NO. 06-0372

IN THE SUPREME COURT OF TEXAS

COLUMBIA RIO GRANDE HEALTHCARE, L.P. D/B/A
RIO GRANDE REGIONAL HOSPITAL.

Petitioner

VS.

ALICE H. HAWLEY AND JAMES A. HAWLEY,

Respondents

BRIEF OF AMICUS CURIAE, TEXAS MEDICAL LIABILITY TRUST

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INTEREST OF THE AMICUS CURIAE

Texas Medical Liability Trust (TMLT) respectfully submits its brief of Amicus Curiae, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, in support of the reversal of the judgment of the Court of Appeals in this case.

Amicus Curiae, Texas Medical Liability Trust, is a not-for-profit health care liability claim trust owned by Texas physician policyholders. TMLT was formed to offer a source of affordable and stable medical liability insurance for Texas physicians. Texas Medical Liability Trust's purpose is to make a positive impact on the quality of health care for Texans by educating, protecting, and defending physicians.

In existence for more than 25 years, Texas Medical Liability Trust is the largest medical liability carrier in the state of Texas, with more than 13,000 physician policyholders. For the past five calendar years, approximately 16% of the claims made against TMLT physicians related to diagnosis error. Because one of the primary issues in this Petition for Review involves lost chance of survival based on alleged misdiagnosis, TMLT has an interest in this Court's review of this important issue.

TMLT is responsible for the expense and payment of legal fees associated with the preparation of this brief. TMLT is vitally interested in the consistency and predictability of Texas courts' decision making in cases involving professional liability of physicians of this state.

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BRIEF OF AMICUS CURIAE, TEXAS MEDICAL LIABILITY TRUST

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Texas Medical Liability Trust respectfully submits its Brief of Amicus Curiae pursuant to Rule 11 of the Texas Rules of Appellate Procedure in support of the reversal of the court of appeals' judgment in this case.

ISSUE PRESENTED FOR REVIEW

ISSUE NO. 1

Where raised by the evidence, are doctors and other health care providers entitled to a jury instruction forbidding a finding of proximate cause based on a determination that the lost chance of survival is fifty percent or less?

SUMMARY OF THE ARGUMENT

The Thirteenth Court of Appeals' opinion in this case allows plaintiffs to circumvent the prohibition against recovery for lost chance of survival, and subjects physicians to liability in cases in which the patient would have suffered the same outcome regardless of the treatment rendered. The opinion ignores this Court's rejection of the lost chance doctrine in Kramer v. *Lewisville* Memorial *Hosp.,* 858 S.W.2d 397, 407 (Tex. 1993) and Park Place Hosp. v. The Estate of Milo, 909 S.W.2d 508, 511 (Tex. 1995). This Court should grant review in this case in order to prevent Texas litigants and courts from relying on this damaging precedent.

ARGUMENT AND AUTHORITIES

ISSUE NO. 1 RESTATED

Where raised by the evidence, are doctors and other health care providers entitled to a jury instruction forbidding a finding of proximate cause based on a determination that the lost chance of survival is fifty percent or less?

I. FAILING TO REQUIRE AN INSTRUCTION IN A MEDICAL MALPRACTICE CASE THAT A JURY MAY NOT FIND PROXIMATE CAUSE IF IT DETERMINES THE PATIENT'S CHANCE OF SURVIVAL WAS FIFTY PERCENT OR LESS UNDERMINES THIS COURT'S DISAPPROVAL OF THE LOST CHANCE OF SURVIVAL DOCTRINE IN KRAMER V. *LEWISVILLE* MEMORIAL HOSPITAL[1]

The Thirteenth Court of Appeals' holding in this case renders this Court's rejection of the lost chance doctrine in *Kramer* meaningless and permits a jury to find proximate cause even if it determines that a patient would have had a fifty, ten or even a one percent chance of survival. If allowed to stand, the holding permits recovery against doctors where the adverse health care result would have likely occurred irrespective of any negligence. The net effect is a *de facto* adoption of the lost chance doctrine.

A. THE COURT OF APPEALS' HOLDING DEPRIVES JURORS OF A PROPER INSTRUCTION ON THE LAW AND PERMITS RECOVERY IN CASES WHERE CHANCE OF SURVIVAL WAS FIFTY PERCENT OR LESS

If an issue is properly pleaded and is supported by some evidence, a litigant is entitled to have controlling questions submitted to the jury." *Triplex Communications, Inc. v. Riley, 900* S.W.2d 716, 718 (Tex. 1995). A trial court reversibly errs when it denies a party proper submission of a valid theory of

[1] *Kramer v. Lewisville Memorial Hosp., 858* S.W.2d *397* (Tex. 1993)

recovery or a vital defensive issue raised by the pleadings and evidence. Exxon Corp. v. Perez, 842 S.W.2d 629, 631 (Tex. 1992).

The trial court, in this case, gave the general instructions for negligence[2] and proximate cause[3]. Petitioner additionally requested the following instruction, which the trial court denied:

> You are instructed that Alice H. Hawley must have had greater than a fifty percent (50%) chance of survival on November 28, 2000 for the negligence of Rio Grande Regional Hospital to be a proximate cause of injury to Alice H. Hawley. (Petitioner's Appendix, Tab 7, p. 1).

This instruction was supported by conflicting evidence regarding the chances of the patient's survival, including testimony that the patient had a 33% chance of survival on the date in question. Additionally, as conceded by the court of appeals, the instruction reflected a correct statement of the law. See Columbia *Rio Grande* Regional Healthcare, *L.P.* v. Hawley, 188 S.W.3d 838, 863 (Tex. App.—Corpus Christi 2006, pet. filed).

The instruction was absolutely paramount in assisting the jury in determining proximate cause. Without the instruction, the jury was free to find proximate cause based on a determination that the Defendant deprived Mrs. Hawley of a 33% chance of survival, which runs directly afoul of Texas

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[2] The court defined negligence as: "[F]ailure to use ordinary care, that is, failing to do that which a hospital of ordinary prudence would have done under the same or similar circumstances, or doing that which a hospital of ordinary prudence would not have done under the same or similar circumstances." (Petitioner's Appendix, Tab *3,* p. *3).*

[3] Likewise, the court defined proximate cause as: "[T]hat cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a hospital using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of any event." (Petitioner's Appendix, Tab 3, p. *3).*

jurisprudence. See Kramer v. *Lewisville* Memorial Hosp., 858 S.W.2d 397, 407 (Tex. 1993) (refusing to allow an action for lost chance of survival where chance of survival is 50% or less); see also Park Place Hosp. *v.* The Estate of Milo, 909 S.W.2d 508, 511 (Tex. 1995) (no proximate cause where defendant denied patient 40% chance of survival).

In Kramer, this Court held that there was no cause of action for lost chance of survival in a medical malpractice case. Kramer, 858 S.W.2d at 407. This Court explained:

> [W]*here* preexisting illnesses or injuries have made a patient's chance of avoiding the ultimate harm improbable even before the allegedly negligent conduct occurs—*i.e.*, the patient would die or suffer impairment anyway—the application of these traditional causation principles will totally bar recovery, even if such negligence has deprived the patient of a chance of avoiding the harm.

Id. at 400.

Since Kramer, this Court and Texas courts of appeals have continued to maintain the rejection of the lost chance doctrine. See e.g., Milo, 909 S.W.2d at 511; *Hodgkins* v. Bryan, 99 S.W.3d 669, 673 (Tex. App.—Houston [14th Dist.] 2003, no pet.); Arguelles v. *UT* Family Med. Ctr., 941 S.W.2d 255, 258 (Tex. App.—Corpus Christi 1996, no writ) ("In Texas, . . . if a person is going to die anyway, no cause of action for medical malpractice can be maintained against a treating physician").

The expert testimony at trial left an obvious conflict on the likelihood of

survival had treatment occurred in November of 2000. This was a primary issue of fact to be decided by the jury. Unfortunately, despite the objection of Petitioner, we will never know if this fact was resolved by the jury.

The court of appeals discounts this dilemma by stating that there was "legally-sufficient evidence adduced at trial to prove that Mrs. Hawley's lost chance of survival was greater than 50 percent." Hawley, 188 S.W.3d at 864. This, of course, misses the point. Even if there was legally sufficient evidence that her chances of survival were greater than 50 percent, there was similarly legally sufficient evidence that her chances of survival were less than 50 percent. The fact finder, the jury in this case, should be properly equipped with the correct law in order for it to make a proper determination regarding causation when recovery concerns lost chance of survival. The absence of the requested instruction in this case left this threshold finding unanswered.

Thus, there is every chance that the jury concluded that Mrs. Hawley had less than a 51% chance of survival before the alleged negligence and further concluded that this percentage was sufficient to find that said negligence proximately caused Mrs. Hawley's death.

This Court recently discussed the importance of submitting defensive issues to the jury in Dew *v.* Crown Derrick Erectors, Inc., ____ S.W. 3d ____, 2006 WL 1792216 (Tex. 2006). The Court noted that without submission of

proper defensive instructions raised by the evidence, "the jury, in rendering a general verdict under a [general] charge . . . , may have disregarded a defense which they might have given effect to, if it had been brought to their attention. . . . Although we have moved to broad-form jury submissions, we do not use the broad-form submissions as a vehicle to deny a party the correct charge to which the party would otherwise be entitled." id. at *9 (citations omitted).

The damage suffered without the requested instruction in this case is exactly akin to the harmful charge error discussed by this Court in Crown Life *Ins.* Co. *v. Casteel,* 22 S.W.3d 378, 388 (Tex. 2000), where this Court observed, "The best the court can do is determine that some evidence could have supported the jury's conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds." *Casteel,* 22 S.W.3d at 388 (emphasis original).

The best the Thirteenth Court of Appeals can do in the present case is speculate. Because the jury was not instructed on the lost chance issue, the heath care provider in this case has been held liable without a judicial determination that a fact finder actually found that there was a greater than fifty percent chance of survival. As in *Casteel*, it is impossible to conclude that the jury's answer was not based on an improperly submitted theory.

B. AUTHORITY AND COMMENTARY FROM THIS STATE SUGGEST THAT, WHEN RAISED BY THE EVIDENCE, TRIAL COURTS SHOULD INSTRUCT JURIES THAT THEY MAY NOT FIND PROXIMATE CAUSE WHERE THE PATIENT'S CHANCES OF SURVIVAL WAS FIFTY PERCENT OR LESS

The court of appeals below noted a general absence of guiding precedent as to whether a trial court should instruct juries on Texas law in this type of case. Although there is apparently no case holding a trial court abused its discretion in refusing an instruction, like the one requested, at least one case acknowledges the use of such an instruction.

While not a published case, *Vigil v. Montero,* 08-01-00092-CV, 2002 *WL* 1988173 (Tex. App.—El Paso 2002, pet. denied) (not designated for publication)[4], provides an example of a court of appeals discussing the submission of an instruction on lost chance. There, the trial court submitted a lost chance instruction that asked the jury whether the patient's pre-existing illness at the time she arrived at the hospital made her chance of survival 50 percent or less. The jury answered "yes" to this question and the trial court subsequently granted judgment notwithstanding the verdict. On appeal, the court of appeals observed that "[r]ecovery is barred when the defendants' negligence deprived the patient of only a fifty percent or less chance of survival[,]" quoting *Kramer.* See *id.* at *3.

Because the court of appeals determined that there was some evidence that

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[4] See Tex. R. App. P. 47.7 (intermediate appellate court unpublished opinions have no precedential value but may be cited with the notation "(not designated for publication)".

the patient had less than a 50 percent chance of survival before her arrival at the hospital, the court reversed the trial court's judgment notwithstanding the verdict. *Vigil,* 2002 WL 1988173, at *3. Although the court of appeals in *Vigil* did not focus its review on the propriety of the jury instruction, it nevertheless gave no indication that such an instruction was in any way improper. At a minimum, it documents that, contrary to the court of appeal's suggestion in this case, courts and practitioners have submitted lost chance instructions to juries in Texas.

Furthermore, at least one Texas commentator has opined that, "[t]he lost chance should be treated as an element of proximate cause" and an instruction to be submitted "if raised by the evidence. . . ." John W. McChristian, Jr., Proximate Cause and the Lost chance Doctrine (MILO), State Bar of Texas 10th Annual Advanced Medical Malpractice Course, 2003, at 1[illegible]. According to Mr. McChristian, the following instruction should be submitted:

> You are further instructed that the alleged failure to diagnose breast cancer on August 12, 2002 can only be a proximate cause of the death of Paula Payne if you find that on that date, her chance of survival was greater than 50%.

Id.

As this commentator and *Vigil* demonstrate, the rule that a plaintiff may not recover where the defendant's negligence deprived the patient of only a fifty percent or less chance of survival, may be easily side-stepped if no instruction is submitted. The court of appeals' opinion in this case, which rejected the need for an instruction, creates the probability of many more such cases in which a jury is

permitted to make a finding on proximate cause without any assurance that such finding is in accord with Texas law. In order to protect health care providers and doctors in future cases, this Court should preempt this adverse development by granting review in this case.

C. THE COURT OF APPEALS' OPINION CREATES THE RISK OF UNREASONABLE LIABILITY FOR TEXAS PHYSICIANS

Review by this Court is critical to the doctors and other medical care providers of this state. Even the court of appeals below recognized "the significance of the excluded instruction," while refusing to find the trial court abused its discretion "in the absence of guiding precedent." *Hawley,* 188 S.W.3d at 863. The unfairness in omitting a lost chance instruction lies in holding a health care provider responsible for the death of an individual that was going to happen regardless of the treatment given, and in assigning liability based on uncertainty. *Kramer,* 858 S.W.2d at 405 ("legal responsibility under the lost chance doctrine is in reality assigned based on the mere possibility that a tortfeasor's negligence was a cause of ultimate harm"). The court of appeals' opinion creates precedent for other litigants and courts to circumvent the rule that prohibits liability in such situations. In the process it exposes physicians to unjust liability and creates the risk of a lawsuit with every critical care patient.

CONCLUSION AND PRAYER

For all these reasons, Amicus Curiae, Texas Medical Liability Trust, urges this Court to grant Petitioner's, Columbia Rio Grande Healthcare, L.P. dlbla Rio Grande Regional Hospital, Petition for Review and reverse the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument has been forwarded via U.S. Certified Mail, Return Receipt Requested on this the 6th day of October, 2006 to all counsel of record:

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