

CAUSE NO. 2015-69681

DAVID CHRISTOPHER DUNN § IN THE DISTRICT COURT OF
 §
 §
V. § HARRIS COUNTY, TEXAS
 §
THE METHODIST HOSPITAL § 189TH JUDICIAL DISTRICT

**DEFENDANT, HOUSTON METHODIST HOSPITAL F/K/A THE
METHODIST HOSPITAL'S, VERIFIED PLEA IN ABATEMENT,
SPECIAL EXCEPTIONS AND ORIGINAL ANSWER**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **HOUSTON METHODIST HOSPITAL f/k/a THE
METHODIST HOSPITAL (“Defendant”)** Defendant herein, and in answer to
Plaintiff's Original Verified Petition and Application for Temporary Restraining
Order and Injunctive Relief, makes and files this Verified Plea in Abatement, Original
Answer and Special Exceptions and respectfully shows the Court the following:

**I.
VERIFIED PLEA IN ABATEMENT**

Plaintiff, David Christopher Dunn (“Plaintiff”) has been on ventilator
support, unable to communicate verbally, sedated, largely unresponsive and wholly
unable to participate in any health care or other decisions since October 12, 2015 and
including on November 20, 2015, the date this suit was filed.¹ Plaintiff remains
incapacitated at this time.² Defendant, therefore, moves to abate this case pursuant
to Texas Rule of Procedure 93(1) as Plaintiff lacked and lacks the legal capacity to file

¹ See Affidavit of Aditya Uppalapati, M.D., attached as Exhibit A.

² See *id.*

this lawsuit. This case should be abated until this capacity issue is resolved. An Application For Appointment of Permanent Guardian over the Person is being filed in the Harris County Probate Court.

II. SPECIAL EXCEPTIONS

Defendant specially excepts and objects to Plaintiff's Petition in its entirety in that it fails to set forth a claim upon which relief can be granted. Plaintiff alleges no cognizable cause of action under Texas common law, statute, or constitution. The only basis for judicial relief on the facts pled in Section 166.0046(g) of the Health and Safety Code, which requires him to plead and prove to the Court that "there is a reasonable expectation that a physician or health care facility that will honor the patient's directive [regarding life sustaining treatment] will be found if the time extension is granted." TEX. HEALTH & SAFETY CODE §166.046(g). Plaintiff offers neither allegation nor proof that there is another physician or facility that will accept the Plaintiff for transfer and so has failed to state a cognizable claim for relief that the Court can grant.

Independently and in the alternative, Defendant specially excepts to Constitutional claims, including counts 2-4 of the Petition. The Texas Constitution does not provide a direct cause of action for infringement of constitutionally protected rights. In short, "[t]here is not state constitutional tort." *Bagg v. University of Texas Medical Branch at Galveston*, 726 S.W.2d 582, 584 n.1 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.) (affirming dismissal of due process and free speech claims under the Texas Constitution); *Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836, 837

(Tex. App. – Austin 1993, writ denied) (jury verdict reversed and rendered because the Texas Constitution creates no tort action “for damages for a private entity’s infringement of an individual’s free-speech rights”; court “decline[d] to recognize a compensatory cause of action to redress a wholly private entity’s infringement of free-speech rights guaranteed by the state constitution”); *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 872-73 (noting that plaintiffs had failed to provide any authority for a private cause of action under Article 1, section 19 of the Texas Constitution).

Defendant further specially excepts to count 3 of the Petition, the allegation that it is a “state actor,” because Plaintiff has not stated a claim for deprivation of liberty or property interests guaranteed by the U.S. Constitution in this Court.

II.
GENERAL DENIAL

Pursuant to Tex. R. Civ. Proc. 92, Defendant generally denies all of the material allegations contained in the Petition, and requests that this Court require Plaintiff to prove such allegations by either a preponderance of the evidence of, where applicable, clear and convincing evidence as required by the Texas Constitution and by the statutes, laws, and Rules of Civil Procedure of the State of Texas.

III.
AFFIRMATIVE AND OTHER DEFENSES

Plaintiff’s Petition fails to state a claim, in whole or part, upon which relief may be granted.

Defendant reserves the right to amend or supplement this answer with additional defenses as they become known through the course of discovery.

IV.
JURY DEMAND

Defendant demands that all issues of fact in this case be tried to a properly impaneled jury.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, **DEFENDANT HOUSTON METHODIST HOSPITAL F/K/A THE METHODIST HOSPITAL** prays that Plaintiff take nothing by this suit , that Defendant recover costs and for such other and further relief to which it is justly entitled.

Unofficial Copy Office of Chris Daniel District Clerk

Respectfully submitted,

SCOTT PATTON PC

By: /s/ Dwight Scott

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METHODIST HOSPITAL**

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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 1st day of December 2015.

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