No. 01-17-00866-CV

IN THE FIRST COURT OF APPEALS
AT HOUSTON, TEXAS

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

v.

HOUSTON METHODIST HOSPITAL
Appellee.

On Appeal from the 189th District Court, Harris County, Texas.
(No. 2015-69681)

APPELLANTS' BRIEF REPLY

James E. "Trey" Trainor, III
State Bar No. 24042052
trey.trainor@akerman.com
AKERMAN LLP
700 Lavaca, Suite 1400
Austin, Texas 78701
Tel: (512) 623-6700
Fax: (512) 623-6701

Joseph M. Nixon
State Bar No. 15244800
joe.nixon@akerman.com
AKERMAN LLP
1300 Post Oak Blvd., Suite 2500
Houston, Texas 77056
Tel: (713) 623-0887
Fax: (713) 960-1527

Kassi Dee Patrick Marks
kassi.marks@gmail.com
2101 Carnation Ct.
Garland, Texas 75040
Tel: (469) 443-3144
Fax: (972) 362-4214

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF FACTS

Plaintiffs refer to the Statement of Facts initially presented in their Original Plaintiffs' Brief, which contradicts certain of Methodist's misstatements of fact.

SUMMARY OF THE ARGUMENT

The death of Chris Dunn did not moot either his or Evelyn Kelly's declaratory judgment claim or civil rights claims for the violation of their procedural and substantive due process rights by Methodist under color of state law through the use of Tex. Health & Safety Code §166.046 ("§166.046"). Because the trial court erred in finding the case was moot and that it lacked jurisdiction, and because there were cross-motions for summary judgment heard at the court's request, this court must reverse and render the judgment that the trial court should have: that §166.046 is unconstitutional, both facially and as applied, and Plaintiffs are entitled to nominal damages under 42 U.S.C.§1983 ("§1983").

ARGUMENT & AUTHORITIES

I. PLAINTIFFS' CLAIMS ARE NOT MOOT

Methodist's entire response is based on the argument that because Dunn died of "natural causes while still receiving life-sustaining treatment, Plaintiff's challenge to §166.046's constitutionality and their §1983 claims immediately ceased to

prevent a live controversy."[1] Methodist contends that the only deprivation of anyone's rights giving rise to a claim would be withdrawing Dunn's life-sustaining care. It argues that because it ultimately did not terminate Dunn's life prematurely (because this lawsuit was filed), there was no deprivation of *any* right of either Kelly or Dunn and, therefore, there can be no judicial relief given them. Methodist's argument is legally incorrect and it has chosen not to respond to a the gravamen of Plaintiff's claims, that is, *both* Kelly, individually, and in her capacity as the Representative of the Estate of Chris Dunn, suffered numerous violations of their substantive and procedural due process rights because of the application of the unconstitutional §166.046. Further, the capable of repetition yet escaping review exception applies to the declaratory judgment claims. Finally, Methodist has waived and/or left undisputed many of Plaintiffs' arguments providing further bases for this Court to reverse the trial court's grant of Methodist's Motion to Dismiss, render a decision that the statute is unconstitutional, and that both Kelly and Dunn had their due process rights violated by Methodist.

A. Plaintiffs' Rights to Due Process Were Violated before Dunn's Death.

As set forth in Plaintiffs' pleadings and opening brief, it is not merely the termination of Dunn's life sustaining care that would have constituted a civil rights

[1] *See* Resp. at 15.

violation; rather, it was the overall lack of due process in the procedure **and** substance of the law that allowed Methodist[2] to reach the decision to terminate a patient's life prematurely against the Plaintiffs' will that is constitutionally problematic. The fact that Methodist was judicially stopped from pre-maturely terminating Dunn's life with a restraining order does not make the due process violations culminating in its decision to withdraw Dunn's life sustaining care moot. Dunn simply acted to mitigate his damage by obtaining a restraining order.[3] Methodist does not distinguish between "process" and "deprivation of right." Nor does Methodist distinguish between a right to bring a declaratory judgement action and claims under §1983. Methodist contends that process deficiencies are not deprivations of rights because a state actor must actually deprive someone of a constitutionally protected interest without acknowledging that due process is a constitutionally protected. Methodist contends that the only deprivation that could have occurred is the actual withdrawal of Dunn's life sustaining care. Methodist rejects that the right to life and the right to make individual medical decisions are also implicated here and that §166.046 is wholly deficient of due process. As set

[2] And, all other hospitals in Texas.

[3] Methodist's argument that Dunn's death terminated his claims because Methodist was judicially precluded from and did not ultimately withdraw life sustaining care, causing Dunn's death, is shortsighted. Methodist is arguing that had it been allowed to withdraw life-sustaining care, a civil rights claim would have survived his death; but, because a TRO was obtained which prevented Methodist from executing its plan, no civil rights violation occurred. In other words, according to Methodist, because Dunn sought and fought to stay alive, his claims died with him.

forth in Plaintiffs' opening brief and as will be explained further herein, Methodist's arguments are not well taken and are unsupported by the law. Plaintiffs incurred nominal actual damages in the effort to obtain a restraining order by incurring attorney fees, damages they would have not suffered but for the Hospital's invocation of §166.046. Those damages and claims survived Dunn's death.

B. Neither the Declaratory Judgment nor Civil Rights Claims in this Case Are Moot.

Methodist contends again that the moment that Methodist agreed not to withdraw Dunn's life sustaining care, there instantly and permanently ceased to be any claim under §1983 and the moment Dunn died there ceased to be a declaratory judgment right. Bother arguments are incorrect.

Methodist admits that no Texas case has decided the issue of mootness in the context of a §166.046 challenge. The one case on which it did rely, *Betancourt v. Trinitas Hospital*[4] did not involve a constitutional challenge to the applicable statute. In that case, the family wanted the appeal dismissed and the court concluded "that both the lack of an adequate factual record as well as the limited, but unique, factual context presented, warrant dismissal of the appeal as moot."[5] The trial court had determined that "decisions concerning the proper course of treatment for Rueben could not be made by the hospital; rather, such decisions should be made by a

[4] 415 N.J. Super. 301 (N.Y. Super Ct. App. Div. 2010).
[5] *Id.* at 305.

surrogate who could take Rueben's personal value systems into account when determining what medical treatment was appropriate."[6] Rueben's daughter was appointed his guardian and the hospital was permanently restrained from discontinuing Rueben's treatment, which included dialysis.[7] Rueben died and the plaintiff, his daughter, moved to dismiss the appeal as moot.[8] The hospital wanted the case to proceed.

The Appellate Court decided not to hear the appeal and noted that there was also the unique situation of a potential medical malpractice claim.[9] But the Court did note that "**the public has at least an equal, if not greater, interest in a <u>patient's right to live</u> than in a patient's right to die**."[10] The Court continued:

> "This matter involves a situation that could evade judicial review. Obviously, when a patient is in such poor medical condition that his or her physician considers further treatment to be medically futile, there is a heightened possibility or even probability that the patient will not survive prolonged litigation."[11]

The decisive issue for the New Jersey Court was that there was an unusual set of circumstances which made recurrence unlikely.[12] In Texas, the withdrawal of a patient's ventilator (or other life sustaining treatment) is a common occurrence and

---

[6] *Id.* at 309.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 313.
[10] *Id.* at 314. (Emphasis added.)
[11] *Id.*
[12] *Id.* at 315.

the basis for a §166.046 hearing. Like the situation in *Betancourt,* it is very often the case that the patient at the center of a §166.046 storm is very ill and unlikely to survive prolonged litigation.

Interestingly, the statute issue in *Betancourt* contained this language which the Texas Health and Safety Code §166 et seq. does not:

> The right of individuals to forego life-sustaining measures is not absolute and is subject to certain interests of society. *The most significant of these societal interests is the preservation of life,* understood to embrace both an interest in preserving the life of the particular patient and a related but distinct **interest in preserving the sanctity of all human life as an enduring social value**.[13]

The reason that the Court in *Betancourt* declined to hear the appeal is not the least bit analogous to any of the arguments that Methodist makes to try to avoid the determination of the constitutionality of §166.046 or the violation of Plaintiffs' due process rights. In actuality, *Betancourt* supports Plaintiffs' position that this case is not moot, among other reasons, because it is capable of repetition yet evading review and that there is a great societal interest in preserving life and a patient's right to life.

As Plaintiffs have explained, Dunn's estate may continue with the claim for the past violation of his civil rights, which occurred prior to this death. Kelly has her own cause of action for past violations of her civil rights as §166.046 applies to those who are the decision-makers for ill persons. Dunn may have died, but the

[13] *Id.* at 319. (Italicized emphasis by Court; bold emphasis by Plaintiffs.)

controversy about his pre-death denial of constitutional rights, and those of Kelly, are still alive and the merits of those claims have not been adjudicated. Methodist does not provide contrary arguments and authorities; it just continues to state that no deprivation could have occurred since it ultimately did not remove Dunn's life sustaining care as it had intended to do prior to the filing of this lawsuit by Dunn.

Methodist also claims that Kelly's plea for nominal damages does not save the case from mootness. That is incorrect. Plaintiffs met their burden of pleading their claims and the bases of their damages, particularly under the recent U.S. Supreme Court case of *Johnson v. City of Shelby, Miss.*:

> Our decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), are not in point, for they concern the factual allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners' complaint was not deficient in that regard. **Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to *damages* from the city. Having informed the city of the factual basis for their complaint, they were required to do no more** to stave off threshold dismissal for want of an adequate statement of their claim.[14]

Under this guidance, a plaintiff is not even required to state his legal theory so long as the facts support the claim for damages. In this case, the myriad of ways

[14] 135 S.Ct. 346, 347 (2014) (emphasis added). Importantly, this was in the context of a §1983 claim.

that their due process rights were violated by Methodist under the authority of §166.046 were clearly articulated in Plaintiffs' pleadings.

Johnson was decided in 2014, well after the cases relied upon by Methodist. However, the cases cited by Methodist do not contradict *Johnson*. In *Fox v. Board of Trustees of State Univ. of New York*, the Court held: "It is clear that nominal damages are available in actions alleging violations of constitutionally protected rights."

Regarding the claim for nominal damages, even a claim for attorney's fees supports the survival of a case after the plaintiff's death. The *Doe* Court held: "Thus a determination of mootness neither precludes nor is precluded by an award of attorneys' fees."[15] The case was remanded to determine the issue of attorneys' fees for the plaintiff who was the prevailing party because he obtained the primary relief sought. *Id.* Accordingly, *Marshall* has no application to, or impact on, the case *sub judice.*

Methodist then relies upon *Arizonans for Official English v. Arizona*, in which the plaintiff sought to save her claim from being moot based on an assertion of nominal damages for the first time on appeal.[16] That is not the case here as nominal damages were pleaded by Plaintiffs.

[15] *Id.* at 120.
[16] 520 U.S. 43, 70-71 (1997).

Methodist next takes issue with the cases relied upon by Plaintiffs, stating that "[f]our[17] of them concerned nominal-damages claims based on actual past deprivations of constitutional rights."[18] Plaintiffs cited cases that involved the actual deprivation of constitutional rights because they experienced actual deprivation of rights requiring a successful legal action to stay alive.[19]

Methodist further incorrectly claims that the other two cases[20] Plaintiffs relied upon undermined their arguments directly. However, that assertion is based on Methodist's illogical claim there was no deprivation of Plaintiffs' rights because Methodist never withdrew Dunn's life sustaining care. Methodist has failed to address the substance of the due process argument by continuing to ignore the deprivation of rights which required Dunn to mitigate his damages and obtain a TRO. Far from refuting Plaintiffs' constitutional claims, Methodist has not substantively responded to them.

Notably, Methodist does not really distinguish between the claims under the Declaratory Judgment Act and those under §1983 in its response. However, Plaintiffs provided a number of cases setting forth that a decedent's §1983 claims survive his death.

---

[17] These four were *Javits v. Stephens, Carey v. Piphus, Morgan v. Plano I.S.D.*, and *Utah Animal Rights Coalition v. Salt Lake City Corp.*

[18] *See* Resp. at 22.

[19] *See, e.g.,* Appt's Br. at 14-16, 23-24, 28-43.

[20] These two cases were *Memphis Community School Dist. v. Stachura* and *DA Mortgage, Inc. v. City of Miami Beach.*

Methodist concludes with a statement that a nominal damages claim with no basis in law is a poor substitute for a live controversy. But, that is again incorrect. Plaintiffs – not just Kelly alone – but both Kelly in her individual capacity and Kelly in her capacity[21] as the Representative of the Estate of Chris Dunn – have claims for constitutional rights deprivations before Dunn's death. The claim for nominal damages is based on the deprivations of constitutional due process rights that both Plaintiffs experienced at the hands of Methodist. Accordingly, both the declaratory judgment and civil rights claims survived Dunn's death.

C. The Capable of Repetition Yet Evading Review Exception to Mootness Absolutely Applies in these Circumstances.

If this is not a case where this exception applies, then none exists. As noted in Plaintiffs' prior briefing, "[t]he 'capable of repetition yet evading review' exception is applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot."[22] Importantly, Methodist still did not challenge the short duration and inability to obtain review before Dunn's death. Methodist simply states that since "Dunn died, the issue of whether he will be denied

[21] Methodist only acknowledges the claim by Kelly in her individual capacity and claims she does not have standing to pursue any claim on her own behalf. Methodist does not acknowledge that the Estate of Chris Dunn has standing to bring a suit to redress the constitutional violations he endured prior to his death and that Kelly has the capacity to bring that suit as the Representative of the Estate of Chris Dunn.

[22] *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex. App.—Houston [1st Dist.] 1988, no writ).

life-sustaining treatment can never arise again."[23] But that is far too narrow a view of the exception and ignores the claims Plaintiffs are actually making.

Methodist claims that for the exception to apply, the two elements must be met: 1) a deprivation must have occurred in the first place, which Methodist denies based on the misstatement of Plaintiffs' claims; and 2) that §166.046 must evade review, which it claims is not the case because "[i]f a healthcare defendant invoke[s] its [immunity] protections in a future case, a court will then have an opportunity to address its constitutionality."[24] Setting aside for a moment this idea that §166.046 is merely an immunity statute (and it is not), Methodist cites no authority for this novel argument made for the first time on appeal.

This twist by Methodist also highlights, perhaps inadvertently, another problem with the statute as Methodist presents it – only a healthcare provider has any rights under the statute. Only a healthcare provider could seek relief, that is, immunity, under the statute. But why would a healthcare provider seeking immunity protection from the statute then challenge its constitutionality? It would not, of course. This absurdity emphasizes the real challenges to the statute by those harmed by it. A challenge would never come to fruition if the claims died the moment the victim of the statute did. That is the very definition of claim which is capable of

[23] See Resp. at 26.
[24] *Id.*

repetition yet evading review. What Methodist describes is a statute that can never be constitutionally challenged by anyone.

Methodist clearly states that, although it may utilize this statute against another patient in the future, Kelly has no standing to proceed with this case on her own behalf or that of Dunn's Estate. Methodist contends that if it utilized this statute on Kelly's other children in order to withdraw their life-sustaining care, that "would not create a justiciable controversy."[25] In Methodist's view, apparently, there is never really a circumstance under which a review of this statute can happen – which just solidifies the fact that this is a statute capable of repetition (and establishes that Methodist intends to repeatedly use it) yet evading review (as Methodist is demonstrating in its argumentation all the ways it believes this statute cannot be reviewed).

Methodist then argues that Kelly's fears about her children being at risk by this law is not of "sufficient immediacy and reality" to create a justiciable conflict and cites *Golden v. Zwickler* in support.[26] In the context of a declaratory judgment, the case considered whether a statute precluding the distribution of anonymous handbills in connection with a campaign was unconstitutional where it appeared that the real concern was that relating to a particular congressional candidate who had

[25] *See* Resp. at 26-27.
[26] 394 U.S. 103 (1969).

left office to take a new position by the time the court heard the matter.[27] The issue was stated by the Court was "whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on remand."[28] The Court found that "**under all the circumstances of the case** the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' here."[29]

Zwickler is entirely distinguishable from the Plaintiffs' case, particularly when considering "all of the circumstances." Dunn and Kelly had their rights violated prior to his death. Those claims have yet to be adjudicated and remedied. Further, there remains a live controversy with respect to the constitutionality of §166.046. And, the mootness exception of capable of repetition yet evading review squarely applies. [30]

[27] *Id.* at 104-107.
[28] *Id.* at 108.
[29] *Id.* at 109. (Emphasis added.)
[30] Methodist also relied upon *O'Shea v. Littleton* 414 U.S. 488, 498 (1974) ostensibly for the proposition that the threat of an injury that is too remote will not satisfy the case or controversy requirement. However, that snippet ignores the larger context of the case which makes it completely distinguishable from this one. The Court repeatedly noted that there was no constitutionality challenge in *O'Shea* and that the persons bringing the case had not been personally affected by the actions of which they complained. Neither can be said about Dunn and Kelly. The Court noted that there were "other avenues of relief open to respondents for the serious conduct they assert…we conclude that, apart from the absence of an existing case or controversy presented by respondents for adjudication, the Court of Appeals erred in deciding that the District Court should entertain respondents' claims" *Id.* at 504. This is not the case with a patient in the cross-hairs of §166.046 as Methodist makes clear.

Methodist next cites *Boyle v. Landry* for the proposition that speculative charges about the future should not disrupt or block the normal course of proceedings.[31] Again this case is completely distinguishable and provides no basis for impeding the determination of Plaintiffs' claims. Critically, the Court noted that: "Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional."[32] Further, the Court emphasized the context-specific nature of the case which Methodist took the liberty of rewriting:

> As our holdings today…show, the normal course of *state criminal prosecutions* cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The *policy* of a century and a half *against interference by the federal courts in state law enforcement* is not to be set aside on such flimsy allegations as those relied upon here.[33]

Methodist attempts to distinguish one of the cases Plaintiffs relied upon, *Friends of the Earth, Inc. v. Laidlaw Env'l Servs.*[34] Methodist contends in its Response that, "Contrary to Kelly's depiction, however, this case did not become moot when Methodist agreed not to withdraw Dunn's life-sustaining treatment."[35] That is inaccurate. Plaintiffs do *not* contend that this case became moot when Methodist agreed to not withdraw Dunn's life sustaining care (Plaintiffs contend this

[31] 401 U.S. 77, 81 (1971).
[32] *Id.* at 80-81.
[33] *Id.* at 81. (Emphasis added; other citations omitted.)
[34] 528 U.S. 167 (2002).
[35] *See* Resp. at 28.

case has never become moot for any reason). Rather, it was *Methodist* who, in the trial court, repeatedly argued its voluntary cessation of its intention to withdraw Dunn's life sustaining care mooted the claims.[36] To the extent that Methodist used its claim of voluntary cessation of the statute as a basis to claim this case is moot, it does not find support in the law.

Plaintiffs' arguments and legal authority support a finding that the capable of repetition yet evading review exception to mootness applies. Methodist failed to present applicable, binding legal authority and logical analysis to the contrary. The declaratory judgment issue regarding the constitutionality of §166.046 is inarguably capable of repetition yet evading review.

D. The District Court Erred in Determining It Lacked Subject Matter Jurisdiction.

Plaintiffs have not argued "that the dismissal on mootness was really a ruling on the merits denying her amended motion for summary judgment…"[37] What Plaintiffs have argued is: "Here, the granting of Methodist's Motion to Dismiss on mootness necessarily denied Plaintiffs' Motion for Summary Judgment on that same issue."[38] Plaintiffs also stated:

> The holding of this Court in *Frank's* applies with equal force to the case *sub judice*: **'[w]hen, as here, both sides move for summary judgment and the trial court grants one motion and denies the other, we**

[36] *See, e.g.,* CR at 1191.
[37] *See* Resp. at 29.
[38] *See* App'ts Br. at 10.

> **review the summary judgment proof presented by both sides and determine all questions presented**.'[39] This Court in *CenterPoint* continued: "If we find error, we **must** render the judgment the trial court should have entered.'"[40]

In other words, the trial court did not rule on the merits, but should have, because it erroneously determined it did not have the subject matter jurisdiction to do so. When the trial court determined the issue of mootness in Methodist's favor, it necessarily implicitly denied that same issue which was addressed in Plaintiffs' pending motions that were heard at the same time. Plaintiffs never stated that any other issue was decided by the trial court but mootness. Methodist is mistaken. Rather, the procedural circumstances here are such that, as Plaintiffs have already explained with abundant citation and binding authority, this Court can determine all of the issues raised in the underlying motions.

Methodist cites *Meeker v. Tarrant Co. College Dist.* but it is factually and legally distinguishable.[41] The case involved the notice requirements in the Texas Open Meetings Act and decisions regarding certain contracts made at meetings for which there was inadequate notice given.[42] A new contract that superseded those agreed to at the questioned meetings mooted any claims about the validity of the

[39] *Id.* at 563 citing *CenterPoint Energy Houston Elec., L.L.P. v. Old TJC Co.*, 177 S.W.3d 425, 430 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). (Emphasis added).
[40] 177 S.W.3d at 430 citing *Agan*, 940 S.W.2d at 81. (Emphasis added.) *See* App'ts Br. at 10.
[41] 317 S.W.3d 754 (Tex. App.—Fort Worth 2010, pet. denied).
[42] *Id.* at 758.

prior contracts.[43] No mootness exceptions applied because "an issue does not evade appellate review if appellate courts have addressed the issue on the merits."[44] That is most certainly not the case with §166.046.

Plaintiffs' citations to *Textac* and *Nabelek* were for the purpose of determining the proper procedure and standard of review here, not for the purpose of discussing mootness. Nevertheless, they still set forth the proper standard of review that should govern this appeal and provide authority that when a motion to dismiss goes to the merits of the case, it is treated as a summary judgment. In this case, although Methodist addressed mootness in its motion to dismiss, the arguments in its motion went deep into the substance and merits of the case. Further, Plaintiffs' opening brief provided pertinent authority holding that when there are cross-motions for summary judgment requested and heard by the trial court an appellate court can determine all issues.

II. METHODIST'S "ALTERNATIVE GROUNDS" FOR AFFIRMANCE DO NOT INDEPENDENTLY REQUIRE AFFIRMANCE

Methodist first argues that any error by the trial court would have been harmless error because there were alternative grounds for dismissal.[45] Methodist contends it was harmless error not to determine the constitutionality of the statute

[43] *Id.* at 761.
[44] *Id.* at 762. (Other citation omitted.)
[45] *See* Resp. at 31.

because it was not necessary as there is a "strong policy against deciding the constitutionality of statutes absent necessity." That is incorrect, as the constitutionality of §166.046 was the reason this case was filed.

Methodist relies upon *City of San Antonio v. Schautteet* for its proposition but the primary reason the Court in *Schautteet* did not address the constitutionality issue is because it was brought for the first time in a reply brief on appeal.[46] Further, there were genuine issues of material fact precluding the trial court's grant of summary judgment.[47] Likewise, Methodist's reliance on *San Antonio General Drivers, Helpers Local No. 657 v. Thornton* provides nothing more than a blanket statement that "A court will not pass on the constitutionality of a statute if the particular case before it may be decided without doing so."[48]

Schautteet and *Thornton* are not even remotely analogous to Plaintiffs' case. It is difficult to fathom how it was not necessary to determine the constitutionality of §166.046 when that issue was the basis for this lawsuit. Nonetheless, Methodist argues that a constitutional decision was not necessary because (1) Kelly lacked standing to pursue "her" constitutional claims, (2) there was no deprivation of any protected liberty or property interest in "Kelly's claims," and (3) "Kelly's claims"

[46] 706 S.W.2d 103, 104-105 (Tex. 1986).
[47] *Id.* at 105.
[48] 156 Tex. 641, 647 (Tex. 1957).

are fatally flawed because Methodist was not a state actor or acting under color of state law.

A. Kelly Has Standing Individually and Capacity as the Estate's Representative.

Raising this issue for the first time in its brief on appeal, Methodist argues that Kelly has no standing to bring this case. Methodist is incorrect. The *Estate* has the standing necessary for the claims of Dunn and Kelly has *capacity* to continue the suit in her capacity as the Representative of the Estate of Chris Dunn, which Methodist has not challenged and cannot for the first time on appeal. Methodist does not challenge the Estate's standing to pursue Dunn's claims. In addition, Kelly has the standing to bring a claim for the violations of her own constitutional rights, as explained in Plaintiffs' prior briefing, which are unrelated to her former claim for intentional infliction of emotional distress.

Again, Kelly has the capacity to continue the claim for Dunn as the Representative of Chris Dunn's Estate, which has the standing to pursue those claims, but has no capacity to do so as an Estate cannot sue on its own behalf.[49] Methodist has not challenged Kelly's capacity or the Estate's standing. As set forth earlier, the violations of Dunn's constitutional rights that occurred prior to his death

[49] *See, e.g., Gatlin v. Moore*, 2013 WL 655189, at *2 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see also footnote 23 infra.*

have not been adjudicated and did not extinguish upon his death. Thus, his Estate has a claim which Kelly is pursuing on its behalf.

The cases cited by Methodist do not change these facts, the issues in this case, and the pertinent, applicable law. *Kircus v. London* held that: "To have standing to challenge the constitutionality of a statute, a party must show that in its operation the statute is unconstitutional as to him in his situation: he must show that it has an adverse impact on his own rights."[50] Plaintiffs have done that – with regard to both Kelly and Dunn.

B. Methodist Deprived Plaintiffs of Constitutionally Protected Interests of the Right to Life and Self-Determination.

In Plaintiffs' prior brief and in addressing the *Betancourt* case cited by Methodist above, it was shown that courts understand that the process of withdrawal of life sustaining care presents the risk of deprivation of a protected interest. In fact, the courts required that the facts justifying such a decision to terminate life sustain care be shown by clear and convincing evidence; the alternative being that without that standard the statutes are unconstitutional for failure to comport with substantive due process.[51] Section 166.046 wholly lacks procedural due process when

[50] 660 S.W.2d 869, 872 (Tex. App.—Austin 1983, no writ) (other citations omitted).
[51] *See, e.g.,* App'ts Brief at 23, 28, 40-43.

immunizing the hospital's decision to terminate life sustaining care.[52] Section 166.046 violates substantive due process because the government has deprived patients of their constitutional rights of life and self-determination of the right to life and has given that decision the hospital by an arbitrary use of governmental power.

1. Plaintiffs Identified Constitutionally Protected Interests of Life and the Right to Make Individual Medical Decisions.

Incredibly, Methodist claims that neither the rights to life and self-determination to make one's own medical decisions, are implicated in this case. Methodist states that Dunn was terminal and so, even if it had carried out its plan to remove his life sustaining care, it would not have deprived him of life but allowed the natural disease process to continue to its final conclusion. This is argument illogical and barbaric.[53] Dunn lived five weeks past the time Methodist employed the statute. He was awake, alert and communicative.[54] But for a TRO, Methodist would have terminated the life of a man who was awake and actively praying to stay alive.

---

[52] "An individual's right to control his medical care is not lessened when the treatment at issue involves life-sustaining medical procedures." *In re. Gardner*, 534 A.2d 947, 951 (Me. 1987) (Other citation omitted).

[53] Further, Methodist's citation to a case where a patient *refused* life sustaining care is unavailing and utterly inapplicable here. Dunn was filmed asking for his life sustaining care to be maintained. He was in no way refusing life sustaining care.

[54] See video summary judgment evidence in which Chris Dunn is praying to stay alive. That video was taken on December 2, 2015. It is noteworthy that Methodist gave its 48-hour notice under the statute on November 13, 2015.

Dunn's life sustaining care was continued and Methodist admits repeatedly that in that context of receiving life sustaining care, Dunn's death occurred "naturally." In other words, continuing his life sustaining care still "allowed the natural disease process to continue to its final and fatal conclusion." What Plaintiffs did not want is for Dunn's death to be ***hastened*** by the removal of his life sustaining care. They did not want him starved to death, dehydrated to death, or suffocated to death. They did not want him "snowed" by excessive pain medications. (Which is often what is meant by the term "palliative care.") Plaintiffs at no time asked Methodist to provide a cure nor did they request anything extraordinary or beyond mere life-sustaining care – not even life-saving care. Plaintiffs did not, as Methodist incorrectly states, request "particular medical treatments."[55] Rather, Plaintiffs requested care that would not hasten his death but that would allow his disease to progress to its end – as Methodist did only after Plaintiff filed this lawsuit and obtained a TRO.

Methodist argues that a physician cannot be required to provide treatment he does not wish to provide. But what Methodist does not address is why care cannot be transferred to another doctor or care continued until another facility can take over

[55] Thus, the cases relied upon by Methodist holding that a patient is not entitled to particular treatments are irrelevant. They do not address the situation of the patient requesting mere life sustaining care while his terminal disease overtakes him that the hospital wants to withdraw from him against his will in order to hasten his death or that will have that effect.

treatment. Certainly, there is more than one doctor at Methodist. Why is the only solution to withdraw life sustaining care if a particular doctor does not wish to continue providing care? No legal authority or logical reason is provided to support that position of Methodist.

Methodist next argues that the ***government*** cannot be required to provide aid to someone even if that aid is necessary to save his life.[56] This is a stunning admission that Methodist **is** acting as the government and a total contradiction to its argument that it is not a state actor. The only case Methodist cites is *DeShaney v. Winnebago Co. Dept. of Social Servs.*[57] However, that case involved the repeated failure of social workers to intervene to protect a child from abuse by a third-party that ultimately left him permanently brain damaged. The question the Court decided was whether that failure to protect him violated his due process rights.[58] This case is not analogous and provides no legal authority for Methodist to withdraw life sustaining care from Dunn against his will once it began providing it.

Methodist then returns to the argument that Kelly is claiming that physicians must be forced to provide medical treatment contrary to their medical ethics and frames the argument as forcing doctors to provide a preferred treatment of the patient. Once again, Plaintiffs only asked for life sustaining care. Methodist sets up

[56] *See* Resp. at 36.
[57] 489 U.S. 189 (1989).
[58] *Id.* at 194.

a straw man argument, a logical fallacy. Life sustaining care, nutrition, hydration, oxygen/ventilation, is basic, humane care. It is not a request for a futile treatment. It is a request for the basic necessities of life without which one will die whether they have a terminal illness or not.

Methodist does admit, however, that "the Constitution unquestionably protects the right to determine one's own medical treatment" but then states without any explanation "that right is not at issue in this case."[59] This is utter absurdity. Of course Dunn's right to determine his own medical treatment – in this case to continue receiving life sustaining care until his cancer overtook him – was at issue in this case. That is why the lawsuit had to be filed – to try to stop Methodist from thwarting what it now admits is Dunn's unquestionable right. Dunn wanted life sustaining care continued; Methodist did not wish to provide it and intended to withdraw it against Plaintiffs' will. Methodist only relented once a lawsuit was filed. On appeal, Methodist has agreed with this key point made by Plaintiffs: that the Constitution protects the right to determine one's own medical treatment. In doing so, Methodist necessarily admits the Plaintiffs have a claim and that it is viable.

[59] *See* Resp. at 38.

2. Methodist Deprived Plaintiffs of Constitutionally Protected Interests.

Yet again, Methodist only looks to whether life sustaining care was actually withdrawn from Dunn as the sole means of a deprivation of a constitutionally protected interest. But that is not what Plaintiffs have argued. In their opening brief at pages 26-45, Plaintiffs explain all of the various deprivations of their due process rights, as they did in the trial court, which Methodist neither addressed in the trial court or here on appeal. It is not simply that final act – the withdrawal of the life sustaining care against a patient's will – that is the violation of their rights. Section 166.046 violates procedural and substantive due process rights in many ways as the "protocol" unfolds in each case, which requires awarding the Plaintiffs nominal and actual damages. Methodist simply ignores this part of Plaintiffs' argument.

C. Methodist Is Inarguably a State Actor.

Plaintiffs discussed in great detail how Methodist is a state actor in situations like this, which Methodist has admitted in its discussion of *DeShaney*.[60] In addition, Methodist cites to *Philips v. Pitt Cty. Mem'l Hosp.*, but that case involved the suspension of a doctor's privileges.[61] Regarding the state actor requirement for a §1983 claim, the Court noted that "'there is no specific formula' for determining

[60] *See* App'ts Br. at 43-47.
[61] 572 F.3d 176 (4th Cir. 2009).

whether state action is present….'What is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity."[62]

1. Methodist's Authority to Withdraw Life Sustaining Care Emanates only from the State through §166.046.

Methodist argues: "But Methodist's authority to end Dunn's life-sustaining treatment did not derive from §166.046. Indeed, physicians possessed and exercised that very authority long before the Legislature passed §166.046, and they continue to exercise it today without invoking §166.046's protocol."[63] Methodist's admission in a publicly filed document that doctors have the authority to withdraw life-sustaining care against a patient's wishes (which is largely what this case is about) is simply stunning. It is also completely unsupported by any reference to any legal authority whatsoever from any jurisdiction or even a philosophical musing. This is exactly why the constitutionality of §166.046 needs to be decided because entities like Methodist believe it has the authority – with immunity granted by the state – to end lives against the will of patients and, through the state-created "protocol" in §166.046, state sponsored full and absolute immunity.

Methodist also now claims that it never invoked the immunity of §166.046. That is irrelevant. It has not been sued for malpractice. This is a declaratory judgment and civil rights case based upon Methodist's invocation of "protocol" under the

[62] *Id.* at 182.
[63] *See* Resp. at 40-41.

statute. The basis for the suit was the fact that Methodist sent the 48-hour notice letter to Ms. Kelly and Mr. Dunn on November 13, 2015, which contained the statutory cite and language.[64] Methodist continued to utilize the statutory "protocol" every step of the way. It is the "protocol" of §166.046 utilized by Methodist, and what that protocol lacks, that deprived Plaintiffs of their substantive and procedural due process rights every step of the way.

Methodist sums up its argument thusly: "Accordingly, Kelly cannot show that Methodist's authority to withdraw Dunn's life-sustaining care emanated from a law or rule created by the State."[65] Yet, Methodist has no legal authority for this barbaric position. The only authority to withdraw life sustaining care derives from §166.046, the very statute that Methodist used in its notice letter, the statute followed to deprive Plaintiffs of their due process rights, and the statute it used as the basis to deprive Dunn of his right to life until he filed suit and received an injunction preventing the exercise of that state-granted authority by Methodist.

2. Methodist Is a State Actor as It Exercises Authority under §166.046 Evocative of a State Function which the Public Does Not Have.

Methodist is a state actor because it is given the authority under a state statute to determine that one's life will be ended prematurely. Under no other statute or

[64] *See* App'ts Tab C; CR 25-30.
[65] *See* Resp. at 41.

circumstance can any private individual or entity take one's life against their will with authority and total immunity. Only governments have been able to determine when one lives and dies in the context of criminal proceedings. Through Section 166.046, the State of Texas provides the only civil authority.

Methodist, in attempting to argue that it is not a state actor and §166.046 is not the only method available to resolve life disputes, actually argues, "Even this litigation demonstrates the availability of post-decision injunctive relief or constitutional challenges as further alternative means of resolving these disputes."[66] This statement by Methodist undermines its primary argument. Its entire Motion to Dismiss was based on the premise that Dunn's constitutional challenge was moot because it did not withdraw his life sustaining care. Many patients have been, and will continue to be, in Dunn's and Kelly's position – the constitutional challenge could not be completed prior to the patient's death.

III. PUBLIC POLICY CONSIDERATIONS SUPPORT DECLARING §166.046 UNCONSTITUTIONAL

Methodist's public policy arguments are difficult to follow. Recognizing that Methodist is a state actor in the context of determining that §166.046 is unconstitutional would not mean the state can control end-of-life decisions. Rather, it would be an acknowledgement that a patient cannot be left with no rights while

[66] *See* Resp. at 49.

the hospital determines whether he lives or dies. The statistics cited by Methodist demonstrate how often §166.046 is invoked and that it has made doctors feel "more comfortable in confronting possible futile-treatment scenarios."[67] Far from supporting the notion that there is openness and transparency in the process, as Dunn's situation clearly, objectively refutes, Methodist emphasizes in yet another way, how patient rights are completely ignored by hospitals who are empowered by the state through §166.046. Contrary to what Methodist represents, there is hardly "unanimous opposition to the outcome Kelly urges." Ethicists, legal experts, and others have long written of their concern about the state of the law in Texas and elsewhere leaving patients with no rights as involuntary euthanasia creeps forward.[68] This is a powerful reason to declare §166.046 unconstitutional.

IV. THE COURT NEED NOT REMAND; IT CAN RENDER

Without providing any legal authority or analysis, Methodist contends that the proper course of action in the event this Court does not affirm the trial court, is to

[67] *See* Resp. at 50.

[68] The case of Alfie Evans has provided the most publicity and highlighted the inequities between the doctor and patient in these cases. What happened there could absolutely happen in Texas under TADA. But even before this last month, many have written specifically about the flawed TADA and have been for over a decade. *See, e.g.,* Truong, Robert. "Counterpoint: The Texas advance directives act is ethically flawed," CHEST 136, no. 4 (October 2009): 968-71; O'Callaghan, Nora. "Dying for Due Process: The Unconstitutional Medical Futility Provision of the Texas Advance Directives Act" *Baylor Law Review* 60, no. 2 (2008); Smith, Wesley J., "Death by Ethics Committee: Refusing to Treat Lives Deemed Unworthy of Living," April 27, 2006, http://www.discovery.org/a/3452/ (last accessed May 7, 2018).

remand. Under the authorities set forth in Plaintiffs' opening brief, this Court has the full authority to reverse and render.

CONCLUSION & PRAYER

The trial court erred in granting Methodist's Motion to Dismiss. Plaintiffs' claims are not moot, the trial court had jurisdiction to hear them, and committed reversible error when it did not. This Court has subject matter jurisdiction to determine all issues presented in the cross-Motions for Summary Judgment. Section 166.046 is unconstitutional facially and as applied to Chris Dunn who, along with Evelyn Kelly, are entitled to nominal damages for the infringement of their procedural due process rights, including those prior to Dunn's death. Plaintiffs pray this Court reverse the judgment of the trial court and render the judgment requested in Plaintiffs Motion for Summary Judgment and remand the case to the trial court for an award of Plaintiffs attorneys' fees. Alternatively, Plaintiffs pray that this Court find that the trial court abused its discretion in determining Plaintiffs' case was moot and that this Court reverse the trial court and remand this case for further proceedings so that the Plaintiffs' claims may be fully adjudicated. Finally, Plaintiffs pray for such other and further relief as they may show themselves justly entitled.

Respectfully submitted,

/s/Joseph M. Nixon

James E. "Trey" Trainor, III
State Bar No. 24042052
trey.trainor@akerman.com
AKERMAN LLP
700 Lavaca Street, Suite 1400
Austin, Texas 78701
Tel: (512) 623-6700
Fax: (512) 623-6701

Joseph M. Nixon
State Bar No. 15244800
joseph.nixon@akerman.com
AKERMAN LLP
1300 Post Oak Blvd., Suite 2500
Houston, Texas 77056
Tel: (713) 623-0887
Fax: (713) 960-1527

Kassi Dee Patrick Marks
State Bar No. 24034550
kassi.marks@gmail.com
2101 Carnation Ct.
Garland, Texas 75040
Tel: (469) 443-3144
Fax: (972) 362-4214

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rules of Appellate Procedure 9.4(c)(3), the undersigned attorney hereby certifies that the forgoing brief contains 7293 words, excluding those portions permitted by TEX. R. APP. P. 9.4(c)(1). The undersigned further certifies that their brief has been prepared using a typeface of no smaller than 14-point, except for footnotes, which are 12-point.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellants' Brief Response has been electronically filed and served on the Respondent and all counsel for the Appellees and Real Parties in Interest below on May 29, 2018.

Reagan W. Simpson
rsimpon@yettercoleman.com
YETTER COLEMAN LLP
909 Fannin Street, Suite 3600
Houston, Texas 77010

Dwight W. Scott
dscott@scottpattonlaw.com
SCOTT PATTON, PC
3939 Washington Ave. Suite 203
Houston, Texas 77007

/s/ Joseph M. Nixon
Joseph M. Nixon