

CAUSE NO. 2015-69681

EVELYN KELLY,
INDIVIDUALLY, AND ON
BEHALF OF THE ESTATE OF
DAVID
CHRISTOPHER DUNN

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IN THE DISTRICT COURT OF

V.

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HARRIS COUNTY, TEXAS

THE METHODIST HOSPITAL

189TH JUDICIAL DISTRICT

**DEFENDANT, HOUSTON METHODIST HOSPITAL F/K/A THE
METHODIST HOSPITAL'S REPLY IN SUPPORT OF
MOTION FOR CONTINUANCE AND EXTENSION OF DEADLINES,
RESPONSE TO PLAINTIFFS' MOTION TO QUASH AND
FOR PROTECTION AND RESPONSE TO PLAINTIFFS'
SECOND MOTION TO QUASH AND FOR PROTECTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **HOUSTON METHODIST HOSPITAL F/K/A THE
METHODIST HOSPITAL** ("Houston Methodist" or the "Hospital"), and files the
following Reply in support of Motion for Continuance and Extension of Deadlines,
Response Plaintiffs' Motion to Quash and For Protection and Response Plaintiffs' Second
Motion to Quash and For Protection ("Motion"). By way of the Motion, Houston
Methodist respectfully shows the Court the following:

**I.
SUMMARY OF THE REPLY**

Plaintiffs' request that this Court enter an order of protection from all discovery
requests from Houston Methodist should be denied. **No discovery has been conducted
in this case.** Plaintiffs and Houston Methodist entered into an agreement in February 2016
to abate all discovery in this case while the parties worked through the legal and procedural

issues involved, and again pending the past legislative session that recently concluded because the legislature was considering passing an amendment to the Advance Directive Act that both parties agreed would have rendered this litigation moot. In fact, it has been Plaintiff's insistence since this case was filed that this is "legal issue only case."¹ Both parties agreed to abate discovery while attempting to resolve the dispute through dueling dispositive motions and/or legislative efforts, hence the reason why counsel formally withdrew written discovery sent to Defendant in February 2016.² Abating discovery during these efforts were thought to save both sides the costs and expenses of the discovery process. The amendment to the Advanced Directive Act has not passed in the recent legislative sessions, and Houston Methodist now requires full discovery to prepare for trial in this matter. Defendant never agreed to abate discovery forever, and remains adamant that it will be severely prejudiced without full discovery in this matter. Unfortunately, Plaintiffs have chosen to pretend that their agreement to abate discovery never existed, and are remarkably opposing Houston Methodist's discovery requests in hopes of creating a trial by ambush.³

To deny a trial continuance to conduct discovery in the current posture would reward Plaintiffs for renegeing on their agreement. Accordingly, Houston Methodist respectfully requests that the Court grant Houston Methodist's Motion for Continuance and Extension of Discovery Deadlines and deny Plaintiffs' Motions to Quash and for Protection from the following discovery: 1) Subpoena and Notice of Intention to Take Oral and Videotaped

¹ See email from Mr. Joe Nixon, attached hereto as Exhibit A.

² See Id, wherein Mr. Nixon formally withdraws his written discovery to Defendant.

³ See *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 646 (Tex. 1989) (The rules of discovery "were designed to prevent 'trial by ambush' and to ensure fairness.")

Deposition of Plaintiff Evelyn Kelly; 2) Houston Methodist's First Requests for Production to Plaintiff; 3) Houston Methodist's First Set of Interrogatories to Plaintiff; 4) Houston Methodist's Requests for Admission to Plaintiff; 5) Houston Methodist's Requests for Disclosure; 6) Houston Methodist's Second Requests for Production; and 7) a Medical Record Authorization Form from Plaintiff.

II. **ARGUMENTS AND AUTHORITIES**

A. Discovery is Required to Prevent Trial By Ambush

“The trial court is allowed great latitude in ordering discovery and its action cannot be set aside unless there is a clear showing of abuse of discretion.”⁴ The purpose of discovery is to allow the parties to obtain full knowledge of the issues and facts of the lawsuit before trial, and to prevent trial by ambush.⁵ Discovery may be obtained about any matter relevant to the subject matter of the case.⁶ Information is discoverable as long as it appears “reasonably calculated to lead to the discovery of admissible evidence.”⁷ “Information may sustain a case, or it may lead to the end of litigation, but in either case it is the lifeblood of the process.”⁸ “Parties and their attorneys are expected to cooperate in discovery and to make any agreements reasonably necessary for the efficient disposition of

⁴ *Meyer v. Tunks*, 360 S.W.2d 518 (Tex.1962); *Young Companies, Inc. v. Bayou Corp.*, 545 S.W.2d 901 (Tex.Civ.App. Beaumont 1977, no writ).

⁵ *Gutierrez v. Dallas Indep. Sch. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987).

⁶ See TEX. R. CIV. P. 192.3(a).

⁷ *Id.*

⁸ *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 394 (Tex. 2014).

the case.”⁹

Here, the parties cooperated in discovery by agreeing to abate discovery while both sides managed the legal and procedural complexities of the case, determined the best mechanism to resolve the matter and allowed the Texas Legislature to consider an amendment to the Advanced Directive Act that would make the matter moot. This agreement prevented both sides from incurring the costs and expenses of discovery pending a legislative amendment that would render the trial of the matter unnecessary. This cooperation by both parties in no way constitutes a failure in due diligence. It amounts to thoughtful consideration of the legal complexities involved in the matter. The amendment did not pass and this case is currently set for trial on August 21, 2017. Now, in a brazen attempt at trial gamesmanship, Plaintiffs argue that this Court should enter an order of protection preventing Houston Methodist for propounding any discovery in this case.

If the court fails to grant Houston Methodist’s Motion for Trial Continuance and Extension of Deadlines, Houston Methodist will suffer substantial harm or prejudice in the presentation of Houston Methodist's defense. Houston Methodist requires discovery to defend this case. Accordingly, Houston Methodist respectfully requests that this Court reject Plaintiffs’ attempt to force Houston Methodist into a trial by ambush and permit discovery to go forward.

B. The Discovery Sought is Material and the Evidence or Testimony Sought Cannot be Obtained from any other Source.

Houston Methodist seeks the following discovery: 1) the Deposition of Plaintiff

⁹ See TEX. R. CIV. P. 191.2; *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 184 (Tex. 1999).

Evelyn Kelly; 2) Houston Methodist's First Requests for Production to Plaintiff; 3) Houston Methodist's First Set of Interrogatories to Plaintiff; 4) Houston Methodist's Requests for Admission to Plaintiff; 5) Houston Methodist's Requests for Disclosure; 6) Houston Methodist's Second Requests for Production; and 7) a Medical Record Authorization Form from Plaintiff, so that it can ascertain medical facts of his condition, not to mention his knowledge of his condition, prior to his arrival at Houston Methodist. Once Plaintiff provides Defendant with a medical authorization, then it will likely require discovery from providers involved in Mr. Dunn's care and treatment prior to his hospitalization at Houston Methodist. Further, Ms. Kelley has alleged intentional infliction of emotional distress against Houston Methodist. Surely, Defendant is entitled to discover medical information into her medical background to properly prepare its defense of the claim. The discovery sought is material in order to ascertain knowledge of all issues and facts relevant to the subject matter of this case prior to trial. Houston Methodist requires this discovery in order to evaluate her claims and prepare its defenses for trial. Houston Methodist also requires a signed Medical Records Authorization Form to allow it to subpoena records from non-parties who possess vital information relating to the claims. Houston Methodist cannot obtain this discovery from any other source.

III. PRAYER & CONCLUSION

For these reasons, Houston Methodist respectfully requests that this Court grant its Motion for Trial Continuance and issue a new docket control order for expert witness designations, pleadings, discovery, and summary judgment deadlines to afford the parties the

opportunity to complete the necessary discovery for trial, in this cause in accordance with the new trial setting, and grant all other relief the Court deems appropriate.

Respectfully submitted,

SCOTT PATTON PC

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

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f/k/a THE METHODIST HOSPITAL**

Unofficial Copy Office of Christy D. Smith, Clerk

VERIFICATION

STATE OF TEXAS §
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COUNTY OF HARRIS §


BEFORE ME, the undersigned authority, on this day personally appeared **DWIGHT W. SCOTT, JR.** known to me to be the person whose name is subscribed hereto, who upon his oath, stated that he has read the foregoing Motion, and acknowledged to me that the factual statements contained therein are true and correct to the best of his knowledge.



DWIGHT W. SCOTT, JR.

SUBSCRIBED TO AND SWORN BEFORE ME on this 9th day of August, 2017 to certify which witness my hand and official seal of office.





Notary Public in and for
The State of Texas

Unofficial Copy Office of Civil District Clerk

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 9th day of August, 2017.

Via E-file

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