

No. 08-1066

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**In the Supreme Court of Texas**

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**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.*

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

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**REPLY TO RESPONSE TO PETITION FOR REVIEW**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Hospital's Petition stands essentially un rebutted, although it is anyone's guess whether that arises out of the Respondents' failure to understand the arguments in the Petition or their inability to refute them. Whichever is the case, the Petition should be granted so that this Court of last resort can decide the following issue of first impression:

Texas Rule of Civil Procedure 278 provides that the "[f]ailure to submit a[n] . . . instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct . . . instruction has been requested in writing and tendered by the party complaining of the judgment," while Texas Rule of Appellate Procedure 33.1(a) requires that "the record must show" a party has preserved error. Must the error in refusing an unavoidable accident instruction – Pattern Jury Charge 3.4 – be shown in the clerk's record? Or do the rules permit preservation of the error to be shown in either the clerk's or the reporter's record?

Simply stated, at issue in this appeal is whether a court may engraft an additional requirement onto Rule 278, *i.e.*, that the requested instruction and its refusal be shown in the clerk's record? Or must a court interpret and apply the rule to serve the overarching principle of error preservation – "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling" – as this Court announced in *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) and re-affirmed in *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995) (per curiam) and *Lester v. Logan*, 907 S.W.2d 452, 453 (Tex. 1995) (per curiam)?

**1.**  
**Unavoidable Accident Instruction**

Respondents either misunderstand or cannot refute the Hospital's argument that it preserved the trial court's error in refusing a written unavoidable accident instruction. As a result, they mischaracterize the Hospital's "position," arguing that it "appears to be simply 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 [sic] correctness." (Resp. at 8-9.) That is not the Hospital's position. Rather, the Hospital argues that error was preserved because:

- (i) the Hospital pleaded unavoidable accident;
- (ii) unavoidable accident was raised by the evidence;
- (iii) the reporter's record establishes that the Hospital tendered a written unavoidable accident instruction;
- (iv) neither the trial court nor Respondents' attorney suggested that the instruction (which is Pattern Jury Charge 3.4) was anything less than "substantially correct"; and
- (v) the reporter's record establishes that the trial court refused the instruction.

(Pet. at 6-7.) The Respondents' attorney must have forgotten the following exchange:

MR. DUBOIS: Your Honor, also for the record we have proposed in writing -- the Defendant Hospital has requested instructions and special issues. The first of which we believe is the ultimate issue in this case that should be decided and that was: Whether by a preponderance of the evidence the Plaintiff has proved that there was an injury to Ms. Casas in the case.

Also, [we] requested instructions on unavoidable accident. And as we have shared with the Court as it is used in medical malpractice cases, and is understood in such

as the decision of [*Wisnberger v. Gonzales Warm Springs Rehab. Hosp., Inc.*, 789 S.W.2d 688 (Tex. App.—Corpus Christi 1990, writ denied)], in a medical negligence case where expert testimony establishes that another physical condition or circumstance was the probable cause of the injury, the definition of unavoidable accident must follow the jury instruction on proximate cause.

We also have proffered new and independent cause and sole proximate cause to the Court for consideration and submission of the Charge. I believe the same have been raised by the evidence of other such events, circumstances and persons who are not Defendants in the case as the proximate cause of the injury to the Plaintiff, and they're presently not in the Charge, and I just respectfully request the Court to make a ruling on the record.

THE COURT: Yes, sir. Those were the same requested instructions and questions that -- or definitions that you requested earlier in chambers off the record, right?

MR. MASTIN: That's correct.

THE COURT: All of those that were shown to me and that you made a request for are denied. If you'd like me to sign them, Counsel, I will.

MR. MASTIN: You did sign.

THE COURT: But I think I signed the copies.

MR. MASTIN: Well, I gave them to --

MR. DUBOIS: The originals should be in the file.

THE COURT: We can put them in the Court's file and make them a part of the record.

MR. MASTIN: I gave them --

THE COURT: But I don't know where they are.

MR. MASTIN: They're in your office. I'm talking about the original signatures.

THE COURT: They're right here. I'll have the Clerk when he comes in stamp file these.

(13 RR 53-54.) The reporter's record thus plainly establishes that the Hospital's attorney tendered a written unavoidable accident instruction; the trial court refused the instruction;

and neither the trial court nor Respondents' attorney suggested the instruction was anything less than the "substantially correct" Pattern Jury Charge 3.4.

Because Respondents mischaracterize the Hospital's argument, they never grapple with the important procedural question of whether "a court of appeals [may] engraft an additional requirement for preservation of error onto Texas Rule of Civil Procedure 278, *i.e.*, that the requested instruction and its refusal be included in the clerk's record?" (Pet. at ix (emphasis added).) The answer to that question must be "No." As this Court previously held in a similar context, "an endorsement by the trial court is not the exclusive means of preserving error for refusing a charge request"; error may also be preserved by the trial judge's "statements on the record." *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 387 (Tex. 1997).

Rather than addressing the issue presented by the Hospital's Petition, Respondents refer the Court to Texas Rule of Appellate Procedure 30 and the requirement in restricted appeals that "[t]he error complained of must be apparent from the face of the record." (Resp. at 9.) But, of course, this is not a restricted appeal. Therefore, that requirement and Rule 30 are irrelevant.<sup>1</sup>

Respondents also apparently fail to understand the quantum of proof required for reversal. The trial court erred in refusing to submit an unavoidable accident instruction because the record contains **some** evidence that Ms. Casas's injuries were proximately caused by nonhuman conditions – "her metastatic colon cancer and learning that it was

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<sup>1</sup> Moreover, as evidenced by the authority Respondent cites, the requirement is met by the quoted excerpt from the reporter's record. (See Resp. at 9 (citing *Petco v. Schuster*, 144 S.W.3d 554 (Tex. App.—Austin 2004, no pet.) as support for the proposition that "[t]he face of the record consists of all the papers on file in the appeal".))

no longer in remission and in fact required further surgery to remove the abscesses and repair her perforated bowel, coupled with the infections resulting from that surgery.” (Pet. at 7.) Whether “the evidence was overwhelming that no such condition or circumstance existed,” as Respondents argue (Resp. at 9), is therefore legally irrelevant. *See, e.g., Hill v. Winn Dixie Tex.*, 849 S.W.2d 802, 803 (Tex. 1992) (holding that an unavoidable accident instruction is proper if there is evidence that the event was proximately caused not by the negligence of any party to the event but by a nonhuman condition). Nor is Respondents’ assertion factually correct, as discussed next.

## 2.

### No Evidence of Causal Nexus

Respondents demonstrate that they fail to grasp the Hospital’s second issue in two respects. First, they seem to place great reliance upon the fact that the Hospital “has previously conceded that its employees’ failure to place a renewal order for [Ms. Casas’s] antibiotics was a cause of the event sued upon.” (Resp. at vii, 2, 12 (citing Appellant’s Br. to Ct. of Appeals at 8, ¶ B).) However, conceding the first of *Morgan*’s two required causal links does not establish the second required causal link. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex. 1984). And the Hospital’s appeal focuses on *Morgan*’s second required causal nexus between “the event sued upon” and the injuries claimed. *See Morgan*, 675 S.W.2d at 732; *see also Guevara v. Ferrer*, 247 S.W.3d 662, 666 (Tex. 2007).

In its brief to the court of appeals, the Hospital argued as follows:

For Plaintiffs to prevail on appeal, there must be sufficient evidence to establish: (i) a causal nexus between the Hospital’s conduct (failure to place the

renewal form in Ms. Casas's chart) and the event sued upon (Ms. Casas's failure to receive Maxipime and Flagyl); and (ii) a causal nexus between that event sued upon and the injuries claimed (Ms. Casas's pain and mental anguish). *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731 (Tex 1984). *Morgan's* first causal nexus is not involved in this appeal. The Hospital concedes that not placing a renewal order in Ms. Casas's chart was a cause of the event sued upon. The Hospital's appeal instead focuses on *Morgan's* second required causal nexus, which relates solely to damages. *See id.* at 732.

(Appellant's Br. at 8.) The Hospital thus argued in the court of appeals that, although the failure to place the renewal form in Ms. Casas's chart was a cause of her failure to receive Maxipime and Flagyl, there was no competent expert testimony that the failure to receive those medications for four and one-half days was a cause of her pain or mental anguish). (Appellant's Br. at 8-17.) The Hospital re-urges that argument in its Petition. (Pet. at 10-15.)

Respondents also mischaracterize the Hospital's argument on appeal as challenging Dr. Daller's qualifications. (Resp. at 10.) That assertion is simply incorrect. As plainly stated in the Hospital's Petition, the Hospital's argument is that there is no competent expert testimony that the failure to receive Maxipime and Flagyl for four and one-half days was a cause of Ms. Casas's pain or mental anguish: Although "[s]everal expert witnesses testified regarding the effects of Ms. Casas not receiving the prescribed medications," "[n]one testified that Ms. Casas's pain and mental anguish were caused by not receiving Maxipime and Flagyl for four and one-half days." (Pet. at 11.)

As Respondents' expert witness, Dr. Daller, recognized, the Candida and Coagulase Negative Staph from which Ms. Casas suffered during that four and one-half day period cannot be effectively treated with either Maxipime or Flagyl. (Pet. at 11.)

Unable to support their assertion to the contrary with any record reference, Respondents attempt to refute a “straw man” argument regarding Dr. Daller’s qualifications. (*See* Resp. at 10-12.) However, because that issue is not raised by the Hospital’s Petition, that part of the Response is simply irrelevant. Equally irrelevant is Respondents’ argument that mental anguish damages are recoverable because “circumstantial evidence” proved “a particularly disturbing event.” (Resp. at 13.) Whether the record contains sufficient evidence of mental anguish is also not raised by the Hospital’s Petition.

Respondents simply do not address the legal sufficiency issue that is raised in the Hospital’s Petition: Whether Dr. Daller’s hypothesis that “it is possible that the cultures done of Ms. Casas’s surgical incision did not reveal other infections that might have been treated by Maxipime and Flagyl” constitutes some evidence of causation. (Pet. at 12.) As explained in the Petition, that testimony is, in legal effect, no evidence of the required causal nexus for two reasons: (i) it creates no more than a mere surmise or suspicion of a causal link between the failure to receive Maxipime and Flagyl for four and one-half days and the claimed injuries; and (ii) it lacks any reliable foundation. (*See* Pet. at 13.) Respondents fail to show otherwise.

#### **CONCLUSION AND PRAYER**

The Hospital’s Petition presents the Court with the opportunity to apply the admirable principle announced almost two decades ago in *Payne* in the context of the refusal of a Pattern Jury Charge unavoidable accident instruction: A party preserves error if it “made the trial court aware of the complaint, timely and plainly, and obtained a ruling.” To deny the Petition will signal the lower courts that they may ignore *Payne* and

indeed add yet another layer to the “myriad uncertainties in preserving complaints of error in the jury charge.” *Payne*, 838 S.W.2d at 240.

The Hospital therefore prays that this Court grant its petition, reverse the court of appeals’ judgment, and remand the cause for a new trial – unless the Court agrees that there is no evidence to support the jury’s finding that the failure to receive Maxipime and Flagyl for four and one-half days was a proximate cause of Ms. Casas’s pain and mental anguish. In that event, the Hospital respectfully prays that the Court reverse the judgment and render judgment in the Hospital’s favor. The Hospital further requests all other relief to which it may show itself justly entitled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the May 7, 2009 a true and correct copy of the foregoing was served on the following counsel of record via United States mail, postage prepaid:

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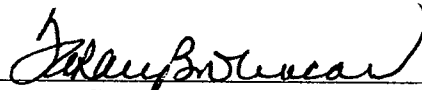
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