

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. 13-06-00088CV*

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

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**John N. Mastin  
State Bar No. 13184300  
630 Broadway  
San Antonio, Texas 78215  
Telephone: (210) 615-7284  
Facsimile: (210) 615-1480**

**ATTORNEY FOR RESPONDENTS**

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**TO THE HONORABLE SUPREME COURT OF TEXAS:**

Petitioner's response brief continues to cling to the hope that this Court will speculate as to whether or not the alleged written request for an 'unavoidable accident' instruction was presented to the trial court in substantially correct form. Petitioner has now expanded its allegation that the alleged instruction was in accordance with Pattern Jury Charge 3.4. However, nowhere within the record before this Court does such instruction exist! Additionally, Petitioner contends that 'neither the trial court nor the Respondents' attorney suggested the instruction was anything less than "substantially correct" as found in Pattern Jury Charge 3.4.' (Petitioner's Reply to Response p.3-4) It is neither the trial court's, nor Plaintiffs' counsel's job to point out error preservation to any opposing party, and to suggest such simply misstates the law. The requirement of error preservation lies solely to the party seeking same. See Tex. R. App. P. 33.1(a)

Petitioner's contention that the trial court 'endorsed' the preservation of error is again a fragile attempt to extend the plain reading of this courts ruling in *Dallas Mkt. Ctr. Dev. Co. v Liedeker*, 958 S.W.2d 382, 384 (Tex. 1997). *Liedeker* is not on point with what this Petitioner contends. *Liedeker* stands for the proposition that an **objection** to an instruction or definition is preserved **if** the trial court is **informed** of the reason. In *Liedeker* the first complaint dealt with whether or not the defendant was held to 'ordinary care/negligence' or a much greater degree of care that is required of a common carrier, as all that is required to preserve error to a **defective instruction is an objection**. *Id.* at pp.384-385. What is present in *Liedeker* that is not present in the case at bar, is the

requested instruction! The second portion of the *Liedeker* opinion, is dicta dealing with the manner the case should proceed on retrial (ie. premises defect or mere negligence) *Id.* at p.385. That portion of the opinion also dealt with objection to the issue given. The opinion **does not** deal with whether or not the **proper** instruction was requested, but rather whether it was denied. As noted by the court in *Liedeker*, "...There is no question they were submitted. They are stamped in the clerk's office." *Id.* at p.385. In the case at bar, where is the requested instruction to be reviewed? In *Liedeker* there was never concern that the instruction or definition were not tendered in substantially correct form, but rather that the appellant failed to have the trial court **sign** such refusal. *Id.* at pp.386, 387. Petitioner wants an extension of preservation of error by only requiring that somewhere in the reporter's record, a reference be made to some innocuous instruction and that the trial court indicate (in the record) it is overruled. That, Petitioner suggests, is enough. If this Court follows this extension, a whole new array of trial tactic is created. For instance, one party knowing a case is going badly for them in trial could reasonably assure themselves of a retrial by having an incorrect version of an instruction or definition written, discuss it in generality with the court on the record, fail to have it included in the record on appeal, and do just what this Petitioner is doing. The reason for the rule seems simple enough, courts need to know, not guess or speculate, that the instruction was correct for the facts presented at trial. To require less simply allows uncertainty and gamesmanship.

## **CONCLUSION AND PRAYER**

The hospital has not shown this court where it **plainly** presented a substantially correct version of an ‘unavoidable accident’ instruction, much less one in compliance with the Pattern Jury Charge. Accordingly, the Hospitals’ Petition should be in all things denied, and mandate issue.

Respectfully submitted,

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John N. Mastin  
State Bar No. 13184300  
630 Broadway  
San Antonio, Texas 78215  
Telephone: (210) 615-7284  
Facsimile: (210) 615-1480

***COUNSEL FOR RESPONDENTS***

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been sent to counsel listed below via Certified Mail, Return Receipt Requested on this the \_\_\_\_ day of June, 2009:

Mike A. Hatchell  
Sarah B. Duncan  
Elissa G. Underwood  
Locke, Liddell & Sapp, P.L.L.C.  
100 Congress Ave., Suite 300  
Austin, Texas 78701  
**Appellant Counsel for Columbia Rio Grande Healthcare, L. P.**

I. Cecilia Garza  
Ronald G. Hole  
Hole & Alvarez, L.L.P.  
Water Tower Centre  
612 West Nolana, Suite 370  
McAllen, Texas 78504  
**Trial and Appellant Counsel for Michael T. Jelinek, M.D.**

Francisco J. Rodriguez  
RODRIGUEZ, TOVAR & DE LOS SANTOS, LLP  
1111 W. Nolana  
McAllen, Texas 78504  
**Trial Counsel for Respondents**

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John N. Mastin