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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

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)

PETITION FOR REVIEW

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DESIGNATION OF RECORD REFERENCES

Clerk's Record

Clerk's Record	(CR[volume]: [page]) (RR[volume]: [page])
Reporter's Record	(CR:[page]); Exhibit X as referred to in the petition
Appendix	App [letter]

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

Nature of the Case: This appeal arises from a denial of the trial court to rule on cross-motions for summary judgment and the granting by the trial court of Methodist's motion to dismiss based on mootness. Dunn and Kelly sued Methodist under the Texas Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Chapter 37, and the Federal Civil Rights Act, 42 U.S.C. §1983, challenging the hospital's use of the Texas Advanced Directives Act, Tex. Health and Safety Code §166.046, seeking a declaration that §166.046 was unconstitutional both facially and as applied and for nominal damages for violation of his civil rights.

Trial Court Information: The Honorable William R. Burke, Presiding Judge, 189th District Court of Harris County, Texas

Course of Proceedings: Methodist urged its motions to dismiss on mootness while both Petitioner and Respondent urged cross motions for summary judgment.

Trial Court Disposition: The district court granted Methodist's motion to dismiss. The district court further denied Methodist's motion to dismiss under TCPA Chapter 74. Finally, the district court heard, but did not rule on the cross motions for summary judgment.

Parties in Court Of Appeals and Supreme: Appellant/Petitioner Evelyn Kelly, individually and on behalf of the Estate of David Christopher Dunn. Appellee/Respondent is Houston Methodist Hospital.

Evelyn Kelly, individually and on behalf of the Estate of David Christopher Dunn v. Houston Methodist Hospital, No. 1-17-00866-CV, 2019 (Tex.App-Houston [lst Dist], March 26, 2019, pet. filed). The Court of Appeals opinion was authored by

Justice Julie Countiss and joined by Chief Justice Radack and Justice Goodman.

Court: Court of Appeals Opinion/ Court of Appeals Disposition: The Court of Appeals affirmed the trial court's order granting Methodist's motion to dismiss on the grounds of mootness, holding that Dunn's death mooted his claims "because he succumbed to his terminal condition."

STATEMENT OF JURISDICTION

This court has jurisdiction because this case is important to the jurisprudence of the state, Tex. Gov't Code §22.001(a).

The Court of Appeals identified in its opinion the key question: Do declaratory judgment relief and claims to civil rights violations expire "as a result of Dunn's passing"? (Opinion p. 5).

In deciding that question in the affirmative, the justices deviated from United States Supreme Court precedent in *Honig v. Doe,* 484 U.S. 305 (1988) and this court's analysis in *Patel v. Tex. Dept. of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2014). (Standing to challenge constitutionality of statute). Instead, the Court of Appeals ignored the procedural due process claims, the substantive damages incurred pre-death, and the fact that Dunn mitigated his damages by obtaining a TRO against Methodist's use of §166.046, holding "there is no right to due process if there has not been a deprivation of a constitutionally protected interest." (Opinion p. 9).

The Court of Appeals further ignored U.S. Supreme Court precedent in *Honig,* 484 U.S. at 305 regarding the exception to the mootness doctrine of "capable of repetition yet escaping review" by holding the exception only applies if the same wrong may be inflicted on the same person. Here, the Court of Appeals ruled the exception is inapplicable because Dunn "cannot be subjected to the same complained of action again since he is deceased." (Opinion p. 11).

ISSUES PRESENTED

1. Did the Court of Appeals err in affirming the trial court's finding that Dunn's death mooted the civil rights claims under 42 U.S.C. §1983?

2. Did the Court of Appeals err in affirming the trial court's finding that Dunn's death mooted his facial and as applied constitutional challenge under the Texas Uniform Declaratory Judgment Act?

3. Did the Court of Appeals err in ignoring the trial court's implicit denial of Plaintiffs' Amended MSJ (where there were cross-motions for summary judgment) on the basis that the case was moot even though 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 *before* he died?

STATEMENT OF FACTS

David Christopher Dunn ("Dunn") was admitted as a patient of Methodist on October 12, 2015. (CR 1152). On November 11, 2015, Methodist provided Evelyn Kelly, Dunn's mother ("Kelly"), with a letter informing Kelly that Methodist intended to terminate the life-sustaining treatment ("LST") of her son, Dunn, and that a meeting of the hospital's ethics committee would take place to discuss removing Dunn's treatment. (CR 1152-53; 1174).

Methodist sent the letter pursuant to TEX. HEALTH & SAFETY CODE §166.046 ("§166.046") (*Id.*). Methodist then held an ethics committee meeting on November 13, 2015 and decided to terminate LST on Tuesday, November 24, 2015 despite the fact that Dunn was awake, alert and communitive. (CR 25-30).) (Tab J).[1] Dunn and Kelly obtained a temporary restraining order on November 20, 2015, ordering Methodist to "cease and desist all actions of any nature to pursue the removal of Dunn's LST through December 4, 2015". (CR 34). 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 in the Probate Court

[1] The summary judgment evidence included a video of Dunn, though sedated and intubated, communicating with his mother and his lawyers on December 2, 2015. This video is part of the appellate record and was shown on national television. A photo/frame of that video is Tab J.

No. 1 of Harris County, Texas." (CR 136-37).[2] Methodist continued LST pursuant to that order until Dunn's natural death. Dunn died on December 23, 2015. (*Id*.)

[2] Methodist's employee, Justine Moore, filed the guardianship proceeding, requesting the probate court appoint someone other than Kelly as guardian of Dunn (CR 1223). The guardianship application had the effect of abating the pending temporary injunction hearing. (CR 136-37).

SUMMARY OF ARGUMENT

The Court of Appeals erred in affirming the trial court's granting of Methodist's MTD on mootness and finding that 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 procedural or substantive due process or the constitutional challenge to §166.046. Alternatively, the mootness exception of capable of repetition yet evading review sustains claims for retrospective and/or prospective relief. Further, the Court of Appeals is wrong in its statement that the repetition of injury must happen to the same plaintiff. Plaintiffs' protected interests in life and to determine his own medical needs were violated when Methodist – under color of state law by utilizing §166.046 – deprived Dunn 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 the Court of Appeals considered these issues, this court must reverse and render the judgment that the trial court should have – that is, declare §166.046 is unconstitutional and that the Plaintiffs are entitled to nominal damages for their due process violations pursuant to 42 U.S.C. §1983.

ARGUMENT

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

Dunn's death did not moot his or Kelly's claims under 42 U.S.C. §1983, based on Methodist's utilization of §166.046 to terminate LST. The Court of Appeals ignored the procedural due process claims and incorrectly ruled that because (*after* this lawsuit was filed and a TRO issued) Methodist *voluntarily* decided it would not withdraw LST, Dunn never suffered a substantive due process violation before his death.[3] In other words, the Court of Appeals incorrectly reasoned because there was no substantive due process violation in the termination of Dunn's life, any procedural due process violation was not actionable and Dunn's death mooted his claims.

First, the Court of Appeals continually misstated 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 allowed Methodist to reach the decision to terminate a patient's life prematurely against his will that is problematic. That Methodist was stopped with a restraining order does not make the due process violations leading to its earlier or original decision moot.

[3] The Court of Appeals ignored the two orders which prohibited Methodist from "voluntarily" doing anything other than providing LST.

Plaintiffs also spent money on lawyers to sue Methodist and obtain a TRO. Those are damages incurred prior to Dunn's death. The Court erred in not making this distinction.

Methodist's claim of voluntary cessation of withdrawal of Dunn's LST 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 mootness in a similar situation.[4] In that case, the Court examined a statute where 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.[5] The permit holder voluntarily complied with the statute after the suit had been filed.[6] 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 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**

[4] 528 U.S.167, 189 (2000).
[5] *Id.* at 174-175.
[6] *Id.* at 189.

> **cannot reasonably be expected to start up again lies with the party asserting mootness.** Ibid.[7]
>
> ***
>
> Careful reflection on the long-recognized exceptions to mootness, however, reveals that the description of mootness as "standing 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.[8]

At no time has Methodist agreed to a permanent injunction prohibiting it from utilizing §166.046 or otherwise met this formidable burden. Thus, the fact that it "voluntarily" chose, after a TRO was obtained, to not terminate LST is not a factor in determining mootness. Further, such voluntary cessation 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 Plaintiffs have for past due process violations survived Dunn's 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 because §166.046, on its face, applies to all persons for whom LST is being utilized in Texas hospitals.

Section 166.046 allows 48 hours' notice of the ethics committee meeting, and in 10 days' time, LST may be removed, presumably resulting in death. It is

[7] *Id.* (Emphasis added).
[8] *Id.* at 190.

impossible for a patient bound to LST, let alone any person, to retain counsel and complete a lawsuit, with resulting appeals, in twelve days.

Second, and relatedly, the Court of Appeals conflated "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 the victim of the violation. Dunn's estate may continue with the claim for the past violations 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. Thus, Kelly has a prospective claim for relief as well in asking that this law be declared unconstitutional. *See Patel v. Tex. Dept. of Licensing and Regulation,* 469 S.W. 69, 77-78 (Tex. 2014).

Finally, 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. *Morgan v. Plano I.S.D*, 589 F.3d 740, 748-749 (E.D. Tex. 2009).

II. This Case Is Not Moot Under the Uniform Declaratory Judgment Act.

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."[9]

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. *See Patel* at 77-78. Neither was mooted by his death. Moreover, this controversy will actually be resolved by the judicial declaration sought.[10]

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 LST be withdrawn against Dunn & Kelly's express wishes in order to hasten Dunn's death — all of which happened before he died naturally, none

[9] *Id*. Citing Tex.Civ.Prac. & Rem. Code §37.008 (Vernon 1997).
[10] *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").

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.

Accordingly, Plaintiffs' declaratory judgment claims based on the violations of due process rights are not moot as they have already occurred and did not cease to be a live controversy because of Dunn's 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.

III. 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 of repetition yet evading review.[11] "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."[12]

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."[13] *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

[11] *State v. Lodge,* 608 S.W.2d 910, 912 (Tex. 1980).
[12] *Spring Branch I.S.D. v. Reynolds,* 764 S.W.2d 16, 18 (Tex. App.—Houston [lst Dist.] 1988, no writ).
[13] *Honig v. Doe,* 484 U.S. at 318.

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.[14] At the time the case was before the U.S. 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.[15] The Court found his civil rights claim was not moot because it was capable of repetition yet evading review.[16]

The Court then examined the lengthy process provided in the statute which allowed for judicial review and that had taken seven years in just this one case to fully adjudicate the claims.[17] By the point the case reached the Supreme Court some students affected were aged out of the program before being able to challenge any disciplinary proceedings or loss of rights.[18] Finding "any resulting claim [plaintiff] may have for relief will surely evade our review", so the Court determined the merits of the case.[19] Thus, the court applied the exception to mootness even though the same plaintiff would not be again subjected to the due process inquiry.

In *Kremens v. Bartley*, 431 U.S. 119, 133 (1977) the United States Supreme Court stated clearly, “[c]ourts do not require or always anticipate that the repetition

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 322.
[18] *Id.* at 322-23.
[19] *Id.* at 323.

will occur to the same plaintiff in all circumstances." *Id.* at 133. *See also, Roe v. Wade* 410 U.S. 113, 124-125 (1973) ("Our law should not be that rigid…[I]f man is to survive, [pregnancy] will always be with us."). Thus, the Court of Appeals misapplied the law when it held that the repetition of injury must occur to the same person.

IV. Plaintiffs' Entitlement to 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 are asserted by a decedent's estate.[20] 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."[21] Similarly, in *Memphis Community School Dist. v. Stachura*, the U.S. Supreme 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."[22] The court also referenced *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."[23]

Accordingly, the Court of Appeals erred in holding that there can be no claim for procedural due process violations without a violation of substantive due process.

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[20] *See e,g., Javits v. Stevens,* 382 F.Supp. 131, 136 (S.D.N.Y. 1974).
[21] *DA Mortgage, Inc. v. City of Miami Beach,* 486 F.3d 1254, 1259 (11th Cir. 2007).
[22] 477 U.S. 299, 310 (1986).
[23] *DA Mortgage,* 486 F.3d at 1259-60 citing 435 U.S. 247, 266-67 (1978).

(Opinion p. 8-9). Plus, this morbid and legally incorrect statement from the Court of Appeals invites future harm to every patient in a Texas hospital:

> And Kelly's assertion that "the procedures outlines 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" is without force here since there can no longer be a "risk of mistake or unjustified deprivation of life" with respect to Dunn because he succumbed to his terminal condition."

(Opinion, p. 9).

With this statement, the Court of Appeals has decided that it is impossible for a court to ever review §166.046. According to the Court of Appeals, if the patient dies, the case is moot. *Id*. Likewise, if the patient survives, there is no substantive due process injury regardless of procedural due process violations. (Opinion p. 11). And, in either event, when the hospital correctly complies with §166.046, as it did here, the statute gives the hospital complete immunity from liability. It is error for the Court to have reached these illogical conclusions.

V. 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 where cross-motions for summary judgment based on mootness were before this court, 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.

Neither Methodist nor the Court of Appeals nor the Texas Attorney General chose to defend the constitutionality of the statute.[24] 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.[25]

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 LST without due process.[26] The statute states: "If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision

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[24] The Attorney General submitted a brief to the trial court stating his opinion that §166.046 was unconstitutional and that he chose not to defend it. Tab L.

[25] *Grynberg v. Grey Wolf Drilling Co. L.P.,* 296 S.W.3d 132*,* 136 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (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").

[26] 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, 17 (Tex. App.—Texarkana 2011, no pet.); *Pickett v. Texas Mut. Ins. Co.,* 239 S.W.3d , 826, 834 (Tex. App.—Austin 2007, no pet.).

made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics or medical committee..."[27] If a conflict exists, the statute then gives a patient limited rights as set out in §166.046(b)(1)-(4).

As written, §166.046 denies patients constitutional due process before a life-terminating decision is made. There is no impartiality in the hospital's ethics committee. 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. *See* §166.046(b) (1)-(4).

By statutorily protecting the hospital's committee from liability and providing it the opportunity to deprive an individual of life by terminating LST 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.[28] 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

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[27] §166.046(a).
[28] *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).

to a risk of mistaken or unjustified deprivation of rights guaranteed by both Texas' and the United States constitutions.

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."[29] 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.[30] Thus, a threshold inquiry in §1983 cause of action is whether plaintiff has alleged a violation of a constitutional right or of federal 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 through an impartial tribunal.[31] A competent trial requires that the trial must be

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[29] *Gomez v. Toledo,* 446 U.S. 635, 638 (1980).

[30] *See Gomez,* 446 U.S. at 640 (1980); *Schreiber v. City of Garland*, 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).

[31] *R.M.T.,* 352 S.W.3d at 17 *(*Tex. App.—Texarkana 2011*,* no pet.); *Pickett,* 239 S.W.3d at 834. It is important to note, that while the Texas Constitution is textually different in that it refers to "due

conducted before an unbiased judge.[32] 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.[33]

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.[34] Denial of the right to due process requires the award of nominal damages even without proof of actual injury.[35] The Court of Appeals disregarded such constitutionally required due process. Here, §166.046 violates multiple facets that make up the constitutional right to due process by: (1) failing to have an important tribunal (2) failing to provide a patient (or their surrogate decision-maker) an opportunity to be heard, (3) failing to give a reasonable opportunity to prepare for a hearing, (4) failing to give adequate notice of the reasons why removal of LST is to occur, (5) failing to allow for a decision to be reached through an impartial

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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.

[32] *Johnson v. Mississippi*, 403 U.S. 212, 216, (1971) *Martinez v. Texas State Bd. Of Medical Examiners,* 476 S.W.2d 400, 405, Tex. Civ. App.—San Antonio 1972, writ refused n.r.e.

[33] *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,* 435 U.S. at 259 (1978)).

[34] *Wiland,* 216 S.W.3d at 356 (citing *Carey,* 435 U.S. at 259 (1978)).

[35] *Id.* at 356-57 (citing *Carey,* 435 U.S. at 259).

tribunal, (6) failing to require objective standards, and (7) failing to provide a record or right of review. The Court of Appeals erred in stating procedural due process rights are only protected by a showing of substantive due process damages.

Dunn was sentenced to a premature death. That is a substantive due process violation.[36] It occurred by use of a statute which denies procedural due process. 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 being ill. Neither the State of Texas nor its surrogate has the authority to sentence ill people to premature death.[37]

There is simply no precedent or constitutional justification for Methodist's ethics committee 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 in light of the due process intended to protect the first liberty guaranteed in Article 1, Section 19 of the Texas Constitution and the Fourteenth Amendment. Accordingly, the use of §166.046 by Methodist deprived Plaintiffs' of their civil rights under color of state law.

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[36] Dunn mitigated his damages by obtaining a TRO.

[37] *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)) *Cruzan* also held "It cannot be disputed that the Due Process Clause protects an interest in life." *Id.* at 281.

CONCLUSION AND PRAYER

For the above reasons, Kelly respectfully requests the Court (i) require full briefings, (ii) grant review, (iii) reverse the judgment of the Court of Appeals affirming the trial courts final judgment signed on March 26, 2019 and (iv) either rule on or remand to the Court of Appeals for a determination of the cross-motion for summary judgment and the constitutionalities, both facially and as applied, of Tex. Health & Safety Code §166.046.

Respectfully submitted,

/s/ Joseph M. Nixon

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 9.4(i)(3), I certify that the foregoing Appellant's Brief contains 4,442 words, excluding those portions not counted by TEX. R. APP. P. 9.4(i)(1). I further certify that this brief has been prepared using a typeface no smaller than 14-point, except for footnotes which are 12-point.

/s/ Joseph M. Nixon
Joseph M. Nixon

CERTIFICATE OF SERVICE

I hereby certify that I have complied with the electronic filing rules for this Court, and that on June 18, 2019, a true and correct copy of the foregoing Appellant's Brief was e-filed and also e-served on all counsel listed below in accordance with the Texas Rules of Appellate Procedure.

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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)

APPENDIX

Opinion of the First Court of Appeals and Judgment	Tab A
Order of the Trial Court (CR T544-45	Tab B
Tex. Health Safety Code Sec 166.046	Tab C
Methodist Ethics Notice Letter (CR 25-30)	Tab D
Plaintiffs' Amended Motion for Summary Judgment with Exhibits (CR 1152-1183)	Tab E
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 (CR 1184-1251)	Tab F
Defendant, Houston Methodist Hospital's Traditional and No-Evidence Motion for Summary Judgment (CR 1254-1274)	Tab G

Plaintiff's Response to Defendant's Motion to Dismiss for Mootness, Chapter 74 Motion to Dismiss, and Traditional Motion for Summary Judgment.	Tab H
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 I
Defendant Houston Methodist Hospital f/k/a The Methodist Hospital's Response to Plaintiff's Amended Motion for Summary Judgment (CR 1281-1306	Tab J
Photo of Chris Dunn praying to stay alive, taken from video on Dec. 2, 2015.	Tab K
Brief of the Honorable Ken Paxton, Attorney General of Texas to the trial court.	Tab L

TAB A

Opinion issued March 26, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00866-CV

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
Trial Court Case No. 2015-69681

MEMORANDUM OPINION

Appellant, Evelyn Kelly, Individually and on Behalf of the Estate of David Christopher Dunn, challenges the trial court's order dismissing her claims against appellee, Houston Methodist Hospital ("Methodist"), as moot. In two issues, Kelly

contends that the trial court erred in dismissing her claims against Methodist as moot and that the trial court should have granted summary judgment in her favor.

We affirm.

Background

On November 20, 2015, Dunn, prior to his death, filed an Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief, seeking to preserve the life-sustaining treatment for a terminal condition that he was receiving at Methodist, a hospital located in Houston, Texas. Dunn also sought a declaration that Texas Health and Safety Code section 166.046 ("section 166.046"),[1] a statutory scheme that Methodist used to determine it would withdraw his life-sustaining treatment, violates due process. Methodist agreed to a temporary restraining order preserving the status quo of the life-sustaining treatment being provided to Dunn for fourteen days. A temporary injunction hearing was set for December 3, 2015, but, before the hearing, Methodist requested an abatement of the case while Dunn's guardianship issues were being resolved in probate court. In an agreed order of abatement, Methodist agreed to preserve the status quo by continuing life-sustaining treatment during the abatement.

[1] TEX. HEALTH & SAFETY CODE § 166.064.

On December 23, 2015, Dunn succumbed naturally to his terminal condition. At the time of his death, the case was still abated and Methodist had not ever withdrawn his life-sustaining treatment.

After Dunn's death, Kelly filed a motion to lift the abatement and substitute the plaintiff "David Christopher Dunn" with "Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn." The trial court entered an agreed order granting Kelly's motion and also granted her permission to file a first amended petition.

In her first amended petition, filed on February 2, 2016, Kelly alleged that she is the mother of David Christopher Dunn, a Texas resident who was receiving life-sustaining treatment at Methodist for "an unidentified mass on his pancreas which caused damage to other organs." Dunn "faced immediate irreparable harm of death" if Methodist discontinued the life-sustaining treatment. Methodist informed Kelly and Dunn on November 10, 2015, that it planned to initiate procedures to discontinue Dunn's treatment.

After a hearing before a committee, pursuant to section 166.046, Methodist determined that it would discontinue life-sustaining treatment "on or about Monday, November 23, 2015." "Dunn had neither legal counsel nor the ability to provide rebuttal evidence" at the committee meeting. Kelly asserted that the Texas Constitution and the U.S. Constitution guaranteed Dunn a representative to advocate

for his life and an opportunity to be heard when life-sustaining treatment was being removed.

In her first amended petition, Kelly asserted a cause of action against Methodist for a declaratory judgment that section 166.046 violates procedural and substantive due process. She alleged that section 166.046 violated her and Dunn's rights to procedural due process by "failing to provide an adequate venue for [them] and those similarly situated to be heard in this critical life-ending decision," failing "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," and by failing to "provide a reasonable time or process for a patient to be transferred." Kelly alleged that their substantive due process rights were violated because "there [was] no evidentiary standard imposed by [s]ection 166.046" and the "doctor and ethics committee [were] given complete autonomy in rendering a decision that further medical treatment [was] 'inappropriate' for a person," like Dunn, "with an irreversible or terminal condition." Kelly also asserts a cause of action against Methodist for violation of her and Dunn's civil rights pursuant to Chapter 42, section 1983,[2] of the United States Code based on the same alleged due process violations.[3] She sought recovery for attorney's fees and costs.

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2 42 U.S.C. § 1983.

3 Kelly also asserted a claim against Methodist for intentional infliction of emotional distress, which she later abandoned.

On April 22, 2016, Methodist filed a motion to dismiss, arguing, among other things, that Kelly's claims for violations of due process and civil rights against Methodist should be dismissed as moot because "[a]s a result of Dunn's passing," Kelly's "claims no longer present a live case or controversy," and "[a]ny opinion rendered . . . on such issues would constitute an advisory opinion." In response, Kelly argued that Dunn's death did not moot the due process claims and that "[t]he absolute authority and unfettered discretion by . . . Methodist Hospital's application of [s]ection 166.046[] violated Dunn's right to due process of law" as guaranteed to him by the United States and Texas constitutions.

On October 13, 2017, the trial court granted Methodist's motion to dismiss on the grounds that Kelly's claims for due process and civil rights violations were moot. It then dismissed Kelly's lawsuit against Methodist for lack of subject-matter jurisdiction, without expressly ruling on the parties' competing, pending motions for summary judgment.

Mootness Doctrine

Whether the trial court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The mootness doctrine implicates subject-matter jurisdiction. *See Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993). Whether a claim is moot depends on whether there is a justiciable

controversy remaining between the parties. *City of Hou. v. Kallinen*, 516 S.W.3d 617, 622 (Tex. App.—Houston [1st Dist.] 2017, no pet.). A justiciable controversy must exist between the parties at every stage of the legal proceedings. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). If a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome, a case is moot. *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005). The same is true when a judgment would not have any practical effect upon a then-existing controversy. *Kallinen*, 516 S.W.3d at 622 (citing *Zipp v. Wuemling*, 218 S.W.3d 71, 73 (Tex. 2007)). Thus, under certain circumstances, the death of a party may render a case moot. *Zipp*, 218 S.W.3d at 73.

Here, Kelly asserted two causes of action against Methodist. In her first cause of action, she sought a declaratory judgment, pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code,[4] that Methodist's "actions in furtherance of coming to its decision to discontinue life[-]sustaining treatment under" section 166.046 "infringed" upon her and Dunn's federal and state "due process rights." In her second cause of action, Kelly asserted a claim for deprivation of due process rights pursuant to 42 U.S.C. § 1983 based on Methodist utilizing section 166.046 to cease provision of life-sustaining treatment to Dunn. Thus, both causes of action asserted by Kelly were based on alleged due process violations.

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[4] TEX. CIV. PRAC. & REM. CODE § 37.001–.011.

The United States Supreme Court has determined that due process[5] has both procedural and substantive components. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 331 (1986). "A violation of substantive due process occurs only when the government deprives individuals of constitutionally protected rights by an arbitrary use of its power." *Byers v. Patterson*, 219 S.W.3d 514, 525 (Tex. App.—Tyler 2007, no pet.) (citing *Simi Inv. Co. v. Harris Cty.*, 236 F.3d 240, 249 (5th Cir. 2000)). Procedural due process protects an individual from deprivation of "certain substantive rights—life, liberty, and property—without constitutionally adequate procedures." *Bexar Cty. Sheriff's Civil Serv. Comm'n v. Davis*, 802 S.W.2d 659, 661 (Tex. 1990). Accordingly, an analysis of due process claims—whether procedural or substantive—requires an inquiry into whether the plaintiff has been deprived of a protected interest. *See id.*; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*,

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[5] The due course of law guarantee in the Texas Constitution provides:

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX. CONST. art I, § 19. The federal due process clause, which is nearly identical, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. CONST. amend. XIV, § 1; *see also Univ. of Tex. Med. Sch. at Hou. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (explaining courts regard terms "due course" and "due process" "without meaningful distinction").

526 U.S. 40, 59 (1999) ("Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process.").

The foundation for Kelly's request for relief was Methodist's determination to remove the life-sustaining treatment Dunn had been receiving at its facility allegedly without providing procedural due process and in violation of substantive due process. The constitutionally-protected interests that she alleged she and Dunn were deprived of without due process are the "rights to life and self-determination to make one's own medical decisions."[6] It is undisputed that Methodist continued the life-sustaining treatment allegedly desired by Dunn until he passed away naturally from his terminal condition. Accordingly, no action inconsistent with Dunn's alleged desires regarding his medical treatment was ever taken and he was not actually deprived of any constitutionally-protected right by Methodist's utilization of the procedure set forth in section 166.046. Because there was no deprivation of his rights, and there can be no deprivation of his future rights by these means due to his death, there is also no remaining controversy between the parties in regard to the alleged due process violations.

Kelly argues, without any citation for support, that "[a]s written, § 166.046 denies patients constitutional due process before a life-terminating decision is

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[6] For purposes of this opinion, we do not need to decide whether there is a constitutionally protected right to "self-determination to make one's own medical decisions." *See* TEX. R. APP. P. 47.1.

made." But, as we previously explained, there is no right to due process if there has not been a deprivation of a constitutionally-protected interest. *See Sullivan*, 526 U.S. at 59; *Davis*, 802 S.W.2d at 661. And Kelly's assertion that "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" is also without force here since there can no longer be a "risk of mistake or unjustified deprivation of life" with respect to Dunn because he succumbed to his terminal condition.

Accordingly, we hold that Kelly's claims, which are all based on the alleged due process violations, are moot.

A. Nominal Damages

Kelly argues that even if the underlying claims at issue are moot, her claim for nominal damages pursuant to section 1983 keeps the claims alive because "[d]eath does not moot a § 1983 claim for past damages that may be asserted by a decedent's estate." We agree with Methodist that "a claim for nominal damages, extracted late in the day from [Kelly's] general prayer for relief and asserted solely to avoid otherwise certain mootness, [necessitates] close inspection." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). And where, as here, there has been no deprivation of constitutional rights, a claim for nominal damages cannot save a moot claim. As the United States Supreme Court has emphasized, "whatever

the constitutional basis for § 1983 liability, such damages must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation"—a conclusion that "simply leaves no room for non-compensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (quoting *Carey v. Piphus*, 435 U.S. 247, 265 (1978)). Because the claims in this case were mooted before any deprivation, and, thus, no due process violation could potentially occur, Kelly is not entitled to damages. *See id.* Accordingly, there is no surviving nominal damages claim that could arguably keep the controversy alive in this case.

B. Capable of Repetition Yet Evading Review

Kelly also argues that the claims at issue are capable of repetition yet evading review and are, therefore, excepted from application of the mootness doctrine in this case.

"Capable of repetition yet evading review" is a "rare exception to the mootness doctrine." *Tex. A & M Univ.—Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011) (citing *Lara*, 52 S.W.3d at 184). To invoke this exception, a party must establish that both (1) the challenged act is of such a short duration that the issue becomes moot before review may be obtained, and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *Lara*, 52 S.W.3d at 184–85.

This exception does not apply to Dunn because he cannot be subjected to the same complained-of actions again since he is deceased. *Id.* (explaining requirement of exception is that same complaining party will be subjected to same action again). Kelly does not assert in her brief that she has a reasonable expectation that she will personally be subjected to the same action again. But in the trial court, she did assert that she "has other children" and "fears that without a declaration of unconstitutionality, this situation may repeat itself, while evading review." However, the capable of repetition element requires a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. *See, e.g.*, *City of Dall. v. Woodfield*, 305 S.W.3d 412, 419 (Tex. App.—Dallas 2010, no pet.) (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). A merely "theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test." *Id.*; *see also Murphy*, 455 U.S. at 482 (explaining if every theoretical or physical possibility were sufficient to satisfy test then "virtually any matter of short duration would be reviewable"); *Lara*, 52 S.W.3d at 184 (holding former inmates did not meet capable of repetition requirement of exception where "[w]hether and when" they "may be charged with a crime that would lead to their incarceration" and subject them to the same conduct that allegedly violated their constitutional rights was "speculative"). Thus, Kelly's asserted fear that she or one of her surviving children may be subject to the

procedures in section 166.046 again in the future is too speculative to meet the requirements of the exception.

Accordingly, we hold that the exception to the mootness doctrine for issues capable of repetition and evading review is inapplicable here.

We overrule Kelly's first issue challenging the trial court's dismissal for mootness. Because we agree that the claims at issue are moot, we lack subject-matter jurisdiction to consider her remaining issue.

Conclusion

We affirm the trial court's order dismissing the claims in this case for lack of subject-matter jurisdiction.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-17-00866-CV

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

V.

HOUSTON METHODIST HOSPITAL, Appellee

Appeal from the 189th District Court of Harris County.
(Tr. Ct. No. 2015-69681).

This case is an appeal from the order dismissing the underlying case for lack of subject-matter jurisdiction signed by the trial court on October 13, 2017. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's dismissal order contains no reversible error. Accordingly, the Court **affirms** the trial court's dismissal order.

The Court **orders** that appellant, Evelyn Kelly, Individually and on Behalf of the Estate of David Christopher Dunn, pay all appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered March 26, 2019.

Panel consists of Chief Justice Radack and Justices Goodman and Countiss. Opinion delivered by Justice Countiss.

TAB 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

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

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

TAB C

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

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 to legislation effective May 29, 2019, of the 2019 Regular Session of the 86th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

TAB D

HOUSTON Methodist
LEADING MEDICINE

J. Richard Cheney
Project Director

Biomedical Ethics
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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 E

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.,*

[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

[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

[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.

[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.

[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

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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.

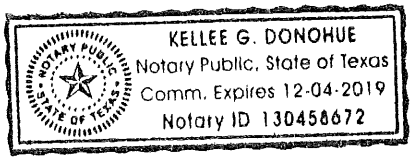
FURTHER, your affiant sayeth naught.

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.



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.

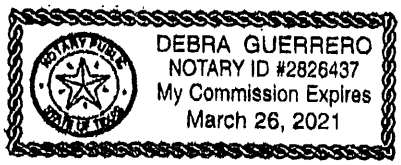
FURTHER, your affiant sayeth naught.

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 F

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

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[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

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[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

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[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,

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

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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.

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