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THOMAS A. WILDER
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Cause No. 048-112330-19

T.L., A MINOR AND MOTHER, TRINITY LEWIS, ON HER BEHALF	§	**IN THE DISTRICT COURT**
PLAINTIFFS,	§	
V.	§	**TARRANT COUNTY, TEXAS**
COOK CHILDREN'S MEDICAL CENTER,	§	
DEFENDANT.	§	**48TH JUDICIAL DISTRICT**

PLAINTIFFS' RESPONSE TO COOK CHILDREN MEDICAL CENTER'S MOTION FOR EXPEDITED SCHEDULING ORDER

TO THE HONORABLE COURT:

Plaintiffs, T.L., and her mother, Trinity Lewis ("Trinity"), on her behalf, file this Response to Defendant, Cook Children Medical Center's Motion for Expedited Scheduling Order ("Cook's Motion") and would show unto the Court as follows:

I. INTRODUCTION

Plaintiffs' proposed scheduling order is efficient and reasonable. This case is complex. While Cook has its experts in-house, Plaintiffs deserve the opportunity to conduct discovery and then consult experts. Plaintiffs' proposed docket-control-order is swift. The proposed trial date, next January, is just over nine months away. The proposed docket-control-order keeps the case moving but includes time for dispositive motions and pre-trial motions. Plaintiffs seek to move the case forward, but to try it correctly.

Cook's proposed scheduling order violates Plaintiffs' rights to due process of law because it prevents Plaintiffs from making their case. Cook argues that the expedited scheduling order is necessary, but Cook has delayed resolution of this case through its appeals and by failing to timely

respond to Plaintiffs requests regarding the proposed temporary injunction order and proposed scheduling order. *See* Cook's Motion at 1; **Exhibit A** (Plaintiffs' counsel had to threaten to file proposed temporary injunction order without response because Defense counsel ignored Plaintiffs for weeks).

Most importantly, though, Cook has grossly mischaracterized T.L.'s condition. Cook says the cost of her care has never mattered. Cook's Motion at 4. Cook says it does not matter now. *See id.* But Cook based its motion to expedite on the cost of her care. Cook discussed the cost of her care as if it does matter. *See id.* Cook's action speaks louder than its words – which are outdated and unsupported by recent evidence. T.L.'s doctors have consistently told Trinity that she is doing better than they expected. And T.L. has improved. *See* **Exhibit B.** T.L.'s improvements have led to occupational therapy. *See id.* She is not stiff. *See id.* She is no longer nasally intubated. *See id.* She has been weaned off the paralytics discussed in Cook's motion. *See id.* She is pointing and communicating. *See id.* T.L. and Trinity have fought hard for her life. They deserve a true chance. The laws of our country afford them one.

II.
RELEVANT BACKGROUND & PROCEDURAL FACTS

T.L. was born on February 1, 2019, with a congenital heart disease and chronic lung disease. She did not need a ventilator to breathe until late August of 2019, when she developed complications after a procedure at Cook. Plaintiff's First Amended Verified Petition and Application for Injunctive Relief at 2. She remained on the ventilator until March 31, 2021. *See* **Exhibit B.**

The ventilator is the means by which Cook sought to involuntarily passively euthanize T.L. Cook invoked Texas Health & Safety Code §166.046 and attempted to remove the ventilator from T.L. against the wishes of her mother, Trinity. Trinity obtained legal assistance and obtained a

Temporary Restraining Order to save her daughter's life. The related Temporary Injunction was denied in the trial court, but the denial was reversed by the Court of Appeals.

Cook sought petition for review at the Supreme Court of Texas and then filed a Petition for a Writ of Certiorari before the United States Supreme Court. Both courts denied Cook's petitions.

During this time, T.L. has made steady progress. *See* **Exhibit B; Exhibit C; Exhibit F**. T.L.'s doctors have told Trinity that T.L. is doing better than expected. She is in occupational therapy and is working on sitting in a chair. *See* **Exhibit B.** Cook recently performed a tracheostomy and G-tube placement (procedures Plaintiffs have sought since August 2019). *See id.* T.L.'s doctors have repeatedly told Trinity how surprised the care team is at how well T.L. handled the tracheostomy procedure, and related G-tube procedures. She is more comfortable. *Id.* Since the tracheostomy procedure, T.L. has been weaned off vecuronium. *Id.* T.L. has been able to be without it for over a month. *Id.*

T.L.'s response to the tracheostomy has been encouraging and Plaintiffs are excited about the communications they have had with other facilities considering caring for T.L. as a transfer patient. *See* **Exhibit D.** Because T.L. received the tracheostomy only on March 31, 2021, Plaintiffs could not begin the process of seeking to transfer to T.L. until she had sufficient time to demonstrate that she responded well to the procedure. *Id.* As Cook stated in Cook Children's Medical Center's Response to Plaintiffs' Motion to Compel/Application for Temporary Mandatory Injunction, a patient usually has her first tube change after a trach 6-7 days after the initial surgery. *Cook Children's Medical Center's Response*, at 5. Cook acknowledged "[t]he first seven days are critical for tracheostomy patients." *Id.* Because this time frame is so important, Plaintiffs waited for T.L. to reach these milestones before seeking to transfer T.L. Plaintiffs currently are in the process of trying to seek transfer for T.L. *See* **Exhibit D.**

Nevertheless, Cook still appears intent on killing T.L. at the first available opportunity with increasingly gross mischaracterizations and misrepresentations of her actual condition and prognosis. T.L. has defied all odds and "expiration dates" given her by Cook. With the interlocutory appeals complete, it is time for a reasonable and just Discovery Control Plan to be put into place so that the facts and expert testimony necessary for this case may be developed and a trial on the merits completed.

III.
ARGUMENTS AND AUTHORITY

A. Cook misrepresents T.L's condition.

In its rush to kill T.L., Cook recycles stale and completely unsupported "facts" for its current motion. Cook refers to testimony taken in December of 2019, but it fails to note that such testimony – simply through the mere passage of time – has been proven false. One of T.L.'s treating doctors who has pushed to withdraw her life-sustaining care against her mother's wishes testified she would not live four months beyond December of 2019. *See* **Exhibit E**. It is now May 2021. T.L.'s condition has improved significantly since Cook finally performed a trach, but Cook's narrative remains stuck in December 2019. Cook offers no new evidence to substantiate the statements made by counsel in its motion.

Cook's Motion shows the need for both fact and expert discovery in this case. The motion itself raises a multitude of fact issues, including the following:

- T.L.'s diagnosis and prognosis;
- The effect and availability of alternative treatment;
- The standard of care;
- The nature of treatment T.L. has received and the reasons for the treatment;
- T.L.'s pain;
- The cost of T.L.'s treatment.

Counsel's representations to this Court are unsupported by any evidence. They starkly contrast with reports from physicians to Trinity about T.L.'s current condition. The representations do not accurately depict T.L.'s condition. *See* **Exhibit C**.[1] But, developing the record will take time. T.L.'s medical records are lengthy. To properly present her case, which should not be required at this juncture (in response to a motion regarding entering a Docket Control Order and before Plaintiffs have had the ability to consult with experts) T.L. needs to consult experts and those experts need time to review her medical records.

Plaintiffs have tried to substantiate the statements Cook's Motion about the position of the State's Medicaid manager. *See* Cook's Motion, at 2. Cook asserts, without support, the State of Texas is reviewing whether continuing care is appropriate for T.L. *Id.* These assertions in Cook's motion surprised Plaintiffs who had not been informed of any such review or threat. Plaintiffs spoke with legal counsel for the relevant state agency and representatives of T.L.'s managed care organization to try to understand whether Cook's assertions were correct. *See* **Exhibit D.** Counsel advised that the investigation described in Cook's motion was not ongoing and there are no plans to intervene. *See id.*

Due process demands that Plaintiffs have the opportunity to develop and try their case. This means Plaintiffs deserve the opportunity to seek and review discovery as well as depose the decisionmakers at Cook both regarding Cook's representations about T.L.'s condition and Cook's processes under Texas Health and Safety Code section 166.046.

[1] Plaintiffs also believe it necessary to make the Court aware that Trinity risks being prohibited by Cook from taking more videos and photographs of her firstborn daughter because Cook has previously threatened to take her phone away if she did so and the images were published. Yet, Cook files court documents like this with no supporting evidence (or self-serving evidence in some instances) in order to negatively influence this Court and the court of public opinion with impunity while simultaneously trying to prevent Plaintiffs from answering these falsehoods and building the record needed for their case.

B. Equity does not support expediting this case.

Cook's Motion is devoid of legal authority and bases supporting its request for relief other than what it terms "[p]rincipals of equity." Cook's Motion at 5. Equity supports giving T.L. and Trinity time to make their case. Plaintiffs are a mother and child who are fighting for dear life against a massive corporation granted authority by the state to take it without due process. Cook seeks to deprive Plaintiffs of due process rights in yet another context – the denial of sufficient time to conduct appropriate and necessary discovery. Equity militates in favor of denying Cook's request.

First, Cook argues that a trial date in July is justified because of T.L.'s alleged condition. Cook's Motion at 1. Cook's statements about T.L.'s condition, prognosis, and imminent demise is demonstrably false. The passage of time and the changes in T.L. refute Cook's arguments about her current state. As described above, T.L. is doing remarkably well and there is a lot of hope for her future.

Second, the claims at issue in this case are not appropriate for resolution in July. As demonstrated at length above, Cook is wrong to assert "[t]he claims presented here – and the rulings needed – involve few (if any) factual disputes." *Id.* at 5. There are many legal issues here, but there are also many factual ones as well. And, while the opinion from the Court of Appeals lays out many legal issues, it did not address all the claims asserted by Plaintiffs. It focused on the procedural due process aspect of the case and whether Cook was a state actor. It did not address the substantive due process issues. The substantive due process issues will turn on complex medical testimony.

Third, Cook argues that the procedural status of the case calls for a quick trial as the case was filed in November 2019. *Id.* While the case has never been stayed, Plaintiffs have been focused

on ensuring that T.L. is allowed to live pending the trial on the merits. That required an appeal. After that, however, Cook decided to further delay any litigation on the merits of the case by appealing further to the Texas Supreme Court and even to the United States Supreme Court. As Plaintiffs discussed in Plaintiffs Motion for Scheduling Order, Cook has delayed this case by longer than the amount of time Cook argues is necessary to have the entire trial by failing to quickly respond to Plaintiffs requests for proposed orders and proposed scheduling orders. Plaintiffs Motion for Scheduling Order at 2–3.

Fourth, allowing a full trial under Plaintiffs' proposed scheduling order will ultimately be faster than lodging a quick trial that violates Plaintiffs right to present their case. Plaintiffs need time to conduct discovery. Cook is misleading when it says that it has responded to informal discovery requests. Cook's Motion at 5–6. Plaintiffs have requested updated medical records for T.L. to which they would be entitled even without a lawsuit. Plaintiffs may wish to depose those on the ethics committee, treating doctors, experts, and the Corporate Representative of Cook – *after* written discovery is completed. Written discovery will involve matters related to the usage of this statute in other cases, Cook's policies regarding the implementation of the statute, its decision-making procedures, who makes those decisions, how those decisions are made, and so forth. Cook has also raised the issue of Medicaid getting involved or intervening and that creates the necessity of third-party discovery as well.

Cook notes that there will likely be appeals no matter what the final outcome at trial. *Id.* at 6. But, the failure to allow Plaintiffs the opportunity to fully make their case would also raise a separate due process issue that also would be subject to review. Review of that issue potentially would delay trial longer than following Plaintiffs proposed scheduling order.

C. Cook's proposed schedule is logistically problematic

Cook's proposal is an unreasonable timeline for everyone, including this Court. It is also incomplete and fails to include time and deadlines for dispositive motions, pretrial motions and filings, and enough time for appropriate responses.

It is already early May, and yet Cook proposes that Plaintiffs' Experts be designated June 11, a mere five weeks or so from now. Cook then proposes to designate its experts on June 22, 11 days later, and then expects Plaintiffs' rebuttal experts to be designated by July 2. *Id.* at 6. Only 10 days later, Cook expects all to file their Motions to Exclude Experts on July 12. *Id.* This proposal provides no time to carefully review the reports, much less confer with experts, conduct depositions, get transcripts, and then prepare Motions to Exclude. Cook wants a trial on July 26, which is only 14 days after the Motions to Exclude are *filed*. *Id.* The schedule has insufficient time to prepare proper and complete responses, have them heard, and decided.

Cook proposes that discovery end on July 16, which is only 10 days before trial and well after expert designations are due and even after Motions to Exclude are due. *See id.* Yet, certain discoverable materials may be withheld or not disclosed that would be relevant to an expert that he will not have in time for his report. Then there will be an issue of scrambling to supplement reports as all are trying to prepare for trial. Written discovery has not been sent given the lack of Scheduling Order. But Cook will be entitled to 30 days to object and respond. Plaintiffs would welcome, but do not expect, that full and complete discovery responses will be forthcoming without objections needing to be addressed and perhaps even a Motion to Compel. Written discovery needs to be completed before depositions can meaningfully take place. Failure to allow Plaintiffs the opportunity to present their case is a due process violation that denies Plaintiffs access to justice. *See In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998).

D. Conflicts with Plaintiffs' Counsels' Schedules

The undersigned Mrs. Marks has a 15-day trial scheduled for July 20, 2021, in Kansas City, Missouri. On April 20, 2021, the Court issued the attached text order that the case is expected to go forward and Plaintiffs are to be prepared to do so. *See,* **Exhibit G**, the Text Order from Judge Kays as well as the Docket Control Order in that case setting the trial for 15-days beginning on July 20, 2021. She will be an active second chair and required to be in Missouri from July 17 through the completion of the trial which will not be until the second week of August.

In addition, the undersigned Mrs. Schumacher has filed a vacation letter with this Court making the court aware that she will be unavailable the weeks of July 19 and July 26 to attend an event that has been scheduled for well over a year.

Each of Plaintiffs' counsels have a role to play in the preparation and prosecution of this case.

IV.
PLAINTIFFS' PROPOSED SCHEDULING ORDER

On April 26, 2021, Plaintiffs submitted the following proposed Scheduling Order and trial date which they believe strikes a balance between what is needed for sufficient discovery to be completed, a record developed, and as expeditious a trial as the circumstances make possible:

TRIAL SETTING: 1/31/2022

PRETRIAL MATTERS:

Pretrial Hearing:	1/17/2022
Plaintiffs' Expert Designations:	8/13/2021
Defendant's Expert Designations:	8/27/2021
Plaintiffs' Rebuttal Experts:	9/10/2021
Defendant's Rebuttal Experts:	9/24/2021
Discovery Completion Date:	10/22/2021
Depositions Completion Date:	10/22/2021
Alternative Dispute Resolution/ Mediation:	5/10/2021

Motions for Summary Judgment:	11/5/2021
Motions to Exclude Expert Testimony:	11/19/2021
Hearing on *Daubert/Robinson* Challenges:	12/13/2021

Plaintiffs' proposal is efficient given the amount of discovery to complete. Plaintiffs propose a fairly rapid trial date under the circumstances – only nine months from now. Yet, it allows for sufficient discovery to be completed, including expert discovery, and gives the Court time to decide critical pretrial matters ahead of the trial itself and allows sufficient time for trial preparation after pretrial motion practice is complete.

V.
CONCLUSION & PRAYER FOR RELIEF

Based on the foregoing, Plaintiffs request that this Court deny Cook's Motion for Expedited Scheduling Order in its entirety and enter the proposal submitted by Plaintiffs, which is in keeping with the legal principals behind discovery and will help ensure equity and fairness in this case.

Respectfully submitted,

DANIELS & TREDENNICK, PLLC

/s/ John F. Luman, III
John F. Luman, III
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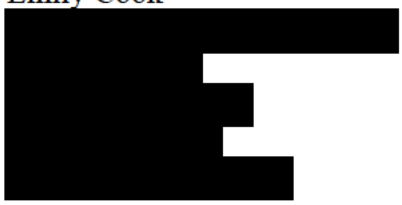

KDPM Law

/s/ Kassi Dee Patrick Marks
Kassi Dee Patrick Marks


Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Civil Procedure, I hereby certify that on the 6th day of May, 2021, a true and correct copy of the foregoing document was served on the following counsel of record:

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