

R-2011

CAUSE NO. 2009-07079

BY DEPUTY

FILED
LOREN JACKSON
DEPUTY CLERK
HARRIS COUNTY, TEXAS
2009 FEB -14 9AM 9:59
7-0-2009

MAURICE DAVIS, ELLA JEAN DAVIS,
AND KELLY DAVIS

Plaintiffs,

V.

MEMORIAL HERMANN HOSPITAL
SYSTEM D/B/A MEMORIAL
HERMANN MEMORIAL CITY
HOSPITAL AND ADEEBA AKHTAR,
M.D.

Defendants.

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

113 JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION, MOTION FOR TEMPORARY RESTRAINING ORDER, MOTION FOR TEMPORARY INJUNCTION, AND JURY DEMAND

NOW COME Maurice Davis, Ella Jean Davis, and Kelly Davis, complaining of Memorial Hermann Hospital System d/b/a Memorial Hermann Memorial City Hospital ("Memorial") and Adeeba Akhtar, M.D. ("Akhtar"), and for cause of action would respectfully show as follows:

DISCOVERY CONTROL PLAN

1. Pursuant to Texas Rule of Civil Procedure 190, Plaintiffs intend for discovery to be conducted under Level 3.

PARTIES

2. Plaintiff Maurice Davis, an individual, is currently residing at Memorial Hermann Hospital System d/b/a, Memorial Hermann Memorial City Hospital, 921 Gessner Road, Houston, Texas.

3. Plaintiff Ella Jean Davis, an individual, is the wife of Maurice Davis, and currently resides at 9110 Chesney Downs Drive, Houston, Texas.

4. Plaintiff Kelly Davis, an individual, is the daughter of Maurice Davis, and currently resides 9110 Chesney Downs Drive, Houston, Texas. Kelly Davis also is named as the primary decision-maker in Maurice's Davis durable financial power of attorney and medical power of attorney instruments.

5. Defendant Memorial Hermann Hospital System, d/b/a/ Memorial Hermann Memorial City Hospital, is a domestic nonprofit corporation providing medical services to the population in and around Houston, Texas. It may be served with process through its registered agent, V. Randolph Gleason, 7737 Southwest Freeway, Suite 200, Houston, Texas 77074.

6. Defendant Adeeba Akhtar, M.D., an individual, provides medical services to the population in and around Houston, Texas, and is the attending physician of Maurice Davis. She may be served with process at her office, 8830 Long Point Road, Suite 404, Houston, Texas 77055, or wherever she may be found.

JURISDICTION AND VENUE

7. Venue and jurisdiction are appropriate in this Court in Harris County, Texas because the actions taken against Plaintiffs and to be taken against Plaintiffs occurred in Harris County, Texas.

BACKGROUND

8. Maurice Davis, a 69-year old gentleman, experienced a stroke in April 2008, and subsequently was a resident of a Houston area nursing home. On or about November 25, 2008, some medical complications led to his admission at Memorial. At Memorial, Mr. Davis's providers determined that he was suffering from five infections, and began treatment.

9. The Affidavit of Kelly Davis, attached hereto as Exhibit A, addresses the unfortunate events that unfolded at Memorial.

10. Within a week of his admission to Memorial, administrators, nursing personnel, and physicians began to withhold information from Mr. Davis's family, including the fact that he had suffered a stroke while at the hospital. *See* Exhibit A at ¶ 4.

11. By December 13, 2008, Memorial officials and physicians began aggressively urging the family to authorize termination of curative care, in favor of hospice services. *See id.* at ¶ 5. When the family did not agree, Memorial convened its Medically Inappropriate/Futile Treatment Review Committee ("Committee") in a transparent attempt to railroad through an order overriding the family. *See id.* at ¶ 5. The final meeting of Committee met was on January 21, 2009. *See id.* at ¶ 5.

12. Kelly Davis's affidavit also sheds light on Maurice Davis's current function. *See id.* Mr. Davis is not in a coma and is not brain dead. *See id.* at ¶¶ 6-7. Indeed, at the Committee meeting, his attending physician, Defendant Akhtar, a family practice and geriatrics physician, and Godofredo Rossi, M.D., a neurology, testified that Mr. Davis was not in a coma. *See id.* at ¶ 7.

13. On the date of the Committee proceeding, Mr. Davis was awake and responsive. *See id.* at ¶ 7. On the day prior to the Committee meeting, Kelly Davis, his daughter, asked him if he wanted him to give up or keep on fighting, and asked him to open his eyes if he wanted to continue receiving care. *See id.* at ¶ 7. Mr. Davis opened his eyes so widely that it stretched his face, and he then he reached for her with his hand. *See id.* at ¶ 7.

14. On the date this petition is being filed, Mr. Davis is also awake and responsive. *See id.* at ¶ 6. His eyes are open, he looks around the room, and follows movement. *See id.* at ¶ 6. Kelly Davis recently showed him a Christmas photo of her twin children, and a tear rolled down Mr. Davis's cheek as he looked at it. *See id.* at ¶ 6.

15. Despite the contrary sentiments and observations of Mr. Davis's family, on January 21, 2009, Memorial and Akhtar unilaterally decided to withdraw life-sustaining treatment, via a written decision of the Committee, a copy of which is attached as Exhibit B.

16. Memorial and Akhtar have failed to comply with mandatory provisions of Texas Health & Safety Code Chapter 166, which guarantee substantive and procedural due process to people like Mr. Davis.

IMMEDIATE AND IRREPARABLE HARM IS THREATENED

17. Unless this Court intervenes and orders Defendants to refrain from withdrawing life-sustaining treatment, Plaintiff Maurice Davis will die. Memorial and Akhtar fully intend to disconnect life-sustaining support and treatment, as evidenced by the Committee decision. *See* Exhibit B. Oddly, the Committee decision does not specify the date and time when the discontinuation will occur, *see id.*, but the Davis family was orally informed by Memorial that it would occur on Sunday, February 1, 2009, at 5:30 p.m. *See* Exhibit A at ¶ 8. Memorial agreed to extend that deadline to Wednesday, February 4, 2009, at 5:30 p.m., but the Davis family has been unable to find a transfer facility and finalize logistics in that short time. *See* Exhibit C. Memorial has refused to extend the deadline further. *See* Exhibit D.

THE THREATENED INJURY IS ACTUAL AND SUBSTANTIAL

18. Memorial and Akhtar's proposed action against Plaintiff Maurice Davis is, without question, actual, substantial, and permanent.

NO ADEQUATE REMEDY AT LAW EXISTS

19. Upon the death of Plaintiff Maurice Davis, he will, quite obviously, have no adequate remedy at law or equity.

TEMPORARY RESTRAINING ORDER

20. Kelly Davis testifies that, with additional time, she believes that her family will locate a facility to accept her father, Maurice Davis. *See* Exhibit A at ¶ 10. Nancy Wilsford, the administrator of one facility, Rosenberg Health & Rehabilitation Center, has confirmed in writing that it will accept Mr. Davis, but needs time to arrange stretcher dialysis for him. *See* Exhibit E.

21. Because Plaintiffs have shown that there is a “reasonable expectation that a . . . health care facility” will accept Mr. Davis as a patient, the Court has statutory authority for granting a temporary restraining order:

At the request of the patient or the person responsible for the health care decisions of the patient, the appropriate district or county court shall extend the time period provided under Subsection (e) only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient’s directive will be found if the time extension is granted.

TEXAS HEALTH & SAFETY CODE § 166.046(g).

22. It is essential, in order to preserve the status quo until an evidentiary hearing can be held, that the Court immediately issue a temporary restraining order, without notice to Defendants, Restraining Defendants, directly or indirectly, from taking the following actions:

- (1) Ordering any hospital, nurse, or caregiver to withdraw or withhold life-sustaining treatment, including ventilation, medication, or nourishment, from Plaintiff Maurice Davis;
- (2) Implementing any order to withdraw or withhold life-sustaining treatment, including ventilation, medication, or nourishment from Plaintiff Maurice Davis; and
- (3) Failing to take any and all actions necessary to preserve Plaintiff Maurice Davis’s life.

23. This relief cannot wait for the normal notice period and hearing because Defendants have demonstrated that they have the ability and the intention to unilaterally withdraw life-sustaining treatment from Plaintiff Maurice Davis at 5:30 p.m. today, February 4, 2009. Nevertheless, Plaintiffs' counsel provided notice to Memorial's risk manager, Pat Metzger, by telephone and email, on February 3, 2009, and was informed by Ms. Metzger that a Memorial representative would attend the hearing. *See* Exhibit D.

TEMPORARY INJUNCTION

24. In order to preserve the status quo and the property rights of Plaintiffs during the pendency of this lawsuit, and to protect the interests of Plaintiffs, Defendants should be cited to appear and show cause why it should not be temporarily restrained during the pendency of this action from:

- (1) Ordering any hospital, nurse, or caregiver to withdraw or withhold life-sustaining treatment, including ventilation, medication, or nourishment, from Plaintiff Maurice Davis;
- (2) Implementing any order to withdraw or withhold life-sustaining treatment, including ventilation, medication, or nourishment from Plaintiff Maurice Davis; and
- (3) Failing to take any and all actions necessary to preserve Plaintiff Maurice Davis's life.

25. Again, under these circumstances, the Court has statutory authority to enter a temporary injunction. *See* TEXAS HEALTH & SAFETY CODE § 166.046(g).

CAUSES OF ACTION

COUNT ONE: Multiple questions of fact exist which should be resolved before the actions of the Defendants end the life of Maurice Davis.

26. First, there is a question of fact as to whether or not Memorial, Akhtar, and the Committee have based their determinations on the presumption that further care for Mr. Davis is

futile. The aforementioned consciousness and activities of Mr. Davis raise questions concerning the actual status of his condition. Given that his present and future condition are probative evidence of same, Memorial and Akhtar should be constrained from taking his life prior to a jury trial on those issue.

27. Further, there are questions of fact as to whether or not Dr. Akhtar, who is a family and geriatric physician, is practicing outside the scope of her practice regarding these matters.

28. There also exist questions of fact as to whether or not Memorial and Akhtar have taken adequate steps to provide appropriate treatment—or have given sufficient time for recovery. There are other numerous questions of fact that will, by necessity, arise as these matters are investigated. Under the Texas Constitution, Mr. Davis has a right to a determination of these questions before his death is intentionally hastened by actions of Memorial and Akhtar. *See* Count Five.

COUNT TWO: Assault

29. The threatened action of Defendants, without fulfilling their obligations under Texas Health & Safety Code Chapter 166, constitute a non-consensual assault under Texas common law. This assault has already caused Maurice Davis to incur damages in excess of the minimum jurisdictional limits of this Court.

30. Specifically, the statute requires both Dr. Akhtar and Memorial to make a “reasonable effort to transfer the patient to a physician who is willing to comply with the directive. If the patient is a patient in a health care facility, the facility’s personnel shall assist the physician in arranging the patient’s transfer to . . . another physician [or] another facility.” TEXAS HEALTH & SAFETY CODE § 166.046(d).

31. Kelly Davis testifies that Dr. Akhtar has not assisted the Davis family in locating a suitable transferee facility, and that Memorial's efforts have been spotty. *See* Exhibit A at ¶ 9. In fact, on January 23, 2009, a Memorial case manager told Ms. Davis that she would not help the Davis family at all. *See id.*

COUNT THREE: Declaratory Judgment Action

32. Without waiving the foregoing, Plaintiffs alternatively contend that Maurice Davis will be able to find an alternative health care provider, willing to treat him, if Defendants fulfill their obligations under Texas Health & Safety Code Chapter 166.

33. Pursuant to Texas Health and Safety Code Section 166.046(g), Plaintiffs request this Court to extend the deadline of Wednesday, February 4, 2009, at 5:30 p.m., to allow Plaintiffs time to find an alternate treatment center. There is more than a reasonable expectation that Plaintiffs will secure an alternate treatment center if an extension is granted. *See* Exhibit A at ¶ 10; Exhibit E.

COUNT FOUR: Texas Constitution

34. In the alternative, and without waiving the above, Texas Health & Safety Code Section 166.046 is unconstitutional and violates Plaintiff Maurice Davis's substantive and procedural due process rights. In effect, Section 166.046 allows a group of doctors and hospital administrators to overrule the decision of a patient and his family and to determine that the patient's medical condition is "futile," with no overview by Texas courts and no right to a jury decision.

35. As evidenced by some internal disagreement within the Memorial Committee, the futility determination is certainly a fact issue with the most serious of consequences. The Texas

Constitution guarantees that the decision to deprive a Texas citizen of his or life can only be made by a jury of peers.

COUNT FOUR: Defendants failed to comply with Texas Health & Safety Code Section 166.046

36. Kelly Davis, Maurice Davis's daughter and designated health care agent, has made repeated requests for Memorial and Akhtar to assist her family in finding a transferee facility. *See Exhibit A at ¶ 9.* Dr. Akhtar has undertaken no efforts whatsoever, let alone the required "reasonable effort" to arrange an alternative facility. *See id.* Moreover, Memorial's assistance has been intermittent, as demonstrated by a case manager's refusal to aid the family on January 23, 2009. *See id.*

37. The failures by Memorial and Akhtar violate Texas Health & Safety Code Section 166.046.

RELIEF REQUESTED

38. By reason of the wrongful acts of Defendant as set forth above, Plaintiffs have already incurred damages in excess of the minimum jurisdiction of this Court. Further, if Defendant is not restrained from taking its intended actions, Plaintiff Maurice Davis will face the ultimate damage—the loss of his life.

JURY DEMAND

39. Plaintiffs respectfully request a trial by jury, as is their right under the laws and Constitution of the State of Texas.

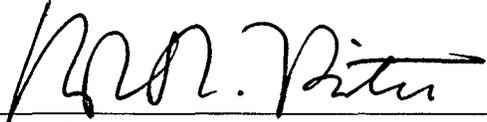
PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Maurice Davis, Ella Jean Davis, and Kelly Davis prays for judgment against Defendant, as follows:

- (1) For all relief requested above, including a temporary restraining order and a temporary injunction;
- (2) For attorney's fees under applicable laws;
- (3) For all costs of these proceedings;
- (4) For pre-judgment and post-judgment interest; and
- (5) For such further relief, at law and equity, to which Plaintiffs may show that they are justly entitled.

Respectfully submitted,

PAINTER LAW FIRM PLLC

By: 

Robert W. Painter

Texas Bar No. 24013284

12750 Champion Forest Drive

Houston, Texas 77066

Telephone: 281-580-8800

Facsimile: 281-580-8802

**ATTORNEYS FOR PLAINTIFFS,
MAURICE DAVIS, ELLA JEAN DAVIS, AND
KELLY DAVIS**

4. After his first week as a patient at Memorial, I realized that physicians, administrators and nursing personnel were delaying sharing information with Ella Jean Davis (my mother and Maurice Davis's wife) and me, or withholding information altogether concerning my father's condition and health care. This includes one instance in which it took approximately one week for anyone to tell us that my father had experienced a stroke while he was a patient at Memorial.

5. By December 13, 2008, Memorial officials and physicians began urging my mother and me to authorize termination of curative care, and told us that we should allow them to place my father on hospice. When we refused, Memorial officials and physicians threatened to convene the Medically Inappropriate/Futile Treatment Review Committee ('Committee') to override our wishes. The Committee met on January 21, 2009.

6. My father is not currently in a coma and he is not brain dead. His eyes are frequently open, he looks around the room, and follows movement. Although he has a trach tube, he sometimes tries to talk around it. I recently showed him a Christmas photo of my twin children, and saw a tear rolled down his cheek as he looked at it.

7. At the Committee meeting, one of the members of the Committee stated that, because of my father's condition, it was inappropriate for the Committee to meet and that the meeting should be adjourned on the spot. My father's attending physician is Adeeba Akhtar, M.D., a family practice and geriatrics physician. At the meeting, Dr. Akhtar and a neurologist, Godofredo Rossi, M.D., testified that he was not 'brain dead.' On the day of the Committee meeting itself, my father was awake and responsive. On the day before the Committee meeting, I asked him if he wanted me to give up or to keep on fighting him. Because he has a trach tube, he is unable to speak, so I asked him to open his eyes if he wanted me to continue fighting for him to receive care. My father clearly responded, by opening his eyes so wide that it stretched his face, and he then he reached for me with his hand.

8. Around 7:00 p.m., on January 21, 2009, I was informed that the Committee decided to end curative treatments, and that Memorial would withhold treatment at 5:30 p.m. on February 1, 2009, at 5:30 p.m., which is 10 days after the written notice of the Committee's decision was mailed.

9. Since I received verbal notice of the Committee's decision, on January 21, 2009, I have made repeated requests of Memorial and Akhtar to assist me in finding a suitable health care facility that would accept my father as a patient, and to arrange transfer. Dr. Akhtar has undertaken no efforts to help us find an alternative facility. On January 23, 2009, a Memorial case manager told me that she would not assist my family in finding an alternate facility for my father.

10. With additional time, I believe it will be possible to find a facility to accept my father. One challenge we are facing is that my father requires stretcher dialysis treatments. Nancy Wilsford, administrator of one facility, Rosenberg Health & Rehabilitation, has agreed to accept him, but needs additional time to work out the

stretcher dialysis treatment requirements. On January 27, 2009, I requested that Ms. Wilsford send written confirmation of our conversation to my attorney, Robert Painter, by fax. A true and correct copy of her letter to Mr. Painter is attached to Plaintiffs' Petition."

Further, the affiant saith not.

Kelly M. Davis / Kelly Davis
Kelly Davis

SUBSCRIBED and SWORN to before me, the undersigned authority, on this 28th day of January, 2009.



Erika M. Casarez
Notary Public in and for the State of ~~Arkansas~~ Texas
EWC

STATE OF TEXAS
COUNTY OF Fort Bend

This instrument was acknowledged before me on the
28 day of January, 2009

Erika Casarez
NOTARY PUBLIC, STATE OF TEXAS

**MEMORIAL
HERMANN**

Memorial City

Dear Mrs. Ella Davis and Family:

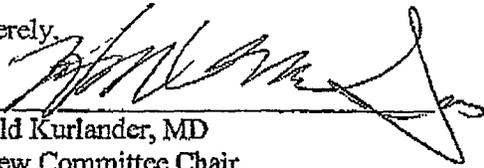
This is to inform you of the decision of the Medically Inappropriate/Futile Treatment Review Committee that met on January 21, 2009 at 5:30 p.m. As a reminder, this Committee was composed of independent clinicians who had not been involved in the treatment of Mr. Davis or any bioethics consult that was requested.

The attending and consulting physicians of Mr. Davis presented the clinical case to this Committee, after which the Committee and family were given the opportunity to ask questions. After reviewing the medical record and having had all questions asked and answered, the Committee is in agreement with the attending physician that the current artificial life sustaining interventions are medically inappropriate. Please see the enclosed documentation.

We understand that the patient advocate has given you information from the Texas Advance Directive Act regarding the right to seek transfer of the patient to another facility and the listing from the TDSHS registry of healthcare providers.

If we can be of further assistance please let us know.

Sincerely,



 Harold Kurlander, MD
 Review Committee Chair



 Robert Herman, MD
 Review Committee Facilitator

Memorial Hermann Memorial City Medical Center
Decision of the Medically Inappropriate Treatment Review Committee

Date JANUARY 21, 2009 Time 7:00 AM

Patient Name MAURICE DAVIS Medical Record # 38646326-8370

Background:
MULTIPLE CVA'S, MULTISYSTEM FAILURE, SEPSIS, UNRESPONSIVE

Intervention(s) under review:
DIALYSIS, LAB, MEDICATIONS EXCEPT COMFORT MEASURES,
MONITORING

Committee's conclusion:
The committee unanimously affirms the following intervention(s) is/are medically inappropriate treatment in this case:
DIALYSIS, LAB, MEDICATIONS EXCEPT COMFORT MEASURES,
MONITORING

The committee does not make a finding of medically inappropriate treatment on the following interventions:

CHAIR, MEDICALLY INAPPROPRIATE TREATMENT REVIEW COMMITTEE:
DR HAROLD KURLANDER

FACILITATOR, MEDICALLY INAPPROPRIATE TREATMENT REVIEW COMMITTEE:
DR ROBERT HERMAN

Robert Painter

From: Metzger, Pat
Sent: Thursday, January 29, 2009 8:30 AM
To: 'Robert Painter'
Cc: Durham, Barbara
Subject: RE: Maurice Davis/Memorial City

I appreciate the time you spent talking with me as well. As you have outlined in your email, the hospital will agree to extend the deadline to Wednesday, February 4, 2009 at 5:30 PM. As we also discussed, if the hospital has an accepting facility before that time, I will call you directly, and based on our conversation, you agree that we should proceed with discharge to that facility. If the family then wishes to move the patient to another facility at a later date, they may do so.

Thanks for working with us on this case. I will keep you informed if anything arises.

From: Robert Painter [mailto:rpainter@painterfirm.com]
Sent: Wednesday, January 28, 2009 6:03 PM
To: Metzger, Pat
Cc: Durham, Barbara; Robert Painter
Subject: Maurice Davis/Memorial City
Importance: High

Dear Ms. Metzger,

Thank you for speaking with me this afternoon concerning Maurice Davis. As we discussed, I have been retained by the Davis family and am assisting with Mr. Davis's transfer from Memorial to a nursing home facility.

Under Memorial's January 21, 2009 written ethics committee decision, termination of curative treatment is scheduled to occur on Sunday, February 1, 2009, at 5:30 p.m. As we discussed, the Davis family believes that a transfer can be achieved early next week. From our conversation, I understand that Memorial will extend that deadline until Wednesday, February 4, 2009, at 5:30 p.m., and based on that we are not filing a Chapter 74 injunction. Please confirm by return email that this is consistent with our agreement and understanding.

The Davis family is working diligently to have Mr. Davis transferred to a nursing home facility, and it is not their goal for this to linger on. I appreciate Memorial's willingness to work with us under these difficult circumstances.

Robert W. Painter
Painter Law Firm PLLC

Exhibit C

2/3/2009

12750 Champion Forest Dr.
Houston, TX 77066
tel 281-580-8800
fax 281-580-8802
www.painterfirm.com

Robert Painter

From: Robert Painter
Sent: Tuesday, February 03, 2009 5:40 PM
To: Metzger, Pat
Cc: Durham, Barbara; Robert Painter
Subject: Maurice Davis/Memorial City: Notice of TRO
Importance: High

Ms. Metzger,

In follow-up to our conversation this afternoon, I understand that Memorial is unwilling to extend the Wed., 2/4/09, 5:30 p.m. deadline to terminate curative health care to Maurice Davis. As we discussed, my clients have instructed me to proceed with filing a lawsuit and seeking a temporary restraining order (TRO) to prevent these actions.

The Ancillary Judge this week is The Hon. Tracy Christopher. I contacted the Ancillary Clerk of the Harris County District Clerk's Office, after speaking with you, and have made plans to file the lawsuit at 10:00 a.m. tomorrow, Wed., 2/3/09. The Ancillary Clerk stated that **my clients' request for TRO will be heard around 10:30 a.m. tomorrow by Judge Christopher** (the Ancillary Clerk could not give an exact time, because Judge Christopher is in a jury trial this week).

This email also confirms that you have notified the appropriate people at Memorial of our intent to seek a TRO tomorrow, and that Memorial will send a representative to attend the TRO hearing.

Robert W. Painter
Painter Law Firm PLLC
12750 Champion Forest Dr.
Houston, TX 77066
tel 281-580-8800
fax 281-580-8802
www.painterfirm.com

Exhibit

D

2/3/2009

Robert Painter

From: Metzger, Pat [Pat.Metzger@memorialhermann.org]
To: Robert Painter
Sent: Tuesday, February 03, 2009 5:45 PM
Subject: Read: Maurice Davis/Memorial City: Notice of TRO

Your message

To: Pat.Metzger@memorialhermann.org
Subject:

was read on 2/3/2009 5:45 PM.



**ROSENBERG
HEALTH &
REHABILITATION
CENTER**

January 23, 2009

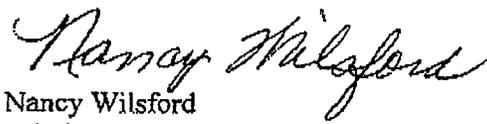
Mr. Robert Painter

RE: Maurice Kelly

This letter is to confirm my conversation with Kelly Davis, daughter. We will accept Mr. Davis, however, we will need time to workout the issue of finding a stretcher dialysis.

If you have any questions, please call me at 281-342-0065.

Sincerely,


Nancy Wilsford
Administrator