

42 U.S.C. § 1983 allows an individual to bring a civil action to recover damages sustained as a result of the violation of their constitutional rights. The statute serves as the vehicle to redress the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[11] To state a claim under the statute, a plaintiff must allege that (1) defendant deprived plaintiff of a federal right secured by the laws of the United States or by the Constitution and (2) acted under color of state law.[12] "Thus, a threshold inquiry

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[9] 446 U.S. 238, 242 (1980).
[10] *Parham v. J.R.*, 442 U.S. 584, 591 (1979).
[11] *Gomez v. Toldeo*, 446 US 635, 638 (1980).
[12] See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Schreiber v. City of Garland*, Tex., CIV.A. 3:06-CV-1170-O, 2008 WL 1968310, at *4 (N.D. Tex. May 7, 2008) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 241 (5th Cir.1999)).

in a 42 U.S.C. § 1983 cause of action is whether plaintiff has alleged a violation of a constitutional right or of federal law." [13]

B. The two elements to make a claim as required by 42 U.S.C. § 1983 are met in this case—deprivation of a federal right(s) under color of state law.

1. Dunn was deprived of his right to Due Process.

Due process requires a fair and impartial trial, accomplished by providing: (1) an opportunity to be heard (2) a reasonable opportunity to prepare for a hearing, (3) a reasonable notice of the claims against them, and (4) a decision to be reached through an impartial tribunal.[14] To constitute a competent trial, the trial (hearing) must be conducted before an unbiased judge.[15] Procedural due process rules are meant to protect persons not only from the deprivation, but from the mistaken or unjustified deprivation, of life, liberty, or property and

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[13] *Schreiber v. City of Garland, Tex.*, CIV.A. 3:06-CV-1170-O, 2008 WL 1968310, at *4 (N.D. Tex. May 7, 2008) (citing *Neal v. Brim*, 506 F.2d 6, 9 (5th Cir. 1975)). The underlying nature of a claim determines whether or not it is a healthcare liability claim. *Tesoro v. Alvarez* (App. 13 Dist. 2009) 281 S.W.3d 654; *Covenant Health Sys. v. Barnett*, 342 S.W.3d 226, 231-32 (Tex. App.—Amarillo 2011, no pet.) (citing to *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010) (citing *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004)). "A cause of action against a healthcare provider is a health care liability claim if it is based on a claimed departure from an accepted standard of healthcare. A claim alleges a departure from accepted standards of health care if the act or omission alleged in the complaint is an inseparable part of the rendition of healthcare services." *Covenant Health Sys. v. Barnett*, 342 S.W.3d 226, 231-32 (Tex. App.—Amarillo 2001, no pet.) (citing to *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005); *Buck v. Blum*, 130 S.W.3d 285, 290 (Tex. App.—Houston [14th Dist.] 2004, no pet.)). Here, the committee formation and decision making processing is a separable claim.

Defendants cite to *Texas Cypress Creek* in their argument that this case is analogous and should be treated accordingly. Not so. A reading of this short opinion by the Texas appellate court addresses the issue of whether a mental healthcare claim is a Chapter 74 claim. In that case, the plaintiff claimed that the doctors did not provide adequate care for the patient and plaintiff had initially filed a healthcare liability claim but later amended her pleadings to artfully take out these claims. *Texas Cypress Creek Hosp., L.P. v. Hickman*, 329 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Here, no such allegations are made. Plaintiff is not alleging the hospital did not provide care or failed to meet a professional standard; rather, Plaintiff's complaint is that the committee decision-making process violated due process and is unconstitutional as a matter of law. Plaintiff has not claimed a violation of a medical standard, nor that the medical professionals gave inadequate care. Previous briefing has also informed the Court that a claim pursuant to 42 U.S.C. § 1983 may not be pre-empted by state statute.

[14] *In re R.M.T.*, 352 S.W.3d 12 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.,* 239 S.W.3d 826 Tex. App.—Austin 2007, no pet.); It is important to note, that while the Texas Constitution is textually different in that it refers to "due course" rather than "due process," the terms are regarded without meaningful distinction. *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 252–53 (1887). Consequently, Texas has "traditionally followed contemporary federal due process interpretations of procedural due process issues." *Univ. of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); *Mellinger*, 3 S.W. at 252-53.

[15] *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.— San Antonio 1972), writ refused n.r.e., (May 17, 1972).

interests protected by the Fourteenth Amendment.[16] The right to due process is absolute. It does not turn on the merits of a claim, rather, "because of the importance to organized society", procedural due process must be observed.[17] Denial of the right to due process requires the award of nominal damages even without proof of actual injury.[18]

The statute at issue disregards this constitutionally required process. Here, Section 166.046 of the Texas Health and Safety Code violates multiple facets that make up the constitutional right to due process by: (1) failing to provide a patient (or their surrogate decision-maker) an opportunity to be heard, (2) failing to give a reasonable opportunity to prepare for a hearing, (3) failing to give adequate notice of the reasons why removal of life-sustaining treatment is to occur, and (4) failing to allow for a decision to be reached through an impartial tribunal, (5) failing to require objective standards, and (6) failing to provide a record or right of review.

2. Dunn was not given an opportunity to be heard.

The opportunity to be heard constitutes a fundamental requirement of due process and must be provided at a meaningful time and in a meaningful manner.[19] While due process allows

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[16] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972); *County of Dallas v. Wiland*, 216 S.W.3d 344 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[17] *County of Dallas v. Wiland*, 216 S.W.3d 344, 356 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[18] *County of Dallas v. Wiland*, 216 S.W.3d 344, 356-57 (Tex. 2007) (citing *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

[19] *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *Univ. of Texas Med. Sch. at Houston v. Than,* 901 S.W.2d 926, 930 (Tex. 1995); *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976); At the core of affording sufficient due process lies the opportunity to be heard in front of an impartial tribunal. *Johnson v. Mississippi*, 403 U.S. 212 (1971); The constitutional right to be heard serves as a basic tenant of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his [rights or] possessions. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (noting the high value embedded in our constitutional and political history in permitting a person the right to enjoy what is his, free of governmental interference). In discussing the deprivation of property, the United States Supreme Court noted that the purpose of this requirement is not only to ensure abstract fair play to the individual, but more particularly, is to protect a person's use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

for variances in the form of hearing "appropriate to the nature of the case,"[20] depending on significance of the interests involved and nature of the subsequent proceedings, "the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[21] Part of the opportunity to be heard is the ability to be represented at the hearing.[22] Mr. Dunn's mother was left without an advocate to defend her son's life.

The Texas Supreme Court has held that the "opportunity [to be heard] may not be attenuated to mere formal observance."[23] Here, while Tex. Health & Safety Code § 166.046(b)(4) entitles a patient or surrogate decision-maker to attend the committee meeting and receive the patient's medical records, diagnostic results, and a written explanation of the committee's decision, that by no means equates to due process, and the constitutional right to be heard is glaringly absent in the statute.[24]

3. Dunn was not given proper notice of the proceeding.

The unnecessary exclusion of *the* critical party from meaningful participation in a determination of this right to direct the course of medical treatment contravenes the basic tenets

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[20] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).
[21] *Boddie v. Connecticut*, 401 U.S. 371, 378- 79 (1971).
[22] While U.S. Circuit Courts were split on whether a prohibition against representation of a plaintiff by and through counsel was a violation of plaintiff's right to due process when subject to permanent suspension, the Court in *Houston v. Sabeti* referred to and assessed five factors first laid out in *Wasson v. Trowbridge*, most notably were: the education level of the student, his/her ability to understand and develop the facts, whether the other side is represented, and fairness of the hearing. *Univ. of Houston v. Sabeti*, 676 S.W.2d 685, 687 (Tex. App. – Houston [1st Dist.] 1984, no writ). The *Sabeti* court held the student was met with due process upon determining that the *Wasson* factors were not present, for: 1) the proceeding was not criminal; 2) the government did not proceed through counsel; 3) the student was mature and educated; 4) the student's knowledge of the events enabled him to develop the facts adequately; and, 5) the other aspects of the hearing, taken as a whole, were fair. *Id*; *see Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967).
[23] "Due process of law ordinarily includes: (1) hearing before condemnation; (2) accordance of reasonable opportunity to prepare for the hearing. Mandate of reasonableness of opportunity may not be attenuated to mere formal observance by judicial action." *Ex parte Davis,* 344 S.W.2d 153, 157 (Tex. 1961) (citing *Ex parte Hejda*, 13 S.W.2d 57, 58 (Tex. Comm'n App. 1929).
[24] The statute does not entitle the patient or surrogate decision-maker to offer evidence or utilize counsel. *Tex. Health & Safety Code Ann.* § 166.046(b)(4)(West 2017).

of our judicial system and affronts the principles of individual integrity that sustain it.[25] As such, notice of the claims is a critical component of due process.[26] Mr. Dunn, though lucid and communicative, was not provided direct notice of the hearing. The statute does not require a conscious patient be guaranteed notice of the hearing that will determine whether the patient will be removed from life-sustaining treatment. The statutory language provides certain entitlements to "the patient or the person responsible for the health care decisions of the individual who has made the decision regarding the directive or treatment decision."[27] In this instance, the hospital was aware of the patient's ability to communicate, yet his mother was handed the letter which stipulated the hearing date. In fact, Mr. Dunn had made clear his intention to continue life-sustaining treatment and the attached summary judgment evidence of a video recording reveals this to be certain even post-hearing. Further, it was not until counsel was hired and a temporary restraining order was put in place that the hospital took the stance that Mr. Dunn was incapacitated. And, not until after Mr. Dunn hired a lawyer and obtained a restraining order did the hospital seek the appointment of a permanent guardian. Where on its face and in practice, a statute neglects to safeguard the attendance or notification of the individual to be deprived of his constitutional right, the system is void of due process, especially so, when hospitals can legally and arbitrarily deem individuals incapacitated and go as far as to remove guardianship rights from family members.

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[25] *Edward W. v. Lamkins*, (2002) 99 Cal. App. 4th 516, 529 (holding that public guardian's routine of seeking notice waivers violated conservatee's due process rights); *Thor v. Superior Court* (1993) 5 Cal. 4th 725, 723, fn. 2.

[26] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank Tr. Co.* 339 U.S. 306, 314 (1950); *see Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (noting that notice is required to satisfy the traditional notions of fair play and substantial justice implicit in due process).

[27] *See Tex. Health & Safety Code Ann.* § 166.046(b)(West 2017).

4. Dunn was not given ability to prepare for the hearing.

A disciplinary proceeding by which a medical student is dismissed for cheating demands a level of due process that consists of oral and written notice of the charges, written notice of evidence to be used against the student in the hearing, including a witness list and summaries of their respective testimonies, the right to counsel or other representation, a formal hearing with the opportunity to present evidence and cross-examine witnesses, and a right of appeal.[28] It is ironic that Tex. Health & Safety Code § 166.046 does not afford individuals on life-sustaining treatment any of these same procedural safeguards as are given to medical students.[29] Here, the interest at risk is higher, yet per the statute in question, ethics meetings are held without providing the patient or surrogate with notice of evidence to be used, a witness list accompanied by summaries, notice of panel members with accompanying qualifications, right to counsel or the opportunity to present evidence and cross-examine witnesses. With the absence of uniform statutory guidance, the ability of a patient or surrogate decision-maker to address an ethics committee depends upon the internal policies of individual hospitals, the individual in charge of that hospital's ethics committee, and the good graces (if any) of the committee members. Effectively, a patient's ability to advocate before the body determining whether to continue his life may well depend in which hospital he finds himself. This lack of uniformity creates different due process availability to similarly-situated patients, and therefore, renders the statute facially unconstitutional. As Methodist applied an unconstitutional statute, it deprived Mr. Dunn of his civil rights under color of state law.

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[28] *Univ.of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995).

[29] Even with the heightened procedural due process observed in *Than*, the Court held that due course of law was infringed when a student with a liberty interest is denied an opportunity to respond to a new piece of evidence against him obtained in an ex parte visit and given that the countervailing burden on the state is slight. 901 S.W. 2d at 932.

5. The hospital committee is not an impartial tribunal as required by due process as a hearing must be conducted before an unbiased judge.[30]

The U.S. Supreme Court has stressed the importance of a "neutral factfinder" in the context of medical treatment decisions and the right to a review process.[31] Under Tex. Health & Safety Code § 166.046, a fair and impartial tribunal did not and could not hear Dunn's case. The "ethics committee" members who are employed by the treating hospital cannot be fair and impartial. Their decision may have an adverse financial impact on the hospital or put a colleague's judgment in public question. Additionally, there is no safeguard against ex parte communications or the ex parte presentation of evidence to which the patient or his surrogate could rebut.

Aside from hospital employees, the hospital itself has an inherent conflict of interest when acting as arbiter – treating any patient requires a financial burden upon the entity. Members of a fair and impartial tribunal should not only avoid a conflict of interest, they should avoid even the appearance of a conflict of interest, especially when a patient's life is at stake.[32] When a hospital "ethics committee" meets under Tex. Health & Safety Code § 166.046 for a patient within its own walls, objectivity and impartiality essential to due process are nonexistent. Section 166.046 provides no mechanism in which a patient's desire to live is considered by an impartial tribunal. Accordingly, a lack of an impartial committee by Methodist was another violation of Mr. Dunn's right to due process.

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[30] *Johnson v. Mississippi*, 403 U.S. 212 (1971); *Martinez v. Texas State Bd. of Medical Examiners*, 476 S.W.2d 400 (Tex. Civ. App.—San Antonio 1972), writ refused n.r.e., (May 17, 1972).

[31] *Parham v. J.R.*, 442 U.S. 584, 591 (1979) (citing examples of hospital procedures where several hospitals' review boards are made up of non-staff community medical professionals and review processes afforded to patients).

[32] "There is a great potential for serious conflict of interest for the State when it is paying the medical bill for the treatment of its ward." *Woods v. Com.*, 142 S.W.3d 24, 64 (Ky. 2004).

6. Dunn was sentenced to a premature death.

The preservation of life in Texas is a long-valued right.[33]

Courts recognize "no right is held more sacred, or is more carefully guarded, by the common law, than 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."[34]

The State of Texas does not own the decision, and thus lacks the authority, to end a patient's life by taking away life-sustaining treatment. As such, the State of Texas does not have any authority to delegate such a decision to any actor, private or public. The situation facing patients in hospitals is distinctly different than the institution of the death penalty for convicted felons. By the enactment of Tex. Health & Safety Code § 166.046, the State of Texas has created a scheme whereby patients in Texas hospitals may have their life extinguished without any standard, being found guilty of nothing except that of being ill. The State of Texas simply does not have the authority to sentence ill people to premature death.

In *Cruzan*, the Court noted that the Constitution requires that the State not allow anyone "but the patient" to make decisions regarding the cessation of life-sustaining treatment.[35] The Court went on to note that the state could properly require a "clear and convincing evidence" standard to prove the patient's wishes.[36] In this case, there is no evidentiary standard imposed by Tex. Health & Safety Code § 166.046. An attending physician and hospital ethics committee are given

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[33] "(a) A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide." Tex. Pen. Code Ann. §22.08 (West 2017); Additionally, courts across the nation have upheld similar statutes. *See Donorovich-Odonnell v. Harris,* 241 Cal. App. 4th 1118 (2015) (upholding a statute criminalizing the mere act of prescribing drugs as it "is active and intentional participation in the events leading to the suicide).

[34] *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); "It cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan,* 497 U.S. at 281.

[35] *Cruzan,* 497 U.S. at 286.

[36] *Id.* at 280.

complete autonomy in rendering a decision that further medical treatment is "inappropriate" for a person with an irreversible or terminal condition. This is an alarming delegation of power by the state law. A final decision rendered behind closed doors, without an opportunity to challenge the evidence, present contrary evidence, or appeal a committee decision, is legally insufficient from the due process intended to protect the first liberty mentioned in Article 1, Section 19 of the Texas Constitution and that of the Fourteenth Amendment. Accordingly, the act of using Tex. Health & Safety Code § 166.046 by Methodist deprived Mr. Dunn of his civil rights under color of state law.

7. The hospital acted under color of state law.

Conduct or action under color of state law requires that a defendant exercise power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.[37] A State cannot avoid constitutional responsibilities by delegating public function to private parties.[38] "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action... Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor."[39] Courts have made clear that state action is concluded when "the State create[d] the legal framework governing the conduct."[40] Here, the State enacted Tex. Health & Safety Code § 166.046, the legal framework granting authority to the hospital which deprived Dunn of his constitutional rights. And, Methodist used it. See Exhibit A.

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[37] *See Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)); see also *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 864 (Tex. App.—Amarillo 1993, cert. denied).
[38] *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).
[39] *National Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988).
[40] *Tarkanian*, 488 U.S. at 192 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

Pursuant to the Texas Health & Safety Code, the Hospital exercised statutory authority evocative of a government function in the following ways:

- Provided approximately two days' formal notice[41], that Dunn's life-sustaining could be removed;
- Held a hearing regarding whether Dunn's life-sustaining treatment should be removed[42];
- Came to a determination that Dunn's request to continue life-sustaining treatment should not be honored[43];
- Came to a determination that Dunn's life-sustaining treatment should be removed[44];
- Gave written notice that Dunn's life-sustaining treatment could be removed on or about November 24, 2015, as it can do under the Act[45].

Tex. Health & Safety Code § 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. This grant of authority indicates even a private hospital, when taking action under the statute, is performing a State function. The ability to take formal action which will result in death is not available to the public.[46] In making the decision to withhold life-sustaining treatment, the statute allows a hospital's ethics committee to sit as both

[41] *See* Tex. Health & Safety Code § 166.046(a)(2)(West 2017).
[42] *See* Tex. Health & Safety Code § 166.046 (a)(West 2017).
[43] *See* Tex. Health & Safety Code § 166.046 (a)(West 2017).
[44] *See* Tex. Health & Safety Code § 166.046 (a)(West 2017).
[45] *See* Tex. Health & Safety Code § 166.046(e)(West 2017) ("The physician and health care facility are not obligated to provide life-sustaining treatment after the 10th day after the written decisions required under Subsection (b) s provided to the patient or the person responsible for the health care decisions of the patient [.]").
46 Compare *Lindsey v. Detroit Entertainment*, LLC, 484 F.3d 824, 828–31 (6th Cir. 2007) (casino security personnel were not engaged in state action when they detained a patron and thus owner could not be held liable for an unlawful seizure under § 1983, because security personnel are not licensed under state law to have misdemeanor arrest authority; although private security guards who are endowed by law with plenary police power may qualify as state actors, plaintiffs could not point to any powers beyond those possessed by ordinary citizens that the state delegated to unlicensed security personnel, and thus they could not show that defendant engaged in any action attributable to the state); see also *Johnson v.* , 372 F.3d 894, 896-898, (7th Cir. 2004) *Children's Hosp.LaRabida* (delegation of a public function to a private entity triggers state action and a privately employed "special officer" who possesses full police power pursuant to city ordinance will be treated the same as a regular Chicago police officer.

judge and jury of a physician's recommendation to take action which will result in premature death. This judicial function of the "ethics committee" is similarly evocative of action.

Private entities have been held to be acting under color of State law for performing traditionally government functions/heavily regulated government functions as follows:

- *Marsh v. State of Ala.*, 326 U.S. 501 (1946) (company owned town);
- *Smith v. Allwright*, 321 U.S. 649 (1944) (primary election);
- *Watchtower Bible and Tract Society of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 10 (1st Cir. 2011), cert. denied, 132 S. Ct. 549, 181 L. Ed. 2d 396 (2011) (public streets within "urbanizations," which are neighborhood homeowners' associations authorized by city to control vehicular and pedestrian access, remain public property despite their enclosure, and regulating access to and controlling the behavior on public property is a traditional, classic government function; thus, urbanizations were state actors for purposes of § 1983 action challenging closure of access to public streets);
- *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 636-40 (6th Cir. 2005) (although private security guards who exercise some police-like powers may not always be viewed as state actors, where guards are endowed by state law with plenary police powers, they qualify as state actors under the public function test; casino's private security police officers were licensed by the state and had the authority to make arrests and thus were afforded power traditionally reserved to the state alone such that guard's conduct on duty on the casino's premises would be considered state action);
- *Belbachir v. County of McHenry*, 726 F.3d 975, 978 (7th Cir. 2013) (although employees of private firm hired to provide medical services at jail were not public employees, they were performing a public function and thus were acting under color of state law);
- *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002) (under *Brentwood*, it suffices that a nominally private party satisfy a single state action test and here private lessee of public outdoor area owned by city performed a traditional sovereign function when it sought to regulate free speech activity on city-owned land; although not everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a state actor, here the city retained little, if any, power over the private entity and thus its policing of free speech in the public forum was a traditional and exclusive function of government);

- *Duke v. Massey*, 87 F.3d 1226, 1231 (11th Cir. 1996) (decision of presidential candidate selection committee for state Republican Party to exclude candidate from primary ballot pursuant to authority granted under state law constitutes state action for purposes of candidate's federal civil rights action despite argument that committee members made decision in their capacity as representatives of Republican Party); and

- *Duke v. Smith*, 13 F.3d 388, 393 (11th Cir. 1994), writ denied, 513 U.S. 867 (1994) (because bipartisan state-created committees are inextricably intertwined with the process of placing candidates' names on the ballot and it is the state-created procedures and not the political parties that make the final determination as to who will appear on the ballot, the power exercised is directly attributable to the state).

The Tex. Health & Safety Code § 166.046 clearly permits Texas hospitals, via its "ethics committees," to take action (such as to hear and determine whether a recommendation to withhold life-sustaining treatment against a patient's wishes is appropriate, and then exercise removal of life-sustaining care 10 days after providing written notice) normally only held in the hands of State officials such as peace officers and executioners who can take a person's life against that person's wishes with immunity.[47] Thus, as Methodist admitted to using Tex. Health & Safety Code § 166.046, the elements to a 42 U.S.C. § 1983 claim are met.

III. The case is not moot because it is capable of repetition yet evading review.

Despite Defendant's arguments, the death of Chris Dunn does not render this case moot. The Supreme Court of Texas has recognized two exceptions to the mootness doctrine: (1) the capability of repetition yet evading review exception, and (2) the collateral consequences exception.[48] "The 'capable of repetition yet evading review' exception is applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot."[49] The Supreme Court of Texas has noted that the "capable of repetition yet

[47] *See, e.g. Cornish v. Correctional Services Corp.*, 402 F.3d 545, 550-51 (5th Cir. 2005) (private corporation delegated authority to operate juvenile correctional facility fell within public function test as far as its provision of juvenile correctional services to the county).
[48] *State v. Lodge,* 608 S.W.2d 910, 912 (Tex. 1980).
[49] *Spring Branch I.S.D. v. Reynolds,* 764 S.W.2d 16, 18 (Tex. App.—Houston [1st Dist.] 1988, no writ).

evading review" exception has only been observed in cases that similarly challenge unconstitutional acts performed by the government or its designated surrogates.[50]

A. Application of Section 166.046 designed for repetition.

Specifically, Tex. Health & Safety Code § 166.046, on its face, applies to all persons for whom life-sustaining treatment is being utilized to sustain their life in all Texas hospitals. Certainly, application of the Statute is capable of repetition. Defendant's own citation, *Lee v. Valdez* states:

> [T]here may be rare instances where a court holds that a case involving a ***deceased*** prisoner is not moot, either because it is a class action or because it is capable of repetition yet evading review[.][51]

In the *Conservatorship of Wendland*, the California Supreme Court made clear that rather than dismissing a case upon the passing of the conservatee, it has the discretion to retain "otherwise moot cases presenting important issues that are capable of repetition yet tend to evade review."[52] The *Wendland* Court applied the exception, noting that the case raised "important issues about the fundamental rights of incompetent conservatees to privacy and life, and the corresponding limitations on conservators' power to withhold life-sustaining treatment."[53] Repeatedly, in Texas, patients on life-sustaining treatment are dealing with similarly important issues of their fundamental rights. Being provided 48 hours' of notice that a nameless, faceless panel of persons of unknown qualifications will decide whether to terminate life-sustaining treatment, the patient is afforded only a meeting, at which they will have no right to speak, no

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[50] *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990); *eg State v. Lodge*, 608 S.W.2d 910 (Tex. 1980) (holding that the mootness doctrine does not apply to appeals from involuntary commitments for temporary hospitalization of less than 90 days in mental hospitals pursuant to Texas Mental Health Code).

[51] *Lee v. Valdez*, 2009 WL 1406244, *14 (N.D. Tex. May 20, 2009) (C.J. Fitzwater) (emphasis added) (citing *Kremens v. Bartley*, 431 U.S. 119, 133 (1977) (indicating that courts do not require or always anticipate that the repetition will occur to the same plaintiff in all circumstances – certainly, in the case of a deceased prisoner, the same prisoner will not receive the repeated action).

[52] (2002) 26 Cal.4th 519, ft. 1; *e.g. Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122; *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1011, fn. 5.

[53] 26 Cal.4th at ft. 1.

right to counsel, no advance knowledge of the rules or standards, and with no right of review, is a deprivation of fundamental rights. Given that patients subject to Tex. Health & Safety Code § 166.046 are almost all gravely ill, this denial of due process is unarguably subject to repetition.

B. Application of Tex. Health & Safety Code § 166.046 is designed to evade review.

The Court in *Wendland*, which heard a case involving a conservator who had sought to remove life-sustaining treatment from the conservatee, further affirmed that "as this case demonstrates, these issues tend to evade review because they typically concern persons whose health is seriously impaired."[54] Similarly, where a guardian ad litem appealed to the Circuit Court in *Woods v. Kentucky* concerning the constitutionality of a statute governing the withdrawal of artificial life support after the passing of Mr. Woods to natural causes, the circuit court dismissed the case as moot, but the Court of Appeals reversed and remanded, "citing an exception to the mootness doctrine, applicable when the underlying dispute is 'capable of repetition, yet evading review.'"[55]

Tex. Health & Safety Code § 166.046 allows 48 hours' notice of the ethics committee meeting, and in 10 days' time, life-sustaining treatment may be removed, presumably resulting in death.[56] As the statutory answer period for a lawsuit is at least 20 days following date of service, it is practically impossible for a patient bound to life-sustaining treatment, let alone any person, to retain counsel and complete a lawsuit, with resulting appeals, in just twelve days.[57] The application of Tex. Health & Safety Code § 166.046 is undoubtedly capable of evading review.

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[54] 26 Cal.4th at ft. 1.
[55] *142* S.W.3d 24, 31(Ky. 2004) (distinguished case from the one at hand due to the clear and convincing evidence standard required by the Kentucky statute).
[56] *See* Tex. Health & Safety Code § 166.046 (West 2017).
[57] *See* Tex. R. Civ. P. 99(b) ("The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof.").

Defendant is mistaken in believing this matter moot; Tex. Health & Safety Code § 166.046 fits squarely within a mootness exception, and case law as well as the importance of the issues firmly support the matter being heard as the act as put forth by the statute is capable of repetition while evading review.

CONCLUSION

There are no facts in dispute. Tex. Health & Safety Code § 166.046 reads as it is written. Methodist used and relied on that statute to assemble its ethics committee and render its decision. Only the intervention of this Court stayed implementation of Methodist's decision. But, the denial of due process had been accomplished. Accordingly, the Court should find that Tex. Health & Safety Code § 166.046 is unconstitutional, both facially and as applied to Mr. Dunn, because it denies patients due process rights and, specifically, denied Mr. Dunn of his due process rights. The Court should also find that Methodist violated Mr. Dunn's constitutional rights under color of state law and award nominal damages of one dollar ($1.00).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Evelyn Kelly prays that the Court grant this motion for summary judgment and provide Plaintiff such other and further relief, at law or in equity, to which she may be justly entitled.

Respectfully submitted,

AKERMAN, LLP

/s/ James E. Trainor, III
James E. "Trey" Trainor, III.
Texas State Bar No. 24042052
trey.trainor@akerman.com
700 Lavaca Street Suite 1400
Austin, Texas 78701
Telephone: (512) 623-6700
Facsimile: (512) 623-6701

Joseph M. Nixon
Texas State Bar No. 15244800
joe.nixon@akerman.com
Brooke A. Jimenez
Texas State Bar No. 24092580
brooke.jimenez@akerman.com
1300 Post Oak Blvd., Suite 2500
Houston, Texas 77056
Telephone: (713) 623-0887
Facsimile: (713) 960-1527

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record listed below in accordance Texas Rules of Civil Procedure 21a on August 21, 2017, via E-Filing and Serve system via email to:

Dwight W. Scott, Jr. — Via Email: dscott@scottpattonlaw.com
Carolyn Capoccia Smith — Via Email: csmith@scottpattonlaw.com
Scott Patton, PC
3939 Washington Avenue, Suite 203
Houston, Texas 77007

/s/ Joseph M. Nixon
Joseph M. Nixon

EXHIBIT A

HOUSTON Methodist
LEADING MEDICINE

J. Richard Cheney
Project Director

Biomedical Ethics
6565 Fannin Street, AX-200
Houston, Texas 77030-2707
Office: 713.441.4925
Fax: 713.669.9986
dcheney@houstonmethodist.org
houstonmethodist.org

13 November 2015

By Hand Delivery

Dear Ms. Evelyn Kelly and Mr. David Dunn:

On behalf of every member of the Houston Methodist Hospital Biomedical Ethics Committee, I express our sadness that your son, David "Chris" Dunn, is so ill. Thank you for meeting with the Committee to tell us of your hopes for Chris and of your request to continue life-sustaining treatment. After hearing from you and from Chris's physicians, the Committee has decided that life-sustaining treatment is medically inappropriate for Chris and that all treatments other than those needed to keep him comfortable should be discontinued and withheld.

Eleven days from today, Chris's physicians are allowed to withdraw and withhold life-sustaining treatments and to establish a plan of care designed to promote his comfort and dignity. During this period, the physicians and others will assist you in trying to find a doctor and facility that are willing to provide the treatments that you request. A copy of Chris's medical record for the past 30 days at Houston Methodist Hospital is delivered to you at this time for your use in trying to find other providers.

Also, for additional information, please see the enclosed copies of "When There Is A Disagreement About Medical Treatment" and the Registry created by the Texas Department of State Health Services. Houston Methodist Hospital personnel will assist you with any medically appropriate transfer that you arrange.

The ethics consultants you have already met will continue to be available to help you. Simply contact them as you have in the past or by calling 713-790-2201 and asking the page operator to page the ethics consultant on call.

Houston Methodist is honored to serve your son and you in a spiritual environment of caring.

Very truly yours,

J. Richard Cheney

J. Richard Cheney
Meeting Chair,
Houston Methodist Bioethics Committee

Enclosures

EXHIBIT B

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
HOUSTON METHODIST HOSPITAL	§	189th JUDICIAL DISTRICT

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally appeared Evelyn Kelly, being first duly sworn, deposes and states the following:

1. My name is Evelyn Kelly.

2. I am a United States citizen and over twenty-one (21) years of age. I am of sound, mind, capable of making this affidavit, and I have personal knowledge of the facts stated herein, which are true and correct.

3. I am the mother of David Christopher Dunn "Dunn/Chris/my son."

4. David Christopher Dunn was admitted to Houston Methodist "Methodist" on October 12, 2015.

5. I was told that Chris had an unidentified mass on his pancreas that was affecting his other organs.

6. My son was not in a coma; instead, he was awake, alert, and responsive during his stay at Methodist. Chris was communicative with me and others. He understood where he was, and he also understood that he was very sick. He still expressed that he wanted to live.

7. To keep Chris from choking on the ventilator tube they had inserted in his throat, Methodist was giving him Dilaudid.

8. The tube inhibited Chris from speaking in clear sentences, however, he could communicate with hand gestures and head nodding.

9. I visited with Chris every day he was at Methodist, staying most nights. I went home only to change clothes and clean up.

10. On November 9, 2015, I met with representatives of Methodist in which they communicated to us the Hospital's recommendation to cease treatment and remove the ventilator.

11. A nurse told me that Chris would live only two or three minutes without the ventilator. She told me that Chris would be given morphine and another drug at the time the ventilator was removed.

12. The next day, November 10, 2015, Methodist delivered letters to inform me and David Dunn that because we had not agreed on a decision the day prior, the Methodist had the power, in accordance with a state statute, to convene a hearing to make that final determination in 48 hours.

13. These letters referenced *Tex. Health & Safety Code §166.052 and §166.053.*

14. I asked Chris if he wanted to live or be taken off the ventilator. His response always indicated that he wanted to continue living.

15. I attended the Committee review meeting on Friday, November 13, 2015.

16. David Dunn, Chris' father, was not present at the meeting.

17. I addressed the committee, comprised of individuals affiliated with the Methodist, but they did not agree with my thoughts and concerns.

18. I received a letter stating that the Committee's determination was that life-sustaining treatment was inappropriate and would be ended in eleven days' time.

19. We were unable to locate a facility to transfer Chris.

20. At this point, I contacted Texas Right to Life. The attached videos show Chris' ability to communicate and desire to be represented regarding this matter by the attorneys who took the case. The first video was filmed December 2, 2015, at 7:51 p.m., and the second was captured on December 11, 2015, at 1:30 p.m.

21. Houston Methodist only agreed to keep providing care to Chris after the temporary restraining order was filed.

22. With the temporary injunction in place, Chris continued to receive treatment from Methodist Hospital until his natural death on December 23, 2015.

FURTHER, your affiant sayeth naught.

DATED this 10th day of July, 2017.

Evelyn Kelly

STATE OF TEXAS §
COUNTY OF HARRIS §

Subscribed and sworn to before me, a Notary Public, this 10 day of July, 2017.

KELLEE G. DONOHUE
Notary Public, State of Texas
Comm. Expires 12-04-2019
Notary ID 130458672

Notary Public
(SEAL)

EXHIBIT C

VIDEOS (SEE FLASH DRIVE) PREVIOUSLY FILED VIA HAND DELIVERY WITH THE COURT ON JULY 14, 2017, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. COPY WAS ALSO PROVIDED TO OPPOSING COUNSEL PER CERTIFIED MAIL.

EXHIBIT D

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
HOUSTON METHODIST HOSPITAL	§	189th JUDICIAL DISTRICT

STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, personally appeared Joseph M. Nixon, being first duly sworn, deposes and states the following:

1. My name is Joseph M. Nixon.

2. I am a United States citizen and over twenty-one (21) years of age. I am of sound, mind, capable of making this affidavit, and I have personal knowledge of the facts stated herein, which are true and correct.

3. The two videos on the accompanying flash drive were recorded on my cell phone.

4. Both videos are "original" recordings as defined in Texas Rules of Evidence Rule 1001 (d).

5. These two recordings were taken of David Christopher Dunn during his stay at Methodist Hospital.

6. The first recording was filmed December 2, 2015, at 7:51 p.m.

7. The second film, Image 1583, was taken on December 11, 2015, at 1:30 p.m.

8. Both films are true, accurate, and unaltered representations of what is recorded.

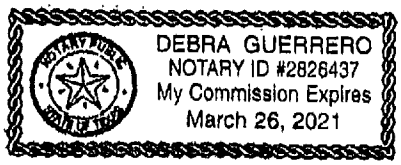
FURTHER, your affiant sayeth naught.

DATED this 14th day of July, 2017.

Joseph M. Nixon

STATE OF TEXAS §
COUNTY OF HARRIS §

Subscribed and sworn to before me, a Notary Public, this 14th day of July, 2017.



Notary Public

(SEAL)

TAB E

8/21/2017 4:10 PM
Chris Daniel - District Clerk Harris County
Envelope No. 18978561
By: ARIONNE MCNEAL
Filed: 8/21/2017 4:10 PM

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'S FINAL SUPPLEMENTAL MOTION TO DISMISS PLAINTIFFS' CAUSES OF ACTION FOR VIOLATION OF DUE PROCESS AND CIVIL RIGHTS AS MOOT, AND CHAPTER 74 MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL** and files this Final Supplemental Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss and respectfully shows the Court the following:

I. SUMMARY OF ARGUMENT

Defendant Houston Methodist Hospital ("Houston Methodist" or the "Hospital")'s Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss (the "Motion") should be granted in its entirety because:

- **Plaintiffs' claims for violation of due process and civil rights are moot as they no longer present a live case or controversy;**
- **Neither exception to the mootness doctrine applies; and**

- **Plaintiffs failed to timely file a Chapter 74 expert report.**

II.
FACTUAL SUMMARY

On October 12, 2015, Aditya Uppalapati, M.D., a Board Certified Medical Intensivist, 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.[1]

Shortly after Dunn's admission, his treating physicians determined that his condition was irreversible and progressively terminal. Having treated Dunn since October 12, 2015, his treating physicians concluded that the treatment necessary to sustain his life was causing Dunn to suffer without any hope for a change in prognosis, and thus, life-sustaining treatment was medically inappropriate for Dunn. However, Dunn had no advanced directives in place, and although his recent actions seemed to indicate his choice with regard to his desired level of care[2], he was unable to communicate his wishes to his current health

[1] *See* affidavit of Aditya Uppalapati, M.D., attached hereto as Exhibit A.

[2] *See* affidavit of J. Richard Cheney, attached hereto as Exhibit B, concerning meetings with Dunn's family and providers noting his recent refusal of care at another facility, refusal of a liver biopsy, leaving the facility against medical advice, and barricading himself in a room to avoid another hospitalization.

care providers during this hospitalization.[3] During the hospitalization, Dunn's treating physicians determined that he lacked the mental capacity to understand his medical condition, its predicted progression and consent to any medical treatment.[4,5]

Since Dunn had no advanced directives in place, was not married, and had no children, his divorced parents became his statutory surrogate decision makers.[6] Accordingly, Dunn's attending physicians and patient care team recommended that Dunn's divorced parents authorize the withdrawal of aggressive treatment measures and that only palliative or comfort care be provided.[7] 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.[8] The divisive situation between Dunn's divorced parents created a firestorm between the two people the Hospital looked to for direction of his medical care.

With no consensus in sight, the matter was referred to The Houston Methodist Biomedical Ethics Committee ("Ethics Committee") for consultation on October 28, 2015. 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

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[3] *See* Exhibit A.

[4] *See* Id.

[5] Dr. Uppalapati's competency evaluation was certified by an independent board certified psychiatrist, as is noted within Mr. Dunn's medical chart.

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

[7] *See* Exhibit B.

[8] *See* Id.

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. 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, however, 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.[9]

Over the next few 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

[9] *See* Id.

facilities were contacted by Houston Methodist representatives requesting transfer.[10] 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.[11] 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 father, his mother, and the outside forces influencing her.[12]

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.[13] 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 Dunn's due process rights afforded by the Texas and United States Constitutions.[14] 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

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[10] *See* Affidavit from Justine Moore, LMSW, attached hereto as Exhibit C.

[11] *See id.* at 2, ¶ 4.

[12] *See id.* at 4, ¶ 9.

[13] *See* Plaintiff's Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief, on file with this Court.

[14] *See id.*

hearing was scheduled for December 3, 2015.

Prior to the Temporary Injunction hearing, Houston Methodist formally appeared in the matter.[15] 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 now 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.[16] 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.**[17]

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.

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[15] *See* Houston Methodist Hospital's Verified Plea in Abatement, Original Answer and Special Exceptions, on file with this Court.

[16] *See* Order of Abatement dated December 4, 2015 from the 189th Judicial District of Harris County, Texas, on file with this Court.

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

In any event, on December 23, 2015, Dunn naturally succumbed to his terminal illnesses. The final autopsy report revealed a 7x6x5 cm cancerous mass on Dunn's pancreas with metastasis to the liver and lymph nodes, and micrometastasis to the lungs.[18] Further, the report showed Dunn suffered obstructive jaundice, hepatic encephalopathy, peritonitis, acute renal failure, acute respiratory failure and sepsis.[19]

It is undisputed that from the day of his admission until the time of his death Houston Methodist provided continuous life-sustaining treatment to Dunn. In fact, following his death, Evelyn Kelly, Dunn's mother and Plaintiff herein, 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."[20] Despite the expressed gratitude by Evelyn Kelly following Dunn's death, this lawsuit 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 Plaintiffs.[21] In their First Amended Petition, Plaintiffs state that as a result of Houston Methodist's conduct, Evelyn Kelly sustained injury individually, and on behalf of the Estate.[22] However, as a result of the passing of Dunn, Plaintiffs' claims for violation of due process and civil rights no longer present a live case or controversy and are moot. Consequently, Plaintiffs'

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[18] *See* Final Anatomic Diagnosis of David Christopher Dunn, attached hereto as Exhibit D.

[19] *Id.*

[20] *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 hereto as Exhibit E.

[21] *See* Plaintiffs' First Amended Petition, attached hereto as Exhibit F.

[22] *See id.* at 4, ¶ 10.

causes of action for violation of due process and civil rights must be dismissed with prejudice.

Further, as evidenced by the facts and prevailing law, Plaintiffs' entire claim including Ms. Kelly's intentional infliction of emotional distress ("IIED") claim, are health care liability claims governed by Chapter 74 of the Texas Civil Practice and Remedies Code. In accordance with Chapter 74, Plaintiffs are required to serve Houston Methodist with an expert report no later than 120 days after the filing of Houston Methodist's Original Answer. However, to date, Plaintiffs have not served Houston Methodist with any expert reports. As a result, Plaintiffs' claims against Houston Methodist must be dismissed with prejudice.

III.
ARGUMENTS & AUTHORITIES

A. Plaintiffs' Constitutional Causes Of Action For Violation Of Due Process And Civil Rights Are Moot And Must Be Dismissed.

As a result of Dunn's natural death, the due process and civil rights claims asserted against Houston Methodist no longer present a live case or controversy. As a result, Plaintiffs' alleged injuries no longer exist and this Court cannot provide any effectual relief on their claims. Therefore, this Court lacks subject matter jurisdiction over the aforementioned claims, as said claims are moot.

Article III of the Constitution confines this Court's jurisdiction to those claims involving actual "cases" or "controversies."[23] "To qualify as a case fit for adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the

[23] U.S. CONST. art. III, § 2, cl. 1; TEX. CONST. art. II, § 1.

complaint is filed.'"[24] When a case is moot – that is, when the issues presented are no longer live or when the parties lack a generally cognizable interest in the outcome – a case or controversy ceases to exist, and dismissal of the suit is compulsory.[25] There are two exceptions that confer jurisdiction regardless of mootness: (1) if the issue is capable of repetition, but evading review; and (2) the collateral consequences exception.[26] Neither exception applies to the instant case.

The "capable of repetition, yet evading review" exception is invoked in "rare circumstances" where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, or the party cannot obtain review before the issue becomes moot; and (2) there is a reasonable expectation that *the same complaining party would be subjected to the same action again.*"[27] In other words, a party must show a "reasonable expectation" or "demonstrated probability" that the same controversy will recur involving the same complaining party.[28] 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."[29] In addition, this rare "exception to the mootness doctrine has only been used to challenge

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[24] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

[25] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

[26] *FDIC v. Nueces Cty.*, 886 S.W.2d 766, 767 (Tex. 1994) (citing *Camarena v. Tex. Employment Com'n*, 754 S.W.2d 149, 151 (Tex. 1988); *see also Gen. Land Office v. OXY U.S.A., Inc.*, 780 S.W.2d 569, 571 (Tex. 1990).

[27] *City of McAllen v. McAllen Police Officers Union*, 221 S.W.3d 885, 896 (Tex. App.—Corpus Christi 2007, pet. denied) (emphasis added); *Gen. Land*, 789 S.W.2d at 571.

[28] *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

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

unconstitutional acts performed by the government."[30] Houston Methodist is a private hospital, not a government entity.

The second exception, the collateral-consequences exception, applies only under "narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment."[31] The "collateral consequences" recognized by Texas courts under the exception "have been severely prejudicial events whose effects continued to stigmatize helpless or hated individuals long after the unconstitutional judgment had ceased to operate."[32] In essence, such effects would not be absolved by mere dismissal of the cause as moot, thus necessitating the need for the collateral-consequences exception.[33] To invoke this exception, the plaintiff must demonstrate that he has suffered a concrete disadvantage from the judgment, and the disadvantage would persist even if the judgment was vacated and the case dismissed as moot.[34]

In the present case, due to Dunn's natural death and the undisputed fact that Houston Methodist never withdrew life-sustaining care, there is no longer a live case or controversy between the parties. Any decision rendered by this Court would constitute an advisory opinion.[35] Additionally neither exception to the mootness doctrine applies.

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[30] *Blackard v. Schaffer*, 05-16-00408-CV, 2017 WL 343597, at *6 (Tex. App.—Dallas Jan. 18, 2017, pet. filed) (citing *Gen. Land.*, 789 S.W.2d at 571; *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.–Dallas 2010, no pet.); *In re Sierra Club*, 420 S.W.3d 153, 157 (Tex. App.–El Paso 2012, orig. proceeding)).

[31] *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006) (citing *Tex. v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980)); *Carrillo v. State*, 480 S.W.2d 612, 617 (Tex. 1972)).

[32] *Gen. Land*, 789 S.W.2d at 571.

[33] *Id.*

[34] *Reule v. RLZ Invs.*, 411 S.W.3d 31, 33 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[35] "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the

Because Dunn is no longer living, there is no possible way, let alone reasonable expectation, that he or Plaintiffs, acting on behalf of Dunn, will be subject to the same alleged deprivation of due process or civil rights under the Texas Health and Safety Code §166.046. Based on Plaintiffs' inability to meet this prong, there is no need to consider whether the challenged action was in its duration too short to be fully litigated prior to its cessation of expiration, or whether Plaintiffs could obtain review before the issue became moot, as both elements are necessary for the exception to apply. As such, the "capable of repetition, yet evading review" exception is not applicable.

Further, the critically important and undisputed fact here is that Methodist provided Dunn with life-sustaining care until his natural death – life-sustaining treatment was never withdrawn. Plaintiffs seek to have Texas Health and Safety Code §166.046 declared unconstitutional.[36] Plaintiffs allege that the law "allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient" and therefore violates procedural due process, substantive due process and civil rights.[37] Here, in addition to the fact that there is no possible way that Dunn will be subject to the same alleged deprivation of due process or civil rights under the Texas Health and Safety Code §166.046, the termination of life-sustaining treatment is also not capable of repetition because it never happened in the first place.

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parties." *Tex. Air Control Bd.*, 852 S.W.2d at 444 (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. Products, 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.

[36] *See* Exhibit F.

[37] *Id.*

Moreover, the collateral-consequences exception is also not applicable. First, the collateral-consequence exception is only applicable in cases where a judgement has been entered. The collateral-consequences exception is "invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment."[38] There is no judgment at issue in this case. Accordingly, the narrow circumstances for which this exception might apply is not the circumstances present in the instant case. Therefore, it is inapplicable to the facts of this case.

The inquiry regarding the collateral-consequences exception should end with the fact that there is no underlying judgment here. However, even if we assume that the collateral-consequences exception can somehow be applied to this case, Plaintiffs still cannot meet their burden. The Texas Supreme Court further explained that "such narrow circumstances exist when, as a result of the judgment's entry, (1) concrete disadvantages or disabilities have in fact occurred, are imminently threatened to occur, or are imposed as a matter of law; and (2) the concrete disadvantages and disabilities will persist even after the judgment is vacated."[39] Again, it is undisputed that Methodist provided Dunn with life-sustaining care until his natural death. Therefore, the alleged adverse consequence—removal of life-sustaining care—never occurred in this case and cannot occur in the future. Based on the undisputed facts in this case, Plaintiffs are unable to meet their burden to show both that a

[38] *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006); see also *RLZ Investments*, 411 S.W.3d at 33 ("Texas courts have recognized two exceptions to the mootness doctrine, *under which an appellate court should still consider the merits of an appeal even if the immediate issues between the parties have become moot*: (1) the capability of repetition yet evading review exception and (2) the collateral consequences exception.") (emphasis added).

[39] *Id.*

judgment would result in a concrete disadvantage, and that the disadvantage would persist even if the judgment were vacated and the case dismissed as moot.[40] Plaintiffs provide no evidence to support invocation of the collateral consequence exception, as there is no prejudicial effect these specific Plaintiffs would continue to suffer as a result of dismissal of the case for the same reasons articulated for the "capable of repetition, yet evading review" exception – that Dunn died naturally while still receiving life-sustaining care and Houston Methodist never ended life-sustaining care in alleged violation of his due process and civil rights. As such, neither exception to the mootness doctrine applies.

It is undisputed that Houston Methodist never ended life-sustaining treatment in alleged violation of Dunn's due process and civil rights and Dunn has since succumbed to his terminal illnesses naturally. There is no longer any controversy between the parties in this case. If a decision cannot have a practical effect on an existing controversy, the case is moot.[41] Accordingly, Plaintiffs' due process and civil rights causes of action must be dismissed as moot.

B. Plaintiffs' Failed To File Any Chapter 74 Expert Report(s) Within The 120-Day Statutory Time Period.

This is a health care liability claim as the term is defined by Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE. Pursuant to the statute, a plaintiff asserting a health care liability claim is required to serve on all defendants at least one competent expert report

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[40] *See Marshall v. Hous. Auth.*, 198 S.W.3d 782, 784, 790 (Tex. 2006).

[41] *Houston Hous. Auth. v. Parrott*, 14-16-00249-CV, 2017 WL 3403621, at *3 (Tex. App.—Houston [14th Dist.] Aug. 8, 2017, no pet. h.) (holding that a forcible detainer action to determine the right to possession of a premises became moot when the tenant vacated the property and no exception to the mootness doctrine applied).

not later than the 120th day after each defendant files its original answer.[42] If a plaintiff fails to do so, a defendant may move to have the case against it dismissed with prejudice.[43]

The underlying nature of Plaintiffs' constitutional claims, as well as Ms. Kelly's claim for intentional infliction of emotional distress ("IIED"), constitutes a health care liability claim as the term is defined in the TEXAS CIVIL PRACTICE AND REMEDIES CODE § 74.001(13).[44] As such, Plaintiffs are required to serve on Houston Methodist at least one competent expert report to support their claims. However, Plaintiffs failed to timely tender any expert report(s) within the 120-day statutory time period, and consequently, their entire suit against Houston Methodist must be dismissed with prejudice.

Chapter 74 defines a health care liability claim ("HCLC") as:

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.[45]

"[A] health care liability claim cannot be recast as another cause of action in an attempt to avoid the [Chapter 74] expert report requirement."[46] To determine whether a claim is a health care liability claim, courts "examine the underlying nature of the claim and are not bound by the form of the pleading."[47] If the conduct complained of "is an inseparable part

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[42] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[43] *Id.* at § 74.351(b).

[44] *Id.* at § 74.001(13).

[45] *Id.*

[46] *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005).

[47] *Id.* at 851.

of the rendition of health care services," the claim is a health care liability claim.[48] The breadth of Chapter 74 essentially creates a presumption that a claim is a health care liability claim if it is against a physician or **health care provider** and is based on facts **implicating the defendant's conduct during the course of a patient's care, treatment, or confinement.**[49]

Determining whether a claim is a HCLC is a question of law.[50] A HCLC contains three basic elements: (1) a physician or a health care provider must be the defendant; (2) the suit must relate to the patient's treatment, lack of treatment, or some other departure from accepted standards of medical care, health care, or safety, or professional or administrative services directly related to health care; and (3) the defendant's act, omission or other departure must proximately cause the claimant's injury or death.[51] Plaintiffs' characterization of their claims against Houston Methodist as constitutional claims for the purpose of attacking a state statute does not change the underlying nature of the claims. Plaintiffs' claims are brought against a health care provider for acts of claimed departures from medical care, health care, or safety, or professional or administrative services directly related to health care that proximately caused alleged injuries for which Plaintiffs' now seek relief. As such, Plaintiffs' constitutional claims for violation of due process and civil rights, and Ms. Kelly's claim for IIED, are HCLCs within the scope of Chapter 74.

1. Houston Methodist is a health care provider.

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[48] *Boothe v. Dixon*, 180 S.W.3d 915, 919 (Tex. App.—Dallas 2005, no pet.).

[49] *Loaisiga v. Cerda*, 379 S.W.3d 248, 253 (Tex. 2012); see also *Groomes v. USH of Timberlawn, Inc.*, 170 S.W.3d 802 (Tex. App.—Dallas 2005, no pet.).

[50] *Tex. West Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012).

[51] *Id.* at 179-80; *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 662 (Tex. 2010); *Saleh v. Hollinger*, 335 S.W.3d 368, 374 (Tex. App.—Dallas 2011, pet. denied).

Houston Methodist is the Defendant in this case. The Hospital, as a health care institution, meets the statutory definition of a health care provider under Chapter 74.[52] Therefore, it is undisputed that Houston Methodist is a health care provider.

2. In essence, Plaintiffs claim that Houston Methodist violated accepted standards of medical care, health care, or safety, or professional or administrative services directly related to health care.

Throughout their First Amended Petition, Plaintiffs specifically allege the following departures from accepted standards of medical care, health care, or safety, or professional or administrative services directly related to health care against Houston Methodist:

> On November 10, 2015 The Methodist Hospital informed Ms. Evelyn Kelly and Dunn that it sought to discontinue Dunn's treatment, and that a committee meeting would be held on November 13, 2015 to make such a decision. At the committee meeting, Dunn had neither legal counsel nor the ability to provide rebuttal evidence pursuant to Texas Health and Safety Code §166.046,[53]
>
> ....
>
> The defendant hospital, given its lack of full statutory compliance, prematurely applied the procedures outlined in Section 166.046 to withdraw life sustaining treatment from Dunn. This implementation of Section 166.046 resulted in the Defendant hospital scheduling: (1) Dunn's life sustaining treatment be discontinued on Monday, November 24, 2015, and (2) administration, via injection, of a combination of drugs which would end Dunn's life almost immediately.[54]
>
> ...
>
> Defendant's actions in furtherance of coming to its decision to discontinue life sustaining treatment under the Texas Health & Safety Code infringed the due process right of Plaintiffs.[55]

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[52] §§ 74.001(a)(11)(G), (a)(12)(A).

[53] *See* Exhibit F at pg 2, ¶ 2.

[54] *Id.* at 2-3, ¶ 4.

[55] *Id.* at 4, ¶ 11.

...

In this case, Plaintiffs did not receive due process. ... Dunn lived with his mother at the time of the occurrence, as he had for years, had no spouse or children. Therefore, Kelly assisted Dunn throughout the process. But, Kelly received both little and inadequate notice that the relevant committee of The Methodist Hospital would be hearing, on Friday, November 13, 2015, a recommendation to discontinue Dunn's life sustaining treatment. ... She did not have the right to speak at the meeting, present evidence, or otherwise seek adequate review.[56]

...

Under Tex. Health & Safety Code §166.046, a fair and impartial tribunal did not and could not hear Dunn's case. "Ethics committee" members from the treating hospital cannot be fair and impartial, when the propriety of giving Dunn's expensive life-sustaining treatment must be weighed against a potential economic loss to the very entity which provides those members of the "ethics committee" with privileges and a source of income. Members of a fair and impartial tribunal should not only avoid a conflict of interest, they should avoid even the appearance of a conflict of interest, especially when a patient's life is at stake. That does not occur, when a hospital "ethics committee" hears a case under Texas Health & Safety Code §166.046 for a patient within its own walls. The objectivity and impartiality essential to due process are nonexistent in such a hearing.[57]

....

Defendant violated Plaintiffs' Civil Rights.[58]

...

Though The Methodist Hospital's decision permitted Plaintiffs to seek healthcare treatment for Dunn elsewhere, Dunn was unable to find treatment elsewhere, due in part to the stigma which attaches to a patient who a hospital has determined is no longer recommended for life sustaining treatment. Other hospitals sought after for transfer by Dunn's mother either failed to respond, or refused to receive him likely on the basis that The Methodist Hospital had

[56] *Id.* at 6-7, ¶ 17.

[57] *Id.* at 7, ¶ 18.

[58] *Id.* at 8, ¶ 22.

> deemed him a futile case unworthy of continued life sustaining treatment. As of November 13, 2015 (the date of the "ethics committee meeting") neither Dunn's attending physician, Dr. Sanchez, nor Dunn's case worker, Roslyn Reed, had spoken with any potential receiving physician to review and determine whether or nor any other physicians would accept the transfer of Dunn as required by Texas Health & Safety Code §166.046(d). Moreover, Dunn and Kelly never received definitive responses from the five local major healthcare facilities equipped and capable of treating Dunn and honoring his medical decision regarding basic life-sustaining treatment.[59]
>
> ...
>
> Defendant intentionally inflicted emotional distress on Plaintiff Kelly, Individually.
>
> On November 10, 2015 The Methodist Hospital informed Ms. Kelly that it would hold a committee meeting on November 13, 2015 to determine whether the life-sustaining treatment of her son, who was alert and communicating, should be removed. Without the life-sustaining treatment, her son's death was imminent and certain. Directly after the committee meeting, on November 13, 2015, Ms. Kelly was informed by The Methodist Hospital that the committee had decided that The Methodist Hospital would withdraw her son's life-sustaining treatment, resulting in certain death, unless Ms. Kelly found a hospital willing to accept transfer of her son. Ms. Kelly suffered severe emotional distress, which was the expected risk of informing her that the hospital had decided to remove Mr. Dunn's treatment against Mr. Dunn's wishes.[60]

Texas courts have often faced the question of which types of claims are covered by the § 74.001(a)(13) definition of "health care liability claim."[61] The courts have consistently disapproved of plaintiffs' attempts to avoid Chapter 74 by recasting their causes of action as something other than HCLCs.[62] In determining whether a case presents a HCLC, courts are not bound by the pleadings or a party's characterization of it's claim, but instead look to the

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[59] Id at 10-11, ¶ 27.

[60] *Id.* at 11-12, ¶ 29.

[61] § 74.001(a)(13).

[62] *See Diversicare,* 185 S.W.3d at 848; *Garland Cmty. Hosp. v. Rose,* 156 S.W.3d 541, 543 (Tex. 2004); *MacGregor Med. Ass'n v. Campbell,* 985 S.W.2d 38, 40 (Tex. 1998); *Sorokolit v. Rhodes,* 889 S.W.2d 239, 242 (Tex. 1994); *MacPete v. Bolomey,* 185 S.W.3d 580, 584 (Tex. App.—Dallas 2006, no pet.).

underlying nature of the claim presented.[63] In fact, the Texas Supreme Court in *Ross v. St. Luke's Episcopal Hospital* stated:

> the statutory definition of 'health care' is broad ('any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment, or confinement'), and that if the facts underlying a claim *could* support claims against a physician or health care provider for departures from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care, the claims are HCLCs regardless of whether the plaintiff alleged the defendants were liable for the breach of the standards.[64]

Additionally, in determining whether a case presents a HCLC, courts will consider whether the acts or omissions alleged in the complaint are an inseparable part of the rendition of health care services.[65]

Despite their artful attempts to plead around Chapter 74, even if in an attempted attack on Texas Health & Safety Code §166.046, Plaintiffs' allegations against Houston Methodist with regard to their handling of Dunn's condition, and claims by Ms. Kelly individually, including the Hospital's reliance on Texas Health & Safety Code §166.046, are HCLCs. All of the alleged claims against Houston Methodist, whether based in tort or on alleged violations of his constitutional rights, revolve around the health care, professional and administrative services provided to a terminally ill Dunn, and are an inseparable part of a hospital's rendition of medical services. The true nature of Plaintiffs' collective claim is such that Plaintiffs allege the Hospital, through its BioMedical Ethics Committee breached the standards of medical care, health care, or safety, or professional or administrative services

[63] *Campbell,* 985 S.W.2d at 40; *Victoria Gardens of Frisco v. Walrath,* 257 S.W.3d 284, 289 (Tex. App.—Dallas 2008, pet. denied).

[64] 462 S.W.3d at 502-03.

[65] *Rose,* 156 S.W.3d at 544.

directly related to the health care owed to Dunn. Although Plaintiffs positioned their causes of action as a constitutional claim, their claim is not removed from the purview of Chapter 74 when the essence of Plaintiffs' claim is inseparable from the health care provider's rendition of medical care involving a claimed departure from appropriate standards of medical care.[66] By contending the statute governing Houston Methodist's behavior is unconstitutional, Plaintiffs assert that any action taken by a health care provider in accordance with §166.046(a) breaches the necessary and appropriate standards of health care. Thus, because the facts underlying Plaintiffs' claims support claims against Houston Methodist for departures from accepted standards of medical care, health care, or safety, or professional or administrative services directly related to health care, the quintessence of Plaintiffs' constitutional claims constitute HCLCs.[67]

3. Plaintiffs assert that Houston Methodist's alleged departures from accepted standards proximately caused Plaintiffs' alleged injury.

To satisfy this third element of a HCLC, the complained of act or omission must have proximately caused injury or damage to the claimant.[68] In the instant case, Plaintiffs assert in their complaint that as a result of Houston Methodist's alleged departures from the appropriate standards of health care, they sustained injuries.[69] Therefore, it is clear that Plaintiffs' assert that Plaintiffs' alleged injuries were proximately caused from Houston Methodist's decision to discontinue Dunn's life-sustaining treatment. Thus, because all three

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[66] *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995).

[67] *See supra* note 12.

[68] *Williams*, 371 S.W.3d at 180.

[69] *See* Exhibit F at 4, ¶ 10.

(3) elements are present, Plaintiffs' constitutional causes of action are HCLCs governed by Chapter 74.

Further, with regard to Plaintiffs' IIED claim, the analysis requires no debate. In *USH of Timberlawn, Inc.*, the plaintiff, Groomes, sued Timberlawn for false imprisonment, intentional infliction of emotional distress, and abuse of process when Timberlawn did not discharge her minor son from its facility upon her request.[70] Groomes' lawsuit was dismissed when she failed to file an expert report. Groomes appealed claiming that her claim for intentional infliction of emotional distress derives from her claim for false imprisonment, not a healthcare liability claim. The Dallas Court of Appeals disagreed and affirmed the dismissal of her case for failing to file an expert report. The court explained that the "underlying nature of all of Groomes' claims against Timberlawn derive from the doctors' decisions to administer medication and to discontinue [her son's] discharge" and "as a result, the hospital's alleged acts or omissions are inextricably intertwined with the patient's medical treatment and the hospital's provision of medical care." "Consequently, the trial court properly determined that Groomes' claims were health care liability claims controlled by the MLIIA because they arose from health care provided to [the son] [and] that his admission, discharge, and discontinuance of discharge order were decisions made by physicians exercising their medical judgment."[71]

Plaintiffs' IIED cause of action against Houston Methodist is a healthcare liability claim. Plaintiffs allege that "Ms. Kelly suffered severe emotional distress, which was the expected risk of informing her that the hospital had decided to remove **Mr. Dunn's**

[70] *USH of Timberlawn, Inc.*, 170 S.W.3d at 803.

[71] *Id.* at 806.

treatment against Mr. Dunn's wishes."[72] As in *Timberlawn*, Plaintiffs' IIED claim arises from health care decisions concerning her son's medical treatment. Plaintiffs cannot avoid application of the Chapter 74 expert report requirement through "artful pleading." The foundation of Plaintiffs' IIED claim is inexplicably entangled in Houston Methodist's rendition of health care services provided to David Christopher Dunn. Consequently, Plaintiffs' IIED claim is a health care liability claim subject to the Chapter 74 expert reporting requirements.

Plaintiffs filed this lawsuit against Houston Methodist on November 20, 2015 complaining of Houston Methodist's conduct, as a health care provider, as it relates to Decedent David Christopher Dunn's October 12, 2015 admission to Houston Methodist.[73] Because Plaintiffs' claims against Houston Methodist are unavoidably health care liability claims, Plaintiffs must serve a proper expert report within 120 days of Houston Methodist's answer.[74]

On December 2, 2015, Houston Methodist filed its Original Answer.[75] On March 31, 2016, Plaintiffs' 120-day expert reporting deadline expired. To date, despite ample time to do so, Plaintiffs have not served any expert report(s) on Houston Methodist. Therefore, this Court must now dismiss with prejudice Plaintiffs' claims, including Ms. Kelly's IIED claim, against Houston Methodist.

IV.

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[72] *See* Exhibit F at 11 (emphasis added).

[73] *See* Plaintiff's Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief, on file with this Court.

[74] *See supra* note 26.

[75] *See* Defendant's Original Answer, on file with this Court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL,** respectfully requests that this Court grant its Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss 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 August, 2017.

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

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

Exhibit A

CAUSE NO. 2015-69681

DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT
	§	OF
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

AFFIDAVIT OF ADITYA UPPALAPATI, M.D.

THE STATE OF TEXAS	§
	§
COUNTY OF HARRIS	§

Before me, the undersigned authority, on this day personally appeared Aditya Uppalapati, M.D. who after first being duly sworn upon his oath, deposed and states as follows:

"My name is Aditya Uppalapati, M.D. I am over eighteen years of age and fully competent and authorized to make this affidavit. This affidavit is made of my own personal knowledge and the statements made herein are true and correct.

1. I am a medical doctor licensed to practice medicine in the state of Texas. I practice critical care medicine in the medical intensive care ("MICU") unit at Houston Methodist Hospital ("Methodist"). I am board certified in internal medicine and critical care medicine. In my medical specialty I am commonly referred to as an intensivist.

2. The MICU is unit at Methodist that cares for critically ill adult patients with complex and multi-system medical illnesses such as cardiopulmonary arrest, respiratory distress, sepsis, renal failure, gastrointestinal bleeding and multi-system organ failure. As a board certified intensivist I have the education, training and experience to provide on-going and continuous care to these types of adult critically ill patients. David Christopher Dunn ("Mr. Dunn") is

one such critically ill patient.

3. On October 12, 2015, I admitted Mr. Dunn to Methodist. I, along with the other members of the intensivist team, provide 24 hours care to patients in the MICU, including Mr. Dunn. I have provided on-going and continuous medical care and treatment to Mr. Dunn since his admission to Houston Methodist Hospital on October 12, 2015. In my capacity as Mr. Dunn's treating intensivist, I have made treatment decisions affecting his care. I am familiar with the progression of his chronic condition, his current condition, and prognosis.

4. Based on my education, training, experience as well as my care of Mr. Dunn, I, and members of my team, have advised his family members that Mr. Dunn suffers from end-stage liver disease, the presence of a pancreatic mass suspected to be malignant with metastasis to the liver and complications of gastric outlet obstruction secondary to his pancreatic mass. Further, he suffers from hepatic encephalopathy, acute renal failure, sepsis, acute respiratory failure, multi-organ failure, and gastrointestinal bleed. I have advised members of Mr. Dunn's family that it is my clinical opinion that Mr. Dunn's present condition is irreversible and progressively terminal.

5. On October 12, 2015, Mr. Dunn arrived unresponsive to Methodist. Since that time he has been on ventilator support as a life-sustaining treatment. This means that Mr. Dunn cannot verbally communicate. In addition to being unable to verbally communicate the severity of Mr. Dunn's critical illnesses as well as the use of narcotic pain medication have made him unable to participate in his care. On occasion he has been able to follow simple commands. However, the majority of the time he is completely unresponsive.

6. Since October 12, 2015, Mr. Dunn has been unable to participate in his health care decisions such as providing a review of systems or medical history due to his altered mental status, intubation and sedation.

7. Based on the foregoing, in my opinion, Mr. Dunn has a low probability that his mental status will return to his baseline. He is not oriented to person, time, place or situation. He cannot communicate. He cannot attend to any activities of daily living. He does not have the mental capacity to consent to any medical treatment. He does not have the mental capacity to consent to or make any business, managerial, financial, legal or other decisions. This

incapacity began October 12, 2015 and in reasonably medical probability will continue until his death.

FURTHER AFFIANT SAYETH NOT."

ADITYA UPPALAPATI, M.D.

Sworn to and subscribed before me by ADITYA UPPALAPATI, M.D. on December 02, 2015.

Notary Public In and For
The State of Texas

NAJMAH W. GRANT
Notary Public, State of Texas
My Commission Expires
October 17, 2016

Exhibit B

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

AFFIDAVIT OF J. RICHARD CHENEY

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared J. Richard Cheney, who after first being duly sworn upon his oath, deposed and states as follows:

1. "My name is J. Richard Cheney. I am over eighteen years of age and fully competent and authorized to make this affidavit. This affidavit is made of my own personal knowledge and the statements made herein are true and correct.

2. 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.

3. 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.

4. 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. 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.

5. 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 physician, 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. While the Committee did inform Chris's parents that all treatments other than those needed to keep him comfortable would be removed in eleven days, at no time did the Committee inform Chris's parents that Chris would be provided with a medication that would hasten his death.

12. The physicians, social workers, and case managers continued efforts to assist Ms. Kelly with her request to transfer Chris. These efforts continued though December 23, 2015. Life-sustaining treatment was constantly administered to Chris until his natural death on December 23, 2015.

FURTHER AFFIANT SAYETH NOT."

J. RICHARD CHENEY

Sworn to and subscribed before me by J. Richard Cheney on August 17, 2016.

Notary Public In and For
The State of Texas

TERESA ROBINSON
Notary Public, State of Texas
Comm. Expires 12-20-2019
Notary ID 11589444

Exhibit C

CAUSE NO. 2015-69681

DAVID CHRISTOPHER DUNN	§	IN THE DISTRICT COURT OF
	§	
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
THE METHODIST HOSPITAL	§	189TH JUDICIAL DISTRICT

AFFIDAVIT OF JUSTINE MOORE, LMSW

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Justine Moore, LMSW, who after first being duly sworn upon her oath, deposed and states as follows:

"My name is Justine Moore, LMSW. I am over eighteen years of age and fully competent and authorized to make this affidavit. This affidavit is made of my own personal knowledge and the statements made herein are true and correct.

1. I am a Social Worker licensed to practice in the State of Texas since 2013. I have been employed as a Social Worker at Houston Methodist Hospital since June 24, 2013.

2. I served as one of the social workers for David Christopher Dunn ("Dunn") in the Medical Intensive Care Unit (MICU) at Houston Methodist Hospital from October 12, 2015 until his death on December 23, 2015. I am familiar with the progression of his condition throughout his hospitalization.

3. In my role as a social worker for Dunn, I have personal knowledge of the efforts Houston Methodist Hospital made to identify a potential facility willing to accept a transfer of Dunn. As a Social Worker at Houston Methodist Hospital, I am often involved in efforts to coordinate the transfer of patients like Dunn. I was personally involved in Houston Methodist Hospital's efforts to locate a transfer facility for him.

4. When contacting potential transfer facilities, we provide the facility with the patient's demographic information, and recent clinical information to be reviewed by the facility's transfer center.

5. With respect to our efforts to locate a potential transfer facility for Dunn, I contacted the following facilities for potential transfer of Dunn, all of which declined the requested transfer:

    1) Graham Oaks Care Center;
    2) Meridian Healthcare;
    3) Southern Specialty;
    4) Casa Rio Healthcare and Rehabilitation;
    5) Liberty Healthcare Center;
    6) Valley Grande Manor;
    7) Gilmer Care Center;
    8) Willowbrook Nursing and Rehabilitation;
    9) Christus Dubuis – Port Arthur;
    10) Creekside Terrace;
    11) Colonial Belle;
    12) River City Care Center;
    13) Casa Juan Diego;
    14) Crestview Manor Nursing and Rehabilitation;
    15) Christus St. Michael in Texarkana;
    16) West Houston Rehabilitation and Healthcare;
    17) Village of Richmond;
    18) Trinity Nursing and Rehabilitation;
    19) Season's Hospice;
    20) Christus Dubuis Hospital of Beaumont;
    21) Huntsville Health Care Center;
    22) Christus Dubuis Hospital of Houston;
    23) Christus Dubuis – Corpus Christi;
    24) The Village at Richardson;
    25) Park Manor of McKinney;
    26) Conroe Healthcare Center;
    27) Advanced Healthcare of Garland;
    28) Spanish Meadows;
    29) Clear Brook Crossing;
    30) Grace Care Center;
    31) Cornerstone – Clear Lake; and
    32) Paramount Senior Care.

6. Rosalyn Reed, RN, BSN, ACM, Case Manager contacted the following additional facilities, all of which declined transfer:

1) Houston Northwest Hospital;
2) North Cypress Medical Center;
3) Ben Taub General Hospital;
4) LBJ Hospital;
5) Memorial Hermann Hospital and 9 affiliated facilities;
6) Cornerstone Long Term Acute Care;
7) St. Joseph's Hospital;
8) Bayshore Hospital;
9) MD Anderson;
10) Kindred Long Term Acute Care;
11) CHI Baylor St. Luke's Medical Center;
12) East Houston Medical Center;
13) Cypress Fairbanks Medical Center;
14) Methodist Healthcare System Medical Center;
15) Northeast Methodist Hospital Medical Center;
16) Metropolitan Methodist Hospital Medical Center;
17) Methodist Texan Hospital Medical Center;
18) Methodist Stone Oak Hospital Medical Center;
19) Methodist Specialty and Transplant Hospital Medical Center;
20) Baptist Hospital System, San Antonio;
21) Baptist Hospital Medical Center;
22) Plaza Specialty Hospital;
23) North Central Baptist Medical Center;
24) Northeast Baptist Hospital;
25) Clear Lake Regional Hospital;
26) Conroe Regional Hospital;
27) Kingwood Medical Center;
28) Mainland Medical Center;
29) Pearland Medical Center;
30) Texas Health Resources to include all 24 affiliated facilities in the Dallas area;
31) Baylor Scott and White Health System to include all 14 affiliated facilities;
32) Select Specialty Hospital;
33) St Luke's Baptist Hospital; and
34) Mission Trail Baptist Hospital.

7. I continued to call, recall and call again facilities throughout Dunn's hospitalization in an attempt to locate a facility willing to accept his transfer. Despite the exhaustive measures described above, I was unable to locate a single facility that was willing to accept transfer.

8. I contacted Seasons Hospice, who was willing to clinically accept Dunn, and provide health care in Evelyn Kelly's home. Mrs. Kelly declined to accept this care in her home.

9. It is my understanding that in situations where an unmarried adult patient like Dunn is unable to assist his healthcare providers in making treatment decisions, then in absence of an advanced directive, healthcare providers are to look towards the patient's parents for treatment decisions. In Dunn's case, however, his parents were wholly unable to agree on a desired course of treatment. As a result, healthcare providers at Houston Methodist Hospital, including myself, were caught in the middle of a firestorm between Dunn's mother, his father and outside forces influencing them. Having no other place to turn for treatment decisions, it was determined that guardianship proceedings be filed to give Dunn's healthcare providers one clear voice in which to look for treatment decisions.

10. It has been alleged that I attempted to gain personal guardianship of Christopher Dunn through guardianship proceedings. I never sought personal guardianship of Dunn. I merely sought the Court's appointment of a person that could legally direct the care of Dunn during his hospitalization.

FURTHER AFFIANT SAYETH NOT."

JUSTINE MOORE, LMSW

Sworn to and subscribed before me by JUSTINE MOORE, LMSW on June 10, 2016.

KIMBERLY JOY LUCHT
Notary Public, State of Texas
Comm. Expires 04-23-2020
Notary ID 10411770

Notary Public In and For
The State of Texas

Exhibit D

DUNN, DAVID, CHRISTOPHER
0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203

10/12/2015

DATE OF ADMISSION:
12/23/2015
DATE OF DEATH:
DATE OF AUTOPSY: 12/23/2015

FINAL ANATOMIC DIAGNOSIS

PRIMARY:
GENERAL

Anasarca

Jaundice

Coagulopathy

Abdominal and chest adhesions, multiple

HEPATOBILIARY SYSTEM
Pancreas Moderately to poorly differentiated mucinous adenocarcinoma (7 x 6 x 5 cm)
Head of pancreas with involvement of common bile duct and duodenum
Secondary bile duct obstruction and severe duodenal lumen stenosis

Liver (1340 g) Multiple metastases ranging from 0.3 to 2.5 cm
Chronic passive congestion of liver parenchyma, diffuse
Marked cholestasis
Micro- and macrosteatosis (30%)
Common hepatic duct, dilated
Gallbladder Markedly distended, filled with approximately 75 ml of green bile
Peritoneal cavity Hemorrhagic and icteric ascites, 20 liters

CARDIOVASCULAR SYSTEM
Heart (330g) Concentric hypertrophy, mild
Coronaries Left main coronary Artery: 50% stenosis with calcification, no occlusion identified
RCA: 20-30% stenosis, calcified, no occlusion identified
LCA and circumflex: no calcifications, no occlusion identified
Aorta Aorta, atherosclerosis, distal

RESPIRATORY SYSTEM

DUNN, DAVID, CHRISTOPHER
039213608

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Houston, TX, 77030

AUTOPS

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

Y

DUNN, DAVID, CHRISTOPHER

0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
Lungs (right 500 g; left 390 g) Microscopic metastatic adenocarcinoma in lung parenchyma
Acute pneumonia, right lower lobe
Edematous and congested parenchyma
Bilateral minimal pleural effusions, serosanguineous fluid
Pleural adhesions to chest wall
No pulmonary emboli identified

GASTROINTESTINAL TRACT
Stomach, distended, erythematous mucosa and hiatal hernia
Small bowel, bloody fecal contents
Large bowel, bloody fecal contents, extensive

RETICULOENDOTHELIAL SYSTEM
Spleen (300 g) Splenomegaly, mild, due to passive congestion
Lymph nodes Metastatic pancreatic adenocarcinoma to periaortic and mesenteric lymph nodes
Lymphadenopathy, diffuse

GENITOURINARY SYSTEM
Kidneys (right, 160 g; left 180 g) Cortical cysts (largest 0.5 cm), right
Cortical scars, bilateral
Acute pyelonephritis, right

MUSCULOSKELETAL SYSTEM
Diaphragm Hematoma, right
COMMENT:
History: 46 year old man with pancreatic mass and obstructive jaundice, hepatic encephalopathy, peritonitis, acute renal failure, acute respiratory failure and sepsis. The patient had worsening hemodynamic condition on the days before death, severe metabolic and lactic acidosis, and coagulopathy.

The main autopsy findings include a 7 x 6 x 5 cm pancreatic mass with involvement of the common bile duct and duodenum, with metastasis to the liver and lymph nodes and micrometastasis to the lungs. There was significant ascites clinically, which correlates with the obstructive pancreatic lesion.

DUNN, DAVID, CHRISTOPHER
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There was also sepsis and acute renal and respiratory failure clinically, which correlates with the autopsy findings of pyelonephritis and acute pneumonia in the lung.

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

DUNN, DAVID, CHRISTOPHER

0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
APZEZ / APMDG
APA2A 01/25/2016 01:26 PM
PATHOLOGIST: Alberto Ayala, M.D.
I have reviewed this material and confirm the report. 01/25/2016 13:26
Released by electronic signature on:

EXTERNAL EXAMINATION

The body is identified by wrist band, right toe tag, and two external ID tags as David Christopher Dunn.

The body is that of a slim, well-developed caucasian male appearing the stated age of 48 years. The body measures 180 cm in length. There is no rigor mortis present in the upper extremities. Decompositional changes are not present.

The abdomen is markedly distended and diffusely icteric. The chest, back, abdomen, and upper extremities have multiple petechiae. There are stretch marks on the abdomen and two scars on the lateral chest, each about approximately 3 cm. There is anasarca, diffusely. There is a 0.7 cm crusted scar on the left lateral abdomen.

IV lines are seen in the right upper extremity and in the right wrist. There is a Band-Aid placed on the dorsal left wrist and a Band-Aid on the right thumb and right index fingers. There are three sutured wounds, approximately 1-2 cm long, on the lateral left abdomen. There is a bandage covering a 0.2 cm puncture wound on the mid-abdomen.

INTERNAL EXAMINATION

The autopsy is limited to the chest and abdomen with the consent signed by Evelyn Kelly (mother; next of kin).
The body is opened using a standard U-shaped thoraco-abdominal incision. There is subcutaneous tissue edema. The peritoneal cavity contains approximately 20 liters of sero-sanguinous ascitic fluid. There are multiple adhesions between the rib cage and lungs. The abdominal organs are covered by a yellowish film of fibrinous tissue. Clots are present in the peritoneal cavity. The pleural cavity contains a minimal amount of fluid (approximately 10cc each). The pericardium is intact. The pericardial sac contains a minimal amount of clear fluid. There is a right subclavian catheter extending to the vena cava. The diaphragm is intact.

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DUNN, DAVID, CHRISTOPHER

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AGE: 46 Y SEX: M DOB: 05/27/1969
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Pathology
Consultation
Report
CASE: AMP-15-203
CARDIOVASCULAR SYSTEM

Heart : The heart weighs 330g and is of the usual shape, normally positioned and without congenital malformations. The pericardium is tan, smooth and glistening. The epicardium is smooth and glistening with marked adipose tissue. Serial sections are made across the ventricles and the heart is opened according to the flow of blood. The atrial and ventricular chambers are of normal size. The endocardium is tan-white, smooth and thin. The right ventricular wall is 0.3 cm thick, the left ventricular wall is 1.7 cm thick, and the interventricular septum is 2 cm. The myocardium is homogenous red-brown. Mural thrombi are not present. The valve leaflets and cusps are white, delicate and membranous. Valve circumferences are: Tricuspid 9.5 cm, Pulmonic 7.5 cm, Mitral 10 cm and Aortic 7.5 cm.

Vessels : The coronary arteries have a normal anatomic distribution. The coronary ostia are normally located and without stenosis. There is moderate atherosclerosis with 20-30% stenosis of the RCA and 50% stenosis of the left main coronary artery. The aorta contains atherosclerotic changes with complicated plaques in the distal abdominal aorta extending to the iliac arteries. There is not dissection or aneurysmal dilatation.

RESPIRATORY SYSTEM

Lung : The right and left lungs weighs 500g and 390g, respectively. The bronchial tree is patent without hemorrhage, mucous plugging, fluid or foreign material. The pulmonary tree does not contain thromboemboli. The hilar nodes are enlarged; with anthracosis. The pulmonary parenchyma is red-brown with marked edema and hemorrhage.

GASTROINTESTINAL TRACT

Esophagus : The esophageal mucosa is gray-tan, smooth and glistening without lesions.

Stomach and duodenum: The stomach is distended and is lined by an erythematous mucosa. A hiatal hernia is grossly identified. The mesentery and duodenum are involved by a mass originating from the pancreas.

Small Bowel : The small bowel has a 2 cm soft nodule and bloody fecal contents.

Large Bowel: The serosal surface and the mucosa are tan, smooth and glistening. There are bloody fecal contents throughout the entire length of the large bowel.

Appendix : The appendix is present.

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039213608

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0392136085284
AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
HEPATOBILIARY SYSTEM

Liver : The liver weighs 1340 g. There are multiple nodules ranging from 0.3 cm to 2.5 cm in diameter. The parenchyma is congested.

Biliary tract : The common hepatic duct is dilated. The gallbladder is markedly distended and filled with approximately 75 cc of green bile.

RETICULOENDOTHELIAL SYSTEM

Spleen : The spleen weighs 300 g. The capsule is gray-blue, translucent and smooth with a 4 x 3.5 cm surface scar. The parenchyma is soft and red-purple and unremarkable.

Lymph nodes : The lymph nodes of the mediastinum, mesentery and retroperitoneum are enlarged.

GENITOURINARY SYSTEM

Kidneys : The right and left kidneys weigh 160 g and 180 g respectively. The capsules strip with ease to reveal dark red smooth cortical surfaces. There are multiple cysts on the cortical surface of the right kidney, the largest measures 0.5 cm. The cut surfaces of the kidneys show well demarcated cortico-medullary junctions and the cortices are unremarkable, except for the cysts and bilateral cortical scars. The renal calyces and pelves are not dilated and the mucosa is tan-white and glistening, without lesions.

Ureters : The unobstructed ureters have a tan, smooth and glistening mucosa without lesions. The distal ureters are probe patent into the bladder.

ENDOCRINE SYSTEM

Pancreas : There is a 7 x 6 x 5 cm mass in the head of the pancreas. The mass grossly involves the duodenum, and mesentery. The pancreatic duct and common bile duct are obstructed secondary to the pancreatic mass. There is marked duodenal lumen stenosis secondary to the pancreatic mass. The ampulla is patent.

Adrenals : The right and left adrenal glands have a normal configuration and position.

MUSCULOSKELETAL SYSTEM

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

There is a right diaphragmatic hematoma.

DUNN, DAVID, CHRISTOPHER
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AGE: 46 Y SEX: M DOB: 05/27/1969
DOCTOR: ADITYA UPPALAPATI

Pathology
Consultation
Report
CASE: AMP-15-203
MISCELLANEOUS

During the autopsy, photographs were obtained. Peritoneal swabs, lung tissue and peritoneal fluid samples were submitted for cultures.

CULTURE RESULTS (post mortem)
Left lung tissue Candida tropicalis

Ascites fluid Occasional Pseudomonas aeruginosa and occasional stenotrophomonas maltophilia

Abdominal cavity Lactobacillus paracasei

SECTIONS SUBMITTED

A1: Spleen
A2: Right adrenal and right kidney
A3: Left adrenal and left kidney
A4: Periaortic lymph nodes
A5: Right upper lobe, lung
A6: Right middle lobe, lung
A7: Right lower lobe, lung
A8: Left superior lobe, lung
A9: Left inferior lobe, lung
A10: Left main coronary artery, anterior left ventricle
A11: Circumflex artery, posterior left ventricle
A12: Left anterior descending artery, lateral left ventricle
A13: Right coronary artery, anterior right ventricle
A14: Hilar lymph nodes, posterior right ventricle
A15: Subcarinal lymph nodes, lateral right ventricle
A16: Mesenteric lymph nodes
A17: Small bowel, intraventricular septum
A18: Gallbladder, large bowel
A19: Liver mass
A20: Liver mass
A21: Uninvolved liver
A22: Pancreatic tumor
A23: Pancreatic tumor

DUNN, DAVID, CHRISTOPHER
039213608

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

6565 Fannin Street, MS205
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AGE: 46 Y SEX: M DOB: 05/27/1969
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Pathology
Consultation
Report
CASE: AMP-15-203
A24: Pancreatic tumor
A25: Pancreatic tumor
A26: Small bowel diverticulum

MICROSCOPIC EXAMINATION

CARDIOVASCULAR SYSTEM

Coronaries (slide # A10-A13): The left main coronary artery shows approximately 50% stenosis by atherosclerotic plaque with calcification. The right main coronary artery shows approximately 30% stenosis.

Heart (slide # A10-A15, A17): There is mild diffuse myocardiocyte hypertrophy.

RESPIRATORY SYSTEM

Lung (slide # A5-A9): There is congestion and edema of the lung parenchyma. There is evidence of aspiration. There is acute pneumonia in the right lower lobe. A microscopic focus of metastatic disease is present.

GASTROINTESTINAL TRACT

Small bowel (slide # A17, A26): There is marked autolysis limiting histologic examination. There is involvement of the pancreatic adenocarcinoma to the duodenum. The serosa shows fibrosis and marked fibrin deposits.

Large bowel (slide # A18): There is marked autolysis limiting histologic examination.

HEPATOBILIARY SYSTEM

Liver (slide # A19-A21): There is multifocal metastatic disease by pancreatic adenocarcinoma with marked autolysis. The uninvolved liver parenchyma shows autolytic changes. In the most preserved areas there is bridging fibrosis highlighted with trichrome stain (Stage 3-4), micro- and macrovesicular steatosis (30%), profound cholestasis (mixed type) and centrilobular necrosis. No alpha-1-antitrypsin globules are seen on PAS with diastase stain. Iron stain shows focal 2+ storage iron in hepatocytes

Gallbladder (slide # A18): There is marked autolysis limiting histologic examination.

NAME : DUNN, DAVID CHRISTOPHER ACCT NBR: 0392136085284

RETICULOENDOTHELIAL SYSTEM

DUNN, DAVID, CHRISTOPHER
039213608

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Pathology
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Report
CASE: AMP-15-203
Spleen (slide # A1): Except for passive congestion there is no pathologic alteration.

Lymph nodes (slide # A4, A14, A15, A16): There is metastatic pancreatic adenocarcinoma to the periaortic and mesenteric lymph nodes. Examined hilar and subcarinal lymph nodes negative for carcinoma.

GENITOURINARY SYSTEM

Kidneys (slide # A2, A3): There are pigmented casts and calcifications within the kidney tubules in the left and right kidneys. The right kidney has an infiltration by acute inflammatory cells consistent with acute pyelonephritis

ENDOCRINE SYSTEM

Pancreas (slide # A22-A25): Sections of pancreas show presence of a moderately to poorly differentiated mucinous adenocarcinoma. Extensive perineural, neural and lympho-vascular invasion is identified.

Adrenals (slide # A2, A3): No pathologic alteration.

CENTRAL NERVOUS SYSTEM

Not examined. Autopsy limited to thorax and abdomen.

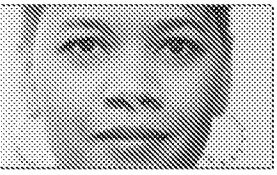
DUNN, DAVID, CHRISTOPHER
039213608

6565 Fannin Street, MS205
Houston, TX, 77030

AUTOPS
Y

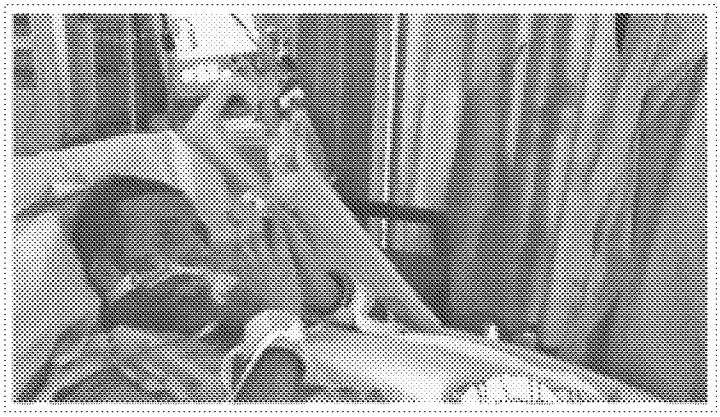
This report was verified electronically.

Exhibit E



NEWS

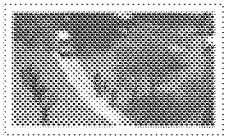
CHRIS DUNN DIES AFTER FIGHT OVER LIFE-SUSTAINING TREATMENT, ATTORNEY CONFIRMS



LeBron James, Sarah Palin and Texas Right to Life are among those fighting to keep a former officer alive in Houston.

NEWS

Tom Brady to Appeal 'Deflategate' Ruling to Entire Circuit Court
Updated 4 mins ago



Body found in water at Hermann Park golf course
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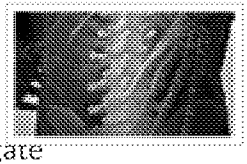

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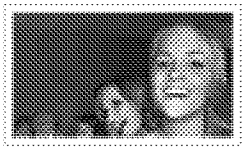

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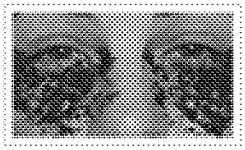

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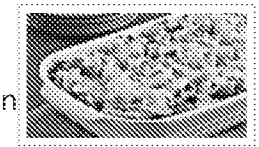

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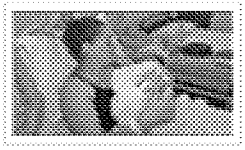

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Child m sentenc

Wednesday, December 23, 2015

HOUSTON (KTRK) -- The attorney for Chris Dunn says the 46-year-old man has died after his fight over life-sustaining treatment with Methodist Hospital.

The hospital told Dunn's family this week that it would soon stop his life-sustaining treatment. The family refused to accept the decision.

According to Texas Right to Life, Methodist continued life-sustaining care for Chris and he died this morning around 6:30am of natural causes. His attorneys feel they still have grounds to challenge the state law that allows hospitals to discontinue life sustaining treatment at their discretion.

Dunn's mother, Evelyn Kelly, shared this statement: "Chris's family and I are grateful for all of the prayers, kind notes of encouragement, and support we have received from around the world. We would like to express our deepest gratitude to the nurses who have cared for Chris and for Methodist Hospital for continuing life-sustaining treatment of Chris until his natural death. Chris's health battle has now ended, but I intend to continue the fight against this horrible law. No family should have to fight for the Right to Life of their loved one."

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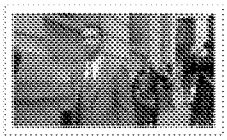

Police Officer Found Not Guilty in Freddie Gray Death
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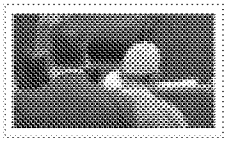

Man accused in fatal crash that killed 3 faces judge
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Defense Pointing to Gary Condit in Chandra Levy Case
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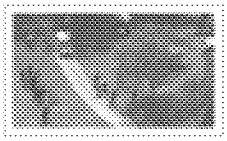

Body found in water at Hermann Park golf course
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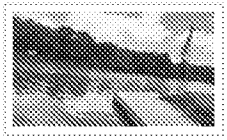

Officials: Missing boater's body found in Clear Creek
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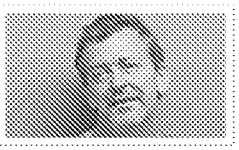

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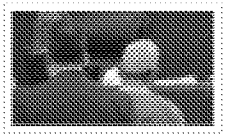
PHOTOS


Man accused in fatal crash that killed 3 faces judge
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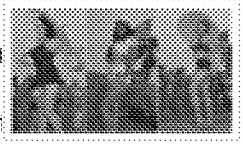
PHOTOS: Bathing Beauties contest in Galveston
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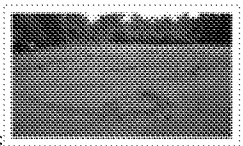
Suspected drunk driver charged in fatal Gulf Freeway crash
Updated 2 hrs 42 mins ago


PHOTOS: Houston flood recovery benefit concert

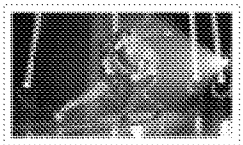
Wake today for 11-year-old stabbed in north Houston

Judge finds Baltimore officer not guilty in Freddie Gray case
Updated 1 hr 24 mins ago


Man falsely accused in boy's death hopes police find killer

Puppy tests positive for meth, heroin after drug bust

J.J. Watt joins elite list of NFL players with personal logos


PHOTOS: Houston golf club vandalized

Boy's remarkable memory earns high praise

Spanish priest pleads for divine intervention to repair road

Major closures on Hardy Toll Road

See photos from behind the scenes of 'Dancing With The Stars'

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Man seeking cans finds baby's body inside dumpster in SE Houston

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Exhibit F

2/2/2016 3:31:45 PM
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By: Deandra Mosley
Filed: 2/2/2016 3:31:45 PM

CAUSE NO. 2015-69681

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

PLAINTIFFS' FIRST AMENDED PETITION

TO THE HONORABLE COURT:

Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn ("the Estate") ("Plaintiffs") file this First Amended Petition as follows:

I.
Discovery-Control Plan

1. Plaintiffs request that a "Level 3" discovery plan be adopted and affirmatively pleads that it seeks injunctive relief. Rule 190.4, Texas Rules of Civil Procedure.

II.
Background Facts and Relief Requested

2. Evelyn Kelly is the mother of David Christopher Dunn. David Christopher Dunn ("Dunn") was a Texas resident who was receiving life sustaining treatment[1] at The Methodist Hospital to treat an unidentified mass on his pancreas which caused damage to other organs. Dunn faced immediate irreparable harm of death if the life sustaining treatment discontinued.

[1] "Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain. Tex. Health & Safety Code § 166.052.

On November 10, 2015 The Methodist Hospital informed Ms. Evelyn Kelly and Dunn that it sought to discontinue Dunn's treatment, and that a committee meeting would be held on November 13, 2015 to make such a decision. At the committee meeting, Dunn had neither legal counsel nor the ability to provide rebuttal evidence pursuant to Texas Health and Safety Code §166.046, The Methodist Hospital found that it would discontinue life sustaining treatment on or about Monday, November 23, 2015. Plaintiffs assert the Texas Constitution and the U.S. Constitution guaranteed Dunn a representative to advocate for his life and opportunity to be heard when life sustaining treatment is being removed. Dunn sought and obtained a temporary restraining order preserving the status quo of his treatment. Thereafter, an order of abatement, to which the parties were agreed as to form, was entered, and required The Methodist Hospital to provide life sustaining treatment to Dunn until the time of his natural death on December 23, 2015.

3. Plaintiffs continue to seek a declaration that Texas Health and Safety Code Section 166.046 violated David Christopher Dunn's due process rights under the Texas Constitution and the U.S. Constitution. This case is brought to protect the constitutional right of Dunn, a man who faced certain death at the hands of Defendant acting under color of state law.

4. Section 166.046 of the Texas Health & Safety Code allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient, despite the existence of an advanced directive, valid medical power of attorney, medical decision determined by a surrogate as outlined in Texas Health & Safety Code § 166.039, or expressed patient decision to the contrary. The defendant hospital, given its lack of full statutory compliance, prematurely applied the procedures outlined in Section 166.046 to withdraw life sustaining treatment from Dunn. This implementation of Section 166.046 resulted in the

Defendant hospital scheduling: (1) Dunn's life sustaining treatment be discontinued on Monday, November 24, 2015, and (2) administration, via injection, of a combination of drugs which would end Dunn's life almost immediately.

5. Section 166.046 violates Dunn's right to due process of law guaranteed him by the Fourteenth Amended of the United States Constitution and Article I, Section 19, of the Texas Constitution.

III.
Parties

6. Plaintiff, Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn, is an individual who resides in Harris County, Texas.

7. Defendant, The Methodist Hospital, formerly known as Houston Methodist Hospital, is a domestic nonprofit corporation with its principle place of business in Harris County, Texas. Defendant has been served with process.

IV.
Jurisdiction and Venue

8. This Court has jurisdiction over this cause under § 24.007 of the Texas Government Code and Article 5, Section 8 of the Texas Constitution. Venue is proper in this County under Texas Civil Practices & Remedies Code § 15.002(a)(2) and Texas Civil Practices & Remedies Code § 15.005. The amount in controversy is within the jurisdictional limits of the court.

V.
Conditions Precedent

9. All conditions precedent to Plaintiffs' claim for relief have been performed or have occurred.

VI.
Causes of Action

10. As a direct result of the actions of the Defendant described above, Plaintiff individually and on behalf of the Estate has sustained injury, and brings the following claim for permanent relief:

1. Declaratory judgment regarding violation of due process.

11. Plaintiff, Individually and on behalf of the Estate petition this Court for a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code declaring that, pursuant to Amendment 14 to the United States Constitution and Article I, Section 19, of the Texas Constitution, Defendant's actions in furtherance of coming to its decision to discontinue life sustaining treatment under the Texas Health & Safety Code infringed the due process right of Plaintiffs.

12. Texas Health & Safety Code § 166.046 indicates that if an attending physician refuses to honor a patient's treatment decision, such as continuing life sustaining treatment, the physician's refusal shall be reviewed by an "ethics committee". Tex. Health & Safety Code § 166.046(a).

13. There are no specific restrictions under the act regarding the qualifications of the persons serving on the committee, though the attending physician may not be a member of that committee. *Id.* The statute does not provide adequate safeguards to protect against the conflict of interest inherently present when the treating physician's decision is reviewed by the hospital "ethics committee" to whom the physician has direct financial ties.

a. Texas Health & Safety Code § 166.046 violates procedural due process

14. Texas Health & Safety Code § 166.046 violates Plaintiffs' right to procedural due process by failing to provide an adequate venue for Plaintiffs and those similarly situated to be

heard in this critical life-ending decision. The law also fails to impose adequate evidentiary safeguards against hospitals and doctors by allowing them to make the decision to terminate life-sustaining treatment in their own unfettered discretion. Finally, the law does not provide a reasonable time or process for a patient to be transferred.

15. Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950). Procedural due process involves the preservation of both the appearance and reality of fairness so that "no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed against him." *Marsahll v. Jerrico, Inc.*, 446 U.S. 238 91980). Under traditional notions of Due Process, the fourteenth amendment was "intended to secure the individual from the arbitrary exercise of the powers of government" which resulted in "grievous losses" for the individual. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989).

16. Procedural due process expresses the fundamental idea that people, as opposed to things, at least are entitled to be consulted about what is done to them. *See* Laurence H. Tribe, American Constitutional Law § 10-7, at 666 (2d ed. 1988). Modern procedural due-process analysis begins with determining whether the government's deprivation of a person interest warrants procedural due-process protection. This interest may be either a so-called "core" interest, i.e., a life, liberty, or vested property interest, or an interest that stems from independent sources, such as state law. *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). Procedural due-process analysis next determines what process is due, with courts looking almost exclusively to the Constitution for guidance. *Cleveland Bd. of Education v. Lourdermill*, 470 U.S. 532 (1985). What process is due is

measured by a flexible standard that depends on the practical requirements of the circumstances. *Mathews*, 424 U.S. at 334. This flexible standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

17. In this case, Plaintiffs did not receive due process. Section 166.046 contemplates that those for whom life sustaining treatment is being provided may not be able to read letters, receive notice, attend the ethics committee meeting, etc. Therefore, the Statute specifically applies to not only the individual receiving treatment, but the person "responsible for the healthcare decisions of the individual." Dunn lived with his mother at the time of the occurrence, as he had for years, had no spouse or children. Therefore, Kelly assisted Dunn throughout the process. But, Kelly received both little and inadequate notice that the relevant committee of The Methodist Hospital would be hearing, on Friday, November 13, 2015, a recommendation to discontinue Dunn's life sustaining treatment. *See* Tex. Health & Safety Code 166.046(b) (the statute applies to not only the individual receiving treatment, but the person "responsible for healthcare decisions of the individual"). She did not have the right to speak at the meeting, present evidence, or otherwise seek adequate review. *See* Tex. Health & Safety Code 166.046(b). Thus, as a person to whom the statute applied, the statute only permits Kelly to sit and watch as an ethics committee determines it is appropriate to remove the life sustaining treatment of her son; as such, Kelly's right to due process was violated. *See, e.g., Planned Parenthood of Cent. Mo.*, 428 U.S. 52, 62 (1976) (physicians found to have standing

when seeking declaratory relief challenging the constitutionality of the Missouri abortion statute which placed an additional burden on a woman's right to abortion).

18. Under Tex. Health & Safety Code § 166.046, a fair and impartial tribunal did not and could not hear Dunn's case. "Ethics committee" members from the treating hospital cannot be fair and impartial, when the propriety of giving Dunn's expensive life-sustaining treatment must be weighed against a potential economic loss to the very entity which provides those members of the "ethics committee" with privileges and a source of income. Members of a fair and impartial tribunal should not only avoid a conflict of interest, they should avoid even the appearance of a conflict of interest, especially when a patient's life is at stake. That does not occur, when a hospital "ethics committee" hears a case under Texas Health & Safety Code § 166.046 for a patient within its own walls. The objectivity and impartiality essential to due process are nonexistent in such a hearing.

19. Finally, Texas Health & Safety Code § 166.046 is so lacking in specificity that no meaningful due process can be fashioned from it and, as a result, it is unconstitutional. For example, it does not contain or suggest any ascertainable standard for determining the propriety of continuing Dunn's life-sustaining treatment or the propriety of the attending physician's refusal to honor Dunn's health care decisions. Thus the statute is vague, ambiguous, and overbroad and should be declared unconstitutional.

b. Texas Health & Safety Code § 166.046 violates substantive due process.

20. It is unquestioned that a competent individual has a substantive privacy right to make his or her own medical decisions. "Before the turn of the century, this Court observed that 'no right is held more sacred, or is more carefully guarded, by the common law, than 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.'" *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (U.S. 1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). "It cannot be disputed that the Due Process Clause protects an interest in life[.]" *Cruzan*, 497 U.S. at 281. This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. In *Cruzan*, the Court noted that the Constitution requires that the State not allow anyone "but the patient" to make decisions regarding the cessation of life-sustaining treatment. *Id.* at 286. The Court went on to note that the state could properly require a "clear and convincing evidence" standard to prove the patient's wishes.

21. In this case, there is no evidentiary standard imposed by Section 166.046. The doctor and ethics committee are given complete autonomy in rendering a decision that further medical treatment is "inappropriate" for a person with an irreversible or terminal condition. This is an alarming delegation of power by the state law. When the final decision is rendered behind closed doors, and the Plaintiffs are not allowed to challenge the evidence or present his own testimony or medical evidence, this does not reassemble a hearing with due process protecting the first liberty mentioned in Article I, Section 19 of the Texas Constitution or the Fourteenth Amendment.

2. Defendant violated Plaintiffs' Civil Rights.

22. Section 1983 of Chapter 42 of the United States Code guarantees that every person who "under color of any statute...subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right ... secured by the Constitution...shall be liable to the party in an action[.]" *See* 42 U.S.C. § 1983. Based on the foregoing facts and allegations, a Section 1983 matter clearly lies in this case.

23. Private actors are subject to regulation under the United States Bill of Rights, including the First, Fifth, and Fourteenth Amendments, which prohibit the federal and state governments from violating certain rights and freedoms when taking state action. Because the Defendants utilize Texas Health & Safety Code § 166.046 to protect their decision to remove life sustaining treatment, they are taking state action and are subject to Constitutional regulation. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

24. The Supreme Court has set forth a two-pronged inquiry for determining when a private party will be held to be a state actor. First, the Court considers whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority. *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982)). Second, the Court considers several factors relevant to determining whether the private party charged with the deprivation is a person who can, in fairness, be said to be a state actor. *Lugar*, 457 U.S. at 937.

25. Private conduct pursuant to statutory or judicial authority is sufficient to establish the first prong. Thus, the Court has held this prong satisfied by a creditor who sought the assistance of state authorities in attaching a debtor's property in a statutorily created pre-judgment attachment procedure, *Lugar*, 457 U.S. at 941-42, and by the racially discriminatory use of peremptory challenges to potential jurors in civil and criminal trials. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 615 (1991); *Georgia v. McCollum*, 505 U.S. 42, 51-52 (1992). In each case the Court emphasized that the private party was using a state-created statutory procedure, and was reaping a privilege through the use of the statutorily prescribed procedure. Similarly, doctors and ethics committees empowered by the state to cloak their denial

of life sustaining medical treatment with absolute immunity by acting pursuant to the procedures of section 166.046 are exercising a right or privilege having its source in state authority.

26. The hospital committee's action also satisfies the second prong of the Supreme Court's state-actor test. The Court has laid out three factors that must be considered in answering the question of whether the person charged with a deprivation may be fairly considered to be a state act: (1) the extent to which the actor relies on governmental assistance and benefits, (2) whether the actor is performing a traditional governmental function and (3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority. *See Lugar*, 457 U.S. at 942. Each of these factors weighs in support of the conclusion that the hospital committee should be held to be a state actor. The committees rely extensively on the state benefit of absolute immunity in determining whether a patient will receive life sustain medical treatment; the committee exercises the traditionally exclusive state function of a court when it issues final determinations of legal rights and duties with respect to life sustaining medical treatment, which cannot be reviewed under any circumstance; and the patient's injury is aggravated by incidents of state authority because the state allows the ethics review committee to bind the hands of state authorities with respect to societal protections that would otherwise be available to the patient.

27. Though The Methodist Hospital's decision permitted Plaintiffs to seek healthcare treatment for Dunn elsewhere, Dunn was unable to find treatment elsewhere, due in part to the stigma which attaches to a patient who a hospital has determined is no longer recommended for life sustaining treatment. Other hospitals sought after for transfer by Dunn's mother either failed to respond, or refused to receive him likely on the basis that The Methodist Hospital had deemed him a futile case unworthy of continued life sustaining treatment. As of November 13, 2015 (the

date of the "ethics committee meeting") neither Dunn's attending physician, Dr. Sanchez, nor Dunn's case worker, Roslyn Reed, had spoken with any potential receiving physician to review and determine whether or nor any other physicians would accept the transfer of Dunn as required by Texas Health & Safety Code § 166.046(d). Moreover, Dunn and Kelly never received definitive responses from the five local major healthcare facilities equipped and capable of treating Dunn and honoring his medical decision regarding basic life-sustaining treatment.

28. Further, transfer to another facility was likely to result in repeated application of Section 166.046 of the Texas Health and Safety Code, while evading the opportunity for adequate review. Plaintiffs further submit that the death of David Christopher Dunn should not absolve or otherwise excuse the violation of his constitutional rights. A finding otherwise would simply permit hospitals to 'wait out' lawsuits involving the terminally ill.

3. Defendant intentionally inflicted emotional distress on Plaintiff Kelly, Individually.

29. On November 10, 2015 The Methodist Hospital informed Ms. Kelly that it would hold a committee meeting on November 13, 2015 to determine whether the life-sustaining treatment of her son, who was alert and communicating, should be removed. Without the life-sustaining treatment, her son's death was imminent and certain. Directly after the committee meeting, on November 13, 2015, Ms. Kelly was informed by The Methodist Hospital that the committee had decided that The Methodist Hospital would withdraw her son's life-sustaining treatment, resulting in certain death, unless Ms. Kelly found a hospital willing to accept transfer of her son. Ms. Kelly suffered severe emotional distress, which was the expected risk of informing her that the hospital had decided to remove Mr. Dunn's treatment against Mr. Dunn's wishes. Ms. Dunn seeks a ruling by the court that use of Texas Health & Safety Code Section 166.046 is unconstitutional for reasons stated *supra*, and therefore the severe emotional distress

stemming from its intentional or reckless unlawful application is actionable. Ms. Dunn has other children, and fears that without a declaration of unconstitutionality, this situation may repeat itself, while evading review.

VII.
Attorney Fees and Costs

30. Plaintiffs are entitled to its reasonable attorney fees and costs incurred in pursuit of this action under the common law, and Texas Civil Practice and Remedies Code § 37.009.

VIII.
Conclusion and Prayer

31. In conclusion, Plaintiffs seek a declaration that application of Section 166.046 of the Texas Health and Safety Code violated the constitutional rights and liberties of David Christopher Dunn, and Plaintiffs seek such other and further relief, both general and special, at law or in equity, to which Plaintiffs may show itself to be justly entitled.

Respectfully submitted,

BEIRNE, MAYNARD & PARSONS, L.L.P.

/s/ James E. Trainor, III

James E. "Trey" Trainor, III.
Texas State Bar No. 24042052
ttrainor@bmpllp.com
401 W. 15th Street, Suite 845
Austin, Texas 78701
Telephone: (512) 623-6700
Facsimile: (512) 623-6701

Joseph M. Nixon
Texas State Bar No. 15244800
jnixon@bmpllp.com
Kristen W. McDanald
Texas State Bar No. 24066280
kmcdanald@bmpllp.com
1300 Post Oak Blvd., Suite 2300
Houston, Texas 77056
Telephone: (713) 623-0887
Facsimile: (713) 960-1527

and

Emily Kebodeaux
Texas State Bar No. 24092613
TEXAS RIGHT TO LIFE
9800 Centre Parkway, Suite 200
Houston, Texas 77036
Telephone: (713) 782-5433
Facsimile: (713) 952-2041
ekebodeaux@texasrightolife.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

On February 2, 2016 the foregoing document was served on counsel for The Methodist Hospital in accordance with Texas Rules of Civil Procedure via the Court's E-file and Serve system via email to:

Dwight W. Scott, Jr.
dscott@scottpattonlaw.com
Carolyn Capoccia Smith
csmith@scottpattonlaw.com
3939 Washington Avenue, Suite 203
Houston, Texas 77007
Telephone: 281-377-3311
Facsimile: 281-377-3267

/s/ Joseph M. Nixon
Joseph M. Nixon

TAB F

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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 'S
TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Houston Methodist Hospital f/k/a The Methodist Hospital ("Houston Methodist"), and files this its Traditional and No-Evidence Motion for Summary Judgment and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

Plaintiffs claim that §166.046 unconstitutionally deprives patients like Christopher Dunn of life and the right to make independent medical decisions. **Houston Methodist Hospital continues to take no formal position on the constitutionality of the statute itself, but is prepared to defend its conduct, and the conduct of its healthcare providers that provided professional, ethical and compassionate care and treatment to Christopher Dunn. Simply put, Houston Methodist did not violate Plaintiffs constitutional rights and rejects Plaintiffs' allegations in full.**

Houston Methodist Hospital is not the proper party to defend the constitutionality of a state statute. As demonstrated within the Brief of the Amici Curiae filed in this matter by proponents of the statute, the legislation in question offends no constitutional provision and,

importantly, implements public policy that the Legislature enacted after years of compromise and debate.[1] Challenges to that policy belong in the Capitol, not this Court.

Plaintiffs' due-process claim fails for two reasons. First, the Due Process Clause is properly invoked only where a constitutionally protected interest is at stake. Here, none is. Nothing in the Constitution or related caselaw compels physicians to provide any particular course of treatment when it violates their own beliefs. Neither does §166.046 deprive any patient of life. As the Supreme Court of the United States has acknowledged, when life-sustaining interventions are discontinued, death is caused by the underlying disease - not the withdrawal of treatment. Because there is no constitutional right to a particular form of medical treatment - including life-sustaining intervention - its withdrawal cannot violate the Constitution.

Second, because the Constitution protects an individual from a governmental deprivation, a plaintiff cannot prevail on a due process claim without first showing state action. Medical treatment decisions are quintessentially private. Section 166.046 has not altered that reality. Section 166.046 does not impose a duty on - let alone control the actions of - private actors, such as the healthcare providers involved in Chris Dunn's care and treatment. Rather, it provides immunity if a physician voluntarily complies. The private employment of a state-sanctioned remedy is not state action. In fact, both the Supreme Court and the Fifth Circuit have held that a legislative grant of immunity is not state action. Thus even if Plaintiff could show a constitutionally protected interest at stake in this case -

[1] *See* Brief of Amici Curiae Texas Alliance for Life, Texas Catholic Conference of Bishops, Texas Baptist Chrisitian Life Commission, Texans for Life Coalition, Coalition of Texans with Disabilities, Texas Alliance for Patient Access, Texas Medical Association, Texas Osteopathic Medical Association, Texas Hospital Association, and LeadingAge Texas, filed with this Court on July 31, 2017. Houston Methodist Hospital incorporates the arguments expressed within the amici curiae brief verbatim as specifically delineated within this Motion for Summary Judgment.

which she cannot - the claim would fall on the state action prong.

Additionally, after an adequate time for discovery, Plaintiffs cannot offer any evidence to support her intentional infliction of emotional distress claim.

Accordingly, Houston Methodist is entitled to a judgment as a matter of law, as well as outright dismissal for reasons stated within its concurrently filed Motion to Dismiss.

II.
STANDARD OF REVIEW

The purpose of summary judgment is to eliminate patently unmeritorious claims or untenable defenses.[2] Houston Methodist Hospital urges this summary judgment, to eliminate Plaintiff's unmeritorious claims, pursuant to traditional and no evidence standards set forth in Texas Rules of Civil Procedure 166a(c) and 166a(i).[3]

A. Traditional Motion for Summary Judgment

Traditional summary judgment is proper when the movant has demonstrated that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.[4] A defendant may prevail in summary judgment by disproving as a matter of law at least one element of each of the plaintiff's causes of action.[5] Once a movant has established a right to summary judgment, the burden shifts to the non-movant.[6] The non-movant must then respond to the motion for summary judgment and present to the trial

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[2] *Gulbenkian v. Penn*, 151 Tex. 412, 416 (1952).

[3] TEX. R. CIV. P. 166a(c), 166a(i). A party may file a single summary judgment motion under both the no-evidence and traditional summary judgment standards. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

[4] *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985).

[5] *Int'l Union United Auto. Aerospace & Agr. Implement Workers of Am. Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 563 (Tex. App.—Dallas 1991, writ denied).

[6] *HBO, A Div. of Time Warner Ent. Co., L.P. v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

court any issues that would preclude summary judgment.[7] Methodist is entitled to summary judgment in this case because it has conclusively disproved at least one, if not all, element(s) of Plaintiffs' claims.

B. No Evidence Summary Judgment

A no-evidence motion for summary judgment is proper when, after adequate time for discovery, "the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the non-movant's claim on which the non-movant would have been the burden of proof at trial.[8] "If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists."[9] On the other hand, "[l]ess than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence."[10] This matter has been on file since November 2015. However, Plaintiff has no evidence to support any element of her intentional infliction of emotional distress claim against Houston Methodist.

III.
ARGUMENTS & AUTHORITIES

A. Traditional Motion for Summary Judgment on Plaintiffs' Constitutional Claims.

1. Section 166.046 gives medical professionals a safe harbor, but it does not mandate a specific course of action.

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[7] *Id.*

[8] *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70–71 (Tex. App.—Austin 1998, no pet.).

[9] *Id.* at 71.

[10] *Id.* (internal quotation admitted).

Physicians have long been free to choose who they will treat and what treatments they will provide. "The physician-patient relationship is 'wholly voluntary.'"[11] Even once a physician-patient relationship has begun, either party may terminate it at will.[12]

While a physician cannot countermand a patient's wish, she can *abstain* from providing a particular treatment when her medical judgment, her conscience, or her ethics, demands it. The Code of Medical Ethics protects physicians' right "to act (*or refrain from acting*) in accordance with the dictates of conscience in their professional practice," allowing them "considerable latitude to practice in accord with well-considered, deeply held beliefs."[13] The key limitation is that the physician has an ethical duty not to terminate the relationship without "[n]otify[ing] the patient (or authorized decision maker) long enough in advance to permit the patient to secure another physician."[14] The physician must also "[f]acilitate transfer of care when appropriate."[15]

The Legislature passed the Texas Advance Directives Act ("TADA"),[16] to create a legal framework governing how physicians should handle and comply with advance directives, out-of-hospital do-not-resuscitate orders, and medical powers-of-attorney in the context of life-sustaining intervention.[17] The Act requires a physician or health-care facility that "is unwilling to honor a patient's advance directive or a treatment decision to provide life-

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[11] *Gross v. Burt*, 149 S.W.3d 213, 224 (Tex. App.—Fort Worth 2004, pet. denied) (quoting Fought v. Solce, 821 S.W.2d 218, 220 (Tex. App.—Houston [1st Dist.] 1991, writ denied)).

[12] AM. MED. ASS'N COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MED. ETHICS §1.1.5 (2016).

[13] *Id.* §1.1.7 (emphasis added).

[14] *Id.* §1.1.5.

[15] *Id.*; *accord King v. Fisher*, 918 S.W.2d 108, 112 (Tex. App.—Fort Worth 1996, writ denied) (describing elements of a common law abandonment claim); *see also Tate v. D.C.F. Facility*, Civil Action No. A407CV162-MPM-JAD, 2009 WL 483116, at *1 (N.D. Miss. Jan. 23, 2009) ("Doctors and hospitals of course have the right to refuse treatment . . . .").

[16] TEX. HEALTH & SAFETY CODE §§166.001–.166,

[17] See TADA §§166.002(1), (10) (defining "advance directive" and "life-sustaining treatment").

sustaining treatment" to nevertheless provide that treatment, but "only until a reasonable opportunity has been afforded for transfer of the patient to another physician or heath care facility."[18] This is wholly consistent with physicians' ethical rights and duties.

Generally, TADA requires a physician to follow an advance directive or treatment decision made by or on behalf of a patient. However, it acknowledges that a patient's wishes may conflict with a physician's conscience or understanding of medical necessity. It thus provides a procedure by which physicians can seek to harmonize their ethical duties with patients' wishes.[19] This is the procedure that is the subject of Plaintiff's constitutional challenge, but it applies regardless of whether the doctor wishes to withhold or provide life-sustaining intervention over the patient's wishes.[20] The procedure calls for a medical review committee to consider the case while a decision is made, with the patient's directive honored in the interim.[21]

The §166.046 procedure gives the patient or his representative a right to notice of and to attend the committee's meeting, but it leaves the decision regarding whether to disregard the advance directive to the committee.[22] If the committee makes the difficult decision to countermand the patient's or family's wish, the physician or hospital must "make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive."[23] And if the committee's decision is to withdraw life-sustaining intervention, the hospital must

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[18] Id.

[19] Id. §166.046.

[20] Id. §166.052.

[21] Id. §166.046(a).

[22] Id. §166.046(b).

[23] Id. §166.046(d).

continue the intervention for at least 10 days while efforts are made to transfer the patient.[24]

TADA generally provides physicians who withdraw life-sustaining intervention in accordance with its provisions immunity from civil and criminal liability, as well as professional discipline, "unless the physician or health care facility fails to exercise reasonable care when applying the patient's advanced directive."[25] Section 166.046 goes further, providing an absolute safe-harbor to physicians who comply with it when abstaining from compliance with a patient's wishes.[26]

But §166.046 does not create a mandatory procedure, even for physicians wishing to abstain:

> If an attending physician refuses to comply with a directive or treatment decision *and does not wish to follow the procedure established under Section 166.046*, life-sustaining treatment shall be provided to the patient, but only until a reasonable opportunity has been afforded for the transfer of the patient to another physician or health care facility willing to comply with the directive or treatment decision.[27]

A physician who elects not to comply with the §166.046 procedure will lose the benefit of the safe-harbor provision. But he would still have the benefit of TADA's immunity to the extent that he withdrew life-sustaining intervention without "fail[ing] to exercise reasonable care when applying the patient's advance directive."[28]

2. Houston Methodist Did Not Violate Dunn's Civil Or Due Process Rights

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[24] Id. §166.046(e).

[25] Id. §§166.044(a), (c).

[26] Id. §166.045(d).

[27] Id. §166.045(c) (emphasis added).

[28] Id. §166.044(a).

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due.[29,30] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest.[31] But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that the deprivation occurred due to state action.[32] Plaintiffs can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims must fail.

i. Plaintiff fails to identify a protected interest.

To state a due-process claim, a plaintiff must identify an interest the constitution protects. Plaintiff identifies two purported interests: life, and the right to make individual medical decisions. In fact, neither of those interests are implicated in the case at hand.

Plaintiff's arguments are premised on their mistaken understanding of TADA, and they imply that a patient has a *constitutional right* to receive treatment from a physician that the physician does not wish to give. The constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[33]

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[29] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[30] The federal Due Process Clause, U.S. CONST. amend. XIV, §1, and Texas's Due Course of Law Clause, TEX. CONST. art. I, §19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[31] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

[32] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

[33] *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

Plaintiff has not confronted these fundamental precepts. Take, for example, her claim that TADA deprives patients of "life." In fact, it is the patient's illness that causes death; it is merely forestalled by life-sustaining intervention.[34] In *DeShaney*'s language, the life-sustaining treatment is "aid" that "secure[s]" the patient's life.[35] But patients have no constitutional right to this aid.[36] A physician is not *constitutionally obligated* to provide *any* treatment, including life-sustaining treatment.

A contrary holding would have severe consequences. Any illness or medical condition, if the responsibility of state actors, may cause constitutional injuries. If Plaintiff were right that the Constitution requires doctors to undertake treatment that *prevents or forestalls* illness, then patients would have a constitutional right to have *any and all* ailments treated. Yet the United States Supreme Court has expressly rejected this position.[37] Indeed, even in the unique prison context, courts have roundly rejected the notion that a patient has a right to receive "any particular type of treatment."[38]

The same analysis dooms Plaintiff's stated interest in the individual right to make medical decisions. That right is not diminished by TADA. Rather, TADA protects individuals' right to make their own medical decisions, confirming the longstanding rule that before terminating a patient-physician relationship, the physician must give the patient reasonable notice so that he can find someone who will comply with his wishes. But under

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[34] *Vacco v. Quill*, 521 U.S. 793, 801 (1997) ("[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . .").

[35] 489 U.S. at 196.

[36] *Id.*

[37] *Id.* at 198–99; *accord Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007) (en banc) ("No circuit court has acceded to an affirmative access [to medical care] claim.");[37] *Johnson v. Thompson*, 971 F.2d 1487, 1495–96 (10th Cir. 1992) (rejecting argument that right to life includes right to receive medical care).

[38] *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *accord Jenkins v. Colo. Mental Health Inst. at Pueblo*, 215 F.3d 1337, at *1–2 (10th Cir. 2000) (unpublished).

DeShaney, an individual's right to make a decision does not compel a physician to implement it against the physician's own will. The patient's right is to make his choice, but this right does not overpower the physician's conscience.[39,40]

Plaintiff's claims of constitutional injury are predicated on the notion that a patient has a constitutional right not only to receive medical care, but to receive medical care of a specific type. But there is no constitutional right to medical care, let alone specific types of care, even if the care would save a person's life. Because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

ii. Plaintiff's arguments are based on a misconception about §166.046.

Plaintiff argues that §166.046 "violated David Christopher Dunn's [substantive and procedural] due process rights under the Texas Constitution and the U.S. Constitution," and she seeks a declaration to this effect.[41] She complains that §166.046 "allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient," regardless of the patient's or his decision-maker's wishes.[42] In fact, however, TADA delegates no such authority. It explicitly did not alter "any legal right or

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[39] *See Harris v. McRae*, 448 U.S. 297, 318 (1980) ("Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.").

[40] *Harris* illustrates the danger in Plaintiff's conception of constitutional rights. If a constitutional life interest conferred an affirmative right to medical care, so would the constitutional abortion right confer an affirmative right to have the state provide abortions. Yet *Harris* rejected precisely such an argument, explaining:

> It cannot be that because the government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

Harris v. McRae, 448 U.S. 297, 318 (1980) (citations omitted).

[41] Plaintiff's First Am. Pet. ¶3.

[42] *Id.* ¶4.

responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner."[43] It did not grant physicians any new powers, and did not even require them to follow any procedure. It created a safe harbor for - that is, granted immunity to - physicians who withhold or withdraw life- sustaining intervention in a specific manner.

iii. A private physician's treatment decision does not constitute state action.

Proof of a constitutional claim requires state action. Houston Methodist cannot be considered a state actor. The Supreme Court has found state action in only a few unique circumstances, none of which are present here:

- The *public function test* asks "whether the private entity performs a function which is 'exclusively reserved to the State.'"[44]
- The *state compulsion test* attributes a private actor's conduct to the state when the state "exerts coercive power over the private entity or provides significant encouragement."[45]
- And the *nexus test* asks if "the State has inserted 'itself into a position of interdependence with the private actor, such that it was a joint participant in the enterprise.'"[46]

The Supreme Court has not resolved "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in" state-action cases.[47]

a) Section 166.046 does not satisfy the state-compulsion test.

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[43] *See* TADA §166.051 (emphasis added).

[44] *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

[45] *Id.* at 549–50 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170–71 (1970).

[46] *Id.* at 550 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974)) (brackets omitted).

[47] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

Supreme Court precedent firmly refutes any notion that a hospital or physician invoking §166.046's safe harbor is a state actor. In the first place, §166.046 provides a discretionary, not mandatory, procedure; it requires no action from any private actor. The Supreme Court has repeatedly held that "[a]ction taken by private entities with *mere approval or acquiescence* of the State is not state action."[48]

Indeed, the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."[49] A physician or hospital making use of §166.046 is doing no more than using a state-provided remedy; the physician or hospital does not receive the type of "overt, significant assistance of state officials" that creates state action.[50]

In the absence of overt assistance from or coercion by the State, even compliance with a *mandatory* procedure does not implicate state action. Consider *Blum v. Yaretsky*, in which "a class of Medicaid patients challeng[ed] decisions by the nursing homes in which they reside to discharge or transfer [them] without notice or an opportunity for a hearing."[51] Federal law *required* nursing homes to establish utilization review committees ("URC") to "periodically assess whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified."[52] The *Blum* plaintiffs were found by their respective URCs to not require a higher level of care, and were

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[48] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); *Flagg Bros.*, 436 U.S. at 154–65; *Jackson*, 419 U.S. at 357.

[49] *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485–86 (1988); *accord Flagg Bros.*, 436 U.S. at 161–62.

[50] *Pope*, 485 U.S. at 485–86; *cf. id.* at 487 (finding state action in private use of probate procedure, where probate judge was "intimately involved" in the procedure's operation); *Lugar*, 457 U.S. at 941 (holding that private use of prejudgment-attachment procedure constituted state action, where acts by sheriff and court clerk showed "joint participation with state officials in the seizure of the disputed property").

[51] 457 U.S. at 993.

[52] *Id.* at 994–95.

therefore transferred to other institutions in accordance with the statutory procedure.[53] Yet the Supreme Court held that there was no state action: the nursing homes, not the state, initiated the reviews and judged the patients' need for care on their own terms, not terms set by the state. The nursing homes' decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State."[54]

Similarly, the decision to abstain from following a patient's wishes—and thus whether to initiate the §166.046 procedure—originates with the physician, who acts according to his own conscience, expertise, and ethics.[55] As in *Blum*, the State does not determine when or for what reasons a physician may invoke the §166.046 procedure. Moreover, unlike in *Blum*, use of §166.046 is permissive, even for physicians wishing to abstain. This case thus fits easily within *Blum*'s no-state-action holding.[56]

Another consideration cutting strongly against state action is that §166.046 does no more than immunize a physician who employs it. A similar issue arose in *Flagg Brothers*, in which the plaintiff sued to stop a warehouse from selling, pursuant to a warehouseman's lien, goods she had abandoned at the warehouse.[57] State law provided the warehouse a

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[53] *Id.* at 995.

[54] *Id.* at 1008; *see also id.* at 1010 ("[The] regulations themselves do not dictate the decision to discharge or transfer in a particular case.").

[55] *Cf. id.* at 1009 (noting that nursing homes' transfer decisions were based on judgments that "the care [the patients] are receiving is medically inappropriate").

[56] Even a private hospital's involvement in an involuntary commitment, pursuant to state law, is not state action. *See, e.g.*, *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5–6 (1st Cir. 2005) (holding that the "scheme does not compel or encourage involuntary commitment," but "merely provides a mechanism through which private parties can, in their discretion, pursue such commitment"); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260, 269 (4th Cir. 1998); *Harvey v. Harvey*, 949 F.2d 1127, 1130– 31 (11th Cir. 1992); *see also Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 266–67 (2d Cir. 1999) (holding that Time Warner's congressionally authorized, but non-mandatory, indecency policy was not state action).

[57] *See* 436 U.S. at 153–54.

procedure for making the sale and absolved it from liability if it complied.[58] The Court rejected the argument that the statute, or the state's decision to deny relief, constituted state action:

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.[59]

Likewise, the Legislature's decision to provide safe harbor for a physician's acts does not convert those acts into public acts.

The Fifth Circuit has applied these principles in even more analogous circumstances. In *Goss v. Memorial Hospital System*[60], the court considered a provision of the Texas Medical Practice Act that immunized hospitals' medical peer review committees from civil liability for reporting physician incompetency to the Board of Medical Examiners.[61] The plaintiff argued "that this immunity granted appellees by the State of Texas provided such encouragement to appellees that the peer review committee acted as an investigatory arm of the state."[62] Relying on *Flagg Brothers*, the Fifth Circuit rejected this argument, writing that the conferral of immunity "did not make the action of appellees a state action."[63]

Similarly, in *White v. Scrivner Corp.*, the Fifth Circuit considered whether a grocery store security guard's detention of a shoplifter constituted state action.[64] The plaintiff

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[58] *See id.* at 151 n.1.

[59] *Id.* at 165.

[60] 789 F.2d 353, 356 (5th Cir. 1986)

[61] An amended version of this statute is codified at TEX. OCC. CODE §160.010.

[62] *Id.*

[63] *Id.*

[64] See 594 F.2d 140, 141 (5th Cir. 1979)

relied on a Louisiana statute "insulating merchants from liability for detention of persons reasonably believed to be shoplifters."[65] The court held that *Flagg Brothers* "require[d] rejection of this argument."[66] Noting that the statute allowed, but did "not compel merchants to detain shoplifters," the court held that the immunity statute could not constitute state action.[67]

Because §166.046 is a permissive statute, initiated at a physician's sole option, and because it does no more than withhold a cause of action, there is no coercion or participation rising to the level of state action.

b) Section 166.046 does not satisfy the public-function test.

The Supreme Court holds that state action exists when a private entity performs a function that is "traditionally the *exclusive* prerogative of the State."[68] These are powers "traditionally associated with sovereignty."[69] The public-function test is "exceedingly difficult to satisfy."[70] The Court has "rejected reliance upon the doctrine in cases involving":

> coordination of amateur sports, the operation of a shopping mall, the furnishing of essential utility services, a warehouseman's enforcement of a statutory lien, the education of maladjusted children, the provision of nursing home care, and the administration of workers' compensation benefits.[71]

Plaintiffs argue that section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. The statute does not give doctors or hospitals the

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[65] *Id.* at 143.

[66] *Id.*

[67] *Id.*

[68] *Jackson*, 419 U.S. at 353.

[69] *Id.*

[70] MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES §5.14[A].

[71] *Id.* (footnotes omitted).

power to take life; it acknowledges their right not to provide treatment inconsistent with their own conscience. In this respect, Plaintiffs' premise is deeply flawed.

In the case at hand, Plaintiff cannot show a public function. It is true that in one exceptionally narrow circumstance - legally sanctioned executions - the state has an affirmative power to take life. But the power ends there; it has not "traditionally" or "exclusively" extended into the field of medicine. On the contrary, centuries of common law, and the state and federal constitutions, *bar* the State from taking the lives of private citizens. Thus, Plaintiff cannot cite, for example, a case in which a prison hospital has been held to have the power to deny a patient needed care.

Section 166.046 concerns a quintessentially *private* function: medical decision-making.[72] Even when overlaid with state regulations, a hospital's decisions are its own.[73] Decisions about when to enter into and leave doctor-patient relationships are governed by the desires of the doctor and patient. A doctor's decision to terminate that relationship is left to his medical judgment and conscience, provided that he conforms to a non-statutory code of medical ethics. These private, personal decisions are not - and never have been - regarded as public functions.

c) Section 166.046 does not satisfy the nexus test.

Likewise, the Plaintiffs cannot meet their burden to show that the nexus test applies to this case. The nexus test asks if the State has insinuated itself into a position of

[72] *See Blum*, 457 U.S. at 1011 ("We are also unable to conclude that nursing homes perform a function that has been traditionally the exclusive prerogative of the State." (quotations omitted)).

[73] *See id.* 1011–12 (holding that even if the state were obligated to provide nursing home services, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign").

interdependence with the private actor, such that it was a joint participant of the enterprise.[74] In *Jackson*, the plaintiff sued a privately-owned utility company after the company disconnected her electricity.[75] The plaintiff argued that because the company had failed to provide adequate notice, her due process rights had been violated.[76] The plaintiff claimed that because the utility was state-regulated and was essentially a statewide monopoly, the utility was a state actor.[77] The U.S. Supreme Court disagreed, holding that there was not a "sufficiently close nexus" between the conduct of the utility company and the state in order to conclude that the utility was a state actor.[78]

Here, like the utility company in *Jackson*, Houston Methodist is a privately owned and operated corporation. Plaintiffs have not alleged that the State and Houston Methodist are joint participants of the same enterprise and there is absolutely no rational argument that there is a sufficiently close nexus between the conduct of Houston Methodist and the State. Accordingly, since Houston Methodist Hospital cannot be deemed a state actor, then it is entitled to judgment as a matter of law.

B. No-Evidence Motion for Summary Judgment as to IIED Claim

Plaintiff, Evelyn Kelly, Individually, has claimed that Houston Methodist Hospital intentionally inflicted emotional distress upon her through the hospital's actions in implementing §166.046 with regard to her son, Christopher Dunn's care and treatment. After an adequate time for discovery, Plaintiffs are unable to provide any evidence to

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[74] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 366, 95 S. Ct. 449, 461, 42 L. Ed. 2d 477 (1974).

[75] *Id.* at 346–47.

[76] *Id.* at 348.

[77] *Id.* at 350–52.

[78] *Id.* at 354–59 (noting "[d]octors, … are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State").

support each of the required elements of Plaintiff's intentional infliction of emotional distress claim. Specifically, Plaintiff failed to present even a scintilla of evidence that: (1) Houston Methodist Hospital acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused Plaintiff emotional distress; (4) the emotional distress was severe; and (5) no alternative cause of action would provide a remedy for the severe emotional distress caused by Defendant's conduct.[79]

The Texas Supreme Court considers the tort of intentional infliction of emotional distress ("IIED") to be a "gap-filler."[80] Thus, an IIED claim is available only when a person intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress; however, such cases are rare.[81]

Accordingly, this Court should grant Methodist's No-Evidence Motion for Summary Judgment as Plaintiff has not and cannot offer any evidence to support her claim for intentional infliction of emotional distress.

IV.
CONCLUSION AND PRAYER

For physicians, patients, and families, no aspect of health care is more fraught than end-of- life decision-making. In many instances, physicians face a difficult choice between their desire to carry out their patients' wishes and their ethical duty, as medical professionals, not to increase or prolong their patients' suffering.

Plaintiff's constitutional challenge misapprehends both the statute and its purpose. As a consequence, Plaintiff has failed to demonstrate two fundamental prerequisites to a

[79] *Hoffmann–La Roche Inc.*, 144 S.W.3d at 445; *Wal–Mart Stores, Inc. v. Canchola,* 121 S.W.3d 735, 740 (Tex.2003).

[80] *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex.2004).

[81] Id. ("Meritorious claims for intentional infliction of emotional distress are relatively rare precisely because most human conduct, even that which causes injury to others, cannot be fairly characterized as extreme and outrageous.").

successful due process claim: a constitutionally protected interest and state action.

WHEREFORE PREMISES CONSIDERED, Defendant HOUSTON METHODIST HOSPITAL respectfully request that this Court GRANT its Traditional and No-Evidence Motion for Summary Judgment, and for any such other and further relief to which Defendant 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 August, 2017.

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

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

8/22/2017 1:08 PM
Chris Daniel - District Clerk Harris County
Envelope No. 18998611
By: ARIONNE MCNEAL
Filed: 8/22/2017 1:08 PM

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

ORDER ON DEFENDANT HOUSTON METHODIST HOSPITAL 'S TRADITIONAL AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

ON THIS DATE CAME TO BE HEARD Defendant **HOUSTON METHODIST HOSPITAL F/K/A THE METHODIST HOSPITAL's** Traditional and No-Evidence Motion for Summary Judgment. The Court, after considering Defendant's Motion, Plaintiffs' response, if any, and the arguments of counsel, is of the opinion that Defendant's Traditional and No-Evidence Motion for Summary Judgment is meritorious and should in all respects be GRANTED.

It is, therefore, ORDERED, ADJUDGED AND DECREED that Plaintiffs' suit against Defendant **HOUSTON METHODIST HOSPITAL F/K/A THE METHODIST HOSPITAL** is hereby dismissed with prejudice to the re-filing of same.

SIGNED this _____ day of _____, 2017.

_____
JUDGE PRESIDING

TAB G

CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	HARRIS COUNTY, TEXAS
v.	§	
HOUSTON METHODIST HOSPITAL,	§	
Defendant.	§	189th JUDICIAL DISTRICT

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR MOOTNESS, CHAPTER 74 MOTION TO DISMISS, AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

Now comes Plaintiff Evelyn Kelly ("Mrs. Kelly"), individually and on behalf of the Estate of David Christopher Dunn ("Mr. Dunn"), and files this final Response to Defendant Houston Methodist Hospital's ("Methodist") Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and its Traditional Motion for Summary Judgment.

SUMMARY OF THE ARGUMENT

The Court must deny Houston Methodist Hospital's Motions to Dismiss, because (i) the matter is not moot, but rather a prime example of the exception—being capable of repetition yet evading review and (ii) this is not a medical malpractice claim. The Court must also deny Methodist's Motion for Summary Judgment, because both elements of Mr. Dunn's §1983 claim are present: (a) the right to life and the right to determine one's own medical treatment are protected interests; and (b) by cloaking itself in the state's immunity and authority by following the statute's legal framework, Methodist made itself a state actor. Additionally, Methodist's motion cannot be granted as to Plaintiff's declaratory judgment claim, because Defendant's

TAB H

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Chris Daniel - District Clerk Harris County
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By: Deandra Mosley
Filed: 9/21/2017 9:59 AM

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 REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS, AND TRADITIONAL 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 Reply to Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment, and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

This Court should grant Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional and No-Evidence Motion for Summary Judgment in their entirety because:

- **This cause of action is moot and Plaintiff's argument that the Court should review it under an public interest exception to the mootness doctrine fails a matter of law;**
- **Plaintiff did not file a Chapter 74 report;**
- **No constitutionally protected interest is at stake here;**

- **Houston Methodist is not a state actor;**
- **Houston Methodist did not violate Dunn's civil or due process rights; and**
- **Plaintiff did not respond to Houston Methodist's No-Evidence Summary Judgment as to the Intentional Infliction of Emotional Distress Claim.**

II.
ARGUMENTS AND AUTHORITIES

1. REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

A. This cause of action is moot. Plaintiff's argument that this Court should recognize a public interest exception to the mootness doctrine is not a viable legal theory in our jurisdiction.

Plaintiff's argument that this Court should maintain jurisdiction over this moot case because "in Texas, patients on life-sustaining treatment are dealing with similarly important issues of their fundamental rights"[1] fails because a public interest exception to the mootness doctrine is not a viable legal theory in our jurisdiction. Houston Methodist provided Dunn with life-sustaining care until his natural death. This case became moot when Dunn died. Plaintiff argues that this case falls under the 'capable of repetition yet evading review' exception of the mootness doctrine.[2] In support of her argument Plaintiff cites the holdings of two cases from outside of our jurisdiction, one from California[3] and the other from Kentucky.[4] Both of the cases Plaintiff cites applied a public interest exception to the

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[1] Plaintiff's Amended Motion for Summary Judgment at page 18, which Plaintiff incorporated into her Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss and Traditional Motion for Summary Judgment.

[2] *See* Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 2 incorporating Plaintiff's arguments as stipulated in Plaintiff's Amended Motion for Summary Judgment.

[3] *Conservatorship of Wendland* (2001) 26 Cal. 4th 519, 110 Cal. Rptr. 2d 412.

[4] *Woods v. Commonwealth*, 142 S.W. 3d 24 (KY.2004); Plaintiff's also cite dicta from *Lee v. Valdez*, 2009 WL 1406244 (N.D. Tex. 2009). However, *Lee* held that a prisoner's claim for declaratory relief regarding inadequate medical care was rendered moot by that prisoner's death. *Lee*, 2009 WL 1406244 at *14.

mootness doctrine.[5] Plaintiff asks this Court to follow this California and Kentucky case law and asserts that "the importance of the issues firmly support the matter being heard."[6] However, the First Court of Appeals has explicitly held that "until and unless the Texas Supreme Court recognizes the public interest exception to the mootness doctrine, **it is not a viable legal theory in our jurisdiction.**"[7] Accordingly, this Court must reject Plaintiff's argument asking this Court to exercise jurisdiction over Plaintiff's civil rights and constitutional claims. This case is moot and no exception to the mootness doctrine applies here.

In addition, the rare capable of repetition yet evading review "exception to the mootness doctrine has only been used to challenge unconstitutional acts performed by the government."[8] As further explained below, Houston Methodist is a private hospital, not a government entity.

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[5] *Wendland*, 26 Cal. 4th at footnote 1 ("We have the discretion to decide otherwise moot cases presenting **important issues** that are capable of repetition yet tend to evade review. This is such a case. The case raises **important issues about fundamental rights of incompetent conservatees to privacy and life**, and the corresponding limitations on conservators' power to withhold life-sustaining treatment.") (emphasis added)(internal citations omitted); *Woods*, 142 S.W. 3d at 31; *see also Morgan v. Getter*, 441 S.W. 3d 94, 101 (Ky. 2014)(the Kentucky Supreme Court explained that "[c]learly, there was no chance that the ward himself would again be confronted by the challenged action (the removal of life support), and neither did the issue evade review, inasmuch as other patients on life support could be expected to survive until the matter was fully litigated" and therefore the Court reviewed *Woods* "not in any strict sense under the standard 'capable of repetition exception, but rather **because it raised issues of substantial public importance** certain to be repeated with respect to other patients, their families, and their caregivers, and because guidance from the Court could properly be thought a matter of some urgency.")(emphasis added).

[6] Plaintiff's Amended Motion for Summary Judgment at page 20.

[7] *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 400 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (noting that the Texas Supreme Court has not decided the viability of the public interest exception which is defined as permitting "judicial review of questions of **considerable public importance** if the nature of the action makes it capable of repetition yet prevents effective judicial review.")(emphasis added).

[8] *Blackard v. Schaffer*, 05-16-00408-CV, 2017 WL 343597, at *6 (Tex. App.—Dallas Jan. 18, 2017, pet. filed) (citing *Gen. Land.*, 789 S.W.2d at 571; *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.–Dallas 2010, no pet.); *In re Sierra Club*, 420 S.W.3d 153, 157 (Tex. App.–El Paso 2012, orig. proceeding)).

B. This case is subject to the Chapter 74 Expert Report requirement.

a. Plaintiff's Intentional Infliction of Emotional Distress claim is unquestionably a medical malpractice claim.

Although Plaintiff fails to mention or respond to Defendant's arguments regarding her intentional infliction of emotional distress ("IIED") claim in her five pages of briefing regarding whether this case is subject to the Chapter 74 Expert Report requirement, Plaintiff's live petition in this case includes a claim for IIED.[9] An IIED claim that arises from health care decisions concerning a family member is a health care liability claim subject to the Chapter 74 expert reporting requirements.[10] The 120-day deadline long ago expired and Plaintiff has never filed an expert report. Consequently, her IIED claim must be dismissed.[11] Apparently, Plaintiff does not dispute this fact as she does not address Defendant's Motion to Dismiss her IIED claim in her Response to Defendant's Motion to Dismiss.[12]

b. Plaintiff's civil rights case is also a health care liability case subject to Chapter 74 requirements.

Plaintiff's civil rights and constitutional claims are moot and no exception to the mootness doctrine applies to Plaintiff's claims. Accordingly, there is no reason for this Court to consider whether these claims are subject to Chapter 74's expert report requirement. However, Defendant asserts that the underlying nature of Plaintiff's constitutional claims constitute a health care liability claim because the conduct complained

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[9] Plaintiffs' First Amended Petition; *see also* Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at pages 2-6.

[10] *Groomes v. USH of Timberlawn, Inc.*, 170 S.W.3d 802, 803 (Tex. App.—Dallas 2005, no pet.).

[11] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

[12] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at pages 2-6.

of "is an inseparable part of the rendition of health care services," therefore the claims are health care liability claims.[13]

Plaintiff argues that her case is not a health care liability claim because "[i]t is irrelevant that Methodist is a health care provider and Mr. Dunn was its patient; Mr. Dunn was an individual faced with state-adopted, state-incentivized and state-immunized statutory procedure that authorized his pre-mature death via a hospital-formed committee without his input, record, or review" and that federal preempts state law in this instance.[14] This argument fails for several reasons. First, far from being irrelevant, health care is at the heart of Plaintiff's claims. Plaintiff's claims are brought against a health care provider for acts of claimed departures from medical care, health care, or safety, or professional or administrative services directly related to health care that proximately caused alleged injuries for which Plaintiff's now seek relief. Second, Plaintiff wrongly attempts to characterize Houston Methodist, a private hospital, as a state actor. Third, while Defendant agrees that preemption may apply if a state law conflicts with federal law, there is no conflict between federal and state law in this case. Accordingly, Plaintiff's constitutional claims for violation of due process and civil rights are health care liability claims within the scope of Chapter 74.

2. REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

C. No constitutionally protected interest is at stake here.

Plaintiff claims that the "constitutional right in question is the individual's right to life and the right to choose one's own medical treatment" as articulated by the US Supreme

[13] *Boothe v. Dixon*, 180 S.W.3d 915, 919 (Tex. App.—Dallas 2005, no pet.).

[14] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 2, 4.

Court in the *Cruzan* case.[15] *Cruzan*, however, involved a patient's right to **refuse** life sustaining treatment.[16] In *Cruzan*, the U.S. Supreme Court held that a patient has a liberty interest under the Due Process clause to refuse unwanted medical treatment.[17] The inverse, however, has been rejected by the U.S. Supreme Court.[18] A hospital does not deprive a patient of life by removing life-sustaining treatment; rather, the patient's illness causes death. Moreover, a patient does not have a constitutional right to any and all medical treatment he requests and a physician is not constitutionally obligated to provide any treatment that a patient requests.[19] Frankly, to hold that a patient has a constitutional right not only to receive medical care, but to receive any medical care of the specific type requested by the patient, would have horrific results. Imagine an otherwise healthy schizophrenic who has decided that his left eye offends him and requests that a surgeon remove it. Based on Plaintiff's argument, such a patient has a constitutional right to have a healthy eye surgically removed because he requests that specific Hippocratic-oath violating medical procedure.

Plaintiff relies on two cases from jurisdictions outside Texas to support her assertion that "the withdrawal of life-sustaining treatment presents a risk of deprivation of a protected interest."[20] First, she cites *Wendland* again.[21] In *Wendland*, the California Supreme Court considered "whether a conservator of the person may withhold artificial nutrition and hydration from a conscious conservatee **who is not terminally ill**, comatose, or in a

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[15] *Id.* at page 7 citing *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

[16] *Cruzan*, 497 U.S. at 278.

[17] *Id.* at 279.

[18] *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 196-199, 109 S. Ct. 998, 103 L.Ed. 2d 249 (1989).

[19] *Id.* at 196-199; *see also* Brief of Amici Curiae attached as Exhibit A.

[20] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 9.

[21] *Wendland*, 26 Cal. 4th 519.

persistent vegetative state, and who has not left formal instructions for health care or appointed an agent or surrogate for health care decisions."[22] The California Supreme Court held that "in light of the relevant portions of the **California Constitution**, we conclude that a conservator may not withhold artificial nutrition and hydration from such a person absent clear and convincing evidence the conservator's decision is in accordance with either the conservatee's own wishes or best interest."[23] *Wendland* has no bearing on the case at bar. There is no dispute that Dunn was terminally ill. Further, the case was decided based on California law and the interpretation of the California Constitution.

Second, Plaintiff cites *Baby F. v. Oklahoma Cty. Dist. Court*, 348 P. 3d 1080, 1084 (Okla. 2015). *Baby F.* involved an infant that was in the custody of the State of Oklahoma.[24] The issues before the court in *Baby F.* was whether a trial court could authorize a change in resuscitation status from full code to allow-natural-death pursuant to an Oklahoma statute for a child in state custody.[25] The case did not involve any health care providers.[26] Because Oklahoma was in the role of *parens patriae*, the Oklahoma Supreme Court explained that the paramount consideration is the best interest of the child.[27] This is highly distinguishable from the facts here, where Dunn was an adult. Moreover, neither *Wendland* nor *Baby F.* hold that a physician is constitutionally obligated to provide any medical treatment requested by a patient. Accordingly, because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

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[22] *Id.* at 523-524 (emphasis added).

[23] *Id.* (emphasis added).

[24] *Baby F. v. Oklahoma Cty. Dist. Court*, 348 P. 3d 1080, 1084 (Okla. 2015).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1088.

D. Houston Methodist Did Not Act Under Color of State Law.

Plaintiff claims that Houston Methodist "cloaked" itself in the "mantle of state authority" and "that converts a private hospital into a state actor."[28] This is absurd and incorrect. Houston Methodist is not a state actor and thus cannot be sued in the capacity in which Plaintiff seeks. As an initial matter, state action is a fact-intensive determination and no discovery has been conducted in this case.

Plaintiff claims that this case satisfies the state compulsion test because "the state provides 'significant encouragement, either overt or covert.'"[29] This is simply inaccurate. Plaintiff alleges that the safe-harbor aspect of Section 166.046 is a substantial incentive or significant encouragement by the state for a hospital to use the statutory procedure at issue.[30] Plaintiff cites no law in support of this allegation.[31] The existence of a safe-harbor provision falls far short of the State exercising "coercive power or [providing] significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[32] Section 166.046 does not coerce a hospital in any way shape or form. Nor does a safe harbor provision provide significant encouragement to take any action. The Supreme Court has repeatedly held that "[a]ction taken by private entities with mere approval or acquiescence of the State is not a state action."[33]

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[28] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 11-12.

[29] *Id.*

[30] *Id.* at 12.

[31] *Id.* at 11-12.

[32] *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

[33] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982).

E. Procedural Due Process.

Plaintiff asserts that Houston Methodist's motion cannot be granted as to Plaintiff's declaratory judgment claim because Houston Methodist "expressly states that it takes 'no formal position on the constitutionality of the statute.'"[34] This is an incomplete quotation of Houston Methodist's motion. The full rendition of Houston Methodist's position is as follows:

> Houston Methodist Hospital continues to take no formal position on the constitutionality of the statute itself, but is prepared to defend its conduct, and the conduct of its healthcare providers that provided professional, ethical and compassionate care and treatment to Christopher Dunn. Simply put, Houston Methodist did not violate Plaintiff's constitutional rights and rejects Plaintiff's allegations in full.[35]

This Court absolutely may grant Houston Methodist's Motion for Summary Judgement as to Plaintiff's declaratory judgment cause of action because 1) with Dunn's natural death there is no longer a justiciable controversy concerning the administration of life-sustaining treatment and declaratory judgment is not available when, like the case at bar, there is no justiciable controversy;[36] 2) there is no constitutionally protect interest here; and 3) Houston Methodist is not a state actor. There should be no doubt that Defendant opposes Plaintiff's Motion for Summary Judgment.

3. REPLY REGARDING DEFENDANT'S NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT AS TO IIED CLAIM

Plaintiff did not respond to Defendant's No-Evidence Motion for Summary Judgment on the IIED claim. Plaintiff, Evelyn Kelly, Individually, has claimed that Houston

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[34] Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment at page 12-13.

[35] Defendant, Houston Methodist Hospital's Traditional and No-Evidence Motion for Summary Judgement at page 1.

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

Methodist Hospital intentionally inflicted emotional distress upon her through the hospital's actions in implementing §166.046 with regard to her son, Christopher Dunn's care and treatment. After an adequate time for discovery, Plaintiff is unable to provide any evidence to support each of the required elements of Plaintiff's intentional infliction of emotional distress claim. Specifically, Plaintiff failed to present even a scintilla of evidence that: (1) Houston Methodist Hospital acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused Plaintiff emotional distress; (4) the emotional distress was severe; and (5) no alternative cause of action would provide a remedy for the severe emotional distress caused by Defendant's conduct.[37] Accordingly, this Court should grant Houston Methodist's No-Evidence Motion for Summary Judgment as Plaintiff has not and cannot offer any evidence to support her claim for intentional infliction of emotional distress.

III.
CONCLUSION & PRAYER

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL,** respectfully requests that this Court GRANT its Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional and No-Evidence Motions for Summary Judgment in their 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

[37] *Hoffmann–La Roche Inc.*, 144 S.W.3d at 445; *Wal–Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 740 (Tex.2003).

dscott@scottpattonlaw.com
CAROLYN CAPOCCIA SMITH
Texas Bar No. 24037511
csmith@scottpattonlaw.com
LAURA A. EDMISTON
Texas Bar No. 24050552
ledmiston@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 September, 2017.

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.

TAB I

9/15/2017 10:48 AM
Chris Daniel - District Clerk Harris County
Envelope No. 19457488
By: Deandra Mosley
Filed: 9/15/2017 10:48 AM

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 PLAINTIFF'S AMENDED 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 Plaintiff's Amended Motion for Summary Judgment, and respectfully shows the Court the following:

I.
SUMMARY OF THE ARGUMENT

This Court should deny Plaintiff's Amended Motion for Summary Judgment in its entirety because:

- **This cause of action is moot;**
- **Houston Methodist is not a state actor;**
- **The constitutionality of Texas Health and Safety Code § 166.046 is an issue more appropriately addressed by the Texas Legislature; and**
- **Houston Methodist did not violate Dunn's civil or due process rights.**

II.
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.[1] 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.[2] 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.[3] In light of these standards, this Court should deny Plaintiff's traditional motion for summary judgment because Plaintiff has failed to prove all elements of her causes of action, resulting in genuine issues of material fact.

B. This Cause of Action is Moot.

a. As a result of Dunn's natural death, the due process and civil rights claims asserted against Houston Methodist no longer present a live case or controversy.

Due to Dunn's natural death and the undisputed fact that Houston Methodist never withdrew life-sustaining care, there is no longer a live case or controversy between the parties. As a result, Plaintiff's alleged injuries no longer exist and this Court cannot provide any effectual relief on Plaintiff's claims. Therefore, this Court lacks subject matter

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

[2] *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).

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

jurisdiction over the aforementioned claims, as said claims are moot. Any decision rendered by this Court would constitute an advisory opinion.[4]

Article III of the Constitution confines this Court's jurisdiction to those claims involving actual "cases" or "controversies."[5] "To qualify as a case fit for adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'"[6] When a case is moot – that is, when the issues presented are no longer live or when the parties lack a generally cognizable interest in the outcome – a case or controversy ceases to exist, and dismissal of the suit is compulsory.[7]

b. No exception to the mootness doctrine applies to this case and Texas law does not recognize a public interest exception to the mootness doctrine.

Contrary to Plaintiff's assertion, this matter is moot as it is not capable of repetition. In their argument, Plaintiff fails 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*."[8] Not only must a plaintiff show that the challenged action is too short in duration as to evade review, but also must show a

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[4] "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Tex. Air Control Bd.*, 852 S.W.2d at 444 (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. Products, 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.

[5] U.S. CONST. art. III, § 2, cl. 1; TEX. CONST. art. II, § 1.

[6] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

[7] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

[8] *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).

"reasonable expectation" or "demonstrated probability" that the same controversy will recur *involving the same complaining party.*[9] 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."[10] In addition, this rare "exception to the mootness doctrine has only been used to challenge unconstitutional acts performed by the government."[11] Without question, Houston Methodist is a private hospital, not a government entity.

In the present case, it is impossible for the same complaining party to be subjected to the same action in the future. Dunn is no longer living, and therefore, cannot be subject to the same action or controversy.[12] Additionally, because of the expiration of Dunn's natural life, he can never again, in any capacity, be a complaining party to a lawsuit. As such, there is no possible way, let alone reasonable expectation, that the same complaining party will be subjected to the same action or controversy.[13]

Plaintiff cites three cases in support of their novel request that this Court ignore Texas law stating that a plaintiff must prove that "a reasonable expectation exists that the *same complaining party* will be subjected to the *same action again.*"[14] None of these three cases are applicable or persuasive in the instant case.

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[9] *Murphy*, 455 U.S. at 482.

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

[11] *Blackard v. Schaffer*, 05-16-00408-CV, 2017 WL 343597, at *6 (Tex. App.—Dallas Jan. 18, 2017, pet. filed) (citing *Gen. Land.*, 789 S.W.2d at 571; *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.–Dallas 2010, no pet.); *In re Sierra Club*, 420 S.W.3d 153, 157 (Tex. App.–El Paso 2012, orig. proceeding)).

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

[13] *Id.*

[14] *Williams*, 52 S.W.3d at 184 (Tex. 2001) (emphasis added); *see Murphy*, 455 U.S. at 482 (1982); *Weinstein*, 423 U.S. at 149 (1975); *Blum*, 997 S.W.2d at 264 (Tex. 1999); *OXY U.S.A., Inc.*, 789 S.W.2d at 571 (Tex. 1990).

First, Plaintiff cites incomplete and vague dicta from *Lee v. Valdez*.[15] In *Lee*, the court held that a prisoner's claim for declaratory relief regarding inadequate medical care while in prison was rendered moot by the prisoner's death. The court explained:

> To satisfy the "case or controversy" requirement of Article III, a "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." "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." Courts therefore hold, for example, that when a prisoner challenges prison conditions after he is released from confinement, his claim for injunctive and/or declaratory relief is moot, and the prisoner can no longer challenge the prison conditions unless he can point to a concrete and continuing injury. Similarly, the death of a prisoner renders a claim for prospective injunctive relief against the prison conditions moot. Although there may be rare instances where a court holds that a case involving a deceased prisoner is not moot, either because it is a class action or because it is "capable of repetition yet evading review," plaintiffs have presented no evidence that Sims's case fits into one of these categories. Even if plaintiffs can establish at trial that they are entitled to recover damages, their request for prospective declaratory and injunctive relief related to Sims is moot in light of her death. Accordingly, these claims for relief are dismissed without prejudice.[16]

The court in *Lee* does not suggest that courts should hear cases where there is no longer a live case or controversy between the parties because the party claiming they are in danger of sustaining an injury has died. Moreover, the court in *Lee* does not explain under what "rare circumstance" a case involving a deceased prisoner is not moot.[17] Instead, the holding in *Lee* is that the case is moot because of the prisoner's death.[18] Therefore, the holding in *Lee* supports the dismissal of the present case. Like in *Lee*, the natural death of Dunn has

[15] *Lee v. Valdez*, CIV.A.3:07-CV-1298-D, 2009 WL 1406244 (N.D. Tex. May 20, 2009).

[16] *Id.* at *14 (internal citations omitted).

[17] *Id.*

[18] *Id.*

eliminated the controversy between the parties. Accordingly, like in *Lee*, Plaintiff's claims should be dismissed.

Second, Plaintiff cites a California Supreme Court case captioned *Conservatorship of Wendland* in support of their claim that this Court should apply a mootness exception. However, California applies a different standard than Texas when evaluating the "capable of repetition yet evading review" exception to the mootness doctrine. In California, courts "have the discretion to decide otherwise moot cases presenting important issues that are capable of repetition yet tend to evade review."[19] This is not the law in Texas. In Texas, "[t]o invoke the exception, a plaintiff must prove that: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again."[20] Unlike California, whether or not a case concerns 'important issues' is not a factor in applying this mootness exception in Texas. In citing the *Wendland* case, Plaintiff asks this Court to ignore Texas law in favor of adopting law from California. This is improper and the Court should apply well-settled Texas law.[21]

Third, Plaintiff cites *Woods v. Kentucky*, a Supreme Court of Kentucky case.[22] Again, Kentucky law regarding "capable of repetition yet evading review" exception to the mootness doctrine is different than the law in Texas. Kentucky recognizes a public interest

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[19] *Conservatorship of Wendland*, 26 Cal. 4th 519, footnote 1 (2001).

[20] *In re Philadelphia Indem. Ins. Co.*, 12-17-00117-CV, 2017 WL 3224886, at *2 (Tex. App.—Tyler July 31, 2017, no pet. h.) (citing *Texas A & M Univ.-Kingsville v.Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011); *Williams*, 52 S.W.3d at 184–85; *Blum*, 997 S.W.2d at 264 (Tex. 1999); *OXY U.S.A.*, 789 S.W.2d at 571 (Tex. 1990); *In re Fort Worth Star Telegram*, 441 S.W.3d 847, 852 (Tex. App.–Fort Worth 2014, orig. proceeding).

[21] *See supra* footnote 49.

[22] *Morgan v. Getter*, 441 S.W.3d 94, 101 (Ky. 2014).

exception to the mootness doctrine.[23] In a later case, the Kentucky Supreme Court explained that it reviewed *Woods* "not in any strict sense under the standard 'capable of repetition' exception, but rather because it raised issues of substantial public importance."[24] In other words, the Kentucky Supreme Court heard *Woods* under a public interest exception to the mootness doctrine that is recognized in Kentucky jurisprudence. The Texas Supreme Court has not recognized a public interest exception to the mootness doctrine. The First Court of Appeals has explicitly stated that "until and unless the Texas Supreme Court recognizes the public interest exception to the mootness doctrine, **it is not a viable legal theory in our jurisdiction**."[25] In relying on both *Woods* and *Wendland*, cases from jurisdictions outside Texas, Plaintiff asks this Court to apply a public interest exception to the mootness doctrine that simply does not exist in the State of Texas. The First Court of Appeals has explicitly rejected this legal theory.[26]

Here in Texas, the only exceptions to the mootness doctrine are (1) if the issue is capable of repetition, but evading review; and (2) the collateral consequences exception.[27] Neither exception applies to the instant case. As discussed above, the "capable of repetition" prong of the mootness exception requires plaintiff to prove that "a reasonable expectation exists that the *same complaining party* will be subjected to the *same action again*."[28]

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[23] *Id.*

[24] *Id.*

[25] *Houston Chronicle Pub. Co. v. Thomas*, 196 S.W.3d 396, 400 (Tex. App.—Houston [1st Dist.] 2006, no pet.)(emphasis added).

[26] *Id.*

[27] *FDIC v. Nueces Cty.*, 886 S.W.2d 766, 767 (Tex. 1994) (citing *Camarena v. Tex. Employment Com'n*, 754 S.W.2d 149, 151 (Tex. 1988); *see also Gen. Land Office v. OXY U.S.A., Inc.*, 780 S.W.2d 569, 571 (Tex. 1990).

[28] *Williams*, 52 S.W.3d at 184 (Tex. 2001) (emphasis added); *see Murphy*, 455 U.S. at 482 (1982); *Weinstein*, 423 U.S. at 149 (1975); *Blum*, 997 S.W.2d at 264 (Tex. 1999); *OXY U.S.A., Inc.*, 789 S.W.2d at 571 (Tex. 1990).

Plaintiff has not argued the collateral consequences exception. The collateral consequences exception is inapplicable as collateral-consequences exception is "invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment."[29] There is no judgment at issue in this case. Accordingly, the narrow circumstances for which this exception might apply is not the circumstances present in the instant case.

Further, the undisputed facts here show that Methodist provided Dunn with life-sustaining care until his natural death – life-sustaining treatment was never withdrawn. Plaintiff seeks to have Texas Health and Safety Code §166.046 declared unconstitutional.[30] Plaintiff alleges that the law allows Texas hospitals "to end a patient's life by taking away life-sustaining treatment" and therefore violates procedural due process, substantive due process and civil rights.[31] Here, in addition to the fact that there is no possible way that Dunn will be subject to the same alleged deprivation of due process or civil rights under the Texas Health and Safety Code §166.046, the termination of life-sustaining treatment is also not capable of repetition because it never happened in the first place.

Based on Plaintiff's 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 Plaintiff

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[29] *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006); *see also RLZ Investments*, 411 S.W.3d at 33 ("Texas courts have recognized two exceptions to the mootness doctrine, *under which an appellate court should still consider the merits of an appeal even if the immediate issues between the parties have become moot*: (1) the capability of repetition yet evading review exception and (2) the collateral consequences exception.") (emphasis added).

[30] *See* Plaintiff's Amended Motion for Summary Judgment at13.

[31] *Id.*; *see also id.* at 13.

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.[32] Accordingly, Plaintiff's due process and civil rights causes of action must be dismissed as moot.

C. Houston Methodist Did Not Act Under Color of State Law.

Undeniably, Houston Methodist is not a state actor and thus cannot be sued in the capacity in which Plaintiff seeks. 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.[33] Further, as the movant, Plaintiff is responsible for conclusively establishing that Houston Methodist is a state actor.[34] There has been neither a single piece of discovery exchanged, nor a single deposition taken to date. 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.

Contrary to Plaintiff's argument, Houston Methodist did not act under the color of state law. Plaintiff looks to *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988), noting that "(i)n the typical case raising a state-action issue, a private party has taken

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[32] "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.

[33] *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.").

[34] *Id.* at 896.

the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action…Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor"[35] Plaintiff incorrectly relies on this case, which held that the NCAA was *not* a state actor, in support of their theory that because the State enacted Tex. Health & Safety Code §166.046 and Houston Methodist used this statute, this use somehow equates to a state action.

Proof of a constitutional claim requires state action. Houston Methodist cannot be considered a state actor. The Supreme Court has found state action in only a few unique circumstances, none of which are present here:

- The *public function test* asks "whether the private entity performs a function which is 'exclusively reserved to the State.'"[36]
- The *state compulsion test* attributes a private actor's conduct to the state when the state "exerts coercive power over the private entity or provides significant encouragement."[37]
- And the *nexus test* asks if "the State has inserted 'itself into a position of interdependence with the private actor, such that it was a joint participant in the enterprise.'"[38]

[35] *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988). (Holding that state university's imposition of disciplinary sanctions against basketball coach in compliance with NCAA rules did not turn NCAA's otherwise private conduct into state action was not performed "under color" of state law).

[36] *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

[37] *Id.* at 549–50 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170–71 (1970).

[38] *Id.* at 550 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974)) (brackets omitted).

The Supreme Court has not resolved "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in" state-action cases.[39]

a. Section 166.046 does not satisfy the state-compulsion test.

Supreme Court precedent firmly refutes any notion that a hospital or physician invoking §166.046's safe harbor is a state actor. In the first place, §166.046 provides a discretionary, not mandatory, procedure; it requires no action from any private actor. The Supreme Court has repeatedly held that "[a]ction taken by private entities with *mere approval or acquiescence* of the State is not state action."[40]

Indeed, the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."[41] A physician or hospital making use of §166.046 is doing no more than using a state-provided remedy; the physician or hospital does not receive the type of "overt, significant assistance of state officials" that creates state action.[42]

In the absence of overt assistance from or coercion by the State, even compliance with a *mandatory* procedure does not implicate state action. Consider *Blum v. Yaretsky*, in which "a class of Medicaid patients challeng[ed] decisions by the nursing homes in which they reside to discharge or transfer [them] without notice or an opportunity for a hearing."[43]

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[39] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

[40] *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); *Flagg Bros.*, 436 U.S. at 154–65; *Jackson*, 419 U.S. at 357.

[41] *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485–86 (1988); *accord Flagg Bros.*, 436 U.S. at 161–62.

[42] *Pope*, 485 U.S. at 485–86; *cf. id.* at 487 (finding state action in private use of probate procedure, where probate judge was "intimately involved" in the procedure's operation); *Lugar*, 457 U.S. at 941 (holding that private use of prejudgment-attachment procedure constituted state action, where acts by sheriff and court clerk showed "joint participation with state officials in the seizure of the disputed property").

[43] 457 U.S. at 993.

Federal law *required* nursing homes to establish utilization review committees ("URC") to "periodically assess whether each patient is receiving the appropriate level of care, and thus whether the patient's continued stay in the facility is justified."[44] The *Blum* plaintiffs were found by their respective URCs to not require a higher level of care, and were therefore transferred to other institutions in accordance with the statutory procedure.[45] Yet the Supreme Court held that there was no state action: the nursing homes, not the state, initiated the reviews and judged the patients' need for care on their own terms, not terms set by the state. The nursing homes' decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State."[46]

Similarly, the decision to abstain from following a patient's wishes—and thus whether to initiate the §166.046 procedure—originates with the physician, who acts according to his own conscience, expertise, and ethics.[47] As in *Blum*, the State does not determine when or for what reasons a physician may invoke the §166.046 procedure. Moreover, unlike in *Blum*, use of §166.046 is permissive, even for physicians wishing to abstain. This case thus fits easily within *Blum*'s no state-action holding.[48]

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[44] *Id.* at 994–95.

[45] *Id.* at 995.

[46] *Id.* at 1008; *see also id.* at 1010 ("[The] regulations themselves do not dictate the decision to discharge or transfer in a particular case.").

[47] *Cf. id.* at 1009 (noting that nursing homes' transfer decisions were based on judgments that "the care [the patients] are receiving is medically inappropriate").

[48] Even a private hospital's involvement in an involuntary commitment, pursuant to state law, is not state action. *See, e.g., Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5–6 (1st Cir. 2005) (holding that the "scheme does not compel or encourage involuntary commitment," but "merely provides a mechanism through which private parties can, in their discretion, pursue such commitment"); *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999); *S.P. v. City of*

Another consideration cutting strongly against state action is that §166.046 does no more than immunize a physician who employs it. A similar issue arose in *Flagg Brothers*, in which the plaintiff sued to stop a warehouse from selling, pursuant to a warehouseman's lien, goods she had abandoned at the warehouse.[49] State law provided the warehouse a procedure for making the sale and absolved it from liability if it complied.[50] The Court rejected the argument that the statute, or the state's decision to deny relief, constituted state action:

> If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.[51]

Likewise, the Legislature's decision to provide safe harbor for a physician's acts does not convert those acts into public acts.

The Fifth Circuit has applied these principles in even more analogous circumstances. In *Goss v. Memorial Hospital System*[52], the court considered a provision of the Texas Medical Practice Act that immunized hospitals' medical peer review committees from civil liability for reporting physician incompetency to the Board of Medical Examiners.[53] The plaintiff argued "that this immunity granted appellees by the

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Takoma Park, Md., 134 F.3d 260, 269 (4th Cir. 1998); *Harvey v. Harvey*, 949 F.2d 1127, 1130– 31 (11th Cir. 1992); *see also Loce v. Time Warner Entm't Advance/Newhouse P'ship*, 191 F.3d 256, 266–67 (2d Cir. 1999) (holding that Time Warner's congressionally authorized, but non-mandatory, indecency policy was not state action).

[49] *See* 436 U.S. at 153–54.

[50] *See id.* at 151 n.1.

[51] *Id.* at 165.

[52] 789 F.2d 353, 356 (5th Cir. 1986)

[53] An amended version of this statute is codified at TEX. OCC. CODE §160.010.

State of Texas provided such encouragement to appellees that the peer review committee acted as an investigatory arm of the state."[54] Relying on *Flagg Brothers*, the Fifth Circuit rejected this argument, writing that the conferral of immunity "did not make the action of appellees a state action."[55]

Similarly, in *White v. Scrivner Corp.*, the Fifth Circuit considered whether a grocery store security guard's detention of a shoplifter constituted state action.[56] The plaintiff relied on a Louisiana statute "insulating merchants from liability for detention of persons reasonably believed to be shoplifters."[57] The court held that *Flagg Brothers* "require[d] rejection of this argument."[58] Noting that the statute allowed, but did "not compel merchants to detain shoplifters," the court held that the immunity statute could not constitute state action.[59]

Because §166.046 is a permissive statute, initiated at a physician's sole option, and because it does no more than withhold a cause of action, there is no coercion or participation rising to the level of state action.

b. Section 166.046 does not satisfy the public-function test.

The Supreme Court holds that state action exists when a private entity performs a

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[54] *Id.*

[55] *Id.*

[56] See 594 F.2d 140, 141 (5th Cir. 1979).

[57] *Id.* at 143.

[58] *Id.*

[59] *Id.*

function that is "traditionally the *exclusive* prerogative of the State."[60] These are powers "traditionally associated with sovereignty."[61] The public-function test is "exceedingly difficult to satisfy."[62] The Court has "rejected reliance upon the doctrine in cases involving":

> coordination of amateur sports, the operation of a shopping mall, the furnishing of essential utility services, a warehouseman's enforcement of a statutory lien, the education of maladjusted children, the provision of nursing home care, and the administration of workers' compensation benefits.[63]

Plaintiff argues that section 166.046 gives hospitals the power to decide a patient is no longer worthy of life-sustaining treatment. The statute does not give doctors or hospitals the power to take life; it acknowledges their right not to provide treatment inconsistent with their own conscience and long-standing medical ethics. In this respect, Plaintiff's premise is deeply flawed.

In the case at hand, Plaintiff cannot show a public function. It is true that in one exceptionally narrow circumstance - legally sanctioned executions - the state has an affirmative power to take life. But the power ends there; it has not "traditionally" or "exclusively" extended into the field of medicine. On the contrary, centuries of common law, and the state and federal constitutions, *bar* the State from taking the lives of private citizens. Thus, Plaintiff cannot cite, for example, a case in which a prison hospital has been held to have the power to deny a patient needed care.

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[60] *Jackson*, 419 U.S. at 353.

[61] *Id.*

[62] MARTIN A. SCHWARTZ, SECTION 1983 LITIG. CLAIMS & DEFENSES §5.14[A].

[63] *Id.* (footnotes omitted).

Section 166.046 concerns a quintessentially *private* function: medical decision-making.[64] Even when overlaid with state regulations, a hospital's decisions are its own.[65] Decisions about when to enter into and leave doctor-patient relationships are governed by the desires of the doctor and patient. A doctor's decision to terminate that relationship is left to his medical judgment and conscience, provided that he conforms to a non-statutory code of medical ethics. These private, personal decisions are not - and never have been - regarded as public functions.

c. Section 166.046 does not satisfy the nexus test.

Likewise, the Plaintiff cannot meet her burden to show that the nexus test applies to this case. The nexus test asks if the State has insinuated itself into a position of interdependence with the private actor, such that it was a joint participant of the enterprise.[66] In *Jackson*, the plaintiff sued a privately-owned utility company after the company disconnected her electricity.[67] The plaintiff argued that because the company had failed to provide adequate notice, her due process rights had been violated.[68] The plaintiff claimed that because the utility was state-regulated and was essentially a statewide monopoly, the utility was a state actor.[69] The U.S. Supreme Court disagreed, holding that there was not a

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[64] *See Blum*, 457 U.S. at 1011 ("We are also unable to conclude that nursing homes perform a function that has been traditionally the exclusive prerogative of the State." (quotations omitted)).

[65] *See id.* 1011–12 (holding that even if the state were obligated to provide nursing home services, "it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign").

[66] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 366, 95 S. Ct. 449, 461, 42 L. Ed. 2d 477 (1974).

[67] *Id.* at 346–47.

[68] *Id.* at 348.

[69] *Id.* at 350–52.

"sufficiently close nexus" between the conduct of the utility company and the state in order to conclude that the utility was a state actor.[70]

Here, like the utility company in *Jackson*, Houston Methodist Hospital is a privately owned and operated corporation. Plaintiff has not alleged that the State and Houston Methodist Hospital are joint participants of the same enterprise and there is absolutely no rational argument that there is a sufficiently close nexus between the conduct of Houston Methodist Hospital and the State. Accordingly, since Houston Methodist Hospital cannot be deemed a state actor, then Plaintiff's request for summary judgment fails as a matter of law.

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

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

Plaintiff spends 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. Houston Methodist Hospital continues to take no formal position on the constitutionality of the statute itself, but is prepared to defend its conduct, and the conduct of its healthcare providers that provided professional, ethical and compassionate care and treatment to Christopher Dunn. Simply put, Houston Methodist Hospital did not violate Plaintiff's constitutional rights and rejects Plaintiff's allegations in full. As such, Houston Methodist Hospital denies any assertion that

[70] *Id.* at 354–59 (noting "[d]octors, … are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State").

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 Hospital simply initiated the long-standing 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 Plaintiff complains, 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 Hospital specially excepts to Plaintiff's declaratory judgment cause of action regarding the constitutionality of TEXAS HEALTH AND SAFETY CODE § 166.046. With Dunn's natural death there is no longer a justiciable controversy concerning the administration of life-sustaining treatment. As further discussed above, declaratory judgment is not available when, like the case at bar, there is no justiciable controversy.[71] Therefore, all of Plaintiff's claims must be dismissed.

Texas courts may not render advisory opinions.[72] Nor do courts decide cases where no controversy exists between the parties.[73] In other words, a court must not render an advisory opinion in a case where there is no live controversy.[74] A declaratory judgment is only appropriate when a justiciable controversy exists concerning the rights and status of the

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

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

[73] *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).

[74] *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.").

parties and the controversy will be resolved by the declaration sought.[75] That is, the Declaratory Judgment Act does not empower a court to render an advisory opinion or to rule on a hypothetical fact situation.[76] 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.[77] "An advisory opinion is one which does not constitute specific relief to a litigant or affect legal relations."[78]

Clearly, there is no justiciable controversy between Plaintiff and Houston Methodist as Dunn's death has mooted any conceivable justiciable controversy between the parties.[79] Plaintiff seeks a declaratory judgment that Houston Methodist's "actions and planned discontinuance of life sustaining treatment" (emphasis added) violated Plaintiff's due process rights under both the Texas and United States Constitutions.[80] However, it is undisputed

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

[76] *Id.* at 164.

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

[78] *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).

[79] *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).

[80] 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.

that Houston Methodist never discontinued life-sustaining treatment, and even more importantly, Dunn is now deceased. Thus, Houston Methodist did not discontinue life sustaining treatment to Dunn and obviously cannot discontinue such life sustaining treatment in the future given Dunn's death. Because there is no longer a justiciable controversy between Plaintiff and Houston Methodist, a declaratory judgment is improper under well-settled Texas law and all claims in this lawsuit should be dismissed.[81]

A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome."[82] "The mootness doctrine implicates subject matter jurisdiction."[83] "[W]hen a case becomes moot the only proper judgment is one dismissing the cause."[84] Due to 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 Plaintiff simply wants to challenge the constitutionality of TEXAS HEALTH & SAFETY CODE § 166.046. Houston Methodist Hospital 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 Hospital has no interest or incentive to zealously litigate on what now amounts to an advisory opinion on a Texas Health & Safety Code provision. That advocacy role belongs to the legislature.

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[81] *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.

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

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

[84] *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.").

E. Houston Methodist Did Not Violate Dunn's Civil Or Due Process Rights.

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due.[85,86] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest.[87] But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that the deprivation occurred due to state action.[88] As discussed above, Houston Methodist Hospital is not a state actor. Plaintiff can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims must fail.

a. Plaintiff fails to identify a protected interest.

To state a due-process claim, a plaintiff must identify an interest the constitution protects. Plaintiff identifies two purported interests: life, and the right to make individual medical decisions. In fact, neither of those interests are implicated in the case at hand.

Plaintiff's arguments are premised on their mistaken understanding of Texas Advance Directives Act ("TADA"),[89] and she implies that a patient has a *constitutional right* to receive treatment from a physician that the physician does not wish to give. The constitution

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[85] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[86] The federal Due Process Clause, U.S. CONST. amend. XIV, §1, and Texas's Due Course of Law Clause, TEX. CONST. art. I, §19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[87] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

[88] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

[89] TEX. HEALTH & SAFETY CODE §§166.001–.166.

"generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[90]

Plaintiff has not confronted these fundamental precepts. Take, for example, their claim that TADA deprives patients of "life." In fact, it is the patient's illness that causes death; it is merely forestalled by life-sustaining intervention.[91] In *DeShaney*'s language, the life-sustaining treatment is "aid" that "secure[s]" the patient's life.[92] But patients have no constitutional right to this aid.[93] A physician is not *constitutionally obligated* to provide *any* treatment, including life-sustaining treatment.

A contrary holding would have severe consequences. Any illness or medical condition, if the responsibility of state actors, may cause constitutional injuries. If Plaintiff is right that the Constitution requires doctors to undertake treatment that *prevents or forestalls* illness, then patients would have a constitutional right to have *any and all* ailments treated. Yet the United States Supreme Court has expressly rejected this position.[94] Indeed, even in the unique prison context, courts have roundly rejected the notion that a patient has a right to receive "any particular type of treatment."[95]

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[90] *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

[91] *Vacco v. Quill*, 521 U.S. 793, 801 (1997) ("[W]hen a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology . . . .").

[92] 489 U.S. at 196.

[93] *Id.*

[94] *Id.* at 198–99; *accord Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007) (en banc) ("No circuit court has acceded to an affirmative access [to medical care] claim.");[94] *Johnson v. Thompson*, 971 F.2d 1487, 1495–96 (10th Cir. 1992) (rejecting argument that right to life includes right to receive medical care).

[95] *Long v. Nix*, 86 F.3d 761, 765 (8th Cir. 1996); *accord Jenkins v. Colo. Mental Health Inst. at Pueblo*, 215 F.3d 1337, at *1–2 (10th Cir. 2000) (unpublished).

The same analysis dooms Plaintiff's stated interest in the individual right to make medical decisions. That right is not diminished by TADA. Rather, TADA protects individuals' right to make their own medical decisions, confirming the longstanding rule that before terminating a patient-physician relationship, the physician must give the patient reasonable notice so that he can find someone who will comply with his wishes. But under *DeShaney*, an individual's right to make a decision does not compel a physician to implement it against the physician's own will. The patient's right is to make his choice, but this right does not overpower the physician's conscience.[96,97]

Plaintiff's claims of constitutional injury are predicated on the notion that a patient has a constitutional right not only to receive medical care, but to receive medical care of a specific type. But there is no constitutional right to medical care, let alone specific types of care, even if the care would save a person's life. Because physicians have no constitutional obligation to provide treatment they wish not to provide, Plaintiff's claims cannot succeed.

b. Plaintiff's arguments are based on a misconception about §166.046.

Plaintiff argues that §166.046 "violated David Christopher Dunn's [substantive and procedural] due process rights under the Texas Constitution and the U.S. Constitution,"

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[96] *See Harris v. McRae*, 448 U.S. 297, 318 (1980) ("Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.").

[97] *Harris* illustrates the danger in Plaintiff's conception of constitutional rights. If a constitutional life interest conferred an affirmative right to medical care, so would the constitutional abortion right confer an affirmative right to have the state provide abortions. Yet *Harris* rejected precisely such an argument, explaining:

> It cannot be that because the government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

Harris v. McRae, 448 U.S. 297, 318 (1980) (citations omitted).

and she seeks a declaration to this effect.[98] Plaintiff complains that §166.046 "allows doctors and hospitals the absolute authority and unfettered discretion to terminate life-sustaining treatment of any patient," regardless of the patient's or his decision-maker's wishes.[99] In fact, however, TADA delegates no such authority. It explicitly did not alter "any legal right or responsibility a person may have to effect the withholding or withdrawal of life-sustaining treatment in a lawful manner."[100] It did not grant physicians any new powers, and did not even require them to follow any procedure. It created a safe harbor for - that is, granted immunity to - physicians who withhold or withdraw life- sustaining intervention in a specific manner.

The traditional procedural due-process inquiry has two parts: (1) whether the plaintiff had a protected liberty or property interest; and (2) what process is due.[101,102] The substantive due-process inquiry looks at whether the state has arbitrarily deprived the plaintiff of a constitutionally protected interest.[103] But because neither the Texas nor U.S. Constitution protects against purely private harms, Plaintiff must also demonstrate that

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[98] Plaintiff's First Am. Pet. ¶3.

[99] *Id.* ¶4.

[100] *See* TADA §166.051 (emphasis added).

[101] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

[102] The federal Due Process Clause, U.S. CONST. amend. XIV, §1, and Texas's Due Course of Law Clause, TEX. CONST. art. I, §19, are functionally similar, and the Texas Supreme Court routinely relies on federal precedent in interpreting the state clause. *Univ. of Tex. Med. School at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). This is especially true of "state action issues," with respect to which the Court has explained that "[f]ederal court decisions provide a wealth of guidance." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997).

[103] *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015); *Simi Inv. Co. v. Harris Cty., Tex.*, 236 F.3d 240, 249 (5th Cir. 2000).

the deprivation occurred due to state action.[104] Plaintiff can show neither a constitutionally protected interest nor state action. Accordingly, her constitutional claims must fail.

III.
CONCLUSION & PRAYER

Plaintiff's Amended Motion for Summary Judgment must be denied in its entirety because Plaintiff's case is moot, she has failed to show that no genuine issue of material fact exists, and has also failed to prove various elements of their claims.

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL,** respectfully requests that this Court deny Plaintiff's Amended 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

[104] *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (holding that the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful"); *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 90–91 (Tex. 1997) (applying same doctrine to the Texas Constitution).

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 15th day of September, 2017.

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.