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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.
No. 08-1066.
February 18, 2010.

Oral Argument

Appearances:Sarah B. Duncan, Locke Lord Bissell & Liddell LLP, Austin, TX, for Petitioner: Columbia Rio Grande Healthcare, L.P. d-b-a Rio Grande Regional Hospital.
Ida Cecilia Garza, Hole & Alvarez, L.L.P., McAllen, TX, for petitioner: Michael T. Jelinek.

John N. Mastin, San Antonio, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett. Justice Eva Guzman did not participate.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-1066, Michael T. Jelinek, M.D., and Columbia Rio Grande Healthcare vs. Francisco Casas.

MARSHALL: May it please the Court, Ms. Duncan and Ms. Garza will present argument for Petitioners. The Petitioner has reserved five minutes for rebuttal. Ms. Duncan will open with the first 12 minutes, and Ms. Duncan will present rebuttal.

MS. GARZA: Ms. Garza. Oh, I'm sorry.

MARSHALL: Okay. Ms. Duncan will present the rebuttal.

JUSTICE DAVID M. MEDINA: That cost you five minutes, Counselor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Ms. Duncan, please.

ORAL ARGUMENT OF SARAH B. DUNCAN ON BEHALF OF THE PETITIONER

ATTORNEY SARAH B. DUNCAN: May it please the Court, I apologize, Mr. Hawthorne. Good morning. As the Court knows, the hospital's presented two arguments in favor of reversal. The first is that there is no competent evidence that Mrs. Casas's failure to receive the two medications that had been prescribed for her caused her any additional pain and suffering that she wouldn't have had as a result of the tragedy that she was enduring. And the second is that the trial court erred in failing to accept our proposed instruction on unavoidable accident. Clearly if there isn't a [inaudible] issue in this case, it's the second one because that instruction, although indisputably, tendered to the trial judge in writing. The trial judge refused it. Is now nowhere to be found. But with the Court's indulgence, I'd like to spend the first few minutes on the no evidence point, because I think it's simple it's straightforward and it's dispositive of this case. In a nutshell, as the Court recently confirmed in Guevara, causation in a med mal case has to be established by expert testimony. In this case, all three experts agreed, plaintiff's expert, defendant's expert and the treating physician, Dr. Jelinek, agreed that nothing, not receiving those two medications would not have affected at all the two infections that Mrs. Casas had after surgery, and that she was going to have pain and suffering as a result of the infections she did have.

JUSTICE DAVID M. MEDINA: Well, what about the period of time from when the doctors first saw her until the time she started getting the right medication? There's some evidence in the record that the odor was so horrible, they had to bring fans in, and that to me implies that there must have been a great deal of suffering.

ATTORNEY SARAH B. DUNCAN: That was going to be my next sentence, that the odor that was so horrible, and if any of you know about yeast infections, you will know it is a horrible odor. That was when they had to take the clamps off the surgical incision so that the yeast could get, be exposed to air. That was the candida, the yeast infection, that all of the experts agreed was not going to be treated by Maxipime or Flagyl. It would not be affected whatsoever.

CHIEF JUSTICE WALLACE B. JEFFERSON: Didn't Doctor -- is it Daller, testify that patients exhibiting her symptoms had infections caused by anaerobic bacteria, which those medications that were not given would have prevented?

ATTORNEY SARAH B. DUNCAN: I believe on pages 157 and 158, what he testified to is that it's possible that when they did the cultures after the surgery that there was an infection that was not revealed by the cultures, and that unrevealed infection might have been treated by Maxipime or Flagyl. Now, I think under this Court's recent decision in City of San Antonio vs. Pollock, that string of mights and maybes is not competent evidence and can't support the judgment, but that's the most evidence there is in this record. So the hospital asks that the Court reverse the judgment and render judgment in the hospital's favor. Now, before you start in on me on the charge of preservation issue, I would like to say that even though I went to this law school, I did learn procedure from Scott McCowan [Ph.] and I made an A in that class. We all learned the same charge preservation rules. I think this case is different than any case certainly this Court has considered and I've not read of a case that's similar. There's no dispute on this record that the hospital tendered a written unavoidable accident instruction. There's no question, first of all, that the hospital pleaded unavoidable accident, and I don't really think there's any legitimate question that it was raised by some evidence. The hospital tendered a written unavoidable accident instruction.

JUSTICE HARRIET O'NEILL: Now, unavoidable accident is what? The failure to renew the medication?

ATTORNEY SARAH B. DUNCAN: No, that the pain and mental anguish that Mrs. Casas suffered was

caused by a condition outside of anybody's control, and that's the two infections that she had.

JUSTICE HARRIET O'NEILL: But you're saying the outcome was unavoidable, but I thought unavoidable accident was the means towards the outcome. So I'm not sure I understand under these facts the propriety of an unavoidable accident instruction.

ATTORNEY SARAH B. DUNCAN: Well, the way it's been applied, as I understand it in a med mal case, is that if the injury could have been suffered by a condition outside of any party's control, an unavoidable accident instruction is appropriate. That would be the decision for corpus in Wisenbarger. That's a written Nye decision, I believe Chief Justice Nye wrote the opinion. So the mechanism here -- there's no dispute that she didn't get those two medications. What's at issue is whether not getting those two medications was a cause of her pain or her suffering or her mental anguish, and that's why the instruction was requested. It fits in a med mal case. Maybe not in an auto accident case, but there's no dispute that a written instruction was tendered. There is no dispute --

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask about that on the preservation point. In many of the records that we reviewed, the instruction is tendered, and we have a paper copy and we can actually hold it and look at it, but also the instruction is read into the record, and the Appellate record is not only the Clerk's record, but also the Reporter's record, so wouldn't the absence of the instruction in the Clerk's record have been cured by reading into the record what the proposed instruction was?

ATTORNEY SARAH B. DUNCAN: Certainly it could have been.

CHIEF JUSTICE WALLACE B. JEFFERSON: And so it could have been preserved that way. Why was it not waived by not having done that?

ATTORNEY SARAH B. DUNCAN: Well, because we -- the Judge said he was going to get his Clerk, when his Clerk returned, to file stamp the written instruction we had given. So there was no indication to trial counsel that there was any need to read it into the record. Now certainly, as Ms. Garza was telling me before we started, the prudent course would be to do both, because you never know when a piece of paper is going to get lost, but that wasn't done here.

JUSTICE PHIL JOHNSON: Couldn't you have done it when counsel realized that it was not in the record? Could you not have done some kind of a bystander's bill, something of that nature to - to - a -? Aren't there other procedures to make the record complete?

ATTORNEY SARAH B. DUNCAN: There could be. There could be a bystander bill, there could be an agreement between counsel. I think even a cursory look at the Casas's brief would say that that agreement was not going to happen, that would be futile. But by the time it was realized that this instruction wasn't in the record, obviously it would take some time to get the record prepared, et cetera. Any number of calls went to the Clerk's office asking, “Where is this instruction? Please ask the Judge if he still has it. Please ask the Judge's Clerk if he has it.” It's just gone. So --

JUSTICE PHIL JOHNSON: At that point there is no way of making a record on it though?

ATTORNEY SARAH B. DUNCAN: At that point --

JUSTICE PHIL JOHNSON: Even going to the Judge and --

ATTORNEY SARAH B. DUNCAN: At that point I believe the Judge's power over the case had expired.

JUSTICE PAUL W. GREEN: Was it just a standard instruction, unavoidable accident instruction, do we know?

ATTORNEY SARAH B. DUNCAN: Well, that's our problem is, you know, part of our burden is to show that what we tendered was substantially correct.

JUSTICE PAUL W. GREEN: Right.

ATTORNEY SARAH B. DUNCAN: And without the piece of paper, we can't show that. Part of the argument we've made is that certainly opposing counsel and the trial judge -- no one suggested there was anything incorrect about this instruction, and Mr. Mastin argues that I'm trying to flip --

JUSTICE DAVID M. MEDINA: Is it the other side's counsel to make that judgment?

ATTORNEY SARAH B. DUNCAN: That's exactly what he argues is that he had no burden to object, and I'm not suggesting that he did. All I'm stating is the fact that he didn't. There is no suggestion in the record --

JUSTICE DAVID M. MEDINA: Well, that's kind of like, you cited the City of San Antonio vs. Pollock, there is no duty to do anything because there's an analytical gap. Why speak up, right?

ATTORNEY SARAH B. DUNCAN: Well, the reason I would have spoken up had I been there was, and representing the plaintiffs, is to avoid a remand, because I think, you know, in the Payne [Ph.] case, the State's premised defect question was affirmatively incorrect, and what the Court said was there should be but one test for preservation of charge error, and that is did you make the trial judge aware of your specific complaint and get a ruling. And we did that. So what I would propose is the way out of this mess, it seems to me, that when the trial judge has undertaken the duty -- not the duty, but has undertaken to file the signed refused written instruction, to get it filed through his Clerk, and somehow, some way, that doesn't happen, there should be a presumption that it was substantially correct. Just like in a bill of review case, if there is an official mistake, we'll say the judgment is invalid. If the court reporter loses all or part, a material part of the record, we get a new trial. That's all we're saying is the Judge said he was going to do it, either he didn't do what he said he was going to do, or his clerk didn't follow instructions. It's one or the other, and under those circumstances, we're arguing that there should be a presumption that it was substantially correct.

JUSTICE DALE WAINWRIGHT: The trial court did not require filing of pretrial orders that included all the proposed motions in limine, the exhibits --

ATTORNEY SARAH B. DUNCAN: They had them.

JUSTICE DALE WAINWRIGHT: -- instructions, jury charge, none of that was required?

ATTORNEY SARAH B. DUNCAN: They had a charge conference, an informal charge conference off the record in chambers, followed by a formal charge conference on the record.

JUSTICE DALE WAINWRIGHT: But no requirement to file a week, two weeks, 30 days before trial, the proposed pretrial that included all the things I mentioned?

ATTORNEY SARAH B. DUNCAN: No, Your Honor. So we -- and I still say the easy way out of this is to reverse and render judgment for the hospital on the basis of no evidence. But if the Court wants to tackle official mistake in not getting that instruction filed, that's the way I suggest you do it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Duncan.

ATTORNEY IDA CECILIA GARZA: May it please the Court, Counsel. We're going to switch pages a little bit here. This is a frivolous case, it's a bad report, and this case should have been dismissed way back

when our motion to dismiss was filed.

JUSTICE DAVID M. MEDINA: Well, that's what your side always says, but this goes beyond that.

ATTORNEY IDA CECILIA GARZA: Okay. Well, plaintiffs filed a wrongful death action, no doubt about it. The original petition was wrongful death. At 180 days their petition was wrongful death. At the time we filed our motion to dismiss, their allegations were wrongful death. Dr. Daller's report mentions nowhere anything about Mrs. Casas's death. For that reason, there were other reasons, but for that reason alone this report is insufficient. It doesn't address the pleadings, it doesn't address the allegations. The allegations at all relevant times was Mrs. Casas's wrongful death.

JUSTICE PHIL JOHNSON: I thought when the trial court rejected, or at the time of dismissal, one or the other, the pleadings at that time were not wrongful death any more, that they had dropped that claim?

ATTORNEY IDA CECILIA GARZA: At the time of the hearing, yes.

JUSTICE PHIL JOHNSON: At the time of the hearing, when --

ATTORNEY IDA CECILIA GARZA: At the time of the hearing. But what former Article 4590(i) did was it was 180-day, I guess, safe harbor. You have six months to give a report to look at this case, and you determine is it a frivolous case, does it have merit? You get the report, and what 4590(i) did that 74 doesn't do is it gave you the option to nonsuit within those first 180 days.

JUSTICE PHIL JOHNSON: But if you have a claim that the doctor did something wrong to your client and it injured your client, isn't the negligence, whether it caused death or simply caused some other injury short of that, what you're talking about in your report is whether the doctor was negligent and did it cause some type of injury. And wouldn't a prudent lawyer, once you get a doctor's report that doesn't link it up to death say, “Well, still that same negligence caused injuries just short of death.” Isn't that what a lawyer should do?

ATTORNEY IDA CECILIA GARZA: A lawyer should do that within the 180 days.

JUSTICE PHIL JOHNSON: Why?

ATTORNEY IDA CECILIA GARZA: Because that's what the law provided for, and at least even --

JUSTICE PHIL JOHNSON: Well, wait. It provided for the amendment? It limited the lawyer to the amendment for pleadings in 180 days?

ATTORNEY IDA CECILIA GARZA: Well, let me back up. They could have done it within 180 days or at least before we filed our motion to dismiss. At the time that the objection and the motion to dismiss was made as to that report --

JUSTICE PHIL JOHNSON: Yeah.

ATTORNEY IDA CECILIA GARZA: -- those were the allegations.

JUSTICE PHIL JOHNSON: Okay, but we have requirements about when the report has to be filed, and that's the 180 days?

ATTORNEY IDA CECILIA GARZA: That's correct.

JUSTICE PHIL JOHNSON: All right. Under the law that was applicable at this time. What does the law say about when the plaintiff can amend?

ATTORNEY IDA CECILIA GARZA: Well, a plaintiff can amend their petition any time they want.

JUSTICE PHIL JOHNSON: Okay, so the law doesn't address that, it just says the report has to be filed within 180 days?

ATTORNEY IDA CECILIA GARZA: Correct. But the report has to address the allegations that are on file during that time period. Those allegations were not made during those 180 days.

CHIEF JUSTICE WALLACE B. JEFFERSON: I just want to be clear. You're here seeking attorney's fees, that's what the case is all about?

ATTORNEY IDA CECILIA GARZA: Absolutely.

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the approximate amount that you're seeking?

ATTORNEY IDA CECILIA GARZA: At this point -- at the time of the hearing, it was $9,000. That was in 2004. Dr. Jelinek was not nonsuited until 2005, a couple months before trial, so there would have been, I don't know the exact amount, but there would have been a significant amount of attorney's fees from 2004 through the nonsuited 2005, and then of course the appellate fees. And if I may just very briefly address --

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, if there are questions.

JUSTICE PHIL JOHNSON: I have another question. At the trial the jury found 5 percent negligence on the doctor. In Ebram [Ph.] we said that if -- would you address the question that I'm about to pose. That we said that if you go through trial and there is a finding of negligence supported by evidence, well, then you by not bringing up an interlocutory appeal, you have waived.

ATTORNEY IDA CECILIA GARZA: Right. And I'd like to say two things about that, because I do remember that argument about a year ago in Ebram. In this particular case there was a 5 percent finding. Actually what the jury charge said was, “5 percent Dr. Jelinek directly or by agent or employee Dr. Romero.” So we don't know whether they found him negligent or whether they found his employee negligent. Dr. Jelinek was not a party at the time of the trial. We don't know if anybody even discussed the employee-agency relationship between him and Dr. Romero, so I don't think that that finding of 5 percent negligence even addresses whether the claims had merit or not.

JUSTICE PHIL JOHNSON: Under Ebram?

ATTORNEY IDA CECILIA GARZA: Under Ebram, and also the fact that, and this sort of came up during Ebram, is the 180 days is a bright-line rule. It's just like the statute of limitations. If you have an absolute two-year statute of limitations, and you have the most meritless, most awful case brought two days -- two years and five days late, it's late. That's the same thing that the Legislature was doing with the 180 days. Basically, and as far as the attorney's fees issue goes, it's to deter. And if, yes, the claim was nonsuited, but if the attorney's fees aren't awarded, it's just not having that deterrent effect.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Ms. Garza. The Court is ready to hear argument now from the Respondent.

MARSHALL: May it please the Court, Mr. Mastin will present argument for the respondent.

ORAL ARGUMENT OF JOHN N. MASTIN ON BEHALF OF THE RESPONDENT

ATTORNEY JOHN N. MASTIN: May it please the Court, I don't know what the Court's preference is with regards to the sequence of the argument, since it's reversed a couple times with regards to the Petitioner hospital. But I will address, I guess, since she went first with the no evidence points, is that I took great pains, I think, to contain within our brief page upon page upon page of facts that were elicited in the trial court, that was from every nurse that testified, that was from every doctor that treated, that was from the medical records, that was from the hospital's only expert and from the expert, the Plaintiffs' retained. And each of those people, every single one of them indicated that the standard of care was to provide antibiotic treatments for the type, since she had the colon cancer and then the resection, at all times, not just periodically but for the entire hospital stay. We had the chief of the pharmacy said that that should have been done. Within the confines of Petitioners' argument really lies that the only mental anguish could have come from the “cancer” and I guess arguably the surgery itself. But that disregards part of what we have reached and which is the particularly disturbing events of what happened. You have to consider, I think, in the context of this case and of great significance, and the jury heard it over and over, was that this lady, the antibiotics that should have been delivered to her, the Flagyl and the Maxipime, there was an empty IV bag and it stayed there in her room 24 hours a day for almost five days. Not one nurse noticed it, not one doctor noticed it.

JUSTICE NATHAN L. HECHT: Do you think there has to be evidence that the Maxipime and Flagyl would have been effective to treat?

ATTORNEY JOHN N. MASTIN: No. And Doctor --

JUSTICE NATHAN L. HECHT: It's your position, I was not quite clear from your brief, but I think it's your position that whether it would have been or not, what she suffered from was knowing that something was supposed to be given and it wasn't?

ATTORNEY JOHN N. MASTIN: Correct. Your Honor, and there's -- well, actually there's one more. Dr. Daller was clear, is that, and what counsel suggests is, is that anaerobic might possibly -- and that's not the context of how he described it. He described the type of purulent smell, and keeping in mind as Justice Medina indicated, that this went on for a number of days. This is not just the candida, as counsel suggests. The evidence was that this had gone on for a number of days, that they had to bring in fans to dissipate as much they could the purulent, necrotic, rotting smell in that room.

JUSTICE NATHAN L. HECHT: Do you agree that there is no evidence that she did have an infection post-surgery that Maxipime and Flagyl would have treated?

ATTORNEY JOHN N. MASTIN: No, I do not agree. I --

JUSTICE NATHAN L. HECHT: As opposed to that there might have been?

ATTORNEY JOHN N. MASTIN: No, it's not a might have been.

JUSTICE NATHAN L. HECHT: Okay. Well, what is the evidence that she did have an infection that was --

ATTORNEY JOHN N. MASTIN: Doctor -- sorry.

JUSTICE NATHAN L. HECHT: -- was treated?

ATTORNEY JOHN N. MASTIN: Dr. Daller says that the very type of infection, that the symptom, if you would, or the sign of the purulent smell is a sign of a anaerobic bacteria. You can never prove an anaerobic bacteria, because by definition, when it hits the air, it's gone. So a negative finding of anaerobic bacteria

can never be found. So medically speaking --

JUSTICE NATHAN L. HECHT: But I thought he testified that it also could have been the candida.

ATTORNEY JOHN N. MASTIN: It could have been. At some point in time, yes, there is no question about that. But the bottom line is, is that from a medical standpoint when you have anaerobic bacteria, you as a plaintiff or if you're a defendant and needed to prove it, you can never literally prove it except by your own experience. And keeping in mind that Dr. Daller not only was a teaching professor at John Sealy down in Galveston, but, and other universities. He also had degrees in microbiology, in toxicology and pharmacology. All of these elements came into play when the jury listens to it, and that also get us to the point from a standpoint of, an evidentiary standpoint, is -- the jury is entitled to believe whoever they want to believe, based, assuming they have sufficient credentials. And in this case, it's obvious that the jury believed, and you have to believe Dr. Daller. You also have to consider from that facts --

JUSTICE DALE WAINWRIGHT: But Counsel, the jury, there's some further limitations on what a jury is entitled to believe. An expert has to have sufficient credentials, as you said, but if an expert just says it's "possible" that something happens. We've said over and over again, that's not legally sufficient evidence.

ATTORNEY JOHN N. MASTIN: Well, I don't think he said "possible," Your Honor.

JUSTICE DALE WAINWRIGHT: Well, I'm just saying that that's an additional limitation on what a jury can believe.

ATTORNEY JOHN N. MASTIN: I think he testified "within a medical probability" that anaerobic bacteria would have been treated by Flagyl and Maxipime if given. That's what I believe he testified to.

JUSTICE DALE WAINWRIGHT: Okay. And we've said that the medical expert doesn't have to use those terms, but if they do, that makes it clear. And you're saying he said "within reasonable medical probability," and then gave his opinion?

ATTORNEY JOHN N. MASTIN: I feel comfortable that I asked the question in that manner.

ATTORNEY JOHN N. MASTIN: I mean obviously, you know, we're five years out from the jury trial and I don't recall everything.

JUSTICE PHIL JOHNSON: The question is then, is there only one type of anaerobic bacteria, or how do he get to the point of saying whatever the anaerobic bacteria, assuming that smell indicated an anaerobic bacteria, whatever bacteria was causing it was sensitive to the Flagyl and --

ATTORNEY JOHN N. MASTIN: Flagyl and Maxipime. Because it was explained to the jury that those were the two most broad-based antibiotics used.

JUSTICE PHIL JOHNSON: But --

ATTORNEY JOHN N. MASTIN: And they're used everywhere in the United States to hit these types of anaerobic bacteria. You don't know which one it is, but they are very broad-based antibiotics.

JUSTICE PHIL JOHNSON: So was there testimony that they would hit all of them, or are there some that are not sensitive to it? Did he discuss that at all?

ATTORNEY JOHN N. MASTIN: That, my recollection on that, Your Honor, that was not to that specifics, is that these are the most broad-based antibiotics known in medicine at the time, that were always utilized in this type of procedure. But in addition to just the use of the antibiotics, we have to -- and I think we have

to consider the fact of the traumatic effect of finding out. This lady was in remission of cancer, the evidence in this case shows. In May of 2005, there was a reoccurrence, that's why she goes into the hospital in July to see what they can do. Now you have to think -- and, you know, this is, I don't think really that complicated. You have a person who has been a fighter, uncontradicted, she's been a fighter. She goes in to have a surgery. Now what does that tell a person? That tells a reasonable person, I think, that she's still a fighter, because if she just wants to give up, she doesn't do anything. She goes into this hospital, she has the surgery. She's still a fighter after the surgery. It's only when, and the evidence is very clear in this, a downward spiral in her case. It's only when she is told that the medication she was supposed to be given weren't delivered, or weren't given, and she's had this problem before that is discovered. You have to consider also that in this context that this jury heard from defense counsel in both voir dire and in opening statement, the hospital messed up. They're sorry they messed up, and they won't do it again. That's what this jury heard. You take that in context with all of the evidence you have. And Justice Hecht, you mentioned some other evidentiary, or asked about some other evidentiary, and in this case Dr. Daller also testified that matters contained within the record also indicate pain or anguish, not necessarily from -- and I will grant not necessarily from not getting the antibiotics, but we have tachycardia, we have elevated blood pressure, which could be considered the same, assuming it gets to a certain level, and then you also had a long-term elevated temperature. All of those are medical signs that a person is suffering from both pain and/or mental -- or anxiety, if you will.

JUSTICE DAVID M. MEDINA: Mr. Mastin, can you address that instruction that was lost?

ATTORNEY JOHN N. MASTIN: Well, I don't know. Counsel has made giant leaps that it was lost. It was not stamped, that we know because if it had have been stamped, it would be easy to cure that, the file stamped. There was an informal charge. The Petitioner in this case is taking --

JUSTICE NATHAN L. HECHT: “Informal charge,” a conference you mean?

ATTORNEY JOHN N. MASTIN: Yes, I'm sorry. A formal charge conference.

JUSTICE NATHAN L. HECHT: Back in chambers?

ATTORNEY JOHN N. MASTIN: Back in chambers off the record. There was a -- there's no question there was an instruction in writing, but they, the Petitioners ask this Court to take a quantum leap and really, I think, set Payne on its head by now saying there is a presumption that if you hand a trial court an instruction or a definition you want, and it doesn't show up somewhere in the record, it should be automatically reversed. Well, that --

JUSTICE NATHAN L. HECHT: Why is that -- address her argument that if you handed it to the court reporter and it got lost, that would be grounds for a new trial, but why is it not if you hand it to the Clerk and it gets lost, or up to the Judge.

ATTORNEY JOHN N. MASTIN: I don't know who they handed it to, to start off with. I know the Judge had one.

JUSTICE NATHAN L. HECHT: Why should the rule be different?

ATTORNEY JOHN N. MASTIN: Well, the rule should be that -- and she talked about -- I went to South Texas and Justice Spurgeon Bell --

JUSTICE DAVID M. MEDINA: Well, then you probably learned there that you need to check to make sure all the documents you're submitting --

ATTORNEY JOHN N. MASTIN: You know, we actually worked on that. We actually worked on that. We

also were taught we'd get a file stamped copy and keep one.

JUSTICE DAVID M. MEDINA: And God bless.

ATTORNEY JOHN N. MASTIN: We don't have it. We don't have one in this case. So I think that we can presume that it wasn't done that way, the way it should have been done.

JUSTICE DALE WAINWRIGHT: That's true, Counsel. The record says counsel -- you know, it was during this exchange in open court taken down by the court reporter, counsel says -- I'm going to paraphrase a little bit -- “The originals of this instruction are in your office. I'm talking about the original signatures on the instruction.” The Court says, “They're right here. I'll have the Clerk when he comes in stamp file these. Any other objections?” So the Court says, “I've got them. Here are the originals, I've signed them,” refuse it.

ATTORNEY JOHN N. MASTIN: Rhetorically speaking, what does that mean? We don't know, because we don't have -- using the words, “sudden emergency,” using the words “unavoidable accident,” what does that mean? Could they have contained within those? This Court doesn't know, because it's not in the record.

JUSTICE PHIL JOHNSON: But if we go to the question, can you not file documents with the Judge?

ATTORNEY JOHN N. MASTIN: Can you --

JUSTICE PHIL JOHNSON: Can you file documents with the trial judge?

ATTORNEY JOHN N. MASTIN: I'm sorry, Your Honor. I'm just not following what you're saying.

JUSTICE PHIL JOHNSON: Well, if you give a document to the Clerk --

ATTORNEY JOHN N. MASTIN: Right.

JUSTICE PHIL JOHNSON: -- and they file stamp it, it's filed. If you give a document to the Clerk and say, “I'm filing this,” and they don't file stamp it, is it still filed?

ATTORNEY JOHN N. MASTIN: Well, that's not the real world, because actually --

JUSTICE PHIL JOHNSON: Well, but I'm asking. We do have those things happen, and now if you give a document to a trial judge, say after the Clerk's office is closed, you drive to the Judge's house and hand it. Can you file, can you file a document with the Judge?

ATTORNEY JOHN N. MASTIN: You can file a document with the Judge.

JUSTICE PHIL JOHNSON: All right. So if the Judge is in chambers and you hand it to the Judge and you say, “Your Honor, this is our requested instruction.” The Judge says, “I've got it. It's taken care of.” Why is that not filed, as we call the term?

ATTORNEY JOHN N. MASTIN: Because it's not stamped as an official record of the Court. I have, I have in my --

JUSTICE PHIL JOHNSON: But does the stamp make it filed?

ATTORNEY JOHN N. MASTIN: Yes.

JUSTICE PHIL JOHNSON: Or does the handing it to the person with the intent that it be filed make it filed?

ATTORNEY JOHN N. MASTIN: Well, in my personal opinion, Your Honor, that's fool's play just to hand it and not have it file stamped, because then --

JUSTICE PHIL JOHNSON: Well, that may be true, but we have a problem. My question is, is it filed when you hand it to the Judge or the Clerk with the intent that it be filed? Do we have any cases on that one way or the other that you're aware of?

ATTORNEY JOHN N. MASTIN: No, I think it's -- I think you actually have, the Clerk has to actually, or some official of the Court actually has to stamp it. And here's the reason for it, because how easy would it be in a situation, talking -- Counsel wants a presumption that if you had, if you mentioned words that -- if you mention words that this is how the presumption is that it was done in substantially correct form. How about if, and this will happen, is that if you see your case going south and the Court is not letting in certain evidence or the witnesses just didn't come across, or one of them that you thought was coming in didn't show up, and you see your case going south, either side, all you have to do is put a definition, instruction or a question in writing, don't have it filed in the Court, and then later on say, “Well, we had it, we talked about “sudden emergency,” we talked about “unavoidable accident,”” which happened in this case --

JUSTICE DALE WAINWRIGHT: But this case is much different. The trial judge said, “I've got the originals right here.” I think this was in open court, wasn't it?

ATTORNEY JOHN N. MASTIN: That was in open court.

JUSTICE DALE WAINWRIGHT: “I'll have the Clerk when he comes in stamp file these.” Are you saying Counsel should say, “Judge, I don't believe you. Stamp them now or I'm not going away.” Is that what you're saying?

ATTORNEY JOHN N. MASTIN: I wouldn't suggest that. I wouldn't suggest that far.

JUSTICE DALE WAINWRIGHT: I wouldn't suggest that either.

ATTORNEY JOHN N. MASTIN: But the normal way it's done, Your Honor, the way I understand -- my 37 years in doing trial practice is you go to the Clerk, you give the Clerk one -- not one, I give them three, and you get them all stamped. Typically what happens is even if you don't do that, I've seen other attorneys where they just have one stamped, but what you do is you take it, you take that file stamped --

JUSTICE DALE WAINWRIGHT: Clearly, there are better ways to do it to add a belt to the suspender. But if -- when I was a trial judge, if I said “I'm going to get this stamped,” you know, I'm making a representation that I'm going to get it done and it should be taken as done. And if the lawyer said, “I don't believe you,” I'd say, “We're going off the record. Counsel, in chambers, and bring your toothbrush.”

ATTORNEY JOHN N. MASTIN: I would have thought you probably say [inaudible] in chambers.

JUSTICE DAVID M. MEDINA: You're not really advocating for anything more than --

ATTORNEY JOHN N. MASTIN: Sorry?

JUSTICE DAVID M. MEDINA: You're not advocating for anything more than what a judge is required to do, which is, for example, give a ruling on your objection --

ATTORNEY JOHN N. MASTIN: Exactly.

JUSTICE DAVID M. MEDINA: -- when you make it or when you want a bill of exception, we'll do it after lunch, we'll take it at the next break. You've got to keep pressing that Judge to make sure that you get that ruling so you can preserve your record.

ATTORNEY JOHN N. MASTIN: We do it all the time, Your Honor. We do it when trial exhibits, there's things that are put up on the bench and the court reporter keeps them, but when you go in, you have to go back through and you check and you double-check and you triple-check what the Court admitted in, what the court reporter says she has now, and what you have, what the other side has. That's how you do this.

JUSTICE PAUL W. GREEN: Well, but the problem is not with the regular way of doing it, it's when the ox is in ditch, when you can't find the document, and you're trying to figure out, well, what procedures are available to protect yourself? And you're not suggesting that there has to be a file stamp, I don't think.

ATTORNEY JOHN N. MASTIN: I am, I am suggesting that.

JUSTICE PAUL W. GREEN: Well, if the Judge puts, writes on the -- and I've done this before, handed a Judge something in a courtroom and he'll write on the document, “Filed,” date it and sign it.

ATTORNEY JOHN N. MASTIN: But that wasn't done in this case though, Your Honor.

JUSTICE PAUL W. GREEN: Well, but you're suggesting that it has to be file stamped. And if that document gets lost, what's the parties to do then? The Judge has possession of it, you've seen it and it's been marked ‘filed.’

ATTORNEY JOHN N. MASTIN: Well, that's part of the adversarial system, that's part of --

JUSTICE PAUL W. GREEN: And --

ATTORNEY JOHN N. MASTIN: -- and keeping, keeping the record straight so this Court doesn't have to guess.

JUSTICE PAUL W. GREEN: And so if the document is missing, and it's an important document, then the remedy is a remand, isn't it?

ATTORNEY JOHN N. MASTIN: Well, no. Your Honor, I disagree with you. They could have, they could have brought this before the trial court, they could have even in front of the court of appeals, filed something, but they didn't.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was there a motion for new trial? Did the hospital file a motion for new trial?

ATTORNEY JOHN N. MASTIN: I'm trying to remember that. It seems like it took about a year before we even had it. I mean this is not something --

CHIEF JUSTICE WALLACE B. JEFFERSON: But my question goes to if the -- I presume, you know, typically there is a motion for new trial, factual insufficiency, legal insufficiency, but also in this case there would be one about the failure of the trial court to give the requested instructions.

ATTORNEY JOHN N. MASTIN: Yeah, I think there's just been too much water under the bridge for me to remember if there was actually a motion for new trial.

CHIEF JUSTICE WALLACE B. JEFFERSON: Maybe Ms. Duncan can answer, because then, if that were one of the points in the motion for a new trial, you would, presumably the lawyer would look for that instruction in the record to make that point.

ATTORNEY JOHN N. MASTIN: Correct, Your Honor. That is correct.

JUSTICE PHIL JOHNSON: Mr. Mastin, let me short circuit, and just say Dr. Jelinek, the pleading, the amendment of the pleading after the filing of the affidavit and the finding against him in the trial court in connection with our decision in Ebram would -- do you have time? Do you have anything to say about those two points?

ATTORNEY JOHN N. MASTIN: Well, with regards, the jury obviously found in -- it wasn't addressed in any of the briefs I don't believe, but my memory is there was, there was little to no argument about the negligence same, except from the hospital concerning the doctor's trying to throw it off on somebody else.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY JOHN N. MASTIN: But with regards to whether there was negligence presented at trial, without question, doctor -- there was testimony, I think I pointed it out in the brief, Your Honor. It talks about how mad he was, how the nurses --

JUSTICE PHIL JOHNSON: Do you have a position on what that would do to Dr. Jelinek's plea here --

ATTORNEY JOHN N. MASTIN: I think it would bar his, the plea here.

JUSTICE PHIL JOHNSON: All right. How about your pleading amendment after, from death to non-death?

ATTORNEY JOHN N. MASTIN: I think that's the controlling with regards to whether the report is sufficient. And the report, this was not a complicated case of a series of other doctors becoming involved. This was a simple question, and Dr. Daller pointed it out, if I might, Your Honor, just very quickly, and I've got it. He said that -- he went through the whole litany of what he understood reasonable medical probability was and standard of care, and he sets that out. And he says in the case, in this specific case, that Dr. Jelinek was, failed to monitor the receiving of medications by Mrs. Casas, he confirmed it.

JUSTICE PHIL JOHNSON: But you're going to the affidavit now.

ATTORNEY JOHN N. MASTIN: Right.

JUSTICE PHIL JOHNSON: I'm going to the question. She says that when he gives his affidavit, your pleading is wrongful death. And then after the affidavit, before the hearing, you change your pleading and drop wrongful death.

ATTORNEY JOHN N. MASTIN: It was wrongful death and survival.

JUSTICE PHIL JOHNSON: And survival.

ATTORNEY JOHN N. MASTIN: We dropped out the wrong death because we couldn't prove the wrongful death.

JUSTICE PHIL JOHNSON: So you at all times had both in there?

ATTORNEY JOHN N. MASTIN: Right. And the situation is, Your Honor, is that this was, this was a short window from a medical malpractice standpoint, from the problems that Mrs. Casas had. This was not a jury gone wild. Even Dr. Berkowitz, the defendants' attorneys -- I'm sorry, the defendants' expert, the hospital's expert in this case alluded to and agreed that the failure was below the standard of care. His only question was whether or not Flagyl and Maxipime would have -- the ones that were actually the bacteria actually found, not anaerobic, would actually have been affected by Flagyl and Maxipime. And that's all.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF SARAH B. DUNCAN ON BEHALF OF PETITIONER

ATTORNEY SARAH B. DUNCAN: May it please the Court. Judge O'Neill, if I could first address your question and read to you from Wisenbarger, “In a medical negligence case when expert testimony establishes that another physical condition or circumstance was the probable cause of the injury, the definition of unavoidable accident must immediately follow the jury instruction defining proximal cause.” That's on page 16 of our brief. A writ denied case from Corpus in 1990. If I could refer the Court, and these are cited in our brief, to the page numbers that I cited in our brief, Dr. Daller testified there could still be other organisms that were not grown out because of the fact that you cannot grow out every -- every time you have a bowel perforation, you don't grow out every organism that's in there. And --

JUSTICE DALE WAINWRIGHT: Did he also use the term “reasonable medical probability”?

ATTORNEY SARAH B. DUNCAN: Not with, he did with, in many respects in his testimony, yes, he said in reasonable medical probability, but not with respect to there being some uncultured, unrevealed anaerobic bacteria in the bowel. And yes, Judge Johnson, you can file with a judge, as you know. You probably had things filed with you. The test, as I remember it, Mr. Panguine [Ph.] is what comes to mind, but I'd be happy to file a supplemental brief with the Court. All my responsibility is as a lawyer is to tender something for filing to the Clerk. The Clerk has a duty to accept it for filing. That was part of the problem with supersedeas bonds when we required that they be approved. And the clerks didn't want to approve them, and once they were tendered, they felt that they had to approve them. You know, Judge Wainwright, I'm not going to say to a sitting Judge, “I don't believe you” in chambers. I'm also not going to, particularly in this climate, I'm not going to follow a Judge around --

JUSTICE HARRIET O'NEILL: Well, but we've all been in trial where everybody at every break is checking to make sure that this actually got admitted, and this document is there, so you didn't have to follow the Judge around. You could have looked at the record and seen have we preserved our objections and where is the instruction?

ATTORNEY SARAH B. DUNCAN: That's correct.

JUSTICE HARRIET O'NEILL: And it would have been cured at the trial court level.

ATTORNEY SARAH B. DUNCAN: That's correct, and that didn't happen. So this is not a case where could not have been steps taken, but we're still left with the --

CHIEF JUSTICE WALLACE B. JEFFERSON: Was there a motion for new trial?

ATTORNEY SARAH B. DUNCAN: Well, I don't remember, but why would you include the failure to give instruction in a motion for new trial?

JUSTICE PAUL W. GREEN: Because you want to --

ATTORNEY SARAH B. DUNCAN: Because at that point, we didn't even know it wasn't in the record.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, if, and I'm not saying it's required, but if you are telling the trial court you erred by not giving this instruction and you brief it, and you persuade the trial court, then the trial court grants a new trial, and you get rid of the $250,000 judgment, or whatever it was.

ATTORNEY SARAH B. DUNCAN: Of course at that point there was no reason to know that it wasn't going to be in the record.

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm just saying if there is a point in the record --

ATTORNEY SARAH B. DUNCAN: And everybody involved --

CHIEF JUSTICE WALLACE B. JEFFERSON: -- if there's a point in a motion for a new trial involving a jury charge problem, then at least I think many lawyers would say, “Here is the instruction we proposed from the record, and your order was to deny it. We think it's error.” And had you gone through that exercise, you would have known it wasn't there and could have maybe done something about it.

ATTORNEY SARAH B. DUNCAN: Possibly.

JUSTICE HARRIET O'NEILL: And it could have been checked before the case went to the jury. I mean it could have been checked at the end of the, at the close of the evidence.

ATTORNEY SARAH B. DUNCAN: It could have been.

JUSTICE HARRIET O'NEILL: At many points it could have been checked --

ATTORNEY SARAH B. DUNCAN: It could have been.

JUSTICE HARRIET O'NEILL: -- and cured.

ATTORNEY SARAH B. DUNCAN: It could have been. No question about it. The problem that we're left with is what is Texas law when a trial judge says “I will have the Clerk when he returns file stamp this,” and it never gets into the record? That's the question. We would ask the Court to reverse and render on the no evidence point and remand for new trial on the instruction point.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Duncan. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

Michael T. Jelinek, M.D. and Columbia Rio Grande Heal Thcare, 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.
2010 WL 710000 (Tex.) (Oral Argument)

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