ORAL ARGUMENT REQUESTED

NO. 06-0372

IN THE
SUPREME COURT OF TEXAS

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

v.

ALICE H. WAWLEY AND JAMES A. HAWLEY,
Respandents.

On Petition for Review from the
Thirteenth District Court of Appeals at Corpus Christi, Texas
No. 13-03-00427-CV

PETITION FOR REVIEW

Respectfully submitted,

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[1]Mrs Hawley died on May 31, 2003, while this appeal was pending before the Thirteenth District.Court of Appeals

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I. STATEMENT OF THE CASE

Nature of the Case:

In this medical malpractice action, Plaintiffs Alice H. Hawley, James A. Hawley, Mary Christina H. Sadati, Julia Claire H. Trizzino, Laura H. Koenig, and Jonathan H. Hawley asserted negligence theories against Columbia Rio Grande Healthcare, L.P. d/b/a Rio Grande Regional Hospital, Jesus A. Rodriguez, M.D., and Jose Luis Valencia, M.D. (1 CR 15-31). Plaintiffs sought recovery of actual and exemplary damages based on the alleged negligent acts and/or omissions of the Defendants, (1 CR 22).

All Plaintiffs non-suited Dr. Rodriguez and Dr. Valencia (1 CR 67-68; 2 CR 273-74). Plaintiffs James A. Hawley, Mary Christina H. Sadai, Julia Claire H. Trilzzion, Laura H. Koenig, and Jonathan H. Hawley non-suited their "wrongful death" claims against Defendant. (1 CR.122-24).

The case proceeded to a jury trial on February 18, 2003, (2 RR 52). On February 26,2003, the jury returned a verdict in favor of Respondents. (2 CR 378-86). The jurors found that the negligence of Petitioner proximately caused injury to Mrs. Hawley. (2 CR 381). The jury awarded damages in the amount of $650,000 far pain and mental anguish, $190,000 for physical impairment, and $400,000 for medical expenses, (2 CR 382-83). The jury also awarded Mr. Hawley $760,000 for loss of consortium. (2 CR 384).

***Trial Court*:**

The Honorable Rodolfo Delgado, 93rd District Court, Hidalgo County, Texas,

Trial Court Disposition:

The trial court signed a Final .Judgment on March 10,2003. (2 CR 443-48), and a Judgment Nunc Pro Tunc on March 27, 2003, modifying and reducing the medical expenses awarded. Appellant timely filed a Motion for New Trial or, it the Alternative, Motion for Remittitur (2 CR

	466-77), and a Motion to Modify, Correct or Reform the Judgment (2 CR 478-93), which were overruled by operation of law. Appellant timely filed its notice of appeal on June 2,2003. *(2* CR 497-503).
Parties in the Court of Appeals:	Columbia Rio Grande Healthcare, L.P. d/b/a Rio Grande Regional Hospital - **Appellant;** Alice H. Hawley Estate and James A. Hawley - Appellees.
Court of Appeals:	Thirteenth District Court of Appeals at Corpus Christi, Texas.
Court of Appeals' Disposition:	Published opinion, by Justice Dori Contreras Garza, with Justice Rodriguez concurring, and Justice Castillo dissenting, affirming trial court's judgment. *Columbia Rio Grande Healthcare v. Hawley*, No. 13-03-427-CV, __ S.W.3d __, 2006 WL 733940, *1 (Tex. App.–Corpus Christi 2006, pet. filed).

II. STATEMENT OF THE JURISDICTION

This Court has jurisdiction over this appeal under Texas Government Code section 22.001(a)(1) because the justices of the Thirteenth Court of Appeals at Corpus Christi disagree an questions of law material to the decision. Compare *Columbia Rio Grande Healthcare* v. *Hawley*, No. 13-03-427-CV, __ S.W.3d __, 2006 WL 733940, *1-*26 (Tex. App.–Corpus Christi 2006, pet. filed), *with Id.* at *26-*31 (Castillo, J., dissenting),

This Court also has jurisdiction aver this appeal under Texas Government Code section 22.001(a)(6) because it appears that an error of law has been committed by the Court af Appeals, and that error is of such importance to the ,jurisprudence of the State that it requires correction.

III. ISSUES PRESENTED

Briefed. Partially Briefed, and Unbriefed Issues[2]

1. Was it reversible error to refuse to instruct the jury that Mrs. Hawley must have had a greater than fifty percent (50%) chance of survival on November 28, 2000, for the Petitioner's negligence to be a proximate cause of her injuries?

2. Was the refusal to instruct the jury an new and independent cause reversible error where the evidence raised the issue of new and independent cause concerning the delayed notice to Mrs. Hawley of her colon cancer diagnosis?

3. Whether Petitioner is entitled to rendition ofjudgment in its favor based on the legal insufficiency of the evidence to support the jury's finding in response to Question 1? (Unbriefed).

4. Did the exclusion of evidence of the negligence of Mrs. Hawley's surgeon (Dr. Jesus Rodriguez) and treating physician (Dr. Armando Arechiga) as a new and independent cause of Mrs. Hawley's damages probably lead to the rendition of an improper judgment, resulting in reversible error? (Unbriefed),

5. Was it reversible error to refuse to instruct the jury nat to consider the conduct of Dr. Valencia, an independent contractor physician, when considering whether Petitioner's negligence proximately caused Mrs. Hawley's injuries? (Unbriefed),

6. Whether the damages (and associated prejudgment interest an those damages) should have been limited pursuant to the provisions of section 11.02 of former Article 4590i of the Texas Revised Civil Statutes? (Unbriefed).

7. Whether the Judgment, even if affirmed, should be modified to reflect the Texas Finance Code amendments through House Bill 2415 and House Bill 4 to the accrual rate of post-judgment and prejudgment interest, reducing that rate from 10% to 5%? (Unbriefed).

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[1]Petitioner reserves the right to present additional briefing on these issues presented if the Court so requests. Petitioner submits as much argument as possible within the **page** limitations for petitions far review imposedby the Texas Rules of **Appellate** Procedure ***See*** TEX R. APP P 53 2(i).

IV. STATEMENT OF FACTS

A. Court of Appeals' Opinion

The court of appeal's opinion correctly states the nature of the case in this matter. See TEX. R. APP. P. 53.2(g).

B. Facts & Procedural Background

1. *Factual Background – Hospital Follows Procedure Regarding Cancer Diagnosis, but Mrs. Hawley's Physicians Fail to Review Same in Medical Chart or Convey Diagnosis to Her*

This medical negligence case involves the Defendant Hospital's alleged negligence in failing to timely and properly convey a cancer diagnosis to Plaintiff Alice H. Hawley ("Mrs. Hawley"), her surgeon, and her admitting physician, and in failing to follow its own policies and procedures in the reporting of surgical pathology results, among other claims. (1 CR 20-21, 257-58).[3] Following an emergency colon surgery on November 23,2000, Jose Valencia, M.D. ("Dr. Valencia"), an independent contractor pathologist, diagnosed Mrs. Hawley as having adenocarcinoma of the colon, specifically Stage 3 or "Duke's C" cancer. (3 RR 180; 4 RR 8; 5 RR 52; 6 RR 13, 16, 19; 7 RR 69; 21 RR Ex. 8 at 40 & Ex. 10 at 7, 11). Pursuant to the Hospital's procedure regarding cancer diagnoses, a copy of the written diagnosis was placed in Mrs. Hawley's medical chart on November 28,2000, one day before her discharge, and it was sent to both Mrs. Hawley's surgeon, Dr. Rodriguez, and primary care physician, Dr. Arechiga, although each denied receipt and/or review of same, and although Dr. Arechiga's receptionist had signed the certified mail receipt for the report. (3

[3]Dr Jesus Rodriguez ("Dr Rodriguez") is the surgeon who performed Mrs. Hawley's colon surgery; Dr Armando Arechiga ("Dr Arechiga") was her primary care physician. (4 RR 8; 5 RR 52; 21 RR Ex 10 at 11) Plaintiffs nonsuited Dr Rodriguez and Dr Valencia before trial (1 CR 15, 19-20, 67-68; 2 CR 273-74)

RR 180; 4 RR 8, 15; 7 RR 69-72, 98, 106-110; 21 RR Ex, 7 at 36-37, Ex. 8 at 40, 49, & Ex. 10 at 22-23, 53-54). However, despite the fact the Stage 3 colon cancer diagnosis remained in her medical chart during all subsequent medical care and treatment by Drs. Rodriguez and Arechiga (including treatment of conditions consistent with cancer and additional surgery), neither Dr. Rodriguez nor Dr. Arechiga reviewed that diagnosis or relayed same to Mrs. Hawley. (3 RR 180; 4 RR 8; 5 RR 55-58; 21 RR Ex. 8 at 52-53, Ex. 10 at 34, 38). (See Brief of Appellant at 2-4). Instead, Mrs. Hawley first learned that she had cancer in October 2001, almost one year after the initial diagnosis, when a cancer specialist she consulted for treatment of a liver tumor found the prior diagnosis in her medical chart upon reviewing the records from her previous surgeries. (3 RR 18, 180; 4 RR 8; 5 RR 28, 55-64; 21 RR Ex. 8 at 52-53 & Ex. 10 at 16, 34, 38). By that time, the colon cancer had reached Stage 4, the final stage, *(See* 5 RR 58; 4 RR 8; 21 RR Ex. 10 at 38).

2. *Procedural Background – Trial Court Excludes Court of Appeals Affirms Trial Court's Judgment in All Respects*

Among other rulings (not addressed herein but preserved for further briefing an the merits if requested), the trial court refused to instruct the jury that (1) Mrs. Hawley must have had a greater than fifty percent (50%) chance of survival on November 28, 2000, for the Petitioner's negligence to be a proximate cause of her injuries, or (2) regarding "new and independent cause," as properly requested, and the jury returned a verdict against the Hospital. (2 CR 355-57, 361-62, 378-86; 6 RR 133-34, 150; 7 RR 132, 149). Accordingly, Petitioner filed an appeal in the Thirteenth District Court of Appeals at Carpus Christi, Texas. On March 23,2006, the court of appeals issued its opinion, affirming the trial court's

judgment in all respects, with Justice Errlinda Castillo dissenting on questions of law material to the disposition of the case. See *Hawley,* 2006 WL 733940 at *1.

V. SUMMARY OF THE ARGUMENT

In the normal medical malpractice case, proximate causation requires proof of foreseeability and cause in fact. In a Iost chance case, a third component is addressed – whether the plaintiff had a greater than 50% chance of survival. Here, the trial court committed harmful error, as recognized by the dissent, in failing to instruct the jury on the third component.

The trial court further erred in failing to submit an inferential rebuttal defense of new and independent cause. The hospital's policy was to notify a treating physician of a positive biopsy by telephone, certified mail, or by placing the report in the medical records. The evidence was undisputed that Mrs. Hawley's treating physician received the report by certified mail and that a copy had been placed in her medical records before discharge. Any negligence on the part of the hospital in allegedly failing to call the treating physician with positive report was superseded by her physician's actual receipt of the biopsy report by certified mail and in the medical records, and the failure to review the report for eleven months. As a result, a new and independent cause instruction should have been given.

Thus, this matter presents this Court several compelling reasons to exercise its jurisdiction and grant review: (a) the justices disagree on a question of law material to the disposition of the case: whether the trial court's refusal to submit Instructions to the jury concerning (1) the inferential rebuttal defense of new and independent cause and (2) the last

chance doctrine (a matter of first impression) was error that probably led to the rendition of an improper judgment.

VI. ARGUMENT

A. Justices of the Court of Appeals Disagree on Questions of Law Material to the Disposition of this Case and of Importance to the Jurisprudence of the State: Error in Failure to Submit Instructions on New and Independent Cause and the Doctrine of Lost Chance of Survival

1. *Standard of Review for Jury Charge Error*

The standard of review for error in the jury charge is abuse of discretion, *Texas Dept. of Human Svcs. v. E.B.*, 802 S.W.2d 647,649 (Tex. 1990),, which occurs only when the trial court acts without reference to any guiding principles. *In re V.L.K., 24* S.W.3d 338, 341 (Tex.2000). When the trial court refuses to submit a requested instruction, the question an appeal is whether the requested instruction was reasonably necessary to enable the jury to render a proper verdict, *Tex. Workers' Comp. Ins. Fund v. Mandlbauer, 34* S.W.3d 909,912 (Tex.2000) (per curiam); *see* TEX. R. CIV. P. 277. A party is entitled ta a jury question, instruction, or defiition if the pleadings and evidence raise an issue; a litigant is entitled to have controlling questions of fact submitted to the jury if they are supported by "some evidence." TEX. R. CIV. *P. 278; Union Pac. R.R. Co. v. Williams,* 85 S.W.3d 162, 166 (Tex.2002); *Wright Way Constr. Co., Inc. v. Harlingen Mall Co., 799* S.W.2d 415,422 (Tex, App.–Corpus Christi 1990, no writ), This is a substantive, non-discretionary directive to trial courts, requiring them to submit requested questions to the jury if the pleadings and any evidence support them. *Elbaor v. Smith, 845* S.W.2d 240,243 (Tex.1992). To determine if the failure to submit a requested instruction is error, the reviewing court must consider the

pleadings, trial evidence, and the entire charge. *Island* Recreational **Dev.** *Corp. v. Republic of Tex. Sav. Ass'n,* 710 S.W.2d 551,555 (Tex.1986) (op, on reh'g); see also TEX. R. APP. P. 44.1(a)(1).

When evaluating whether a party is entitled to a jury instruction, the reviewing court must examine the record for evidence supporting submission of the instruction and ignore evidence to the contrary. See *Elbaor*, 845 S.W.2d at 243. Importantly, when the charge error relates ta a contested, critical issue, the error is generally considered harmful. ***See*** Bel-Ton Elec. Sew., *Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996) (per curiam) (trial court's refusal to submit sole cause instruction, raised by evidence, was reversible error); *Southwestern* Bell *Tel. Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470, 472 (Tex. 1992) (concluding that requesting the jury to resolve dispute without proper legal definition to essential legal issue was reversible error), The failure to submit appropriate jury instructions is grounds for reversal if it probably caused the rendition of an improper judgment. TEX.R.APP. P. 61.1(a); *Louisiana-Pacific Corp. v. Knighten, 976* S.W.2d *674,* 675-76 (Tex.1998) (per curiam).

2. *Refusal to Submit New & Independent Cause Instruction Was Harmful* Error, Requiring Reversal and Remand far New Trial

This Court has recognized that when defendants blame an occurrence an someone or something other than themselves, the Texas Pattern Jury Charges provide multiple alternatives. *Dillard v. Tex. Elec. Coop,,* 157 S.W.3d 429,432 (Tex.2005). The purpose of these instructions is to advise the jurors, in the appropriate case, that they do not have to place blame on a party to the suit if the evidence shows that the conduct of some person not a party to the litigation caused the occurrence in question. ***See*** id (citing *Reinhart v. Young,*

906 S.W.2d 471,472 (Tex.1995)). One of the alternatives involves a new-and-independent-cause instruction if the occurrence is later caused by someone else. See id.. "'New and independent cause' means the act or omission of a separate and independent agency, not reasonably foreseeable, that destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question and thereby becomes the immediate cause of the occurrence." *Dillard,* 157 S.W.3d at 432 n. **3;** *Phan Son Van v. Pena,* 990 S.W.2d 751, 754 (Tex.1999) (adopting the factors to determine whether an act is a concurring or new and independent cause); Taylor *v. Carley,* 158 S.W.3d 1, 9 (Tex. App.-Houston [14th Dist.] 2004, pet. denied).

Texas courts distinguish between a new and independent cause and a concurrent act. *Taylor,* 158 S.W.3d at 9 (citing *Benitz v. Gould Group,* 27 S.W.3d 109, 116 (Tex. App.-San Antonio 2000, no pet.)), A concurrent act cooperates with the original act in bringing about the injury and does not cut off the liability of the original actor. *Id.* A "new and independent cause," sometimes referred to as a superseding cause, however, is an act or omission of a separate and independent agency that destroys the causal connection between the negligent act or omission of the defendant and the injury complained of, and thereby becomes the immediate cause of such injury. *Id.* The issue of new and independent cause is a component of the ultimate issue of proximate cause and not an affirmative defense. *Id.* (citing *Rodriguez v. Moerbe,* 963 S.W.2d 808, 821 n. 12 (Tex. App.-San Antonio 1998, pet. denied)).

Here, the court of appeals concluded that the evidence supported only a conclusion of concurring cause rather than new and independent cause because it tended to prove that

the delay in notifying Mrs. Hawley could also be attributed to the treating physicians, who should have reviewed her charts and discovered the diagnosis, and that the hospital did not prove that the effects of its negligence were cut off by the doctors' alleged negligence or had otherwise ceased by the time of the doctors' negligence. *Hawley*, 2006 WL 733940, *19 But, as Justice Castillo explained in the dissent, the pleadings and some evidence supported submission of the new-and-independent-cause instruction,[4] and the failure to do so probably resulted in the rendition of an improper judgment, requiring reversal and remand for a new trial. *Hawley*, 2006 WL 733940, *25-30 (Castillo, J., dissenting).

a, Evidence of New and Independent Cause

As Justice Castillo explained, the evidence showed that the day before her discharge, Mrs. Hawley's chart contained the pathology report at issue. (7 RR 71-72; 3 RR 180, 21 RR Ex. 8 at 49). Her.treating physician, Dr. Arechiga, compiled the discharge summary and did not reference the report in her chart which, the testimony showed, reflected that the report was not read. (5 RR 84-87; 6 RR 88). Testimony also established that both the treating physician and the surgeon had access to Mrs. Hawley's chart for purposes of post-operative diagnosis and treatment. (5 RR 80-81, 84-87, 92-93 & [Deposition of Caldarola at 40-42]; 7 RR 125-26). A return receipt establishes that the pathology report was mailed to and received by the treating physician's office. (4 RR 8; 7 RR 106-10; 21 RR Ex. 10 at 22-23, 53-54). While the pathology lab secretary did not recall whether she sent the pathology report to the surgeon via certified mail, the testimony showed that the custom, habit, and

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[4] Here, Petitioner requested the Texas PJC instruction containing the definition of "new and independent cause," **which** the trial court refused. (2 CR 355-57; 7 RR 132, **149)** (Apx. Tab **)

practice was that the distribution policy for positive cancer pathology reports was followed an a daily basis and that cancer cases were priority over other cases. (3 RR 180, 21 RR Ex. 8 at 41-42; 4 RR 15, 21 RR Ex. 7 at 38; 7 RR 102-03, 110-14). By its plain terms, the distribution policy does not require that natice be provided orally, and by fax, and by certified mail. (21 RR Pl. Ex. 1). Without question, however, all pathology reports must be filed in the patient's chart. *(Id.)*. As set forth above, the evidence unequivocally places the pathology report in Mrs. Hawley's chart prior to her release from the hospital post-surgery.

b. Physicians' Failure to Refer to Chart or Pathology Report for Eleven Months Was Not Foreseeable

Even if the Hospital complied with the notice/distribution policy for a positive cancer pathology report, it is unforeseeable that compliance itself would result in lack of notice to the afflicted patient af the cancer diagnosis. (See Brief of Appellant at 21-23). Ample testimony established that two secretaries received daily requests, all day long, from physicians' and surgeons' offices (including from Dr. Rodriguez's office) requesting duplicate copies of pathology reports, after documented, full compliance with the distribution policy, (7 RR 105-06, 114, 119-20). Testimony showed that it was often easier to request a new copy from the pathology department than to locate the reports in a medical office. (7 RR **). In Mrs. Hawleys case, documentation showed that the pathology report was sent to and received by the treating physician's office by certified mail, return receipt requested. (4 RR 8; 7 RR 106-10; 21 RR Ex. 10 at 22-23, 53-54). The notice is consistent with one of the transmittal methods provided for in the distribution policy made the basis of the negligence claim. (21 RR Pl. Ex. 1). Notice by placement in Mrs. Hawley's chart is also

consistent with the distribution policy. (*Id.*). Even so, Mrs. Hawley was not treated for cancer until approximately eleven months after it was initially discovered by a pathologist. (5 RR 28, 63-66).

Further, the evidence presented by Dr. Tucker provided evidence of acts of Dr Archiega and Dr. Rodriguez that were not foreseeable to Petitioner/Hospital, constituting a new and independent cause. (7 RR 132; Brief of Appellant at 8-10). In short, Dr. Tucker testified that, in his opinion, it is within the scope of the physician's responsibility in making professional decisions and the expectations of the hospital are that physicians would perform follow-up an the pathology reports. (6 RR 78-79), Thus, it was unforeseeable that during treatment of Mrs. Hawley subsequent to November 2000 and prior to October 2001, neither Dr. Arechiga nor Dr. Rodriguez would have followed up on the pathology report which was made a part of Mrs. Wawley's medical chart as of November 28, 2000, remained therein during all subsequent medical care and treatment by those physicians, and of which Dr. Arechiga received a certified copy. (6 RR 67, 69, 74, 78-79, 85-86, 88, 94-96). Stated differently, Dr. Tucker testified that the unforeseeable event of Dr. Arechiga's conduct and Dr. Rodriguez's conduct in failing to check the Hospital's chart for Mrs. Hawley, or to check their own office charts, or to follow up on the November 2000 pathology report constituted a new and independent cause of Mrs. Hawley's damages.

c. Analysis of Factors Showing New & Independent Cause

Turning to analyze the "new and independent cause" versus "concurring cause" factors, the evidence showed that the effects of the negligence of the Hospital, if any, had

ceased at the time of the placement of the pathology report in Mrs. Hawley's hospital chart a day before her November 29th discharge, the receipt by Dr. Arechiga of the report by certified mail, and the testimony that the distribution policies had been complied with at all times. This, coupled with the extraordinary circumstances that bath her treating physician and the surgeon had access to, yet failed to review the pathology report of which each had received and of which was available in the hospital chart, indicating the Duke's C cancerous tumor before her November 2000 discharge, and at numerous other times during her subsequent care and treatment.

Mrs. Hawley returned to the hospital several. times between November 2000 and October 2001,when her cancer had metastasized to her liver, and her doctors could do nothing to extend her life (5 RR 28-29, 36-37), and she was under the care and treatment of the same treating physician and surgeon – with each apparently not requesting or not reviewing her complete medical chart that contained the findings s f cancer, Further, in July 2001, she visited Dr. Arechiga, whose office had received the pathology report by certified mail and filed it in her chart – yet the pathology report was never reviewed. Indeed, Mrs. Hawley's own experts testified that the delay proximately caused the metastasis of her cancer.

In sum, as Justice Castillo concluded within the dissent, the proposed instruction (2 CR 355-57) would have assisted the jury, was in proper form, and was supported by the pleadings (2 CR 304-07) and the evidence presented. Consequently, the trial court should have submitted the requested instruction on new and independent cause and its failure to do

so constitutes harmful error requiring reversal.

B. Refusal to Instruct Jury that Mrs. Hawley Must Have Had a Greater than Fifty Percent (50%) Chance of Survival on November 28, 2000 for Petitioner's Alleged Negligence to be Proximate Cause of her Injuries Constitutes Reversible Error

1. *"Lost Chance" Includes Additional Component to Proximate Cause*

In a typical medical malpractice case, plaintiffs are required to show that their injuries were proximately caused by the negligence of one or more of the physicians or healthcare providers. *Park* Place *Hosp.* v Milo, 909 S.W.2d 508, 511 (Tex. 1995). In most medical malpractice cases, the inquiry is whether or not the physician's or healthcare provider's negligence was "a" proximate cause of the plaintiff's injury. (See, *e.g.*, PJC *50.3).* Proximate causation embraces two concepts: foreseeability and cause in fact. *Hodgkins v.* Bryan, 99 S.W.3d 669, 673 (Tex. App.–Houston [14th Dist.] 2003, no pet.). Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury, which would not otherwise have occurred. *Id.* To prove cause in fact, the plaintiff must establish a causal connection between the negligent act and the injury based on reasonable medical probability. Id. So, in the typical medical negligence case, the jury is instructed that to find proximate cause, they must find: (1) foreseeability; and (2) cause in fact.

However, with respect to cases involving lost chance, a different rule applies, In a lost chance case, such as the case at hand, the plaintiff already is suffering from some condition or illness for which the defendant physician or hospital has no responsibility, In a lost chance survival case, even though the defendant's negligence may have decreased the likelihood of

recovery by the plaintiff, this alone is insufficient to demonstrate proximate causation. This Court has held that in order for a plaintiff to demonstrate proximate causation in a lost chance case, the plaintiff must introduce evidence and the jury must find that there was a greater than fifty percent chance af survival absent the defendant's negligence. *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397 (Tex. 1993). So, in a lost chance of survival case, to prove proximate causation, the plaintiff must demonstrate one additional element: (1) foreseeability, (2) cause in fact, and (3) plaintiff had a greater than fifty percent chance of survival,

2. *Testimony Conflicted as to Whether Mrs. Hawley Had a Greater than Fifty Percent Chance of Survival*

The testimony in the case at hand at best was conflicting as to whether or not Mrs. Hawley had a greater than fifty percent chance of survival. Indeed, Dr. Escudier, assuming (but not conceding) her testimony was admissible on the issue, also testified that the five-year prognosis far Mrs. Hawley in November 2000 would be 0% to 30% if the cancer was in her liver. (21 RR Ex. 5 at 32). She also testified that her opinion that based an the diagnosis of Duke's C staging, Mrs. Hawley had a survivability rate at 60% was speculation – that the rate was unknowable. (21 RR Ex 5 at 46-47, 49). Similarly, assuming (but not conceding) Dr. Marek's opinions on the issue were admissible, the witness testified that there was a less than 50% chance of cure without treatment in November 2000, and a 65% chance of cure with chemotherapy. (21 RR Ex. 6 at 17, 19). Dr. Marek testified that Mrs. Hawley would not be one of those patients in the 50% to 55% cure rate with surgery alone, that a 33% chance of survival existed in November 2000 if she had received treatment. (*Id.* at 60). Dr. Marek

testified that, with certainty, the cancer had spread to the liver in November 2000. (21 RR Ex. *6* at **53).**

Defense expert, Dr. Raefsky, testified that because Mrs. Hawley's cancer had spread before surgery in November 2000, there existed a chance of cure with surgery alone of zero percent (0%), (21 RR Ex. 11 at 115), and at best, of 25%. (*Id.* at 143-150). The rate of survivability was not greater than 25% and was less than 50% in November 2000. (Id. at 153). Further, defense expert, Dr. Wheeler, believed Mrs. Hawley was at Stage 4, or Duke's D, cancer in November 2000 because the tumor was present in the liver (6 RR 16, 19), such that the five-year survival rate at that time was about 20%. (6 RR 20).

Thus, assuming Dr. Escudier's and Dr. Marek's opinions are reliable and admissible, which Petitioner does not concede, there was conflicting evidence on the issue of chance of survivability, There was some testimony that the chance of survivability would be greater than fifty percent, there was some testimony that the chance of survival would be less than fifty percent,

3. *Without Proper Instruction, How Will the Jury Know it Must Find Greater than 50% Chance of Survival to Find Proximate Cause*

If the jury believed that the chances of survival were less than fifty percent, they might still believe that the conduct of the defendant reduced Mrs. Hawley's chance of survival and somehow was "a" proximate cause of injuries to her. The jury had no instructions, and hence na way of hawing, that they were unable to find proximate causation unless they first determined that the plaintiffs chance of survival was greater than fifty percent,

Under Rule 277, a trial court must submit "such instructions and definitions as shall

be proper to enable a jury to render a verdict," A pasty is entitled to instructions if the evidence raises an issue. TEX. R. CIV. P. 278. In this case, viewing the evidence supporting the instruction there was conflicting evidence regarding whether the plaintiff's chance of survival was greater than or less than fifty percent. An instruction is proper and necessary if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. Union *Pacific Railroad Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). Petitioner requested the trial court instruct the jury that Mrs. Hawley "must have had a greater than fifty percent chance of survival on November 28,2002, fox the negligence of (Petitioner) to be a proximate cause of injury to [her]." (2 CR 361-62; 6 RR 133-34). The requested instruction was refused. (2 CR 361-62; 6 RR 150).

The foregoing instruction was not only in proper form, but was necessary for the jury to make a decision as to whether or not the Petitioner's conduct was a proximate cause of any injury to Mrs. Hawley. Without such instruction, the jury had absolutely no way of knowing that they must first determine that the plaintiff had a greater than fifty percent chance of survival before they could find proximate causation. Under the charge given by the trial court to the jury, the jury could have found that Mrs. Hawley's chance of survival was less than fifty percent, but that nonetheless, Petitioner's conduct resulted in some harm to her and as a result proximate causation was established. Because the requested instruction was not given, Petitioner has no way of knowing whether the jury found Mrs. Hawley's chance of survival was greater than fifty percent or less than fifty percent, The action of the trial court not only fails to properly instruct the jury on the law, but also prevents Petitioner from

adequately presenting this paint on appeal. TEX. R. APP. P. 61.1(b).

4. *Dissent Correctly Held That Requested Instruction on Chance of Survival Should Have Been Given*

The dissent explained that assuming there was legal evidence of a greater than 50% chance of survival on the part of Mrs. Hawley, an additional instruction an the third element ofproximate causation should have been given. Justice Castillo noted in her dissent that the "crux of the Hospital's argument regarding lost chance of survival on legal sufficiency and charge error grounds rests on the trial court's proximate cause instruction, which I would hold necessitated a further instruction . . . I would hold that the erroneous jury charge prevents the Hospital from properly presenting the case to this Court. *Id.* at 31.

WHEREFORE, PREMISES CONSIDERED, Petitioner Columbia Rio Grande Healthcare, L.P. d/b/a Ria Grande Regional Hospital respectfully moves this Court. to grant its Petition for Review, order full briefing on the merits, set this matter for oral argument, and, upon submission or within a per curiam opinion, reverse the trial court's judgment and render judgment, or alternatively, remand this case for a new trial. Petitioner also prays for all such other and further relief, general or special, at law or in equity, that this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served upon the counsel listed below on May 15, 2006.

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