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' APPLICATION FOR TEMPORARY INJUNCTION

Defendant Texas Children's Hospital ("TCH") files this Response to Plaintiffs' Application for Temporary Injunction and would respectfully show the Court as follows:

SUMMARY OF ARGUMENT

Late in the evening of September 24, 2020, N.T., a minor, presented to TCH's campus in the Woodlands after tragically experiencing a drowning incident in his home. Upon arrival, N.T. underwent a series of evaluations that established a complete cessation of all spontaneous brain activity and, thus, his death based on the standard set forth in Texas Health and Safety Code § 671.001(b). Following N.T.'s transfer to TCH's campus in the Texas Medical Center in Houston, further evaluations of N.T. were performed by a different set of physicians, which confirmed that N.T. was dead based on the statutory standard above. To date, Plaintiffs have failed to present any controverting evidence – much less competent expert evidence establishing a reasonable medical probability – that N.T. is not dead based on the statutory standard above.

As shown below, TCH has complied with all applicable legal standards in providing services to N.T. and, in fact, has gone beyond what is required of a health care institution in this position. Plaintiffs, however, contend that TCH must do more, arguing that TCH should be

enjoined from terminating further services for N.T. until the statutory review process set forth in Texas Health and Safety Code § 166.046 has been completed. That statutory review process, however, applies only to the removal of ***life-sustaining*** treatment. Based on the express and unambiguous language of that statute and the undisputed facts of this case, the statutory review process does not – indeed, cannot – apply to an individual like N.T. who is already dead and for whom the removal of life-sustaining treatment is therefore moot.

While N.T.'s death is undeniably tragic, there is simply no legal or factual support for Plaintiffs' attempt to invoke a statutory review process that is plainly inapplicable to this case. Consequently, TCH respectfully requests that this Court deny Plaintiffs' application for a temporary injunction.

FACTUAL AND PROCEDURAL BACKGROUND

I. N.T.'s Medical History and Current Condition

On the evening of September 24, 2020, N.T. – a ten-month old baby – presented to TCH's campus in The Woodlands after aspirating water during an accident in his home. 9/30/20 TRO Hearing Transcript at 2 (Exhibit 1). He arrived intubated, with a weak pulse and had no clinical response. Exhibit 1 at 17; N.T.'s Medical Records, Torres/TCH at 95-97 (Exhibit 2). N.T. was immediately placed on a ventilator. Exhibit 2 at 96. A physical exam noted a body temperature of only 93 degrees and "toxic-appear[ance]." *Id*. at 95. N.T.'s admission summary indicated that he suffered "[a]cute hypoxemic respiratory failure due to submersion injury, now with multiorgan failures with significant cerebral edema." *Id*. at 92. That same day, a CT scan of N.T.'s head was taken. *Id.* at 102. The findings were consistent with "global hypoxic ischemic injury." *Id.*

On September 25, 2020, a physical exam was performed on N.T., with neurological findings of no response to painful stimuli and no movement of extremities. *Id*. at 93-99.

On September 26, 2020, an EEG was performed on N.T., which showed a "lack of reactivity." *Id.* at 102, 209-211. A neurological consultation was ordered and occurred that same day. *Id.* at 100-103. After reviewing both N.T.'s medical records and the CT and EEG results, the neurologist noted N.T.'s "brainstem responses are complete absent with absent brainwaves on EEG, concerning for brain death" and ordered a repeat CT scan and formal brain death exam to occur the following day (September 27, 2020). *Id.* at 103. That same day, a second CT was performed which showed the brain as "markedly abnormal," with progressively worse results than the CT performed on September 24, 2020. *Id.* at 39-40.

On September 27, 2020, a brain death exam was performed, which was positive for brain death. *Id.* at 199-200. Pursuant to TCH policy, a second brain death exam was to be performed on the morning of September 28, 2020 to confirm that diagnosis before N.T. was formally pronounced dead (Exhibit 1 at 50-51), but Plaintiffs refused further evaluations. *Id.* at 124. Plaintiffs, instead, requested a transfer of N.T. to another facility, and TCH agreed to accommodate the family. Exhibit 2 at 11-12, 124. On September 28, 2020, N.T. was transferred to TCH's main campus in the Texas Medical Center in Houston. *Id.* at 11-12. TCH inquired about transferring N.T. to Memorial Hermann Hospital, Woman's Hospital in Houston, U.T. Health Science Center in San Antonio, but all three institutions declined to accept a transfer. Exhibit 1 at 68-69.

On September 29, 2020, brain vascular flow imaging was performed on N.T. Exhibit 2 at 13-14. The imaging showed no evidence of brain perfusion (blood flow in the brain). *Id.* at 13-14, 106. No brain perfusion indicates no brain activity – that is, the brain is not voluntarily or involuntarily causing anything else in the body to function. Exhibit 1 at 63.

On September 30, 2020, following the hearing on Plaintiffs' application for a temporary restraining order and with the ancillary court's authorization (*id*. at 78), a second brain death exam

was performed on N.T, and the brain death exam found "cessation of the function of the brain and brainstem." Exhibit 2 at 106-07. Accordingly, N.T. was pronounced dead. *Id.*

During the hearing on Plaintiffs' application for a temporary restraining order, Dr. Matt Musick – the Senior Medical Director for TCH's Pediatric Intensive Care Unit – presented sworn testimony that based on his medical education, training, and experience, his review of N.T. medical records from both TCH's Woodlands and Texas Medical Center campuses, and reasonable medical probability: (1) N.T. is dead as that term is defined under Texas law and has been dead since, at minimum, his first brain death exam; (2) N.T. has not shown any signs of life since that determination was made; and (3) no reasonable physician would disagree with his opinions regarding N.T.'s death. Exhibit 1 at 45-53. Dr. Musick further testified that there have been no indications to the contrary since that date, and every physician who has examined N.T. has concluded that N.T. is dead. *Id*. at 48-49, 63.

Plaintiffs have argued that N.T. is not dead because, due to the ventilator, his heart continues to beat and organs other than his brain continue to function. But Dr. Musick testified that: (1) N.T. is on a ventilator because he lacks any function in his brain stem, which is required for his heart and other organs to continue to function (Exhibit 1 at 63); and (2) the ventilator is not sustaining N.T.'s life because N.T. is already dead (*id*. at 51-52). Dr. Musick also testified that the existence of a heart beat and organ function was not "a sign of life" when, as in this case, there is no brain function. *Id*. at 55. Plaintiffs have presented no evidence to the contrary.

II. Procedural History of This Case

On September 30, 2020, Plaintiffs filed the present action against TCH and "Dr. John Doe" and "Dr. Jane Doe." Plaintiffs' Original Complaint and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction (Exhibit 3). According to the petition,

"Dr. John Doe" and "Dr. Jane Doe" refer to "doctor[s] working at TCH and [are] primarily in charge of the medical decisions concerning the minor N.T." *Id*. at 2. Plaintiffs' first cause of action is for "Violation of Due Process" under 42 U.S.C. § 1983. *Id*. at 5-7. According to Plaintiffs, allowing the discontinuation of services to N.T. without first undergoing the statutory review process under Texas Health and Safety Code § 166.046 that Plaintiffs claim applies to the discontinuation of such services constitutes a violation of their right to due process. *Id*. at 5-6. Plaintiffs' second cause of action is for "Injunctive and Other Equitable Relief" based, it appears, on the alleged conduct above but does not plead the specific injunctive and equitable relief requested. *Id*. at 7-8. Plaintiffs' third cause of action is for "Declaratory Judgment" seeking a declaration that Defendants "are violating Plaintiffs' due process under the law" and "are relying on laws and procedures that are unconstitutional, as applied or on the laws face." *Id*. at 8-9.

The same day the petition was filed, a hearing was held in the ancillary court (before Judge Engelhardt) on Plaintiffs' request for a temporary restraining order. Exhibit 1. In addition to hearing argument by the parties' counsel, the ancillary court also heard sworn testimony from Dr. Musick regarding N.T.'s care and current medical condition. Exhibit 1 at 44-73. At the conclusion of the hearing, the ancillary court granted Plaintiffs' application for a temporary restraining order in part, restraining TCH and the unnamed physician defendants from:

1. Causing the ventilator to be removed from the minor N.T.;

2. Failing to Give the Plaintiffs, MARIO TORRES and ANA PATRICIA TORRES, due notice of who are the decision-makers concerning their child, including medical staff at the hospital;

3. Withhold from making any final decision to discontinue medically appropriate life-sustaining treatment to the minor, N.T. (DOB 11/15/2019) who is located at 6651 Main Street room 913, Houston, TX 77030;

4. Continue to provide the minor, N.T., any medically appropriate pain management medication, medical procedures necessary to provide comfort, or any other health care provided to alleviate a patient's pain, unless such

> care would be medically contraindicated or contrary to the patient's or surrogate's clearly documented desire not to receive artificially administered nutrition or hydration.

Temporary Restraining Order (Exhibit 4). As noted above, however, the ancillary court declined to enjoin the performance of the second set of tests to confirm N.T.'s lack of brain function. Exhibit 1 at 77-78; *see also* Exhibit 4 (crossing through the following proposed language in TRO enjoining "any additional medical testing or treatment to the minor if the patient's parents, the Plaintiffs, do not desire any such testing or treatment.").

TCH has complied and will continue to comply with all aspects of the above temporary restraining order pending this Court's disposition of Plaintiffs' application for temporary injunction. But as shown below, TCH objects to any requirement that it be forced to engage in a statutory review process that is plainly inapplicable based on the undisputed facts of this case.

STANDARD FOR TEMPORARY INJUNCTION

A "temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Butnaru v. Ford Motor Co.*, 284 S.W.3d 198, 204 (Tex. 2002). "The status quo is the 'last actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004). To obtain a temporary injunction, an applicant must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *See, e.g., Butnaru*, 284 S.W.3d at 205. If the moving party fails to satisfy its burden as to any one of these elements, the party is not entitled to such relief. *See, e.g., International Paper Co. v. Harris Cty., Tex.*, 445 S.W.3d 379, 397 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

As to the second element, a temporary injunction may not issue unless the party moving for that injunction shows a likelihood of success on the merits. *See, e.g.*, *Kinney v. Barnes*, 443 S.W.3d 87, 94 n.9 (Tex. 2014). As to the third element, "probable injury" includes the elements

of imminent harm, irreparable injury, and no adequate remedy at law. *See, e.g.*, *Shor v. Pelican Oil & Gas Mgt., LLC*, 405 S.W.3d 737, 750 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

A trial court considering an application for a temporary injunction also must weigh the respective conveniences and hardships of the parties and balance the equities. *See, e.g., In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002). Consideration of the equities involves weighing the public interest against the injury to the parties from the grant or denial of the injunctive relief. *See, e.g.*, *Int'l Paper Co.*, 445 S.W.3d at 395.

Finally, to the extent Plaintiffs seek mandatory (as opposed to prohibitive) injunctive relief that changes (as opposed to preserves) the status quo, such mandatory injunctive relief should only be granted if there is "a clear and compelling presentation of extreme necessity or hardship." *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 401 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

ARGUMENT & AUTHORITIES

Based on the allegations in Plaintiffs' petition, all of Plaintiffs' claims against Defendants turn on whether Plaintiffs are entitled to the statutory review process under Texas Health and Safety Code § 166.046 before services for N.T. are terminated due to his passing. As shown below, Plaintiffs are not entitled to any temporary injunctive relief because the governing law and undisputed facts in this case conclusively establish that Plaintiffs do not have a probable right to relief on those claims or are not likely to succeed on the merits of those claims.

I. The Undisputed Evidence Conclusively Establishes That N.T. Is Dead Under the Standard Set Forth in Texas Health and Safety Code § 671.001(b) and Has Been Dead Since At Least N.T.'s First Brain Death Exam.

The threshold issue in this case is whether N.T. is currently dead under the standard set forth under Texas law. If N.T. is dead under that standard, then Plaintiffs are not entitled to the statutory review process they have sought to invoke under Texas Health and Safety Code § 166.046 before services are terminated to N.T. As shown below, that process applies only when there is a

dispute whether to provide or withhold "***life-sustaining treatment***." It is axiomatic that "life-sustaining treatment" cannot be provided or withheld when, as the undisputed evidence conclusively establishes in this case, the individual in question – N.T. – has already died.

Texas Health and Safety Code § 671.001(b) states that "[i]f artificial means of support preclude a determination that a person's spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease." TEX. HEALTH & SAFETY CODE § 671.001(b). Notably, "[d]eath must be pronounced ***before*** artificial means of supporting a person's respiratory and circulatory functions are terminated." TEX. HEALTH & SAFETY CODE § 671.001(c) (emphasis added). Thus, the statute expressly recognizes that an individual can be legally dead despite continued physical maintenance of the body through artificial support such as a ventilator.

N.T.'s death has been confirmed through a series of medical evaluations conducted by two separate medical teams at two separate facilities as well as additional expert testimony. For example, on September 25, 2020, a physical exam was performed on N.T., with neurological findings of no response to painful stimuli and no movement of extremities. Exhibit 2 at 93-99. On September 26, 2020, an EEG was performed on N.T., which showed a "lack of reactivity." *Id.* at 102, 209-211. A neurological consultation was ordered and occurred that same day. *Id.* at 100-103. After reviewing both N.T.'s medical records and the CT and EEG results, the neurologist noted N.T.'s "brainstem responses are complete absent with absent brainwaves on EEG, concerning for brain death" and ordered a repeat CT scan and formal brain death exam to occur the following day. *Id.* at 103. A second CT was performed which showed the brain as "markedly

abnormal," with progressively worse results than the CT performed on September 24, 2020. *Id.* at 39-40.

On September 27, 2020, a brain death exam was performed which was positive for brain death. *Id.* at 199-200. On September 29, 2020, brain vascular flow imaging was performed on N.T. *Id.* at 13-14. The imaging showed no evidence of brain perfusion (blood flow in the brain). *Id.* No brain perfusion indicates no brain activity – that is, the brain is not voluntarily or involuntarily causing anything else in the body to function. Exhibit 1 at 63. And on September 30, 2020, following the hearing on Plaintiffs' application for a temporary restraining order and with the ancillary court's authorization (*id*. at 78), a second confirmatory brain death exam was performed on N.T, and the brain death exam found "cessation of the function of the brain and brainstem" and N.T. was formally pronounced brain dead. Exhibit 2 at 106-07.

During the hearing on Plaintiffs' application for a temporary restraining order, Dr. Matt Musick – the Senior Medical Director for TCH's Pediatric Intensive Care Unit – presented undisputed, sworn testimony that based on his medical education, training, and experience, his review of N.T. medical records from both TCH's Woodlands and Texas Medical Center campuses, and reasonable medical probability: (1) N.T. is dead as that term is defined under Texas Health and Safety Code § 671.001 and has been dead since at least his first brain death exam (b); (2) N.T. has not shown any signs of life since that determination was made; and (3) no reasonable physician would disagree with his opinions regarding N.T.'s death. Exhibit 1 at 45-53. Plaintiffs, in contrast, presented no expert testimony to the contrary.

While Plaintiffs' counsel argued that N.T. is not dead because, due to the ventilator, his heart continues to beat and organs other than his brain continue to function, the only expert testimony presented to date conclusively refutes that lay opinion and attorney argument.

Specifically, Dr. Musick testified that: (1) N.T. is on a ventilator because he lacks any function in his brain stem, which is required for his heart and other organs to continue to function (*id*. at 63); and (2) N.T.'s life is not being sustained by the ventilator because N.T. is already dead (*id*. at 51-52). Dr. Musick also testified that the existence of a heart beat and organ function was not "a sign of life" when, as in this case, there is no brain function. *Id*. at 55. Dr. Musick further noted that every physician who has examined N.T. has concluded that N.T. is dead. *Id*. at 48-49, 63.

Based on the undisputed evidence above, the record conclusively establishes that "according to ordinary standards of medical practice, there [was] irreversible cessation of all spontaneous brain function" in N.T. so as to support a determination that N.T. was dead as that term is defined under Texas Health and Safety Code § 671.001(b).

II. Plaintiffs Are Not Entitled to the Statutory Review Process Under Texas Health and Safety Code § 166.046 Because the Statute Does Not Apply to Individuals Who Are Already Dead

Plaintiffs argue that due process allegedly requires TCH to comply with the statutory review process outlined in the Texas Advanced Directives Act of 1999 – specifically, Texas Health and Safety Code § 166.046 – before removing "life support" from N.T. (which they believe includes the ventilator N.T. is on). Exhibit 1 at 5. Plaintiffs erroneously characterize Section 166.046 as dictating "what to do when there is a dispute between parties that do not consent to medical treatment of a terminally ill child." *Id*. But Plaintiffs' argument ignores both the statute's express and unambiguous language as well as the undisputed medical facts in this case which limit the application of Section 166.046 to situations where the patent is not dead.

Section 166.046(a) 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. The attending physician may not be a member of that committee. ***The patient shall be given life-sustaining treatment during the review.***

TEX. HEALTH & SAFETY CODE § 166.046(a) (emphasis added). "Life-sustaining treatment,' in turn, is statutorily-defined as

> 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 artificially administered nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

TEX. HEALTH & SAFETY CODE § 166.002(10).

The fact that Section 166.046(a) mandates that "[t]he patient shall be given life-sustaining treatment during the review" necessarily assumes that the patient is not dead at the time of the review. Interpreting Section 166.046(a) to apply when a patient is dead would render that language meaningless and mere surplusage in violation of basic canons of statutory construction. *See, e.g.*, *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016) ("We consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage."). The same provision further establishes that the statute is predicated on the existence of a dispute over the continuation of ***life-sustaining*** treatment, which, again, based on the statutory definition of that term, necessarily requires a patient to be alive. Significantly, in a concurrence, one member of the Houston [14th Dist.] Court of Appeals has described this statute as one that applies to "the withdrawal of life-sustaining care for patients ***who are not brain dead*** if the hospital's ethics committee has determined the care is inappropriate." *Nikolouzous v. St. Luke's Episcopal Hosp.* 162 S.W.3d 678, 683 (Tex. App.—Houston [14th Dist] 2005, no pet.) (Fowler, J., concurring)(emphasis added).

Plaintiffs contend that the statute specifies "mechanical breathing machines" as life-sustaining treatment and, thus, Section 166.046 applies in the present action because N.T. is on a ventilator. Exhibit 1 at 28. But Section 166.002(10) specifically identifies mechanical breathing

machines like ventilators as an example of "artificial ***life support***." TEX. HEALTH & SAFETY CODE § 166.002(10). In this case, Dr. Musick testified that the ventilator that N.T. is currently on ***is not*** a life-sustaining treatment for N.T, and Plaintiffs have presented no evidence to the contrary:

> Q: Based on that definition, that to be a life sustaining treatment, the treatment must sustain the life of the patient, based on that definition, in your mind, and in your professional judgment, is ventilation a life sustaining treatment for Nicholas Torres?
>
> A: No.
>
> * * * *
>
> Q: Dr. Musick, is there a medical disagreement about if the – is there a medical disagreement about Nick, whether or not he's a living patient, given that he's on a ventilator?
>
> A: No.
>
> * * * *
>
> Q: In your medical opinion, Doctor, aren't heartbeats and organ function a sign of life?
>
> A: In this case no.
>
> Q: But in other cases you might have observed that a heartbeat and organ function would be a sign of life?
>
> A: Not when there's no brain function.

Exhibit 1 at 52, 55, 58. The only reason that N.T. was still on a ventilator at the time of the hearing is because Plaintiffs objected to N.T.'s treating physicians performing the second brain exam that must be conducted pursuant to TCH's policies before making a declaration of death. *Id.* at 58. Nothing about N.T.'s medical status called for the continuation of the ventilator where he has already been determined to be dead. Dr. Musick also testified that the procedures outlined in Section 166.046 (such as an ethics analysis) have been invoked for ***living patients*** on a ventilator when there is a disagreement about appropriate therapy for that patient. *Id.* at 56-57. But such procedures are not necessary in this case because N.T. is already dead. *Id.* at 73 ("As part of our

training, we all learn ethics. I don't need an ethical consult to tell me that it is ethically inappropriate to not declare [N.T.] dead when he meets the definition of dead.")

In support of its argument, Plaintiffs make much of the fact that while N.T. met the legal definition of death upon arrival to TCH, he was not formally pronounced dead. Exhibit 1 at 60-61. But that is a distinction that is immaterial to the application of Section 166.046. As shown above, the statutory review process under Section 166.046 is predicated on the existence of questions regarding the provision or withholding of ***life-sustaining*** treatment – questions that do not exist in cases like this one where the undisputed evidence establishes that a patient meets the legal definition of death, regardless of whether he has been formally pronounced dead.

For the same reasons, the Fort Worth Court of Appeals opinion that Plaintiffs claim to be directly on point in support of their request for injunctive relief – *T.L. v. Cook Children's Med. Ctr,* 2020 WL 4260417 (Tex. App.—Fort Worth 2020, pet. filed) – is readily distinguishable. In *Cook*, the physicians were considering whether continued treatment was appropriate for a living child in light of her unstable condition and poor prognosis. *Id.* The concern was over the ethical appropriateness of continued treatment of a child who was very much alive but perceived to be suffering under further care. *Id.* There was no question over the medical status of the patient, simply a determination to be made about the propriety of further care. In this case, however, the tragic fact is that recovery is not possible because N.T. has already passed. Thus, the statutory review process under Section 166.046 that applies in considering whether to remove life-sustaining treatment does not apply because there is no life-sustaining treatment at issue in this case.

CONCLUSION

For the foregoing reasons, TCH respectfully requests that this Court: (1) deny Plaintiffs' application for 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 Defendant Texas Children Hospital's Response to Plaintiffs' Application for Temporary Injunction was served in compliance with the Texas Rules of Civil Procedure via electronic filing on October 1, 2020, upon the following:

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