8/30/2016 9:41:35 AM
Chris Daniel - District Clerk Harris County
Envelope No. 12435537
By: ARIONNE MCNEAL
Filed: 8/30/2016 9:41:35 AM

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'S MOTION TO DISMISS PURSUANT TO CHAPTER 74 OF THE CIVIL PRACTICES & REMEDIES CODE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **HOUSTON METHODIST HOSPITAL f/k/a THE METHODIST HOSPITAL** ("Houston Methodist" or the "Hospital"), and files this Motion to Dismiss pursuant to Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE, and respectfully shows the Court the following:

Unofficial Copy Office of Chris Daniel District Clerk

I. SUMMARY OF ARGUMENT

Defendant Houston Methodist Hospital f/k/a The Methodist Hospital ("Houston Methodist" or the "Hospital")'s Motion to Dismiss pursuant to Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE should be granted because—

- **Plaintiffs' lawsuit is nothing more than a health care liability claim, which is governed by Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE;**
- **Plaintiffs failed to serve an expert report on Houston Methodist within 120 days after Houston Methodist files its Original Answer; and**
- **Plaintiffs' Chapter 74 Health Care Liability claims are not preempted by any alleged Section 1983 liability.**

II.
FACTUAL SUMMARY AND PROCEDURAL HISTORY

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

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

Shortly after Dunn's admission, Dr. Uppalapati advised Dunn's family that his condition was irreversible and progressively terminal.

Having treated Dunn since October 12, 2015, his treating physicians concluded that he was suffering from the treatment necessary to sustain his life, and thus, life-sustaining treatment was medically inappropriate for Dunn. As a result, Dunn's attending physicians and patient care team recommended to his divorced parents that these aggressive treatment measures be withdrawn and that only palliative or comfort care be provided. The patient's father, David Dunn, strongly agreed with the recommendation and plan to provide comfort measures only, while the patient's mother, Evelyn Kelly, strongly disagreed with the providers' recommendation to discontinue life-sustaining treatment. Since Dunn had no advanced directives in place, was not married, and had no children, his parents became his

Unofficial Copy Office of Chris Daniel District Clerk

statutory surrogate decision makers.[1] The divisive situation between Dunn's divorced parents created a significant conflict between the two people the Hospital looked to for direction of his medical care.

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

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

Unofficial Copy Office of Chris Daniel District Clerk

[1] *See* TEX. HEALTH & SAFETY CODE § 597.041(a)(3) (2015).

Ethics Committee consulted with Chris's treatment team and his family. During the meeting, it was noted that the patient had recently left another facility against medical advice, refused to undergo a liver biopsy and refused treatment following the diagnosis of a pancreatic mass. The patient's father, David Dunn, expressed that his son "did not want to go to the hospital for treatment, because he believed he would die there." Accordingly, Mr. Dunn requested that the treatment team provide comfort care measures only to his son in accordance with what he thought Chris would want. The patient's mother, Evelyn Kelly, was unable to support any decision about transitioning the patient to comfort measures, opining that Chris would have wanted aggressive support, despite his prior conduct in leaving the prior hospital against medical advice, refusing liver biopsy and refusing treatment. At the conclusion of the meeting, Ms. Kelly requested additional time to discuss the matter with her family.

On Monday, November 2, 2015, members of the Biomedical Ethics Committee, along with several of Chris's treating physicians, multiple members of Chris's family, including his mother and siblings, again met to discuss Chris's terminal condition, prognosis and recommendations regarding his continued care and treatment. After hearing about the patient's terminal condition, prognosis and recommended transition to comfort care from Chris's treating physicians, Ms. Kelly requested additional time to discuss the matter with her family. Chris's father, David Kelly, did not attend the meeting, but continued to request that Chris's care be transitioned to comfort care only out of respect for Chris's wishes.

On Friday, November 6, 2015, I was present at a meeting with Ms. Kelly, Aditya Uppalapati, M.D. (ICU intensivist and critical care specialist caring for Chris), Andrea Downey (a member of Houston Methodist's palliative care department), and Justine Moore (a hospital social worker assigned to the case). The meeting was convened at Chris's bedside to discuss Chris's terminal condition and the physicians' recommendation that the patient be switched to comfort care and the ventilator be removed. Ms. Kelly continued to be unable to make the decision, and informed the group that she'd discuss the matter with her family on Monday. During the meeting, I personally described Houston Methodist Hospital Policy and Procedure PC/PS011 titled, "Medically Inappropriate Decisions About Life-Sustaining Treatment" in the event a consensus couldn't be reached. During this meeting, I answered Ms. Kelly's questions regarding the issues involved, including the process going forward, including the fact that another meeting of the Committee would be

Unofficial Copy Office of Chris Daniel District Clerk

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

Unofficial Copy Office of Chris Daniel District Clerk

> 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.[2]

Over the next days, hospital representatives exhausted efforts to transfer Dunn to another facility. In fact, as delineated within the affidavit of Justine Moore, a Houston Methodist Hospital Social Worker assigned to Dunn's case, some sixty-six (66) separate facilities were contacted by Houston Methodist representatives requesting transfer.[3] 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.[4] 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 mother, his father, and the outside forces influencing them.[5]

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.[6] 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

Unofficial Copy Office of Chris Daniel District Clerk

[2] *See* Affidavit from J. Richard Cheney, attached hereto as "Exhibit A."

[3] *See* Affidavit from Justine Moore, LMSW, attached hereto as "Exhibit B."

[4] *See id.* at 2, ¶ 4.

[5] *See id.* at 4, ¶ 9.

[6] *See* Plaintiff's Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief, attached hereto as "Exhibit C."

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

Prior to the Temporary Injunction hearing, Houston Methodist formally appeared in the matter.[8] 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.[9] 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**

Unofficial Copy Office of Chris Daniel District Clerk

---

[7] *See id.*

[8] *See* Houston Methodist Hospital's Verified Plea in Abatement, Original Answer and Special Exceptions, attached hereto as "Exhibit D."

[9] *See* Order of Abatement dated December 4, 2015 from the 189th Judicial District of Harris County, Texas, attached hereto as "Exhibit E."

physicians to withdraw life-sustaining treatment.[10]

In the probate matter, Dunn's counsel inexplicably sought an expedited guardianship process and determination. If Dunn's representatives only sought more time to locate alternative treatment providers while preserving the provision of life-sustaining treatment, then why would they want to expedite anything? They were given the precise remedy that they demanded in their pleadings to this Court – time.

In any event, on December 23, 2015, Dunn succumbed to his terminal illnesses. The final autopsy report of Dunn revealed a 7x6x5 cm cancerous mass on Dunn's pancreas with metastasis to the liver and lymph nodes, and micrometastasis to the lungs.[11] Further, the report showed Dunn suffered obstructive jaundice, hepatic encephalopathy, peritonitis, acute renal failure, acute respiratory failure and sepsis.[12]

It is undisputed that from the day of his admission until the time of his death Houston Methodist provided continuous life-sustaining treatment to Dunn. In fact, following his death, Evelyn Kelly, Dunn's mother, wrote, "we would like to express our deepest gratitude to the nurses who have cared for Chris [Dunn] and for Methodist Hospital for continuing life sustaining treatment of Chris [Dunn] until his natural death."[13] 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

Unofficial Copy Office of Chris Daniel District Clerk

---

[10] *See id.* (emphasis added).

[11] *See* Final Anatomic Diagnosis of David Christopher Dunn, attached hereto as "Exhibit F."

[12] *Id.*

[13] *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 as "Exhibit G."

Kelly, Individually and on behalf of the Estate of David Chrisopher Dunn, as Plaintiff.[14] In her First Amended Petition, Plaintiff states that as a result of Houston Methodist's conduct, she sustained injury individually, and on behalf of the Estate.[15]

As evidenced by the facts, Plaintiffs' claims are health care liability claims governed by Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE. In accordance with Chapter 74, Plaintiffs were 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, which are health care liability claims, must be dismissed with prejudice.

III.
ARGUMENT & AUTHORITIES

This is a health care liability claim, which is governed by Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE. As such, Plaintiffs are required to serve on Houston Methodist an expert report not later than the 120th day after Houston Methodist files its original answer. Failure to file an expert report results in dismissal of the entire case with prejudice. Plaintiffs' Original Petition was filed on November 20, 2015.[16] Houston Methodist filed its Original Answer on December 2, 2015, placing Plaintiffs' 120-day expert reporting deadline on March 31, 2016.[17] To date, Plaintiffs have not provided Houston

Unofficial Copy Office of Chris Daniel District Clerk

[14] *See* Plaintiffs' First Amended Petition attached as "Exhibit H."

[15] *See id.* at 4, ¶ 10.

[16] *See* Plaintiffs' Original Verified Petition, attached hereto as "Exhibit C."

[17] *See* Houston Methodist's Original Answer, attached hereto as "Exhibit D."

Methodist with any expert report(s). Therefore, Plaintiffs' claims against Houston Methodist must be dismissed with prejudice in their entirety.

In advance of Plaintiffs' anticipated preemption argument, it is Houston Methodist's position that Plaintiffs' Chapter 74 health care liability claims are not preempted via the Supremacy Clause. There are three ways that a state law may conflict with federal law, and thus be preempted; however, none are present here, making any such argument moot.

A. Plaintiffs' Cause of Action Is A Health Care Liability Claim.

To determine whether a cause of action is a "health care liability claim," courts examine the claim's underlying nature; they are not bound by the form of the pleading.[18] A "health care liability claim" means:

> 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.[19]

If the act or omission alleged in the complaint is an inseparable part of the rendition of health care services, then the claim is a health care liability claim.[20]

B. Requirements Of An Expert Report In A Health Care Liability Claim.

Pursuant to the TEXAS CIVIL PRACTICE AND REMEDIES CODE § 74.351, a claimant:

> shall not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.[21]

[18] *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994).

[19] TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

[20] *Diversicare*, 185 S.W.3d at 848; *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995).

[21] § 74.351(a).

Unofficial Copy Office of Chris Daniel District Clerk

The purpose of the expert reporting requirement is two-fold: (1) inform the Defendant of the specific conduct Plaintiff has called into question; and (2) provide a basis for the trial court to conclude that Plaintiff's claims have merit.[22] The reporting requirement is not meant to serve as a roadblock for claimants, but rather a procedural tool to weed out frivolous and/or meritless claims.[23]

"Strict compliance with [§74.351(a)] is necessary."[24] If a health care liability claimant fails to comply with the expert reporting requirement within the statutory time period, on motion by the affected physician or health care provider, the court shall dismiss the case with prejudice to the refilling of the same.[25]

C. Plaintiffs' Claims Are Indisputably Health Care Liability Claims Governed By Chapter 74 Of THE CIVIL PRACTICE AND REMEDIES CODE.

Despite Plaintiffs' attempts to skillfully plead around the statute, this case undeniably falls within the purview of Chapter 74 and is subject to the reporting requirement outlined above. Texas courts stand firm in their holdings that a plaintiff cannot escape the clutch of the Chapter 74 procedural safeguards by cloaking a health care liability claim in the language of another cause of action.[26] A court is "not bound by the niceties of pleadings, and a mere 'recasting' of a health care liability claim based on physician or health care provider negligence in the garb of some other cause of action is not sufficient to preclude the

Unofficial Copy Office of Chris Daniel District Clerk

22 *Am. Transitional Care Ctrs. Of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

23 *Loaisiga v. Cerda*, 379 S.W.3d 248, 258 (Tex. 2012).

24 *Zanchi v. Lane*, 408 S.W.3d 373, 376 (Tex. 2013).

25 § 74.351(b)(2).

26 *Diversicare*, 185 S.W.3d at 848; *Boothe v. Dixon*, 180 S.W.3d 915, 918 (Tex. App.—Dallas 2005, no pet.).

application of Article 4590i."[27]

To avoid such trickery of artful pleading, courts focus on the underlying nature and essence of the claim instead of the way the cause of action was plead.[28] Specifically, courts consider the alleged wrongful conduct, in addition to the duties allegedly breached.[29] If the act or omission that forms the basis of the complaint is an inseparable part of the rendition of health care services, or if it is based on a breach of the standard of care applicable to health care providers, then the claim is a health care liability claim.[30]

Determining whether a claim is a health care liability claim is a question of law.[31] A health care liability claim 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.[32]

Plaintiffs' First Amended Petition specifically states that the facts underlying and supporting this lawsuit are based on the manner in which Houston Methodist provided life-sustaining health care services to Dunn. Therefore, there can be no dispute then that the

Unofficial Copy Office of Chris Daniel District Clerk

---

[27] *Diversicare*, 185 S.W.3d at 851. TEX. REV. CIV. STAT. art. 4590i, was amended and recodified in 2003 as Chapter 74 of the TEX. CIV. PRAC. & REM. CODE. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.

[28] *Lee v. Boothe*, 235 S.W.3d 448, 451 (Tex. App.—Dallas 2007, pet. denied).

[29] *Id.*

[30] *Vanderwerff v. Beathard*, 239 S.W.3d 406, 409 (Tex. App.—Dallas 2007, no pet.).

[31] *Tex. West Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012).

[32] *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).

underlying nature or essence of Plaintiffs' claims are inseparable from the rendition of the health care services rendered at Houston Methodist, thereby implicating and invoking applicable standards of medical care, health care, safety, professional or administrative services directly related to health care. Therefore, all of the claims asserted in this matter by Plaintiffs are indisputably health care liability claims.

Another significant factor that cannot be overlooked in determining whether the particular claims asserted are health care liability claims is whether expert testimony is necessary to prove the alleged lapses in professional judgment and treatment.[33] Again, it can not be disputed that a determination concerning the provision of life-sustaining health care services requires particular knowledge possessed by experts, knowledge that is not commonly held amongst the general population, nor does the general public know of the myriad of other questions that may need to be asked, much less answered, in making such professional judgments.[34] And additionally, when determining whether claims are health care liability claims subject to Chapter 74, "courts should consider the entire court record, including the pleadings, motions and responses, and relevant evidence properly admitted," to ensure the true nature of the claims and causes of action are revealed.[35]

Because the alleged departures involved in this matter are so inextricably interwoven with the rendition of health care services, as each squarely focuses on an alleged failure to exercise the appropriate medical, professional and/or administrative judgment as to both the medical and health care services rendered to Dunn during his admission to Houston

Unofficial Copy Office of Chris Daniel District Clerk

---

[33] *Diversicare*, 185 S.W.3d at 851.

[34] *Id.*

[35] *Loaisiga*, 379 S.W.3d at 258.

Methodist, the proof of any of the claims asserted against Houston Methodist requires the establishment of the applicable standards of care, through qualified expert testimony, regarding the appropriate plan of care for Dunn, the administration and withdrawal of life-sustaining treatment, and the conduct of the Ethics Committee. This need for expert testimony is simply another indication the claims are health care liability claims.

i. Houston Methodist Hospital, The Defendant In The Instant Action, Is A Health Care Provider.

Houston Methodist is the Defendant in this cause of action. The Hospital, as a health care institution, meets the statutory definition of a health care provider under Chapter 74.[36] Therefore, it is undisputed that Houston Methodist is a health care provider.

ii. 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.

Although carefully worded to avoid an outward appearance of health care liability claims, Plaintiffs' allegations are rooted in the rendition of the medical services and health care provided to Dunn and the corresponding standards of care. In numerous pleadings, responses, and motions to the court, Plaintiffs specifically complain:

> 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***.[37]

Unofficial Copy Office of Chris Daniel District Clerk

[36] §§ 74.001(a)(11)(G), (a)(12)(A).

[37] *See supra* note 14 at 2-3, ¶ 4.

> …
>
> On November 13, 2015 HMH held a meeting and determined that it would in fact remove Dunn's LST and ***inject him with a death-causing serum***[38]***.***
> …
>
> Now, it is clear The Methodist Hospital's intended application of [166.046] ***would have resulted in the early termination of Mr. Dunn's life*** by approximately one month's time.[39]
>
> …
>
> On November 10, 2015 The Methodist Hospital informed [Plaintiff] 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.[40]

The essence of Plaintiffs' aforementioned allegations regard the medical decisions and actions of the physicians and health care providers who cared for Dunn while he received life-sustaining treatment at Houston Methodist. These complaints all stem from the Plaintiffs' criticisms of the treatment or lack of treatment Dunn received while at Houston Methodist. Such complaints undeniably implicate an inseparable part of Dunn's diagnosis, care and treatment while at Houston Methodist.[41]

Plaintiffs' criticisms of Houston Methodist's "premature" decision to withdrawal life sustaining treatment, and whether that decision was appropriate under the existing facts and circumstances regard inseparable or integral parts of the rendition of Dunn's health care.[42] As such, Plaintiffs' claims allege departures by Houston Methodist from accepted standards

Unofficial Copy Office of Chris Daniel District Clerk

---

[38] Plaintiffs' Response in Opposition to Houston Methodist Hospital's Second Motion to Dismiss 2, attached hereto as "Exhibit I."

[39] Plaintiffs' Response in Opposition to Houston Methodist Hospital's Special Exceptions and Motion to Dismiss 2, attached hereto as "Exhibit J."

[40] *See supra* note 14 at 11, ¶ 29.

[41] *Smalling v. Gardner*, 203 S.W.3d 354, 365 (Tex. App.—Houston [14th Dist.] 2005).

[42] *Diversicare*, 185 S.W.3d at 848.

of health care applicable to a patient in the same or similar circumstances as Dunn.[43] Not only do Plaintiffs criticize the Houston Methodist's decision to cease life-sustaining treatment and proceed with palliative care, but they accuse Houston Methodist of attempting to inject an "almost immediate" life-ending combination of drugs, or a "death serum," – in essence, assisted suicide – which is not only a blatant fabrication, but also calls into question the professional decision making ability of the medical professionals at Houston Methodist. Although cleverly worded as to avoid the appearance of a health care liability claim, all Plaintiffs have done in their complaints are condemn Houston Methodist's medical and professional judgment and accuse the Hospital of failing to provide care and treatment to Dunn in accordance with the medically-accepted, applicable standards of care.

As further evidence that Plaintiffs' claims are health care liability claims, Plaintiffs have alleged Houston Methodist "***prematurely***" applied the procedures outlined in Section 166.046 to withdraw life-sustaining treatment from [an 'alert and communicating'[44]] Dunn." Accordingly, expert testimony is required to establish: (1) whether Dunn was "alert and communicating;" (2) whether withdrawal of life-sustaining treatment was appropriate; and (3) the appropriate standard of care necessary for a patient in Dunn's condition. The necessity of an expert's testimony to establish all three (3) of the aforementioned applicable standards of care suggests such claims are health care liability claims.[45]

In addition to the aforementioned accusations that Houston Methodist breached the appropriate standard of care, Plaintiffs claim the Ethics Committee was negligent in its

---

[43] *Id.* ("A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of medical services.").

[44] *See supra* note 14 at 11, ¶ 29.

[45] *Diversicare*, 185 S.W.3d at 851.

Unofficial Copy Office of Chris Daniel District Clerk

handling of the section 166.046 hearing regarding whether to end Dunn's life-sustaining treatment. Plaintiffs specifically allege the following departures from the standard of care by Houston Methodist and the Ethics Committee:

> 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***, The Methodist Hospital found that it would discontinue life sustaining treatment on or about Monday, November 23, 2015. Plaintiffs assert the Texas Constitution and the U.S. Constitution guaranteed Dunn a representative to advocate for his life and opportunity to be heard when life sustaining treatment is being removed.[46]
>
> …
>
> In this case, Plaintiffs did not receive due process. Section 166.046 contemplates that those for whom life sustaining treatment is being provided may not be able to read letters, receive notice, attend the ethics committee meeting, etc. Therefore, the Statute specifically applies to not only the individual receiving treatment, but the person "responsible for the healthcare decisions of the individual." 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.*** See Tex. Health & Safety Code 166.046(b) (the statute applies to not only the individual receiving treatment, but the person "responsible for healthcare decisions of the individual"). She did not have the right to speak at the meeting, present evidence, or otherwise seek adequate review. See Tex. Health & Safety Code 166.046(b). Thus, as a person to whom the statute applied, the statute only permits Kelly to sit and watch as an ethics committee determines it is appropriate to remove the life sustaining treatment of her son; as such, Kelly's right to due process was violated. See, e.g., Planned Parenthood of Cent. Mo., 428 U.S. 52, 62 (1976) (physicians found to have standing when seeking

Unofficial Copy Office of Chris Daniel District Clerk

[46] *See supra* note 14 at 2, ¶ 2.

declaratory relief challenging the constitutionality of the Missouri abortion statute which placed an additional burden on a woman's right to abortion).[47]

…

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.[48]

…

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 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.[49]

…

Ms. Kelly suffered severe emotional distress, which was the expected risk of informing her that the ***hospital had decided to remove Mr. Dunn's***

[47] *Id.* at 6–7, ¶ 17.

[48] *Id.* at 7, ¶ 18.

[49] *Id.* at 10–11, ¶ 27.

Unofficial Copy Office of Chris Daniel District Clerk

treatment against Mr. Dunn's wishes.[50]

Decisions regarding whether to withdraw a patient's life sustaining treatment, and ensuring such a decision, if necessary, complies with section 166.046 involve professional medical judgment and are therefore part of the rendition of health care. By accusing the Houston Methodist and the Ethics Committee of failing to conduct itself in a fair and impartial manner, providing Plaintiffs with little and inadequate notice of the Ethics Committee hearing on November 13, 2015, failing to ensure Plaintiffs had legal counsel and the ability to provide rebuttal evidence at the Ethics Committee hearing on November 13, 2015, and communicating to other potential receiving hospitals that Dunn was a futile case unworthy of continued life sustaining treatment, Plaintiffs undoubtedly fault Houston Methodist for departing from the accepted standards of care owed to a patient in the same or similar circumstances.[51] Although Plaintiffs strategically sound the above-mentioned accusations in constitutional law, Plaintiffs cannot hide behind their artful pleading to avoid the health care liability claims.[52]

Analogous to this case, in *Texas Cypress Creek Hospital, L.P. v. Hickman*, the mother of a psychiatric patient argued that her claims about her daughter's treatment sounded in constitutional law, not contract or tort, under sections of the Texas Constitution that include protections for the mentally ill.[53] The court acknowledged that while Appellee posited good arguments to support her position, Appellee could "not use artful pleading to avoid chapter

Unofficial Copy Office of Chris Daniel District Clerk

---

[50] *Id.* at 11, ¶ 29.

[51] *See supra* note 46–50.

[52] *Tex. Cypress Creek Hosp., L.P. v. Hickman*, 329 S.W.3d 209, 216–17 (Tex. App.—Houston [14th Dist.] 2010, pet denied.).

[53] *Id.* at 216.

74's requirements when the essence of the suit [was] a health care liability claim.[54] The court further reasoned that Appellee could not avoid the requirements of Chapter 74 by carrying forward factual allegations that in essence assert health care liability claims, while excluding any reference to Chapter 74 and altering the labels for the claims.[55] The court found that despite Appellee's tactic positioning of her causes of actions as constitution claims, Appellee's claims fell squarely within the definition of health care liability claims and were this subject to Chapter 74 and its reporting requirement.[56]

Just as in *Hickman*, Plaintiffs in this case cannot completely abandon their health care liability claims in favor of alternative claims through crafty pleadings. Here, Plaintiffs have clearly attempted to recast the health care liability claims asserted against Houston Methodist by cloaking their accusations of the breaches of the applicable medical standards of care in constitutional due process causes of action. Plainly looking at the entirety of the record, Plaintiffs attack and critique Houston Methodist's actions and professional decisions regarding the administration and withdrawal of life-sustaining treatment, and also criticize the conduct of the Ethics Committee and its ultimate treatment decision for Dunn. The Plaintiffs' claims are undeniably health care liability claims, and as such, the requirements of Chapter 74 cannot be avoided.[57] Plaintiffs' recasting of their claims must therefore be ineffective in avoiding the application of Chapter 74.

Unofficial Copy Office of Chris Daniel District Clerk

---

[54] *Id.*

[55] *Id.*; s*ee Med. Hosp. of Buna Tex., Inc. v. Wheatley,* 287 S.W.3d 286, 291–92 (Tex. App.—Beaumont 2009, pet. denied); *NCED Mental Health, Inc. v. Kidd,* 214 S.W.3d 28, 36–37 (Tex. App.—El Paso 2006, no pet.).

[56] *Hickman*, 329 S.W.3d at 217.

[57] *Diversicare*, 185 S.W.3d at 851; *MacGregor Med. Ass'n v. Campbell*, 985 S.W.2d 38, 40 (Tex. 1998); *Gormley v. Stover*, 907 S.W.2d 448, 450 (Tex. 1995).

iii. Plaintiffs Assert That Houston Methodist's Alleged Departures From Accepted Standards Proximately Caused Plaintiffs' Alleged Injury.

To satisfy this third element of a health care liability claim, the complained of act or omission must have proximately caused injury or damage to the claimant.[58] 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, Plaintiffs sustained injuries.[59] Therefore, it is clear that Plaintiffs assert that Plaintiffs' alleged injuries were proximately caused from Houston Methodist and the Ethics Committee's decision to discontinue Dunn's life-sustaining treatment. Thus, because all three (3) elements are present, Plaintiffs' constitutional causes of action are health care liability claims governed by Chapter 74.

D. Plaintiffs Failed To Serve Their Chapter 74 Expert Report On Houston Methodist As Required By The Texas Civil Practice And Remedies Code § 74.351.

Established by the above analysis, it is evident that Plaintiffs' claims constitute health care liability claims. As such, Plaintiffs were required to serve an expert report on Houston Methodist on or before March 31, 2016, 120 days from the date Houston Methodist filed its original answer.[60] When a plaintiff fails to serve an expert report within 120 days of the filing of each defendant's original answer, upon motion of the defendant health care provider, the court is **required** to dismiss the claim with prejudice, and award attorney's fees and costs of court.[61] This mandate is rigid such that the Legislature denied trial courts the

Unofficial Copy Office of Chris Daniel District Clerk

[58] *Williams*, 371 S.W.3d at 180.

[59] *See supra* note 14 at 4, ¶ 10.

[60] § 74.351(b).

[61] *Id.* (emphasis added).

discretion to deny motions to dismiss or grant extensions when a claimant fails to serve any expert report.[62] In fact, a trial court's refusal to dismiss is immediately appealable.[63]

To date, Plaintiffs have not served any expert report on Houston Methodist. As such, Plaintiffs have failed to satisfy the mandatory expert reporting requirement of Chapter 74. Accordingly, Houston Methodist requests this Court dismiss Plaintiffs' claims against it with prejudice. Out of respect for the family, Houston Methodist does not seek an award of fees and costs at this time, but reserves the right to do so should same prove necessary.

E. Plaintiffs' Chapter 74 Health Care Liability Claims Are Not Preempted By Any Alleged Section 1983 Liability.

In response to Houston Methodist's motion, Plaintiffs are likely to put forth the argument that they have not alleged any liability under Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE; rather, all liability alleged is governed by Section 1983 of the United State Code. As such, the Supremacy Clause prohibits a Chapter 74 health care liability claim from taking precedence over a Section 1983 cause of action. However, any such potential argument is flawed because there are three (3) ways state law can conflict with federal law and thus be preempted, none of which apply in this case.[64]

Under the Supremacy Clause of the United States Constitution, federal law may preempt state law in one of three ways: express preemption; implied field preemption; and implied conflict preemption.[65] Express preemption occurs when congress uses specific

Unofficial Copy Office of Chris Daniel District Clerk

---

[62] *Ogletree v. Matthews*, 262 S.W.3d 316, 319–20 (Tex. 2007).

[63] *Id.*

[64] *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 748 (Tex. 2003).

[65] *Id.*

language in a statute to expressly displace state law.[66] Implied field preemption occurs "when the scheme of federal regulation is sufficiently comprehensive to support a reasonable inference that Congress left no room for supplementary state regulation…."[67] Implied conflict preemption occurs "if the state law actually conflicts with federal regulations."[68]

Historically, the states have exercised primary authority in matters concerning the public health and safety of their citizens.[69] Thus,

> [i]n all pre-emption cases, and particularly in those in which Congress has "legislated ... in a field which the States have traditionally occupied," ... [**preemption** analysis] "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress."[70]

The purpose of such a presumption is to provide "assurance that the 'federal-state balance'… will not be disturbed unintentionally by Congress or unnecessarily by the courts."[71] A party urging preemption of a state's police powers has a difficult burden of overcoming the presumption against preemption and must prove federal law preempts state law in one of the three (3) abovementioned ways.[72]

Chapter 74 regards the health and well being of individuals and is undoubtedly within the state of Texas's inherent police powers. Chapter 74 governs the health and care the

Unofficial Copy Office of Chris Daniel District Clerk

---

[66] *Great Dane Trailers v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

[67] *Black*, 116 S.W.3d at 748.

[68] *Id.*

[69] *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (citing *Hillsborough Cnty. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 719 (1985), and *Metropolitan Life Ins. Co. v. Mass.,* 471 U.S. 724, 756 (1985)).

[70] *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 5 (Tex. 1998) (citing *Medtronic,* 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (Tex. 1996) (emphasis added) (citation omitted)).

[71] *Jones v. The Rath Packing Co.,* 430 U.S. 519, 525 (1977).

[72] *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 255 (1984).

people receive by various health care providers in the state, and ensures such health and medical care is administered safely in accordance with applicable standards of care. Therefore, this Court must begin any preemption analysis with the assumption that Chapter 74 is not to be superseded by federal law. Because Plaintiffs cannot overcome the arduous burden in rebutting such a presumption, this preemption argument, if made, fails.

i. Express Preemption

Express preemption occurs when a federal law *expressly*, by its plain language, preempts a state law.[73] Section 1983 of the United States Code states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[74]

Nothing in the language of Section 1983 even mentions preemption, nor does the section contain an express preemptive provision. Further, Section 1983 makes absolutely no mention or reference to a state's police powers, let alone Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE. Therefore, under the Supremacy Clause, Section 1983 does not expressly preempt Chapter 74.

Unofficial Copy Office of Chris Daniel District Clerk

[73] *Black,* 116 S.W.3d at 748; *Estate of Wells v. Great Dane Trailers, Inc.*, 5 S.W.3d 860, 863 (Tex. App.—Houston [14th Dist.] 1999).

[74] 42 U.S.C. § 1983.

ii. Implied Preemption

As noted above, federal law may also preempt state law when the scope of a statute demonstrates that Congress intended to occupy a field exclusively or when state law actually conflicts with federal law.[75] However, as discussed below, neither field preemption nor conflict preemption are applicable in the instant case.

a. Field Preemption

Field preemption occurs when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[76] It may also occur when "the Act of Congress ... touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[77]

Throughout the history of the United States, the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, ... matter[s] of local concern,"[78] the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."[79] It logically follows that Congress did not intend for any federal statute, including Section 1983, to usurp the field of regulating the health and safety of the American people. Neither does the language of Section 1983 suggest its intention to regulate in the field of the health and safety of the American citizens.

Unofficial Copy Office of Chris Daniel District Clerk

[75] *Wells*, 5 S.W.3d at 865; *see Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

[76] *Alvarado*, 974 S.W.2d at 9 (quoting *Rice*, 331 U.S. at 230).

[77] *Id.*

[78] *Hillsborough*, 471 U.S. at 719.

[79] *Metropolitan Life*, 471 U.S. at 756.

Chapter 74 regulates the health and care the people receive by various health care providers in the state, and ensures such health and medical care is administered safely, and in accordance with applicable standards of care.[80] As such, because Chapter 74 deals exclusively with the health and safety of the American people, and the regulation of the health and safety of the American people was explicitly left to the states via the police powers, field preemption is not applicable in this case.

b. Conflict Preemption

Conflict preemption occurs when it is impossible to comply with both the federal and state requirement.[81] A state law actually conflicts with a federal regulation when a party is unable to comport its behavior to both federal and state regulations, or "when the state law would obstruct Congress' purposes and objectives."[82] Put differently, a federal law may preempt state law when the state law '"stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'[83] It is particularly important with conflict preemption to begin the analysis "with the assumption that state police powers are not superseded absent a clear mandate from Congress."[84] "State law will be superseded *only where* the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together."[85]

In the instant matter, it is not impossible for Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE to stand with Section 1983. Chapter 74 is simply a

---

[80] *See* § 74.000.

[81] *Alvarado*, 974 S.W.2d at 10 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–43 (1963)).

[82] *Damian v. Bell Helicopter Textron, Inc.*, 352 S.W.3d 124, 134 (Tex. App.—Dallas 2011).

[83] *Avarado*, 974 S.W.2d at 10.

[84] *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 718 (Tex. App.—Dallas 2012).

[85] *Id.* (emphasis added).

Unofficial Copy Office of Chris Daniel District Clerk

procedural requirement, just as any pleading requirement or other procedural hurdle. The purpose behind Chapter 74 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE is to deter frivolous and meritless lawsuits against health care providers.[86] In no way does Chapter 74 stand as an obstacle to Section 1983's protection of a person's civil rights. Nothing in the language of Chapter 74 makes it impossible to simultaneously abide by Section 1983, and the procedural requirements of Chapter 74. And while it is not Houston Methodist's contention that there is even slight tension between Chapter 74 and Section 1983, even if tension existed between the two laws, "[t]he mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."[87]

As demonstrated above, Plaintiffs will be unable to meet their strenuous burden in proving preemption because Chapter 74 is not expressly or impliedly preempted by Section 1983. Any argument by Plaintiffs asserting such will be unfounded and without merit.

IV. PRAYER

As set forth above, Plaintiffs' causes of actions are health care liability claims based on alleged departures of the accepted standards of medical and health care. Because Plaintiffs failed to serve an expert report on Houston Methodist within 120 days of the Hospital filing it's original answer, Plaintiffs' claims must be dismissed with prejudice.

Unofficial Copy Office of Chris Daniel District Clerk

[86] *Palacios*, 46 S.W.3d at 879.

[87] *Cabello*, 390 S.W.3d at 720; *see also Silkwood,* 464 U.S. at 256 (recognizing tension between state and federal law but nonetheless finding federal law did not preempt state law).

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT, HOUSTON METHODIST HOSPITAL,** respectfully requests that this Court grant its Motion to Dismiss pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code, and for any such other and further relief to which Houston Methodist shows itself justly entitled.

Respectfully submitted,

SCOTT PATTON PC

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

DWIGHT W. SCOTT, JR.
Texas Bar No. 24027968
dscott@scottpattonlaw.com
CAROLYN CAPOCCIA SMITH
Texas Bar No. 24037511
csmith@scottpattonlaw.com
3939 Washington Avenue, Suite 203
Houston, Texas 77007
Telephone: (281) 377-3311
Facsimile: (281) 377-3267

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

Unofficial Copy Office of Chris Daniel District Clerk

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record pursuant to Rule 21a, Texas Rules of Civil Procedure, on this the 30th day of August, 2016.

Via E-file
James E. "Trey" Trainor, III
ttrainor@bmpllp.com
BEIRNE, MAYNARD & PARSONS, LLP
401 W. 15th Street, Suite 845
Austin, Texas 78701

Via E-file
Joseph M. Nixon
jnixon@bmpllp.com
Kristen W. McDanald
kmcanald@bpllp.com
BEIRNE, MAYNARD & PARSONS, LLP
1300 Post Oak Blvd., Suite 2300
Houston, Texas 77002

Via E-File
Emily Kebodeaux
ekebodeaux@texasrighttolife.com
TEXAS RIGHT TO LIFE
9800 Centre Parkway, Suite 20
Houston, Texas 77036

ATTORNEYS FOR PLAINTIFF

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

Unofficial Copy Office of Chris Daniel District Clerk