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SUPREME COURT OF TEXAS
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No. 19-0390

IN THE SUPREME COURT OF TEXAS

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

v.

HOUSTON METHODIST HOSPITAL
Respondent.

On Appeal from the First Count of Appeals, Houston, Texas.
(No. 01-17-00866-CV)

PETITIONERS' REPLY BRIEF

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WHY THE COURT SHOULD GRANT REVIEW

Methodist's Response elucidates the reasons this Court should grant review. According to Methodist and the Court of Appeals, there are **NO** circumstances where a court has jurisdiction to address the constitutionality of Tex. Health & Safety Code §166.046 ("§166.046"): either the patient dies and the case is moot; or, the patient lives and there is no substantive due process violation. Further, according to Methodist and the Court of Appeals, decision-makers for the patient have no rights either.

These positions are demonstrably and inarguably incorrect. Left uncorrected, the Court of Appeals' Opinion adversely affects every patient in a Texas hospital because the application of §166.046 is not limited to those patients who are gravely ill or in their last illness.

SUMMARY OF REPLY

Methodist admits that a constitutional controversy existed when Dunn was alive.[1] Methodist further admits that Dunn and Kelly have due process rights and that it strictly complied with §166.046 giving Dunn the "due process" it claims exists there.[2] Because Methodist invoked §166.046, both Kelly and Dunn made claims under 42 U.S.C. §1983 ("§1983") and the Declaratory Judgment Act ("DJA"). When

[1] Response p. 14.
[2] Response p. 6, 7, 12 and 14.

Dunn died, his claims passed to his Estate. That is why Kelly, *Individually* **and** on behalf of the *Estate* have pursued adjudication of their rights, respectively.

The death of Dunn did not moot either his DJA or civil rights claims for the violation of his procedural and substantive due process rights by Methodist through the use of §166.046, nor did his death moot Kelly's identical claims. The Appellate Court erred in finding the case was moot. Because there were cross-motions for summary judgment heard at the trial court's request, this Court must instruct the Court of Appeals to reverse and render the judgment that the trial court should have: that §166.046 is unconstitutional, facially and as applied, and Petitioners are entitled to nominal damages under §1983.

Significantly, Methodist *now* argues that it wanted to provide "palliative care" as Dunn was "suffering." Response, at 6-7; 9-10. Removing life-sustaining care to alleviate suffering, as Methodist argues is its right, is mercy killing – euthanasia – prohibited by Tex. Health & Safety Code §166.050.[3] Thus, the statute has an internal conflict: the prohibition of euthanasia on one hand; and legal immunity for it, on the other.

Finally, an award of nominal damages is mandatory where plaintiff pleads and establishes facts that a procedural due process violation occurred. *Farrar v. Hobby*,

[3] "Mercy Killing Not Condoned. This chapter does not condone, authorize, or approve mercy killing or permit an affirmative or deliberate act or omission to end life except to permit the natural process of dying as provided by the subchapter."

506 U.S. 103, 112 (1992) ("'…the denial of procedural due process should be actionable for nominal damages without proof of actual injury'"). This Court also follows *Farrar. See Grounds v. Tolar ISD,* 856 S.W.2d 417, 424 (Tex. 1992) (Gonzales, J. concurring.).

REPLY ARGUMENT

I. PETITIONERS' CLAIMS ARE NOT MOOT.

Methodist's entire response is based on the argument that because Dunn died of "natural causes" while still receiving life-sustaining treatment, Petitioners' challenge to §166.046's constitutionality and their §1983 claims immediately ceased to presents a live controversy. Methodist contends the only deprivation of anyone's rights giving rise to a claim would be withdrawing Dunn's life-sustaining care. It argues that because it ultimately did not terminate Dunn's life prematurely (*only* because Petitioners enjoined it), there was no deprivation of *any* right of either Kelly or Dunn and no judicial relief can be afforded them. Methodist's argument and the Opinion are legally incorrect. Further, neither have responded to the gravamen of Petitioners' claims, *i.e.*, both Kelly, *individually*, **and** in her capacity as the *Representative* of the Estate, suffered numerous violations of their substantive and procedural due process rights **BEFORE** Dunn's death through the invocation of the §166.046 procedure. Also, the capable of repetition yet escaping review exception to mootness applies to the DJ claims.

A. Petitioners' Rights to Due Process Were Violated before Dunn's Death.

It is not merely the termination of Dunn's life-sustaining care that would have constituted a civil rights violation; it was the overall lack of due process in the §166.046 procedure **and** substance of the law that allowed Methodist to act to terminate a patient's life prematurely against Petitioners' will that is unconstitutional. That Methodist was judicially halted from prematurely terminating Dunn's life with a TRO does not make the due process violations culminating in its decision to withdraw Dunn's life-sustaining care moot. Dunn mitigated his damage by obtaining a TRO.[4] Neither Methodist nor the Court of Appeals distinguish between "process" and "deprivation of right." Nor do either distinguish between a right to bring a DJA or claims under §1983. They contend that process deficiencies are not deprivations of rights because an actor must actually deprive someone of a constitutionally protected interest. Neither acknowledge that due process is constitutionally protected. Both contend that the only deprivation that could have occurred is the actual withdrawal of Dunn's life-sustaining care. Both the Opinion and Methodist reject that the right to life and the right to make individual medical

[4] Methodist argues that had it been allowed to withdraw life-sustaining care, a civil rights claim would have survived his death; but, because a TRO was obtained which prevented Methodist from executing its intended plan, no civil rights violation occurred. In other words, according to Methodist, because Dunn sought and fought to stay alive, his claims died with him.

decisions are also implicated here and that §166.046 is wholly deficient of due process.[5] Finally, Petitioners incurred nominal damages in the denial of due process.

B. Neither the Declaratory Judgment nor Civil Rights Claims in this Case Are Moot.

Methodist contends that the moment that Methodist agreed not to withdraw Dunn's life-sustaining care, there instantly and permanently ceased to be any claim under §1983 and the moment Dunn died there ceased to be a DJ right. Both arguments are incorrect.

As Petitioners have explained, Dunn's Estate may continue with the claim for the past violation of his civil rights, which occurred prior to his death. Kelly has an individual claim for past violations of her civil rights as §166.046 specifically 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. The merits of those claims have not been adjudicated. Methodist does not provide contrary arguments and authorities; it just repeats its incorrect assertions that no deprivation could have occurred since it ultimately did not remove Dunn's life-sustaining care.

Methodist also incorrectly claims that Kelly's plea for nominal damages does not save the §1983 case from mootness. Petitioners met their burden of pleading.

[5] **NO ONE IS DEFENDING THE CONSTITUTIONALITY OF §166.046, INCLUDING METHODIST.** The statute is literally constitutionally indefensible.

See Johnson v. City of Shelby, Miss., 135 S.Ct. 346, 347 (2014) (per curium) (in the context of a §1983 claim). In addition to pleading facts supporting their claim for damages, Petitioners specifically pled for damages, and "all such other relief, both general and special, at law or in equity, to which they may show themselves justly entitled." ICR 23 (Orig. Pet.); ICR 193 (lst Amd. Pet.).

C. The Capable of Repetition Yet Evading Review Exception to Mootness Absolutely Applies.

If this is not a case where this exception applies, then none exists. As noted in Petitioners' prior briefing, "[t]he '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." *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex. App.—Houston [lst Dist.] 1988, no writ). Importantly, Methodist still did not challenge the short duration and inability to obtain review before Dunn's death. Methodist simply states that "[w]hen Christopher died of natural causes while still receiving life-prolonging treatment from Methodist…the parties' dispute disappeared instantly." Resp. p. 14. But that is far too narrow a view of the exception and ignores the claims Petitioners are actually making.

Methodist claims that for the exception to apply, two elements must be met: 1) a deprivation must have occurred in the first place, (which Methodist admits occurred before a TRO issued), and 2) that §166.046 must evade review, which

Methodist also tacitly admits because it asserts Christopher's claims "disappeared instantly" upon his death.

These admissions also highlight another problem with the statute as Methodist presents it – only a healthcare provider has any rights under the statute. The patient does not; his surrogate does not. Only a healthcare provider has relief—immunity—under the statute. This absurdity emphasizes the real challenges to the statute by those harmed by it. A challenge would never come to fruition if the claims died the moment the victim of the statute did. That is the very definition of a claim which is capable of repetition yet always evades review.

Further, Methodist states it intends to utilize this statute in the future, yet argues Kelly has no standing to proceed with this case on her own behalf or that of Dunn's Estate. Methodist contends that if it utilized this statute on Kelly's other children in order to withdraw their life-sustaining care, that "would not create a justiciable controversy as the injury is not to the same patient." Resp. p. 15-16. In Methodist's view, there is never a circumstance under which a review of this statute can happen – solidifying the fact that this ***is*** a statute capable of repetition yet evading review (as Methodist demonstrates all the ways it believes this statute cannot be reviewed).

II. METHODIST'S "ALTERNATIVE GROUNDS" DO NOT INDEPENDENTLY REQUIRE AFFIRMANCE.

A. Kelly Has Standing Individually and Capacity as the Estate's Representative.

Raising this issue for the first time on appeal, Methodist incorrectly argues that Kelly has no standing to bring this case. The *Estate* has the standing necessary for the claims of Dunn and Kelly has *capacity* to continue the suit in her capacity as the Representative of the Estate of Chris Dunn. *See, e.g., Gatlin v. Moore*, 2013 WL 655189, at *2, n.23 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

B. Methodist Deprived Petitioners of the Right to Life and Self-Determination.

Courts understand that the process of withdrawal of life-sustaining care presents the risk of deprivation of a protected interest.[6] Section 166.046 violates substantive due process because the government has deprived patients of their constitutional rights of life and self-determination and has given that decision to the hospital by an arbitrary use of governmental power.

Incredibly, Methodist claims that neither the rights to life nor self-determination are implicated here. Methodist states that Dunn was terminally ill and even if it had carried out its plan to remove his life-sustaining care, it would not have deprived him of life, but allowed the natural disease to progress to its final

[6] "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).

conclusion. This argument is illogical and barbaric.[7] Dunn lived five weeks past the time Methodist employed §166.046. He was awake, alert and communicative.[8] But for the issuance of a TRO, Methodist would have prematurely terminated the life of a man who was awake, actively praying to stay alive.

What Petitioners did not want was for Dunn's death to be ***hastened*** by the removal of his life-sustaining care. Petitioners never asked Methodist to provide a cure, nor did they request anything extraordinary or beyond mere life-sustaining care – not even life-saving care. Rather, Petitioners requested care that would not hasten his death but would allow his disease to progress to its end – as Methodist did only after Petitioners obtained a TRO.

Methodist and the Court of Appeals only look to whether life-sustaining care was actually withdrawn from Dunn as the sole means of a deprivation of a constitutionally protected interest. That is not what Petitioners have argued. Petitioners explained all of the numerous deprivations of their due process rights, as they did in the trial court, which Methodist neither addressed in the trial court, here, or on appeal. It is not simply that final act – withdrawing life-sustaining care against a patient's will – that is the violation of their rights. Section 166.046 violates

[7] Further, Methodist's citation to a case where a patient *refused* life-sustaining care is unavailing and utterly inapplicable here. Dunn was filmed asking for his life-sustaining care to be maintained, in no way refusing life-sustaining care.

[8] *See* video summary judgment evidence in which Dunn is praying to stay alive taken on December 2, 2015.

procedural and substantive due process rights as the "protocol" unfolded, which requires awarding the Petitioners nominal damages and a judgment declaring the statute is facially and, as applied, unconstitutional. Methodist and the Court of Appeals simply ignore this part of Petitioners' argument.

C. Methodist Is Inarguably a State Actor.

Methodist argues the authority to end Dunn's life-sustaining treatment did not derive from §166.046. This is exactly why the constitutionality of §166.046 needs to be decided. Entities like Methodist believe they have the authority as private citizens – with state-granted, state-sponsored full, absolute immunity – to end lives against the will of patients through the state-created "protocol" in §166.046.

Methodist is a state actor because it is given the authority under state statute to determine that one's life will be ended prematurely against their will. Under no other statute can any private entity take one's life involuntarily with total autonomy and immunity. Only governments have been able to determine when one lives and dies in the context of criminal proceedings, but even then only with abundant procedural and substantive due process. Through §166.046, the State of Texas delegates this governmental authority to Texas' licensed hospitals.

CONCLUSION AND PRAYER

This Court should grant review. The Court of Appeals erred in sustaining the trial court's order granting Methodist's Motion to Dismiss. Section 166.046 is

unconstitutional facially and as applied to Dunn who, along with Kelly, are entitled to nominal damages for the infringement of their due process rights, including those occurring prior to Dunn's death. Petitioners pray this Court grant the petition and the relief set out in the petition. Finally, Petitioners pray for such other and further relief as they may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Texas Rules of Appellate Procedure 9.4(i)(2)(E), the undersigned attorney hereby certifies that the forgoing brief contains 2,394 words, excluding those portions exempted by TEX. R. APP. P. 9.4(i)(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.

/s/ *Joseph M. Nixon*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply has been electronically filed and served on the Respondent and all counsel for the Appellees and Real Parties in Interest below on September 4, 2019.

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