NO. 08-1066

In the Supreme Court of Texas

MICHAEL T. JELINEK, M.D. AND COLUMBIA RIO GRANDE HEALTHCARE, L.P. D/B/A RIO GRANDE REGIONAL HOSPITAL,

Petitioners,

v.

FRANCISCO CASAS AND ALFREDO DELEON, JR., AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ELOISA CASAS, DECEASED

Respondents

On Appeal from the Thirteenth Court of Appeals
At Corpus Christi-Edinburg
Court of Appeals No. 13-06-00088CV

RESPONSE TO THE PETITION FOR REVIEW OF PETITIONER, COLUMBIA RIO GRANDE HEALTHCARE, L.P. D/B/A RIO GRANDE REGIONAL HOSPITAL

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The petition for review should not be granted as this petitioner has failed to preserve error as the entire appellate record is devoid of any language where any appellate court can specifically state that a substantially correct instruction was provided to the trial court that would have allowed the trial court to make a determination of the merit of such

instruction as is required under Texas Rule of Civil Procedure 278. Additionally, Petitioner has previously conceded that its employees' failure to place a renewal order for Eloisa Casas' antibiotics was a cause of the event sued upon and accordingly, Petitioner is not entitled to the instruction it now requests. (Appellant's Brief to the Court Of Appeals at p. 8, paragraph B) Finally, the event was of such a disturbing nature that harm or mental anguish should be presumed; and Petitioner further misinterprets the needed qualification to enable plaintiffs retained expert to testify; and further misstates the quantification of evidence presented to the trial court concerning the sufficiency of evidence presented.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The Petitioner, in its Statement of the Case, further misstates to this Court when Petitioner suggests:

> "THE THIRTEENTH COURT OF APPEALS AFFIRMED, HOLDING as follows:
>
> (ii) The error, if any, in refusing the Hospital's unavoidable accident instruction is not reversible "[b]ecause the [clerk's] record does not reflect that a 'substantially correct' instruction has been 'requested in writing and tendered' by the Hospital." (Petition xi)

what the appellate court actually stated was:

> "…the Hospital contends that it requested an unavoidable accident instruction to follow the jury instruction on proximate cause. **However, the Hospital points to nothing in the record that can be considered a "substantially correct" rendition of such an instruction**." (emphasis ours) (Memorandum Opinion P.13) (Appx 1).

and the appeals court further stated:

> “**Although the Hospital alludes to the presence of a written unavoidable accident instruction tendered to the trial court, it does not appear in the record.”** (emphasis ours) (Memorandum Opinion P.14) (Appx 1).

Eloisa Casas for four and one half (4 ½) days following abdominal surgery, was not provided the antibiotics prescribed by her physician and universally agreed by all witnesses should have been given to her. In fact, for four and one half (4 ½) days the same empty antibiotic bag remained on its stand within sight of each shift of nurses at the hospital. When this negligence was finally detected and Eloisa was informed, she understandably became distraught. She died some three months after this horrible event, never regaining the fighting will she had exhibited before being informed that the nursing staff had made such a grievous mistake.

RESPONSE TO PETITIONER’S STATEMENT OF JURISDICTION

The petitioner incorrectly suggests the appellate court has engrafted an additional requirement for error preservation onto Texas Rule of Civil Procedure 278. Petitioner failed to preserve any error by wholly failing to bring forth any written and tendered instruction request as required by Texas Rule of Civil Procedure 278.

The conflicts as enumerated by Petitioner s “Conflict #1 – “The court of appeals’ opinion engrafts an additional requirement to preserve error onto the Texas Rule of Civil Procedure 278 …”, misconstrues the court below in that the court did not have before it any record (either in writing or oral) that set forth with any clarity the jury instruction so as to provide the appellate court with a sufficient basis to make its decision.

Contrary to its stated position, this petitioner actually seeks to expand preservation of error by having this Court declare that <u>any</u> request no matter if written, or tendered, or found within the appellate record, is sufficient so long as some vague words alluding to it can be found.

Conflict #2 – Petitioner, incorrectly sets forth the opinion of the court of appeals dealing with the test of sufficiency of the evidence as stated in *City of Keller v. Wilson*, 168 S.W. 3d 802 (Tex 2005)

RESPONSE TO PETITIONER'S STATEMENT OF ISSUES PRESENTED

<u>Reply to Petitioner's Issue 1:</u> Preservation of Charge Error

The hospital failed to preserve its right to an unavoidable accident instruction as there is no written instruction to review; nor, is there any statement to suggest the language requested was correct or substantially correct to enable any appellate court to rule. Additionally, the evidence was such that Petitioner was not entitled to such instruction as factually all the evidence pointed to the hospital's negligence and the total lack of some non-human factor as is needed.

<u>Reply to Petitioner's Issue 2:</u> Causation Claim

Under the factual circumstances of this record, the 'event' was one of such particularly disturbing circumstance that mental anguish was inferred and therefore the petitioner is not entitled to an unavoidable accident instruction. The court of appeals correctly applied the legal sufficiency standard set out in *City of Keller*.

STATEMENT OF FACTS

Eloisa Casas had colon cancer that had ceased being in remission necessitating surgery due to a suspected perforated colon. After surgery the standard course for antibiotic medications is that all patients receive them for the entire hospital stay due to the high likelihood of infection. For four and one-half days neither the Hospital personnel nor any medical providers "noticed" that Eloisa was not receiving the required antibiotics.

It is under this background that a medical negligence case was brought wherein the plaintiffs sought recovery for pain and mental anguish associated with the failure of the Hospital personnel to follow established policies and procedures in the delivery of appropriate antibiotics to Eloisa; or alternatively, in failing to inform the physician(s) that medications normally utilized for the type of treatment necessary for her would be continued; or alternatively, failing to have sufficient safety/check lists regarding the continuation of standard physician orders dealing with medications.

Plaintiffs did not seek damages from the Petitioner claiming that its negligence proximately caused her ultimate death. Rather, plaintiffs sought, and it was ultimately found by a jury, that Eloisa had suffered associated pain and mental anguish from the Hospital's failure to properly administer medications and/or inform the attendant physicians that she was not receiving medications or in failing to have sufficient safety/check lists in place. At all times, the attendant physicians believed that appropriate antibiotics were being delivered to Eloisa, when in fact, they had been negligently discontinued by the Hospital personnel. **These operative facts are not only *not***

contested, but conceded in Petitioner's trial counsel's opening statement and argument, (RR. Vol. 8, p. 122; RR. Vol 13, p. 90) as well as conceded in their brief to this Court. (Appellant's Brief to the Court of Appeals at page 1).

Appellee includes by reference Petitioner's statement of the condition of the verdict, judgment, and appeal as being an accurate presentation (Petition for Review P3).

1. Unavoidable Accident: The Negligence of the Hospital

Eloisa's treating physician, Dr. Garcia-Cantu acknowledged that the failure to provide antibiotics was not medically appropriate for Eloisa (RR Vol. 12, Garcia-Cantu Depo at p. 37) and Hospital Pharmacy Director, Gabriel Garza acknowledged that if no antibiotic is given it cannot help the patient. (RR Vol. 8, p. 176) Dr. Garcia further acknowledged that no competent surgeon would perform a surgery on a patient and not give the patient antibiotics after the surgery. (RR Vol. 12, Garcia-Cantu Depo at p. 41)

It was undisputed that the Hospital, negligently handled the disbursement of medications necessary for the treatment of Eloisa. For instance, Nurse Dominguez testified that Dr. Jelinek blamed the Hospital employees for not giving Eloisa the prescribed antibiotics. (RR Vol. 11, pp. 56-58) Additionally, Gabriel Garza testified, "I think we dropped the ball." (RR Vol. 8, p. 201) "We didn't give medications that we should have given the patient." (RR Vol. 8, p. 203) Finally and not of insignificance are the statements of Petitioner's own trial counsel. Trial counsel, both in voir dire and opening statement, alluded to, or commented concerning the negligence of the Hospital and that corrections had been taken by

the Hospital to make sure that no other person was treated the way Eloisa was treated in such a negligent manner. (RR Vol 8, p121, 123, 184)

On the 23rd of July, Dr. Jelinek indicated he was "not happy" to see that Eloisa had a higher fever than the day before and as he reviewed the chart, he could not find any medication administration record documenting that she was getting antibiotics. Indeed, the I.V. bags in the room were from the date of the beginning of the negligence! (July 19th) (RR Vol. 12, p. 131) Dr. Jelinek's attitude speaks volumes in that he indicated he had raised his voice and was "not pleased" with the actions of the Hospital personnel. (RR Vol. 12, p. 133) His displeasure was to the extent as to summon the risk manager, the administrator of nurses, and the director of the pharmacy. (RR. Vol. 12, p. 134) Dr. Jelinek stated that his intention was to at all times continue the Maxipime through July 23rd. (RR Vol. 12, p. 138) He also indicated that it would be prudent for a physician to treat a person such as Eloisa with the type of medication that he had ordered to be administered, but was not given. (RR Vol. 12, p. 138)

Dr. Jelinek testified that antibiotics were given for two specific reasons; to either alleviate the infection, or lessen or reduce the infection. (RR V. 12, p. 97). **Dr. Jelinek further testified that infections if not treated, create problems.** (RR V. 12, p. 97) **In fact, if not treated, infections get worse, and infections create more problems for the person who has one. Infections can be painful and Dr. Jelinek further testified that the type of infections Eloisa had were painful.** (RR V. 12, p. 98) (emphasis ours) Eloise's treating nurses indicated that fevers (which Eloisa had) cause pain and anxiety.

(RR Vol. 11, pp. 34, 66-67, 109, 122, 126-12; RR Vol. 10, p. 186) Both Dr. Garcia and the nurses stated that infections can be life-threatening and effect patients. (RR Vol. 12, Garcia-Cantu Depo at p. 35; RR Vol. 11, p. 15, 34) Ruth Coronado, another of the treating nurses, testified that infections make people feel bad and suffer pain. (RR Vol. 10, p. 188) Dr. Garcia further acknowledged that fevers make patients feel bad. (RR Vol. 12, Garcia-Cantu Depo at p. 35) He also acknowledged that a continued fever over a period of days will make a patient feel bad. (RR Vol. 12, Garcia-Cantu Depo at p. 36) Nurse Dominguez testified that Eloisa needed pain medication, (RR Vol. 11, pp. 66, 67) and the director of the Hospital pharmacy stated that Eloisa was on heavy pain medications **after** July 23, 2001. (RR Vol. 8, p. 173)

Dr. Garcia also agreed that the longer an infection goes untreated, the longer it takes to redirect the course of treatment. (RR Vol. 12, Garcia-Cantu Depo at p. 47) This is supported by the Hospital's retained expert, Dr. Berkowitz where he opined that if medication thought to be delivered is not being delivered, it will affect the course of treatment. (RR Vol. 10, p. 52)

When Eloisa learned her cancer was no longer in remission, her family and friends, while themselves in shock, indicated that she was the stalwart person in the family. (RR Vol. 13, pp. 9, 10, 53-54) Prior to the disclosure to her of the Hospital's negligence, she exhibited the will of a "fighter." (RR Vol. 13, p. 13) Her son, Alfredo DeLeon, who saw her on a daily basis stated such. Immediately after the surgery on the 13th of July, 2001,

she seemed to be doing ok and exhibited no signs of depression or sadness. (RR Vol. 13, p. 14)

However, when Dr. Jelinek informed Eloisa on July 23, 2001 that the Hospital had failed (from July 18 to July 23, 2001), to give her antibiotics to fight off infections, she began a rapid decline. (RR Vol. 12, pp. 66-69.; RR Vol. 13, pp. 17-19) She was no longer trusting of either her physicians or the Hospital personnel (RR Vol. 12, pp. 66, 88; RR Vol. 13, p. 17) (a point most understandable under the circumstances), and became depressed, as was testified to by her son, husband, Dr. Garcia, Dr. Jelinek, and also contained in the medical records. (RR Vol. 13, pp. 14-15) (RR Vol. 12 – Garcia-Cantu Depo p. 56) (RR Vol. 12 p 140)

The very day that Eloisa was informed of the failure of the Hospital to provide the antibiotics ordered by her physicians, she went from being a cooperative patient to one who refused a recommended bronchoscopy. The medical records indicated depression and anxiety. (PX 1, 7/23/01)

Dr. Merrick, (her Oncologist) indicated in his records that he had informed her that any chemotherapy for her cancer would not be possible "until her other problems are resolved and that may not happen." (PX 1 in Progress Notes) In other words, the methodology in her care could no longer be given due to a nursing mistake!

Additionally, the surgical wound site required the sutures to be removed due to the purulent foul smelling drainage coming from the wound site. (RR Vol. 13, p. 17; RR Vol. 12, p. 62). Nurse Dominguez testified that purulent is equivalent to bad things for a

patient. (RR Vol. 11, 118, 119) The odor from the site was so strong that even upon opening the door to Eloisa's room, the stench was so strong it could be detected notwithstanding attempts to diffuse the odor by circulating the air with a fan. (RR Vol. 13, pp. 19, 20) The open wound and the stench remained until the time of her death. (RR Vol. 13, p. 20) This factor alone is sufficient for a jury to award damages for both pain and mental anguish. (RR Vol. 13, p. 15) Her son indicated that in addition to the embarrassment, she did not want "anybody to see her in pain". (RR Vol. 13, p. 15)

Eloisa exhibited both depression and anxiety from July 23rd forward until the date of her death. (RR Vol. 12, pp. 58, 66; RR Vol. 13, pp. 17-19.) On September 17, 2001, Dr. Garcia noted:

> "…She is very depressed. She is not able to take any food by mouth, she is vomiting constantly and having problems with that. She seems to be dehydrated. I will admit her to hospital and we will see how she does."

Dr. Garcia acknowledged that Eloisa was concerned about the open abdominal area. (RR Vol. 12, Garcia-Cantu Depo at p. 55-56) Likewise, Eloisa was both distressed and embarrassed from the purulent, foul-smelling incision that could not be treated with antibiotics. (RR Vol. 12, pp. 63, 64; RR Vol. 13, pp. 15, 19-20; RR Vol. 118, p. 119)

Her son indicated that the situation was such that she no longer had trust in either the doctors or the Hospital personnel. (RR Vol. 13, p. 17) Her son expressed the depression which his mother exhibited, which included crying, was unusual and out of character for her. (RR Vol., p. 18) He further stated she was told that the reason that no chemotherapy or other type of therapy was performed was due to the failure of the

incision to heal. (RR Vol. 13, p. 17) All of this was corroborated by her husband. (RR Vol. 12, p. 55) He likewise corroborated that the failure to administer the antibiotics required Dr. Jelinek to remove the staples to determine the amount and depth of the infection from the purulence at the incision site and that Eloisa reacted to that by crying. (RR Vol., p. 62) Her husband indicated the purulent drainage made her afraid, caused her to worry, and embarrassed her because of the way that she looked. (RR Vol., p. 63) Mr. Casas likewise confirms that Eloisa's trust in the Hospital personnel was gone once she was informed she had not received her antibiotic treatments. (RR. Vol. 12, p. 66) By their verdict, the jury believed Eloisa's husband, son and retained expert rather than the Hospital personnel, treating physicians and their retained expert. It is well recognized that the jury is the sole judge of witness credibility and the weight to be given their testimony. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex 2005).

SUMMARY OF THE ARGUMENT

Petitioner's Issue 1: The Hospital Preserved It's Right to an Unavoidable Accident Instruction

Contrary to Petitioner's contention, the Hospital failed to preserve its right to an unavoidable accident instruction as there is nothing for this court to review to rule that the alleged instruction was either substantially correct, or tendered to the court. The Petitioners' bald assertion would require this court or any other court, to make assumptions which it may not do. Further, under the particular facts of the case at bar, where trial counsel, as well as most, if not all of the employees of the Hospital, not only admitted to being negligent in failing to administer antibiotics; but also conceded that

their negligence would cause associated medical problems, including, but not limited to, pain and anguish, and a cessation of a medical regimen needed for the treatment of her cancer which would further increase Eloisa's hospital stay. Under these circumstances an 'unavoidable accident' instruction would clearly cause confusion to the jury, and would effectively be a comment on the weight of the evidence.

Petitioner's Issue 2: The Jury Finding that the Hospital Caused Injury to Ms. Casas is Not Supported by Legally or Factually Sufficient Evidence.

Petitioner claims that there was no legally or factually sufficient evidence, must likewise fail as plaintiff's expert was properly qualified both by training and experience in the very area of medicine involved in this case; and, the very nature of the event itself was of such a disturbing quality that harm would be presumed and not require expert testimony.

ARGUMENT AND AUTHORITIES

Reply to Petitioner's Issue 1:

> **"… Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." Tx.R.Civ.P. 278**

Petitioner's position that it preserved it's right to an unavoidable accident instruction appears to simply be that all one need do to preserve error on appeal, is allegedly write a request for an instruction, not tender it to the trial court, fail to file it with the court, fail to read it into the record; and, then later ask an appellate court to guess that the instruction complied with the stringent requirement of clarity and substantially

correctness. To prevail, what is actually required, is for the instruction to actually appear in the record, as it cannot be inferred from the record. *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004) The error complained of must be apparent from the face of the record. Tex. R. App. P. 30, *Norman Communications v Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) The face of the record consists of all the papers on file in the appeal. *Petco v. Schuster*, 144 S.W.3d 554 (Tex.App. 3rd Dist. 2004) Nowhere within the 'face' of the record is the instruction that petitioner baldly claims it deserved.

Another requirement, in which this Petitioner fails, is that the Petitioner has failed to first show that the 'event' was proximately caused by a condition or circumstance beyond the control of any party to the cause of action. *Hill v. Winn Dixie,* 849 S.W.2d 802 (Tex. 1992) *An unavoidable accident instruction is proper only when there is evidence that the event was proximately caused by a nonhuman condition and not by the negligence of any party to the event. Winn Dixie,* supra at p.803 citing other cases**.** As noted above, the evidence was overwhelming that no such condition or circumstance existed. *Dillard v Texas Elec Co-op*, 157 S.W.3d 429, 432 (Tex. 2005) citing *Reinhart v Young*, 906 S.W.2d 471, 472 (Tex. 1995)

Reply to Petitioner's Issue 2:

Petitioner's claim that there was no legally or factually sufficient evidence that the Hospital caused injury to Eloisa is again, a mischaracterization of the testimony presented in court where they suggest that the undisputed testimony was that Eloisa was not harmed by the failure to receive the antibiotics in question. Not only did Plaintiff's Retained

Expert testify as to this harm, most, if not all of the Petitioner's personnel, and her treating physicians, stated the numerous problems associated with the malfeasance of the Hospital. In any event, the very nature of the disclosure of the malfeasance was of such character and egregiousness, that harm should be presumed therefore not requiring expert testimony.

Petitioner implies that Plaintiff's expert was simply unqualified, which is simply not supported by the record. It was petitioner's trial counsel that stated to the jury: "(Dr. Daller) was a very highly qualified transplant surgeon and has excellent credentials as a surgeon." (RR Vol 9 p. 90, px 20) Plaintiff's expert, Dr. Daller, had in addition to his extensive medical credentials and teaching credentials, a Doctorate in Pharmacology. His Pharmacology Doctorate also included within its regimen of study, the field of toxicology, oncology, and immunology. Dr. Daller's educational background as well as his practice involved the study and mechanism of drug actions and how they interact with the body. He was further well versed in the study of side effects of various drugs and medications; the effect of poisons in the body, and lastly, the effect on the body and the body's immune system and the response to the body from infection and other types of stress. (RR Vol. 9, pp. 11, 12)

While he had had numerous positions in several medical schools throughout the country, including Assistant Director of Surgery at John Sealy Hospital at the University of Texas medical branch in Galveston, (RR Vol. 9, p. 13) he indicated that he had treated in excess of one hundred patients with similar intra-abdominal infections as found in

Eloisa. (RR Vol. 9, p. 6) Dr. Daller opined that the type of procedure performed on Eloisa was such that he was adequately trained not only to surgically manage the patient, but to administer appropriate antibiotic care. (RR Vol. 9, p. 16) He further opined that the course of treatment was so routine that an infectious disease specialist would not be necessary. (RR Vol. 9, p. 16) There was nothing either by his training, or experience, or by any standard of which he was aware, that his opinion would have to be deferred to that of an infectious disease specialist, even if board certified. (RR Vol. 9, p. 17)

Dr. Daller explained that when one has a perforation in the bowel (as Eloisa did) it is "by definition" a "poly-microbial infection". (RR Vol. 9, pp. 18, 19) Dr. Daller stated based on reasonable medical probability, how patients normally respond to certain circumstances such as infections, be they treated or untreated infections. (RR Vol. 9, p. 21) He based that upon the very large number of patients with similar courses of studies in nearly ten years, and observing patient's responses to a variety of physiologic and emotional distresses.

Whether or not Dr. Daller was appropriately qualified is solely within the trial court's discretion. *E.I. Du Pont De Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995) and *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 108 (Tex. 1985). Courts should not disturb the trial court's discretion absent clear abuse; and the test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principals. *E.I. Du Pont*, 923 S.W.2d at 55. All that is required is that the offering party establish that the expert has "knowledge, skill, experience, training, or education"

regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject. *Ponder v. Texarkana Memorial Hospital*, 840 S.W.2d 476, 477-78 (Tex. App. – Houston [14th Dist.] 1991, writ denied). *Broders v. Heise,* 924 S.W.2d 148 (Tex. 1996) If a party can show that a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields. *Porter v. Puryear*, 153 S.W.2d 82, 262, S.W.2d 933, 936 (1953). Dr. Daller opined that his experience was such that he would not have needed to have an infectious disease consultant to treat Eloisa's condition as her condition was such that surgeons, such as himself, who did this type of surgery had the qualifications and expertise needed. In any event, Petitioner's trial counsel failed to properly bring before the trial court any contest to the qualifications of Dr. Daller and therefore, any such Daubert type challenge is waived.

Finally, the jury is at liberty to judge the credibility of all the witnesses, which includes the experts. The jury may choose to believe one witness and disbelieve another. Reviewing courts cannot impose their own opinions to the contrary. *City of Keller v. Wilson*, 168 802, 819. Neither the *ipsit dixit* of the Hospital's expert, nor their employees are sufficient, and there is absolutely no abuse of discretion by either the trial court or the appellate court in upholding the jury's decision.

Petitioner has previously conceded that its employees' failure to place a renewal order for Eloisa's antibiotics was a cause of the event sued upon. (Appellant's Brief to The Court of Appeals at p. 8, paragraph B) (emphasis ours)

> "Hope is the earliest and most indispensable virtue inherent in the state of being alive. If life is to be sustained hope must remain, even where confidence is wounded, trust impaired." *Erik Erikson, Austrian psychologist*

When one combines the seriousness of Eloisa's illness (cancer), the uncontroverted testimony for the need for the antibiotics to be given, together with: the total disregard of vigilance by the nursing staff, the cessation of needed chemotherapy to treat the cancer because of the infections, the horrid smell coming from the wound site, and the uncontested embarrassment, and acknowledged depression and anxiety, most assuredly amounts to what has been called a particularly disturbing event. When a particularly disturbing event has been proved, as is the case at bar, mental anguish damages are not hard to justify. *Parkway v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995) Further, conscious pain and suffering may be established by circumstantial evidence. *HCRA of Tx v. Johnson*, 178 S.W.3d 861 (Tex. App. [2nd Dist.] 2005)

As noted in the facts above that were established at trial, both direct and circumstantial evidence clearly showed a nexus.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondents request that the Texas Supreme Court deny petition for review of Columbia Rio Grande Healthcare, L.P. D/B/A Rio Grande Regional Hospital and award Respondents such other relief as may be proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent to counsel listed below in accordance with the Texas Rules of Appellate Procedure on this the ____ day of April, 2009:

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