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. HAWLEY AND JAMES A. HAWLEY,
Respondents.

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

PETITIONER'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

In accordance with Rule 55.2(a) of the Texas Rules of Appellate Procedure, the following is a list of names and addresses of all parties to the trial court's final judgment and their counsel:

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

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ABBREVIATIONS & RECORD REFERENCES

Abbreviations

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Susan Escudier, M.D.	Dr. Escudier
James A. Hawley	Mr. Hawley or Respondent
Alice H. Hawley	Mrs. Hawley or Respondent
Jonathan H. Hawley	Jonathan Hawley
Laura H. Koenig	Ms. Koenig
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Stephen L. Tucker, M.D.	Dr. Tucker
Domingo Useda, M.D.	Dr. Useda
Jose Luis Valencia, M.D. (Non-suited Defendant)	Dr. Valencia

Record References

Cites to the Reporter's Record are in the form of ([volume#] RR [page #]).

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Cites to the Clerk's Record are in the form of ([volume #] RR [page #]).

Cites to the Appendix attached hereto are in the form of ([appendix tab#] App. [page #]).

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IN THE
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No. 13-03-00427-CV

PETITIONER'S BRIEF ON THE MERITS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Petitioner Columbia Rio Grande Healthcare, L.P. d/b/a Rio Grande Regional Hospital ["Petitioner " or "Hospital"), submits this Brief on the Merits, pursuant to the Court's letter request and in compliance with rule 55 of the Texas Rules of Appellate Procedure, seeking reversal of the judgments of the court of appeals and trial court.

STATEMENT OF THE CASE

In this medical malpractice action, Respondents Alice H. Hawley, James A. Hawfey, 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. ("Dr. Rodriguez"), and Jose Luis Valencia, M.D. ("Dr. Valencia"). (1 CR 15-31). Respondents sought recovery of actual and exemplary damages based on the alleged negligent acts and/or omissions of Petitioner, Dr. Rodriguez and Dr. Valencia. (1 CR 22).

All Respondents non-suited Dr. Rodriguez and Dr. Valencia. (1 CR 67-68; 2 CR 273-74). Respondents James A. Hawley, Mary Christina H. Sadai, Julia Claire H. Trilzzion, Laura H. Koenig, and Jonathan H. Hawley nan-suited their "wrongful death" claims against Petitioner. (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; Apx, Tab A). 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 for pain and mental anguish, $190,000 far 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).

The trial court signed a Final Judgment on March 10, 2003 (2 CR 443-48; Apx. Tab B), and a .Judgment Nunc Pro Tunc on March 27, 2003, modifying and reducing the medical expenses awarded. (2 CR 459-65; Apx. Tab C). Petitioner 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. Petitioner timely filed its notice of appeal on June 2,2003. (2 CR 497-503).

On appeal to the Thirteenth District Court of Appeals at Corpus Christi, Columbia Rio Grande Healthcare, L.P. d/b/a Rio Grande Regional Hospital appeared as **Appellant,** Alice H. Hawley and James A. Hawley appeared as **Appellees.** The Thirteenth Court issued its published opinion, authored by Justice Dori Contreras Garza, with Justice Rodriguez concurring and Justice Castillo dissenting, affirming the trial court's judgment. *Columbia Rio Grande Healthcare v. Hawley*, 188 S.W.3d 838 (Tex. App.–Corpus Christi 2006, pet. filed).

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 on questions of law material to the decision. *Compare* Columbia *Rio Grande Healthcare v. Hawley*, 188 S.W.3d 838, 838-68 (Tex. App.–Corpus Christi 2006, pet. filed), *with Id.* at 868-74 (Castillo, J., dissenting).

This Court also bas jurisdiction over 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 of Appeals, and that error is of such importance to the jurisprudence of the State that it requires correction

ISSUES PRESENTED"

1. Was the refusal to instruct the jury on 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?

2. 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?

3. Was it reversible error to refuse to instruct the jury not to consider the conduct of Dr. Valencia, an independent contractor. physician, when considering whether Petitioner's negligence proximately caused Mrs. Hawley's injuries?

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

5. 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%?

Petitioner withdraws its issues concerning the legal sufficiency of the evidence, set forth as unbriefed Issue 3 in its Petition for Review, and concerning the exclusion of the evidence of new and independent cause, set forth as unbriefed issue 4 in its Petition for Review, and re-orders its Issues Presented here See Petition for Review at iii

STATEMENT OF FACTS

A. November 2000: Surgical Treatment for Perforated Diverticuli

On November 22, 2000, Alice Hawley presented to Dr. Armando Arechiga, her primary physician, complaining of cramps, nausea and vomiting, (5 RR 52). Dr. Arechiga referred Mrs. Hawley far a Doppler exam; upon hearing the results of the exam, Dr. Arechiga sent Mrs. Hawley directly to Rio Grande Regional Hospital (the "Hospital") for treatment of a perforated diverticuli. (5 RR 52; 4 RR 8, 21 RR ex. I0 at 7). On November 23,2000, Dr. .Jesus Rodriguez performed a resection of Mrs. Hawley's colon because of the ruptured diverticulum. (4RR 8, 21 RR Ex. 10 at 11). Mrs. Hawley was discharged from the Hospital on November 29,2000. (3 RR 180, 21 RR Ex, 8 at 40).

B. Pathologist Identifies Adenocarcinoma of Colon with Lymph Node Involvement; Duke's C or Stage 3 Cancer

Drs. Useda and Valencia are employees of Useda and Associates, a partnership of pathologists whose office is located within the Hospital, although Useda and Associates physicians are employees of the partnership, not of the Hospital. (7 RR 45-46), Dr. Valencia diagnosed Mrs Hawley as having adenocarcinomma of the colon with four or five lymph nodes being positive. (7 RR 69; 6 RR 13). Dr. Valencia staged the cancer, in terms of severity, as Stage 3, or "Duke's C," cancer.. (6 RR 16, 19).

C. Hospital Policy Regarding Pathology Reports Indicating Cancer Changes

The Hospital changed its policies and procedures manual in July 2000 regarding the proper procedure to take with respect to pathology reports indicating cancer. (7 RR 98). Specifically, the hospital began requiring that: (1) the pathologist verbally notify the

physicians of record; (2) the pathologist's secretary send the report via facsimile to the physicians of record; and (3) the pathology lab deliver the report to the physician of record by certified mail. (4 RR 15, 21 RR Ex. 7 at 36-37; 7 RR 69-71). Additionally, the report was placed in the patient's medical chart. (7 RR 71). Tina Garcia and Marisol Garcia complied with the three requirements of the duly 2000 policy on a regular basis; it was their standard practice. (7 RR 30; 7 RR 102, 112). If a receipt was ever not returned, it was the laboratory's standard practice to fax the report to the particular physician's office and call the office to ensure that the fax was received. (7 RR 119-20).

D. Pathology Report Placed in Ms. Hawley's Chart Day Before Discharge

Mrs. Hawley's pathology report was placed in her hospital medical chart at 3:59 p.m. on Noveinber 28,2000, one day before her discharge. (7 RR 71-72; 3 RR 180, 21 RR Ex. 8 at 49). Drs. Arechiga and Rodriguez testified the report was not in her chart on November 28,2000. (4 RR 8, 21 RR Ex. 10 at 16; 3 RR 180, 21 RR Ex.8 at 40).

E. Pathology Report Sent to, but Allegedly Not Received by or Reviewed by, Surgeon and Treaty Physician Until October 2001

Marisol Garcia, who was working as a secretary in the pathology lab in November 2000, sent Dr. Valencia's pathology report indicating the cancerous tumor to Dr. Arechiga's office via certified mail, (7 RR 106-10). Esther De Leon, Dr. Arechiga's receptionist, signed the certified mail receipt and filed Mrs. Hawley's report without Dr. Arechiga's knowledge and before he ever reviewed same. (4 RR 8, 21 RR E x 10 at 22-23, 53-54). The hospital had no record of the certified mail receipt for Mrs..Hawley's surgeon, Dr. Rodriguez. (3 RR 180, 21 RR *Ex.* 8 at 41-42; 4 RR 1.5, 21 RR Ex. 7 at 38). **As** a result, neither Mrs. Hawley's

surgeon, Dr. Rodriguez, nor her treating physician, Dr. Arechiga, were aware of her pathology report indicating the cancerous tumor until eleven months after the pathologist's diagnosis, in October 2001. (3 RR 180, 21 RR Ex. 8 at 40; 4 RR 8, 21 RR Ex. 10 at 53-54)

F. Mrs. Hawley Returned to the Hospital Several Times Between November 2000 and September 2001

Mrs. Hawley was discharged following her colon resection surgery on November 29, 2000. (3 RR 180, 21 RR Ex. 8 at 39). On December 4, 2000, Dr. Arechiga dictated Mrs. Hawley's discharge report relating to the November 23,2000 colon surgery and a subsequent hospital stay. (4 RR 8, 21 RR Ex. 10 at 16). Dr. Rodriguez performed surgery on Mrs. Hawley again on or around January 16, 2001, to close the colostomy created during Mrs. Hawley's November 23,2000 colon surgery. (3 RR 180, 21 RR Ex. 8 at 52). Mrs. Hawley presented to Dr. Arechiga on or about March 12,2001, complaining of leg pain and swelling, and was admitted to the hospital with deep vein thrombosis ("DVT"). (3 RR 180, 21 RR Ex. 8 at 53; 4 RR 8, 21 RR Ex. 10 at 34). Dr. Arechiga testified that he believed the DVT was caused by hypercoagulability, because the blood thickens in patients with certain types of cancers. (4 RR 8, 21 RR Ex. 10 at 34). Mrs. Hawley was treated with blood thinners and released. (5 RR 55-56),

Mrs. Hawley visited Dr. Arechiga for a routine checkup on July 31, 2001, at which time he noticed that her liver enzymes were elevated. (5 RR 56; 4 RR 8, 21 RR Ex. 10 at 38). Dr. Arechiga was concerned at the elevated level of Mrs. Hawley's enzymes and recommended that she visit him again in a few weeks. (5 RR 56). During a trip to Alaska in August 2001, Mrs. Wawley became weaker and had trouble walking. (5 RR 57). She saw

Dr. Arechiga again on September 25, 2001; Dr. Arechiga found a dramatic increase in her liver enzymes and ordered a CT scan, which revealed the tumor in Mrs. Hawley's liver. (5 RR 58; 4 RR 8, 21 RR Ex. 10 at 38).

G. The Hawleys are Informed of the Cancer Diagnosis

Mrs. Hawley consulted several cancer specialists after the tumor was discovered in her liver. (5 RR 58-62). On October 26, 2001, as the Hawleys were returning from a visit to a physician, Dr. Joseph White, of the Scott & White clinic called to inform Mrs. Hawley that, after reviewing her records from the November 23, 2000 and January 16, 2001 surgeries, he had discovered that her cancer was diagnosed several months prior and she was not informed. (5 RR 28, 63-64). Mrs. Hawley began chemotherapy treatment in November 2001. (5 RR 64). Mrs. Hawley initially had an excellent response to the chemotherapy, (5 RR 65-66; 4 RR 68, 21 RR Ex. 6 at 38; 4 RR 59, 21 RR Ex. 5 at 18). Dr. Marek testified that in early 2003, Mrs. Hawley had approximately six to eight months to live, (4 RR 68, 21 RR Ex. *6* at 10).

SUMMARY OF THE ARGUMENT

This Court should exercise jurisdiction for several reasons, Generally, the trial court and Court of Appeals committed errors of substantive law, and those errors are of such importance to the jurisprudence of the state that they require correction. First, the Court of Appeals erred in affirming the trial court's judgment where the trial court's refusal to instruct the jury on new and independent cause constitutes reversible error, pursuant to controlling authority and as recognized by the dissent, where the propased instruction *(2* CR 355-57) an

this contested, critical issue would have assisted the jury, was in proper form, and was supported by the pleadings (2 CR 304-07) and at least some evidence presented at trial. ***See*** *Elbaor v. Smith,* 845 S.W.2d 240,243 (Tex. 1992).

Second, the Court of Appeals erred in affirming the trial court's judgment where the trial court's refusal to instruct the jury that Mrs. Hawley must have had a greater than 50% chance of survival on November 28, 2000, for the Hospital's negligence to be a proximate cause of her injuries, pursuant to controlling authority. Further, as the dissent explains, assuming there was legal evidence of a greater than 50% chance of survival on the part of Mrs. Hawley, an additional instruction on the third element of proximate causation should have been given; for this additional reason the trial court's clear abuse af discretion in refusing to submit the requested instruction constituted reversible error.

Third, the trial caurt's failure to instruct the jury not to consider the negligence of Dr. Valencia (pathologist) constitutes reversible error where the undisputed evidence at trial established he is an independent contractor for' whom the Hospital cannot be liable pursuant to controlling Texas authority. Thus, the trial court's failure to provide the requested instruction is harmful error requiring reversal for new trial because the charge mixed arguably valid and invalid theories of negligence (negligence committed by agents for whom the Hospital could be held vicariously liable as opposed to negligence committed by Dr. Valencia, an independent contractor). See *Crown Life Ins. Co.* ***v.*** *Casteel, 22* S.W.3d 378,388 (Tex. 2000); see *also Harris County v. Smith*, 96 S.W.3d 2.30, 2.34 (Tex. 2002).

Fourth, the Texas legislature validly exercised its police power in enacting former

article 4590i, section 11.02, of the Texas Revised Civil Statutes which limited an award of damages against a health care provider to $500,000, as adjusted by the Consumer Price Index. Here, the tatal award was $1,739,628.67, well. in excess of the adjusted limitation. Because the limitation in former article 4590i, section 11.02 reflects a valid exercise of the Texas legislature's police power, and a court is not free to ignore the legislature's expressed intent, the trial court should have reduced Respondents' total damages to $500,000, as adjusted by the Consumer Price Index.

Finally, Appellant re-urges an issue currently before this Court in the *Hogue* matter[3] that, based on application of the well-recognized rules for statutory interpretation and the legislative intent regarding the amendments to the Texas Finance Code, Texas law does not support the interpretation of the court of appeals, here, or by sister courts of appeals concluding the language "subject to appeal," when used to describe a judgment, means "capable of being appealed." Consequently, this Court should effectuate the Legislature's intent by applying the amended rates to the judgment here, subject to approval on and after the effective dates of HB 4 and HB 2415, thus reducing same from 10% to 5%.

For these reasons, the Hospital respectfully requests this Court grant its request for review in all respects, set this matter far oral argument, and, upon submission and for the reasons set forth herein, reverse the ,judgments of the court: of appeals and trial court and remand this matter to the trial court for a new trial, Alternatively, and without waiving same, even if this Court affirms the judgment, Petitioner prays this Court reduce the jury's award

[3] *Columbia Med Ctr of Las Colinas, Inc v Hogue*, No 04-0575 (oral argument heard **April** 12,2005)

to the statutorily mandated $500,000, pursuant to the caps set forth in Article 4590i, section 11.02, of the former Texas Revised Civil Statutes, and, further, modify the judgment to reflect the accrual rate of pre- and post-judgment interest, reducing that rate from 10% to 5%

ARGUMENT & AUTHORITIES

I. 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 an New and Independent Cause and the Doctrine of Lost Chance of Survival

A. Issue No. 1 – Trial Court Committed Reversible Error by Refusing to Submit New & Independent Cause Instruction, Requiring Reversal and Remand far New Trial

1. *New and Independent Cause, Generally*

This Court: has recognized that when defendants blame an occurrence on someone or something other than themselves, the Texas Pattern Jury Charges provide multiple alternatives* *Dillard v. Texas Elec.* Coop., 157 S.W.3d 429, 432 (Tex. 2005); *see also Columbia Rio Grande Healthcare v Hawley*, 188 S.W.3d 838, 869 (Tex. App.–Corpus Christi 2006, pet. filed) (Castillo, J., dissenting). 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 tile occurrence in question. *See Dillard,* 1.57S.W.3d at 432 (citing *Reinhart v. Young,* 906 S.W.2d 471, 472 (Tex. 1995)); *Hawley,* 188 S.W.3d at 869 (Castillo, J., dissenting).. One of the alternatives involves a new-and-independent-cause instruction if the occurrence is later caused by someone else.. *See Dillard,* 157 S.W.3d at: 432; *Hawley*, 188 S.W.3d at 869 (Castillo, J., dissenting). "'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 amission inquired about and the occurrence in question and thereby becomes the immediate cause of the occurrence." *Dillard,* 1.57 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 concumng or new and independent cause); *Hawley*, 188 S.W.3d at 870 (Castillo, J., dissenting); ***Taylor*** *v. Carley,* 158 S.W.3d 1, 9 (Tex. App.-Houston [14th Dist.] 2004, pet, denied). The issue of new and independent cause is a component of the ultimate issue of proximate cause and not an affirmative defense. *Taylor,* 158 S.W.3d at 9 (citing *Rodriguez v. Moerbe,* 963 S.W.2d 808, 821 n. 12 (Tex. App.–San Antonio 1998, pet. denied)); *Hawley*, 188 S.W.3d at 870 (Castillo, J., dissenting),

2. *New and Independent Cause, or Superseding or Intervening Cause, as Distinguished from Concurrent Act*

a. Definitions of Terms

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.)); *Hawley*, 188 S.W.3d at 870 (Castillo, J., dissenting). A concurrent act cooperates with the original act in bringing about the injury and does not cut off the liability of the original actor. *Taylor,* 158 S.W.3d at 9; *Hawley*, 188 S.W.3d at 870 (Castillo, J., dissenting). 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, *Taylor,* 158 S.W.3d

at 9; *Hawley*, 188 S.W.3d *at* 870 (Castillo, J., dissenting).

b. Factors that May Be Considered to Determine Whether Act is Concurring Act or New and Independent Cause

This Court has instructed that, as set forth in the Restatement (Second) of Torts, Section 442, the following factors that may be considered in determining whether an intervening force rises to the level of a superseding cause:

> (a) the fact that the intervening force brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that the intervening force's operation or the consequences thereof appear after the event to he extraordinary rather than normal in view of the circumstances existing at the time of the force's operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Phan Son Van, 990 S.W.2d at 754; see *also Humble Oil & Refining Co. v. Whitten*, 427 S W.2d 313, 315 (Tex. 1968); *Hawley*, 188 S W.3d at 859 (listing factors) *(See* Brief of Appellant at 8 n.3).

As this Court recently explained in its plurality opinion in *Dew v. Crown Derrick*

Erectors, Inc.:

> 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 mare remote cause. [ ]. An intervening cause thus supersedes the defendant's negligence by destroying the causal connection between that negligence and the plaintiff's injury thereby relieving that defendant of liability. .... The instruction's purpose is "to advise the jurors, in the appropriate case, that they do not have to place blame on 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 on new and independent cause,
>
> ***
>
> . . . the threshold, and often controlling, inquiry when distinguishing between a concur–ring 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.' [ ].

Dew v. Crown Derrick Erectors, Inc., No. 03-1128, __ S.W.3d __, 2006 WL 1792216, *1, *2-*3 (Tex. 2006) (emphasis added) (internal citations omitted)

3. *Dew v. Crown Derrick Erectors, Inc., Is Factually Distinguishable Here*

This Court's opinion in *Dew v. Crown Derrick Erectors, Inc.*, is factually distinguishable here. (*See* Reply to Petition for Review at 1-3). 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 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. (See Reply to Petition for Review at 3). 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 id.; Brief of Appellant 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, 535 (Tex. 1900)). Finally, this superseding 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. (7 RR 71-72; 3 RR 180, 21 RR **Ex.**8 at 49).

4. *Court of Appeals Concluded Evidence Supported Only Conclusion of Concurring Cause Rather than New and Independent Cause*

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*, 188 S.W.3d at 860-61. But, as Justice Castillo's dissenting opinion concludes, the pleadings and same 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*, 188 S.W.3d at 869-73 (Castillo, J., dissenting).

5. *Evidence of New and Independent Cause*

As Justice Castillo's dissenting opinion explains, the evidence shawed 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). See *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). Mrs. Hawley's 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). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). Testimany also established that both the treating physician (Dr. Arechiga) and the surgeon (Dr. Rodriguez) had access to Mrs. Hawley's chart for purposes of post-operative diagnosis and treatment. (5 RR 80-81, 84-87, 92-93 & [Depo. of Caldarola at 40-42]; 7 RR 125-26). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). A return receipt establishes that the pathology report was mailed to and received by the treating physician's office (*i.e.*, Dr. Arechiga). (4 RR.8; 7 RR 106-10; 21 RR Ex. 10 at 22-23, 53-54).. *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). While the pathology lab secretary did not recall whether she sent the pathology report to the surgeon (Dr. Rodriguez) via certified mail, the testimony

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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)

showed that the custom, habit, and practice was that the distribution policy for positive cancer pathology reports was followed on a daily basis and that cancer cases were priority aver 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). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting), By its plain terms, the distribution policy does not require that notice be provided orally, and by fax, and by certified mail. (21 RR Pl. Ex. 1). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). Without question, however, all pathology reports must be filed in the patient's chart. (21 RR Pl. Ex. 1). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). 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. *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting).

a. Dr. Rodriguez' and Dr. Arechiga's Failure to Refer to Chart or Pathology Report for Eleven Months Was Not Reasonably Foreseeable

(1) Even If Hospital. Complied with Notice/distribution Policy, it Is Not Reasonably Foreseeable That Compliance Itself Would Result in Lack of Notice to Patient of Cancer Diagnosis

Even if the Hospital complied with the notice/distribution policy for a positive cancer pathology report, it is not reasonably foreseeable that compliance itself would result in lack of notice to the afflicted patient of the cancer diagnosis. (See Brief of Appellant at 21-23), *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). Ample testimony established that two pathology lab secretaries received daily requests, all day long, from physicians' and surgeons' offices (including from the office of Dr. Rodriguez, Mrs. Hawley's surgeon) requesting duplicate copies of pathology reports, after documented, full compliance with the distribution

policy. (7 RR 105-06, 114, 119-20). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). Testimony showed that it was often easier for doctors to request a new copy of the pathology report from the pathology department than to locate same in their medical office. (7 RR 105-06, 113-14). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). In fact, Dr. Rodriguez's office called "all the time" for copies of pathology reports and copies were sent to his office on a daily basis. (7 RR 105-06). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). In Mrs. Hawley's case, documentation showed that the pathology report was sent to and received by the treating physician's office (ie., Dr. Arechiga) by certified mail, return receipt requested. (4 RR 8; 7 RR 106-10; 21 RR Ex. 10 at 22-23, 53-54). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). That 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). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting) Notice by placement in Mrs Hawley's chart is also consistent with the distribution policy. (21 RR Pl. Ex. I). *Hawley*, 188 S.W.3d at 871 (Castillo, J., dissenting). 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). *Hawley*, 188 S.W.3d at 871 ((Castillo, J., dissenting).

(2) Dr. Tucker, Hospital's Expert Hospital Administrator Who Testified Regarding Dissemination of Pathology Reports, Provided Evidence of Acts or Omissions of Dr. Arechiga (Treating Physician) and Dr. Rodriguez (Surgeon) That Were Not Foreseeable to Hospital, Constituting New and Independent Cause

Further, the testimony of Dr. Stephen L. Tucker ("Dr. Tucker"), the Hospital's expert hospital administrator who testified regarding the dissemination of pathology reports,

provided evidence of acts or omissions of Dr. Arechiga and Dr. Rodriguez that were not foreseeable to Petitioner/Hospital, constituting a new and independent cause, (7 RR 132; Brief af Appellant at 8-10). *See Dillard,* 157 S.W.3d at **432** n.3; *Phan Son Van,* 990 S.W.2d at 7.54; *Hawley*, 188 S.W.3d at 871-72 (Castillo, J., dissenting); Taylor, 158 S.W.3d at 9.

Dr. Tucker testified that as a hospital administrator, he commonly works with physicians and is involved in the dissemination of reports. (6 RR 77). He has reviewed and is familiar with the policy in place here; the pathology report indicates it was dictated and transcribed on November 28; the hospital's procedure was to post it on the same day by 4:30 p.m. *(6* RR **67,** 69, 85-86). 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 on the pathology reports. (6 RR 79). Dr. Arechiga, as admitting physician, received a certified copy of the pathology report. (6 RR 74). The records showed the report was in the chart as of November 28, however, Dr. Arechiga did not refer. to it or. follow up on it when he dictated the discharge summary for the November 29th discharge and the December 4th discharge (6 RR 88).

Further, the pathology report would have been a part of the hospital records when Mrs. Hawley was admitted in January 2001, less than two months after the initial admission of November 2000, (6 RR 94-95). There would have been a chart each time a patient is admitted and for a follow-up admission. (6 RR 96). During the January admission, Dr. Tucker is aware that Dr Rodriguez saw Mrs. Hawley at that time and the pathology report would have been part of the medical records. (6 RR 94-95).

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 on the pathology reports, (6 RR 78-79), Thus, it was unforeseeable that during Mrs. Hawley's subsequent treatment after November 2000 and before October 2001, neither Dr. Arechiga (her treating physician) nor Dr. Rodriguez (her surgeon) would have followed up on the pathofogy report which was made a part of Mrs. Hawley'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. ***(See*** id.).

Consequently, as set forth above, Dr. Tucker testified and presented legally sufficient evidence of a new and independent cause; that is, the unforeseeable event of Dr. Arechiga's conduct and Dr. Rodriguez's conduct in failing to check the I-Iospital's chart for Mrs. Hawley, or to check their own office charts, to follow up on the November 2000 pathology report. See *Dillard,* 157 S.W.3d at 432 n.3; *Phan Son Van,* 990 S.W.2d at 754; *Hawley*, 188 S.W.3d at 871-72 (Castillo, J., dissenting); *Taylor,* 158 S.W.3d at 9. Indeed, Dr. Tucker testified 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. (6 RR 79). This evidence of an unforeseen and independent intervening force is due to the failure of third parties, Dr. Arechiga and Dr.. Rodriguez, to act. Given Respondents' evidence (although unreliable) from Dr. Escudier and Dr. Marek that in November 2000, Mrs. Hawley had a greater than 50% chance of survival with surgery or chemotherapy, the harm caused by the failure of Dr. Arechiga and Dr. Rodriguez is that by the time Mrs. Hawley's cancer was discovered eleven months later, different treatments were required, different medical expenses incurred (even by Respondents' own admission (5 RR 9-10)) and her chance of survival drastically reduced.

b. Analysis of Factors Shawing 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 See *Phan Son Van*, 990 S.W.2d at 754 (factors to consider in determining whether cause is concurring or new and independent cause include "(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of'such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act"); see also *Hawley*, 188 S.W.3d at 8.59 (listing factors).

Further, it is extraordinary rather than normal in view of the circumstances existing

at the time that both Mrs. Hawley's treating physician (Dr. Arechiga) and surgeon (Dr. Rodriguez) 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 both before her November 2000 discharge and at numerous other times during her subsequent care and treatment. See *Phan Son Van*, 990 S.W.2d at 754 (factors to consider in determining whether cause is concurring or new and independent cause include "(b) the fact that the intervening force's operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the force's operation"); see *also Hawley*, 188 S.W.3d at 859. 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 during this time she was under the care and treatment of the same treating physician (Dr. Arechiga) and surgeon (Dr. Rodriguez) – with each apparently not requesting or not reviewing her complete medical chart that contained the cancer findings. (3 RR 180, 21 RR Ex. 8 at 39, 52-53; 4 RR 8, 21 RR Ex, 10 at 16, 34, 38; 5 RR 28, 55-64). 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. (4 RR 8, 21 RR Ex. 10 at 38; 5 RR 56, 84-91). Indeed, Mrs. Hawley's own experts, Dr. Escudier and Dr. Marek – assuming (but not conceding) their opinions on this issue were admissible – testified that the delay proximately caused the metastasis of her cancer. (*See* Brief of Appellant at 12; *cf.* 3 R 180; 4 RR 8, 47-48; 5 RR 55-56; 21 RR Ex. 5 at 32, 46-47, 49; 21

RR Ex. 6 at 17, 19, 53, 60; 21 RR Ex. 10 at 34).

Finally, as Justice Castillo's dissent nates, the trial testimony showed that the time differential from notice to treatment is critical in cancer cases. *Hawley*, 188 S.W.3d at 870 n.3 (Castillo, J., dissenting). (See Brief of Appellant at 10-13; Reply Brief of Appellant at 6-8). Thus, the dissenting opinion instructs, "it follows that the timing of notice would correlate with the question of a different harm in the first factor in *Phan* Son *Van v. Pena*, 990 S.W.2d 821, 824 (Tex. 1999)." *Id.* at 870 n.3; ***see*** *also Humble Oil & Refining Co.*, 427 S.W.2d at 315 (listing factors); *Phan Son Van,* 990 S.W.2d at 824 (same). Finally, a trial court may not properly refuse to submit a question merely because the evidence is factually insufficient to support an affirmative finding. *Hawley*, 188 S.W.3d *at* 870 n.3 (Castillo, J., dissenting) (citing *Garza v. Alviar*, *395* S.W.2d *821*, 824 (Tex. 1965)).

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 at least some evidence presented. See *Hawley*, 188 S.W.3d at 871-72 (Castillo, J., dissenting); ***see*** *also* TEX. R. CIV. P. 277,278; TEX. R. APP. P. 44.1(a)(1); *Elbaor v. Smith,* 845 S.W.2d 240, 243 (Tex. 1992); *Island Recreational Dev. Corp v Republic of Tex. Sav. Ass'n, 710* S.W.2d 551,555 (Tex. *1986)* (op. on reh'g). Further, based on the evidence set forth above, the jury could have found superseding cause, and the jury verdict was against the proponent of this issue (*i.e.,* the Hospital); therefore, the trial *court's* error in refusing to instruct the jury on new and independent cause was harmful. *See Hawley*, 188 S.W.3d at 872 (Castillo, J., dissenting); see *also* Bel-Ton *Elec. Sew., Inc. v. Pickle*, 915

S.W.2d 480, 481 (Tex. 1996) (per curiam); *Southwestern Bell Tel. Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470,472 (Tex. 1992). 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 id

B. Issue No. 2 – Court of Appeals' Rejection of Instruction that Mrs. Hawley Must Have Had a Greater than Fifty Percent (50%) 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 ta submit a requested instruction, the question on appeal is whether.the requested instruction was reasonably necessary to enable the jury to render a proper verdict. *Texas 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 to a jury question, instruction, or definition 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). Ta 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 to a contested, critical issue, the error is generally considered harmful. See *Bel-Ton Elec. Serv., 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 jury to resolve dispute without proper legal definition to essential legal issue was reversible error). A trial court reversibly errs when it denies a party proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and the evidence, *Exxon* Carp. *v. Perez*, 842 S.W.2d 629, 631 (Tex. 1992). 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. *"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 health care 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 health care 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.* Thus, the typical medical negligence case requires the jury be instructed that to find "a" proximate cause, it must find both foreseeability and cause in fact.

However, with respect to cases involving lost chance, a different rule applies., In a last 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 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 to demonstrate proximate causation in a lost chance case, the plaintiff must intraduce evidence and the jury must find that there was a greater than fifty percent chance of survival absent the defendant's negligence. *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397 (Tex 1993). Thus, 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,

3. *Court of Appeals Erroneously Concluded No Abuse of Discretion, or Alternatively, No Harmful Error in Refusal to Submit Instruction*

a. Abuse of Discretian in Refusal to Submit Instruction

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 party is entitled to instructions if the evidence raises an issue. TEX. R. CIV. P. 278. The court of appeals recognized, there was conflicting evidence regarding whether the plaintiffs chance of survival was greater than or less than fifty percent. *Hawley*, 188 S.W.3d at 863. 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 362, 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, for 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.[5] (2 CR 361-62; 6 RR 150). The court of appeals acknowledged the requested instruction accurately stated the law and "finds support in the pleadings and evidence."" *Hawley*, 188 S.W.3d at 863.

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[5] The trial 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"

[6] The testimony was conflicting as to whether Mrs Hawley had a greater than fifty percent chance of survival Indeed, Dr. Escudier testified that the five-year prognosis for 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 on 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) Dr. Marek 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

The court of appeals initially reasoned, nonetheless, that the failure to submit the instruction was not an abuse of discretion because the trial court had no guiding authority or precedent that endorsed or required the submission of this instruction in a lost chance case, that the Texas Pattern Jury Charges on medical malpractice provided no guidance on lass-of-chance instructions, and there was no documented practice of instructing Texas juries on the loss-of-chance rule. *Hawley,* 188 S.W.3d at 863 Because of the absence of such guiding precedent,[7] the court of appeals concluded that the trial court did not abuse its discretion in refusing to submit the requested instruction, and the court could not fairly conclude that the trial court clearly failed to correctly analyze or apply the law if no appellate court in the state has set precedent requiring or even endorsing such an instruction. *Id.* But, such reasoning is misguided, where Texas jurisprudence is well-established that the trial court must charge the jury with the law governing the case, See, ***e.g***, *Williams,* 85 S.W.3d at 166-69 (analyzing foreseeability element of duty under FELA, and requiring submission of instruction to conform to FELA duty standard when evidence disputed).

The court of appeals acknowledged the significance of the excluded instruction, but

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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 chat time **was** about 20% (6 RR 20)

[7]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), the court discussecl the submission of an 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 "recovery is barred when the defendants' negligence deprived the patient of only a fifty percent. or less chance of survival Because the evidence was that 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

further concluded that because there was legally sufficient evidence that Mrs. Hawley's last chance of survival was greater than 50 percent, the jury may nat have returned a verdict of liability based solely on a lost chance of survival or 50 percent or less. Id. at 864. Such reasoning misses the point – even the court of appeals acknowledged that there was also legally sufficient evidence that Mrs. Hawley's lost chance of survival was less than 50 percent. *Hawley*, 188 S.W.3d at 863 ("There being some evidence that Mrs. Hawley's chances of survival were less than 50 percent before the Hospital's alleged negligence, we must decide whether the trial court abused its discretion in refusing to give the jury a loss-of-chance instruction."). What the court: failed to appreciate is that the jury was required to be instructed about the proper legal standard for determining proximate causation in a lost chance case.

Finally, the court: concluded that no abuse of discretion occurred because the loss-of-chance instruction was "inherent in the jury charge," where the charge was entirely consistent with the ultimate standard of proof. *Hawley*, 188 S.W.3d at 864. The court concluded that even if there was an abuse of discretion in the refusal to submit the instruction, it could not conclude that such an abuse probably fed to the rendition of an improper ,judgment. *Id.* As stated, the court of appeals' rejection of the need for an instruction based on the definition of "proximate cause" contained in the charge ignores this Court's pronouncement of the rule of law applicable in a last chance case.

In *Kramer*, this Court was asked to decide "whether there is liability for negligent treatment that decreases a patient's chance of avoiding death or other medical conditions in

cases where the adverse result probably would have occurred anyway," *Kramer*, 858 S.W.2d at 398. This Court ultimately held that recovery for a lost chance is neither authorized by the statutes of Texas, nor is it authorized under a separate common law cause of action. *Id* In ultimately rejecting the plaintiffs request to impose liability for a deprivation of a chance of survival, the Supreme Court of Texas set out several important principles demonstrating the trial court's error here:

> [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, In Texas, therefore, if a person is going to die anyway, no cause of action for medical malpractice can be maintained against a treating physician. *Arguelles v. UT Family Med. Ctr.*, 941 S.W.2d 255, 258 (Tex. App.–Corpus Christi 1996, no writ).

This Court later expounded upon its decision in *Kramer* in *Park Place Hospital v. Milo*.[8] In *Park Place Mem'l Hosp* , the Supreme Court of Texas was again confronted with a lost chance of survival argument. There, the plaintiffs expert testified that a person in the plaintiff's condition, on the day she was ostensibly negligently removed from her respirator, had only a forty percent chance of living even if she had remained on the respirator. *Park Place Mem'l* Hasp.,909 S.W.2d at 510. This Court again explained that there is no liability for negligent medical treatment that decreases a patient's chance of avoiding death or other medical conditions in cases where the adverse result probably would have occurred anyway

[8]909 S W 2d **508** (Tex 1995)

Id. at 511. This Court soundly announced that "recovery is barred when the defendant's negligence deprived the patient of only a fifty percent or less chance of survival." *Id.* Indeed, this Court characterized the chance of survival as the "dispositive issue," *Id*

The foregoing requested 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. The jury heard evidence of a rate of'survivability in November 2000 of between 25 and 65 percent, But what the jury did not know was that if it believed Mrs. Hawley's rate of survivability was 25 percent or anything less than 51 percent, the Hospital's purported negligence was not a proximate cause of injuries to her. The jury had no instructions, and hence no way of knowing, that it was unable to find proximate causation unless it first determined that the plaintiffs chance of survival was greater than fifty percent. The requested instruction was paramount in assisting the jury in determining proximate cause, and without it, the jury was free to determine proximate cause based on the charge, providing an instruction on proximate cause only, and evidence that the Hospital deprived Mrs. Hawley of a 25 percent, a 33 percent, or anything less than a 51 percent chance of survival–running afoul of this Court's holdings in *Kramer* and *Milo*.

Thus, the requested instruction was proper and necessary here, where it would have assisted the **jury** in determining proxiinate cause, and where the court of appeals acknowledged that it accurately stated the law and found support in the pleadings and evidence. See *Williams*, 85 S.W.3d at 166. The action of the trial court in refusing to submit the instruction was, therefore, a clear abuse of discretion.. See id.

b. Trial Court's Error Requires Reversal

A trial court's error in refusing an instruction is reversible if it "probably caused the rendition of an improper judgment." ***Williams,*** 85 S.W.3d at 170 (citing TEX. R. APP. P. 61.1(a)). Here, the evidence was disputed that Mrs. Hawley had a greater than 50 percent chance of survival in November 2000. A jury instruction about this Court's requirements in *Kramer* and ***Milo,*** would have enabled the jury to determine whether the Hospital's purported negligence was a proximate cause of the injury or harm to Mrs.. Hawley. Without the instruction, the jury made a liability finding without first determining whether Mrs. Hawley had a greater than 50 percent chance of survival in November 2000, and there is every chance that the jury concluded Mrs. Hawley had less than a 51 percent 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. We cannot assume that the jury considered the *Kramer* and ***Milo*** requirement in the absence of an instruction, and given the instruction defining proximate cause that it actually had before it,

This Court's holdings in *Kramer* and ***Milo*** of the additional requirement in the lost chance context is an "essential ingredient" – indeed, the dispositive issue – in the causation analysis? Therefore, the instruction's absence from the jury charge probably caused the rendition of an improper judgment. *See Williams*, 85 S.W.3d at 171; ***see*** TEX. R. APP. P. 61.1(a)(1). Accordingly, the trial court's error was reversible, and the case should be reversed and remanded for a new trial. *See* id.

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

As this Court recently stated in ***Dew,*** 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 [it] might have given effect to, if it had been brought to their attention, . . . Although we moved to broad-form jury submissions, we do not use the broad-form submission as a vehicle to deny a party the correct charge to which the party would otherwise be entitled." ***Dew,*** 2006 WL 1792216 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.

Because the jury was not instructed on the last chance issue, Petitioner has been held liable without a judicial determination that a factfinder actually found that there existed a greater than 50 percent chance of survival; it is impossible to conclude that the jury's answer was not based an an improperly submitted theory. *See id.*

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 on the third element of proximate 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." *Hawley*, 188 S.W.3d at 873; TEX. R. APP. P. 61.1(a)(2). Accordingly, for this additional reason, the trial court's clear abuse of discretion in refusing to submit the requested instruction constituted reversible error, and this Court should exercise review, should reverse the judgment and remand the case to the trial court far a new trial. *See* id

C. Issue No. 3 – Submission of Liability Question (Question 1) Without Proper Explanatory Instruction Instructing Jury Not to Consider Conduct of Dr. Valencia, an Independent Contractor Physician, When Considering Whether Hospital's Negligence Proximately Caused Mrs. Hawley's Injuries Prevents Hospital from Properly Presenting Appeal, Constituting Harmful Error Requiring Reversal

Rule 277 of the Texas Rules of Civil Procedure mandates broad form submission of jury questions whenever.. feasible. *See, e.g., Casteel*, 22 S.W.3d at 389-90. This court reviews charge error under an abuse of discretion standard. See *Texas Dep't of Human Svcs v E.B*, 802 S.W.2d 647, 659 (Tex. 1990). All error is harmful and reversible if the error prevents the appellant from properly presenting its case to the court of appeals, *See* TEX. R. APP. P. 44.1(a)(2); *Casteel*, 22 S.W.3d at 388-89.

a. Texas Supreme Court Requires Jury Question be Supported by the Substantive Law and the Evidence

In *Crown Life Insurance Company v Casteel*,[9] the Texas Supreme Court held, when

[9] 22 S.W.3d 378 (2000).

a jury bases a finding of liability on a single broad-farm question that commingles valid theories of liability with invalid theories, the appellate court is unable to determine the effect of such an error,. *Casteel*, 22 S.W.3d at 388; *accord Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002). The error is harmful because the appellate court cannot know that the jury actually found the defendant *should* be held liable on proper legal grounds. *Casteel*, 22 S.W.3d at 388. The court also recognized that broad-form submission is not absolute, but should be used only "whenever feasible." *Id.* at 390. Similarly, this Court instructed that the adoption of broad-form jury submissions was intended to benefit the jury, the parties, and the trial court, but it was never intended to permit, and therefore encourage, more error in a jury charge+ *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 230 (Tex. 2005). When properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury. *Romero*, I66 S.W.3d at 230. However, it is not always practicable to submit every issue in a case broadly, and broad-form submission cannot be sued to broaden the harmless error rule to deny a party the correct charge to which it would be otherwise entitled *Id* at 230; see *also Smith*, 96 S.W.3d at 236 (reaffirming that trial court's duty is to submit only those questions, instructions, and definitions raised by the pleadings and the evidence; concluding submission of damages question with four elements of damages but only one answer blank was harmful error requiring reversal and remand for new trial).

b. Hospital is Not Liable for Independent Contractor Physician's Negligence Pursuant to Controlling Texas Authority

Simply put, a hospital is not liable for an independent contractor physician's negligence. *Baptist Mem'l Hosp. Sys. v. Sampson,* 969 S.W.2d 945,948 (Tex. 1998); see *also* ***Lee*** *Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778,792 (Tex. 2001) (Hecht, J., joined by Owen, J, concurring) (employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants),

c. Trial Court's Failure to Provide Limiting Instruction Based on Undisputed Evidence that Dr. Valencia (Pathologist) is Independent Contractor Constitutes Harmful Error Where Same Resulted in Charge that Arguably Mixed Valid and Invalid Theories of Negligence

Here, the undisputed evidence was that Drs. Useda and Valencia are employees of Useda and Associates, a partnership of pathologists whose office is located within the Hospital, although the Useda and Associates physicians are employees of the partnership, and are not employees of the Hospital, (7 RR 45-46). The testimony at trial raised a fact issue concerning whether Dr. Valencia was negligent in the alleged failure to ensure that the pathology reports were provided to Mrs. Hawley's treating physicians* Specifically, Dr. Valencia is the pathologist who examined Mrs. Hawley's resected colon following surgical treatment for a perforated diverticuli in November 2000. (3 RR 180, 22 RR Ex. 8 at 40; 4 RR 8, 21 RR Ex, 10 at 7, 11; 5 RR 52). Dr. Valencia diagnosed Mrs. Hawley with adenocarcinoma of the colon (four or five positive lymph nodes). (7 RR 69, 6 RR 13). He staged the cancer as Stage 3, or "'Duke's C," cancer. (6 RR 16, 19). At that point, Dr.

Valencia's duties to notify Mrs. Hawley's doctors of his diagnosis were apparent and mandatory according to hospital policy. (4 RR 15, 21 RR Ex.7 at 36-37; ***see*** *also* Reply Brief' of Appellant at 15). The Hospital changed its policy manual in July 2000 with respect to pathology reports diagnosing cancer, (7 RR 98). Specifically, it required: (I) the pathologist verbally notify the physicians of record; (2) the pathologist's secretary send the report via facsimile to the physicians of record; and (3) the patholagy Iab deliver the report to the physician of record by certified mail. (4 RR 15, 21 RR Ex. 7 at 36-37; 7 RR 69-71). Thus, the jury may have imputed Dr. Valencia's acts or omissions, if'any, to the Hospital, in failing to follow the policy.

Accordingly, the Hospital properly requested an instruction that "In considering the negligence of [the Hospital], do not consider the acts or omissions of the pathologist, Dr. Valencia." (2. CR 368-69; *6* RR 36). The Hospital requested the limiting instruction concerning the conduct of Dr. Valencia because the evidence conclusively showed that Dr. Valencia was an independent contractor for whom the Hospital was not responsible. *See Sampson,* 969 S.W.2d at 948; see *also Lee Lewis Constr., Inc ,70* S.W 3d at 792. (*See* Brief of Appellant at 13-15; Reply Brief'of Appellant at 14-16).

Consequently, because the charge mixed arguably valid and invalid theories of negligence (negligence committed by agents for whom the Hospital could be held vicariously liable as opposed to negligence committed by Dr. Valencia, an independent contractor.),the failure to provide the instruction is harmful error requiring reversal for new trial. *See Casteel*, 22 S.W.3d at 388; see *also Smith,* 96 S.W.3d at 234. The error is harmful because this Court

cannot determine whether the jury found liability in Question 1 based on the conduct of Dr. Valencia, an invalid legal theory, or the conduct af the Hospital. See *id.* Thus, having timely objected and submitted a requested instruction, a new trial is required. See id

D. Issue No. 4 – Damages land Associated Prejudgment Interest) Should Have Been Limited Pursuant to the Provisions of Section 11.02 of Former Article 45901 of the Texas Revised Civil Statutes

On February 26, 2003, the jury returned a verdict in favor of Respondents and 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 378-86, 382-83; Apx. Tab A). The jury also awarded Mr. Hawley $760,000 for loss of consortium. (2 CR 384). The trial court signed a Final .Judgment on March 10,2003 (2 CR 443-48; Apx. Tab B), and a Judgment Nunc Pro Tunc on March 27,2003, modifying and reducing the medical expenses awarded from $400,000 to $139,628.67, resulting in a final award of $1,739,628.67, plus prejudgment interest at 10%. (2 CR 459-65; Apx. Tab C).[10] The total award exceeds the limitation of $500,000, as adjusted by the Consumer Price Index ("CPI"), provided for in former article 4590i, section 11.02. TEX. REV. CIV. STAT **ANN.** art. 4590i, §11.02(a), (b) (Vernon Supp. 2003). Because the limitation in former article 45903, section 11.02 reflects a valid exercise of the Texas legislature's police power, and a court: is not free to ignore the legislature's expressed intent, the trial court should have reduced Respondents' total damages from $1,739,628.67 to $500,000, as adjusted by the CPI. *See id*

[10] Mrs. Hawley **succumbed** *to* complications **caused** by her **cancer** while this case was pending before the Court *of* **Appeals** *Hawley*, 188 S W.3d *at* 844

1. *Former Article 4590i, Section 11.02's Damages Cap Limited Health Care Liability Damages to $500,000, as Adjusted by the Consumer Price Index*

Former article 4590i, section 11.02 provided, in pertinent part:

> (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000.
>
> (b) Subsection (a) of this section does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury,

TEX. REV. CIV. STAT. ANN. art. 4590i, §11.02(a), (b) (Vernon Supp. 2003). Section 11.04 provided that the limitation of $500,000 was adjustable based on the changes in the CPI:

> When there is an increase or decrease in the consumer price index with respect to the amount of that index on the effective date of this subchapter each of the liability limits prescribed in Section 11.02(a) or in Section 11.03 of this subchapter, as applicable, shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index between the effective date of this subchapter and the time at which damages subject to such limits are awarded by final judgment or settlement,

TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.04 (Vernon Supp. 2003) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(b) (Vernon 2005)); see *Spohn Hosp. v. Mayer*, 104 S.W.3d 878, 881 n.3 (Tex. 2003)("The limit is adjusted based on fluctuations of the consumer price index.")

2. *The Legislature Validly Exercises its Inherent Police Power When It Enacts a Statute Designed to Achieve an Objective Within its Police Power and a Rational Relationship Exists Between the Enactment and the Legislative Purpose*

The legislature's inherent police power affords it the authority "to ensure the public health, the public safety, the public comfort, or welfare" of the state's citizens." An exercise of police power is valid (and will survive a due process challenge) when (I) it is designed to achieve an objective within the police power and (2) a rational relationship exists between the enactment and its purpose.[12] Determining if an enactment satisfies this test is a question of law.[13]

3. *Section 11.02's Damages Cap is a Valid Exercise of the Legislature's Inherent Police Power*

The right of the State of Texas to regulate the practice of medicine has traditionally been justified by the "fundamental" need to furnish the people of this state with competent health services, See *Members of Bd. of Regents v. Hilley*, No. 05-93-01729-CV, 1994 WL 708295, at *9 (Tex. App.–Dallas Dec. 21,1994, writ denied) (not designated for publication) (citing *Garcia v. Texas State Bd. of Medical Examiners*, 384 F. Supp. 434, 437 (W.D. Tex.

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[11] *See Martine v Wholesome Dairy, Inc* , 437 S W 2d 586, 590-91 (Tex Civ App –Austin 1969); *see also Nichols v White*, 325 S W 2d 867,874 (Tex Civ App–Austin 1959); *Tyler* v *State*, 176 S W 2d 177, 182 (Tex Crim App 1943); *Lombardo v Dallas*, 73 S W 2d 475, 478 (Tex 1934) [public health, morals, safety, convenience, and prosperity); *Ex Parte Smythe*, 28 S W 2d 161, 162 (Tex Crim App 1930); *Spann v Dallas*, 235 S W 513, 515 (Tex 1921) (public health, safety, comfort, and welfare)

[12] *E g , Mayhew v Town of Sunnyvale*, 964 S W 2d 922,938 (Tex 1998); *Texas State Bd of Barber Examiners v Beaumont Barber College* 454 S W 2d 729, 732 (Tex 1970) ("It is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of [the public] and really Lends to accomplish the purpose for which it was enacted"); *State v Spartan Indus* , 447 S W 2d 407,417 (Tex 1969); *State* v *Richards*, 301 S W 2d 597,602 (Tex 1957) ("it is essential that the [police] power be used for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists")

[13] *West Univ Place v Ellis*, 134 S W 2d 1038, 1040 (Tex 1940)

1974), *aff'd*, 421 U.S. 99.5 (197.5)). The reasoning adopted by the Dallas Court of Appeals in *Hilley* and the federal district court in ***Garcia*** (following Texas law) both support the conclusion that the legislature exercises its police power when enacting a statute in the health care context, such as former article 4590i and section 11.02, and the limitation on damages therein,

a. The Legislature Exercises its Police Power to Provide Competent Health Services to all the Citizens of this State

In *Hilley*, the Dallas Court of Appeals faced the question of whether Section 3.07(c) of the Medical Practice Act prohibited arrangements where an entity (there, the University of Texas System) received fees from a licensed physician in exchange for providing the physician with patients to treat. *Hilley*; 1994 WL 708295, at *8. The court concluded that the Medical Practice Act was neither drafted nor intended to apply to arrangements in which clinical faculty physicians agree to assign their professional fees to the state-run medical schoals for which they work. Id.

Moreover, the evidence showed that the arrangements provided the University with approximately $95 million in revenues each year, or approximately thirty percent of all funds generated by the University. *Id.* at *9. The Dallas Court of Appeals reasoned that, "[w]ithout these funds, the University would lose faculty and be unable to provide quality medical services to the public and continue much-needed medical research." *Id.* By upholding the validity of the arrangement, the court "further[ed] the legislature's goal of providing competent health services to all the citizens of this State." *Id.* "Our conclusion gives full effect to the legislature's original intent in adopting the Medical Practice Act and

its predecessors; i.e. to provide the public with reliable, quality health care." *Id* at *9.

b. The Right of a State to Provide for the General Health and Welfare of its Citizens is of Such Vast Importance as to Approach the Status of a Duty

In *Garcia*, the question before the federal district court was whether Texas' licensure statutes were rationally related to accomplishing the goals of ensuring that only qualified individuals could be licensed to practice medicine. ***Garcia,*** 384 F. Supp. at 436-39. In construing one of the Medical Practice Act's predecessor statutes, the *Garcia* court explained, "[t]he police power of the State includes the power to enact comprehensive, detailed, and rigid regulatians for the practice of medicine, surgery, and dentistry." *Garcia*, 384 F. Supp. at 437 (citing *Douglas v. Noble*, 261 U.S. 165, 168-70 (1923)); *cited with approval in Thompson v.* ***Texas*** *State Bd of Medical Examiners*, 570 S.W.2d *123,* 128 (Tex. Civ. App.–Tyler 1978, writ ref d, n.r.e).

The *Garcia* court reasoned that "[the] right of a State to regulate under its police powers all aspects of the practice of medicine and thereby help provide for the general health and welfare of its citizens is of such vast importance as to approach the status of a duty" *Garcia*, 384 F. Supp. at *437; see also Prudential Health Care Plan, Inc. v. Commissioner of Ins.*, *626* S.W.2d 822, 828 (Tex. App.–Austin 1981, writ ref d n.r.e.) ("A fair reading of the Texas Health Maintenance Organization Act reveals it to be a typical exercise of the State's inherent police power in the interest of the public health, safety and welfare."). In recognizing the particular importance of affirming a legislature's expression of policy in the area of health care, the *Garcia* court cited the California Supreme Court's reasoning: "The

California Supreme Court has aptly stated that the matter of changing State policy regarding the practice of medicine is one for the Legislature, not the Courts." *Id* at 439. Ultimately, the ***Garcia*** court reasoned that the Texas legislature's expression of policy in the health care context should be followed: "'So does this Court deem it proper to follow the existing policy in this area as set down by the elected representatives of the society in the Texas Medical Practice Act and related statutes." *Id.* at 439.

c. This Court Should Affirm the Legislature's Expression of its Police Power in Enacting the Limitation on Damages in Former Article 4590i, Section 11.02

This Court should affirm the legislature's police power in determining that former article 4590i, section 11.02 can be constitutionally applied to limit Respondents' damages (and associated prejudgment interest) to $500,000, as adjusted by the CPI. As this Court has instructed, Texas constitutional rights, including due process rights, may be infringed or even denied by a valid exercise of the legislature's police power.[14] The damages cap in former article 4590i, section 11.02 – much like the statutes at issue in *Hilley* and Garcia – represents

[14] *See, e g , Spann*, 235 S W at 515 ("[The] [p]olice power may abridge inherent constitutional rights to ensure the public health, the public safety, the public comfort, or welfare"); ***Austin,*** 331 S W 2d at 743 (police power may be valid even though it results in private injury or lass to citizens which is necessary to protect or promote the public health, safety, comfort, and convenience); *Lone Star Gas Co v Kelly*, 165 S W 2d 446,449 (Tex 1942) ("The police power cannot be exercised to impose a burden upon the individual unless it results in benefit to the public"); *Lombardo,* 73 S W 2d at478 (police power based regulations arc not unconstitutional even though they restrain individual constitutional rights if they are necessary to prevent danger to the general public); *Missouri K & T RY Co Of Texas,* 91 S W 214, 220 (Iex 1906) ("The constitutional inhibition against the impairment of the obligation of contracts is not a limitation upon the police power when exercised within its legitimate sphere "); *Houston v T C RY,* 84 S W 648,653 (Tex 1905) (in certain circumstances the legislature may disregard constitutional provisions under guise of police power to promote the general welfare); *Spartan Indus , 447 S* W 2d at 413 ("The guarantee of due process does not deprive the state of the right to take private property by the exercise of such power in a proper and lawful manner"); ***Richards,*** 301 S W 2d at 602 (same); *Wylie v* Hays, *263* S W 563, 565 (Tex 1924) (constitutional right to due process may be "regulated, or in certain circumstances denied, by the Legislature" as a proper use of the police power)

another valid use of the Texas legislature's police power in the health care context.[15] However, this Court has held that the damages cap set forth in former.article 4590i, section 11.02 is constitutional as applied to statutory wrongful death claims, but unconstitutional as applied to common law medical malpractice claims. *Compare Horizon/CMS Healthcare Corp v. Auld*, 34 S.W.3d 887, 901-904 (Tex. 2000) (cap violates open courts doctrine as applied to common law claims); *with* Rose *v. Doctors Hosp.*, 801 S.W.2d 841,845-46 (Tex. 1990) (cap can be constitutionally applied to wrongful death claims); *and Lucas v. United States, 757* S.W.2d 687, 690 (Tex. 1988) (cap unconstitutional as applied to common law medical malpractice claims).

However,,because the open courts provision is a due process right, an action under the police power should not be void because it violates the open courts provision.[16] Indeed, this Court has never instructed that the section 11.02 damages cap cannot be enforced as a valid exercise of the legislature's broad police power. The Court should exercise its jurisdiction to address this important issue and clarify the exercise of the legislature's police power in the area of health care liability.

4. *Section 11.02's Damages Cap Was Designed to Achieve, and is Rationally Related to, an Objective Within the Legislature's Police Power*

a. It Was Designed to Achieve an Objective Within the Legislature's Police Power

"Health being the sine qua non of all personal enjoyment, it is not only the right but the

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[15] Petitioner properly preserved this issue by invoking the statutory limitation in former article 4590i, section 11 01 in its Third Amended Answer and through the post-verdict motions phase (2 CR 304-07, 395-442)

[16] *Sax v Votteler*, 648 S W 2d 661,664 (Tex 1983); *Hanks v Port Arthur*, 48 S W 2d 944,945 (Tex 1932)

duty of a state or a municipality possessing the police power to pass such laws or ordinances as may be necessary for the preservation of the health of the people." *City of New Braunfels v. Waldschmidt*, *207 S.W.* 303, 308 (1918) (*citing* 12 C. J. 913). In passing former article 4590i, the legislature's intent was to tower medical-liability insurance rates which, in turn, "would increase the availability of medical care for Texans." *Horizon/CMS Healthcare Corp. v Auld, 34* S.W.3d at 893. The undergirding purpose of the act "is to limit, not expand, a health-care provider's civil liability for damages."' *Id.* at 900. The confinement of former article 4590i only to health care liability claims "demonstrates that the Legislature intended to limit liability in ways that are unique to 4590i and to be a self-contained structure for determining a health care provider's liability and damages." Id at 901.

Former article 4590i's "findings and purposes," as expressed by the legislature, represent the legislature's focus on reducing the medical malpractice insurance crisis in Texas and ensuring that health care be available for all Texans:

(a) The Legislature of the State of Texas finds that:

(1) the number of health care liability claims (frequency) had increased since 1972 inordinately;

(2) the filing of legitimate health care liability claims in Texas is a contributing factor affecting medical professional liability rates;

(3) the amounts paid out by insurer's in judgments and settlements (severity) have Iikewise increased inordinately in the same short period of time;

(4) the effect of the above has caused a serious public problem in availability of and affordability of adequate medical professional liability insurance;

(5) the situation has created a medical malpractice insurance crisis in the State of Texas;

(6) this crises has had a material adverse effect an the delivery of medical and health care in Texas . . . ;

(7) the crises has had a substantial impact on the physicians and hospitals of Texas . . .;

(8) the direct cast of medical care to the patient and public of Texas has materially increased due to rising cost of malpractice insurance protectian for physicians and hospitals in Texas;

(9) the crisis has increased the cost of medical care both directly through fees and indirectly through additional services provided for protection against future suits or claims; and defensive medicine has resulted in increasing costs to patients, private insurers, and the state and has contributed to the general inflation that has marked health care in recent years;

(10) satisfactory insurance coverage for adequate amounts of insurance in this area is often not available at any price;

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(b) **Because of the conditions stated in Subsection (a) of this section, it is the purpose of this Act to improve and modify the system by which health care liability claims are determined** . . . .

(1) reduce excessive frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance. tort. and medical practice systems;

(2) decrease the cost of those claims and assure that awards are rationally related to actual damages;

(3) **do so in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis;**

(4) make available to physicians, hospitals, and other health care providers protection against potential liability through the insurance mechanism at reasonably affordable rates;

(5) make affardable medical and health care more accessible and available to the citizens of Texas;

(6) make certain modifications in the medical, insurance, and legal systems in order' to determine whether or not there will be an effect on rates charged by insurers for medical professional liability insurance; and

(7) make certain modifications to the liability laws as they relate to health care liability claims only and with an intention of the legislature to not extend or apply such modifications of liability to any other area of the Texas legal system or tort law,

TEX. REV. CIV. STAT. ANN, art. 4590i, $1.02 (Vernon Supp. 2003) (emphasis added).. The findings of former article 4590i confirm that the legislature had serious concerns that medical care in Texas would be limited if the tort system for health care providers was not altered, The legislature's concern in this area turned out to be prescient as evidenced by the subsequent enactment of House Bill 4, which echoed the very same findings pronounced in former article 4590i.

b. Courts Cannot Ignore Mandates of Former Article 45903

Courts are not free to ignore the legislative findings and plain language supporting former article 4590i and section 11.02. See, *e.g., In re Raja*, __ S.W.3d __, *2006 WL* 2075230, at *2-3 (Tex. App.–Eastland July *27,2006,* pet. filed) (interpreting Chapter 74);see *also, e.g, In re Allan*, 191 S.W.3d 483, 486-89 (Tex. App.–Tyler 2006, orig. proceeding); *Fleming Foods of Texas, Inc. v. Rylander*, *6* S.W.3d 278, 283-84 (Tex. 1999) (instructing prior law and legislative history cannot be used to alter or disregard express terms of code provision when its meaning is clear from code when considered in its entirety); City *of New Orleans v. Dukes*, *427* U.S. 297, 302 (1976) (explaining that when Legislature supports its

enactment by findings of fact, courts are not at liberty to re-examine those facts); *cf. Day* Land *& Cattle Co. v. State*, 68 Tex. 526, 543, 4 S.W. 865, **873** (1887) (if legislature states facts authorizing immediate passage of bill as "emergency," courts have no power to re-examine those facts). By allowing an award of damages to exceed the $500,000 limitation, as adjusted by the CPI, despite the clear purposes and findings supporting former article 4590i, the trial court and the Court of Appeals impermissibly circumvented the findings and the plain language of former article 4590i and section 11.02.

c. A Rational Relationship Exists Between Section 11.02 and the Legislative Findings and Goals

Responsive to the above findings, the legislature sought to assuage the medical malpractice insurance crisis by making modifications in the medical, insurance, and legal systems, and to liability and damages laws as they relate to health care liability claims. The means of implementing such objectives is reasonable, with the benefits to the public commensurate with the resulting infringements to individual liberties. *Spartan Indus.*, 447 S.W.2d at 417; *Richards*, 301 S.W.2d at 602. Specifically, former article 4590i and section 11.02, in particular, represent a reasonable method of controlling the medical malpractice crisis in Texas., The benefit to the public (*i.e.*, fewer frivolous medical malpractice claims, increased availability and affordability of health care) is commensurate with the infringements on personal rights (*i.e.*, the limitations on damages on medical malpractice claims),

Thus, section 11.02 is rationally related to the goats sought to be achieved by the Legislature, and the legislature's goals are rationally related to the facts found by it. *Rose,* 735 S.W.2d at 252, The rational relationship between a legislative enactment and its purpose is

determined at the time of enactment; or the relationship to be questionable, it must be "fairly debatable" whether the enactment was rationally related to a legitimate government interest., See *Mayhew*, 964 S.W.2d at 938. Actions taken pursuant to police power should not be held to be automatically unconstitutional (under the open courts pravisian or any other provision). *Spann*, 235 S.W. at 515. Rather, they should be upheld as Iong as they are rationally related to the legislature's goals, *Id*. Therefore, in this case, as long as section 11.02, in particular, and former article 4590i, in general, are rationally related to the legislature's goals, they should not be found to be unconstitutional. As reflected in section 11.02, the legislature placed a reasonable restriction on the available damages to further the legitimate state interest of maintaining its health care industry for the benefit of its general population, as reflected in the legislative findings. Consequently, section 11.02 was rationally related to the legislature's findings and goals.

Section 11.02's damages cap should have been applied in this case, to limit Respondents' damages (and associated prejudgment interest) to $500,000, as adjusted by the CPI. However, the trial court erroneously refused to apply the limiting provisions, thereby thwarting application of the legislature's valid exercise of its police power. Because the legislature had already determined that the interests of the public required the passage of' sweeping legislation designed to address Texas' health care crisis, the trial court was not at Iiberty to decline to abide by this determination.. Accordingly, this Court should determine that the damages cap (including prejudgment interest) found at former article 4590i, section 11.02, is a valid exercise of the legislature's police power. And on that basis, the Court

should exercise its jurisdiction to consider this issue and, ultimately, reduce the jury's award to the statutorily mandated $500,000, as adjusted by the CPI. See TEX. REV. CIV. STAT, ANN. art. 4590i, §11.02(a), (b).

E. Issue No. 5 – Even if Affirmed, Judgment Should be Modified to Reflect Change in Pre- and Post-Judgment Interest Rate

Finally, even if affirmed, the judgment should be modified to reflect the change in Texas law to the pre- and past-judgment interest rate and applying the 5% interest rate to the interest award here. This issue is currently before this Court in the *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, No. 04-0575 (oral argument heard April 12, 200.5; presenting issue of "Whether the 2003 amendments to the Texas Finance Code, through House Bills 2415 and/or 4 of the 78th Legislature's Regular Session, require reformation of the judgment, even if affirmed, to reflect the change in the accrual rate of prejudgment and postjudgment interest."). [17] Hence, the Hospital awaits this Court's ruling on this issue in the *Hogue* matter and, in the interest of judicial economy, respectfully directs this Court to the pertinent argument and authorities – including the

[17] (See Brief on the Merits of Petitioner Columbia Medical Center of Las Colinas, Inc d/b/a Las Colinas Medical Center, No 04-0575, filed November 29, 2004, at ix) (available *online at* http://www supreme courts state tx us/ebriefs/files/20040575 htm, last visited January I, 2007) In *Hogue*, the trial court signed the Final Judgment on August 30,2002, and the Amended Final Judgment on December 3,2002; here, the trial court signed the Final Judgment on March 10, 2003, and a Judgment Nunc Pro Tunc on March 27,2003 (2 CR 4-13-48, 459-65; Apx Tabs B & C) (*See* Brief on the Merits of Petitioner Columbia Medical Center of Las Colinas, Inc d/b/a Las Colinas Medical Center, at 43) I-fence, in both matters the judgments were "subject to appeal" before the effective dates of House Bill 2415 and House Bill 4, i e , June 20,2003 and September 1,2003, respectively (*See* id) *See* Act of June 2,2003, 78th Leg R.S , H B , 2415 § 1 (Apx Tab D), and Act of June 2,2003, 78th Leg , R S , H B 4, art 6 (Apx Tab D) (*each amending* TEX FIN CODE ANN § 304 003(c)) *Cf Columbia Med Ctr of Las Colinas v Hogue*, 132 S W 3d 671, 688 (Tex App --Dallas 2004, pet: granted)

55.5 (instructing party may file brief filed in court of appeals as brief on the merits). (See Brief of Appellant, filed June 25,2004, at 41-51; Reply Brief of Appellant, filed November 22,2004, at 23-25).[18]

Far the reasons set forth in the briefing below and incorporated fully herein by reference, Texas law does not support the interpretation of the court of appeals, here, or by sister courts of appeals concluding the language "subject to appeal," when used to describe a judgment, means "capable of being appealed," when the well-recognized rules fox statutory interpretation are applied. *See Hawley*, 188 S.W.3d at 867. (See Brief of Appellant at 41-51; Reply Brief of Appellant at 23-25). Consequently, this Court should effectuate the Legislature's intent by applying the amended rates to the judgment here, subject to approval on and after the effective dates of HB 4 and **MB** 2415. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, *866* (**Tex.** 1999); *see also RepublicBank Dallas, N.A. v Interkal, Inc.*, 691 S.W.2d 605, *607* (Tex. 1985).

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, set this matter. for oral argument, upon submission or within a per

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[18] Petitioner brings this issue in good faith, however recognizing that courts have rejected this approach under different, but similar, facts, and that this and related issues are currently pending before this Court in other matters See, *e g , Bic Pen Corp* v *Carter*, 171 S W 3d 657, 677-80 (Tex App –Corpus Christi 2005, pet granted) (reviewing effective date of House Bill 2415 in light of Resolution 66, holding that House Bill 2415 did not take immediate effect but went into force ninety days after the adjournment of the 78th Regular Session of the Texas Legislature, and concluding judgment there was signed [on August 8,20031 and became appealable prior to the effective date of House Bill 2415*); Columbia Med Ctr of Las Colinas v Hogue*, 132 S W 3d 671, 688 (Tcx App –Dallas 2004, pet granted) (concluding former pre- and post-judgment interest rate applied, instructing "[b]ecause the judgment **was** both signed and subject to appeal before September 1, 2003, the amended statute setting post-judgment interest rates does not apply "); Playboy *Enterprises, Inc v Editorial Caballero, S A* de *C* V, 202 S W 3d 250,272-73 (Tex App.–Corpus Christi 2006, pet filed) (instructing House Bill 2415 and House Bill 4 both became effective on September 1,2003 and concluding appellant is not entitled to new judgment interest rates where final judgment was signed – and thus became capable of being appealed – on October 24, 2002, well before the effective date of the new rate calculation)

curiam opinion, reverse the trial court's judgment and remand this case for a new trial. Alternatively, and without waiving same, even if this Court affirms the judgment, Petitioner prays this Court first reduce the jury's award to the statutorily mandated $500,000, as adjusted by the CPI, pursuant to the caps set forth in Article 4590i, section 11.02, of the former Texas Revised Civil Statutes, and, further, modify the judgment to reflect the accrual rate of pre- and post-judgment interest, reducing that rate from 10% to 5%. Petitioner also prays for 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 January 3, 2007.

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