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No. 08-1066

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.

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

1. **No Evidence that Event Caused Injury** – In response to the Hospital’s argument that there is no evidence that not receiving Maxipime and Flagyl for four and one-half was a cause of Mrs. Casas’s pain, mental anguish, and embarrassment, the Plaintiffs argue that the jury was entitled to infer causation because the event was of “such a disturbing character.” (Resp. at 6.) In support of that assertion, Plaintiffs cite *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 797 (Tex. 2006). In that case, however, a security officer “grabbed Ramirez, slammed Ramirez’s head against a concrete wall, knocking him unconscious, and then struck him several times. The altercation resulted in multiple injuries to Ramirez, including a fractured skull.” *Id.* at 790. Those injuries are hardly comparable to pain, mental anguish, and embarrassment allegedly caused by missing four and one-half days of two antibiotics that the experts agreed would not treat Mrs. Casas’s post-surgery infections. Those alleged injuries, unlike those in *Ramirez*, do not warrant an inference of accompanying mental anguish. Nor is an inference of causation warranted by the Plaintiffs’ “additional direct and circumstantial evidence” that, before learning of the missed medications, Mrs. Casas was a “fighter”; but afterwards she became “depressed” and “began a rapid decline.” (*Id.*) This argument simply misrepresents the sequence of events and relevant testimony.

Mrs. Casas was diagnosed with colon cancer in the summer of 2000. (12 RR 55.) On June 29, 2001, Mrs. Casas learned that the cancer was in remission; she and her husband thought she was “cured.” (12 RR 56.) It was thus a “rude awakening” when, eleven days later, on July 11, she was readmitted to the hospital and learned that the

cancer “was back with a vengeance”; “[i]t had metastasized and spread” and was now “terminal” and probably untreatable. (12 RR 86-87.) Two days later, on July 13, Mrs. Casas underwent a subtotal colectomy to remove abscesses that perforated her bowel and the accumulated pus. (9 RR 144.) On July 21, cultures of the surgical incision showed Candida, a yeast or fungal infection that is not responsive to either Maxipime or Flagyl. (9 RR 146; 9 RR 150; 12 RR 142.)

To treat the fungal infection, Dr. Romero started Mrs. Casas on Diflucan (9 RR 146); and Dr. Garcia-Cantu removed the clamps binding the incision so it could receive air. (12 RR 63.) According to her husband and son, it was then that the bad odor was noticed and when Mrs. Casas experienced pain and embarrassment – from the removal of the clamps, the odor, and the open incision. (12 RR 63; 13 RR 15.) Her mental anguish – and loss of fighting spirit – resulted from learning that the post-surgical Candida and Coagulase Negative Staph infections prevented her from having further chemotherapy. (13 RR 19.) According to her son, the “turning point” – the point in time when Mrs. Casas “lost hope” – was after she was released from the hospital that August, after she was readmitted in September, and, specifically, when, on September 11, 2001, she watched television with her son and saw the Twin Towers collapse. (13 RR 19.) By September 17, Mrs. Casas was very depressed, unable to eat, and vomiting constantly. (12 RR (Garcia Depo. at 55).)

Plaintiffs also attempt to rely on expert testimony to establish that the infections from which Mrs. Casas suffered caused pain and fever. (Resp. at 7-10.) As even Mrs. Casas’s son admitted, however, all three expert witnesses agreed that the post-surgical

infections from which Mrs. Casas suffered and which caused her pain and fever would not have been effectively treated with either Maxipime or Flagyl. (12 RR 23.) As a matter of simple logic, therefore, there cannot be a causal nexus between Mrs. Casas's injuries and missing four and one-half days of these antibiotics. To describe these antibiotics as "necessary life saving treatment" (Resp. at 13) is thus nothing more than useless hyperbole.

Equally disingenuous is the Plaintiffs' attempt to characterize the Hospital's argument as requiring reversal when there is conflicting expert testimony. (Resp. at 14.) That is not and never has been the Hospital's argument. Rather, as fully explained on pages 12-13 of the Hospital's brief on the merits, Dr. Daller's theory of an uncultured infection is incompetent because it based on nothing more than speculation; thus, even Dr. Daller admitted that his hypothesis was not even suggested by any objective evidence.

In sum, although there is no doubt that Mrs. Casas experienced pain, mental anguish, and embarrassment, the record likewise leaves no doubt that these injuries were not caused by not receiving Maxipime and Flagyl for four and one-half days. The injuries were caused by learning the cancer was no longer in remission but instead terminal and untreatable, undergoing the second surgery to remove the abscesses and pus and, in particular, the removal of the clamps binding the surgical incision and the resulting open wound and release of the fungal odor. Not receiving Maxipime and Flagyl, although regrettable, had no causative role in Mrs. Casas's injuries. The judgment should therefore be reversed and judgment rendered for the Hospital.

2. **Refusal of Unavoidable Accident Instruction** – As the Hospital recognized on page 15 of its brief on the merits and as the Plaintiffs correctly argue (Resp. at 15), the Hospital bore the burden of tendering a substantially correct unavoidable accident instruction. The Hospital admitted on page 18 of its brief on the merits that the instruction is not included in the clerk’s record and has been lost. Like the court of appeals, however, the Plaintiffs argue that the Hospital failed to meet its burden because the tendered instruction is “nowhere to be found” in the clerk’s record. (See Resp. at 17.) But that fails to meet the Hospital’s argument: Neither Rule 278 of the Texas Rules of Civil Procedure nor Rule 33.1(a) of the Texas Rules of Appellate Procedure requires a requested instruction to be included in the clerk’s record. They require merely that the record reflect a written tender and ruling. The record plainly meets both requirements. (13 RR 53-54.) Nowhere do the Plaintiffs respond to this argument. Nor do the Plaintiffs respond to the Hospital’s reliance upon the holding in *Payne* that there is but one test to determine if a party has preserved the right to complain about a trial court’s failure to submit a requested instruction: Did “the party ma[k]e the trial court aware of the complaint, timely and plainly, and obtain[] a ruling”? *State Dep’t of Hwys. & Pub. Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). The Hospital met that test.

The Plaintiffs’ harmless error and abuse of discretion arguments are defeated by this Court’s recent opinion in *Hawley*, in which the Court held (i) a trial court is “required to give ‘such instructions and definitions as shall be proper to enable the jury to render a verdict’” and (ii) the failure to submit a requested instruction is “generally considered

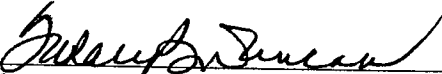
harmful if it relates to a contested, critical issue.” *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855 (Tex. 2009). Plainly, in light of the evidence tying Mrs. Casas’s physical pain, mental anguish, and embarrassment to factors other than her not receiving Maxipime and Flagyl for four and one-half days, the tendered unavoidable accident instruction related to a “contested, critical issue.” The trial court’s failure to submit it is therefore reversible error.

CONCLUSION AND PRAYER

Because the Hospital tendered a written unavoidable accident instruction, timely and plainly, and obtained a ruling, the Hospital prays that the Court reverse the judgment and remand the cause for a new trial. Alternatively, if the Court agrees the record contains legally insufficient evidence of the requisite causal nexus between not receiving the two antibiotics for four and one-half days and Mrs. Casas’s injuries, the Hospital prays that the Court reverse the trial court’s judgment and render judgment in the Hospital’s favor. The Hospital also prays for all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September, 2009, a true and correct copy of the foregoing document was served via certified mail, return receipt requested on the following:

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