

CAUSE NO. 2015-69681

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

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IN THE DISTRICT COURT OF

V.

HARRIS COUNTY, TEXAS

THE METHODIST HOSPITAL

189<sup>TH</sup> JUDICIAL DISTRICT

**DEFENDANT THE METHODIST HOSPITAL'S**  
**MOTION FOR LEAVE TO SET A HEARING ON DISPOSITIVE MOTIONS,**  
**AND BRIEF IN SUPPORT OF PREVIOUSLY FILED**  
**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 Motion for Leave to set a hearing on dispositive motions and Brief in Support of Previously Filed 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 f/k/a The Methodist Hospital ("Houston Methodist" or the "Hospital")'s Motion for Leave, 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—

- **Houston Methodist seeks leave for good cause as the parties were attempting an amicable resolution, and waiting to determine if Texas**

Health and Safety Code § 166.046 would be addressed in the most recent legislative session;

- **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. PROCEDURAL HISTORY**

This case is set for trial on August 21, 2017. Houston Methodist has pending Motions to Dismiss that have not yet been heard. The Motions at issue are:

- Defendant Houston Methodist Hospital's Special Exceptions to Plaintiffs' First Amended Petition and Motions to Dismiss filed on 1/15/2016;<sup>1</sup>
- Defendant The Methodist Hospital's Chapter 74 Motion to Dismiss and Brief in Support of Defendant's Previous Motion to Dismiss filed on 4/22/2016;<sup>2</sup> and
- Defendant's Motion to Dismiss Pursuant to Chapter 74 of the Civil Practices and Remedies Code filed on 8/30/2016.<sup>3</sup>

These Motions have not yet been heard because the parties have been attempting an amicable resolution of this lawsuit, and waiting to see if the statute at issue in this lawsuit—Texas Health and Safety Code § 166.046—would be addressed in the 85<sup>th</sup> legislative session. However, Texas Health and Safety Code § 166.046 was not addressed in the 85<sup>th</sup> legislative session, and the parties have been unable to reach an agreeable resolution. Under the docket

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<sup>1</sup> See Defendant Houston Methodist Hospital's Special Exceptions to Plaintiffs' First Amended Petition and Motions to Dismiss, attached hereto as Exhibit A.

<sup>2</sup> See Defendant The Methodist Hospital's Chapter 74 Motion to Dismiss and Brief in Support of Defendant's Previous Motion to Dismiss, attached hereto as Exhibit B.

<sup>3</sup> See Defendant's Motion to Dismiss Pursuant to Chapter 74 of the Civil Practices and Remedies Code, attached hereto as Exhibit C.

control order, all dispositive motions and pleas were to be heard by June 9, 2017.<sup>4</sup> In the interest of judicial economy, Houston Methodist respectfully requests that this Court grant leave to set a hearing on Houston Methodist's previously filed Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss. In addition, for the purpose of streamlining the issues for the Court, Houston Methodist files this Brief in Support of its Motions to Dismiss re-urging its previously articulated arguments.

### **III.** **FACTUAL SUMMARY**

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

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

Shortly after Dunn's admission, Dr. Uppalapati advised Dunn's family that his condition was irreversible and progressively terminal. Having treated Dunn since October 12, 2015, his treating physicians concluded that the treatment necessary to sustain his life was causing

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<sup>4</sup> See Docket Control Order, attached hereto as Exhibit D.

Dunn to suffer without any hope of a change in prognosis, and thus, life-sustaining treatment was medically inappropriate for Dunn. As a result, 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. The patient's father, David Dunn, strongly agreed with the recommendation and plan to provide comfort measures only, while the patient's mother, Evelyn Kelly, strongly disagreed with the providers' recommendation to discontinue life-sustaining treatment. Since Dunn had no advanced directives in place, was not married, and had no children, his parents became his statutory surrogate decision makers.<sup>5</sup> The divisive situation between Dunn's divorced parents created a significant conflict between the two people the Hospital looked to for direction of his medical care.

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

At the time of the care that was provided to David Christopher Dunn ("Chris"), I was the Project Director of Spiritual Care at Houston Methodist Hospital. Furthermore, I served as the Meeting Chair for the Houston Methodist Bioethics Committee (the "Committee"), which was consulted by Chris's treating physicians to review the ethical issues involved in his care at Houston Methodist Hospital. I am familiar with this matter, including the meetings and communications between Chris's health care providers and Chris's family, and the events that lead to the determination that the continuation of life-sustaining treatment was medically inappropriate. I was personally involved in communications between Chris's family and his health care providers. Further, I coordinated the ethical review process by which Chris's family was informed of the Biomedical Ethics consultations, the

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<sup>5</sup> See TEX. HEALTH & SAFETY CODE § 597.041(a)(3).

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, 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.<sup>6</sup>

Over the next days, hospital representatives exhausted efforts to transfer Dunn to another facility. In fact, as delineated within the affidavit of Justine Moore, a Houston Methodist Hospital Social Worker assigned to Dunn's case, some sixty-six (66) separate facilities were contacted by Houston Methodist representatives requesting transfer.<sup>7</sup> 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.<sup>8</sup>

According to Ms. Moore, all sixty-six (66) facilities declined the transfer. Ms. Moore further

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<sup>6</sup> See Affidavit from J. Richard Cheney, attached hereto as "Exhibit E."

<sup>7</sup> See Affidavit from Justine Moore, LMSW, attached hereto as "Exhibit F."

<sup>8</sup> See *id.* at 2, ¶ 4.

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> On the same day and without the necessity of a hearing, Houston Methodist voluntarily agreed to an Agreed Temporary Restraining Order preserving the status quo by continuing life-sustaining treatment to Dunn, and extending the statutory ten (10) day period by another fourteen (14) days in order to continue efforts to locate a transfer facility. The Temporary Injunction hearing was scheduled for December 3, 2015.

Prior to the Temporary Injunction hearing, Houston Methodist formally appeared in the matter.<sup>12</sup> 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

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<sup>9</sup> See *id.* at 4, ¶ 9.

<sup>10</sup> See Plaintiff’s Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief, on file with this Court.

<sup>11</sup> See *id.*

<sup>12</sup> See Houston Methodist Hospital’s Verified Plea in Abatement, Original Answer and Special Exceptions, on filed with this Court.



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.<sup>13</sup> 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.**<sup>14</sup>

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.

In any event, on December 23, 2015, Dunn succumbed to his terminal illnesses. The final autopsy report of Dunn revealed a 7x6x5 cm cancerous mass on Dunn's pancreas with metastasis to the liver and lymph nodes, and micrometastasis to the lungs.<sup>15</sup> Further, the report showed Dunn suffered obstructive jaundice, hepatic encephalopathy, peritonitis, acute renal failure, acute respiratory failure and sepsis.<sup>16</sup>

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<sup>13</sup> See Order of Abatement dated December 4, 2015 from the 189th Judicial District of Harris County, Texas, on filed with this Court.

<sup>14</sup> See *id.* (emphasis added).

<sup>15</sup> See Final Anatomic Diagnosis of David Christopher Dunn, attached hereto as "Exhibit G."

<sup>16</sup> *Id.*

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, 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."<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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' 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' intentional infliction of emotional distress ("IIED") claim is a health care liability claim 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

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<sup>17</sup> 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 H."

<sup>18</sup> See Plaintiffs' First Amended Petition, on filed with this Court.

<sup>19</sup> See *id.* at 4, ¶ 10.

served Houston Methodist with any expert reports. As a result, Plaintiffs' IIED claim against Houston Methodist must be dismissed with prejudice.

### **III. ARGUMENTS & AUTHORITIES**

#### **A. Good Cause Exists For This Court To Grant The Hospital's Motion For Leave.**

Houston Methodist requests leave of court to set a hearing on its Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss.

According to the Court's most recent Docket Control Order generated on January 4, 2017, the dispositive motion deadline in this lawsuit was June 9, 2017.<sup>20</sup> However, a docket control order is an interlocutory order that a court may modify either explicitly or implicitly.<sup>21</sup> A court may modify a docket control order by setting a hearing after a deadline.<sup>22</sup> A court has "wide discretion in managing its docket", including allowing dispositive motions to be heard after a deadline to prevent an unnecessary trial.<sup>23</sup>

Houston Methodist now moves for leave to set its Motions to Dismiss for hearing for good cause. Specifically, the parties have been attempting an amicable resolution of this lawsuit, and waiting to see if the statute at issue in this lawsuit—Texas Health and Safety Code § 166.046—would be addressed in the 85<sup>th</sup> legislative session. However, Texas Health and Safety Code § 166.046 was not addressed in the 85<sup>th</sup> legislative session as expected, and

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<sup>20</sup> See Exhibit D.

<sup>21</sup> *J.W. Garrett & Sons, Inc. v. Snider*, 09-14-00306-CV, 2015 WL 5731291, at \*4 (Tex. App.—Beaumont Oct. 1, 2015, pet. denied)(citing Tex. R. Civ. P. 306a).

<sup>22</sup> *Id.* (citing *Trevino v. Trevino*, 64 S.W.3d 166, 170 (Tex. App.—San Antonio 2001, no pet.).

<sup>23</sup> *Trevino*, 64 S.W.3d at 170 (quoting *Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982)).

the parties have been unable to reach an agreeable resolution. This leave will not cause any undue prejudice to Plaintiffs, as this Motion was filed less than two (2) week after the dispositive motion deadline. In addition, the trial is set for August 21, 2017. Houston Methodist is filing these Motions 60 days in advance of the trial setting providing ample opportunity for any additional response and a hearing in advance of the trial setting.

In the alternative, should the Court be disinclined to grant Houston Methodist's Motion for Leave to set a hearing on its Motions to Dismiss, Houston Methodist respectfully requests a brief trial continuance of 30 days, with an amendment of the Docket Control Order allowing for dispositive motions to be heard within 30 days of the granting of the trial continuance. This continuance is not sought for delay but so that justice may be done.

**B. 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,<sup>24</sup> 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."<sup>25</sup> "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

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<sup>24</sup> See Exhibit G.

<sup>25</sup> U.S. CONST. art. III, § 2, cl. 1; TEX. CONST. art. II, § 1.

complaint is filed.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.*”<sup>29</sup> In other words, a party must show a “reasonable expectation” or “demonstrated probability” that the same controversy will recur involving the same complaining party.<sup>30</sup> 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.”<sup>31</sup>

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” such judgment.<sup>32</sup> The “collateral

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<sup>26</sup> *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); see also *Levis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

<sup>27</sup> *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)).

<sup>28</sup> *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).

<sup>29</sup> *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.

<sup>30</sup> *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

<sup>31</sup> *Trulock v. City of Duncanville*, 277 S.W.3d 920, 924–25 (Tex. App.—Dallas 2009, no pet.).

<sup>32</sup> *Spring Brach I.S.D. v. Brady*, 764 S.W.2d 16, 19 (Tex. App.—Houston [1st Dist.] 1988, no writ) (citing *Tex. v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980)); *Carrillo v. State*, 480 S.W.2d 612, 617 (Tex. 1972).

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.”<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> Additionally neither exception to the mootness doctrine applies. 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

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<sup>33</sup> *Gen. Land*, 789 S.W.2d at 571.

<sup>34</sup> *Id.*

<sup>35</sup> *Renle v. RLZ Inns.*, 411 S.W.3d 31, 33 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

<sup>36</sup> “The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties.” *Tex. Air Control Bd.*, 852 S.W.2d at 444 (citing *Ala. State Fed’n of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Firemen’s Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968); *Cal. Products, Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 591 (Tex. 1960)). “An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury.” *Tex. Air Control Bd.*, 852 S.W.2d at 444.

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.

Moreover, the collateral-consequences exception is also not applicable. Plaintiffs have the burden of showing both that a 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.<sup>37</sup> 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 of natural causes and Houston Methodist never ended life-sustaining treatment in alleged violation of his due process and civil rights. Therefore, neither exception to the mootness doctrine applies. Accordingly, Plaintiffs’ due process and civil rights causes of action must be dismissed as moot.

**C. Plaintiffs’ Failed To File Any Chapter 74 Expert Report(s) Regarding Their Intentional Infliction Of Emotional Distress Claim Within The 120-Day Statutory Time Period.**

Pursuant to Texas Civil Practice and Remedies Code § 74.351, a plaintiff asserting a health care liability claim is required to serve on all defendants at least one competent expert report not later than the 120th day after each defendant files its original answer.<sup>38</sup> If a plaintiff fails to do so, a defendant may move to have the case against it dismissed with

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<sup>37</sup> See *Marshall v. Hous. Auth.*, 198 S.W.3d 782, 784, 790 (Tex. 2006).

<sup>38</sup> TEX. CIV. PRAC. & REM. CODE § 74.351(a).

prejudice.<sup>39</sup>

The underlying nature of Plaintiffs' IIED claim against Houston Methodist constitutes a health care liability claims as the term is defined in the Texas Civil Practice and Remedies Code § 74.001(13).<sup>40</sup> As such, Plaintiffs are required to serve on Houston Methodist at least one competent expert report to support their IIED claim. However, Plaintiffs failed to timely tender any expert report(s) within the 120-day statutory time period, and consequently, their claim for IIED against Houston Methodist must be dismissed with prejudice.

**a. Plaintiffs' Intentional Infliction Of Emotional Distress Claim Constitutes A Health Care Liability Claim Pursuant To Chapter 74 Of The Texas Civil Practice And Remedies Code.**

Plaintiffs' claim for IIED is a health care liability claim by nature, and as defined by the Texas Civil Practice and Remedies Code § 74.001(13).<sup>41</sup> Chapter 74 defines a health care liability claims 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.<sup>42</sup>

“[A] health care liability claim cannot be recast as another cause of action in an attempt to avoid the [Chapter 74] expert report requirement.”<sup>43</sup> To determine whether a claim is a

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<sup>39</sup> *Id.* at § 74.351(b).

<sup>40</sup> *Id.* at § 74.001(13).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005).



health care liability claim, courts “examine the underlying nature of the claim and are not bound by the form of the pleading.”<sup>44</sup> If the conduct complained of “is an inseparable part of the rendition of health care services,” the claim is a health care liability claim.<sup>45</sup>

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.**<sup>46</sup> This is precisely Plaintiffs' IIED cause of action against Houston Methodist. The focal point of Plaintiffs' IIED claim regards Houston Methodist's care and treatment of Dunn while a patient at Houston Methodist. Specifically, Plaintiffs complain of Houston Methodist's reliance on Texas Health & Safety Code § 166.046 in choosing to withdraw Dunn's life-sustaining treatment.<sup>47</sup> 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.

**b. Plaintiffs Are Required To File At Least One Competent Expert Report For Their Intentional Infliction Of Emotional Distress Claim Within 120 Days Of The Methodist Hospital Filing Its Answer.**

In a health care liability claim, a plaintiff must serve at least one competent expert

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<sup>44</sup> *Id.* at 851.

<sup>45</sup> *Boothe v. Dixon*, 180 S.W.3d 915, 919 (Tex. App.—Dallas 2005, no pet.).

<sup>46</sup> *Loaisiga v. Cerda*, 379 S.W.3d 248, 253 (Tex. 2012).

<sup>47</sup> *See Savage v. Psychiatric Inst. of Bedford, Inc.*, 965 S.W.2d 745, 753 (Tex. App.—Fort Worth 1998, pet. denied) (plaintiff's claims for false imprisonment and emotional distress arise from care received at hospital and are health care liability claims).

report on each defendant not later than 120 days after each defendant files its original answer.<sup>48</sup> This requirement for a timely and competent expert report is absolute, and failure to provide such report(s) results in the dismissal, with prejudice, of all claims and an award of defendant's fees and costs.<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup>

On December 2, 2015, Houston Methodist filed its Original Answer.<sup>52</sup> 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' claim for IIED against Houston Methodist.

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<sup>48</sup> TEX. CIV. PRAC. & REM. CODE § 74.351(a). A competent expert report requires the report provide a "fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *Id.* at § 74.351(r)(6).

<sup>49</sup> *Id.* at § 74.351(b); *Ogletree v. Matthews*, 262 S.W.3d 316, 319–20 (Tex. 2007) (A court has no discretion to deny a motion to dismiss or to extend the statutory deadline when a plaintiff completely fails to serve an expert report.).

<sup>50</sup> See Plaintiffs' Petition, on file with this Court.

<sup>51</sup> See *supra* note 26.

<sup>52</sup> See Defendant's Original Answer, on file with this Court.

**IV.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL**, respectfully requests that this Court grant its Motion for Leave, Motion to Dismiss Plaintiffs' Causes of Action for Violation of Due Process and Civil Rights as Moot, and Chapter 74 Motion to Dismiss in its entirety, and for any such other and further relief to which Houston Methodist shows itself justly entitled.

Respectfully submitted,

**SCOTT PATTON PC**

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

**DWIGHT W. SCOTT, JR.**

Texas Bar No. 24027968

[dscott@scottpattonlaw.com](mailto:dscott@scottpattonlaw.com)

**CAROLYN CAPOCCIA SMITH**

Texas Bar No. 24037511

[csmith@scottpattonlaw.com](mailto:csmith@scottpattonlaw.com)

3939 Washington Avenue, Suite 203

Houston, Texas 77007

Telephone: (281) 377-3311

Facsimile: (281) 377-3267

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

**CERTIFICATE OF CONFERENCE ON MOTION FOR LEAVE TO SET  
HEARING OR, IN THE ALTERNATIVE, TRIAL CONTINUANCE**

I hereby certify that I have spoken to opposing counsel in this matter and they are unopposed to Houston Methodist's Motion for Leave to Set a Hearing on its Motions to Dismiss. I further certify that opposing counsel is unopposed to Houston Methodist's Motion for Trial Continuance.


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

Unofficial Copy Office of Chris Daniel District Clerk


VERIFICATION

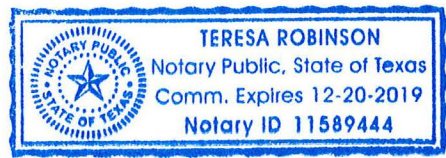
STATE OF TEXAS       §  
                                  §  
COUNTY OF HARRIS   §

BEFORE ME, the undersigned authority, on this day personally appeared **DWIGHT W. SCOTT** known to me to be the person whose name is subscribed hereto, who upon his oath, stated that he has read Houston Methodist's Motion for Leave to set a hearing on dispositive motions or, in the alternative, Motion for Continuance and acknowledged to me that the factual statements contained therein are true and correct to the best of his knowledge.

  
\_\_\_\_\_  
DWIGHT W. SCOTT, JR.

SUBSCRIBED TO AND SWORN BEFORE ME on this 22<sup>nd</sup> day of June 2017 to certify which witness my hand and official seal of office.

  
\_\_\_\_\_  
Notary Public in and for  
The State of Texas



Unofficial Copy Office of Chris Daniel District Clerk

**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 22<sup>nd</sup> day of June, 2017.

*Via E-file*

James E. "Trey" Trainor, III  
[ttrainor@bmpllp.com](mailto:ttrainor@bmpllp.com)  
BEIRNE, MAYNARD & PARSONS, LLP  
401 W. 15<sup>th</sup> Street, Suite 845  
Austin, Texas 78701

*Via E-file*

Joseph M. Nixon  
[jnixon@bmpllp.com](mailto:jnixon@bmpllp.com)  
Kristen W. McDonald  
[kmcanald@bpllp.com](mailto:kmcanald@bpllp.com)  
BEIRNE, MAYNARD & PARSONS, LLP  
1300 Post Oak Blvd., Suite 2300  
Houston, Texas 77002

*Via E-file*

Emily Kebodeaux  
[ekebodeaux@texasrighttolife.com](mailto:ekebodeaux@texasrighttolife.com)  
TEXAS RIGHT TO LIFE  
9800 Centre Parkway, Suite 20  
Houston, Texas 77036

ATTORNEYS FOR PLAINTIFF

*/s/ Dwight W. Scott, Jr.*  
\_\_\_\_\_  
DWIGHT W. SCOTT, JR.