CAUSE NO. 2020-61396

MARIO TORRES and ANA PATRICIA TORRES individually and A/N/F/ of N.T., a minor	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	HARRIS COUNTY, TEXAS
TEXAS CHILDREN'S HOSPITAL and DR. JOHN DOE and DR. JANE DOE	§	
Defendants,	§	234TH JUDICIAL DISTRICT

DEFENDANT TEXAS CHILDREN'S HOSPITAL'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION AND REHEARING OF ORDER DENYING PLAINTIFFS' APPLICATION FOR A TEMPORARY INJUNCTION

Defendant Texas Children's Hospital ("TCH") files this Response to Plaintiffs' Motion for Reconsideration and Rehearing of Order Denying Plaintiffs' Application for a Temporary Injunction ("Plaintiffs' Motion"). In support, TCH respectfully shows this Court the following:

INTRODUCTION

Plaintiffs' Motion should be summarily denied because it is too little, too late. In their motion, Plaintiffs claim that they have new, additional evidence in support of their Application for Temporary Injunction. Setting aside the fact that such evidence, as shown below, is actually no evidence at all, Plaintiffs' Motion comes not just after this Court denied Plaintiffs' Application for Temporary Injunction on October 2, 2020, but after this Court's ruling was ***affirmed in full*** by the Court of Appeals on October 9, 2020. This Court should decline Plaintiffs' untimely request to reconsider its October 2, 2020 order because Plaintiffs have failed to provide this Court any explanation why they were unable to obtain the alleged evidence prior to that order when the first brain death test established that N.T. was dead no later than September 27, 2020. *See* Transcript of 10/2/20 Temporary Injunction Hearing at 42-42, 44-45, 64-65, 77.

As TCH showed, obtaining the alleged evidence was certainly possible where TCH was able to secure the testimony of a non-treating pediatric neurologist, Gary Clark, and present him at the temporary injunction hearing on October 2, 2020 even though TCH was not sued until September 30, 2020. *Id*. at 75-82. Plaintiffs, particularly after they retained counsel sometime before the filing of this lawsuit on September 30, 2020, could have done the same. But Plaintiffs never presented any evidence that they made ***any*** – much less a reasonable – effort to obtain controverting expert testimony prior to the temporary injunction hearing. Instead, they repeatedly misrepresented to this Court that they needed to first be able to obtain a transfer of N.T. to another hospital in order to obtain a second opinion on N.T.'s status even though there is no dispute that physicians – not hospitals – provide second opinions. Indeed, the fact that Plaintiffs have now obtained a declaration from a physician who has offered to provide a second opinion belies that argument. But even if Plaintiffs had tried but simply needed more time to obtain a second opinion, Plaintiffs could have but failed to object to the ancillary court's setting of the temporary injunction hearing for October 2, 2020 or requested a continuance of that hearing from this Court.

Furthermore, neither of the declarations that Plaintiffs claim to support their motion for reconsideration justify such extraordinary, untimely relief. First, Plaintiffs submit the declaration of a Cuban physician who does not even testify that N.T. is not brain dead. That physician also ***cannot*** do so because he admits that he has not reviewed N.T.'s medical records or physically examined N.T. This Court should not reconsider its October 2, 2020 temporary injunction order based on a non-existent opinion that has no factual basis. Second, Plaintiffs submit the declaration of a California plaintiffs' attorney whose testimony is incompetent at worst and irrelevant at best. For example: (1) the attorney is not qualified to offer any expert medical opinions on whether N.T. is brain dead and whether N.T.'s treating physicians' properly determined and pronounced N.T.'s

death; (2) the attorney's testimony regarding his work on two other cases allegedly involving brain dead individuals is irrelevant to this case; and (3) this Court certainly does not need to hear the attorney's opinions on what he believes the applicable law is because the Court of Appeals has already held that this Court got the questions of law in this case right.

Finally, this Court cannot and should not reconsider its October 2, 2020 order ***after*** the Court of Appeals has already affirmed that order. This Court, the parties, and the Court of Appeals expended extraordinary time, effort, and resources in connection with Plaintiffs' appeal only for Plaintiffs to now try to drag everyone back to square one based on declarations that should have been obtained earlier and do not offer any opinions of value. Plaintiffs also fail to cite any authority authorizing this Court to reconsider its ruling where the Court of Appeals has already affirmed this Court's October 2, 2020 order denying Plaintiffs' Application for Injunction. Permitting reconsideration in this situation, in contrast, would violate Texas Rule of Appellate Procedure 29.5 by: (1) improperly interfering with the Court of Appeals' jurisdiction by allowing Plaintiffs to use this Court to vacate the Court of Appeals' adverse ruling against them; and (2) interfering with or impairing "the effectiveness of any relief sought or that may be granted on appeal" by vacating the Court of Appeals' decision granting TCH's request to affirm this Court's order.

At some point, this legal carousel must come to an end, and that time has passed. Consequently, TCH respectfully requests that this Court deny Plaintiffs' Motion in full.[1]

[1] In Paragraph 11 of their motion, Plaintiffs summarily assert that N.T. is allegedly "being denied essential nutrition to sustain [N.T.'s] current state of life and the functioning of [N.T.'s] vital organs." That is untrue where TCH has been providing N.T.'s body basic nutrition in the form of glucose and saline. N.T., who bears the burden of proof, has not presented any evidence that such basic nutrition is not being provided or that the basic nutrition being provided is insufficient "to sustain [N.T.'s] current state of life and the functioning of [N.T.'s] vital organs."

ARGUMENT

I. Neither of the Two New Potential Witnesses Cited By Plaintiffs Justify Reconsideration of This Court's October 2, 2020 Order Denying Plaintiffs' Application for Temporary Injunction

Plaintiffs base their motion for reconsideration on declarations by two new potential witnesses: (1) Dr. Calixto Machado, a Cuban physician; and (2) Mr. Christopher B. Dolan, a California plaintiffs' attorney. As shown below, neither declaration supports Plaintiffs' extraordinary and untimely request that this Court reconsider its October 2, 2020 order denying their Application for Temporary Injunction after the Court of Appeals has affirmed that order.

A. Dr. Machado's Declaration Does Not Offer Any Competent or Relevant Evidence That Would Justify Reconsideration of the This Court's Order

First, Dr. Machado's declaration is irrelevant to any issue regarding the merits of this Court's October 2, 2020 order denying Plaintiffs' Application for Temporary Injunction where Dr. Machado ***does not*** opine that Nick is not brain dead. Indeed, Dr. Machado – who apparently resides in Cuba – cannot render such an opinion where he states in Paragraphs 37 and 42-45 of his declaration that he has not even reviewed Nick's medical records or, obviously, examined Nick in person. Therefore, Dr. Machado has absolutely no factual basis for even speculating – much less stating with reasonable medical probability – that Nick is not brain dead.

Second, Dr. Machado's qualifications are unproven. It appears in Paragraphs 3-4 of his declaration and his curriculum vitae that all of his medical education and training was in Cuba, and he does not state that he is licensed to practice medicine in any jurisdiction in the United States or is familiar with the standard of care for determining brain death in Texas or anywhere else in the United States.

Third, Dr. Machado's stressing of the risks of determining irreversible cessation of all neurologic activity during an "acute phase of trauma" in Paragraphs 34, *et seq.* of his declaration

– even if valid – cannot be applied in this case where Dr. Machado: (1) does not define how long an "acute phase of trauma" lasts in general or in this specific case; (2) offers no evidence that N.T. was ever in an "acute phase of trauma" during his hospitalization or that such a period extended to the time when either or both brain death studies were performed on N.T.; and (3) does nothing more than speculate that "[i]t is more probable than not that [N.T.] is in the acute phrase of his brain trauma" (Paragraph 35) because he admits he has not reviewed N.T.'s medical records.

Even more troubling, Dr. Machado does not indicate exactly how much longer N.T. should continue to be ventilated until allegedly appropriate confirmatory testing can be performed. Is it one week, one month, six months, or longer? Both of TCH's expert witnesses at the October 2, 2020 temporary injunction hearing testified that N.T. was properly determined to be dead and pronounced dead without any criticisms of the timing of the exams and tests used to make that determination and pronouncement. If Plaintiffs truly believed that there was an issue regarding the timing of N.T.'s treating physicians' exams and tests in determining and pronouncing N.T.'s death, then Plaintiffs' counsel could and would have cross-examined N.T.'s physicians on that issue during the October 2, 2020 temporary injunction hearing. But they did not.

Fourth, Dr. Machado's citation of examples of two other patients who were allegedly incorrectly declared brain dead cannot be used to suggest N.T. may be similarly situated where Dr. Machado: (1) has not reviewed N.T.'s medical records or personally examined N.T.; (2) provides only a broad, unsubstantiated summary (without the support of any medical records) of those two other patients' medical history, precluding any valid comparison to N.T.'s medical history; and (3) does not indicate whether those two other patients represent a statistically-significant percentage of the total number of patients in the United States who have been declared brain dead such that the applicable standard of care would have mandated that N.T.'s treating physicians pursue

whatever clinical approach Dr. Machado suggests would have been appropriate for N.T.

Finally, even if this Court deems Dr. Machado's declaration to be relevant in any material respect, Plaintiffs' filing of the declaration confirms that Plaintiffs' demand for a temporary injunction in order to obtain time to transfer N.T. to another facility to obtain a second opinion was mere pretext. Plaintiffs' filing of the declaration confirms that they could have obtained a second opinion at least as early as September 27, 2020, after the first brain function test concluded that N.T. was brain dead, without the need to transfer N.T. to another hospital. Thus, this Court should decline to reconsider its October 2, 2020 order to consider a second opinion when Plaintiffs misrepresented the reasons why they did not obtain one prior to the entry of that order.

Consequently, Dr. Machado's declaration does not support granting Plaintiffs' Motion.

B. Mr. Dolan's Testimony Does Not Offer Any Competent or Relevant Evidence That Would Justify Reconsideration of This Court's Order

Plaintiffs next argue that this Court should reconsider its October 2, 2020 order denying Plaintiffs' Application for Temporary Injunction based on their submission of a declaration they received from a California-licensed plaintiffs' attorney named Christopher B. Dolan. Mr. Dolan claims that he has represented two individuals who are allegedly similarly-situated to N.T. As this Court can easily determine for itself, Mr. Dolan's declaration is not relevant evidence on any issue currently before this Court where, as an attorney, he obviously is unqualified to offer any expert medical opinions on issues such as: (1) whether N.T. is currently dead; (2) whether N.T.'s treating physicians properly determined and pronounced N.T. to be dead (*i.e.*, what the standard of care required and whether N.T.'s treating physicians breached that standard of care); and (3) what additional measures Defendants should take regarding N.T. Even in his capacity as an attorney, this Court certainly does not need to hear Mr. Dolan's opinions on what he believes the applicable law in this case is because that is not the proper subject of an evidentiary hearing, this Court can

determine what the law is on her own, and – most importantly – the Court of Appeals has already held that this Court correctly decided the questions of law in this case.

To the extent Mr. Dolan would testify regarding his past experiences in handling cases involving two individuals who are allegedly similarly-situated to N.T., that may be interesting to hear but it is not relevant to any issue before this Court. Moreover, to the extent Mr. Dolan intends to suggest that the experiences of the two individuals he represented parallel N.T.'s experience in this case, he is not qualified to render a medical opinion that those two individuals' medical history and condition are sufficiently similar to N.T.'s medical history and condition so as to support any conclusions that: (1) N.T. is not brain dead or may live for the same amount of time that the two individuals he represented ultimately did; or (2) Defendants' care for N.T. was somehow deficient in the way the care for the two individuals he represented may have been.

Finally, in a highly inappropriate passage from his declaration, Mr. Dolan asserts in Paragraph 58 of his declaration that: (1) "[a]s with this case, the brain-death criteria apparently are being used for the purposes of transplant authorization and resource allocation. Indeed, I have been informed that the Hospital repeatedly pursued the parents of Baby [N.T.] to provide transplant authorization"; and (2) that after N.T.'s parents allegedly stated that they believe N.T. is still alive and may revive, TCH then "withdrew most all life sustaining support, and nutrition, aside from the ventilator and water." Mr. Dolan, an allegedly prominent attorney, should know that he cannot file a sworn declaration without having personal knowledge of the facts stated in his declaration and that his assertions above clearly violate that rule.[2] And his unsubstantiated accusation above constitutes nothing more than rank, defamatory speculation as to N.T.'s treating physicians'

[2] Mr. Dolan asserts in the first paragraph of his declaration that "I make this Declaration of my own ***Personal Knowledge*** …" (emphasis added).

alleged motive for pronouncing N.T. brain dead, particularly given the undisputed documentary and testimonial medical evidence conclusively establishing that N.T. is, in fact, brain dead. Mr. Dolan's statement also is untrue where TCH has been providing N.T. basic nutrition such as glucose and water, and Plaintiffs have failed to present any competent evidence to the contrary or any competent evidence that such nutrition is insufficient to maintain N.T.'s body.

Consequently, Mr. Dolan's declaration does not support granting Plaintiffs' Motion.

II. Granting Plaintiffs' Motion Is Legally Impermissible and Would Create Bad Precedent

Finally, the only legal authority that Plaintiffs cite to support the extraordinary relief they are requesting – reconsideration of this Court's October 2, 2020 order denying their Application for Temporary Injunction ***after*** the Court of Appeals has already affirmed that order in full – is Texas Rule of Civil Procedure 505.3. Rule 505.3, however, does not even apply to district courts – it applies to justice courts. TEX. R. CIV. P. 500.1, *et seq.* (indicating that Part V of the Texas Rules of Civil Procedure contains "Rules of Practice in Justice Courts"). Additionally, Rule 505.3 merely states that: (1) "[a] plaintiff whose case is dismissed may file a motion to reinstate the case no later than 14 days after the dismissal order is signed" (Rule 505.3(a)), but this case has not been dismissed; (2) "[a] defendant against whom a default judgment is granted may file a motion to set aside the judgment no later than 14 days after the judgment is signed" (Rule 505.3(b)), but Plaintiffs are not a defendant and have not had a default judgment issued against them; and (3) "[a] party may file a motion for a new trial no later than 14 days after the judgment is signed" (Rule 505.3(c)), but no judgment has been issued in this case, just an interlocutory order denying Plaintiffs' Application for Temporary Injunction. Consequently, Rule 505.3 is inapposite.

Plaintiffs ignore the only potentially relevant rule, which is Texas Rule of Appellate Procedure 29.5. Rule 29.5 states as follows:

> While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of on appeal. If permitted by law, the trial court may proceed with a trial on the merits. ***But the court must not make an order that***:
>
> (a) is inconsistent with any appellate court temporary order; or
>
> (b) ***interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.***

TEX. R. APP. P. 29.5 (emphasis added).

Plaintiffs' demand that this Court grant Plaintiffs' motion to reconsider its October 2, 2020 order – with the further intention that this Court vacate that order – impermissibly "interferes with or impairs the jurisdiction" of the Houston [14th District] Court of Appeals' by effectively asking this Court to disregard and vacate the Court of Appeals' October 9, 2020 order affirming this Court's October 2, 2020 order on the merits. This Court should especially decline to do so where Plaintiffs have failed to present any evidence actually justifying such an extraordinary move.

Furthermore, Plaintiffs' demand that this Court grant Plaintiffs' motion to reconsider its October 2, 2020 order – with the further intention that this Court vacate that order – also impermissibly "interferes with or impairs the … effectiveness of any relief sought or that may be granted on appeal" where TCH, on appeal, sought affirmance of this Court's October 2, 2020 order and obtained such relief from the Court of Appeals on October 9, 2020. But Plaintiffs now seek to deprive TCH of the relief it fought so hard for after the Court of Appeals granted such relief.

This Court also should decline to disregard Rule 29.5's directive because it would create bad precedent in future cases. It is not difficult to imagine a scenario where a plaintiff applies for a temporary injunction and presents evidence that the trial court deems insufficient to support such relief, resulting in the trial court's decision to deny the plaintiff's application for a temporary injunction. The Court of Appeals affirms, agreeing that the evidence was insufficient to support a

temporary injunction. On remand, the plaintiff then requests reconsideration of the trial court's prior order based on a new witness (who could have been discovered before and presented at the first temporary injunction hearing) that he claims will present sufficient testimony to support a temporary injunction. The trial court agrees to reconsider her order but, after hearing the testimony, again denies the plaintiff's application for temporary injunction and the Court of Appeals again affirms the trial court's order based on insufficiency of the evidence. On remand, the plaintiff again requests reconsideration of the trial court's order based on yet another new witness (who could have been discovered before and presented at the first temporary injunction hearing) that he claims will present sufficient testimony to support a temporary injunction. And so it goes, on and on, with the plaintiff obtaining multiple bites at the apple.

While that may seem like a farfetched scenario because one would assume no reasonable plaintiff would fail to obtain and present all the evidence they could have at the first temporary injunction hearing, that actually is what is happening in this case where Plaintiffs are seeking reconsideration based on evidence they could and should have obtained prior to the temporary injunction hearing on October 2, 2020. The party seeking a temporary injunction should be incentivized to diligently prepare and then present the most compelling case for a temporary injunction the ***first*** time around to avoid the gross waste of time, effort, and resources that would result from two or more hearings, orders, and appeals. As shown above, Plaintiffs failed to diligently prepare for and present the most compelling case for a temporary injunction at the October 2, 2020 temporary injunction hearing. Plaintiffs failed to present ***any*** expert witnesses and gave a patently false justification for why they allegedly were unable to do so (they allegedly could not obtain a second opinion from a ***physician*** unless N.T. was first transferred to another ***hospital***). Specifically, absolutely nothing prevented Plaintiffs from contacting Dr. Machado (or

Mr. Dolan) prior to October 2, 2020, and absolutely nothing prevented Plaintiffs from objecting to the ancillary court's setting of the temporary injunction hearing for October 2, 2020 or asking this Court for a continuance of such hearing if they felt they did not have sufficient time to prepare.

Stated simply, Plaintiffs' failure to diligently litigate their Application for Temporary Injunction the first time around does not in any way justify this Court setting aside the extraordinary time, effort, and expense incurred by the parties, this Court, and the Court of Appeals in order to give Plaintiffs the opportunity to cure that inexcusable failure.

CONCLUSION

For the foregoing reasons, TCH respectfully requests that this Court: (1) deny Plaintiffs' Motion for Reconsideration and Rehearing of Order Denying Plaintiffs' Application for a Temporary Injunction; and (2) grant TCH all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of Appellee Texas Children Hospital's Response to Plaintiffs' Motion for Reconsideration and Rehearing of Order Denying Plaintiffs' Application for a Temporary Injunction was served in compliance with Texas Rule of Appellate Procedure 9.5 via electronic filing on October 11, 2020, upon the following counsel of record:

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