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Supreme Court of Texas.  
Columbia Rio Grande Healthcare, L.P. d/b/a Rio Grande Regional  
Hospital,  
Petitioner,  
v.  
Alice H. Hawley and James A. Hawley, Respondents.  
No. 06-0372.

January 17, 2008

Appearances:

Charles R. 'Skip' Watson, Austin, Texas, for petitioner.  
Darrin Walker, Kingwood, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument on 06- 0372 Columbia Rio Grande Healthcare versus Alice and James Hawley.

THE COURT MARSHAL: May it please the Court. Mr. Watson will present argument of petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CHARLES R. "SKIP" WATSON ON BEHALF OF THE PETITIONER

MR. WATSON: May it please the Court, Skip Watson and Mike Hatchell for Columbia Rio Grande Healthcare. The Court of Appeals has held that the trial court that is not needed to submit, what this Court has held is the ultimate causation issue when survival is an issue whether the chance of survival is greater than 50 percent that the time of the defendant's alleged negligence. It gave essentially two reasons. I suspect we're here because of the first. They said, "It's absolutely clear that it did not need to submit it because of the absence of precedence saying that an instruction was necessary, but it's a second reason that concerns me the most" and that is they said that "It would not have assisted the jury because that ultimate issue of chance of survival being greater than 50 percent was inherent in the causation instruction that was given so there was no basis to conclude that it

was necessary to enable the jury to reach a verdict." To me that raises a deeper question that is "at the core of [inaudible] charge practice that only this Court can decide and that question is simple." Do judges or do attorneys tell the jury what the controlling issue is under the law and what factors they can consider under the law in deciding that issue? That question must be decided.

JUSTICE O'NEILL: Why doesn't the proximate cause definition take care of it, if it, if it does in fact mean that is more likely than not, that the negligence caused her death?

MR. WATSON: Your Honor, I understand that it could be interpreted as saying that but it's very similar to what Justice Hecht had dealt with in *Ryner* in his concurring opinion. You can work a way where a lawyer could figure out that it would be in there, but it is inscrutable to a juror. That's what Justice Willet and the Court just dealt with in *Ford versus Ledsma*.

JUSTICE O'NEILL: What's inscrutable without more likely than not?

MR. WATSON: Because you just said, "In *Ford* that there are two discrete elements to factual causation, not just more likely than not, not just but four, but also substantial factor." Let me go through just quickly the practical reasons why the charge precludes the argument of counsel from directing the jury's attention to the ultimate issue rather than having the court do that. First, they were instructed in the charge to follow only what the court said concerning what the law was. They are to follow only what the court said. They are free to disbelieve lawyers, indeed they know the lawyers arguing the charge to them are advocates. There is no mention in this charge of substantial factor. It is the same charge out of the PJC on products and malpractice that you dealt within *Ledsma* only without the exciting factors part. All you have is but for causation. That's the critical issue, is can-- this core ultimate element of the charge be deciphered by a jury when the Court doesn't draw the attention to it. This has been a problem from the get-go of charge practice. *Hodges*, 50 years ago lamented in, in page 30 of his Special Issue treaties-- lamented submitting causation in other terms just in legal leads.

JUSTICE O'NEILL: If substantial factor had been specifically put into the charge, would you also need the lost chance instructions and if so why?

MR. WATSON: Yes you would. The reason is this, you have to draw the jury's attention to what is being asked is the same reason for example in inferential battle instructions that this Court has consistently held that if they raised by the evidence they must be submitted. Our entire unbroken body of charge jurisprudence is that you can't just assume that the jury can figure out from the charge that it doesn't have to put negligence on somebody.

JUSTICE O'NEILL: But why doesn't substantial factor, just by definition mean more than 50 percent?

MR. WATSON: I think it should mean more than 50 percent but the jury doesn't know that, that's being talked about that the ultimate issue in the case is going to be determined by whether she had greater than a 50 percent right-- a, a chance of survival. They need the court to tell them, you we're deciding the issue on these factors, otherwise, again it's the lawyers not the Court telling the jury under the law, this is what you're deciding here. I cannot concede of this Court wanting a laissez fair jury system where the court gives what-- I think Justice Willet called it, "it's not concurrent terms."

CHIEF JUSTICE JEFFERSON: I have a little bit of problem with your argument because the-- I mean-- when you go through the pattern jury

charge-- we, we've done a study. You know, and California has done a study and looked at the sorts of questions that we ask today of jurors. And jurors don't, you know, in general understand and so they rely on the lawyers to sort of elaborate on the concepts of negligence in what a marketing defect is and, and the lawyers then can object to each other about whether that accurately states the law. So if we accept your argument that the instruction here on proximate cause wasn't enough, is it-- would it be incumbent on the Court then to go through and elaborate on all these technical terms and charge instructions?

MR. WATSON: I don't about all of the technical terms in all of the charge instructions. I do know that when the ultimate issue is something like either an inferential rebuttal, that is telling the jury you don't have to blame anybody in this case or when it's an ultimate issue of something as technical as "Causation is going to be determined by whether this person has a chance of survival greater than 50 percent and you've got to focus on that and find it." This Court has consistently said that those things, if raised by the evidence must be submitted and I don't see any reason to distinguish this from an inferential rebuttal issue, it's the same principle, who is going to guide the jury? It, it may be a problem, in terms of every discrete case but it's not a problem in this case. This case all the court had to do is grant the issue right under it. Just like an inferential rebuttal issue would've been done and allow the jury to be told that in considering this one, you must determine whether the person had greater than 50 percent right of survival.

JUSTICE O'NEILL: Let's, let's presume that the court erred in failing to submit the instruction, why would that be reversible err when the Counsel apparently agreed and stated to the jury that they had to meet a greater than 50 percent burden?

MR. WATSON: There is no question that it was argued your Honor. Absolutely no question about that. Part of the problem is we really can't tell. There is no way of knowing that as in [inaudible] *Harris County*, the other cases, it is impossible to know that this jury decided the case on an issue that was the proper, legal issue for it to be decided on. It's impossible to know that unless the Court drew the line to it. That was the point that was being made when we talked about that the element has to be submitted. I mean, you've said that in the *Diamond Offshore*, you've said, "It in *Kitch versus Kruger*, you've said it in, in, in *Rhineheart*, you've said it in case after case specifically, going back to the beginning of *Bradford*." In *Scott versus Atchison*, *Topeka*, act of god, inferential rebuttal. The Court made a point that the instruction not only should be given but needs to be tied-in to the element that it's talking about.

JUSTICE WAINWRIGHT: Counsel?

MR. WATSON: Yes, your Honor.

JUSTICE WAINWRIGHT: It sounds like you would even argue for submission of the question to the jury as to the probability of survival give us -

MR. WATSON: Not at all.

JUSTICE WAINWRIGHT: -45 percent , you just said, "It was impossible to tell if the jury based its decision in this issue on a proper factual determination supported by the law." The way to know is to ask the jury what percentage, what chance of survival there was, right?

MR. WATSON: Of course, you would know that, but at least and this is, this is the point I believe -

JUSTICE WAINWRIGHT: I am asking if you think it's necessary, do

you think it would be an error to submit such a question, asking the jury for the number that represents the chance of survival?

MR. WATSON: I certainly don't think it's ever-- error to submit a granulated question, but I want to be crystal clear, it's not necessary. This Court has never held that it's a reversible error to submit a granulated question. I, I know with no such case, but what's at issue here is, and that's what Justice Hecht's concurring opinion *Ryner* made crystal clear, is that you got to be able to tie the jury's answer on negligence and causation to the proper legal standard and they don't have the proper legal standard unless the Court tells it. Now if, if this Court wants lawyers to tell juries what the law is, that controls their decisions and what the factors are that they consider, it should say so but in *Spencer versus Eagle Star* it drew a bright line and say it, for example, in areas of bad faith of insurance practices, we are not just going to ask that issue. It's got to be [inaudible] and that's the job of Courts not juries to decide what the law is and that is critical to the function broad-form practice. We cannot know what the jury decided in this case but to answer Justice Wainwright's question, if there had just been an instruction, we would know, without it we cannot possibly know. Last in the few seconds that I have left, I want to make crystal clear that only interferential rebuttal instruction of independent cause, this case is not due but it can clarify due. In this case the re-statement factors that Justice O'Neill listed in *Fan* were met in terms of it being truly independent in terms of it, of it being operating independently due to a third party's failure to act due to the third party's -

JUSTICE O'NEILL: Well, but it has to be unforeseeable as well.

MR. WATSON: That is correct, your Honor.

JUSTICE O'NEILL: And doesn't the hospital's policy that incorporated this redundancy, and I've realized for some disagreement that the policy required an oral notification, fax notification, certified mail notification, doesn't that mean that the treating physician may not be informed of the path results or particularly in the case like this where they weren't looking for colon cancer but they were performing another procedure and might know to follow up, so this redundant policy in itself doesn't that imply as foreseeable that the doctor would not get the report?

MR. WATSON: It certainly that should've been argued. If it had been-- if we had been allowed to submit our evidence, but this is a *Dressor* case not a *Due* case. This is a case like *Dressor* where we were prohibited it from bringing in our evidence, there was a limiting where couldn't even mention the word negligence and what our evidence in the bills was trying to show was that there--that we've yes, assumed this duty to try to deliver but once they had access, once it was in the chart, once the green card came back from the primary treating physician, that duty had been met second and more important that this was truly a superseding duty on the part of the doctors. What our evidence was trying to show was that the doctors cannot sit back and wait for the fax machine to ring or to wait for the mail to arrive -

JUSTICE O'NEILL: But I thought--

MR. WATSON: That they had an ongoing duty to find out.

JUSTICE: But I thought the record was pretty replete with evidence that doctors did not do that and therefore, this policy was put into place. That there was difficulty whether it's the doctor's fault or the hospital's fault that there was always difficulty in making sure these reports got through-- whosever ever fault it was and therefore, it's the reason you have this policy. And so it's just the policy itself

would seem to indicate [inaudible].

MR. WATSON: I understand that the policy itself was designed to try to have redundant ways to give the doctor's access to the information but again, the evidence that we were prepared to submit was like *Dressor* where the court recognized that even though there's a warning label and there is a failure to do a warning label, that there are circumstances when the failure to have that warning label can still be overcome by an inferential rebuttal situation in that case, sole cause. This case when it goes [inaudible] may well end up as a sole cause case, I don't know how it will shake out. I understand this case was tried prior to do.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you Mr. Watson. The Court is now ready to hear argument from the respondents.

THE COURT MARSHAL: May it please the Court Mr. Walker will present argument for the respondent.

ORAL ARGUMENT OF DARRIN WALKER ON BEHALF OF THE RESPONDENT

MR. WALKER: Thank you with respect to the absence of an additional instruction that proximate cause in this case require that Mrs. Hawley have a greater than 50 percent probability of survival. As we pointed out in our brief, the Court or rather the charge instructed the jury that, a yes answer had to be based on a preponderance of the evidence that preponderance of the evidence met the greater weight and degree of credible evidence, that the hospital's negligence could not be proximate cause unless it was a cause which in actual and continuous sequence caused the event and without which -

JUSTICE BRISTER: It might, it might have been helpful in this case. I mean the Court of Appeal says, "This is what the trial was really about, whether her chances were below 50 percent or not?"

MR. WALKER: That was absolutely the central issue in the case.

JUSTICE BRISTER: And you know, you read the Court of Appeals' opinion, then you get the impression that they're not going to make a step away from the pattern jury charge because they are afraid to get to the first, wouldn't it have made-- don't we need to say something to tell folks-- "Look, if, if the case is about one thing, don't submit 37 other issues just cause there in the pattern jury charge, why don't you submit the one thing that the case is about, wouldn't that be a better way for the world to work?"

MR. WALKER: Well, your Honor the pattern jury charge does instruct the jury that, that had to be more likely than not. The lawyer was in kept-

JUSTICE BRISTER: Of course, we've had-- I mean there was reason, it did that before we had the cases reversing people telling them, that's what it means. So at least it allowed the lawyers in courts until we did so didn't think that's what it meant, right?

MR. WALKER: Well, actually -

JUSTICE BRISTER: Why are, why are the jurors in the Dallas County more sophisticated than the lawyers who lost those cases right up here?

MR. WALKER: Well, actually as I recall in the *Kramer* case, the charge submitted the standard wrongful death cause and the plaintiff had requested an additional instruction that has-- Okay if you find-- no, it didn't caused the death, did it cause a reduction in her chance

of survival and the Court refused that and this Court said that was right because the wrongful death act, that requires that it caused death and it can only cause death under the preponderance of the evident standard if there was a probability of survival before the act of negligence.

JUSTICE WILLETT: What is it, what is it caused quicker death if it hastened death?

MR. WALKER: Well, I personally believe that under the *Kramer* standard, if the, if the defendant's negligence hastened death-- probably hastened death, when it otherwise, would not have occurred that, that would likely survive the *Kramer* standard that, that's not necessarily an issue in this particular case because the evidence in this case was there was evidence from the plaintiff that there was greater than 50 percent probability of survival if the hospital had not been negligent. And then the conversed evidence from the defendant was, no there wasn't-- she was destined to this result regardless of our negligence. So we didn't have the situation where everyone agreed she would die in 10 years but the hospital intervened and therefore, she died immediately.

JUSTICE JOHNSON: Well, that's-- that is something that the Court of Appeals looked at in both legally and factually sufficient on more than or less than 50 percent. That is clearly an issue in the case, that's going to be evaluated here. Now if we have the Court of Appeals looking at it and if we're arguing about it here, why wouldn't it not help the jury-- to tell the jury what the test is. It seems like, you know, what the standard is seems like-- we're asking a jury to give an answer and then, then we tell them the question later on or at least we argue about the question and we never did tell the jury the question. Why, why would it not help them if in fact, that's what the case is about, to give them for the Court to tell them here's what the case is about?

MR. WALKER: Well, your Honor, I think that probably any broad-form submission charge could include additional instructions that would refine-- define expand upon.

JUSTICE JOHNSON: But we're talking about the one that we're going to measure evidenced by--on appeal by judges and lawyers arguing about and we're, we're assuming that the jury will know what it's about that we haven't told them.

MR. WALKER: Well, with all due respect, I don't think that under this record there can be much question that the jury did understand, that was the issue.

JUSTICE JOHNSON: Those, those-- that's what the lawyers argue, that's what opposing counsel said that "the trial judge didn't tell them though" and that's what we tell them in the charge the judge is going to tell them the law so-- and, and many in times quite frankly, lawyers argue about what the law has reasoned and the jury gets confused about that so-

MR. WALKER: And that's, that's a great point your Honor and, and that's one reason why in this particular case, regardless of whether the instruction would've been helpful or not, under this record there can be no probability that it caused the rendition of improper judgment because this was not the case. First of all, ordinarily you would have broad-form jury instructions the lawyers would then apply those to the evidence argue about it explicate it to the jury. In this case, you didn't have a situation where the plaintiff's lawyer was saying, here's the broad-form definition of proximate cause or preponderance of the evidence. That doesn't mean 50 percent, we don't have to prove 50

percent. We just have to prove it was substantial and then the defense lawyer objects and says, "no," that's not the law, in he says, "The law is what we say it is." This is a case where the plaintiff's lawyer said "Look, preponderance of the evidence that means we have to show more likely than not she would've survived." That was conceded from the beginning, there was never any question about it, it was argued by both sides so-- I am not trying to evade your question. You asked whether this instruction might have been helpful in this case. I don't think I can, in good faith, say there is no possibility that it could've been helpful it could have clarified things. However, under the record in this case, I don't think there's anyway it can be considered harmful error under the standard that harmful error in the jury charge means that the omission was probably caused the rendition of an improper judgment because there was no dispute that the preponderance of the evidence standard of proof combined with the definition of proximate cause required the plaintiff to prove that Mrs. Hawley's chance of survival was greater than 50 percent.

JUSTICE WAINWRIGHT: Counsel, do you, do you see any way that the instruction at issue here would've cause harm or confusion in the case? I am not talking about harmful error but is there any prejudice or harm that such instruction could apply?

MR. WALKER: Well, I think that the only-- that the harm that it might cause and again I think that probably this-- the probability of this harm is, is similar to the probability that it would've been helpful. It might have caused harm in the sense that the jury may have seen it as nudge. Here's the judge telling the jury first of all, you have to find yes by a preponderance of the evidence. It can't be a proximate cause unless it probably led to death and now let me say again don't find for the plaintiff unless you find that it is more than 50 percent. The-- and some of the inferential rebuttal cases where some of the concurring and descending justices have criticized inferential rebuttals, they've made comments like you know at best, it, it only repeats what's in the charge; at worst it could be seen as a nudge to find no negligence, I think you could conceivably have that problem by repeating what is already in the charge in general terms that have been well-accepted by the bench and bar for many years in the pattern jury charge by repeating those with a specific explication particularly--

JUSTICE BRISTER: So if the judge repeats what you've just argued to us that both sides agreed on they'll be nudge against you?

MR. WALKER: Say again, I'm sorry.

JUSTICE BRISTER: I just said, "Both parties in the closing argument telling the jury that's what this charge meant and if the judge puts in what both sides you are arguing to the jury how could the jury be nudged by the judge?"

MR. WALKER: Well, because-- what I'm saying is that, that the, the plaintiff is admitting what his burden of proof is. The charge has that burden of proof in general terms. The judge then comes in not only has the plaintiff admitted that's my burden of proof but the judge has made a comment and by the way don't find for the plaintiff unless, now that's not saying that's an incorrect statement of the law, and I'm not saying it would necessarily nudge but it could and, and, and in this particular case, it was unnecessary -

JUSTICE BRISTER: Moving into the independent contract at question, what was the-- tell me just first a little bit about the fax, the pathologist does the report, -

MR. WALKER: That's right.

JUSTICE BRISTER: And everybody agrees it's the pathologist's duty

to get that report to the doctors who can act upon.

MR. WALKER: The policy actually-- the pathologist does have a duty. The, the policy said, "The pathologist ...

JUSTICE BRISTER: No the, the hospital, the hospital has a duty also because it under took it or the hospital have no policy, would it still have a duty to make sure the pathologist is doing his job?

MR. WALKER: No, I believe-

JUSTICE BRISTER: Normally they would?

MR. WALKER: The, the hospital under in this case the allegation negligence was that the hospital failed in its policy to notify the doctor as it and-

JUSTICE BRISTER: Because it had a policy it undertook, how did they undertake to make sure that the report got-- that the pathologist did what they were supposed to do?

MR. WALKER: Well, remember the hospital under--established this policy and the physicians, Dr. Rodriguez, Dr. Ortega, they were aware that this policy existed and so they relied on that policy and so when the hospital says, "Here's our policy when there is a cancer positive pathology report, here's what's going to happen." First of all, policy number one is the pathologist to pick up the phone and will give you a call but in addition, to that and because we know this is important and because we know these are patients admitted to our hospital and we're also going to fax you the report and send the pathology secretary and-

JUSTICE BRISTER: She an employee of the hospital--

MR. WALKER: Yes, she is, she is and, and in the record the-- and I'll-- I'll tell you exactly where it is in the record because I thought about that as I was preparing. Marisol Garcia at volume 7, page 112. She testified that, "I was the pathology secretary. I was an employee of the hospital. I was, I was the one who is responsible for faxing." So it was the hospital's employee who was responsible for faxing and sending the certified mail. Now the pathologist who is not a hospital employee was the one responsible for picking up the phone and calling.

JUSTICE JOHNSON: As long as it we're on that-- the policy also said, "The pathologist will verbally notify the physician on the record, that's the hospital policy?"

MR. WALKER: Yes.

JUSTICE JOHNSON: And the question we're talking about, was the doctor the hospital's agent?

MR. WALKER: No, the doctor was not- the doctor was--

JUSTICE JOHNSON: He was not, you admit he was not but the hospital policy says, "The pathologist-- one of their policies is that the pathologist will verbally notify and as I understand there's a question about the pathologist verbally notifying in this case?"

MR. WALKER: Well, there was, there was evidence that Dr. Ortega and Dr. Rodriguez did not receive verbal notification because the hospital was attempting to put blame on them and so they had to say, "You know, we're not at fault, we didn't get a call, we didn't-- so forth." And so they did not received notice under any of these things-

JUSTICE JOHNSON: So the question I have goes to this, if, if the hospital's policy says, "The pathologist is to verbally notify and that's part of their policy and there's evidence that the pathologist did not," what's to prevent the jury from saying, "Well, that the hospital can't tell the pathologist what to do unless the pathologist is some kind of an agent for the hospital," I mean, you know, that thought process-

MR. WALKER: Well, -

JUSTICE JOHNSON: Which is what the-- as I understand, the requested instruction was directed to--

MR. WALKER: Well, to do that the jury would have had to have ignored the undisputed evidence in the case that the, that the pathologist was not a hospital employee. That was-- there was --

JUSTICE JOHNSON: No. We're talking agent. Is there a difference between employee and agent?

MR. WALKER: I don't think in the tort context that, that there is. I think it --

JUSTICE JOHNSON: Anybody tell jury that, is the question?

MR. WALKER: Well, I don't think that the-- no, the jury charge did not get into that, that issue about whether an employee is the same as thing as an agent. However, the, the evidence repeatedly said that "The pathologist did not work for the hospital." He was not their employee. He just had an office in the hospital, the jury in the jury arguments, the plaintiff's counsel made no argument about Dr. Valencia failed to call or anything like that. He focused strictly on the failure to fax, failure to do certified mail. When the defense lawyer gave his argument he said, "Twice Dr. Valencia wasn't our employee, he wasn't-- he didn't work for the hospital. So throughout the trial the jury heard that Dr. Valencia was not the hospital's employee and I believe that the-- I don't have the language of the instruction." I think it said that "It acts only through its employees; servants, nurses it may have said agent 'I don't know.'"

JUSTICE WAINWRIGHT: Employees, agents, nurses and servants in the charge. What was the evidence that he was not the agent? Again, I following up on Justice Johnson's question, someone who has an office in the building of the defendant who is working with the defendant. The defendant's policy say that this person has to do certain things, a person who's off and off the street listening to that, might conclude that there's something kind of agency relationship there. Maybe they, perhaps, won't know the legal definition agent. So what's the evidence that he was not the agent?

MR. WALKER: Well, the, the evidence that he was not an agent was the various testimonies that he was not an employee or employed by the hospital or worked for the hospital. Now, there was not a requested instruction-defining agent. There was no objection to that particular jury instruction that you shouldn't consider the hospital's acts other than their agent's employee, servants or nurses on the basis that, well because we have the word agent in there, the jury might be confused. The requested instruction was not to consider Dr. Valencia's conduct and because the plaintiff's argument never argue to Dr. Valencia's conduct because it was undisputed, Dr. Valencia was not an employee, I think at the very least it was harmless error. One could not say that it is probable that the jury returned the verdict on Dr. Valencia's based on Dr. Valencia's conduct under the entire record of this case.

JUSTICE WAINWRIGHT: And what was the basis of the objection for the instruction? Why was it at bad instruction, why is it opposed at the trial court?

MR. WALKER: Actually, the, the basis of the opposition was that it would unduly call attention to Dr. Valencia's conduct.

JUSTICE WAINWRIGHT: That was the plaintiff's objection?

MR. WALKER: Well, that's right. The plaintiff's said, "It wasn't necessary because it's undisputed that Dr. Valencia was not the hospital's employee, didn't work for the hospital."

JUSTICE WAINWRIGHT: But the lawyers know there's difference between employees and agents. A lot of your points go back to-- almost

all of them go back to employee, a non-employee status and then as you can see I'm struggling with the agency term which we know is broader than employee.

MR. WALKER: Yes.

JUSTICE WAINWRIGHT: So I'm wondering if there's a proposed instruction, since everyone agrees that the doctor, the pathologist was not the employee or the agent of the hospital and the instruction said, "Don't consider that pathologist conduct attributed to the hospital in effect, again I'm asking what's the basis for the objection to that instruction?" How does it hurt but he agrees he is not the employee or the agent.

MR. WALKER: Well, again, I'm not necessarily sure that it would have definitely hurt or been harmful to include it-

JUSTICE WAINWRIGHT: You just don't think it's necessary?

MR. WALKER: That's right and, and, and particularly under this record, I don't think it could be argued that it was probably called to rendition of an improper judgment because no one ever suggested that agent meant something broader than employee that he was an agent of the hospital that was never argued, it was never suggested-

JUSTICE BRISTER: Was he sued?

MR. WALKER: Dr. Valencia,-- No, I don't believe he was. Now there were some physicians who were sued and dismissed. So to be candid with you, I, I don't know 100 percent but I don't believe he was. In my last minute, I will go to the intervening cause question and I just wanted to mention one other thing and that is the in counsel's argument he stressed that we attempted to put on evidence and it was excluded. And the Court of Appeals, they raised an appellate point about that the Court of Appeals said, "It was not error to exclude the evidence and in their brief in the merits in this Court that point was not carried forward." So the question is, what, what are the evidence that was admitted, raised the issue of new and independent cause. And as we briefed, we did not believe that it did both because it was a foreseeable, in a concurrent cause and also because there was no evidence that the consequences of the hospital's negligence were cut off such as to cause a new and different result.

CHIEF JUSTICE JEFFERSON: Any further questions. Thank you Counsel.

REBUTTAL ARGUMENT OF CHARLES R. "SKIP" WATSON ON BEHALF OF PETITIONER

MR. WATSON: Questions about the agency-servant instruction. The charge read, "You are hereby instructed that Rio Grande Regional Hospital acts or fails to act only through its employees, agents, nurses and servants." The Counsel is correct agents, servants, employees was not defined, therefore we requested a limiting instruction to follow it immediately in considering the negligence of Rio Grande Regional Hospital do not consider the acts or omissions of the pathologist, Dr. Valencia. There were two reasons we requested that. The first is the policy itself number one, under reports positive for cancer that's Item 2(a) is pathologist will verbally notify physicians of record. It's obvious that a verbal notification of cancer is like a "brick to a window" it has a tremendous impact. The path-- the, the doctors said, "They didn't get it." Second, please look at volume 7, pages 82 through 93 of the record where the doctor was on the stand, Dr. Valencia was on the stand and was repeatedly questioned

about the first "failed safety" used plaintiff's counsels words of the policy and that it didn't work therefore, it was necessary you see under their theory to fax and send by certified mail because the first fail safe didn't work, that's critical. We had to be able to stop the confusion that what when we're being told we assume the duty by publishing policies and the first policy is a pathologist whom we don't control to tell the jury he is not an agent or servant. I don't even know what a servant is. I don't expect I can-- the jury is going to know what it is they all wear white coats. How are they supposed to differentiate. We need a limiting instruction. Second, on the preponderance of the evidence questions, that debates the question, it's preponderance of the evidence of what? That's what we're here about. What was the charge trying to get at? Let me read you what this quote wrote in 1901-- "It is not to be supposed that the jury considered an issue not developed by the charge of the Court." And from that thesis in the concurring opinion in *Rhineheart v. Young* is the principle that controls this case. While it is true that the general terms in which the court's charge is expressed would as a matter of law include something. It is not to be supposed that the jury considered an issue not developed of the charge. It is possible to deduce from standard instructions on ordinary care negligence and proximate calls, that some accidents are no one's fault. A party is entitled to have that fact pointed out to the jury, untrained in the law and that's the point on these instructions. A jury untrained in the law cannot be expected to understand what our proximate calls instruction is talking about. You had gone a long way in *ICS Cedars* again in *Lexima* to say you've got through it at least add substantial factor. What this case is about whether-- when the whole issue is whether a person has greater than 50 percent chance of survival. Whether one, that is an element of causation that must be submitted and found or at least is the operative ultimate issue in causation; that the jury's attention must be drawn to. Again, this case is about whether juries are told what the law is and what the factors that govern their decision or by courts or lawyers. I guarantee you, if you give us that vacuum we will cheerfully fill it. And I suspect that would be the day broad-form when we look back 50 years from now is said to have started its decline. The judge cannot put down his or her pencil. They've got to focus the jury on what's at issue. Justice Brister is absolutely correct. It cannot be just here it is from the PJC. Good luck.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, counsels the cause is submitted and the court will take a brief recess.

THE COURT MARSHAL: Rise.

2008 WL 2746496 (Tex.)