

CAUSE NO. 2015-69681

EVELYN KELLY, INDIVIDUALLY, § IN THE DISTRICT COURT OF
AND ON BEHALF OF THE §
ESTATE OF DAVID §
CHRISTOPHER DUNN §

V. § HARRIS COUNTY, TEXAS

THE METHODIST HOSPITAL § 189TH JUDICIAL DISTRICT

**DEFENDANT, HOUSTON METHODIST HOSPITAL 'S
OBJECTIONS TO PLAINTIFFS' SUMMARY JUDGMENT EVIDENCE,
MOTION TO STRIKE PLAINTIFF'S SUMMARY JUDGMENT EVIDENCE,
AND MOTION TO CONTINUE HEARING ON
PLAINTIFF'S SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Houston Methodist Hospital f/k/a The Methodist Hospital, objects to the following summary judgment evidence as irrelevant, hearsay, and because its probative value is substantially outweighed by the danger of unfair prejudice:

- Affidavit of Joseph M. Nixon attached to a letter to Judge Burke dated July 14, 2017;
- Affidavit of Evelyn Kelly attached to a letter to Judge Burke dated July 14, 2017;
- Video with the file name IMG_1580.mov that was on a flash drive enclosed with the letter to Judge Burke dated July 14, 2017; and
- Video with the file name IMG_1583.mov that was on a flash drive enclosed with the letter to Judge Burke dated July 14, 2017.

**I.
FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff filed her Motion for Summary Judgment on October 7, 2016.¹ In her

¹ See Plaintiff's Motion for Summary Judgment, attached as Exhibit A.

Motion, Plaintiff claims that TEXAS HEALTH AND SAFETY CODE § 166.046 is unconstitutional. Plaintiff's Motion for Summary Judgment does not reference any exhibits, presumably because Plaintiff believes her due process allegations are not dependent on any specific facts in this case.²

On July 14, 2017, Plaintiff sent a letter to Judge Burke enclosing the Affidavit of Joseph M. Nixon, the Affidavit of Evelyn Kelly and a flash drive containing two video files labeled IMG_1580.mov and IMG_1583.mov.³ According to Joseph Nixon's affidavit, both video files are of David Christopher Dunn while he was hospitalized at Houston Methodist Hospital.⁴ Mr. Nixon further states that IMG_1580.mov was filmed on December 2, 2015 at 7:51pm and IMG_1583.mov was filmed on December 11, 2015 at 1:30pm.⁵ It is not clear from Plaintiff's letter to Judge Burke whether Plaintiff intends for these two video files to serve as summary judgment evidence. Plaintiff's letter only states that the "affidavits are in support of our Motion for Summary Judgment that was e-filed on October 7, 2016."⁶ Out of an abundance of caution, Defendant is objecting to the two video files as they were also sent to Judge Burke in support of Plaintiff's Motion for Summary Judgment.

In IMG_1580.mov, Mr. Nixon asks Mr. Dunn two questions. First, he asks if Mr. Dunn would like Mr. Nixon and his firm to be his lawyers. Second, Mr. Nixon asked Mr. Dunn: "Do you want to stay alive?" In IMG_1583.mov, both Mr. Nixon and Ms. Kelly ask

² *Id.*

³ See Letter from Brooke A. Jimenez to the Honorable Bill Burke dated July 14, 2017 enclosing the Affidavit of Joseph M. Nixon, the Affidavit of Evelyn Kelly, and a flash drive containing two video files., attached as Exhibit B.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Mr. Dunn if it feels better when his mother moistens his mouth and they also ask Mr. Dunn to waive goodbye to Mr. Nixon.

Plaintiff's letter to Judge Burke states that the Affidavit of Joseph M. Nixon and the Affidavit of Evelyn Kelly are in support of Plaintiff's "Motion for Summary Judgment that was e-filed on October 7, 2016."⁷ Ms. Kelly's Affidavit states that "[t]he attached videos show Chris' ability to communicate and desire to be represented regarding this matter by the attorneys who took the case."⁸

Whether or not Mr. Dunn had the ability to communicate or be represented by counsel is not at issue in Plaintiff's Motion for Summary Judgment.⁹ Likewise, any response to the questions posed to Mr. Dunn in the videos have absolutely no bearing on Plaintiff's constitutional challenge, which is the only issue in Plaintiff's Motion for Summary Judgment.¹⁰

II. ARGUMENTS & AUTHORITIES

A. The Affidavit of Joseph M. Nixon, the Affidavit of Evelyn Kelly, the video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov are not competent summary judgment evidence because they are irrelevant.

Summary judgment evidence must be presented in a form that would be admissible in a trial proceeding.¹¹ Irrelevant evidence is not admissible.¹² To be relevant, the evidence

⁷ *Id.*

⁸ *Id.*

⁹ See Exhibit A.

¹⁰ *Id.*

¹¹ *Hidalgo v. Surety Sav. & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex.1972).

¹² TEX. R. EVID. 401.

must be of consequence in determining the action.¹³ Nothing in the Affidavit of Joseph M. Nixon, the Affidavit of Evelyn Kelly, the video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov are of any consequence in determining whether TEXAS HEALTH AND SAFETY CODE § 166.046 violates procedural due process or substantive due process. Accordingly, this Court should exclude the Affidavit of Joseph M. Nixon, the Affidavit of Evelyn Kelly, the video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov.

B. Even if the video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov were relevant, which they are not, their probative value is substantially outweighed by the danger of unfair prejudice.

As discussed above, the Affidavit of Joseph M. Nixon, the Affidavit of Evelyn Kelly, the video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov have no bearing on Plaintiff's claim that TEXAS HEALTH AND SAFETY CODE § 166.046 violates procedural due process or substantive due process. As relevancy is a threshold issue, this purported summary judgment evidence should be excluded on that reason alone. However, the video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov should also be excluded under Texas Rules of Evidence 403. A trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay or needlessly presenting cumulative evidence."¹⁴

¹³ *Id.*

¹⁴ TEX. R. EVID. 403.

Unfair prejudice refers to “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”¹⁵ The video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov have no probative value and Plaintiff provided these videos in support of her Summary Judgment for the purpose of eliciting an emotional response. These videos show a critically ill man in a hospital bed whose mother asks him if he wants to live. Mr. Dunn’s capacity to communicate, through gestures or otherwise, is not at issue in this case. Whether or not Mr. Dunn could seemingly communicate at the time these videos were taken has no bearing on Plaintiff’s constitutional challenge. Plaintiff’s only reason for filing these videos is to elicit a sympathetic emotional response from the viewer.

Further, at the time that these videos were taken, Mr. Dunn lacked the requisite mental and legal capacity to respond to questions asked of him in a legally cognizant manner, as indicated within the affidavit of his then treating physician, Aditya Uppalapati, M.D.,¹⁶ the results of which were verified through a second opinion by a consulting psychiatrist. In his affidavit, Dr. Uppalapati opined that:

Since October 12, 2015, Mr. Dunn has been unable to participate in his health care decisions such as providing a review of symptoms or medical history due to his altered mental status, intubation and sedation.

Mr. Dunn has a low probability that his mental status will return to his baseline. He is not oriented to person, time, place or situation. He cannot communicate. He cannot attend to any activities of daily living. He does not have the mental capacity to consent to or make any business, managerial, financial, legal or other decisions. This incapacity began October 12, 2015 and in reasonable medical probability will continue until his death.¹⁷

¹⁵ *Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999).

¹⁶ See affidavit of Aditya Uppalapati, MD, as Exhibit C.

¹⁷ See Id.

Even with this uncontroverted medical testimony, Plaintiffs still believe that the Court, and jury for that matter, should consider the substance of the videos despite the uncontroverted medical evidence.

C. The video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov are hearsay.

The video file labeled IMG_1580.mov and the video file labeled IMG_1580.mov are hearsay, and cannot be considered by this Court as competent summary judgment evidence. Pursuant to Texas Rule of Civil Procedure Rule 166a, competent summary judgment proof includes affidavits, deposition testimony, authenticated certified documents and certain discovery responses.¹⁸ These two videos do not fit any of these categories of evidence. Hearsay statements cannot constitute competent summary judgment evidence.¹⁹ Therefore, this Court should not consider these two video files as summary judgment evidence.

III.
MOTION FOR CONTINUANCE

Plaintiff is seeking leave of Court to set her Motion for Summary Judgment on August 18, 2017, the same date as Houston Methodist's Motion for Leave and to Dismiss are set for hearing. Plaintiff's Motion for Leave is presently set for August 11, 2017. In the event this Honorable Court grants Plaintiff's request for leave and determines the videos to be competent summary judgment evidence, Houston Methodist requests a continuance of the hearing so that it can obtain deposition testimony from Ms. Kelly regarding the facts stated in her affidavit and the events and circumstances surrounding the videos in question.

¹⁸ TEX. R. CIV. P. 166a

¹⁹ *Southland Corp. v. Lewis*, 940 S.W.2d 83, 85 (Tex. 1997).

Specifically, Houston Methodist seeks the deposition testimony of Evelyn Kelly to determine the basis for her statements contained within her affidavit. Houston Methodist has requested Ms. Kelly's deposition previously, but such requests were improperly denied. Without Ms. Kelly's deposition, Defendant cannot properly prepare its response and defense to Plaintiff's Motion for Summary Judgment.

Therefore, Pursuant to TRCP 166a(g), Houston Methodist requests a continuance of the hearing on Plaintiff's Motion to provide it with time to secure the deposition testimony of Plaintiff, Evelyn Kelly.

IV.
PRAYER

WHEREFORE PREMISES CONSIDERED, Defendant HOUSTON METHODIST HOSPITAL F/K/A THE METHODIST HOSPITAL'S respectfully request that this Court GRANT its Objections to Plaintiffs' Summary Judgment Evidence, disregard this evidence, and GRANT its Motion for Continuance of Plaintiff's Motion for Summary Judgment Hearing, and for any such other and further relief to which Defendant shows itself justly entitled.

Respectfully submitted,

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By: /s/Dwight W. Scott, Jr.

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**ATTORNEYS FOR DEFENDANT,
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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 8th day of August, 2017.

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