# No. 05-0386

# In the Supreme Court of Texas

**Providence Health Center a/k/a Daughters of Charity Health Services of Waco and DePaul Center a/k/a Daughters of Charity Health Services of Waco**

*Petitioners*

v.

**Jimmy and Carolyn Dowell, Individually and on behalf of the Estate of Jonathan Lance Dowell, Deceased**

*Respondents*

Appealed from the 170th District Court of
McLennan County, Texas and from the
Tenth District Court of Appeals
At Waco, Texas

# Brief on the Merits


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From the 10th District Court of Appeals
At Waco, Texas

Certificate of Parties & Attorneys

Pursuant to Rule 55.2(a) of the Texas Rules of Appellate Procedure, Petitioners, Petitioners supply the following list of parties to the orders appealed from, and the names and addresses of counsel:

**Parties**

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Waco, Texas

Carolyn Dowell..... Plaintiff / Respondent
Waco, Texas

Lance Dowell..... Decedent
Waco, Texas

Providence Health Center ..... Defendant / Petitioner
Waco, Texas

DePaul Center, ..... Defendant / Petitioner
Waco, Texas

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[1] Dr. Pettit has filed a separate Petition for Review in Case No. 05-0788, which is pending in this Court.

# Table of Contents


Identity of Parties and Counsel ..... ii

Table of Contents ..... iv

Index of Authorities ..... vi

Statement of the Case ..... x

Statement of Jurisdiction ..... xi

Statement of the Issues ..... xiii

Statement of Facts ..... 1

Summary of the Argument ..... 6

Argument ..... 8

**Issue Number One** ..... 11

The evidence at trial does not show a sufficient causal connection to hold either Providence Health Center or DePaul Center responsible for the suicide of Lance Dowell. The claimed connection between Providence and the suicide is simply too attenuated to constitute legal cause and the evidence is legally insufficient to support the verdict.

**Issue Number Two** ..... 27

The evidence at trial showed that the Dowells were given, and accepted, specific instructions to follow after Lance Dowell was released. The evidence is undisputed that they failed to follow these instructions. Yet, despite a request to the Trial Court, the Court refused to allow the jury to consider the comparative responsibility of the Dowells for Lance's death. This was error.

**Issue Number Three**..... 32

In a wrongful death case, the persons authorized to bring suit are required to sue on behalf of all of the statutory beneficiaries. In this case, the Dowells never sought to include a child that the evidence shows with a 99.9% probability, was fathered by Lance Dowell. By failing to include a necessary party, the Dowells are not entitled to recover on their wrongful death claim.

Conclusion and Prayer for Relief ..... 37

Certificate of Service ..... 39

# Index of Authorities

***Statutes & Rules***


§22.001(a)(1), Texas Government Code..... xi

§22.001(a)(2), Texas Government Code..... xii

§22.001(a)(6), Texas Government Code..... xi

§71.002, Texas Civil Practice & Remedies Code (Vernon 1986) ..... 33

§71.004, Texas Civil Practice & Remedies Code (Vernon 1986) ..... 33, 34

§573.022 Tex. Health and Safety Code ..... 25

Rule 273, Tex. R. Civ. P……... 28


***Cases***


*American Type Culture Collection v. Coleman*, 83 S.W.3d 801 (Tex. 2002).. xi, xii

*Austin Nursing Center, Inc. v. Lovato*, No. 03-0659 (May 13, 2005)..... 36

*Avila v. St. Luke's Lutheran Hosp.*, 948 S.W.2d 841 (Tex. App.--San Antonio 1997)..... 34

*Berry Property Management Co. v. Bliskey*, 850 S.W.2d 644 (Tex. App.--Corpus Christi 1993, writ dism'd by agr.)……... 29

*Bradley v. Rogers*, 879 S.W.2d 947 (Tex. App. – Houston [14th Dist.] 1994)…… 25, 26

*Brown v. Edwards Transfer Co., Inc.*, 764 S.W.2d 220 (Tex. 1988)……... 35

*City of Dallas v. Maxwell*, 248 S.W. 667 (Tex.Comm'nApp.1923), holding approved ..... 15, 22

*City of Keller v. Wilson*, --- S.W.3d ---, 2005 WL 1366509, (Tex., June 10, 2005)…… 9, 21

*Coastal Corp. v. Garza*, 979 S.W.2d 318 (Tex. 1998)..... xii

*Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004) ..... 9, 22

*Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444 (Tex. 1996)..... 9, 19

*Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339 (Tex. 1998)..... 16, 17, 19

*Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993)..... 10

*Duff v. Yelin*, 751 S.W.2d 175 (Tex.1988)..... 12

*Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992)..... 29, 31, 32

*Eoff v. Hal and Charlie Peterson Foundation*, 811 S.W.2d 187 (Tex. App.-San Antonio 1991) ..... 31

*Fort Bend County Drainage Dist. v. Sebrusch*, 818 S.W.2d 392 (Tex. 1991). 30

*Ft. Worth & Denver City Ry. Co. v. Wilson*, 3 Tex.Civ.App. 583, 24 S.W. 686 (1893) rev'd on other grounds, 85 Tex. 516, 22 S. W. 578 (1893)..... 34

*Garza v. Maverick Market, Inc.*, 768 S.W.2d 273 (Tex. 1989)..... 36

*Havner v. E-Z Mart Stores, Inc.*,, 825 S.W.2d 456 (Tex.1992)..... 8, 12, 20

*IHS Cedars Treatment Center of Desoto, Texas, et al v. Mason, et al*, 143 S.W.3d 794 (Tex. 2004) ..... xi, xii, 13, 17, 18, 19

*Isern v. Watson*, 942 S.W.2d 186 (Tex. App.- Beaumont 1997) ..... 30

*Island Recreational Development Corp. v. Republic of Texas Sav. Ass'n.*, 710 S.W.2d 551 (Tex. 1986)..... 29

*Jackson v. Axelrad*, No. 04-0923, (opinion of the 14th Court of Appeals at 142 S.W.3d 418)..... 32

*Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994)..... 31

*Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004)..... 22

*Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470 (Tex. 1991)..... 15, 16

*Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703 (Tex.1970)…..... 12

*Lester v. Logan*, 893 S.W.2d 570 (Tex. App.-Corpus Christi 1994)…… 29

*Macias v. Moreno*, 30 S.W.3d 25 (Tex. App.-El Paso 2000)……... 29

*Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348 (Tex. 1990)……..... 33

*Nelson v. Galveston, H. & S.A. Ry. Co.*, 78 Tex. 621, 14 S.W. 1021 (Comm. 1890, opinion adopted)……... 34

*Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex.1985) ..... 12

*Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)….. 15

*Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d 156 (Tex.1995) ..... 12

*Sendejar v. Alice Physicians & Surgeons Hosp*. 555 S.W.2d 879 (Tex. Civ. App. – Tyler 1977, ref'd n.r.e.)……..... 32

*Springall v. Fredericksburg Hospital and Clinic*, 225 S.W.2d 232 (Tex.Civ.App.--San Antonio 1949, no writ)..... 15

*State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992)……..… 28

*Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992)..... 12

*Union Pump v. Allbritton*, 898 S.W.2d 773 (Tex. 1995)..... 15, 19

***Treatises***

Restatement (Second) Of Torts § 431 cmt. a (1965)…… 16, 17

Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 Tex. L. Rev. 361 (1960). ..... 8

W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 127, at 945 (5th ed. 1984)……. 33

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*Respondents*

From the 10th District Court of Appeals
At Waco, Texas

# Brief on the Merits

To the Honorable Supreme Court of Texas:

Comes Now, Providence Health Center a/k/a Daughters of Charity Health Services of Waco and DePaul Center a/k/a Daughters of Charity Health Services of Waco (Providence), and files this Brief on the Merits in this case. In this Brief, every effort will be made to refer to the parties by name.

## *Introduction*

This is a medical malpractice case. Lance Dowell committed suicide near his home, 36 hours after being seen at Providence Health Center. All of the experts agreed that Lance was not "actively suicidal" at the time he left Providence Emergency Room. He did not want to be hospitalized, and as an adult, he had the right to refuse to be

admitted to the hospital. No expert opined that Lance was in a condition that would allow involuntary commitment. Yet, by finding that Providence should have been able to predict Lance's suicide long after he was seen and treated, the courts below have imposed a standard on health care providers that is impossible to meet and have affirmed a claim where causation is extraordinarily remote – attenuated far beyond the prior standards announced by this Court – and based solely on the conclusory statements of experts retained by Lance's attorneys. The judgment should, accordingly, be reversed and rendered in favor of Providence.

## Statement of the Case

| | |
|---|---|
| *Trial Court* | The Honorable Joe Johnson (now retired) of the 170th District Court in McLennan County, Texas. |
| *Result of Trial* | Judgment rendered against Providence based on a Jury Verdict. |
| *Parties in Court of Appeals* | Jimmy and Carolyn Dowell, Individually and on behalf of the Estate of Lance Dowell were Plaintiffs in the Trial Court, and Appellees in the 10th Court of Appeals. Providence Health Center and DePaul Center were a Defendants in the Trial Court, and the Appellants in the Court of Appeals. In the Trial Court, Dr. James C. Pettit, M.D. was also a Defendant. He appealed from the judgment, and the 10th Court of Appeals assigned his appeal a separate cause number. A Petition for Review filed by Dr. Pettit is pending. |
| *Court of Appeals decision* | The 10th Court of Appeals affirmed the Judgment of the Trial Court in an opinion authored by Justice William Vance, joined by Justice Felipe Reyna. Chief Justice Tom Gray dissented. The Court's decision is published at 2005 WL 762942 (Tex. App.-Waco). |

## Statement of Jurisdiction

This Court has jurisdiction over this appeal under §22.001(a)(6), TEX. GOV'T. CODE because the court of appeals has committed errors of law of such importance to the State's jurisprudence that it should be corrected. The judgment in this case is not just erroneous. It leaves medical professionals, and especially those in the mental health field, responsible for extraordinarily remote injuries with which they have no real connection. The judgment situates medical professionals as guarantors of the future mental stability of their patients, and confuse the standards that do apply to the care that they provide. The result is contrary to both common sense and the laws of Texas. In *IHS Cedars Treatment Center of Desoto, Texas, et al v. Mason, et al*, 143 S.W.3d 794 (Tex. 2004), this Court held that a one car accident occurring 28 hours after the discharge of a mental health patient was not proximately caused by any faulty diagnosis or treatment; it was simply too attenuated to impose liability on the health care professionals. Under *Mason*, mental health professionals are not responsible for a patient's injury to himself that occurs long after the inpatient care has ended. Under the decisions in this case, mental health professionals are made responsible for injuries long after inpatient care has ended, and without regard to intervening events. Because the Court of Appeals opinion in this case is published, it will create new and extended standards of causation for medical professionals unless this Court intervenes.

This Court also has jurisdiction under §22.001(a)(1), Tex. Gov't. Code because Chief Justice Gray filed a dissenting opinion in which he disagreed with the majority about questions of law material to the decision of the court. *American Type Culture*

*Collection v. Coleman*, 83 S.W.3d 801, 805 (Tex. 2002). ["Our jurisdiction is based not on the bare fact that a justice dissented … but on the direct clash between the justice and the court on the appropriate analysis for the case."]. The primary issue argued by Providence in the appeal was the issue of proximate cause. Justice Gray would reach the opposite decision from the majority on that issue.

This Court also has jurisdiction under §22.001(a)(2), Tex. Gov't Code. The decision of the Court of Appeals conflicts with this Court's decision in *IHS Cedars Treatment Center of Desoto, Texas, et al v. Mason, et al*, 143 S.W.3d 794 (Tex. 2004). It conflicts because the facts of *Mason* are so similar to the case at hand. Like this case, *Mason* involved an alleged faulty medical diagnosis by a mental health professional, and the release of the patient from care where the release was allegedly an incorrect medical decision. The patient in *Mason* was injured some 28 hours later, whereas here, the patient suffered injury 36 hours later. This Court, in *Mason*, held that the injury was not sufficiently related to the premature release from treatment to impose liability. In the present case, the facts relating to liability and causation are more attenuated than in *Mason*, yet the majority opinion of the Court of Appeals reached precisely the opposite conclusion. Under *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998), the two cases are "…so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other."

## Statement of the Issues

### Issue Number One

The evidence at trial does not show a sufficient causal connection to hold either Providence Health Center or DePaul Center responsible for the suicide of Lance Dowell. The claimed connection between Providence and the suicide is simply too attenuated to constitute legal cause and the evidence is legally insufficient to support the verdict.

### Issue Number Two

The evidence at trial showed that the Dowells were given, and accepted, specific instructions to follow after Lance Dowell was released. The evidence is undisputed that they failed to follow these instructions. Yet, despite a request to the Trial Court, the Court refused to allow the jury to consider the comparative responsibility of the Dowells for Lance's death. This was error.

### Issue Number Three

In a wrongful death case, the persons authorized to bring suit are required to sue on behalf of all of the statutory beneficiaries. In this case, the Dowells never sought to include a child that the evidence shows with a 99.9% probability, was fathered by Lance Dowell. By failing to include a necessary party, the Dowells are not entitled to recover on their wrongful death claim.

## Statement of Facts

*Factual Background*

Late in the evening of August 29, 2001, a Freestone County deputy Sheriff went to the Dowell place near Teague, Texas. (5 R.R. 106). He saw Lance in the house. Lance had apparently had a cut on his wrist, but it was not bleeding at that time. (5 R.R. 107). When the police tried to get to Lance in the house, Lance "went out the window" and ran into the woods. (5 R.R. 107-108). The police left, but were called back to the house around 4:30 a.m. (5 R.R. 109-110). Lance had returned to the house. The deputy then took Lance into custody because of the prior cut, and because Lance had said that he would "kill himself if he was left." (5 R.R. 110). During the 75-minute drive to Providence Hospital, Lance calmed down considerably. (5 R.R. 111; 120-121). Lance was taken to Providence emergency room, and was met by a nurse, who took him to a "back room". Lance was at Providence Emergency Room for about three hours.

Lance was also seen by Dr. Pettit, who stitched up what he called a "superficial" wound. (7 R.R. 23). Dr. Pettit found an admittedly calm and remorseful young man who had recently broken up with his girlfriend. (7 R.R. 24-25; 31-32). Dr. Pettit evaluated Lance while stitching his wound, and as he talked to him, he came to the conclusion that Lance was not "actively suicidal". He made this determination not on the basis of past events, but primarily on his present observation and evaluation. (7 R.R. 23-27). The Dowell's own emergency room expert – Dr. Abramson – testified that the wound was superficial, and was a suicide "gesture" as opposed to a suicide "attempt". The "gesture" was meaningful to Abramson as a risk factor, but was not a true attempt; it was an effort

to gain attention. (5 R.R. 30-31; 46). Sister Mary Teresa (Providence nurse, and a qualified mental health professional) also conducted an evaluation, and observed the same characteristics. She reached the same conclusions. (7 R.R. 93-99; 101-109).

The final determination was that Lance was not actively suicidal. Lance, who was 21 years old at that time, made it clear that he did not want to be hospitalized, and accordingly, he was discharged from the hospital. (7 R.R. 25; 108-109; 176-177). Not one of the Dowell's experts disagreed with the final diagnosis of Lance's condition. [5 R.R. 67; 77; 104 (Dr. Abramson was not critical of the "diagnosis or lack of diagnosis that Lance Dowell was actively suicidal"); 6 R.R. 169 (Nurse Day has no information that Lance Dowell was actively suicidal at the time of his discharge).] Further, Dr. Abramson was not critical of the decision to discharge Lance into the care of his parents. (5 R.R. 29; 67-68; 91-92). When Lance was discharged, he was stable and not actively suicidal. (7 R.R. 108). If either Dr. Pettit or Sister Mary Teresa had concluded that Lance was actively suicidal, Lance would not have been discharged and the on-call psychiatrist would have been called to arrange for admission to the DePaul Center. (7 R.R. 26-27; 108; 110-111).

Dr. Pettit met with both Lance and his mother (who was a registered nurse) before Lance was discharged. He discussed discharge instructions with them. The discharge instructions were specific: Lance agreed to a "no suicide" contract and he agreed to stay with either his mother or another family member until he was seen in a follow up examination in three days. (5 R.R. 207-208; 7 R.R. 32, 126-127, PX-1). Carolyn Dowell, Lance's mother, testified that Lance agreed to follow these instructions. (5 R.R. 185).

After his discharge Lance went back to Teague, and then to Fairfield with his brother to rodeo. (6 R.R. 188). Lance's brother, Larry, went home after the rodeo while Lance went to visit some friends. (6 R.R. 189; 194). Later, Lance went to a friend's house. Lance did not get home until about 2 a.m., but stayed at home that night without any apparent problems. (6 R.R. 109). The next day, the two brothers attended a family reunion, separated, and planned to meet at a party in Robinson later that night. (6 R.R. 190). Carolyn Dowell testified that she spoke to Lance on the telephone both before going to work on Saturday evening, (August 30th) and again after getting off work on Sunday morning (August 31st). (5 R.R. 191-192). In both instances, Lance assured his mother that he was "okay." (5 R.R. 192). The next time that Carolyn called to check on Lance, apparently on Sunday afternoon (August 31st), she was told that Lance had gone with a friend to bale hay. Lance committed suicide by hanging himself that evening. (PX 2).

In the trial, none of the experts could draw any definite conclusion about what would have happened had Lance been hospitalized when he came in with the deputy. Lance specifically stated that he did not want to be hospitalized and stay at DePaul (the inpatient psychiatric facility). Even the Dowell's experts agree that an adult (like Lance) cannot be forced to go to a psychiatric hospital if they do not want to go. (5 R.R. 183; 6 R.R. 78). None of the Dowell's experts opined that Lance was in a mental state where he could be detained against his will. The defense witnesses believe that Lance could not have been involuntarily held, nor should he have been. The Dowell's experts never disputed that conclusion. (5 R.R. 29-31; 41; 67-68; 73;77; 6 R.R. 73; 77-78; 97; 103).

Instead of testifying to cause in terms of reasonable medical probability, the Dowell experts simply "hoped" that the chance of suicide would have been "lessened" (5 R.R. 68-69; 70) or they believed that it was less probable that Lance would have committed suicide (6 R.R. 54-56) had he been hospitalized. They admitted, however, that suicide is not predictable. (6 R.R. 73; 103; 150-151; 160). They also admitted that even if Lance had been hospitalized, he still might have killed himself upon release. (5 R.R. 69; 6 R.R. 55-56; 73). The Dowell's experts also admitted that if Lance's mother had followed the discharge instructions given to her, Lance probably would not have committed suicide. (5 R.R. 102-103; 6 R.R. 88-89). In fact, after Lance was released from Providence E.R., all those in contact with him indicated that he appeared calm and "normal" (5 R.R. 209-210; 212-213; 6 R.R. 196-197).

*Procedural Background*

The Dowells brought suit under the Texas Wrongful Death and Survival statutes seeking damages as the statutory beneficiaries in the wrongful death action. They also sought survival damages on behalf of Lance Dowell's estate. (C.R. 7-16). In essence, the claim was a malpractice claim against Providence, alleging that Providence failed to perform "an appropriate evaluation" of Lance Dowell when he was brought to the hospital. (C.R. 348).

Providence raised two legal points and one factual issue in defense. The legal issues centered on (1) the lack of proper parties in the suit, as the Dowells were not the sole heirs of Lance Dowell's estate and (2) the failure of the Trial Court, despite a valid request, to submit the Dowell's contributory negligence to the jury. The factual issue was

whether an alleged faulty evaluation could have caused Lance Dowell's suicide – particularly when no valid evidence supported this conclusion. (C.R. 356).

Trial was to a jury. After four days of testimony, the jury returned a verdict finding that Providence negligently failed to provide "an appropriate psychiatric screening examination." (C.R. 408). Providence Health Center was found 40% responsible for Lance's death, and DePaul Center was found 40% responsible. A third Defendant, Dr. James C. Pettit, was found 20% responsible. The damages in the wrongful death claim were $400,000.00 for mental anguish and loss of companionship and society to the Dowells. (C.R. 410). The damages in the survival claim were also $400,000.00 for funeral and burial expenses, and for mental anguish. (C.R. 411). The Trial Court granted the Dowells a judgment assessing Providence with a final liability in excess of $800,000.00 (including pre-judgment interest). (C.R. 593-595).

*The Court of Appeals Decisions*

The Court of Appeals affirmed the Trial Court's judgment in a published opinion. The majority held that that the issue of proximate cause had been proven because the Dowell's experts had testified on causation without an objection at the time that the testimony was offered. The majority made a summary disposition of all of the other issues raised by Providence. Chief Justice Gray, in dissent, correctly wrote that the issue of causation was not one that called for an objection at the time the testimony was offered. Instead, Providence properly raised the sufficiency of the evidence on causation in a number of other ways, including voicing objections to the Court's charge. And,

Chief Justice Gray also would have found that the connection between an alleged faulty evaluation was simply too attenuated to impose liability on the hospital.

## Summary of the Argument

Even if one concludes that Providence made an inappropriate evaluation of Lance Dowell when he came to the emergency room, the evidence simply does not support a conclusion that the emergency room evaluation caused Lance to commit suicide. The most the Dowells can claim is that the evaluation at Providence emergency room and the subsequent discharge made it possible for Lance to kill himself, just as getting out of bed in the morning makes a car wreck on the way to work possible. However, that alone is legally insufficient to establish liability. More than 36 hours passed from the time that Lance was discharged until he committed suicide. There are so many intervening events unrelated to mental health evaluation that common sense could not necessarily connect the suicide with the discharge from the hospital. To find causation in this case would always make mental health professionals guarantors of the future health of patients discharged from the hospital and require 100% accuracy in predicting the future. Moreover, even Plaintiffs' experts admit Providence could not have forced Lance to stay at the hospital against his will.

The expert testimony at trial failed to make the causal connection between the evaluation done at Providence and Lance's tragic suicide. The Dowells presented experts that criticized the evaluation methodology used at Providence, but the experts were really

just quibbling over whether certain risk factors were given adequate or appropriate weight in Providence's evaluation.

In the end, the Dowell's experts agreed with two critical conclusions. First, they agreed that Lance was not "actively suicidal" at the time he was discharged, meaning that he was not an imminent danger to himself or to others. This conclusion was buttressed by the actions of Lance's family – who saw an active and "normal" Lance for the next day or so upon discharge from Providence E.R.

Second, the Dowell's experts understood and agreed that Lance did not want to be hospitalized. Under Texas law, they could not offer an opinion on any basis for forcing Lance into the hospital against his will. So, although Dr. Donica felt that Lance should have been hospitalized, he could not say how that was to be accomplished under the circumstances. More importantly, no expert could go any further than to say that they "hoped" Lance would improve, that patients (generally) improve if they are hospitalized and treated, and that hospitalization might have "reduced the likelihood" that Lance would take his own life. Obviously, this testimony falls short of the substance of reasonable medical probability that is required under Texas law.

Further, the evidence at trial showed that both Lance and his mother (a registered nurse) received discharge instructions that they simply failed to follow. Whether the failure to follow the instructions constituted negligence was a question clearly presented by the evidence; it was apparent in the pleadings and requested by Providence. The Dowell's own experts admitted that had those instructions been followed, Lance probably would not have committed suicide. Despite these facts, the Trial Court improperly

refused to allow the jury to consider the negligence or comparative responsibility of either Lance or his family.

Finally, the Trial Court failed to address a significant issue concerning an infant child that should have been a party to the lawsuit. The evidence showed a 99.9% probability that Lance was the father of an infant son, Alec Bean. The Defendants urged the Trial Court to consider whether all the necessary parties were before the court in the wrongful death action (since Alec Bean would be a statutory beneficiary if he were a filial descendant of Lance Dowell). Both the Trial Court and the Dowells simply ignored these issues, preferring to try their own damages regardless of the statutory requirements and the statutory protection afforded to the child and to Providence as a Defendant.

## Argument and Authorities

*The Standard of Review*

Providence challenges the legal sufficiency of the evidence supporting the verdict in this case. A legal sufficiency complaint may be sustained when the record shows one of the following: (a) a complete absence of a vital fact; (b) the reviewing court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more that a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 362-63 (1960). *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458 (Tex. 1992).

In *City of Keller v. Wilson*, --- S.W.3d ---, 2005 WL 1366509, (Tex., June 10, 2005), this Court recently restated the controlling standard for legal sufficiency review:

> The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *Id.* at * 14.

As the Court in *Keller* also affirmed that "[i]t has long been the rule in Texas that incompetent evidence is legally insufficient to support a judgment, even if admitted without objection." *Id.* at * 4. Thus, evidence showing a judgment to be incompetent cannot be disregarded, even if the result is contrary to the verdict. *Id.* Here, the jury and the reviewing court were faced with incompetent evidence in the guise of an expert opinion.

In addition, the mysterious circumstances of Lance's death require that the Court review circumstantial evidence to support a verdict. Where circumstantial evidence is relied upon, and the circumstances are equally consistent with either of two facts, then there is no more than a scintilla of evidence and a "no evidence" point must be sustained. *Continental Coffee Products Co. v. Cazarez,* 937 S.W.2d 444, 450 (Tex. 1996).

Finally, it is the opinion of the Dowell experts that is specifically at issue in the sufficiency of the evidence challenges made by Providence. In *Coastal Transport Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004), this Court held that when a challenge to an expert's conclusions is restricted to the face of the record, a party may challenge the legal sufficiency of the evidence even in the absence of any objection

to its admissibility. For example, where an expert's opinion is by its very nature not "falsifiable" – i.e. where there is no test to prove it wrong – it may still be challenged without an objection to admissibility. *Daubert v. Merrill Dow Pharmaceuticals, Inc*. 509 U.S. 579, 593 (1993). In this case, the Dowell experts testified in a conclusory fashion that they "hoped" that the chance of suicide would have been "lessened" by the evaluation and treatment at Providence. They "believed" that it was less probable that Lance would have committed suicide had the evaluation or treatment been different, but they could not testify that he should have been involuntarily detained at Providence. In fact, the primary Dowell expert, Dr. Donica, admitted that even had Lance been hospitalized, he still might have committed suicide on his release.

Not only does this opinion not provide any proper evidence of causation, it is not an opinion that is "testable" and it may be challenged, just like any other evidence, on the basis of its sufficiency to support a verdict. Instead, the Court of Appeals improperly held that a failure to object to expert testimony on causation was fatal to Providence's arguments. That holding misconstrues this Court's holdings as to review of the insufficiency of evidence in the guise of expert opinions and the rules relating to the proper standard of review.

**Issue Number One**

The evidence at trial does not show a sufficient causal connection to hold either Providence Health Center or DePaul Center responsible for the suicide of Lance Dowell. The claimed connection between Providence and the suicide is simply too attenuated to constitute legal cause and the evidence is legally insufficient to support the verdict.

*The Factual Background of Lance's Suicide*

Lance Dowell was brought to the hospital after inflicting a superficial cut on his wrists. There was no urgency associated with the wound to his wrists; both the law enforcement and medical professionals recognize this fact. However, it was prudent to bring him to the hospital emergency room for mental health evaluation. The medical professionals were to evaluate whether Lance was "actively suicidal" – i.e. they were to decide whether he needed to be admitted to a mental hospital for continuing care. Rather than expressing the classic signs of a person intent on taking his own life, Lance arrived calm, oriented and remorseful. Dr. Pettit and Sister Mary Teresa (Providence mental health nurse) both agreed that he was not "actively suicidal." None of the Dowell's experts challenge or disagree with this ultimate conclusion. Lance himself did not want to stay at the hospital, and no expert offered testimony that Providence could have or should have kept him there against his will.

In fact, a determination that Lance was "actively suicidal" would have raised more questions than it answered. Could Lance have been persuaded to agree to be admitted to the hospital? Could Lance have been involuntarily admitted? Would a hospital admission have stopped a suicide? For how long would it have been successful? In the end, what matters is the universal agreement of the experts. Suicide is not predictable,

and here it cannot be connected to a continuous chain of events that are this unrelated. For this reason, Providence says that the evidence is legally insufficient on the issue of causation (Question No. 3 to the jury), and for this reason, the judgment should be reversed and be rendered that the Dowells take nothing.

*Proof of Proximate Cause is Required*

In order to prevail, the Dowells are required to prove not only that Providence was negligent in some manner, but that the negligence of Providence was a proximate cause of Lance's suicide. Here, they are not able do so. It has long been established that in a medical malpractice action, the burden of proof is upon the plaintiff to establish negligence on the part of the defendant through competent medical expert testimony. *Duff v. Yelin*, 751 S.W.2d 175 (Tex.1988). The same is true as to the element of proximate cause. *Id.* at 176. To be entitled to submit the issue of proximate cause, the plaintiff must prove a causal connection between the act of negligence and subsequent injury beyond the point of mere conjecture. *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex.1970).

*The Standards for Proximate Cause*

Proximate cause has two elements: cause in fact and foreseeability. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex.1992). Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred. *Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d 156 (Tex.1995); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 549 (Tex.1985); *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458-59 (Tex.1992). Foreseeability, on

the other hand, means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others. Here, the evidence does not support a conclusion that any negligence of Providence was a substantial factor in Lance's suicide, or that Providence should have anticipated any danger that Lance posed to himself – especially given the undisputedly correct conclusion that Lance was not "actively suicidal".

Under the Dowell's theory, Providence failed to make an appropriate evaluation of Lance's condition. They say Lance should have been admitted to the hospital.[2] And, they claim, had Lance been admitted to the hospital, he would probably still be alive.[3] (C.R. 348-349). Thus, they claim that Lance's suicide is at the end of a chain of events that begins at Providence emergency room, and his evaluation there. The chain of causation ends, for the Dowells, at Lance's untimely death.

However, at some point in this chain, it is clear that the conduct of Providence is not sufficiently connected with Lance's injury to constitute legal causation. *IHS Cedars Treatment Center of Desoto, Texas, et al v. Mason, et al,* 143 S.W.3d 794 (Tex. 2004). Lance's suicide did not occur immediately after his discharge from Providence E.R. He and his parents admittedly did not follow the discharge instructions to which they had agreed. Instead, Lance went back to Teague, went to a rodeo, went to visit friends, went to a party alone, returned home late at night, slept overnight, went to a family reunion,

[2] The Dowells ignore the fact that Lance expressed his unwillingness to be admitted to the hospital. No expert found Lance should have been involuntarily admitted to the hospital.

[3] This part of the chain of events ignores the obvious fact that Lance did not want to stay in the hospital, and could not be forced to stay against his will.

ate lunch, and made plans to attend another party in Robinson. (6 R.R. 190-197). Over 36 hours passed between the time of Lance's discharge from Providence until the time of his suicide. The Dowell's experts made no effort to exclude or to deal with events that happened during this 36 hour period of time after Lance's discharge.

Moreover, the alleged flaws in Providence's evaluation (even according to the Dowells) were in the method of evaluation, not the result. The Dowell's experts essentially claimed that the evaluation left out some risk factors that should have been considered, and gave insufficient weight to other risk factors that were considered. However, they admit that the conclusion – Lance Dowell was not actively suicidal – was correct. In fact, no professional that conducts an evaluation can be held to foresee injury when he has reached the proper conclusion that injury is not likely. Thus, while Dr. Donica claimed that hospitalization would have lessened the risk, Lance did not want to stay and was discharged. Nor does any expert say that Lance could have been held against his will at Providence.

Because of that fact, the lapse of time, and the significant intervening events, nothing in the evaluation performed at Providence can be said to be a cause in fact of Lance's suicide. No competent expert evidence provides the causal link.

> [T]he law does not hold one legally responsible for the remote results of his wrongful acts and therefore a line must be drawn between immediate and remote causes. The doctrine of "proximate cause" is employed to determine and fix this line and "is the result of an effort by the courts to avoid, as far as possible the metaphysical and philosophical niceties in the age-old discussion of causation, and to lay down a rule of general application which will, as nearly as may be done by a general rule, apply a practical test, the test of

> common experience, to human conduct when determining legal rights and legal liability."

*Springall v. Fredericksburg Hospital and Clinic*, 225 S.W.2d 232, 235 (Tex.Civ.App.--San Antonio 1949, no writ) (quoting *City of Dallas v. Maxwell*, 248 S.W. 667, 670 (Tex.Comm'nApp.1923, holding approved).

In the seminal decision of *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928), the New York courts defined the principles of proximate cause by noting that the word "proximate" implies that, "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." See *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 786 (Tex. 1995). In *Union Pump*, this Court considered the issue of proximate cause, and came to the conclusion that proximate cause is not established "if the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible." *Union Pump* at 776.[4]

In coming to this conclusion, the Court relied on its prior decisions, including *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991).[5] In *Lear Siegler*, the Court

[4] In *Union Pump*, a faulty valve caused a fire at a plant. The plaintiff was part of the fire-fighting team, and helped to extinguish the flames. After the fire was out, the plaintiff was headed out of the plant when she fell in the slippery fire fighting liquids. She alleged that the defective pump that started the fire was the proximate cause of her fall. Assuming that the pump was defective and caused the fire, by the time that the plaintiff fell, the fire had been extinguished. At the point of the plaintiff's fall, the fire had simply provided a condition in which it was possible for the plaintiff to be injured. In a legal sense, the fire was not directly related to the fall.

[5] In *Lear Siegler*, an employee of the Texas Highway Department, Perez, was driving a truck pulling a flashing arrow sign behind a highway sweeping operation to warn traffic of the highway maintenance. The sign malfunctioned. Perez got out of the truck to push the wire connections back together, and an oncoming vehicle, whose driver was asleep, struck the sign, which in turn struck Perez. Perez's survivors brought suit against the manufacturer of the sign.

recognized that there are situations where a defendant's negligence exposes another to an increased risk of harm by placing him in a particular place at a given time. Nonetheless, there are certain situations in which the happenstance of place and time is too attenuated from the defendant's conduct for liability to be imposed. The Court cited a comment to the Restatement (Second) of Torts, section 431, that is instructive on the issue of legal causation:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent.... The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. ***Lear Siegler***, 819 S.W.2d at 472 (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)).

This Court has been consistent in its view of proximate cause – including the requirement that an act or omission be a "substantial factor" in causing injury. In ***Dallas County Mental Health and Mental Retardation v. Bossley***, 968 S.W.2d 339 (Tex. 1998), a patient "eloped" through unlocked doors from a restricted hospital environment. The patient was actively suicidal at the time he escaped. The hospital employees and police officers chased the patient, and just before he was captured, he leaped into the path of a truck and was killed. ***Id.*** at 340-341. This Court in ***Bossley*** reviewed a fast-paced and continuous series of events, undisturbed, uninterrupted, and within a compressed period of time. The Court still found that the unlocked doors only permitted an already suicidal

patient to escape. The unlocked doors did not cause the patient's death. Although the escape through the unlocked doors was part of a sequence of events that ended in his suicide, the unlocked condition of the doors was too attenuated from the suicide to have caused it. *Id.* The patient in *Bossley* was clearly more "at risk" than Lance.

So, this Court has logically set boundaries on the chain of causation so that legal liability is dependent on a connection between the alleged negligence of a defendant, and the injury suffered. It is not enough that negligence be linked to injury in a metaphysical sense. The law requires more, as this Court has recently and repeatedly recognized.

In *Mason*, 143 S.W.3d 794, 796 (Tex. 2003) this Court again considered "the limits of the causal nexus between conduct and harm that is necessary to support liability in tort." Citing the Restatement (Second) of Torts and prior cases, the Court began by acknowledging that it is not enough that the harm would not have occurred had the actor not been negligent. This is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. RESTATEMENT (SECOND) OF TORTS § 431.

After affirming that its precedents "establish that merely creating the condition that makes harm possible falls short as a matter of law of satisfying the substantial factor test," the Court in *Mason* concluded that the evidence in that case—of the defendant psychiatrist's negligent care, treatment, and discharge—had not been shown to do any more than create a circumstance that led to the plaintiff's injuries; it was thus too attenuated to support a finding that such acts proximately caused the plaintiff's injuries in the car accident some twenty-eight hours after her discharge. *Id.* at 800-801.

As was the case in *Mason*, here the Dowells make no argument and offer no evidence in this case that Providence caused Lance to experience a suicidal episode approximately thirty-six hours after he was discharged. As in *Mason*, the discharge decision in this case, at most, did nothing more than create a circumstance that made Lance's subsequent actions possible.

*Providence's Evaluation Process is Not a Substantial Factor in Lance's Death*

The decision here should be the same as in *Mason*. At the time of his discharge from the E.R., the Dowells certainly argue that Providence conducted a sub-standard evaluation. The Dowells had experts that criticized the risk factors that Providence failed to consider, and the risk factors that should have been considered differently. But, no one argued that Providence had come to an erroneous conclusion because of these alleged errors or in spite of these alleged errors.

When he came to the E.R., Lance appeared calm, oriented, and remorseful. Whatever had caused him to cut his wrists, whether as a "gesture" or an "attempt," had obviously run its course by the time he arrived at Providence. Lance exhibited no signs that he was "actively suicidal" during the three hours that he was being evaluated at Providence. No witness (expert or not) says that he was "actively suicidal" at that time. No witness therefore believes that a medical professional would have diagnosed that a suicide was imminent. Lance was discharged in accordance with his wishes, and even if his prior distress had not subsided before he got to Providence, all the witnesses say that he appeared perfectly normal from his discharge forward. As the evidence was

presented, the evaluation at Providence simply appears in the chain of events preceding Lance's suicide.

In fact, the testimony at trial was that Providence was right in concluding that Lance was not actively suicidal. Further, the experts barely attempted to criticize the discharge instructions or the treatment prescribed at Providence. Thus, Providence got the diagnosis right, and got the treatment right. And, although no one knows precisely why Lance killed himself, it is just as likely that a new and unknown event triggered a suicidal episode far removed from the evaluation process at Providence.[6] Legal causation requires that the negligence asserted be a substantial factor in causing the plaintiff's injury. Providence evaluation, whether it was flawed in its methodology or not, had come to a conclusion – that Lance was not actively suicidal. Everyone agrees that this is the correct conclusion. So, whatever negligence might have been found in making that evaluation had come to rest with the professional conclusion and the discharge of the patient. Like *Union Pump*, *Bossley* and *Mason*, subsequent events might not have occurred if Lance had not been discharged, but the fact that he was discharged merely permitted the conditions to form for the eventual tragedy of Lance's suicide.

*The Alleged Failure to Admit Lance to the Hospital Also Fails to Prove a Causal Connection*

Aside from proving that the negligence of Providence was a cause in fact of the injury, the Dowells also had the burden to prove that Lance's injury was foreseeable – in

the sense that it was something that an ordinary practitioner would guard against. *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458-59 (Tex.1992). Here, Dr. Donica argued that he thought that Lance should have been hospitalized. But, he fails to account for critical facts in coming to this conclusion. First, there was no reason, or basis, to hospitalize a person who is not actively suicidal (unless, of course, he wants to be hospitalized). Lance expressly said that he did not want to be in the hospital. Moreover, even if Lance had been hospitalized, it is possible that he would have committed suicide at some later date – after his hospitalization ended. The Dowell's experts admit as much. Even if Lance had been actively suicidal (which he was not) he might have been hospitalized, but that is equally uncertain. There is no guarantee that Lance would have acquiesced to an admission (something he expressly opposed); there is no guarantee he could have been involuntarily committed; and there is no guarantee that treatment would have prevented subsequent suicide.

In this case, the act of suicide is not legally connected to the decision to discharge Lance because the untaken precaution urged by the Dowells – to hospitalize Lance after he was evaluated – simply cannot be credited. Every doctor agrees that Lance was not actively suicidal when he left Providence. And if Lance is not actively suicidal, he could not be involuntarily committed under the facts. For that reason, if for no other, proximate cause does not exist in this case, and the judgment should be reversed.

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[6] Where circumstantial evidence is relied upon, and the circumstances are equally consistent with either of two facts, then there is no more than a scintilla of evidence and a "no evidence" point must be sustained. *Continental Coffee Products Co. v. Cazarez,* 937 S.W.2d 444, 450 (Tex. 1996)

*The Flawed Evidence on Causation*

Not only does the undisputed evidence show a lack of proximate cause, the evidence actually submitted does not meet the evidentiary standards for proof of causation. Here, the evidence does not support a conclusion that any negligence of Providence was a cause in fact of Lance's suicide, nor does it show that Providence could have reasonably foreseen Lance's suicide thirty-six hours after he left the hospital (calm and composed), particularly with the discharge instructions that were given to him and to his mother, and which they agreed to follow.

Under the Dowells' theory, Providence failed to make an appropriate evaluation of Lance's condition. If they had, say the Dowells, Lance would have been admitted to the hospital and he would probably still be alive.[7] (C.R. 348-349). That conclusion does not follow the facts of the case – Lance did not want to stay and he could not be detained. However, the evidence relied upon to make the claim is conclusory and flawed.

In *City of Keller v. Wilson*, --- S.W.3d ---, 2005 WL 1366509, (Tex., June 10, 2005), this Court said, "[i]t has long been the rule in Texas that incompetent evidence is legally insufficient to support a judgment, even if admitted without objection." *Id.* at * 4. Thus, evidence showing it to be incompetent cannot be disregarded, even if the result is contrary to the verdict. *Id.* In this case, Dr. Donica (the Dowell's psychiatric expert) testified that, had Lance been hospitalized in August 1997 and received treatment, he still

[7] Again, this misses a critical point. If the evaluation conclusion is correct, as the Dowells admit, then Lance is not actively suicidal and cannot be involuntarily committed. And, Lance did not want to stay voluntarily. Had the experts said that Lance was, indeed, actively suicidal, the case might be different, but the trial would have been different too. The case was not tried on any evidence that Lance was actively suicidal.

"might have killed himself" but that "he would have improved, been at a lower risk for suicide when he left." (6 R.R. at pp. 55-56). This testimony does not satisfy the Dowells' burden of proving that, more likely than not, Lance would not have killed himself if he had not been discharged. Not only was Dr. Donica's testimony inadequate on its face to prove proximate cause, his testimony precludes any inference that the "cause" Dr. Donica opined about rose to the level of being a "proximate cause." *See e.g., Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 254-57 (Tex. 2004) (holding that review of an expert's damage estimates cannot disregard expert's admission on cross-examination that none can be verified). In fact, Dr. Donica testified that even with hospitalization, the same result might occur. (5 R.R. 69; 6 R.R. 55-56; 73).

Because Dr. Donica was simply unable and unwilling to say that, but for the alleged negligence, Lance would not have committed suicide, there was no competent evidence at trial that "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller*, at * 14.

In *Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 229 (Tex. 2004), the Court held that the testimony by an expert was too conclusory, and thus incompetent, to constitute evidence of critical facts to be submitted to the jury. The same situation exists here.[8]

[8] Because the testimony was challenged as conclusory or speculative and therefore non-probative on its face, there was no need to go beyond the face of the record to test its reliability. *Id.* at 233. In this case, the Dowells cannot point to any underlying methodology utilized by Dr. Donica that could have been tested by the trial court in the face of an objection to the reliability of his opinion.

In this case, Dr. Donica offered no theory whatsoever (other than his "hope" that the risk might be "lessened" or that it might be "less probable" that Lance would commit suicide [5 R.R. 68-70; 6 R.R. 54-56]) in order to support his conclusory opinion that the failure to provide an adequate evaluation and admit Lance to the hospital was "a cause" of Lance's suicide. (6 R.R. at pp. 53-54). Indeed, Dr. Donica offers no opinion even suggesting a causal nexus between the decision to discharge Lance on Saturday morning, August 30, 1997, and Lance's decision to take his own life on Sunday evening, August 31, 1997. In the absence of such testimony, the decision to discharge Lance from the emergency room—when he "certainly was not actively suicidal" (6 R.R. at 223)—was simply too attenuated from Lance's death to have caused it. Notwithstanding the citations in the Response filed in this case, the Dowells are simply unable to point to evidence that supports their conclusion. Their experts admitted that Lance was not actively suicidal when he was discharged and conceded that admitting Lance to the hospital might or might not have prevented him from taking his own life almost two days later. The verbiage quoted in the Response to the Petition for Review does not change those two ultimate facts, and those ultimate facts are fatal to recovery.

Dr. Donica's opinion, that is so heavily relied upon by the Dowells, expressly assumes that Lance should have been hospitalized in order to lessen his suicide risk. It was specifically upon this basis that he opined that negligence on the part of Sister Mary Theresa may have contributed to Lance's suicide. It is undisputed, however, that Lance Dowell was an adult and that he said at the time, and in Providence Emergency Room, that he did not want to remain at DePaul (the in-patient mental health hospital). The

Dowells do not prove how Providence could accomplish this hospitalization despite Lance's expressed desire to not remain there. Yet, Dr. Donica and the Dowells simply ignore this break in the logical requirements of their causation case.

The fact of the matter is that for the three hours that he was in Providence emergency room, Lance was calm, oriented, and remorseful. No expert, including Dr. Donica, has testified that Lance was "actively suicidal" at the time. Dr. Abramson testified that he believed Lance's injury to himself was a "gesture" rather than a true suicide attempt, and that Lance was not actively suicidal at Providence Emergency Room. (5 R.R. 29-32; 67-68; 73-74; 77). For that reason, Dr. Abramson was not critical of the ultimate diagnosis and resulting discharge. (5 R.R. 67-68; 73-74). It was his belief that the physician and provider that actually examined Lance were in the best position to know whether or not Lance should be discharged from the hospital, and upon what terms. Dr. Donica admits that at the time of treatment at Providence's emergency room, he cannot say that Dowell was actively suicidal. (6 R.R. 81; 97; 103-104). Dr. Donica even testified he did not disbelieve that Dr. Petit about Dowell's affect or demeanor. (6 R.R. 97-98; 103; 104). Dr. Donica himself admits that he has not frequently hospitalized a patient who has voiced no suicidal intent. (6 R.R. 73). Dr. Petit and Sister Mary Theresa concurred that Lance was not actively suicidal, and was not an imminent threat to himself or others. They did not believe that he was a candidate, under the circumstances, for involuntary admission. No expert has challenged that determination.

On that crucial question, Donica had no opinion to offer as to whether or not Dowell qualified under Texas law for involuntary admission to the hospital. (6 R.R. 77-

78). He did not want to voluntarily stay, and under Texas law at the time (and the evidence), Dr. Petit and Sister Mary Theresa could not have involuntarily admitted him. They would have had to find Dowell presented a "substantial risk of serious harm to himself or others..." that was "imminent unless...immediately restrained", and finally that emergency detention was the "least restrictive" means to that end. Tex. Health and Safety Code §573.022. V.A.T.S (1997) Certainly the discharge to his mother, a nurse, with the instruction to stay with family was less restrictive, comported with his wishes and admittedly was capable of accomplishing the same end.

While Dr. Donica testifies that he believed Providence evaluation was inappropriate, he does not bridge the gap between what he claims to be a faulty evaluation and the hospitalization that he believes would have lessened the suicide risk. While he wishes that Lance could have been hospitalized, given Lance's express wish not to voluntarily be admitted, and given Dr. Donica's inability to testify that Lance should have been involuntarily admitted, Dr. Donica cannot complete the required causal link between the examination, on the one hand, and the suicide on the other. Accordingly, there is no evidence of proximate cause.

Both Donica and Abramson fail to meet the standard for proving proximate cause. The testimony that they did offer is simply no more than hope, speculation and surmise, and is incompetent proof. Remarkably similar testimony was offered in ***Bradley v. Rogers***, 879 S.W.2d 947, 959 (Tex. App. – Houston [14th Dist.] 1994). The expert (among several that testified to essentially the same opinion) was asked whether earlier or

different treatment would have reduced the injuries to a burn victim. In a memorable portion of the testimony, an expert said:

> But had this been recognized, I believe that the patients would have been evacuated to a burn unit immediately or they would have gotten the biggest burn doctor in the area who have said, "holy mackerel, these patients are in septic shock," and the first thing we have to do is to remove the dead tissue, drain the abscess, try to identify the nidus for infection, remove the girdle, and at least take a look at the offending area, however big or small it may have been. And I believe that had that been done 8 or 12 hours earlier, that perhaps both of these patients would have fared better.

The Houston Court had little trouble in determining that the quoted testimony, and testimony like it throughout the trial was simply no proof of proximate cause. Words like "perhaps these patients would have fared better", are remarkably similar to the testimony of Donica and Abramson here. "Hope", "lower risk", "might" are all words that are highlights of the Donica / Abramson opinions. But, as in the ***Bradley*** case, it does not amount to probative evidence of proximate cause. Regardless of how it the language is parsed, the language still describes only a "possibility" – clearly insufficient under the law.

The Dowells insist that the Courts establish a standard that requires Providence to forecast and prevent suicide, without exception, and to ensure that future events will not trigger suicidal episodes – requirements that even the Dowell's mental health experts acknowledge are impossibilities. Suicide cannot be predicted. The testimony of the Dowell's experts that they "hoped" for a better outcome, or "believed" suicide less probable with hospitalization is not legally sufficient to prove causation. This is particularly true when the Dowells cannot prove how a hospitalization – the critical

component of their causation theory – could be accomplished under the facts. Moreover, to impose this standard on a hospital when the patient does not want to be admitted and where no grounds exist to involuntarily commit the patient is to place the hospital and the provider in a completely untenable position – they must be the guarantors of the patient's future health where they have no control over his situation. For these reasons, the judgment of the Trial Court and the Court of Appeals should be reversed.

**Issue Number Two**

The evidence at trial showed that the Dowells were given, and accepted, specific instructions to follow after Lance Dowell was released. The evidence is undisputed that they failed to follow these instructions. Yet, despite a request to the Trial Court, the Court refused to allow the jury to consider the comparative responsibility of the Dowells for Lance's death. This was error.

Texas law permits consideration by the jury of the comparative responsibility of every person whose acts or omissions may have been a proximate cause of the injuries alleged by the plaintiff. The jury charge in this case only inquired about the conduct of the Defendants who were sued, and did not inquire about the conduct of Lance Dowell (who actually perpetrated the injury), or the acts and omissions of the Dowells who were given, and did not object to, specific instructions not to leave Lance alone at least until the follow-up appointment with the MHMR. The failure to submit the issue of comparative responsibility was error, and requires a new trial.

Providence specifically requested that the Court ask the jury whether the negligence of Lance Dowell or his parents was a cause of the injuries sought in the case. At the conclusion of the evidence, the Court was given a requested submission of a

question that included the negligence and comparative responsibility of Lance Dowell. (C.R. 385-386). In addition, an objection (on behalf of Dr. Pettit and Providence) to the omission of Lance's negligence from the charge was made and overruled. (8 R.R. 69-73). A specific objection was also lodged to the failure to include the negligence of the Dowells in the charge. (8 R.R. 80-81).

Rule 273, Tex. R. Civ. P. provides, in relevant part:

> Either party may present to the court and request written questions, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge.

This Court has adopted a simple test for determining whether a party has preserved his complaint to the Court's Charge. The test "is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle." *State Dept. of Highways & Public Transp. v. Payne,*838 S.W.2d 235, 241 (Tex. 1992). Providence clearly met that test.

To determine whether an alleged error in the jury charge is reversible, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. Alleged error will be deemed reversible only if, when viewed in the light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause

the rendition of an improper judgment. *Island Recreational Development Corp. v. Republic of Texas Sav. Ass'n.*, 710 S.W.2d 551, 555 (Tex. 1986). Put another way, the question on review is whether the instruction was reasonably necessary to enable the jury to render a proper verdict. *Lester v. Logan,* 893 S.W.2d 570, 577 (Tex. App.-Corpus Christi 1994); *Berry Property Management Co. v. Bliskey*, 850 S.W.2d 644, 661 (Tex. App.--Corpus Christi 1993, writ dism'd by agr.). An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. *Macias v. Moreno,* 30 S.W.3d 25, 27(Tex. App.-El Paso 2000). Here, under the pleadings and the evidence, the submission was necessary.

In a medical malpractice case, a patient's failure to follow the instructions of his treating physician is contributory negligence that should be submitted to the jury. *Elbaor v. Smith*, 845 S.W.2d 240, 245 (Tex. 1992). In this case, there was substantial evidence about the negligence of Lance, and of his parents. To be sure, the evidence is not conclusive. There was some confusion about precisely what discharge instructions were given, how those instructions were understood, and whether the Dowells were capable of following the instructions. Equally sure, though, is the fact that the Dowells, and Lance, were given follow-up instructions that required that Lance not be left alone – that he remain with his mother or his family until his follow-up visit on Tuesday, September 2nd. However, it is not seriously disputed that the instructions were not followed. Even the Dowell's own experts agree that had these instructions been followed, it is likely that Lance would not have killed himself.

It is ironic that, at trial, the Dowells were certain that Lance should have been admitted to Providence Hospital under 24 hour supervision after he was evaluated in the E.R. – at a time where he was calm and remorseful and not actively suicidal. Yet, at the actual time of discharge (not at trial), the Dowells themselves did not consider strict supervision necessary, despite the instructions given to them, which they accepted. They were given instructions to stay with Lance, but they did not significantly alter their family business after the discharge. In fact, they acted in a way that was protective of Lance, but not overly protective. They either perceived that he was not a danger to himself (as Dr. Pettit and Sister Mary Teresa did), or they simply ignored critical instructions given to them.

Under either circumstance, the question of their contribution to the eventual suicide was a question of fact, raised by the pleadings, discussed in the evidence, agreed upon (to some extent) by their own experts and requested of the Trial Court. The negligence and comparative responsibility of the Dowells should have been submitted to the jury. *See Isern v. Watson,*942 S.W.2d 186, 201 (Tex. App.-Beaumont 1997).

The argument, raised by the Dowells, about whether or not parents have a legal duty to care for adult children really sidesteps the issue here. The real issue is that the Trial Court refused, despite the objection of Providence, to include an inquiry in the Court's Charge, concerning the parent's neglect and failure to abide by the discharge instructions. The Dowells had the duty to do what they indicated to the Hospital they would do, and had the duty to do so in a non-negligent manner. *See Fort Bend County Drainage Dist. v. Sebrusch,* 818 S.W.2d 392 (Tex. 1991). Accordingly, their

contributory negligence should have been submitted to the jury, since it was clearly raised at trial.

Lance's own negligence should also have been submitted. This is not a claim that suicide is an absolute defense to the wrongful death or survival claim. Providence recognizes that the complete affirmative defense is not available if they breached a legal standard of care. ***Kassen v. Hatley,*** 887 S.W.2d 4, 12 (Tex. 1994). However, the question of submitting Lance's comparative responsibility is focused on his own failure to follow discharge instructions to which he had agreed. Lance knew and agreed that he was to stay with his family, and knew that he could call or come back to the hospital if he was having suicidal episodes. Whether one believes that it was reasonable to hold Lance to his instructions is a question of fact that should have been determined by the jury. What is not in question, though, is whether a patient can be negligent (and thus bear some responsibility) if he fails to follow instructions. ***Eoff v. Hal and Charlie Peterson Foundation,*** 811 S.W.2d 187, 191 (Tex. App.-San Antonio 1991) (Evidence that patient failed to exhaust available alternatives for medical care; that she voluntarily left the hospital before receiving treatment; ignored the advice to return to the emergency room; and that they failed to obtain medical care until approximately seven hours after leaving the emergency room.) A patient may be contributorily negligent if he fails to follow instructions, and the failure is an inherently harmful act. And, the failure to follow instructions breaches a duty of cooperation which patients owe treating physicians who assume the duty to care for them. ***Elbaor v. Smith,*** 845 S.W.2d 240, 245 (Tex. 1992).

A patient's contributory negligence, just like a doctor's negligence, must be an "active and efficient contributing cause of the injury. ***Sendejar v. Alice Physicians & Surgeons Hosp***. 555 S.W.2d 879, 885 (Tex. Civ. App. – Tyler 1977, ref'd n.r.e.) But, the point of both ***Sandejar*** and ***Elboar*** is that trial courts should not refuse to submit questions about the negligence of a patient. A patient's lack of cooperation can be a contributing cause to an injury. ***Elboar***, at 251.[9] As in ***Elboar***, Providence raised the issue in the pleadings, produced evidence on the issue, and brought the issue to the Trial Court's attention. The Trial Court's failure to pose the question, in some form, to the jury, violated the plain requirements of Rule 278, and was, therefore, error. For this reason, this Court should reverse the judgment of the Trial Court and remand the case for a new trial.

**Issue Number Three**

In a wrongful death case, the persons authorized to bring suit are required to sue on behalf of all of the statutory beneficiaries. In this case, the Dowells never sought to include a child that the evidence shows with a 99.9% probability, was fathered by Lance Dowell. By failing to include a necessary party, the Dowells are not entitled to recover on their wrongful death claim.

The Texas Wrongful Death Act provides a statutory remedy for specific persons closely related to the decedent to presume that the death has caused them to suffer in a

[9]This Court will hear the case of ***Jackson v. Axelrad***, No. 04-0923, (opinion of the 14th Court of Appeals at 142 S.W.3d 418) this fall, where the issue of a patient's cooperation is the primary question to be resolved. In this case, Lance's mother was a nurse who arguably failed to follow express instructions that she was given for Lance's aftercare, and who arguably should have known the importance of the instructions.

way that legally merits compensation. When suing under the statute, all of the potential beneficiaries are necessary parties in the case. A court should not proceed to trial in the absence of known beneficiaries since the defendant(s) could be exposed to multiple liability or inconsistent results. Here, the Trial Court did just that. There was ample evidence to conclude that there was a statutory beneficiary who was not joined as a party. It is 99.9% certain that Lance had a son – who was not joined as a party. The Trial Court should not have proceeded to trial without at least determining the standing of Lance's putative son, and doing so was error, requiring that this Court reverse and remand the case.

The courts have long recognized that a claim for wrongful death was not recognized under the common law, and is purely a creature of statute. Tex. Civ. Prac. & Rem. Code § 71.002; *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 356 (Tex. 1990).[10] Because the claim exists only by virtue of a statute, the statutory requirements are critical and a plaintiff must comply with the statute's requirements. The persons entitled to sue for wrongful death are described in §71.004, Tex. Civ. Prac. & Rem. Code. That Section provides:

[10] The common-law not only "denied a tort recovery for injury once the tort victim had died, it also refused to recognize any new and independent cause of action in the victim's dependents or heirs for their own loss at his death." W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 127, at 945 (5th ed. 1984).

§ 71.004. Benefitting From and Bringing Action

a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.

b) The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all.

c) If none of the individuals entitled to bring an action have begun the action within three calendar months after the death of the injured individual, his executor or administrator shall bring and prosecute the action unless requested not to by all those individuals.

Texas courts have held that a suit under the wrongful death statute must include all of the existing beneficiaries named under the statute. All of the beneficiaries are necessary parties.

> "The act contemplates that only one suit shall be brought, which shall be for the benefit of all parties entitled to recover. See Tex. Civ. Prac. & Rem. Code § 71.004 (Vernon 1986). So when the suit is not prosecuted for the benefit of all of said parties, and this is developed during the trial, it is the duty of the court, when requested in a motion for new trial, to set aside the verdict, ***Ft. Worth & Denver City Ry. Co. v. Wilson***, 3 Tex. Civ. App. 583, 24 S.W. 686, 687 (1893) rev'd on other grounds, 85 Tex. 516, 22 S.W. 578 (1893) because all the beneficiaries named in the act are necessary parties." ***Avila v. St. Luke's Lutheran Hosp.***, 948 S.W.2d 841, 850 (Tex. App.-San Antonio 1997).

The requirement that all beneficiaries be joined in a single suit is for the protection of the defendants. ***Nelson v. Galveston, H. & S.A. Ry. Co.***, 78 Tex. 621, 14 S.W. 1021, 1023 (Comm. 1890, opinion adopted). Unless all beneficiaries are joined in one suit, a defendant could be subject to multiple suits, or to inconsistent judgments.

There is undisputed evidence that Lance Dowell was the father of a child – Alec Bean – who is a statutory beneficiary under the Wrongful Death Act. Although the

Dowells purported to bring the suit "for the benefit of all statutory beneficiaries", there was no jury question about the damages suffered by Alec Bean. He was simply left out of any potential recovery. Apparently, the Dowells believed that (1) there was some doubt as to the paternity of Alec Bean, or (2) the law requires the establishment of legal paternity before the benefits of the statute accrue to a putative child. Neither position is supportable.

First, although Carolyn Dowell said that she had doubts about whether Lance fathered a child; the evidence included a paternity test that determined that there was a 99.9% probability that Lance was the father of Alec Bean. Even if one concluded that that this .1% uncertainty was sufficient to raise a fact issue about the status of the child as a statutory beneficiary, the Trial Court was not authorized to simply ignore the evidence. The issue was raised on numerous occasions by the Defendants, and the Trial Court refused to deal with the issue at all. By doing so, he not only deprived the Defendants of their right to have their liability determined in a single suit (as contemplated by the statute) but it also deprived Alec Bean of any potential recovery.

The Dowell's alternative position – that the statute requires a legal determination of paternity – is flawed. "Children" under the Wrongful Death Act means filial descendants, not solely those who are legally legitimized. *Brown v. Edwards Transfer Co., Inc.*, 764 S.W.2d 220, 223 (Tex. 1988). This Court has specifically refused to require proof of paternity under other laws in order to be a wrongful death beneficiary.

> "[I]t is inappropriate to incorporate the requirements of legitimation under the Family Code into the Wrongful Death Act. The two bodies of law are simply too disparate in application for such combination. The obvious purpose of chapter 13 of the Family Code is to protect the rights of mothers and putative fathers, and to serve the best interest of the child. The text of that chapter shows that it was neither designed or even intended to address tort actions; nor was it designed to protect tortfeasors. The equally obvious purpose of the Wrongful Death Act, on the other hand, is to provide a means whereby surviving spouses, children, and parents can recover for the loss of a family member by wrongful death. Absent any indication by the legislature that it intended the legitimation provisions of the Family Code to apply to the Wrongful Death Act, we will not make that application ourselves.
>
> "We hold that in a wrongful death action an illegitimate child need not be 'recognized' in accordance with other bodies of law not specifically applicable to the Wrongful Death Act. If paternity is questioned in a wrongful death action the alleged child would have to prove by clear and convincing evidence that he is a filial descendant of the deceased. *Garza v. Maverick Market, Inc.,* 768 S.W.2d 273, 275-276 (Tex. 1989)

So, under *Maverick Market*, the Dowells had to join Alec Bean, permitting him an opportunity to prove, by clear and convincing evidence, that he was a descendant of Lance Dowell. They failed to do so, over the objection of Providence. The only proper course of action was to abate the suit, or to grant a new trial. The Trial Court did neither, and the judgment must, therefore, be reversed.

Providence acknowledges that this Court has determined that a specific defect in the capacity of the Plaintiff to bring suit may be cured. *See Austin Nursing Center, Inc. v. Lovato*, No. 03-0659 (May 13, 2005) (holding that the failure to qualify as an administrator of an estate to be the Plaintiff in a survival claim can be cured). But, the absence of a necessary party is not just a defect in the parties. It is also not simply a

question of the capacity in which the Plaintiffs have sued. Instead, when the Court permitted this case to proceed without addressing the question of whether all the proper parties were before the Court, it exposed the Defendants to the potential of double liability, and deprived a child of his right to be heard. And, unlike the *Lovato* case, the defect in failing to join Alec Bean was never cured. The Trial Court ignored the issue, and the Dowells refused to do anything about it. So, even if this Court were to extend *Lovato* to a case involving the absence of necessary parties, the lack of any effort to cure the defect is fatal to the judgment in this case.

Under the Wrongful Death Act, the Dowells had to join Alec Bean, permitting him an opportunity to prove by clear and convincing evidence that he was a descendant of Lance Dowell. They failed to do so over the objection of Providence. The only proper courses of action were to abate the suit or to grant a new trial. The Trial Court did neither, and the judgment must, therefore be reversed.

## Conclusion

For the reasons stated herein, the Court should reverse the Judgment of the Trial Court and the judgment of the Court of Appeals and render judgment here that the Dowells take nothing.

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*Certificate of Service*

I hereby certify that a true and correct copy of the foregoing was sent to the person(s) named below, at the address shown by placing the same in a properly addressed envelope, postage pre-paid, and mailing the document by first class mail (and by other means stated below) on October ___, 2005.

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