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 REPLY BRIEF ON THE MERITS

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Abbreviations

Dave Almquist ..... Almquist
William R. Anderson, M.D. ..... Dr. Anderson
Armando Arechiga, M.D. ..... Dr. Arechiga
William A. Burns, M.D. ..... Dr. Burns
Columbia Rio Grande Healthcare, L.P.
d/b/a Rio Grande Regional Hospital ..... Hospital or Petitioner
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
Billie Marek, M.D. ..... Dr. Marelc
Eric Raefsky, M.D. ..... Dr. Raefsky
Jesus A. Rodriguez, M.D. (Non-suited Defendant) ..... Dr. Rodriguez
Mary Christina H. Sadati (Non-suited Plaintiff) ..... Ms. Sadati
Julia Claire H. Trizzino (Non-suited Plaintiff) ..... Ms. Trizzino
Stephen L. Tucker, M.D. ..... Dr. Tucker
Domingo Useda, M.D. ..... Dr. Useda
Jose Luis Valencia, M.D. (Nan-suited Defendant) ..... Dr. Valencia

Record References

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

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

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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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Petitioner Columbia Rio Grande Healthcare, L.P). d/b/a Ria Grande Regional Hospital ("Hospital" or "Petitioner"), submits this Reply Brief on the Merits,' urging the Court grant review, and reverse the judgments of the court of appeals and trial court.

To the extent Petitioner may not reply to a particular assertion or argument or.citation by Respandcnts, such conduct should not be construed as acquiescence by Petitioner in Respondents' arguments or waiver by Petitioner af any argument. Page limitations imposed by the Texas Rules of Appellate Procedure required Petitioner. to select certain issues on which to focus in this Reply Brief on the Merits.

STATEMENT OF FACTS IN REPLY

Petitioner objects to Respondents' Statement of Facts to the extent it contains impermissible argument and mischaracterizes the record, See TEX. R. APP. P. 55.2(g) (statement of facts "must state concisely and *without argument* the facts and procedural background . . .") (emphasis added). (Respondents' Brief an the Merits ["Respondents' Brief"] at 1-3). Specifically, Petitioner rejects and denies that the Hospital's distribution policy for cancer-positive patliology reports required the pathologist to disseminate its report by *each* method listed in that policy. (See Respondents' Brief at 1). (P Ex, 1 at 1-2). Rather, as the court of appeals' dissenting opinion correctly recognized, the plain language of the policy indicates otherwise. *See also Columbia Rio Grande Healthcare v Hawley*, 188 S.W.3d 838, 871 (Tex. App.–Corpus Christi 2006, pet. filed) (Castillo, J., dissenting).

Petitioner also rejects the assertion concerning Dr. Rodriguez that the "Hospital produced no evidence that they followed their notification policy in any respect." (Respondents' Brief at 2). Rather, the evidence shawed that the Hospital complied with that policy, that the pathology report was placed in Ms. Hawley's chart on November 28,2000, that both Dr. Rodriguez and Dr. Arechiga had access to her chart for purposes of post-operative diagnosis and treatment during their continued care and treatment of Ms. Hawley from November 2000 to October 2001, that Dr. Arechiga was mailed and received a copy of the report by certified mail, and that the custom, habit, and practice for the distribution of positive cancel pathology reports was followed on a daily basis and took priority over other cases. (4 RR 8, 15; 5 RR 80-81, 84-87, 92-93 & [Depo. of Caldarola at 40-42]; 7 RR 71-72,

102-03, 106-14, 125-26; 3 RR 180, 21 RR Ex. 8 at 41-42, 49; 21 RR Ex. 7 at 38; 21 RR Ex. 10 at 22-23, 53-54). (Petitioner's Brief on the Merits ["Petitioner's Brief"] at 12-13).

ARGUMENT AND AUTHORITIES IN REPLY

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 on New and Independent Cause and the Doctrine of Lost Chance of Survival

A, Issue No. 1 – Refusal of Hospital's New and Independent Cause Instruction was Reversible Error as a Matter of Law Where Pleadings and Some Evidence Raised that Issue

Respondents argue the trial court did not err in refusing to instruct the jury on new and independent cause because the intervening cause was a concurring – and not superseding – cause. (Respondents' Brief at 6-19). Respondents and the court of appeals conclude there is no error because Petitioner allegedly failed to establish new and independent cause at trial, which is not the standard of review for submission of an inferential rebuttal defense. *(Id,.)*. Under Texas law, a party is entitled to an instruction on new and independent cause not only if it establishes same; rather, that instruction is required under Texas law if the pleadings and "some evidence" raise an issue concerning same. See TEX. R. CIV. P. 278; *Dew v. Crown Derrick Erectors, Inc.*, *208* S.W.3d 448, 455 (Johnson, J., Hecht, J., and Green, J., dissenting); see *also Union Pac. R.R. Co. v. Williams,* 85 S.W.3d *162,* 166 (Tex. 2002); *Elbaor* v. *Smith,* 845 S.W.2d 240, 243 (Tex. 1992); *Wright* Way *Constr. Co., Inc. v. Harlingen Mall Co.*, *799* S.W.2d 415, 422 (Tex. App.–Corpus Christi 1990, no writ).[2] Here,

[2] Notably, although the court of appeals' opinion sets forth the proper standard of review, set forth above, it then analyzed the evidence not to determine whether there was "some evidence" of new and independent cause as would **require** a jury instruction on same, but instead to determine whether the evidence *proved* or *established* new and independent cause, concluding that it did not See *Hawley*, 188 **S** W **3d** at 861-62 ("Dr Tucker's testimony did not tend

because the pleadings and some evidence raised an issue concerning new and independent cause, the trial court abused its discretion in refusing to instruct the jury on this issue as a matter of law. See TEX. R. CIV. P. 278; *Williams*, 85 S.W.3d at 166; *Elbaor*, 845 S.W.2d at 243; *Wright Way Constr. Co., Inc.*, 799 S.W.2d at 422.

1. *Hospital Presented Some Evidence that Doctors' Subsequent Negligence in Failing to Read Ms. Hawley's Medical Chart, Their Own Records, or Follow-up With Pathology Lab Concerning their. Patient for Eleven Months Was Not Reasonably Foreseeable*

Foreseeability requires more than viewing the facts in retrospect and charging a party to anticipate an extraordinary sequence of events whereby the defendant's conduct can be said to bring about the injury. *Dew*, 208 S.W.3d at 461 (Johnson, J., dissenting); see Doe *v. Boys Clubs*, 907 S.W.2d 472, 478 (Tex. 1995). The evaluation of evidence as to foreseeability and proximate cause generally involves practical inquiries based an common experience applied to human conduct. *Dew*, 208 S.W.3d at 461; see *City of Gladewater v.* Pike, 727 S.W.2d 514, 518 (Tex. 1987).

a. Some Evidence Raises Issue of New and Independent Cause

Here, the Hospital presented some evidence that the negligence of Dr. Rodriguez and Dr. Arechiga in failing to follow up on the pathology report during their subsequent care and treatment of Ms. Hawley from November 2000 to October 2001 was a superseding cause of her injuries because same was (1) not foreseeable to the Hospital and (2) cut off (and did not merely cooperate with) the effects of the Hospital's alleged negligence,

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to establish ."; "Dr Tucker's testimony tended to prove nothing mare than "; " the failure of the evidence to militate in any meaningful respect **toward** *a finding* of new and independent cause ") (emphasis added)

Some evidence places the pathology report containing the cancer diagnosis in Ms. Hawley's medical chart on November 28,2000, the day before her discharge post-surgery. (7 RR 71-72; 3 RR 180, 21 RR Ex. 8 at 49). Further, it is undisputed that Dr. Rodriguez and Dr. Arechiga continued to treat Ms. Hawley after November 2000 (when her cancer was first diagnosed by the pathologist) on a frequently basis, including subsequent hospitalizations (involving both Dr. Rodriguez and Dr. Arechiga) in January 2001 and March 2001, subsequent surgery by Dr. Rodriguez on January 16,2001, and subsequent offices visits and testing with Dr. Arechiga on July 31,2001 and September 25,2001. (3 RR 180, 21 RR Ex. 8 at 52-53; 4 RR 8, 21 RR Ex. 10 at 16, 34, 38; 5 RR 28, 55-64). Yet—incredibly—at all times during this continued care and treatment of Ms. Hawley, each doctor failed to (1) read the pathology report contained in her medical chart; (2) read the pathology report contained in their own office charts; (3) follow up on the whereabouts of that pathology report; or (4) otherwise follow up with pathology concerning the examination results and diagnosis of the 20-plus centimeter portion of Ms. Hawley's colon Dr. Rodriguez excised during surgery and sent for pathological evaluation in November 2000. (6 RR 74, 88, 94-96; Pl. Ex. 2). The hospital also p esented expert testimony that Dr. Rodriguez and Dr. Arechiga each had an independent duty to perform follow-up an the pathology reports. (6 RR 78-79, 88). As a result of their breach of this independent duty, Ms. Hawley's cancer diagnosis lay unread until a third physician at a separate hospital – eleven months later -- first read the cancer diagnosis in the pathology report contained in Ms. Hawley's medical chart. (5 RR 28, 63-64; 6 RR 94-96). By presenting this evidence at trial, the Hospital raised the issue of new and

independent cause, *See Bel-Ton Elec. Svcs., Inc v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996) (per.curiam). If the jury believed the Hospital's evidence, it could have concluded that the doctors' negligence in failing to read the pathology report or to follow up concerning the pathologist's diagnosis was a new and independent cause of Ms. Hawley's injuries. See *id.* at 481. Because this issue was critical to the Hospital's defense, the trial court's refusal to submit a new and independent cause instruction was reversible error. *See id.* The court of appeals incorrectly concluded there is no evidence in the record that raises the issue of new and independent cause, *See* id.; *cf. Hawley*, 188 S.W.3d at 861-62. Accordingly, this Court should reverse the trial court's judgment and remand this matter for a new trial.

b. Respondents' Authority is Factually Distinguishable and Supports the Hospital's Arguments

Respondents assert Dr. Tucker testified not that it was unforeseeable that the physicians wauld follow up, and therefore his "testimony is simply no evidence that it was unforeseeable that Hawley's doctors might not independently obtain the pathology report," (Respondents' Brief at 9). It was a reasonable inference from Dr. Tucker's testimony that it was foreseeable that the physicians would follow up on the pathology report on their patient rather than failing to read or consult the report contained not only in Ms, Hawley's hospital records from November 2000, but also within their awn chart for Ms. Hawley. (6 RR 67, 69, 74, 78-79, 85-86, 88, 94-96). *See Galvan v. Fedder*, 678 S.W.2d 596,598 (Tex. App.–Houston [14th Dist.] 1984, no writ) (citing C a m *v. Alviar*, 395 S.W.2d 821,823 (Tex. 1965)) (reviewing court must consider only evidence and inferences which support inclusion of new and independent cause and disregard all evidence and inferences to the contrary).

Likewise, it was also a reasonable inference from Dr. Tucker's testimony that it was unforeseeable that: the physicians would not follow up on the pathology report on their patient. See *id.* Respectfully, Respondents' exercise of semantics may be relevant if Petitioner was required to establish new and independent cause at trial to warrant a jury instruction an same, but it is irrelevant where Petitioner was required only to present "some evidence" of new and independent cause to warrant such instruction and Dr. Tucker's testimony does so. See TEX. R. CIV. P. 278; *Williams, 85* S.W.3d at 166; *Elbaor,* 845 S.W.2d at 243; *Wright Way Constr. Co., Inc., 799* S.W.2d at 422. Moreover, the only medical malpractice case cited by Respondents to generally support their assertion instead supports Petitioner's arguments, instructing:

> In order to determine whether there is any evidence to raise "new and independent cause," **this court must consider only the evidence and inferences which will support the inclusion of this element and disregard all evidence and inferences to the cantrarv. See** *Garza v. Alviar, 395* S.W.2d *821* (Tex. 1965).

Galvan, 678 S.W.2d at ,598(emphasis added). (*Cf.* Respondents' Brief at 9 & n.13). Thus, by Respondents' own authority, the court of appeals could consider only the evidence and inference that supported the inclusion of an instruction of new and independent cause and was required to disregard all evidence and inferences to the contrary, See *id.* The court of appeals failed to do so,[3] and this Court should not consider the evidence *set* forth in Respondents' Brief purporting to weigh against the inclusion of that instruction. (See, *e.g.,* Respondents' Brief at 10-11). Moreover, *Galvan v. Fedder* is factually distinguishable where

[3] *See Hawley,* 188 S W 3d at 861-62

Ms. Hawley's colon cancer developed naturally and not as a result of medical malpractice, as in *Galvan* where the decedent's subsequent hospitalization and surgery were caused by the first doctor's malpractice in prescribing the wrong dosage of medication. *See id* at 598-99. In short, Dr. Tucker's testimony that it was foreseeable that Dr. Rodriguez and Dr. Arechiga would follow up on the pathology reports coupled with their failure to do so for the next eleven-month time period during which they continued their care and treatment of Ms. Hawley is some evidence of new and independent cause,

2, *Not Concurring Cause – Court of Appeals Could Only Consider Evidence Supporting Instruction on New and Independent Cause*

Respondents next assert the trial court properly refused the new and independent cause instruction because the doctors' failure "to independently obtain Hawley's pathology report was at most a concurring cause . . ., because the physicians' omission at most 'cooperate[d] with the still-persisting original negligence of the defendant to bring about the injury.'" (Respandents' Brief at 12) (citation omitted). Without conceding same, this argument may be credible had the Hospital presented no evidence that it complied with the distribution policy for positive cancer pathology reports. However, to the contrary, the Hospital presented some evidence that it complied with that policy, that the pathology report was placed in Ms. Hawley's chart on November 28,2000, that both doctors had access to her chart for purposes of past-operative diagnosis and treatment from November 2000 to October. 2001, that Dr. Arechiga was mailed and received a copy of the report by certified mail, and that the custom, habit, and practice for the distribution of positive cancer pathology reports was followed on a daily basis and took priority over other cases. (4 RR 8, 1.5; 5 RR 80-81,

84-87, 92-93 & [Depo. of Caldarola at 40-42]; 7 RR 71-72, 102-03, 106-14, 125-26; 3 RR 180, 21 RR *Ex.* 8 at 41-42, 49; 21 RR *Ex.* 7 at 38; 21 RR Ex. 10 at 22-23, 53-54). *(See* Petitioner's Brief at 12-13). See *Hawley*, 188 S.W.3d at 871 (Castillo, I., dissenting). Therefore, because the Hospital presented some evidence to raise the issue of new and independent cause and its pleadings supported same, the trial court had no discretion but to submit an instruction concerning same. See TEX. R. CIV. P. 278; *Williams,* 85 S.W.3d at 166; *Elbaor,* 845 S.W.2d at 243; *Wright Way Constr. Co., Inc.*, 799 S.W.2d at 422.

3, *Soma Evidence Demonstrates Superseding Cause*

Respondents assert the Hospital's distribution policy for positive cancer pathology reports required distribution by *each* of the three methods enumerated, and that "the purpose of the redundant notification policy was to prevent this very result[.]" (See Respondents' Brief at 1, 14-15). Respondents argue the alleged intervening force's operation and its consequences are "in no way extraordinary" even if Dr. Rodriguez and Dr. Arechiga each had actual receipt and knowledge of Ms. Hawley's pathology report by two of the enumerated methods but not the third. Indeed, Respondents' characterize the doctors' negligence in failing to read Ms. Hawley's pathology report or follow up with same over the course of eleven months as "normal in view of the circumstances existing at the time." (Respondents' Brief at 15).[4] To the contrary, the Hospital presented of the extraordinary

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[4] Respondents' additional argument that there is no superseding cause requiring submission of the requested instruction because "there was no evidence that the doctors would be subject to liability to the plaintiff for such failure [to act]" is untenable where Dr. Tucker testified 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) (Respondents' Brief at 15) Indeed, Dr. Rodriguez **wns** a named defendant in this lawsuit but was later non-suited by all Plaintiffs (1 CR 67) (Petitioner's Brief at **xvi)**

nature of the doctors' negligence where it presented evidence that: Dr. Arechiga received a copy of the November 2000 pathology report via certified mail; that Ms. Hawley later visited Dr. Arechiga in December 2000, March 2001, July 2001, and September 2001, yet that pathology report was never reviewed; that Dr. Rodriguez received the pathology report to the extent the pathology lab secretary testified 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 over other cases yet that report was never viewed; that Dr. Rodriguez conducted subsequent surgery on Ms. Hawley on January 16, 2001, yet the pathology report in her file was never viewed; and that tlie report was placed in Ms. Hawley's chart the day before her discharge on November 29,2000 and both Dr. Rodriguez and Dr. Arechiga had continuing access to same yet failed to review that report until it was discavered in her chart by a third physician in October 2001, (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, 84-91). This evidence, among other evidence presented, is some evidence raising the issue of new and independent cause ignored by the court of appeals. *See* TEX. R. CIV. P. 278; *Williams,* 85 S.W.3d at 166; *Phan Son Van v. Pena,* 990 S.W.2d 751,754 (Tex. 1999); *Elbaor,* 845 S.W.2d at 243; *Hawley*, 188 S.W.3d at 870 n.3 (Castillo, J., dissenting); *Wright Way Constr. Co , Inc.*, 799 S.W.2d at 422. Indeed, the doctors' negligence was not brought into operation by any alleged wrongful act of the Hospital and operated independently of any such act. (See Respondents' Brief at 16, discussing *Dew,* 208 S.W.3d at 451). Finally, a trial court may not properly refuse to submit a question merely because the evidence is factually insufficient to support an affirmative

finding, and, consequently, the trial court erred in refusing the Hospital's requested instruction on new and independent cause where the pleadings and some evidence raised that issue. See *Hawley*, 188 S.W.3d at 870 n.3 (Castillo, J., dissenting) (citing *Garza*, 395 S.W.2d at 824).

4. *Error in Refusing Requested Instruction on New arid Independent Cause is Harmful Error*

The vital inquiry in any case involving proximate cause is whether the negligent act(s) set in motion a natural and unbroken chain of events that led directly and proximately to a foreseeable injury or result. *See* Hart *v. Van Zandt*, 399 S.W.2d 791 (Tex. 1965). If the evidence raises the issue of new and independent cause, it is reversible error not to define and include the term in the definition of proximate cause. *Cook* v. *Caterpillar, Inc.*, *849* S.W.2d 434, 440 (Tex. App.–Amarillo 1993, writ denied); see *also Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753,757 (Tex. 2006) (noting "harm can be presumed when meaningful appellate review is precluded because valid and invalid liability theories or damage elements are commingled"). Thus, because the issue of whether Dr. Arechiga's and Dr. Rodriguez's negligence were new and independent causes of Ms. Hawley's injuries was a fact issue to be determined by the jury and not to be resolved by the trial court as a matter of law, the failure to instruct the jury an new and independent cause was reversible error. See *id.*; *Sappington v. Younger Transp., Inc.*, *758* S.W.2d 866, 867 (Tex. App.–Corpus Christi 1988, writ denied); see *also Bel-Ton Elec. Svcs., Inc.*, 915 S.W.2d at 481. (Reply Brief of Appellant at 10-12).

5. *No Pleading Requirement to Submit New and Independent Cause Instruction; Alternatively, Hospital Properly Pleaded Same*

New and independent cause is an inferential rebuttal defense (and not an affirmative defense) that may be submitted to the jury as an instruction; it is one element to be considered by a fact finder in deter-mining whether there is proximate cause. See *James v. Kloos*, 75 S.W.3d 153, 161 (Tex. App.–Fort Worth 2002, no pet.); see *also Bed, Bath & Beyond, Inc.*, 211 S.W.3d at 756-57 (unavoidable accident is an inferential rebuttal issue); *Dew*, 208 S.W.3d at 456 (new and independent cause "has historically been viewed as part of the definition of 'proximate cause.'"). (Reply Brief of Appellant at 8-9). Hence, Petitioner, even though it pleaded a new and independent cause, was not required to plead the defense because it was an element of whether Petitioner proximately caused Ms. Hawley's damages. See *Buls v. Fuselier*, 55 S.W.3d 204, 211 (Tex. App.–Texarkana 2001, no pet.). (*Cf.* Respondents' Brief at 19). For the same reasons, it was not necessary to join Dr. Arechiga and Dr. Rodriguez as parties or responsible third parties to advance evidence of these new and independent causes of Ms. Hawley's injuries. *See* id.

Concerning this general issue, the court of appeals correctly noted that Hospital asserted the defense of new and independent cause for the first time six days before trial; Respondents asked the trial court to strike the pleading and also filed a motion in limine regarding any evidence that Mrs. Hawley's treating physicians were negligent in rendering treatment; the reporter's record shows that the trial court granted the motion in limine, at least in part, and ruled that the Hospital could put on testimony and other evidence of what Mrs. Hawley's treating physicians should have done under the circumstances but specifically

cautioned counsel not to tie the conduct of the treating physicians to the ward "negligence*" See *Hawley*, 188 S.W.3d at 858. (2 RR 34). Notably, thereafter the court of appeals affirmed the trial court's refusal to instruct the jury on new and independent not because of a lack of pleading (or proper pleading) but because it concluded the evidence "support nothing more than a finding of a concurring cause." *See id.* at 860-62.

6. *Conclusion: Refusal of New and Independent Cause Instruction is Harmful Error Requiring Reversal and Remand*

As ,Justice Johnson recently instructed:

> What we said lang ago bears repeating: In reviewing omissions from the jury charge, "we should view the charge as practical experience teaches that a jury, untrained in the law, would view it." [ ]. The discussions in reported cases of whether proximate cause instructions should or should not include new and independent cause language bear witness to the subtleties involved in what is a sufficient subsequent event or force to break the chain of causation between a party's negligence and an occurrence. To fail to instruct the jury on an established legal doctrine raised by the evidence and in serious contention at trial should not be held to be harmless error.

Dew, 208 S.W.3d at 461 (Johnson, J., dissenting) (citation omitted) (*quoting Galveston, H. & S.A. Ry. Co. v. Washington*, **63** S.W. 534,538 (Tex. 1901)); *see also Bed, Bath & Beyond, Inc.*, 211 S.W.3d at 756-59 (concluding submission of improper unavoidable accident instruction was harmless error where there was no clear indication improper instruction caused rendition of improper verdict).

Here, the issue of new and independent cause of Ms. Hawley's injuries was raised by the evidence; however, the charge failed to guide the jury on this issue, Wright *Way Constr. Co. Inc.*, 799 S.W.2d at 423. (2 CR 380). In fact, the question actually given tended to preclude such findings, Id. at 423. The question submitted was: "Was the negligence, if

any, of RIO GRANDE REGIONAL HOSPITAL, a proximate cause of injuries to ALICE H. HAWLEY?" (2 CR 381). The problem with this question is it does nat encoinpass the new and independent cause defense which was raised by the evidence. ***See*** id. at 424. The wording of the question is ambiguous and misleading because it suggests and implies that new and independent cause was not a defense, ***See*** id. The instruction tendered by Petitioner would have eliminated this deficiency. See *id* (2 CR 355-56). Therefore, the trial court's failure to instruct the jury an new and independent cause was error. See id.

Next, this Court must determine whether this error was reversible. See *id* To do so, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. *Island Recreational Dev. Corp. v. Republic of Texas Sav.* Assoc., 710 S.W.2d 551, 555 (Tex. 1986). Alleged error will be deemed reversible only if, when viewed in. the Iight of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment. *Island Recreational Dev. Corp.*, 710 S.W.2d at 555.

The evidence supported the new and independent cause component of proximate 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 trial court's failure to instruct on this matter effectively directed a verdict upon it. *Wright Way Constr. Co. Inc.*, 799 S.W.2d at 424, Based on the evidence, tlze jury could have found that Ms. Hawley's injuries were caused by a new and independent cause; *i.e.*, the negligence of her surgeon and treating physician in following up on her pathology report. *See* id. at *424.* Consequently, the trial

court's failure to instruct on this defense was such a denial of Petitioner's rights as was reasonably calculated and probably did cause the rendition of an improper verdict. *Southwestern Bell Tel. Co. v. Thomas*, 554 S.W.2d 672, 674 (Tex. 1977); *Wright Way Constr. Co. Inc.*, 799 S.W.2d at 424; TEX. R. APP. P. 81(b)(1). Harmful error almost certainly occurs if a defendant who has properly requested an appropriate instruction on a controlling defensive issue does not have that issue submitted to the jury. *Wright Way Constr. Co. Inc.*, 799 S.W.2d at 424, That is precisely what occurred at trial, and this Court must reverse the trial court's ,judgment and remand for a new trial. *Id.* at 424.

B. Issue No. 2 – Refusal to Instruct Jury on Lost Chance of Survival Where Pleadings and "Some Evidence" Raised Issue Was a Non-Discretionary Function and Constitutes Reversible Error

Respondents argue that because "lawyers for both parties openly acknowledged that 50%+ survivability was the critical hurdle" and the jury heard evidence to prove both that Ms. Hawley's chance of survival in November 2000 was more than *50%* (by Respondents) and less than 50% (by Petitioner), the trial court did not err in refusing to instruct the jury on lost chance of survival where it submitted the Texas Pattern Jury instruction on proximate cause. (See Respondents' Brief at 19-24). This argument fails far several reasons,

1. *Respondents Again Apply Erroneous Standard of Review*

First, Respondents again apply an erroneous standard of review, asserting "the majority opinion property concluded the trial court did not abuse its discretion in utilizing the Pattern Jury Charge "when no authority supported the requested instruction [*i.e.*, an the lost chance doctrine]." (Respondents' Brief at 21). Respondents also assert the trial court did

not err in refusing the requested instruction because to submit it "would have been redundant" where the trial court "properly instructed the jury that it had to be more likely than not that [Ms.] Hawley would not have suffered the injuries she did in the absence of the Hospital's negligence." (*Id.* at 20-21).

Despite Respondents' arguments to the contrary,[5] in *Kramer v. Lewisville Mem'l Hosp.*, this Court strongly admonished and held that recovery for lost chance of survival is neither authorized by the statutes of Texas nor under a separate common law cause of action. See *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397,398 (Tex. 1993); *see also Arguelles v. UT Family Med. Ctr.*, 941 S.W.2d 255,258 (Tex. App.–Corpus Christi 1996, no writ) (In Texas, if a person is going to die anyway, no cause of action for medical malpractice can be maintained against a treating physician,). Further, Texas jurisprudence is well-established that the trial court must charge the jury with the law governing the case, and a party is entitled to have controlling questions of fact submitted to the jury if they are supported by "some evidence." *See* TEX. R. CIV. P. *278; Williams,* 85 S.W.3d at 166-69; *Elbaor*, 845 S.W.2d at 243; *Wright* Way *Constr. Co., Inc.*, 799 S.W.2d at 422.[6] Importantly, the standard of review is whether "some evidence" supported the requested instruction where the pleadings and evidence raised the issue and whether the requested instruction was reasonably necessary to enable the jury to render a proper verdict. *See* TEX. R. CIV. P. 277, 278;

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[5] (See Respondents' Brief at 21-22)

[6] Hence, Petitioner rejects Respondents' argument that "the jury was not misled by the absence of the [lost chance of survival] instruction" where that is not the applicable standard of review (See Respondents' Brief at 22) Even the pattern jury charge, relied an by Respondents, instructs that on matters of law, the court must instruct the jury *See* PJC 40 3 (instructing: "but in matters of law, you must be governed by the instructions in this charge "); see also TEX R CIV P 226a

Williams, 85 S.W.3d at 166; *Texas Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000) (per curiam). This Court also has instructed that when evaluating whether a party is entitled to a jury instruction, the reviewing court must examine the record supporting the submission of the instruction and ignore evidence to the contrary. See *Elbaor*, 845 S.W.2d at 243.[7] The standard of review is **not** whether "no authority supported the requested instruction," as Respondents claim. (Respondents' Brief at 21).

Here, Respondents admit "some evidence" supported the requested instruction on the lost chance of survival doctrine where they admit both parties presented conflicting evidence on this issue, and that "lawyers for both parties openly acknowledged that 50%+ survivability was the critical hurdle." (Respondents' Brief at 22-23). Likewise, the court of appeals stated in its opinion that some evidence was presented of less than a 50% chance of survival. See, *e.g.*, *Hawley*, 188 S.W.3d at 863 ("The requested instruction accurately states the law and finds support in the pleadings and evidence."), Thus, by Respondents' and the court of appeals' own concessions, the trial court abused its discretion in refusing the requested instruction on last chance of survival. See *Elbaor*, 845 S.W.2d at 243; *cf. Dew*, 208 S.W.3d at 461 ("To fail to instruct the jury on an established legal doctrine raised by the evidence and in serious contention at trial should not be held to be harmless error.")."

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[7] For that reason, the court of appeals erred in considering any evidence that Ms Hawley's chance of survival in November 2000 was greater than 50% See *generally Hawley*, 188 S W 3d at 864 (analyzing trial court's refusal to instruct **jury** on "loss-of-chance," instructing: "**As** discussed above, legally-sufficient evidence was adduced at trial to prove that Mrs Hawley's lost chance of survival was greater than 50 percent ")

[8] Additionally, it is irrelevant to this analysis whether trial counsel for both parties "openty acknowledged [to the jury] that 50%+ survivability **was** the critical hurdle" and otherwise discussed same at trial (*See* Respondents' Brief at 22-23) Respondents fail to produce any authority supporting the proposition that an instruction regarding the law governing the case on an issue that admittedly involves a controlling question of fact and which is supported by some evidence and the pleadings is unnecessary if **trial** counsel discussed that issue with **the** jury at trial. ***(See generally***

2. *Respondents Misstate Hospital's Position Concerning Lost Chance of Survival Instruction*

Next, contrary to Respondents' assertions, Petitioner does not assert the last chance of survival instruction should be given in all tort cases. (See Respondents' Brief at 24). Instead, the lost chance af survival doctrine applies to all medical malpractice cases wherein plaintiff already suffers from some condition or illness for which the defendant health care provider has no responsibility and which independently limits or may limit her chance of survival to less than 50%. (See Petition for Review at 11-12; Appellant's Brief at 10-13, 24).[9] As this Court has instructed, under Texas law there is no cause of action for medical malpractice unless plaintiff proves her chance of survival was greater than 50% absent the defendant's negligence. *Kramer*, 858 S.W.2d at 400,404-405. The trial court must charge the jury with the law governing the case. See, *e.g.*, *Williams*, 85 S.W.3d at 166-69. Thus, the lost chance of survival instruction is required in medical malpractice cases because it is the law as expressed by this Court as a predicate to proving the cause of action, and in addition to proving proximate causation in a medical malpractice case, the plaintiff must prove that there was a greater than 50% chance of survival absent the defendant's negligence. *Kramer*, 858 S.W.2d at 400, 404-405; see *also Park* Plnce *Mem'l Hosp.*, 909 S.W.2d at 511. Accordingly, where some evidence is presented that plaintiff's chance of survival was less

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Respondents' Brief at 19-24)

[9] *See Park Place Mem'l Hosp v Milo*, 909 S W 2d *508,511* **(Tex** *1995);Hodgkins v Bryan*, *99 S W* 3d **669, 673 (Tex App –**Houston [14th Dist] 2003, no pet) (citing *Kramer*, 858 S W 2d at 400, 404-405) Ironically, Respondents' assertions, if applied, would render a lost chance instruction superfluous in all tart cases, asserting "[t]he standard definitions and instructions in the charge are perfectly adequate to tell the jury not to find causation unless is it more likely than not" (Respondents' Brief at 24)

than 50% absent the defendant's negligence, the definition of proximate cause is inadequate by merely stating "more likely than not." *See id.*

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

In short, the court of appeals' conclusion that the trial court did not abuse its discretion in refusing the Hospital's loss-of-chance instruction because "no assistance [*i.e.*, guiding precedent] was available to guide the trial court to the proper result"[10] is misplaced where this Court instructs a litigant:is entitled to have controlling questions of fact submitted to the jury if they are supported by "some evidence" and that this is a substantive, *non-discretionary* directive to trial courts if the pleadings and any evidence support them. See *Williams, 85* S.W.3d at 166; *Elbaor,* 845 S.W.2d at 243. (See Appellant's Brief at 4). Without the requested jury instruction on lost chance of survival, it is impossible to determine whether the jury awarded Mrs. Hawley for a lost chance, which is prohibited by Texas law. See *Crown Life Ins. Co.* v. *Casteel*, 22 S.W.3d 378,388 (Tex. 2000); *Kramer*, *8.58* S.W.2d at 398, 400. Accordingly, the trial court erred in refusing to submit the Hospital's requested jury instruction and such refusal probably led to the rendition of an improper judgment, requiring reversal. See *Park Place Mem'l Hosp.*, *909* S.W.2d at 510; *Kramer*, 858 S.W.2d at 400; *Arguelles*, 941 S.W.2d at 258; see *also Bel-Tor?Elec. Svcs., Inc.*, 915 S.W.2d at 481.

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

C. Issue No. 3 – Submission of Liability Question (Question 1) Without Proper Limiting Instruction Concerning Conduct of Dr. Valencia, an Independent Contractor Physician, Constitutes Reversible Error"

Under established Texas law, a hospital is not liable for an independent contractor physician's negligence. *E.g.*, Baptist *Mem'l Hosp. Sys. v. Sampson,* 969 S.W.2d 945, 948 (Tex. 1998); *Denton v. Big Spring Hosp. Corp.*, 998 S.W.2d 294,296 (Tex. App.–Eastland 1999, no pet.); see *also Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778,792 (Tex. 2001) (Mecht, J., Owen, J., concurring) (employer of an independent contractor is not liable for physical harm caused to another by an act or omission of contractor or his servants),

Respondents contend or imply there was no evidence Dr. Valencia was negligent. (See Respondents' Brief at 26-27; Brief of Appellees at 43). But, the facts raised whether his conduct was at issue in the alleged failure to ensure that the pathology reports were provided to Ms. Hawley's treating physicians. Dr. Valencia was an employee of Useda and Associates, a pathology partnership located in the Hospital, although its physicians were partnership employees and not hospital employees, (7 RR 45-46). Dr. Valencia diagnosed Ms. Hawley with adenocarcinoma of the colon (four or five positive lymph nodes). (7 RR 69; 6 RR 13). Dr. Valencia 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 as alleged by Respondents, mandatory according to hospital policy, (See Respondents' Brief at 1-2). The Hospital changed its policy manual in July 2000 with respect to pathology reports diagnosing cancer. (7 RR 98). Specifically, it required: (I) the

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[1] On this issue, Respondents appear to adopt their prior briefing, verbatim (*Compare* Respondents' Brief at 24-27 *with* Brief of Appellee at 40-43)

pathologist verbally notify the physicians of record; (2) the pathologist's secretary send the report via facsimile to the physicians of record; (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). Thus, the jury may have imputed Dr. Valencia's acts or omissions, if any, to the Hospital, in failing to follow the policy, Hence, the Hospital properly requested an instruction that "'In considering the negligence of [the Hospital], do not consider the acts ox omissions of the pathologist, Dr. Valencia." (2 CR 368-69; 6 RR 36). *See* TEX. R. CIV. P. 277,278; *Williams,* 85 S.W.3d at 166; *Mandlbauer,* 34 S.W.3d at 912. Such limiting instruction was proper and necessary where the evidence canclusively established that Dr. Valencia was an independent contractor for whom the Hospital was not responsible under Texas law. *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).

Among other things, Respondents contend that the trial court did not submit a single liability question incorporating multiple theories of liability because the charge did not incorporate any theory of liability beyond simple negligence, (Respondents' Brief at 26; Brief of Appellees at 42). However, that argument also wholly fails to address the possibility that the jury may have imputed Dr. Valencia's negligence, if any, to the Hospital, Here, the charge mixed arguably valid and invalid theories of negligence (*i*.e., negligence committed by agents for whom the Hospital could be held vicariously liable as apposed to negligence committed by independent contractors). See *Casteel*, 22 S.W.3d at 388. The failure to provide the requested instruction is harmful because this Court cannot determine whether the

jury found liability based on the conduct of Dr. Valencia, an invalid legal theory, or the conduct of the Hospital* See *id.* Thus, having timely objected and submitted a requested instruction, a new trial.is required, See *id.; see also Harris County v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002).

D. Issue No. 4 – Medical Malpractice Statute's Damages Cap Does Not Violate Open Courts Provision of Texas Constitution as Applied Here, and Trial Court Erred in Refusing to Apply that Cap in the Judgment

1. *Proper Exertion of Police Power is Constitutional*

Longstanding Texas precedent holds that exertion of the police power upon subjects lying within its scope, in a proper and lawful manner, is due process of law. *Houston & T.C.* Ry. *Co.* v. *City of Dallas*, 98 Tex. 396, 413, 84 S.W. *648,652* (1905). The decisive question is whether the action of the legislature is sustained by the existence of facts affecting the public welfare sufficient to justify such an application of the police power, and thus, comports with due process. *Houston & T.C. Ry. Co.*, 98 Tex. at 415. The power has limitations; it is commensurate with, but does not exceed the duty to provide for the real needs of the people in their health, safety, comfort, and convenience. Id The test involves consideration of (1) that the interests of the public generally, as distinguished from those of a particular class, require such interference; and (2) that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. *Houston & T.C. Ry. Co., 98* Tex. at *41*6, 84 S.W. at 654. This Court has also recognized the same standards in open courts analysis, See *Lebohm v. City of Galveston*, 154 Tex. 192, 199,275 S.W.2d 951, 955 (1955). This Court explained:

> [L]egislative action withdrawing common-law remedies for well-established common law causes of action for injuries to one's "lands, goods, person or reputation" is sustained only when it is reasonable in substituting other remedies, ***or*** when it is a reasonable exercise of the police power in the interest of the general welfare, Legislative action of this type is not sustained when it is arbitrary or unreasonable.

Lebohm, 154 Tex. at 199,275 S.W.2d at 955 (emphasis added).

2. *No Police Powers Analysis Undertaken in Lucas v. United States*

Respondents claim that this Court considered whether Article 4590i's damage cap is a valid exercise of the state's police power through the open court's analysis applied in *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). (Respondent's Brief on the Merits at 29). Respectfully, a review of *Lucas* opinion, analysis, and Justice Phillips' dissent reveals that this Court conducted the *Sax v. Votteler*,[12] two-pronged open court's analysis, without reference to the *Lebohm* police power prong. *See Lucas*, 757 S.W.2d at 690-92,718-20, The majority of this Court concluded the statute failed to provide any adequate substitute to obtain redress, that the stated purpose to "assure that awards are rationally related to actual damages" was a judicial rather than a legislative function, and the damage caps were inconsistent with and violated article I, section 13, of the Texas Constitution. *Id.* at 690-92.

As Justice Phillips recognized, however, in the absence of a reasonable alternative remedy, longstanding Texas precedent required an analysis of a separate inquiry: "The courts must independently determine if the legislative action constitutes a reasonable exercise of the police power." *Lucas*, 757 S.W.2d at 718 (citing *Lebohm v. City of Galveston*, 154 Tex. 192, 199,275 S.W.2d 951,955 (1955)). Thus, even in the absence of a redress, if the

[12]648 S W 2d 661 (Tex. **1983)**

Legislature properly exercised its police power, the statute is constitutional. See id.

Justice Phillips conducted the police power analysis:

> The cap addressed an important public issue. The Medical Liability and Insurance Improvement Act was our state's response to a national problem of maintaining the delivery of affordable and comprehensive health care to all citizens in light of rapidly increasing insurance costs far health care providers, Forty-eight other states passed some type of legislation during the 1970's in response to this crisis, and twelve of those states also enacted damages limitations. The need for available and affordable health care is of critical importance to all people, and the Legislature was addressing an important state interest in enacting this statute,
>
> The Legislature both perceived and articulated this interest in enacting the cap. Two years before the law was passed, the Legislature established the Professional Liability Study Commission. The Commission held hearings, gathered evidence and issued a report to the Legislature, with three members writing separate minority reports. Relying an the Commission's work, the Legislature found a '"medical malpractice insurance crisis" in Texas which "has had a material adverse effect on the delivery of medical and health care in Texas," including both "significant reductions of availability of medical and health care services" and an increase in "the cost of medical care bath directly through fees and indirectly through services provided for protection against future suits or claims." A detailed explanation of the legislative purpose underlying the statute is set forth in the legislative findings.

Lucas, 7.57 S.W.2d at 719 (Phillips, J., dissenting) (citing TEX. REV. CIV. STAT. art. 45901, § 1.02(a)(5), (6), (9)). ,Justice Phillips concluded the cap bears a real relationship to a rationally perceived malpractice crisis, and that the primary purpose of the cap was not to protect health care providers, but to protect the public. *Lucas*, 757 S.W.2d at 719. Relying on the findings and purpose af article 4590i, Justice Phillips further' concluded the Legislature was reasonable in concluding that: (1) the cap would make insurance protection available "at reasonably affordable rates," thereby making "affordable medical and health care more accessible and available to the citizens of Texas"; and (2) cheaper and more

widely available insurance coverage would result in greater health care services being provided to more citizens in more areas at more economical charges, all to the public benefit. Id. (citing TEX. REV. CIV. STAT. art. 4590i, § 1.02(a)(7), (10), (11), (b)(4), (5)).

Justice Phillips further emphasized that the Legislature attempted to meet a complex social problem by limiting damages "in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis." *Id.* (citing TEX. REV. CIV. STAT. art. 4590i, § 1.02(a)(3)). Thus, in cancluding that the damages caps were reasonably related, or an "acceptable fit" to a rationally perceived social evil, he further concluded that the cap is "a reasonable exercise of the police power in the interest of the general welfare." Id. at 720.

Accordingly, although there is no reasonable alternative remedy, because the damages cap is a valid exercise of the police power of the Legislature, it should have been applied ta limit the damages awarded against Petitioner.

E. Issue No. 5 – Petitioner Awaits Court's Ruling an This Issue Currently Before this Court in other Matters

As set forth in Petitioner's Brief, this issue is currently before this Court in *Columbia Med. Ctr. of Las Colinas v. Hogue,* No. 04-0575. See *Columbia Med. Ctr. of Las Colinas v. Hogue*, 132 S.W.3d 671,688 (Tex. App.–Dallas 2004, pet.,granted [oral argument heard April 12,20051). (Petitioner's Brief at 46-47). 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 relevant legislative history of HB 2415 and HB 4 – set forth in its Brief of Appellant and Reply Brief of Appellant and incorporates same herein by reference, See TEX. R. APP. P. 38.9, 55.5. ***(See***

Brief of Appellant, filed June 25,2004, at 41-51; Reply Brief of Appellant, filed November 22,2004, at 23-25).[13]

WHEREFORE, PREMISES CONSIDERED, Petitioner Columbia Rio Grande Wealthcare, 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 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 farmer 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 Iaw or in equity, that this Court deems just.

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[13] 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 [oral argument heard Feb. 13, 2007]) (reviewing effective date of I-louse 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 L egislature, and concluding judgment there was signed [on August 8, 2003] and became appealable prior to the effective date of House Bill 2415); *Columbia Med Ctr of Lns Colinas v Hogue*, 132 S W 3d 671,688 **(Tex** 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 [response to petition fur review filed March 2, 2007]) (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)

Respectfully submitted,

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I certify that a true and correct copy of the foregoing document has been served upon the counsel listed below on March 12, 2007.

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