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

[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

[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

[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

[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

[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

[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.

[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]

[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

[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

[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

[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

[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.

[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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