

NO. 08-0248

In the Supreme Court of Texas
Austin, Texas

**Carmelita Escalante, M.D., E. Edmund Kim, M.D., Edgardo Rivera, M.D.,
and Franklin C. Wong, M.D.,
Petitioners,**

v.

**Donita Rowan and James Niese,
Respondents.**

On Petition for Review from the Court of Appeals
for the Fourteenth District

RESPONDENTS' BRIEF ON THE MERITS

Peter M. Kelly (Lead Counsel)
State Bar No. 00791011
LAW OFFICE OF PETER M. KELLY, P.C.
1005 Heights Boulevard
Houston, Texas 77008
Telephone: 713.529.0048
Facsimile: 713.529.2498

Walter James Kronzer, III
State Bar No. 11735001
WALTER JAMES KRONZER, III, P.C.
3000 Wesleyan, Suite 351
Houston, Texas 77027-5753
Telephone: 713.622.5766
Telephone: 713.622.5445

Counsel for Respondents

TABLE OF CONTENTS

Table of Contents	i
Index of Authorities	ii
Response Issues Presented	iv
Statement of Facts	1
Summary of Argument	5
Argument and Authorities	5
I. This case does not merit this court’s review—all it is really about is whether summary judgment can be granted on a ground not asserted in the summary judgment motion.	5
II. In addition to asking this court to rewrite their motion for summary judgment, the Doctors ask this court to adopt an inhumane rule regarding terminally ill victims of medical negligence.	6
III. The summary judgment was improper because it was not addressed to Rowan and Niese’s causes of action.	7
A. Standard of review: this issue is to be reviewed <i>de novo</i> , and the burdens remain on the defendant doctors.	7
B. Rowan and Niese’s causes of action are for degradation or diminishment of quality of life, NOT for loss of chance of survival or cure.	8
C. The Doctor’s motion for summary judgment was directed at causes of action not asserted by Rowan and Niese, and should have been denied.	10
IV. The Doctors have waived any argument relating to the denial of their motion to dismiss for lack of subject matter jurisdiction.	12
Conclusion and Prayer	13
Certificate of Service	15

INDEX OF AUTHORITIES

Cases	Page
<i>Casso v. Brand</i> , 776 S.W.2d 551 (Tex. 1989)	8, 11
<i>Chessher v. Southwestern Bell Tel. Co.</i> , 658 S.W.2d 563 (Tex. 1983)	11
<i>Escalante v. Rowan</i> , 251 S.W.3d 720 (Tex. App.--Houston [14th Dist.] 2008, pet. filed)	7
<i>Gibbs v. Gen'l Motors Corp.</i> , 450 S.W.2d 827 (Tex. 1970)	8, 11
<i>Helm v. Swan</i> , 61 S.W.3d 493 (Tex. App.--San Antonio 2001, pet. denied)	11
<i>Kramer v. Lewisville Mem'l Hosp.</i> , 858 S.W.2d 397 (Tex. 1993)	10
<i>M.D. Anderson Hosp. v. Willrich</i> , 28 S.W.3d 22 (Tex. 2000)	8
<i>McConnell v. Southside Indep. Sch. Dist.</i> , 858 S.W.2d 337 (Tex. 1993)	11
<i>Natividad v. Alexis</i> , 875 S.W.2d 695 (Tex. 1994)	7
<i>Parrott v. Caskey</i> , 873 S.W.2d 142 (Tex. App.--Beaumont 1994, no writ)	9
<i>Ramos v. Richardson</i> , 228 S.W.3d 671 (Tex. 2007)	12
<i>Randall's Food Mkts., Inc. v. Johnson</i> , 891 S.W.2d 640 (Tex. 1995)	8
<i>Volkswagen of Am., Inc. v. Ramirez</i> , 159 S.W.3d 897 n.1 (Tex. 2004)	12

Statutes and Rules

TEX. R. APP. P. 55.2 12-13

TEX. R. CIV. P. 166a(c) 5, 8, 12

TEX. CIV. PRAC. & REM. CODE § 74.051 2

TEX. CIV. PRAC. & REM. CODE § 101.106(f) 3

RESPONSE ISSUE PRESENTED

Response Issue No. 1:

The intermediate court properly found the trial court's summary judgment was erroneous because the motion for summary judgment was not addressed to the causes of action asserted by Rowan and Niese. The doctors have given the court no legal or ethical basis for holding that Rowan and Niese did not suffer damages separate and distinct from the loss of chance.

STATEMENT OF FACTS

Donita Rowan recently lost her fight with cancer. This lawsuit is about whether her doctors should have diagnosed the cancer's metastasis earlier, and whether their failure to make that diagnosis has caused a degradation or diminishment in her and her husband's quality of life.

Rowan came under the care of Carmelita P. Escalante, M.D., E. Edmund Kim, M.D., Edgardo Rivera, M.D., and Franklin C. Wong, M.D. (the defendant "Doctors") in November 2001. At the time, she had been diagnosed with Stage II breast cancer. 2d Supp. CR 4. The Doctors treated Rowan through May 2003. *Id.* Rowan complained to the Doctors of severe and unremitting fatigue throughout the course of her treatment. *Id.*

While under the Doctors' care in September 2002, Rowan underwent a bone scan. *Id.* At least one of the Doctors interpreted the bone scan as normal. *Id.* The bone was actually abnormal. *Id.* An ordinarily prudent physician or oncologist would have recognized the bone scan's abnormality, and realized it was highly suspicious for a metastatic disease. *Id.* As a direct result of the incorrect interpretation of the bone scan, Rowan did not receive appropriate medical care. *Id.*

While still in Doctors' care in May 2003, Rowan underwent a second bone scan. 2d Supp. CR 5. This bone scan was reported as "stable nonspecific osseous uptake in the left posterior first rib, essentially unchanged since previous study of 9/4/02." *Id.* Like the first bone scan, the second bone scan was not reported as highly suspicious for metastatic disease. *Id.* Like the first bone scan, an ordinarily prudent physician or oncologist would have

recognized the second bone scan's abnormality and realized it was highly suspicious for metastatic disease. *Id.*

Though further testing was indicated by both bone scans and would have been medically appropriate, Doctors did not order any. *Id.* Defendants Rivera and Escalante did not perform CA 27-29 or 15.3 cancer blood marking testing. Such testing would have determined the existence of Rowan's metastatic disease. *Id.* Doctors did not order or obtain any abdominal CT scans to determine if abdominal masses existed. *Id.* Rowan's medical condition indicated both cancer marker blood testing and abdominal CT scans. *Id.*

Rowan and her husband, James Niese, sued the Doctors on November 12, 2004. CR 2. They had duly given the requisite statutory notice. *See* TEX. CIV. PRAC & REM. CODE § 74.051; 2d Supp. CR 2. They alleged each physician was negligent in

- a. failing to properly diagnose Rowan's medical condition;
- b. failing to properly treat Rowan's medical condition;
- c. failing to timely and appropriately recommend further diagnostic testing; and
- d. failing to properly and timely recommend further treatment.

2d Supp. CR 7-8. Rowan and Niese seek damages not for the "loss of chance," but rather for the degradation of the quality of their lives occasioned by the ongoing, severe tumor-related symptoms that, they allege, would have been avoided had the Doctors not violated the standard of care. 2d Supp. CR 8-9.

Each defendant duly filed an answer. CR 10-21. On May 25, 2005, the Doctors together filed a motion to dismiss the case, alleging they are immune from suit as state

employees. CR(A) 120-29^{1/}; *see* TEX. CIV. PRAC. & REM. CODE § 101.106(f). On May 30, it was submitted to the court without oral hearing. Defendants-Appellants Brief in No. 14-05-828-CV at vi, “Statement of the Case.” The hearing was 56 before the deadline for motions that could trigger the automatic statutory stay, calculated as 180 days from Escalante’s original answer, on July 26, 2005.

By order signed July 19, the trial court denied the motion to dismiss. CR(A) 181. On August 4, Doctors filed their notice to appeal the interlocutory order. CR(A) 186.

Subsequently, the Doctors moved for a standard summary judgment on the ground that Rowan and Niese were not asserting a cause of action recognized under Texas law-- specifically, that damages for a loss of chance of survival or cure are not available under Texas law. CR 23-25. As summary judgment proof, the Doctors appended the affidavit of defendant Rivera, which was directed solely at the loss of chance of survival or cure. CR 28-30.

The Rowan and Niese responded, but the trial court granted summary judgment in the Doctors’ favor. CR 52. After the court overruled Rowan and Niese’s motion for reconsideration and for new trial and refused to consider the supplemental expert affidavits they submitted, CR 222, this appeal ensued. CR 226.

Rowan and Niese submitted two expert affidavits in response to the Doctors’ motion for summary judgment, by John Eckardt, M.D., a board certified medical oncologist, and Michael J. Foley, M.D., a diagnostic radiologist. Dr. Eckardt testified that with respect to

^{1/}Record references to “CR(A)” are to the clerk’s record in the intermediate court’s number 14-05-828-CV, with which this appellate cause has been consolidated.

defendants Escalante and Rivera, the standard of care required (1) continued monitoring for evidence of recurrent tumors, and 2) ordering blood work, bone scans, and CT scans, depending on the patient's symptoms. CR 40-41. Eckardt noted that Escalante and Rivera failed to perform those acts, and stated that "it is more likely than not that the delay in diagnoses cause [Rowan] to have prolonged tumor related symptoms that could have been treated, improving her quality of life." CR 41.

With respect to defendants Wong and Kim, Dr. Eckardt stated that the standard of care requires a radiologist to read a bone scan correctly. CR 41. Dr. Eckardt concluded that Wong and Kim failed to read the bone scan correctly, which resulted in a delay in diagnosing that the tumors had metastasized to other organs in Rowan's body. *Id.*

Dr. Foley, Rowan and Niese's other expert, served as the Assistant Chairman and then Chairman of the department of radiology at Brandon Medical Center in Florida. He is also board certified in radiology, nuclear medicine, and interventional radiology. With respect to Wong and Kim, he testified that the standard of care for a radiologist reading a bone scan is that it be done correctly to identify all information relevant to the diagnosis and treatment of the patient. He concluded that Kim's reading of the September 4, 2002 bone scan, and Wong's reading of the May 2, 2003, bone scan, both fell below that standard. CR 46-47. The trial court sustained the Doctors' objections to the affidavits as conclusory. CR 53-54.

SUMMARY OF ARGUMENT

Rowan and Niese seek damages for the degradation and diminishment of the quality of life occasioned by the Doctors' failure to diagnose the cancer metastasis. The defendant doctors moved for a traditional summary judgment on the ground that a cause of action for loss of chance of survival or cure is not recognized by Texas law, and they submitted an expert affidavit opining that the Doctors' misdiagnosis did not cause any loss of chance of survival or cure. The motion was thus directed at a cause of action *not* asserted by Rowan and Niese; the dismissal of Rowan and Niese's claims, then, could have only been on grounds not asserted in the motion. Such a summary judgment is improper and was properly reversed by the intermediate court.

ARGUMENT AND AUTHORITIES

- I. **This case does not merit this court's review--all it is really about is whether summary judgment can be granted on a ground not asserted in the summary judgment motion.**

Rowan and Niese seek damages for the non-death injuries, separate and apart from "loss of chance" injuries, caused by the Doctors' failure to timely diagnose the recurrence of Rowan's bone cancer. The Doctors moved for traditional summary judgment solely on the loss-of-chance injury. CR 22-29. Absent from the motion for summary judgment are a) any grounds relating to the non- death injuries, or b) any arguments similar to those made in the Doctors' brief on the merits trying to conflate the two categories of damages.

The Fourteenth Court of Appeals properly applied Texas Rule of Civil Procedure 166a and found that the Doctors had moved for summary judgment on a claim *not* asserted in

Rowan and Niese's petition. The Doctors now ask this court to expend its scarce resources to bail them out of the predicament they put themselves in. If they wanted appellate review of the issue of whether non-death injuries are subject to the loss of chance doctrine, they should have made that argument to the trial court, whether in a more thorough motion for traditional summary judgment, or in a motion for no-evidence summary judgment. If that issue is important to the jurisprudence of the state, this court would have to suspend the Texas Rules of Civil Procedure to reach it. The Doctors have made no showing of why they should be accorded that special dispensation.

II. In addition to asking this court to rewrite their motion for summary judgment, the Doctors ask this court to adopt an inhumane rule regarding terminally ill victims of medical negligence.

If the issue presented by the Doctors were actually properly before this court, consideration of a hypothetical would aid the court in disposing of the petition for review. Suppose that Rowan's bone scans had revealed metastasis in her right leg, and that amputation of the leg would raise her chance of survival from 5% to 25%. As a result of medical negligence, the surgeons mistakenly removed her left, cancer-free leg instead. The right leg still had to be amputated, but the trauma of having both lower extremities removed made her chance of survival only 20%. The defendant doctors would have this court hold that the erroneous amputation is not an injury for which damages may be had--that once a patient is mortally ill, that all damages are referable only to the "final outcome."

The hypothetical Rowan, just like the real one, suffered two distinct injuries: the loss of chance, for which no recovery may be had in Texas, and the degradation of her quality of

life occasioned by the medical negligence. To prevail in court, both the hypothetical and real Rowans must prove by a preponderance of the evidence that the medical negligence caused the injury. Both the hypothetical and real medical professionals have the opportunity to challenge the evidence of causation by motions for summary judgment. The real medical professionals here, though, challenged only a cause of action for loss of chance; they did not challenge the cause of action for the distinct, non-wrongful-death injuries.

The Doctors here ask the court to adopt a rule of startling misanthropy: if a patient has less than a 51% chance of survival, no amount of medical negligence in the patient's treatment will ever yield a cause of action for damages. That is not Texas law, and it should not be. The intermediate court sensibly got it right. *See Escalante v. Rowan*, 251 S.W.3d 720, 724 (Tex. App.--Houston [14th Dist.] 2008, pet. filed) (attached as Tab C to the Doctors' Brief on the Merits).

III. The summary judgment was improper because it was not addressed to Rowan and Niese's causes of action.

As set forth in the intermediate court's opinion, the Doctors' motion for summary judgment was not directed at the causes of action actually asserted by Rowan and Niese. The trial court's grant of summary judgment was thus improper.

A. Standard of review: this issue is to be reviewed *de novo*, and the burdens remain on the defendant doctors.

Standard summary judgments are reviewed *de novo*. *Natividad v. Alexis*, 875 S.W.2d 695, 699 (Tex. 1994). A standard summary judgment is proper only when a movant established there is no genuine issue of material fact and that it is entitled to judgment as a

matter of law. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640,644 (Tex. 1995). When the movant does not meet its burden of proof, the burden does not shift to the nonmovant. *M.D. Anderson Hosp. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). The burden shifts to the nonmovant only after the movant has established it is entitled to summary judgment as a matter of law. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). Only then must the nonmovant produce any summary judgment evidence to raise a fact issue. “[The question on appeal . . . is not whether the summary judgment proof raises [a] fact issue[[],] . . .but is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more elements of the plaintiff’s cause of action.” *Gibbs v. Gen’l Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). Here, the Doctors moved for a traditional motion for summary judgment: the term “no evidence” appears nowhere in the document; there is no reference at all to Texas Rule of Civil Procedure 166a(I); and the Doctors attached evidence (in the form of an affidavit) in their attempt to meet their burden of proof.

B. Rowan and Niese’s causes of action are for degradation or diminishment of quality of life, NOT for loss of chance of survival or cure.

Rowan and Niese pleaded for damages resulting from the degraded quality of life they suffered as a result of the Doctors’ misdiagnosis and mistreatment of Rowan’s condition.

Their original petition states:

8.01 As a proximate result of the negligent acts and/or omissions of Defendants as set out above, Plaintiff Donita Rowan has suffered great physical pain and suffering, and will likely suffer great pain and suffering in the future. Moreover, she has suffered mental anguish in the past and will continue to do so. She has suffered loss of enjoyment

of life, loss of wage earning capacity and medical expenses, and will likely succumb to an otherwise unnecessary, premature death.

8.02 As a proximate result of the negligent acts and/or omissions of Defendants as set out above Plaintiff James Niese has suffered and will continue to suffer the loss of advise, counsel and other pecuniary elements of damages from his wife, Plaintiff Donita Rowan. He has and will continue to suffer mental anguish, loss of consortium, loss of inheritance, loss of household services and the loss of her financial contributions to the family unit and to him personally.

CR 8.

In their response to the motion, filed on November 7, Rowan and Niese make crystal clear that they are not seeking damages for loss of chance of survival or cure:

Notwithstanding the Defendants' assertions to the contrary, **Plaintiffs are not seeking damages for any loss of chance** resulting from the failure to timely diagnosis [sic] the metastatic disease in question as discussed above. They bring their cause of action in this instance for the damages which they suffered as a result of the delay in properly diagnosing her condition. The damages incurred by the Plaintiffs include, but are not limited to, the prolonged tumor related symptoms, such as continued fatigue, that could have been treated had the diagnosis of metastatic disease been made on a more timely basis. This would have improved the Plaintiff Donita Rowan's quality of life during the time that she sought treatment for the metastatic disease in question.

CR 33-34 (emphasis added). To further drive home the point that they are not seeking damages for loss of chance of survival or cure, Rowan and Niese amended their petition to remove the assertion in the original petition that Rowan "will likely succumb to an otherwise unnecessary, premature death." *Compare* CR 8 with 2d Supp. CR 8-9. Given these two filings, that Rowan and Niese were not seeking damages for loss of chance of survival or cure could not have been made more explicit.

Rowan and Niese's causes of action are recognized under Texas law, and they are recognized as separate from a claim for loss of chance of survival or cure. *See Parrott v.*

Caskey, 873 S.W.2d 142, 151 (Tex. App.--Beaumont 1994, no writ) (discussing *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397 (Tex. 1993)). The only caveat is that the causation standard cannot be relaxed to less than “more likely than not”--in other words, absent the malpractice, it must have been more likely than not that Rowan would have avoided her symptoms. *Id.*

If there had been any confusion about the causes of action being asserted by Rowan and Niese, the Doctors could have filed special exceptions. They elected not to, and instead filed a motion for traditional summary judgment directed at a cause of action not asserted. They cannot now be heard to complain, for the first time on appeal, that Rowan and Niese’s actual cause of action is invalid.

C. The Doctors’ motion for summary judgment was directed at causes of action not asserted by Rowan and Niese, and should have been denied.

The only ground asserted in the defendant doctors’ motion for summary judgment is that Texas does not recognize a cause of action for loss of “chance of survival and chance of cure.” CR 25, 26. Similarly, the affidavit of Rivera submitted in support of the motion focused exclusively on the chances of survival or cure, and did not address ongoing suffering or degradation of quality of life. CR 29. Neither the legal authorities nor the summary judgment evidence submitted by the Doctors establishes their right to summary judgment on the causes of action asserted by Rowan and Niese—that the Doctors’ medical malpractice caused a degradation or diminishment of quality of life. The burden of going forward with

the evidence thus never shifted to Rowan and Niese. *Casso*, 776 S.W.2d at 556.^{2/} That the trial court sustained the Doctors' objections to Rowan and Niese's own summary judgment evidence is immaterial because the Doctors' motion and evidence did not conclusively negate--indeed, did not even address--any element of Rowan and Niese's cause of action. *See Gibbs*, 450 S.W.2d at 828.

The Doctors tried to fix this problem by asserting in their reply (filed November 10, less than 21 days before the summary judgment hearing) that the motion addressed to loss of chance of survival or cure should be read to include Rowan and Niese's actual claims. CR 48. Even if the Doctors were correct as a matter of legal interpretation--which they did not establish, and which Rowan and Niese do not concede--their summary judgment proof is still deficient. As noted above, the Rivera affidavit is addressed solely to the loss of chance of survival or cure, and mentions not a word about Rowan's and Niese's actual allegations. CR 29.

A party may not be granted judgment as a matter of law on a ground not addressed in a summary judgment proceeding. *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983). Grounds for summary judgment must be "expressly presented in the motion for summary judgment itself." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 338 (Tex. 1993). Movants must file and serve summary judgment motions and any

^{2/}In their brief on the merits, the Doctors rely heavily on *Helm v. Swan*, 61 S.W.3d 493 (Tex. App.--San Antonio 2001, pet. denied). *See Drs. Br. on Merits* at 16-19. That case involved a motion for no-evidence summary judgment. *Helm*, 61 S.W.3d at 495. The *Helm* plaintiffs thus bore the burden of going forward with the evidence, and the opinion is principally an analysis of the quality of the plaintiff's summary judgment evidence. The burden of going forward never shifted to Rowan and Niese, so the *Helm* analysis is thus inapplicable here.

supporting affidavits at least twenty-one days before the hearing except with leave of court and notice to opposing counsel. Tex. R. Civ. P. 166a(c).

The Doctors' reply was filed but eight days before the judgment was granted, and therefore could not have been considered by the court. Further, they submitted no authority to suggest that Rowan's and Niese's causes of action were, as a matter of law, the same as one for loss of chance of survival. Finally, they timely submitted no summary judgment proof other than the Rivera affidavit, which, as discussed above, addressed only loss of chance of survival or cure.

Under the firmly established standards for traditional summary judgment, the Doctors did not show themselves entitled to one--they simply failed to carry their burden of proof with respect to the claims actually asserted by Rowan and Niese.

III. The Doctors have waived any argument relating to the denial of their motion to dismiss for lack of subject matter jurisdiction.

The Doctors' second principal point advanced in their brief on the merits is that the trial court should have dismissed the case because suit could have been brought against their employer, and the court of appeals erred in affirming the denial of the motion to dismiss. *See* Drs. Br. at 39 -34. That issue is not properly before this court.

Texas Rule of Appellate Procedure 55.2 plainly states that “[t]he petitioner’s brief on the merits must be confined to the issues or points stated in the petition for review” Tex. R. App. P. 55.2; *see Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) (“We need not address this argument because the petitioners waived it by failing to advance it in their petition for review.”); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 914 n.1 (Tex.

2004 (Jefferson, CJ, and O'Neill, J, dissenting). The Doctors' Petition for Review reserves for briefing the issue, "Did the Fourteenth Court err in affirming the trial court's denial of Doctors' motion to dismiss by a) characterizing Rowan-Niese's damages as pre-death damages?" Drs. Pet. at xiii. That very specific reserved issue may have presented something, but it is not related to what the Doctors actually argue--that the suit against them should have been dismissed because it "could have been brought" against their employer. Accordingly, because the jurisdictional issue was not raised in the petition for review, it cannot be raised in the brief in the merits. For this court to consider the issue, it would have to retroactively amend the Rules of Appellate Procedure to allow issues to be raised for the very first time at the merits stage.^{3/}

CONCLUSION AND PRAYER

Rowan and Niese pray this court deny the doctors' petition for review, and for such other and further relief as to which they may be entitled. This court need not expend its judicial resources to examine a case that has already been so thoroughly parsed by the trial court, and in which the granting of any relief would require changing Texas law *and* adopting a rule that would hold doctors immune from any malpractice committed during the treatment of patients who have less than a 51% chance of survival. This court would have to suspend or rewrite the rules of civil and appellate procedure to reach the issues included in the Doctors' brief on the merits, and the Doctors have not shown why they deserve that special

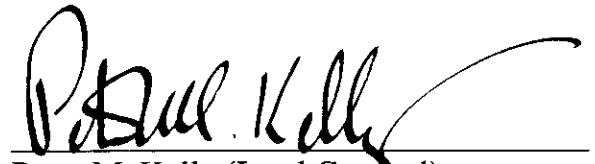
^{3/}The issue, of course, can be raised for the first time in this court. See Drs. Br. at 39. But the way to do it is in accordance with the rules, in the petition for review. See Tex. R. App. P. 55.2. If the court on its own motion decides to suspend the Rules of Appellate Procedure for the Doctors' benefit, Rowan and Niese request the court's leave to supplement their briefing.

treatment. In the alternative, should the court on its own motion decide to suspend those rules, Rowan and Niese request leave of court to supplement their briefing to address those issue that have, so far, been only improperly presented. Rowan and Niese also pray for such other and further relief as to which they may be entitled.

Respectfully submitted,

LAW OFFICE OF PETER M. KELLY, P.C.

BY:



Peter M. Kelly (Lead Counsel)

State Bar No. 00791011

1005 Heights Boulevard

Houston, Texas 77008

Telephone: 713.529.0048

Facsimile: 713.529.2498

WALTER JAMES KRONZER, III, P.C.

BY:



Walter James Kronzer, III

State Bar No. 11735001

3000 Wesleyan, Suite 351

Houston, Texas 77027-5733

Telephone: 713.622.5766

Facsimile: 713.622.5445

by permission

CERTIFICATE OF SERVICE

A true and correct copy of this *Respondents' Brief on the Merits* has been forwarded to all counsel of record on December 29, 2008 as follows:

Nancy Bolin Broaddus
SMITH & SMITH
4900 Woodway, Suite 1030
Houston, Texas 77056

Via First Class Mail

Counsel for Appellees


Peter M. Kelly