**ORAL ARGUMENT REQUESTED**

# NO. 06-0372

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**IN THE**
**SUPREME COURT OF TEXAS**

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

**v.**

**ALICE H. HAWLEY AND JAMES A. WAWLEY,**
**Respondents.**

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

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## PETITIONER'S REPLY TO RESPONSE TO PETITION FOR REVIEW

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## TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

COMES NOW, Columbia Rio Grande Healthcare, L.P. d/b/a Rio Grande Regional Hospital ("Petitioner" or "Hospital"), and in accordance with rule 53.5 of the Texas Rules of Appellate Procedure, files this, its Reply to the Response to the Petition for Review, and respectfully represents as follows:

## ARGUMENT AND AUTHORITIES IN REPLY[1]

## I. This Court Should Exercise Jurisdiction to Consider Disagreement Among Justices of the Court of Appeals on Questions of Law Material to the Disposition of this Case and of Importance to the Jurisprudence of the State

### A. Refusal to Submit New and Independent Cause Instruction Was Harmful Error, Requiring Reversal and Remand for New Trial

#### 1. *Dew. v. Crown Derrick Erectors, Inc. Is Factually Distinguishable*

Respondents assert the court of appeals' opinion here "is in perfect harmony with *Dew*."[2] (Hawley's Response to Petition for Review ["Response"] at 5). Conversely, this Court's plurality instruction in *Dew* is factually distinguishable here. (*Cf.* Response at 4-7).

In *Dew*, the decedent's wife and parents sued the platform owner, manufacturer, and Crown Derrick, and – *unlike here* – the jury apportioned liability to each defendant as well as to the decedent. See *id* at *2. Only Crown Derrick appealed, complaining, among other things, that the trial court erred in refusing to submit a jury instruction on new and independent cause. See *id.* The court of appeals agreed and reversed the judgment against Crown Derrick and remanded plaintiffs' claims against it for new trial. *See id.* On review, this Court instructed, in a plurality opinion:

> A new and independent cause is one that intervenes between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause. [ ]. An intervening cause thus supersedes the defendant's negligence by destroying the causal connection between that negligence and the plaintiffs injury thereby relieving that

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[1] To the extent the Hospital may not reply to a particular assertion or argument or citation by Respondents, such conduct should not be construed as acquiescence by the Hospital to Respondents' arguments or any waiver of any argument made in its Petition for Review ("Petition"), briefed or unbriefed. The Texas Rules of Appellate Procedure's page limitations required the Hospital to focus on certain select issues in this Reply *See* TEX R APP. P. 53 6

[2] *See Dew v Crown Derrick Erectors, Inc.*, No. 03-1128, __ S.W.3d __, 7006 WL 1792216, *1 (Tex 2006).

> defendant of liability. .... The instruction's purpose is "to advise the jurors, in the appropriate case, that they do not have to place blame an a [particular defendant] to the suit" if the true cause for the accident lies elsewhere. [ ]. The instruction is necessary when the evidence in the case raises a fact issue an new and independent cause.
>
> ***
>
> . . . the threshold, and often controlling, inquiry when distinguishing between a concurring and a superseding cause remains 'whether the intervening cause and its probable consequences were such as could reasonably have been anticipated by the original wrongdoer.' [ ].

*Id.* at *2-*3 (internal citations omitted). Ultimately, this Court's plurality opinion determined Crown Derrick's argument that it was entitled to an instruction on new and independent cause was based on the erroneous assumption that its double rope barricade was adequate, concluding the jury "obviously" did not view that barricade as an adequate precaution against the danger caused by Crown Derrick based on its verdict finding Crown Derrick negligent. *See Dew,* 2006 WL 1792216, at *4 (reversing and remanding cause for consideration of other issues raised, but not considered, in court of appeals).[3]

Unlike *Dew,* the dangerous condition here (*i.e.,* Ms. Hawley's Stage 3 cancer diagnosis and the failure of her physicians to inform her of same) developed naturally apart from any action or inaction by the Hospital. Compare *Dew,* 2006 WL 1792216 at *1-*2 (dangerous hole in elevated platform developed when Crown Derrick failed to erect permanent safety gates around same). And, the physicians' negligence in failing to review

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[3] The *Dew* concurring opinion concluded the charge was adequate because itpresented Crown Derrick's theory that the accident was someone else's fault via the comparative negligence portion of that charge. See *Dew,* 2006 WL 1792216 at *5-*6 (Brister, J. and Willett, J., concurring). Notably, the charge here included no such comparative negligence question. (2 CR. 278-86). The *Dew* dissenting opinion concluded the trial court erred in refusing the new and independent cause instruction and that such error was "not harmless" where some evidence supported that instruction. *See* id at *10-*13. The motion for rehearing deadline in *Dew,* as extended, is October 13, 2006.

their own medical chart and pathology report setting forth the cancer diagnosis is a superseding cause of Ms. Hawley's injuries because it altered the natural sequence of events, produced results that would not otherwise have occurred, and was otherwise unforeseeable. See *id.* at *3. That is, apart from the physicians' negligence in failing to read their patient's medical chart during their post-surgical and continued care and treatment of Ms. Hawley, she would have promptly received notice of the cancer diagnosis contained in her medical chart. And, it was unforeseeable to the Hospital that those physicians would not review Ms. Hawley's medical chart: where excluded testimony established, via offers of proof, those physicians had independent obligations to review same. (See Appellant's Brief at 21-22), (4 RR *66;* 5 RR 90-93). Moreover, a party generally is not bound to anticipate negligent conduct of another, See ***Dew,*** 2006 WL 1792216 at *9 (citing Ft. *Worth & D.C. Ry. Co. v. Shetter*, 59 S.W. 533, 53.5 (Tex. 1900)). Finally, this superceding cause of the physicians' negligence is not reduced to an intervening cause by the fact that the Hospital may not have (without conceding same) provided those physicians with a *second* notice of the cancer diagnosis where the medical chart contained the original pathology report setting forth that diagnosis, Respondents wholly fail to address this important fact. (See Response at 1-15).

### 2. *Physicians Had Independent Obligation to Review Medical Chart*

Respectfully, the Hospital's alleged failure to follow its notification policy did not "set in motion a force (Hawley's physician's ignorance of her diagnosis)"[4] where those physicians had an independent duty to review Ms. Hawley's medical chart – *including the* pathology

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[4] (Response at *6).*

*report containing the cancer* diagnosis – during the eleven month time period at issue those physicians continued to treat Ms. Hawley for conditions consistent with cancer and additional surgery, (See Appellant's Brief at 21-22). (4 RR 66; 5 RR 80-93 & [Depo. of Caldarola at 16-17, 40-42]; 7 RR 125-26). Thus, Respondents' assertion that the Hospital should have foreseen the physician's negligence in failing to review their own medical chart is misplaced and an inaccurate application of Texas law. (See, *e.g.,* Response at 2-3, 7). See *Dew,* 2006 WL 1792216 at *9 (generally, no duty to foresee other's negligence),

Respectfully, Ms. Hawley did not die because her physicians did not learn of her cancer diagnosis either "a week" or "six months" after that diagnosis[5] as a result of any act or omission af the Hospital; she died because, despite the Hospital's compliance with its own disclosure policy and timely placing the finalized pathology report (which included the cancer diagnosis) into her medical chart before she was discharged,[6] her physician's failed to review that pathology report therein in violation of their own independent obligation to do so as Ms. Hawley's treating physicians. (2 RR 34-35; 3 RR 180, 21 RR Ex. 8 at 40, 49; 4 RR 8, 21 RR Ex. 10 at 16, 53-54; 7 RR 71-72). (See Appellant's Brief at 20-21).

### *3. Dissenting Opinion and Petitioner. Correctly Represent Terms of Pathology Report Distribution Policy*

Respondents claim the assertion that "by its plain terms the distribution policy does not require that notice be provided orally, and by fax, and by certified mail" is incorrect. (Response at 1,6 n.2). (21 RR Pl. Ex. 1). *Columbia Rio Grande Healthcare v. Hawley,* 188

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[5] (*See* Response at *6-7)*

[6] (3 RR 180; 4 RR 8, 15; 7 RR 30, 69-72, 102, 106-10, 112, 119-20; 21 RR Ex. 7 at 36-37, Ex. 8 at 49, Ex 10 at 22-23, 53-54).

S.W.3d 838, 871 (Tex. App.–Corpus Christi 2006, pet. filed) (Castillo, J., dissenting). However, this characterization of the Hospital's policy is correct where that policy does not include the term "and" when listing the distribution methods for reports positive for cancer. (21 RR Pl. Ex. 1). Mare importantly, the testimony at trial established the Hospital complied with its distribution policy here, (4 RR 8, 21 RR Ex. 10 at 22-23, 53-54; 6 RR 75-76; 7 RR 30; 7 RR 71, 102, 106-110, 112, 119-20).

### 4. *Refusal to Instruct Jury on New and Independent Cause was Not Harmless Error*

Respondents assert, without explanation, that the failure to submit the instruction was harmless "because the court's charge permitted the Hospital to argue that the doctors, and not it, caused Hawley's injuries." (Response at 8). To the contrary, the trial court excluded evidence and testimony regarding nonparty physicians and, at the pretrial stage, denied the "sole proximate cause and new and independent cause instructions," explaining that it would allow factual evidence to be developed, but that the facts could not be tied to the word "negligence" or whether there was any type of negligence on the part of the physicians. (2 RR 34-35). (Appellant's Brief at 20-21). Moreover the Court's Charge does not mention or address the non-party physicians. (2 CR 378-86).

Respondents' argument implies that the Hospital did not prove new and independent cause, and therefore the trial court did not err in refusing to instruct the jury regarding same. (See Response at 4-8). Respectfully, the Hospital did not have to prove new and independent cause to be entitled to a jury question regarding same; instead, it only had to shaw that "some evidence" supported the requested instruction on new and independent cause where the

pleadings and evidence raised the issue. See 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). (Petition at 4). Here, 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. See *Hawley,* 188 S.W.3d at 869-72 (Castillo, J., dissenting).[7] Hence, this issue of new and independent cause was a fact issue for the jury to decide. *See id.* at *871*; see *also* TEX. R. CIV. P. *278; Moore v. Lillebo*, 722 S.W.2d 683,686-87 (Tex. 1986). 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, (See Appellant's Brief at 7-10). See TEX. R. CIV. P. *278; Union Pac. R.R. Co.*, 85 S.W.3d at 166; *Wright Way Constr.*, 799 S.W.2d at 422. Respondents fail to address this argument.

### B. Refusal to Instruct Jury on Last Chance of Survival is Reversible Error

#### 1. *Respondents Apply Erroneous Standard of Review*

Again, Respondents apply an erroneous standard of review, asserting the majority opinion properly concluded the trial court: did not abuse its discretion in utilizing the Pattern Jury Charge "when no authority supported the requested instruction [*i.*e., on the lost chance doctrine]." (Response at 9). The standard of review is whether "some evidence" supported the requested instruction where the pleadings and evidence raised the issue and whether the requested instruction was reasonably necessary to enable the jury to render a proper verdict.

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[7] 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 v Smith,* 845 S.W.2d 240, **243** (Tex. 1992). (Petition at 5).

*See* TEX. R. CIV. P. 277,278; *Union Pac. R.R. Co.*, 8.5S.W.3d at 166; *Texas* ***Workers' Comp.*** *Ins..Fund v. Mandlbauer,* 34 S.W.3d 909, 912 (Tex. 2000) (per curiam). The standard of review is not whether "no authority supported the requested instruction," as Respondents claim, (Response at 9). Indeed, Respondents admit there was "some evidence" to support the requested instruction on the lost chance doctrine where they admit bath parties presented conflicting evidence on this issue,[8] and that "lawyers for both parties openly acknowledged that 50%+survivability was the critical hurdle." (Response at 10). *Cf. Dew,* 2006 WL 1792216 at *13 ("To fail to instruct the jury on an established legal doctrine raised by the evidence and in serious contention at trial should not be held to be harmless error."),

### 2. *Respondents Misstate Hospital's Position Concerning Lust Chance*

Next, contrary to Respondents' assertians, Petitioner does not assert the lost chance doctrine should be given in all tort cases. (See Response at 11-12). Instead, that doctrine applies to all medical malpractice cases wherein plaintiff already suffers from some condition or illness for which the defendant physician or hospital has no responsibility and which independently limits or may limit her chance of survival to less than 50%. (*See* Petition at 11-12; Appellant's Brief at 10-13, 24).[9] Ironically, Respondents' assertians, if applied, would render a lost chance instruction superfluous in all tort cases, asserting "[t]he standard definitions and instructions in the charge are perfectly adequate to tell the jury not to find causation unless is it more likely than not." (Response at 12 & n.4).

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[8] ***(See id*** at 9-10)

[9] *See* ***Park*** *Place Mem'l Hosp* v *Milo,* 909 S W 2d 508,511 (Tex 1995); *Hodgkins v* ***Bryan,*** *99* S W.3d **669, 673 (Tex** App – Houston [14th Dist ] 2003, no pet.) **(citing** *Kramer v Lewisville Mem Hosp* **, 858** S W 2d 397,400, 404-405 (Tex **1993)).**

### 3. *This Court Instructs Parties Are Entitled to Requested Instructions When Same Are Supported by "Some Evidence"*

Finally, Respondents quote the Opinion as purported evidence that it "***encourages*** trial courts to submit an instruction similar to the one the Hospital requested." (Response at 12-13) (emphasis in original). In short, the Opinion's conclusion that the trial court did not abuse its discretion in refusing the Hospital's loss-of-chance instruction because "no assistance [*i.e.*, guiding precedent] was available to guide the trial court to the proper result"[10] is misplaced where this Court instructs a litigant is entitled to have controlling questions of fact submitted to the jury if they are supported by "'some evidence" and that 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. See *Union Pnc. R.R. Co.*, 85 S.W.3d at 166; *Elbaor,* 84.5S.W.2d at 243. (See Appellant's Brief at 4).

**WHEREFORE,** PREMISES CONSIDERED, Petitioner Columbia Rio Grande Healthcare, L.P. d/b/a Rio 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 such other and further relief, general or special, at law or in equity, that this Court deems just,

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[10] *Hawley,* 188 S.W.3d at 863

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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 September 29, 2006.

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