

NO. 09-0942

IN THE
SUPREME COURT OF TEXAS

IN RE MARK A. JACOBS, M.D., DEBRA C. GUNN, M.D.,
AND OBSTETRICAL AND GYNECOLOGICAL ASSOCIATES, P.A.
Relators.

Original Proceeding Arising Out of the
Probate Court Number Two, Harris County, Texas
Cause No. 352,923-401
(Hon. Mike Wood)

RELATORS' RESPONSE AND OBJECTION TO
REAL PARTIES IN INTEREST'S MOTION TO DISMISS

Respectfully Submitted,

COOPER & SCULLY, P.C.

Diana L. Faust

Texas Bar No. 00793717

R. Brent Cooper

Texas Bar No. 04783250

900 Jackson Street, Suite 100

Dallas, Texas 75202

(214) 712-9500

(214) 712-9540 (fax)

**HARRIS, HILBURN &
SHERER, L.L.P.**

Barbara A. Hilburn

Texas Bar No. 09618950

Divya R. Chundru

Texas Bar No. 24045658

Elizabeth A. Kaufman

Texas Bar No. 24060068

1111 Rosalie

Houston, Texas 77004

(713) 223-3936

(713) 224-5458 (fax)

ATTORNEYS FOR RELATORS

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION AND PROCEDURAL BACKGROUND	2
II. RESPONSE AND OBJECTION TO MOTION TO DISMISS	4
A. This Proceeding is Not Moot Because Respondent’s Order Vacating the Discovery Orders is Void	4
1. This Court’s Temporary Stay of the Discovery Orders Precluded Any Action by Respondent or Real Parties on those Discovery Orders “Pending Further Order of This Court”	4
2. Real Parties’ Authority is Distinguishable and Does Not Support Relief Requested.....	6
B. Alternatively, If No Live Controversy Exists, Exceptions to the Mootness Doctrine Apply Here.....	9
1. Capable of Repetition, But Evading Review Exception Applies	9
2. Collateral Consequences Exception Applies Here.....	10
3. Public Interest Exception Should Be Recognized by This Court, and Applied Here	13
a. Public Interest Exception Should Be Recognized by This Court.....	13
b. Public Interest Exception Applies Here	15
C. This Court Should Deny Real Parties’ Motion and Reverse the Denial of Attorney’s Fees as Sanctions, and Remand for Further Proceedings	17
1. Filing of Motion in Violation of This Court’s Stay	18
2. Filing of Motion for Improper Purpose.....	19

CERTIFICATE OF SERVICE..... 22

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page(s)</u>
<i>Allstate Ins. Co. v. Hallman</i> , 159 S.W.3d 640 (Tex. 2005)	11, 12, 13
<i>Aramark Uniform Services, Inc. v. Tyson</i> , 40 Tex. Sup. J. 84 (November 15, 1996)	15
<i>Aramark Uniform Servs., Inc. v. Tyson</i> , 40 Tex. Sup. J. 131 (December 13, 1996)	16
<i>Blum v. Lanier</i> , 997 S.W.2d 259 (Tex. 1999)	9, 10
<i>Burrhus v. M & S Mach. & Supply Co., Inc.</i> , 897 S.W.2d 871 (Tex. App.—San Antonio 1995, no pet.)	5
<i>Camarena v. Texas Employment Comm'n</i> , 754 S.W.2d 149 (Tex. 1988)	11, 12, 13
<i>Carrillo v. State</i> , 480 S.W.2d 612 (Tex. 1972)	11
<i>Cire v. Cummings</i> , 134 S.W.3d 835 (Tex. 2004)	19, 20
<i>City of Houston v. Swinerton Builders, Inc.</i> , 233 S.W.3d 4 (Tex. App.—Houston [1st Dist.] 2007, no pet.)	4
<i>In re Consol. Freightways</i> , 75 S.W.3d 147 (Tex. App.—San Antonio 2002, orig. proceeding)	5
<i>In re Cornyn</i> , 27 S.W.3d 327 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.)	9
<i>In re County of El Paso</i> , 104 S.W.3d 741 (Tex. App.—El Paso 2003, orig. proceeding)	7, 8
<i>FDIC v. Nueces Cty.</i> , 866 S.W.2d 766 (Tex. 1994)	13

<i>Fiske v. City of Dallas</i> , 220 S.W.3d 547 (Tex. App.—Texarkana 2007, no pet.)	15, 17
<i>Fowler v. Bryan Indep. School Dist.</i> , No. 01-97-01001, 1998 Tex. App. LEXIS 4036 (Tex. App.—Houston [1st Dist. July 2, 1998, no writ])	14
<i>General Land Office v. Oxy U.S.A., Inc.</i> , 789 S.W.2d 569 (Tex. 1990)	9, 11
<i>Griffin v. Birkman</i> , 266 S.W.3d 189 (Tex. App.—Austin 2008, pet. denied)	11
<i>Harrell v. NationsBank of Tex.</i> , No. 07-00-0179-CV, 2000 Tex. App. LEXIS 5038 (Tex. App.—Amarillo July 27, 2000, no pet.)	5
<i>Houston Chronicle Publ'g Co. v. Thomas</i> , 196 S.W.3d 396 (Tex. App.—Houston [1st Dist.] 2006, no pet.)	14
<i>In re J.P. Morgan Chase Bank, N.A.</i> , No. 08-06-00253-CV, 2006 Tex. App. LEXIS 8620 (Tex. App.—El Paso 2006, orig. proceeding)	6, 8
<i>In re Jacobs</i> , 300 S.W.3d 35 (Tex. App.—Houston [14th Dist.] 2009, orig. proc.)	16, 17
<i>In re Jerry's Chevrolet-Buick, Inc.</i> , 977 S.W.2d 565 (Tex. 1998)	16
<i>Lunsford v. Morris</i> , 746 S.W.2d 471 (Tex. 1988)	15
<i>In re Martinez</i> , 77 S.W.3d 462 (Tex. App.—Corpus Christi 2002, orig. proceeding)	4
<i>Nueces County v. Whitley Trucks, Inc.</i> , 865 S.W.2d 124 (Tex. App.—Corpus Christi 1993)	13
<i>Oryx Capital Int'l, Inc. v. Sage Apartments, L.L.C.</i> , 167 S.W.3d 432 (Tex. App.—San Antonio 2005, no pet.)	4, 5, 6, 19

<i>Paine v. Sealey</i> , 956 S.W.2d 803 (Tex. App.—Houston [14th Dist.] 1997, no pet.)	5
<i>Perry Home Contractors, Inc. v. Patterson</i> , 39 Tex. Sup. J. 237 (February 9, 1996).....	15
<i>Perry Home Contractors, Inc. v. Patterson</i> , 40 Tex. Sup. J. 398 (March 6, 1997).....	15
<i>Securtec, Inc. v. County of Gregg</i> , 106 S.W.3d 803 (Tex. App.—Texarkana 2003, pet. denied).....	14, 15
<i>Speer v. Presbyterian Children's Home & Serv. Agency</i> , 847 S.W.2d 227 (Tex. 1993)	11
<i>Spencer v. Kemna</i> , 523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)	11
<i>State Farm Mut. Automobile Ins. Co. v. Carmichael</i> , No. 05-96-00990-CV, 1998 Tex. App. LEXIS 1736 (Tex. App.—Dallas March 20, 1998, no pet.).....	14
<i>State v. Lodge</i> , 608 S.W.2d 910 (Tex. 1980)	10
<i>Texas Dep't of Pub. Safety v. Lafleur</i> , 32 S.W.3d 911 (Tex. App.—Texarkana 2000, no pet.)	9, 10, 15, 17
<i>Univ. Interscholastic League v. Buchanan</i> , 848 S.W.2d 298 (Tex. App.—Austin 1993, no writ)	13, 14
<i>In re Valley Baptist Medical Center</i> , 33 S.W.3d 821 (Tex. 2000)	6, 7

Statutes, Rules & Constitutions

Page(s)

TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001(1)	12, 18, 19, 20
TEX. CIV. PRAC. & REM. CODE ANN. §10.002(c).....	12
TEX. GOV'T CODE ANN. §§ 22.001(a)(2), (e)	14
TEX. R. APP. P. 29.3.....	5, 6

IN THE
SUPREME COURT OF TEXAS

IN RE MARK A. JACOBS, M.D., DEBRA C. GUNN, M.D.,
AND OBSTETRICAL AND GYNECOLOGICAL ASSOCIATES, P.A.,
Relators.

Original Proceeding Arising Out of the
Probate Court Number Two, Harris County, Texas
Cause No. 352,923-401
(Hon. Mike Wood)

RELATORS' RESPONSE AND OBJECTION TO
REAL PARTIES IN INTEREST'S MOTION TO DISMISS, REQUEST FOR
REVERSAL OF DENIAL OF MOTION FOR SANCTIONS AND AWARD OF
ATTORNEY'S FEES AND COSTS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

COME NOW, Relators Mark A. Jacobs, M.D. ("Dr. Jacobs"), Debra C. Gunn, M.D. ("Dr. Gunn"), and Obstetrical and Gynecological Associates, P.A. ("OGA") (collectively "Relators"), and pursuant to this Court's letter request and in compliance with Rule 10.1(b) of the Texas Rules of Appellate Procedure hereby file this Response and Objection to Real Parties' in Interest Motion to Dismiss ("Real Parties' Motion"), and Request for Reversal of Respondent's Order Denying Relators' Motion for Sanctions and Award of Attorney's Fees and Costs, and would show the Court and all counsel as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. On November 12, 2009, Relators filed this original proceeding, moving this Court for a writ of mandamus directing the Respondent, the Hon. Mike Wood of Probate Court Number Two, Harris County, Texas (“Respondent”), to vacate the January 23, 2009 “Order Granting Real Party in Interest’s Motion to Compel the Deposition of Mark A. Jacobs” (the “Deposition Order”), the January 23, 2009 “Order on Real Party in Interest’s Motion to Compel Net Worth Discovery” (the “Compel” Order), and the January 30, 2009 “Order Clarifying Court’s Orders Regarding the Discoverability of Net Worth Information” (the “Production Order”) (collectively the “Discovery Orders”). Relators have also complained of the modifications to those orders made by the Fourteenth Court of Appeals allowing for net worth discovery to proceed, as modified.

2. On November 16, 2009, this Court issued its Order staying the Discovery Orders pending further order of the Court. (RPM Apx. Tab 4¹).

3. On November 30, 2009, Real Parties in Interest (“Real Parties”) filed their Response to Relators’ Petition for Writ of Mandamus, and on December 29, 2009, Relators filed their Reply to Response to Petition for Writ of Mandamus.

4. On January 15, 2010, this Court requested the parties to file briefing on the merits.

5. Relators filed their Brief on the Merits on February 16, 2010, Real Parties filed their Response Brief on the Merits on March 8, 2010, and Relators filed their Reply Brief on the Merits on March 23, 2010.

¹ The Appendix attached to Real Parties’ Motion will be cited herein as (RPM Apx. Tab ____).

6. On June 18, 2010, this Court advised the parties that Relators' petition would be set for oral argument. On July 16, 2010, this Court set argument for October 14, 2010.

7. In an effort to moot this proceeding after this Court ordered that the case would be argued, on June 23, 2010, Real Parties withdrew in the trial court, with prejudice to re-serving same prior to the entry of a final judgment, all of the net worth discovery requests directed to Relators that formed the bases of the Discovery Orders and this original proceeding, and requested that Respondent sign an order vacating the Orders. (*See* RPM Apx. Tabs 5, 7, 8). Relators opposed and objected to Real Parties' Motion by written response on June 28, 2010, and requested attorney's fees as sanctions in the amount of \$7,260.50 and related costs of \$392.90. (RPM Apx. Tab 6). After a hearing conducted on June 29, 2010, Respondent granted Real Parties' Motion and signed an order vacating the Discovery Orders. (RPM Apx. Tabs 8, 9). Respondent denied Relator's request for attorney's fees and costs as sanctions. (RPM Apx. Tab 9 at 11).

8. On July 7, 2010, Real Parties filed a Motion to Dismiss herein, moving this Court to dismiss Relators' Petition for Writ of Mandamus on the grounds of mootness.

9. On July 12, 2010, this Court requested Relators to file a response to the Motion to Dismiss.

II. RESPONSE AND OBJECTION TO MOTION TO DISMISS

A. This Proceeding is Not Moot Because Respondent's Order Vacating the Discovery Orders is Void

1. *This Court's Temporary Stay of the Discovery Orders Precluded Any Action by Respondent or Real Parties on those Discovery Orders "Pending Further Order of This Court"*

10. Respectfully, Respondent's June 29, 2010 Order vacating the Discovery Orders is void, where this Court stayed the Discovery Orders "pending further order of this Court." (Apx. Tab 4). As a result, this proceeding is not moot, and Real Parties' Motion should be denied.

11. Real Parties argue here, as they did in the trial court, that because this Court did not stay the *entire* proceedings, they and Respondent could take any action regarding the Discovery Orders, including asking Respondent to vacate them based on their withdrawal of the discovery forming their basis. (Real Parties' Motion at 3-7, 15; RPM Apx. Tab 5). However, Texas law is clear that once a stay has been imposed by an appellate court, the litigants are required to follow that stay order, and any action taken in the trial court regarding the subject of the stay order is void. *See In re Helena Chem.*, (citing *City of Houston v. Swinerton Builders, Inc.*, 233 S.W.3d 4, 8-9 (Tex. App.--Houston [1st Dist.] 2007, no pet.) (construing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (Vernon 2008)) (party filed amended petition during pendency of automatic stay imposed by statute due to filing of interlocutory appeal); *Oryx Capital Int'l, Inc. v. Sage Apartments, L.L.C.*, 167 S.W.3d 432, 438 (Tex. App.--San Antonio 2005, no pet.) (party filed notice of non-suit while stay imposed by appellate court was pending); *In re Martinez*, 77 S.W.3d 462, 464 (Tex. App.--Corpus Christi 2002, orig. proceeding)

(same); *In re Consol. Freightways*, 75 S.W.3d 147, 149 (Tex. App.--San Antonio 2002, orig. proceeding) (party filed motion to enforce agreement during pendency of stay automatically imposed by insurance code due to other party's insurer being declared "impaired"); *Paine v. Sealey*, 956 S.W.2d 803, 806 (Tex. App.--Houston [14th Dist.] 1997, no pet.) (party served requests for admissions while automatic bankruptcy stay was in effect); *Burrhus v. M & S Mach. & Supply Co., Inc.*, 897 S.W.2d 871, 873 (Tex. App.--San Antonio 1995, no pet.) (holding that appellate deadlines are stayed during pendency of automatic stay imposed by insurance code); *see also Harrell v. NationsBank of Tex.*, No. 07-00-0179-CV, 2000 Tex. App. LEXIS 5038, at *3 (Tex. App.--Amarillo July 27, 2000, no pet.) (not designated for publication) (noting that party intervened and moved to lift a court-imposed stay)).

12. For example, when an appellate court stays *all* proceedings in the trial court, the parties and the trial court are ordered to take no further action *on the entire case* until they receive further orders from the court or it resolves the appeal. *Oryx*, 167 S.W.3d at 438 (citing TEX. R. APP. P. 29.3 ("When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security.")). Applied here, when this Court stayed the Discovery Orders pending further orders from this Court, the parties and Respondent were ordered to take no further action *on the Discovery Orders* until they received further orders from this Court. *See id.* Instead, Real Parties asked Respondent to vacate those Discovery Orders; this they cannot do. Rather, Real Parties were required to seek from this Court a lift of the stay imposed *on*

the Discovery Orders before they asked Respondent to take action on them. *See Oryx*, 167 S.W.3d at 438 (“If Sage desired to non-suit its claims against Oryx, Sage should have asked [the appellate court] to lift our stay so that it could file its non-suit in the trial court”). (*See also* RPM Apx. Tab at 5, 6, 8). Because they did not do so, Respondent’s order vacating the Discovery Orders is void. *See id.*

13. Relators acknowledge that "while an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from . . . **but the court must not make an order that . . . is inconsistent with any appellate court temporary order. . . .**" TEX. R. APP. P. 29.5 (emphasis added). Here, Respondent’s order is inconsistent with this Court’s temporary order staying the Discovery Orders pending further order of this Court. *See id.*; *Oryx*, 167 S.W.3d at 438. Real Parties and Respondent failed to follow the mandates of this Court’s temporary stay order, attempting to circumvent this Court’s authority. *See Oryx*, 167 S.W.3d at 438. This Court's order prohibited any action on the Discovery Orders until further order from this Court, and, respectfully, Respondent had no authority to entertain Real Parties’ motion or to sign or enter the order vacating the Discovery Orders. *See id.* Respondent’s order is void, and the appeal is not moot because the Discovery Orders remain pending. *See id.*

2. *Real Parties’ Authority is Distinguishable and Does Not Support Relief Requested*

14. Real Parties rely on three cases to argue this proceeding is now moot. *See In re Valley Baptist Medical Center*, 33 S.W.3d 821, 822 (Tex. 2000); *In re J.P. Morgan Chase Bank, N.A.*, No. 08-06-00253-CV, 2006 Tex. App. LEXIS 8620 (Tex. App.—El

Paso 2006, orig. proceeding) (memorandum opinion); *In re County of El Paso*, 104 S.W.3d 741, 743 (Tex. App.—El Paso 2003, orig. proceeding). Because none of those cases involves action on a discovery order taken by the trial court during the time the discovery order was stayed by an appellate court, they are distinguishable and not controlling on the mootness issue presented here.

15. First, *Valley Baptist* involved an appeal from a ruling on a rule 202 deposition, where the deponent voluntarily appeared for deposition and thus complied with the trial court's discovery order. *Id.*, 33 S.W.3d at 822. This Court explained that at the time the deponent appeared for deposition, there ceased to be a live controversy, mooting the appeal of the discovery order requiring the deponent to appear for the deposition. *Id.* Because *Valley Baptist* turns on voluntary compliance with the discovery order subject of the appeal, it does not support Real Parties' relief requested.

16. Next, in *J.P. Morgan*, the withdrawal of discovery requests subject of the discovery order at issue was made at a time the original proceeding was pending, but nothing in the opinion states that the discovery order had been stayed at the time of the withdrawal of the discovery subject of the order. Indeed, the entirety of the court's opinion follows:

Relator, J. P. Morgan Chase Bank N.A., seeks a writ of mandamus against the Honorable Luis Aguilar, Judge of the 120th District Court of El Paso County. Mandamus will lie only to correct a clear abuse of discretion. Moreover, there must be no other adequate remedy at law. The Real Party in Interest, Beatriz Molinar de Meneses, has expressly withdrawn the discovery requests which gave rise to the trial court's discovery order. This effectively renders this mandamus proceeding moot. Accordingly, we deny mandamus relief.

J.P. Morgan, 2006 Tex. App. LEXIS 8620, *1 (citations omitted). Because nothing in the case addresses the propriety of the withdrawal of discovery subject of the discovery orders from which the original proceeding arose, or addresses any action by the trial court to vacate those discovery orders while the discovery orders were stayed by the appellate court, it also does not support Real Parties' request here.

17. Finally, *In re County of El Paso*, the court of appeals considered a petition for mandamus and request for stay of a discovery order and denied *both* as moot, where the discovery was withdrawn and the trial court vacated its discovery order *prior* to the time the court of appeals ruled on the motion to stay. The entire analysis of the court follows:

In this mandamus proceeding, the County complains of an order entered on April 16, 2003 clarifying a prior ruling which excluded certain testimony by an expert witness, Dr. Robert Bux, due to an alleged violation of a discovery deadline. Trial is set to begin on May 2, 2003. Since the filing of Relator's petition and motion for emergency stay, the Real Parties in Interest have withdrawn their objections to Dr. Bux's testimony based upon alleged untimely response to discovery deadlines. On April 30, 2003, the trial court vacated its April 16, 2003 order. Because the trial court has vacated its order, we conclude that the matters raised in this original proceeding are moot. Accordingly, the relief requested in the petition for writ of mandamus and the motion for emergency stay are denied as moot.

County of El Paso, 104 S.W.3d at 743. Because the withdrawal of discovery subject of the discovery order from which the original proceeding arose, and the action of the trial court in vacating the discovery order *before* the discovery order was stayed by the appellate court, it also does not support Real Parties' request here.

B. Alternatively, If No Live Controversy Exists, Exceptions to the Mootness Doctrine Apply Here

18. This Court has recognized two exceptions to the mootness doctrine: (1) the "capable of repetition" exception and (2) the "collateral consequences" exception. *General Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). Further, although this Court has not considered the viability of the public interest exception to the mootness doctrine, as discussed below, several Texas intermediate courts have done so. Relators urge that all the exception apply here, and further request this Court to address the public interest exception to the mootness doctrine, to recognize and approve the public interest exception to the mootness doctrine, and hold that the exception applies here to preclude Real Parties' requested relief.

1. *Capable of Repetition, But Evading Review Exception Applies*

19. An exception to the mootness doctrine applies where an appellate court may review a case after it becomes moot if the appeal challenges certain conduct that is of such short duration that the appellant cannot obtain review before the issue becomes moot. *See Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999). This exception to the mootness doctrine is referred to as "capable of repetition, yet evading review." *Id.* It additionally requires that there be a reasonable expectation that the same action will occur again if the issue is not considered. *See id.* Some courts of appeals have required that such reasonable expectation be with respect to the same complaining party. *See In re Cornyn*, 27 S.W.3d 327 (Tex. App.-Houston [1st Dist.] 2000, no pet. h.). Others have not. *See Texas Dep't of Pub. Safety v. Lafleur*, 32 S.W.3d 911 (Tex. App.—Texarkana 2000, no pet.).

20. This Court allowed others not party to the suit to support application of this exception in *Blum*, where "Blum or any other signatory to the petition" could again be affected by the disputed conduct of the defendant. *Blum*, 997 S.W.2d at 264 (emphasis added). In *Lafleur*, the Texarkana Court of Appeals considered that because others could be affected by legislation subject of the mooted appeal, the exception applied. *Lafleur*, 32 S.W.3d at 914 ("It is possible that future parties could find themselves in the same position as the DPS and LaFleur due to the expiration of a license prior to the completion of an appeal").

21. Applied here, the net-worth discovery (although pending for more than two years) was of such short duration as to evade review before withdrawal of the discovery after this Court granted argument in this proceeding. And, although Relators are not, under the conditions for withdrawal of the offending discovery and relied on by Respondent, subject to the discovery any time prior to final judgment in this matter, other future defendants could find themselves in the same position as Relators, subject of overly broad, invasive discovery of net worth information prior to the showing of any basis to support the relevance of that information. *See id.* As such, the capable of repetition but evading review exception applies. *See id.*; *see also Blum*, 997 S.W.2d at 264

2. Collateral Consequences Exception Applies Here

22. The collateral consequences exception to the mootness doctrine is invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. *State v.*

Lodge, 608 S.W.2d 910, 912 (Tex. 1980) (applying collateral consequences exception to mootness doctrine in case involving involuntary commitment to mental hospital); *Carrillo v. State*, 480 S.W.2d 612, 616-17 (Tex. 1972) (applying collateral consequences exception to mootness doctrine in case involving a minor's adjudication as a juvenile delinquent). Such narrow circumstances exist when, as a result of the judgment's entry, (1) concrete disadvantages or disabilities have in fact occurred, are imminently threatened to occur, or are imposed as a matter of law; and (2) the concrete disadvantages and disabilities will persist even after the judgment is vacated. See *Spencer v. Kemna*, 523 U.S. 1, 8, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998); see also *Oxy U.S.A., Inc.*, 789 S.W.2d at 571 (Tex. 1990) (noting that collateral consequences exception is invoked only when prejudicial events have occurred whose effects will continue to stigmatize after dismissal of case as moot). A request for attorney's fees and costs may constitute a circumstance falling within the collateral consequences exception to the mootness doctrine.

23. Attorney's fees may "breathe life" into an appeal otherwise mooted. See *Griffin v. Birkman*, 266 S.W.3d 189, 193-94 (Tex. App.--Austin 2008, pet. denied) (citing *Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988) (holding that "live" request for attorneys' fees can "breathe [] life into the appeal")). See also *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642-43 (Tex. 2005). A request for attorneys' fees can only breathe life into an appeal where attorneys' fees were erroneously denied below. Compare *Camarena*, 754 S.W.2d at 151, with *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229-30 (Tex. 1993) (plaintiffs lost on merits and therefore not entitled to attorneys' fees; denial of attorneys' fees not live issue on appeal).

Where the issue of attorney's fees may be tied to the merits of the proceeding otherwise rendered moot, the live issue of attorney's fees may save the consideration of the merits from dismissal or denial of relief based on mootness. *See Hallman*, 159 S.W.3d at 642-43.

24. Here, as discussed below and incorporated herein as if fully set forth, Relators sought (and continue to seek) attorney's fees and reasonable costs incurred in responding to Real Parties' motion to vacate the Discovery Orders, a motion Relators showed through undisputed evidence was filed for an improper purpose. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001(1), 10.002(c). Real Parties have sought dismissal of this matter as moot, and Relators herein, seek to have this Court determine the propriety of Respondent's denial of the request for chapter 10 sanctions, and grant its request for attorney's fees and reasonable costs and remand for consideration of the amount of fees and costs to be awarded. As such, the sanctions issue requesting attorney's fees and reasonable costs incurred is a live controversy. *See Hallman*, 159 S.W.3d at 462-63; *see also Camarena*, 754 S.W.2d at 151. This Court will be required to consider the effect of its order staying the Discovery Orders, as well as whether Respondent's vacating those orders was a void act, and thus failed to moot the proceeding. This Court will also be required to consider whether Real Parties' stated reason for filing the motion to vacate was an improper purpose, given their blatant refusal after they filed their motion) to engage in discovery in an expedited manner, causing *additional* delay of the trial of this cause by refusing to waive the 21-day notice period for obtaining medical records. As a result, this Court should apply the collateral

consequences exception to the mootness doctrine, and should consider the merits of all the issues raised in this original proceeding. *See Hallman*, 159 S.W.3d at 462-63; *see also Camarena*, 754 S.W.2d at 151.

3. *Public Interest Exception Should Be Recognized by This Court, and Applied Here*²

a. *Public Interest Exception Should Be Recognized by This Court*

25. As this Court has acknowledged, “the public interest exception [to the mootness doctrine] permits judicial review of questions of considerable public importance if the nature of the action makes it capable of repetition and yet prevents effective judicial review.” *FDIC v. Nueces Cty.*, 866 S.W.2d 766, 767 (Tex. 1994) (finding it unnecessary to consider exception in reaching dispositive issues). This Court commented that a common element of both the public interest exception and the capable of repetition exception is the complained of action be capable of repetition yet not effectively reviewable. *Id.* This exception allows appellate review of a question of considerable public importance if that question is capable of repetition between either the same parties or other members of the public, but for some reason evades appellate review. *See Univ. Interscholastic League v. Buchanan*, 848 S.W.2d 298 (Tex. App.--Austin 1993, no writ); *see also Nueces County v. Whitley Trucks, Inc.*, 865 S.W.2d 124 (Tex. App.--Corpus Christi 1993), *overruled on other grounds*, *Nueces Cty.*, 886 S.W.2d at 767.

² To the extent Real Parties respond with additional briefing regarding the application of this exception, Relators respectfully request this Court allow Relators to respond to that briefing and fully brief all issues raised by the parties before this Court rules on Real Parties’ Motion. *See* Real Parties’ Motion at 8 n.1.

26. Intermediate courts of appeals have inconsistently recognized the public interest exception to the mootness doctrine. *Houston Chronicle Publ'g Co. v. Thomas*, 196 S.W.3d 396, 400 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that “until and unless the Texas Supreme Court recognizes the public interest exception to the mootness doctrine, it is not a viable legal theory in our jurisdiction”); *see, e.g., Securtec, Inc. v. County of Gregg*, 106 S.W.3d 803, 810-11 (Tex. App.—Texarkana 2003, pet. denied) (recognizing the public interest exception); *State Farm Mut. Automobile Ins. Co. v. Carmichael*, No. 05-96-00990-CV, 1998 Tex. App. LEXIS 1736 n.3 (Tex. App.—Dallas March 20, 1998, no pet.) (not designated for publication) (refusing to recognize public interest exception); *Buchanan*, 848 S.W.2d at 304 (Tex. App.—Austin 1993, no pet.) (recognizing the public interest exception); *Fowler v. Bryan Indep. School Dist.*, No. 01-97-01001, 1998 Tex. App. LEXIS 4036, n.15 (Tex. App.—Houston [1st Dist. July 2, 1998, no pet.) (not designated for publication) (stating that “until [the Texas Supreme Court] acknowledges [the public interest exception]—we will recognize only [the capable of repetition and collateral consequences] exceptions” but, in any event, recognizing that the exception does not apply to present facts).

27. Thus, here, should this Court conclude no live controversy exists, this Court should exercise its jurisdiction and address the public interest issue squarely presented here, and the subject of conflict among the courts of appeals. This Court should resolve the issue to avoid further unnecessary uncertainty in the law and unfairness to litigants. *See* TEX. GOV'T CODE ANN. §§ 22.001(a)(2), (e); 22.225(c), (e).

b. Public Interest Exception Applies Here

28. For the public interest exception to the mootness doctrine to apply, some courts require evidence that the controversy is of considerable public importance. *See Fiske v. City of Dallas*, 220 S.W.3d 547, 550 (Tex. App.--Texarkana 2007, no pet.); *Lafleur*, 32 S.W.3d at 914; *but see Securtec, Inc.*, 106 S.W.3d at 810-11 (court reviewed the merits pursuant to the public-interest exception, stating: "This case is . . . a matter of public interest because Gregg County is a governmental body that is required to follow the Texas Local Government Code when accepting bids for construction contracts. . . .").

29. This case presents issues regarding net worth discovery that is a matter of public interest. Future defendants will be subject to net worth discovery under the outdated authority from this Court in *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988), issued prior to legislative changes bearing on the recovery of punitive and exemplary damages. This Court has not had the opportunity to consider the issues since the latest enactments and further restriction on the ability to recover exemplary damages through amendments made in House Bill 4 in 2003, and prior to that time, had the opportunity and granted review in two cases that settled prior to disposition. *See Aramark Uniform Services, Inc. v. Tyson*, 40 Tex. Sup. J. 84 (November 15, 1996), and *Perry Home Contractors, Inc. v. Patterson*, 39 Tex. Sup. J. 237 (February 9, 1996). In those cases, this Court was to determine whether a plaintiff must make a prima facie showing of entitlement to exemplary damages before discovering evidence of a defendant's net worth. However, those cases were dismissed pursuant to settlement. *Perry Home Contractors, Inc. v. Patterson*, 40 Tex. Sup. J. 398 (March 6, 1997);

Aramark Uniform Servs., Inc. v. Tyson, 40 Tex. Sup. J. 131 (December 13, 1996). While Relators acknowledge this Court also denied an additional mandamus seeking apparently similar relief in *In re Jerry's Chevrolet-Buick, Inc.*, 977 S.W.2d 565 (Tex. 1998) (Gonzalez, J., Hecht, J., dissenting from denial), that denial does not impede the application of the public interest exception.

30. Further, as Justice Sullivan of the court of appeals wrote separately in his concurrence in this case, “the current Texas rule on net-worth discovery is now decades-old and, in light of the evolution of Texas law, needs to be revisited.” *In re Jacobs*, 300 S.W.3d 35, 48 (Tex. App.—Houston [14th Dist.] 2009, orig. proc.) (Sullivan, J., concurring). Justice Sullivan further explained his reasons for urging this Court to revisit the net-worth discovery issues:

The instant case illustrates how it contributes to unnecessary "satellite litigation" unrelated to the merits of the case and often produces expense and burden far exceeding any potential benefit.

A brief review of the history of this dispute is illustrative. It is noteworthy that the medical incident made the basis of this lawsuit occurred in September 2004. Five years later this legal dispute remains unresolved -- even at the trial-court level.

The specific controversy over net-worth discovery is fast approaching its second anniversary and has continued largely unabated. It began with an exhaustive request for financial records covering a multi-year period. Those discovery requests inevitably produced -- over many months -- a flood of objections, hours of court hearings, multiple court orders, and the current mandamus proceeding with multiple appellate briefs from each side. The cost to the parties has no doubt been significant. The level of chaos in this case -- a tort case with themes common to many such disputes -- has given me pause, with a belief that some assessment is in order as to the efficacy of this process as well as the relative value of the discovery in question.

Id. Justice Sullivan urged this Court to consider the lack of guidance on net-worth discovery issues, and emphasized:

Trial courts have the necessary management tools to control the sequence, timing, and scope of discovery to minimize burden, maximize efficiency, and protect privacy rights. Still, we must acknowledge that there are literally hundreds of Texas trial-court judges -- spread over 254 counties -- who may preside over cases with claims for exemplary damages and, of necessity, disputes involving net-worth discovery. They each have different backgrounds, different approaches, and different dockets. Those dynamics are likely to produce a highly unpredictable and idiosyncratic approach to the management of these issues across the state -- and history shows us that these are issues that regularly recur. I believe parties to litigation in Texas are entitled to greater clarity and predictability from our courts. Accordingly, I would urge that *Lunsford* be revisited and updated.

Id. at 44. The net-worth discovery issues presented herein are of profound public importance and satisfy the public interest exception. *See Fiske*, 220 S.W.3d at 550; *Lafleur*, 32 S.W.3d at 914. Guidance on this issue will assist trial court and litigants in streamlining discovery issues that routinely and regularly recur. Judicial economy will be achieved, and uncertainty in the law will be avoided. As a result, this Court should recognize the public interest exception to the mootness doctrine, should apply it here, and should deny Real Parties' Motion. *See id.*

C. This Court Should Deny Real Parties' Motion and Reverse the Denial of Attorney's Fees as Sanctions, and Remand for Further Proceedings

As discussed above, Relators requested sanctions under Civil Practice and Remedies Code chapter 10, for responding to the filing of the motion to vacate Discovery Orders (filed in violation of this Court's stay of the Discovery Orders), and because Real Parties' motion to vacate was filed for an improper purpose. (RPM Apx. Tab 6 at 4 & Ex. B). In addition to the argument addressing Relators' position regarding the effect of

this Court's stay of the Discovery Orders, Relators presented unobjected-to testimony of the amount of attorney's fees requested to respond to the motion to dismiss and those required for appealing the issue to this Court. (*Id.* at Tab 6 & Ex. C). Relators also presented unobjected-to testimony of additional related costs associated with appearance at the hearing on Real Parties' Motion, in the amount of \$392.90. (*Id.*). Relators also presented unobjected-to evidence of a Waiver of Notice and Deposition Delay Period, wherein Real Parties refused to waive the delay period for obtaining updated medical records pertaining to Shannon Miles McCoy. (*Id.* at Tab 6 & Ex. B). Relators urge this Court to deny Real Parties' Motion to Dismiss, and to reverse the trial court's denial of Relators' request for sanctions, and remand for further proceedings to award Relators the fees and reasonable costs.

1. *Filing of Motion in Violation of This Court's Stay*

31. Respondent improperly denied the motion for sanctions where same was filed for an improper purpose – in violation of this Court's stay of the Discovery Orders. To that end, Relators incorporate here their arguments and authorities cited above (Section II.A.) as if fully set forth.

32. This court's stay of the Discovery Orders pending further order of this Court required that Real Parties and Respondent observe that stay, and take no action in conflict with same. Because the motion to vacate the Discovery Orders violated that stay order (as did Respondent's order), the motion was filed for an improper purpose. *See* TEX. CIV. PRAC. & REM. CODE § 10.001(1). Based on the authority discussed above and incorporated here, the trial court's denial of Relators' motion for sanctions was improper

and erroneous, and constituted an abuse of discretion, where the motion to vacate the Discovery Orders was a violation of the stay of those Discovery Orders.³ *See Cire*, 134 S.W.3d 838; *Oryx*, 167 S.W.3d at 438. This Court should reverse the denial of the sanctions motion, and should remand to the trial court for further proceedings, and to award appropriate attorney's fees and reasonable costs. *See id.*; *See* TEX. CIV. PRAC. & REM. CODE § 10.001(1), 10.002.

2. *Filing of Motion for Improper Purpose*

Real Parties urged in their Motion to Vacate (filed five (5) days following this Court's notice that oral argument had been granted but over two years after the discovery was served) that they no longer sought the discovery at issue and subject of the Discovery Orders because they suddenly wished to avoid further delay in the trial of the case, and advised Respondent at the hearing that this Court's resolution of the issue "can take years." (RPM Apx. Tab 5 at 2; RPM Apx. Tab 9 at 7⁴, 11). Despite that Real Parties represented to Respondent that they wished to proceed with trial and no longer delay the case, the evidence showed that Relators had consistently and diligently attempted to obtain current discovery during the period that this proceeding has been pending to be ready for trial when the proceeding concluded, and sought to obtain updated medical

³ The standard of review for an order denying a motion for sanctions is abuse of discretion. *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). The test for an abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action, but whether the court acted without reference to any guiding rules and principles. *Id.* The trial court's ruling should be reversed only if it was arbitrary or unreasonable. *Id.* at 839.

⁴ Respondent stated during the hearing that Relators' legal position regarding the effect of this Court's stay of the Discovery Orders constituted "an intentional delay technique," and that "We just want to go to trial." (RPM Apx. Tab 9 at 7). Respondent admonished Relators and threatened to assess against Relators "one hundred percent of the costs of going to the Supreme Court to do this." (*Id.* at 6-7).

records of Ms. McCoy. (RPM Apx. Tab 6 at 4 & Ex. B). Relators' counsel made such a request on June 18, 2010. (*Id.*). In response, Real Parties' counsel, Mr. Trombley, signed the Deposition on Written Questions Waiver as "No" to "Waive Notice and Deposition *Delay* Period," and stated "I take the actions indicated above regarding waiving the notice and deposition delay period." (RPM Apx. Tab 6 at 4 & Ex. B; RPM Apx. Tab 9 at 7, 12-13). The refusal to waive the delay period was signed following this Court's notice, four (4) days prior to the trial court hearing, and only two (2) days following the filing of Real Parties' motion to vacate, allegedly based on the delay the Discovery Orders caused. (RPM Apx. Tab 6).

33. The undisputed evidence shows that delay was of no concern to Real Parties at the time they filed their motion to vacate, and afterward, such that their motion to vacate was filed for an improper purpose, and Respondent's denial of the motion on this ground, constituted an abuse of discretion. *See Cire*, 134 S.W.3d at 838. For this additional reason, this Court should reverse the denial of the sanctions motion, and should remand to the trial court for further proceedings, and to award appropriate attorney's fees and reasonable costs. *See id.*; *See* TEX. CIV. PRAC. & REM. CODE § 10.001(1), 10.002.

WHEREFORE, PREMISES CONSIDERED, Relators Mark A. Jacobs, M.D., Debra C. Gunn, M.D., and Obstetrical and Gynecological Associates, P.A., pray this Court deny Real Parties' in Interest Motion to Dismiss in all respects, proceed with oral argument and submission of the issue raised herein, reverse and remand the order denying sanctions under chapter 10 of the Civil Practice and Remedies Code for further

proceedings in the trial court and for award of attorney's fees and reasonable costs, and grant Relators all such other and further relief, general or special, at law or in equity, as this Court deems just.

Respectfully submitted,

COOPER & SCULLY, P.C.

By: _____

DIANA L. FAUST

Texas Bar No. 00793717

R. BRENT COOPER

Texas Bar No. 04783250

900 Jackson Street, Suite 100

Dallas, Texas 75202

TEL: (214) 712-9500

FAX: (214) 712-9540

HARRIS, HILBURN & SHERER, L.L.P.

BARBARA H. HILBURN

Texas Bar No. 09618950

DIVYA R. CHUNDRU

Texas Bar No. 24045658

ELIZABETH A. KAUFMAN

Texas Bar No. 24060068

1111 Rosalie

Houston, Texas 77004

TEL: (713) 223-3936

FAX: (713) 224-5358

COUNSEL FOR RELATORS

MARK A. JACOB, M.D., DEBRA C.

GUNN, M.D., AND OBSTETRICAL AND

GYNECOLOGICAL ASSOCIATES, P.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on the _____ day of July 2010, to the following counsel of record:

Hon. Mike Wood
Probate Court Number Two
Harris County Civil Courthouse
201 Caroline, 6th Floor
Houston, Texas 77002
Respondent

VIA CMRRR

Mr. Alexander B. Klein, III
Mr. J. Todd Trombley
The Klein Law Firm
2000 The Lyric Centre
440 Louisiana Street
Houston, Texas 77002
Counsel for Real Parties in Interest

VIA CMRRR

R. BRENT COOPER

D/770528.2