

II.

FACTUAL SUMMARY

The Court is familiar with the underlying facts of this dispute through the date of the temporary injunction hearing (December 12, 2019) and such details will not be repeated here.

The critical issues relevant to the dispute that have taken place since the last date that the Court took evidence, are as follows:

- **T.L. remains terminal with no medical treatment available to improve her long-term prognosis** – The key issue before the Court is unchanged: T.L. is terminal and no medical treatment can improve her long-term prognosis. While Cook Children’s continues to take care of T.L., none of the treatments she has received have in any way been curative to her underlying condition. She cannot properly maintain adequate oxygenation of her blood without aggressive ventilation and constant care and support. No medical professional that has reviewed her medical records has found any reason for hope or located any physician or facility that has thought they could improve her short- or long-term prognosis. Nor, has any facility offered to assume her care.
- **T.L. has only survived until now because she has been subject to extreme and aggressive treatments well beyond the standard of care** – As the Court may recall, as of December 12, 2019, T.L.’s prognosis was dire and she was not likely to survive even a few more months if treated within the standard of care. However, following the orders of this Court and the Second Court of Appeals, Cook Children’s instituted heroic measures designed to keep T.L. alive that far exceed the medical standards. While such actions have kept T.L. technically alive, such care has consequences. T.L. has spent her days sedated and paralyzed in order to remain still and calm so that the limited oxygen she absorbs can keep her brain alive. She has had extremely limited movement. She cannot cuddle. She is rarely held.

And, as discussed in more detail below, the aggressive treatment that has been necessitated to keep T.L. alive since December 2019 both increased her suffering and has had profound negative consequences.

- **T.L. continues to suffer and her medical condition has continued to decline necessitating an emergency tracheostomy on March 30** – Having now spent more than a year paralyzed, sedated, and attached to the multiple machines that keep her alive, T.L.’s body is ravaged. She has suffered numerous serious infections. While each infection was aggressively treated and beaten back, they have caused suffering and more infections will appear in the future.

Because T.L. has not been able to move, her muscles have wasted away and her limbs are contracting. Her care has become harder and harder to maintain as, for example, the muscles in T.L.'s jaw have stiffened and contracted so much that her mouth can barely be opened. This condition created danger to T.L.'s airway, which mandated an emergency tracheostomy on March 30 (which, as the Court will recall, was a procedure deemed not in T.L.'s best interest until it suddenly became necessary for her survival). She is swollen and stiff such that almost any attempted movement is extremely painful.

Moreover, T.L.'s brain and lungs have suffered deterioration from her treatment. While the full extent of such deterioration cannot be measured while T.L. is kept in her current condition, there is little doubt that she is profoundly developmentally delayed.

T.L. continues to be in constant pain, and her care exacerbates her suffering. Not only are her medical treatments painful, but basic life necessities – such as a diaper change – are excruciating for T.L. Because of the stiffness of her limbs, an extreme amount of pressure must be placed on T.L.'s legs to separate them enough for her to be cleaned and changed. This causes such extreme pain that T.L.'s nurses typically begin by apologizing to T.L. in hopes she will understand that the torturous exercise she is undergoing is not their choice. But, of course, due to her medication, T.L. has limited movement and is unable to communicate.¹

And, absent a court ruling, this is the only future T.L. can look forward to: Spending day after day in needless agony until, one day, she suffers a dying event that she does not recover from. Her pain and suffering is made worse by T.L.'s brain function. She is not brain dead or in a coma. Though she is paralyzed, she feels every painful intervention and suffers the fear and anxiety that comes along with it. And as a baby, she cannot understand what is being done to her. She can only know that her doctors and nurses hurt her.

¹ Indeed, T.L.'s condition is such that Cook Children's cannot even get a quick reading regarding its desire to shift T.L.'s medication. As the Court may recall, Cook Children's has tried on numerous occasions to wean T.L. off some of her medications (such as the paralytics) and, to date, she has not tolerated the change in her medication. Cook Children's is currently in a cycle of trying yet again. However, because T.L.'s muscles are so atrophied, she is not capable of significant movement currently and, therefore, Cook Children's cannot get a reading as to whether she can tolerate less medication going forward. This is a critical question as Plaintiff allegedly continues to seek to have T.L. treated at a facility with a lower level of care where such medications may not be available. Notably, while Plaintiff has repeatedly claimed that performing a tracheostomy on TL was the only barrier to finding a facility that would be willing to assume her care, over two weeks have passed since TL underwent the surgery and, to date, Plaintiff has not provided the names of any of these facilities or doctors. Further, no physician or outside facility has independently contacted Cook Children's to initiate a transfer.

- **As the financial cost of T.L.’s medical care – which is currently covered by a Texas Medicaid managed program – has continued to mount, the State of Texas’s manager appears to be reviewing whether continued care for T.L. is appropriate** – Although this case has never been about money – and Cook Children’s has *never* considered finances when making an end-of-life decision – the State of Texas (through its manager of a Medicaid care program) is now threatening to interject the issue into this dispute.

T.L.’s medical care is paid for through a special Texas Medicaid managed program known as Texas STAR Kids. Texas has hired a third party to administer the program for the State who, among other things, evaluates charges to determine whether treatment should be covered as medically appropriate and within the standard of care.

As would be expected in light of the extreme efforts that have been required to keep T.L. alive since birth, Cook Children’s and its physicians have incurred **more than \$24 million in billable charges** for T.L.’s medical care through 2020.

Although the Attorney General for the State of Texas filed amicus briefs in this action to support Plaintiff’s temporary injunction, the State’s Medicaid manager has recently begun to review whether – as a steward of the public’s money – Texas should be spending tax dollars on T.L.’s medical care when such care is medically futile, far beyond the applicable medical standard of care, and cannot impact her underlying condition. Although its review of the matter is ongoing, the actions of the State shed even further light on the lack of merit of the Plaintiffs’ claims.

- **After the Second Court of Appeals issued its decision, the Texas Supreme Court and United States Supreme Court declined to consider whether the opinion was correct until a final judgment is issued** – On July 24, 2020, a 2-1 panel of the Second Court of Appeals issued a 148-page opinion that reversed this Court, appeared to declare the Texas Advance Directives Act unconstitutional, and ordered that a temporary injunction be granted. As noted by the dissent, the majority’s pronouncement that a private hospital such as Cook Children’s should be considered a “state actor” due to the character of its conduct was incorrect, novel, and sought to expand the scope of Section 1983 into areas that “patently are not state action merely because of the weightiness or importance of the challenged decision.”

Although the opinion was interim in nature – and not a ruling on the merits of the dispute – Cook Children’s tried, and was unable, to appeal the decision as the reviewing courts were not willing to consider the issue until a final ruling was made. On October 16, 2020, the Texas Supreme Court declined to consider the interim opinion and denied Cook Children’s petition for review without comment. And on January 11, 2021, the United States Supreme Court denied the application for writ of certiorari as its jurisdiction only allows it to review

“final judgments or decrees rendered by the highest court of a state in which a decision could be had.” *See* 28 U.S.C. § 1257(a). As the court of appeals’ opinion was neither final nor made by the “highest court” of Texas, the Supreme Court determined that they could not review the decision.

III.

ARGUMENT

The Court should enter an expedited scheduling order for this matter with a trial date of July 26, 2021. An expedited trial date is both necessary and appropriate for this case.

First, a trial date in July is justified due to the ongoing condition of T.L. and the impact of this case on her physical and mental condition. As noted above, T.L. continues to suffer and the medical care she receives daily increases her pain. Moreover, her condition continues to deteriorate. As noted by the testimony at the hearing on the motion for temporary injunction, being forced to treat T.L. has also impacted the doctors and nurses at Cook Children’s who find themselves judicially ordered to violate their ethical code by harming a child for no medical benefit. Principles of equity clearly mandate that the Court expedite the process as it is simply cruel to drag this matter out.

Second, the claims at issue in this case are appropriate for a resolution in July. The claims presented here – and the rulings needed – involve few (if any) factual disputes. The issues presented here for resolution are dominated by legal questions. Indeed, the opinion from the Second Court of Appeals lays out nothing but legal issues that it believes controls the resolution of this case. There are – at most – a limited set of facts that could possibly be in dispute or need to be found out in discovery. Thus, there is no need for months of discovery.

Third, the procedural status of the case also calls for trial to be set quickly. This case was filed in November of 2019. Even while the appeal of the Court’s ruling on the motion for temporary injunction was pending, the case has never been stayed. Indeed, Cook Children’s has been

responding to informal discovery requests about the dispute almost constantly over the last year. Thus, to the extent that there are any matters that would normally require discovery, almost all of the discovery that would be needed has already been completed. Cook Children's has provided T.L.'s medical records to Plaintiff almost a dozen times (updated each time). Indeed, Cook Children's cannot think of any discoverable materials regarding T.L. within its possession that have not already been produced to Plaintiff. In short, there is no reason to delay the trial of this matter.

Finally, Cook Children notes that – no matter how this Court ultimately rules – multiple appeals are likely to follow the entry of final judgment. And as happened with the interlocutory appeals, such a process is likely to take many months. This fact exacerbates all of the time pressures listed above.

Thus, Cook Children's asks this Court to enter a scheduling order that sets this case for trial on July 26, 2021. While Cook Children's believes that the interim deadlines can be negotiated and agreed to between the parties, to the extent that the Court desires to immediately enter a full scheduling order, Cook Children's suggests the following deadlines:

- Deadline to File/Amend Pleadings Seeking Affirmative Relief: June 7, 2021
- Plaintiff's Expert Designations: June 11, 2021
- Defendant's Expert Designations: June 22, 2021
- Plaintiff's Rebuttal Expert Designations: July 2, 2021
- Discovery Completion Date: July 16, 2021
- Deadline to File Motions to Exclude Experts: July 12, 2021
- Trial: July 26, 2021

IV.

CONCLUSION

For the foregoing reasons, Defendant Cook Children's Medical Center respectfully asks the Court to set this case for trial beginning on July 26, 2021.

Dated: April 16, 2021

Respectfully submitted,

By: /s/ Geoffrey S. Harper

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on all counsel of record in accordance with the Texas Rules of Civil Procedure on this the 16th day of April 2021.

/s/ Geoffrey S. Harper
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